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 RESPONDENT

Attorneys for Respondent

QUESTIONS PRESENTED

I. Does a government official's deletion of a citizen's comment to a Facebook post constitute state action when the post in question was an announcement of a new government policy on an account frequently used by the official to discuss matters of state?

II. If so, does that official create a public forum after making an unqualified request for input on a Facebook page that has deliberately been made open to the public?

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The memorandum opinion of the United States District Court for the District of Calvada in Civil Action No. 16-CV-6834 is unreported but appears in the record on pages 1–28. The opinion of the United States Court of Appeals for the Fourteenth Circuit in Appeal No. 17-874 is unreported but appears in the record on pages 29–40.

STATEMENT OF JURISDICTION

The United States District Court for the District of Calvada had original jurisdiction under 18 U.S.C. § 3231 (2012), because this case involves alleged violations of federal law and the United States Constitution. R. at 1–2. The United States Court of Appeals for the Fourteenth Circuit had jurisdiction over this appeal under 28 U.S.C. § 1291 (2012), because the appeal was taken from a final judgment of the district court entered on January 17, 2017. R. at 12. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2012), because this Court granted certiorari. R. at 41.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which appears in Appendix "A." U.S. Const. amend. I. This case also involves Section 1983 of Title 42 of the United States Code, the pertinent provisions of which are reproduced in Appendix "B." 42 U.S.C. § 1983 (2012).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case centers around the use of the social media platform Facebook. Facebook is an online service which allows for individuals, corporations, and state actors to create a "profile."

Through a complex algorithm Facebook connects its users to news items and Facebook "pages" created by other users. A "page" serves as a stylized electronic cork board created by a user which commonly focuses on a person or their interests, and which other users may view and comment on if permitted.

Each individual user maintains control over who is able to see and comment on their profile, pages, and posts by altering their privacy settings. R. at 2. A "private" Facebook page is one that can only be seen and commented on by a user's "friends," those people whom the user has individually permitted to see posts. R. at 2. A privacy setting of "public" permits anyone to see a user's post and leave a comment. R. at 2.

Elizabeth Norton has operated a Facebook account since 2008. R. at 2. In 2011, she created a page entitled Elizabeth Norton. R. at 2. Until 2016 Norton's Facebook page was only visible to people she permitted to be her "friend." R. at 2. This changed in January of 2016, when Norton was elected as governor of the state of Calvada and the very next day changed the name of her personal Facebook page to "Governor Elizabeth Norton" (GEN) and changed the privacy settings of her account to allow anyone to view and comment on her posts. R. at 2. Since becoming Governor, Governor Norton primarily uses the GEN Facebook page when announcing a new policy on social media; in fact, the vast majority of her posts pertain to her official duties as governor rather than her personal life. R. at 30, 14.

After her inauguration, Governor Norton began using the GEN Facebook page to announce matters of state and ask her constituents for their input. R. at 2. For example, on January 14th, 2016, Governor Norton made a post stating:

> I'm moving Calvada into the 21st Century by introducing new and exciting ways to interact directly with me and my senior staff. Check my "Governor Elizabeth Norton"

> Facebook page often for exciting announcements and policies from YOUR government, and let me know what you think by posting your comments there.

R. at 14. In addition to billing her Facebook page as a place for public interaction with the governor's office and generally promoting interaction there, the governor repeatedly made posts that asked for input from the public. R. at 15. These posts include requests for input on the state budget, a new flag, immigration policy, and a pothole repair plan. R. at 14, 15.

The governor's staff plays a prominent role in the administration of the GEN Facebook page. R. at 3. Governor Norton's Social Media Director is an administrator of the GEN page, and he, along with the Director of Public Security, and the Chief of Staff, monitors and helps create content for the GEN page. R. at 3. Additionally, the Calvada department of transportation has a standing order from the governor herself to monitor the GEN page for information regarding the pothole initiative. R. at 2.

This case arises out of Governor Norton's deletion of a comment left on the GEN page by Brian Wong, and her choice to ban him from posting in the future. R. at 4. The Governor's post explicitly asked the public for comments about immigration. R. at 4. The governor didn't like what Wong had to say, so she had his comment deleted and banned his account from commenting on her page in the future. R. at 16. Specifically, Governor Norton emailed her Social Media Director, ordered him to delete Wong's comment, and block him from Facebook. R. at 16. This effectively denied Wong the ability to contact the Governor through Facebook, something she herself touted as an exciting way to stay in contact with she and her staff. R. at 14.

Immediately upon finding out that the governor had deleted his comment and blocked him from Facebook, Wong sent an email to the governor's official email address asking to be unblocked. R. at 28. The governor refused to respond. R. at 28.

II. NATURE OF THE PROCEEDINGS

The District Court. The district court granted summary judgment in favor of Governor Norton on the grounds that the state of Calvada was engaged in government speech. R. at 10. Regarding state action, the district court found that the deletion of Wong's Facebook comment, and his subsequent ban from commenting in the future was a state action because the governor's Facebook page was used as a tool of governance. R. at 9. The district court went on to hold that because Governor Norton's deletion and subsequent ban of Wong occurred as the result of state action, it must necessarily be government speech. R. at 11–12.

The Court of Appeals. The court of appeals affirmed the district court's holding that there was state action but reversed its holding that Calvada was engaging in government speech. The court of appeals instead held that Governor Norton had created a public forum by making the GEN page open to the public and repeatedly asking for public comments. The court remanded to the district court for entry of summary judgment in favor of Respondent. R. at 40.

SUMMARY OF THE ARGUMENT

I.

Governor Norton's banishment of Wong from commenting on her Facebook page is a violation of his First Amendment right to speak and be heard by his intended audience and constitutes state action by the state of Calvada. Governor Norton's actions are fairly attributable to the state because she is the state's executive and primary policy maker for the use of the GEN Facebook page which, when not being used to deny Wong his right to speak, has been used as a tool of governance since her inauguration. Additionally, because of her position as head of state, Governor Norton utilizes government staff and equipment to effectuate her control over the GEN

Facebook page. Therefore, the respondent asks that this Court affirm the Fourteenth Circuit Court of Appeals' holding that Governor Norton engaged in state action.

II.

The result of Governor Norton's state action was to create a public forum from which Wong could not be excluded without a violation of his rights first occurring. The governor created a public forum by opening an area up for expression on matters of state which had previously been inaccessible to the public, and by inviting her constituents to use the GEN page to interact with she and her staff as representatives of the state of Calvada. Regardless of whether Governor Norton's actions created a traditional or designated forum, Wong is an individual entitled to participate. The respondent therefore asks that this Court affirm the Fourteenth Circuit Court of Appeals' grant of summary judgment.

ARGUMENT AND AUTHORITIES

This case comes before the Court on an appeal from cross motions for summary judgement. R. at 1. When parties submit cross motions for summary judgment, "the court must review each motion separately on its own merits 'to determine whether either of the parties deserves judgment as a matter of law.'" *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quoting *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 62 (1st Cir. 1997) (citation and internal punctuation omitted)). In cases involving the First Amendment, the Court conducts an independent examination of the record as a whole, without deference to the trial court. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 567 (1995).

I. THE LOWER COURT CORRECTLY CONCLUDED THAT GOVERNOR NORTON ENGAGED IN STATE ACTION WHEN SHE DELETED WONG'S FACEBOOK POST AND BANNED HIM FROM COMMENTING.

Section 1983 permits government entities to be held civilly liable when a government official deprives an individual of a federal right while acting under the color of law. 42 U.S.C. § 1983. In the present case, the sole issue regarding the § 1983 claim is whether Governor Norton was acting under the color law when she deleted Wong's Facebook comment. R. at 41. A government official acts under the color of the law when their actions are fairly attributable to the state. *West v. Atkins*, 487 U.S. 42, 49 (1988). This is identical to the state action requirement of the Fourteenth Amendment and is often analyzed by courts using the associated framework. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

Although establishing these elements would be sufficient to hold Governor Norton *personally* liable for a deprivation of Wong's rights, in the present case Wong has sued Governor Norton solely in her *official* capacity. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *see also* R. at 1. In *Graham*, this Court held that:

> [T]o establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation, thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law.

473 U.S. at 166 (internal quotations omitted).

This means that although the holding of the court below is ultimately correct it erred in their delineation of the elements of state action in a suit against a person in their official capacity. Specifically, the court failed to analyze whether Governor Norton's actions were the result of a custom or policy of the state of Calvada. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 699 (1978). Despite the lower courts' exclusion of this element, Wong has proven that the governor's

deletion of his Facebook comment, and ban of him from future commenting qualified as state action. As such, this Court should affirm the Fourteenth Circuit Court of Appeals' holding.

A. Governor Norton's Deletion of Wong's Comment, and Ban from Commenting in the Future, Constitute State Action.

For the actions of a public official to constitute state action, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *West*, 487 U.S. at 49. And, "the deprivation must be caused by the exercise of some right or privilege created by the State ... or by a person for whom the State is responsible." *Id.* (internal quotation omitted). This Court has held that "[S]tate employment is generally sufficient to render the defendant a state actor...." *Lugar* 457 U.S. at 936. And that a state is responsible for an employee while they act in their official capacity, or when they are exercising their responsibilities under the law. *West*, 487 U.S. at 50. In the present case, even though Governor Norton overstepped the bounds of her authority by denying Wong's First Amendment speech rights, there is no doubt that she was a state actor acting under the color of law; she is the head of state for the state of Calvada and was using social media to announce a new policy to her constituents.

1. Governor Norton Was a State Actor When She Deprived Wong of His First Amendment Right to Free Speech.

Despite being the executive of the state of Calvada, who was conducting business of the state of Calvada, while operating under her official title, Governor Norton argues that when she used Facebook to announce an official state policy and remove dissenting opinions, she was a private actor. R. at 6–8. Although the courts below each comingle the questions of whether the governor is a state actor, and whether she was acting according to her responsibilities as governor into a singular question of whether a sufficient nexus exists between her actions and the

state, this Court has typically used a different framework for individuals sued in their official capacity. *Monell,* 436 U.S. at 699.

In *Monell*, this Court held that § 1983 permits two kinds of actions against a public official: a suit in their official capacity for which the state is liable, and a suit in their personal capacity for which they are held individually liable. *Id*. at 690. When a person is sued in their official capacity the "person" being sued for purposes of the statute is the governmental entity to which the individual belongs. *Id*. Therefore, in order to protect the state from being held liable for actions that are not fairly attributable to it, the Court requires an additional showing that a state's policy or customs led to the deprivation of a plaintiff's rights. *Id.* at 694. When a person is sued in their individual capacity, the determination of whether a state action occurred hinges on whether a private actor exercised a traditional and exclusive state function. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974). Each court below can be seen applying this framework throughout their opinions. *See* R. at 6–10 (district court applying the individual capacity framework and citing individual capacity cases); *see also* R. at 34 (Fourteenth Circuit Court of Appeals comingling the state actor and state action requirements). Where the courts below err in their analysis is failing to recognize that it is not Governor Norton who is being sued for depriving Wong of his rights, but the state of Calvada. R. at 1. Since the state itself is the person being sued, there is no doubt that it is a state actor.

That this interpretation is the correct one is evidenced by this Court's many holdings in § 1983 actions against public officials in their official capacity whose actions were attributable to the state, in which the Court did not assess whether the individuals are exercising an exclusive state function. *See Monell*, 436 U.S. 699 (holding that state entities are persons under § 1983); *see also Los Angeles County v. Humphries*, 562 U.S. 29, 30 (2010) (holding that "acts are the

municipality's own for purposes of liability"); *McMillian v. Monroe County*, 520 U.S. 781, 783 (1997) (holding that a county sheriff sued in his official capacity is an official of both the county and state for purposes of determining whether § 1983 permits recovery from the state, without ever analyzing the existence of a nexus between state and private conduct). Having demonstrated the efficacy and validity of disentangling the state actor requirement from the question of whether an official was acting in accordance to their duties, respondent argues that this Court should hold that the office of the governor is a state actor as a matter of law. By using this framework to separate the elements which were comingled by the lower court, the Court will set a precedent that further clarifies the separation between official and individual suits under § 1983 and give clear guidance to the circuit courts. Furthermore, using this framework places greater emphasis on the requirements that a state actor be exercising their responsibilities as an official, as the result of a state policy or custom.

2. Governor Norton was exercising her responsibilities as governor when she announced and responded to a new state policy on social media.

A state is responsible for an official while they are acting in their official capacity, or when they are exercising their responsibilities under the law. *West*, 487 U.S. at 50. This holds true regardless of whether an official's actions contravene the letter of the law because the ultimate question is whether the power of the state as itself was abused. *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 244 (1931). It is here in the analysis that the Court asks whether "there is a sufficiently close nexus between the State and the challenged action" so that the action "may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351. Determining the existence of a nexus between state and private action is a fact specific question whereby "[o]nly by sifting facts

and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S.715, 722 (1961).

Evidence that an official's motive to act grew out of the circumstances of their official duties is sufficient to prove that a close nexus exists between state and private action. In *Rossignol*, off duty police officers conducted a "mass purchase" of newspapers that were critical of the local sheriff on the night before an election. 316 F.3d at 519. The officers' motivation was to censure a published opinion which called into question their fitness for office. *Id.* at 524. The Fourth Circuit held that despite not being on the clock, the officers' motive of censuring dissent alone established a sufficient nexus between private actions and the state because the officers' "animosity grew out of [the] performance of [their] official duties." *Id.* (quoting *Layne v. Sampley*, 627 F.2d 12, 13 (6th Cir. 1980)). This can be directly contrasted with the Third Circuit Court's ruling in *Barna v. City of Perth Amboy*, that no sufficient nexus existed between the state, when two off duty officers' choice to assault a man in an altercation wholly unrelated to their employment, despite their use of state issued nightsticks to do so. 42 F.3d 809, 813 (3d Cir. 1994).

Like the officers in *Rossignol*, Governor Norton deleted Wong's comment while off the clock because she didn't like what he was publishing about her. R. at 17. But, unlike the officers in *Barna* whose actions were purely personal, Governor Norton's motive grew directly out of her official duty to announce state policy which can be seen in her own email wherein she says "saw nastygram by Wong in response to immigration announcement. Pls delete/ban."[Sic] R. at 17 (emphasis added). Indeed, Governor Norton had the very same motive and partook in the same kind of censorship that led the Fourth Circuit Court in *Rossignol* to conclude that: "The

defendants' scheme was thus a classic example of the kind of suppression of political criticism which the First Amendment was intended to prohibit." 316 F.3d at 519.

A sufficient nexus also exists between apparently private actions and the state when a person possesses state authority and purports to act under that authority. *Griffin v. Maryland*, 378 U.S. 130, 135 (1964). In *Griffin*, a sheriff who was working as a security guard for a private park "wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park." *Id.* at 135. Consequently, this Court held that he was acting under the color of law when he unlawfully arrested a man, even though he testified that he would have taken the exact same actions as a private citizen. *Id.* The Court went on to hold that other manifestations of pretended authority that warrant a finding of state action would include flashing a badge or identifying oneself as a police officer. *Id.* In the present case, the governor purported to have authority by using her official title on Facebook and using her authority to order a state employee to delete Wong's comment, and block him from Facebook.

Because Governor Norton's motive to act arose out of her official duties as governor, and because she brandished her official title while acting to the point of commanding state resources to effectuate her will, this Court should hold that a sufficiently close nexus exists between her actions and the state of Calvada so as to warrant a finding of state action.

B. Government Policy Acted as the Moving Force Behind Governor Norton's Choice to Delete Wong's Comment, and Block Him on Facebook.

In order to prevail on a § 1983 action, a plaintiff must show that the action which deprived them of a federal right was the result of a "policy or custom" of the state. *Monell*, 436 U.S. at 661. In other words, the state cannot be held liable unless the choice to delete Wong's comment and block his account can be "deemed to be that of the state." *Blum v. Yaretsky*, 457 U.S. 991,

1004 (1982). Generally, this requires the plaintiff to identify a specific policy or custom of the state as the source of their injury. *Monell*, 436 U.S. at 694. However, whenever a defendant is a "policymaker" for a particular area or issue of the state entity to which he or she belongs, the entity itself is responsible for the defendant's actions. *McMillian*, 520 U.S. at 785. If a policymaker with final approval over an area of governance approves a subordinate's decision to act, their ratification is chargeable to the government entity. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Whether someone has the legal ability to create policy in a certain area is a fact intensive question that the Court usually answers by reviewing whatever state law defines a defendant's capacity to create policy. *Id.* However, here, all of the information necessary to find that Governor Norton is a policy maker concerning what comments are deleted, and who is banned on the GEN Facebook page is available before the Court.

Governor Norton is a policymaker in relation to the operation of the GEN Facebook page because she maintains final authority over its operation. The state of Calvada has no relevant laws relating the Governor's use of her GEN Facebook page. R. at 26. This means that all state policy regarding the use of the GEN page is created by policymakers. Governor Norton created the Facebook page that would eventually become the GEN page 5 years prior to being elected, during which time she was the sole authority over its activity. R. at 14. The power to delete a comment on one's Facebook post, or a comment thereon is inherent to the ownership of a page or profile. Facebook, *Statement of Rights and Responsibilities* § 2 (Jan. 30, 2015), https://www.facebook.com/terms.php. Any person posting content to Facebook owns that content, and any intellectual property rights flowing therefrom. *Id.* Governor Norton has repeatedly demonstrated dominion over the GEN page by creating it, declaring singular ownership of it, using it for personal business, and maintaining direct control over its privacy

settings and name. R. at 28, 25. Furthermore, Governor Norton has directly created policy for government use of the GEN page, as can be seen by her standing order to the transportation department to monitor it. R. at 2. In the present case, the deletion of Wong's comment, and his subsequent ban were the direct result of an order from Governor Norton to one of her subordinates. R. at 16.

Insofar as the state of Calvada uses the GEN Facebook page as a tool of governance, there is no discernable separation between Governor Norton and the state of Calvada. This means that Governor Norton is a policymaker of the GEN page, and that the actions she takes while operating it are the responsibility of the office of the Governor of Calvada. Because Governor Norton is a state actor who was acting in accordance with her responsibilities as governor and is a policy maker with final authority over how the GEN Facebook page is run, this Court should hold that her deletion of Wong's comment, and ban from future posting, were state actions attributable to the state of Calvada.

II. THE LOWER COURT CORRECTLY HELD THAT GOVERNOR NORTON'S DELETION OF WONG'S POST WAS IMPERMISSIBLE VIEWPOINT DISCRIMINATION ON A PUBLIC FORUM, RATHER THAN A FORM OF GOVERNMENT SPEECH.

The First Amendment guarantees that the government will not abridge the Freedom of Speech. U.S. Const. Amend. I. This guarantee "protects *both* a speaker's right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas." *Rossignol*, 316 F.3d at 522. As such, when the government opens a forum for public discussion, it cannot discriminate against individuals based on the viewpoint their speech expresses. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 820 (1995). The government engages in viewpoint discrimination when it discriminates against a speaker because of their specific motivating ideology, opinion or perspective. *Id.* at 820. In the

present case, the petitioner has not disputed that she engaged in viewpoint discrimination, rather, she has raised the defense that such discrimination is permissible because she was engaged in government speech. R. at 10. As such, if the Court holds that no government speech occurred, then the Governor's actions are subject to strict scrutiny regardless of the type of forum that was created.

A. Governor Norton's Facebook Post on Immigration Created a Public Forum.

When the government creates an area for public expression, it creates a forum for speech. The area need not be physical for a forum to be created, it may exist in "a metaphysical [rather] than in a spatial or geographic sense." *Id.* at 830. There are three types of forums relevant to the present case: traditional public forums, designated public forums, and limited public forums. Traditional public forums are those places which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," such as streets, parks and sidewalks. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Designated public forums are created when "government property that has not traditionally been regarded as a public forum is intentionally opened up for [expression]." *Pleasant Grove City v. Summum*, 555 U.S. 460, 465 (2009). A limited public forum is created when the government sets aside an area for expression on a specific set of topics. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010).

In the present case, Governor Norton's Facebook post on immigration can adequately be defined as either a traditional or designated public forum. In either case, Governor Norton's deletion of Wong's comment, and ban from future commenting constitutes impermissible viewpoint discrimination.

1. Governor Norton Created a Traditional Public Forum When She Opened Her Facebook Page up to the Public.

This Court has held that "[T]raditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). The Government can exclude a speaker from a traditional public forum only when the exclusion is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest. *Id.* Although the Court has shown a preference for granting the status of traditional public forum to areas that were used for speech in antiquity and has resisted expanding this status to newer venues of popular discussion such as airports, the modern social media phenomenon fits well within the definition quoted from *Forbes*, above defining a traditional public forum. *Id.*; See also *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). (holding that airports are not a traditional public forum).

Facebook likely sees more speech every day than any venerated sidewalk ever has. See R. at 2. (Stating that Facebook sees over one billion daily users.) This Court has held that "in the modern world, one of the most important places to exchange views is cyberspace, particularly social media, which offers 'relatively unlimited, low-cost capacity for communication of all kinds.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Indeed, despite its late arrival on the scene, at least one court has recognized Twitter as "the modern, electronic equivalent of a public square," the epitome of what this Court has recognized as a traditional public forum. *Twitter, Inc. v. Sessions*, No. 14-cv-04480-YGR, 2017 WL 2876183, at *8 (N.D. Cal. July 6, 2017). Facebook may not have existed "time out of mind," but with one in seven people operating it daily, it has roughly the same

impact on communication as cars have on land travel. *See* John Sousanis, *World Vehicle Population Tops 1 Billion Units*, WardsAuto (Aug. 15, 2011), http://wardsauto.com/news-analysis/world-vehicle-population-tops-1-billion-units (reporting that as of the 2010 census there were slightly over one billion motor vehicles).

All of this shows that the Court should adopt the status of traditional public forum for Facebook as a whole, but the same reasoning applies equally to the GEN Facebook page. Because, on the same day Governor Norton changed her Facebook page's name to reflect her official title, she changed the privacy settings to public; meaning that every one of those billion users had access to her page. R. at 2.

Of those one billion users, only Wong, a citizen of Calvada who responded to an invitation by his governor to speak about an issue that was important to him, has ever been excluded from commenting. In a case mirroring this one, the United States District Court for the Eastern District of Virginia held that a public official's choice to allow "virtually unfettered discussion" on a Facebook page that used her official title was "more than sufficient to create a forum for speech." *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 712, 727 (E.D. Va. 2017). As such, this Court should find that Governor Norton's choice to open her GEN page to the public and allow anyone to comment on it created a traditional public forum.

2. In the Alternative, the Governor's Express Invitation for Constituents to Comment on Her Post About Immigration Created a Designated Public Forum.

Even if the Court elects not to extend the status of traditional public forum to the governor's GEN page, her invitation for constituents to comment on her immigration policy created a designated public forum. Unlike traditional public forums which exist regardless of government intent, designated public forums are created by the purposeful government action of

opening a nontraditional public forum for expressive use by the public, or a particular class of speakers. *Forbes,* 523 U.S. at 667. This means that although a finding that Governor Norton created a traditional public forum may be maintained even without first finding that she engaged in state action, a finding that Governor Noroton's immigration post created a designated public forum necessitates a finding of state action. When designating a forum, the government may limit the permissible class of speakers, or topics of discussion. *Id*. However, If the government excludes a speaker who would otherwise be a member of the class to which the forum is made generally available, the exclusion is subject to strict scrutiny. *Id*. Because the government is under no obligation to create a designated public forum, it may prohibit such a forum's use at any time so long as it does not discriminate against speakers. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc*., 473 U.S. 788, 802 (U.S. Dist. Col., 1985). In the present case, even making every assumption in the governor's favor regarding to whom the Facebook post on immigration was open, and what topics were permissible to speak on, her invitation created a designated forum, of which Wong was a rightful member, when she asked for public comments on her post about immigration.

In the present case, Governor Norton made an announcement apparently inviting anyone who could read it to comment on her new immigration policy. R. at 3-4. This means that even if her GEN Facebook page as a whole is not traditionally a place for public expression, her invitation to comment on the immigration post opened a nontraditional forum up for communication. As stated above, when the government creates a designated public forum it may limit the class of people who can speak at the forum. Even assuming that when the governor said, "I welcome your comments" in her official announcement, she was only referring to citizens of the state of Calvada, Wong is a member of that class. R. at 27. Furthermore, even if it

was the governor's intention to limit the topics of discussion to the immigration policy, she herself recognized that Wong's comment was "in response to immigration announcement." [Sic] R. at 17.

This means that after opening a designated forum for discussion, which she was under no obligation to do, the governor excluded Wong from that forum even though he met every permissible limitation that the governor's invitation to comment can reasonably be read to convey.

B. Governor Norton's Deletion of Wong's Post Was Not Government Speech.

Although the First Amendment ensures that a citizen's right to speak will not be abridged by the government, traditional First Amendment analyses are not triggered when the government itself speaks. U.S. Const. amend. I; *see also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). The Court uses three factors to determine whether the government is engaging in speech: 1) First the Court asks whether the medium has historically been used to convey a government message. *Matal* v. Tam 137 S. Ct. 1744, 1760 (2017). 2) Second, the Court asks whether the medium is closely associated in the public mind with the government. *Id.* And 3) the Court asks whether the government maintains direct control over the message that is being conveyed. *Id.*

1. The Government Does Not Have a Long History of Sending Messages to the Public by Deleting Comments on Social Media.

The Court first analyzed government speech under the modern three part analyses in *Summum*. 555 U.S. at 465. In *Summum*, the defendant-city refused to place a donated religious monument in a public park which already had 11 permanent monuments. *Id.* The Court held that monuments were a venerable tool for governments to communicate a message to their citizens.

Id. Similarly, in *Walker*, this Court held that state license plates have long been used by states to cultivate a reputation, and to convey a specific viewpoint to the public. 135 S.Ct. at 2248. By contrast, the Court most recently ruled that a trademark is not a vehicle for a government message in *Matal,* 137 S.Ct. at 1758. The Court pointed to the Patent and Trademark Office's own decisions stating that "issuance of a trademark registration ... is not a government imprimatur," to support its holding. *Id.*

At the outset of the government speech analysis, the respondent concedes that Governor Norton, while acting in her official capacity as the Governor of the state of Calvada, engaged in government speech when she announced a new state policy on her GEN Facebook page. However, because the petitioner is asserting government speech as a defense to the respondent's section 1983 claim, the question the Court is tasked with answering is whether the event that deprived Wong of his First Amendment rights, having his Facebook comment deleted, and his account blocked, was intended by the government to send a message to the public.

In *Summum*, the plaintiff argued that by accepting privately donated monuments from other sources, the government had created a public forum for speech, and therefore could not refuse to erect his monument. *Summum*, 555 U.S. at 466. The Court rejected that argument noting that the use of monuments to convey a message to the public is a venerable tradition of governments. *Id.* at 471. The Court held that:

> A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. *Id*. at 470.

The present case is not like *Summum*. Unlike the monuments in *Summum*, which were designed to convey a message, Governor Norton has not alleged that she intended to convey any message

to the public when she deleted Wong's comment and banned him; she had his message quietly removed in the middle of the night. R. at 4. Rather than communicating a message to the public, as did the monuments in *Summum*, Governor Norton's removal of Wong's expressive creation served only to decrease the amount of speech in the marketplace. Governor Norton's deletion of Wong's comment is also unlike the state license plates in *Walker*, because it was neither meant to cultivate a reputation, nor convey specific viewpoints to the public. 135 S.Ct. at 2249.

Rather than adopting the expressive conduct of another as being that of the state, like the license plates in *Walker* and the monuments in *Summum*, Governor Norton's deletion of Wong's comment more closely resembles a silent disapproval of what Wong had to say. Of the Court's recent Government speech precedent, this most closely resembles the governments' acceptance of a Trademark in *Matal*, which this Court called a "mere seal of approval" that didn't rise to the level of Government speech. *Matal,* 137 S.Ct. at 1759. Like the Trademark Trial and Appeal Board in *Matal*, which expressly denied any connection to the marks it granted, Governor Norton has alleged no connection between deleting Wong's comment, and making an official government expression to the public.

While it may be true that the removal of some expressive product such as a monument is itself an expressive action, Governor Norton has failed to even allege an expressive purpose for deleting Wong's comment and blocking him. As such, she cannot claim to have engaged in government speech.

2. **Neither a Comment to a Facebook Post, Nor the Deletion Thereof Are Closely Connected in the Public Mind with the Government.**

The second factor of the government speech test is whether the medium of expression is closely connected in the public mind with the government. Again, the problem arises that the

activity which abridged Wong's Freedom of Speech, the deletion of his comment and subsequent ban, did not express anything. This Court pointed out in *Summum*, that it would be absurd to think that an individual would put a monument in their yard which they did not agree with. 555 U.S. at 460. So too would it be absurd to suggest that a Facebook comment, which has the name and photograph of its author to the side, is closely connected in the public mind with a person who did not author it. Furthermore, nothing on the record suggests that there was a danger of Wong's comments being mistaken for those of the government, in fact, there were over 30 other commenters to the governor's post, not one of which is alleged by the state to have been mistaken as its own speech. R. at 30.

In *Matal*, this court held that trademarks were not connected in the public mind with the government in part because the government was not known for playing a part in "dreaming up" the marks. 137 S.Ct. at 1758. So too in the present case, the government played no part in dreaming up Wong's comment. These cases differ from the precedents set forth in *Summum,* and *Walker* because in both of those instances, the government was holding out the designs of another to be their own. 135 S.Ct. at 2248; 555 U.S. at 460. Whereas here, the petitioner has failed to show that anyone thinks that comments to official announcements are the speech of the state.

3. **Governor Norton Maintains no Control Over the Messages in the Comments Sections of Her Facebook Posts.**

Lastly, the Court looks to whether the government maintains control over the message that is being sent. This Court has found that the government controls the message that is being sent when it is selective in accepting privately constructed monuments that are to be placed on public property in *Summum*. 555 U.S. at 465. Similarly, in *Walker* the Court recognized that

accepting a design and putting it on government property is more substantial than a mere seal of approval. 135 S.Ct. at 2245. In the present case, Governor Norton's Facebook account is set to public with no restrictions on who posts there. The record does not suggest that she asks individual commenters on her page to conduct themselves civilly, nor are any posting guidelines for participation, or moderators checking for content or discussions she thinks inappropriate for the forum. Despite having several employees whose duties include aiding the governor in her use of social media, there is nothing on the record to suggest that Governor Norton exercises any control over the comments to her post other than her decision to delete Wong. R. at 3. Not only does this show a lack of control exercised over the message being sent by the comment section, but it also draws attention to the governor's initial discriminatory motive.

Taking the three Government speech factors together and keeping in mind that they are being used in defense of a section 1983 claim, Governor Norton has failed to prove that her deletion of Wong's comment, and following ban was an act of government speech. Nowhere in the record does Governor Norton identify the message she intends to send by deleting his comment, and the government generally has no history of removing the expression of others to send a message to the public. Her deletion of Wong's comment can't be closely connected in the public mind with the government because she removed it secretly in the middle of the night. Lastly, there is no evidence that Governor Norton maintains control of the information that others dream up and comment beneath her posts. Because Governor Norton has failed to prove these elements, this Court should affirm the Fourteenth Circuit Court of Appeals' holding that the state of Calvada was not engaged in Government speech when it deleted Wong's comment.

CONCLUSION

This Court should AFFIRM the judgment of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

BRIEF CERTIFICATE

Team 16 certifies that the work product contained in all copies of Team 16's brief is in fact the work product of the members of Team 16 only; and that Team 16 has complied fully with its law school's governing honor code; and that Team 16 has complied with all Rules of the Competition.

_____
TEAM 16

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APPENDIX "A"

CONSTITUTIONAL PROVISION

U.S. Const. amend. I

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

APPENDIX "B"

STATUTORY PROVISION

42 U.S.C. Section 1983

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