Brief on the Merits

No. 17-874

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

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 RESPONDENTS

Team 3
Counsel for Respondents

ISSUES PRESENTED FOR REVIEW

I. Was there a sufficiently close nexus between the State and Governor Norton to make her actions fairly attributable to the to the State of Calvada under the Fourteenth Amendment's State action requirement, when those actions entwined Governor Norton to the State and she acted with the traditional and exclusive power of the State, where she deleted Mr. Wong's Facebook comment in response to the newly enacted immigration policy and banned him from communicating on the "Governor Elizabeth Norton" Facebook Page which she uses to communicate with constituents, solicit public opinion, and make announcements regarding government policy positions?

II. Did Governor Norton's actions in deleting a comment Mr. Wong posted on the GEN Page and permanently banning Mr. Wong from communicating on the page amount to viewpoint discrimination in violation of the First Amendment, when she opened a public forum for speech on her GEN Page and did not engage in government speech by announcing a new state immigration law enforcement policy on her GEN Page which she used to communicate with constituents, solicit public opinion, and make announcements regarding government policy positions?

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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 (Norton II)*, No. 17-874, slip op. at 1 (14th Cir. Nov. 1, 2017). Petitioner timely filed a petition for writ of certiorari which this court granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent, Mr. Brian Wong, brought this 42 U.S.C. § 1983 action against Petitioner, Ms. Elizabeth Norton, Governor of the State of Calvada, in her official capacity, after Governor Norton deleted a comment Mr. Wong posted on the "Governor Elizabeth Norton" Facebook page ("the GEN Page"), and permanently banned Mr. Wong from posting further comments on that page on March 5, 2016. *Wong v. Norton (Norton I)*, No. 16-CV-6834 (D. Calvada Jan. 17, 2017). The parties submitted cross-motions for summary judgment and on January 17, 2017, the District Court granted Governor Norton's motion. *Norton* I, slip op at 1. The Court held that Governor Norton's actions are attributable to the State of Calvada and that she may control its content without violating the First Amendment, as she engaged in government speech insofar as she used the GEN Page in connection with matters pertaining to the state.

Mr. Wong submitted a timely appeal to the U.S. Court of Appeals for the Fourteenth Circuit, seeking reversal of the District Court's grant of summary judgment, and the Fourteenth Circuit heard arguments for the matter on September 22, 2017. *Norton II*, slip op. at 1. On November 1, 2017, the Fourteenth Circuit agreed that Governor Norton's conduct constituted state action, however, it held that Governor Norton did not engage in government speech, but instead opened a government sponsored forum for speech on her GEN Page. *Id. at 2.* Consequently, the deletion of Mr. Wong's post from the GEN Page and the ban imposed on him is a form of

impermissible viewpoint discrimination in violation of the First Amendment. *Id*. The Fourteenth Circuit thus reversed the District Court's decision and remanded the case with instructions to grant Mr. Wong's Motion for Summary Judgment. *Id*. at 12. Governor Norton filed a timely petition for writ of certiorari, which this Court granted. *Norton v. Wong*, No. 17-874 (U.S. Nov. 12, 2017).

STATEMENT OF THE FACTS

The dispute before the court involves the social media website Facebook. Facebook is a social platform with over a billion users each day. (R.13). Individuals and entities are able to create an account to interact with other users to connect on political, social, and human interest topics. Users interact by posting updates, making comments, replying, and "liking" content of other users. Not only are users able to connect with friends, but they are given unprecedented access to political figures, celebrities, and athletes. *Id*. In addition, a user is able to create a page which allows for subscribers to come together around a common interest (typical examples include political figures, sports teams, businesses). (R.14). Facebook has the ability to verify the authenticity of public figures and places a blue badge on the page to show that it has been verified. *Id*. Furthermore, Facebook gives users the ability to ban accounts from further interaction on the pages that a user controls. *Id*.

Prior to her election in 2015, Governor Norton created a Facebook page titled "Elizabeth Norton," where she would engage with a limited audience of her friends on social and business topics. *Id*. After Governor Norton won the 2015 gubernatorial election, she promptly changed the title of the "Elizabeth Norton" page to the "Governor Elizabeth Norton" Page. (R.25). In addition to the subsequent name change, Governor Norton also made the GEN Page visible and open to interaction by the public. *Id*.

In her capacity as Governor, Norton looked to keep her constituents up-to-date on the actions of the State government. *Id*. Her Chief of Staff, Ms. Maria Mulholland, views Governor

Norton's actions on the GEN Page as a point of pride due to the unprecedented level of access Governor Norton has provided her constituents through the use of the GEN Page. (R.23). Governor Norton often poses questions on the GEN Page in her official capacity as governor to gain input on how to improve the State of Calvada. (R.25). This input has once been used to help "rebrand" the State in selecting a new flag design. *Id*. Governor Norton has also used the GEN Page to employ the Department of Transportation to repair the State's decaying road system after receiving constituent feedback regarding the roads. (R.15). She engaged constituents on the GEN Page regarding budget negotiations and looked to "help make the law easier to understand." (R.25). Governor Norton sought to connect with the citizens of Calvada as individuals, thus she would also make posts on personal matters. (R. 14-15).

In order to accomplish these goals, Governor Norton utilized the resources of the State of Calvada. Much of the posting and interactions on the GEN Page was done through two of her Senior Advisors, Director of Social Media Sanjay Mukherjee and Chief of Staff Maria Mulholland. (R.20-22). Ms. Mulholland often drafts public announcements, takes photos and videos, and monitors the GEN Page. Her duties also include responding to constituents. (R.23). These announcements, photos, and videos would then be posted by Mr. Mukherjee. (R.21). After making a public announcement in the form of a post on the GEN Page, the post would then be "shared, or reposted, on the State's "Governor of Calvada" page, which is passed down to the new administration. In compliance with State security, much of this work on the GEN Page is done on internet devices owned by the State. (R.26). Mr. Nelson Escalante monitors the GEN Page for threats to the Governor or her family's safety. (R.18).

On the day of the events that gave rise to the issue at hand, Governor Norton posted the "New State Policy on Immigration Law Enforcement" (the "Immigration Policy Post") on the

GEN Page (R.15). The post unveiled the new state policy before it was announced by the Governor's office to the press. In short, the policy directed State and local law enforcement agencies to cooperate with federal law enforcement agencies in enforcing the immigration law of the United States. *Id*. The post concluded with a call to action for her constituents: "As always, I welcome your comments and insights on this important step." *Id*. The Governor subsequently received her requested feedback on the policy. Three of the comments were negative. (R.17). One negative post was made by Mr. Brian Wong, a school teacher, immigrant, and constituent of Governor Norton. (R.27). The post 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.16) (emphasis added). Later that night, Governor Norton, in an email to Mr. Mukherjee, directed him to delete Mr. Wong's post and ban him from posting further comments on the GEN Page. (R.20). Mr. Wong's post was the only post deleted. (R.17). Mr. Wong hoped his comment would be heard by both the Governor and citizens of the State of Calvada— "I wanted to alert the public to this waste of State resources." (R.27).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit and find that Governor Norton's deletion of Mr. Wong's comment from the GEN Page and the ban imposed on Mr. Wong constituted impermissible viewpoint discrimination in violation of the First Amendment. These actions by the governor also create a sufficient nexus to fairly attribute them to the State of Calvada. Governor Norton, in her official capacity, directed State resources to retaliate against Mr. Wong, which when taken together in the totality of the circumstances, render the actions of the Governor and the State entwined. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001). Furthermore, by soliciting and responding to constituent feedback and announcing public policy updates on the GEN Page, Governor Norton preformed a traditional state function. *See Marsh v. Alabama*, 326 U.S. 501 (1946). Governor Norton's actions violated Mr. Wong's First Amendment rights and are properly attributable to the State of Calvada.

Governor Norton opened a public forum for speech on the GEN Page which she used to communicate with constituents, solicit public opinion, and make announcements regarding government policy positions. The Supreme Court has described public fora as "places which by long tradition … have been devoted to assembly and debate" such as public parks or town squares. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Facebook has not existed long enough to have been devoted "by long tradition" to assembly and debate, however, the Supreme Court in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), analogized social media platforms to traditional public fora, as they provide a person with the opportunity to communicate with "a voice that may resonate farther than it could from any soapbox." *Id*. at 1737.

The First Amendment prohibits the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others. However, the government is not prohibited from regulating its own speech. Mr. Wong's comment on the Immigration Policy Post on the GEN Page did not constitute government speech, making Governor Norton's deletion of Mr. Wong's comment and subsequent ban of Mr. Wong from the page a violation of his First Amendment rights. The Fourteenth Circuit stated that Governor Norton "neither dreams up nor edits" the content of the speech posted on the GEN Page in response to her invitation to constituents to voice their views on various issues. (R. 35). Furthermore, the factors this Court identified in *Tam* determine whether certain speech constitutes government speech. Applying the *Tam* factors to the case at hand furthers the conclusion that the immigration policy post was not government speech—social media platforms (specifically Facebook) are analogous to traditional public fora, Mr. Wong's comment is not closely identified in the public mind with the state, and the state does not maintain direct control over the messages conveyed. *See Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017). Therefore, the Fourteenth Circuit correctly held that the Immigration Policy Post and Mr. Wong's comment on the GEN Page do not constitute government speech.

Finally, Governor Norton's deletion of Mr. Wong's comment from the GEN Page and the ban imposed by Governor Norton on Mr. Wong constitute a form of impermissible viewpoint discrimination in violation of the First Amendment. This Court has stated that viewpoint discrimination by the government in regulating speech is a violation of the First Amendment and an "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Here, because of the viewpoint taken by Mr. Wong in his comment on the GEN Page, Governor Norton deleted Mr. Wong's comment and permanently banned him from communicating on the page, a clear form of viewpoint discrimination.

STANDARD OF REVIEW

Traditionally, decisions on "questions of law" are "reviewable *de novo*," *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014). This Court exercises *de novo* review over First Amendment claims raised on appeal. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). This Court also exercises *de novo* review over a grant of summary judgment. C*herry v. Auburn Gear, Inc.*, 441 F.3d 476, 481 (7th Cir. 2006).

ARGUMENT

I. GOVERNOR ELIZABETH NORTON ENGAGED IN STATE ACTION BY DELETING MR. WONG'S POST ON THE GEN PAGE AND BANNING HIM FROM POSTING FURTHER COMMENTS, WHEN SHE AND THE STATE OF CALVADA HAVE BECOME PERVASIVELY ENTWINED AND EXERCISED THE TRADITIONAL AND EXCLUSIVE POWERS OF THE STATE.

Governor Norton violated Mr. Wong's First Amendment right to freedom of speech when, clothed with the power of the State, she deleted his post and prevented him from posting further comments on the GEN Page. The First Amendment of the U.S. Constitution provides that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. The First Amendment is applied to the States through the Fourteenth Amendment's Due Process Clause which provides that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. This Court has recognized various means by which a private individual can be clothed in the color of State law, thereby making their actions fairly attributable to the State. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001). Accordingly, the threshold inquiry must be whether Governor Norton's actions are attributable to the State of Calvada.

A. Governor Elizabeth Norton is Pervasively Entwined with the State Which Make Her Actions Fairly Attributable to the State of Calvada.

Governor Norton's deletion of Mr. Wong's comment on her Immigration Policy Post and the subsequent ban from posting further comments on the GEN Page involved excessive State participation to make these actions attributable to the State. State action can be found where a State affirmatively facilitates, encourages, and authorizes the acts of a private entity. *See Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164-65 (1978). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible." *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982); *See also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).

In *Jackson v. Metropolitan Edison Co.*, this Court held that "state regulation does not by itself convert [a private corporation's] action into that of the State." *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 351 (1974). This Court looked for a close enough nexus to link the State with the actions of the private company but was unable to find one. "[It cannot] be said to make the State in any realistic sense a partner or joint venturer." *Id*. at 358 (quoting *Moose Lodge No. 107*, 407 U.S. 176-77) (internal quotation marks omitted). *Jackson* does not specifically define what, in addition to the regulation, must be present for finding State action, but what is apparent is that the Court appears to be looking for some evidence that the State is not simply a passive observer. *Brentwood Academy*, 531 U.S. at 299.

Brentwood Academy v. Tennessee Secondary School Athletic Ass'n created the test to determine whether the State and private entity are pervasively entwined. *Brentwood* created a totality of the circumstances test. "[N]o one fact can function as a necessary condition across the board for finding State action." *Brentwood Academy*, 531 U.S. at 296. *Brentwood* pointed out several cases where the private action was entwined with State policy or the State was entwined with management and control. *Id*. at 296-97. When a private entity is pervasively entwined with

the State, the action can be fairly applied to the State. *Id*. at 299-301. These various tests cannot be applied in a mechanical, rigid manner. *Id.* at 531 U.S. at 295. The inquiry is highly fact specific, and "only by shifting facts and weighing circumstances can nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

In *Brentwood Academy*, defendant Tennessee Secondary School Athletic Association ("TSSAA"), a private organization, was tasked with facilitating and regulating athletic competition between its member high schools in Tennessee. *Brentwood Academy*, 531 U.S. at 291. TSSAA membership was made up primarily of public schools. *Id*. TSSAA was governed by a board of directors which was composed of school officials that met during the school day. *Id*. It was funded by membership dues and gate fees from its member schools' sporting events, and its employees were eligible to join the State's public retirement system. *Id.* at 291-92. In addition, the Tennessee legislature and State Board of Education recognized TSSAA's role in coordinating interscholastic athletics and approved the TSSAA's rules and regulations, while maintaining a right of future review. *Id* at 292. TSSAA's status as a private entity was challenged when it deemed plaintiff, Brentwood Academy, a member high school, to have violated its rules. *Id*. at 293.

After weighing the facts presented above, this Court held that state action was undeniably present. "Entwinement down from the State Board of Education is therefore unmistakable, just as the entwinement up from the member public schools is overwhelming." *Id*. at 302. TSSAA's composition and function provided by and made up of school officials, the State Board of Education's recognition of the role TSSAA plays, and TSSAA employees being permitted to join the State's retirement system were significant to the Court's finding of state action.

This line of reasoning was followed by the U.S. Court of Appeals for the Fourth Circuit in *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003). In *Rossignol*, plaintiff, the publisher of a local newspaper, argued defendant, the Sheriff and his deputies, violated his First Amendment right to freedom of speech by purchasing every copy of a local newspaper, which included a negative article about the Sheriff, effectively taking the paper out of circulation. *Id*. at 519. The Sheriff made disparaging remarks about the newspaper. *Id*. In addition, the deputies wore police sweatshirts and carried State issued firearms. *Id*. The Court held that there was "no doubt that the seizure in this case was perpetrated under the color of state law." *Id.* Specifically, the Court found the motivations of the Sheriff significant in its finding of state action.

Here, the situation is analogous to that of *Brentwood* and *Rossignol*. The State of Calvada is "overborne by the pervasive entwinement" with the actions of Governor Norton. Several factors shine bright to make the State's presence clear. First, Governor Norton's official status as the State's chief executive linked the State to the private action. It is undeniable that Governor Norton did not lose her individuality upon her election, but her status as the governor is still relevant. "State employment is generally sufficient to render the defendant a state actor." *West v. Atkins*, 487 U.S. 42, 49 (1988).

Furthermore, Governor Norton's official status goes further as she was also acting in her official capacity as the State's chief executive. While it is not required that Governor Norton maintain a Facebook page, this understanding of her official duties and her interactions online is overly formalistic. (R.26). Governor Norton uses Facebook as a platform to engage her constituents—encouraging and responding to constituent input. (R.25). Governor Norton's deletion of Mr. Wong's comment is undoubtedly a response to a constituent, especially when the

comment was pertaining to a newly enacted state policy. "Thus, generally, a public employee acts under color of State law while acting in [her] official capacity." *West*, 487 U.S. at 51.

Governor Norton's status as governor, and her actions within her official capacity are similar to that of the school officials in *Brentwood*, as she exercises both control and operation of GEN page's activity. *See Brentwood*, 531 U.S. at 302. Governor Norton directed her staff, specifically the Director of Social Media, Mr. Mukherjee, to delete Mr. Wong's comment and ban Mr. Wong from posting further comments on the GEN Page. (R.26). "It is standard practice for Mr. Mukherjee, and Chief of Staff Ms. Maria Mulholland… to respond quickly to requests, even on weekends and holidays." (R.17). These two senior advisors acted as the deputies did in *Rossignol*. Likewise, "the fact that these [state officials] acted after hours … cannot immunize their efforts to shield themselves from adverse comment and to stifle public scrutiny of their performance." *Rossignol*, 316 F.3d at 523.

Governor Norton's motivation was also similar to that of the Sheriff in *Rossignol*. In both instances the elected official acted in retaliatory manner. Governor Norton argues that her actions were motivated by the alleged *ad hominem* attack by Mr. Wong, yet this appears to be nothing more than pretext. A plain reading of Mr. Wong's post disproves her claimed motives. First, in his comment, Mr. Wong stated that "no one could *act* as you have." (R.16) (emphasis added). The act referred to was the Governor Norton's posting of the immigration policy a little over an hour earlier. Second, the final two sentences of Mr. Wong's comment, in which he compares her public policy skill to that of a toad and declares her a disgrace to the statehouse, is in reference to her fitness to serve as Governor, not as an individual.

This pervasive entwinement between Calvada and Governor Norton is contrary to the original purpose of the Fourteenth Amendment's state action requirement. In 1883, this Court

interpreted the state action requirement, holding that "wrongful acts of an individual, unsupported by any [State] authority, is simply a private wrong, or a crime of that individual." *The Civil Rights Cases*, 109 U.S. 3, 17 (1883); This proposition has been routinely cited as legal axiom in the years that followed. *See Shelley v. Kraemer*, 334 U.S. 1, 14 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982); *Cooper v. U.S. Postal Service*, 577 F.3d 479, 491 (2d Cir. 2009). In *The Civil Rights Cases*, the necessity of the state's involvement was paramount to a finding of a violation of the Fourteenth Amendment, and this Court identified the actions which can and cannot be taken by an individual. *Id*. at 17.

"The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004 (emphasis in original). "Careful adherence to the state action requirement thus preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982). The Fourteenth Amendment's State action requirement aims to keep separate the individual and State, only permitting the state to be held responsible for the individual's action when it would be fairly attributable. *See National College Athletic Assn. v.* Tarkanian, 488 U.S. 179, 191 (1988); See *also Lugar*, 457 U.S. at 937. Governor Norton's comingling of the State and the individual works against the original purpose of the state action requirement. Consequently, failing to find state action would be untenable.

Given the circumstances discussed above, the State's pervasive entwinement made the actions of Governor Norton fairly attributable to the State of Calvada.

B. Governor Norton's Act of Deleting Mr. Wong's Facebook Comment and Banning Him from Posting Further Comments is an Exclusive and Traditional State Function.

In addition to finding state action when the State and private entity have been entwined themselves in with governmental policy, function, and control, this Court has also recognized that a private entity acts with the color of state law when it exercises an exclusive and traditional state function. The inquiry is whether they are so traditionally the exclusive prerogative of the State that their conduct might be fairly attributable to the State. *Flagg Brother v. Brooks*, 436 U.S. 149, 158 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974); *Marsh v. Alabama*, 326 U.S. 501, 506-07 (1946); *Terry v. Adams*, 345 U.S. 461, 469 (1953). No bright line test exists to determine when an action is a traditional and exclusive state function. This power is one "which is traditionally associated with sovereignty, such as eminent domain." *Jackson*, 419 U.S. at 353.

The principal case finding a private entity acted with traditional and exclusive power of the States was this Court's decision in *Marsh v. Alabama,* 326 U.S. 501 (1946). In *Marsh*, the town of Chickasaw was a company owned and operated town. *Id*. at 502. The town consisted of residential buildings, a business block, sewage, a sewer system, and streets. *Id*. at 503. The business block consisted of business that could be rented from the company. *Id.* Chickasaw employed a Mobile County Sheriff deputy. *Id*. The sidewalks and streets permitted residential use, and there was no obstruction between the State highway that ran parallel to the town.

The defendant in *Marsh* was arrested and convicted of distributing religious literature in violation of a criminal trespass ordinance. Defendant argued that such conviction violated her First Amendment rights. This Court held that if the town been owned by a municipal corporation rather than a private one, the defendant's conviction could not be upheld. *Id*. at 505. "[The citizens of Chickasaw,] just as residents of municipalities, are free citizens of their State and country." *Id*. at

508. Consequently, this Court found that the Gulf Shipbuilding Corporation was acting with the traditional and exclusive function of the state because it possessed and operated "Chickasaw [no] different from any other town." *Id*. at 508-09.

Similarly, Governor Norton acted with powers that are traditionally and exclusively reserved to the State. The District Court noted in its opinion that the use of Facebook cannot be viewed as a traditional state function and held that Governor Norton was not exercising a traditional and exclusive state function. (Norton I, slip op. at 7). However, this rationale is a narrow view of Governor Norton's actions. Governor Norton was acting as an elected representative in her official capacity. She sought to use her GEN Page as a platform to keep her constituents updated on the functioning of her administration and to solicit their feedback on various issues. She sought the help of the citizens of Calvada to identify issues with the State's infrastructure, and then directed the State Department of Transportation to address and remedy the identified issues. (R.15). She also directed her staff to administer and make updates to the GEN Page. (R.21-23). The State alone has the power to direct and employ its resources to the needs of its citizens.

The District Court's narrow interpretation would create a limited view of governmental powers in the digital age. Although the powers exercised must be "traditional", there must be way to move beyond a rigid historical analysis to allow for technological advancement in governmental functions. This Court should not focus on the *instrument or method* employed, but whether a traditional and exclusive *power* of the State is present.

Finally, this case involves the same concerns that this Court had in *Terry v. Adams*. In *Terry*, Texas delegated the responsibility of conducting primarily elections to a private social club, and this social club sought to exclude African Americans from voting. *Terry*, 345 U.S. at 462. In holding that state action existed, this Court expressed concerns about a State delegating its

responsibilities to a private entity as a means subverting the Fifteenth Amendment. *See Id*. at 469. Here, Governor Norton is subverting Calvada's obligation to the First Amendment by arguing that her actions were as an individual and were not done with color of State law. Her actions of directing and employing State resources to the expressed needs of her constituents, Governor Norton's actions were the exclusive and traditional functions of the State.

II. GOVERNOR ELIZABETH NORTON VIOLATED MR. WONG'S FIRST AMENDMENT RIGHTS WHEN SHE DELETED HIS COMMENT AND PERMANENTLY BANNED MR. WONG FROM COMMUNICATING ON HER GEN PAGE.

A. Governor Elizabeth Norton Created a Public Forum for Speech When She Created the Immigration Policy Post.

Governor Norton created a public forum for speech when she generated her Immigration Policy Post on the GEN page which she used to communicate with constituents, solicit public opinion, and make announcements regarding government policy positions. The Constitution does not require the Government to grant free speech rights to every citizen who wishes to exercise those rights on every type of government property without regard to the nature of the property. *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 799–800 (1985). Recognizing that the government has the power to preserve the property under its control for the use to which it was lawfully dedicated, this Court has adopted a forum analysis test as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property to express their First Amendment free speech rights. *Id.* The extent to which the government may regulate speech-related conduct depends on whether the forum involved is a public forum, a designated public forum, a limited public forum, or a nonpublic forum.

This Court has described public fora as "places which by long tradition or by government

fiat have been devoted to assembly and debate" such as public parks or town squares. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Facebook has not existed long enough to have been devoted "by long tradition" to assembly and debate, however, this Court in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), analogized social media platforms to traditional public fora. "Social media allows a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id.* at 1737 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *cf. Twitter, Inc. v. Sessions*, 263 F.Supp.3d 803, 815 (N.D. Cal. 2017) ("Twitter acts as the modern, electronic equivalent of a public square.").

In *Packingham*, the plaintiff challenged the constitutionality of a North Carolina state law that made it illegal for registered sex offenders to access social media sites, specifically Facebook. The plaintiff alleged that the law at issue infringed on his First Amendment rights. "[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.*

In line with this Court's line of reasoning in *Packingham*, the United States District Court for the Eastern District of Virginia in *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F.Supp.3d 702 (2017) held that when a member of the County Board of Supervisors allowed the public to have "virtually unfettered discussion" on her Facebook page, that action was "more than sufficient to create a forum for speech." *Id.* at 717. In *Davison*, the plaintiff brought suit against the Chair of the County Board of Supervisors (the "Chair") for banning him from the Chair's Facebook page titled "Chair Phyllis J Randle" as a result of a comment left by the plaintiff on a post generated by the "Chair Phyllis J Randle" Facebook page. The Chair often used the Facebook page to communicate with her constituents by soliciting comments and questions pertaining to public matters. The plaintiff's comment was critical of the Chair and her colleagues, and the Chair

subsequently deleted the entire post (which included the plaintiff's comment) and banned the plaintiff from the page for twelve hours. The Court stated that the First Amendment applies to speech on social media with no less force than in other types of forums, and held that the Chair violated the First Amendment by engaging in viewpoint discrimination and banning the plaintiff from a digital forum for criticizing her colleagues in the County government. *Id.* at 719.

The facts in the case at hand are similar to the facts in both *Packingham* and *Davison*. Here, Governor Norton's use of the GEN Page to communicate with her constituents by soliciting public opinion, engaging the public in order to solve municipal problems, and make announcements regarding government policy positions presented her constituents with the opportunity to communicate openly on a public forum similar to the fora in *Packingham* and *Davison*. As such, Governor Norton's deletion of Mr. Wong's comment and banning Mr. Wong from voicing his opinion on subsequent posts on the GEN Page is an unconstitutional violation of Mr. Wong's First Amendment rights.

Governor Norton's use of the GEN Page to solicit public opinion on government policy, among other things, created a public forum for speech. Governor Norton opened the GEN page to the public by allowing any Facebook user to comment on or discuss a matter of public concern by posting on her page. (R.25) *See Packingham,* 137 S.Ct. at 1735 ("While in the past there may have been difficulty in identifying the most important places (in the spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular."); *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989) ("The city commission designated their meeting a public forum when the commission intentionally opened it to the public and permitted public discourse on agenda items."). Here, Governor Norton used her GEN Page to open a digital public forum for speech.

Governor Norton argues that by using Facebook, a private social media outlet that is beyond the government's control, she could not have opened up a forum for speech. However, as the Fourteenth Circuit Court of Appeals noted, "[w]hen a government official opens an internet platform to the public by posting important government policy announcements and soliciting commentary, the official thereby creates a government-sponsored forum for speech." *Norton II*, slip op. at 9. *See Denver Area Education Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part) (public fora are not "limited to property owned by the government"); *see also Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding that a theater that was privately owned and subsequently leased by the city was a public forum.). The fact that Facebook is not a government owned forum has no bearing on whether or not the forum can be opened up as a forum for speech. Furthermore, this Court has found that a forum need not physically exist to be afforded constitutional protection. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995). A forum can exist in "a metaphysical rather than in a spatial or geographic sense . . . and the same legal principles are applicable." *Id*.

The distinction between public forum or a designated public forum for speech by the use of her GEN Page is not relevant, as the analysis for a violation of a person's First Amendment rights is the same for a public forum and designated public form. To be constitutional, government regulation of speech in public forums and designated public forums must: 1) be content neutral; 2) be narrowly tailored to serve an important government interest; and 3) leave open alternative channels of communication. *Perry Educ. Ass'n*, 460 U.S. at 45. Here, this test fails; Governor Norton's deletion of Mr. Wong's comment and banning of Mr. Wong from posting further comments on the GEN Page were based on the content of Mr. Wong's speech, which were critical of Governor Norton's implementation of the new immigration policy and her fitness to serve as

the State's chief executive. No governmental interest was being served, and Mr. Wong had no alternative channels of communication similar to the one taken away from him by Governor Norton's actions. Thus, Governor Norton's actions amount to impermissible government regulation of speech in either a public or a designated public forum.

B. Governor Elizabeth Norton's Immigration Policy Post Does Not Constitute Government Speech.

Governor Norton is prohibited from regulating the speech on the post by deleting Mr. Wong's comment and banning him from communicating on the GEN Page by citing only her disagreement with the viewpoints expressed by Mr. Wong in his comment as reason for taking those actions. The First Amendment prohibits the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others, thereby requiring the government to maintain viewpoint neutrality when regulating private speech. The First Amendment does not, however, require the government to maintain viewpoint neutrality when its officers and employees speak to a subject, commonly referred to as government speech. *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017).

Governor Norton claims that her immigration policy post constitutes government speech, so that the deletion of Mr. Wong's comment and permanent banning of Mr. Wong from the GEN page does not infringe on his First Amendment rights. Governor Norton and the District Court, respectively, grounded their arguments and analyses on *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015). In *Walker*, this Court held that license plates are a form of government speech, and the Texas Department of Motor Vehicles Board did not infringe on the plaintiffs' first amendment rights by rejecting a confederate flag design for specialty vehicle license plates. *Id.* at 2253. The Court stated that license plate designs are meant to convey and have the effect of conveying a government message, therefore they constitute government

speech. *Id.* at 2251. Here, the District Court extended this logic, holding that Governor Norton's Immigration Policy Post conveyed a government message, and therefore constituted government speech. However, as the Fourteenth Circuit Court of Appeals correctly pointed out, the District Court erred in holding that the post constituted government speech, as Mr. Wong's right to express his opinion through a *comment* was at issue here, not the Immigration Policy Post. *Norton II,* slip op. at 7. (emphasis added).

After the District Court entered its order, this Court decided *Matal v. Tam*. *Tam* involved an action brought against the Patent and Trademark Office (the "Office") for its refusal to register a trademark for the plaintiff's band on grounds that the mark was a violation of the Lanham Act, which permits the Office to reject a trademark on the basis that it is "disparaging". *Tam, 137 U.S.* at 1753. This Court in *Tam* held that a federally registered trademark does not constitute government speech, as the government does not "dream up, nor edit" the marks submitted for registration. *Id.* at 1758. In doing so, the Court struck down the provision of the Lanham Act, holding that the statute required impermissible viewpoint discrimination. *Id.* at 1763.

The *Tam* Court came up with a three-factor analysis to help determine whether certain speech constituted government speech. These factors include: 1) whether the medium of expression had "long been used by the States to convey state messages;" 2) whether the speech was "often closely identified in the public mind" with the State; and 3) whether the State "maintained direct control over the messages conveyed" on the medium of expression. *Id*. at 1760 (quoting *Walker*, 135 S.Ct. at 2248-49). In analyzing the three factors, the critical question is not whether the public perceives Governor Norton's posts to be government speech, but whether the public perceives Mr. Wong's comment on her post to be government speech, as the comment was regulated here. (R. 35).

The first factor of the Tam analysis, "whether the medium of expression had long been used by the states to convey state messages" is not totally on point here, as Facebook is a relatively new social media site, and states do not have a tradition of using it to convey government messages. *Tam*, 137 U.S. at 1760. However, as alluded to earlier, this Court in *Packingham* has stated that "cyberspace in general, and social media in particular, has emerged as one of the most important places for speech of all kinds." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

The second and third factors in the Tam analysis are more relevant to the case at hand. The second factor is whether the speech, Mr. Wong's comment, was closely identified in the public's mind with the State; here, it was not. Any Facebook user, which total over one billion worldwide, understands that one user's comment on another user's post is separate and distinct from the original user's post and ideas. Mr. Wong's comment was made under his personal profile, with his name "Brian Wong" appearing directly adjacent to his comment. (R.27). Furthermore, Governor Norton's solicitation of public opinion on her post supports the argument that neither the Immigration Policy Post nor Mr. Wong's comment are government speech because it put the public on notice of her desire to hear from her constituents. The third factor in the Tam analysis is whether the State maintained direct control over the messages conveyed. The government does not control, and Facebook users would not think that the government does control, the responsive messages conveyed on the GEN Page. The comments and posts by other Facebook users are clearly distinguishable from posts or comments of the GEN Page itself. Thus, applying the factors in *Tam* leads to the conclusion that Governor Norton's speech is not protected government speech.

C. The Governor's Deletion of Mr. Wong's Post on the GEN Page Constituted Impermissible Viewpoint Discrimination in Violation of the First Amendment.

This Court has held that viewpoint discrimination is unconstitutional "even when the public forum is one of the government's own creation." *Rosenberger v. Rector & Visitors of the*

University of Virginia, 515 U.S. 819, 829 (1995). In *Rosenberger*, a student organization brought suit against the University of Virginia for its denial of funds to cover costs for the publication of the student organization's editorials. *Id*. at 819. The university had a funding program in place for registered student organizations to cover costs of publication of any student organization's editorials, but denied funding to the plaintiffs' student organization based on the religious viewpoint of the organization's editorials. *Id*. This Court stated that any viewpoint discrimination by the government in regulating speech is a violation of the First Amendment and an "egregious form of content discrimination," and "when the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829.

In *Lamb's Chapel*, the plaintiff brought suit alleging that defendant school district's refusal to allow the use of school facilities due to the religious viewpoint constitutes a violation of the plaintiff's First Amendment rights, as the school facilities were opened up to other groups, but not plaintiff's. *See Lamb's Chapel v. Center Moniches Union Free School District*. 508 U.S. 384 (1993). This Court held that a school district's rejection of a religious group's request for after-hours use of school facilities because of that group's intention to use the facilities for a religious oriented film series violated the First Amendment. *Id*. The District's denial of access to its facilities solely because of the religious viewpoint was unconstitutional viewpoint discrimination. *Id.* at 392. "It discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint." *Id.* at 393.

Here, the situation is similar to both *Rosenberger* and *Lamb's Chapel*. Governor Norton deleted Mr. Wong's post and permanently banned him from communicating on the page due to

the viewpoint he expressed in his comment. Mr. Wong was critical of Governor Norton's new immigration policy and her fitness to serve as Governor, and as a result, Governor Norton took action and infringed upon Mr. Wong's First Amendment rights. Mr. Wong was discriminated against for no reason other than the viewpoint he took on the immigration policy issue, and that is evidenced by the fact that no other posts pertaining to the immigration policy were deleted and no other users were banned from the GEN Page. (R. 17).

Governor Norton argues that Mr. Wong's post was deleted and because it was an *ad hominem* attack unrelated to the content of the Immigration Policy Post. (R. 26). However, Mr. Wong's comment pertained directly to the Immigration Policy Post. Mr. Wong posted his comment directly to the Immigration Policy Post after being solicited by Governor Norton to provide his comments, and specifically addressed Governor Norton's *action* in enacting the policy and her ethics and morality as governor. (R.16) (emphasis added).

Mr. Wong's post can be considered a political message that was of public concern. The First Amendment requires the government to afford speech of public concern the highest degree of constitutional protection. *See Snyder v. Phelps*, 562 U.S. 443, 444 (2011). In *Snyder*, this Court stressed that "speech is of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Id*. at 444 (quoting *Connick v, Myers*, 461 U.S. 138, 146 (1983)). Here, Mr. Wong's post should be fairly understood as relating to a political matter—the Immigration Policy Post—and as such, Mr. Wong's post can be considered a matter of public concern. Accordingly, Governor Norton's actions are a form of unconstitutional viewpoint discrimination.

CONCLUSION

For the forgoing reasons, Respondents respectfully requests this Court affirm the decision of the United States Court of Appeals for the Fourteenth Circuit, upholding the validity of the Mr. Wong's Frist Amendment Protections.

Dated: January 31, 2017

Respectfully submitted,

Team 3

BRIEF CERTIFICATE

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

Respectfully submitted,

Team 3