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 OF PETITIONER

Counsel for Petitioner

Team 1

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the 14th Circuit erred in concluding that a State official engaged in state action by deleting an individual's post on her personal Facebook page and banning him from posting further comments on that page; and

2. If so, whether the 14th Circuit erred in holding that the State official violated the individual's First Amendment rights by engaging in viewpoint discrimination in a state- sponsored forum rather than government speech.

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APPENDIX

U.S. Const. amend. 1.

The First Amendment states the following:

> 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.

STATEMENT OF FACTS

Elizabeth Norton established her Facebook account in January of 2008 with the purpose of connecting with family and friends. R. at 14, 24. A Facebook account is created by an individual or entity by providing personal information, including a name, date of birth, phone number, etc. R. at 13. In 2011, Elizabeth Norton created a Facebook page titled "Elizabeth Norton" to promote her personal and business announcements, including pictures of her family. This page was viewable only to her contacts. R. at.13, 25. On November 3, 2015, the State of Calvada elected Elizabeth Norton governor. R. at 25.

On January 12, 2016, one day after her inauguration, Governor Norton renamed her Facebook page to "Governor Elizabeth Norton" (GEN) to reflect her new title. R. at 13. She additionally altered her privacy settings. R. at 13. Governor Norton reasoned that, with her recent rise in popularity, members of the public may be interested in her personal announcements and thoughts published on her page. Governor Norton additionally maintained an inherited Facebook page titled "Office of the Governor of Calvada." This was the preexisting and official Facebook page for the Governor of Calvada and linked to the state's official gubernatorial website. R. at 25.

Through the GEN Facebook page, Governor Norton sought to keep Calvadans up to date with her personal life, including familial accomplishments, and sought to publish her personal opinions and motivations behind her administration's activities R. at 30. For example, on January 14, 2016 at approximately 12:47pm, Governor Norton invited constituents to inform her of their thoughts on using social media to interact with their government. R. at. 14. On February 8, 2016, she asked constituents to inform her what

should take priority before she began budget negotiations and, similarly, on March 15, 2016, she requested new logo ideas for the state flag as part of an effort to revitalize the state's image. R. at 14-15, 25.

On March 5, 2016, at approximately 3:15pm, Governor Norton announced her reasoning on a forthcoming immigration policy, which was related to the question of whether state law enforcement officials should cooperate with federal law enforcement agencies in enforcing the immigration laws of the United States. R. at 15. The last sentence of her post invited constituents to provide feedback on what they thought about this new policy given the potential of its widespread effect on Calvadans. R. at 16. Approximately one hour later, at 4:23pm, the Respondent, a constituent of Calvada, reacted to Governor Norton's post: "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 16, 27.

In an email later that same evening to Mr. Sanjay Mukherjee, gubernatorial Director of Social Media, Governor Norton requested that the Respondent be removed from the ability to interact with the page, in addition to deleting his comment. R. at 17, 26. She believed that the Respondent's comment was ultimately a personal attack to her character and unresponsive to her invitation for input on the new immigration policy. R. at 16-17. At approximately 10:10pm, Mr. Mukherjee fulfilled Governor Norton's request. R. at 17. Although the Respondent requested to have his access to the Facebook page reinstated and his comment restored, he remains banned from Governor Norton's Facebook page. R. at 17, 28. Neither Governor Norton nor Mr. Mukherjee removed any

of the other comments or banned anyone from the page. R. at 17. Two of the comments that remained on the page were critical of the policy and openly disagreed with its implementation. R. at 17.

SUMMARY OF THE ARGUMENT

Governor Norton respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit and find that Governor Norton did not engage in state action through her personal conduct. Or, in the alternative, that the Facebook page and subsequent posts constituted government speech, or, that it was a limited forum and Governor Norton engaged in viewpoint neutral discrimination.

For private conduct to amount to state action, the conduct must be found to be either traditionally and exclusively the responsibility of the state, or the conduct must so closely touch the nexus of the state that one can fairly represent the other. Governor Norton's conduct in maintaining a personal Facebook page satisfies neither of these tests.

Operating a social media account is not a traditional or exclusive duty of the state. Governor Norton sought to use her GEN page as a forum for her personal opinions and accomplishments, and to share her motivations underlying her administration's actions. While communicating with the public can be viewed as such a duty, Governor Norton chose to keep her posting and communication through the GEN page removed from her official capacity as Governor. She posted primarily for her home and outside of regular work hours, and she never used the GEN page alone to announce new policies. Furthermore, Governor Norton's deletion of Mr. Won's post and ban on his future commentary to the GEN resulted from personal, not public motivation. Mr. Wong's post insulted Governor Norton in her professional capacity, it did not attack her policy. Choosing to protect oneself from personal bullying is not conduct intertwined with the nexus of the state, and can therefore not be fairly characterized as state action.

However, if this Court finds Governor Norton's conduct did amount to state action, it is still proper for the lower court to be reversed. When the government speaks, they are not subject to First Amendment scrutiny. Governor Norton's Facebook page and posts satisfy the government speech test because, first, although Facebook is a relatively new medium, the manner in which it is used, to convey information to the public, is very much analogous to the traditional forms of communication. Secondly, the Facebook page was closely identified in the mind of the public with the state of Calvada, since, as a whole, it was primarily used to make announcements and seek specific information from constituents on a number of topics. Third, it was clear that Governor Norton exercised effectively maintained control and ownership over the Facebook page by determining which content would be posted and removed from the page.

In the alternative, if the Court does not find that the government speech test is satisfied, Governor Norton's Facebook page constitutes a limited public forum. In a limited public forum the government can limit the discussion to specific speakers and subject matter. Here, Governor Norton limited her Facebook page to speakers who responded directly to certain topics whether it was about their priorities for the budget or their thoughts about the merits of her new immigration policy. Accordingly, by deleting the Respondent's comment and banning the Respondent because his response went beyond the scope of the subject matter, she did not engage in viewpoint discrimination. Rather, her response was reasonable and constituted only viewpoint neutral discrimination.

ARGUMENT

I. THE COURT ERRED IN HOLDING GOVERNOR NORTON'S ACTIONS IN DELETING MR. WONG'S POST AND BANNING MR. WONG FROM FURTHER COMMENTS ON HER FACEBOOK PAGE CONSTITUTED STATE ACTION AS SHE DID NOT ACT IN HER OFFICIAL CAPACITY NOR ENGAGE IN BEHAVIOR ENTWINED TIED WITH GOVERNMENTAL DUTIES.

The Supreme Court of the United States has consistently held the First Amendment protects the right of free speech against violation by state actors. Const. amend. I. In the *Civil Rights Cases*, 109 U.S. 3 the Court reasoned that the 14th Amendment, in applying the First Amendment to the states, offered no constitutional recourse to plaintiffs suffering private acts of racial discrimination. 109 U.S. 3 (1883). Through the First Amendment's language prohibiting "congress" from encumbering free speech, and the 14th Amendment's language barring a "State" from attacking such a right, the Court ruled the federal government had limited power to regulate the actions of private persons. The assertion that one private citizen's right to freedom of speech cannot be prioritized over another's, despite the serious harm caused in the *Civil Rights Cases*, underlined this state action requirement. Furthermore, a state actor was not only legally bound by the constitution but additionally posed, through the power of their position, a greater threat to free speech.

However, the Court both superseded the *Civil Rights Cases* and reconfigured the qualifications for operating as a state actor in the mid-1900's. Firstly, the Court recognized the myriad of roles a government employee, the traditional state actor, assumed in their lives. A state employee was also often a spouse, a parent, a member of social clubs and could not reasonably be, at all times, a voice of the state. *West v. Atkins*, 487 U.S. 42, 56 (1988)(explaining that a state employed physician was not a state actor

solely because he was "on the state payroll"). Therefore, the analysis of state action shifted from examining the source of employment to actual conduct, with the recognition state employees could and did engage in *private* conduct. Blum v. Yaretsky, 457 U.S. 9991, 1002 (1982)(noting that there are no constitutional protections against "merely private conduct, no matter how discriminatory or wrongful").

In place of a *de facto* state actor argument relying exclusively on government employment, the Court asked in *Jackson v. Metro. Edison Co*., 419 U.S. 345, 349 if the conduct of the alleged state actor was "traditionally exclusively reserved to the State." 419 U.S. 345, 349 (1974). An understanding that state employees are not constant conduits for their employer and should not be viewed as such when they are removed from work, living as private citizens, underscored this reasoning.

Secondly, the Court created space within the state action doctrine for private individuals, non-state employed persons, who carry out actions interwoven with the state. *Shelly v. Kraemer*, 334 U.S. 1 (1948). Through a totality of the circumstances test, the Court asked whether behavior of the individual or entity was so closely associated with the state that the former could be said to represent the latter. *See Jackson*, 419 U.S. 345 at 351; *Rossignol v. Voorhaar*, 316 F.3d 516, (2003) Allowing for the inclusion of private individuals further cemented the assertion that varied people hold varied roles; a government employee is not always a state actor and neither is a private individual's conduct always private.

A. Governor Horton's conduct in managing the GEN Facebook Page as a forum for her personal opinions is a private action and removed in time and space from her state duties.

In deciding whether an alleged state actor's conduct constitutes state action, courts first ask if the conduct was a traditional and exclusive state function. See *Jackson*, 419 U.S. 345 at 35. For example, in *Jackson* a utility company, heavily regulated by the state of Pennsylvania, provided electricity almost exclusively to the town of York through a monopoly. While the company operated under a certificate of public convenience issued by the state, its close association with the state was not enough to prove it was a state actor. *See id*. The Court instead held that the conduct of the company, providing electricity, was not a traditional and exclusive function of the state and therefore not a state action. *See id*. The Court also clarified that if the company had touched upon the state's sovereign duties, state action would have been more readily found. See id.; *Marsh v. Alabama*, 326 U.S. 501 (1945)(finding that a private town's conduct in maintaining infrastructure and post office were traditionally reserved for the state and, as such, constituted state action).

In the case at hand, Governor's Norton's private conduct in running her personal Facebook Page cannot amount to state action. Like the utility company in *Jackson*, Governor Norton has close ties with the state. Both Governor Norton, as executive of Calvada, and the utility company were sanctioned and regulated by the state. But also like in *Jackson*, such bonds to the state do not alone create state action. *See id*. Despite her elected position, Governor Norton is not always a representative of the state. Just as the utility company's conduct in providing electricity was not traditional or exclusive to the

state, neither is Governor Norton's conduct when she maintains a personal social media account.

1. The duty to maintain social media account is not an enumerated duty of nor traditional, or exclusive to the state.

In *Jackson*, the court emphasized the absence of a law or code enumerating a duty of the state to provide electricity. 419 U.S. 345 at 353 (noting no obligation on the government through statute to provide service of electricity). The Court utilized this lack of enumerated duty to argue that such a service was not a traditional or exclusive responsibility of the state. *See id*. So too, for Governor Norton, there is no enumerated duty charging her to operate a Facebook Page in her official capacity. R. at 7. In both instances, the state chose not to formally recognize or impose, through laws, statutes, or regulations, the respective conduct in each matter as traditional or exclusive state responsibility. Governor Norton was never instructed by the state to operate her personal Facebook Page, an omission the *Jackson* court treated as dispositive of alleged state action. 419 U.S. 345 at 353.

Furthermore, Governor Norton's operation of the GEN Facebook Page does not touch on state sovereignty. Both the *Jackson* and *Marsh* courts held that matters of state sovereignty, the ability of the state of govern itself, would almost always implicate state action. *See Marsh*, 326 U.S. 501; *Jackson*, 419 U.S. 345. Conduct necessary to sustaining and self-governing of a state is perhaps the most traditional and exclusive function of a state. *Marsh* identified as such conduct as operating a post office, preserving infrastructure, and ensuring public safety. *See* 326 U.S. 501. In contrast to these duties, operating a social media account pales. Governor Norton's conduct on her personal

Facebook page does not amount to the identified traditional and exclusive state actions in *Marsh*. *See id*.

2. Governor Norton used the GEN Facebook Page to discuss her personal opinions and motivations, not her official views and, furthermore, the state of Calvada maintains a separate, and official, Governor Facebook Page.

The Respondent argues that while operating a Facebook page is not a historically recognized state action, Governor Norton utilizes her page to corresponded with constituents and such conduct is traditional and exclusive to the state. R. at 33. The Respondent ignores, however, that Governor Norton utilized the GEN Facebook page to communicate only her personal opinions and ambitions. R. at 1. For example, Governor Norton's post about her daughter's soccer team and a post announcing her own birthday are not matters of the state. R. at 15. Such posts do not invite the public to engage in a dialogue about official state matters, nor do they signal to constituents the Facebook page was a forum for official dialogue. Governor Norton sought only to voice her private opinions and motivations behind her admiration's actions.

Additionally, Governor Norton's March 5th post discussing a new immigration law enforcement policy was not official conduct amounting to state action. *Id*. Despite being more closely related to her political duties than the previously discussed posts, Governor Norton was not making an official announcement or opening an official dialogue. Instead, she was simply voicing her personal motivations for such a policy. *Id*. In fact, Governor Norton even indicated where visitors of her page could read the official policy: at an immediately forthcoming state press conference and release of an Executive Order. R at 16. In this circumstance, the traditional and exclusive state action is the

formal press conference and executive order, not personal thoughts about the policy published on a social media page.

Moreover, even if this court agreed with the Respondent that social media is becoming an increasingly popular mechanism for communication between elected officials and constituents, the state of Calvada maintains a separate and clearly designated official Governor Facebook page. In *Davison v. Loudoun County Board of Supervisor*, 267 F.Supp.3d. 702, a case relied upon by the Respondent, a Chairwoman's operation of a Facebook page is deemed state action. *R at 33*; *Davison v. Loudoun County Board of Supervisor*, 267 F.Supp.3d. 702 (2017). However, the Chairwoman's Facebook page differs significantly from Governor Norton's page. For example, the Chairwoman's page contained clear markers identifying it as her singular and official page: it included her official county email address and telephone number, linked to the county's official website, and contained posts submitted on behalf of the Loudon County Board of Supervisors. *Id.* at 714.

In contrast, Governor Norton's page does not link to the State's website, it does not provide her government contact information, nor does Governor Norton post on behalf of her colleagues. R. at 15. In fact, it is the separate and official page titled "Office of the Governor of Calvada" which provides government contact information and makes official announcements on behalf of Governor Norton's staff. R. at 25. Furthermore, Governor Norton created the strong majority posts for her personal page while at home and outside of work hours, meaning the official Facebook page was the only social media updated during the workday. R. at 7.

Moreover, Governor Norton created the GEN Facebook page in 2011, when she was a business woman, to make personal announcements. *Id*. Following her inauguration, Governor Norton simply adjusted the name on the page to include her new title, the way newly married spouses adjust their names to reflect an important life event. Governor Norton additionally changed her privacy settings to allow members of the public to interact with her page, reasoning more people may be interested in her private life. *Id*. Ultimately, Governor Nixon created a personal Facebook seven years ago, adjusted this page to reflect her life accomplishments, and intends to maintain the page following the conclusion of her term. *Id*. The GEN page began, continues to be, and will endure as a mechanism for Governor Norton to share her personal thoughts.

B. <u>As a private individual, Governor's Horton's conduct in deleting Mr. Wong's comment and banning Mr. Wong from further commentary on the GEN Facebook Page was not associated with the state and cannot be considered state action.</u>

Although Governor Norton's conduct in operating her personal Facebook page is not traditionally nor exclusively associated with state responsibilities, and thereby not state action under a "joint action" framework, courts apply a second, totality of the circumstances test to the conduct in question. This analysis, iterated by the court in *Rossignol v. Voorhaar*, 316 F.3d 516, is not rigid. *See* 316 F.3d 516 (4th Cir. 2003). Rather, the *Rossignol* court asked whether conduct had a sufficiently close nexus with state to be fairly considered state action. *Id.* at 523. In *Rossignol* a group of police officers sought to prevent the distribution of newspapers critical of their professional practices through an elaborate scheme of purchasing the papers before other readers. *Id.* at 519. The fourth circuit Court of Appeals deemed the officer's conduct state action. *See*

id. The court ultimately relied on the elaborate scheme involving multiple state employees, one Officer's choice to wear state issued apparel, the group's use of the Sherriff's office as a rest stop that evening, and the choice of two members to carry their state firearms. *Id.* at 520. These facts, coupled with the court's finding that the group's employment as state officers was the stimulus for their conduct, amounted to state action. *Id*. at 524 (explaining the groups' action "arose out of public, not personal circumstances").

Governor Norton's actions are strikingly dissimilar to those of the *Rossignol* officers. Firstly, Governor Norton was not involved in an intricate scheme. Governor Norton, and Mukherjee, her Social Media Manager, alone had access to the GEN Facebook page. R. at 26. While it is true Governor Norton utilized the assistance of a staff member in operating her personal page, the pair had straight forward communication about the content of the page. *Id*. There was no plotting of a massive employee movement like the kind witnessed in *Rossignol. Id.*

Additionally, Respondent would urge this Court to draw a parallel between the officer wearing a state uniform and the two others carrying state issued firearms, with Governor Norton's use of her state supplied phone and computer to manage the GEN Facebook page. This is not a reasonable analogy. In *Rossignol* the state supplied the officers with uniforms to identify themselves as state employees and guns to use in their duties as state employees. *See Rossignol,* 316 F.3d 516.

In contrast, Governor Norton was supplied the electronics, in part, for her *personal* safety. R. at 7. Governor Norton's security staff encouraged her to use these devices not only for all state matters, but any matter that touch upon personal security or

safety. *Id*. As a high-profile politician, most of Governor's Norton's online dealings, whether professional or personal, touch on elements of safety. For example, it is entirely feasible a Facebook user would post a threat to Governor Norton's safety on her personal page. The state issued devices, additionally, contained advanced protections against hacking. It is reasonable that the hacking of Governor Norton's personal information would jeopardize her safety or the security of the state in the same way hacking her official government information might. Therefore, unlike the Officer's use of state apparel and weapons clearly intended to be worn in the commission of official state conduct, Governor Norton was reasonable in using her state electronics for personal conduct.

The *Rossignol* court additionally focused on the impetus behind the officer's conduct. *See Rossignol,* 316 F.3d The court found that the officers strove to retaliate against a newspaper critical of their professional performances. *Id.* at 516 (detailing the newspaper's "'constant belittlement'" and reporting of "'scandalous things'" about the sheriff's deputies' performance, including what they "'buy for the agency, equipment, [and] positions [they] ask for'"). The officers feared for their official state reputations and sought to prevent the publication of words adverse to their public and professional personas. Ultimately, their concerns for their ability to continue to be state actors motivated their conduct. The opposite is true of Governor Norton.

Mr. Wong's post did not attack Governor Norton in her public capacity. Rather, the post contained derogatory language about her own person. R. at 4. Mr. Wong did not comment on any specific policies or actions of Governor Norton, rather he compared her to a "toad" and insulter her personal ethics and morality. *Id*. Unlike the officers,

Governor Norton was not intended to suppress speech critical of her official performance. She felt only bullied and that such comments against her person were not appropriate on her personal Facebook page. Furthermore, Governor Norton kept up two other posts directly critical of her immigration policy, but that did not attack her person. *Id*.

Governor Norton's conduct is more analogous to *Martinez V. Colon*, 54 F.3d 980 (1st Cir. 1995) where the shooting of a coworker by an off-duty police officer with his state issued gun was not state action. 54 F.3d 980 (1st Cir. 1995). In Martinez, the court found the impetus behind the shooting to result from personal feelings and could therefore not amount to state action. *See id*. at 987. So too was Governor Norton's conduct motivated solely by personal feelings arising from insults to her private person. As Governor Norton did not participate in a wider scheme with other state employees, unreasonably use state issued electronics to carry out her conduct, and was not motivated by a public and professional agenda, her conduct does not approach the nexus of state responsibility to be fairly considered state action.

II. THE COURT ERRED IN HOLDING THAT GOVERNOR NORTON VIOLATED THE RESPONDENT'S FIRST AMENDMENT RIGHTS BY ENGAGING IN VIEWPOINT DISCRIMINATION IN A STATE SPONSORED FORUM RATHER THAN GOVERNMENT SPEECH.

A. Governor Norton's Facebook page and subsequent posts satisfy the government speech test because the page is analogous to traditional mediums of communication, it was closely identified in the public mind with the state of Calvada and Governor Norton exercised final authority and control over the page.

The Free Speech Clause does not regulate government speech and the government is not required to maintain viewpoint neutrality on its own speech. U.S. CONST. AMEND. I; *Matal v. Tam*, 137 S.Ct. 1744, 1757 (2017). *See also Pleasant Grove City, Utah v.*

Summum, 555 U.S. 460, 465-479 (2009)(concluding that the placement of a permanent monument in a public park was a form of government speech and, therefore, not subject to scrutiny under the Free Speech Clause); *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 561 (2005)(finding that a government-ran program which used funds from assessment fees constituted government speech and was not susceptible to First Amendment challenges). Although Facebook and responses from constituents are non-governmental entities, the government may still exercise this same freedom when it receives private assistance for a government-controlled message. *Johanns*, 544 U.S. at 562; *see also Legal Services Corp. Velazquez*, 531 U.S. 533, 541-543 (2001)(finding that the government can use "[p]rivate speakers to transmit specific information pertaining to its own program").

The courts are reluctant in extending the government speech doctrine because of the fear that it would allow disfavored speech to be suppressed. *Tam*, 137 S.Ct. at 1758 (noting that "[w]e must exercise great caution before extending our government speech precedents"). However, the courts recognize that the doctrine is essential in order for the government to function in an efficient manner, emphasizing that the democratic process provides a sufficient check on government speech. *See Walker v. Texas Div. Sons of Confederate Veterans, Inc*., 135 S.Ct. 2239, 2246 (2015); *Summum*, 555 U.S. at 468 (noting that "it is not easy to imagine how the government could function if it lacked the freedom to select the messages it wished to convey").

In *Walker* the Supreme Court set forth the test to determine when speech is appropriately attributable to the government, such that it does not implicate the First Amendment. *Walker*, 135 S.Ct. at 2248-49; *see also Tam*, 137 S.Ct. at 1760. The courts

will analyze the history of the medium, whether the medium is "often closely identified in the public mind with the state," and the extent to which the state has "effectively controlled the message conveyed." *Walker*, 135 S.Ct. at 2248-49; *see also Tam*, 137 S.Ct. at 1760. Here, although Facebook is a relatively new medium, it is relatively analogous to the manner in which governments have disseminated information to the public in the past. *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017)(noting that "social media offers 'relatively unlimited, low-capacity communication of all kinds'"). Additionally, the nature in which Governor Norton used the Facebook page, primarily to make announcements related to her gubernatorial role, supports a contention that the post was closely identified in the mind of Calvadans. *See Tam*, 137 S.Ct at 1760 (noting that trademarks could not be government speech because they were not, for example, "designed" by the state). Further, Governor Norton effectively controlled the message by exercising "final approval" over the content the page. *See Summum*, 555 U.S. at 467; *Sutliffe v. Epping School District*, 584 F.3d 314, 331 (1st Cir. 2009), *Page v. Lexington County School Dist. One*, 531 F.3d 275, 282 (4th Cir. 2008).

1. Governor Norton used the Facebook page to make announcements and solicit responses from constituents, which is analogous to the manner in which governments have traditionally conveyed information.

Over the past few decades, the courts have recognized the significance of the Internet, including social media, as an increasingly important channel of communication. *See Reno v. ACLU*, 521 U.S. 844, 850 (1997). In *Reno*, the Court expounded on the scope of the Internet, recognizing that it was a vast network for information of all kinds, widely and easily accessible and increasingly used by academic institutions and major companies. *Id*. at 850-851. They also acknowledged that it was a primary communicative

channel in our society. *Id*. at 870. Twenty years later, in *Packingham*, the Court again emphasized that the Internet had "emerged as one of the most importance places for speech of all kinds." 137 S.Ct at 1735. Accordingly, Governor Norton established a Facebook page immediately after she won the election, recognizing the platform as one of the most common ways for governments to convey information to constituents.[1] R. at 25.

Although this prong of the government speech test has been applied in situations where the government was engaged in more traditional forms of communication, it is not a stretch to conclude that Facebook is significantly similar to prior methods. *See Walker*, 135 S.Ct. at 2248 (finding that license plates were historically used as communication from the states); *Summum*, 555 U.S. at 470 (concluding that the use of monuments as a way to communicate was rooted in tradition). Ultimately, despite not having a long history in using Facebook, specifically, as a mode of communication, it's rooted in the same tradition of license plates and monuments, in that the government tends to use modes of communication in a way that is easily disseminated to the public. *See Walker*, 135 S.Ct. at 2248; *Summum*, 555 U.S. at 470 (finding that "governments have long used monuments to speak to the public").

[1] Presently, federal, state and local governments operate thousands of websites, some of which are primarily informational, though some are significantly comprehensive. *See* David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 B.Y.U.L. Rev. 1981, 1986-1987 (2010).

2. Governor Norton's Facebook page and subsequent posts are closely identified in the minds of Calvadans because they were announcements or direct requests directly related to her gubernatorial role.

Governor Norton's Facebook page is closely identified in the public mind with the State of Calvada, given the nature of its use, in addition to the inclusion of identifiable marks. *See United Veterans Memorial and Patriotic Ass'n v. City of New Rochelle*, 72 F.Supp.3d 468, 475 (S.D.N.Y. 2014)(noting that spaces used by the public are accordingly closely identified in the public mind). Although the Fourteenth Circuit correctly recognized that reasonable users of the social media platform do not attribute comments on a post to the creator of the post, the court failed to properly distinguish Governor Norton's posts. R. at 36. The Facebook page consisted of either announcements, such as that of the new immigration policy, or direct requests for information or perspectives, such as when Governor Norton asked for constituents to tell her what their priorities were, or to report potholes they encountered. R. at 15.

Admittedly, in instances where there has been an invitation to provide an answer to a question or share factual information, it is unlikely that constituents may attribute the actual responses to the State. R. at 36. However, although Governor Norton may have invited responses from her constituents, this did not change the fact that her posts, including the immigration policy post, constituted government speech. *See Downs v. Los Angeles Unified District*, 228 F.3d. 1003, 1013 (9th Cir. 2000)(concluding that although the school invited others to post on a bulletin board it still qualified as government speech).

3. Governor Norton effectively maintained control of the page by exercising "final approval" over the content of the page.

Governor Norton effectively maintained ownership and control of the Facebook page by exercising final approval of its contents. *See Sutliffe*, 584 F.3d at 318; *Page*, 531 F.3d at 277. The manner in which Governor Norton removed and added content on the Facebook page, as well as directing other State officials to do so, is significantly similar to other cases where the courts have concluded that such conduct satisfied the government speech test. *See Sutliffe*, 584 F.3d at 318; *Page*, 531 F.3d at 277. In *Sutliffe*, the plaintiff, a citizens advocacy group, alleged that the Town violated their First Amendment rights by excluding hyperlinks on the Town's website that would have countered support for approving the school budget. 584 F.3d at 318. There, the Court concluded that the test for government speech was satisfied specifically because the Town maintained control over which hyperlinks were placed on the website. *Id*. at 331 (noting that "[i]t [was] undisputed that the hyperlinks were only added to the website with the approval of the Board Selectman"); *see also Summum*, 555 U.S. at 467 (finding that the city satisfied the government speech test by exercising "final approval authority" over the[] selection").

The court in *Page* emphasized this same reasoning where a parent wanted to include his own message in support of a bill pending in the state legislature through the school's "informational distribution system," which included the school's website. 531 F.3d at 277. In finding that the school district effectively controlled and maintained ownership over its communications to satisfy the government speech test, the court reasoned that the district approved all of the speech before it was disseminated through the various communication channels. *Id*. at 282. Similar cases also emphasize this

reasoning to conclude that the government maintained effective control over a message, albeit in other formats. *See People for the Ethical Treatment of Animals v. Glittens*, 414 F.3d 23, 30 (U.S. App. D.C. 2005)(finding that the government exercised effective control by deciding which designs would be selected for an art exhibit); *United States v. Am. Library Ass'n*, 539 U.S. 194, 204–05 (2003)(applying the government speech doctrine to "a public library's exercise of judgment in selecting the material it provides to its patrons"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585–86 (1998) (finding that in deciding which projects to fund the organized was engaging in government speech); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (noting that "[w]hen a public broadcaster exercises editorial discretion" it engages in speech activity even when there is third party involvement).

Here, Governor Norton exercised this same control, ownership and final authority over the content of the Facebook page. *See Sutliffe*, 584 F.3d at 318; *Page*, 531 F.3d at 277. Not only did Governor Norton primarily post directly to the page, but also, her control over the page is further evidenced by the manner in which she directed other State officials to include content. *See Sutliffe*, 584 F.3d at 318; *Page*, 531 F.3d at 277. For example, in her email to Sanjay Mukherjee, the Social Media Director, on March 5, 2016, she directed him to post photos from a basketball tournament that included her daughter and mascot, in addition to removing the Respondent's content. R. at 16-17. Similar to the Town's selection of hyperlinks to their website in *Sutliffe* and the chosen view of the school district in *Page* chose to communicate through its various communication channels, Governor Norton maintained control and ownership over what was disseminated to constituents through her Facebook page. *Sutliffe*, 584 F.3d at 318; *Page*,

531 F.3d at 277. Her removal of the Respondent's content, which she decided was "not appropriate" for her Facebook page, was in accordance with the freedom of government speech. R. at 15.

B. In the alternative, Governor Norton's immigration policy post is equivalent to a limited public forum because she restricted the discussion specifically to her constituents' views on using state resources to enforce federal immigration laws.

The courts have divided the public forum doctrine into three distinct categories, each with its own limitations: traditional public forums, limited public forums or designated public forums and nonpublic forums. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49 (1983)(finding that a traditional public forum consists of physical spaces subject to content-based restrictions); *Carey v. Brown*, 447 U.S. 455, 461 (1980)(defining a designated or limited public forum as public property that the government has transformed into a place for expressive activity); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981)(defining a nonpublic forum as a space opened up for a specific purpose).

However, in *Cornelius v. NAACP*, the Court made clear that even when the government has established an "instrumentality for communication," this does not automatically equate to creating a public forum. *See* 473 U.S. 788, 803 (1985). Further, the courts have been generally reluctant in applying the public forum doctrine to non-physical spaces. *See Summum*, 129 S.Ct. at 480 (noting that "[w]here the application of forum analysis would lead almost inexorably to closing of the forum it is obvious that forum analysis is out of place"); *Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 518 U.S. 727 (1996)(in a plurality

opinion, seven of the justices declined to apply the public forum doctrine to an internet platform where the government posted policy announcements and solicited commentary).

Here, at best, Governor Norton's immigration policy is analogous to a limited public forum. *See Cornelius*, 473 U.S. at 803. The Court has defined a limited public forum as a "designated public forum that is limited to a class of speakers or to the discussion of certain subjects." *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 677 (1998). On a number of occasions Governor Norton invited constituents to respond to posts about narrow and specific topics, which included either their thoughts of the Facebook page, what their priorities were regarding the budget or ideas for a new state logo design. R. at 14-15. Specifically, in her immigration policy post, she requested feedback directly in regard to her constituents' views on using state law enforcement resources to enforce federal immigration laws. R. at 15-16.

Consequently, she did not exclude anyone who was appropriately participating within the scope of the forum. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 831 (1995)(finding that the University's student Christian newspaper was did not go beyond the scope of the limited forum); *Lambs Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-394 (1993)(concluding that where a school district opened its facilities for social, civic and recreational purposes, the exclusion of a group because of its religious standpoint was impermissible). Rather, she only excluded comments that went beyond the scope of expressing views on the new immigration policy. *See Carlow v. Mruk*, 425 F.Supp.2d 225, 242, 245(D.R.I. 2006)(concluding that where the purpose of the forum was to adopt a budget, elect officers and vote on resolutions of the town, it was reasonable to exclude nonresidents); *Rowe v. City of*

Cocoa, Florida, 358 F.3d 800, 803 (11th Cir. 2004)(finding it reasonable for a city to restrict speaking at meetings to those individuals who have a direct stake in the business of the city); *Perry*, 460 U.S. at 50 (finding that the school district appropriately limited their mailing system to organizations representing the interest of all the teachers). As such, responses that expressed views that were critical of the policy, but ultimately within the scope of the forum's subject matter, were not deleted. *See Carlow*, 425 F.Supp.2d at 245; *Rowe*, 358 F.3d at 803.

C. Even if the Court disagrees as to the nature of the forum, Governor Norton engaged in viewpoint-neutral discrimination when banning the Respondent and deleting his post because the subject matter restriction was reasonable in light of the purpose of the post, and based only on the forum's subject matter.

The courts have made clear that viewpoint discrimination is prohibited in all forums. *Davison v. Loudoun County Board of Advisors,* 267 F.Supp. 702, 717 (E.D. Va. 2017). Where the government has created a limited public forum, the government "must respect the lawful boundaries it has set for itself." *Rosenberger*, 515 U.S. at 829. The limited forum doctrine allows the government to impose blanket restrictions on the discussion of other genres within the forum, and makes it permissible as long as the restriction is viewpoint neutral and reasonable in light of the purpose served by the forum. *See Christian Legal Soc'y v. Martinez,* 561 U.S. 661, 679 (2010); *Good News Club v. Milford Central School*, 533 U.S. 98, 121 (2001). Accordingly, it was permissible for Governor Norton to delete Mr. Wong's post and ban him from the Facebook page because his comment, referring to her as a "scoundrel," "disgrace" and "toad," went specifically to her ethics and morality, not the merits of the new immigration policy. R. at16. Not only was the restriction on responses that went beyond the scope of the subject matter reasonable in "light of the purpose of the forum and all the surrounding

circumstances," but also, deleting the Respondent's comments was viewpoint neutral because other comments expressing negative opinions of the policy were not removed. *See Cornelius*, 473 U.S. at 809.

1. Limiting the scope of the forum's subject matter was reasonable in light of the purpose of the post, because it was intended to elicit perspectives on Governor Norton's new immigration policy.

While the comments were generally a valid exercise of the Respondent's First Amendment rights, it went beyond the scope of the limited public forum, which was established to elicit responses as to Governor Norton's constituents' views specifically regarding whether local law enforcement should engage in administering federal immigration laws. R. at 15, R.at 26. To limit the scope of the forum to this topic and exclude those who went beyond it was reasonable, especially given the content of Governor Norton's post. *See Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d. 65,90 (1st Cir. 2004)(concluding that "the reasonableness standard is not a particularly high hurdle"); *Cornelius*, 473 U.S. at 808 (finding that the "decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation").

Furthermore, Governor's Norton's interest in maintaining efficiency, in order to appropriately access her constituents' views and excluding those who did not comport with that was reasonable. *See Rowe*, 358 F.3d at 802 (concluding that "the City Council's Rules of Procedure on their face are a permissible limitation of speech to non-residents at the limited public forum of a City Council meeting"); *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 271 (9th Cir.1995)(concluding that the rent control board had a "legitimate interest in conducting efficient, orderly meetings").

2. Banning the Respondent and deleting his post was viewpoint neutral because it was based only on the scope of the forum's subject matter.

The Respondent's comment went beyond the scope of the forum's subject matter and, as a result, his removal from the forum and deletion of the post was viewpoint neutral. *See Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133,151 (2nd. Cir. 2004)(finding that "[the plaintiff] has offered no evidence that [the defendant's] access policy was based on bias against its viewpoint rather than on preserving the Job Centers for their intended purposes"). The courts have defined viewpoint discrimination as the suppression of speech due to the speaker's "ideology or perspective." *See Ridley*, 390 F.3d at 82; *see also Berner v. Delahanty*, 129 F.3d 20, 28 (1st Cir. 1997)(concluding that "[t]he essence of viewpoint-based discrimination is the state's decision to pick and choose among similarly situated speakers in order to advance or suppress a particular ideology or outlook.").

Here, the ideology in question was the belief that state resources should not be used to enforce federal immigration policies. R. at 27. If Governor Norton removed all comments that comported with this ideology, it is clear that such conduct would have constituted viewpoint discrimination. *See Ridley*, 390 F.3d at 82. However, the only comment that was ordered removed was based not on this ideology but because it only reflected the Respondent's opinion on the Governor's character. R. at 26. Accordingly, the Respondent's claim that Governor Norton engaged in viewpoint discrimination is misplaced.

CONCLUSION

For the foregoing reasons, Governor Norton respectfully requests that this Court reverse the decision below.

Respectfully Submitted,
/s/
Team 1
Counsel for Petitioner,
Elizabeth Norton, in her official capacity as Governor, State of Calvada

CERTIFICATE OF COMPLIANCE

1. The work product contained in all copies of this team's brief is in fact the work product of its team members.
2. This team has complied fully with its school's governing honor code.
3. This is an acknowledgment that this team has complied with all Rules of the Competition.

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