Brief on the Merits

No. 17-874

In the Supreme Court of the United States

ELIZABETH NORTON

Petitioner,

v.

BRIAN WONG

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

TEAM 7
Attorneys for Respondent

QUESTIONS PRESENTED

I. 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

II. 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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JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit affirmed in part, reversed in part, and remanded to the United States District Court for the District of Calvada in favor of Respondent Brian Wong. This Court granted a petition for writ of certiorari to the Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(b).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.
>
> U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> 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.

STATEMENT OF THE CASE

Mr. Wong is a high school teacher and citizen of the State of Calvada and the United States. R. at 27. Governor Elizabeth Norton ("Petitioner") was elected Governor of the State of Calvada on November 3, 2015 and inaugurated into office on January 11, 2016. R. at 2.

A. The "Governor Elizabeth Norton" Facebook Page

In January of 2008, prior to being elected to office, Petitioner created a private Facebook account to connect with family and friends. R. at 2, 24. For several years, Petitioner's Facebook account was set to "private," only allowing her "friends" to view and interact with her Facebook account. R. at 2. In 2011, Petitioner created a Facebook page titled "Elizabeth Norton." R. at 2, 25. Between 2011 and 2016, Petitioner used her page to make personal and business announcements, but limited those who could view her page to select individuals she was connected with on Facebook. R. at 2.

On January 12, 2016, the day after her inauguration, Petitioner changed the name of her Facebook page to "Governor Elizabeth Norton," ("GEN") and changed the privacy settings to make the page available to the public. R. at 2, 25. The changes to the privacy settings were made to allow residents of Calvada to have a "personal connection with [Petitioner]," and "interact with [her] as an individual through Facebook." R. at 25. After changing the page's name and privacy settings, Petitioner posted multiple requests for input from constituents about matters pertaining to the State of Calvada. R. at 2. For example, Petitioner requested that constituents submit photographs of potholes on state roads to the GEN Facebook page, and instructed the Calvada Department of Transportation to monitor for such posts and act accordingly. *Id.* In a separate instance, Petitioner posted on the GEN page seeking input from constituents regarding ideas for a new state flag and logo as part of an initiative to attract new businesses to Calvada. R.

at 2-3. Additionally, Petitioner posted updates during state budget negotiations and asked for input from constituents on different ideas and proposals suggested by the legislature. R. at 26. Due to security concerns, Petitioner primarily accesses the GEN Facebook page through devices provided by the State of Calvada. *Id.*

The State of Calvada maintains an official Facebook page for its governor under the name "Office of the Governor of Calvada." R. at 3. However, Petitioner posts far more frequently on the GEN page, and does so with the assistance of her staff. *Id*. Petitioner's Director of Social Media, Sanjay Mukherjee, frequently assists Petitioner in managing the content of the GEN page. *Id.* As an administrator of the GEN page, Mr. Mukherjee has the ability to "edit the page and add apps, create and delete posts as the page, go 'live' as the page from a mobile device, send messages as the page, respond to and delete comments and posts to the page, remove and ban people from the page, create ads, promotions, or boosted posts." R. at 15. In furtherance of his official duties, he frequently uses mobile devices provided by the State of Calvada. R. at 20. Calvada's Director of Public Security, Nelson Escalante, and Petitioner's Chief of Staff, Mary Mulholland, also regularly monitor the GEN page. *Id.* Ms. Mulholland is also an administrator of the GEN page and has "authored posts," and "replied to constituents" on the page. R. at 23. Occasionally, Petitioner's senior staff members will assist her in drafting GEN page content or responses to posts from the public. *Id.*

B. Immigration Policy Post

On March 5, 2016, Petitioner posted an update pertaining to Calvada's immigration law enforcement policy, stating that Calvada's state law enforcement officials should cooperate with federal law enforcement in enforcing federal immigration laws. R. at 3. The post was directed to the "most active, influential, caring, and patriotic citizens of the State of Calvada." R. at 3-4.

Petitioner concluded her post by stating that, "[a]s always, [she] welcomed comments and insights." R. at 4. In response to Petitioner's post, Mr. Wong commented on the post from his personal Facebook account and expressed disagreement with Petitioner's political position. *Id.* That evening, Petitioner e-mailed Mr. Mukherjee and requested that, among other things, he delete Mr. Wong's post and block Mr. Wong from the GEN page. *Id.* Mr. Mukherjee complied with Petitioner's requests and subsequently deleted Mr. Wong's comment and banned him from posting on the page. *Id.* Mr. Wong immediately e-mailed the governor's official e-mail address to request that his post be reinstated. R. at 28. Mr. Wong also asked for his ban to be removed so he could continue to comment and participate on the GEN Facebook page. *Id.* Neither Petitioner nor her staff responded to his request. *Id.*

C. Proceedings Below

On March 30, 2016, Mr. Wong filed a civil rights action pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Calvada asserting Petitioner violated his first Amendment right to freedom of speech. R. at 1. On August 25, 2016, Mr. Wong and Petitioner filed cross motions for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. R. at 1, 5. The district court granted Petitioner's Motion for Summary Judgment, finding that while her actions in deleting Mr. Wong's post and banning him from her page were state action, her Facebook page constituted "government speech" and therefore was not subject to First Amendment limitations on viewpoint discrimination. R. at 12.

Thereafter, Mr. Wong appealed the district court's decision to the United States Court of Appeals for the Fourteenth Circuit. R. at 29. The Fourteenth Circuit affirmed the district court's holding that Petitioner's actions constituted state action. R. at 39. On the issue of government speech, the Fourteenth Circuit reversed the district court and found that Petitioner's actions in

opening her Facebook page to the public created a government-sponsored forum. R. at 40. The Fourteenth Circuit remanded this matter to the district court for entry of summary judgment in favor of Mr. Wong. *Id.* This Court granted certiorari and directed that briefing and argument be limited to the issues noted above.

SUMMARY OF THE ARGUMENT

Petitioner acted within the scope of her official duties as the Governor of the State of Calvada when she had Mr. Wong's post deleted and had him blocked from further posting, Petitioner therefore acted on behalf of the State of Calvada. This Court has established multiple factors that should be considered when determining whether Petitioner acted as a public official or a private citizen. One district court properly applied the analysis announced by this Court to a similar set of facts; therefore, this Court should adopt the test established by that court. Applying those factors to this case show that Petitioner acted as a public official, and therefore engaged in state action.

Further, there is a presumption of state action when public officials are acting in an official capacity. A functional analysis determines whether a public employee's actions constitute state action. As the chief executive of the State of Calvada, Petitioner is responsible for communicating with her constituents. Petitioner has used the GEN page to further this responsibility. As a result, Petitioner engaged in state action by having her Director of Social Media delete Mr. Wong's Facebook post and block him from future posting on the page.

Petitioner intentionally opened the GEN Facebook page, a nontraditional forum for public discourse, and created a designated forum for speech. The GEN Facebook page is not government speech. Speech is considered government speech when the speech has long been used by the state convey state messages, the speech is closely identified in the public mind with

the state, and the state maintained control over the messages conveyed and the medium of expression. None of these considerations apply to the case at hand, therefore the GEN page cannot be government speech.

Because the GEN page constituted a public forum and is not government speech, Petitioner's deletion of Mr. Wong's post and subsequent blocking his ability to post to the GEN page constituted impermissible discrimination. Accordingly, Mr. Wong's First Amendment guarantee to freedom of speech was abridged when Petitioner ordered his post deleted and had him subsequently blocked from the GEN page.

ARGUMENT

I. STANDARD OF REVIEW

Appellate courts must review First Amendment claims *de novo*. *See Bose Corp. v. Consumers Union of U.S. Inc.,* 466 U.S. 499 (1984) ("[A]n appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) ("The fact that such activity is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed.").

II. PETITIONER ENGAGED IN STATE ACTION BY HAVING MR. WONG'S POST DELETED FROM THE GEN FACEBOOK PAGE AND BLOCKING HIM FROM POSTING FURTHER COMMENTS ON THAT PAGE.

The First Amendment guarantee of freedom of speech is among the "fundamental personal rights and liberties" protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The Due Process clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property without

due process of law." U.S. Const. amend. XIV § 1. Consistent with this language, since the issue first arose in the *Civil Rights Cases*, 109 U.S. 3 (1883), this Court has always maintained that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley v. Kramer*, 334 U.S. 1, 13 (1948). In short, the Constitution "erects no shield against merely private conduct." *Id.; see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (noting that the Constitution does not reach "merely private conduct, no matter how discriminatory or wrongful.") (citation omitted). Therefore, state action is a requirement in any civil action seeking relief on the basis of constitutional guarantees. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987). Thus, before a court can determine whether a private citizen's constitutional right has been violated, it must first determine whether the state was responsible for the challenged action. *Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614, 619 (1991).

A. Petitioner operated the GEN page as a public official and used the page in furtherance of her official duties.

Petitioner operated the GEN page as a public official and used the page in furtherance of her official duties. To determine whether Petitioner acted as a public official or a private individual when she had Mr. Wong's post deleted and blocked him from further posting on the GEN Facebook page, this Court should look to the factors established by its precedent. In *Evans v. Newton*, 382 U.S. 296 (1966), this Court was faced with the question of whether a privately owned park was subject to Fourteenth Amendment protections. *Id.* at 297-98. The *Evans* Court insisted that, where a privately-owned park performs a public function, private ownership will not insulate the park from the operation of the Constitution. The private trustees of the park in *Evans* argued they could circumvent the Fourteenth Amendment's ban on segregation because the title to the park rested with them rather than with the city. *Id.* The Court rejected this

argument because the public nature of the park required "that it be treated as a public institution subject to the command of the Fourteenth Amendment." *Id.* at 302. The *Evans* Court noted that for years, the park was "an integral part of the City['s] . . . activities" and the park was "swept, manicured, watered, patrolled, and maintained by the city as a public facility." *Id.* at 301. In other words, this Court looked at the park's public function and the government's pervasive involvement in the management of the park.

State action can also be found where the actor is collaborating with the government or executing government policies. In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), this Court held that an interscholastic athletic association was a state actor. Although the association was technically private, eighty-four percent of its members were state employees acting in their official capacity. *Id.* at 290-91. In addition to the overwhelming number of public school officials, this Court determined that the association acted under color of state law[·] because "interscholastic athletics obviously play an integral part in . . . public education," the meetings "were held during official school hours," and the association enjoyed the public schools' "moneymaking capacity as its own." 531 U.S. at 299-300. Therefore, this Court considered multiple factors including the association's reliance on public school officials, it's execution of governmental duties, and the association's use of state resources.

The determining factors established by this Court in *Evans* and *Brentwood* were adapted by a district court to determine whether a public official had engaged in state action by deleting a constituent's post from her social media account. This Court should adopt the factors set forth by the district court in *Davison v. Loudoun County. Board. of Supervisors,* 267 F. Supp. 3d 702, 714

[·] In a 42 U.S.C. § 1983 action against a state official, the statutory requirement of action under color of state law is identical to the state action requirement offc the Fourteenth Amendment. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 929 (1982).

(E.D. Va. 2017), which properly applied the analysis announced by this Court in *Evans* and *Brentwood.* In determining whether the commissioner acted under the color of law, the court considered five factors. Those factors included: 1) the impetus to create the account, 2) the "owner" of the account or page, 3) publicly owned resources used to update or maintain the account, 4) the purpose of the account, 5) whether the account is swathed in the trappings of office, and 5) the contents of the posts. *Id*.; *see also Borreca v. Fasi*, 369 F. Supp. 906, 910 (D. Haw. 1974) (holding that an elected official excluding a member of the press from a press conference constitutes state action when he "uses public buildings and public employees," to call and hold news conferences on "public matters.").

Petitioner's actions are distinguishable from the actions of individuals in cases where this Court found that state action did not exist. In those cases, the plaintiffs challenged the actions of private parties, *not* the actions of public officials acting within the scope of their official duties. The question in those cases was whether there was a sufficient "nexus" between the state and the "challenged action" to make the private party's action state action. In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), this Court found an absence of state action based on the State's granting of a liquor license to a private club practicing racial discrimination because the State's regulations did not "in any way foster or encourage racial discrimination," or "make the State in any realistic sense a partner or even a joint venture in the club's enterprise." *Id.* at 171-77. In doing so, this Court observed that:

> Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. *Shelley v. Kraemer*, *supra* . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' *Reitman v. Mulkey*, 387 U.S. 369, 380 . . . (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

Id. at 172-73.

Similarly, this is unlike *Jackson v. Metropolitan Edison Co.*, 419 U.S. 354 (1974), where this Court held that the termination of electric service by a privately owned and operated utility company did not constitute state action, even though the utility was heavily regulated by the state, enjoyed "at least a partial monopoly in the providing of electrical services within its territory," and acted in terminating services pursuant to authority granted under a state-approved tariff., *Id.* at 358. The private utility's "exercise of the choice allowed by state law" does not constitute state action, this Court explained, "where the initiative comes from it and not from the State." *Id*. at 357. In other words, for the government to allow a private party to take some action is not the same as the government forcing or instigating that action.

In contrast to the actors in *Moose Lodge* and *Jackson*, Petitioner is not a private actor who is performing a function traditionally attributed to the state; Petitioner is a public official who acted in her official capacity as the chief executive for the State of Calvada. By her own admission, Petitioner used Facebook as a tool of governance. Through the GEN Page, she sought input on how to improve Calvada and encouraged constituents to be more actively involved in government decisions. R. at 25.

Applying the aforementioned factors identified by this Court in *Evans* and *Brentwood,* and by the district court in *Davison,* to the context of Petitioner's Facebook page suggests that the relevant considerations include: 1) the impetus to create the account, 2) the "owner" of the account or page, 3) the public resources used for communication, 4) the Facebook page's purpose, including its connection to fulfillment of government goals or duties, 5) whether the account is swathed in the trappings of office, 6) whether Petitioner is relying on or exercising state authority, and 7) the contents of the posts.

The facts in this case show that Petitioner used the GEN Facebook page to fulfill her official duties as governor. She used the GEN page to "keep Calvadans apprised of the actions [her] administration was taking to make Calvada a better place to live," and "asked constituents for their input about how to make the state better." R. at 25. Many of her posts relate to her duties as governor, including "request[ing] ideas on how to improve [Calvada]." *Id.* Further, Petitioner has categorized the GEN page as belonging to a government official by renaming the page "*Governor* Elizabeth Norton." R. at 2. It is undisputed that Petitioner regularly uses the GEN page to announce major policy decisions, such as the immigration policy post at issue in this case. R. at 26. It is also undisputed that the Governor's Chief of Staff, Director of Social Media, and other staff monitor the GEN page and respond to constituents accordingly. R. at 22-23.

Applying this analysis to Petitioner's actions in deleting Mr. Wong's post and blocking him from further posting on the GEN page compels a finding that Petitioner engaged in state action. Petitioner created the GEN page in 2011 for the purpose of making personal and business announcements on a variety of topics, however the page was closed to the public at that time. R. at 2. Petitioner then altered the function of the account when she removed the privacy settings following her inauguration, and added "Governor" to the title of the page. *Id.* Once Petitioner saw Mr. Wong's post in response to her immigration law enforcement post, she contacted her Director of Social Media, who is employed by the State of Calvada, and requested that he delete Mr. Wong's post and block him from the GEN page. R. at 4, 20; *see also Borreca,* 369 F. Supp. at 910 (finding that the actions of staff members in excluding a member of the press from a public press conference constituted "actions by public officials in their official capacities taken pursuant to the mayor's directive"). Further, the fact that Petitioner's Director of Social Media

received Petitioner's request to delete Mr. Wong's post while he was at home on a Saturday evening, and did not conduct the action from within the confines of a government building or during traditional working hours, R. at 20, is irrelevant to this analysis. *See Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003) (finding that law enforcement officers engaged in state action by mass-purchasing newspapers critical of the sheriff even though they acted after hours and had taken off their badges).

B. Conduct of public officials like Petitioner acting in an official capacity is presumptively state action.

Since Petitioner acted as a public official in having Mr. Wong's post deleted and having him blocked from further posting on the GEN Facebook page, those actions are presumptively attributed to the state of Calvada. An individual's conduct constitutes state action if: 1) the alleged constitutional deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and 2) "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Am. Mfrs. Mutual Ins. Co.,* 526 U.S. at 50. In other words, the core inquiry is whether the infringement of rights is "fairly attributable to the State." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). In applying the state action analysis, this Court has consistently found that function matters over form. Even "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state actions." *Evans*, 382 U.S. at 299.

Application of that standard is straightforward when a suit is brought challenging the actions of a state government entity, such as a state governor, since the "actions of local government *are* the actions of the State." *Avery v. Midland Cty.*, 390 U.S. 474, 480 (1968)

(emphasis added); *see also* Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 2.04, at 62 (3d ed. 1991) ("The easy cases in which to find state action are those where a state employee acting on behalf of the state pursuant to state authority thereby brings about plaintiff's constitutional deprivation."). Similarly, except in limited circumstances, a public official engages in state action "while acting in his official capacity." *West v. Atkins*, 487 U.S. 42, 50 (1988); *see also Lugar*, 457 U.S. at 935 n.18 ("[S]tate employment is generally sufficient to render the defendant a state actor . . . ."); *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 157 n.5 (1978) ("'The involvement of a state official . . . plainly provides state action . . . ." (citation omitted)). Only in one case, *Polk County v. Dodson*, 454 U.S. 312 (1981), has this Court "determined that a person who is employed by the State and who is sued under § 1983" while "acting in his official capacity" was not operating under color of state law. *West*, 487 U.S. at 50. In *Polk County*, the Court held that a public defender employed by the government was not acting under color of state law because, in the defense attorney's traditional role, the public defender "is not acting on behalf of the State; he is the State's adversary." 454 U.S. at 322 n.13.

A functional analysis determines whether a public employee's actions constitute state action as required by the Fourteenth Amendment. *Lugar*, 457 U.S. at 939. Therefore, the state action inquiry is "necessarily fact-bound." *Id.* As the District Court for the District of Calvada noted, "speaking with and listening to constituents is a traditional function of all state officials." R. at 6. The internet and social media, however, have changed how politicians and public officials communicate with their constituents. *See, e.g.,* D. Wes Sullenger*, Silencing the Blogosphere: A First Amendment Caution to Legislators Considering Using Blogs to Communicate Directly with Constituents*, 13 Rich. J.L. & Tech. 15, 46 (2007). For example, state officials frequently use social media to target followers with advertising based on zip codes,

express a position on a policy or political issue, and comment about their district or state. *See, e.g.* Matthew Eric Glassman et al., Cong. Research Serv., *R43018, Social Networking and Constituent Communications: Members' Use of Twitter and Facebook During a Two Month Period of the 112th Congress,* 5 (2013). Government use of social media benefits citizens by providing a source in which to receive government information "quickly, cheaply, and without distortion." Lyrissa Barnett Lidsky, *Government Sponsored Social Media and Public Forum Doctrine under the First Amendment: Perils and Pitfalls*, 19 Pub. Law. 2 (2011). .

Petitioner used the GEN Facebook page as a tool of governance, by which she communicated with her constituents. Soon after her inauguration, she changed the name of her Facebook page to "*Governor* Elizabeth Norton" and removed the privacy settings to make the page accessible to the public. R. at 2 (emphasis added). These changes were made to "make the page available to all members of the public, so that [her] constituents could follow [her]." R. at 25. Subsequently, Petitioner posted on the GEN page inviting constituents to submit their input pertaining to matters related to the policy of the State of Calvada. R. at 2. For example, Petitioner posted on the GEN page asking constituents to provide input on how the State of Calvada could be improved. R. at 25. On a separate occasion, Petitioner posted updates during the state budget negotiations and requested input from constituents on different ideas and proposals suggested by the legislature. *Id.*

III. THE DELETION OF MR. WONG'S POST AND THE IMPOSITION OF A BAN PRECLUDING HIM FROM FURTHER COMMENTARY CONSTITUTED IMPERMISSIBLE VIEWPOINT DISCRIMINATION IN VIOLATION OF THE FIRST AMENDMENT.

The decision of the Fourteenth Circuit should be affirmed. The First Amendment provides that "Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I. The First Amendment guarantee of an individual's right to free speech is a

fundamental right. *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Gitlow*, 268 U.S. at 666. Thus, this Court has consistently found that it "must give the benefit of any doubt to protecting rather than stifling speech." *Federal Trade Comm'n v. Wis. Right to Life, Inc.,* 551 U.S. 449, 451 (2007).

In the case at hand, Mr. Wong was denied his right to free speech. Specifically, Mr. Wong's freedom of speech was abridged when his Facebook post on Petitioner's GEN page was deleted and when he was subsequently blocked from posting on the page. Additionally, Mr. Wong's right to comment in a public forum was denied because of his opinion. Petitioner's use of the GEN Facebook page is analogous to a traditional public forum because "social media allows a person with an internet connection to become a town crier with a voice that resonates farther than it could from any soapbox." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Furthermore, this Court has consistently construed the First Amendment to protect against government prohibition of expression simply because the government does not like the message. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). This Court should "not treat a First Amendment violation in this vital, developing forum differently than it would elsewhere simply because technology has made it easier to find alternative channels through which to disseminate one's message." *Davison*, 267 F. Supp. 3d at 719.

Mr. Wong's invocation of the First Amendment against Petitioner's deletion of his post is appropriate because Petitioner is a public official who has created a public forum and whose speech is not government speech. Petitioner has therefore engaged in impermissible viewpoint

discrimination in violation of the First Amendment by barring a citizen from commenting in that forum.

A. Petitioner's GEN Facebook page created a designated public forum for speech.

"[T]he rights of the State to limit expressive activity" are severely restricted in places that by history, tradition, or government agreement are "devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983). A forum need not physically exist to be afforded constitutional protection, rather a forum can exist in a "metaphysical" way and the same legal principles apply. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 837 (1995). This concept of "space" means that a forum can take on many forms, including the internet. Brian P. Kane, *Social Media is the New Town Square: The Difficulty in Blocking Access to Public Official Accounts*, 60 Advocate 31 (2017). The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). In order to ascertain whether the government intended to designate a place not traditionally open to assembly and debate as a public forum, this Court has looked to the public policy and practice of the government and to the nature of the property and its compatibility with expressive activity. *Id.*

This Court has recognized the three types of public forums. *Perry,* 460 U.S. at 45-47. First, there is the traditional public forum consisting of property like parks and streets that have historically been held out for public use for the expression of ideas. *Id*. Second, there is the designated public forum consisting of public property which the government has opened for use by the public as a place for expressive activity. *Id.* Courts will find a designated public forum where there is "a clear intent to open the forum . . . such intent can be determined in part based

on 'policy and practice' and whether the property is a type compatible with expressive activity." Lidsky, *supra*, at 4 (quoting *Cornelius*). Third, there is the limited public forum consisting of public property which is not by tradition or designation a forum for public communication. *Id.* at 46. Although the government is not required to create a forum, once it designates a forum as generally open to the public, the Constitution prohibits the government from "enforce[ing] certain exclusions." *Id.* at 45.

To foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of their First Amendment rights. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). In *Packingham*, this Court held that a North Carolina statute barring sex offenders from accessing social media impermissibly restricted lawful speech in violation of the First Amendment. *Id.* at 1731. This Court regarded cyberspace in general, and social media in particular, as "the most important places . . . for the exchange of views." *Id.* at 1735. This Court also stated that social media users employ websites like Facebook to engage in a wide array of protected First Amendment activity "on topics 'as diverse as human thought.'" *Id.* at 1735-36 (citation omitted). Further, a "[s]tate may not enact [a] complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society." *Id.* at 1738.

In determining whether the government has created a designated public forum, the Court looks to the "policy and practice of the government," as well as to the "nature of the property and its compatibility with expressive activity to discern the government's intent." *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1256 (3d Cir. 1992). (citing to *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975), holding a theater was a designated public forum because it was "public" in nature and "dedicated to expressive

activities."). One a designated public forum has been created by the government and opened to the public, there is a constitutional right of fair access to it. *Conrad*, 420 at 555-56.

Petitioner's GEN Facebook page is a designated public forum. First, Petitioner intended to open her GEN page to the public. The day after her inauguration, Petitioner renamed her Facebook page to include the title of "Governor." R. at 14. Petitioner also changed her privacy settings to make her page public and used the page to interact with her constituents on matters of social and political concern. R. at 14. A significant number of Petitioner's posts on the page pertain in some way to her official duties as governor. R. at 14. Second, Petitioner intended to open the GEN page as a place for expressive activity. She used the GEN page to keep her constituents apprised of the actions her administration was taking to make Calvada a better place to live. R. at 25. She also regularly asked her constituents for their input and ideas on various matters and encouraged them to become more actively involved in government decisions. R. at 25. Third, the GEN page is property that is compatible with expressive activity. Facebook is a social media platform with more than one billion daily activity users worldwide. R. at 13. The platform allows users to post messages, photographs, and videos; to interact with other users through comments, replies and "likes;" and to connect with friends, politicians, businesses, bands, and much more through various other mechanisms available on the platform. R. at 13. For the reasons enumerated above, Petitioner's GEN page is a designated public forum that the State of Calvada has opened for use as a place of public expression.

B. Petitioner's GEN Facebook page is not government speech.

The state does not engage in government speech unless it effectively controls and exercises final authority over the message that is sent. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 473 (2009). In *Summum*, this Court established a three-part test to determine

whether speech could be considered government speech. *Id.* at 470. The first two considerations are whether the speech has long been used by the state to convey state messages and whether the speech is often closely identified in the public mind with the state. *Id.* at 470-71. The third and final factor is whether the state maintained control over the messages conveyed on the medium of expression. *Id.* at 473.

Speech is not government speech if the government neither creates nor edits the speech. *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). In *Matal*, the petitioner sought federal trademark registration of his band's name, "The Slants." *Id.* at 1751. "'Slants' is a derogatory term for persons of Asian descent . . . . " *Id.* "The Patent and Trademark Office denied the application based on a provision of federal law prohibiting the registration of trademarks that may 'disparage . . . or bring into contemp[t] or disrepute' any 'persons, living or dead.'" *Id.* (alteration in original) (citation omitted). This Court held that, because the registration of a trademark is mandatory and cannot be rejected by an examiner for the message it conveys once it is determined that it does not violate any of the stated prohibitions, "it is far-fetched to suggest that the content of a registered mark is government speech." *Id.* at 1758.

Speech is not government speech if the government does not maintain control of and exercise final authority over the speech. *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2251 (2015). In *Walker*, the petitioners sought to create a specialty license plate bearing the confederate flag and were denied by the Texas Department of Motor Vehicles Board. *Id.* at 2245. This Court held that the Board did not violate the First Amendment because license plates are government speech. *Id.* at 2248. This Court applied the *Summum* analysis and held that license plates are government speech because they have long conveyed messages from the states, are often closely identified in the public mind with the State because of their function of vehicle

registration and identification, and the State maintains direct control over the messages conveyed on its specialty plates. *Id.* at 2248-49. This Court further stated that because "Texas 'has "effectively controlled" the messages [conveyed] by exercising "final approval authority" over their selection'", the specialty license plates are government speech. *Id.* at 2249 (alteration in original) (citation omitted).

Applying the *Summum* three-part test to the case at hand, it necessarily follows that Governor Norton's GEN page is not government speech. First, the state has not long used Facebook to convey state messages. Facebook is relatively new in general, and very new specifically in its use as a platform for expression. Sarah Philips, *A Brief History of Facebook*, The Guardian https://www.theguardian.com/technology/2007/jul/25/media.newmedia (providing a timeline of Facebook with its original inception in 2004 and its transcendence beyond educational institutions in 2006). Second, there is nothing to suggest that the public closely identifies Facebook with the state. This case is distinguishable from *Walker* because Mr. Wong's speech would not be confused as government speech endorsed by Petitioner since Mr. Wong criticized Petitioner's Immigration Policy and questioned her fitness as Governor. R. at 16. Third, the state did not maintain control over the messages conveyed on the GEN Facebook page. Petitioner posted requests for input from constituents, who then were responsible for commenting in response. R. at 25. Petitioner was not responsible for generating those comments nor did she exercise authority in editing the comments that were posted.

Furthermore, this Court should find that Petitioner's use of the GEN page was not government speech because it would shrink the public forum doctrine. The government would have free reign to argue that its speech is the pertinent speech at issue, not the speech of the private individual. This would artificially confine relevant speech to the government's speech

instead of the private individual's speech and would allow the government to deny and suppress criticism of the government. If private speech could be passed off as government speech by simply affixing a government seal of approval, the government could silence or muffle the expression of disfavored viewpoints. *Matal*, 136 S. Ct. at 1758. This is exactly what the First Amendment protects against and ruling otherwise would chill speech.

C. Because Petitioner's GEN Facebook page constituted a designated public forum and not government speech, Petitioner's actions towards Mr. Wong in deleting his post and blocking him from the GEN page constituted impermissible speech discrimination.

It has long been held that speech on matters of public importance enjoy the highest position of First Amendment protections. *Connick v. Myers*, 461 U.S. 138, 145 (1983). "There is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). Speech on matters of public concern cannot be suppressed on the sole basis that it is provokes disdain. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). "Premised on the mistrust of governmental power, the First Amendment stands against attempts to disfavor certain viewpoints . . . [and] restrictions distinguishing among different speakers, allowing speech by some and not others." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010).

Because the preservation of the freedom to speak on public matters is so important, the government is "strictly limited in [its] ability to regulate private speech in such "traditional public fora.'" *Summum*, 555 U.S. at 469 (citation omitted). "The First Amendment prohibits the government from regulating speech in ways that favor some opinions or topics over others. *Lamb's Chapel v. Ctr. Moriches Union Free School Dist.,* 508 U.S. 384, 394 (1993). Restrictions

based on content must pass strict scrutiny; that is the restrictions must be narrowly tailored to serve a compelling state interest. *See Cornelius*, 473 U.S. at 800. Further, restrictions based on viewpoint are prohibited. *See Carey v. Brown*, 447 U.S. 455, 463 (1980). Restrictions in a designated public forum are subject to the same restrictions in a traditional public forum. *Summum*, 555 U.S. at 470. Therefore, because Petitioner created a designated public forum in using the GEN Facebook page, any viewpoint discrimination is prohibited and any content-based discrimination is subject to strict scrutiny.

1. Petitioner's deletion of Mr. Wong's post is viewpoint discrimination in violation of the First Amendment.

When the government regulates speech, it may not do so based on hostility or favoritism towards the underlying message expressed. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992). In *R.A.V.,* this Court struck down an ordinance prohibiting displays that amount to '"fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender'" as unconstitutional. *Id.* at 391. This Court reasoned that because the ordinance allowed for displays that contained "fighting words" unless they involve one of the enumerated subjects, those who wished to use "fighting words" involving other topics were not covered under the ordinance. *Id.* This Court further stated that the ordinance constituted impermissible viewpoint discrimination because a speaker could use fighting words that argued in favor of one of the proscribed topics while use by the speaker's opponent could not. *Id.* This Court held that the ordinance had the effect of singling out individuals with viewpoints towards which there was an unfavorable opinion and that the First Amendment does not permit imposition of special prohibitions upon those individuals simply because they disagree. *Id.* at 396.

It is a blatant violation of the First Amendment when the government targets particular views taken by speakers on a subject. *Rosenberger,* 515 U.S. at 829. In *Rosenberger*, a university

denied payment of funds to a student organization because they published a paper that "promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.* at 826. The university did not exclude the subject of religion, but selected those with religious viewpoints for disfavored treatment. *Id.* at 831. This Court held that the denial of funds was based on the views expressed by the organization, which constituted viewpoint discrimination in violation of the First Amendment. *Id.* at 832. "The prohibited perspective, not the general subject matter, resulted in the refusal . . . for the subjects discussed were otherwise within the approved category of publications." *Id* at 831.

Petitioner's deletion of Mr. Wong's comment in response to her "Immigration Law Enforcement Policy" post, R. at 13, is viewpoint discrimination because Mr. Wong's post was deleted because of the opinion it expressed. Petitioner claims that the deletion was due to its content being unrelated to her immigration policy and was instead a personal attack. R. at 26. However, this is untrue because Mr. Wong's post was triggered by Petitioner's posting of the policy and he was commenting on her performance as an official in public office. Mr. Wong stated in his post "only someone with no conscience could act as you have" and specifically referenced Petitioner's inadequacy at engaging in public policy. R. at 16. Additionally, there were thirty other comments posted and Petitioner did not delete any of them. R. at 17. Petitioner allowed posts with one viewpoint to remain over others because, although a few of the posts were unfavorable, most were favorable. R. at 26. Although petitioner retained two comments that also disagreed with her policy, R. at 17, those comments did not express quite the same viewpoint as Mr. Wong. While the two unfavorable comments that remained on the page stated that they disagreed with the policy, they were much more narrow than Mr. Wong's comment. They did not criticize Petitioner or her fitness for the office of Governor, but only the policy and

its effect on Calvada and its citizens. As such, the two comments that remained cannot be said to have the same viewpoint as Mr. Wong's. Since Mr. Wong was the only individual to express his particular view and was also the only individual whose comment was deleted, R. at 26, it follows that Petitioner discriminated on the basis of the viewpoint that was expressed: by allowing a certain opinion on the subject to remain while silencing the other.

2. Petitioner's actions violated the First Amendment because blocking Mr. Wong from the GEN page is content-based discrimination.

Even if this Court finds that Petitioner did not engage in viewpoint discrimination when she deleted Mr. Wong's comment, Petitioner's actions still violated the First Amendment because blocking Mr. Wong from the GEN page is content-based discrimination. Government regulation of speech is content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed. *Reed v. Town of Gilbert, Ariz*., 135 S. Ct. 2218, 2227 (2015). At issue in *Reed* was a sign code that identified various categories of signs based on the type of information they conveyed and then subjected those categories to different restrictions in terms of the permitted size and location of the signs. *Id.* at 2224. This Court held that because the restrictions in the sign code were applied to the signs based solely on their communicative content, the regulations were content based. *Id.* at 2227.

Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. *Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). In *Mosley*, this Court held that selective exclusion from a public place is not permitted. In *Mosley*, the issue was an ordinance prohibiting picketing "within 150 feet of any primary or secondary school building" unless it was the "peaceful picketing of any school involved in a labor dispute." *Id.* at 93. The petitioner in *Mosley* would walk the public sidewalk adjoining a school carrying a sign protesting the practice of "black discrimination" and "black

quotas," which was a prohibited topic to picket. *Id.* Because peaceful picketing on the topic of labor management disputes was permitted, but all other peaceful picketing was not, the restriction was based on the message asserted. *Id.* at 101-02. This Court held that once a forum is opened up for assembly or expression for some groups, the government may not prohibit access by other groups based on the content of their message. *Id.* at 96.

Petitioner's actions in having Mr. Wong blocked form the GEN page amounts to content based discrimination because, in doing so, Petitioner has barred all content from Mr. Wong from the GEN page's public discourse. Petitioner banned Mr. Wong from further commenting on her page, R. at 13, the effect of which is to say that she does not want to read any content from Mr. Wong. This amounts to a blanket ban on Mr. Wong's position on any issue, regardless of what his opinion on the matter would be. For example, even if Mr. Wong's next comment has nothing to do with Petitioner or her fitness as Governor, the speech would be blocked because it comes from him. Restrictions on Mr. Wong's speech are based on the fact that his opinions constitute their communicative content. Thus, these restrictions amount to content based discrimination.

CONCLUSION

For the foregoing reasons Mr. Wong respectfully requests this Court to affirm the decision of the United States Court of Appeals for the Fourteenth Circuit, declare Petitioner engaged in state action by having deleted Mr. Wong's post and blocking him from further posting on the GEN Facebook page, and find that Mr. Wong's First Amendment right to free speech was violated.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the Respondent's Brief complies with the *Rules of the Supreme Court of the United States*, and Rule 3(C) of the Sutherland Moot Court Competition Rules. The undersigned counsel also certifies that the work product contain in this brief is the work product of the undersigned counsel, and complies with our school's governing honor code.

/s/ Team 7
TEAM 7