

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

BRENDA BOHANAN,

Plaintiff,

v.

DOUGLAS COUNTY COMMISSIONER
KELLY G. ROBINSON,
in his individual and official capacities,

Defendant.

CIVIL ACTION
NO. 1:20-cv-02641-JPB

**DEFENDANT KELLY G. ROBINSON'S
MEMORANDUM OF LAW IN SUPPORT OF HIS
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
I. Background Facts.....	5
II. Robinson’s Facebook Pages.....	5
III. Bohanan’s Inappropriate Interactions with Robinson.....	6
IV. Douglas County Paid Bohanan \$750 to Avoid Litigation Expenses Associated With Defending Legally Deficient Claims.....	8
V. Robinson’s Current Use of Facebook.....	9
LEGAL STANDARD	10
I. Dismissal for Lack of Subject Matter Jurisdiction.....	10
II. Dismissal for Failure to State a Claim.....	11
ARGUMENT AND CITATION TO AUTHORITY	11
I. The Court Lacks Subject Matter Jurisdiction to Consider Bohanan’s Claims.....	12
II. Bohanan’s Complaint Should Be Dismissed Failure to State a Claim	15
A. Bohanan’s Claims Are Barred by the Statute of Limitations. ..	15
B. Plaintiff’s Claims Are Barred By the Doctrine of Equitable Estoppel.....	16
C. Bohanan’s Claims Against Robinson in His Official Capacity Are Barred By Qualified Immunity.....	18
D. Bohanan Has Failed to Establish The Unlawful Closure of a Public Forum.....	22
E. Bohanan Has Failed to Establish That Robinson Breached the Settlement Agreement.....	24

F. Bohanan is Not Entitled to Declaratory or Injunctive Relief. ...24

CONCLUSION.....25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Al Najjar v. Ashcroft</i> , 273 F.3d 1330 (11th Cir. 2001)	1
<i>Ansley v. Ansley</i> , 307 Ga. App 388 (2010).....	23, 24
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2008).....	11
<i>Beckman v. Hamilton</i> , 731 Fed. App’x 737 (11th Cir. 2018)	20
<i>Blue Ridge Mountain Fisheries, Inc. v. Dept. of Nat. Resources</i> , 217 Ga. App. 89 (1995)	15
<i>Chabad-Lubavitch of Ga. v. Miller</i> , 5 F.3d 1383 (11th Cir. 1993)	4, 21, 23, 24
<i>Corbett v. Transp. Sec. Admin.</i> , 930 F. 3d 1225 (11th Cir. 2019)	25
<i>D.C. v. Wesby</i> , 138 S. Ct. 577 (2018).....	20
<i>Dawkins v. Fulton Cty. Gov’t</i> , 733 F.3d 1084 (11th Cir. 2013)	17
<i>Echols v. Lawton</i> , 913 F.3d 1313 (11th Cir. 2019)	19
<i>Fair Fight Action, Inc. v. Raffensperger</i> , 413 F. Supp. 3d 1251 (N.D. Ga. 2019).....	13
<i>Gagliardi v. TJC Land Trust</i> , 889 F.3d 728 (11th Cir. 2018)	13, 15, 25
<i>Gardner v. Mutz</i> , 962 F.3d 1329 (11th Cir. 2020)	10, 11

Harod v. Sage Prod., Inc.,
 188 F. Supp. 2d 1369 (S.D. Ga. 2002)17

Jackson v. BellSouth Telecomm.,
 372 F.3d 1250 (11th Cir. 2004)11, 14

Keevan v. Smith,
 100 F.3d 644 (8th Cir. 1996)13

Lind v. UPS,
 254 F.3d 1281 (11th Cir. 2001)23

Little v. Markely,
 No: 3:15-CV-0067, 2015 U.S. Dist. LEXIS 109992 (M.D. Ga.
 Aug. 20, 2015)16

Lovett v. Ray,
 327 F.3d 1181 (11th Cir. 2003)16

Mathews v. Crosby,
 480 F.3d 1265 (11th Cir. 2007)19

Mercado v. City of Orlando,
 407 F.3d 1152 (11th Cir. 2005)19

*Nat’l Ass’n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys.
 of Georgia*,
 633 F.3d 1297 (11th Cir. 2011)10, 13

Norton v. Budget Rent a Car Sys.,
 307 Ga. App. 501 (2010)24

In re Pullen,
 451 B.R. 206 (Bankr. N.D. Ga. 2011)17

Santana v. Miami-Dade County,
 688 F. App’x 763 (11th Cir. 2017)21

Stabler v. Tyson Foods, Inc.,
 No. 5:17-cv-00143-MTT, 2018 U.S. Dist. LEXIS 176233 (M.D.
 Ga. 2018).....23

State Farm Mut. Auto. Ins. Co. v. Bates,
542 F. Supp. 807 (N.D. Ga. 1982).....25

Stillwell v. Allstate Ins. Co.,
663 F.3d 1329 (11th Cir. 2011)11

Youmans v. Gagnon,
626 F.3d 557 (11th Cir. 2010)19, 20

Statutes

42 United States Code § 1983.....1, 15, 16, 25

Rules and Regulations

Federal Rule of Civil Procedure

§ 12(b)(1)1, 10, 12, 13

§ 12(b)(6)1, 11

Other Authorities

First Amendment.....3, 22

Fourteenth Amendment1, 5

United States Constitution1, 10

INTRODUCTION

Defendant Kelly G. Robinson (“Robinson”) moves pursuant to Federal Rule of Civil Procedure 12(b)(1) and, alternatively, Rule 12(b)(6), for the Court to dismiss all claims asserted in Plaintiff Brenda Bohanan’s (“Bohanan”) Amended Complaint. Bohanan alleges that Robinson violated her First and Fourteenth Amendment rights under the United States Constitution, as prohibited under 42 U.S.C. § 1983, because Robinson closed his public Facebook page located at <https://www.facebook.com/commissionerkelly.robinson>, (“Old Facebook Page”), and declined to grant Bohanan access to his newly created personal Facebook page located at <https://www.facebook.com/kellyrobinsonsr> (“Personal Facebook Page”). Bohanan’s claims against Robinson—whether asserted in his individual or “official” capacity—fail in their entirety for multiple reasons.

First, Bohanan lacks standing to bring this action because her claims are moot. The Facebook page that is the subject of the Settlement Agreement, and which Bohanan asserts that she was entitled to access is defunct. (Dec. ¶ 11.) Thus, the Court cannot grant Bohanan access to that “public forum”, or provide “meaningful relief” in that regard. *See Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (if court cannot grant the plaintiff “meaningful relief”, the case is moot and must be dismissed for lack of subject matter jurisdiction).

Moreover, although Bohanan claims that the Amended Complaint is filed to address “newly arisen” facts, it omits important facts. Bohanan even attempts to distance herself from her own sworn admissions in the “Verified Complaint”, in an effort to revive her defective claims. Nevertheless, and contrary to Bohanan’s assertion that Robinson engaged in an “unconstitutional forum closure”, counsel for Robinson informed Bohanan’s counsel *before* Bohanan filed suit that Robinson intended to maintain a wholly personal Facebook account, and that any posts by Robinson directed at his role as a public official were being removed from the Personal Facebook Page. (*See* Ex. 1., Correspondence Between S. Olens, C. Norins and G. Weber (“Correspondence”)).¹ Counsel for Robinson also explained that—to ensure that all items were removed—Robinson would cull through more than ten-years-worth of Facebook data, and the review would take time to complete. (*Id.*)

Despite Bohanan’s attempt to make it appear that Robinson was dilatory in addressing Bohanan’s concerns, counsel for Bohanan agreed that it was a “cumbersome process.” (*Id.*) Nevertheless, as Robinson was diligently, and in good faith, balancing managing the review and removal judiciously, while continuing to serve his constituents during the early and crucial stages of the global

¹ The Court can consider the correspondence in this motion because the Amended Complaint refers to the parties’ communications (Am. Compl. ¶¶ 78-79.) and the authenticity of the document is not challenged. *Lowman v. Platinum Prop. Mgmt. Servs., Inc.*, 166 F. Supp. 3d 1356, 1358 (N.D. Ga. 2016).

COVID-19 pandemic, Bohanan filed her Complaint alleging that Robinson acted in “bad faith”, just nineteen (19) days later. Now, despite full knowledge of the process that Robinson was undertaking, and acquiescing to that process, the Amended Complaint seeks money and an injunction against Robinson asserting that Robinson “closed the public forum for the purpose of excluding Plaintiff and others whose speech [Robinson] disfavors.” (*See id.*; Am. Comp. ¶ 5.)

Indeed, despite pleading thirty-eight pages of allegations, the relevant facts are few, and the matter simple. Robinson’s counsel expressly informed Bohanan’s counsel that Robinson was removing any postings related to his official duties. (*See* Ex. 1., Correspondence.) Counsel for Bohanan agreed to this course of action. (*Id.*; *see also* Am. Compl. ¶ 81.) Robinson has completed that process, and further affirms he intends to remain compliant with the applicable law. (*See* Ex. 2., Declaration of Kelly G. Robinson (“Dec.”) ¶ 12.; Ex. 3., Supplemental Dec. ¶ 4. (“Supp. Dec.”)) Thus, Bohanan has failed to present a justiciable controversy.

Second, Bohanan’s First Amendment claims stemming from Robinson blocking her from his Old Facebook Page are barred by the two-year statute of limitations because Bohanan was “blocked” in June 2015. (Am. Compl. ¶ 88.)

Third, Plaintiff’s claims are barred by equitable estoppel because Bohanan’s counsel acquiesced to the changes which Bohanan now asserts violate her constitutional rights. (*See* Ex. 1., Correspondence) Robinson reasonably relied on

discussions with Bohanan's counsel in continuing the search and removal of posts directed at his official role. Bohanan cannot now seek damages for conduct her counsel acquiesced to, after waiting for Robinson to complete that process.

Fourth, Bohanan has failed to state a claim upon which relief can be granted because Robinson did not engage in view point discrimination. Robinson merely brought his Facebook page into compliance with Facebook's Community Standards by ensuring that he was not complicit in violating those standards, and ensuring that he did not maintain Hate Speech on his Old Facebook Page.

More importantly, even if Robinson engaged in viewpoint based discrimination through the closure of his Old Facebook Page, as alleged, controlling precedent dictates that Robinson is free to close a forum, even for the purpose of limiting expression. *See Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993) (finding Georgia can close the forum "altogether" to avoid maintaining a religious display in the state capitol). Bohanan simply cannot prevail on her claims, which stem from the incorrect assertion that she is entitled to force a government official to continuously maintain a "public forum."

In sum, the Amended Complaint also fails as a matter of law.²

² On August 24, 2020, Robinson filed a Motion to Dismiss Bohanan's Complaint. (Doc. 15.) Robinson also served counsel for Bohanan with formal notice pursuant to Rule 11 of the false allegations in the Complaint, and misinformation publically disseminated. (*Id.* at 8, n. 2.) On September 14, 2020, Bohanan filed an Amended Complaint, curing, in part, the false allegations. In September 2020, counsel for

STATEMENT OF FACTS³

I. Background Facts

Bohanan filed suit against Robinson alleging violations of her First and Fourteenth Amendment Rights, stemming from Robinson's closure of his Old Facebook Page.

II. Robinson's Facebook Pages.

Robinson currently maintains three separate Facebook accounts.⁴ The Complaint centers on three different Facebook accounts having belonged to Robinson. First, is Robinson's Facebook account for his official duties as a Douglas County Commissioner ("Official Facebook Page") (Dec. ¶ 7.) The Official Facebook Page is a designated or limited public forum, that Robinson uses to communicate, or otherwise share information about his official duties. Bohanan admits that she has access to the Official Facebook Page. (Am. Compl. ¶ 14.)

Second, is Robinson's former Facebook page ("Old Facebook Page"). (Dec. ¶¶ 9-10.) The Old Facebook Page initially contained only personal information

Bohanan also amended the Clinic's public website discussing this lawsuit (*See* <https://firstamendment.law.uga.edu/clinic-wins-settlement-for-douglas-county-resident-blocked-from-county-commissioners-facebook-page/>).

³ Unless otherwise contradicted, Robinson takes the well pleaded facts in the Amended Complaint as true, for purposes of the present motion to dismiss only.

⁴ Official Facebook Page (available at <https://www.facebook.com/commissionerkellyrobinsonofficial>); Old Facebook Page (available at <https://www.facebook.com/commissionerkelly.robinson>); Personal Facebook Page (available at <https://www.facebook.com/kellyrobinsonr>).

related to Robinson’s non-public life. But, over time, Robinson shared information related to his public office on the Old Facebook Page. (*Id.* ¶¶ 12–14).

Third, is Robinson’s new Facebook created to interact with his friends and family (“Personal Facebook Page”). (Dec. ¶ 11.) The Personal Page was created to draw a clear distinction between the limited or designated public forum on the Official Facebook Page and the Re-Elect Facebook Page, while still allowing Robinson to exercise his privacy rights, as a private citizen, and maintain a Facebook account for personal social purposes. (*Id.* ¶¶ 11, 16.) Bohanan is not blocked from Robinson’s Personal Facebook Page. (*Id.* ¶¶ 16-17; Am. Compl. ¶ 84.)

III. Bohanan’s Inappropriate Interactions with Robinson.

Robinson, who is African-American, is legally blind. (Dec. ¶ 3.) In or around June 2015, Bohanan was the Administrator of a public Facebook group called the “Douglasville & Douglas County for Civic Action” (“the Group”).⁵ (Dec. ¶ 19.) The Group’s page, with Bohanan as Administrator, made veiled comments about the growing African-American population in Douglas County and its government. (Dec. ¶ 20.) The type of language used on the Group’s page, and allowed by Bohanan as the Group’s Administrator, is what is referred to as “dog-whistle language”—language that, while not overtly racist, is designed to stoke and

⁵ The Group’s Page was located at <https://www.facebook.com/groups/douglasco4civicaction/permalink/2538324246285186>, but the Group’s page is no longer publically accessible.

foment the same racist sentiment and ideals in a more palatable or seemingly innocuous way. (*Id.*) Such language is nonetheless Hate Speech under Facebook’s governing Community Standards.⁶ Under the definition of “Hate Speech,” Facebook instructs users: “Do not post.” (*Id.*) Contrary to Facebook’s Community Standards addressing Hate Speech, overtly racist posts were also posted and allowed to remain on the Group’s page.

Bohanan was also a member of a group on Facebook called The Authority.⁷ (Dec. ¶ 23.) The Authority, and Bohanan, also posted and maintained Hate Speech on their pages. Bohanan, or The Group, and the Authority also posted Hate Speech on Robinson’s Old Facebook Page—which Robinson deleted—or alternatively, Bohanan, or the groups, tagged Robinson in such posts making them visible on his Facebook timeline. (*Id.*) In or around 2015, prior to case law developing on this issue, and after growing increasingly concerned by Bohanan, and her groups’

⁶ Facebook’s Community Standards addressing Hate Speech states:

We do not allow hate speech on Facebook because it creates an environment of intimidation and exclusion and in some cases may promote real-world violence. We define hate speech as a direct attack on people based on what we call protected characteristics — race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability . . . We define attack as violent or dehumanizing speech, harmful stereotypes, statements of inferiority, or calls for exclusion or segregation.

(available at https://www.facebook.com/communitystandards/hate_speech)

⁷ Bohanan states that she is not presently a member of the Authority. (Am. Compl. ¶ 94.) The Authority’s Facebook page is publically accessible at <https://www.facebook.com/The-Authority-298695796887002>.

continued use of Hate Speech, Robinson blocked Bohanan from his Old Facebook Page. (*Id.* ¶¶ 23-24.)

IV. Douglas County Paid Bohanan \$750 to Avoid Litigation Expenses Associated With Defending Legally Deficient Claims.

In early 2020, new case law began addressing the issue of whether there is a constitutional right to access public officials’ social media accounts. (Compl. ¶ 33).⁸ Thus, in March 2020, Bohanan’s counsel sent Robinson a demand letter. (Am. Compl. ¶ 49.) In May 2020, despite the fact that the purported violation alleged by Bohanan occurred in or around 2015—three years after the statutory limitations period—Robinson and Douglas County entered into a settlement agreement and release with Bohanan (“Settlement Agreement”), to avoid the costs associated with defending against the legally deficient claims. (*Id.* ¶ 51; Dec. ¶ 26.)

Pursuant to the Settlement Agreement, Douglas County paid Bohanan \$750.00 (Bohanan’s attorneys received \$1,750.00). (Doc. 20-3, Settlement Agreement, at 1.) Robinson expressly denied any liability to Bohanan and also affirmed that “there is no factual or legal basis for the allegations and claims.” (*Id.*)

⁸ See *Davidson v. Litton Loan Servicing LP*, No. 1:09-CV-1681-RWS-AJB, 2011 WL 13318760, at *4 (N.D. Ga. June 30, 2011) (“[T]he Court may take judicial notice of admissions in pleadings.”) (quoting *Harris v. N.Y. Dep’t of Health*, 202 F. Supp. 2d 143, 173 n.13 (S.D.N.Y. 2002)); *Jones v. Savannah Fed. Credit Union*, No. CV417-228, 2018 WL 3384310, at *2 (S.D. Ga. July 10, 2018) (taking judicial notice of admission in a complaint filed by plaintiff in the N.D. Ga. to find that plaintiff did not have standing to bring suit in the S.D. Ga.)

Nevertheless, Robinson agreed to provide Bohanan with access to “the Facebook Account ‘commissionerkelly.robinson.’” (*Id.*) The parties also agreed that the Settlement Agreement was not an “admission” that Robinson had “acted contrary to the law or violated the rights of [Bohanan].” (*Id.*)

V. Robinson’s Current Use of Facebook.

Robinson determined that it was prudent to have a clear demarcation between his personal social media pages, and those that could be associated with his role as a public official. (Dec. ¶ 11.) He elected to maintain his Official Facebook Page and Re-Elect Facebook Page for use in his role as a public official. (*Id.* ¶¶ 7-11, 18.) Thus, Robinson shut down his Old Facebook Page, and created a new Personal Facebook Page to interact with his friends and family. (*Id.*)

Robinson’s Official Facebook Page and Re-Elect Facebook Page are used to communicate, or otherwise share information about his official duties as a Douglas County Commissioner, and Bohanan has access to the Official Facebook Page and Re-Elect Facebook Page. (*Id.*) Robinson’s Personal Facebook Page was created to draw a clear line between the limited or designated public forum found on the Official Facebook Page and Re-Elect Facebook Page, while still allowing Robinson to exercise his privacy rights as a private citizen in maintaining a Facebook account for social purposes. (Dec. ¶ 11.) Although Robinson’s Personal Facebook Page initially contained some “public” content because material was

migrated from his Old Facebook Page, Robinson undertook the laborious task of culling through his entire Facebook account, through inception, to remove any posts he had made that related to his public office. (*Id.* ¶¶ 12-14.) There is nothing on Robinson’s Personal Facebook Page that relates to his official duties as a Commissioner. (*Id.*) Instead, public forum discussions are maintained on Robinson’s Official Facebook Page and Re-Elect Facebook Page. (*Id.* ¶¶ 7, 18.)

LEGAL STANDARD

I. Dismissal for Lack of Subject Matter Jurisdiction.

A court must dismiss a complaint pursuant to Rule 12(b)(1) when the court lacks jurisdiction to consider the claims. “The most notable—and most fundamental—limits on the federal ‘judicial Power’ are specified in Article III of the Constitution, which grants federal courts jurisdiction only over enumerated categories of ‘Cases’ and ‘Controversies.’” *Gardner v. Mutz*, 962 F.3d 1329, 1336 (11th Cir. 2020) (citing U.S. Const. art. III, § 2). The case-or-controversy requirement comprises the following “strands”: (1) standing, (2) ripeness, and (3) mootness. *Id.* (citing *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011)). A mootness argument is “properly brought under Rule 12(b)(1),” and the Court may consider extrinsic evidence. *Nat’l Ass’n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297, 1308-09 (11th Cir. 2011). “[A] court must satisfy itself that the plaintiff has standing before

proceeding to consider the merits of her claim, no matter how weighty or interesting.” *Gardner*, 962 F.3d at 1338-39.

II. Dismissal for Failure to State a Claim.

A court must dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) if the facts alleged do not entitle the plaintiff to relief. “[A plaintiff’s] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1333 (11th Cir. 2011) (first quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008); then quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when the well pleaded factual content “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). “Conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250 (11th Cir. 2004) (citing *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

ARGUMENT AND CITATION TO AUTHORITY

The Court lacks subject matter jurisdiction over Bohanan’s claims because Bohanan has failed to present a justiciable controversy. To the contrary, the allegations in the Complaint show that Bohanan’s claims are moot. Bohanan plainly pleads that Robinson denied her access to his Old Facebook Page.

Moreover, despite Bohanan's assertion that the Old Facebook Page and the Personal Facebook Page are the same, Bohanan tellingly is not seeking access to Robinson's Personal Facebook Page because it is indeed different. Neither the Court, nor Robinson, can grant Bohanan access to the closed "public forum" previously located at <https://www.facebook.com/commissionerkelly.robinson>.

Moreover, and as independent grounds for dismissal, Bohanan's claims stemming from Robinson restricting her access to his Old Facebook Page are barred by the statute of limitations because the alleged wrongful act occurred in 2015—far beyond the two year statutory limitations period. Further, Bohanan's claims are equitably barred because her counsel acquiesced to the continued remediation efforts. (*See* Ex. 1. Correspondence.)

Finally, the Complaint fails to plead a cognizable claim. Bohanan cannot compel a government official to continue to maintain a public forum. Assuming *arguendo* that Robinson is prohibited by law from closing and removing content his own Facebook page, Bohanan waived any claims arising therefrom when her counsel acquiesced to such conduct. Bohanan has also failed to plead a legally cognizable breach of contract claim. Therefore, pursuant to Rules 12(b)(1), and alternatively, 12(b)(6) this Court should dismiss the Complaint in its entirety.

I. The Court Lacks Subject Matter Jurisdiction to Consider Bohanan's Claims.

This Court should dismiss the Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Dismissal is proper because Bohanan's claims are moot. "A case is moot when events ... create a situation in which the court can no longer give the plaintiff meaningful relief." *Nat'l Ass'n of Boards of Pharmacy*, 633 F.3d at 1308. The "mootness doctrine ensures that a justiciable case or controversy is present 'at all stages of review.'" *Gagliardi v. TJC Land Trust*, 889 F.3d 728, 733 (11th Cir. 2018). "One 'event' that may moot a claim is when the defendant [voluntarily] ceases the behavior on which a claim is based." *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1270 (N.D. Ga. 2019).

Here, the Facebook page that is the subject of the Settlement Agreement, and which Bohanan sought access to pursuant to that agreement, is defunct. (Dec. ¶ 9.) Thus, the Court cannot afford Bohanan with access. *See e.g. Keevan v. Smith*, 100 F.3d 644, 646 (8th Cir. 1996) (vacating as moot order addressing prisoner access to the educational programs because BOP closed the program, therefore, the court could no longer order equitable access to a program that did not exist).

Bohanan seeks to breathe life into a her claim by asserting that Robinson merely changed the "username" on his Facebook account. But, Bohanan ignores the fact that Robinson's Old Facebook Page and Personal Facebook Page are, indeed, different. The pages do not differ merely in nomenclature, but more importantly, they differ in content and function. (Dec. ¶ 9.) Thus, Bohanan's

unsupported conclusory assertions that the Facebook Pages are “akin to changing a license plate on a car” cannot save her Complaint from dismissal. *See Jackson*, 372 F.3d 1250 (“Conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.”).

Bohanan again attempts to cure the mootness defect by asserting that Robinson’s declarations, made under penalty of perjury, “provides thin assurance” of compliance. (Am. Compl. ¶ 102.) Put another way, despite Bohanan’s attempts to shirk her own counsel’s representations, and despite suing to purportedly protect against the same conduct that her counsel acquiesced to, Bohanan claims that Robinson, who: (1) through his counsel made representations regarding his intended conduct; (2) followed through by undertaking and completing the labor-intensive review; and (3) and further made a commitment, under oath, to stay compliant with applicable law, should not be given any credence. Bohanan’s assertion strains credulity. More importantly, case law dictates otherwise.⁹

⁹ Indeed, Robinson’s affirmance that his Personal Facebook Page does not contain his postings related to his public role warrants dismissal. *See Al Najjar*, 273 F.3d at 1336 (holding, if events subsequent to the filing of a lawsuit deprive the court of the ability to give the plaintiff meaningful relief, the case is moot and must be dismissed for lack of subject matter jurisdiction.) Here, Robinson has not only affirmed that his Personal Facebook Page does not contain postings related to his role as a public official, but Robinson has affirmed his commitment to remaining compliant with applicable law. *See e.g. Diaz v. Kroger Co.*, No. 18 CIV. 7953 (KPF), 2019 WL 2357531 (S.D.N.Y. June 4, 2019) (holding that plaintiff’s case over ADA-compliant website was mooted by declaration from defendant that website was newly compliant and would remain so).

Further, and rather tellingly, despite claiming that Robinson’s Old Facebook Page and Personal Facebook Page are “the same”, Bohanan is not seeking access to Robinson’s Personal Facebook Page—undoubtedly because the Personal Facebook Page, unlike the Old Facebook Page, is not a “public forum.” (Am. Compl. ¶ 4.) Thus, Robinson’s Personal Facebook Page is not at issue in this litigation, and, Bohanan’s superfluous allegations cannot advance her claims. *See e.g. Gagliardi*, 889 F.3d at 735 (“case is moot and therefore nonjusticiable”).

II. Bohanan’s Complaint Should Be Dismissed Failure to State a Claim
A. Bohanan’s Claims Are Barred by the Statute of Limitations.

Bohanan’s 42 U.S.C. § 1983 claims are barred by the statute of limitations. Section 1983 claims must be brought within two years from when the Bohanan learned of the purported injury. *See e.g. Blue Ridge Mountain Fisheries, Inc. v. Dept. of Nat. Resources*, 217 Ga. App. 89, 94 (1995) (“the period of limitation for § 1983 claims” is “two years after the right of action accrues, which occurs upon the infliction of injury.”) Robinson blocked Bohanan from his Old Facebook Page on or around June 21, 2015. (Am. Compl. ¶ 88.) Thus, any purported violation of section 1983 occurring before June 22, 2018 is time barred.

Moreover, Bohanan cannot establish a continuing violation based on the one-time act that “prevented [her] from viewing, commenting on, or otherwise interacting” with Robinson’s Old Facebook page through its closure. (Am. Compl. ¶ 111.) “A continuing violation is occasioned by continual unlawful acts, not by

continual effects from an original violation.” *Little v. Markely*, No: 3:15-CV-0067, 2015 U.S. Dist. LEXIS 109992, *5 (M.D. Ga. Aug. 20, 2015) (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir.1981)). As the Eleventh Circuit explained in *Lovett v. Ray*, 327 F.3d 1181, 1183, (11th Cir. 2003), “the critical distinction in the continuing violation analysis...is whether the plaintiff complains of the present consequence of a one time violation, which does not extend the limitations period.”

Here, like in *Lovett*, Bohanan complains of lingering effects of one purportedly unlawful act that occurred in 2015, “which does not extend the limitations period.” *Id.* Thus, Bohanan’s section 1983 claims stemming from Robinson’s conduct in 2015 are barred by operation of law.

B. Plaintiff’s Claims Are Barred By the Doctrine of Equitable Estoppel.

Plaintiff’s claims are barred by equitable estoppel because Bohanan’s counsel acquiesced to the changes which Bohanan now asserts violate her constitutional rights, and purportedly breached the Settlement Agreement. But, equitable estoppel prevents a party from misrepresenting material facts, and inducing detrimental reliance by a counterparty. *Dawkins v. Fulton Cty. Gov’t*, 733 F.3d 1084, 1089 (11th Cir. 2013).¹⁰ Misrepresentation can be in the form of

¹⁰ “[T]he elements of federal common law equitable estoppel in this circuit are: (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the party asserting the

“misleading words, conduct, or silence.” *Harod v. Sage Prod., Inc.*, 188 F. Supp. 2d 1369, 1379 (S.D. Ga. 2002). Here, Bohanan’s counsel, through her words, conduct and silence, acquiesced to Robinson’s post-settlement remediation. Bohanan cannot now take a contrary position to that of her counsel. (Ex. 1., Correspondence.); *see In re Pullen*, 451 B.R. 206, 210 (Bankr. N.D. Ga. 2011) (finding letters from attorney could be basis for equitable estoppel).

Robinson relied on the discussions with Bohanan’s counsel in continuing the labor intensive task of reviewing more than ten-years-worth of Facebook data to locate posts directed at his official role. (Dec. ¶ 14.) Bohanan knew that Robinson would rely on such discussions, because Robinson’s counsel affirmed that Robinson was continuing to undertake a review of his Personal Facebook Page.¹¹ (*See* Correspondence.) Robinson’s reliance was reasonable because an ordinary person would have no basis to believe that Bohanan would file suit asserting that

estoppel would rely on it; (4) the party asserting the estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation.” *Id.*

¹¹ Bohanan asserts that her counsel informed Robinson’s counsel “that this did not satisfy the terms or fulfill the purpose of the fully executed Settlement Agreement.” But, tellingly, omits underlying correspondence, which speaks for itself, and contradicts Bohanan’s self-serving narrative. Indeed, the allegations in the Amended Complaint show that counsel for Bohanan were aware that Robinson was operating under the understanding that he should delete “public” posts to comply with the parties’ discussions. (*See* Am. Compl. ¶ 81 (Counsel for Bohanan acknowledging reviewing Robinson’s Personal Facebook Page for compliance—i.e. removal of the offending posts)).

the same conduct acquiesced to is violative of the Constitution just nineteen days later. Robinson's reliance on Bohanan's counsel has been to his detriment as it has subjected him to litigation and negative press, including commentary from Bohanan's counsel, that failed to disclose the true nature of the parties' discussions.¹²

Moreover, Bohanan waited until *after* Robinson had completed all relevant changes to the Personal Facebook Page to file the Amended Complaint alleging that he wrongfully closed the "public forum." Indeed, Bohanan in one paragraph alleges that Robinson was dilatory in removing the offending posts, and in another alleges that Robinson violated her constitutional rights by maintaining a Personal Facebook Page in the manner consistent with the parties' discussions. (*Id.* ¶¶ 4, 81, 100-107.) Thus, as a matter of equity, the Court should dismiss the Amended Complaint in its entirety under the doctrine of equitable estoppel.

C. Bohanan's Claims Against Robinson in His Official Capacity Are Barred By Qualified Immunity.

Bohanan's damages claims are independently barred by the doctrine of qualified immunity. "Qualified immunity shields public officials from liability ... when their conduct does not violate a constitutional right that was clearly

¹² (See e.g. <https://news.yahoo.com/blocked-facebook-douglasville-woman-sues-185613952.html?guccounter=1>). In September 2020, after Robinson served Bohanan's counsel with notice pursuant to Rule 11, counsel for Bohanan amended the information contained on their publically maintained website. (*Supra* at 4, n.2.)

established at the time of the challenged action.” *Echols v. Lawton*, 913 F.3d 1313, 1319 (11th Cir. 2019). A qualified immunity arises when a public official establishes that his or her actions, as alleged in the complaint, were within the scope of his or her discretionary authority. *Mathews v. Crosby*, 480 F.3d 1265, 1269 (11th Cir. 2007); *Mercado v. City of Orlando*, 407 F.3d 1152, 1156 (11th Cir. 2005) (same). Once it has been established that the official was engaged in a discretionary duty, the burden shifts to the plaintiff to establish “[1] that the defendant committed a constitutional violation and [2] that the law governing the circumstances was already clearly established at the time of the violation.” *Youmans v. Gagnon*, 626 F.3d 557, 562 (11th Cir. 2010). Bohanan must satisfy “[b]oth elements of [the analysis] for [Robinson] to lose qualified immunity.” (*Id.*)

Here, Robinson was acting in his discretionary authority when he operated the Old Facebook Page. The Old Facebook Page was not a “government” Facebook page; and was created by Robinson using his personal email address. (Dec. ¶ 10.) Robinson had access to the Old Facebook Page in his capacity as a private citizen, and used the Old Facebook Page to express his own views. (*Id.*) Also, the Old Facebook Page was not endorsed, sanctioned, monitored or otherwise affiliated with Douglas County. (*Id.*) In short, Robinson ran and maintained the Old Facebook Page entirely within his personal discretion. Accordingly, Robinson’s actions are subject to qualified immunity.

Bohanan cannot overcome Robinson’s qualified immunity because the purported illegality of the conduct was not clearly established in 2015. To be clearly established, a rule must “have a sufficiently clear foundation in then-existing precedent” such that it would be “clear to a reasonable [official] that his conduct was unlawful in the situation he confronted.” *D.C. v. Wesby*, 138 S. Ct. 577, 589–90 (2018). To demonstrate that a constitutional right is “clearly established,” the party opposing qualified immunity must identify “a controlling case or robust consensus of cases” finding a constitutional violation “under similar circumstances.” *Id.* at 591. In other words, “existing precedent must have placed the constitutional question beyond debate.” *Beckman v. Hamilton*, 731 Fed. App’x 737, 740 (11th Cir. 2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).

Bohanan clearly fails this inquiry. By Bohanan’s own admission—under oath—the applicable body of law is just recently “growing.” (*See Verified Compl.* ¶ 33.) There exists no precedent of the Supreme Court, Eleventh Circuit, or Georgia Supreme Court addressing the constitutionality of the conduct challenged here.¹³ *See Santana v. Miami-Dade County*, 688 F. App’x 763, 773 (11th Cir.

¹³ Indeed, the most widely reported decision addressing public access of non-government social media accounts of elected officials—that is inapposite and not controlling here—was decided in 2019, four years after Robinson blocked Bohanan. *See Knight First Amendment Inst. v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019) (finding President Trump violated the First Amendment when he blocked the plaintiffs for posting messages critical of him and his policies). On August 20, 2020, the U.S. Department of Justice filed a Petition for Writ of Certiorari asking

2017) (finding “fair warning [may be] provided by materially similar precedent from the Supreme Court, [the Eleventh Circuit], or the highest state court in which the case arose.”) (citing *Terrell v. Smith*, 668 F.3d 1244, 1256 (11th Cir. 2012)).

Therefore, Robinson is entitled to qualified immunity.

Bohanan’s claims regarding the purportedly unlawful closure of a public forum are likewise barred by the doctrine of qualified immunity because Robinson was acting within the scope of his discretionary authority when he decided to close his Old Facebook Page. Moreover, the purported illegality of such conduct was not clearly established in 2020. To the contrary, the Eleventh Circuit has held that government officials may close a forum for any reason, even under the circumstances alleged by Bohanan. *See Chabad-Lubavitch of Ga.*, 5 F.3d at 1394 (holding that Georgia was entitled to “clos[e] the forum altogether” to avoid religious displays).¹⁴ Thus, Bohanan’s claims against Robinson in his official capacity, are barred by qualified immunity.

the Supreme Court of the United States to review the decision, explaining that “[t]he result of the court of appeals’ novel ruling will be to jeopardize the ability of public officials—from the President of the United States to a village councilperson—to insulate their social-media accounts from harassment, trolling, or hate speech without invasive judicial oversight.” Available at https://www.supremecourt.gov/DocketPDF/20/20-197/150726/20200820102824291_Knight%20First%20Amendment%20Inst.pdf. (last visited October 11, 2020).

¹⁴ Independently dispositive on this issue, Bohanan cannot establish a constitutional violation. *See Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009) (a court need not determine whether a constitutional violation

D. Bohanan Has Failed to Establish The Unlawful Closure of a Public Forum.

Bohanan cannot plead a cognizable claim resulted from the closure of Robinson's Old Facebook Page. According to Bohanan, Robinson improperly closed his Old Facebook Page for a "viewpoint-discriminatory purpose", because Hate Speech "nonetheless, is a type of viewpoint that is protected by the First Amendment." (Am. Compl. ¶ 167.) But, Bohanan wholly ignores that our rights as citizens are tempered by the practical constraints of the world that we live in, including the place and manner in which we seek to exercise those rights.

Indeed, by Bohanan's rationale, an employee could successfully sue an employer for viewpoint discrimination if the employee is terminated, or otherwise disciplined for using racial slurs in the workplace, or posting racial slurs on the employer's social media accounts. That is clearly not the case. *See e.g. Lind v. UPS*, 254 F.3d 1281 (11th Cir. 2001) (affirming district court's finding that no retaliation occurred when an employee was terminated for using a racial slur in the

occurred where it is shown that the alleged constitutional right was not clearly established). Despite devoting several paragraphs in the Amended Complaint to Robinson's Personal Facebook Page, Robinson's Personal Page is not a public forum, and Bohanan has no right to access that page. Moreover, assuming *arguendo*, that Bohanan is able to plead facts establishing a breach of the Settlement Agreement, such a breach would be contractual in nature, not constitutional. Finally, Robinson's closure of his Old Facebook Page is expressly permitted by law. *See Chabad-Lubavitch of Ga.*, 5 F.3d at 1394. Accordingly, Robinson cannot establish a constitutional violation.

workplace); *Stabler v. Tyson Foods, Inc.*, No. 5:17-cv-00143-MTT, 2018 U.S. Dist. LEXIS 176233, *10 (M.D. Ga. 2018) (finding employee was terminated for a legitimate non-discriminatory reason for using a racial slur in the workplace, in violation of the employer's code of conduct). Here, Facebook has clear Community Standards that prohibit individuals from posting Hate Speech anywhere on its platform. It strains credulity for Bohanan to assert that she can post Hate Speech unbridled, on a forum that expressly prohibits such conduct.

More importantly, and independently dispositive on this issue, the Eleventh Circuit has held that the government may close a public forum, even if the closure resulted from the purposeful suppression of a particular view point or content. *See Chabad-Lubavitch of Ga.*, 5 F.3d at 1394 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (holding that "a State is not required to indefinitely retain the open character of the facility"). Accordingly, even if Robinson closed his Old Facebook Page to prevent certain types of speech from appearing on that page, such conduct is legally permissible. Finally, and also fatal to Bohanan's claims, the post-settlement communications with counsel waived such claims. *See Ansley v. Ansley*, 307 Ga. App. 388, 393 (2010) ("waiver may be express, or may be inferred from actions.") Thus, Bohanan cannot show that she is entitled to relief on her claims regarding the closure of the Old Facebook Page.

E. Bohanan Has Failed to Establish That Robinson Breached the Settlement Agreement.

Bohanan has failed to plead a cognizable breach of contract claim. Bohanan must show “(1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken.” *Norton v. Budget Rent a Car Sys.*, 307 Ga. App. 501, 502 (2010). Bohanan has not—and cannot—allege facts establishing a breach of the Settlement Agreement. The Settlement Agreement only governed Robinson’s Old Facebook Page, but that page is defunct. (Dec. ¶¶ 9-12; Doc. 20-3 at 2.; Ex. 1., Correspondence (Bohanan’s counsel acknowledging that the Settlement Agreement does not encompass the new page, and requests “an addendum to the settlement agreement stating that it’s terms apply to the new url.”)). Bohanan is not entitled to compel Robinson to maintain a public forum. *See e.g. Chabad-Lubavitch of Ga.*, 5 F.3d at 1394. Further, the post-settlement communications with Bohanan’s counsel waived any such claims. *See Ansley*, 307 Ga. App. at 393. Bohanan cannot show that she is entitled to relief on her breach of contract claims.

F. Bohanan is Not Entitled to Declaratory or Injunctive Relief.

Bohanan is not entitled to declaratory relief because she cannot demonstrate a justiciable controversy. “[A] declaratory judgment is available only in cases involving an actual case or controversy, ... It may not be made the medium for securing an advisory opinion in a controversy which has not arisen.” *State Farm*

Mut. Auto. Ins. Co. v. Bates, 542 F. Supp. 807, 817 (N.D. Ga. 1982) (citing *Coffman v. Breeze Corporations, Inc.*, 323 U.S. 316 (1945)).

Here, no such controversy exists. Robinson’s Old Facebook Page—that is the subject of the Settlement Agreement—is now defunct, and Bohanan admits that Robinson is free entitled to utilize a personal Facebook page. Am. Compl. ¶ 85.) Thus, Bohanan is attempting to prevent the “potential use of [Robinson’s Personal] Facebook Page as a non-public government forum.” (*Id.* ¶ 106.) That is a controversy that “has not arisen.” *State Farm Mut. Auto. Ins.*, 542 F. Supp. at 817.

Moreover, there is no immediacy to Bohanan’s section 1983 claims, because Robinson denied Bohanan access in June 2015.¹⁵ *See Gagliardi*, 889 F.3d at 735. (“A declaratory judgment devoid of ‘sufficient immediacy and reality’ cannot render a case justiciable.”) (citing *Preiser v. Newkirk*, 422 U.S. 395, 402, (1975)). Further evidencing the lack of immediacy is Bohanan’s withdrawal of her Motion for Preliminary Injunction. (Docs. 21, 24). Accordingly, Bohanan is not entitled to declaratory or injunctive relief.

CONCLUSION

For all of the foregoing reasons Robinson respectfully requests that the Court dismiss Bohanan’s Amended Complaint, with prejudice.

¹⁵ Bohanan’s similarly failed to plead a cognizable “future harm” for injunctive relief. *Corbett v. Transp. Sec. Admin.*, 930 F.3d 1225, 1233 (11th Cir. 2019) (plaintiff lacks standing unless “an injury is likely to occur immediately.”)

Respectfully submitted, this 12th day of October, 2020.

/s/ Samuel S. Olens

Steven J. Labovitz

Georgia Bar No. 431025

Samuel S. Olens

Georgia Bar No. 551540

Uchenna Ekuma-Nkama

Georgia Bar No. 957861

DENTONS US LLP

303 Peachtree Street, Suite 5300

Atlanta, Georgia 30308

Telephone: (404) 527-4000

Facsimile: (404) 527-4198

steve.labovitz@dentons.com

samuel.olens@dentons.com

uchenna.ekuma-nkama@dentons.com

Attorneys for Defendant

Kelly G. Robinson

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

BRENDA BOHANAN,

Plaintiff,

v.

DOUGLAS COUNTY COMMISSIONER
KELLY G. ROBINSON,
in his individual and official capacities,

Defendant.

CIVIL ACTION
NO. 1:20-cv-02641-JPB

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on October 12, 2020, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to counsel of record. I also certify this date that the foregoing was prepared in accordance with N.D. Ga. L.R. 5.1, using Times New Roman font, 14 point.

/s/ Samuel S. Olens
Samuel S. Olens
An Attorney for Defendant
Kelly G. Robinson