No. 17-874

IN THE

SUPREME COURT OF THE UNITED STATES

GOVERNOR ELIZABETH NORTON

Petitioner,

-against-

BRIAN WONG

Respondent.

ON PETITION FOR REVIEW
FROM THE FOURTEENTH CIRCUIT COURT OF APPEALS

BRIEF FOR RESPONDENT

COMPETITOR 9

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fourteenth Circuit properly held that a state official engaged in state action by deleting her constituent's post on her public Facebook page and banning him from ever posting further comments on that page.

2. Whether the Fourteenth Circuit properly held that the state official violated the constituent's First Amendment rights by engaging in impermissible viewpoint discrimination in a state-sponsored forum.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit rendered its decision on November 1, 2017. Wong v. Norton, No. 17-874, slip op. at 1 (14th Cir. November 1, 2017). A Petition for Writ of Certiorari was filed and granted. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

After Gov. Norton, Petitioner, deleted Mr. Wong's comment from her Facebook page and banned him from posting any further comments, Mr. Wong, Respondent, filed a civil rights action pursuant to 42 U.S.C. § 1983, alleging that the Governor violated his right to freedom of speech under the First and Fourteenth Amendments. (R. 01). Mr. Wong and Petitioner filed cross motions for summary judgment on August 25, 2016. (R. 01). In granting Petitioner's motion, the district court found that Governor Norton's entire Facebook post was a form of "government speech" thereby entitling her to delete Mr. Wong's comment without violating his First Amendment rights. (R. 10.) However, the district court acknowledged that Petitioner's use of the GEN page was state action. (R. 01-02). On appeal, the Fourteenth Circuit agreed that Petitioner's action was attributable to the state of Calvada but reversed on the grounds that Petitioner's GEN page "established a government-sponsored forum for speech" and therefore was bound by the First Amendment. (R. 36.) According to the Court of Appeals, the restrictions placed on Mr. Wong constituted impermissible viewpoint discrimination. (R. 40). Petitioner filed the instant appeal challenging the Court of Appeals' finding. This Court reviews the grant of summary judgment *de novo*. See Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 340-41 (4th Cir. 2000).

STATEMENT OF FACTS

Petitioner, Elizabeth Norton, was sworn in as Governor of the state of Calvada on January 11, 2016. (R. 24.) In January of 2008, Petitioner created a personal Facebook account with the title "Elizabeth Norton" and allowed only "Facebook friends" whom she had expressly connected with to access the page. (R. 24-25.) The day after her inauguration, Petitioner adapted her Facebook page for use in her new role as a public official. (R. 25.) She renamed the page "Governor Elizabeth Norton", (hereinafter the "GEN Page"), changed the privacy settings to allow all members of the public to view her content and make comments, and added her Social Media Director, Sanjay Mukherjee, and her Chief of Staff, Mary Mulholland, as administrators with the "capacity to manage page roles and settings" and post content. (R. 14; R. 23; R. 25.) Petitioner also inherited a Facebook page that had been used by her predecessor and was titled "Office of the Governor of Calvada." (R. 25.) That page consistently reposted content that initially appeared on Petitioner's GEN Page. (R. 26.)

Since taking office, Petitioner has used her GEN page as a forum for her administration's policy initiatives. (R. 25.) The page was "regularly monitor[ed]" by Ms. Muholland and Mr. Mukherjee, who maintained Petitioner's social media presence along with other senior advisors in the administration. (R. 20.) Ms. Mulholland approved all public announcements, policy-related or otherwise, on the GEN Page before they would be posted publicly. (R. 23.)

The vast majority of Petitioner's posts since inauguration have pertained to state government, policy initiatives, and her role as Governor. (R. 14.) She employed the Facebook page as a vehicle for official government communication, inviting comments, requesting input from constituents on various state issues, announcing policy changes, and posting updates on government matters. (R. 25.) Two days after inauguration, Petitioner posted "Check my

'Governor Elizabeth Norton' Facebook page often for exciting announcements and policies from YOUR government, and let me know what you think by posting your comments there. I will get back to as many of you as I can!" (R. 14.) On March 7, 2016, Petitioner asked Calvada residents, via her Facebook page, to "[p]ost a picture and the location of any post-winter potholes you see on the road here, and the State Department of Transportation is going to fix them as fast as they can." (R. 15.) She also responded to "as many users who replied with relevant input" because she wanted her constituents to know "they could actually interact with [her] as an individual through Facebook." (R. 25.) Ms. Mulholland also regularly responded to constituent requests via the GEN Page. (R. 23.)

Petitioner, Mr. Mukherjee, and Ms. Mulholland were told by Nelson Escalante, the Director of Public Safety for the state of Calvada, to "use only devices provided by the State for all communications that in any way touch on State of Calvada business or other matters of concern to the state[.]" (R. 18.) All three signed an agreement when they began working for the state in which they promised to abide by this instruction. (R. 18.) Petitioner and Mr. Mukherjee "primarily" use the phones provided by the state for their government work, which includes accessing and updating the GEN Page. (R. 20; R. 26.)

On March 5, 2016 at 3:15 PM, the following message was posted to the GEN page:

> <u>New State Policy on Immigration Law Enforcement</u>
>
> Members of my cabinet, other senior advisors, the leadership of the Calvada Senate and House of Delegates, and I have now concluded an extensive discussion of the question whether state law enforcement officials should cooperate with federal law enforcement agencies in enforcing the immigration laws of the United States. I have decided to commit the law enforcement resources of our State to this effort. This new approach in our State will entail cooperation on a number of different levels. For example, law enforcement officers will be instructed to request proof that individuals stopped for alleged traffic infractions or apprehended as suspects in criminal investigations are legally present in the United States wherever such

> inquiries are determined to be consistent with the United States Constitution and the Constitution of our State.
>
> I do not make this decision lightly. I know that some Calvadans worry that cooperating with the federal government in enforcing federal immigration laws may raise concerns among our citizens about family members and friends, and I am aware that many local law enforcement officials worry that this cooperation will jeopardize their ability to work with immigrant communities in seeking to solve crimes. These are important issues. Nevertheless, it is essential for the good of all Calvadans – and all Americans – to ensure that the laws of our country are vigorously enforced. We need to do our part to enforce United States immigration laws.
>
> I am announcing this new policy here today because I know that those of you who visit this Facebook page are among the most active, influential, caring and patriotic citizens of the State of Calvada. I wanted you to be the first to know of this decision. I will announce the new policy to the news media at a press conference I will hold in just a few minutes, and my office will issue an Executive Order pertaining to this new policy later this afternoon. You may find the Executive Order and more information about our new policy at https//:www.immigrationenforcementinitiative.calvada.gov. As always, I welcome your comments and insights on this important step.

Respondent, Brian Wong, is a lifelong Calvada resident who teaches at a local high school. (R. 27.) As the son of immigrants, Mr. Wong was upset by the immigration policy announced by the Governor and replied to her announcement a little over an hour after it was posted. (R. 16.) He posted on the GEN page from his own "Brian Wong" account:

> 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.

Later that evening, the Governor wrote an email to Mr. Mukherjee stating that she "saw the nastygram by Wong in response to immigration announcement, Pls delete/ban. Not appropriate for page." (R. 17.) In that same email, she instructed Mr. Mukherjee to post a statement about tragedies in Iraq, a picture of her daughter and her at a basketball tournament, and a statement about a Young Farmers Program. (R. 16.) Within a half hour of Petitioner's email, Mr. Mukherjee deleted Mr. Wong's post and banned him indefinitely from posting any future content on the GEN

page. (R. 17.) Of the over thirty comments posted in response to the immigration announcement, only Mr. Wong's was deleted. (R. 17.) Mr. Wong remains banned from Petitioner's Facebook page. (R. 17.)

SUMMARY OF THE ARGUMENT

Petitioner engaged in state action when she banned Mr. Wong from her GEN Page and deleted his comment on the Immigration Policy Post. As Governor, actions taken in performance of her official duties render her a state actor whose conduct is attributable to the state. Additionally, even if Petitioner was acting in her capacity as a private citizen, her conduct is sufficiently related to Calvada to constitute state action. The context and manner under which Petitioner censored Mr. Wong created a clear relationship between the conduct and the state. Mr. Wong's comment was deleted from Petitioner's announcement on Facebook of a new state policy. That post explicitly invited constituent feedback and was clearly related to Petitioner's role as Governor. Petitioner's use of government resources and employees to post the announcement and censor Mr. Wong lends further support to the finding of state action. Petitioner ordered a state employee, with administrative access on the GEN Page, to delete Mr. Wong's comment and ban him from making future comments. Because of the close relationship between the Governor's conduct and the State, the censorship of Mr. Wong constitutes state action.

In deleting Mr. Wong's comment and permanently banning him from engaging with her as a constituent in her forum of choice, Petitioner violated Mr. Wong's First Amendment rights. By opening her Facebook page to the public and inviting her constituents to communicate with her through the page, Petitioner created a public forum. Though there are varying levels of acceptable restrictions on speech in public, limited, and nonpublic forums alike, viewpoint discrimination is never an appropriate way to regulate speech. Similarly, any reliance on the government speech

doctrine in this case is misplaced because that doctrine does not supplant properly held First Amendment rights. The Fourteenth Circuit correctly found that Petitioner's GEN page was a government-sponsored forum for speech and her censoring of Mr. Wong's solicited comment was impermissible viewpoint discrimination.

ARGUMENT

I. BY DELETING MR. WONG'S POST AND BANNING HIM INDEFINITELY FROM POSTING FURTHER COMMENTS, GOV. NORTON ENGAGED IN STATE ACTION.

Petitioner's deletion of Mr. Wong's comment and permanent ban on his participation on her GEN Page constitute state action because those actions were taken "by, or on behalf of the state." (R. 33.) Mr. Wong's claim under 42 U.S.C. § 1983 alleges deprivation of a constitutional right by the defendant "under color of any statute" imposed by a state or territory. 42 U.S.C. § 1983 (West 1996). This requires "that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). Relatedly, a constitutional claim brought pursuant to the Fourteenth Amendment requires the plaintiff to prove that the contested action be "fairly characterized as 'state action.'" Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982). State action has been described as a "deprivation of a federal right [] fairly attributable to the state." Id., at 937. Therefore, in alleging a violation of the First Amendment as applied to the states through the Fourteenth Amendment, Plaintiff must show that the deprivation occurred "under color of state law" and that the defendant engaged in "state action."

The difference between the constitutional inquiry into the state action requirement and the "color of state law" statutory inquiry under § 1983 have not been cleanly differentiated by the

Court[1] but where, as here, the defendant is a state official, the nature of that distinction is irrelevant. See Lugar, 457 U.S. at 929 ("[I]t is clear that in a § 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical.")

Determining whether a defendant's conduct is fairly attributable to the state involves a two-pronged analysis. The first prong, that "the deprivation [] be caused by the exercise of some right or privilege . . . by a person for whom the State is responsible" and the second, that "the party charged with the deprivation [] be . . . a state actor" collapse into a single inquiry when the defendant's position as a government official "lend[s] the weight of the state to [her] decisions." Id at 937. Petitioner, as Governor of Calvada, is emblematic of a state actor whose "official character" inherently lends the weight of the state to her decisions. Id. Therefore, the Court need only determine whether Petitioner's actions are fairly attributable to her role as the chief executive of the state.

There are two ways Petitioner's actions could be qualified as "state action." First, if the particular conduct occurred in Petitioner's official capacity as governor, it is fairly attributable to the state. Second, even if the conduct is deemed to relate to a personal matter, such as the maintenance of an independent social media account, it can still be attributed to the government if "there is a sufficiently close nexus between the State and the challenged action." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

[1] Compare United States v. Price, 383 U.S. 787, 794 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment") with Lugar, 457 U.S. at 928 (noting that the two concepts, while related, are distinguishable but where state action is prove so is the color of state law requirement). Because these two concepts are the same for purposes of this analysis, I will rely on both "color of state law" doctrine and "state action" doctrine.

A. Gov. Norton Was Acting In Her Official Capacity When She Deleted Mr. Wong's Comment and Banned Him From Her Page.

The Equal Protection Clause of the Fourteenth Amendment inhibits only those actions that are attributable to the state. Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961) (internal quotations omitted). Petitioner's role as Governor is sufficient to equate her actions in the instant case with the state. While not every action taken by a state employee is automatically attributable to the state, such employment "is generally sufficient to render the defendant a state actor." Atkins, 487 U.S. at 49 (internal quotation marks and citation omitted). Rarely has the Supreme Court held that an employee of the state was not acting under color of state law during the performance of her official duties. See Id. ("Thus, 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"); Naffe v. Frey, 789 F.3d 1030, 1036 (9th Cir. 2015) (holding that an action by a government employee is attributable to the state when the employee acts "in his official capacity or while exercising his responsibilities pursuant to state law" (quoting Atkins, 487 U.S. at 50)). Petitioner was acting in her official capacity as Governor when she announced the immigration policy on March 5, 2016. The announcement was made on behalf of her administration and pertained to her "responsibilities" as Governor of Calvada, including correspondence with constituents and the announcement of state policy. Therefore, her actions taken in censoring Mr. Wong's comment are clearly attributable to the state by virtue of her position of authority.

While there are exceptions to the general rule that the conduct of state employees acting in their official capacities is attributable to the state, none of these exceptions are applicable to the Petitioner where, as here, the conduct is not related to an interpersonal conflict at work, an expression of a personal belief, or the performance of a traditionally private function. See, e.g.,

Patterson v. Cty. Of Oneida, N.Y., 375 F.3d 206, 231 (2d. Cir. 2004) (challenged conduct involved "mere horseplay" between two state employees and likely does not constitute state action); Ottman v. City of Indep., Mo., 341 F.3d 751, 762 (8th Cir. 2003) ("When the alleged harassment does not involve the use of either state authority or position, courts have declined to find co-workers liable under section 1983" (internal citation omitted)); Polk Cty. v. Dodson, 454 U.S. 312, 325 (1981) (finding that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding").

While maintenance of a Facebook page may not be considered a "traditional and exclusive state function," communication with constituents in that forum is an express priority of Petitioner's administration. (R. 07; R. 25.) Further, it was the Governor's social media director, a state employee, who deleted Mr. Wong's comment. (R. 17.) Petitioner cannot claim that this act was of an entirely personal nature when it was executed by a state employee on a state-owned cell phone and directly related to her function as Governor and her employee's function as social media director. Her censorship of Mr. Wong is therefore fairly attributable to the state of Calvada.

B. Even If Gov. Norton Acted As A Private Actor, The Conduct Bears A Sufficiently Close Nexus To The State To Constitute State Action.

Even if the Court were to analyze Petitioner's conduct as that of a private actor, it is attributable to the State of Calvada. A private actor's conduct constitutes state action when there is a "close nexus" between the conduct at issue and the government. Jackson, 419 U.S. at 351. "What is fairly attributable is a matter of normative judgement, and the criteria lack rigid simplicity." Brentwood Academy v. Tennessee Secondary School Athletic Ass'n., 531 U.S. 288, 295 (2001). The analysis is highly fact-specific and requires consideration of Petitioner's actions as they relate specifically to Mr. Wong, as well as to the general use and set-up of her GEN Page. (R. 33.) As the Fourth Circuit explained, "there is no specific formula for defining state action" and

courts considering this question must conduct an inquiry into the specific facts of the alleged misconduct. Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003) (internal quotation marks omitted).

i. Gov. Norton Regularly Uses the GEN Page to Communicate with Constituents and Announce State Policy.

The GEN Page became a vehicle for the dissemination of public information relating to Petitioner's role as Governor on January 12, 2016 when she made the page available to the public, added two members of her senior staff as administrators on the page, and changed the name to include her official title as Governor. (R. 15; R. 20; R.23; R. 26.) This page, and the use of it by Petitioner, clearly constitute "official business." (R. 33.)

A recent case in Virginia, Davison v. Loudoun Cty. Bd. of Supervisors, 267 F. Supp. 3d 703 (E.D. Va. 2017), is instructive. There, an elected official, with the assistance of her chief of staff, created a Facebook page before taking office. Id. at 708. The court found the role played by state personnel to be persuasive in finding that the page was a vehicle for state action. Id. at 714. Similarly, Petitioner's decision to grant administrative access to her chief of staff and social media director weighs strongly in favor of finding the page to be a vehicle for conveying government business. Both Mr. Mukherjee and Ms. Mulholland regularly access the page, respond to comments, and "manage the content." (R. 20; R. 23). All of this is part of Petitioner's "social media strategy" of which the GEN Page is a major part. (R. 20; R. 23). As Ms. Mulholland boasts, the "Governor has created an unprecedented level of access for her constituents via social media." (R. 23). The Governor's staff has played a key role in creating and maintaining that level of access. As a result, the use of the GEN Page is an aspect of the administration's communication strategy in the same way a weekly newsletter or town hall might be. "While in the past there may have been difficulty in identifying the most important places . . . for the exchange of views, today the

answer is clear. It is cyberspace . . . and social media in particular." Packingham v. North Carolina, 137 S.Ct. 1730, 1735 (2017). See also, Twitter, Inc. v. Sessions, 263 F. Supp. 3d 803, 815 (N.D. Cal. 2017) ("In some ways, Twitter acts as the modern, electronic equivalent of a public square").

Petitioner made her page public so that her "constituents could follow [her] and have a personal connection to [her]." (R. 25.) Alongside this purposeful shift from a private page to a fully public one, she began using the GEN Page to engage with her constituents: she posted policy initiatives and then requested feedback on them, she engaged in one-on-one conversations with members of the public (often via her chief of staff,) she even used the page as a method of collecting information on behalf of the State's Department of Transportation in order to locate and fix potholes in the state's roads. (R. 15.) The Petitioner has therefore "used [the GEN Page] as a tool of governance." Davison, 267 F. Supp. 3d at 714. In fact, Mr. Mukherjee's full-time job is to incorporate social media into the administration's governance strategy. (R. 20.) Additionally, Petitioner and Mr. Mukherjee primarily use devices provided by the state when they access and edit the GEN Page. (R. 20; R. 26.) Their use of Government resources lends support to the conclusion that the GEN Page is a "tool of governance" supported by and made possible by the state. See Davison, 267 F. Supp. 3d at 714. Because Petitioner uses the page as a tool of her administration's strategy and employs senior staff to monitor and post to the page, its maintenance is fairly characterized as state action.

ii. The Deletion of Mr. Wong's Post and His Permanent Ban From the GEN Page Occurred in the Context of a Policy Announcement and Were Performed By a State Employee.

The only conduct that need be categorized as "state action" in order for Mr. Wong to have a valid claim under § 1983 is the deletion of his comment and his ban of him from the GEN Page. See e.g., Davison, 267 F. Supp. 3d at 715. The post to which Mr. Wong responded and the

management of that post by Petitioner's staff share a close nexus to the state of Calvada. Because Petitioner's actions were taken in response to Mr. Wong's comment on that post, her conduct is also attributable to the state. (R. 27.)

The Court has relied on a "host of facts" to determine if private action is fairly attributable to the state. Brentwood Academy, 531 U.S. at 296. A state's "exercise of coercive power" or control over the private actor, its provision of "significant encouragement" in the exercise of the challenged conduct, its joint participation in the relevant activities, the delegation of a "public function" or the entwinement of the activity with "government policies," are all examples of when the Court has found a private actor's conduct to be attributable to the state. Id. (internal quotation marks and citations omitted) (collecting cases).

There are four reasons why the instant conduct – separate and apart from any other conclusions regarding the GEN Page as a whole or Petitioner's role as Governor – constitutes state action.

First, the post to which Mr. Wong responded was titled "New State Policy on Immigration Law Enforcement." (R. 15.) Petitioner is not couching this post as her personal perspective on immigration enforcement; she is announcing the policy of the state, thereby "entwining" the conduct with government policies. See Brentwood Academy, 531 U.S. at 296. Second, Petitioner linked the post to the Calvada State government's official page. See Davison, 267 F. Supp. 3d at 715 (noting that an additional factor "weighing in favor of finding state action" was the public official's inclusion of the official county email address, telephone number and web address). This creates a clear and clean link between the GEN Page Immigration Post and Petitioner's administration. Third, Petitioner ends the post by inviting constituent "comments and insights." (R. 16.) Her invitation to comment is not directed solely at personal friends and family but to the

public at large and is made in her official role as Governor. Finally, Petitioner engaged the apparatus of the government in deleting Mr. Wong's comment. She emailed her social media director—from her official government email address to his official government email address—and requested that he delete the comment on her behalf and ban Mr. Wong from making future posts. (R. 16.) This creates an obvious nexus between the relevant conduct and the state. See Davison, 267 F. Supp. 3d at 713 (finding public official's "use of county resources" to support a finding of state action). Individually, any of these factors would weigh heavily in favor of a finding of state action. Taken together, they make it clear that Petitioner's conduct is fairly attributable to the state.

While there is no denying that certain aspects of the GEN Page pertain to Petitioner's personal life, Petitioner cannot use the existence of occasional personal posts to shield all elements of her page from a finding of state action. Creating clear distinctions between private and public conduct is not always easy. See Jackson, 419 U.S. at 349-50 ("the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer"). The Fourth Circuit in Rossignol, held that a group of off-duty sheriffs were engaged in "state action" when they prevented dissemination of a local newspaper. Rossignol, 316 F.3d at 525-26. "[I]t is clear that if a defendant's purportedly private actions are linked to events which arose out of his official status, the nexus between the two can play a role in establishing that he acted under color of state law." Id. at 524. The sheriffs' conduct in buying up newspapers around the city was deemed to arise out of "public, not personal, circumstances" because they were driven to this act by concerns pertaining to their job. Id. Being "off-duty" and taking an action on their personal time, did not prevent a finding of state action. Similarly, even a finding that the post occurred after official government hours ended and that the GEN Page is primarily a personal

account, Petitioner's misconduct as pertains to Mr. Wong are not shielded from a finding of state action.

After engaging in this fact-bound inquiry, it is clear that Petitioner's conduct in censoring Mr. Wong is attributable to the state. See Jackson, 419 U.S. at 453.

C. Permitting Gov. Norton To Censor Mr. Wong's Comment Would Incentivize Public Officials To Engage With Constituents On Social Media, Rather Than In Other Forums, In Order To Censor Constituent Comments.

Failure to attribute Petitioner's actions to the state would encourage government officials to evade federal constitutional protections by interacting with constituents through social media. Petitioner incorporated social media, and its 167 million daily active users, into her administration's governing strategy. (R. 13.) Making this choice, in lieu of other avenues of communication with the public, should not shield it from normal prohibitions on government censorship.

Concealing Petitioner's actions from constitutional scrutiny would create incentives for state officials moving forward to utilize social media in the hopes of evading constitutional requirements. Communication online would become the ideal mode of constituent engagement: officials could curate their profiles and pages to include only those perspectives that fit their public image or capitalize on their policy objectives. These activities could be implemented with the assistance of government resources and publicly-employed administrators while avoiding the typical constitutional restrains on state action. Petitioner's decision to announce her immigration policy online should not be treated differently than had it been announced at a town hall meeting.

Therefore, the deletion of Mr. Wong's comment and the decision to ban him from the GEN Page should be viewed as state action under the Fourteenth Amendment.

II. GOV. NORTON VIOLATED MR. WONG'S CONSTITUTIONAL RIGHT TO FREE SPEECH BY ENGAGING IN VIEWPOINT DISCRIMINATION IN A STATE-SPONSORED FORUM.

A. In Her Operation of the GEN Page, Gov. Norton Created a Virtual Town Hall and Opened a Public Forum for Speech.

"The First Amendment prohibits Congress and other entities and actors from 'abridging the freedom of speech.'" Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) (quoting Pleasant Grove City Utah v. Summum, 555 U.S. 460, 467 (2009)). The Constitution, though, does not merely protect individuals' right to free speech in the abstract but requires unfettered access to fora in which such speech can be safely made. See, e.g. Packingham, 137 S. Ct. at 1735 ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."). If a citizen speaks in a forum that is public either by tradition or by designation, and his speech is compatible with the primary activity of that forum, the government cannot restrict his free speech without a compelling interest and a narrowly tailored regulation. Grayned v. Rockford, 408 U.S. 104, 116-17 (1972) (finding that in a public forum, the government cannot broadly deny First Amendment rights and may instead only make time, place, and manner regulations that are reasonable for that particular forum).

The "crucial question" in determining whether a forum is public or nonpublic is whether expressive activity is compatible with the nature and the normal activity of the forum. Id. A "traditional public" forum is a venue like a street or park that has a long-established history of being used for assembly, debate among citizens, and discussion of public issues. Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). Because free speech is so crucial to the nature of these fora, the government is severely limited in its ability to restrict expressive activity within them. Jones v. Heyman, 888 F.2d 1328, 1331 (11th Cir. 1989).

Conversely, a venue that is not open to general debate or the free exchange of ideas is "nonpublic." Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 811 (1985). A government can choose to "designate" a forum as public by specifically classifying a nontraditional[2] venue—meaning a place or channel of communication—as open to assembly and speech. Id. at 802 (citing Perry, 460 U.S. at 45-47). In designating the forum, the government may limit the types of speakers or the topics that can be freely discussed within the forum. Id. (citing Perry, 460 U.S. at 45-47). However, once the government has established the limited purposes for which the forum has been opened, it cannot then restrict expressive activity that falls within that purpose. See, e.g., Rosenberger v. Rector and Visitors of Univ. of VA, 515 U.S. 819, 829 (1995) (noting that a state must "respect the lawful boundaries it has itself set" in a designated public forum); see also Jones, 888 F.2d at 1334 (finding that a citizen could only be removed from a city commission meeting if his speech did not pertain to the agenda items for which the meeting was opened to the public for comments and debate).

A nontraditional, "metaphysical" space may also be a public forum. Rosenberger, 515 U.S. at 830. For example, social media has become one of the "most important" public fora for the exchange of views. Packingham, 137 S. Ct. at 1735. Because the scope of the medium has not yet been addressed by the Court, extra care must be taken before denying social media more than "scant" First Amendment protection. Id.; see also Bland v. Roberts, 730 F.3d 368, 386 n. 14 (4th Cir. 2013) (citing Reno v. ACLU, 521 U.S. 844, 870 (1997)) (rejecting the idea that online speech

[2] The Court has declined to expand its definition of "traditional public forum" beyond the "historic confines" established in Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939), identifying specifically public streets and parks as places "immemorially held in trust for the use of the public . . . for purposes of assembly [and] communicating thoughts between citizens . . . ." Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680-81 (1992)). Nontraditional fora fall outside these confines.

is "somehow not worthy of the same level of protection" as conventional speech). In fact, given the ever-increasing prevalence of social media as public forum, the Court has found that access is *required* for an individual to fully exercise their First Amendment rights. Id. at 1735-36. Facebook itself has 1.79 billion active users who engage in a "wide array" of protected First Amendment speech. Id. at 1735-36.

A Facebook page is a "digital space for the exchange of ideas and information." Davison, 267 F. Supp. 3d at 702; see also Page v. Lexington Cnty. Sch. Dist. One, 531 F.3d 275, 284 (4th Cir. 2008) (finding that a government opens a forum for speech by creating a website for users to post their opinions). Just as the city in Jones v. Heyman, 888 F.2d at 1331, created a designated public forum by inviting constituents to come to a physical meeting to discuss agenda items, when a government invites constituents to come to a Facebook page to discuss official policies, it designates that page as a public forum.

Petitioner's GEN page is a designated public forum, much like a conventional town hall meeting. Thus, restriction of Mr. Wong's speech was impermissible if his speech was compatible with the purpose of the forum. In classifying the forum as public or nonpublic, we must determine Petitioner's intent in opening the GEN Page. Cornelius, 473 U.S. at 803.

Petitioner changed her Facebook page to reflect her title, giving it the appearance of being an official site. (R. 02.) She changed her privacy settings to "public" and posted multiple requests for input from constituents, imploring them to use her page to post comments that "let [her] know what [they] think." (R. 14.) In previous posts, when she solicited comments, Petitioner expressly said that she would try to incorporate posted priorities into her policymaking and even that "everything submitted here will be considered." (R. 15.) These comments indicate that she intended her page to be a forum in which constituents could submit comments and exchange ideas.

Even if the Court found that Mr. Wong's comments were an "ad hominem" attack that was not responsive to the intention of the forum, Petitioner should still be found to have violated Mr. Wong's rights by indefinitely banning him from the forum. Designated public fora can be open to the general public or can be limited "for use by certain speakers or for the discussion of certain subjects." Cornelius, 473 U.S. at 802 (citing Perry, 460 U.S. at 45-46). However, once the government has limited the forum to these certain speakers or subjects, it must respect that boundary so long as the limitations of the forum are preserved. Rosenberger, 515 U.S. at 829-30. Petitioner opened her page to the public and invited them to engage in dialogue about the initiatives she posts on her page. At the time of the immigration post, her page was still open for this purpose: "As always, I welcome your comments and insights on this important step." (R. 04.) Her request for comments was specifically tailored to those who visit her page: ". . . I know that those of you who visit this Facebook page are among the most active, influential, caring and patriotic citizens of the State of Calvada. I wanted you to be the first to know of this decision." (R. 04.) Brian Wong is one such "patriotic citizen." Even if his comment was rightfully deleted for being nonresponsive to the Petitioner's request, as a Calvada citizen and visitor to the GEN page, he is a speaker specifically granted access to this forum.

To deny Mr. Wong's rightful access to a public forum that is limited to his classification of speakers is to deny his First Amendment right to free speech.

B. Gov. Norton's Comment Censoring and Indefinite Ban of Mr. Wong from the GEN Page is Viewpoint Discrimination and is Not a Permissible Regulation of Free Speech.

The GEN Page is a designated public forum limited to citizens of Calvada wishing to speak about the government policies that Petitioner posts about on the page. Speech within the forum that falls within this purpose cannot be restricted unless the state has a compelling interest in excluding speech and unless that exclusion is narrowly drawn to the compelling interest.

Cornelius, 473 U.S. at 800. However, even if the Court finds that the forum was nonpublic and the government was thus able to more freely restrict speech within it, because Petitioner singled out Mr. Wong for silencing, her actions were impermissible viewpoint discrimination in violation of the First Amendment.

The government cannot engage in unreasonable "viewpoint discrimination," or the selective restriction of a subset of speakers or messages based solely on a "specific motivating ideology" or "the opinion or perspective of the speaker." Rosenberger, 515 U.S. at 829. A distaste for the message of an expression is not a sufficient reason for the government to censor it. Grayned, 408 U.S. at 115 (1972) ("The right to use a public place for expressive activity may be restricted only for weighty reasons."); see also Perry, 460 U.S. at 46 (regulations on speech must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."). The prohibition on viewpoint discrimination is well-established. See, e.g. Matal, 137 S. Ct. at 1763 (finding that a trademark clause attempting to prohibit disparagement is impermissible viewpoint discrimination because "[g]iving offense is a viewpoint" that trademark holders are entitled to); Good News Club v. Milford Central School, 533 U.S. 98, 108-09 (2001) (holding that a state's restriction on a Christian club meeting after school was unconstitutional viewpoint discrimination); Rosenberger, 515 U.S. at 829 ("Viewpoint discrimination is . . . an egregious form of content discrimination.") (citing Perry, 460 U.S. at 46); Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 233 (2000) (demanding "viewpoint neutrality" in allocating school extracurricular funding).

The restriction on viewpoint discrimination applies across fora. Though speech regulations within a nonpublic forum are held to "less exacting scrutiny" than in a public forum—in the former they must merely be "reasonable" while they must be "narrowly drawn" to a "compelling state

interest" in the latter—viewpoint discrimination is not permitted even under the laxer standard of the nonpublic forum. Jones, 888 F.2d at 1331; see also Cornelius, 473 U.S. at 806 (holding that regulations on speech in a nonpublic forum must be "viewpoint neutral").

By deleting only Mr. Wong's comment and banning only Mr. Wong from the GEN Page, Petitioner engaged in viewpoint discrimination. While Petitioner may have been unhappy to be called a "scoundrel," the Court has said "time and time again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" Matal, 137 S. Ct. at 1763 (quoting Street v. New York, 394 U.S. 576, 592 (1969)). Mr. Wong's comment was responsive to Petitioner's post announcing a state immigration policy and thus suited the purpose of the GEN Page forum. (R. 04.)

This circumstance is distinguishable from Jones, where the court found the plaintiff's First Amendment rights were not violated when he was removed from a public meeting. There, Jones was removed because he continued to ask questions about subjects that were not on the table at the meeting. The removal was tailored to the mayor's interest in "controlling the agenda and preventing the disruption of the commission meeting." Jones, 888 F.2d at 1333. In the present case, Mr. Wong's comment was not off-topic and it did not derail further discussions—other posters could, and did, continue posting unencumbered. (R.04.) Deleting the post did not serve a compelling interest in maintaining the debate on the GEN Page; such action was unnecessary and a First Amendment violation.

While Mr. Wong's words were arguably indelicate, there is no requirement in the First Amendment that free speech made in response to a public policy be couth. In fact, the Court has found more offensive language sufficiently expressive to fall under the First Amendment or sufficiently tailored to a limited public forum's purpose. Boos v. Barry, 485 U.S. 312, 322 (1988)

(quoting Hustler Magazine Inc. v. Falwell, 485 U.S. 46, 56 (1988) (internal quotation marks omitted) (". . . [I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."). Mr. Wong's comment, though blunt, was an expression of his opinion on the immigration policy, and Petitioner acted unconstitutionally in excluding it merely because she considered it a "nastygram." (R. 17.) See Grayned, 408 U.S. at 115 ("Clearly, government has no power to restrict such activity because of its message.").

C. The Government Speech Doctrine Is Inapplicable and Does Not Supersede Mr. Wong's First Amendment Right to Free Speech in a Public Forum.

The government speech doctrine provides that when the Government speaks, it is free to control the content of what it says. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) (citing Summum, 555 U.S. at 467–68). However, to be considered government speech, the expression must be made *by the government itself* in a manner that represents the citizens. Id. at 2246. For example, the government speech doctrine has been used to exempt both monuments and license plates from legal challenges, because the public has long equated both items with the government and because the government would have control over the design and message of the objects. See Walker, 135 S. Ct. at 2246-47 and Summum, 555 U.S. at 470-72. Conversely, if a forum bears "no indicia" that the speech was owned or conveyed by the government, there is no reason to think expressive activity in that forum is government speech. Walker, 135 S. Ct. at 2252 (citing R.A.V. v. St. Paul, 505 U.S. 377, 390 n.6 (1992) (citing Lehman v. Shaker Heights, 418 U.S. 298, 299 (1974)).

As the Circuit Court found, the message at issue in this case is not the message posted by the government but the comment posted by Mr. Wong. (R.35.) The comment was posted in Mr. Wong's name from his personal Facebook page. He was clearly identifiable as the author, and it

is highly unrealistic to assume anyone would think Petitioner was calling herself a scoundrel. The general public—and in particular, the 1.79 billion people who use Facebook[3]—by and large understand the mechanics of social media. Visitors to the GEN page would almost certainly be familiar with the forum and would not confuse Mr. Wong's expression with one made by the government.

Banning Mr. Wong from the Governor's page is an especially egregious violation of his rights. His comment should have been protected by the First Amendment, but even assuming *arguendo* that the comment was permissibly removed, Petitioner had no grounds to remove Mr. Wong from the forum entirely. He remains an engaged constituent, the very kind to whom Petitioner addressed her Facebook posts. Her interest in keeping her page focused on the specific debate she invited is not further served by indefinitely removing him because he posted one off-topic, off-color post; the act is not narrowly tailored to the compelling government interest.

The Virginia district court held similarly in Davison, finding even a *temporary*, twelve-hour ban of a poster after he left an inflammatory comment on a Facebook page was a constitutional violation: "By prohibiting Plaintiff from participating in her online forum because she took offense at his claim that her colleagues . . . had acted unethically, Defendant committed a cardinal sin under the First Amendment." Davison, 267 F. Supp. 3d at 717-18. At present, *only* Mr. Wong was censored and *only* Mr. Wong was banned from further posting on the page. See Texas v. Johnson, 491 U.S. 397, 400 (1989) (finding that the sanctioning of the one protestor out of one hundred because he burned the flag was a violation of the First Amendment). This was a direct response to the Petitioner taking issue with Mr. Wong's classification of her and her policies.

[3] Packingham, 137 S. Ct. at 1735.

It was not a government speaking on its own behalf, but a government official singling out an individual constituent for his opinions.

As the Court has cautioned, the government speech doctrine is "susceptible to dangerous misuse." Matal, 137 S. Ct. at 1758. Extending the doctrine too far creates an incentive for the government to claim "government speech" anytime they wish to "muffle the expression of disfavored viewpoints." Id. As a legitimate visitor to a designated public forum, Mr. Wong had the right to respond to Petitioner's request for public comment on her immigration policy; her denial of this right is not an exercise of government speech but an act of unconstitutional viewpoint discrimination.

CONCLUSION

Petitioner appeals from the final judgment of the United States Court of Appeals for the Fourteenth Circuit, contending that the court erred in finding that Petitioner engaged in a state action that violated Respondent's First Amendment rights. Because the Court of Appeals' ruling was proper for the aforementioned reasons, the Supreme Court should affirm the ruling below.

Respectfully submitted,

/s/_____

Competitor 9
Counsel for Respondent
Dated: January 31, 2018

CERTIFICATE

We hereby certify that:

1. The work product contained in this brief is our work only;
2. In preparing this brief, we have complied fully with our law school's honor code;
3. In preparing this brief, we have complied fully with the Rules of the Competition.

_____
Competitor 9

January 31, 2018