Docket No. 16-6834

IN THE

SUPREME COURT OF THE UNITED STATES

March Term, 2018

ELIZABETH NORTON, in her official capacity,
As Governor, State of Calvada

Defendant-Petitioner,

-v.-

BRIAN WONG,

Plaintiff-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT
(Hon. Lief Skillrud, Circuit Judge)

BRIEF FOR PETITIONER ELIZABETH NORTON

Team 24
January 31, 2018
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether Ms. Norton's removal of Respondent's comment and subsequent imposition of a ban against him constituted state action where Facebook is a private company, Ms. Norton was exercising the managerial right afforded to her as a personal Facebook account holder, and the action arose out of personal motivation to delete a comment attacking her character; and

2. If so, whether Ms. Norton engaged in government speech when she regulated the content of her post, which would otherwise be indefinitely affixed to her personal Facebook page, or, in the alternative, whether deleting inflammatory content from her post amounts to permissible, viewpoint-neutral regulation of a public forum when other less inflammatory comments expressing similar viewpoints were allowed to remain.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

OTHER CASES

CONSTITUTIONAL PROVISIONS

STATUTES & REGULATIONS

Other Authorities

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on November 1, 2017. *Wong v. Norton*, No. 17-874 (14th Cir. Nov. 1, 2017). Petitioner timely filed for writ of certiorari, which this Court granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1251(1). See Appendix for relevant statutory provisions.

STATEMENT OF THE CASE

Respondent Brian Wong brought this 42 U.S.C. § 1983 action, pursuant to the First and Fourteenth Amendments to the United States Constitution, against Petitioner Elizabeth Norton, Governor of the State of Calvada ("Ms. Norton"), in her official capacity after she deleted a comment on March 5, 2016 that Wong posted on her "Governor Elizabeth Norton" Facebook page ("GEN" page) and banned Wong from posting further on her page. *Wong v. Norton*, No. 16-6834, R. at 1 (D. Calvada Jan. 17, 2017). The parties submitted cross-motions for summary judgment and on January 17, 2017, the District Court granted Ms. Norton's motion. *Id.* at 12. The court held that Ms. Norton's actions were attributable to the state but that neither the removal of the comment nor the ban violated the First Amendment because they constituted government speech. *Id.*

Mr. Wong submitted a timely appeal to the United States Court of Appeals for the Fourteenth Circuit, seeking reversal of the District Court's grant of summary judgment. *Wong v. Norton*, No. 17-874, R. at 39–40. On November 1, 2017, the Fourteenth Circuit held that Ms. Norton's actions constituted state action, but that her actions violated the First Amendment because her page was a government-sponsored forum of speech and her actions constituted impermissible viewpoint discrimination. *Id.* The Fourteenth Circuit thus reversed the District Court's decision in part and remanded the case with instructions to grant Mr. Wong's Motion for Summary Judgment. *Id.* Ms. Norton timely filed a petition for writ of certiorari, which this Court subsequently granted. *Id.*

STATEMENT OF THE FACTS

Elizabeth Norton is a Calvada citizen and resident of roughly 50 years. (R. at 24.) Her father was a history teacher at a local high school, and her mother was a lawyer at a firm. *Id.* Ms. Norton graduated from the University of Calvada with a Bachelor of Science degree in Business Marketing and a Master of Business Administration. *Id.* While there, she successfully started a small business specializing in roasting coffee, which she "sold to local restaurants." *Id.* In January 2008, Elizabeth Norton created a personal Facebook account to connect with family and friends. (R. at 24.)

Facebook is a social media platform that allows users to post messages and interact with other users through comments, replies, and likes. (R. at 13.) To create a Facebook account, an individual or entity provides their name, email or phone number, password, date of birth, and gender. (R. at 13.) In addition to connecting with friends, users can create a public page, which can serve as a medium for "individuals, businesses, organizations, and others [to] connect with the public." (R. at 14.) A user can have their page verified by Facebook to confirm its authenticity, such as in the case of public figures. *Id.* Facebook allows the administrators of these pages to take various actions in managing its content, including creating and deleting posts, responding to or deleting comments, and banning or removing accounts from the page. (R. 14–15.) However, a banned account can "still share content from the page to other places on Facebook," and "can be unbanned at any point." (R. at 14.)

In 2011, Ms. Norton created a personal Facebook page titled "Elizabeth Norton," which she used to make personal and business announcements. (R. at 25.) Such announcements ranged from pictures of her children, to posts documenting the progress of a new roasting and distribution

facility for her business. *Id.* Ms. Norton limited those who could view and comment on the page to personal connections. *Id.*

In 2015, Ms. Norton ran for Governor of the State of Calvada and won on her first attempt. *Id.* She divested herself of all business holdings and was inaugurated on January 11, 2016. (R. at 24, 25.) As part of her office, she inherited a Facebook page titled "Office of the Governor of Calvada," a page which previous administrations used, and which linked to the state's official website. (R. at 25.) However, Ms. Norton wanted her constituents to follow and have a personal connection with her, so she also renamed her personal page to "Governor Elizabeth Norton," and changed the privacy settings to make it available to the public. (R. at 25.) Ms. Norton would use this page to post pictures of her family, thoughts on news and national events, as well as to keep Calvadans informed about government happenings. *Id.* She would also frequently request input on how to make the State better and encourage constituents to be more actively involved. *Id.* However, all initiatives she announced here were reposted "in an official capacity" on the official governor's page. (R. at 25, 26.) Ms. Norton intends to keep her personal Facebook page after her service as Governor is complete. (R. at 26.)

On Saturday, March 5, 2016, Ms. Norton posted to the GEN page the "New State Policy on Immigration Law Enforcement," detailing the State's commitment to cooperate with federal law enforcement agencies. (R. at 15.) In the post, Norton announced that the Governor's office would be issuing the official Executive Order for the policy later in the afternoon and specified the government website link where it could be found. (R. at 4, 8, 16.) Later, a user named Brian Wong posted the following comment on the page in response: "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 4.) Brian Wong is a citizen of the State of Calvada born to parents who immigrated to the United States from Hong Kong. (R. at 27.)

At around 9:45 p.m., Ms. Norton wrote an email to Sanjay Mukherjee, her Director of Social Media. (R. at 04, 32.) Mr. Mukherjee routinely assisted in managing the GEN page, along with other members of the Governor's staff, but usually only after official working hours. (R. at 3, 20, 30.) In the email, Ms. Norton instructed Mr. Mukherjee to add photos to the GEN page from a recent basketball tournament visit, one which included her and daughter in front of the mascot, a statement on ongoing Iraq tragedies, as well as photos and statements pertaining to a reboot of a 4-H Young Farmers program. (R at 16.) Further, Ms. Norton asked Mr. Mukherjee to remove the "nastygram by [Brian] Wong in response to [the] immigration announcement," and to ban him, specifically stating that the comment was not "appropriate for [the GEN] page." (R. at 17.) Ms. Norton expressed the view that Mr. Wong's comment was an "*ad hominem* attack that was unrelated to" the request for input on the policy. (R. at 26.) At around 10:10pm, Mr. Mukherjee deleted the comment and banned Mr. Wong from the GEN page. *Id.*

Ms. Norton received more than 30 other comments in response to the post and did not delete any of them. *Id.* Included in those comments were two of the following, expressing disagreement with the policy: "I disagree with the new Calvada immigration enforcement policy. It will harm our state's economy. (posted at 4:55 p.m.)" and "This is not a good policy. It will punish many hard-working people and their families. (posted at 6:12 p.m.)" *Id.* After realizing he was banned, Mr. Wong requested by email that Ms. Norton restore his post, but never received a response and remains banned from the page. (R. at 5.)

SUMMARY OF THE ARGUMENT

This Court is tasked with determining whether the exercise of a private managerial right afforded to a Facebook user in deleting a comment from a personal Facebook page can constitute state action. The Court must engage in a fact-specific inquiry to determine whether Ms. Norton's act of deleting Mr. Wong's comment creates a "sufficiently close nexus with the State" to warrant treatment as state action. *West v. Atkins*, 487 U.S. 42, 49 (1988); *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003). Ms. Norton's removal of Mr. Wong's comments and subsequent ban do not possess a sufficiently close nexus with the State to implicate state action.

The Court has found such a nexus to exist where there is close intermingling between State and private functions, but Facebook is a private entity which receives no benefit or service from the State. It is not permeated by government control. To the contrary, access to the site requires voluntary membership, which involves agreement to Facebooks terms and conditions, in order to interact with other users.

There is no sufficiently close nexus because of the personal nature of the GEN page. Ms. Norton did not require the powers of state law when she created her personal Facebook page long before becoming governor. The fact of her election did not afford her special privileges that other Facebook users do not enjoy. Ms. Norton made the personal decision to delete the post and ban Mr. Wong unilaterally, and without consultation from the government. Neither did she invoke authority under state law when electing to delete Mr. Wong's comment. Further, the existence of an official Governor of Calvada page, separate from GEN page, suggests that the latter is an unofficial medium for Ms. Norton's personal use.

Although Ms. Norton opened her page up to the public, this does not transform the nature of the page. Any Facebook user can open their page to the public while maintaining private control

over its management. The personal nature of this page is evidenced by the simple fact that Ms. Norton is still able to determine who may engage with the page at any time, and may change the settings back to private whenever she wishes to do so. In fact, Ms. Norton intends to maintain her personal page after her time as Governor, in comparison to the official Governor page which will continue to be controlled by the State after her term is over.

Ms. Norton's actions arose from personal circumstance. After being elected Governor, Ms. Norton continued to request input from her constituents because of her own ongoing desire to involve the community in her personal and professional life. Accordingly, her decision to delete a comment which insulted her character does not transform into state action because her motivations were personal. Crucially, Ms. Norton allowed other less inflammatory comments to remain despite the fact that they were critical of her position.

To rule that Ms. Norton's actions are attributable to the state would be overreaching and have a chilling effect on government officials who also happen to operate personal Facebook pages. These are private, managerial decisions, afforded by agreement with a private entity, and involving them in the spectrum of State activity would change the nature of social media as a means of personal expression.

If the Court decides Ms. Norton's actions constitute state action, then Mr. Wong's comments are unprotected because all content within the Facebook post qualify as government speech. If the Court decides this content does not constitute government speech, Ms. Norton's decision to remove the comment and ban Mr. Wong is a permissible regulation of a public forum.

The Court should find that Ms. Norton's post, and all interactions therein, qualify as government speech. When determining whether a state action is government speech, the Court

looks at the history of the mediums use, whether the medium is closely identified with the State, and whether the State exercised effective control over the medium.

There is sufficient history to establish a Facebook post as government speech because Facebook posts are the functional equivalent of a monument in a public park. Like a monument, the post, and all comments therein, exist indefinitely unless removed. They serve many of the same purposes as monuments, such as commemorating events of civic importance. Unlike a passing speaker, posts are a permanent means of expression. Similarly, a monument on government property is a permanent means of expression. Specifically, here, there is sufficient history because Ms. Norton used these posts to communicate government messages.

Furthermore, here, the Facebook post and its comments are closely associated with the State. A finding that the post is attributable to the State lends itself to this conclusion. Ms. Norton frequently posts updates and feedback on State affairs on this page, and thus the post will clearly be associated with the State.

Additionally, Ms. Norton's administrator role also allows her exercise selectivity when deciding whether to keep or delete a comment on her Facebook post. In *Summum*, the Court acknowledged this as a key indicator of government speech. By acknowledging this, the Court rejected the proposition that a private actor donating a monument to a public park constitutes private speech. Thus, here, the fact that a private user provides the comment is not dispositive. Like a proposed monument, a comment on Ms. Norton's post is permanently affixed to a post, which is indefinitely available on her personal GEN page. Ms. Norton engaged in government speech when she exercised selectivity in deleting the comment. Finally, the State effectively controls the message conveyed on the post. Sanjay Muhkherjee, the administrator of the GEN page, can respond to and delete comments on the page.

Even if the post is not government speech, it is not a public forum. This Court has never held that social media is a traditional public forum, and it should decline to do so today. The government does not own social media; Facebook owns the proprietary interests to its platform, not Ms. Norton. The GEN page is also not a designated public forum for the same reasons. Even if Ms. Norton owned the GEN page, she did not open up her page to general discourse, and thus, did not create a designated forum.

If Ms. Norton did create a forum, it is, at most, a limited public forum. Regulation of a limited public forum is entitled to more deference, and only overruled if it imposes viewpoint discrimination. On a user's personal Facebook page, comments may only be solicited on a post created by that user. Here, Ms. Norton could only solicit feedback by creating a post which framed the conditions of the discussion. Because these posts frame the topics to be discussed in the comments, they constitute a limited public forum. By deleting Mr. Wong's *ad hominem* attack, and subsequently banning him, Ms. Norton did not engage in viewpoint discrimination—she simply chose to limit use of this forum to respectful dialogue. This is evidenced by the fact that she did not delete two comments which were critical of her immigration policy.

Even if this is found to be a traditional or designated public forum, the State is still allowed to impose reasonable time, place and manner regulations. Ms. Norton did not delete Mr. Wong's comment, and subsequently ban him, in order to impose viewpoint discrimination. Rather, Ms. Norton did so to because of the inflammatory and disruptive nature of his comments. Her actions only had an incidental effect on Mr. Wong's rights, because he can still repost and share thoughts about content from the GEN page despite being banned.

ARGUMENT

I. MS. NORTON'S REMOVAL OF RESPONDENT'S COMMENT AND SUBSEQUENT IMPOSITION OF A BAN AGAINST HIM DID NOT CONSTITUTE STATE ACTION BECAUSE FACEBOOK IS A PRIVATE COMPANY, MS. NORTON WAS EXERCISING THE MANAGERIAL RIGHT AFFORDED TO HER AS A PERSONAL FACEBOOK ACCOUNT HOLDER, AND THE ACTION AROSE OUT OF PERSONAL MOTIVATION TO DELETE A COMMENT ATTACKING HER CHARACTER.

The Supreme Court should reverse the Court of Appeals' holding that Ms. Norton's actions constituted state action. The Supreme Court has delineated between wrongful acts by the state and that of a private individual. *The Civil Rights Cases*, 109 U.S. 3, 10–11, 16–17 (1883). For a wrongful act to be remedied under the Fourteenth Amendment of the Constitution, it must be "done under State authority" and not simply by an individual. *Id.* at 17. The Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). State action can manifest itself "in the shape of laws, customs, or judicial or executive proceedings." *Id.* at 14–15. State action requires that the state or "a person for whom the State is responsible," "exercise [] some right or privilege created by the State" and that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *West v. Atkins*, 487 U.S. 42, 49 (1988).

While employment by the state usually suffices to create a state actor, "mere employment by the state does not mean that the employee's every act can properly be characterized as state action." *Patterson v. County of Oneida*, N.Y., 375 F.3d 206, 230 (2d Cir. 2004). Although "private actions which have a 'sufficiently close nexus' with the State" can be treated as state action, the Court has stated that "acts of officers in the ambit of their personal pursuits are plainly excluded." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)); *Screws v. United States*, 325 U.S. 91, 111 (1945). Additionally, "[f]or a state official's conduct to amount to state action, the official must have exercised power

'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Atkins*, 487 U.S. at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Therefore, a public official "acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Id.* at 50. It was also recognized that "when public officials deliver public speeches…their words are not exclusively a transmission from the government." *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting) (emphasis in original).

Whether an action can be attributed to the state is a fact-specific inquiry. There is not one factor or "necessary condition" that automatically transforms a private action into "state action," "for there may be some countervailing reason against attributing activity to the government." *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295–96 (2001). As the Court in *Burton v. Wilmington Parking Authority* stated, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." 365 U.S. 715, 722 (1961).

In *Hudgens v. National Labor Relations Board*, the Supreme Court held that a privately-owned shopping center was not a state actor, allowing the manager to bar a group of union members from picketing inside. 424 U.S. 507, 508–09 (1976). In that case, the Court distinguished *Marsh v. Alabama*, which "involved the assumption by a private enterprise of *all* of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State." *Hudgens*, 424 U.S. at 519 (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568–69 (1972)) (emphasis added). Similarly, in *Moose Lodge No. 107 v. Irvis*, this Court held that the State's granting of a liquor license to a private club did not implicate state action in the club's discriminatory guest policies. 407 U.S. 163, 171, 177 (1972). In *Jackson v.*

Metropolitan Edison Co., this Court held that a privately-owned utility that terminated service to an individual was not sufficiently connected with the State to be considered a state actor, where the State approved the termination and the utility had a partial monopoly in the services it provided. 419 U.S. 345, 346, 354, 357–59 (1974). The Court reasoned that the utility's "exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the First Amendment. *Id.* at 357.

Ms. Norton's removal of Mr. Wong's post and the imposition of a ban against him does not have a sufficiently close nexus with the State to implicate state action and therefore, the protections of the First Amendment. Facebook, like the entities in *Jackson*, *Hudgens*, and *Moose Lodge*, is privately run and privately funded. Additionally, unlike the private club in *Moose Lodge*, Facebook receives no benefit or service from the State. The Court held that the private company in *Marsh v. Alabama* was a state actor because of its ubiquitous control over all aspects of the "company-town." 326 U.S. 501, 502–05 (1946). Such control normally lies with a municipal government. Facebook is simply not permeated by government control and the actions that individuals take on the site cannot be deemed state action. Although Facebook is free, it is a voluntary membership and is not accessible to the public in the same way that, for instance, an official government website or an entire town is. Only those who have their own Facebook account, which requires signing an agreement and volunteering either personal or professional information, can comment and interact with other pages and accounts.

Moreover, the nature of Ms. Norton's Facebook page, specifically, implicates the personal nature of her decision to remove the comment and the lack of state responsibility. Ms. Norton did not act under the powers or responsibilities derived from any State law given that the State does not require her to maintain a Facebook account. The only power that Ms. Norton exercised was

the power Facebook itself gave her. The fact that she, as Governor, was "clothed with the authority of state law" did not afford her any special powers that an ordinary Facebook user wouldn't have. *Atkins*, 487 U.S. at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Like the initiative for action in *Jackson*, the initiative for the deletion of the post in the present case came from Ms. Norton and not the State. She acted, by her own initiative and without any input from other government officials, and therefore in her personal capacity when she made the decision that the post should be deleted. Furthermore, unlike the utility in *Jackson*, Ms. Norton was not acting under the authority of any state law when she deleted the post. Ms. Norton's personal page, like all Facebook accounts, is accessed through private credentials.

Not only this, but there is an official Governor of Calvada page, separate from the GEN page. The removal of the comment cannot be attributed to Ms. Norton in her official capacity because it did not even take place on the official Governor page. The fact that there even is a separate official page logically implicates that her page is not an official page and therefore, her actions on this page are not made in her official capacity. Ms. Norton's advancement into government employment simply does not and should not transform the page she created years before her election into the State's page and therefore should not transform the actions taken to manage the page into state action. Every Facebook account holder has the ability to delete comments on the items they post and to ban anyone from posting in the future. Once Facebook users sign the Terms of Agreement, they have the right to edit their page the way they see fit.

Despite the fact that Ms. Norton opened her page up to the public, this does not transform the nature of the *account* to public, as any Facebook user can open their page up to the public while maintaining private control over the management of the page. Like the private shopping center in *Hudgens*, that was open to the public, Ms. Norton's Facebook page was open the public. Like the

manager in *Hudgens*, Ms. Norton's position of "manager" of her page still remained despite the public nature of the "forum." Furthermore, like the manager in *Hudgens*, who was able to bar picketers from the shopping center, Ms. Norton is allowed to bar commenters from her page. Given that the entity they manage is private, the public does not have the constitutional right to enter whenever and however they wish. The public's right to enter and participate is contingent upon the manager's decision to open their "forum" up to the public, and thus the managers have the right to control who is allowed in, when, and under what circumstances.

Furthermore, even after Ms. Norton's time as Governor is over, she intends to maintain the same page associated with her name and personal information. This is distinct from the official Governor page, which will remain in control of the State, and will pass from governor to governor. Additionally, asking for constituents input, while helpful for her to do her job, does not transform her actions on the privately-run platform into the actions of the government. Ms. Norton posted policy related posts out of her own desire to, not under her duties to the State. She was not required to go the extra step for her constituents by allowing them access to her page but did so on her own volition. Therefore, the constituents that interact with her on that page do not have the constitutional right to have their comments beneath her posts. It is simply not a government page.

Here, Ms. Norton's actions were not facilitated by her authority under the State, but rather, her actions arose out of personal circumstances. The court in *Rossignol v. Voorhaar* stated that "where the action arises out of purely personal circumstances, courts have not found state action even where a defendant took advantage of his position as a public officer in other ways." 316 F.3d at 524. Additionally, having the title of Governor does not mean you "are the state" in everything you do. *See Van Orden*, 545 U.S. at 723; *Patterson*, N.Y., 375 F.3d at 230. For example, government officials are allowed to go to church without violating the Establishment Clause. Ms.

Norton was acting as a private individual who wanted to delete a post that attacked her character. This is evidenced by the fact that she did not delete the negative responses to the new immigration policy, but rather only the solitary post that attacked her morals. Even though the post would not have garnered as much attention from citizens if it were not for her status as a Governor, according to the court in *Rossignol*, this does not transform the action into state action, given that she acted for personal reasons. Additionally, the deletion of the post was not done during her normal working hours. All of these facts, in conjunction, show that the action in question arose out of personal circumstances and was triggered by solely personal motivations, as opposed to censorial motivations.

Given that the Director of Social Media helps the Governor by managing the personal page generally after hours, this does not create a sufficiently close nexus between the private action and the State. More importantly, the State did not open this account for Ms. Norton and does not advise her on how to manage it. Unlike the government in *Burton*, whose financial success was positively impacted by the restaurant's discriminatory conduct, the government here does not profit from this "discrimination." *Burton*, 365 U.S. at 724. Even if the help that Ms. Norton received in managing the page was considered a benefit or service provided by the government, the Court in *Moose Lodge* noted that a private entity that receives a benefit or service from the State does not necessarily become a state actor. 407 U.S. at 173.

The present case is distinguishable from *Davison v. Loudon County Board of Supervisors*. No. 16-cv-932, 2017 WL 3158389 (E.D. Va. July 25, 2017). There, the District Court of Virginia held that the chair of a county board's ban of a resident from her Facebook page was state action. *Id.* at 714. Unlike Ms. Norton, the chairwoman in *Davison* created the Facebook page the day before she was sworn into office for the purposes of addressing residents. *Id.* at 707. While the

impetus for the creation of the page in *Davison* arose out of public circumstances, Ms. Norton created her page years before she was elected into office, for business reasons. *Id.* at 713. Therefore, the Facebook page and the motivation behind its creation are personal, unrelated and uninfluenced by the State. Additionally, while the court in *Davison* mentions that the chairwoman acted out of a "'censorial motivation," Ms. Norton allowed comments critical of the policy change to remain, and only deleted the irrelevant comment attacking her morality. *Id.* at 714. As a Facebook account holder, she has the right to determine what is allowed on her page and what isn't.

The present case is also distinguishable from *Rossignol v. Voorhaar*, where the Court of Appeals held that the officials in that case acted under color of state law when they attempted to suppress an entire issue of a newspaper from reaching the public. 316 F.3d at 519–521. While the court put significant weight on the fact that the officials were trying to suppress speech critical of them, it is important to note that the officials had no personal right to control the newspapers, unlike Ms. Norton, who had created a personal account managed by a private company. By creating that account, she gained the right to delete comments, ban people, post and share pictures, and post text on her page. These rights afforded to her through her agreement with Facebook cannot be permanently or temporarily taken away due to the nature of her job.

If this Court were to rule that Ms. Norton's actions were attributable to the state, this would infringe on citizens' rights associated with personal social media accounts. This would be overreaching and prevent those citizens who also happen to be government officials from exercising the management options that Facebook, a private company, gives them. It would interfere greatly with government officials' individual rights and attribute too broad a spectrum of their activity to the State, thus changing the nature of social media as a way to express oneself in

a personal capacity to the connections of one's choice. Therefore, the removal of Mr. Wong's comment and any future action that Ms. Norton takes with respect to the management of her personal Facebook page should not constitute state action.

II. IF SO, THEN MR. WONG'S COMMENTS ARE UNPROTECTED BECAUSE ALL CONTENT WITHIN A FACEBOOK POST ATTRIBUTABLE TO THE STATE OF CALVADA NECESSARILY QUALIFIES AS GOVERNMENT SPEECH, OR, OTHERWISE, STATE ACTION HERE CONSTITUTES A REASONABLE TIME, PLACE, OR MANNER REGULATION.

Although the government does not have a free hand to regulate private speech on government property, "government speech is not restricted by the Free Speech Clause*." Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). Even if the Court finds that the Facebook post is not government speech, here, Governor Norton's actions should be upheld because they did not constitute viewpoint discrimination. Governor Norton's actions qualify as reasonable regulation of a limited public forum, or, if not, constitute a narrowly tailored time place manner regulation of a designated or traditional public forum.

A. The Governor's Facebook Post and All Interactions Therein Qualify as Government Speech.

In determining whether a state's action constitutes government speech, the Court in *Summum* employed a three-step analysis, considering first, the history of the medium communicating the message; second, whether the medium is "closely identified in the public mind with the [State;]" and third, the extent to which the state has "effectively controlled" the messages conveyed. 555 U.S. at 472–473. Further, in holding that permanent monuments in public parks are government speech, the Court specifically referenced the permanency of such fixtures. *See id.* at 478. For example, in *Monumental Task Committee., Inc. v. Foxx*, the District Court for the Eastern District of Louisiana applied the reasoning in *Summum* and held that even removal of the commonly vandalized Confederate statue was an unprotected form of government speech. 157

F.Supp.3d 573, 594 (E.D. La. 2016). *See also Walker v. Texas Div., Sons of Confederate Veterans*, 135 S.Ct. 2239, 2246 (2015) (holding that specialty license plates are government speech); *Griffin v. Sec'y of Veterans Affairs,*, 288 F.3d 1309, 1325 (2002) (affirming the removal of a confederate flag from a national cemetery as a reasonable restraint in the pursuit of preserving dignity and decorum); *but see Matal v. Tam*, 137 S.Ct. 1744, 1760, 1768 (2017) (holding that federally registered trademarks do not constitute government speech because "the federal government does not dream up these marks, and it does not edit marks submitted for registration.") Here, the Court should find that the Facebook post, and all actions therein, constitute government speech because the page has a sufficient history of being used to communicate a government message, the content is closely associated with the State, and the State has effective control over the post and its comments.

1. A Social Media Page, Both Generally and Specifically, Has a Sufficient History of Being Used to Communicate a Government Message.

In *Summum*, the Court recognized that "[g]overnments have long used monuments to speak to the public." 555 U.S. at 470. Moreover, "[p]ermanent monuments displayed on public property typically represent government speech," and "[a] monument, by definition, is a structure that is designed as a means of expression." *Id.* Although a post on a social media page is not a monument in a physical sense, it is a functional equivalent. Generally, a Facebook post can be, and indeed is, employed by the government to effect many of the same ends that physical monuments do—such as "commemorat[ing] military victories and sacrifices and other events of civic importance." *Id.* In *Summum*, the Court determined that a monument on public property constitutes government speech because of its capacity for expression and its permanency, not its physicality. *See id.* What is critical is the premise that observers will reasonably interpret monuments as conveying some message on a property owner's behalf, whether it is located on private or public property. *See id.*

at 471. This is what leads to the conclusion that monuments on government property are a tool of government speech.

A Facebook post, and the comments therein, meet both the requirements of permanency and expressiveness because the content exists indefinitely unless taken down, and reasonable observers will associate this content with the speaker. (*See* R. at 13, 15.) Lending itself to the permanency and accessibility of such posts is the fact that even a banned user can share content from a Facebook page. (R. at 14.) Whether or not this Court finds the GEN Facebook page to be government property, if the post is found to be attributable to the State, it follows that the post operates as the functional equivalent of a monument in a public park. Thus, in a functional sense, there is a sufficient history of governments using "Facebook post-like" mechanisms to express viewpoints. However, one need not rest on a generalized conclusion. Here, there are numerous and specific examples of Ms. Norton using the Facebook page to communicate government messages, including posting updates on state budget negotiations and reposting all announced initiatives from the official "Office of Governor of Calvada" page—all after she made her page visible to the general public. (R. at 25, 26, 30.) Ms. Norton even took steps to rename her Facebook private page to "Governor Elizabeth Norton." (R. at 25.) Therefore, her page, and subsequent Facebook posts, have a sufficient history of being used to express a government message.

2. Ms. Norton's Post, Including Mr. Wong's Affixed Comment, Are Closely Identified in the Public Mind with the State Because It Is Permanently Affixed to and Associated with the State.

If the court finds that Ms. Norton's Facebook post is attributable to the State, it can hardly be contested that the post itself is closely identified in the public mind with the State as well. Generally, the GEN page was made available to the public; all government initiatives posted on the GEN page are reposted by the official "Office of the Governor of Calvada" Facebook page, and Ms. Norton frequently posts and solicits updates and feedback on state affairs—all under the

title of "Governor Elizabeth Norton." (R. 24–26.) Specifically, the immigration policy post would be closely identified in the public mind with the State because Governor Norton posted it on her Facebook page, it addressed the State's policy on immigration law enforcement, and made express reference to government actors. (R. at 3.) Here, what may seem less clear is whether Mr. Wong's comment is also closely identified in the public mind with the State.

One may argue that Mr. Wong's comment constitutes private speech because an observer would associate a Facebook comment with the respective commenter, and not the Government. However, this Court rejected a similar line of reasoning in *Summum*, when it reversed the Tenth Circuit Court of Appeal's finding that a Ten Commandments monument, donated to a public park by the Fraternal Order of Eagles, was private speech. *See* 555 U.S. at 466–67. There, the Tenth Circuit panel "noted that it had previously found the Ten Commandments monument to be private rather than government speech," and thus erroneously concluded that the "City could not reject [a] Seven Aphorisms monument" from a public park, which has "traditionally been regarded as [a] public forum[]." *Id*. Similarly, the argument that Mr. Wong's comment constitutes private speech amounts to the proposition that a Facebook user's donated content remains private even when displayed permanently on a post controlled by another user.

In reversing, this Court made clear that when the government exercises selectivity in accepting the placement of permanent monuments, even private funded or donated monuments constitute government speech. *See Summum*, 555 U.S. at 471–472. Using this rationale, the Court affirmed the City's right of preference for a Ten Commandments monument over placement of the Seven Aphorisms monument. *See id*. at 465. Here, as in *Summum*, the Court should allow the Government to engage in selective receptivity of permanent comments. *See id.* at 471. Unlike

speakers, who, "no matter how long-winded, eventually come to the end of their remarks," a comment on a Facebook post will "endure" unless removed. *Id.* at 479.

Even if the Court rejects the argument that the content of a comment will be associated with the Government, it is still the case that the character of such a comment will be associated with the Government. Because Ms. Norton has control over the comments which appear on these posts, allowing inflammatory and *ad hominem* attacks to permanently exist may reflect poorly on her administration, and compromises State's ability to present the image of civic engagement it prefers.[1] (*See* R. at 26.) Under this approach, inflammatory comments would be more comparable to the graffiti seen in the *Monumental Task Committee* decision, and the removal of such comments, or even the post itself, would be an unprotected exercise of government speech. *See* 157 F.Supp.3d at 594 ("the removal of the monument is a form of government speech and is exempt from First Amendment scrutiny.")

Finally, this case is distinguishable from *Matal*. In that case, the court held that a registered trademark goes on to be associated exclusively with the artist. 137 S.Ct. at 1760. Like in *Matal*, some of the content generation in the present case comes from private users in the form of comments. However, unlike in *Matal*, this content may only be generated upon solicitation in the form of a post, and only administrators can create posts.[2] (R. at 13, 33.) Further, this content

[1] *See* Section D for further analysis of this point. Even if the Court does not agree that the substance of Mr. Wong's comment is government speech, the Court should consider whether a right to government speech includes the prerogative to present a preferred image of civic engagement. For example, in *Griffin v. Sec'y of Veterans Affairs*, the Federal Circuit Court of Appeals concluded that the State may remove a confederate flag from a national cemetery. *See* 288 F.3d at 1325. In doing so, the Circuit Court of Appeals reasoned that where the government "seeks to project a certain image and atmosphere, it must be especially sensitive to concerns that private speech taking place in the same forum might be perceived by listeners as government speech, or might dilute the government's own message. The government therefore must exercise discretion and judgment to decide what speech is appropriate." *Id.* at 1325.

[2] *See* Section C for further analysis of this point.

remains on the government's profile, not the commenters. Thus, the permanency and association with the State that comes with a Facebook post and comment demands a finding that such content is government speech.

3. The State Has Effectively Controlled the Messages Conveyed on the Post, Including the Comments.

Another clear indication that both the post and comment are Government speech is the fact that Facebook gives users control over all content. Here, Sanjay Muhkherjee, the administrator of the GEN page, has the capacity to manage roles, settings, create and delete posts, as well as respond to and delete comments to the page. (R. at 14.) Mr. Muhkerjee and other members of the Governor's staff monitor the page and have administrator roles, and thus, it is clearly the case that the Government has control over expressive content on the page. (R. at 23.)

B. Even If the Post Is Not Government Speech, It Is Not a Public Forum.

Relying on *Packingham v. North Carolina*, Respondent argues, and the Circuit Court suggests, that Facebook is a traditional public forum. 137 S.Ct. 1730 (2017). This suggestion is misplaced. Conventional public forum doctrine spawned from dicta set forth in *Hague v. Committee for Industrial Organization* by Justice Roberts. 307 U.S. 496 (1939). While discussing the prevailing theory that government has a proprietary interest in public property comparable to an owner of private property, Justice Roberts articulated public forum doctrine as the proposition that certain public lands were held in public trust for time immemorial, and that public speech on such property is thus part of the privileges, immunities, rights and liberties of citizens. *See Hague*, 307 U.S. at 515–516 (1939); *See also Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) ("for the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.") This notion has prompted some commenters to describe the public forum

doctrine as a kind of First Amendment prescriptive easement for speech. *See* Harry Kalven, Jr., *The Concept of Public Forum: Cox v. Louisiana*, 1965 SUPREME COURT REVIEW 1, 13 (1965).

For example, this Court has held that speech that takes place on spaces like sidewalks and public parks, despite being government property, are protected under traditional public forum doctrine, because they have historically been preserved for free speech purposes. *See McCullen v. Coakley*, 134 S.Ct. 2518, 2529 (2014) ("these places—which we have labeled 'traditional public fora'— "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 56–57 (1983) (an interschool mailing system is not a traditional public forum); *but see Reno v. ACLU*, 521 U.S. 844, 869-869 (1997) ("[n]either before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision that has attended the broadcast industry"); *Davison v. Loudoun Cty. Bd. of Supervisors*, No. 16-cv-932, 2017 WL 3158389 (E.D. Va. July 25, 2017) (finding a local government Chair's Facebook page to be a public forum.)

Tempting as the argument may be, this Court has never held, nor should it hold now, that social media is a traditional public forum. In *Packingham*, the Court, at most, merely opined on the importance of social media, in a spatial sense, for the exchange of views—it did not declare social media to be a traditional public forum. *See Packingham*, 137 S.Ct. at 1735; *See also Id.* at 1730 ("the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.") In fact, Justice Alito, in a concurring opinion, specifically expressed reservations about the courts "loose rhetoric" on this point:

> While I thus agree with the Court that the particular law at issue in this case violates the First Amendment, I am troubled by the Court's loose rhetoric. After noting that "a street or a park is a quintessential forum for exercise of First Amendment rights," the Court states that "cyber space" and "social media in particular" are now "the most important places (in a spatial sense) for the exchange of views"…[t]he Court declines to explain what this means with respect to free speech law.

Packingham, 137 S.Ct. at 1743 (Alito, J., concurring).

In *Reno*, the Court did not make the positive declaration that social media was a traditional public forum. Rather it made a negative qualification by distinguishing social media, as a matter of analysis, from the broadcast industry. *See* 521 U.S. at 858–869. Finally, in *Davison v. Loudon Cty. Bd of Supervisors*, although the Court held that a local government Chair's Facebook page was a public forum, it explicitly refused to opine on what kind of public forum the page was. No. 16-cv-932, 2017 WL 3158389 at *10 (E.D. Va. July 25, 2017).

Neither is it the case that the GEN page constitutes a designated public forum. The government does not create a public forum by inaction—the decision to create a public forum must instead be made by intentionally opening a nontraditional forum for public discourse. *See Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992). Again, Ms. Norton and her assistants do not own a proprietary interest in the Facebook page, and thus cannot take action to designate it a public forum. Although they can exercise control over the page, the ability to do so is not vested in Facebook—a private entity. Although, in *Marsh v. Alabama*, this Court held that corporations which assume the functions of a municipality are subject to First Amendment considerations, that case was a rare exception involving extraordinary circumstances where citizens of a municipality would otherwise be subjected to unchecked censorship. *See Marsh v.*

Alabama, 326 U.S. 501 (1946). Generally, the Court rejects the notion that the Constitution requires private owners to make their property available for public speech purposes. *See e.g.*, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (privately owned shopping centers can validly exclude people distributing handbills); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (privately owned shopping center may validly exclude labor picketers). Even if Ms. Norton's actions in opening up her personal page to the public could be subject to First Amendment scrutiny, she did not open up the forum for *general* public discourse. She made her private page available so that her constituents could follow her and have a personal connection with her. (R. at 25–26.) By asking her constituents for input on government decisions, she, at the most, would have established a limited public forum.

C. Even If the GEN Page Is a Public Forum, It Is, at Most, a Limited Public Forum.

Even if the Court holds that the GEN page is a public forum, it would most resemble a limited public forum. When a State establishes a limited public forum, it is "not required to and does not allow persons to engage in every type of speech." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). Once established, the State's regulation of such forum must merely be "reasonable in light of the purpose served by the forum." *Id.* at 106–07. For example, in *Good News Club*, the parties agreed that opening a school's facilities for recreational use after hours was operation of a limited public forum. *Id.* at 106. *See also Perry Educ. Ass'n*, 460 U.S. at 47 (holding that a school's mail system is a limited public forum); *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010) (holding that imposing conditions on student groups at a public law school constitutes a reasonable and viewpoint regulation of a limited public forum); *but see Good News Club*, 533 U.S. 98 (holding that denying a Christian club's use of after hour facilities at a public school constitutes viewpoint discrimination); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that facilities at a public university made available to student groups, except

those who wanted to engage in religious worship, is an unconstitutional viewpoint regulation of a limited forum).

Here, the GEN page should generally be considered a limited public forum because Ms. Norton can only solicit comments from her constituents by creating a post. Thus, her posts operate more as a school facility, an area which she makes available for discussion of a topic of her choosing. Further, Ms. Norton made her page available to the public because she sought to encourage her constituents to be more actively involved in government decisions. (R. at 25.) Where she sought input, she would frame it accordingly by asking for comments on how to make the State better. (R. at 25.) Here, specifically, Ms. Norton merely invited feedback on her new immigration policy by creating the post that Mr. Wong responded to. (R. at 15.) Her actions to remove the comment and ban Mr. Wong were not viewpoint discrimination because she allowed comments critical of her policy to remain on the post. (R. at 5.) Instead, removal of the *ad hominem* attack and subsequent ban was merely a reasonable regulation comparable to the conditions imposed on student groups in the *Christian Legal Society* decision. There, this Court upheld the University of California's requirement that all school-approved groups using campus facilities abide by a non-discrimination policy. See *Christian Legal Soc'y*, 561 U.S. at 669–670. Similarly, here, the Court should uphold Ms. Norton's practice of limiting use of this forum to respectful dialogue. In both cases, the Government is regulating the rules of engagement—not discriminating against viewpoint.

D. Even If It Is Not a Limited Public Forum, and Is, Instead, a Designated or Traditional Public Forum, the Governor's Actions Constitute Reasonable Time, Place or Manner Regulation.

Even in a public forum, "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that restrictions are justified without reference to the content of the regulating speech, that they are narrowly tailored to serve a significant

governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). For example, in *McCullen*, this Court upheld an ordinance which made it a crime to stand within 35 ft. of an abortion center, reasoning that this was a neutral regulation that did not burden speech in a manner integral to its effective conveyance, and one that left alternative means of communication available. *See* 134 S.Ct. at 2518; *See also Ward v. Rock Against Racism,* 491 U.S. 781, 491 (1989) (citing *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47–48 (1986) (holding that a regulation that serves purposes unrelated to the content of expression is neutral, even if it has an incidental effect on some speakers or messages but not others)); *Jones v. Heyman*, 888 F.2d 1328, 1332-1333 (11th Cir. 1989) (upholding government action silencing and banning a disruptive participant from a public meeting, reasoning that government may limit public meetings to important manners); but see *Davison*, No. 16-cv-932, 2017 WL 3158389 (E.D. Va. July 25, 2017) (holding that banning a commenter from a Government Facebook page is viewpoint discrimination).

Here, the facts are more analogous to *Jones* than *Davison*. The Court in *Davison* did not have the comment at issue, which complicated its analysis by making it more difficult to determine whether state action constituted viewpoint discrimination. *Davison*, No. 16-cv-932, 2017 WL 3158389 (E.D. Va. July 25, 2017). Here, we have the exact comment, and the exact reason why Ms. Norton removed it—namely because it was a "nastygram" that was "not appropriate for [the] page." (R. at 17.) This makes the case more analogous to *Jones*. There, the Eleventh Circuit Court upheld state action in silencing, and subsequently banning, a disruptive participant from a public meeting. *See Jones*, 888 F.2d at 1332–33. Here, Mr. Wong's comment was a flagrant and *ad hominem* attack on Ms. Norton, and like *Jones*, removing it and banning Mr. Wong was about preventing disruption, not about discriminating against his viewpoint. (R. at 4, 25.) This action

amounts to a reasonable time, place and manner regulation meant to achieve Ms. Norton's interests in maintaining a respectful image of civic engagement and promoting constructive dialogue. It does not burden Mr. Wong's speech in a manner integral to its conveyance because Mr. Wong can still share posts from the GEN page, along with his thoughts on them. (R. at 14.) To the contrary, removing Mr. Wong's comment and banning him incidentally effects his rights by only limiting his ability to express them specifically when Ms. Norton's makes a post on her personal page. As this Court held in *Renton v. Playtime Theatres, Inc.*, the State may impose content-neutral regulations in a public forum, even if they incidentally burden one's free speech rights. 475 U.S. 41, 47–48 (1986). With clear evidence of Ms. Norton's purpose, namely the fact that she did not remove other comments which were critical of the immigration policy, and the fact that she expressly cited the inappropriateness of Mr. Wong's "nastygram" in her instructions to remove it, such action constitutes a reasonable time, place and manner regulation.

CONCLUSION

For these reasons, Ms. Norton respectfully requests this Court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit and find that Ms. Norton's actions did not constitute state action, therefore they do not invoke the protections of the First Amendment. However, if state action is found, Ms. Norton respectfully requests this Court reverse on the grounds that her actions constituted government speech, therefore they are consistent with the First Amendment.

APPENDIX

RELEVANT STATUTORY PROVISIONS

Amendment I to the United States Constitution:

> 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.

Amendment XIV to the United States Constitution:

> 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. U.S. Const. amend. XIV, § 1.

New Calvada State Policy on Immigration Law Enforcement:

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

my office will issue an Executive Order pertaining to this new policy later this afternoon. You may find the Executive Order and more information about our new policy at https://www.immigrationenforcementinitiative.calvada.gov. As always, I welcome your comments and insights on this important step.