No. 17-874

IN THE

Supreme Court of the United States

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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

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BRIEF FOR THE PETITIONER

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TEAM 12

Counsel for Petitioner

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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The opinion of the United States Court of Appeals for the Fourteenth Circuit (No. 17-874) is unreported and contained in the Record on Appeal at R. 29-40. The order of the United States District Court for the District of Calvada denying summary judgment is unreported and contained in the Record on Appeal. R. 1-12.

JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on November 1, 2017. The Petitioner's timely petition for a writ of certiorari was granted by this Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The First Amendment of the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
>
> U.S. Const. amend. I.

STATEMENT OF THE FACTS

In January 2008, businesswoman Elizabeth Norton created a Facebook account, from which she connected with friends and family. R. at 24. In 2011, Elizabeth Norton created, in accordance with Facebook policies, a designated "page" which could be used to connect with the public. R. at 25. Elizabeth Norton titled this page "Elizabeth Norton," and set the privacy settings to allow her connections to access the content of the page. R. at 25. On this self-titled page, Ms. Norton posted both business and personal announcements, including pictures of her daughters and updates on her family life. R. at 25.

On January 11, 2016, Elizabeth Norton (hereinafter "Governor Norton") was elected as Governor of the State of Calvada. R. at 25.. Following her inauguration, on January 12, 2016, Governor Norton changed the name of her page to "Governor Elizabeth Norton" (hereinafter "GEN"). Norton Aff. R. at 25. Governor Norton also expanded her settings to allow the public to access her page as well. R. at 25. At this time, Governor Norton also inherited the "Office of the Governor of Calvada" Facebook page that the State of Calvada created in 2010 and is maintained by the Governor's staff. R. at 3.

Governor Norton continued to use the GEN page to share personal announcements, photographs, and family updates, in addition to directly posting her thoughts on news and national events and providing updates on her administration. R. at 25. The "Office of the Governor of Calvada" page is regularly updated by Governor Norton's staff, and the staff routinely responds to content on the page on behalf of the Governor herself, including reposting all government initiatives that Governor Norton shares on her GEN page. R. at 25-26.

At 3:15pm on March 5, 2016, Governor Norton posted an announcement regarding new policies for immigration law enforcement to the GEN page. R. at 15-16. At 4:23pm that same

day, Respondent Brian Wong (hereinafter "Mr. Wong"), posted the following comment on the GEN page:

> 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.

Upon seeing the comment, Governor Norton emailed Sanjay Mukherjee (hereinafter "Mr. Mukherjee"), her Director of Social Media who assists her in managing the content of the GEN page in addition to the "Office of the Governor of Calvada" page, and asked him to remove Mr. Wong's comment as she did not find it appropriate for the page and ban him from posting on the page. R. at 16-17. Mr. Mukherjee deleted Mr. Wong's comment and blocked Mr. Wong from being able to post any other comments on the GEN page. R. at 20. Mr. Wong was not blocked from viewing the content of the GEN page. R. at 14.

Mr. Wong discovered that his comment had been deleted and email Governor Norton's office asking them to restore his post. R. at 28. When his comment was not restored, Mr. Wong filed a civil rights action against Governor Norton for violation of First Amendment right to freedom of speech as applied to the states through the Fourteenth Amendment. R. at 1.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in ruling that the deletion of Mr. Wong's comment and his being banned from posting on Governor Norton's personal page was an action by a state official on behalf of the state. Under the ruling in *Jackson v. Metropolitan Edison Co.*, Governor Norton's GEN page does not conform with the criteria of a "traditional and exclusive state function" as it is

not an obligation of public officials to operate social media accounts. 95 S. Ct. 449, 453 (1974). Consequently, based on the totality of the circumstances, Governor Norton's deletion of Respondent's comment is not sufficiently interwoven with the Government as to be considered a state-sanctioned action since the state did not delegate any authority to Governor Norton concerning her actions as a private individual on social media. *See Nat'l Collegiate Athletic Assoc. v. Tarkanian*, 109 S.Ct. 454, 462 (1988). Furthermore, under the *Rossignol* holding that a public figure's actions arising from a purely personal circumstance are not state-sanctioned actions, Governor Norton's actions on social media are not connected to her duties as Governor. 316 F.3d 516, 524 (4th Cir. 2003). Governor Norton's GEN page is therefore not a constitutionally-protected public property based on this Court's decision in *Lloyd Corp. v. Tanner*, which held that for private property to gain the shroud of Constitutional protection, it must be clear that private individual was standing in the shoes of the state when he or she acted. 407 U.S. 551, 567 (1972).

The Court of Appeals also erred in holding that Governor Norton's deletion of Mr. Wong's comment and ban of Mr. Wong from the GEN Facebook page was viewpoint discrimination in violation of the First Amendment. The entire contents of GEN are properly characterized as government speech, and thus beyond the reach of the First Amendment. Moreover, if the Court holds that GEN is government property, Governor Norton's Facebook page is nonpublic forum because under *Davison v. Loudoun Cty. Bd. of Supervisors*, a government officer's social media page can be a limited public forum. 227 F. Supp. 3d 605, 609-11 (E.D. Va. 2017). Alternatively, if the Court finds that GEN is a designated forum, it would be a limited forum based on the fact that Governor Norton did not explicitly designate her page as a public forum. Therefore, under a limited forum analysis, Governor Norton's removal of Mr. Wong's comment was appropriate subject matter regulation, not viewpoint regulation. Finally, public policy considerations demand

that public officials be allowed to keep separate social media pages that are not public forums, as a ruling to the contrary would have potential chilling effects on government officials' communication. Accordingly, this Court should reverse the decision of the Court of Appeals for the Fourteenth Circuit.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN RULING THAT GOVERNOR NORTON'S DELETION OF MR. WONG'S SPECIFIC COMMENT AND BAN OF MR. WONG FROM POSTING FURTHER COMMENTS ON HER PERSONAL FACEBOOK PAGE WAS AN ACT BY A STATE OFFICIAL ENGAGED IN STATE BUSINESS.

In order to afford Mr. Wong protection from wrongs committed by a state under the Fourteenth Amendment, Governor Norton's deletion of Wong's Facebook post must, in and of itself, constitute a state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974). To establish such an action, a "sufficiently close nexus" must exist between the state of Calvada and Norton's deletion of Wong's post. *Id.* at 453-54 (holding that a private utility did not partake in state action simply because its actions were heavily regulated and, in the challenged case, permitted under state law).

A. Governor Norton's maintenance of her private GEN Facebook account is not a traditional or exclusive state function because it is not a sovereign obligation imposed on her by the state.

In determining whether an action is attributable to the state, the Court must first look to whether the private actor is exercising a traditional and exclusive state function. *Jackson*, 419 U.S. at 454. The operation of a privately-held social media account, such as Governor Norton's GEN Facebook page, does not match the criteria for traditional state function set forth in *Jackson*. In *Jackson*, the court defines "traditional and exclusive state function" as an obligatory exercise of power "traditionally associated with sovereignty." *Jackson*, 419 S. Ct. at 454

(holding that supplying utility service was "not traditionally the exclusive prerogative of the state" because the state did not require it to be governmentally operated in any sense beyond adherence to regulation). A private party's exercise of a state-delegated power traditionally associated with sovereignty, "such as eminent domain," would quickly trigger Constitutional protection—an independent exercise of power through provision of a service like a public utility, however, does not. *Jackson*, 419 S. Ct. at 454.

Here, Governor Norton's maintenance of her personal GEN Facebook page is not even remotely an exclusive prerogative of the state, as the state of Calvada provides no obligation upon its public officials to operate social media accounts. Like the private utility in *Jackson*, Governor Norton's GEN page is a voluntary service for the benefit of Calvadians, as it seeks to encourage civic participation among Constituents and make policy matters more accessible to the average citizen. See Norton Aff. ¶ 10.

B. Governor Norton's deletion of Respondent's comment is not sufficiently interwoven with the Government to be attributed to state-sanctioned action.

When an action is not a state function in the traditional or exclusive sense and it therefore the conduct of a private actor, as in this case, the Court must use the totality of the circumstances to evaluate whether the conduct on the part of the private actor is sufficiently interwoven with the government to make the action attributable to the state. *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). This close nexus requires that there be sufficient state involvement in a private party's action, and that the private party's action must be a "decisive step" toward harming a plaintiff. *Nat'l Collegiate Athletic Assoc. v. Tarkanian*, 488 U.S. 179, 192 (1988). In turn, a Court must determine that the state delegates its authority to the private actor in question or provides "a mantle of authority" to the private actor in relation to the disputed action in order to establish that sufficient state involvement has occurred. *Id.* (holding that NCAA sanction against college coach

did not qualify as state action because the state university "delegated no power" to the NCAA to take any specific action).

Under the Calvada State Constitution, there is no requirement for the chief executive to maintain a Facebook page, nor does state law give Governor Norton any special power over social media. Governor Norton started the Facebook page in question well before she was elected governor, and simply changed the name to reflect her status upon her election. As the proprietor of her personal GEN account, Governor Norton enjoys the same freedom to post, comment, and filter data on her page that any other user enjoys, and may choose at any time to switch her profile from public to closed. In fact, the Facebook page at issue is wholly separate from the "Office of the Governor of Calavada" account maintained by the state or its chief executive at any given time. Whereas this account is primarily maintained by administration staffers, Governor Norton posts far more frequently on her GEN page. In the issue in question, the state has not delegated any authority to Governor Norton as a private actor in her conduct on Facebook; Respondent's comment regarded a personal attack on Governor Norton, and the removal of the comment was solely based on Governor Norton's decision as a private person. Therefore, under the standards laid down in *Nat'l Collegiate Athletic Assoc.*, the act of deleting Respondent's comment is not interwoven with the government enough to be considered a state-sanctioned action or even to prove sufficient state involvement.

C. Governor Norton's speech or action related to her personal Facebook account is not inherently public nor inappropriately connected to her duties as Governor.

Moreover, a public official's written or spoken words are not automatically converted to state action merely because of that distinguished status. Rather, with regard to public addresses, courts recognize that a public official's words are "embedded with inherently personal views of the speaker as a member of the polity." *Van Orden v. Perry*, 545 U.S. 677, 723 (2005). As such,

a public figure's action arising out of "purely personal circumstances" are not necessarily sanctioned state action. *Rossignol v. Voorhaar,* 316 F.3d 516, 524 (4th Cir. 2003). That a public officer has taken advantage of his or her position is not dispositive of state-sanctioned activity either. *See Martinez v. Colon,* 54 F.3d 980, 987 (1st Cir. 1995) (holding that a police officer's assault on a fellow officer as part of a personal conflict was not state action, even though the perpetrator utilized a state-issued rifle).

Rather, the "sufficiently-intertwined" analysis turns on whether a private actor "executed his or her scheme in a manner that private citizens could not have." *Rossignol,* 316 F.3d at 526. For example, the *Rossignol* court found that off-duty police officers could not have violated journalist-plaintiff's First Amendment rights but for their status as cops—their visible weapons and insignia as law enforcement were instrumental in suppressing distribution of a damning newspaper story. *See Rossignol,* 316 F.3d at 520. Furthermore, the character and quality of the speech being repressed, as well as the state actor's motivation for repressing the speech, are considerations in this assessment. *See Rossignol,* 316 F.3d at 520 (noting that cops were thwarting distribution to prevent the dissemination of a newspaper's accurate yet damning account of the official's past transgressions).

To the contrary, Governor Norton is not using her status as the state's chief executive doing anything beyond what a normal Facebook user is capable of doing—she did not delete Respondent's comment because of any special power or ability, but rather exercised a right enjoyed by all Facebook users. Furthermore, like officer's use of a state-issued gun in *Colon,* Governor Norton's use of state-issued devices to update her personal GEN page is of no significance other than the fact that such use is mandated for official security concerns. Escalante Aff. ¶4. Here, Norton is personally espousing her views on immigration and hope for imminent

change, much like a politician's prayerful communication, which was deemed private and opinionated in *Van Ordan*, 545 U.S. at 723. Likewise, the ad hominem speech contained in the present case, inexplicably referring to Governor Norton as a "scoundrel" with the "morality of a toad," differs markedly from the journalistic speech repressed through official power in *Rossignol*. 316 F.3d at 526. Had Governor Norton shared the self-serving, reputation-obsessed motivation of the officials in *Rossingol*, she likely would have removed other more substantive comments on the GEN Facebook page critical of her stance on immigration. *Id.* at 526. Yet she did not, and limited her censorship only to Respondent's ad hominem attack. Accordingly, her action taken to delete Respondent's comment is neither a public action nor an action related in an inappropriate manner to her duties as Governor of Calvada.

D. Governor Norton's personal GEN Facebook page is not constitutionally-protected public property by analogy.

Furthermore, Governor Norton's personal Facebook page, upon which she continues to post information on family and friends—and formerly used to offer takes on national events and promote private business ventures—is not the functional-equivalent of publically-used property shrouded by Constitutional protection. For example, the plaintiffs in *Lloyd Corp.* argued that First Amendment right hand out anti-war handbills were protected within the confines of a large-scale shopping center because the center's property was open to the public, served a purpose equivalent to a municipal business district, and "therefore had been dedicated to certain types of public use." *Lloyd Corp v. Tanner*, 407 U.S. 551, 567 (1972). However, the court rejected this argument by analogy, holding that the Constitution does not require "such an attenuated doctrine of dedication of private property to public use." *Id.* at 568-69. For private property like Norton's Facebook account to gain the shroud of Constitutional protection for its occupants, there must be a clear "assumption" by the private enterprise or individual "of all of the attributes of a state-

created municipality," essentially standing in the shoes of the state. *Id*.

Here, the respondent tries to frame Governor Norton's personal Facebook account as being analogous to a state legislature or public referendum – a forum in which constituents are invited to make on policy and reform, with Governor Norton contributing announcements of her own. However, as the *Lloyd* court observed, mere functional resemblances between a private entity and a public forum do not automatically trigger Constitutional protections. Sharing space with Governor Norton's family photos and old business pitches, the page's publically-minded functions merely "encourage [Governor Norton's] constituents" to provide "input about how to make the state better," while "making the law easier to under" for the average Calvadians." Norton Aff. ¶10.

Despite any resemblances, this private, non-state-sanctioned page does is not a forum for voting on or deciding new law in the state of Calvada, and—with the backdrop of Norton family photos—is no substitute for town meeting, let alone a legislative session. The page, which pre-dated Governor Norton's administration by eight years, belongs to Governor Norton personally and is completely separate from state-maintained "Office of the Governor of Calvada" page. Because Governor Norton's personal Facebook account does not assume all of the attributes of a state-sanctioned democratic institution, it does not garner Constitutional protection.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT GOVERNOR NORTON'S DELETION OF RESPONDENT'S COMMENT AND BAN OF RESPONDENT FROM HER FACEBOOK PAGE WAS VIEWPOINT DISCRIMINATION IN VIOLATION OF FIRST AMENDMENT.

The First Amendment of the United States Constitution declares that "Congress shall make no law. . .abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Yet this protection is not an absolute license to engage in any type of speech, in any

context. Indeed, our country has also guaranteed the right of individuals to be safe from unwanted speech in their own homes, and their own property. Further, the First Amendment does not apply to government speech; thus government officials can articulate a specific viewpoint without violating free speech protections. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."). If the Court determines that Governor Norton's actions were state action, Governor Norton's GEN page, including the Respondent's comment, should be categorized as government speech. Alternatively, the GEN page should be categorized as a limited forum, where Governor Norton's actions to limit the subject matter of GEN were appropriate and justified under First Amendment doctrine.

First Amendment doctrine embraces the right of the citizenry to debate in public forums, limiting the government's power to regulate such speech. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed."). Yet this speech is not unfettered, and the Supreme Court has provided guidance on the contours of the First Amendment for speech on government property.

There are three general categories of government property, or 'forums', for the purposes of First Amendment analysis: traditional, nonpublic, and designated forums. A traditional forum is typically a street or park, places that "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *See id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). A nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication is governed by different standards." *Id.* at 46. The

state has broad latitude to control speech in nonpublic forums. *See id.* ("'[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" (quoting *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981)). The government can "[i]n addition to time, place, and manner regulations. . . reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

The government can also designate public property as a public form. If the public forum is fully designated, the courts treat it as a traditional public forum. *See id.* at 45. The government can issue reasonable time, place, and manner regulations, but content-based restrictions receive strict scrutiny. *Id.* at 46. A limited forum is a sub-type of designated forum, in which the government retains additional control over the forum. The government can establish a limited forum for specific groups or "discussion of certain subjects." *See id.* at 46 n. 7. Thus, the government can regulate the subject matter of speech, but cannot issue viewpoint regulations. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106, (2001) ("The restriction must not discriminate against speech on the basis of viewpoint."). The restriction must also be "reasonable in light of the purpose served by the forum." *Id.* at 107 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

A. Governor Norton's actions were proper because the content on GEN is government speech.

The First Amendment does not constrain the government when it speaks. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."). The government therefore may espouse a specific viewpoint. *See id.* at 2246

("[W]hen the government speaks it is entitled to promote a program, to espouse a policy, or to take a position.). Government speech can incorporate private individuals' speech without losing its status as government speech. *See id.* at 2250 (holding that personalized state license plates are government speech, and thus the government may constrain with viewpoint regulations). Trademarks are not government speech. *See Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) ("Trademarks are private, not government, speech."). The test for government speech has three factors: first, the medium has historically been viewed as government speech; second, if the medium is "often closely identified in the public mind" with the government; third, if the government retains direct control over the speech. *See id.* (quoting *Walker*, 135 S. Ct. at 249). The first prong requires historical analysis, which is lacking when the medium is a new technology, such as Facebook. Thus the second and third are the relevant factors in this analysis.

Government ownership and design of a medium are indicators that it is "closely identified in the public mind" with the government. *See Walker*, 135 S. Ct. at 2242 (holding that license plates are government speech). When a private individual controls the medium, society is less likely to associate the medium with the government. *See Matal*, 137 S. Ct. at 1760 (holding that Trademarks are not government speech). While Facebook itself is not associated with the government, individual Facebook profiles are associated with the owner of the profile. Governor Norton uses GEN for both personal and professional uses; thus when she speaks in a professional capacity, users associate her posts with the government. Conversely, when she speaks in a personal capacity, users do not associate her posts with the government.

Here, the Respondent targeted his comment at Governor Norton in her professional capacity by addressing the comment to the "Governor." Thus it was clear to any Facebook user that the comment was associated with the government. Further, an individual who owns a

Facebook profile maintains complete control over the design and content of the page. The owner chooses what and how often to post; can enable or disable public comments; can provide varying levels of personal information, including posting pictures; and can keep or delete any comments. Thus not only did Governor Norton maintain control of the ownership and design of both the professional and personal parts of her Facebook page, the Respondent made it clear to every viewer that he was addressing Governor Norton in her professional capacity.

The third prong asks if the government maintained control over the speech, overlapping somewhat with the second prong analysis. The owner of a Facebook page retains complete control over the content of the page, including the ability to post and delete content. Every Facebook user posts on other's pages with the knowledge that his post could be deleted. Further, Governor Norton had both a personal and professional interest in controlling the message and general decorum of her personal Facebook page. She acted in this interest when she deleted the Respondent's ad hominem comment.

GEN should not be categorized into both government and private speech, consisting respectively of Governor Norton's posts and other's comments. Such categorization fails to recognize the nature of Facebook. Governor Norton has an interest in keeping the page non-offensive and productive. Visitors to the page will get an overall feel of the page, and they know that the Governor could delete comments if she wanted to. Thus they will see her choice not to delete a comment as indicating she had a purpose to keep the comment. Thus the Governor is responsible for all of the content a viewer sees on her personal page.

Thus, under the *Walker* test, affirmed in *Matal*, the Respondent's comment on Governor Norton's Facebook page is government speech.

B. If the Court finds that the content on GEN is not government speech, it should hold that GEN is a nonpublic forum.

A government could not operate if it could not set aside certain areas as nonpublic. Governor Norton could not run her administration effectively if, for example, her office was a public space. Thus the importance of recognizing and protecting nonpublic forum is essential to the operation of the government. A nonpublic forum is government property that has not "by tradition or designation [been] a forum for public communication." *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The government must intentionally designate the medium as a public forum. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) ("Designated public fora. . . are created by purposeful governmental action. 'The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse.'" (quoting *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985)). Government regulation in a nonpublic forum must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* While a forum does not have to be a physical space, the Supreme Court has yet to hold that Facebook can be a forum. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995) (finding that a newspaper was a public forum, even though it was a forum "more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable"). A government officer's official Facebook page may be a limited public forum. *See Davison v. Loudoun Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605, 609-11 (E.D. Va. (2017) (holding that an official government page, with no personal information, combined with an official social media policy inviting public comment, was a limited public forum). The presence of an official government social media policy inviting public comment can be an indicator of a public forum.

See id. at 611. ("[The official social media] policy evinces the County's purposeful choice to open its social media websites to those wishing to post.").

Facebook is a new innovation, and thus it has no traditional role in public discourse. The key question, therefore, is whether Governor Norton designated GEN as a public forum. Governor Norton must have designated GEN as a public forum in order for it to lose its status as a nonpublic forum. When she became Governor, she changed the settings on GEN from private to public. This simply meant that Facebook users did not have to go through the process of becoming her 'friend' on Facebook in order to see her page. Many Facebook users have public profiles, but still use their profile as a personal page. Further, Governor Norton continued to use GEN for both personal and professional use. As a government official, she is motivated to reach as many of her constituents as possible. With that purpose, she chose to make GEN more open and accessible. However, she also began to use her professional Calvada Facebook page for official purposes. At no point did she intentionally communicate to the viewers of GEN that she had designated it as a public forum. Moreover, when she chose to solicit feedback from Facebook users regarding certain policy issues, she was seeking specific input; she was not opening up GEN for users to use as a space for public debate on any topic.

Further, Governor Norton could regulate GEN as long as the regulations were reasonable and not purely motivated by a desire to silence opposing views. Governor Norton's actions were reasonable. She informed her constituents about her new immigration policy, and stated she was open to comments on the policy. She did not delete the comments of any other users; rather, she only deleted the Respondent's ad hominem attack. In particular, she did not delete two comments that were critical of her immigration policy. Constraining the content of her page to civil comments that are on a relevant topic is reasonable. Governor Norton has both a personal and

professional interest in keeping GEN both a civil and on-topic page. She has an interest in making the page friendly and an organized place for viewers to visit. Removing ad hominem attacks is completely in line with those purposes. Further, she did not delete the comment because the Respondent disagrees with her views politically. If the Respondent had directly commented to her post, and actually addressed immigration policy in a civil manner, Governor Norton would have welcomed the input. But Respondent not only was uncivil, he also did not mention a single point of policy. The attack was purely personal.

Thus, if Governor Norton's Facebook page is government property, it is a nonpublic forum. Further, Governor Norton's actions to maintain a civil, topical Facebook page were reasonable regulations for a nonpublic forum.

C. If the Court finds that GEN is a designated forum, it should hold that GEN is a limited forum.

The government can designate a forum for public debate. The forum can either be fully open to debate, or it can be limited to specific subject matter or specific speakers. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, n. 7 (1983). The presence of an official government social media policy inviting public comment can be an indicator of a limited public forum, rather than a nonpublic forum. *See Davison v. Loudoun Cty. Bd. of Supervisors,* 227 F. Supp. 3d 605, 611 (E.D. Va. 2017) ("[The official social media] policy evinces the County's purposeful choice to open its social media websites to those wishing to post.").

If GEN is a designated forum, it should be characterized as a limited forum. Governor Norton did not designate GEN as a public forum, nor was there an official government social media policy that could have been misinterpreted to designate GEN as a public forum. Governor Norton simply invited comments on specific topics. If the Court finds that this transforms GEN

to a designated forum, Governor Norton's focus on specific topics requires categorization as a limited public forum.

In *Davison*, where there was a social media policy inviting public comment, which is lacking here, the court only held that the Facebook page was a limited forum, not a full designated forum. Holding that GEN is a designated forum would reach far beyond the reasoning in *Davison.* The rationale in *Davison* guides a finding that GEN was a nonpublic forum, and if a public forum, a limited one.

D. Under a limited forum analysis, Governor Norton did not violate the First Amendment, because removing the Respondent's post was appropriate subject matter regulation, not viewpoint regulation.

When a government official opens up a limited forum to a particular subject matter, the official may not engage in viewpoint discrimination. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) ("The restriction must not discriminate against speech on the basis of viewpoint.").

Here, Governor Norton announced her new immigration policy on GEN. She included a statement that welcomed "comments and insights" on the new policy. Jt. Stip. ¶ 12. Governor Norton thus opened up her Facebook page to comments on the specific subject of the immigration policy. She thus could not limit the comments of other viewers simply because they articulated a stance against her immigration policy. She maintained the authority, however, to delete comments that were not on the topic of immigration policy.

The Respondent's post fell into the latter category. Nothing in his ad hominem attack referenced immigration policy. Thus Governor Norton did not engage in viewpoint discrimination; rather, she properly engaged in limiting the subject matter of GEN. Moreover, other users posted comments criticizing her immigration policy, which she did not delete.

Further, she acted in accordance with her interest in maintaining a civil dialogue on GEN. Thus Governor Norton used her authority to properly control the subject matter on GEN.

E. Public policy considerations also advise against categorizing GEN as a public forum.

Applying the First Amendment to technology continues to challenge the courts. New technology does not always fit easily into traditional First Amendment doctrine. New mediums of communication, such as Facebook, pose not only challenging legal questions, but also demand a thorough investigation into public policy implications. Categorizing a government official's personal Facebook page, particularly when she also maintains a separate, official Facebook page, as a public forum may cause serious detriment to freedom of speech. The desire to encourage public dialogue should not obfuscate the potential ramifications of identifying a private Facebook page as a public forum. Such categorization could have a chilling effect on government officials' speech and ability to communicate freely in a personal capacity.

First, it prevents a government official from engaging with the community via Facebook, which is an increasingly popular way of communicating with friends and family. If simply changing one's Facebook profile from private to public prevents a government official from controlling the civility and content of the page, officials may be reticent to keep Facebook pages. Thus the choice to sacrifice their time as a public servant has negative implications for their personal lives.

Second, if a government official chooses to keep her personal Facebook page, she may not be able to control the content on her page, even though Facebook users have an expectation that users do maintain control over their Facebook pages. Thus, a government official is caught between wanting to maintain a popular medium of communication, and the inability to control the identity and message she is communicating to viewers of her page. Particularly for public

officials, who are continually under public criticism, it would be particularly detrimental to lack power to control their public image.

Third, if a government official accepts the above risks, and decides to creatively engage her constituents via Facebook, she may not be able to maintain proper control over the civility of the Facebook page. This could lead to an official simply shutting down her Facebook page, chilling both her and her constituent's speech.

Fourth, she may open herself up to frivolous litigation. A busy government official may choose not to maintain this avenue of communication with her constituents, if she is opening herself up to frivolous litigation. Here, Governor Norton simply attempted to remove an uncivil, unproductive ad hominem attack from GEN. She embraced the other, on-topic Facebook posts. Even so, she has had to deal with years of litigation that have only taken her attention away from the job her constituents elected her to do.

Thus, public policy ramifications also caution against categorizing Governor Norton's personal Facebook page as a public forum.

CONCLUSION

Application of this Court's precedent guide the proper characterization of Governor Norton's GEN page. Governor Norton's action in deleting Respondent's comment was not state action. However, if this Court holds that it was state action, the contents of the GEN page should properly be categorized as government speech. Alternatively, GEN should be categorized as a nonpublic forum. Public policy implications warn against applying the First Amendment in ways that could chill government officials' speech. For the aforementioned reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

TEAM 12

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