Team 21

No. 17-874

IN THE

# SUPREME COURT OF THE UNITED STATES

**ELIZABETH NORTON**,
in her official capacity as Governor, State of Calvada
**Petitioner**

v.

**BRIAN WONG**,
**Respondent**.

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

## BRIEF FOR RESPONDENT

**Counsel for Respondent**
Team 21

## QUESTIONS PRESENTED

I. Whether Governor Norton's act of deleting Brian Wong's comment and banning him posting further comments on her "Governor Elizabeth Norton" Facebook page constituted state action?

II. Whether Governor Norton violated Brian Wong's First Amendment right to free speech by deleting his political comment in a viewpoint specific manner on a Facebook page she set up to serve as a state-sponsored forum rather than government speech?

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## STATEMENT OF JURISDICTION

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

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

## STATEMENT OF THE CASE

Respondent Brian Wong ("Wong") is a United States citizen and teacher in a religiously affiliated high school in the city of Laguna, Calvada. [R. at 13, 27.] He is a son of immigrant parents and was born in Calvada, where he plays an active role in his community. [R. at 27.] Aside from his high school teaching duties, Wong operates a Facebook profile under his own name and regularly interacts with individuals online. [R. at 13.] Facebook is a social media platform that allows users to connect with friends, politicians, businesses, bands, and other entities through posts, comments, and "likes." [Id.]

On March 5, 2016, Wong noticed a post by Calvada State Governor Elizabeth Norton ("Governor Norton") on her public Facebook page titled "Governor Elizabeth Norton" ("GEN

page"). [R. at 15-16.] The post revealed to the public, for the first time, Governor Norton's new State policy on immigration:

> New State Policy on Immigration Law Enforcement
>
> 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.

[Id.] (hereafter, the "immigration policy post")

Governor Norton's immigration policy post was one of many GEN page posts concerning her official duties. [R. at 14-15.] On January 12, 2016, one day after her inauguration, Governor Norton created the GEN page by changing her private Facebook account titled "Elizabeth Norton" into a public account titled "Governor Elizabeth Norton." [R. at 14.] Although the State

of Calvada provides its Governors with a Facebook page titled "Office of the Governor of the State of Calvada," Governor Norton posted far more often about her duties on her GEN page. [R. at 14, 31.]

By providing all Facebook users with access to the GEN page, Governor Norton aimed to introduce new ways for her constituents to interact with her and her senior staff. [R. at 14.] For example, through her GEN page, Governor Norton asked constituents for their input on how to make the state better and encouraged them to be more actively involved in government decisions. [R. at 25.] One post in particular requested constituents to post pictures of potholes so that the Governor could direct the Calvada Department of Transportation to address the potholes accordingly. [R. at 15.] In addition to Governor Norton, Chief of Staff Mary Mulholland ("Chief Mullholland") and Director of Social Media Sanjay Mukherjee ("Director Mukherjee") were registered as "administrators" of the GEN page. [R. at 15, 23.] They, along with Director of Public Security Nelson Escalante ("Director Escalante"), regularly monitored and helped manage the contents of the GEN page. [R. at 23.]

After Governor Norton uploaded her immigration policy post at 3:15 p.m., Wong posted a comment at 4:23 p.m. in hope that the Governor and people of Calvada would see his reply and agree that the immigration policy was morally and ethically suspect. [R. at 27-28.] Wong's comment read, "Governor, you are a scoundrel. Only someone with no conscience could act as you have. You have the ethics and morality of a toad (although, perhaps I should not demean toads by comparing them to you when it comes to public policy). You are a disgrace to our statehouse." [R. at 16.] Director of Public Security Nelson Escalante saw the post and did not flag it. [R. at 19.] As part of his official duties, Director Escalante flags certain posts on the GEN page that present "overt or implicit threats to the governor, her family, or her staff." [Id.]

Later that evening at 9:45 p.m., Governor Norton emailed Director Mukherjee and cc'ed Director Mullholland using her state-issued smartphone and email address (E.Norton@governor.calv.gov). [R. at 16-17.] The email instructed Director Mukherjee to perform four tasks on the GEN page, one of which was to "delete/ban" Wong and his "nastygram" from the page. [Id.] Governor Norton viewed Wong's post as an *ad hominem* attack unrelated to the content of the immigration policy post. [R. at 26.] Shortly thereafter, at 10:10 p.m., Director Mukherjee deleted Wong's post and on the next day, March 6, 2016, banned him from posting further comments on the GEN page. [R. at 17.] No other comment on the immigration policy post was deleted. [Id.]

After discovering that his comments had been deleted and banned from the GEN page, Wong emailed Governor Norton's official email address, requesting that his post be reinstated and that the ban be lifted. [R. at 28.] Wong received no response to his email and remained banned from posting comments on the GEN page. [Id.]

On March 30, 2016, Wong filed a civil rights action in the United States District Court for the District of Calvada pursuant to 42 U.S.C. § 1983. Wong requested the Court to declare that Governor Norton violated his right to free speech pursuant to the First Amendment to the United States Constitution. In addition, he requested the Court to require Governor Norton to reinstate his post and permit him to post further comments on the GEN page. In response, Governor Norton filed a cross motion, claiming that her act of deleting Wong's comment neither constituted state action nor violated the First Amendment.

The District Court held that Governor Norton's actions were attributable to the State of Calvada, and that the Governor did not violate Wong's First Amendment rights because her immigration policy post constituted government-speech. *Wong v. Norton*, No. 16-CV-6834, slip

op. at 1 (D.C.A. Aug. 25, 2016). On appeal, the United States Court of Appeals for the Fourteenth Circuit affirmed the District Court's holding that the Governor's actions constituted state action, and reversed the holding that Governor Norton's immigration policy post was protected by the government-speech doctrine. *Wong v. Norton*, No. 17-874, slip op. at 1 (14th Cir. Nov. 1, 2017). The Petitioner timely filed a petition for writ of certiorari, which the Supreme Court granted.

## SUMMARY OF THE ARGUMENT

The Supreme Court should hold that Governor Norton violated Brian Wong's First Amendment right to free speech when she deleted Wong's post and banned him from posting further comments on her GEN page.

The Governor's act constituted state action because she performed the act in pursuit of state objectives while collaborating with state actors and using state resources. Although Governor Norton used her GEN page sometimes in a private capacity and deleted Wong's comment on a Saturday evening, the Governor's act still involved substantial entwinement of state actors, the use of state-issued smartphones and email addresses, and a purpose to protect her role as governor. The presence of such factors has been sufficient for the Court to find state action on the part of state officials. Recognizing Governor Norton's act as state action would also further the Court's policy objectives by deterring state officials from abusing their powers and compensating citizens like Wong for constitutional violations.

Furthermore, Governor Norton was not entitled to delete Wong's comment because the GEN page was intentionally created to be, and was capable of serving as, a state-sponsored forum for speech. Governor Norton intentionally opened up the GEN page for public discourse,

and the page had the capacity to hold an almost infinite number of comments from speakers. In addition, the Governor's deletion of Wong's comment was not entitled to government-speech protections. Given the Court's approach in *Summum*, Wong's comment—and not the Governor's immigration policy post—was the speech under consideration. Just as the unit of analysis in *Summum* was the monument and not the park holding the monument, the unit of analysis here was Wong's comment and not the Governor's post holding Wong's comment. As such, the deletion of Wong's comment should not be afforded government-speech protections because, under the *Walker* three-factor test, Facebook comments (1) have not been traditionally used to convey government messages; (2) are not closely identified in the public mind with the state; and (3) have not been subject to the government's direct control.

Moreover, the Court should rule that Governor Norton committed viewpoint discrimination because Wong's comment, which challenged her fitness to serve as Governor of Calvada, was the only post that she censored on her GEN page. The timing and plain language of Wong's comment indicate that it expressed an opinion about the morality and ethics of the Governor. Although the Governor referred to Wong's comment as a "nastygram," Wong's comment was not made with reckless disregard for the truth and was not likely to provoke violence when addressed to an ordinary U.S. citizen. Furthermore, because Wong's comment concerned a broad issue of public interest, extending First Amendment protections to Wong would further the Court's policy objectives concerning free speech.

Taken together, the Supreme Court should hold that Governor Norton's act constituted state action and that the Governor's act of deleting Wong's post and banning him from posting further comments on her GEN page amounted to viewpoint discrimination.

## ARGUMENT

### I. GOVERNOR NORTON'S ACT OF DELETING BRIAN WONG'S FACEBOOK POST AND BANNING HIM FROM POSTING FURTHER COMMENTS ON HER GEN PAGE CONSTITUTED STATE ACTION BECAUSE SHE PERFORMED THE ACTS IN PURSUIT OF STATE OBJECTIVES WHILE COLLABORATING WITH STATE ACTORS AND USING STATE RESOURCES.

For a plaintiff to succeed on a constitutional rights claim, the plaintiff must demonstrate that the violation of his or her constitutional right occurred while the defendant was acting under color of state law. *Filarsky v. Delia*, 566 U.S. 377, 383 (2012); *West v. Atkins*, 487 U.S. 42, 49 (1988); *Shelley v. Kramer*, 334 U.S. 1, 13 (1948). The defendant's act will be attributable to the state if there is a sufficient nexus between the state and the defendant's act such that seemingly private behavior "may be fairly treated as that of the state itself." *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001). The question of whether such a nexus exists is a matter of normative judgement that considers the totality of the circumstances. *Id*. at 295; *National Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 193 (1988); *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003).

A sufficient nexus between the state and a defendant's act exists where there is substantial entwinement of state actors in the defendant's act. *Brentwood*, 531 U.S. at 302; *Tarkanian*, 488 U.S. at 193; *Evans v. Newton*, 382 U.S. 296, 299 (1966). In *Brentwood*, the Supreme Court held that the activities of a Tennessee non-profit organization constituted state action because its governing body and 84% of its membership consisted of Tennessee state actors. *Brentwood*, 531 U.S. at 291. Although the activities were ostensibly private, the substantial entwinement of state actors therein precluded the organization from having a substantial reason to regard the Court's holding as unfair. *Id*. at 298-99. By contrast, the Supreme Court in *Tarkanian* held that the enforcement of a NCAA sanction against a Nevada state

university basketball coach was not state action, in part because only a small fraction of the NCAA consisted of Nevada state actors. *Tarkanian*, 488 U.S. at 196. Had the majority of the NCAA's members been Nevada state representatives—instead of an array of actors from other states—then the Court would have had greater reason to regard the sanction as an act under color of Nevada state law. *Id*. Taken together, the holdings of *Tarkanian* and *Brentwood* imply that there are considerable grounds to regard an act as state action if the majority of those performing the act are official representatives of that state.

An act by a defendant, even if performed while off-duty, is further viewed as state action if the act was performed while using state resources in pursuit of state objectives. *Atkins*, 487 U.S. at 50; *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003). In *Atkins*, the Supreme Court declared that just because a defendant's part-time work for the state paralleled what he did full-time in his private practice, there was no reason to conclude that the defendant's activities constituted private, and not state, action. *Atkins*, 487 U.S. at 56-57. Because the defendant's work still served state objectives, the Supreme Court held that the defendant had acted under color of state law. *Atkins*, 487 U.S. at 55-56. Similarly, the Fourth Circuit in *Rossignol* held that a scheme by off-duty police officers to buy out every copy of a single day's newsprint constituted state action because it furthered state objectives while using state resources. *Rossignol*, 316 F.3d at 519. Specifically, the scheme looked to block a newspaper from criticizing the police and was executed as they carried state-issued firearms and pagers. *Id*. at 520-21. Although the officers were off-duty and out of uniform, the Court—in finding state action—placed greater weight on the fact that their official identities and state resources were used in an effort to protect their official roles. *Id*. at 526.

Furthermore, as a matter of public policy, the Supreme Court has emphasized that the scope of what constitutes state action should not be so narrow as to insulate state actors from constitutional rights violations. *Atkins*, 487 U.S. at 50; *Marsh v. Alabama*, 326 U.S. 501 (1946). An overly narrow construction of state action would do little to deter state officials from abusing their powers. *See Monroe v. Pape*, 365 U.S. 167, 184 (1961) (stating that a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law). Although a broad definition of state action may lead to more federal litigation, the Supreme Court has emphasized that compensating members of the public, whose constitutional rights have been violated, is just as important a consideration. *See Marsh*, 326 U.S. at 509. As such, the Court has maintained that the more a state actor opens up to the public in an official capacity, the more his or her rights become "circumscribed by the statutory and constitutional rights" of those the state actor encounters. *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 325 (1968) (citing *Marsh*, 326 U.S. at 505-06). Because the deprivation of constitutional rights by state actors is a "significantly different" and "serious" matter, *Monroe*, 365 U.S. at 196, the Supreme Court has refrained from adopting a narrow construction of state action. *See Atkins*, 487 U.S. at 52 ("defendants are not removed from the purview of [state action] simply because they are professionals acting in accordance with professional discretion and judgment"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("the test [for state action] is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Here, Governor Norton's act of deleting Brian Wong's post on her GEN page constituted state action because state actors were substantially entwined in that act. Like the organization of

schools in *Brentwood*, the team of individuals managing Governor Norton's GEN page primarily consisted of state actors. In addition to the Governor, who included her official title in the header of the Facebook page, Chief of Staff Mary Mulholland ("Chief Mullholland"), Director of Social Media Sanjay Mukherjee ("Director Mukherjee"), and Director of Public Security Nelson Escalante ("Director Escalante") all monitored and helped manage the contents of the GEN page. [R. at 15, 23.] Director Mukherjee himself was the one who deleted the post and banned Wong in accordance with Governor Norton's orders. [R. at 17.] Furthermore, the Calvada Department of Transportation also played an active role, as it monitored and responded to pothole posts on the GEN page. [R. at 15.] Because the record does not mention any private affiliate of the Governor as a GEN page administrator, the Supreme Court should find state action on the part of Governor Norton, given that only state actors are listed as administrators of the GEN page. The Court indeed found state action with much less in *Brentwood*: only 84% of the organization's membership consisted of state actors.

The Governor's act may further be regarded as state action because she performed the act while using state resources for the purpose of protecting her role as Governor. Like the defendant in *Atkins*, Governor Norton cannot argue that just because she sometimes used her GEN page in a private capacity, her deletion of Wong's post constituted private, and not state, action. Her act still served state objectives in that it functioned to protect her moral and ethical capacity to govern in Calvada. Given that Wong's post challenged her "conscious," "ethics," and "morality" in response to her new immigration policy, [R. at 16.] the Governor has little room to argue that her act served non-official purposes. Neither do the facts suggest that the Governor acted for reasons of personal safety: she did not express any concern for personal safety in her email to Director Mukherjee, she did not seek any help from her Director of Public Security, and Wong's

post was not flagged by Director Escalante as an overt or implicit threat to the Governor. [R. at 19.] Furthermore, like the police officers in *Rossignol*, Governor Norton used state-issued equipment when she took action against Wong. Specifically, her email to "delete/ban" Wong's comment was sent to Director Mukherjee and Chief of Staff Mulholland through her state-issued smartphone and email address (E.Norton@governor.calv.gov). [R. at 16-17.] Although it can be argued that the acts were not state action because they were performed while "off-duty," it was standard work practice for the Governor's senior aides to respond quickly to her requests, even on weekend evenings. [R. at 20.] Even if the acts fell outside the scope of their normal work hours, *Rossignol* demonstrates that state action may still be found if the acts were performed while using state resources for the purpose of serving state objectives. Because both elements are present here, the Supreme Court should rule that the Governor's acts constituted state action.

Furthermore, finding no state action on the part of Governor Norton would present serious public policy concerns. State officials would be able to evade liability for viewpoint discrimination simply by holding political discussions—and censoring disfavored views—on social media. Because cyberspace is "one of the most important places to exchange [political] views" in modern society, *Packingham v. North Carolina*, 137 S.Ct. 1730, 1732 (2017), the Supreme Court should not refrain from finding state action when state officials like Governor Norton interact with citizens over the internet. A narrow construction of state action would do little to deter state actors from abusing their powers online. Furthermore, lower courts have already recognized the importance of holding state actors like Governor Norton accountable for their online activities. *See Davison v. Loudoun County Board of Supervisors*, No. 16-cv-932, 2017 WL 3158389 (E.D. Va. July 25, 2017) (finding state action where a state official banned a citizen for twelve hours from her "Chair of the Loudoun County Board of Supervisors"

Facebook page); *see also Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013) (holding that a reasonable jury could conclude that a sheriff retaliated against a deputy after seeing on the internet the deputy's support for the sheriff's political rival). Given that activities like those of the Governor will likely become more prevalent as social media progresses, the Supreme Court should firmly establish that it is open to finding state action on sites such as Facebook. In order to ensure that citizens like Wong get compensated for constitutional violations, the Court should rule that the Governor's deletion of Wong's post constituted state action.

Because the actions of the Governor involved substantial entwinement of state actors, the use of state resources, and the pursuit of state objectives, the Supreme Court should find state action on the part of Governor Norton. Such a finding would further the goals of public policy by deterring state officials from abusing their powers and compensating citizens like Wong for constitutional violations.

## II. GOVERNOR NORTON VIOLATED BRIAN WONG'S FIRST AMENDMENT RIGHT TO FREE SPEECH WHEN SHE DELETED WONG'S POLITICAL POST IN A VIEWPOINT SPECIFIC MANNER ON A FACEBOOK PAGE SHE SET UP TO SERVE AS A STATE-SPONSORED FORUM FOR PUBLIC SPEECH.

While government speech is not restricted by the Free Speech clause of the First Amendment, not all statements and actions by the government constitute government speech. *Matal v. Tam*, 137 S.Ct. 1744, 1766 (2017). When the government intentionally opens up a medium of communication for public discourse, it is not engaging in government speech, but rather creating a state-sponsored forum for speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). In such state-sponsored forums, the government does not have a free hand to regulate private

speech. *Summum*, 555 U.S. at 469. The First Amendment prohibits the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others. *Tam*, 137 S.Ct. at 1758.

A. Governor Norton's act of deleting Brian Wong's comment is not entitled to government-speech protections because the GEN page was intentionally created to be, and was capable of serving as, a state-sponsored forum for speech.

A government does not speak on its own behalf, but rather provides a state-sponsored forum for speech when it intentionally opens up a nontraditional forum for public discourse.[1] *Cornelius*, 473 U.S. at 802; *Walker v. Texas Sons of Confederate Veterans*, 135 S.Ct. 2239, 2249-50 (2015). Such intent to open up a public forum has been found where the policy and practice of the government and nature of the venue are compatible with expressive activity. *Summum*, 555 U.S. at 478-79; *Cornelius*, 473 U.S. at 802. In *Summum*, the Supreme Court identified public parks as public forums for speech because they have traditionally been opened up for speakers to assemble and exchange ideas, and because they have the spatial capacity to accommodate such speakers. *Summum*, 555 U.S. at 478-79. By contrast, the Court did not apply public forum analysis to the display of permanent monuments in public parks because such displays have not been used for public discourse and cannot be accommodated in large numbers. *Id*. at 461-62. The findings in *Summum* imply that as long as the expressive activity and number

[1] The Supreme Court has recognized three types of fora for speech: (1) traditional public forums, (2) state-designated public forums, and (3) nonpublic or limited forums. *Cornelius*, 473 U.S. at 802. Although in limited forums government may impose reasonable and viewpoint-neutral restrictions on speech, the government cannot discriminate in any of the three types in a viewpoint specific manner. *Summum*, 555 U.S. at 461. Furthermore, the required elements to establish a nonpublic forum are the same as those for traditional and state-designated public forums: (i) government intent or authorization, and (ii) capacity to accommodate the speakers.

of speakers do not defeat the essential function of the public venue, courts should apply public forum analysis. *Summum*, 555 U.S. at 478; *Cornelius*, 473 U.S. at 802.

Even in cases where public forum analysis is less certain, the Court has refrained from recognizing an act or statement as government speech if (1) the medium of expression has not traditionally taken the form of government speech, (2) the act or statement is not often closely identified in the public mind with the state; and (3) the government has not maintained direct control over the acts or statements conveyed on the medium of expression. *Tam*, 137 S.Ct. at 1759-60; *Walker*, 135 S.Ct. at 2248-49. In *Tam*, for example, the Supreme Court held that trademarks are not government speech because "[t]rademarks share none of [the] characteristics" of the *Walker* three-factor test for government speech. *Tam*, 137 S.Ct. at 1760. Specifically, unlike license plates, trademarks: (1) have not been used to communicate slogans urging action or to promote tourism and local industries; (2) are not perceived by the public as serving governmental purposes or displaying the government's name; and (3) have not been subject to the government's final approval based on the viewpoint expressed. *Compare Walker*, 135 S.Ct. at 2242 (explaining why license plates meet each element of the *Walker* three-factor test), *with Tam*, 137 S.Ct. at 1759-60 (stating reasons why trademarks share none of the characteristics of the *Walker* three-factor test). Because the Court does not want the government to appear as if it is "babbling prodigiously and incoherently," the Court has refrained from finding government speech where the act or statement is far afield from the *Walker* three-part framework. *Tam*, 137 S.Ct. at 1755.

Furthermore, for reasons of public policy, the Supreme Court has been more open to applying public forum analysis than the government speech doctrine. In *Tam*, the Court expressed caution about "huge and dangerous extension[s] of the government-speech doctrine."

*Tam*, 137 S.Ct. at 1760. Specifically, the Court forewarned that if the doctrine is applied too broadly, then the state would be able to silence the expression of disfavored viewpoints by simply affixing a government seal of approval to private speech in order to pass it off as government speech. *Id*. at 1758; *Walker*, 135 S.Ct. at 2261 (Alito, J., dissenting). Such a "capacious understanding of government speech" would take "a large and painful bite out of the First Amendment" for everyday U.S. citizens. *Walker*, 135 S.Ct. at 2255 (Alito, J., dissenting). By contrast, the Court has expressed willingness to extend public-forum protections, especially where the state opens up communications with the public, but nevertheless excludes certain speakers. *Cornelius*, 473 U.S. at 802-03. Because the Court has been especially cautious about stripping private speech of its First Amendment protections, *Walker*, 135 S.Ct. at 2255 (Alito, J., dissenting), the Court has recognized only narrow exceptions through which government can circumvent public-forum protections. *See Cornelius*, 473 U.S. at 800 (declaring that government can only exclude an individual from a public forum if it serves a compelling state interest and the exclusion is narrowly drawn to achieve that interest). When faced with borderline cases, the Court has erred on the side of caution by not extending government-speech protections. *Tam*, 137 S.Ct. at 1760 (cautioning against recognizing an act or statement as government speech if doing so would lead to other similar acts or statements, which are clearly not government speech, to be characterized in the same way); *Cornelius*, 473 U.S. at 811 (holding that even though an effort by government to regulate speech may be reasonable, it will not be permitted if it suppresses certain forms of private speech).

Here, Governor Norton's GEN page should be regarded as a state-sponsored forum for speech because the Governor intentionally opened it up for public discourse. Her intent to create a public forum is apparent in that just one day after getting elected governor, she switched the

page's settings from "private" to "public" and changed the account name from "Elizabeth Norton" to "*Governor* Elizabeth Norton" (emphasis added). [R. at 14.] Although the Governor still used the GEN page to message and connect with personal friends and family, the "majority of the Governor's posts… pertained… to her official duties as governor." [Id.] In addition, the plain language of many GEN posts further demonstrates that she intended for the GEN page to function as a public forum. One post reads, "Let me know what you think by posting your comments." [Id.] Others state, "Tell me what your priorities are," and "As always, I welcome your comments and insights." [R. at 15.] Furthermore, unlike the permanent monuments in *Summum*, Facebook posts and comments can accumulate almost infinitely on a public Facebook page. *Packingham*, 137 S.Ct. at 1732 ("[S]ocial media… offers relatively unlimited, low-cost capacity for communication of all kinds to users engaged in a wide array of protected First Amendment activity"). There is no concern that a high number of posts and comments would "defeat an essential function" of a public Facebook page. *Summum*, 555 U.S. at 478. In fact, it would further an essential function: "to interact with other users through comments, replies, and 'likes.'" [R. at 13]. Given the GEN page's capacity and Governor Norton's intent to open up the page for public discourse, the Supreme Court should recognize the page as a public forum.

The Supreme Court should also refrain from extending government-speech protections to Governor Norton because her act of deleting Wong's comment fails to satisfy the *Walker* three-factor test. Here, the speech under analysis is not the Governor's immigration post, but rather Wong's comment to that post. Just as the unit of analysis in *Summum* was the monument and not the park that held the monument, the unit of analysis here is Wong's comment and not the Governor's post that held Wong's comment. *Summum*, 555 U.S. at 471-80. As such, under the *Walker* three-factor test, government-speech protections should not be extended to the deletion

of Wong's comment. First, Facebook posts and comments have not traditionally been used to convey government messages. Indeed, Governor Norton introduced her GEN page as a "new" way to interact with her constituents. [R. at 14.] Second, unlike the license plates in *Walker*, Facebook comments are not closely identified in the public mind with the state; their commonly understood purpose is to interact and connect with friends, not to serve the state; and they normally display the account name of the private user, not the name of the government. [R. at 13.] Here, Wong's comment challenged the Governor's fitness to serve and appeared under the account name "Brian Wong." [R. at 27-28.] Finally, comments on Facebook have not been subject to the government's direct control. Unlike license plates, Wong's comment did not require the authorization of the state before it appeared in public. Private users like Wong can unilaterally compose and upload comments onto any public Facebook page. [R. at 14.] Because recognizing such comments as government speech would make the government appear as if it is "babbling prodigiously and incoherently," *Tam*, 137 S.Ct. at 1755, the Court should not extend government-speech protections to the Governor's deletion of Wong's comment.

Furthermore, public policy concerns weigh in favor of applying public forum analysis rather than the government speech doctrine in this case. Recognizing Governor Norton's act as government speech would enable similarly situated state actors to censor constructive but disfavored criticisms simply by making a reference to their title and policies in their posts. Such power to manipulate public discourse would undermine the First Amendment rights of citizens to receive public information. *See Rossignol*, 316 F.3d at 522; *see also Packingham*, 137 S.Ct. at 1732 (stating that the court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to social media networks). Given that social media is now "a principal source for knowing current events" and "speaking and listening in the

public square," *Packingham*, 137 S.Ct. at 1732, public commentary like that of Wong must be afforded public forum protections. Such a holding would be consistent with several federal court rulings. *See Davison v. Loudoun County Board of Supervisors*, No. 16-cv-932, 2017 WL 3158389 (E.D. Va. July 25, 2017) (holding that a government official created a public forum for speech when she deliberately set up a public Facebook page named "Chair Phyllis J. Randall" in order to receive comments from her constituents); *see also Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 285 (4th Cir. 2008) (declaring that government may open a forum for speech by creating a social media site that includes a chatroom or bulletin board in which private viewers could express opinions about the government's position).

Taken together, the Supreme Court should apply public forum analysis in this case because Governor Norton intentionally created her GEN page for public discourse. The *Walker* three-factor test and policy concerns about government-speech abuse also militate in favor of applying public forum analysis rather than the government speech doctrine.

B. Governor Norton committed viewpoint discrimination when she deleted Brian Wong's comment which expressed his opinion about the Governor's fitness to serve as leader of the State of Calvada.

A government commits viewpoint discrimination when it targets not subject matter, but particular views taken by a speaker on a subject. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). In *Rosenberger*, the Supreme Court held that a state university committed viewpoint discrimination because it refused to subsidize the costs of a student newspaper based on the particular beliefs the newspaper espoused. *Rosenberger*, 515 U.S. at 819. While the university provided funding to other student newspapers, it withheld funds to the plaintiff's newspaper, claiming improperly that the publication of its particular views violated

the university's SAF guidelines. *Id*. In *Tam*, the Court also held for similar reasons that the Patent and Trademark Office's (PTO) denial of a trademark application constituted viewpoint discrimination. Although the PTO applied its restrictions evenhandedly in the sense that they equally "damn[ed] Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue," the Court ruled that the PTO's reason for the denial, that the trademark was "offensive" to others, was unconstitutional. *Tam*, 137 S.Ct. at 1763. The Court explicitly declared that "giving offense is a viewpoint" that cannot be discriminated against. *Id*; *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Moreover, because of the threat posed to free expression by content-based restrictions, the Court has expressly rejected ad hoc tests that balance their relative costs and benefits, and has instead permitted such restrictions for only a few traditional categories of speech, including defamation and so-called "fighting words." *See United States v. Alvarez*, 567 U.S. 709, 717-18 (2012); *see also Elonis v. United States*, 135 S.Ct. 2001, 2027 (2015); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964). In *Sullivan*, the Court held that a newspaper company was not liable for publicly criticizing a public official because the content of its publications did not constitute libel or defamation. To constitute defamation, the Court declared, the speech must be made with actual malice and reckless disregard for the truth. *Sullivan*, 376 U.S. 279-80. The Court similarly held in *Elonis* that an individual's Facebook posts did not make him liable to his employer because the contents of his posts did not amount to "fighting words." *Elonis*, 135 S.Ct. at 2027 (defining "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"); *see also Cohen v. Cal.*, 403 U.S. 15 (1971) (stating that states are free to ban the simple use of "fighting words"). As such, as long as the speech is not likely to provoke the

mind of an ordinary citizen to violence, the speech will not be exempted from the general prohibition against content-based restrictions." *Elonis*, 135 S.Ct. at 2027.

Furthermore, as a public policy matter, the Supreme Court has emphasized that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011); *Sullivan*, 376 U.S. at 270-71. In *Synder*, for example, the Court held that the protest signs of picketers, which read "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell," were all entitled to Free Speech protections. *Snyder*, 562 U.S. at 443-44. The Court emphasized that although the messages could have been written in a more refined manner, the "issues they highlighted—the political and moral conduct of the United States and its citizens, [and] the fate of the nation…—were matters of public import." *Id*. Because the signs plainly related to broad issues of public interest, rather than matters of purely private concern, the Court declared that the only grounds to censor the signs would be for the "content and viewpoint of the message[s] conveyed." *Id*. at 457. Such grounds to censor a person's speech are impermissible under the First Amendment. *Id*.

Here, Governor Norton's deletion and ban of Brian Wong's comments constituted viewpoint discrimination because she specifically targeted Wong based on the views he expressed. Wong's response to the Governor's immigration policy post explicitly challenged the Governor's fitness to serve as leader of the State of Calvada. Although Governor Norton claims that Wong's comment was an "*ad hominem* attack unrelated to the content of the immigration policy post," the timing and plain language of Wong's comment prove otherwise. Wong made the comment just sixty-eight minutes after the Governor uploaded her post, and he explicitly

included the terms "conscious," "ethics," and "morality" and linked them with her position in the "statehouse" of Calvada. [R. at 27-28.] Wong's comment also refers to the Governor by her official title "Governor" and does not mention the word "Elizabeth," "Norton," or any other nonofficial personal moniker. [R. at 16.] That the Governor found the comment "offensive" is also no excuse to deny Wong of his right to free speech. *Tam*, 137 S.Ct. at 1763. Furthermore, as a son of immigrant parents and as a teacher in a religiously affiliated high school, Wong is well aware of the moral and ethical ramifications involved in tough immigration policies. To deny Wong from challenging the morals and ethics of the Governor would be to deny a voice seeking to protect thousands of immigrant families. Because Wong's moral challenge was the only voice that the Governor censored, the Court should rule that Governor Norton committed viewpoint discrimination.

The Governor's act should also not be exempted from the general prohibition against content-based restrictions because Wong's comment did not constitute defamation or "fighting words." Like the newspaper's publication in *Sullivan*, Wong's comment was not made with reckless disregard for the truth. The Governor's immigration policy can indeed be challenged on moral and ethical grounds. For example, the policy's mandate to instruct law enforcement officers to check the immigration status of any individual as long as he or she has been stopped for an alleged traffic violation or crime would result in more instances of racial profiling, harassment, and abuse of executive powers. Unknowingly undocumented immigrants who have complied with immigration laws by filing applications for adjustment of status or consular processing would also become targets of the policy, even though they have done nothing wrong. Governor Norton herself acknowledges in her post that she knows that "some Calvadans worry" that her policy may "raise concerns among our citizens about family members and friends."

Furthermore, Wong's comment also did not amount to "fighting words" because it did not, and was not likely to, provoke violence when addressed to an everyday U.S. citizen. Like the individual's Facebook posts in *Elonis*, Wong's comment did not cause a single Facebook user to lash back or incite violence during the five hours and twenty-two minutes it was up on the GEN page. [R. at 16-17.] Neither was it flagged by Governor Norton's Director of Public Security Nelson Escalante as an "overt or implicit threat[] to the governor, her family, or her staff." [R. at 19.] Because Wong's comment did not constitute defamation or "fighting words," the Governor's discriminatory actions against Wong's view should not be exempted.

Furthermore, although the Governor referred to Wong's comment as a "nastygram," Wong's comment should not be censored merely because of its sharp tone or "nasty" diction; instead, in order to further the Court's stated policy objectives, it should be protected. Like the protest signs in *Snyder*, Wong's comment could have been written in a more "refined manner," but it nonetheless highlighted broad "issues of public import." *Snyder*, 562 U.S. at 443-44. Like the issues of military service, sexual orientation, and religion in *Snyder*, the issue of immigration concerns the "political and moral conduct of the United States and its citizens." *Id*. Immigration policies have direct effects on families, educational institutions, businesses, and social values. For example, the deportation of a single immigrant may divide a family, remove a tuition-paying student from the classroom, deprive a business of an irreplaceable employee, and promote intolerance and discrimination in the community. Immigration law also implicates federalism concerns, as the issue of whether federal immigration law preempts state immigration law continues to play out in the courts. *See Arizona v. United States*, 132 S.Ct. 2492 (2012); *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582 (2011). Because the Court has encouraged citizens to speak out on such important social issues, Governor Norton should

not be permitted to deny Wong's right to express his views about her immigration policy and fitness to serve.

The Supreme Court should hold that Governor Norton violated Brian Wong's First Amendment right to free speech because she deleted Wong's comment in a viewpoint specific manner on a Facebook page she set up to serve as a state-sponsored forum for speech. In order to uphold the Court's policy objectives and past rulings against restricting free speech, the Court should extend First Amendment protections to Wong's comments on the Governor's GEN page.

## CONCLUSION

The Supreme Court should hold that Governor Norton violated Brian Wong's First Amendment right to free speech when she deleted Wong's post and banned him from posting further comments on her GEN page. The Governor's act constituted state action because she performed the act in pursuit of state objectives while collaborating with state actors and using state resources. The act also amounted to viewpoint discrimination because she only deleted Wong's comment, which challenged her fitness to serve as Governor, on a Facebook page she set up to serve as a state-sponsored forum for public speech. As such, the Supreme Court should affirm both holdings of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

Team 21

Counsel for Respondent

## CERTIFICATE OF COMPLIANCE

Team 21 certifies that:

(i) the work product contained in all copies of Team 21's brief is in fact the work product of the team members;
(ii) Team 21 has complied fully with its school's governing honor code; and
(iii) Team 21 has complied with all Rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.

Respectfully submitted,

Team 21

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