No. 17-2002(L)

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

RESPONSE/REPLY BRIEF FOR DEFENDANT-APPELLANT AND CROSS-APPELLEE PHYLLIS J. RANDALL

SCOTT E. GANT
AARON E. NATHAN
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727
sgant@bsfllp.com

Counsel for Phyllis J. Randall

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SUMMARY OF ARGUMENT

"[A] citizen who works for the government is nonetheless still a citizen," *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006), and "decades of landmark precedent" have enshrined "free speech protection for public employees." *Janus v. AFSCME*, 138 S. Ct. 2448, 2469 (2018).

Davison does not deny: (1) Randall's Facebook page was created before she took office; (2) Randall's Facebook page belongs to her, not Loudoun County; (3) every decision about Randall's Facebook page is made by her alone; (4) Randall uses only personal (not County) equipment to maintain and operate her Facebook page; (5) the decision to implement the 12-hour ban was made by Randall alone, without consulting any County employee; (6) no County policy played any role in Randall's decision to implement the ban; and (7) the ban was effectuated by Facebook, at Randall's request, by virtue of a private agreement between her and Facebook. *See* Opening Brief for Defendant-Appellant Phyllis J. Randall ("Randall Opening Br.") 16. Davison also concedes that "Randall personally administered" her Facebook Page, and that there are "some indicia of private control." Opening/Response Brief of Plaintiff-Appellee and Cross-Appellant Brian Davison ("Davison Opening/Response Br.") 29. Davison nevertheless insists that the 12-hour ban was "state action."

The Supreme Court has made clear there must be "[c]areful adherence to the 'state action' requirement" because it preserves "individual freedom," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982), and promotes important federalism values. *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). The District Court's erroneous conclusion that Randall's actions "can fairly be attributed to the State," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), threatens to chill the First Amendment rights of public employees by converting their private speech into state action, thereby subjecting them to liability under 42 U.S.C. § 1983, as occurred here. That state action determination was wrong and dangerous—and should be reversed.

The First Amendment unquestionably protects a speaker's right to curate and exercise control over the content of her own publications. Davison resists Randall's right to curate and exercise control over the content of her own Facebook Page by labeling the comment section a "public forum." But "public forum" jurisprudence is a doctrinal misfit here—obscuring rather than illuminating the relevant facts and First Amendment principles at stake.

But the Court need not reach the First Amendment issues pressed by Davison and his *amici*. The District Court erred in issuing a declaratory judgment in favor of Davison—regardless of the merits of his First Amendment claim. While declaratory judgments can operate retrospectively or prospectively, Davison's request for a declaratory judgment should have been rejected either way. To the extent the

declaratory judgment at issue operates *prospectively*, Davison lacked Article III standing to seek prospective relief given that the 12-hour ban ended more than seven months before Davison brought his First Amendment claims against Randall because he was concerned she "*may* block [him] in the future." Plaintiff's Mot. for Leave to File Am. Compl. and Mem. of Support 4, *Davison v. Randall*, No. 1:16-cv-00932-JCC-IDD (E.D. Va. Sept. 20, 2016), ECF No. 14 (emphasis added). As the District Court observed: "Plaintiff's access to Defendant's . . . Facebook page was restored long before Plaintiff commenced this action. Since that time, Plaintiff has enjoyed uninterrupted use of Defendant's Facebook page." JA500. The District Court accordingly made no findings demonstrating a likelihood that Davison would suffer *any* future injury. Under this Court's and the Supreme Court's established precedents, Davison's request for prospective declaratory relief was defective—and should not have been granted by the District Court. And to the extent the declaratory judgment operates *retrospectively*, the District Court abused its discretion by permitting an unlawful end-run around the qualified immunity to which Randall is entitled.

As for Davison's cross-appeal, the District Court correctly rejected his claim against Randall in her official capacity, and his allegation of a due process violation.

ARGUMENT

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

Section 1983 does not apply to private conduct. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). Davison's Section 1983 claim therefore depends on his establishing that Randall acted "under color of state law."

Davison does not deny: (1) Randall's Facebook page was created before Randall took office; (2) Randall's Facebook page belongs to her, not the County; (3) every decision about Randall's Facebook page is made by her alone; (4) Randall uses only personal (not County) equipment to maintain and operate her Facebook page; (5) the decision to implement the 12-hour ban was made by Randall alone, without consulting any County employee; (6) no County policy played any role in Randall's decision to implement the ban; and (7) the ban was effectuated by Facebook, at Randall's request, by virtue of a private agreement between her and Facebook. *See* Randall Opening Br. 16. Indeed, Davison concedes that "Randall personally administered" her Facebook Page, and that there are "some indicia of private control." Davison Opening/Response Br. 29.[1]

[1] Davison relies on *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018)—a case in which his counsel here is a plaintiff. There are, however, numerous distinctions between the *Trump* case and this one. For example: the President's Twitter account is operated regularly with the assistance of defendant and White House Social Media Director and Assistant to the President Daniel Scavino, who suggests content for and posts tweets on the President's account; and the President's tweets are considered by the National

Davison's argument that Randall's conduct constituted "state action" therefore rests on his claim that "Randall is using her County Facebook Page in furtherance of her duties of governing." Davison Opening/Response Br. 30. But this "in-furtherance-of-her-duties-of-governing" test finds no support in the law.

The Supreme Court has made clear several points about the state action doctrine relevant here. First, there must be "[c]areful adherence to the 'state action' requirement" because it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar*, 457 U.S. at 936. Second, this careful adherence to the state action requirement also promotes important federalism values, "avoid[ing] the imposition of responsibility on a State for conduct it could not control." *Tarkanian*, 488 U.S. at 191. Third, tests to identify state action all have a common purpose: to determine whether an action "can fairly be attributed to the State." *Blum*, 457 U.S. at 1004. Here, all of these considerations suggest the district court erred in concluding that Randall's actions "can fairly be attributed to the State." *Id.*

A fundamental problem with Davison's test is that it lacks sufficient regard for the important First Amendment rights retained by public employees. He ignores, for example, the bedrock principle that "a citizen who works for the government is

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Archives and Records Administration to be "official records that must be preserved under the Presidential Records Act." 302 F. Supp. 3d at 552-53.

nonetheless still a citizen." *Garcetti*, 547 U.S. at 411; *see also Janus*, 138 S. Ct. at 2469 ("free speech protection for public employees" rests on "decades of landmark precedent"). While Randall's Facebook Page may have discussed her activities as a governmental official or issues relevant to County residents, she was exercising her right as a private citizen to discuss those activities—a right that is not subject to an arbitrary cap, after which private speech transforms into state action. *Cf. Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1010-11 (E.D. Ky. 2018) ("[T]his Court is convinced that Governor Bevin's use of privately owned Facebook Page and Twitter pages is personal speech, and, because he is speaking on his own behalf, even on his own behalf as a public official, 'the First Amendment strictures that attend the various types of government-established forums do not apply."). Under Davison's view, a public employee's speech related to her work becomes government speech—at least if there is too much of it. But Davison's vague and open-ended test fails to provide adequate room for the exercise of private speech by public officials, which would be chilled by the conversion of their speech into state action, subjecting them to liability under Section 1983, as occurred here. *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'") (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)); *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 654 (1994) (in *Tornillo*, the Court "explained that, in

practical effect, Florida's right-of-reply statute would deter newspapers from speaking in unfavorable terms about political candidates").

Davison also ignores that Loudoun County itself recognized Randall's Page as her own—explaining that "she personally operates and maintains" it. JA405. Loudoun County held this view informed by a full understanding of County governance and Randall's role as Chair. While the County's view is not itself dispositive, it weighs against the conclusion that Randall acted under color of state law here. *See Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 347 (4th Cir. 2000) ("Another factor relevant to the state actor determination is how the state itself views the entity.").

Davison (and his *amici*) also rely on the fact that Randall selected from a drop-down menu created by Facebook the option "Government Official" to describe herself. *See* Davison Opening/Response Br. 9, 28-29; Brief of *Amici Curiae* American Civil Liberties Union et al. in Support of Plaintiff-Appellee 5-6 & n.4, 15. But that selection does nothing to advance Davison's assertion that Randall acted under color of state law. If anything, her selection of the unquestionably accurate description of herself as a "Government Official" suggests otherwise when contrasted with Loudoun County's description of itself on its Page: "Government Organization" and "Public & Government Service." *See* https://www.facebook.com/LoudounCountyVa/ (last visited Aug. 7, 2018). And

during her trial testimony about the selection of this label, Randall emphasized the County's lack of involvement in her Page. JA210 (Trial Tr. 132:14-20) ("Q. You're aware that some of the other supervisors categorize their pages differently, such as the community interest page? A. I have no idea what other supervisors do with their pages because we don't discuss that. We have no say or control over one another's pages. I don't know what they do.").

Davison is also wrong in seeking to constrain the scope of this Court's review. He incorrectly claims that "particular deference" should be applied to the District Court's "findings of fact" and "conclusion that Randall's conduct was fairly attributable to the state and thus subject to the First Amendment." Davison Opening/Response Br. 31. But in cases concerning the First Amendment appellate courts are instructed to independently review the record as a whole. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record.") (internal quotation marks omitted). And, in any event, a finding of state action is a question of law. *See Goldstein*, 218 F.3d at 344 n.7 ("[W]hether an actor was a state actor or functioning under color of law is a question of law for the court.").[2]

[2] Davison relies on *Goldstein*, Davison Opening/Response Br. 29 n.8, but the *Goldstein* Court's conclusion that a volunteer fire company was a state actor turned on factors that, if applied here, suggest Randall is *not* a state actor: substantial

Here, the Court should conclude, as a matter of law, that Randall was not exercising power "possessed by virtue of state law," *West v. Atkins*, 487 U.S. 42, 49 (1988), or "exercis[ing] some right or privilege created by the State," *Lugar*, 457 U.S. at 937, when she imposed the 12-hour ban.

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

Insisting the 12-hour ban was state action, Davison is left to thread a needle: claiming the 12-hour ban was state action, and that Randall's speech is government speech,[3] on appeal he contends the "comment section" of Randall's Page should be treated as constitutionally distinct from the rest of the Page.[4] But that argument does

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funding by the state, extensive regulation by the state, and how the state itself views the entity. *See* 218 F.3d at 349.

[3] At trial, Davison conceded that Randall's Facebook page can be viewed as government speech. JA141 (Trial Tr. 63:1-4); JA319 (Trial Tr. 241:7-9). He made the same concession in his proposed conclusions of law. Plaintiff's Proposed Findings of Fact and Legal Conclusions at 10, No. 1:16-cv-00932-JCC-IDD (E.D. Va. May 11, 2017), ECF No. 119 (Randall's Facebook Page "represents government speech under the sole discretion of Defendant Randall"). Although the District Court erred in concluding that Randall acted under color of state law in connection with her Facebook page, if Randall's Facebook page was really a government Facebook page—as the District Court's holding that she was acting under color of state law seems to presume—then Davison's First Amendment claim should have been rejected on the ground that the government's exercise of editorial control over its own publications are not subject to First Amendment limitations. *Cf. Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 481 (2009) ("[W]e hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech.").

[4] *See* Davison Opening/Response Br. at 17 ("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.").

not hold up. Part of what the First Amendment protects is a speaker's right to curate and exercise control over the content of its own publications. *See Tornillo*, 418 U.S. 241; *see also Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("[A] publisher's traditional editorial functions" include "deciding whether to publish, withdraw, postpone or alter content."). Requiring Randall to leave comments on her own Page written by someone else, over her own wishes and objections, is a form of compelled speech, itself prohibited by the First Amendment. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (recognizing a First Amendment right to "avoid becoming the courier for" an unwanted message); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (explaining the "general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion or endorsement, but equally to statements of fact that the speaker would rather avoid").

Davison attempts to overcome these clear legal precedents by insisting the comment section of Randall's Facebook Page must be treated as a "public forum."[5] But "public forum" jurisprudence is a doctrinal misfit here—like a square peg that Davison seems intent on fitting into a round hole.

[5] Davison contends "it is not necessary to decide conclusively the category of public forum at issue here." Davison Opening/Response Br. 31.

The Supreme Court has repeatedly emphasized "that 'differences in the characteristics of new media justify differences in the First Amendment standards applied to them.'" *see also FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969)). And the Court is similarly "wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 740, 749 (1996); *see also id*. (determining it would be "unnecessary" and "unwise" to decide whether and how to apply public forum doctrine).

Part of what makes the public forum doctrine a poor fit here is Facebook's own role in controlling the content of Facebook pages. Davison resists this fact with a strawman argument, claiming, without citation to Randall's briefs: "[Randall] urges that public forums can exist only on public property." Davison Opening/Response Br. 23 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), which concerned property leased, rather than owned, by a city). Not so. As an empirical matter, most public forum cases involve government-owned property. Randall does not contend, however, that the public forum doctrine cannot apply to leased property. Instead, the point is that the public forum doctrine applies only when the government has *control* over speech in the forum. In *Conrad*, the

city—not the lessor of the theater—had control over the relevant speech in the theater. Here, however, Facebook is not a passive supplier of the space in question. To the contrary, Facebook can and does have at least partial control over content creation on Randall's Facebook Page—as it does with all other content on Facebook. Indeed, Plaintiff initially sued the County Board of Supervisors alleging it had unlawfully removed one of his comments, only to withdraw the unfounded claim when Facebook's lawyers explained that Facebook had removed his comments based on its own policies.[6] Opening Br. 20-21.

Busy attacking a strawman, Davison ignores *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018), where the court recognized that Facebook (and Twitter) "are privately owned channels of communication" and "not converted to public property by the use of a public official," and concluded the public forum analysis was inapplicable to a First Amendment challenge by a citizen who complained about being "banned" and "blocked" from the Kentucky Governor's Facebook and Twitter platforms. *Id.* at 1006, 1011.

The public forum doctrine also should not apply here because—as Davison recognizes—the government creates a public forum only when it "purposely opens property to the public for expressive activity." Davison Opening/Response Br. 20.

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

Here, it is undisputed that Randall always believed her Facebook Page activities were undertaken as a *private* citizen; Randall, therefore never intentionally established the comments section of her Page as a *government*-created public forum. While, Randall invited comments, and often wrote to "Loudoun," there is no evidence in the record that she intentionally opened up her own Facebook Page in perpetuity for any and all commentary by others. Indeed, before the trial court **Davison repeatedly conceded Randall has the right *to preclude comments or remove them* after they are posted on her Facebook page**.[7] *Cf. United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 204 (2003) (rejecting application of public forum analysis to public library's decision about what private speech to make available to the public). Davison's position before the trial court is incompatible with his arguments on appeal—and to the extent his arguments before this Court imply that Randall may not preclude or remove comments from her Page, those arguments therefore should be rejected. *See Moench v. Robertson*, 62 F.3d 553, 562

[7] JA85 (Trial Tr. 7:9-12) ("I'm not alleging that she deleted comments. She has the right to delete her post and my comment with it, so that's not before the Court."); JA141 (Trial Tr. 63:1-3) ("[S]he doesn't have to allow anybody to comment on her page at all. I'm not disputing that at all."); JA315 (Trial Tr. 237:20-23) ("Court: So you're not complaining about the deletion?; A: Correct. I assert that she has the right to remove it, all the content on her page."); JA319 (Trial Tr. 241:7-9) ("[I]f she chooses which comments that she wants, *that's government speech and she can do anything* that she can.") (emphasis added); JA323 (Trial Tr. 245:2-3) ("[L]ike I said, she could filter the comments.").

(3d Cir. 1995) (an appellate court "will not permit" a party to "chang[e] course" once it has conceded an argument below).

In addition, before the trial court Davison's cause of action was based on the allegation that due to the 12-hour ban his comments could not be seen by people *other than Randall*.[8] But there is no evidence in the record that Randall established her Facebook page so that other people could communicate *with one another*. Her Facebook page was primarily a vehicle for her own speech—and secondarily for people to speak *to her*. This too rendered the public forum analysis a poor fit here.

Finally, in her Opening Brief Randall noted that she is unaware of any case where a public employee acting in her or his individual (not official) capacity unilaterally created a public forum. Randall Opening Br. 23. Davison still has failed to cite one.

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

III. Davison Concedes That Only "Virginia SGP" Was Temporarily Banned

During the time relevant to this case, Davison maintained at least two Facebook profiles: (1) "Virginia SGP,"[9] and (2) "Brian Davison." *See* Randall Opening Br. 26-27. The exhibits used at trial reflect that he used both to post comments about the County and about Randall—and he testified to that effect as well. *See*, *e.g.*, JA111-JA112 (Trial Tr. 33:25-34:3) ("I made both comments. One was from my -- Brian Davison, my personal account, my personal profile. The other one was post from the Virginia SGP.").

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

On appeal, Davison acknowledges that only his "Virginia SGP" screen name was temporarily banned. *See* Davison Opening/Response Br. 13 (Randall "banned Davison's Virginia SGP account from her County Facebook Page."). And he does

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

not dispute that he could have used "Brian Davison" to comment on Randall's Facebook Page during the 12-hour ban. *See* Davison Opening/Response Br. 34 n.10. These concessions are fatal to his claim.

Instead, Davison's response on this point is limited to a footnote, where he contends this Court should look past it because the 12-hour ban was allegedly viewpoint-based. Davison Opening/Response Br. 34 n.10. While Randall disputes that it the ban was based on viewpoint discrimination, Randall Opening Br. 24-25,[10] Davison is simply wrong is claiming that this Court can overlook the fact that Davison—the natural person, who is the plaintiff in this case—was not ever "banned" from Randall's Facebook Page.[11] In fact, the record evidence contains

[10] Davison presses his argument on viewpoint discrimination by claiming the District Court "found" that the 12-hour ban resulted from Randall's "dislike" of the views expressed by "Virginia SGP." Davison Opening/Response Br. 32. Neither Randall or the District Court ever used that word. What the District Court did find is that Randall "banned Plaintiff from her Facebook page because she was offended by his criticism of her colleagues in the County government," JA472. But the evidence shows otherwise, and the District Court's finding of viewpoint discrimination was clearly erroneous. *See* Randall Opening Br. 24-25.

[11] Davison cites *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 & n.2 (4th Cir. 2006) in support of the notion that this Court can look past the fact that Davison was not banned—only one of his screen names. *Child Evangelism Fellowship* has no relevance here. The predicate for Davison's claim is that ***he*** was prevented from posting comments on Randall's Page during the 12-hour ban. But he was not. The rationale for the ban does not come into play if he remained able to comment during its entire duration (and, the record establishes, he made no attempt to comment during the ban, using any screen name).

examples of Davison using both the "Virginia SGP" and "Brian Davison" screen names *in the same string of comments*. *See, e.g.*, JA439-440.

IV. The District Court Erred in Granting Declaratory Relief

A. The District Court Lacked Jurisdiction to Issue Prospective Declaratory Relief[12]

"The party invoking federal jurisdiction bears the burden of establishing" each element of Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And because the elements of Article III standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Id.* This means that after a trial, the allegations contained in a plaintiff's complaint going to Article III standing are "irrelevant"—instead, a federal court's jurisdiction is limited by the facts establishing standing as they have been proved and found at trial. *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *see id.* at 357-59.

Here, the District Court made no findings that Randall was likely—let alone "imminently" likely—to ban Davison again. The District Court therefore lacked

[12] Davison mentions in passing that Randall has raised this standing argument for the first time on appeal. Davison Opening/Response Br. 36. Even if so, standing is jurisdictional and not subject to waiver. *Lewis*, 518 U.S. at 349 n.1.

jurisdiction to order prospective relief. *See* Randall Opening Br. 33-34; *Lewis*, 518 U.S. at 358 & n.6.

Davison protests that the Declaratory Judgment Act must be "broadly construed," Davison Opening/Response Br. 35, but no construction of the Act can expand Article III's jurisdictional limits. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937); Randall Opening Br. 32-33.

Relying on this Court's decision in *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013), Davison also claims that "standing requirements are somewhat relaxed in First Amendment cases, and that leniency is particularly warranted with respect to the injury-in-fact requirement." Davison Opening/Response Br. 36. But *Cooksey* does not establish any freestanding "relaxation" of Article III's limits on federal jurisdiction. Instead, it described specific circumstances in which a First Amendment plaintiff can show a "threat of injury that is 'credible,' not 'imaginary or speculative,'"—neither of which is present here. 721 F.3d at 235 (quoting *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

Davison also argues he can establish injury-in-fact by "demonstrat[ing] an intention to engage in constitutionally-protected conduct that is threatened by government action." Davison Opening/Response Br. 37. Randall does not take issue with Davison's laudable intention to continue participating in public affairs,

including by commenting on social media. But Davison has failed to prove—and the District Court did not find—that Davison's future participation would be "threatened by government action."

Davison also argues that under *Kenny v. Wilson*, 885 F.3d 280 (4th Cir. 2018), a plaintiff can establish "a real and immediate threat of future injuries," and thus standing to seek prospective relief, "where a government official makes clear her *intent and ability* to act in such a manner as to infringe an individual's constitutional rights." Davison Opening/Response Br. 38 (emphasis added). But Davison fails to show (and, fatally, the District Court did not find) what even his expansive reading of *Kenny* would require: that Randall has both the ability *and the intent* to ban Davison again in the future. Instead, Davison argues that Randall is *able* to ban Davison again, and then infers from that fact that she *intends to do so*. But that argument is untenable, for several reasons.

First, there is *no* evidence in the record that Randall had any intention of repeating the ban—and the District Court made no such finding.[13]

[13] This is another stark contrast with the *Trump* case, where the individual plaintiffs were continuously blocked by the President, and remained blocked until the court entered a declaratory judgment. *Trump*, 302 F. Supp. 3d at 557. In *Trump*, the district court correctly observed that past exposure to illegal conduct does not in itself show a present case or controversy if unaccompanied by any continuing, present adverse effects, and "that plaintiff 'must show a likelihood that he or she will be injured in the future.'" *Id*. at 556. Had the District Court here adhered to that requirement, a declaratory judgment could not have been entered.

Second, Davison's logic is faulty. If a defendant's *intent* to cause future injury could be inferred from her *ability* to do so, then any defendant who maintained that her conduct was lawful on the merits would be *deemed* likely to cause future injury to the plaintiff by engaging in that conduct—and thus, Article III would no longer be an obstacle to any claim for prospective relief where the legal merits were in dispute.[14] Davison's argument would eliminate Article's III limits on a federal court's jurisdiction to award declaratory relief. If, as Davison argues, there is a substantial risk of future harm sufficient to confer standing any time a defendant presses the legal merits of her position, then there would be nothing left of the "actual controversy" requirement of the Declaratory Judgment Act, or of Article III's prohibition on advisory opinions. *See* Randall Opening Br. 34. Article III requires more than competing legal views in order to invoke the jurisdiction of a federal court.[15]

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[14] *See* Davison Opening/Response Br. 39 ("Randall's *position*, and the ongoing threat of constitutional violations that it creates, is sufficient to confer standing.") (emphasis added); Davison Opening/Response Br. 40 ("Randall has made clear throughout this litigation that she believes banning Davison was perfectly constitutional.").

[15] Davison asserts that *Lefemine v. Wideman*, 672 F.3d 292 (4th Cir. 2012), *vacated and remanded*, 568 U.S. 1 (2012) (per curiam), supports his theory because "the analogous facts of that case support a conclusion that the relief in this case was proper," even though the *Lefemine* court "did not expressly address standing." Davison Opening/Response Br. 40. But earlier cases that pass over jurisdictional questions *sub silentio* are not precedent for a finding of jurisdiction in later cases. *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) (collecting

The portions of the Order and Judgment that operate prospectively should therefore be vacated, and dismissed for lack of jurisdiction following remand from this Court. *See Benham v. City of Charlotte, N.C.*, 635 F.3d 129, 134 (4th Cir. 2011).

B. Qualified Immunity Barred Davison's Claims for Retrospective Declaratory Relief

Davison contests Randall's qualified immunity arguments in a single footnote, asserting that two cases—*Lefemine v. Wideman* and *Riechle v. Howards*—stand for the proposition that qualified immunity is inapplicable to claims for declaratory relief writ large. Davison Opening/Response Br. 37 n.11. But as Randall explained in her Opening Brief, neither case supports that proposition. Randall Opening Br. 36-39 & nn.37-39. *Lefemine*'s broad statement concerning qualified immunity's availability in suits for declaratory relief was (1) dicta, (2) erroneous, and (3) without precedential weight because the opinion was later vacated by the Supreme Court. Randall Opening Br. 36-38 & nn.37-39; *see O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) (a Supreme Court decision "vacating the

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cases). Similarly, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), which Davison cites at page 40, does not support an expansion of Article III's jurisdictional limits on the federal courts: that case involved "standing" to bring a facial (as opposed to an as-applied) challenge, a species of the prudential third-party "standing" doctrine, not of Article III standing. *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion of Stevens, J.). *City of Lakewood* does not mention or analyze the injury-in-fact requirement, and its relaxation of prudential restrictions on federal-court review could not affect *jurisdictional* limitations such as those imposed by Article III. 486 U.S. 750.

judgment of the Court of Appeals deprives that court's opinion of precedential effect"). Meanwhile, and as discussed in Randall's opening brief, although the Supreme Court has frequently stated (in *Reichle* and other cases) that qualified immunity *does* apply to claims for civil damages, the Court has never ***held*** that qualified immunity *does not* apply to claims for declaratory relief, and has on the contrary explicitly reserved decision on that question. Randall Opening Br. 36-37 n.37. Davison disputes none of this—instead staking his argument against qualified immunity on the very cases whose faults Randall has already discussed. *Compare* Randall Opening Br. 36-39 & nn.37-39, *with* Davison Opening/Response Br. 37 n.11.[16]

As Randall explained in her opening brief, both Fourth Circuit precedent and the general principles animating qualified immunity doctrine support a different conclusion: the availability of qualified immunity turns not on the distinction between damages and injunctive or declaratory relief, but on the distinction between *prospective* and *retrospective* relief. Randall Opening Br. 38-40 & n.39. Qualified immunity does not apply to claims for prospective relief—including all injunctive

[16] Davison does not dispute the rights at issue in this case were not "clearly established" at the time of the disputed conduct, and has therefore waived any argument to that effect. Davison Opening/Response Br. 34-42; *Mironescu v. Costner*, 480 F.3d 664, 677 n.15 (4th Cir. 2007) (an appellee's failure to brief an argument constitutes a waiver of that argument).

relief and some declaratory relief—but it *does* apply where a plaintiff seeks retrospective relief, such as damages or a retrospective declaratory judgment. *Id.* To hold otherwise would permit an "end run" around qualified immunity by way of the Declaratory Judgment Act, *Green v. Mansour*, 474 U.S. 64, 73 (1985), something that binding circuit precedent forbids. *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 55-56 (4th Cir. 2011) ("[A] request for declaratory relief is barred to the same extent that the claim for substantive relief on which it is based would be barred."). And it would undermine the purposes of qualified immunity—an immunity from *suit*, not just from liability, *e.g. Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019 (2014)—forcing defendants to endure discovery and trial in exactly the same way as with any damages claim. Randall Opening Br. 39-40.

If the District Court wished to "clarify[] and settl[e] the legal relations in issue," by resolving "uncertainty" around the disputed legal questions, JA501-JA502, the proper course was to take advantage of *Pearson v. Callahan*'s relaxed "order of battle," 555 U.S. 223, 234 (2009), and analyze the disputed constitutional question before concluding that because the rights in issue were not "clearly established," Davison's claims for retrospective relief were barred by qualified immunity. Randall Opening Br. 39-40; *Pearson*, 555 U.S. at 236-44.

V. Davison's Official-Capacity Claims Against Randall Were Properly Dismissed

While the District Court should have rejected Plaintiff's request for any declaratory judgment for the reasons explained above, the trial court correctly refused to issue a declaratory judgment against Randall in her official capacity. Davison's failure to prove standing to seek prospective relief is equally fatal to his official-capacity claims for prospective relief. And the Eleventh Amendment bars official-capacity claims against state officials seeking retrospective declaratory relief. Randall Opening Br. 35 n.35 (citing *Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998)). Even so, "[t]here is no . . . need to bring official-capacity actions against local government officials" like Defendant "for . . . local government units can be sued directly for damages and injunctive or declaratory relief" under 42 U.S.C. § 1983. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *see* JA482. Here, Plaintiff concedes that his "official capacity" claims against Randall are really directed to the Board of Supervisors. *See* Plaintiff-Appellant Brian C. Davison's Informal Opening Br. 6 ("A suit against a state actor in their official capacity is a suit against the public body itself.").

Moreover, any claim against Randall in her official capacity was duplicative of Plaintiff's claims against the Boardof Supervisors, and subject to dismissal on that basis as well. *See, e.g.*, *Cotton v. District of Columbia*, 421 F. Supp. 2d 83, 86 (D.D.C. 2006).

VI. Randall Did Not Violate the Due Process Requirements of the United States or Virginia Constitutions

The District Court correctly determined that Randall did not violate the due process requirements of the United States Constitution or the Constitution of Virginia in either her individual or official capacity, and committed no error or abuse of discretion in declining to issue the declaratory judgment sought by Plaintiff.

Although Davison's due process theory before the trial court was unclear,[17] both below and on appeal it is premised on the notion that he was subject to a "prior restraint." *See* Davison Opening/Response Br. 49-52.[18] However, the 12-hour ban of Plaintiff's "Virginia SGP" persona does not resemble any recognized unlawful "prior restraint." "The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citing Melville B. Nimmer, Nimmer on Freedom of Speech § 4.03, at 4-14 (1984)).

Davison also claims the trial court erred in concluding that the alleged First Amendment violation was too minimal to warrant pre-deprivation procedures,

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[17] The District Court correctly observed about Davison's due process claims: "Plaintiff's legal theory is somewhat unclear" and "Plaintiff offered virtually no evidence or argument on the due process issue." JA491.

[18] Davison consistently alleged the 12-hour ban was an unlawful "prior restraint." *See*, *e.g.*, JA84 (Trial Tr. 6:15); JA85 (Trial Tr. 7:14); JA316 (Trial Tr. 238:1-15).

claiming it constituted "irreparable injury." Davison Opening/Response Br. 34. But the evidence established there was (at most) a *de minimis* impact on Davison. *See* Randall Opening Br. 28-29.[19]

The District Court was also correct that pre-"deprivation" process would have been impractical here, and that Plaintiff "failed to adduce any evidence or make any argument regarding the adequacy of available post-deprivation process. Davison bore the burden of demonstrating that any post-deprivation process here was constitutionally inadequate." JA496-JA498.[20]

[19] Davison fails to address the cases cited in Randall's Opening Brief concerning impacts on First Amendment rights so *de minimis* they do not constitute constitutional violations. *Compare* Randall Opening Br. 28 (citing *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("There is, of course a *de minimis* level of imposition with which the Constitution is not concerned."), *and Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006) ("[W]e have recognized a distinction between an adverse impact that is *actionable* . . . and a *de minimis* inconvenience."), *with* Davison Opening/Response Br. 34.

[20] Because Davison's cross-appeal concerning amendment of his complaint involved a potential claim against Loudoun County alone, Randall does not address it here.

CONCLUSION

The portions of the District Court's Order and Judgment against Randall that operate prospectively should be vacated and remanded with instructions to dismiss for lack of jurisdiction. The portions of the District Court's Order and Judgment against Randall that operate retrospectively should be reversed. In all other respects, the District Court's judgment and orders below should be affirmed.

Respectfully submitted,

Dated: August 9, 2018

/s/ Scott E. Gant

Scott E. Gant
Aaron E. Nathan
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727
sgant@bsfllp.com

Counsel for Phyllis J. Randall

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and Local Rule 34(b), I certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 28.1(e)(2)(A)(i) because it contains 6,579 words, excluding the parts exempted by Fed. R. App. P. 32(f), as determined by the word count function of Microsoft Word. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

August 9, 2018 /s/ Scott E. Gant

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), I certify that the foregoing was electronically filed with the Clerk of Court on August 9, 2018 using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

August 9, 2018 /s/ Scott E. Gant