No. 17-874

IN THE

Supreme Court of the United States

ELIZABETH NORTON,
IN HER OFFICIAL CAPACITY AS GOVERNOR, STATE OF CALVADA,
Petitioner,

v.

BRIAN WONG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER

Team 22
Counsel for Petitioner

QUESTIONS PRESENTED

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

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

BRIEF CERTIFICATE

Team 22 certifies the following:

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

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on November 1, 2017. *Wong v. Norton*, No. 17-874, slip op. at 12 (14th Cir. Nov. 1, 2017). Petitioner timely filed a petition for a writ of certiorari, which this Court granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C.A. § 1254(1) (Westlaw through Dec. 8, 2017).

STATEMENT OF THE CASE

Respondent Brian Wong brought this action against Petitioner Elizabeth Norton in her official capacity as Governor of the State of Calvada, pursuant to 42 U.S.C.A. § 1983 (Westlaw through Dec. 8, 2017), alleging that Governor Norton had deprived him of his First Amendment right of free speech by deleting Mr. Wong's reply to Governor Norton's immigration policy post and blocking Mr. Wong from posting on the Governor Elizabeth Norton Facebook Page (GEN Page). R. at 1.

Both parties filed motions for summary judgment. R. at 5. In determining whether Mr. Wong had a cognizable claim under the state action doctrine, the United States District Court for the District of Calvada found that maintaining the GEN Page was not a public function, R. at 7, but concluded that state action existed because of a factual nexus between the State of Calvada and the GEN Page. R. at 7–10.

The district court went on to conclude that the three factors enunciated in *Walker v. Tex. Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015) (collectively "the *Walker* factors"), counseled a finding that the comments on the GEN Page—including the immigration policy post and Mr. Wong's comment—constituted government speech and were therefore not restricted by "First Amendment limitations on viewpoint discrimination." R. at 10-12. Accordingly, the district court granted Governor Norton's motion for summary judgment. R. at 12.

On appeal, the United States Court of Appeals for the Fourteenth Circuit affirmed the district court's ruling with respect to the state-action nexus, R. at 33–34, but reversed the district court's ruling with respect to government speech. R. at 2, 39–40. Specifically, the Fourteenth Circuit applied the *Walker* factors and determined that the GEN Page was a government-sponsored forum, requiring heightened First Amendment protections, rather than government speech. R. at 35–36. Therefore, the Fourteenth Circuit concluded that the actions with respect to Mr. Wong were viewpoint discrimination, violating the First Amendment. R. at 38. The Fourteenth Circuit remanded the case to the district court to enter summary judgment in favor of Mr. Wong, R. at 40, and Governor Norton timely petitioned this Court for a writ of certiorari, which this Court granted. R. at 41.

STATEMENT OF THE FACTS

I. Elizabeth Norton And The GEN Page

Governor Elizabeth Norton started her career not in politics, but as a businesswoman. R. at 24. After opening a small, coffee-roasting business while in college, she expanded the business and developed a public presence as its owner. R. at 24–25. In 2008, Governor Norton created a personal Facebook account to connect with family and friends online, and three years later she created an additional page titled "Elizabeth Norton," to share personal and business announcements with her "connections" on Facebook. R. at 24–25. In 2015, she participated in her first political election, running for Governor of the State of Calvada. R. at 25. She won the election, and was sworn in as Governor in January 2016. R. at 25. One day later, she added "Governor" to the name of her Facebook page, reflecting her new title. R. at 25. At that time, Governor Norton also made the GEN Page viewable by all members of the public, hoping that her constituents might follow the Page and "have a personal connection" with her. R. at 25.

Governor Norton also "inherited" the official Facebook page of the Calvada Governor's Office (the "official page"), which had been used by the previous administration. R. at 25. A link to the official page appears on the state's official website. R. at 25.

Governor Norton continues to use the GEN Page in much the same way as she had before she took office: sharing updates about both her personal and professional life. R. at 25. This includes "post[ing] photographs of [her] daughter and husband, [posting her] thoughts on the news and national events," and chronicling the work of her administration. R. at 25. Governor Norton has sought constituent input on her administration's activities: posting targeted questions about ideas to improve the state and streamline regulations, seeking opinions about various pieces of legislation, and soliciting ideas for a new state flag and logo. R. at 25. Because she has operated the Page and has updated it with both personal and professional news for more than six years, Governor Norton intends to continue using the GEN Page after her public service is complete. R. at 26.

Governor Norton's Social Media Director, Sanjay Mukherjee, and her Chief of Staff, Mary Mulholland, have access to both the GEN Page and the official page, and are able to post updates and monitor and respond to comments. R. at 20–23. Likewise, her Director of Public Security, Nelson Escalante, monitors her social media accounts for security threats, and "flag[s]" threatening posts for the Governor's office. R. at 18–19. Governor Norton's staffers manage the official page, while Governor Norton "personally posts far more often on her GEN Page." R. at 30–31. When Governor Norton announces a government initiative on the GEN Page, one of her staff members reposts the announcement through the official page. R. at 26.

II. The Immigration Policy Post And Mr. Wong's Comment

On March 5, 2016, Governor Norton informed GEN Page followers of her administration's intention to "commit the law enforcement resources" of Calvada to enforcing federal immigration laws. R. at 15–16. Noting that she did not "make this decision lightly," Governor Norton appealed to her followers directly, addressing common concerns about the immigration policy, and explaining why she believed it was important and necessary. R. at 16. She explained that, within a few minutes of posting the update on the GEN Page, she would hold a news conference to announce the policy, and would later issue an executive order enacting the policy. R. at 16. She also directed GEN Page followers to a government website for more information about the policy. R. at 16. She ended the post by welcoming "comments and insights" about the policy from her followers. R. at 16.

The "immigration policy post" garnered diverse responses about the policy throughout the day, ranging from critical to favorable, R. at 26, including comments from users who stated that they believed the policy would "harm [the] state's economy" and "punish many hard-working people and their families," R. at 17. Having encouraged responses that offered productive feedback about the policy, Governor Norton saw no reason to delete these comments. R. at 17. That evening, however, while reviewing comments posted on the GEN Page, Governor Norton noticed Mr. Wong's comment, R. at 26, which stated:

> 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.

Governor Norton found this comment to be "an *ad hominem* attack that was unrelated to [her] immigration policy announcement and unresponsive to [her] invitation for constituent input

on the policy." R. at 26. She determined that the comment was inappropriate for the GEN Page because she believed Facebook users "should not be able to attack [her] like that on [her] own Facebook page." R. at 26. At 9:45 p.m., she emailed Mr. Mukherjee asking him to delete the comment and prevent Mr. Wong from posting further. R. at 17. The next day, Mr. Wong realized that his post had been taken down, and that he was no longer permitted to comment on the GEN Page. R. at 28. He emailed Governor Norton's office and requested that his post be reinstated, and that he be allowed to post on her page once again. R. at 28. Governor Norton did not respond to Mr. Wong's request. R. at 28. Mr. Wong then filed the present suit against Governor Norton to compel her to restore his deleted comment and allow him to post future comments on the GEN Page. R. at 1.

SUMMARY OF THE ARGUMENT

This Honorable Court should reverse and remand the Fourteenth Circuit's holding because Governor Norton's actions with respect to Mr. Wong were not state actions, but private ones. Governor Norton's powers to delete comments and block users from her personal Facebook page are not possessed by virtue of public office. Indeed, Governor Norton could perform these same actions even if she were not Governor. Her decision to delete Mr. Wong's comment and block him from the Page resulted from personal discretion rather than state policy, and expressed only personal preference. Additionally, Governor Norton's private actions cannot be fairly attributed to the state through a nexus or public function analysis. The Fourteenth Circuit erred by applying nexus tests to Governor Norton that were designed by this Court for private entities. Private entities typically have nonobvious state involvement and the factors considered by this Court's past analyses reflect that reality. Governor Norton is concededly an employee of the state and by virtue of her position, has a connection with the state that alone is

not enough to make her private conduct state action. As applied to public officials, the nexus analysis must look beyond factors that show a connection incidental to the official's employment. Otherwise, the ability of a public official to engage in personal pursuits would be impermissibly diminished. The requisite nexus must require state involvement above and beyond factors that are merely incidental to the official's position itself. Such a nexus does not exist in this case. Governor Norton's private actions also cannot be attributed to the state on the theory that use of the GEN Page is a public function. Few activities have been deemed public functions, and those that have been are traditionally and exclusively reserved to the state. Use of a Facebook page is neither of these.

Even if this Court finds state action, it must nonetheless reverse the Fourteenth Circuit's holding because content displayed on the GEN Page is government speech, as demonstrated by a proper application of this Court's three-factor analysis in *Walker*. This analysis distinguishes between government speech, which is not subject to First Amendment restrictions against viewpoint discrimination, and speech in a government-sponsored forum, which is. Applying the first *Walker* factor to the instant case, the brief history of social media supports a finding of government speech, because public officials have used social media to communicate with constituents for almost as long as it has existed. The second *Walker* factor, concerned with whether messages conveyed through the medium are closely associated with a government actor, also indicates that the Page is government speech. The context of the GEN Page, created and operated by Governor Norton and containing her name, title, and updates about her administration, ensures that visitors to the Page understand that she is associated with all of its content. Further, because the average Facebook user realizes that page owners control the content on their pages, even comments posted by others are closely associated with Governor

Norton, as the ultimate controller of the GEN Page. Finally, the third *Walker* factor—whether the government exercises control over the medium—further demonstrates that content on the GEN Page is government speech, because Governor Norton exercises final approval authority over the Page, retaining the power to approve messages that are appropriate for the Page and exclude those that are not. Thus, this Court should reverse and remand the Fourteenth Circuit's erroneous decision.

ARGUMENT

I. The Fourteenth Circuit's Holding That The Challenged Actions Were State Action Must Be Reversed Because Those Actions Were Private Actions And Cannot Be Fairly Attributed To The State.

This Court must reverse the Fourteenth Circuit's holding that deleting Mr. Wong's post and blocking him from posting on the GEN Page constituted state action because: (1) the actions themselves were private actions that did not result from government policy, and (2) the private actions cannot be fairly attributed to the state through a nexus test or the public function test.

The Fourteenth Amendment protects citizens' rights only against state action. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). *See also The Civil Rights Cases*, 109 U.S. 3, 11, 13 (1883). Thus, a deprivation of Fourteenth Amendment rights may be challenged only where those rights are deprived "under color [of state law]."[1] 42 U.S.C.A. § 1983. Private conduct, "no matter how discriminatory or wrongful," cannot offend the Fourteenth Amendment, and is not actionable under Section 1983. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quotation omitted). *See also Rendell-Baker v. Kohn*, 457 U.S. 830, 837–38 (1982). The

[1] Conduct that qualifies as state action also satisfies the "under-color-of-state-law" requirement of Section 1983. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 935 & n.18 (1982).

only exception is when the state "significantly involve[s] itself" with discrimination by private entities. *Moose Lodge*, 407 U.S. at 173.

A. The challenged actions were private decisions and did not result from government policy.

"[T]he touchstone of the [Section] 1983 action against a government body is . . . that official policy is responsible for a deprivation of [protected] rights . . . ." *Monell v. Dep't of Soc. Serv's of the City of N.Y.*, 436 U.S. 658, 690 (1978). Examples include discriminatory statutes, *Gilmore v. City of Montgomery*, 417 U.S. 556, 558–59 (1974), and "custom[s] having the force of law." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171–72 (1970). Public officials engage in state action when they use or misuse power "possessed by virtue of state law . . . ." *United States v. Classic*, 313 U.S. 299, 326 (1941). *See also West v. Atkins*, 487 U.S. 42, 50 (1988) ("[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law."). The exercise of such power must be "made possible only because the wrongdoer is clothed with the authority of state law . . . ." *Polk County v. Dodson*, 454 U.S. 312, 317–18 (1981); *Classic*, 313 U.S. at 326. The "acts of [officials] in the ambit of their personal pursuits are plainly excluded" from the state action doctrine. *Screws v. United States*, 325 U.S. 91, 111 (1945).

This Court has found state action where law enforcement officers beat an individual to death during an arrest. *Id.* at 92–93. The officers had abused their duty under state law "to make the arrest effective." *Id.* at 110. Similarly, election commissioners engaged in state action when they purposefully miscounted ballots, because the alleged acts "were committed in the course of their performance of duties under the . . . statute requiring them to count the ballots . . . ." *Classic*, 313 U.S. at 325–26. By contrast, a public defender was held not to have engaged in state

action, despite being employed by the State, because public defenders "exercise [] independent judgement" and are "not amenable to administrative direction . . . ." *Dodson*, 454 U.S. at 321.

The Fourteenth Circuit glossed over this Court's admonition that state action exists "only" where acts are "made possible" by virtue of state authority. R. at 33; *Dodson*, 454 U.S. at 317–18. Indeed, Governor Norton could have taken the actions challenged by Mr. Wong even if she utterly lacked state authority. No statute or other expression of state policy mandates the GEN Page or creates the authority by which it is edited or maintained. *See Monell*, 436 U.S. at 690. Unlike the scenarios encountered in *Screws* and *Classic*, no express source of State authority exists by which Mr. Wong's post was deleted, or by which Mr. Wong was blocked. Governor Norton's position does not require her to "maintain social media accounts, or interact with constituents via social media in any way." R. at 26. Like the public defender in *Dodson*, Governor Norton is free to "exercise [her] independent judgement," with respect to the GEN Page, 454 U.S. at 321, and therefore, may discontinue communication with any GEN Page follower at any time. As such, the GEN Page cannot be said to be a "power possessed by virtue of state law . . . ." *Classic*, 313 U.S. at 326. Governor Norton could post updates, delete posts, and block users eight years before she assumed office. R. at 14. And her ability to exercise such editorial powers will continue after her governorship concludes. R. at 26. They will not cease simply because she is no longer "Governor" Norton and therefore, are not "made possible only because [she] is clothed with the authority of state law . . . ." *Classic*, 313 U.S. at 326.

Properly viewed, Governor Norton's use of the GEN Page is a personal choice fueled by her decision to interact with people "[o]n a personal level . . . as an individual . . . ." R. at 25. The actions with respect to Mr. Wong were not official actions that expressed state policy but rather personal actions that expressed personal preference. *Monell*, 436 U.S. at 690. As Governor

Norton noted, Mr. Wong's post was "unresponsive" to the immigration policy post. R. at 26. Governor Norton perceived it as an *ad hominem* attack and her impetus for deleting Mr. Wong's post and blocking him was her personal conviction that Mr. Wong "should not be able to attack [her] like that on [her] own Facebook page." R. at 26. The conclusion that Governor Norton's objection was a personal one and not political in any way is bolstered by the fact that she did not delete at least two other posts criticizing the immigration enforcement policy. R. at 17. Governor Norton's reaction to Mr. Wong's post occurred "in the ambit of [her] personal pursuits," and is "plainly excluded" from the state action doctrine. *Screws*, 325 U.S. at 111.

B. The private actions with respect to Mr. Wong cannot be fairly attributed to the state.

The Fourteenth Circuit erred in analyzing Governor Norton's private actions as if Governor Norton were a purely private individual. To preserve a public official's ability to engage in private conduct, the analysis of whether a public official's private actions can be fairly attributed to the state must depend on factors that reveal state involvement beyond that which exists simply because the official holds public office. Such involvement did not exist in the instant case.

Generally, private action can be considered state action only when the state provides "significant encouragement," *Moose Lodge*, 407 U.S. at 173, or so "significantly involve[s] itself," *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 546 (1987) (quotation and citations omitted), that the private action must be considered that of the government. To parse out state involvement, this Court has derived "factbound" analyses, *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 621 (1991), giving weight to different factors in different contexts. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982). *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (itemizing the coercion test, joint

participant test, public function test, and entwinement test); *S.F. Arts*, 483 U.S. at 556 (discussing the "symbiotic relationship" test derived in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)). As correctly applied, none of these analyses reveal state action in the instant case.

1. The private actions had an insufficient nexus with the state.

The majority of this Court's tests focus on the relationship between the state and the private party, asking "whether there is a sufficiently close nexus between the [s]tate and the challenged action . . . so that the action . . . may be fairly treated as that of the [s]tate itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). *See Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 18–21 (1st Cir. 1999). Because "readily applicable formulae may not be fashioned," this Court has designed these tests for specific and unique factual scenarios, *Burton*, 365 U.S. at 725, has cautioned that none of them are "infallible," *Gilmore*, 417 U.S. at 574, and has only applied them to "ostensibly" private parties, *Brentwood*, 531 U.S. at 302. *See, e.g., Edmonson* (private litigants); *Gilmore* (private schools); *Evans v. Newton*, 382 U.S. 296 (1966) (privately owned park); *Burton* (privately owned restaurant). In suits against private parties, finding state involvement often requires a fact-intensive inquiry to discover "nonobvious" connections with the state. *Burton*, 365 U.S. at 722. Where, as here, a public official's actions are challenged, lower courts have little guidance, and nearly boundless discretion, as to what factors are significant in an already "elusive" inquiry. *Perkins*, 196 F.3d at 18.

Nexus tests designed to uncover "nonobvious [state] involvement" in private conduct, cannot be applied the same way to public officials as they are to private individuals. *Burton*, 365 U.S. at 722. Otherwise, a public official's purely "personal pursuits" would fall prey to the state action doctrine. *Screws*, 325 U.S. at 111. This is because public officials share a nexus with the

state by virtue of their positions, which is not necessarily indicative of state action. Accordingly, this Court has refused to analyze a public defender under nexus tests, which are designed for purely private entities, pointing to the fact that a public defender "is concededly an employee of the county . . . ." *Dodson*, 454 U.S. at 322 n.12. It would defy logic to harness a nexus test, which is designed to uncover covert state involvement, to emphasize a connection that almost certainly exists by virtue of public office itself. By doing so, a court automatically equates state action with state employment. *See Davison v. Loudoun Cty. Bd. of Supers.*, 267 F. Supp. 3d 702, 707–08, 713-15 (E.D. Va. 2017) (uncovering the obvious connection between a county and the chair of the county board of supervisors), *appeal filed*, *Davison v. Randall*, No. 17-2002, 2017 WL 5186504 (4th Cir. 2017). And courts have recognized that "[j]ust because [an individual] is a [public official] does not mean that everything he does is state action." *Gritchen v. Collier*, 254 F.3d 807, 812 (9th Cir. 2001).

Thus, when a public official's *private* action is challenged, the analysis must include factors that inquire into state involvement that exists irrespective of the official's relationship with the state. This approach is well-illustrated by *Gritchen*. Following a traffic stop, a motorist "filed a citizen complaint alleging that [the officer] had been discourteous and argumentative, and that his breath smelled of alcohol." *Id.* at 809. The officer threatened to sue the motorist for defamation, *id.*, and the motorist sought relief under Section 1983, alleging that the officer's threats amounted to state action. *Id.* at 810. The *Gritchen* court appreciated that the threats were "'unavoidably tied' to [the officer's] position," having arisen from the traffic stop, *id.* at 813, but rejected that they were state action because: (1) "threatening suit or bringing it [was not] one of [the officer's] duties;" (2) a defamation suit is a "quintessentially personal" action; (3) "the initiative [came] from [the officer] and not from the State;" (4) the police department had

nothing to do with the threats ("[i]ts approval was not required, nor would its disapproval matter"), *Id.* at 813, and (5) the officer's actions were "no different from what any defamation plaintiff [would do] when he or she threatens to sue . . . . In each instance the plaintiff is simply enabled by state law and decides to pursue the remedy afforded." *Id.* at 814.

Governor Norton and her senior staff concededly "take work home," perform official tasks "after regular business hours," R. at 8, and continually use state smartphones and computers. R. at 7. The nature of Governor Norton's position also requires periodic contact with other state officials for security reasons. R. at 18–19. Such factors are incidental to Governor Norton's office and not indicative of a connection with the state beyond that of her own employment. *Dodson*, 454 U.S. at 322 n.12. Like the decision to bring a lawsuit in *Gritchen*, deciding to delete comments or block users is not one of Governor Norton's duties. R. at 26. Although Facebook is a platform with distinctly public characteristics, maintaining a Facebook page is a "quintessentially personal" activity. *Gritchen*, 254 F.3d at 813. The decision to delete Mr. Wong's post and block Mr. Wong from the GEN Page were initiatives that came solely from Governor Norton, and those initiatives were not subject to any input or oversight from the state. R. at 26. Further, deleting posts and blocking users from the GEN Page are no different than those same actions taken by "more than 167 million . . . active [Facebook] users in the United States and Canada" every day. R. at 13. *See Gritchen*, 254 F.3d at 814. In deleting Mr. Wong's comment and blocking Mr. Wong from the GEN page, Governor Norton merely "pursued [a] remedy afforded" by Facebook, a privately owned platform, and it was Facebook that "enabled" the decisive action, not the state. *Id.*

Aside from the connection that necessarily exists because Governor Norton holds public office, no nexus existed between her private actions and the state. Imputing Governor Norton's

private actions to the state under a nexus analysis would impermissibly tread on her "personal pursuits." *Screws*, 325 U.S. at 111.

2. The private actions did not occur in the context of a public function.

The public function test is a well-established doctrine that focuses on the nature of the challenged action rather than the relationship between the actor and the state. Specifically, under the public function test, private action becomes state action when the action itself is "traditionally [and] exclusive[ly] a [state] prerogative . . . ." *S.F. Arts*, 483 U.S. at 544 (quotation omitted, emphasis removed). It is not enough "that a private entity performs a function which serves the public," *id.* (quotation omitted), if the function is not *exclusively* reserved to the state, and as this Court has noted, "very few" functions are, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). For instance, this Court has recognized peremptory challenges as a public function because they are traditional functions of government rather than of a private group, *Edmonson*, 500 U.S. at 625, and "have no significance outside a court of law, *id.* at 620. Conversely, this Court rejected that a public utility performed a public function, even though it was subject to "extensive and detailed regulation." *Jackson*, 419 U.S. at 350. This Court also regarded as insignificant the fact that a private school typically received at least 90% of its operating budget from public funds. *Rendell-Baker*, 457 U.S. at 832, 840. In *S.F. Arts*, 483 U.S. at 544, this Court refused to find that the United States Olympic Committee (U.S.O.C.) performed a public function even though there was no question that the organization itself "serve[d] a national interest . . . ." The Act that gave the U.S.O.C. authority, "merely authorized [it] to coordinate activities that always [had] been performed by private entities." *Id.* at 544–45 (footnote omitted).

The district court correctly concluded that Governor Norton "[did] not, and does not now, exercise a traditional and exclusive state function through using the GEN Page." R. at 7. The

Fourteenth Circuit overemphasized the significance of the state resources involved in the GEN Page. R. at 34. Even considering the salaries of Governor Norton, Mr. Mukherjee, Ms. Mulholland, and Mr. Escalante—of which substantial portions fund functions separate from the GEN Page, R. at 18–26—the Record contains no evidence of direct state funding of the Page, and the multi-tasked salaries themselves are nothing compared to the 90% per-year funding deemed inadequate in *Rendell-Baker*, 457 U.S. at 832, 840. Neither is the GEN Page subject to any state regulation or oversight other than Governor Norton's personal discretion. *See Jackson*, 419 U.S. at 350.

In substance, the use of the GEN Page is a far cry from peremptory challenges that "have no significance outside a court of law." *Edmonson*, 500 U.S. at 620. It is more akin to the U.S.O.C. in *S.F. Arts*, which was not a public function even though it undoubtedly "serve[d] a national interest . . . ." *S.F. Arts*, 483 U.S. at 544. Activities on Facebook like deleting posts and blocking users "always have been performed by private entities." *Id.* at 545 (footnote omitted). Over 100 million users, and likely a great number of Governor Norton's constituents, performed such activities in 2016. R. at 13. The fact that these constituents use Facebook to converse with Governor Norton, R. at 25, cannot mean that they themselves are performing a public function. Allowing insignificant factors to transform a traditionally private function into a public one, offends the "exclusiv[ity]" tenet of the public function doctrine. *Flagg Bros.*, 436 U.S. at 158. Use of the GEN Page is neither traditionally nor exclusively reserved to the state.

In sum, the challenged actions were private actions without the requisite nexus to the state to convert them into state action, and use of the GEN Page cannot be considered a public function. This Court must reverse the Fourteenth Circuit's holding because no basis for a Section 1983 action exists.

II. The Fourteenth Circuit Erred In Holding That Governor Norton Engaged In Viewpoint Discrimination Against Mr. Wong Because The GEN Page And Immigration Policy Post Are Forms Of Government Speech, Which Is Not Subject To The First Amendment Restrictions Applicable To Government-sponsored Fora.

Even if Governor Norton's actions with respect to Mr. Wong could fairly be characterized as state actions, this Court should nevertheless reverse the Fourteenth Circuit's holding because the GEN Page and the immigration policy post are forms of government speech, which is exempt from First Amendment restrictions against viewpoint discrimination.

As this Court has stated, "[w]hen government speaks, it is not barred by the Free Speech Clause [of the First Amendment] from determining the content of what it says." *Walker*, 135 S. Ct. at 2245. Further, it is "the democratic electoral process[,]" rather than the courts, "that first and foremost provides a check on government speech." *Id.* The Free Speech Clause enables the government, like private speakers, to select and display the messages and viewpoints it supports, even where those messages and viewpoints originate from a private individual. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (holding that a government engaged in government speech by selecting monuments from private donors to display in a public park, even though public parks are a quintessential public forum). As such, government speech is "not subject to scrutiny under the Free Speech Clause," and the government may freely select the viewpoints it wishes to convey. *Id*. at 464. This Court has stated that the Free Speech Clause protects against compelling a speaker "to utter what is not in his mind." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943). Conversely, when a government sponsors a public forum for speech, it may not engage in "viewpoint discrimination," or the regulation of speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Thus, "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 U.S. at 467.

Noting that at times "it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech," *Summum*, 555 U.S. at 470, this Court has relied primarily on three factors to make the determination: (1) the history of the medium, (2) whether messages sent through the medium are "closely identified in the public mind" with the government actor, and (3) whether the government exercises control over the messages conveyed through the medium. *Walker*, 135 S. Ct. at 2247 (quoting *Summum*, 555 U.S. at 472). Here, an application of the *Walker* factors supports the district court's determination that the GEN Page and the "immigration policy post" are government speech rather than a government-sponsored forum.

A. The brief history of public officials' social media pages supports a finding that the GEN Page and the immigration policy post are government speech.

Public officials have used social media to communicate with their constituents for almost as long as social media has existed. Under the first *Walker* factor, this establishes a presumption that platforms like the GEN Page, and their content, are a form of government speech. *Id*. at 2248. In applying this factor, this Court has examined both the length and manner of the government's use of a given medium, finding that where the government has traditionally used a medium to convey a message, government communications through that medium are more likely to be considered government speech. *Compare id.* (stating that the history of license plates, and the messages conveyed through their slogans and graphics, indicated that they were a form of government speech), *with Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (holding that trademarks are not government speech partly because they "have not traditionally been used to convey a Government message"). Additionally, courts have recognized relatively new media, like a school

website and email system, as government speech, where those media have been used to convey government messages throughout their existence. *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 288 (4th Cir. 2008).

While the history of social media, including Facebook, is not a lengthy one, it has been a popular platform through which public officials communicate with their constituents since it emerged. Its rapid growth is as remarkable as it is instructive for the first *Walker* factor. For instance, the social media platform Twitter launched in 2006, and within five years, 387 of the 535 members of Congress had Twitter accounts. John H. Parmelee & Shannon L. Bichard, *Politics and the Twitter Revolution: How Tweets Influence the Relationship Between Political Leaders and the Public*, 8 (Lexington Books, 2012). In its decision, the Fourteenth Circuit labeled the first *Walker* factor as "not particularly helpful" based on social media's brief existence. R. at 36. But it is compelling that for almost as long as the medium has been available to public officials, they have used social media to share messages with the public they serve.

Additionally, as public officials increasingly use social media to deliver government messages, these communications have been recognized as "official statements" of those public official. *See* Def.s' Supplemental Submission and Further Response to Pl.s' Post-Briefing Notices, 4, Nov. 13, 2017, No. 1:17-cv-00144-APM (declaring to the court that the government, as defendant, treats President Donald Trump's communications via Twitter "as official statements of the President"). This growing recognition of social media channels as official modes of government communication has prompted some government entities to explicitly state when a government actor's social media statements are *not* official government statements. *See Social Media Policy and Disclaimer*, Commonwealth of Pa., https://www.governor.pa.gov /social-media/ (last visited Jan. 18, 2018) ("Communications posted on [the state and governor's]

social media pages . . . shall not be considered official public comment"). Thus, though the "history" of social media is brief, its rapid rise and recognition as a means of communication by public officials supports a finding that its use constitutes government speech, not limited to First Amendment restrictions.

B. The GEN Page and immigration policy post are closely identified in the public mind with Governor Norton and the State of Calvada.

Because the GEN Page and the immigration policy post are authored under Governor Norton's name, and because Facebook users realize that a page owner like Governor Norton has full control over the content displayed on her page, the Page's contents are "closely identified in the public mind" with Governor Norton and the State of Calvada.

A close association between a medium and a government actor strongly suggests that the contents of the medium are government speech. *Walker*, 135 S. Ct. at 2248. This association may be evidenced by the surrounding context of the speech in question, like a state's name appearing on a custom license plate, *id.*, or a public school's colors and initials appearing on a banner bearing an advertisement for a private business, *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1076 (8th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016). It may also be apparent through a historic affiliation between a medium and the government. *Summum*, 555 U.S. at 472 (stating that a local government could decide which privately created and donated monuments to display, and which not to display in a public park, because such parks are often "closely identified in the public mind with the government unit that owns the land"). Where such an association exists, a casual observer may reasonably assume that the messages conveyed through the medium, or displayed on government-owned property, are endorsed or approved by the government in question. *Walker*, 135 S. Ct. at 2249 (holding that an observer may "reasonably . .

. interpret" expression in a government-linked medium "as conveying some message on the [government's] behalf") (quotation omitted).

The type of expression displayed in the medium also affects its standing as government speech versus private speech. As this Court stated in *Summum*, an individual speaker addressing a crowd in a public park is different than a statue displayed permanently in that park. 555 U.S. at 479 ("One would be hard pressed to find a long tradition of allowing people to permanently occupy public space with any manner of monuments.") (quotations omitted). This Court has thus made clear the distinction between temporary expressions in government-owned property and permanent displays: where a form of expression stands in an ostensibly permanent manner, there is a greater presumption that the message is associated with or endorsed by the government. *Id*. Additionally, this Court has stated that the fact that private parties are involved in the creation 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.

The Fourteenth Circuit oversimplified and misinterpreted the second *Walker* factor. In stating that "Facebook users understand that comments on a Facebook page often originate from another account and are attributable to the source," R. at 36, the Fourteenth Circuit ignored the fact that the average Facebook user also understands that page owners have the power to control what appears on their own page. While a visitor to the GEN Page may not be likely to believe Mr. Wong's comment came from Governor Norton herself, its continued presence on the Page could give users an incorrect impression of the Governor or the State of Calvada. For example, the Governor has stated that she wants her followers to "have a personal connection" to her through the Page, R. at 25, but the continued presence of an *ad hominem* attack like Mr. Wong's

may give the impression that Governor Norton does not read or care about the comments posted to the Page.

The context surrounding the GEN Page also supports the notion that the content on the Page is affiliated with or endorsed by the Governor or the State. First, the GEN Page contains, among other identifying features, the Governor's name, title, and an abundance of messages about the Governor and the State of Calvada. R. at 2–3. As in *Walker*, this surrounding context creates a presumption that the messages conveyed through the Page, even where they are attributable to another speaker, are approved by the government. 135 S. Ct. at 2248–49. Second, if this Court finds that decisions made related to the GEN Page are not private, but are state action, it logically follows that the Page itself is more akin to government-owned property, and should be treated as such. As was established in *Summum*, an ostensibly permanent message displayed in a government-owned space, like a Facebook comment which will exist in perpetuity, is more likely to be identified with the government than more temporary forms of expression from private citizens. 555 U.S. at 479. Likewise, the mere fact that Mr. Wong submitted the comment does not turn the GEN Page, which is overtly linked to Governor Norton, into a forum, or afford Mr. Wong's expression additional rights.

The Fourteenth Circuit also reasoned that because Mr. Wong's comment was critical of the Governor, a visitor to the GEN Page would not "mistake[]" his comment for her speech. R. at 36. But, as this Court has held, this reasoning is misplaced. *Summum* and *Walker* demonstrate that the relevant question is not whether someone might believe Governor Norton or the State of Calvada is the original author of the comment, but whether the comment may be viewed as associated with or endorsed by the Governor or the State. *Walker*, 135 S. Ct. at 2249; *Summum* 555 U.S. at 472. Given the close association of the GEN Page with Governor Norton and the

State of Calvada, R. at 25, a visitor would likely associate the comment with the Governor or the State, and form an impression of either one or both. The fact that Governor Norton controls the content on the Page would further bolster this assumption. R. at 25. As this Court has held, the formation of that impression or misimpression is a protected interest, even where the message was created by a private party and merely displayed by the government. *Walker*, 135 S. Ct. 2249. Thus, because of the context of the Page, and the fact that the average visitor to the Page understands that the Governor controls its content, the GEN Page and its content are "closely identified in the public mind" with Governor Norton and the State of Calvada, further supporting a finding that the Page is a form of government speech. *Summum*, 555 U.S. at 472.

C. Governor Norton, a Calvada state official, exercises control over the content displayed on the GEN Page.

Because Governor Norton, like all Facebook page owners, has the final say regarding what appears on the GEN Page, the Page satisfies the third *Walker* factor: it is a medium over which the government exercises direct control. One way a government maintains "direct control over the messages conveyed" through a given medium is by exercising "final approval authority" over the content. *Walker*, 135 S. Ct. at 2249. "This final approval authority allows [a government] to choose how to present itself" to viewers of the message, by choosing what messages to convey. *Id*. (emphasis removed). *See also Lexington*, 531 F.3d at 282 (holding that a school district "controlled the message" conveyed through its website even when it disseminated an article written by a third party, because it "adopted and approved" the communications). Even where "the bulk of the information" displayed through a given medium comes from a private individual, courts have held that the government exercised control over the message as the ultimate approver of the displayed content. *Mech*, 806 F.3d at 1078. *See also Johanns v. Livestock Mkt'g Assn.*, 544 U.S. 550, 560 (2005).

Governments may also exercise control through selectivity of messages. *Walker*, 135 S. Ct. at 2249 (stating that a state government exercised control over the messages on its license plates and could rightfully choose to display messages promoting educational institutions and the fight against terrorism, without having to "issue plates deriding schooling" or "promoting al Qaeda"). Government officials may choose to display messages "they view as appropriate for the [medium] in question . . . ." *Summum*, 555 U.S. 472. A government may also demonstrate selectivity by "retaining the right and ability to exclude" certain content from its platform for speech and choosing to share expressions from private speakers that support "its own message" or priorities. *Lexington*, 531 F.3d at 284.

There is no question that Governor Norton exercises control over the GEN Page. She created it, and she has operated it since its creation, either by herself or through her staff, posting messages and monitoring comments posted on the Page. R. at 20, 22, 23, 25. Like all other Facebook users, Governor Norton has "final approval authority" as to what will appear on the Page, *Walker*, 135 S. Ct. at 2249, with the ability to select messages that are "appropriate" for the Page, *Summum*, 555 U.S. at 472, and "exclude" those that are not, *Lexington*, 531 F.3d at 284. As with other modes of government communication, Governor Norton sets the priorities for the GEN Page and ensures that those priorities are realized. She frequently invites comments and insights on specific issues within the government, indicating that she wants the GEN Page to be a place where constituents may share productive ideas. R. at 25.

The only material difference between the approval authority exercised here and that exercised in *Summum* or *Walker* is that comments submitted to the GEN Page appear on the Page before Governor Norton has a chance to review them. R. at 16. That is the nature of Facebook, but does not change the fact that Governor Norton has, and exercises, the power to control what

content appears on the Page. As this Court has held before, a government exercising this kind of control over expressive content strongly supports a finding of government speech. *See, e.g.*, *Walker*, 135 S. Ct. at 2249.

Accordingly, because the GEN Page and the "immigration policy post" meet each of the *Walker* factors, this Court should hold that they are government speech. And because government speech is not subject to First Amendment limitations on viewpoint discrimination, this Court must reverse the Fourteenth Circuit's holding.

CONCLUSION

This Court must reverse the Fourteenth Circuit's erroneous holding that the challenged actions constitute state action because the actions occurred in Governor Norton's private capacity and cannot be otherwise attributed to the state. Alternatively, if this Court finds state action, it must still reverse the Fourteenth Circuit's decision because the GEN Page and the immigration policy post are government speech, and expression conveyed through them is not susceptible to viewpoint discrimination.

Respectfully Submitted,

Team 22

Counsel for Petitioner

January 31, 2018

APPENDIX

Constitutional Provisions and Statutes Affected

U.S. Const. amend. I.

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

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. § 1983 (Westlaw through Dec. 8, 2017). Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.