

Brief on the Merits
No. 17-874

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

ELIZABETH NORTON,

Petitioner,

v.

BRIAN WONG,

Respondent.

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

BRIEF FOR RESPONDENTS

Team No. 14
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Governor's actions in deleting Wong's post and banning him from posting any additional comments on the GEN Page are attributable to the State of Calvada; and
2. If so, did the Governor's actions violate the First Amendment because she impermissibly excluded Wong from the state-sponsored speech forum, or did the Governor act within the bounds of the Constitution because her immigration policy post qualified as "government speech"?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

COURSE OF PROCEEDINGS BELOW 2

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

 I. Deleting and Banning Brian Wong from the GEN Page are Actions Attributable to the State of Calvada. 10

 II. Governor Norton Infringed on Wong’s First Amendment Rights by Engaging in Viewpoint Discrimination in a State-Sponsored Forum. 14

 A. Facebook Comments Closely Resemble the Speech of Federally Registered Trademarks Where the Government Speech Doctrine is Not Germane. 15

 B. Governor Norton’s Use of Her Facebook Page as a Limited Public Forum Implicates First Amendment Protections Against Viewpoint Discrimination 18

 C. Governor Norton Engaged in Viewpoint Discrimination When She Banned His Access and Deleted His Comment on the GEN Page. 20

CONCLUSION 23

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

<i>Bd. of Educ. v. Pico</i> , 457 U.S. 853, 102 S. Ct. 2799 (1982).....	21
<i>Cornelius v. NAACP Legal Def. & Educ. Fund</i> , 473 U.S. 788, 105 S. Ct. 3439 (1985).....	14, 20
<i>Marsh v. Alabama</i> , 326 U.S. 501, 506 (1946)	13, 18, 19
<i>Matal v. Tam</i> , 137 S. Ct. 1744 (2017)	16, 17, 20
<i>Packingham v. North Carolina</i> , 137 S. Ct. 1730 (2017)	8, 9, 15
<i>Perry Educ. Ass'n v. Perry Local Educators' Ass'n</i> , 460 U.S. 37, 103 S. Ct. 948 (1983)	14, 22
<i>Pleasant Grove City v. Summum</i> , 555 U.S. 460, 129 S. Ct. 1125 (2009).....	16
<i>Reno v. ACLU</i> , 521 U.S. 844, 117 S. Ct. 2329 (1997)	9, 15, 17
<i>Rosenberger v. Rector & Visitors of the Univ. of Va.</i> , 515 U.S. 819, 115 S. Ct. 2510 (1995).....	14, 15, 20, 21
<i>Snyder v. Phelps</i> , 562 U.S. 443, 131 S. Ct. 1207 (2011)	22
<i>Texas v. Johnson</i> , 491 U.S. 397, 109 S. Ct. 2533 (1989)	20
<i>Walker v. Tex. Div., Sons of Confederate Veterans, Inc.</i> , 135 S. Ct. 2239 (2015).....	15, 16, 18

OTHER CASES

<i>Bland v. Roberts</i> , 730 F.3d 368 (4th Cir. 2013).....	9
<i>Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Sch.</i> , 457 F.3d 376 (4th Cir. 2006)	9, 19
<i>Davison v. Loudoun Cty. Bd. of Supervisors</i> , No. 16-cv-932, 2017 WL 2158389 (E.D. Va. July 25, 2017)	11, 13, 20, 22
<i>Page v. Lexington Cty. Sch. Dist. One</i> , 531 F.3d 275 (4th Cir. 2008).....	19
<i>Rossignol v. Voorhaar</i> , 316 F.3d 516, 523 (4th Cir. 2003)	10
<i>Twitter, Inc. v. Sessions</i> , 263 F. Supp. 3d 803 (N.D. Cal. 2017)	15

SECONDARY AUTHORITIES

Facebook: The New Town Square, 44 SW. L. REV. 385 (2014)19

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgement on this matter on November 1, 2017. *Wong v. Norton*, No. 16-6834 slip op. at 1 (14th Cir. Nov. 17, 2017). Petitioner timely filed a petition for a writ of certiorari which this court granted. R. at 41. This court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

COURSE OF PROCEEDINGS BELOW

In the United States District Court for the District of Calvada, Brian Wong (“Wong”) sued Governor Elizabeth Norton (“Governor Norton”) on the allegation of a freedom of speech violation under the First Amendment to the United States Constitution as incorporated and applied to the states through the Due Process Clause of the Fourteenth Amendment. Record at 1. Wong sought a declaration that the Governor’s acts were a violation of his First Amendment right to freedom of speech and that the Governor be ordered to restore his original post and reinstate his ability to contribute to the Governor Elizabeth Norton Facebook Page (“GEN Page”). R. at 1. Governor Norton affirmatively denied her actions constituted a constitutionally cognizable state action nor violated the First Amendment. R. at 1.

On August 25, 2016, Wong and Governor Norton filed cross-motions for summary judgment. The material facts of the case are not in dispute. The cause of dispute arises from the following legal issues:

1. Whether the Governor’s actions in deleting Wong’s post and banning him from posting any additional comments on the GEN Page are attributable to the State of Calvada; and
2. If so, did the Governor’s actions violate the First Amendment because she impermissibly excluded Wong from the state-sponsored speech forum, or did the Governor act within the bounds of the Constitution because her immigration policy post qualified as “government speech”?

These issues are of first impression in the Fourteenth Circuit. R. at 1. The District Court granted summary judgment in favor of Governor Norton and held that the Governor’s announcement of a new State immigration law enforcement policy on her GEN Page amounted to government speech. R. at 1.

Wong filed a timely appeal to the United States Court of Appeals for the Fourteenth Circuit. R. at 29. The questions presented on appeal involved whether the actions taken by the Governor were attributable to the State of Nevada and if so did her actions violate the First Amendment. R. at 30. The Fourteenth Circuit reversed the decision of the District Court granting summary judgment to Governor Norton. R. at 30. The court of appeals agreed that the Governor's actions constitute state action, however, the court held the Governor did not engage in government speech on her GEN Page. R. at 30. The court found that the Governor opened a government-sponsored forum for speech on her GEN Page and thus the Governor's deletion of Wong's comment amounts to viewpoint discrimination in violation of the First Amendment. R. at 30. This Court granted Governor Norton's petition for review. R. at 41.

STATEMENT OF THE FACTS

Connect. Share. Expand. Facebook is the modern-day megaphone that allows society to share and grow their ideas. This popular social media platform not only gives people a voice, but also allows them to impact a wide audience and influence the marketplace of ideas. Without websites like Facebook, an individual's voice and their expressions are crippled. In an age where society is constantly being bombarded with information, social media tools are essential in ensuring that a person's thoughts are not lost in the flood.

Wong, a school teacher in Calvada, expressed his opinions on Facebook in response to a post from Governor Norton concerning the state's new immigration policy. As a son of immigrant parents and teacher at a school with a diverse population Wong is no stranger to the impact of controversial immigration policies. Out of concern for his students and their families, Wong felt compelled to share his views of the Governor's policy. Governor Norton saw his response and emailed her Director of Social Media, "[I] saw nastygram by Wong in response to immigration announcement. [Please] delete/ban. Not appropriate for page." R. at 17. This email was sent at 9:45 P.M. R. at 17. Shortly after, Wong refreshed the Governor's Facebook page to find his comment deleted and his access banned. R. at 17.

Public discussion and debate is a cornerstone of this country's values. With advancing technology, the government has had an opportunity to better connect with its citizens to stimulate discussions and better understand their concerns. Government actors using social media platforms such as Facebook, or Twitter to collect feedback empowers individuals to express their political beliefs. When a government official uses one of these platforms to communicate and block viewpoints, our first amendment protections begin to erode.

I. Governor Norton's Deletion of Brian Wong's Facebook Comment.

A son of immigrants from Hong Kong and born and raised in Calvada, Wong works at a religiously affiliated school with a diverse population of students and families. R. at 13. March 5, 2016 started out as a normal afternoon for Wong. It was the close of a typical school day when Wong checked his personal Facebook account to catch up on news, connect with friends, and wish someone a happy birthday. On the same day, Governor Norton made an important immigration policy decision. R. at 26.

Wong expressed his unfavorable opinion on the Governor's immigration post as follows:

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.

While the Director of Public Security did not find the comment concerning, Governor Norton instructed her Director of Social Media to delete Wong's comment and ban him from accessing the GEN Page. R. at 20. The ban restricted Wong's access, stripping him of the ability to interact with the Governor and other constituents. R. at 17. Wong has contacted Governor Norton's office to have his access restored, but to no avail. R. at 28. Following Wong's post there were two additional disagreeing comments:

1. I disagree with the new Calvada immigration enforcement policy. It will harm our state's economy. (posted at 4:55 p.m.)
2. This is not a good policy. It will punish many hard-working people and their families. (posted at 6:12 p.m.)

Neither of these posts were deleted by the Governor. R. at 17.

II. The Impact and Function of the GEN Page.

A Facebook page enables users to amplify their reach, like a megaphone allows its user to communicate with a larger audience. Facebook is no longer the only a place to share pictures and

socialize, the site has evolved to serve a variety of functions. From doing business to sharing politics, Facebook has changed the way people interact with the world.

Governor Norton is no stranger to Facebook. Governor Norton created an account in 2008, but created a private page for herself in 2011. R. and 24 and R. at 25. From 2011 to 2016 Governor Norton used her Facebook page both personally and professionally. During that time, she would often make posts about her children or her coffee roasting business. Shortly after her inauguration in January, she changed the name of her page to “Governor Elizabeth Norton” and made her page available to the public. R. at 25. The Governor made her page public because she wanted to bring the State of Calvada into the twenty-first century by making herself more accessible to constituents via Facebook. R. at 14. The following are examples of some of the posts from her GEN Page.

1. “I’m moving Calvada into the 21st Century by introducing new and exciting ways to interact directly with me and my senior staff. Check my “Governor Elizabeth Norton” Facebook page often for exciting announcements and policies from YOUR government, and let me know what you think by posting your comments there. I will get back to as many of you as I can!” January 14, 2016 at 12:47 p.m. R.14.
2. “The state budget is a mess! I’m fighting to make the state better, to make government work for YOU. Tell me what your priorities are, and I’ll try to make sure they get included in the budget.” February 8, 2016 at 3:26 p.m. R.15.
3. “For my birthday I’m starting an exciting new initiative to make the road ahead smoother for everybody. Post a picture and the location of any post-winter potholes you see on the road here, and the State Department of Transportation is going to fix them as fast as they can. We make Calvada betta by workin’ togetha!” March 7, 2016 at 8:13 a.m. R.15.
4. “Calvada is open for business, but our state flag and logo are outdated. Have an idea for a new state flag? Everything submitted here will be considered. Are you good with words? Comment below with a logo, and you could help future generations live in a better, more prosperous state!” March 15, 2016 at 7:35 p.m. R.15.

Governor Norton inherited a Facebook page from the previous administration entitled “Office of the Governor of Calvada.” However, she repeatedly solicited questions, comments,

and general concerns from her constituents on her GEN Page. R. at 25. Therefore, it is unsurprising that Governor Norton posted her announcement regarding Calvada's new immigration policy on her GEN Page to keep her constituents updated in real time. Following her statement of the immigration policy, she encouraged constituents to discuss the new policy by stating:

I am announcing this policy here today because I know that those of you who visit this Facebook page are among the most active, influential, caring and patriotic citizens of the State of Calvada....As always, I welcome your comments and insights on this important step.

A Facebook user's homepage displays the user's timeline, which is entirely under each user's control. A page created by a user displays the timeline of that page. Pages are typically operated by several users and are generally considered a public space even when the page is private. An administrator of a page can control what is and what is not displayed on the page's timeline. Governor Norton and her staff are all administrators of the GEN Page. As administrators, they have the following controls over the GEN Page: publishing, removing and banning users, deleting comments, creating and deleting posts, and managing the page's settings.

Once banned from a particular page, a user, like Wong, cannot publish, "like," or comment on that page. An account ban is not an irreversible act, and an administrator may choose at any time to allow a banned account user full access to a page. To this day Wong has not received any reply from the Governor's office and remains banned from Governor Norton's page. R. at 28.

SUMMARY OF THE ARGUMENT

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who meant to be their own Governor’s must arm themselves with the power which knowledge gives.” *Packingham v. North Carolina*, 137 S. Ct. 1730, *1735 (2017). The truth of Madison’s admonishment is still alive today. However, the exchange of knowledge is no longer limited to letters on paper but has evolved into digital code passing from screen to screen. One of the most popular ways we gather, consume, and disseminate information, is through social media. Social media shapes and allows participation in our digital and democratic culture in ways that we typically associate with governments.

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen. *See Packingham*, 137 S. Ct. at *1735. It is a basic rule that parks and streets are quintessential forums for the First Amendment because of their devotion to public assembly and debate. *Id.* “While in the past there may have been difficulty in identifying the most important places for the exchange of views, today the answer is clear. It is cyberspace...and social media in particular.” *Id.* With over 1.37 billion daily active users, Facebook has become so intrinsic to modern life that it has been named the “modern public square.” *Packingham* at *1737.

Before *Packingham v. North Carolina*, social media sites were the judge, jury, and executioner in all matters of speech and assembly. However, in *Packingham*, this Court declared that social media websites, like the traditional public square, provide the most powerful mechanisms available to a private citizen to make his or her voice heard. *Id.* “They allow a person with an Internet connection to become a town crier with a voice that resonates farther

than it could from any soapbox.” *Id.* at *1735. Since *Packingham*, this Court rejected the notion that online speech is not afforded the same level of protection as other speech. *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329 (1997); *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013)

Like many politicians, Governor Norton has recognized the power and importance of social media and has utilized her GEN Page as an extension of her public office. Therefore, when she used her official Facebook page to post about the state immigration policy and invited constituent feedback she created a government-sponsored speech forum. *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376 (4th Cir. 2006). In creating this forum, her actions are attributable to the State of California. It follows that when the Governor deleted Wong’s comment criticizing her fitness to govern in response to her immigration post, she violated Wong’s First Amendment rights by engaging in impermissible viewpoint discrimination.

Fundamentally, the Governor’s actions in opening her GEN Page to the public established a government-sponsored forum for speech, and her subsequent deletion of Wong’s comment and the imposition of a ban precluding him from posting further on the GEN Page constitutes viewpoint discrimination that violates the rights guaranteed to Wong by the First Amendment.

Americans do not shed their constitutional rights to freedom of speech or expression when they create a Facebook account. *See Child Evangelism* at 865. Wong, by posting, online, therefore is entitled to the same level of protection that he would have if this dialogue occurred in person. Therefore, this Court should uphold the integrity of the First Amendment and uphold the decision of the Fourteenth Circuit Court of Appeals.

ARGUMENT

Everyday Facebook interactions consist of friends and family sharing photos, videos, news articles, status updates, and commentary on other posts. As Facebook has grown the platform has become a powerful resource for organizations, companies, and the government to disseminate ideas. The government's involvement in Facebook necessarily calls upon constitutional issues. Whenever the government is participating in an activity its involvement is controlled by the parameters of federal law – namely, and most importantly, the constitution.

I. Deleting and Banning Wong from the GEN Page are Actions Attributable to the State.

Governor Norton uses the GEN Page as a virtual extension of her public office position. The page is littered with posts and interactions with constituents that visit the page. The activities on the page indicate the representation that the Governor uses the GEN Page in an official state capacity, performing governmental duties. The Governor's intention for the page was to bring the Office into the twenty-first century by establishing a more significant online presence. This case demonstrates a situation where creative uses of technology have surged ahead of the law. The Court is presented with an opportunity to make a pivotal decision about the interplay between citizen's private lives and their guaranteed rights under the First Amendment.

For a First Amendment claim to succeed against Governor Norton, her deletion of Wong's comment must have been performed under color of state law. *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003). An action is performed under color of state law if the action has a "sufficiently close nexus with the State itself". *Id.* When an action arises out of public, not personal circumstances, that action is under color of state law. *Id.* at 18. This is especially

applicable when the sole intention of the public officer is to suppress speech that is critical of their performance and actions in office. *Id.*

The GEN Page is a clear instrument of governance qualifying as state action because of how the Governor and her staff utilize the page. In *Davison*, a chairman of the Board of Supervisors for Loudoun County, Phyllis J. Randall, created a Facebook page shortly before elected into public office. *Davison v. Loudoun Cty. Bd. of Supervisors*, No. 16-cv-932, 2017 WL 2158389 (E.D. Va. July 25, 2017). This page was used as a communication instrument in helping govern the county by collecting issues, requests, criticisms, compliments and other thoughts from the people of the county. *Id.* at *4. A citizen posted unfavorable comments towards Randall on the page resulting in their ban for a period of time. *Id.* at *13. *Davison* poses questions concerning the constitutional limitations on social media accounts operated by elected officials. *Id.* at *1.

The court analyzed the issue under a totality of circumstances approach considering factors such as (i) how the page is titled, (ii) content of the page, (iii) who the posts on the page are addressed to, (iv) how the Chairman asked citizens to use the page, (v) who manages the page, (vi) when the page was created, (vii) what devices make updates on the page, and (viii) where the link to the page was posted. *Id.* at *20-*21. No one factor is dispositive, but the court found that because the Chairman's page was presented as being a tool of governance, and often posted and inquired about state affairs, those factors weighed heavily in favor of state action. *Id.* at *16. The court found the Facebook page, "arose out of public, not personal circumstances", the citizen's comment was addressed to the Chairman's post, therefore, the Chairman operated the page "under the authority vested in [her] by the state. *Id.* at *21-*22. Randall's actions constituted state action thus Randall's ban of the citizen from her page was unconstitutional. *Id.* at *43.

The facts of *Davison* clearly mirror Governor Norton's actions in this case. The GEN Page is primarily used for the purpose of connecting with and governing the citizens of Calvada.

Governor Norton has routinely used this page to help solve state problems, encourage constituent feedback, provide information, and connect to people on a personal level. For example, the page was used to illicit feedback for a new state flag and state budget proposals.

Additionally, the Governor has invested state resources in monitoring and updating the GEN Page. The Governor's Director of Social Media routinely manages the Facebook page, by posting photos, and official statements. Other members of the Governor's staff monitor the page to collect action items from citizens and watch for potential threats. R. at 3. Governor Norton's campaign director authorizes what can and cannot be posted on this page and regularly discusses the social media account and strategy with the Governor. R. at 23.

The goal of the GEN Page was to create an unprecedented level of access for her constituents via social media. This was more than a personal Facebook page, it was a tool created by the Governor to help the state connect with its citizens and keep them updated on the actions of the administration. Governor Norton wanted to use this page to help citizens feel more connected to the administration through Facebook. Based off the totality of circumstances analysis used in *Davison*, the manner in which Governor Norton uses the GEN Page establishes a sufficient nexus between the page and the powers vested in her by the State of Calvada.

The actions of both parties arose from the controversy surrounding the state's new immigration policy adopted by the Governor Norton. Wong's comment on the GEN Page was posted in response to a political decision on immigration by Governor Norton, not the result of personal animosity. Governor Norton removed Wong's comment because it was a criticism of her politics, which she did not want displayed on Facebook, her virtual discussion board. The

Governor removed the comment by ordering her Director of Social Media to delete Wong's comment and ban him from the page. The Governor acted "out of censorial motivation" in an effort to silence Wong's opinion. R. at 26.

Governor Norton argues the acts of the page are private action because the page is frequently managed outside of normal working hours, by devices that have been authorized by the state for purposes other than governance, and will return to her once her public service is complete. These private action contentions are not persuasive. In *Davison*, the Chairman made similar arguments. First, maintaining a social media site was not part of her enumerated duties. Second, the site would not return to the County when she left office, and lastly, she mostly maintained the page after working hours. *Davison* at *16. The court found these factors were not dispositive or convincing. *Id.*

Communicating information and listening to constituents are traditional functions of state officials that have become modernized through the use of technology. When performing traditional functions of the state in a private capacity those actions may become public state actions. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946). In *Marsh v. Alabama*, this Court held a private corporation's operation of a town that it privately owned constituted state action. *Id.* When a private entity opens up its property for use by the public, the more constricted it becomes in adhering to constitutionally protected rights. *Id.*

Governor Norton, opened her Facebook page to the public by changing her privacy settings to allow anyone to view the page, and inviting comments from her constituents. Additionally, operating the GEN Page from a personal device or after working hours does not make the acts exempt from state action. The acts were performed in furtherance of governing the state. Even if

the page was intended to return to Governor Norton after she completed her service, the page is being used for state purposes during her time as governor.

The First Amendment protects the interests of constituents, over that of the government. As such, the law must empower citizens to share their ideas which will help foster the exchange of ideas, and bring political improvements. Whether this page was originally the personal profile of a politician is no longer relevant, because it is now the page the average citizen seeks out first when sharing political beliefs. Governor Norton's actions were perpetrated under color of state law because the requisite nexus between the Calvada State Governor and the deletion of Wong's comment arose out of political censorial motivation.

II. Governor Norton Infringed on Wong's First Amendment Rights by Engaging in Viewpoint Discrimination in a State-Sponsored Forum.

History dictates that places by which long tradition have been devoted to assembly and debate, such as public parks or town squares, are forums where freedom of speech protection is quintessentially protected. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983). Despite its twenty-one years of existence, social media is not considered a traditional forum. To be afforded constitutional protection a forum for speech does not have to physically exist. Rather, a forum can exist in a "metaphysical rather than in a spatial or geographic sense...and the same legal principals are applicable." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515, 516 U.S. (1995) (holding the University of Virginia's student activity fund is a forum for First Amendment purposes and the subsequent denial of funds to a Christian student newspaper is unconstitutional); *See Perry Educ.* 460 U.S. 37 (forum analysis applies to a school district's internal mail system); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985) (forum analysis applies to a charitable contribution program).

As history changes, precedent dictates that freedom of speech protections extend far beyond the quintessential parks and town squares to those forums that share similar or the same characteristics. *See Packingham*, 137 S. Ct. 1730 at 1735. In fact, this Court has stated that one of the most important places for the exchange of views today is clear—it is cyberspace and social media in particular. *Id.* In more recent opinions, the Court has coined social media sites like Twitter, “the electronic equivalent of a public square.” *Twitter, Inc. v. Sessions*, 263 F. Supp. 3d 803 (N.D. Cal. 2017). 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 traditional soapbox. *See Reno*, 521 U.S. 844, at 870.

Amidst this Cyber Revolution, it would be incorrect to conclude that social media affords unlimited constitutional protections. Even in the midst of thought revolutions, there is a balancing of freedoms between the government and those it governs that must be accounted for. It is a long-established principle that when the government speaks, it is not barred by the Free Speech clause for determining the content of what it says. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015). This is known as the government speech doctrine. “Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas.” *Id.* at 2246.

A. Facebook Comments Closely Resemble the Speech of Federally Registered Trademarks Where the Government Speech Doctrine is Not Germane.

When the government exercises its right to speak, the free speech clause of the First Amendment is not implicated. *See Rosenberger*, 515 U.S. 819. The doctrine of government speech most notably encompasses speech and expression on state license plates and monuments in public parks. *See Walker*, 135 S. Ct. 2239 (holding that state license plates are form of

government speech, and therefore the government’s rejection of controversial license plate designs is constitutional); *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009) (holding permanent monuments displayed on public property typically represent government speech). In *Pleasant Grove*, this Court relied on factors such as the history of the medium, whether the medium is closely identified in the public mind with the state and the extent to which the state has effectively controlled the message as indicative of government speech. *Id.* at 473. This Court found that because the government has long used monuments to speak to people, people associate monuments as conveying messages on the owner’s behalf. This Court held that the government speech doctrine applied because of the city’s long use in controlling and maintaining monuments in parks. *Id.* at 472. In applying the *Pleasant City* factors, this Court, in *Walker*, found the second factor weighed heavily towards the application of the government speech doctrine to license plates, “because license plates designs ‘are meant to convey and have the effect of conveying a government message, [t]hey constitute government speech.’” *See Walker*, 135 S. Ct. 2239 at 2250.

“While the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could qualify as government speech by simply affixing a government seal of approval, the government could silence or muffle expression of disfavored viewpoints.” *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). In *Matal*, this Court limited the application of the government speech doctrine when it rejected the idea that Federally Registered Trademarks represent government speech. *Id.* In *Matal*, this Court held a provision of the Lanham Act, which allowed the Patent and Trademark Office the ability to reject marks for registration if they could be considered “disparaging,” unconstitutional. *Id.* at 1757. The *Matal* court applied the three *Pleasant City* factors while also considering whether

trademarks, like license plates, have traditionally been used to convey a government message. *Id.* at 1760. Because the government does not dream up these trademarks nor edit those submitted for registration, this Court concluded the government speech doctrine does not apply. *Id.*

Facebook comments closely resemble the speech of federally registered trademarks where the government speech doctrine is not germane. *See Matal*, 137 S. Ct. at 1760. Like federally registered trademarks, when Governor Norton invites her constituents to voice their views on a Facebook post, she in no way engineers or edits the content of the speech that is posted. In particular, comments on Facebook are attributed to the source of the comment, the individual, not the maker of the post. Like trademarks, Facebook comments are by their nature bound to have expressive content. It would be far-fetched to suggest the content of every Facebook comment on Governor Norton's immigration post is government speech. If so, Governor Norton is not only praising her new immigration policy but also saying it will, "harm our state's economy," "punish many hard-working people and their families," and lastly, comparing her fitness to govern to that of a scoundrel. *R.* at 4. Similar to trademarks, if Facebook comments are to be considered government speech then Governor Norton "...is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views." *See Matal*, 137 S. Ct. at 1758. This is simply not the case. Where the government is not speaking the government speech doctrine does not apply.

Wong's user comment on the GEN Page does not constitute government speech. Applying the *Pleasant City* factors to this case, the first factor's emphasis on traditional use by the state to convey messages is not dispositive. However, Facebook has been recognized as the modern public square when freedom of speech protections can be implicated. *See Reno*, 521 U.S. at 870. Rather than conveying state messages, Governors in all 50 states, and almost every member of

Congress have set up Facebook accounts to engage with their constituents. Government agents create Facebook pages as a forum for speech and a marketplace to exchange ideas to make our country and cities, like Calvada, according to Governor Norton “a better place to live.” R. at 25.

Similar to *Walker*, the last two *Pleasant City* factors are persuasive in this case. When Wong responded to Governor Norton’s invitation to comment on her immigration post, unlike *Walker*, he was not requesting the government to speak on his behalf, nor was he asking Governor Norton to include his speech in such a fashion that anyone could reasonably mistake the Governor’s speech for his own. The comments from individual constituents on the GEN Page are not meant to convey, nor have the effect of conveying, a government message. There is no debate that when an individual, like Wong, comments on the Governor’s post from a personal account that reads “Brain Wong,” other Facebook users and constituents will not associate it as the Governor speaking.

Governor Norton used her Facebook page to communicate government policy, but constituent comments like Wong’s are neither created nor edited by her staff. Comments by their nature are expressive and user-specific much like federally registered trademarks, rather than license plates or public monuments. Therefore, Brain Wong’s individual Facebook comments are not government speech.

B. Governor Norton’s Use of Her Facebook Page as a Limited Public Forum Implicates First Amendment Protections Against Viewpoint Discrimination.

There are two types of forums, traditional public and nonpublic forums. Traditional public forums are classified as either designated or limited. It is an established principle that public fora are not limited to property owned by the government. *See Marsh*, 326 U.S. 501. Although Facebook is homage to private individual profiles and speech it, also hosts pages for public figures. Like the city sidewalks and town squares at issue in *Marsh*, “the Timelines, News Feeds,

and Pages of Facebook have become a public forum where users go to voice their opinions, tell their stories, express ideas, and receive information from the rest of the community.” *Facebook: The New Town Square*, 44 SW.L.REV. 385, 389 (2014). Comparable to the corporate town in *Marsh*, Facebook has created a community that has taken on characteristics of a public square, like a modern public forum.

The government can create a limited public forum by creating a channel for a specific or limited type of expression where one did not previously exist. *See Child Evangelism*, 457 F.3d at 382. In *Child Evangelism*, a religious organization sought access to a school district’s flyer forum to advertise its after-school activities. *Id.* at 379. The school district originally had complete control over this forum. *Id.* However, when it began to use its flyer forum to provide a method to facilitate communication between government actors, community groups, and parents of elementary school children the court held that it embodied a limited public forum. *Id.* at 383. This case illustrates the principle that government forums are fluid and the government can intentionally create a limited public forum where one does not previously exist. *Id.*

To ascertain whether a government intended to designate a place not traditionally open to assembly and debate as a public forum, the Court looks to the policy and practice of the government and the nature of the property and its compatibility with expressive activity. *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008). In *Page*, the school district created and maintained a website that was under its complete control. *Id.* at 278. However, the Fourth Circuit stated that if school district transformed its website into a type of “chat room” or “bulletin board” in which private viewers could post information, the district could have opened a forum for speech subject to the forum analysis. *Id.* at 284. With a mission to give people the power to share and make the world more open and connected—Facebook is such a forum.

However, it is not what the government says that determines the nature of the forum, but rather the nature of the forum and its compatibility with expressivity. *See Cornelius*, 473 U.S. at 800. Recently, it was held that a government official’s actions that allowed the public to have “virtually unfettered discretion” on her Facebook page was more than sufficient to create a forum for speech. *See Davison*, No. 16-cv-932, at *26. In *Davison*, the court held that when Randall deliberately permitted public comment on her Facebook page, she created a government-sponsored speech forum. *Id* at 26.

Governor Norton’s use of her Facebook page as a tool of governance and interaction with her constituents has an uncanny resemblance to *Davison*. In particular, she designated her Facebook page as a channel of communication between her and the citizens of Calvada when she ended her immigration post by affirmatively soliciting feedback on the policy. R. at 3. Similar to *Davison*, when the Governor solicited insight and feedback on state matters she designated her page as government sponsored speech forum.

C. Governor Norton Engaged in Viewpoint Discrimination When She Banned His Access and Deleted His Comment on the GEN Page.

Regardless of the forum, it is a fundamental principal that speech may not be banned on the ground that it expresses ideas that offend or that are contrary to government opinion. *See Matal*, 137 S. Ct. at 1751. In other words, viewpoint discrimination is forbidden. *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533 (1989).

This court has defined viewpoint discrimination as an egregious form of content discrimination by which the state targets not the subject matter, but particular views taken by a speaker on the subject. *See Rosenberger*, 515 U.S. at 829. In *Rosenberger*, the University of Virginia declined to provide student activities funding for the publication of a Christian magazine. *Id.* at 827. The University refused funding because the magazine, “primarily promotes

or manifests a particular belief in or about a deity or an ultimate reality,” prohibited by University policy. *Id.* at 823. This Court determined the refusal of funding on the basis that the content of the magazine was religiously oriented amounted to viewpoint discrimination. *Id.* Holding that viewpoint discrimination is forbidden even when the public forum is one of the government’s creations. *Id.* at 829. Like the university in *Rosenberger*, when Governor Norton encourages participation from constituents on the GEN Page viewpoint is required.

The role of the First Amendment not only focuses on fostering individual self-expression but also on affording the public access to discussion, debate, and the dissemination of information and ideas. *Bd. of Educ. v. Pico*, 457 U.S. 853, 102 S. Ct. 2799 (1982). In *Pico*, this Court held that First Amendment protections apply to the removal of books within the school environment. *See Pico*, 457 U.S. at 867. In *Pico*, the court compared the purpose and functioning of the school library and found it to be no less than that of a public library. *Id.* at 868. The court stated that “the right of freedom of speech and press...embraces the right to distribute literature, and necessarily protects the [student’s] right to receive it.” *Id.* at 447. Therefore, where there is a right to disseminate and receive information First Amendment protections are implicated.

Related to the removal of books in *Pico*, this case concerns the removal of a comment and subsequent ban from commenting on a government official’s Facebook page. Consequently, like the school board in *Pico* rightly possess significant discretion to determine the content of their school libraries, Governor Norton has significant discretion to determine the content of her GEN Page. *See Pico*, 457 U.S. at 859. However, while acting in her official government capacity, that discretion may not be exercised to regulate speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *See Perry*, 460 U.S. at 46.

The suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment protects. *See Davison*, No. 16-cv-932, at *26-*27. In particular, speech of public concern is afforded the highest degree of protection. *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207 (2011). The ability to question an official's fitness to govern in response to a policy decision is the very speech relating to political concern that is protected by the First Amendment. It was under a similar case in *Davison*, where this same behavior resulted in the court holding that the county official engaged in viewpoint discrimination when she banned a constituent from her Facebook page for criticizing her colleagues in the County government. *See Davison*, No. 16-cv-932, at *31-*32. Governor Norton's actions are equivalent to official's in *Davison*. Therefore, like Randall, Governor Norton engaged in viewpoint discrimination by banning and deleting Wong's comment on the basis that it criticized her fitness to govern.

However, freedom of speech protections against viewpoint discrimination do not forbid public officials to moderate comments on their social media websites, or that it will always violate the First Amendment to ban or block commenters from such websites. *See Davison*, No. 16-cv-932, at *31. The First Amendment recognizes that a degree of moderation is necessary, like that in a traditional public square, "to preserve social media websites as useful forums for the exchange of ideas." *Id.* In *Davison*, the court stated that neutral social and comprehensive media policies which are maintained by many municipalities and organizations can provide this type of guidance. *Id.* Governor Norton has no such policy. Her actions were in response to what she called a "nasty gram" about her fitness to govern as a result of a controversial public policy. Such speech of public concern that would be protected in the traditional public square, by being

online, according to *Davison*, is still awarded the same protection. Therefore, Governor Norton committed a cardinal sin by engaging in viewpoint discrimination under the First Amendment.

CONCLUSION

The freedom of speech does not mean the freedom to delete. This Court should affirm the decision of the Fourteenth Court of Appeals.

CERTIFICATE OF COMPLIANCE

1. The work product contained in all copies of Team 14's brief is in fact the work product of its team members;
2. Team 14 has complied fully with its school's governing honor code; and
3. Team 14 has complied with all Rules of the Competition.

Team 14

Attorneys for Respondent

Date: January 31, 2018