Nos. 17-2002 & 17-2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIAN DAVISON,

Plaintiff–Appellee and Cross–Appellant,

v.

PHYLLIS RANDALL,

Defendant–Appellant and Cross–Appellee.

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/RESPONSE BRIEF OF PLAINTIFF–APPELLEE AND CROSS–APPELLANT BRIAN DAVISON

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INTRODUCTION

Over two decades ago, the Supreme Court recognized the essential role that the Internet plays in facilitating participation in a democratic society. *See Reno v. ACLU*, 521 U.S. 844 (1997). In the years since, the power of social media as a tool for public discourse has only grown. It is now "clear" that, among the "vast democratic forums of the Internet," social media platforms—and especially Facebook—have become "the most important places . . . for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quotation marks and citation omitted). Of particular relevance to this case, social media platforms enable ordinary citizens to debate, petition, and otherwise engage their elected officials; they "amplif[y] the distribution of the speaker's message," often "on matters of public import." *Liverman v. City of Petersburg*, 844 F.3d 400, 407–08 (4th Cir. 2016). Government officials have embraced these platforms as key means of communicating with constituents. The promise of this "revolution" in civic discourse, *Packingham*, 137 S. Ct. at 1736, however, faces serious risk when public officials censor speech in these spaces simply because they do not like what their constituents have to say.

Defendant–Appellant and Cross–Appellee Phyllis J. Randall, Chair of the Loudoun County Board of Supervisors, set up a Facebook page for the purpose of providing information to Loudoun County residents, soliciting feedback from her

constituents, and stimulating discussion among citizens about Loudoun County policies. Plaintiff–Appellee and Cross–Appellant Brian Davison, a parent and citizen-critic, posted a comment criticizing those board members on Randall's Facebook page. Offended by the criticism, Randall deleted the comment and banned Davison from posting anything at all on her Facebook page. Although Randall reinstated Davison after a short period of time, she and Loudoun County continue to maintain that Randall's Facebook page was not subject to the First Amendment and thus that Randall may ban Davison again, at any time and for any reason.

The District Court held that Randall's actions violated the First Amendment, and it ordered declaratory relief to ensure that Randall complies with the First Amendment going forward. That ruling, which was supported by its extensive findings of fact, was correct and should be affirmed. The District Court's order, however, stopped short of providing Davison relief sufficient to ensure that Davison's First Amendment rights are fully protected, and for that reason Davison's claims on cross-appeal should be granted. In particular, the District Court erred in denying Davison's due process claim, his claims against Randall in her official capacity, and his motion for leave to amend his complaint to add an additional First Amendment claim.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291. The District Court exercised jurisdiction over the underlying action pursuant to 28 U.S.C. § 1331. On July 25, 2017, the District Court issued a final, appealable order, and on July 26, 2017, the District Court entered judgment. J.A. 504–06. Davison and Randall each filed Notices of Appeal on August 24, 2017. J.A. 12.

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Where a public official operates a social media site primarily for government purposes, does the official's viewpoint-based decision to ban an individual from commenting on that site violate the First Amendment to the U.S. Constitution and Article I § 12 of the Constitution of Virginia? J.A. 503.

2. Did the District Court abuse its discretion in granting declaratory relief upon finding that Davison's First Amendment rights had been violated and that such relief would serve to clarify the parties' legal rights and obligations? J.A. 503.

STATEMENT OF ISSUES FOR CROSS-APPEAL

1. Did the District Court err in denying Davison's claim against Randall in her official capacity, even though Randall used her Facebook account for official chair-related purposes? J.A. 61–64.

2. Does a public official's failure to provide an individual with notice and a meaningful opportunity to be heard when banning that individual from posting

comments on a social media site used primarily for government purposes violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution or Article I § 11 of the Constitution of Virginia? J.A. 503.

3. Did the District Court err in denying Davison's motion to amend his complaint on the grounds of futility without affording Davison, a *pro se* litigant, the solicitude required by Federal Rule of Civil Procedure 12(b)(6)? J.A. 74–76.

STATEMENT OF THE CASE[1]

Plaintiff–Appellee and Cross–Appellant Brian Davison is a resident of Loudoun County, Virginia. J.A. 94 (Trial Tr. 16:23–25); J.A. 461. Davison is a homeowner, actively engages in community affairs, and, as the father of two children enrolled in Loudoun County public schools, has a particular interest in local education policy. J.A. 94–97 (Trial Tr. 16:23–19:8); J.A. 461.

Defendant–Appellant and Cross–Appellee Phyllis J. Randall is Chair of the Loudoun County Board of Supervisors ("County Board"), the governing body of Loudoun County ("County"). J.A. 146 (Trial Tr. 68:11–17); J.A. 461–62. Roughly two-thirds of the County's budget goes to public schools. J.A. 96 (Trial Tr. 18:6–9). Randall was elected to the County Board in November 2015 and began serving her four-year term in January 2016. J.A. 146 (Trial Tr. 68:11–23); J.A. 461–62.

[1] When not otherwise specified, the facts in this section are drawn from the District Court's findings (J.A. 461–73).

Randall's duties as Chair are to conduct the meetings of the County Board, vote on matters before the County Board, and "talk to constituents." *Id.*, J.A. 263 (Trial Tr. 185:1–13). The County provides Randall with a budget to run her office and employ various personnel, including her Chief of Staff, Janine Arnett. J.A. 150–51 (Trial Tr. 72:22–73:11); J.A. 282 (Trial Tr. 204:8–10); J.A. 462. Arnett advises Randall on policy, supports the Office of the Chair, and occasionally posts on Randall's behalf to the "Chair Phyllis J. Randall" Facebook Page (the "County Facebook Page"). J.A. 258–59 (Trial Tr. 180:17–181:24).

A. The Forum

1. How Facebook Works

Facebook is the world's most popular online social-networking platform. Two main communications features allow users to post content on the platform and send private messages to other Facebook users. *See Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 662 (D.N.J. 2013) (explaining that Facebook "provides users with several means of communicating with one another"). A Facebook user may make that content available either to the general public or to a smaller group of Facebook users known as Facebook "friends." *See Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1063 (9th Cir. 2016) ("A user can establish connections with other Facebook users by 'friending' them; the connected users are thus called 'friends.'"). A Facebook user may create one "personal

profile," which is "for non-commercial use and represent[s] individual people." J.A. 403.

A Facebook user who wants to use the platform to represent "business, organizations, or brands" creates a Facebook page. J.A. 403. Facebook pages are "public spaces" that anyone connected to the Internet may access without a Facebook account—but they may only be administered by a Facebook user with a separate personal profile. J.A. 400–01, J.A. 326–27 (Trial Tr. 248:8–249:1); J.A. 403. Administrators of Facebook pages may create "usernames." For example, the administrator of a page for "Jasper's Market" might choose the username "@JaspersMarket."[2] A Facebook user may "follow" an individual's or organization's Facebook page by "liking" the page. Following a Facebook page triggers updates from the page—such as posts that are published there—to appear automatically the Facebook user's "News Feed".[3] J.A. 400; J.A. 403. Any Facebook user may publish posts on a publicly accessible Facebook page, comment on the page's posts, and send private messages to the page's administrator. J.A. 400–02.

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[2] *See Username*, Facebook Help Center, https://www.facebook.com/help/409473442437047 (last accessed July 4, 2018).

[3] A Facebook "News Feed" is "a constantly updating list of stories from people and Pages that [the User] follow[s] on Facebook." *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013) (quotation marks omitted).

Even though Facebook pages are accessible to anyone with Internet access—*i.e.*, not only to Facebook users—administrators of Facebook pages may "ban" specific Facebook users from accessing their pages. *Id.* When a Facebook page administrator bans a user, the banned user may no longer publish posts on the page, comment on or reply to other posts on the page, send private messages to the page's administrator, or follow the page and receive updates in his or her News Feed. *Id.* An administrator may "unban" a banned Facebook at any time to restore that user's full access to the page. *Id.*

2. Davison's Facebook Page

Davison operates one public Facebook page as well as his own personal profile. His personal profile bears his name, "Brian Davison." J.A. 110–11 (Trial Tr. 32:11–33:4). His Facebook page is called "Virginia SGP." J.A. 95. Davison uses his Virginia SGP page to advocate for education policy changes in Virginia. J.A. 130 (Trial Tr. 52:3–7). Davison alone controls the Virginia SGP page. J.A. 111 (Trial Tr. 33:10–24).

3. Randall's Facebook Profile and Pages

Randall operates a personal profile and two public pages on Facebook. Her personal profile lists her name, "Phyllis Randall." J.A. 174 (Trial Tr. 96:16–19). On her profile, Randall posts about items of a personal nature, like "[her] son's birthday or [her] nephew losing his tooth." J.A. 274 (Trial Tr. 196:1–13). Only Facebook

users that Randall has "friended" can access her personal profile. J.A. 174 (Trial Tr. 96:20–21).

Randall also controls the publicly accessible Facebook page "Friends of Phyllis Randall" (the "Friends Facebook Page"). J.A. 173 (Trial Tr. 95:16–18). Randall has described her Friends Facebook Page as a "political" page. J.A. 173 (Trial Tr. 95:16–18); J.A. 174 (Trial Tr. 96:1–6); J.A. 176 (Trial Tr. 98:8–15). Randall uses her Friends Facebook Page for campaign-related purposes—the username of the account is "@randall4chair." J.A. 457. There, she has posted announcements about whether she would be running for Congress, J.A. 177–78 (Trial Tr. 99:25–100:3), and published partisan commentary, including posts about Donald Trump's presidential candidacy and photos from the January 2017 Women's March in Washington, D.C, which she attended in her personal, not official, capacity. J.A. 176–179 (Trial Tr. 98:2–101:7).

Randall also controls the publicly accessible Facebook page "Chair Phyllis J. Randall" (the "County Facebook Page"), which she created in January 2016 with the help of her Chief of Staff, Janine Arnett, on the eve of her inauguration as Chair of the Loudoun County Board of Supervisors. J.A. 254 (Trial Tr. 176:16–25). Randall refers to this Facebook page as her "County" Facebook page. J.A. 226 (Trial Tr. 148:9–12); J.A. 245 (Trial Tr. 167:13–21); J.A. 455; J.A. 457. Both Randall and

Arnett are administrators of her County Facebook Page, meaning they can both publish and edit content on the page. J.A. 187 (Trial Tr. 109:14–23).

Randall deliberately created her County Facebook Page as a way to communicate with her constituents. J.A. 254 (Trial Tr. 176:1–6). Upon taking office in January 2016, Randall posted on her Friends Facebook Page: "Everyone, please visit my County Facebook Page[:] Chair Phyllis J. Randall. I'm posting all updates, links and information on that page." J.A. 457. According to the "About" section, the page is designated as belonging to a "Government Official." J.A. 207–09 (Trial Tr. 129:7–131:9). The same section lists Randall's County office telephone number, her County email address, and the official County website. J.A. 207–09 (Trial Tr. 129:7–131:9). Randall also communicates with her constituents through an official "Chair Phyllis J. Randall" e-mail newsletter that she sends out from her County email address. J.A. 193–95 (Trial Tr. 115:22–17:16); J.A. 338–40; J.A. 369. Each newsletter contains the official Facebook icon and the words "STAY CONNECTED" in its footer; the icon appears to link directly to Randall's County Facebook Page. J.A. 197–200 (Trial Tr. 119:4–122:13); J.A. 338–40.

Randall uses her County Facebook Page as a platform to share information with her constituents about her work on the Board and addresses most of her posts to "Loudoun." J.A. 408–29. For example, she used her County Facebook Page to announce the Board's adoption of a budget, J.A. 443, to announce approval of

funding for new firefighter equipment, J.A. 433, and to recognize police officers who saved a man from a heroin overdose, J.A. 446. She has published several posts explicitly "[o]n behalf of the Loudoun County Board of Supervisors." J.A. 431–34. Randall also used her County Facebook Page to solicit applications for Loudoun County's "Commission on Women and Girls," J.A. 165–70 (Trial Tr. 87:2–92:6); J.A. 419, and to document events she attended in her official capacity as Chair, including the National Association of Counties meeting, J.A. 437, and the Metro Summit in Washington, D.C., J.A. 444.

Randall uses her County Facebook Page to solicit feedback from and invite discussion with her constituents. For example, she expressly encourages "Loudoun citizen[s]" to use her County Facebook Page to have "back and forth conversations" about local issues, at one point posting directions on her Friends Facebook Page:

> Everyone, could you do me a favor. I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, complement or just your thoughts. However, I really try to keep back and forth conversations (as opposed to one time information items such as road closures) on my County Facebook Page (Chair Phyllis J. Randall) or County email (Phyllis.randall@loudoun.gov). Having back and forth constituent conversations are Foiable (FOIA) so if you could reach out to me on these mediums that would be appreciated. Thanks much, Phyllis.

J.A. 455. In a post on her County Facebook Page, Randall asked constituents to post questions for the director of Loudoun's Health Department about the Zika virus. J.A. 448. She used her County Facebook Page to invite Facebook users to attend in-

person events such as her "State of the County" address, J.A. 438, a press conference about road conditions after a snowstorm, J.A. 453, and Board of Supervisors meetings regarding the County budget, J.A. 421. Through comments on her County Facebook Page, Randall also coordinated snowstorm clean-up efforts, J.A. 453, and provided assistance to a constituent whose daughter was interested in exchange programs, J.A. 415.

Randall chose not to allow the County Administrator's Office to create or administer a Facebook page for her because she "didn't want to be constrained to what the County regulations were." J.A. 253 (Trial Tr. 175:14–25). At the time Randall created her County Facebook Page, the relevant County policy stated that the County reserved the right to delete comments from "official" County social media sites if the comments included "vulgar language," "spam," or other violations of its enumerated social media policy. J.A. 58–59. The County has since updated its written policy to create a process by which designated staff moderate official County social media sites. J.A. 49. That policy now requires staff to refer alleged violators of County social media policy to the Office of the County Administrator, which reviews and authorizes removal of comments. *Id.*

Randall has not adopted any policy governing what comments are and are not allowed on her County Facebook Page, but she maintains that she is not bound by the County policy and is permitted to delete comments or ban anyone from her

County Facebook Page at her discretion. *See* J.A. 93 (Trial Tr. 15:5–15); J.A. 159–60 (Trial Tr. 81:25–82:4); Opening Brief for Defendant–Appellant and Cross–Appellee Phyllis J. Randall ("Randall Br.") at 29–30.

B. Randall's Facebook Ban of Davison

On February 3, 2016, Randall served on the panel of a joint town hall discussion held by the County Board and the Loudoun County School Board ("School Board") that was hosted by the Loudoun Educational Alliance for Parents Organization. J.A. 99–100 (Trial Tr. 21:9–22:6). Davison attended the town hall and anonymously submitted a question relating to a proposed ethics pledge requirement; the question implied that School Board members had undisclosed conflicts of interest. J.A. 102 (Trial Tr. 24:18–22). Randall responded to the question, calling it a "setup" and saying that she did not "appreciate" it. J.A. 102–04 (Trial Tr. 24:12–26:1).

Later that night, Randall posted on her County Facebook Page about the town hall. J.A. 268 (Trial Tr. 190:9–20). Davison commented on Randall's post using his Virginia SGP Page account. J.A. 268–69 (Trial. Tr. 190:21–191:8). Although the exact content of his comment is not in the record, the District Court found, based on Davison's and Randall's testimony, that the comment repeated the allegations of conflicts of interest among members of the School Board. J.A. 268–69 (Trial Tr. 190:25–191:25); J.A. 289–290 (Trial Tr. 211:13–212:8); *see also* J.A. 471. Randall

disagreed with and took offense at Davison's comment, calling it a "slanderous" accusation about people she considered "colleagues." J.A. 269 (Trial Tr. 191:1–191:25). Randall deleted Davison's comment as well as her original post. *Id.* Randall next banned Davison's Virginia SGP account from her County Facebook Page. J.A. 291 (Trial Tr. 213:6–25). In banning the account, Randall "decided at that moment that if you were a type of person that would make comments about people's family members, then maybe I didn't want you to be commenting on my site." J.A. 291 (Trial Tr. 213:6–25). The next day, Randall "decided that [the ban] wasn't a correct thing to do" and unbanned Davison. J.A. 291 (Trial Tr. 213:6–20).

To date, Randall has not adopted a formal policy with respect to viewpoint-based blocking from her County Facebook Page. Nor has she disclaimed the authority to ban Davison from the page in the future or provided any guidance for followers of her page to be aware of before replying to or commenting on a post. Consequently, Davison's current participation in the forum is shaped by his knowledge that disagreeing with Randall might result in his being banned again. *See* J.A. 316–17 (Trial Tr. 238:25–239:20).

C. Procedural History

On July 20, 2016, Davison, acting *pro se*, filed a complaint against the Loudoun County Board of Supervisors, Randall, and other Loudon County officials, alleging violations of the First Amendment, the Due Process Clause, and the Equal

Protection Clause, and seeking declaratory and injunctive relief. J.A. 2; J.A. 13–25.[4] The defendants filed a motion to dismiss, which the District Court granted in part. J.A. 3. On September 20, 2016, Davison moved to amend his complaint to seek relief for the events at issue in this litigation, bringing First Amendment and due process claims against Randall in her official and individual capacities. J.A. 3; J.A. 26–33. Randall again moved to dismiss, and Davison moved for partial summary judgment. J.A. 5–6. The District Court denied both motions. J.A. 6.

During discovery, Davison sought leave to amend his complaint against Randall to add free speech and due process claims arising under the Virginia state constitution, as well as "a claim alleging that Loudoun County violates the First Amendment by maintaining a Facebook page given certain technical aspects of the Facebook platform." J.A. 7; J.A. 35–40; J.A. 54. The magistrate judge allowed Davison to add his state constitutional claims, but denied Davison's motion for leave to amend his complaint with respect to the additional First Amendment claim. J.A. 8; J.A. 54.

The District Court held a bench trial on May 16, 2017. *See* J.A. 79–337. Following the trial, the District Court issued an opinion in which it announced the following findings of fact and conclusions of law:

[4] Davison's original complaint contained allegations regarding conduct separate from that which forms the basis of this appeal.

> (1) Defendant acted under color of state law in maintaining her "Chair Phyllis J. Randall" Facebook page and banning Plaintiff from that page; (2) Defendant's actions, while relatively inconsequential as a practical matter, did in fact violate Plaintiff's right of free speech under the First Amendment to the United States Constitution and Article I, § 12 of the Constitution of Virginia; (3) Defendant did not violate Plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution or Article I, § 11 of the Constitution of Virginia; (4) injunctive relief is not warranted; but (5) a declaratory judgment clarifying that Defendant's 'Chair Phyllis J. Randall' Facebook page operates as a forum for speech under the First Amendment to the U.S. Constitution and Article I, § 12 of the Virginia Constitution is appropriate under the circumstances.

J.A. 460–61.

The parties filed their notices of appeal on August 24, 2017. J.A. 12. Randall appealed the District Court's finding that Randall's conduct violated the First Amendment as well as the District Court's entry of a declaratory judgment declaring that violation. Davison cross-appealed the District Court's denial of his due process claim, his claims against Randall in her official capacity, and his motion for leave to amend his complaint to add an additional First Amendment claim.

SUMMARY OF ARGUMENT

These cross-appeals arise from Davison's efforts to ensure that his voice is not unfairly excluded from the public discourse surrounding Loudoun County policies. Davison is an active and vocal—and often critical—participant in Loudoun County policy-making, and his criticism has put him into conflict with county officials. Randall, in particular, has attempted to silence Davison's voice on her

County Facebook Page. Such government-operated platforms function as public forums where, as here, they are increasingly used as a substantial place for discourse surrounding politics. The First Amendment squarely prohibits viewpoint-based attempts to exclude Davison's dissent from that page.

This brief responds to Randall's arguments in her appeal and makes three arguments in support of Davison's cross-appeal.

For Randall's appeal, the District Court correctly concluded, based on trial testimony and extensive findings of fact, that Randall's County Facebook Page functions as a public forum that is open generally to speech by the public, and that Randall uses that page overwhelmingly for the purpose of fulfilling her duties as an elected official, rendering Randall's operation of the County Facebook Page subject to the First Amendment. The District Court also correctly held that by deleting Davison's comment, and by banning Davison from commenting in the future because she found the comment offensive, Randall unconstitutionally excluded Davison from a public forum based on viewpoint. This Court should reject Randall's unconvincing attacks on that ruling.

Randall's argues that her County Facebook Page is not a public forum and indeed is not subject to the First Amendment at all because she set it up herself. That position is wholly unpersuasive. None of her attacks on the District Court's factual findings establishes that they were clearly erroneous, and indeed the District Court's

extensive findings of fact are entitled to considerable deference on appeal. Nor is there any merit to Randall's assertion that even if she operates her County Facebook Page as part of her official duties, then her County Facebook Page is not a public forum because it reflects only Randall's own speech and thus is immune from First Amendment requirements under the government speech doctrine. Randall's own posts on her County Facebook Page are government speech, but the comments posted on her County Facebook Page by members of the public are not. The government speech doctrine is simply inapplicable to those comments.

Randall's assertion that the District Court clearly erred in finding that Randall was motivated by viewpoint animus when she banned Davison from her County Facebook Page is also wrong. Again, the District Court's factual finding that Randall banned Davison because she was offended by the views he expressed was based on the court's extensive consideration of Randall's testimony—and it is entitled to deference. Supreme Court precedent further makes clear that Randall's distaste for Davison's comment as "offensive" or "slanderous" is equivalent to impermissible viewpoint discrimination.

Randall's attack on the relief ordered by the District Court likewise misses the mark. The District Court correctly awarded declaratory relief to Davison based on Randall's First Amendment violation. The District Court also properly recognized the continuing injury to Davison from Randall's decision to block him from her

account, and in particular from the chilling effect of her continuing claim that the First Amendment does not preclude her from blocking him again in the future. This Court should affirm that part of the holding.

While the District Court's entry of declaratory judgment was proper, in his cross-appeal Davison challenges three of the District Court's rulings as reversible error. First, the District Court erred in denying Davison's claim against Randall in her official capacity. Davison named Randall in her official capacity to ensure that the relief he sought applied to the Chair of the Loudoun County Board of Supervisors, not just Randall personally. Indeed, it makes no sense to hold, as the District Court did, that Randall operated her Facebook account as an "official" account, but then deny relief against her in an official capacity, and the District Court ignored the bases for issuing relief against office of Chair. Second, the District Court erred in denying Davison's claim against Randall for violating his due process rights. Banning individuals indefinitely from speaking at all in a public forum, as Randall did here, constitutes a prior restraint on speech and the government must provide sufficient due process before it can take that kind of extreme action. Third, the District Court applied the wrong standard in denying Davison's motion to amend his complaint to add an additional First Amendment claim on the ground of futility. Contrary to the District Court's view, Davison adequately stated a claim for relief and the court should have permitted him to fully develop that claim. For these

reasons, Davison respectfully urges this Court to reverse the District Court's decision insofar as it denied relief on these claims and unfairly deprived him of an opportunity to vindicate his First Amendment and due process rights.

ARGUMENT

I. Standard of Review

This Court reviews the question of whether the District Court properly granted declaratory relief for abuse of discretion. *See S.C. Dep't of Health & Env. Control v. Commerce & Indus. Ins. Co.*, 372 F.3d 245, 260 & n.15 (4th Cir. 2004) ("A district court possesses broad discretion on whether to exercise its jurisdiction in declaratory judgment proceedings, and we are obliged to accord deference to the exercise of such discretion."). Underlying jurisdictional questions are reviewed *de novo*. *See Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992). As for the District Court's conclusion that Randall violated the First Amendment, the Court applies a mixed standard pursuant to which "factual findings are reviewed for clear error," and "conclusions of law are reviewed de novo." *Makdessi v. Fields*, 789 F.3d 126, 132 (4th Cir. 2015).

II. Randall Violated the First Amendment by Banning Davison from Her County Facebook Page Based on His Viewpoint.

The trial record makes clear that the District Court was correct to find that Randall banned Davison on the basis of viewpoint.

A. Randall's County Facebook Page Is a Public Forum.

Designated public forums are places or channels of communication established by the government "for use by the public at large for assembly and speech." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). The government creates a public forum when it purposely opens property to the public for expressive activity. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983); *see also Cornelius*, 473 U.S. at 803 (noting that public forums are distinct from non-public forums insofar as they permit "general access"). Courts have recognized that public forums need not be physical spaces. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995) (describing a space as "a forum more in a metaphysical than in a spatial or geographic sense"); *Cornelius*, 473 U.S. at 801 (1985) (explaining that the Court has extended public forum doctrine to spaces that "lack[] a physical situs"); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018) (concluding "that the interactive space of a tweet from the @realDonaldTrump account constitutes a designated public forum"). To determine whether the government intended to designate a space as a forum for public expression, courts consider the forum's compatibility with expressive activity and whether the government's overall "policy and practice" shows that the forum is intended to be used for speech by the public. *Cornelius*, 473 U.S. at 802.

Here, as found by the District Court, the facts establish that the space for comments on Randall's County Facebook Page—the virtual space where members of the public may post comments directed to Randall and other members of the community—is a public forum. J.A. 484–86. To begin, Facebook is inherently compatible with expressive activity—its central purpose is communication. *See Packingham*, 137 S. Ct. at 1735 ("Social media offers relatively unlimited, low-cost capacity for communication of all kinds.") (quotation marks omitted).

In fact, Randall used her County Facebook Page precisely because the platform offered her a vehicle for speaking to and hearing from constituents about Loudoun County policies. She created her County Facebook Page "in collaboration with her Chief of Staff the day before she took office, and did so for the purpose of addressing her new constituents." J.A. 476–77. She then used the Page "as a tool of governance" to coordinate storm relief efforts, respond to constituent requests, promote public events and initiatives, and generally communicate with her constituents about matters of public import. J.A. 477–78.

Further, the facts in the record evince Randall's intent to make her County Facebook Page generally open to speech by members of the public. *Cornelius*, 473 U.S. at 802 ("A public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."). As the

District Court found, Randall "affirmatively solicited" comments from by members of the public on her County Facebook Page. J.A. 485. For example, Randall wrote: "I really want to hear from ANY Loudon citizen on ANY issues, request, criticism, compliment, or just your thoughts." *Id.* (quoting J.A. 455). She specifically urged constituents to have "back and forth conversations (as opposed to one time information items such as road closures)" on "[her] County Facebook page." *Id.* Her County Facebook Page was thus akin to a "'chat room' or 'bulletin board' in which private viewers could express opinions or post information[.]" *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008) (holding that school district website was *not* a public forum but that "the issue would, of course, be different" if the website permitted outside visitors to publish posts).

In essence, Randall's County Facebook Page operated as a kind of virtual open public meeting, which this Court and others have consistently held constitutes a public forum. *See Local 2106, Int'l Ass'n of Firefighters, AFL-CIO v. City of Rock Hill, S.C.*, 660 F.2d 97, 100 (4th Cir. 1981) ("[C]ouncil meetings were open to any citizen of Rock Hill to comment on any subject relating to city government . . . . Rock Hill thus provided a public forum"); *see also City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976) (holding that a teacher could not be prohibited from speaking at an open school board meeting because the government had "opened a forum for direct citizen involvement");

Surita v. Hyde, 665 F.3d 860, 869 (7th Cir. 2011) (expressing "no doubt" that "audience time during . . . city council meetings constituted a designated public forum); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("City Council meetings . . . where the public is afforded the opportunity to address the Council[] are the focus of highly important individual and governmental interests . . . . [S]uch meetings, once opened, have been regarded as public forums, albeit limited ones."); *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989) ("[T]he city commission designated their meeting a public forum when the commission intentionally opened it to the public and permitted public discourse on agenda items."); *Musso v. Hourigan*, 836 F.2d 736, 742 (2d Cir. 1988) (noting that public speech is usually allowed at an open school board meeting).

Randall's argument that her County Facebook Page is not a public forum rests on several flawed premises. First, she urges that public forums can exist only on public property. Randall Br. 19–21. But the Supreme Court has long recognized that public forums can exist in privately owned spaces that are controlled by the government. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975) (finding that "a privately owned Chattanooga theater under long-term lease to the city" was a public forum); *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part) (noting public forums are not "limited to property owned by the government"); *Cornelius*, 473 U.S. at 801

(noting that public forum analysis applies to "public property or to private property dedicated to public use"). Consistent with this precedent, one court recently held that President Donald Trump's Twitter account, which is hosted on another privately owned social media platform, is a public forum. *See Knight First Amendment Inst.*, 302 F. Supp. 3d at 566 (finding sufficient government control over the President's Twitter account to make it a public forum "[t]hough Twitter is a private . . . company that is not government-owned."). Even the authorities Randall cites acknowledge that "social media pages operated by government entities may be public forums[.]" Randall Br. 21 (quoting Smolla & Nimmer on Freedom of Speech § 8.33.25 (2018)).[5]

Second, Randall mistakenly argues that, because she did not have to allow private citizens to post on her County Facebook Page, the page is not a public forum. Randall Br. 23. But the fact that a government is not required to operate a space as a public forum does not change its obligations with respect to that forum for the period when it *is* operated as such. *See Perry*, 460 U.S. at 45–46 ("The Constitution

[5] Randall cites this text as supportive of her position insofar as it states that "personal social media pages operated by public officials" are not public forums "even when used to discuss public policy issues." *Id.* But as established *infra*, Randall's County Facebook Page is *not* the kind of personal social media page described by Smolla and Nimmer. Rather, in contrast to her profile and other page, Randall's County Facebook Page was created by Randall in her capacity as an elected member of the Board, and she maintains it as a platform to interact with her constituents as a public official.

forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place..”). Randall has created a designated public forum, and accordingly, the First Amendment protects speech within that forum.[6]

Finally, there is no merit to Randall’s argument that the public forum doctrine does not apply because her County Facebook Page represents only Randall’s speech as a government official. Randall Br. 30–31. There is no question that Randall’s own posts to her County Facebook Page are government speech. But that fact does not transform the comments sections of her County Facebook Page into government speech. To be government speech, (1) the speech must “have long been used . . . to convey state messages”; (2) the speech must be “closely identified in the public mind” with the government; and (3) the state must “maintain[] direct control over the message[].” *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (quotation marks omitted).

The comment section of her County Facebook Page fails on all three grounds. Randall does not control the content of Facebook users’ comments on her County

[6] Randall’s suggestion, based on the *Packingham* concurrence, that this Court must proceed with wariness about “novel” legal questions is misguided. *See* Randall Br. 22. But the *Packingham* majority rejected that suggestion, instead emphasizing the need for courts to be vigilant about applying First Amendment speech protections to new means of communicating in order to ensure that speech in these new mediums is not stifled. *See* 137 S. Ct. at 1736.

Facebook Page. Instead, she has opened that page to commentary from anyone with a Facebook account, has not openly imposed any restrictions on what those people say, and has repeatedly emphasized that constituents should use that specific page to speak to her. *See, e.g.*, J.A. 455. No reasonable person would mistake comments on the Chair Facebook Page from constituents like Davison for speech by the government because the comments appear associated with the username and profile photo of individual posters, making clear that the comments are comments by members of the public to the government. *See, e.g.*, J.A. 415 (comment from Elizabeth Raitz-Cowboy: "My daughter is interested in exchange programs."); J.A. 427 (comment from Bob Kelly: "Putting recreation in a flood plain is not a good idea."); J.A. 433 (comment from Konah Terry: "Great job, Chair Randall."). These constituent comments convey the opinions of private individuals, not state messages. The government speech doctrine is thus inapplicable to Davison's constitutional claim. *See Knight First Amendment Inst.*, 302 F. Supp. 3d at 573 (finding that "the interactive space associated with each of the President's tweets [on @realDonaldTrump] is not government speech and is properly analyzed under the Supreme Court's forum precedents.").

B. Randall's Operation of her County Facebook Page Is Government Action Subject to the First Amendment.

The District Court correctly found, on the basis of its exhaustive review of the facts, that Randall operates her County Facebook Page almost exclusively as a forum

to communicate with the general public about County-related matters. Randall challenges that finding on appeal, claiming that the First Amendment does not apply because her County Facebook Page is a "personal" site and thus that Randall did not act "under color of law" when she banned Davison. That argument is wrong.

Conduct by a public official constitutes state action, and accordingly is subject to the First Amendment, if it is "fairly attributable" to the state.[7] *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001); *West v. Atkins*, 487 U.S. 42, 49–50 (1988). To determine whether conduct is attributable to the state, this Circuit applies a functional—rather than formalistic—test based on the facts of each individual case. *See, e.g.*, *Holly v. Scott*, 434 F.3d 287, 292 (4th Cir. 2006) (observing that "there is no specific formula for determining whether state action is present" and that such a determination is "a matter of normative judgment" whose "criteria lack rigid simplicity") (quotation marks omitted); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 342 (4th Cir. 2000) ("[T]he state action determination requires an examination of all the relevant circumstances."). This Court has made clear that a defendant's "purportedly private actions" may nonetheless constitute state action if they are sufficiently "linked to events which

[7] In actions brought pursuant to Section 1983, "'under color' of law has been treated as the same thing as the 'state action' requirement under the Fourteenth Amendment." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (quotation marks omitted).

arose out of his official status." *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003).

Here, the District Court considered "the totality of the circumstances" and correctly concluded that Randall's operation of her County Facebook Page constituted state action. J.A. 474–81. As the District Court noted, it was Randall's election to public office that prompted her to create her County Facebook Page using the title of her new office. *See* J.A. 476–77. Randall then proceeded to use her County Facebook Page almost exclusively for the purpose of conducting Chair-related business, including by addressing nearly every post on the page to "Loudoun," *see* J.A. 408; publishing posts on behalf of the Board, *see* J.A. 431; announcing the Board's budget and policy decisions, *see* J.A. 443; informing constituents about her official appearances and duties, *see* J.A. 451; relaying information about snow removal , *see* J.A. 453; and encouraging constituents to post questions and comments on her County Facebook Page, *see* J.A. 455. Significantly, Randall's understanding of her County Facebook Page to be a forum where she communicated with constituents in her official role as Chair is evidenced by the fact that Randall also maintained a profile and page that she used for personal matters.

Randall's County Facebook Page not only functions as an official page, but also, as the District Court correctly observed, is "swathe[d] . . . in the trappings of [Randall's] office." J.A. 479. The page bears Randall's official title, is designated

as belonging to a "Government Official," and provides, as contact information, Randall's county office telephone number, county email address, and the official county website. J.A. 478–79. To create and maintain the County Facebook Page, Randall used County resources, including sharing the task of publishing and editing content on the page with her Chief of Staff—a salaried County employee—and promoting her County Facebook Page in official County Publications and her official "Chair Phyllis J. Randall" email newsletter. J.A. 478; *see also* J.A. 206 (Tr. 128:5–24); J.A. 338–92.

Randall's argument that she did *not* act under color of state law in operating her County Facebook Page rests on a handful of instances in which Randall simultaneously used the page for personal purposes. *See* Randall Br. at 15–17. But the fact that Randall personally administered her County Facebook Page does not transform the page into a purely private enterprise that falls outside the protection of the First Amendment. To the contrary, the presence of some indicia of private control does not render official conduct private where, as here, the totality of the circumstances show state action.[8]

[8] In *Goldstein*, for example, a volunteer firefighter alleged he had been terminated in retaliation for protected speech. 218 F.3d at 351–52. This Court acknowledged various facts indicating that the defendant, a volunteer fire department, acted in a private capacity rather than under color of law. *Id.* at 343. Nevertheless, this Court found the defendant's conduct to be attributable to the state given the totality of the circumstances. *Id.*

Equally unpersuasive is Randall's argument that in deleting Davison's comment and banning him, she was somehow not "exercising power possessed by virtue of state law." *See* Randall Br. 17. That assertion is belied by the Supreme Court's holding that "a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West*, 487 U.S. at 50. Here, Randall is using her County Facebook Page in furtherance of her duties of governing—by operating a public forum for speech by members of the public related to Loudoun County matters. The activities she performs when using the page—be it posting on the page, monitoring and deleting comments, or deciding who may and may not access it—are all connected to those duties as well. *See Knight First Amendment Inst.*, 302 F. Supp. 3d at 567 (holding that President Trump's operation of an ostensibly private Twitter account was "governmental in nature" and thus subject to the First Amendment as connected to his duties); *see also Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300, 306–07 (2d Cir. 2018) ("Because facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations.").

Given the myriad ways in which the creation and maintenance of her County Facebook Page is "inextricably linked to[] the fact of Defendant's public office,"

J.A. 477, and given the particular deference applied to the District Court's findings of fact, *see C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 436 (4th Cir. 1997), the Court should affirm the District Court's conclusion that Randall's conduct was fairly attributable to the state and thus subject to the First Amendment.

C. Randall's Viewpoint-Based Ban of Davison from a Public Forum Violated the First Amendment.

Although the record establishes that her County Facebook Page is a designated public forum—one that is open to speech by the general public without any limitation on subject matter—it is not necessary to decide conclusively the category of public forum at issue here.[9] Indeed, it is axiomatic that viewpoint discrimination in any public forum is "presumptively unconstitutional."

[9] This Court has used "designated public forum" and "limited public forum" interchangeably to refer to government-controlled spaces that have been opened to expressive activities by the public or by a segment of the public. *Goulart v. Meadows*, 345 F.3d 239, 250 (4th Cir. 2003). The Court recognizes two other categories of public forums. A "traditional" public forum is a place that "by long tradition or by government fiat ha[s] been devoted to assembly and debate," such as public parks and sidewalks. *Perry*, 460 U.S. at 45. Content-based restrictions on speech in a traditional public forum and designated public forum are subject to strict scrutiny, and viewpoint-based restrictions are forbidden. *Goulart*, 345 F.3d at 248, 250. A "nonpublic forum" is a government-controlled space that "is not open by tradition or designation to the public for expressive activity." *Id.* at 248. The government can restrict access to a nonpublic forum "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677–78 (1998)).

Rosenberger, 515 U.S. at 830. When the government "opens its property to private speech," it is prohibited from "discriminat[ing] based upon the viewpoint of the speaker." *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 & n.2 (4th Cir. 2006). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. Viewpoint discrimination is broadly defined, such that a governmental restriction on speech can constitute viewpoint discrimination even when it "prohibits disparagement" in an "evenhanded[]" manner or bars expression that "is offensive to a substantial percentage of the members of any group." *Matal*, 137 S. Ct. at 1763.

Based on Randall's trial testimony, the District Court found that Randall banned Davison from commenting on her County Facebook Page because she disliked the views he expressed in his comment. J.A. 486–89. Although the precise content of the comment is unknown because Randall deleted it, 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." J.A. 471. Concluding that Davison's allegation of corruption was "'probably not something [she] want[ed] to leave' on her Facebook page," Randall deleted her original post, which had the effect of deleting Davison's comment as well. J.A. 471–72. According to the District Court's findings of fact, Randall also banned Davison from

her County Facebook Page because he was not "the type of person" she wanted commenting on her page. J.A. 472.

Randall does not offer any evidence that contradicts or undermines the soundness of the District Court's findings of fact as to Randall's motivation for the ban, and those findings of fact are entitled to considerable deference on appeal. *See C.B. Fleet Co.*, 131 F.3d at 436. Instead, Randall argues that her desire that Davison not discuss the "subject matter" of "slanderous" comments about people's family matters on her County Facebook Page is not viewpoint discrimination. Randall Br. at 25. But that assertion ignores longstanding Supreme Court precedent establishing that government attempts to restrict "offensive" or "slanderous" speech *is* viewpoint discrimination. *See Matal*, 137 S. Ct at 1763 ("Giving offense is a viewpoint."); *see also Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech . . . at a public place on a matter of public concern . . . cannot be restricted simply because it is upsetting or arouses contempt."). Because Randall's ban of Davison from the public forum hosted on her County Facebook Page was motivated by Randall's distaste for Davison's viewpoint, the District Court correctly concluded that it constituted "the quintessential form of viewpoint discrimination against which the First Amendment guards." J.A. 488.

Finally, Randall's argument that the District Court's judgment should be reversed because the temporary ban on Davison was "*de minimis*" is wrong. Randall

Br. 28–29. The Supreme Court has made clear that "[t]here is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *cf. Bland v. Roberts*, 730 F.3d 368, 384–86 (4th Cir. 2013) (rejecting the district court's conclusion that "merely 'liking' a Facebook page is insufficient speech to merit constitutional protection"). The District Court found that Randall banned Davison based on viewpoint—a motivation that is never a valid rationale for government restrictions on speech—and appropriately tailored relief in light of the severity of the injury. Randall's challenges to those rulings fail.[10]

III. The District Court's Grant of Declaratory Relief Was Proper.

Having concluded that Randall unconstitutionally banned Davison from her County Facebook Page because of his viewpoint, the District Court granted declaratory relief that was tailored to the violation, for the purpose of "clarifying and

[10] Randall argues that banning Davison's 'Virginia SGP' account was permissible because he was still able to comment via his personal profile. *See* Randall Br. 26–27. But courts only consider whether "ample alternative channels" of communication exist when speech restrictions are content-*neutral*. Here, as the District Court found, the viewpoint-based restriction that Davison applied is *never* permissible—regardless of whether alternative channels exist. *See Child Evangelism Fellowship of S.C.*, 470 F.3d at 1067.

settling the legal relations in issue." J.A. 501–02 (quoting *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996)). The District Court acted properly in granting this relief.

The Declaratory Judgment Act empowers courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The Act is broadly construed, and district courts have substantial discretion in determining whether to rely on it to award relief. *See Aetna Cas. & Surety Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937) ("The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purpose intended, *i.e.* . . . to settle legal rights and remove uncertainty and insecurity from legal relationships[,]" and the question of whether declaratory relief is proper "is a matter resting in the sound discretion of the trial court.").

In order for a district court to order declaratory relief pursuant to the Declaratory Judgment Act, (1) there must be "a 'case or controversy' within the confines of Article III of the United States Constitution[,]" (the "'constitutional' inquiry") and (2) "the trial court, in its discretion, must be satisfied that declaratory relief is appropriate" (the "'prudential' inquiry"). *White v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 913 F.2d 165, 167 (4th Cir. 1990). In accordance with Article III, the constitutional inquiry includes establishing standing to sue. Specifically,

"[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Courts recognize that "standing requirements are somewhat relaxed in First Amendment cases[,]" and that leniency is particularly warranted with respect to the injury-in-fact requirement. *See Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). As for the so-called "prudential inquiry," courts ask whether declaratory relief "will serve a useful purpose in clarifying and settling the legal relations in issue" and "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Carfax, Inc. v. Red Mountain Techs.*, 119 F. Supp. 3d 404, 417 (E.D. Va. 2015).

The District Court properly exercised its discretion to grant Davison declaratory relief in order to remedy an actual injury and to clarify Davison's legal rights and Randall's legal obligations. Declaratory relief also served the purpose of ensuring that Davison's future participation in the forum would not be chilled by the prospect of Randall's blocking him again on the basis of viewpoint. This Court should therefore affirm the District Court's grant of declaratory relief.

In her opening brief, Randall argues for the first time in this lawsuit that Davison lacked standing to pursue his First Amendment claim because Randall had unbanned Davison before he filed suit, and that the District Court should have denied

prospective relief on this basis. *See* Randall Br. at 32–34.[11] But as this Court recently explained in *Kenny v. Wilson*, a plaintiff can establish ongoing injury sufficient to warrant prospective relief by showing that there is "a substantial risk" that the harm the plaintiff suffered will recur if the plaintiff continues to exercise his or her constitutional rights, or that the plaintiff is "chilled from exercising his right to free expression" (*i.e.*, self-censorship). 885 F.3d 280, 287–88 (4th Cir. 2018). Davison satisfies both of these tests.

Under the well-established law of this Circuit, a plaintiff may establish ongoing injury sufficient to confer standing for the purpose of prospective relief if he or she demonstrates an intention to engage in constitutionally-protected conduct that is threatened by government action. *See Kenny*, 885 F.3d at 288.[12] There must

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[11] In addition to arguing that prospective declaratory relief was improper, Randall asserts that retrospective declaratory relief likewise should not have been granted because she is entitled to qualified immunity. Randall Br. at 35–40. But this Court has held that "[c]laims for declaratory and injunctive relief are not affected by qualified immunity." *Lefemine v. Wideman*, 672 F.3d 292, 303 (4th Cir. 2012); *see also Reichle v. Howards*, 566 U.S. 658, 664 (2012) (emphasis supplied) (stating that 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."). Accordingly, to the extent the declaratory judgment operates retrospectively, Randall has offered no viable ground for disrupting it. And, in any event, because the declaratory judgment also operates prospectively, vacating only its retrospective component would have no practical effect.

[12] This rule applies with equal force where the plaintiff's rights are infringed not by a statute and rather by a policy or practice. *See, e.g.*, *Twyman v. Rockville Hous. Auth.*, 99 F.R.D. 314, 320 (D. Md. 1983) (holding that residents of low-income

be "'a real and immediate threat' of future injuries," *id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983))—as is the case where a government official makes clear her intent and ability to act in such a manner as to infringe an individual's constitutional rights.

Here, as discussed in detail *supra*, Randall deleted Davison's comment from her County Facebook Page and banned him from participating in the public forum of the page's interactive space because she disagreed with the viewpoint Davison expressed. Randall exercises sole control over her County Facebook Page. J.A. 160 (Trial Tr. 82:3–4) ("Every decision about my . . . Chair Randall page[] is made by me and only me."). Accordingly, it is exclusively up to Randall (and her Chief of Staff, to the extent Randall authorizes her to manage content on Randall's County Facebook Page, *see* J.A. 187 (Trial Tr. 109:14–23)), whether to ban Davison again in the future. Moreover, as the District Court rightly observed, Davison "continues to avail himself of the [County Facebook Page]," which Randall continues to maintain "she is permitted to administer . . . as a purely personal page." J.A. 502. In other words, Davison has evinced his intent to continue to express himself on Randall's County Facebook Page, and Randall has made clear her belief that she

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housing had standing to pursue claims against local housing authority on the basis of various housing authority policies and practices that allegedly violated plaintiffs' constitutional rights).

may indiscriminately ban from that page whomever she wishes for any reason whatsoever. Randall's position, and the ongoing threat of constitutional violations that it creates, is sufficient to confer standing. *See, e.g.*, *Boston Correll v. Herring*, 212 F. Supp. 3d 584, 599 (E.D. Va. 2016) (explaining that plaintiffs may establish injury even before an unconstitutional policy is actually enforced against them, and that "[t]his is especially so where there is a serious prospect that free speech will be chilled and that a plaintiff's First Amendment rights are in jeopardy.").

That Davison has not (yet) been blocked again by Randall does not detract from his entitlement to prospective relief. This Court's decision in *Lefemine v. Wideman* is instructive. 672 F.3d 292 (4th Cir. 2012), *vacated on other grounds*, 568 U.S. 1 (2012). In *Lefemine*, a county sheriff's office was found to have violated the First Amendment rights of an anti-abortion organization when it directed the group's members to take down graphic anti-abortion protest signs they displayed on public sidewalks. *Id.* at 295. A year after that incident, the sheriff's department advised plaintiff that if it continued to display the same types of signs, the sheriff's department would again require the group to take down the signs. *Id.* at 296–97. Nevertheless, the group proceeded to protest, displaying the signs at issue for two years in a row without incident. *Id.* at 297. On those facts, this Court upheld the district court's injunction against the defendants "from engaging in content-based restrictions on Plaintiff's display of graphic signs without narrowly tailoring its

restriction to serve a compelling state interest." *Id.* at 303 (quotation marks omitted).[13] Like the defendants in *Lefemine*, Randall has made clear throughout this litigation that she believes banning Davison was perfectly constitutional. *See* J.A. 502. But an ongoing threat that has not been followed through on is not any less of an injury. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) (finding newspaper could bring a facial challenge to a city's newsrack licensing scheme because "the mere *existence* of the licensor's unfettered discretion, coupled with the power of prior restraint, *intimidates* parties into censoring their own speech, even if the discretion and power are never actually abused") (emphasis added).[14] Accordingly, whether Randall has *yet* banned Davison once again based on his viewpoint does not diminish Davison's entitlement to prospective relief.

Davison also satisfies the ongoing injury requirement because of the likelihood of self-censorship in response to Randall's conduct. *See Cooksey*, 721

[13] Although the court in *Lefemine* did not expressly address standing, the analogous facts of that case support a conclusion that the relief in this case was proper.

[14] Courts in other circuits have found the injury-in-fact requirement satisfied in similar cases. For example, in *Berry v. Schmitt*, the plaintiff engaged in speech that caused the Kentucky Bar Association to send him a letter warning him that such speech violated an ethics rule and to refrain from making statements of the same nature in the future. 688 F.3d 290, 294 (6th Cir. 2012). The court reasoned that because of this letter, which "essentially cautioned [the plaintiff] not to let it happen again," the plaintiff "had sufficient reason to fear future discipline." *Id.* at 297. Accordingly, this "threat of future enforcement" constituted ongoing injury for the purpose of establishing standing. *Id.*

F.3d at 235 (noting that "[i]n First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of self-censorship" (quotation marks omitted)). Under this framework, a public official's conduct is "sufficiently chilling" to constitute injury where it is "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Id.* at 236 (quotation marks and citation omitted). Importantly, it is not necessary for a plaintiff to demonstrate that he stopped engaging in the protected expressive activity altogether in order to establish injury. *Id.* Rather, so long as a plaintiff shows "a non-speculative and objectively reasonable chilling effect of his speech due to the actions" of the government official, the injury requirement is satisfied. *Id.*

Davison has demonstrated that Randall's act of banning him from her County Facebook Page has the ongoing effect of threatening to chill his speech. As Davison made clear at trial, he feared that—because of Randall's past conduct, her beliefs regarding her rights and obligations with respect to her County Facebook Page, and her control over the forum—his speech might again be curtailed if he made a statement that "offended her sensibilities." J.A. 317 (Trial Tr. 239:8–20). Indeed, he emphasized that Randall believes she can ban him again and that the only reason she un-banned him the first time was "because she changed her mind . . . not that

she promises not to ban me because it's unconstitutional."[15] *Id.* (Trial Tr. at 239:8–13). Davison therefore has standing and is entitled to the equitable relief ordered by the District Court.

IV. On Cross-Appeal, Davison Is Entitled to Reversal on Three Rulings that Precluded Him from Seeking Full Relief for His Injuries.

While the District Court correctly held that Randall violates Davison's rights under the First Amendment by banning him from her County Facebook Page and properly entered a declaratory judgment on that basis, the District Court erred in three critical respects. First, it wrongly denied Davison's claim for relief against Randall in her official capacity. Second, it failed to undertake the appropriate due process inquiry and improperly rejected that claim. Third, it denied Davison leave to amend his complaint to add an additional First Amendment claim, despite

[15] Even if there were merit to Randall's newly raised argument challenging Davison's standing, the appropriate remedy would be to remand to the District Court to allow Davison to adduce additional evidence establishing his standing to pursue his First Amendment claim—not to reverse the District Court's decision outright. *See Combs v. United States*, 408 U.S. 224, 226–28 (1972) (holding that, where standing was first challenged on appeal such that the record was "virtually barren of the facts necessary" to determine whether standing requirements were met, case would be remanded to allow the petitioner an opportunity to "establish facts" sufficient to show standing); *United States v. Jackson*, 618 F. App'x 472, 475 (11th Cir. 2015) (holding that "a reviewing court may be required to remand the case for fact-finding on the standing issue" where district court ruled on the merits without "receiving evidence relating to [plaintiff's] standing"). That approach would be particularly warranted given that Davison represented himself *pro se* before the District Court.

Davison's timely requests and the sufficiency of his proposed amended pleadings. Each of these three holdings should be reversed.

A. The District Court Erred in Denying Davison's Claim Against Randall in Her Official Capacity.

As noted at the outset of this brief, Davison's purpose in filing this lawsuit was to ensure that his voice was not unconstitutionally silenced from the social media sites operated by Loudoun County and its representative officials. To that end, his first amended complaint named Randall in her individual and official capacities, and in his prayer for relief, Davison asked the District Court to "find that the Defendants' Loudoun BOS and individual Supervisors' Facebook social media forums, as described herein, are limited public forums; [and] that the Plaintiffs' right to participate in the forums' public comments is protected by the First Amendment." J.A. 32. By naming Randall in her official capacity, Davison effectively sued Loudoun County in order to ensure that any Chair of the Board and all of the Loudoun County supervisors, not just Randall herself, would comply with the First Amendment in operating their individual social media pages that function as public forums.[16] *See Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985).

[16] Davison's first amended complaint also sought to ensure that Loudoun County provided proper due process before any of its supervisors banned Davison from their official social media sites. J.A. 33.

The gravamen of Davison's official capacity claim is that the county's policy to afford supervisors like Randall unfettered discretion to ban individuals from their individual social media sites violates the First Amendment. A supervisor who bans an individual from her official social media site has imposed an unlawful prior restraint on that individual. *See Se. Promotions v. Conrad*, 420 U.S. 546, 553–58 (1975) (holding that municipal theater board of directors' refusal to allow performance of musical "Hair" at theater leased by the city was an unlawful prior restraint in a public forum).[17] Without any policy or guidance to limit their operation of the individual pages, supervisors can effectively exclude individuals from a designated public forum indefinitely and offer them no recourse. Just as it would violate the First Amendment for a Loudoun County supervisor to ban Davison indefinitely from participating in county meetings that are open to the general public for speech, it violates the First Amendment for a supervisor to ban Davison indefinitely from commenting on her Facebook page. That each supervisor has unfettered discretion to impose a ban, for any reason and without limitation, further

[17] This is not to say that an individual supervisor may not remove unprotected speech, such as fighting words or truly defamatory content, from the forum after the speech has occurred. But she may not prevent an individual from speaking in the future even if the speaker had previously made a comment that could legitimately be removed from the forum. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315–16 (1980).

compounds the constitutional infirmities of the scheme. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988).

The District Court therefore erred in dismissing Davison's official capacity claim. In its July 25, 2017 ruling, the District Court ruled that because Randall's County Facebook Page was not subject to the Loudoun County Board of Supervisors' social media policy, and because there was no evidence that the county affirmatively ratified Randall's acts in banning Davison from her County Facebook Page, Davison could not maintain a claim against the county itself. J.A 482–83. But the ruling that Randall's actions cannot be imputed to the county is in tension with the District Court's holding that Randall operated the County Facebook Page *for official purposes*, and it ignores the other grounds on which the county can be held liable in these circumstances.

Davison is entitled to relief against Loudoun County because its failure to oversee Randall's activities on her County Facebook Page caused Davison's constitutional injury. A municipality is liable under § 1983 for a constitutional violation where its "policy . . . inflicts the injury." *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978); *see also Spell v. McDaniel*, 824 F.2d 1380, 1385–86 (1987). This occurs where the act in question is "(1) fairly attributable to the municipality as its 'own' and is (2) the 'moving force' behind the particular

constitutional violation." *Spell*, 824 F.2d at 1387 (internal citations omitted); *see also Jordan by Jordan v. Jackson*, 15 F.3d 333, 338 (4th Cir. 1994).

The District Court concluded that the "Board is not Defendant's superior in any relevant sense and has no formal authority to approve or disapprove anything Defendant may do on her 'Chair Phyllis J. Randall' Facebook page." J.A. 483. But the District Court failed to adequately consider evidence in the record that the Board was—and remains—deliberately indifferent to the likelihood of unconstitutional censorship and viewpoint-based discrimination on individual supervisors' social media sites, and that this indifference caused Davison's constitutional injury and continues to chill speech. *See Buffington v. Baltimore Cty.*, 913 F.2d 113, 122 (4th Cir. 1990) (explaining that a municipality is liable for its "policy of omission" where its failure to act causes a constitutional violation); *see also City of Canton, Ohio v. Harris*, 489 U.S. 378, 388–89 (1989) (holding that a municipality is liable where its failure to act "amounts to a deliberate indifference to the rights of persons with whom [its officials] come into contact" and is the "moving force behind [a] constitutional violation").

Here, Loudoun County knew that viewpoint-based discrimination and other constitutional violations could occur on its own social media pages, which is why it issued a social media policy for the county's own official sites. It neglected, however, to extend its written guidelines to Board members' official pages. J.A 482.

Had Loudoun County expressly covered sites like the Chair Phyllis J. Randall Facebook page, and made clear that it would not tolerate viewpoint-based discrimination on those sites, the constitutional violation likely would not have occurred. Granting prospective relief against the county will protect against these types of constitutional violations in the future.

Even if Loudoun County's actions did not rise to the level of deliberate indifference, the county can be held liable for Randall's actions because in banning Davison, Randall acted as a municipal policymaker. Even "a single decision to take [an] unlawful action" can constitute policy for purposes of municipal liability. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986); *see also Semple v. City of Moundsville*, 195 F.3d 708, 712 (4th Cir. 1999). This is true where a county official has "final authority to establish and implement the relevant policy," *Spell*, 824 F.2d at 1387. The relevant inquiry is whether the official "speak[s] with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional . . . violation at issue." *Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701, 737 (1989). The Loudoun County social media guidelines left open the possibility that individual Board members like Randall would create their own official social media pages to discuss government business—

which is exactly what Randall did. The Board of Supervisors thus implicitly[18] delegated final policymaking authority over the administration of these sites to the individual supervisors. As to her County Facebook page, then, Randall acted as final policymaker for Loudoun County, and her decision to ban on the basis of viewpoint reflected a policy decision as to her social media site. *See Pembaur*, 475 U.S. at 483–84 (concluding that municipality could be liable where county prosecutor, exercising with delegated authority under state law, authorized allegedly unconstitutional police raid).

Finally, in the alternative, even if the Court were to conclude that municipal liability under *Monell* had not been established, Davison would still be entitled to prospective equitable relief against Randall in her official capacity under traditional principles related to state officials. It is well established that a plaintiff may sue a state actor in her official capacity under § 1983 for deprivation of rights, seeking prospective injunctive relief notwithstanding Eleventh Amendment state sovereign immunity. *See Edelman v. Jordan*, 415 U.S. 651, 676 (1974); *Ex Parte Young*, 209 U.S. 123, 155–56 (1908). Injunctions in official capacity suits prevent officials from using authority vested in their elected positions to infringe upon constitutional rights

[18] As this Court explained in *Spell*, "delegation may be . . . implied from a continued course of knowing acquiescence by the governing body in the exercise of policymaking authority by an agency or official." 824 F.2d at 1387.

and ensure that relief runs against the successor officer-holder, not merely the official in office at the time of the suit. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991).

In *Lefemine*, for example, this Court explained that although several County sheriff deputies were not municipal policymakers, as state actors, they could be liable in their official capacities under *Ex Parte Young*. *See Lefemine v. Wideman*, 672 F.3d 292, 303–04 (4th Cir. 2012), *vacated on other grounds by* 568 U.S. 1 (2012). There, the injunctive and declaratory relief ran against the sheriffs in their official capacities. *Id.* Similarly, here, regardless of whether Randall has authority to make municipal policy under Virginia law, she acts as a state official for purposes of the First and Fourteenth Amendments. Accordingly, under *Ex Parte Young*, Randall is liable for constitutional violations in her official capacity, and the Court may issue prospective injunctive and declaratory relief against her.

Thus, the District Court erred in dismissing Davison's suit against Randall in her official capacity.

B. The District Court Erred in Denying Davison's Due Process Claim.

Randall violated Davison's procedural due process rights by banning him from commenting in a public forum—in essence imposing a prior restraint on any future speech—without any pre-deprivation process.[19] U.S. Const. amend. XIV; Va.

[19] To be clear, the harm that Randall caused Davison rests in her banning him from her County Facebook Page, thereby preventing him from speaking there at all.

Const. art. I, § 11. The Due Process Clause requires that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (quotation marks omitted).[20] That person is presumptively entitled to such process unless the deprivation was "random and unauthorized." *See Zinermon v. Burch*, 494 U.S. 113, 127–29 (1990). Randall summarily banned Davison from her County Facebook Page without any warning whatsoever, let alone any opportunity to be heard. The due process violation was particularly egregious because the ban amounted to a prior restraint on Davison's speech that prevented him from publishing on Randall's County Facebook Page. *See* J.A. 400–02. Protection against prior restraints is a core purpose of the First Amendment. *See Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931). The District Court incorrectly characterized Randall's conduct as random and unauthorized, and then used that conclusion to support its conclusion that pre-deprivation process was not required. This conclusion was error, and the Court should reverse it.

While it might be permissible in certain contexts to delete an individual comment without providing full pre-deprivation process, it is not permissible to make a viewpoint-based decision to eject someone from a public forum without any procedural due process whatsoever.

[20] "[T]he due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution." *See Shivaee v. Commonwealth*, 613 S.E.2d 570, 574 (Va. 2005).

1. The *Mathews* balancing test weighs in favor of instituting pre-deprivation process on her County Facebook Page.

As a threshold matter, *Mathews* instructs courts to evaluate procedural safeguards by reviewing (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest," including "administrative burdens." 424 U.S. at 334–35. An application of the three *Mathews* factors to the facts of this case demonstrates that Randall violated Davison's due process rights by failing to provide him with any notice before banning him from speaking on her County Facebook Page.

First, as demonstrated in Part II, *supra*, Davison has a robust private interest in his right to engage in speech in the public forum of his representatives' social media sites. Banning an individual from social media is a particularly egregious form of censorship because it curtails the person's ability to speak prospectively. In particular, when a user is banned from a public Facebook page, that user is unable to post, publish a comment on, or send a private message to the page. Nor may the user "like" that page—a communication this Court has already deemed protected speech. *See Bland*, 730 F.3d at 386. Banning a user on Facebook is thus the Internet equivalent of prior restraint, long rendered "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S.

539, 559 (1976) (finding a court order restraining media from publishing about a murder case was unconstitutional); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (noting there is a "heavy presumption" against constitutionality of prior restraints).

In assessing the nature of Davison's interest, the District Court correctly noted that "a practically trivial First Amendment violation is a violation nonetheless." J.A. 496. The District Court erred, however, in characterizing the deprivation as too small to warrant pre-deprivation process. *See id.* By this logic, officials would be permitted to ban speech online, repeatedly and erroneously, so long as such bans are not permanent. That framework is incoherent and vague; the imposition of an "impermanent" ban leaves open the possibility that the ban would last for a considerable amount of time. *Cf. Nebraska Press Ass'n*, 427 U.S. at 559 ("[T]he burden on the Government is not reduced by the temporary nature of a restraint."). This approach also assumes courts would be able to perform the impossible task of measuring bans on speech to determine the benchmark that would trigger an entitlement to pre-deprivation process. Contrary to Randall's argument, courts assessing speech restrictions in physical public fora have found that even temporary ejections violate First Amendment and procedural due process rights—and that approach should apply equally to virtual public forums like Randall's County Facebook Page. *See Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 79–82

(D.D.C. 2001) (finding that ejecting the plaintiff from a public library because of his "objectionable appearance" violated the First Amendment and procedural due process); *Yeakle v. City of Portland*, 322 F. Supp. 2d 1119, 1132 (D. Or. 2004) (finding temporarily banning plaintiffs from city parks as punishment for breaking a city ordinance violated the First Amendment and procedural due process).

Second, pre-deprivation process would have meaningfully reduced the risk of erroneous deprivation. *See Mathews*, 424 U.S. at 334–35. Under Loudoun County's current social media policy, a designated staff member reports suspected policy violations to the Office of the County Administrator, which then reviews the reported comment. J.A. 49. The administrator next contacts the commenter regarding the violation to request voluntary removal before either deleting the comment or banning the user. J.A. 49 (stating that banning will only be considered for "continued or egregious violations of [the] policy."). Had Randall followed a similar process, the risk that Davison would have been erroneously ejected for expressing an unpopular opinion—without violating any other stated policy—would have been substantially reduced.

As for the third *Mathews* factor, the government's competing interest, 424 U.S. at 334–35, Randall has failed to identify any state interest to justify banning Davison without first providing process. While some kind of comment moderation may be necessary to remove spam and prevent "trolls" from overtaking online public

forums, *see* J.A. 497, such review is wholly *compatible* with pre-deprivation process. Although the District Court expressed concern that pre-deprivation procedures "could spell the end of social media websites like the [County Facebook Page]," J.A. 498, a clear process—helping to distinguish between harassment and protected speech in an administrable way—would *facilitate* both moderation of social media pages and the use of her County Facebook Page as a tool for civic discourse. Loudoun County's own social media policy demonstrates that a pre-deprivation process is both warranted and workable.[21]

2. Randall's conduct was not random or unauthorized.

When the government deprives an individual of liberty or property, that individual is presumptively entitled to pre-deprivation process unless the deprivation was "random and unauthorized." *See Zinermon*, 494 U.S. at 127–29. Deprivation is random and unauthorized only if (1) the risk of erroneous deprivation is unforeseeable; (2) the deprivation could not have been prevented by pre-deprivation procedures; and (3) the public official lacked authority to effect the deprivation. *Id.* at 136–39. This Court has repeatedly emphasized that the category of

[21] Even if Randall's conduct were random and unauthorized, Davison is still entitled to post-deprivation process, at least going forward. *See Hudson v. Palmer*, 468 U.S. 517, 534 (1984) (finding that pre-deprivation procedures were impossible because the official's conduct was random and unauthorized, and that the court must therefore consider whether the state had provided "an adequate postdeprivation remedy").

"unauthorized" deprivations that do not require process is "narrow." *See Plumer v. Maryland*, 915 F.2d 927, 929–31 (4th Cir. 1990) (finding the Motor Vehicle Administration's allegedly erroneous suspension of the plaintiff's license was not unauthorized under *Zinermon* because errors were foreseeable); *Fields v. Durham*, 909 F.2d 94, 97–98 (4th Cir. 1990) (holding that the plaintiff's allegedly wrongful termination from employment at a public college was foreseeable).

An application of *Zinermon*'s three factors demonstrates that Randall's decision to censor and eject Davison was not random or unauthorized. First, deprivation of Davison's First Amendment rights was entirely foreseeable as evidenced by the very existence of the County's social media policy— the County contemplated the possibility of erroneous censorship by its officials and actively sought to prevent it. *See Plumer*, 915 F.2d at 931 (characterizing the state's creation of "procedural safeguards to protect against erroneous deprivations" as evidence that errors were foreseeable). Furthermore, Randall censored Davison at an entirely "predictable" point in time, namely, while engaging in the very sort of activity—moderating Facebook comments—that the social media policy was designed to govern. The timing is significant because it is "hardly unforeseeable" that County officials will, in the process of maintaining a Facebook page as a forum for discussion, erroneously censor protected speech. *See Zinermon*, 494 U.S. at 136 (finding it was not unforeseeable, and therefore not random or unauthorized, that

state employees would erroneously deprive someone of his liberty during the admission process for mental health treatment).[22]

Second, the County's revised social media policy, issued after Davison initiated these proceedings, now provides for pre-deprivation notice—a clear indication that such notice is not "impossible." *Zinermon*, 494 U.S. at 136–37. This development is crucial; the requirement for pre-deprivation process is only waived "where it truly is impossible for the state to provide pre-deprivation procedural due process." *Plumer*, 915 F.2d at 930 (quotation marks omitted). There is no such impossibility here.

Third, Randall was acting under her broad, delegated authority as County Board Chair when she deprived Davison of his First Amendment rights without due process. Randall's office gave her broad authority to execute her duty to communicate with constituents as she saw fit. Randall identified Facebook as a

[22] The District Court's concern that pre-deprivation process would "require" County officials to "treat all social media accounts they maintain as governmental in nature, and thus subject to constitutional limitations," is unfounded. J.A. 494–95. The District Court itself recognized that only social media accounts impressed with the trappings of public office can be public forums. Indeed, the District Court's distinction between Randall's private, personal profile and her County Facebook Page highlights the limiting principle behind the process requirement. J.A. 469. Not all pages maintained by government officials would require pre-deprivation notice—only those that operate as public forums.

valuable platform for engaging with her constituents and accordingly used her authority to open a public forum.[23]

C. The District Court Erred in Denying Davison's Motion to Amend His Complaint.

The District Court erred in denying Davison leave to amend his complaint to add a First Amendment claim that Loudoun County's adoption of particular features of the Facebook platform rendered such platform incompatible with the constitutional guarantee of free speech in a public forum. Davison sought leave to amend his complaint to add this claim three separate times. *See* J.A. 3 (Dkt. 14); J.A. 4 (Dkt. 25); J.A. 7 (Dkt. 67 & 68). The first two times, the Magistrate Court denied his motion without prejudice. J.A. 4 (Dkt. 20, Dkt. 32). The third time, the Magistrate Court denied Davison's motion with prejudice. J.A. 8 (Dkt. 87). The District Court reviewed the Magistrate Court's denial *de novo* and reasoned that the

[23] The District Court improperly relied on *Hudson* to reach its conclusion that Randall's conduct was random and unauthorized and that thus pre-deprivation process was not required. *See* J.A. 492–94 (citing *Hudson*, 468 U.S. at 533). As discussed *supra*, *Zinermon* tightened the definition of "random and unauthorized" for purposes of due process claims, making clear that an official's action is not considered "unauthorized" simply because the official did not abide by government procedures. *See Zinermon*, 494 U.S. at 136–39. To the contrary, pre-deprivation process is still required where, as here, deprivations are foreseeable, pre-deprivation procedures are possible, and the official has broad authority to effect deprivations. *See id*.

proposed amendment would be futile and therefore the Magistrate Court had properly denied Davison's motion. J.A. 10 (Dkt. 116); J.A. 73–76.[24]

When a district court denies a motion for leave to amend a pleading based on futility of the proposed amendment, such denial is subject to *de novo* review.[25] *See United States ex rel. Ahumada v. NISH*, 756 F.3d 268, 274 (4th Cir. 2014). Rule 15(a) instructs that courts should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (explaining that so long as "the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits"). In determining whether to deny leave to amend on the basis of futility, courts apply the familiar 12(b)(6) standard. *See, e.g.*, *Pugh v. McDonald*, 266 F. Supp. 3d 864, 866 (M.D.N.C. 2017) ("A motion to amend a

[24] Such a dismissal with prejudice acts as a "final judgment on the merits [that] bars further claims by parties or their privies based on the same cause of action" via the doctrine of res judicata. *Andrews v. Daw*, 201 F. 3d 521, 524 (4th Cir. 2000) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)).

[25] Although the District Court denied Davison's motion for leave to amend for the additional reason that such motion "[came] too late in these proceedings," J.A. 75, that alternative basis is an abuse of discretion. *See United States ex rel. Ahumada v. NISH,* 756 F.3d 268, 274 (4th Cir. 2014)) (holding that the abuse of discretion standard applies to appeals from denial of a motion to amend on some basis other than futility). Davison twice sought leave to amend his complaint to add this claim far earlier in the proceedings, but the Magistrate Judge denied that claim without prejudice. It was an abuse of discretion to hold that Davison waited too late in the proceedings in these circumstances.

complaint is futile if the proposed claim would not survive a motion to dismiss.") (quotation marks omitted).

Importantly, "[a] review for futility is not equivalent to an evaluation of the underlying merits of the case." *Next Generation Grp., LLC v. Sylvan Learning Ctrs., LLC*, No. CIV. CCB-11-0986 (CCB), 2012 WL 37397, at *3 (D. Md. Jan. 5, 2012). On the contrary, "[u]nless a proposed amendment may clearly be seen to be futile because of substantive or procedural considerations, conjecture about the merits of the litigation should not enter into the decision whether to allow the amendment." *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980) (citation omitted).

Davison's proposed amended complaint easily clears the relatively low hurdle for motions for leave to amend pleadings. Davison alleged, *inter alia*, that the Loudoun Board of Supervisors created Facebook pages designed to disseminate official information and engage with constituents, and in doing so it created a public forum subject to the First Amendment. Dkt. 70 ¶¶ 25–29.[26] Davison further alleged that if a third party has banned Davison because of a dispute between them, and that third party posts a comment on a Loudoun County Board of Supervisors Facebook page, Davison cannot see that comment or participate in the discussion surrounding the banning party's comment. *See id.* ¶¶ 28–34, 50–51. According to Davison's

[26] Unless otherwise specified, all citations to "Dkt." are to the District Court docket in this case.

proposed amended complaint, this scenario violates the First Amendment because Loudoun County has effectively enabled third parties to exclude Davison from certain discussions within a public forum, *see id.* ¶¶ 44–46—something a government body could not permissibly do in a physical forum, *id.* ¶¶ 25–29. Davison's proposed amended complaint provided specific examples of precisely this type of exclusionary conduct and alleged that it violated the First Amendment. *Id.* ¶¶ 30–56. Taking these allegations as true and viewing them in the light most favorable to Davison—as is required at the 12(b)(6) stage, *see, e.g.*, *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017)—the proposed amended complaint states a cognizable claim to relief.

In denying Davison's motion for leave to amend, the District Court wrongly applied a far more rigorous standard than is warranted at such early stage. For example, the District Court stated that it "is unaware of any precedent" supporting Davison's First Amendment claim, and that the features of the Facebook platform that give rise to this claim "do[] not curtail Plaintiff's own right to speak in a meaningful way[.]" J.A. 75. But by refusing to allow Davison to amend his pleadings, the District Court denied him the opportunity to offer precedent that supports his claim, or to develop facts proving why, as Davison alleged, use of Facebook's blocking feature in a public forum *does* meaningfully curtail Plaintiff's

free expression.[27] Instead of accepting Davison's allegations as true and giving him the benefit of the doubt, the District Court improperly undertook an evaluation of the claim on the merits. Accordingly, its decision to deny Davison motion for leave to amend should be reversed.

CONCLUSION

For the foregoing reasons, Davison respectfully requests that this Court affirm the District Court's grant of declaratory relief based on Randall's violation of Davison's First Amendment rights. Because the District Court erred in denying Davison's claim against Randall in her official capacity, in denying Davison's claim against Randall for violation of his due process rights, and in denying Davison's motion to amend his complaint, these portions of the District Court's Order and Judgment should be reversed or, where appropriate, remanded for further proceedings.

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[27] The type of claim that Davison seeks to bring is not without precedent. Courts have recognized that, where appropriate, the government may be held liable for unconstitutional constraints imposed by private actors. *See, e.g.*, *McMahon v. Panama City Beach*, 180 F. Supp. 3d 1076, 1113 (D. Fl. 2016) (holding that plaintiff was "substantially likely to succeed on the merits of his free speech claim" premised on conduct by a private actor who had contracted with the city to use a public space, and reasoning that a city may not "do indirectly what it could never do itself; namely, allow unfettered discretion to suppress speech in a public forum"). Congress has codified a similar principle in statutes such as Section 508 of the Rehabilitation Act of 1973, which provides that a government entity may not host software that does not comply with disability accommodations. 29 U.S.C. § 794d.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief complies with the briefing order filed in this case on May 2, 2018 because this brief has 15,277 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Times New Roman 14-point font using Microsoft Word.

July 11, 2018 /s/ Katherine Fallow

CERTIFICATE OF SERVICE

I certify that on July 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

July 11, 2018 /s/ Katherine Fallow