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,

AND

LOUDOUN COUNTY BOARD OF SUPERVISORS,

Defendant–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

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This case is about the right to participate in a public forum without being subject to eviction, without notice, based on the viewpoint one expresses in that forum. Davison seeks to vindicate this right through his cross-appeal of three erroneous rulings issued by the District Court: its denial of Davison's claim against Randall in her official capacity; its denial of Davison's due process claim; and its denial of Davison's motion to amend his complaint. Neither Randall nor the County fully engages with the three arguments that Davison raises in his cross-appeal.

As to the official capacity argument, the County asserts only that it did not have a stated policy governing Randall's operation of her County Facebook Page and, therefore, that it cannot be deemed liable for the infringement of Davison's First Amendment rights. But the County's consistent position in this litigation—that Randall is free to block whomever she likes, for whatever reason—demonstrates a municipal policy of indifference to Davison's First Amendment rights that supports the imposition of municipal liability. And the County does not respond at all to Davison's other arguments for ordering relief against the County in this case, including his argument that Randall acted as a final policymaker as to the administration of her County Facebook Page. For her part, Randall does not address

[1] All abbreviated names and defined terms have the same meaning as in Davison's Opening/Response Brief. *See* Dkt. 64

Davison's official capacity arguments at all, except to assert that Davison lacks standing to pursue relief against her in her individual or official capacities. But Davison has already demonstrated the credible threat of constitutional injury, as well as an objectively reasonable chilling effect from Randall's refusal to disavow her claim of authority to ban Davison from her County Facebook Page based on viewpoint. These two injuries are independently sufficient to establish standing.

On the due process claim, the County fails to show that Randall's banning of Davison from her County Facebook Page was the narrow kind of "random and unauthorized" act that makes pre-deprivation procedural due process infeasible. To the contrary, the County's revised social media policy reflects the County's apparent recognition that it *is* feasible and advisable to provide pre-deprivation process before a person's speech is restricted on a County social media site, and demonstrates that it is entirely practicable for the County to provide similar due process when one of its Supervisors operates a social media site for official purposes. Finally, the County incorrectly describes the claim that Davison was seeking to add to his complaint, and then fails to refute Davison's argument that the District Court erred in denying his motion to amend on the merits of the claim instead of allowing him the opportunity to develop that claim through pleadings and discovery.

I. To Protect His First Amendment Right to Participate in Loudoun County Public Forums, Davison Is Entitled to Prospective Relief Against Randall in Her Official Capacity.

By naming Randall in her official capacity, Davison effectively sued Loudoun County. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Davison named Randall in her official capacity to ensure that, in the future, County supervisors like Randall will conform their operation of *de facto* official social media sites to the requirements of the First Amendment. In his opening brief, Davison explained why prospective relief should have been granted against Randall in her official capacity under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), or, alternatively, under *Ex Parte Young*, 209 U.S. 123 (1908). Davison Opening/Response Br. at 43–48. Neither Randall nor the County persuasively refutes Davison's arguments.[2]

A. Prospective Relief Is Warranted Against the County for Randall's Constitutional Violation.

Davison has shown that the County's deliberate indifference to unconstitutional censorship on individual Supervisors' social media sites is a moving force behind the First Amendment injury here, and therefore relief against the county

[2] Randall does not address any of the bases for official capacity relief in her response brief, but simply asserts that Davison lacks Article III standing for any relief against Randall, in either her individual or official capacities. Randall's standing argument is addressed below.

is appropriate. Davison Opening/Response Br. at 46–47. The County responds that it cannot be liable because it had no explicit policy governing Randall's County Facebook Page. County Response Brief, Dkt. 77, at 8. But that argument ignores that municipal liability may be based on a failure to act where the failure amounts to deliberate indifference to the rights of persons with whom municipal officials come into contact, and that indifference is the moving force behind the plaintiff's injury. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); *see also Lytle v Doyle*, 326 F.3d 463, 471 (4th Cir. 2003); *Carter v Morris*, 164 F.3d 215, 218 (4th Cir. 1999). The County satisfies this standard. Although the County has adopted explicit guidelines governing the use of its "official social media platforms," the County's position is that those guidelines "d[o] not apply to Board members or their staff." J.A. 53. In contrast to its guidelines for "official social media platforms," which contain provisions designed to ensure compliance with the First and Fourteenth Amendments,[3] the County has vested complete discretion in the Supervisors regarding individual social media sites that they use in the course of governing. This policy of omission is directly responsible for Davison's constitutional injury. *See,*

[3] In November 2016, the County adopted a new Social Media Comments Policy. J.A. 49. The new policy differs from the old in two main respects. First, it no longer permits the removal of comments that are "clearly off topic." Second, the authority to remove comments from County social media sites now resides with the Office of the Public Administrator, which must give notice to the commenter before deleting the comment or banning the commenter. *Id*.

e.g., *Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992) ("[T]he decision not to take any action to alleviate the problem of detecting missed arraignments constitutes a policy for the purposes of § 1983 municipal liability."); *Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994) (The "failure to adopt a departmental policy governing th[e] use [of canines], or to implement rules or regulations regarding the constitutional limits of that use, evidences a 'deliberate indifference' to constitutional rights.").

Further, the County has independently demonstrated its deliberate indifference through its posture in this litigation. Once a municipality has become aware through the filing of a lawsuit of the ongoing denial of a constitutional right, its decision not to halt the challenged conduct—and to defend the lawsuit—itself constitutes a municipal policy that is the moving force behind the continuation of the deprivation of the constitutional right. *See Henry v. Cty. of Shasta*, 132 F.3d 512, 519 (9th Cir. 1997) (noting that "post-event evidence is not only admissible for purposes of proving the existence of a municipal defendant's policy or custom, but is highly probative with respect to that inquiry" (citing *Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir.1985))); *Allen v. Muskogee*, 119 F.3d 837, 842 (10th Cir. 1997) ("[E]vidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring

situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability.").

Here, the County has been aware of the nature of Davison's constitutional injury since at least the filing of this lawsuit in July 2016. It has decided not to change its policy, but rather to argue in court that Randall's County Facebook Page is personal, not official, and, accordingly, that Randall has unfettered discretion in the administration of that page. Even after the District Court found Randall in violation of the First Amendment, the County has vigorously maintained that position in this Court. *See, e.g.*, County Response Br. at 7 ("Randall was not operating in her official capacity when she created and maintained her Facebook page."). The County's assertion that the deliberate indifference standard is not met because "there is no way the Board of Supervisors or anyone else could have possibly foreseen that the District Court would find [such] violation" is therefore unavailing. *Id.* at 9. Certainly by July 2017, when the District Court ruled that Randall's County Facebook Page was used as an instrument of governance and therefore was subject to the First Amendment, the County was aware that viewpoint discrimination on individual Supervisors' social media sites was unconstitutional. Yet it continued to refuse to take steps to ameliorate this injury through training or adopting guidelines designed to ensure that individual Supervisors' sites comply

with the First Amendment. This deliberate indifference is sufficient to impose prospective liability on the County.

Even if the County's actions did not rise to the level of deliberate indifference—and they do—relief against the County may appropriately be based on Randall's action as a final policymaker as to the administration of her County Facebook Page. The Supreme Court has held that municipal liability may be based on a single decision by a municipal official who has final policymaking authority. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). In maintaining her County Facebook Page and banning Davison from that page, Randall acted as a final policymaker.

The County argues—albeit somewhat obliquely—that Randall does not have final policymaking authority because individual supervisors do not have power or authority under the Virginia Code to bind the County and the County may only act as a whole with a quorum present. County Response Br. at 7 (citing Va. Code §§ 15.2-1215 and 15.2-1425). However, final policymaking authority need not be bestowed by legislative enactment; it can be delegated. Moreover, delegation may be "express . . . or implied from a continued course of knowing acquiescence by the governing body in the exercise of a policymaking authority by an agency or official." *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987).

Here, it is clear under Virginia law that the Board of Supervisors is the final policymaking body for the County. *See* Va. Code § 15.2-403 ("The board shall be the policy-determining body of the county."). By knowingly allowing its Supervisors to conduct County business using individual social media sites, the County has impliedly delegated to those Supervisors carte blanche authority to make "formal or informal *ad hoc* 'policy' choices or decisions" with respect to the administration of their individual social media sites. *See Hunter v. Town of Mocksville*, 897 F.3d 538, 554 (4th Cir. 2018) (quoting *Spell*, 824 F.2d at 1385) (finding that the Town Board delegated final policymaking authority to the Town Manager where it granted her unfettered discretion to make personnel decisions). The County has not constrained that authority. Nor has it maintained any meaningful review process for evaluating individual members' choices and decisions. The circumstances surrounding Randall's decision to ban Davison therefore confirm that Randall acted as a final policymaker in wielding her authority over the public forum of her County Facebook Page. *Id.* at 557. To hold otherwise would, in effect, mean that the County has *no* policymakers with regard to such decisions. "Such a conclusion would sanction and encourage 'egregious attempts by local governments

to insulate themselves from liability for unconstitutional policies.'" *Id.* at 558 (quoting *Praprotnik*, 485 U.S. at 127).[4]

B. Davison Has Standing to Obtain Relief Against Randall in Her Official Capacity.

The only response that Randall offers to Davison's official capacity argument is to argue that Davison lacks standing to pursue such relief. Randall Response/Reply Brief, Dkt. 78, at 24. That contention is without merit. As Davison explained in his Opening/Response Brief, he satisfies the injury-in-fact requirement in two ways: first, by demonstrating an intention to engage in constitutionally

[4] Even if the Court were to conclude that municipal liability under *Monell* has not been established, Davison would still be entitled to prospective equitable relief under *Ex parte Young*. *See* Davison Opening/Response Br. at 48–49. Under *Ex parte Young*, private citizens may sue state officials in their official capacities in federal court to obtain prospective equitable relief from ongoing violations of federal law. *See McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (The requirement that the violation of federal law be ongoing is satisfied when the violation "is threatened, even if the threat is not yet imminent."). As the Court made clear in *Paxman v. Campbell*, this doctrine extends to municipal officials who act as Randall did here—under color of state law. 612 F.2d 848, 861 (4th Cir. 1980) (holding that school board officials "acting in good faith under color of state law, have, as municipal officials, nevertheless acted in an unconstitutional manner" and should therefore "be stripped of their official or representative character, and required to conform the future conduct of . . . office, to the requirements of the Constitution." (quotation marks and citations omitted)), *reasoning with respect to qualified immunity called into question by Owen v. City of Independence*, 445 U.S. 622 (1980), *but reasoning with respect to Ex parte Young left intact*.

protected conduct that is threatened by government action; and, second, by making a sufficient showing of self-censorship. Davison Opening/Response Br. at 37.[5]

As to the first basis, Randall concedes that Davison has demonstrated an intention to engage in constitutionally protected conduct, but argues that Davison has failed to prove that this conduct would be threatened by government action. Randall Response/Reply Br. at 18–19. Specifically, Randall argues that the threat of government action must be "real and immediate," and that Davison has failed to meet that standard because while Randall may be "*able* to ban Davison again," there is no evidence in the record that she has any intention of doing so. *Id.* at 19.

But as this Court made clear in its recent decision in *Kenny v. Wilson*, the applicable test is whether the threat of government action is "credible." 885 F.3d 280, 288 (4th Cir. 2018) (quoting *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). A threat is credible "so long as [it] is not imaginary or wholly speculative, chimerical, or wholly conjectural." *Id.* (quotation marks and citations

[5] Randall further argues that "the Eleventh Amendment bars official-capacity claims against state officials seeking retrospective declaratory relief," citing *Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998). Randall Response/Reply Br. at 24. But Davison does not seek retrospective relief. *Republic of Paraguay* is therefore inapposite. The plaintiffs there sought declaratory and injunctive relief that was "quintessentially retrospective: the voiding of a final state conviction and sentence." *Republic of Paraguay*, 134 F.3d at 628. Here, Davison does not seek "to undo accomplished state action." *Id.* Rather, he seeks to foreclose further state action in violation of his constitutional rights.

omitted). In evaluating the nature of the threat, "[p]ast enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical." *Id.* (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014)). Further, the threat is "especially credible when defendants have not 'disavowed enforcement' if plaintiffs engage in similar conduct in the future." *Id.*

Kenny's application of these principles is instructive. The plaintiffs in that case included a group of current and former South Carolina public school students. They filed suit under 42 U.S.C. § 1983, challenging the state's disturbing schools and disorderly conduct laws as unconstitutionally vague. The District Court dismissed the action for lack of standing, and this Court reversed. The Court concluded that at least some of the plaintiffs faced a credible threat of arrest or prosecution under the challenged laws because they "regularly attend schools where they allege there may be future encounters with school resource officers or other law enforcement; they had been prosecuted under the laws in the past;[6] and the defendants have not disavowed enforcement if [the] plaintiffs engage in similar conduct in the future." *Id.* at 289.

[6] Each of the plaintiffs had been arrested or charged once under the disturbing schools and disorderly conduct statutes, much as Davison has been banned from Randall's County Facebook Page once.

Here, the District Court found—and Randall rightly concedes—that Davison intends to continue participating in public affairs, including by interacting with Randall's County Facebook Page. J.A. 502; Randall Response/Reply Br. at 18–19. Randall has previously banned Davison from that page on the basis of viewpoint. J.A. 480–81 ("[Randall] acted out of 'censorial motivation' to suppress criticism of county officials related to 'the conduct of their official duties.'"). What is more, Randall refuses to disavow her authority to do so again. To the contrary, she maintains—as she has maintained throughout the course of this litigation—that "she is permitted to administer [her] Facebook page as a purely personal page," and that she may ban those who interact with it for any reason, or no reason at all. J.A. 502. The threat that Randall will ban Davison in the future is therefore not chimerical, but real, and is sufficient to satisfy the injury-in-fact requirement for prospective relief.

Davison also satisfies the injury requirement of Article III because he has made out a "sufficient showing of self-censorship." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (quotation marks omitted). As Davison explained in his Opening/Response Brief, Randall's actions have an objectively reasonable chilling effect on his speech because they are "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." Davison Opening/Response Br. at

40–41 (citation omitted). Randall has failed to refute this argument. Indeed, she does not even address it.[7]

II. Davison Is Entitled to a Declaratory Judgment that Due Process Is Required Before a County Official Attempts to Ban an Individual from a Public Forum Indefinitely.

The County fails to engage at all with Davison's argument that his due process rights were violated when Randall banned him from her County Facebook Page based on the views he expressed in a comment. At most, the County offers two inapposite challenges to Davison's due process arguments. First, the County suggests that because "[t]here is no evidence in the record of an established state or county procedure with regard to Ms. Randall's Facebook page," Randall's ban of Davison from her County Facebook Page must have been a "random, unauthorized

[7] Randall argues that Davison's reliance on *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), is misplaced because "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." Randall Response/Reply Br. at 21 n.15 (quotation marks and citations omitted). But Davison does not rely on *City of Lakewood*'s analysis of Article III standing. He relies on what it says about the relationship between vesting unbridled discretion in a government official to restrain speech and the risk of self-censorship. *See City of Lakewood*, 486 U.S. at 757 ("[T]he mere existence of the [government official]'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."). Here, Randall claims the power to ban users from her County Facebook Page at will. That position plainly gives rise to a risk of self-censorship, especially by individuals like Davison—who have been banned by Randall in the past.

act" for which no pre-deprivation process is required. County Response Br. at 12. But that is not the correct standard. The Supreme Court and this Court have made clear that where, as here, a government official deprives an individual of a liberty interest (such as freedom of speech), that individual is presumptively entitled to pre-deprivation process unless the deprivation was "random and unauthorized." *See Zinermon v. Burch*, 494 U.S. 113, 127–29 (1990); *Plumer v. Maryland*, 915 F.2d 927, 929–31 (4th Cir. 1990). The mere fact that the County did not have a policy in place at the time of deprivation does not mean that the deprivation was "random and unauthorized." To the contrary, a deprivation is "random and unauthorized" only if (1) the risk of erroneous deprivation was unforeseeable; (2) the deprivation could not have been prevented by pre-deprivation procedures; and (3) the public official lacked authority to effect the deprivation. *Zinermon*, 494 U.S. at 136–39. As Davison demonstrated in his opening brief, an erroneous decision banning a citizen from Randall's County Facebook Page was foreseeable, the deprivation could have been prevented by pre-deprivation procedures like those contained in the County's social media policy for "official" social media sites, and Randall has the authority to determine whom to exclude from her County Facebook Page. Davison Opening/Response Br. at 55–57. Randall's actions were therefore not "random and unauthorized" within the meaning of *Zinermon*.

Second, the County asserts that Davison offered insufficient evidence that a pre-deprivation process would have benefited him. County Response Br. at 12. But the County does not dispute that pre-deprivation process like that directed by the County's current social media policy for other County sites would have reduced the risk of Davison's unlawful exclusion from Randall's County Facebook Page for his unpopular viewpoint. Moreover, it is well-established that "a system of prior restraint runs afoul of the First Amendment if it lacks certain [procedural] safeguards" designed to "reduce the danger of suppressing constitutionally protected speech," and there is no question that banning individuals indefinitely from speaking at all in a public forum is a prior restraint. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559–60 (1975).

Randall dismisses Davison's entitlement to due process on the grounds that her decision to ban Davison from her County Facebook Page had only a "*de minimis* impact." Randall Response/Reply Br. at 26. Randall does not cite any case that would support the notion that viewpoint discrimination—the very sort she engaged in when she banned Davison from her County Facebook Page because she did not like his comment—is permitted so long as it is for only a short period of time. And Supreme Court precedent instructs that "[t]here is no *de minimis* exception for a speech restriction that"—just like the one imposed here—"lacks sufficient tailoring

or justification." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001); *see also* Davison Opening/Response Br. at 33–34 (citing cases).

There are significant constitutional ramifications in permitting government officials to ban citizens indefinitely from public forums based only on their viewpoint without any notice or opportunity to be head. *See* Davison Opening/Response Br. at 52–53. Davison respectfully urges this Court to reverse the District Court's denial of his due process claim and declare the deprivation of Davison's rights to be unconstitutional.

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

In defending the District Court's denial of Davison's motion to amend, the County misapprehends which claim Davison was seeking to add to his complaint. The County appears to believe that Davison was seeking to add a claim concerning the deletion of certain comments that Davison posted to the County's Facebook page in July 2016. County Response Br. at 14–15. But as the District Court recognized, the claim that was the subject of Davison's motion to amend did not concern past deletions; it focused on certain features of Facebook that enable other individuals to block Davison from participating in comment threads on the County's Facebook page. The District Court explained:

> [Davison] contends that *third parties* have used the Facebook platform in ways that have limited [his] ability to view and engage with their comments on County social media websites. In short, several

> individuals have "blocked" [Davison] on Facebook, which precludes [Davison] from viewing their Facebook activity. [Davison] believes these individuals are utilizing the County's social media websites, and that he is deprived of the opportunity to engage with their comments and any responses.

J.A. 74. In other words, Davison is alleging that the County, by using Facebook, essentially allows third parties to block Davison from participating in certain segments of a public forum. The County has failed to mount any argument to address this claim.

As set forth in Davison's Opening/Response Brief, the District Court reviewed Davison's motion to amend under a far more rigorous standard than is warranted at the pleading stage. *See* Davison Opening/Response Br. at 60–61. The District Court improperly concluded that Davison's claim would ultimately fail on the merits, instead of accepting Davison's allegations as true and allowing him the opportunity to develop his claim through discovery. Under this Court's *de novo* review, that ruling should be reversed.[8]

[8] The County's suggestion that the Court apply an abuse of discretion standard ignores the fact that a denial of leave to amend a pleading based on futility is reviewed *de novo*. *See United States ex rel. Ahumada v. NISH*, 756 F.3d 268, 274 (4th Cir. 2014) (citing cases); *see also* Davison Opening/Response Br. at 58–61. Although the District Court's alternative conclusion that Davison's motion to amend came too late in the proceedings is reviewed for an abuse of discretion, the District Court plainly abused its discretion because Davison had moved to amend several times much earlier in the proceedings, and those motions were dismissed without prejudice by the magistrate judge. *See* Davison Opening/Response Br. at 58 n.25.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Davison's Opening/Response Brief, the District Court erred in denying Davison's claim against Randall in her official capacity, in denying Davison's claim for violation of his due process rights, and in denying Davison's motion to amend his complaint. Therefore, Davison respectfully requests that these portions of the District Court's Order and Judgment be reversed or, where appropriate, remanded for further proceedings.

Dated: August 23, 2018

Respectfully Submitted,

/s/ Katherine Fallow

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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 4,303 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.

August 23, 2018 /s/ Katherine Fallow

CERTIFICATE OF SERVICE

I certify that on August 23, 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.

August 23, 2018 /s/ Katherine Fallow