No. 17-2002(L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIAN DAVISON,

Plaintiff-Appellee,

v.

PHYLLIS RANDALL,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria,
Case No. 1:16-cv-00932-JCC-IDD

OPENING BRIEF FOR DEFENDANT-APPELLANT PHYLLIS J. RANDALL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF JURISDICTION 4

STATEMENT OF THE ISSUES 4

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 14

ARGUMENT 15

I. Standard of Review 15

II. Randall Did Not Act "Under Color of State Law" 15

III. Randall Did Not Violate the First Amendment or Article I, § 12 of the Virginia Constitution 18

A. Randall's Facebook Page Is Not a "Public Forum" 19

B. The 12-Hour "Ban" Was Not "Viewpoint Discrimination" 24

C. "Virginia SGP"—Not Plaintiff—Was Temporarily Banned 26

D. Any First Amendment Impact Was *De Minimis* and Not Actionable 28

E. The District Court Paid Insufficient Attention to Randall's First Amendment Rights 29

F. If Randall's Actions Were State Actions, Then Her Facebook Page Is Government Speech Immune from First Amendment Scrutiny 30

IV. The District Court Erred in Granting Declaratory Relief 32

A. To the Extent the Declaratory Judgment Operates Prospectively, It Must Be Reversed Because There Was No "Actual Controversy" Necessary for the District Court's Jurisdiction 32

B. To the Extent the Declaratory Judgment Operates Retrospectively, It Must Be Reversed Because Randall Is Entitled to Qualified Immunity 35

CONCLUSION 40

TABLE OF AUTHORITIES

Cases **Page(s)**

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937).....33

California Dep't of Corr. v. Morales,
514 U.S. 499 (1995).....38

CGM, LLC v. BellSouth Telecomms., Inc.,
664 F.3d 46 (4th Cir. 2011) 35, 37

City of Los Angeles v. Lyons,
461 U.S. 95 (1983).....34

Clapper v. Amnesty Int'l U.S.A.,
568 U.S. 398 (2013).....34

Davison v. Plowman,
715 Fed. App'x 298 (4th Cir. 2018) 1

Davison v. Rose,
715 Fed. App'x 298 (4th Cir. 2018) 1

Denver Area Educ. Telecomms. Consortium, Inc. v. FCC,
518 U.S. 727 (1996).....21

Edelman v. Jordan,
415 U.S. 651 (1974).....38

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000).....33

Garcetti v. Ceballos,
547 U.S. 410 (2006).....29

Green v. Mansour,
474 U.S. 64 (1985)..... 32, 35, 37

Harlow v. Fitzgerald,
457 U.S. 800 (1982)..... 36, 39

Helton v. AT&T Inc.,
709 F.3d 343 (4th Cir. 2013) 15

Henry v. Purnell,
652 F.3d 524 (4th Cir. 2011) 35

Ingraham v. Wright,
430 U.S. 651 (1977).....28

International Soc. For Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992).....19

Lefemine v. Wideman,
672 F.3d 292 (4th Cir. 2012) 36, 37, 38

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982).....17

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992).....33

Manning v. S.C. Dep't of Highway & Pub. Transp.,
914 F.2d 44 (4th Cir. 1990) 37

Miami Herald Pub. Co. v. Tornillo,
418 U.S. 241 (1974).....30

Minnesota State Bd. for Cmty. Colls. v. Knight,
465 U.S. 271 (1984).....20

Mitchell v. Forsyth,
472 U.S. 511 (1985).....39

Morgan v. Bevin,
No. 3:17-cv-00060-GFVT, 2018 WL 1557300
(E.D. Ky. Mar. 30, 2018)..... 21, 22, 29

Packingham v. North Carolina,
137 S. Ct. 1730 (2017)..... 22, 23, 24

Paul v. Davis,
424 U.S. 693 (1976).....18

Pearson v. Callahan,
555 U.S. 223 (2009).....39

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984).....38

People for the Ethical Treatment of Animals v. Rasmussen,
298 F.3d 1198 (10th Cir. 2002).....32

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983).....19

Pleasant Grove City v. Summum,
555 U.S. 460 (2009).....31

Pulliam v. Allen,
466 U.S. 522 (1984).....38

Raub v. Campbell,
785 F.3d 876 (4th Cir. 2015).....35

Reichle v. Howards,
132 S. Ct. 2088 (2012).....36

Republic of Paraguay v. Allen,
134 F.3d 622 (4th Cir. 1998)..... 35, 38

Roller v. Cavanaugh,
984 F.2d 120 (4th Cir. 1993)..... 37, 38

Rosenberger v. Rector and Visitors of Univ. of Virginia,
515 U.S. 819 (1995).....25

Rossignol v. Voorhaar,
316 F.3d 516 (4th Cir. 2003)..... 17, 18

Saucier v. Katz,
533 U.S. 194 (2001).....35

Skelly Oil Co. v. Phillips Petroleum Co.,
339 U.S. 667 (1950).....32

The Baltimore Sun Co. v. Ehrlich,
437 F.3d 410 (4th Cir. 2006) 29

United Pub. Workers of Am. (C.I.O.) v. Mitchell,
330 U.S. 75 (1947).....34

United States v. American Library Ass'n, Inc.,
539 U.S. 194 (2003).....23

United States v. Classic,
313 U.S. 299 (1941).....17

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,
535 U.S. 635 (2002)..... 32, 38

Virginia Educ. Ass'n v. Davison,
294 Va. 109 (2017) 1

Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.,
386 F.3d 581 (4th Cir. 2004) 15

Walker v. Texas Div., Sons of Confederate Veterans, Inc.,
135 S. Ct. 2239 (2015)..... 19, 31

West v. Atkins,
487 U.S. 42 (1988).....17

Wooley v. Maynard,
430 U.S. 705 (1977).....30

Constitutional and Statutory Provisions

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XI 35

28 U.S.C. § 1291 4

28 U.S.C. § 1331 4

28 U.S.C. § 2201(a) 32, 37

Va. Const., art. I, § 12 ..... 4, 18, 19

Va. Code § 15.2-1405 36

Other Authorities

Facebook Community Standards, Pt. III: Objectionable Content 20

Facebook Pages Terms.....20

Facebook Terms of Service 20

First Amendment—Freedom of Speech—Public Forum Doctrine—Packingham v. North Carolina, 131 Harv. L. Rev. 233 (2017).....22

Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598 (2018) 20

Smolla & Nimmer on Freedom of Speech § 8.33.25 (2018).....21

INTRODUCTION

Plaintiff Brian Davison is a resident of Loudoun County, Virginia. To his credit, he is actively engaged in civic activities and local government affairs. He is also a frequent litigant against state and local officials, having filed several lawsuits, including the complaint giving rise to this appeal against Defendant Phyllis Randall, Chair of the Loudoun County Board.[1]

On September 20, 2016, Davison sought to amend his pleadings in an ongoing lawsuit against the Loudoun County Board and against Randall in her official capacity, and filed a Section 1983 claim against Randall in her *individual* capacity, alleging, for the first time, that she had violated his First Amendment rights by preventing Davison from posting comments—under one of his aliases, "Virginia SGP"—overnight, for "at most 12 hours," to a Facebook page created and maintained by Randall. JA29-JA30.[2] Davison first sought leave to add his Section 1983 claim against Randall more than seven months after the incident in question, and sought as relief a declaratory judgment and an injunction. JA32-JA33.

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[1] *See*, *e.g.*, *Davison v. Plowman*, 715 Fed. App'x 298 (4th Cir. 2018) (affirming judgment for defendant in Section 1983 case); *Davison v. Rose*, 715 Fed. App'x 298 (4th Cir. 2018) (dismissing for lack of appellate jurisdiction); *Virginia Educ. Ass'n v. Davison*, 294 Va. 109 (2017).

[2] Davison moved for leave to file his First Amended Complaint on September 20, 2016. JA3. Magistrate Judge Davis granted his motion in part on September 30, 2016, and Davison filed his First Amended Complaint on November 3, 2016. JA4.

The District Court appropriately rejected Plaintiff's due process claims, JA491-JA500, his claim against Randall in her official capacity, JA483, and his claim for injunctive relief. JA500-JA501. However, following a one-day bench trial, the District Court erroneously held that Randall violated the First Amendment and issued a declaratory judgment. JA482-JA491.

Davison's request for a prospective declaratory judgment suffered a fatal constitutional defect from the start: there was no ongoing or imminent injury sufficient to confer standing to seek prospective relief. For example, in seeking leave to amend his complaint to add the cause of action now before this Court on appeal, Plaintiff explained he initiated his suit without a claim against Randall because she "unblocked [Plaintiff] within days" and "such a claim might be ruled moot by the Court." Plaintiff's Motion for Leave to File Amended Complaint at 3, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Sept. 20, 2016), ECF No. 14. More than seven months after the 12-hour ban had ended, however, Plaintiff reconsidered, concerned that Randall "*may* block the Plaintiff in the future." *Id*. at 4 (emphasis added). As the District Court observed: "Plaintiff's access to Defendant's . . . Facebook page was restored long before Plaintiff commenced this action. Since that time, Plaintiff has enjoyed uninterrupted use of Defendant's Facebook page." JA500. Given this, it is unsurprising that the District Court made no findings demonstrating a likelihood that Plaintiff would suffer *any* future injury. Under this

Court's and the Supreme Court's established precedents, Davison's declaratory judgment request was defective when filed—and should not have been granted by the District Court.

The District Court compounded this fundamental error with numerous others in its First Amendment analysis, including (1) its erroneous conclusion that Randall "acted under color of state law"; (2) employing the "public forum" doctrine to conclude that Randall's Facebook page "operates as a [public] forum for speech"; (3) concluding that Randall engaged in "viewpoint discrimination"; (4) accepting the notion that Plaintiff has a First Amendment right to post comments on Facebook using any particular screen name; (5) finding the "relatively inconsequential" impact on Plaintiff actionable under the First Amendment; and (6) paying insufficient attention to Randall's own First Amendment rights.

The District Court's Order and Judgment in favor of Plaintiff should be reversed, and the case should be remanded for entry of judgment on all issues for Randall.

STATEMENT OF JURISDICTION

Davison invoked the District Court's jurisdiction under 28 U.S.C. § 1331. The District Court issued a final order disposing of all of Plaintiff's claims on July 25, 2017 and entered judgment on July 26, 2017. JA504-JA505, JA506. Davison and Randall each filed Notices of Appeal on August 24, 2017. JA12. This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court err in concluding that Randall "acted under color of state law" in maintaining her Facebook page and "banning Plaintiff from that page"? JA461.

2. Did the District Court err in concluding that Randall's actions violated the First Amendment of the United States Constitution and Article I, § 12 of the Constitution of Virginia? JA481-JA491.

3. Did the District Court err in concluding that a declaratory judgment "clarifying" that Randall's Facebook page "operates as a forum for speech under the First Amendment and Constitution of Virginia [was] appropriate under the circumstances"? JA461, JA502.

4. Did the District Court err in entering the parts of the Order and Judgment in favor of Plaintiff and against Randall?

STATEMENT OF THE CASE[3]

Defendant Phyllis J. Randall ("Defendant" or "Randall") is Chair of the Loudoun County Board of Supervisors, the County's governing body. JA461.[4] Before taking office as Chair, Randall created a Facebook page so as to communicate more effectively with Loudoun County's residents. JA463. Plaintiff Brian Davison ("Plaintiff" or "Davison") is one of those residents. JA461.

This case concerns Phyllis Randall's decision to remove a post that she had posted on her Facebook page, along with a comment that Davison had appended to that post using one of his own Facebook profiles, the pseudonymous "Virginia SGP" page. Randall removed the post and then banned "Virginia SGP" from further commenting on her Facebook posts for a period that lasted no longer than 12 hours. The next morning, Randall reconsidered and undid the "ban."

A. Randall's Facebook Page

Randall created the Facebook profile at issue on December 30, 2015—before she took elected office. JA463.[5] Randall created the page with the help of

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[3] Unless otherwise indicated, the facts set forth in this brief are drawn from the District Court's findings of fact. *See* JA461-JA473.

[4] Randall was elected to a four-year term in November 2015 and took office on January 1, 2016. JA461-JA462.

[5] Before the District Court, Randall's Facebook page was referred to as the "Chair Phyllis J. Randall page." Randall has two other Facebook pages—"Friends of Phyllis Randall," her "political page," and "Phyllis Randall," a "personal profile." *See* JA173 (Trial Tr. 95:16-97:4); JA277 (Trial Tr. at 199:24-25). Only the "Chair

her friend Jeanine Arnett, who later became Randall's Chief of Staff. JA463. Ms. Arnett and Randall's friendship pre-existed their professional relationship, and continues to exist independently of that relationship. JA463.

Although she named the profile "Chair Phyllis J. Randall," Randall intentionally created the page "outside of the County's official channels so as not to be constrained by the policies applicable to County social media websites." JA463. The Facebook page has two authorized administrators: Randall and Ms. Arnett. JA463. Randall herself "exerts plenary control" over her Facebook page, JA462, and "generally . . . is entirely responsible for posting" to the page, JA464. Randall and Ms. Arnett maintain the page on personal devices—not County-issued computers—and Randall will maintain control over the Facebook page after she leaves office. JA464, JA463.

Although "many" of the posts on the Facebook page related to Randall's work as Chair of the Board of Supervisors, JA464, she also used the page "for discussion of matters of a more personal nature," like "conveying personal congratulations, documenting an afternoon shopping trip, proclaiming her affection for the German language, and announcing awards she has received outside of her governmental service," JA469.

Phyllis J. Randall page" is at issue here—and that page is referred to in this brief as Randall's "Facebook page."

B. Davison's Facebook Pages

Like Randall, Davison maintained multiple Facebook pages. As he confirmed at trial, Davison maintained an individual Facebook user account, "Brian Davison," which included a page that he operated under his own name. JA111 (Trial Tr. 33:10-24); JA124 (Trial Tr. 46:4-5). Facebook permits users to create multiple additional pages, linked to an individual account but displaying a different name to the public. JA111 (Trial Tr. 33:10-24). The Davison Facebook page relevant here was one such page, linked to Davison's personal account but showing the public name of "Virginia SGP." *Id.* Davison testified at trial that "Virginia SGP" was a public Facebook page that he controlled through his individual account, "Brian Davison." *Id.* Davison explained that his control over the "Virginia SGP" account was "similar to . . . serving as president of an organization," and that as the creator and administrator of the "Virginia SGP" page, Davison could "give it to another activist who wants to maintain it, give them administrative control, and they can remove [him] as administrator." JA111 (Trial Tr. 33:17-22). During the period relevant to this case, Davison controlled what he referred to as the "Virginia SGP persona." JA111 (Trial Tr. 33:22-23).

Davison's trial testimony indicated that he could, and frequently did, post on Facebook pages about various topics under his own name, using the "Brian Davison" Facebook page, JA110 (Trial Tr. 32:18-21), and that he even found it

easier to post with his individual "Brian Davison" page than with the "Virginia SGP" page, though he sometimes preferred to post with the "Virginia SGP" page. JA106 (Trial Tr. 28:4-11).

C. The "12-Hour Ban"

On February 3, 2016, the Loudoun County Board of Supervisors and the Loudoun County School Board held a joint town hall panel discussion. JA469-JA470. As Chair of the Board of Supervisors, Randall participated in the town hall. *Id.* Davison attended the panel discussion, after submitting two anonymous questions to the panel. JA470. One of those, a question about Randall's proposal "for an ethics pledge for public servants" that she had offered during her campaign, was picked and presented to the panel. *Id.* Davison's question was "whether School Board members—whom [Davison] suggested had acted unethically—should be required to take such a pledge." *Id.*

Randall answered the question. *Id.* Davison, believing Randall's answer "inadequate," *id.*, posted a response on Twitter, JA470-JA471. Davison claimed that Randall had seen the tweet while sitting on the panel and had been "glowering" back at Davison in response, but as the District Court found, Randall did not know Davison at the time and could not have recognized him in the audience at all. JA471.

Later that evening, Randall put a post about the panel discussion on her Facebook page. *Id.* Davison posted a comment on Randall's post using his "Virginia SGP" page. *Id.*; JA118 (Trial Tr. 40:8) ("I was posting as Virginia SGP"). The precise content of the comment is unknown, but the District Court found that according to Randall's recollection, the comment "included allegations of corruption on the part of Loudoun County's School Board," much like Davison's anonymous question at the panel discussion earlier that evening. JA471.

Randall saw the comment that "Virginia SGP" had left on her post, still unaware that "Virginia SGP," the anonymous questioner at the panel discussion, and Davison were one and the same person. JA471-JA472; JA268 (Trial Tr. 190:1-8). Randall concluded that the comment was "'probably not something [she] want[ed] to leave' on her Facebook page," and "delete[d] her original post." JA472. By deleting her original post, Randall deleted Davison's comment as well (along with any other comments appended to that post).

Randall then "banned" the "Virginia SGP" profile from her Facebook page, meaning that "Virginia SGP" could not "comment on or send private messages to that page," although it could still "read and share content posted on that page." JA472.

The next morning, Randall reconsidered. Reflecting that banning the "Virginia SGP" page "wasn't what [she] wanted to do," JA272 (Trial Tr. 194:22-

23), Randall unbanned "Virginia SGP" from her Facebook page. In total, the ban "was relatively brief and spanned at most 12 hours." JA472.[6]

D. Procedural History

In July 2016, Davison filed a complaint in the District Court seeking declaratory and injunctive relief against the Loudoun County Board of Supervisors several members of the Board including Randall, and the Board's attorney, in their official capacities. JA2, JA13. Those claims related to a separate incident involving a meeting of the Loudoun County Transportation and Land Use Committee, but did not involve the 12-hour ban at issue in this appeal. JA13-JA25. The defendants moved to dismiss that complaint, JA2, and the District Court granted the motion in part and denied it as to the Board alone. JA3.

Davison then sought to amend his complaint on September 20, 2016, adding First Amendment and Due Process claims against Randall in her official and individual capacities, this time relating to the 12-hour ban. JA3, JA26-JA33. Randall moved to dismiss that amended complaint, asserting among other defenses that qualified immunity protected her from suit. *See* Def. Phyllis Randall's Mem. in Support of Mot. to Dismiss at 11-12, No. 1:16-cv-00932-JCC-IDD (E.D. Va.

[6] There is evidence that the period was shorter than 12 hours. *See* JA273 (Trial Tr. at 195:2-195:3). And the evidence is clear that it lasted for no more than 12 hours. *See* JA 272 (Trial Tr. at 194:20-195:3). However, for purposes of convenience only, this brief refers to the period in question as the "12-hour period" or "12-hour ban."

Nov. 17, 2016), ECF No. 36. Davison opposed the motion to dismiss, and also moved for partial summary judgment as to his individual-capacity claims against Randall, JA5, for substantially the same reasons offered in his opposition to the motion to dismiss, and treating the allegations in his amended complaint as undisputed facts. *See* Def. Phyllis Randall's Opp. to Pl.'s Mot. for Summary Judgment at 3, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Nov. 29, 2016), ECF No. 47. Randall opposed the motion. *Id.*

The District Court denied both motions, noting that despite Davison's motion for summary judgment, "it [did] not appear that there [was], at [that] point, any record to speak of." Mem. Op. at 5, No. 1:16-cv-0932-JCC-IDD (E.D. Va. Jan. 4, 2017), ECF No. 57. The District Court rejected Randall's qualified immunity argument at that stage, deferring full consideration until there was a "more fully developed record." *Id.* at 20-21.

The case proceeded to discovery. While discovery was underway, Davison moved again to amend his complaint, this time seeking to add free speech and due process claims against Randall under the Virginia Constitution, and a claim against the Board of Supervisors founded on a theory that the Board "violates the First Amendment by maintaining a Facebook page given certain technical aspects of the Facebook platform." JA54. The District Court referred the motion to Magistrate Judge Ivan D. Davis, who granted the motion as to the additional claims against

Randall, but denied the motion as to the additional claim against the Board. JA3-JA4.

After the close of discovery, Randall and the Board moved for summary judgment. JA8. Among other defenses, Randall reasserted her qualified immunity defense. Defs.' Mem. in Support of Mot. for Summary Judgment at 21-23, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Apr. 3, 2017), ECF No. 97.

The District Court denied summary judgment, holding that "the issues left for trial are narrow. They concern (1) the purpose for which Defendant Randall established her "Chair Phyllis J. Randall" Facebook page and her practices in maintaining it; and (2) the extent to which Defendant Randall has utilized her office's resources in maintaining the "Chair Phyllis J. Randall" Facebook page." JA73. The District Court set the case for trial in order to resolve those "narrow" factual issues relating to "the one specific event at issue in this case"—the 12 hour ban. *Id.*

The District Court held a one-day bench trial on May 16, 2017. JA10-JA11.

The District Court issued its opinion on July 25, 2017, setting out its factual findings and conclusions of law. JA460-JA503.

The District Court held that Randall had acted under color of state law "in maintaining her 'Chair Phyllis J. Randall Facebook page and banning Plaintiff from that page," and that the 12-hour ban had "violated Plaintiff's right of free

speech under the First Amendment to the United States Constitution and Article I, § 12 of the Constitution of Virginia." JA503. The District Court rejected Davison's due process claims. *Id.* As to the free speech claims, the District Court held that injunctive relief was "not warranted" because the nature of the injunction requested appeared to be no more than an order that Randall "henceforth follow the law" and was thus overbroad, because "the Court [could] think of no administrable formulation for such an injunction," and because the balance of hardships did not favor issuing such an injunction. JA500-JA503.

However, the District Court held that a declaratory judgment was appropriate under the federal Declaratory Judgment Act because, in its view, a declaratory judgment would "clarify[] and settl[e]" the legal relations in issue, and bring an end to the "uncertainty, insecurity, and controversy giving rise to the proceeding." JA501-JA503. The District Court therefore held that a declaratory judgment should issue against Randall on Davison's free speech claims. JA502-JA503.

Later that day, the Court issued a corresponding Order, JA504-JA505, and the next day the Clerk issued a Judgment, JA506, tracking the Order and

Memorandum of Decision.[7] Randall and Davison both noticed appeals, JA12, and this appeal followed.

SUMMARY OF ARGUMENT

The District Court erred in issuing a declaratory judgment in favor of Plaintiff—regardless of the merits of his First Amendment claim. While declaratory judgments can operate retrospectively or prospectively, Plaintiff's request for a declaratory judgment should have been rejected either way. To the extent the declaratory judgment at issue operates *prospectively*, Plaintiff lacked Article III standing to seek prospective relief. To the extent the declaratory judgment operates *retrospectively*, the District Court abused its discretion by permitting an unlawful end-run around the qualified immunity to which Randall is entitled.

The District Court's First Amendment analysis was also wrong in numerous respects, including its: (1) erroneous conclusion that Randall "acted under color of state law"; (2) employing the "public forum" doctrine to conclude that Randall's Facebook page "operates as a [public] forum for speech"; (3) concluding that

[7] After docketing each appeal on August 29, 2017, this Court consolidated the cases on August 30, 2017, and issued an informal briefing order requiring the parties to file informal opening briefs by September 25, 2017. Doc. 3-1. After informal briefing, the Court invited Davison to retain counsel or seek *in forma pauperis* status. Doc. 51-1. Counsel appeared for Davison on April 20, 2018, and on April 26, 2018, this Court ordered full briefing and directed that the case be set for oral argument after briefing is complete. Doc. 55. A briefing order followed on May 2, 2018. Doc. 58.

Randall engaged in "viewpoint discrimination"; (4) accepting the notion that Plaintiff has a First Amendment right to post comments on Facebook using any particular screen name; (5) finding the "relatively inconsequential" impact on Plaintiff actionable under the First Amendment; and (6) paying insufficient attention to Randall's own First Amendment rights.

ARGUMENT

I. Standard of Review

"This Court reviews judgments stemming from a bench trial under a mixed standard: factual findings are reviewed for clear error, whereas conclusions of law are reviewed de novo." *Helton v. AT&T Inc.*, 709 F.3d 343, 350 (4th Cir. 2013). And although this Court reviews a district court's decision to grant a declaratory judgment for abuse of discretion, it "review[s] *de novo* the issue of whether a district court possessed jurisdiction in a declaratory judgment proceeding." *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 591 (4th Cir. 2004).

II. Randall Did Not Act "Under Color of State Law"

Because Plaintiff brought claims against Randall under 42 U.S.C. § 1983, the District Court's determinations, Order and Judgment all depended on the conclusion that Randall "acts under color of state law in maintaining her 'Chair Phyllis J. Randall' Facebook page as it is presently constituted." JA502.

The undisputed evidence showed, and the District Court found:

- Randall's Facebook page was created before Randall took office;[8]
- Randall's Facebook page belongs to her, not the County;[9]
- Every decision about Randall's Facebook page is made by her alone;[10]
- Randall uses only personal (not County) equipment to maintain and operate her Facebook page;[11]
- The decision to implement the 12-hour ban was made by Randall alone, without consulting any government employee, "unilateral[ly]" and "in the heat of the moment;"[12]
- No County policy played any role in Randall's decision to ban Plaintiff; and[13]
- The ban was effectuated by Facebook, at Randall's request, by virtue of a private agreement between her and Facebook.

Confronted with this evidence, the District Court recognized "there are some indications" that Randall's Facebook page "is entirely private." JA474. The District Court had also observed in a pre-trial order about Randall's Facebook page that she "has made a significant effort to keep it from entanglement with the County government." JA67.

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[8] JA 463; JA187 (Trial Tr. 109:25); JA254 (Trial Tr. 176:16-19).

[9] JA 463; JA261 (Trial Tr. 183:12-17).

[10] JA 462, JA 464; JA160 (Trial Tr. 82:3-4); JA301 (Trial Tr. 223:4-6).

[11] JA464; JA190 (Trial Tr. 112:2-8); JA257 (Trial Tr. 179:10-180:2); JA272 (Trial Tr. 194:11-18).

[12] JA482.

[13] JA482.

Despite these facts, the District Court, looking at the "totality of circumstances" JA474, JA481, ruled that Randall "acted under color of state law here, both in maintaining her [] Facebook page generally, and in taking the specific action of banning Plaintiff from that page." JA473-JA474. That determination was wrong as a matter of law, and clearly erroneous as to the facts.

When she temporarily banned Plaintiff's "Virginia SGP" persona from commenting on her Facebook page, Randall did not exercise power "possessed by virtue of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) ("[T]he deprivation must be caused by the exercise of some right or privilege created by the State . . . ."). The District Court acknowledged this in a pretrial order, finding that Randall did not "exercise[] power" she had by virtue of state law, JA71—later contradicting that finding post-trial.

In finding Randall acted under color of state law, the District Court relied heavily on this Court's decision in *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003). Yet this case bears little resemblance to *Rossignol*. For example, in *Rossignol* the Defendants "retaliate[d] against those who questioned their fitness for public office and who challenged many of them in the conduct of their official duties." *Id*. at 523. Here, the aspect of the comment which led to the 12-hour ban was not about Randall at all (it was about the School Board and family

members)—let alone about her conduct as a public official. *See* Mem. of Dec. at 25 (comment was "about the conduct of School Board officials, alleging conflicts of interest involving their family members"). And, unlike here, in *Rossignol*, the defendants' "status as sheriff's deputies enabled them to execute their scheme in a manner that private citizens never could have." *Rossignol*, 316 F.3d at 526. Here, Randall's authority and ability to impose the 12-hour ban did not depend in *any way* on Randall's office or status as a public official.[14]

Because Randall did not act under color of state law, Plaintiff's First Amendment claim, brought pursuant to 42 U.S.C. § 1983, must be rejected.

III. Randall Did Not Violate the First Amendment or Article I, § 12 of the Virginia Constitution

The District Court also determined that Randall's actions violated the First Amendment of the United States Constitution and Article I, § 12 of the Constitution of Virginia. JA461.[15] Although Randall's management of her own

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[14] Plaintiff acknowledged he had been banned from the pages of private citizens. *See* Plaintiff Brian C. Davison's Responses to Defendants' First Interrogatories at 15-16, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Apr. 3, 2017), ECF No. 97-8.

[15] The District Court found for purposes of this case that the rights conferred by the First Amendment and Article I, § 12 of the Virginia Constitution are coextensive. JA481; JA57. Plaintiff agreed. *See also* Plaintiff's Proposed Findings of Fact and Legal Conclusions at 11, No. 1:16-cv-00932-JCC-IDD (E.D. Va. May 11, 2017), ECF No. 119 (calling federal and state rights "coextensive"). For purposes of this appeal, Randall does not dispute that conclusion. However, Section 1983 does not provide a cause of action for violations of state law, 42 U.S.C. § 1983; *see Paul v. Davis*, 424 U.S. 693, 699-700 (1976), and to the extent the District Court's declaratory relief was based on an alleged violation of state

Facebook page is not properly viewed as state action, and therefore should not be subject to First Amendment scrutiny, assuming arguendo that her actions were governed by the First Amendment, Plaintiff did not sustain a First Amendment violation, and the District Court's contrary determination was erroneous.[16]

A. Randall's Facebook Page Is Not a "Public Forum"

The District Court determined that Randall's Facebook page, "as presently constituted operates as a [public] forum for speech." JA484-JA486. That determination—a cornerstone of the District Court's judgment—was erroneous, for several reasons.

First, the public forum doctrine is a rule governing claims of "a right of access to *public* property." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) (emphasis added); *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) ("forum analysis" used to evaluate speech "on government property"); *International Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 681 (1992) (finding evidence of

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law, that was erroneous. For convenience, in this brief references to and arguments about the First Amendment also apply to Plaintiff's claim based on Article I, § 12 of the Virginia Constitution.

[16] The District Court supported its conclusion that Randall used "County Resources to support" her Facebook page by claiming "[m]ost notably" that Randall's eventual Chief of Staff "helped to create the page." JA478. But this was erroneous, and seemingly contradicted by the District Court's own finding that the page was created before Randall took office, and before her eventual Chief of Staff had assumed that position. JA463.

expressive activity at privately owned sites "irrelevant to *public* fora analysis"); *see also Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 280 (1984) (discussing what is required "for *government* property to be a public forum") (emphasis added). Here, however, at Plaintiff's urging, the District Court applied the *public* forum doctrine to a *private* website: Facebook. JA462-JA463. Randall, Plaintiff, and other users access Facebook pursuant to private agreements between Facebook and each user. *See Terms of Service*, Facebook, https://www.facebook.com/terms.php (last visited June 5, 2018); *Pages Terms*, Facebook, https://www.facebook.com/page_guidelines.php (last visited June 5, 2018). Facebook imposes terms and conditions on users, which allow Facebook to remove content including comments posted by users. *See id.* ¶ 3.2 ("We can remove content you share in violation of these provisions.").[17] In fact, Plaintiff initially sued the County Board of Supervisors alleging it had unlawfully removed one of his comments, only to withdraw the unfounded claim when Facebook's lawyers explained that Facebook had removed his comments based on its own

[17] Facebook has its own First Amendment rights, which may protect its ability to remove or exclude from users' pages content the government could not categorically proscribe—*e.g.*, hate speech and other offensive speech. *See Community Standards, Pt. III: Objectionable Content*, Facebook, https://www.facebook.com/communitystandards/objectionable_content/ (last visited June 4, 2018). *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1669 (2018) (observing "the answer to how best to conceptualize platforms lies outside current categories in First Amendment doctrine," noting the platforms are "private self-regulating entities").

policies.[18] Recognizing that Facebook (and Twitter) "are privately owned channels of communication" which "are not converted to public property by the use of a public official," one district court has found public forum analysis inapplicable to the First Amendment challenge by citizen who complained about being "banned" and "blocked" from the Kentucky Governor's Facebook and Twitter platforms. *Morgan v. Bevin*, No. 3:17-cv-00060-GFVT, 2018 WL 1557300, at *6-*8 (E.D. Ky. Mar. 30, 2018); *see also* Smolla & Nimmer on Freedom of Speech § 8.33.25 (2018) (criticizing decision below, explaining "[t]he better view is that social media pages operated by government entities may be public forums, but personal social media pages operated by public officials, even when used to discuss public policy issues, may not.").

Second, the history of the Supreme Court's First Amendment jurisprudence is "one of continual development" and the Court has explained it is "wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 740, 749 (1996); *id*. at 749 (determining it would be "unwise" to decide whether and how to apply public forum doctrine). The District Court itself believed this case presented "novel" legal questions. JA473; *see also* JA69 ("When a social media website

[18] *See* Parties' Joint Stipulation of Facts, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Mar. 13, 2017), ECF No. 76.

may be considered 'governmental' for purposes of the First Amendment, notwithstanding that it is controlled privately by a government official, appears to be a novel legal question. There is, to the Court's knowledge, no existing legal framework that can readily supply an answer."). These considerations should have led the District Court to recognize that a public forum doctrine developed for other circumstances was a poor fit here. *See Morgan*, 2018 WL 1557300, at *4 ("Justice Alito is right: 'we should proceed circumspectly, taking one step at a time' when applying the Constitution to social media.") (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1744 (2017) (Alito, J., concurring)); *see also* First Amendment—Freedom of Speech—Public Forum Doctrine—Packingham v. North Carolina, 131 Harv. L. Rev. 233, 238 (2017) ("Although there is an appeal to concretizing the internet, and especially social media, as 'the modern public square,' Justice Alito's misgivings about the 'implications of the Court's unnecessary rhetoric' were well founded.") (citations omitted).

Third, Plaintiff's complaint about the 12-hour ban was that his comments could not be seen by people *other than Randall*.[19] But there is no evidence that

[19] *See* Exhibit to Defendants' Memorandum of Law in Support of Summary Judgment, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Apr. 3, 2017), ECF No. 97-10 (Davison Deposition Tr. at 81:9-19) ("I'm not alleging any right to petition Ms. Randall. I know how to communicate with Ms. Randall. I know where to find her. I can send e-mails. I can send mail. I can do everything . . . . [T]he way to change the policy is to . . . put public pressure on them by making people aware of what they're doing and/or inform people so that they would vote her out.").

Randall established her Facebook page so that other people could communicate *with one another*. Her Facebook page was primarily a vehicle for her own speech—and secondarily for people to speak *to her*. This too rendered the public forum analysis a poor fit here.

Fourth, although Plaintiff uses the phrase "public forum" as a mantra, he effectively acknowledged Randall's Facebook page is not, conceding: "[S]he doesn't have to allow anybody to comment on her page at all. I'm not disputing that at all." JA141 (Trial Tr. 63:1-3). And he conceded that Randall could remove comments that could be offensive—for example "a cuss word." JA318 (Trial Tr. at 240:20-24). *Cf. United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 204 (2003) (rejecting application of public forum analysis to public library's decision about what private speech to make available to the public).

Finally, Randall is unaware of any case where a public employee acting in his or her individual (not official) capacity unilaterally created a public forum—and neither Plaintiff nor the District Court cited any such case in the proceedings below.[20]

[20] The District Court's reliance on *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) was misplaced. *Packingham* concerned a First Amendment challenge to a criminal law prohibiting registered sex offenders from accessing "a commercial social networking Web site." *Id*. at 1733. The decision had nothing to do with the issues presented here.

B. The 12-Hour "Ban" Was Not "Viewpoint Discrimination"

After concluding Randall's Facebook page was a public forum, the District Court next concluded that Randall "engaged in viewpoint discrimination by banning Plaintiff[21] from her Facebook page." JA486. However, that determination too was erroneous.

The 12-hour ban followed Randall's removal of one of her own posts in response to which Plaintiff had posted his own comment on her Facebook page. Randall's removal of her own post had the effect of removing all comments to that post, including Plaintiff's. Before the District Court, however, Plaintiff expressly and repeatedly disclaimed any challenge to the removal of any of his comments from Randall's Facebook page.[22] His claim, instead, was predicated ***solely*** on his alleged inability to post *new* comments on Randall's Facebook page during the 12-hour ban.[23]

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[21] As explained below in Section II.C., Randall banned "Virginia SGP"—not Plaintiff. The District Court erred in not recognizing that distinction.

[22] JA85 (Trial Tr. 7:9-12) ("I'm not alleging that she deleted comments. She has the right to delete her post and my comment with it, so that's not before the Court."); JA141 (Trial Tr. 63:1-3) ("[S]he doesn't have to allow anybody to comment on her page at all. I'm not disputing that at all."); JA315 (Trial Tr. 237:20-23) ("Court: So you're not complaining about the deletion?; A: Correct. I assert that she has the right to remove it, all the content on her page."); JA323 (Trial Tr. 245:2-3) ("[L]ike I said, she could filter the comments.").

[23] Plaintiff consistently alleged the 12-hour ban was unlawful "prior restraint." *See*, *e.g.*, JA84 (Trial Tr. at 6:15); JA85 (7:14); JA316 (Trial Tr. 238:1-15). But there was no prior restraint, and the District Court neither addressed nor accepted that argument in its Memorandum of Decision.

Viewpoint discrimination occurs when "the government targets not subject matter, but particular views taken by speakers." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The District Court found that Randall "banned Plaintiff from her Facebook page because she was offended by his criticism of her colleagues in the County government," JA472—and deemed that viewpoint discrimination. But the evidence shows otherwise.

The 12-hour ban resulted from Randall determining she did not want on her Facebook page discussion about the *subject* of "people's family members"—whether true or false—particularly because they seemed to her "fairly personal in nature" and "slanderous." JA472; JA487-JA488; JA269 (Trial Tr. at 191:1-23); JA291 (Trial Tr. 213:14-17).[24] That is not viewpoint discrimination. And there is no evidence that Randall's decision was driven by disagreement with or dislike for Virginia SGP's *views*.[25]

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[24] Plaintiff did not retain a copy of the comment by "Virginia SGP" which led Randall to ban "Virginia SGP" from making further comments overnight. Nor did Plaintiff adduce evidence from any other source of the comment's precise content. Therefore, all testimony about the comment was based solely on the memory of Plaintiff and Randall. *See* JA485; JA131 (Trial Tr. at 53:15-16) (Plaintiff: "I don't remember the exact comments").

[25] The District Court's own factual findings are inconsistent with its conclusion that the 12-hour ban was the result of viewpoint discrimination. For example, the District Court noted that Randall recalled Plaintiff's comment "included allegations of corruption" by the County School Board and conflicts of interest among the School Board and their family members. JA471. Randall did not disagree with the veracity of Plaintiff's comment—she had "no idea" whether his allegation was well-founded. *Id.* But she determined that if the commenter—who

C. "Virginia SGP"—Not Plaintiff—Was Temporarily Banned

During the time relevant to this case, Plaintiff maintained at least two Facebook profiles: (1) "Virginia SGP,"[26] and (2) "Brian Davison." The exhibits used at trial reflect that Plaintiff used both to post comments about the County and about Randall—and he testified to that effect as well. *See*, *e.g.*, JA111-JA112 (Trial Tr. at 33:25-34:3) ("I made both comments. One was from my -- Brian Davison, my personal account, my personal profile. The other one was post from the Virginia SGP.").

The comment on Randall's Facebook page that led to the 12-hour ban was made by "Virginia SGP." *See* JA268 (Trial Tr. at 190:21-24); JA471 (Factual Finding 35). And it was "Virginia SGP," *a Facebook account screen name*—not *Plaintiff*—that Randall temporarily banned. At the time, Randall did not even know that "Virginia SGP" was related to Plaintiff. JA289 (Trial Tr. at 211:23-24) ("[Y]ou came on as Virginia SGP. I now know that that's also Brian Davison. I did not know that then.").

Plaintiff had at least one other Facebook "screen name" in use at the time—Brian Davison. At trial Plaintiff did not present evidence that he was unable to

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had anonymously posted under the screen name "Virginia SGP"—"was the type of person that would make comments about people's family members then maybe I did not want [him] to be commenting on my site." JA291 (Trial Tr. 213:14-17).

[26] JA100 (Trial Tr. 22:15-16) (Virginia SGP is a "screen name" sometimes used by Plaintiff).

post to Randall's Facebook page during the 12-hour ban of "Virginia SGP" using the "Brian Davison" screen name. Nor did Plaintiff present evidence that he tried and was unable to post comments to Randall's page during the 12-hour ban using another Facebook account—whether previously established by him, a new account created by him, or an account borrowed from someone else.

Plaintiff's claim before the District Court was that he—***Brian Davison***—had his First Amendment rights violated by Randall during the 12-hour ban. And although he has the burden of proof with respect to all issues, at trial Plaintiff failed to demonstrate anything more than the fact that his "Virginia SGP" screen name was subject to a temporary ban.[27] But there is no First Amendment right to post comments on Facebook using any particular screen name.[28]

[27] Plaintiff testified he had not previously posted comments to Randall's Facebook page. JA131 (Trial Tr. 53:18-21).

[28] To the extent the District Court found that ***Plaintiff*** was banned by Randall, for the reasons explained in this Section, that finding was clearly erroneous.

D. Any First Amendment Impact Was *De Minimis* and Not Actionable

In addition to all of the foregoing reasons why there was no First Amendment violation, the District Court's Order and Judgment must be reversed because the evidence established there was—at most—a *de minimis* impact on Plaintiff's First Amendment rights.

The District Court itself determined that Randall's actions and any impact on Plaintiff were "relatively inconsequential as a practical matter." JA461; JA489 ("Practically speaking, the consequences of Defendant's actions were fairly minor. The ban lasted a matter of hours, spanning only a single night. During that time, Plaintiff was able to post 'essentially the same thing on multiple pages.' There is little indication that Plaintiff's message was suppressed in any meaningful sense, or that he was unable to reach his desired audience.") (citing JA129 (Trial Tr. 51)).[29]

And, as the Supreme Court has explained, "[t]here is, of course a *de minimis* level of imposition with which the Constitution is not concerned." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977); *see also Baltimore Sun Co. v. Ehrlich*, 437 F.3d

[29] The ban did not impact Plaintiff's ability to see Randall's Facebook page—which he could at all times during the 12-hour ban. *See* JA472-JA473 (Factual Findings 40 & 43). And during the 12-hour ban Plaintiff "was able to post 'essentially the same thing on multiple pages." *See* JA473 (Factual Finding 43).

410, 416 (4th Cir. 2006) ("[W]e have recognized a distinction between an adverse impact that is *actionable* . . . and a *de minimis* inconvenience.").

Based on the facts of this case, the limited impact on Plaintiff is simply not actionable.[30]

E. The District Court Paid Insufficient Attention to Randall's First Amendment Rights

It is beyond dispute that public employees have their own First Amendment rights, and "a citizen who works for the government is nonetheless still a citizen." *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006). In addressing the "novel" questions presented by this case, the District Court paid insufficient attention to the fact that Randall herself has First Amendment rights, which are themselves impaired by the District Court's decision.

The claim before this Court is Plaintiff's cause of action against Randall in her *individual* capacity only. While Randall's website may have discussed her activities as a governmental official, she was exercising her rights as a private citizen to discuss those activities. *Cf. Morgan*, 2018 WL 1557300, at *5 ("[T]his Court is convinced that Governor Bevin's use of privately owned Facebook Page and Twitter pages is personal speech . . . he is speaking on his own behalf, even on

[30] Randall did not post *anything* to her Facebook during the temporary ban: "I literally banned him before I went to bed that night and I woke up the next morning and I unbanned him." JA272 (Trial Tr. 194:23-25). Plaintiff did not miss *any* opportunity to respond to any new posts while banned, because there were none.

his own behalf as a public official . . . ."). And part of what the First Amendment protects is a speaker's right to curate and exercise control over the content of its own publications. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). Requiring Randall to leave comments on her own website written by someone else, over her own wishes and objections, is a form of compelled speech, itself prohibited by the First Amendment. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (recognizing a First Amendment right to "avoid becoming the courier for" an unwanted message).

Notably, Plaintiff appears to recognize Randall's First Amendment rights are implicated: he repeatedly conceded Randall has the right *to remove* comments after they are posted on her Facebook page.[31]

F. If Randall's Actions Were State Actions, Then Her Facebook Page Is Government Speech Immune from First Amendment Scrutiny

At trial, on two separate occasions, Plaintiff conceded that Randall's Facebook page can be viewed as government speech. First, during cross-examination, he admitted: "she doesn't have to allow anybody to comment on her page at all. I'm not disputing that at all. *That's government speech*." JA141 (Trial Tr. at 63:1-4) (emphasis added). Then, during closing arguments, he admitted that

[31] *See supra* at 23, 24 n.22; JA318 (Trial Tr. at 240:20-24).

"if she chooses which comments that she wants, *that's government speech and she can do anything* that she can." JA319 (Trial Tr. at 241:7-9) (emphasis added).[32]

These concessions alone are dispositive, and grounds for vacating the Order and Judgment, because "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 135 S. Ct. at 2245; *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause . . . does not regulate government speech.").

Although the District Court erred in concluding that Randall acted under color of state law in connection with her Facebook page, if Randall's Facebook page was really a government Facebook page—as the District Court's holding that she was acting under color of state law seems to presume—then Plaintiff's First Amendment claim should have been rejected on the ground that the government's exercise of editorial control over its own publications are not subject to First Amendment limitations. *Cf. Summum*, 555 U.S. at 481 ("[W]e hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech.").

[32] Plaintiff made the same concession in his proposed conclusions of law. Plaintiff's Proposed Findings of Fact and Legal Conclusions at 10, No. 1:16-cv-00932-JCC-IDD (E.D. Va. May 11, 2017), ECF No. 119 (Randall's Facebook page "represents government speech under the sole discretion of Defendant Randall").

IV. The District Court Erred in Granting Declaratory Relief

The District Court also erred in issuing a declaratory judgment in favor of Plaintiff—regardless of the merits of his First Amendment claim.

Declaratory judgments can operate retrospectively or prospectively. *PeTA v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 646 (2002); *Green v. Mansour*, 474 U.S. 64, 72-74 (1985). Here, Plaintiff's request for a declaratory judgment should have been rejected either way. To the extent the declaratory judgment at issue operates *prospectively*, Plaintiff lacked Article III standing to seek prospective relief.[33] To the extent that the declaratory judgment operates *retrospectively*, the District Court abused its discretion by permitting an unlawful end-run around the legal immunities to which Randall is entitled.

A. To the Extent the Declaratory Judgment Operates Prospectively, It Must Be Reversed Because There Was No "Actual Controversy" Necessary for the District Court's Jurisdiction

The Declaratory Judgment Act does not expand the jurisdiction of the federal courts; it only provides an additional remedy in cases of "actual controversy" already within their jurisdiction. 28 U.S.C. § 2201(a); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The Act, therefore, is

[33] Plaintiff's operative complaint asked ***only*** for prospective relief: "It is also prayed that the Court issue a declaratory judgment finding Defendant Randall's blocking *future* Plaintiff comments . . . violates the Plaintiff's First Amendment free speech rights." JA40 (emphasis added).

"operative only in respect to controversies which are such in the constitutional sense." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). In order to establish such a "controvers[y] . . . in the constitutional sense," *id.*, a plaintiff must first have standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). And "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

Here, both Plaintiff's own words and the District Court's findings confirm there was no ongoing or imminent injury sufficient to confer standing to seek prospective relief. For example, in seeking leave to amend his complaint to add the cause of action now before this Court on appeal, Plaintiff explained he initiated his suit without a claim against Randall because she "unblocked [Plaintiff] within days" and "such a claim might be ruled moot by the Court." Plaintiff's Motion for Leave to File Amended Complaint at 3, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Sept. 20, 2016), ECF No. 14. More than seven months after the 12-hour ban had ended, however, Plaintiff reconsidered, concerned that Randall "*may* block the Plaintiff in the future." *Id.* at 4 (emphasis added). And, as the District Court observed: "Plaintiff's access to Defendant's . . . Facebook page was restored *long before* Plaintiff commenced this action. Since that time, Plaintiff has enjoyed

uninterrupted use of Defendant's Facebook page." JA500 (emphasis added). Given this, it is unsurprising that the District Court made no findings demonstrating a likelihood that Plaintiff would suffer *any* future injury.

The Supreme Court has made clear that "past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). A prospective declaratory judgment issued in the absence of any plausible allegation of future injury is nothing more than an impermissible advisory opinion. *See United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field.") (internal quotation marks and citation omitted).

Because Plaintiff lacked standing to seek prospective declaratory relief, the Order and Judgment must be reversed to the extent it operates prospectively.[34]

[34] It was also an error to enter a *prospective* declaratory judgment predicated on how Randall's Facebook page is "presently constituted" JA502—which is necessarily subject to change. Such a *prospective* declaratory judgment is inherently advisory.

B. To the Extent the Declaratory Judgment Operates Retrospectively, It Must Be Reversed Because Randall Is Entitled to Qualified Immunity[35]

"Qualified immunity protects officers who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful." *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). A court evaluating a qualified immunity defense must "look not to whether the right allegedly violated was established 'as a broad general proposition' but whether 'it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted.'" *Raub v. Campbell*, 785 F.3d 876, 882 (4th Cir. 2015) (quoting *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001)).

Whatever the merits of Plaintiff's First Amendment arguments, the right articulated by the District Court below was not "clearly established" when the events giving rise to this lawsuit occurred. The District Court seems to have made this point itself, calling the legal issues presented "novel." JA473.

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[35] The District Court rejected "Plaintiff's free speech claims against Defendant in her official capacity." JA483. To the extent the declaratory judgment is understood as retrospective in nature it would be barred by the Eleventh Amendment. "[A] request for declaratory relief is barred to the same extent that the claim for substantive relief on which it is based would be barred." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 55-56 (4th Cir. 2011) (citation omitted). A plaintiff therefore may not use a declaratory judgment action to make a "partial 'end run'" around an independent bar to relief that would have "much the same effect," *Green*, 474 U.S. at 73, and thus this Court has held that the Eleventh Amendment bars official-capacity claims seeking *retrospective* declaratory relief. *Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998).

Randall asserted qualified immunity,[36] and her entitlement to it does not change merely because Plaintiff omitted a request for damages in his complaint. To escape this conclusion, the District Court relied on the general proposition that "[c]laims for declaratory and injunctive relief are not affected by qualified immunity." JA72 (quoting *Lefemine v. Wideman*, 672 F.3d 292, 303 (4th Cir. 2012), *vacated and remanded*, 568 U.S. 1 (2012) (per curiam)). But that categorical proposition is not supported by Supreme Court decisions.[37] It is also in

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[36] *See* Defendant Phyllis Randall's Mem. in Support of Mot. to Dismiss at 11, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Nov. 11, 2016), ECF No. 36 ("As to any individual capacity claim . . . Randall is entitled to qualified immunity"); Defendant Phyllis Randall's Opposition to Plaintiff's Mot. for Summary Judgment at 4, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Nov. 29, 2016), ECF No. 47 ("Randall reiterates the argument that she is entitled to qualified immunity."); Memorandum Opinion at 18, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Jan. 4, 2017), ECF No. 57; Phyllis Randall's Answer to the Amended Complaint at 5, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Jan. 17, 2017), ECF No. 59 (Randall "states affirmatively that she is entitled to qualified immunity"); JA72. *See also* Va. Code § 15.2-1405. However, the District Court denied Randall's request for summary judgment based on qualified immunity because Davison "[did] not seek civil damages." JA72-JA73.

[37] It is true the Supreme Court frequently recites the principle that qualified immunity applies to damages actions. *See*, *e.g.*, *Reichle v. Howards*, 566 U.S. 658, 664 (2012) ("Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct."). But a careful reading of the Supreme Court's decisions makes clear that description of qualified immunity is a minimum, not a maximum. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the progenitor of modern qualified immunity doctrine, the Supreme Court expressly reserved judgment on the availability of qualified immunity in actions for injunctive or declaratory relief, confining its decision that day to actions for damages only. *Harlow*, 457 U.S. at 819 n.34 ("We emphasize that our decision applies only to suits for civil *damages* . . . . We express no view as to the

direct tension with the principles announced in *Green*, 474 U.S. at 72-74, as followed by this Court in *Manning v. S.C. Dep't of Highway & Pub. Transp.*, 914 F.2d 44 (4th Cir. 1990), that courts should not permit "end-runs" around immunity doctrines by way of the Declaratory Judgment Act. As this Court has explained, "a request for declaratory relief is barred to the same extent that the claim for substantive relief on which it is based would be barred." *CGM, LLC*, 664 F.3d at 55-56. Accordingly, this Court has denied declaratory relief where the defendant's immunity would have foreclosed other relief based on the same retrospective claims. *Manning*, 914 F.2d at 48 ("Manning submits that he is still entitled to relief under the Declaratory Judgment Act. . . . Like the district court, we find this argument unavailing. Manning is not seeking injunctive relief to remedy an ongoing violation of state law. . . . What Manning requests is a declaration that his rights *were* violated under an outmoded statutory scheme.") (emphasis added). The *Lefemine* Court's broad conclusion that declaratory and injunctive relief are *never* subject to qualified immunity depended on an overreading of this Court's holding in *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993), *overruled in part on*

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conditions in which injunctive or declaratory relief might be available."). Randall is aware of no Supreme Court decision holding that qualified immunity is never available in a suit for declaratory relief.

other grounds, California Dep't of Corr. v. Morales, 514 U.S. 499 (1995).[38] In *Roller*, this Court confronted a request for prospective-only declaratory and injunctive relief, and explained that "[b]ecause . . . *prospective* relief to stop unconstitutional practices by states is available in federal courts, Roller's claims for declaratory and injunctive relief are not affected by the defendants' immunities." *Roller*, 984 F.2d at 122 (emphasis added) (internal citation omitted). The *Roller* Court thus relied on the correct distinction: not between suits for damages and suits for declaratory or injunctive relief, but between suits for *retrospective* relief (where qualified immunity is available) and suits for *prospective* relief (where it is not). *Id.*[39]

Categorically refusing to apply qualified immunity to a request for a retrospective declaratory judgment would also conflict with the basic purposes

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[38] Further, because the *Lefemine* Court confronted a request for prospective injunctive relief, its broad statements about a categorical exception to qualified immunity for all claims for declaratory relief are dicta, to the extent that the decision remains binding at all after being vacated by the Supreme Court.

[39] That approach is supported by the Supreme Court's decisions in related contexts. *See*, *e.g.*, *Verizon Md., Inc.*, 535 U.S. at 645; *Pulliam v. Allen,* 466 U.S. 522 (1984); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-06 (1984) (discussing *Edelman v. Jordan*'s "distinction between prospective and retroactive relief"); *see also Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998) ("[The *Ex parte Young* exception to Eleventh Amendment immunity] does not permit federal courts to entertain claims seeking *retrospective* relief, *either compensatory or other*, for completed, not presently ongoing violations of federally-protected rights.") (emphases added) (citing *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974)).

underlying the doctrine. The "conception animating the qualified immunity doctrine" must account for the "general costs of subjecting officials" to litigation: "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985) (quoting *Harlow*, 457 U.S. at 816). The social costs of subjecting a public official in Randall's position to extended, expensive, and distracting litigation did not disappear simply because Plaintiff did not seek damages. Here, Randall had to endure discovery, motions practice and trial—just as she would have to had a damages claim been asserted.

Moreover, the only benefit asserted by the District Court to justify a declaratory judgment is that declaratory relief would "clarify[] and settl[e] the legal relations in issue," by resolving "uncertainty" around the disputed legal questions. JA501-JA502. But the qualified immunity doctrine *itself* permits courts to reach and resolve disputed legal questions, without entering judgment against a defendant who has not violated "clearly established" law. Since *Pearson v. Callahan*, 555 U.S. 223 (2009), the doctrine has permitted courts "to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Id.* at 236. Courts are permitted to first analyze whether a constitutional violation has occurred, and *then* decide "whether the right at issue was 'clearly established' at the time of the defendant's alleged

misconduct." *Id.* at 232. Here, however, there could be only one result: Randall is immune from liability because, at a minimum, Davison failed to allege or prove the violation of any "clearly established" law.

This Court should reverse the Order and Judgment and hold that Randall enjoys qualified immunity from a claim for retrospective declaratory relief.

CONCLUSION

For the foregoing reasons, the District Court erred in entering the parts of the Order and Judgment in favor of Plaintiff and against Defendant—and they should be reversed, and judgment should be entered for Randall with the respect to Plaintiff's claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and Local Rule 34(b), I certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 32(a)(7)(B)(i) because it contains 9,617 words, excluding the parts exempted by Fed. R. App. P. 32(f), as determined by the word count function of Microsoft Word. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

June 6, 2018 /s/ Scott E. Gant

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), I certify that the foregoing was electronically filed with the Clerk of Court on June 6, 2018 using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

June 6, 2018 /s/ Scott E. Gant