Case 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

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BRIEF FOR THE PETITIONER

Team 13
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fourteenth Circuit erred in concluding that Governor Norton engaged in state action by removing Mr. Wong's comment on her personal Facebook page and restricting him from posting further comments on that page.

II. If so, whether the Fourteenth Circuit erred in holding that Governor Norton violated Mr. Wong's First Amendment rights by engaging in viewpoint discrimination in a state-sponsored forum rather than government speech.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Calvada is reported at No. 16-6834. The opinion of a three-judge panel of the United States Court of Appeals for the Fourteenth Circuit is reported at No. 17-874 (Fed. Cir. 2017).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983, in relevant part:

> Every person who under color of [law] . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured[.]

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

> Congress shall make no law . . . abridging the freedom of speech[.]

U.S. Const. amend. I

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

> No state shall . . . deprive any person . . . [of] the equal protections of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Elizabeth Norton ("Governor Norton") has been a resident of the State of Calvada ("the State") since her family moved to the State when she was three years old. R. at 24. Governor Norton has developed deep roots in the State –Governor Norton attended the University of Calvada; she started a local coffee business; and she is currently raising two daughters in the State. R. at 24. In 2015, Governor Norton ran for office to address the "[lack of] leadership" within the State, and on November 3, 2015, she won the election. R. at 25.

As Governor of Calvada, Governor Norton connects with her constituents through the social-media site, Facebook. R. at 14. When users create a Facebook account, the individual must provide a name, email or mobile phone number, password, date of birth, and gender. R. at 13. Users also have the option of limiting access to their account. In January 2008, Governor Norton created a Facebook account to remain connected with family and friends. R. at 24. She limited the access of her 2008 account to her "friends"[1] only. R. at 13, 24.

On January 12, 2016, one day after her inauguration, Governor Norton renamed her personal Facebook page "Governor Elizabeth Norton," ("GEN page"). R. at 14. Additionally, she converted her Facebook privacy settings from private to public. *Id*. The opening to the public of the GEN page still entitles Governor Norton, the administrator of the GEN page, to control the content of the posts and delete content if desired. Moreover, a vast majority of her posts onto the GEN page have pertained in some way to her official duties as governor. *Id*. Governor Norton stated that the purpose of her GEN page is to "keep Calvadans apprised of the actions [her] administration was taking to make Calvada a better place to live." R. at 25. In addition to her GEN page, Governor Norton also inherited a separate Facebook page from the previous administration, titled "Office of the Governor of Calvada," which contained a link to the State's "official website." *Id.*

To assist her, Governor Norton has hired a Director of Social Media, Chief of Staff, and Deputy Director of Public Security, and each closely monitor Governor Norton's social media accounts. R. at 18-23. Governor Norton's Social Media Director, Sanjay Mukherjee ("Mr. Mukherjee"), is also an administrator of the GEN page. R. at 15. In his capacity, he has the power

[1] "Friends" in this context refers to the individuals who the user of the account has sent a "request" for them to accept and allow each other access to their content. R. at 13.

to manage page roles and settings, edit the page and add apps, create and delete posts on 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, and more. R. at 15. To assist him in completing his duties, Mr. Mukherjee regularly uses electronic devices that were provided by the State of Calvada. R. at 20.

On March 5, 2016, at 3:15 p.m., Governor Norton posted an announcement ("the post") on her GEN page about a new immigration policy ("the policy") that will assist federal immigration laws. R. at 15. She concluded the post with: "I welcome your comments and insights on this important step." R. at 15-16. At 4:23 p.m., Respondent Brian Wong ("Mr. Wong") commented on the post, "[Y]ou 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.

In addition to Mr. Wong's comment, two other commenters criticized the new Policy, saying, they ". . . disagree[d] with the new [State] immigration enforcement policy. It will harm our state's economy", and ". . . this is not a good policy. It will punish many hard-working people and their families." R. at 17. At 9:45 p.m., Governor Norton reviewed the post and emailed to Mr. Mukherjee: ". . . saw nastygram by Wong in response to immigration announcement. [Please] delete/ban. Not appropriate for page." R. at 16. At 10:10 p.m., Mr. Mukherjee used his delegated administrative powers to delete Mr. Wong's comment and then banned him from posting further on the GEN page. *Id*.

II. Proceedings Below

On March 30, 2016, Mr. Wong filed a 42 U.S.C. § 1983 action in the District Court of the District of Calvada, claiming that Governor Norton's actions violated his First Amendment

freedom of speech after Governor Norton deleted Mr. Wong's comment and subsequently banned him from the GEN page. R. at 1. On August 26, 2016, Governor Norton and Mr. Wong filed cross-motions for summary judgement. R. at 1. On January 17, 2017, the District Court found in favor of Governor Norton and held that Governor Norton's actions were attributable to the State, and further, that the GEN page amounted to "government speech." R. at 2. Therefore, Mr. Wong's claim must fail because Mr. Wong has no First Amendment protection under the doctrine of government speech. R. at 2.

On November 1, 2017, Mr. Wong appealed to the United States Court of Appeals for the Fourteenth Circuit, and the Fourteenth Circuit reversed the District Court's grant of Governor Norton's Motion for Summary Judgement. The Fourteenth Circuit concluded that although Governor Norton's actions constituted state action, Governor Norton's GEN page was a "government-sponsored forum." R. at 30. Further, the Fourteenth Circuit concluded that Governor Norton's deletion of Mr. Wong's comment and subsequent banning from the GEN page, a "government-sponsored forum," amounted to viewpoint discrimination and violated his First Amendment rights. R. at 30. Governor Norton filed Petition for a Writ of Certiorari, and this Court granted Governor Norton's Petition. R. at 41.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's ruling and find that, as a threshold matter, Governor Norton's actions are not attributable to the State because her actions were not perpetrated under color of state law. Therefore, Mr. Wong's civil rights claim pursuant to 42 U.S.C. § 1983 must fail. Even if this Court finds that Governor Norton's actions are attributable to the State, this Court should conclude that Governor Norton's GEN page is government speech, and therefore, Mr. Wong has no First Amendment right of expression within the GEN page. Nor

can the deletion of Mr. Wong's comment amount to viewpoint discrimination within a public forum.

The Fourteenth Circuit erred by narrowing their analysis in determining state action on the creation and maintenance of Governor Norton's GEN page. Rather, this Court should look to the conduct at issue, that being the deletion of Mr. Wong's comment and subsequent removal from the GEN page. Looking to this conduct, this Court should conclude Governor Norton's conduct is not attributable to the State, and therefore, Mr. Wong has no viable claim because it is self-evident that her actions bore from personal circumstances. This Court should come to the same conclusion even if the state action inquiry were focused on the creation and maintenance of the GEN page.

Even if this Court concludes that Governor Norton's conduct is attributable to the State, this Court should conclude that the post is government speech. Thus, Mr. Wong has no First Amendment right to speech in the GEN page, and no forum analysis is needed. In following this Court's three-factored analysis in identifying government speech, the Post is government speech because: (1) although Facebook does not have a history of being a traditional public forum, the Supreme Court has recognized that social media is becoming a forum where ideas and views are exchanged; (2) the GEN page is "often closely identified in the public mind" with Governor Norton; and (3) Governor Norton exercises "effective control via "final approval" because as the administrator of the GEN page and Governor, her employees are required to take heed to all of her requests, including her request to remove Mr. Wong's comment and ban him from posting.

Furthermore, the Fourteenth Circuit's reliance on *Matal v. Tam* to find that Mr. Wong's comment was government speech was inaccurate. The nature of the post does not change due to the fact that Governor Norton did not create Mr. Wong's comment. The Supreme Court has held multiple times that the governmental nature of a message is not extinguished merely because the

government solicits private assistance or because the government did not create the message. However, if this Court finds that Governor Norton's post was not government speech, this Court should find that the post was a limited public forum, and that Governor Norton did not discriminate based upon viewpoint.

The GEN page is a limited public forum due to the nature of Facebook limiting participation to those signed up with the platform. Furthermore, the GEN page, and specifically the post, reserves discussion to matters pertaining to Governor Norton's duties as governor, and comments relating to the policy. This exclusive access, paired with restrictions on discussion, demands the conclusion that the GEN page be classified as a limited public forum. This Court should then find that Governor Norton did not engage in viewpoint discrimination when she deleted Mr. Wong's comment and banned him from posting further. Rather, the deletion of Mr. Wong's comment and subsequent removal was because his comment was not responsive to Governor Norton's post, nor to any matter similarly addressed in her Page. This type of *ad hominem* attack falls out of line with the intended purpose of the GEN page, and the preservation of other negative comments on the post demonstrates that it is not negative viewpoints towards the policy that compelled Governor Norton to delete Mr. Wong's comment. Thus, removal of the comment, and imposition of the ban, fall within the requisite standard of a limited public forum.

ARGUMENT

I. The Fourteenth Circuit Erred in Concluding that Governor Norton's Actions Are Attributable to the State.

The Fourteenth Circuit's reliance on the District Court case, *Davison v. Loudoun Cty. Bd. of Supervisors*, No. 16-cv-932, 2017 WL 3158389 (E.D. Va. July 25, 2017), and the Fourth Circuit case, *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003), both disregard this Court's emphasis that "because readily applicable formulae may not be fashioned, the conclusions drawn

from the facts and circumstances of [similar records] are by no means declared as universal truths on the basis of which every [social media account maintained by a public official] is to be tested." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

42 U.S.C. § 1983 provides that any "person who under color of [law] . . . subjects . . . any citizen of the United States . . .to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured[.]" 42 U.S.C. § 1983. Therefore, in order to maintain a § 1983 action: (1) the conduct must be committed by a person acting under color of state law; and (2) the conduct must have deprived a person of privileges secured by the Constitution. *Pitchell v. Callan*, 13 F.3d 545, 547 (2d Cir. 1994).[2]

The Fourteenth Amendment provides "[n]o state shall . . . deprive any person . . . [of] the equal protections of the laws." U.S. Const. amend. XIV, § 1. This Court has noted that it has always been "clear . . . that 'individual invasion of individual rights is not the subject-matter of the amendment.'" *Burton*, 365 U.S. 715 at 722. Therefore, the only way a plaintiff can maintain a First Amendment claim, as incorporated and applied to the states through the Due Process Clause of the Fourteenth Amendment, *Gitlow v. New York*, 268 U.S. 652, 666 (1925), is by establishing that the challenged conduct is state action. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (noting the Fourteenth Amendment protects "private conduct, however discriminatory or wrongful.") (*quoting Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982)).

To amount to state action, "the deprivation must be caused by the exercise of some right or privilege created by the state . . . or by a person for whom the state is responsible." *Lugar v.*

[2] Set forth by this Court, state action requirements against state officials are in accordance with the Fourteenth Amendment requirements against private individuals. *Lugar*, 457 U.S. at 929 ("[I]t is clear that in a § 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical.").

Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982). State action occurs where "apparently private actions . . . have a 'sufficiently close nexus' with the state to be 'fairly treated as that of the state itself.'" *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003).[3] What constitutes a "sufficiently close nexus" is a matter of "normative judgement, and . . . lack[s] . . . simplicity," as "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient[.]" *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Similarly, as relevant here, not all conduct by state officials amount to state action simply because they are "clothed with the authority of the state law." *Patterson v. Cty. Of Onieda*, 375 F.3d 206, 230 (2d Cir. 2004); *see also Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994) ("acts of officers in the ambit of their personal pursuits are plainly excluded.").

In applying the state action test to the case at bar, this Court should focus on Governor Norton's conduct of *deleting Mr. Wong's comment and banning him* from the GEN page to determine that her conduct is not attributable to the State. Even if this Court narrows their analysis to Governor Norton *creating and maintaining* the GEN page, this Court should still find that Governor Norton's conduct is not attributable to the State, and therefore, Mr. Wong has no viable claim against Governor Norton.

A. The Fourteenth Circuit Erred in Finding State Action By Inappropriately Narrowing Their Analysis to Governor Norton Creating and Maintaining the GEN Page, Rather Than Focusing on the Actual Deletion and Banning.

In the present case, the "sufficiently close nexus" inquiry must be applied carefully. If this Court were to follow the Fourteenth Circuit's approach by focusing this inquiry on the creation

[3] The Supreme Court has utilized at least seven distinct tests to help lower courts deal with state action; however, the most frequently used test is the nexus test. Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 Miss. L. Rev. 561, 566 (2008).

and maintenance of the GEN page, this would suggest that all actions related to her social media account are attributable to the State. In doing so, every post, including Governor Norton's photos and conversations with family and friends, would constitute state action. Surely this is not the subject matter of the amendment. *See generally Burton*, 365 U.S. 715 (1961); *see also Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting) ("[W]hen public officials deliver public speeches, we recognize that their words are not exclusively a transmission from the government because those oratories have embedded within them the inherently personal views of the speaker[.]"). Therefore, this Court should apply the "sufficiently close nexus" inquiry to Governor Norton's specific actions of deleting and banning his comment, rather than the creation and maintenance of the GEN page, in determining that Governor Norton's actions are not attributable to the State.

When a public official's conduct "[arises] out of personal circumstance," this conduct cannot be said to have a "sufficiently close nexus" to the State. *Rossignol*, 316 F.3d at. 523. In *Rossignol*, the day before an election, off-duty sheriff deputies mass purchased plaintiff's newspaper in an effort to prevent circulation of an article criticizing their official conduct. *Id.* at 519-20. The Fourth Circuit held that their actions possessed the "requisite nexus" between their "public office" to be attributable to the state. *Id*. at 525. The court found that their actions arose out of their censorial motivation, and this link helped to demonstrate that their actions could be "fairly treated as that of the State itself." *Id*. at. 523-24. ("The actions here arose out of public, not personal, circumstances."); Cf. *Martinez v. Colon*, 54 F.3d 980, 987 (1st Cir. 1995) (finding that an officer shooting his coworker was not state action because his actions arose from a "singular[] personal frolic[.]"). Additionally, the court found it significant that the defendants used their status as sheriff deputies to intimidate store clerks. *Rossignol*, 316 F.3d at 526.

Here, in contrast to *Rossignol*, Governor Norton deleting Mr. Wong's comment and banning him from the GEN page arose out of personal circumstances, and therefore compels the conclusion that Governor Norton's conduct is not attributable to the State. *See Rossignol*, 316 F.3d 516 at. 524 ("[P]urely personal circumstances . . . not . . . state action even when defendant [takes] advantage of his position as a public officer[.]"). Governor Norton characterized Mr. Wong's post, in which he tormented and compared her to a toad, as an *ad hominem* attack. R at. 26. *See Martinez*, 54 F.3d 980, 987 (finding significant that "status as a police officer simply did not enter into his [actions]. . . though reprehensible, is not [state action].").

As such, Mr. Wong's personal attack prompted her to delete his comment and restrict him from posting on her page. R at. 26. This was based on personal circumstances, not public as the Respondent has argued. *See Pitchell*, 13 F.3d 545 at 548-49 (noting that the "essence of the color of law requirement" is not the plaintiff's subjective reaction to defendant's conduct, but rather the nature of the defendant's actions). While he claims that his comment was directed at the policy, his comment fails to mention the policy. Furthermore, the fact that Governor Norton did not delete the other comments on her page criticizing the policy further demonstrates that Governor Norton's actions arose out of Mr. Wong's personal attacks on her. In conclusion, in looking to Governor Norton's specific conduct of deleting Mr. Wong's comment and banning him from the GEN page, this Court should find that Governor Norton's conduct is not attributable to the State.

B. Even if This Court Applies the Nexus Inquiry to Governor Norton's Action in the Creation and Maintenance of the GEN page, Governor Norton's Conduct is Still Not Attributable to the State Because This Conduct Arose from Personal Circumstances.

Even if this Court were to focus solely on Governor Norton creating and maintaining the GEN page in applying the nexus inquiry, her actions are still not attributable to the State because they arose from personal circumstances. In *Davison*, Phyllis J. Randell, the chair of the Loudon

County Board of Supervisors, along with the help of her Chief of Staff, created a Facebook page the day before she was sworn into office to address County residents. *Davison*, 2017 WL 3158389 at *2. Since creating the page, she has engaged with constituents by having back and forth conversations and keeping them abreast of her activities as chair and other important events. *Id.* at *7. When she posts she often submits post "on behalf of the Loudon County Board of Supervisors" *Id.* at * 8. Additionally, she sends out newsletters including links to the "Chair Phillis J. Randall" Facebook page. *Id.* at *7.

As a threshold matter, the *Davison* court found *Rossignol* instructive in determining whether the creation of the "Chair Phyllis J. Randell" Facebook page arose out of personal or public circumstances. *Id*. The Court found it self-evident that the impetus for creating the page bore out of Randall's election to the public office. *Id*. The Court further noted that she created the page in collaboration with her Chief of State the day before she took office. *Id*. Moreover, she did so for the purpose of addressing her new constituents. *Id*.

In comparison to *Davison*, it is "self-evident" that the creation of the GEN page bore out of personal circumstances, and therefore, cannot amount to state action. Here, Governor Norton created the GEN page several years before she won the State election. Governor Norton used her Facebook account prior to the election for the personal purpose of connecting with family and friends and posting about her views on social and political issues, and she has continued to use the GEN page for this purpose even after becoming Governor. Simply because she has the title "Governor" does not change the fact she still used the GEN page in accordance with its initial, personal purpose – to connect and post on political and social issues. Moreover, to find that Governor Norton's announcements amount to state action would allude to the notion that once an

official is elected, they are prohibited from making announcements on the "actions of the state" in any setting, public or private, without it being attributable to the state.

Therefore, this Court should find that based on the specific circumstances, Governor Norton's actions cannot be fairly attributed to the State. Consequently, Mr. Wong's First Amendment claim fails at the outset.

II. The Fourteenth Circuit Erred in Holding That Governor Norton Violated Mr. Wong's First Amendment Rights by Engaging In Viewpoint Discrimination In A State Sponsored Forum Rather Than Government Speech.

The Circuit Court erred in finding that Governor Norton did not engage in government speech, but rather established a government-sponsored forum for speech. Furthermore, the Circuit Court also erred in finding that Governor Norton engaged in viewpoint discrimination. Under the Free Speech Clause, "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. Amend. I. "[T]he first inquiry a court must make is whether the party complaining about government action limiting speech is engaged in 'speech protected by the First Amendment.'" Carl E. Brody, Jr., ARTICLE: CONSIDERING THE PUBLIC FORUM STATUS OF GOVERNMENT INTERNET SITES, 44 Stetson L. Rev. 389, 392 (2015), *quoting Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). If the speech is not protected, there is no further analysis. 44 STETLR at 392. However, if the party is engaging in speech protected by the First Amendment, the Court "must identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic." *Id*. Lastly, "the Court must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id*.

This Court should find that Governor Norton's post is government speech. Thus, no further analysis is necessary and Mr. Wong does not have a cognizable First Amendment claim. However,

even if this Court finds that Governor Norton's post is not government speech, this Court should hold that the post is most similar to a limited public forum. As such, the deletion of Mr. Wong's comment, and imposition of a ban excluding him from posting, was a reasonable, viewpoint-neutral restriction and satisfied the appropriate requisite standard.

A. Mr. Wong Does Not Have a Cognizable First Amendment Claim Because Governor Norton's Post is Government Speech and the Circuit Court's Reliance on *Matal v. Tam* is Inaccurate.

The Fourteenth Circuit incorrectly used the Supreme Court's ruling in *Matal v. Tam* as its reasoning to assert that the critical question was not whether Governor Norton's *post* was government speech, but whether Mr. Wong's *comment* would be understood as government speech. R. at 35 (emphasis added). This Court should adopt the District Court's approach in only analyzing whether Governor Norton's post was government speech, rather than the GEN page in its entirety. R. at 10.

1. Governor Norton's Post is Government Speech and Not Protected by the First Amendment.

"The Free Speech Clause [of the First Amendment] restricts government regulation of private speech; [but] it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). Under the government speech doctrine, a government entity is entitled to speak for itself, say what it wishes, and also select the views that it wants to express. *Summum*, 555 U.S. at 468. As a result, "the Government. . . is not required to maintain viewpoint neutrality on its own speech. *Matal v. Tam*, 137 S. Ct. 1744, 1748 (2017), *quoting Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005).

Government speech is typically generated, controlled, and communicated by the government. *Summum*, 555 U.S. at 467-70. As such, the government can decide not to communicate certain messages. *Id*. at 468. This contention is exemplified in *Pleasant Grove City,*

Utah v. Summum where the Supreme Court stated that "[t]he parties' fundamental disagreement . . . centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park." *Summum*, 555 U.S. at 467. The Court concluded that a city "accepting a privately donated monument and placing it on city property" was engaging in government speech. *Id*. at 464. The Court came to its conclusion by considering three factors: (1) the history of the medium; (2) whether the medium is "often closely identified in the public mind with the [City]"; and (3) whether the City "'effectively controlled' the messages sent by the monuments in the park by exercising 'final approval authority' over their selection." *Id*. at 470-73.

In regard to the first factor, the Court reasoned that governments have long used monuments to speak to the public. *Id*. at 470. In considering the second, the Court stated that "persons who observe donated monuments routinely - and reasonably - interpret them as conveying some message on the property owner's behalf." *Id*. at 471. Thus, "[p]ublic parks are 'often closely identified in the public mind with the government unit that owns the land.'" *Id*. at 472. Lastly, in regard to the third factor, the city exercised final authority of the selection because it "selected monuments that present the image the City wishes to project"; "it [took] ownership of most of the monuments in the park"; and it has expressly set out selection criteria it will use in making future selections. *Id*. at 473.

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, the Supreme Court held that because a specialty license plate design constituted government speech, the government was permitted to refuse certain designs based on their content. *Walker v. Texas Div. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2241 (2015). In reaching this conclusion, the *Walker* Court adopted the three factors emphasized in *Summum*. In regard to the first factor, the *Walker* Court found that, "history shows that States . . . have long used license plates to convey government

speech." *Id*. at 2242. In regard to the second factor, the Court concluded that "Texas license plate designs 'are often closely identified in the public mind with the [State]'" because: (1) each plate serves the "governmental purposes of vehicle registration and identification"; (2) "TEXAS" is in large letters on the top of every license plate; (3) Texas vehicle owners are required to display license plates; (4) Texas issues every Texas plate and owns all of the designs on its plates; and (5) the license plates are considered to be government IDs and "ID issuers 'typically do not permit' their IDs to contain "message[s] with which they do not wish to be associated."" *Id*. In regard to the third factor, Texas exercised "final approval authority" because it had "sole control over the design, typeface, color and alphanumeric pattern for all license plates"; the Board approved every specialty plate design proposal; and the Board actively exercised their authority. *Id*. at 2249. Ultimately, the Court found that the Texas specialty plates were "similar enough to the monuments in *Summum* to call for the same result" and were held to be government speech. *Id*. at 2243-49.

This Court should find that when the *Summum* factors are applied to the case at bar, Governor Norton's post is also government speech. In regard to the first factor, although Facebook does not have a history of being a traditional public forum, the Supreme Court has recognized that "[social media] allow[s] a person with an internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" R. at 37, *quoting Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017) ("While in the past there may have been difficulty in identifying the most important places (in the spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular.") In regard to the second factor, constituents recognize the page as Governor Norton conveying messages on behalf of the government. The day after Governor Norton's inauguration, she renamed her personal Facebook page "Governor Elizabeth Norton." Additionally, she converted her Facebook privacy settings

from private to public. Moreover, a vast majority of her posts onto the GEN page have pertained in some way to her official duties as governor. Thus, "persons who observe [Governor Norton's GEN page] routinely – and reasonably – interpret [her posts] as conveying some message on the [Governor's] behalf." In regard to the last factor, Governor Norton exercised final authority of the comments left on her GEN page posts, specifically the post. For example, Governor Norton's Social Media Director, Sanjay Mukherjee, has the capacity to manage page roles and settings, edit the page, create and delete posts, etc. In fact, on March 5, 2016 at 9:45 p.m., after Mr. Wong wrote his comment under the post, Governor Norton emailed Mr. Mukherjee and said, "saw nastygram by Mr. Wong in response to immigration announcement. [Please] delete/ban. Not appropriate for page." At 10:10 p.m., Mr. Mukherjee used his delegated administrative powers to delete Mr. Wong's post and ban him from posting further on the GEN page.

In addition to the three-factored analysis, the case at bar is extremely similar to *Summum* and *Walker* in multiple ways. First, as in *Summum*, the issue in this case "centers on the nature of petitioners' conduct" when Governor Norton removed Mr. Wong's comment from her post and banned him. Additionally, comparable to the city accepting privately donated monuments and placing them on city property in *Summum*, Governor Norton, as the creator and head administrator of the GEN page, accepted comments from private people and allowed them to be posted, as well as remain, on her posts. Next, as the *Walker* Court noted how "TEXAS" is in large letters on the top of every license plate, in this case, when users create a Facebook account, the individual must provide a name, email or mobile phone number, password, date of birth, and gender. Furthermore, the name of the Facebook page at issue is "Governor Elizabeth Norton." Whenever a user "likes", "comments", or "posts", it is done so under their account name. Thus, all likes, comments, or posts that come from the GEN page does so displayed under the name "Governor Elizabeth Norton."

Moreover, although citizens are not required to own Facebook pages or interact with the Governor's GEN page, that specific page is owned and operated by Governor Norton and the three administrators on her team who she has hired. Lastly, as license plates are considered to be government IDs and do not contain "message[s] with which they do not wish to be associated", neither does Governor Norton's GEN page, exemplified by her request to remove Mr. Wong's comment when she stated that it was "not appropriate for page." Therefore, this Court should find that as the license plates in *Walker* and the monuments in *Summum*, the post is government speech.

As the Court stated in *Summum*, "although a park is a traditional public forum for speeches . . . the display of a permanent monument in a public park is not a form of expression to which forum analysis applies." *Summum*, 555 U.S. at 464. Comparably, although Facebook is a traditional public forum for speeches, the display of another user's comment on Governor Norton's Facebook post is not a form of expression to which forum analysis applies. Furthermore, the *Summum* Court stated that "[p]rivately financed and donated monuments[,] that the government accepts and displays to the public on government land[,]" speak for the government, "just as government-commissioned and government financed monuments" do. *Id.* at 470-71. By extending that logic to this case, this Court should find that the comments posted by private individuals, specifically on the post, speak for the government, just as government created posts do.

2. In Analyzing the Applicability of the Government Speech Doctrine, the Circuit Court's Application of *Matal v. Tam* is Inaccurate in Finding that Mr. Wong's Comment Could not be Understood as Government Speech.

The Circuit Court, and Mr. Wong, contend that since "Governor Norton had nothing to do with crafting *his* comment . . . *his* message was not government speech." R. at 35-36, *quoting* R. at 11. To support its reasoning, the Circuit Court relied on the *Tam* Court's statement that, because "[t]he Federal Government does not dream up these marks, and it does not edit marks submitted

for registration[,] . . . it is far-fetched to suggest that the content of a registered mark is government speech." *Tam*, 137 S. Ct. 1744, 1758 (2017). However, the *Summum* Court held that monuments in a public park were still a form of government speech, "[a]lthough many of the monuments were not designed or built by the City and were donated in completed form by private entities. . . ." *Summum*, 555 U.S. at 472. Furthermore, in *Walker*, the Supreme Court stated that, "[t]he fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider." *Walker*, 135 S. Ct. at 2251. In both *Summum* and *Walker*, although the government did not design either the monuments or the specialty license plates, the three-factor analysis led both Courts to hold that both were still government speech. In *Tam*, although the government does not design the content of trademarks, none of the three factors were present to identify trademarks as government speech. *Tam*, 137 S. Ct. at 1760.

In *Tam*, the Supreme Court held that federally registered trademarks are private speech, not government speech. *Id*. In coming to Its conclusion, the Court also applied the three *Summum* factors. *Id*. at 1759-60. In light of these factors, the Court reasoned that: (1) trademarks have not been traditionally used to convey government messages; (2) there is no evidence that the public associates the contents of trademarks with the Federal Government; and (3) the Patent and Trademark Office (PTO), a government body, does not maintain direct control, or final authority, over trademarks since once an examiner finds a mark eligible for registration, the decision is not reviewed by any higher official. *Id*. at 1758. Additionally, the PTO does not have final authority over trademarks because, "the PTO is not authorized to remove it from the [principal] register" unless certain exceptions exist. *Id*. at 1758.

However, *Tam* is readily distinguishable from the present case. First, unlike trademarks, which have not traditionally been used to convey government messages, social media has "become a town crier with a voice that resonates farther than it could from any soapbox." *Packingham*, 137 S. Ct. at 1737. Secondly, unlike *Tam*, the public associates the GEN page, specifically Governor Norton's post, with her in her official capacity as Governor of the State. Thirdly, unlike the PTO's lack of final authority, Governor Norton certainly does exercise final approval authority over her GEN page, specifically the post. This is exemplified by her Director of Social Media, Sanjay Mukherjee, who responds to all of her requests, proving she is the higher authority that reviews. She also has the ability to remove things from the GEN page and its posts, as shown by her email to Mr. Mukherjee on March 5, 2016, asking for him to add photos and statements of various things onto the GEN page.

Lastly, the Circuit Court contends that Governor Norton created a state-sponsored forum for speech because she solicited public opinion. R. at 36. However, this contention is false. When "the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Johanns*, 544 U.S. at 562. Thus, although Governor Norton did state, "I welcome your comments and insights on this important step," she is not precluded from relying on the government speech doctrine because she "sets the overall message to be communicated and approves every word that is disseminated." This contention is further exemplified in *Summum*, where the Court found that the City was still engaging in government speech although eleven out of the fifteen monuments were donated by private individuals. *Summum*, 555 U.S. at 464-65.

Thus, this Court should find that irrespective of whether Governor Norton crafted Mr. Wong's speech or solicited private comments, the government speech doctrine is appropriate to apply and a "forum analysis, which applies to government restrictions on purely private speech [,] that occurs on government property, is not appropriate [since] the State is speaking on its own behalf." *Walker*, 135 S. Ct. at 2242. However, if this Court holds that the government speech doctrine is not applicable, and a forum analysis is appropriate, Governor Norton created a limited public forum at most. Thus, her deletion of Mr. Wong's comment, and imposition of a ban precluding him from posting further, was a reasonable, viewpoint neutral restriction.

B. Even If this Court Concludes that Governor Norton's Post Is Not Government Speech, Mr. Wong Still Has No Viable First Amendment Claim Because the Post Was a Limited Public Forum, and Governor Norton Did Not Engage in Viewpoint Discrimination.

The Fourteenth Circuit erred in choosing not to determine the nature of Governor Norton's GEN page. R. at 38. If the party is engaging in speech protected by the First Amendment, the Court "must identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic." 44 STETLR at 392. This Court should find that Governor Norton's GEN page is a limited public forum and she complied with its requisite standard.

1. At Most, Governor Norton's GEN Page is a Limited Public Forum Because the Page is Not Freely Accessible and the Content is Limited to Discussing Government Topics.

A limited public forum is a lesser protected area of public space set aside by the government for a limited purpose, whether that be for use by certain groups, or for the discussion of certain topics. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1225 (11th Cir. 2017) (public-comment portion of meeting was a limited public forum partly because the discussion was limited to particular

topics). In *Rosenberger*, the Court took note that access to funds from the University were limited to majority-student groups, led by full-time students, who met certain procedural requirements – thus, this selective access bore the characteristics of a limited public forum. *Rosenberger*, 515 U.S. at 823, 829.

In considering the nature of Governor Norton's GEN page, the GEN page most readily identifies with that of a limited public forum. Similar to *Rosenberger*, where the Court found the procedural and status bars to access University funding, created a limited public forum, a similar bar is present here. Interaction with the GEN page requires having a Facebook profile, which further requires registering and inputting personal information. R. at 13. Although the GEN page is a public page, and the Governor asked for comments and insights about the policy on her post, this action did not open up a forum to allow for the expression of any idea. R. at 14, 16. The selective access of the GEN page supports the proposition that it is a limited public forum.

In *Eichenlaub*, the Third Circuit addressed a similar challenge involving the removal of a speaker during a citizen's forum that allowed any citizen to address the Township. *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004). Even in recognizing that the citizen's forum allowed any citizen to speak, the Court still found it was a limited public forum because the transcript indicated that the discussion was limited to issues solely pertaining to the Township. *Id.* The Ninth Circuit addressed in *White v. Norwalk* a similar situation when the court upheld the physical removal of speakers from City Council meetings because of their speech. *White v. Norwalk*, 900 F.2d 1421, 1423 (9th Cir. 1990). Furthermore, the court took note of the limited "nature of the Council meeting" in concluding the Council meeting was a limited public forum, recognizing that speech in this forum could become easily "disruptive" and could "interfere with . . . other[s]" within the forum. *Id.* at 1425-26.

The opening of the GEN page to the Facebook public does not automatically create a limited public forum. In *Eichenlaub*, the court emphasized that the particular way a discussion is directed can create a limited public forum. In similarly looking at the purpose and content of the GEN page, the content largely focuses on Governor Norton's official duties, and her purpose in using the page to keep her constituents informed of her work. R. at 25. The post is similar to that of *Eichenlaub*, for the post itself asked for comments related to the policy solely. Additionally, this case is similar to *White* in that if Mr. Wong's comment were to remain visible on the GEN page, it would have been even more disruptive than the brief outburst of impermissible speech at a public town-hall meeting reserved for a particular topic as seen in *White*. Therefore, the GEN page is a limited public forum not only due to its selective access, but also because the page and post were reserved for particular discussion.

Furthermore, Facebook gives Governor Norton the authority to manage the content of her own page. The nature of access and the posting of content to *any* page is not only limited, but an inherent, and communally-understood part of the platform itself. Second, the language employed by Governor Norton in the post further demonstrates that the GEN page cannot be characterized as anything more than a limited public forum. Lastly, Governor Norton's request for insights and comments dealt exclusively with the new policy. Additionally, her asking for constituents' insight is followed immediately by language indicating that the request is for insight pertaining only to the policy, rather than for a request of general insight on any issue. R. at 16. The exclusive nature of the GEN page, and Governor Norton's narrowing language within the post, demonstrate that Governor Norton had the intent to open a forum for the reservation of comments and insights to the policy only. Therefore, the GEN page is, at most, a limited public forum. In coming to this

conclusion, it is then necessary to determine whether Governor Norton's reasons for deleting Mr. Wong's comment and banning him from her page, pass constitutional muster.

2. The Deletion of Mr. Wong's Comment Did Not Amount to Viewpoint Discrimination Because Circumstances Demonstrate That Governor Norton Did Not Delete Mr. Wong's Comment Based on Any View Mr. Wong Held.

In the last part of the forum analysis, "the Court must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." 44 STETLR at 392. The State can restrict speech based on content, or subject-matter, in limited public forums as long as it is "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829-30 (*quoting Cornelius*, 473 U.S. at 806). Even with limited public forums, such as Governor Norton's Page, the State cannot discriminate based on viewpoint. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 690 (2010). The test for viewpoint discrimination is whether - within the relevant subject category - the government has singled out a subset of messages for disfavor based on the views expressed. *Tam*, 137 S. Ct. at 1750, 1763 **(t**he disparagement clause being applied in *Tam* amounted to viewpoint discrimination because it required the reviewing body to consider whether a trademark gave offense, which was a viewpoint in and of itself).

In evaluating First Amendment claims, it should not be presumed that governmental distinctions of speech inevitably lead to a conclusion that viewpoint discrimination is present in a limited public forum or non-public forum. For instance, this Court has found that exclusion from a school mailbox system was not viewpoint discrimination, but rather an exclusion based on respondent's status that was reasonable to enact within a non-public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49-50 (1983); *see also Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 1634-35 (1998) (exclusion of a political candidate from a publicly-

broadcasted debate was not viewpoint discrimination because ample evidence demonstrated that the exclusion was instead based on account of the lack of public support for the candidate's views).

The deletion of Mr. Wong's comment parallels the restriction upheld in *Perry* since Governor Norton distinguished Mr. Wong's comment as "unresponsive", "unrelated," and "not appropriate." Thus, the deletion was based on the unrelated and unresponsive status of Mr. Wong's comment, rather than any viewpoint he held. Similarly, in *Forbes*, this Court emphasized how particular events and evidence can demonstrate there being a lack of viewpoint discrimination. Here, Governor Norton's request for the deletion of comments unrelated to the policy, and her preservation of negative views, evidences the lack of viewpoint discrimination.

Furthermore, Governor Norton did not delete the other two facially-negative comments on the post. Those comments carried language responding directly to the post and gave reasons as to why there is disagreement, unlike Mr. Wong's comment. Thus, by Governor Norton excluding only the comments that were a bare *ad hominem* attack, she did not engage in viewpoint discrimination. Lastly, no policy that directs a governmental actor to engage in viewpoint discrimination exists here as it did in *Tam*. Instead, Governor Norton's conduct was based in enacting a reasonable, viewpoint-neutral policy within a limited public forum, which satisfies the requisite standard. For the following reasons, the GEN page, specifically the post is at most a limited public forum, and she complied with its requisite standards.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Circuit Court of Appeals for the Fourteenth Circuit and find in favor of the Petitioner.

Respectfully Submitted,

/s/

Team 13
Counsel for Petitioner

CERTIFICATION

Team 13 hereby certifies that on this date, January 31, 2018, the work product contained in all copies of this brief is in fact the work product of the team members. Additionally, we certify that our team has complied fully with our school's governing honor code, and the Rules of the Competition.