No. 17-874

Supreme Court of the United States

ELIZABETH NORTON, in her official capacity as Governor of the 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 THE PETITIONER

TEAM 23

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the 14th Circuit erred in concluding that a State official engaged in state action by deleting an individual's post on her personal Facebook page and banning him from posting further comments on that page; and

2. If so, whether the 14th Circuit erred in holding that the State official violated the individual's First Amendment rights by engaging in viewpoint discrimination in a state-sponsored forum rather than government speech.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Miscellaneous:

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The opinion of the Court of Appeals for the Fourteenth Circuit is not published in the Federal Reporter but is available at ___ Fed. App. ___. The opinion and order of the District Court for the District of Calvada is not published but is available at ___ F. Supp. 2d. ___.

JURISDICTION

This case asserts a claim pursuant to 42 U.S.C. § 1983 (2012). The United States District Court for the District of Calvada had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (2012). The final order was entered on November 1, 2017, and the notice of appeal was timely filed, pursuant to Fed. R. App. P. 4(a)(1)(A). The United States Court of Appeals for the Fourteenth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 (2012) because this is an appeal of a final judgment in a civil case. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (2012) because this Court granted a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this brief.

STATEMENT

Elizabeth Norton, the current Governor of the State of Calvada, has maintained a Facebook page in her own name since 2011, using it to post personal and business announcements, but limited who could view her page to only her connections. [Stip. ¶ 8, R.14; Aff. of Elizabeth Norton, ¶ 6, R.24]. This page was renamed "Governor Elizabeth Norton," after her inauguration, and the privacy settings were changed to make her page public, so that her constituents could follow her and have a personal connection to her. [Stip. ¶ 9, R.14; Aff. of Elizabeth Norton, ¶¶ 9, 10 R.25].

Separate from the Governor Elizabeth Norton Facebook page, the State of Calvada maintains an official Governor's Facebook page entitled "Office of the Governor of Calvada." [Stip. ¶ 7, R.14]. Any government initiatives announced on the "Governor Elizabeth Norton" Facebook page are reposted by the official "Office of the Governor of Calvada" Facebook page. [Aff. of Elizabeth Norton, ¶ 11, R.26]. Under the State of Calvada's Constitution, the governor is not required to maintain social media accounts. [Aff. of Elizabeth Norton, ¶ 14, R.26].

On March 5, 2016, Governor Norton posted an announcement of the New State Policy on Immigration Law Enforcement welcoming comments on the policy to her "Governor Elizabeth Norton" Facebook page. [Stip. ¶ 12, R.15-16]. Brian Wong, a resident of Calvada, posted a comment on the governor's page from his Facebook account calling her "a scoundrel . . . with no conscience[,]" "a toad" and "a disgrace." [Stip. ¶ 13, R.16]. Mr. Wong's comment was removed, and he was banned at the request of Governor Norton.[1] [Stip. ¶¶ 14-15, R.16-17]. Governor Norton did not delete two other posts disagreeing with the policy. [Stip. ¶ 16, R.17].

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[1] Access to a social media account, like the Facebook page at issue here, can be limited in three ways. First, by blocking a user from the page, which prevents him from posting comments, but not from viewing the page. Second, by deleting specific comments, but not prohibiting the user

Mr. Wong filed suit alleging Governor Norton's actions violated the First Amendment to the United States Constitution, as incorporated and applied to the states through the Fourteenth Amendment. [Cir. Court Mem. Op. and Ord., at 1, R.29-30]. Mr. Wong moved for summary judgment and the district court denied his motion, finding that although Governor Norton's conduct was attributable to the State, it was government speech, and thus was constitutional. [Dist. Ct. Mem. Op. and Ord., at 12, R.12]. He appealed, and the Fourteenth Circuit reversed. [Cir. Court Mem. Op. and Ord., at 12, R.40]. The Supreme Court of the United States granted certiorari. [Ord. Supreme Ct. of the U.S., R.41].

SUMMARY OF ARGUMENT

Mr. Wong's constitutional rights were not violated, because there was no state action. There must be state action for Mr. Wong's claim to succeed, as his First Amendment right to free speech is incorporated against the states through the Fourteenth Amendment, which restricts the conduct of States, not individuals. Even if this Court fails to find Governor Norton's conduct was not state action, Governor Norton was engaged in government speech and government speech may discriminate on the basis of viewpoint. If the Court does not find that Governor Norton was participating in government speech, her Facebook page is a limited public forum. In a limited public forum, state actors may discriminate if reasonable to preserve the forum and if viewpoint neutral. The deletion of Mr. Wong's comment and ban was viewpoint neutral, as it was based on the vitriolic nature of his comment, and was necessary to preserve the forum.

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from commenting in the future. Third, the owner may be able to block the user from viewing the page at all. Facebook Help Center, *What is blocking?* (January 28, 2018), access at: https://www.facebook.com/help/131930530214371.

ARGUMENT AND CITATION OF AUTHORITIES

Mr. Wong argues in his civil rights action under 42 U.S.C. § 1983 that Governor Norton's conduct violated his right to freedom of speech. U.S. Const. amend. I, cl. 2. This is because, he argued, Governor Norton's deletion of his comment and ban from her Facebook page constituted state action, and this ban was an impermissible exclusion from a state-sponsored speech forum.

Not so. (I) Governor Norton's conduct did not constitute state action, because there was not a sufficient nexus between the challenged conduct and the State. Even if the conduct was not state action, (II) Governor Norton's Facebook page constitutes government speech; and in the alternative, it is a limited public forum. In either case, Governor Norton's conduct was constitutional. Each of these reasons support a reversal of the decision of the Fourteenth Circuit Court of Appeals and will be examined in turn.

I. Governor Norton's conduct did not constitute state action, because there was not a sufficient nexus between the challenged conduct and the State.

State action is required here because the First Amendment right to freedom of speech is incorporated against the states through the Fourteenth Amendment, which "forbids the *State itself* to deprive individuals of life, liberty, or property without 'due process of law."[2] *DeShaney*, 489 U.S. at 195 (1989) (quoting U.S. Const. amend. XIV, § 1, cl. 3) (emphasis added). The amendment's purpose is to prevent the government "from abusing its power or employing it as an instrument of oppression." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). The scope of this restraint on state power is expanded by the courts reluctantly, as "guideposts for responsible decision making in this . . . area are scarce and open-ended . . . and the doctrine of judicial restraint

[2] While the Fourteenth Amendment protects individuals from certain deprivations made without the due process of law, it by no means "impose[s] an affirmative obligation on the state," to foster or protect these rights. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989).

requires [it] to exercise the utmost care whenever [it is] asked to break new ground[.]" *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Merely a restriction on the power of the state, the Fourteenth Amendment, "erects no shield against . . . private conduct, however discriminatory or wrongful[.]" *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). "Individual invasion of individual rights is not the subject-matter of the amendment," rather the amendment only applies where there is state action. *Civil Rights Cases*, 109 U.S. 3, 11 (1883). When the government exercises its power through public officials, making the distinction between private and state action requires "sifting through the facts and weighing circumstances" for the purported "nonobvious involvement of the State in private conduct[.]" *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *see also New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (describing how in the state action analysis, substance matters more than form).

While certain actions by public officials may be attributable to the state, *Burton*, 365 U.S. at 726, "mere employment by the state does not mean that the employee's every act can properly be characterized as state action[,]" *Patterson v. Cty. of Oneida*, 375 F.3d 206, 230 (2d Cir. 2004) (internal citations omitted). The Court recognizes that actions of public officials "are not exclusively a transmission from the government, because . . . embedded within them [are] the inherently personal views" of the public official. *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting). Instead, conduct by public officials can be "fairly treated as that of the state itself," only where there is "a close nexus between the state and the challenged action." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001).

Determining whether a "close nexus between the state and the challenged action" by a private actor exists is a two-part inquiry. *Id.* First, the Court asks whether this is "the exercise by a private entity of powers traditionally exclusively reserved to the state." *Jackson v. Metropolitan*

Edison Co., 419 U.S. 345, 352 (1974) (internal citations omitted). Second, if "powers traditionally reserved to the state" are not being exercised by the private entity at issue, *id.*, then the courts "look to the totality of the circumstances to determine whether the conduct of a private actor is sufficiently interwoven with government to be attributable to the state." [Dist. Ct. Mem. Op. and Ord., at 7, R.07]. The lower courts easily determined that this case does not fall into this first category, as it is hard to imagine how Facebook exercises "powers traditionally reserved to the state." *Jackson*, 419 at 352. Instead, focusing on the second, fact specific inquiry is warranted here. The facts of this case do not support a finding of state action for three reasons: (A) Governor Norton did not rely on her public office to prevent Mr. Wong from making offensive comments; (B) Governor Norton was acting within her discretion when she deleted Mr. Wong's post; and (C) the Facebook page originated as a private page and lacked the imprimatur of the state.

A. Governor Norton did not rely on her public office to prevent Mr. Wong from making offensive comments.

Where government employees engage in censorship in their capacity as private citizens, but their conduct is such that they "could not have behaved in that way but for the authority of [their] office," *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995), or in other words, they act "under the color of state law,"[3] there is state action, *West v. Atkins*, 487 U.S. 42, 49 (1988) (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)). These circumstances constitute state action, because these constitutional deprivations are "carried out by private organizations with complicated ties to the state apparatus," *Rossignol v. Voorhar*, 316 F.3d 516, 526 (4th Cir. 2003), such that the conduct can be "fairly treated as that of the state itself," as there is a "sufficiently

[3] The state action requirement in the Fourteenth Amendment analysis is coextensive with the test for acting "under color of state law" in the context of 42 U.S.C. § 1983, so cases from both contexts are relied upon throughout this section. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 929 (1982).

close nexus between the state" and the private actor. *Brentwood*, 531 U.S. at 295. For example, in *Rossignol v. Voorhar*, the police department of a small town suppressed criticism of their police practices in a local newspaper, by engaging in "a systematic, carefully organized plan" in which nearly every edition of the newspaper in circulation was purchased by members of the police force. *Rossignol*, 316 F.3d at 523. The police officers in *Rossignol* made this mass purchase in plainclothes as private citizens, but on account of the small size of the town, were still recognized as police officers by the store clerks, who were intimidated into selling them the newspapers. *Id.* The clerks would not have been intimidated into making the sale, had the purchasers not been recognized as public officials, and this "systematic, carefully organized plan" would not have been effective, but for the relationships which the participants developed through working together in their official capacity. *Id.*

Unlike the conduct by the public officials in *Rossignol*, there is not a sufficient nexus between the private actions of Governor Norton the state, because her conduct was not such that she "could not have behaved in that way but for the authority of his office." *Martinez*, 54 F.3d at 986. While Governor Norton, was recognizable as a public official in the online space at issue as her personal Facebook account was named "Governor Elizabeth Norton," [Aff. of Elizabeth Norton, ¶¶ 6, 7, 9, 10, R.24-25], like the police officers in *Rossignol* were recognizable due to their relationships with the store clerks who sold them the magazines, 316 F.3d at 523, the recognition of her status as a public official was not relied upon by Governor Norton to silence her critic, as it was in *Rossignol*. The police officers in *Rossignol*, in order to purchase all the magazines, needed the clerk to know they "would make [the] life [of the clerk] a living hell," if the order to purchase the newspapers was not complied with. *Id.* at 524. This reliance on their public office to silence the critic of the police department is what made their conduct state action. *Id.* at 520.

Contrastingly, all Governor Norton needed to do to prevent Mr. Wong from posting *ad hominem* attacks on her page was to ban Mr. Wong, just as she would any other user, which did not require her to rely upon her public office. [Aff. of Elizabeth Norton, ¶ 13, R.26]. Her intent to prevent Mr. Wong from making these attacks, moreover, did not derive from her public office, as was the case in *Rossignol*, where the police purchased all the critical magazines in town "to suppress speech critical of [the public official's] conduct of his official duties." 316 F.3d at 524. Instead, Governor Norton's purpose was to prevent an "*ad hominem* personal attack that was not connected to the subject matter of her post." [Aff. of Elizabeth Norton, ¶ 13, R.26]. Governor Norton's purpose in blocking the post was to prevent a personal attack, and in doing so, she did not rely upon her public office. So, the only connection between her office and the challenged conduct is her status as government employee. This is not enough to conclude that her conduct was state action, *see Patterson*, 375 F.3d at 230, because she is not simply a conduit of the state, but an individual with personal beliefs, whose reaction to an *ad hominem* attack is hardly an act of government, *see Van Orden*, 545 U.S. at 723 (Stevens, J., dissenting). Her action lacked the "complicated ties to the state apparatus" that were present in the systematic, coordinated effort by the police in *Rossignol*, as this was a page that she had made before assuming office which, was primarily connected to the state in name. 316 F.3d at 526. This tenuous connection is not a "sufficiently close nexus" between the state and her conduct, such that her "conduct could be fairly treated as that of the state itself." *Brentwood*, 531 U.S. at 295.

Instead, this case is much like *Givens v. O'Quinn*, a Fourth Circuit Case. 121 Fed. Appx. 984 (4th Cir. 2005) (per curiam) (Wilkins, J., concurring in pertinent part). In *Givens*, a former state corrections officer alleged that he suffered harassment at the hands of his former coworkers, and that this was state action, because his colleagues were state employees. *Id.* at 988. The

plaintiff in *Givens* argued that his colleagues' harassment was similar to the actions of the police officers in *Rossignol*, because it was a harm perpetrated by public law enforcement officers in plainclothes. *Id.* But the *Givens* Court noted that, unlike in *Rossignol*, the record failed to demonstrate that the officers in Givens possessed "a motivation to suppress criticism of their official conduct" and concluded that the harassment was not state action. 121 Fed. Appx. at 990. Lacking public motivation, the only tie between the harassment and the state was the officers' status as public employees, which is not enough to show state action, *see Patterson*, 375 F.3d at 230, as it is not a "sufficiently close nexus" between the state and the private conduct, *Brentwood*, 531 U.S. at 295.

Like the plaintiff in *Givens*, Mr. Wong failed to demonstrate that Governor Norton's motivation was to suppress criticism of her public duty, because the comment that instigated his ban was a personal attack, not a criticism. Mr. Wong's comment called Governor Norton "a scoundrel," "someone with no conscience," "a toad," and "a disgrace," [Stip. ¶ 13, .R.16], which is not criticism, but an "*ad hominem* attack" which Governor Norton recognized as such and deleted out of personal offense. [Aff. of Elizabeth Norton, ¶ 13, R.26]. Because Governor Norton's motivations were personal, like the Fourth Circuit in *Givens*, the Court should find Governor Norton's private conduct could not fairly be attributed to the state in this circumstance, and as such, that there was no state action. 121 Fed. Appx. at 991.

B. Governor Norton was acting within her discretion when she deleted Mr. Wong's post.

"Generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West*, 487 U.S. at 50 (internal citations omitted). While "acts of officers in the ambit of their personal pursuits are plainly excluded," "[a]cts of officers who undertake to perform their official duties are not[.]"

Screws v. United States, 325 U.S. 91, 111 (1945). In applying this doctrine, the courts consider the degree of discretion that the public employee had when choosing whether to engage in the challenged action, to determine whether they were acting under the color of state law. *West*, 487 U.S. at 50. The more discretion the public employee is afforded by the state with regard to the aspect of their job responsibilities that form the basis of the challenge, the weaker the link between the challenged action and the state.

For example, in *Polk Cty. v. Dodson*, the Court held that a public defender, in executing his job responsibilities, does not act "under the color of state law," because of "his exercise of independent judgment," in his representation of clients. 454 U.S. 312, 321 (1981). The Court went on to note that "a public defender is not amenable to administrative direction in the same sense as other employees of the State," and held that where he exercised his professional judgment, instead of acting in an administrative capacity, he did not act under the color of state law. *Id.* at 320. But the court has held differently when state employees are subject to more direct control. For example, in *West v. Atkins* an inmate alleged that a doctor, who was responsible for attending to the medical needs of inmates in a North Carolina prison, was "deliberately indifferent to his serious medical needs by failing to provide adequate treatment." 487 U.S. at 45. By way of contract, "institutional physicians assume an obligation" to aid the state in caring for its inmates, such that their actions can be fairly attributable to the state. *Id.* at 50-51.

This case is more like *Polk* than *West*, because Governor Norton has a great deal of discretion as to the manner in which she executes her job responsibilities. She is subject to very little administrative direction by any employee of the State of Calvada, as she is the State's highest-ranking executive. She is entrusted to use "a high degree of independent judgment," like the public defender in *Polk*. 454 U.S. at 321. And unlike the defendant in *West*, Governor Norton,

likely, is not subject to an employment contract which provides direct control over her job responsibilities. 487 U.S. at 452. When Governor Norton made the decision to delete Mr. Wong's comment and to ban him from her personal Facebook page, she was not doing so pursuant to a state mandate, but rather, she was acting within her discretion. *See id.* at 455. Decisions made in this way are not made under the color of state law,[4] as they are not the exercise of a right or obligation created by the state, *Lugar*, 457 U.S., at 937, but the actor's own sense of professional responsibility.[5] *See Polk*, 487 at 455.

C. The Facebook page originated as a private page and lacked the imprimatur of the state.

In any context, the state action analysis requires "sifting through the facts and weighing circumstances" for the purported "nonobvious involvement of the State in private conduct," and this is especially true here given the dearth of guidance concerning the use of Facebook by public officials. *See Burton*, 365 U.S. at 722. In one of the few Facebook cases, *Davison v. Loudon Cty. Board of Supervisors*, the Court acknowledged that "there is no specific formula for making this determination" and instead "looked to the totality of the circumstances" to determine whether there was state action. 267 F. Supp. 3d at 703 (internal citations omitted). In that case, a government official blocked a citizen from her public Facebook page, after he had made critical comments

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[4] Nor would this be state action under a more generalized analysis. This decision to delete Mr. Wong's email was not an "abuse[] of the position given to him by the State," *Monroe v. Pape*, 365 U.S. 167, 170 (1961) (overruled on other grounds), such that it would be "fairly attributable to the state," *Lugar*, 457 U.S., at 937, because it was an exercise of Governor Norton's professional judgement, which is not state action under *Polk*, 487 at 455.

[5] In fact, it is unclear whether the decision to delete Mr. Wong's post fell within Governor Norton's professional responsibilities at all, given the timing of the decision and the circumstances surrounding it. Governor Norton decided to delete Mr. Wong's comment at 9:45 p.m. in the evening after the end of the workday, and communicated this decision to a colleague in an email including "[p]hotos from bball tourney [sic] visit." [Stip. ¶ 14, R.16]. Indeed, it was not until 10:10 p.m. that Mr. Wong's comment was deleted [*Id.* at ¶ 15, R.17].

about a local government organization. *Id.* In concluding that this was state action, the Court considered, *inter alia*, the purpose of the page and the imprimatur of public office on the page. *Id.*

Loudon is unlike the case at bar in each of these two respects. First, the purpose of the Facebook page in *Loudon* differs from the purpose of Governor Norton's page. In *Loudon*, the Facebook page at issue was created the day before the official was sworn into office by a marketing professional solely for the purpose of being a page associated with the account-holder's public position. 267 F. Supp. 3d at 708. In contrast, Governor Norton created her page five years before her election, and consistently used it for personal and business announcements. [Stip. ¶¶ 8, 9, R.14]. This distinction matters, because the *Loudon* Court based its decision on the fact that the page at issue "was born of and inextricably linked to the fact of the defendant's public office." 267 F. Supp. 3d at 714. Second, the imprimatur of the public office on the Facebook page in *Loudon* existed in that the page was made by an employee of the state dedicated to that purpose, and after its creation it became the official page of the office. Not so here, as the page at issue was Governor Norton's personal creation and existed apart from the official Facebook page of the Governor of Calvada. [Stip. ¶ 7, R.14]. This official Governor of Calvada page, not Governor Norton's personal page, bore the imprimatur of the public office, as it was officially sanctioned by the Government of Calvada. This Facebook page is passed down from governor to governor, as it is the Facebook page of the office, while Governor Norton's personal page was hers before she assumed office and will remain hers following the conclusion of her term. [*Id.*]. The private resources used to create this page, the nature of its ownership, and its coexistence with the separate Governor of Calvada page, indicate that Governor Norton engaged in private action. While the appearance of the word "governor" in the page's title links the page to the state, it is unfair to attribute her conduct to the state on account of this title, as this tenuous connection is akin to the

insufficient nexus forged merely by one's status as a state employee. *See Patterson*, 375 F.3d at 230.

II. Governor Norton's Facebook page constitutes government speech; in the alternative, it is a limited public forum.

Whether Mr. Wong's First Amendment rights were violated depends, in part, on whether Governor Norton was participating in government speech. If Governor Norton was participating in government speech when she managed the Facebook page entitled "Governor Elizabeth Norton," any alleged viewpoint discrimination would be allowable. If Governor Norton was not participating in government speech, a First Amendment forum analysis is necessary to determine if Governor Norton's actions are constitutional. Her actions were constitutional because: (A) the "Governor Elizabeth Norton" Facebook page is government speech because Governor Norton exercised historic and continual control over the page; and (B) deleting Mr. Wong's comment and banning him was a permissible regulation of speech in a limited public forum, as it was reasonable and viewpoint neutral.

A. The "Governor Elizabeth Norton" Facebook page is government speech because Governor Norton exercised historic and continual control over the page.

"In instances in which the government is itself the speaker," viewpoint-based discrimination can be sustained. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). Any alleged viewpoint-based discrimination by Governor Norton is therefore allowable, if she was practicing government speech. In making the government speech determination, the Court looks to the factors enumerated in *Texas v. Walker*, each of which weigh in favor of finding Governor Norton was practicing government speech.[6]

[6] Since this case falls clearly within established precedent, it is "indeed, essential" to apply the government speech doctrine. *See Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

Three factors determined government speech in *Walker*: "(1) historical context, (2) observers' reasonable interpretation of the messages . . . [as associated with Texas], and (3) the effective control that the State exerts over the design selection process." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2251 (2015) (numbering added). In addition to these three factors, it is also important to note that the "fact that private parties take part in design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider." *Id.*; *see also Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 561 (2005). Taking the above into consideration, the *Walker* Court found that Texas was "not simply managing government property, [it] instead [was] engaging in expressive conduct." *Id.* at 2251.

Applying the *Walker* factors, it is clear that Governor Norton was engaging in government speech. First, while the historical context of Facebook comments is new, users, including users who happen to be government officials, have always had the ability to monitor, delete, and control the comments on a user's profile and postings. Though the second factor of observers' reasonably interpreting the message as related to the government does not weigh in Governor Norton's favor, the third factor does weigh heavily in her favor. For the third factor, the Governor has always held effective control over the postings on her page. This page was created by Governor Norton personally five years before her election, and consistently used it for personal and business announcements. [Stip. ¶¶ 8, 9, R.14]. The page at issue exists apart from the official Facebook page of the Governor of Calvada. [Stip. ¶ 7, R.14]. This official Governor of Calvada page, not Governor Norton's personal page was officially sanctioned by the Government of Calvada and passed down from Governor to Governor, while Governor Norton's page was and will remain hers regardless of holding office. [*Id.*]. Governor Norton, like Texas in *Walker*, did not simply manage

her page, but actively used it to engage in expressive conduct.[7] *See* 135 S. Ct. at 2251. Even when comments were posted by private citizens, they became part of the original post and were transformed into government speech. *See id.* at 2251-52.

B. Deleting Mr. Wong's comment and banning him was a permissible regulation of speech in a limited public forum, as it was reasonable and viewpoint neutral.

Governor Norton's actions are constitutional as they were a permissible exercise of control over a public forum for speech. The "extent to which the Government can control access [to the forum] depends on the nature of the relevant forum." *Zalaski v. City of Bridgeport Police Dep't*, 613 F.3d 336, 341 (2d Cir. 2010). "A limited public forum is created when the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects."[8] *Id.* at 342 (citation omitted). The government can control access to limited public forums "based on subject matter and speaker identity so long as the distinctions

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[7] *Walker* seems to be the last word on the government speech analysis, given the holding in *Matal*, which cautioned expanding the government-speech doctrine because "while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." 137 S. Ct. at 1758. *Walker* was distinguished as "the outer bounds of the government-speech doctrine." *Id.* at 1760. The *Matal* court, finding that regulation of trademarks was distinct from the approval of license plates designs, placed found important that for trademarks, the government "does not dream up these marks, and it does not edit marks submitted for registration." *Id.* at 1758. It noted the difference from *Walker*, where the state of Texas did play a role in what private speech was allowed through its approval process. *Walker*, 135 S. Ct. at 2251. Since the trademark approval process required virtually no action by the government, it fell outside the government speech doctrine and therefore, the doctrine was not extended to allow it. The case at bar falls in line with *Walker*, and thus within the bounds of government speech precedents. *See Matal*, 137 S. Ct. at 1760. Unlike the Government in Matal which "[did] not edit [trade]marks submitted for registration," *id.*, the Governor has always had full control to edit, delete, or completely disallow comments. Because the Governor's actions mirror the ones taken by Texas in *Walker*, the government speech falls clearly within precedent and there is no need to extend the doctrine.

[8] Forums can be metaphysical spaces, but the same rules apply. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995).

drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). Government Facebook pages are limited public forums because they invite the public to comment while retaining the ability to monitor and control the subjects discussed.[9] For the two reasons set forth below, it is clear that Governor Norton exercised reasonableness and viewpoint neutrality in deleting Mr. Wong's comment and banning him from posting future comments. First, Mr. Wong retained the ability to communicate with Governor Norton through other means and the threat Governor Norton faces if all comments were allowed will fall within clear precedent determining reasonableness. Second, because Mr. Wong's comment was outside the scope of the forum and the State's primary interest was preserving the forum, the deletion and ban were viewpoint neutral.

Governmental Facebook pages that solicit comments and limit those comments in some manner are limited public forums. *See*, *e.g.*, *Loudon*, 227 F. Supp. 3d at 609 (holding "the Policy, as applied to official County Facebook pages, creates a limited public forum under the First Amendment."); *Plowman*, 247 F. Supp. 3d at 776 (holding there was "a limited public forum as applied to the Loudon County Commonwealth's Attorney Facebook page"). Monitoring and

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[9] In general, courts consider whether a forum is a limited public forum, or in the alternative, traditional public forum. In the digital context, traditional public forums have only been extended to the entirety of cyberspace, or, in the context of social media, social networks as a whole. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017); *see also Reno v. Aclu*, 521 U.S. 844, 851 (1997). Finding that an entire social media network could be considered a public forum, the Court in *Packingham* found important the vast abilities the combined entirety of social media and the internet provided. *See* 137 S. Ct. at 1737 (looking to the abilities of "knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."); *see also Reno*, 521 U.S. at 851 (holding the public forum was constituted by all the following, combined: "electronic mail ('e-mail'), automatic mailing list services ('mail exploders,' sometimes referred to as 'listservs'), 'newsgroups,' 'chat rooms,' and the 'World Wide Web.'"). Single Facebook pages, lack these characteristics, and are better classified as limited public forums. *See*, *e.g.*, *Davison v. Loudon Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605, 609 (E.D. Va. 2017); *Davison v. Plowman*, 247 F. Supp. 3d 767, 776 (E.D. Va. 2017).

deleting comments is seen as a government action controlling access to the limited public forum. *See Davison v. Plowman*, 191 F. Supp. 3d 553, 554–55 (E.D. Va. 2016).

Important to the determination that a government Facebook Page created a limited public forum was that the government "encourage[d] public participation on government websites, but impose[d] some rules on the scope of that participation." *Plowman*, 191 F. Supp. 3d at 554. Encouraging public participation happens by "permitting public comment . . . [and] solicit[ing] comments from [the government official's] constituents[.]" *Loudon*, 227 F. Supp. 3d at 703. The government policy in both *Plowman* and *Loudon* allowed moderation of comments on official Facebook pages and deletion of comments that "[were] 'clearly off topic,' [or] 'contain[ed] . . . personal attacks of any kind[.]" *Plowman*, 191 F. Supp. 3d at 554–55. Facebook pages that retain the ability to monitor and delete comments are therefore limited public forums.

Governor Norton created a limited public forum when she set her Facebook page to public and solicited comments from her constituents but retained the right to limit or delete comments. The Governor encouraged public participation by setting her page to public and soliciting comments, much like the government's social media policy in *Loudon*. [*See* Aff. of Elizabeth Norton, ¶ 9, R.25; Stip. ¶¶ 8, 9, R.14]; *see also Loudon*, 227 F. Supp. 3d at 703. While the Governor did not have a policy in place, she deleted Mr. Wong's comment for being an *ad hominem* attack that did not respond to her post. [Aff. of Elizabeth Norton, ¶ 13, R.26]. These stated reasons directly parallel to the Policy that allowed for deleting comments that "[were] 'clearly off topic,'. . . [or] personal attacks of any kind[.]" *Plowman*, 191 F. Supp. 3d at 554–55.

Governor Norton's Facebook page created a limited public forum by "encourag[ing] public participation on government websites, but impos[ing] some rules on the scope of that participation." *Plowman*, 191 F. Supp. 3d at 554. Deleting a comment for being off topic and a

personal attack is allowable content control. *Id.* As is control "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. Reasonableness can be measured by the ability to communicate with the intended audience through other means, specifically when the used forum of communication is a smaller part of a larger public forum. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 and 53 (1983).[10] Because a Facebook page still allows a commenter to communicate with the intended party through other means, such as other pages, it is reasonable to limit access to one Facebook page. Were the government to allow unfettered access and commenting, it would be faced with a cacophony that might cause it to close the Facebook page, limiting speech even more. *See*, *e.g.*, *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 681 (1998). Because limiting access is reasonable, Governor Norton did not violate the first requirement in limiting access to a limited public forum.

When the forum was an internal mail system in *Perry*, reasonableness was measured by the ability to communicate with the intended audience through other means. *See* 460 U.S. at 53 (holding that "the reasonableness of the limitations . . . [are] also supported by the substantial alternative channels . . . [for] communication to take place."). This Court made clear that the First Amendment does not require "equivalent access to all parts of a [larger forum] in which some form of communicative activity occurs."[11] *Id.* at 44. Justification of policies limiting access must be measured by the consequences of granting access to everyone. *See Int'l Soc. for Krishna*

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[10] Other circuits have also applied this approach. *See*, *e.g.*, *O'Brien v. Welty*, 818 F.3d 920, 931 (9th Cir. 2016); *Helms v. Zubaty*, 495 F.3d 252, 256-57 (6th Cir. 2007); *Souders v. Lucero*, 196 F.3d 1040, 1044 (W.D. Wash. 2008).

[11] The ability for a smaller part of the larger public forum to be nonpublic is fairly common. *See*, *e.g.*, *O'Brien v. Welty*, 818 F.3d at 931; *Helms v. Zubaty*, 495 F.3d at 256-57; S*ouders v. Lucero*, 196 F.3d at 1044.

Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992). The totality of the potential consequences is important in evaluating First Amendment forums, such as public broadcasts, because "[w]ere it faced with the prospect of a cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all . . . and by so doing diminish the free flow of information and ideas." *Forbes*, 523 U.S. at 681 (citations omitted). In *Forbes*, the Court found especially important the fact that the threat to the flow of ideas was "more than speculative" and therefore requiring the forum to be treated as public "[did] not promote speech but repress[ed] it." *Id.* Applying this to the Facebook context, courts have recognized the need for government officials to moderate content on their Facebook pages, in order to preserve their intended purpose as a forum for public speech, and have condoned measures as broad as comment deletion and the removal of other content,[12] *see*, *e.g.*, *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 334 (1st Cir. 2009), finding threats which fell within the recognized need to preserve the forum in the face of a "cacophony."[13] *See Forbes*, 523 U.S. at 681.

Brian Wong's ban does not restrict him from communicating through other means, such as sharing the page's content to his own account or commenting on the identical, reposted post on the official "Office of the Governor of Calvada" page, which reposts everything posted by Governor Norton's personal Facebook page. [*See* Stip. ¶ 6, R.14; Aff. of Elizabeth Norton, ¶¶ 9, 11, R.25-26]; *see also Perry*, 460 U.S. at 53. Since the First Amendment does not require

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[12] The courts allowed the removal of specific external links and, specifically with Facebook pages, the deletion of comments because "[b]y permitting a commenter to repeatedly post inappropriate content pending a review process, a government official could easily fail to preserve their online forum for its intended purpose." *Loudon*, 227 F. Supp. 3d at 703.

[13] With the lack of clarity from the Supreme Court in state ability to regulate Facebook comments, many government officials have chosen to avoid the "cacophony" described by *Forbes* by deactivating or deleting their Facebook pages, creating a lack of flow of information and ideas. *See* 22 S. Cal. Interdis. L.J. 781, 781-82.

equivalent access to all parts of a larger public forum, even if Facebook as a whole might constitute a public forum, Mr. Wong does not need to have equivalent access to the "Governor Elizabeth Norton" Facebook page as to the official "Office of the Governor of Calvada" Facebook page. *See Perry*, 460 U.S. at 53. If all other comments were allowed without the ability to moderate them, the overwhelming personal attacks on the Governor could make it impossible to control the page for its stated purpose, to allow constituents to follow the Governor and have a personal connection to her. [*See* Aff. of Elizabeth Norton, ¶ 9, R.25]; *see also Krishna*, 505 U.S. at 685. Similar to the threat of public broadcasters stopping broadcasts if forced to allow every candidate who requested to be aired, the Governor could choose to delete her account entirely, since the Governor is not required to maintain social media. [*Id.*, ¶ 14, R.26]; *see also Forbes*, 523 U.S. at 681. Such a threat of limiting social media communication would "not promote speech but repress it." *Forbes*, 523 U.S. at 681.

Governor Norton's control of access to the limited public forum of her personal Facebook page was "reasonable in light of the purpose served by the forum[.]" *Cornelius*, 473 U.S. at 806. Mr. Wong had the ability to communicate with Governor Norton through other means, such as commenting on the identical post on the official "Office of the Governor of Calvada" page. [*See* Aff. of Elizabeth Norton, ¶ 11, R.26]. This gave Mr. Wong the ability to communicate without using a smaller part of a larger public forum. *See*, *e.g.*, *Perry*, 460 U.S. at 44. Were Governor Norton to allow unmoderated commenting, her page would be faced with a cacophony that could make it impossible to control the page for its stated purpose, to allow constituents to follow the Governor and have a personal connection to her. [*See* Aff. of Elizabeth Norton, ¶ 9, R.25]; *see also Krishna*, 505 U.S. at 685. Such a cacophony could cause the Governor to delete her account entirely, since the Governor is not required to maintain social media or interact with constituents

via social media, limiting the ability to communicate. [Aff. of Elizabeth Norton, ¶ 14, R.26]; *see* also *Forbes*, 523 U.S. at 681.

Limitations of access to a limited public forum also "must not be based on the speaker's viewpoint[.]" *Cornelius*, 473 U.S. at 806. Viewpoint neutrality prohibits the government from targeting "particular views taken by a speaker on a subject." *Rosenberger*, 515 U.S. at 829. Viewpoint discrimination is distinct from discrimination based on subject matter. *See id.* The three main factors in determining viewpoint discrimination are whether it is a regulation of speech or of the places where some speech may occur, whether the regulation was adopted because of disagreement with the message of the speech being regulated, and whether the State's interest are unrelated to the content of the speech being regulated. *See Hill v. Colorado*, 530 U.S. 703, 719-20 (2000). State's interests may be in the purpose of the forum. *See Velazquez*, 531 U.S. at 543. Similar to public broadcasters who have to strictly limit their forum to promote the spread of ideas, Governor Norton has to limit the types of comments on her page to preserve the promotion of communication between herself and her constituents. *See Forbes*, 523 U.S. at 681.

When examining viewpoint neutrality, this Court drew a distinction between "discrimination against speech because of its subject matter—which may be permissible if it preserves the limited forum's purposes . . . [and] viewpoint discrimination[.]" *Rosenberger*, 515 U.S. at 830. Viewpoint discrimination "targets not subject matter, but particular views taken by a speaker on a subject." *Id.* at 829. This Court has placed importance on three main factors: whether the regulation taken was of speech or of the places where some speech may occur, whether the regulation was adopted because of disagreement with the message of the speech being regulated, and whether the State's interest are unrelated to the content of the speech being regulated. *See Hill*, 530 U.S. at 719-20. Interests unrelated to the content of the speech being regulated have

previously "been informed by [the forum's] accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations."[14] *See Velazquez*, 531 U.S. at 543. This Court ruled when the purpose of the forum was to promote speech and "[w]ere it faced with the prospect of cacophony, on one hand, and First Amendment liability, on the other, a public broadcaster might decide 'the safe course is to avoid controversy . . . and by doing so diminish the free flow of information and ideas'" *Forbes*, 523 U.S. at 681 (citation omitted). Reasonable restrictions have been upheld when they restrict by taking into account general standards of "decency and respect" when approving grant applications. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998), and this is especially true when restrictions do not impose criminal or civil sanctions and merely deny access.[15]

Mr. Wong's comment was not deleted because of his viewpoint, but because of its subject matter.[16] [Aff. of Elizabeth Norton, ¶ 13, R.26]. This is further evidenced by two other messages expressing disagreement with the Governor's immigration enforcement policy that were not deleted. [Stip. ¶ 16, R.17]. Additionally, the *Hill* factors weigh against finding viewpoint

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[14] In *Velazquez*, this Court considers another case upholding a prohibition for abortion counseling because the law "did not single out a particular idea for suppression because it was dangerous or disfavored; rather… [the] counseling that was outside the scope of the project." 531 U.S. at 541.

[15] In previous First Amendment cases, this Court has been reluctant to find a restriction reasonable when it imposed civil or criminal liability. *See*, *e.g.*, *Packingham*, 137 S. Ct. at 1733 (holding "*a felony* for a registered sex offender to access a commercial social networking Web site" was an unconstitutional violation of the First Amendment) (emphasis added) (citation omitted); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding that conduct expressing dissatisfaction with governmental policies was protected from "*criminal conviction* for engaging in political expression.") (emphasis added); *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding "the State may not… make the simple public display involved on this single four-letter expletive a *criminal offense*.") (emphasis added); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (holding "a rule that would *impose strict liability* . . ." unconstitutional) (emphasis added). In contrast to these cases, Governor Norton's action is much more reasonable.

[16] Because discrimination against subject matter to preserve the forum's purpose is permissible and distinct from viewpoint discrimination, deleting Mr. Wong's comment was permissible. *See Rosenberger*, 515 U.S. at 829-30.

discrimination. The ban did not regulate Mr. Wong's ability to post from his own Facebook page, or on the official "Office of the Governor of Calvada" page, but only from Governor Norton's personal Facebook page. [*See* Aff. of Elizabeth Norton, ¶¶ 11, 13, R.26]. This is a regulation not of the speech itself, but of the place where certain types of speech—*ad hominem* attacks—could occur. *See Hill*, 530 U.S. at 719-20. Mr. Wong's comment was not deleted because of disagreement with his message, as two other messages expressing disagreement were not deleted, but instead because of disagreement with the manner of his message. [*See* Aff. of Elizabeth Norton, ¶ 13, R.26; Stip. ¶ 16, R.17]; *see also Hill*, 530 U.S. at 719-20. The State's interest is with preserving the purpose of the forum, not limiting opinions that disagree. [*See* Aff. of Elizabeth Norton, ¶ 13, R.26; Stip. ¶ 16, R.17]. Mr. Wong's comment was outside the scope of the Facebook post and page because it was unrelated to the purpose of the post and page, which were to allow constituents to give feedback on a policy and to personally follow the Governor, respectively. [*See* Aff. of Elizabeth Norton, ¶¶ 9, 13, R.25-26]. Instead, the comment voiced its opinion on the character of Governor Norton, calling her a "scoundrel" and "toad" without commenting on the policy itself. [*See* Stip. ¶ 13, R.16]. Because the comments were outside the scope of the forum, they could be deleted. *See Velazquez*, 531 U.S. at 541. Furthermore, allowing unlimited ad hominem attacks on Governor Norton's personal Facebook page could make it impossible for constituents to follow the Governor and have a personal connection to her, which is the stated purpose of the page. [*See* Aff. of Elizabeth Norton, ¶ 9, R.25]. Similar to the threat public broadcasters choosing not to broadcast if forced to allow every candidate who requested to be aired, the Governor could choose to delete her account entirely, since the Governor is not required to maintain social media or interact with constituents via social media, diminishing the free flow of information and ideas. [Aff. of Elizabeth Norton, ¶ 14, R.26]; *see also Forbes*, 523

U.S. at 681. Comments calling someone a "scoundrel" or "toad" might be acceptable in other forums, but restrictions on taking decency and respect into consideration are acceptable in limited public forums. *See Finley*, 524 U.S. at 583.

Limited public forums may control access so long as the control remains viewpoint neutral. *See Cornelius*, 473 U.S. at 806. The deletion of Mr. Wong's was viewpoint neutral, because his comment was instead deleted because of its subject matter. [*See* Aff. of Elizabeth Norton, ¶ 13, R.26]. Other messages expressing disagreement with the Governor's immigration enforcement policy without *ad hominem* attacks were not deleted. [Stip. ¶ 16, R.17]. The ban did not regulate Mr. Wong's ability to post *ad hominem* attacks from his own Facebook page, or on the official "Office of the Governor of Calvada" page, but only to Governor Norton's personal Facebook page. [*See* Aff. of Elizabeth Norton, ¶¶ 11, 13, R.26]. Mr. Wong's comment was not deleted because of disagreement with his message, but because of disagreement with the manner of his message. [*See id.*; Stip. ¶ 16, R.17]. Lastly, The State's interests are not related to disagreement over the immigration policy, but instead in preserving the purpose of the forum, which is to allow constituents to give feedback on a policy and to personally follow the Governor. [*See* Aff. of Elizabeth Norton, ¶¶ 9, 13, R.26]. Because the comments were outside the scope of the forum, they could be deleted. *See Velazquez*, 531 U.S. at 541. Furthermore, allowing unlimited *ad hominem* attacks on Governor Norton's personal Facebook page could make it impossible to control the page for its states purpose, to allow constituents to follow the Governor and have a personal connection to her. [*See* Aff. of Elizabeth Norton, ¶ 9, R.26]. Restrictions taking decency and respect into account are acceptable in limited public forums. *See Finley*, 524 U.S. at 583. Because the scope restriction against ad hominem attacks is reasonable for the purposes of the Facebook page, the ban is not viewpoint discrimination.

CONCLUSION

For all of the foregoing reasons, Petitioner Elizabeth Norton, in her official capacity as Governor of the State of Calvada, requests that this Court reverse the Appellate Court's Opinion and Order dated November 1,2017.

Dated: January 31, 2018

Respectfully submitted,

/s/ Team 23

CERTIFICATE OF COMPLIANCE

Pursuant to the rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition, we hereby certify that this brief, in all its copies, is the work product of the members of Team 23. We certify that this brief has complied fully with the governing honor code of Team 23's law school. The members of Team 23 acknowledge that they have complied with all Rules of the Competition.

Respectfully submitted,

/s/ Team 23

APPENDIX

1. U.S. Const. amend. I, cl. 2 provides:

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

2. U.S. Const. amend. XIV, § 1, cl. 3 provides:

[A]ny State [shall not] deprive any person of life, liberty, or property, without due process of law.

3. 28 U.S.C. § 1254 provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

4. 28 U.S.C. § 1291 provides:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

5. 28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

6. 42 U.S.C. § 1983 provides:

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.