IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRENDA BOHANAN, *Plaintiff*, vs. DOUGLAS COUNTY COMMISSIONER KELLY G. ROBINSON, in his individual and official capacities, *Defendant*.	**JURY TRIAL DEMANDED** CIVIL ACTION NO. 1:20-cv-02641-JPB

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Plaintiff Brenda Bohanan ("Plaintiff") submits this Opposition to Defendant Kelly G. Robinson ("Defendant")'s Motion to Dismiss her Amended Complaint ("MTD"). From approximately June 2015 to shortly before August 24, 2020, Defendant blocked Plaintiff from the public forum existing on his social media Facebook Page because he disagreed with her viewpoint, thereby depriving Plaintiff of her First Amendment right to speak, receive the speech of others, and petition her

elected official for grievances. In May 2020, the parties entered into a Settlement Agreement requiring Defendant to unblock Plaintiff and others from his public-forum Facebook Page.

In breach, Defendant continued to block Plaintiff, forcing her to seek a preliminary injunction to be unblocked. Shortly before responding to Plaintiff's suit, Defendant converted his Facebook Page to be private, thereby closing the previously existing public forum. This he did for the purpose of continuing to exclude Plaintiff based on her viewpoint. Now that his Facebook Page is private, and therefore not accessible to Plaintiff, Defendant has belatedly unblocked her. On these facts and the clearly established law set forth below, Defendant's Motion to Dismiss should be denied.

FACTUAL BACKGROUND

Plaintiff is a resident of Douglas County, Georgia who in 2015 criticized how Defendant, her elected official, had responded to some of his concerned constituents. Am. Compl. ¶¶ 7-8, 27-49. Defendant retaliated against Plaintiff by blocking her from his otherwise publicly-accessible Facebook Page ("the Page") which he used to interact with members of the public about his official activities as county commissioner, posting more frequently there than on his official county government Facebook Page. *Id*. ¶¶ 15-25, 40 & Exs. A & D. Defendant concedes that he blocked

Plaintiff and has essentially admitted that he did so based on disagreement with her viewpoint. *Id*. ¶¶ 91-99; Deft's MTD, Ex. 2 at ¶ 24.[1] Being blocked prevented Plaintiff from: (1) receiving the speech of Defendant and others on his Facebook Page relating to matters of public concern, and (2) using the interactive features of the Page to engage in protected political speech, including petitioning Defendant for grievances. *Id*. ¶¶ 42-43, 88.

In May 2020, Defendant entered into a Settlement Agreement ("the Settlement") with Plaintiff wherein he acknowledged that the interactive comments sections of his Facebook Page constituted a designated or limited public forum. *Id*. ¶¶ 51, 56 & Ex. B ¶ 1(a)(ii)(1). Central to the Settlement, Defendant agreed to restore access to his Facebook Page for Plaintiff and other blocked users *within 24 hours* of receiving the fully executed Settlement. *Id*. ¶ 57 & Ex. B ¶ 1(a)(ii).

In material breach of the Settlement, Defendant did not unblock Plaintiff within the specified 24-hour period of its full execution (Defendant's counsel, who had drafted the Settlement, was the last to sign sometime between May 20, 2020 and May 25, 2020). *Id*. ¶¶ 53, 59-62. By May 28, 2020, which was several days or more after the 24-hour period had passed with Plaintiff still blocked, Defendant changed

[1] Plaintiff vehemently denies engaging in "hate speech" as Defendant alleges to try to justify his initially blocking her after she criticized him. "Hate speech" is a type of viewpoint protected by the First Amendment. Am. Compl. ¶¶ 95-96.

the username of his Facebook Page from "commissionerkelly.robinson" to "kellyrobinsonsr." *Id*. ¶¶ 62, 67 & Ex. I. This did not create a new page but was instead analogous to changing the license plate on a car. *Id*. ¶¶ 67-72. New username notwithstanding, Defendant's Facebook Page was the same Page as before. It continued to include interactive features allowing viewers to engage in political speech (unless, like Plaintiff, they were blocked), and to host myriad posts about Defendant's official activities, some — but not all — of which Defendant later removed. *Id*. ¶¶ 73-76, 80-82 & Exs. F, G & H.

Between May 20 and June 3, 2020, Plaintiff repeatedly requested that Defendant cure his breach by unblocking her, affording him ample time to do so. But he refused. *Id*. ¶¶ 62-66, 76-79; Pltff's Opp. MTD, Ex. 2. Finally, with Defendant's Facebook Page still functioning as a public forum and Plaintiff still blocked, Plaintiff filed this action on June 22, 2020 and moved for a preliminary injunction requiring Defendant to unblock her. Am. Compl. ¶ 4.

Shortly before Defendant's August 24, 2020 deadline for responding to Plaintiff's suit, Defendant closed the designated or limited public forum that had long existed on his Facebook Page by converting the Page to be private — i.e., only accessible to his Facebook "friends." *Id*. ¶ 83. This change was done without notifying Plaintiff. Only then, after months of violating the Settlement and a month

or more after Plaintiff had sued, did Defendant belatedly unblock her so that she can now see his profile page (name and photo), but nothing else as they are not "friends." Am. Compl. ¶ 84 & Ex. L. This sequence of events evidences that Defendant converted his Page from public to private to avoid being required by preliminary injunction to give Plaintiff, a member of the public, access. In short, Defendant shuttered the public forum on his Page for the unconstitutional purpose of continuing to exclude Plaintiff and others whose speech he disfavors. *Id*. ¶¶ 86-87.

ARGUMENT

I. Plaintiff's Claims Present a Live Case and Controversy

This Court has federal subject matter jurisdiction over Plaintiff's constitutional claims because they concern a live case and controversy. Defendant's converting his Facebook Page to be private in order to continue denying Plaintiff access to the Page gives rise to a judiciable First Amendment forum-closure claim. Equally live are Plaintiff's claims for a declaratory judgment and any related relief for the period when she was blocked from Defendant's public-forum Facebook Page before he closed that forum, and her claim for a forward-looking injunction to prevent Defendant's resuming his unconstitutional censorship of her and others on any Facebook page that he uses to communicate with the public about his official duties.

Regarding Defendant's assertion that Plaintiff's claims are moot because he is not currently blocking her and because his Facebook Page is not currently public, "It has long been the rule that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of the power to hear and determine the case, i.e., does not make the case moot." *Harrell v. The Florida Bar*, 608 F.3d 1241, 1265 (11th Cir. 2010). Rather, "when a party abandons a challenged practice freely," as Defendant claims to have done[2], the case will be moot only if: "(1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur," and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id*. Neither condition is satisfied here.

On the first *Harrell* prong, Defendant's conduct to-date provides little assurance that he will not resume using his Facebook page to communicate about his official duties either with the general public or with those he accepts as "Facebook friends" (which could be thousands of people), while unconstitutionally blocking Plaintiff and others with whose perspective he does not agree. Specifically, Defendant's breach of the Settlement with Plaintiff, wherein he agreed to unblock

[2]Defendant ceased the challenged conduct only shortly before his deadline to formally respond to Plaintiff's lawsuit -- which, at the time, sought a preliminary injunction requiring Defendant to unblock Plaintiff. This suggests that Defendant's cessation was less voluntary and more catalyzed by the impending possibility of a Court order.

her but then failed to do so, evidences that Defendant's word cannot be trusted. Amended Compl. ¶¶ 101-07. In light of this history, Defendant's non-binding declaration proclaiming his intent "to keep[ ] my Personal Facebook Page compliant with applicable law," MTD, Ex. 3 at ¶ 4, provides thin assurance that, once free from the scrutiny of this litigation, Defendant will not resume using his Facebook Page as an official-capacity forum to discuss his county commissioner duties and activities with constituents while unconstitutionally excluding Plaintiff and others whose perspectives he does not care for. Am. Comp. ¶¶ 100-07. Given Defendant's past behavior as relates to Plaintiff and the breached Settlement, it remains far from "absolutely clear" that his "wrongful behavior could not reasonably be expected to recur." *Harrell*, 608 F.3d at 1265.[3]

On the second *Harrell* prong, no events have eradicated the effects of Plaintiff being blocked from Defendant's public-forum Facebook Page for years, including after he breached the Settlement in May 2020 and continued to block her. Plaintiff can never recoup her lost opportunity to have contemporaneously engaged about

[3] This also raises a concern that, if not squarely addressed in this case, Defendant's unconstitutional behavior would be "capable of repetition, yet evading review." *See Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004) (a court may review even a moot case if the challenged action by defendant terminated prior to being fully litigated and where there is a reasonable expectation that the complaining party would be subjected to the same action again).

political issues of the day on Defendant's Facebook Page while it operated as an interactive forum from. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "The harm is particularly irreparable where . . . a plaintiff seeks to engage in political speech, as timing is of the essence in politics and [a] delay of even a day or two may be intolerable." *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009) (internal quotations and citations omitted).

Nor has any relief eradicated the ongoing effects of Defendant's having closed his public-forum Facebook Page for the purpose of excluding Plaintiff and others whose viewpoint he does not like. The existence of an alternative public forum (i.e., Defendant's county government Facebook Page) does not neutralize the harm arising from the now complete lack of access to the forum at issue. *See Christian Legal Society v. Martinez*, 561 U.S. 661, 690 (2010) ("When the government has discriminated against a speaker based on the speaker's viewpoint, the ability to engage in other speech does not cure that constitutional shortcoming."); *Knight First Amendment Institute v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019) (while plaintiffs retained ability to 'work around' being blocked from Trump's Twitter account, this "does not cure the constitutional violation"). In sum, Defendant fails to satisfy either *Harrell* prong for mootness.

The futility of Defendant's mootness argument is further highlighted by several circuit court decisions holding that the closure of a forum does not moot First Amendment claims for declaratory relief relating to that forum. In *Sefick v. Gardner*, 164 F.3d 370 (7th Cir. 1998), the plaintiff alleged viewpoint discrimination after the government decided not to allow any further art displays in the lobby of a federal courthouse following plaintiff's application to display a satirical sculpture of a federal judge. *Id*. at 371. First, the Seventh Circuit held that a court could order display of the sculpture as a remedy for violation of the plaintiff's rights in 1996 and 1997, even though the government stopped taking art applications in 1998. *Id*. Similarly here, this Court may rule on Defendant's past blocking of Plaintiff from his public-forum Facebook Page, even though that forum has since been closed. Second, *Sefick* held that because the "no-display policy [in the courthouse lobby]. . . is not implemented by statute or regulation and could be changed again, [] *this voluntary cessation of the challenged conduct does not eliminate the controversy*." *Id.* (emphasis added). Here, absent a ruling from this Court, Defendant will be free to resume at his discretion using his Facebook Page to communicate with the public

about his official duties while excluding Plaintiff and others with whose perspectives he disagrees. Thus, the controversy has not been eliminated.[4]

Finally, the inapplicability of preliminary injunctive relief now that Defendant has converted his Facebook Page to be private and unblocked Plaintiff does not moot Plaintiff's other claims, including, without limitation, for declaratory relief related to Defendant's past blocking of her when his Page operated as a public forum. *See Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121-22 (1974) ("even though the case for an injunction dissolved . . . the parties to the principal controversy . . . may still retain sufficient interests and injury as to justify the award of declaratory relief"); *Zwickler v. Koota*, 389 U.S. 241, 254 (1967) (where both declaratory and injunctive relief are sought, courts have a duty to decide "the appropriateness and the merits of the declaratory request irrespective of . . . the propriety of the issuance of the injunction").

In sum, this case presents a live case and controversy under the standard articulated in *Harrell*, as well as under *Sefick*, *DiLoreta*, and *Barnard*, with

[4] The Ninth and Tenth Circuits have issued similar rulings to *Sefick*. *See DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999) (finding that a live controversy existed despite closure of the forum); *Barnard v. Chamberlain*, 897 F.2d 1059 (10th Cir. 1990) (finding plaintiff's First Amendment challenge was not mooted by closure of the forum).

Plaintiff's claims for declaratory and other relief to be appropriately decided by this Court independent of whether it finds grounds for an injunction.

II. Plaintiff's Claims Are Timely as She Suffered Continued Rights Violations in the Two-Year Period Prior to Filing Suit

Defendant argues that Plaintiff's claims are time-barred because he first blocked her from his public-forum Facebook Page in 2015. Defendant's argument fails on both the facts and the law. Under O.C.G.A. § 9-3-33, a plaintiff is "allow[ed] two years [to bring a claim] after the right of action accrues." *Blue Ridge Mountain Fisheries, Inc. v. Dept. of Nat. Res.*, 217 Ga. App. 89, 94 (1995). However, the Eleventh Circuit has explained that "[t]he continuing violation doctrine permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period." *Robinson v. United States*, 327 Fed. Appx. 817, 818 (11th Cir. 2007) (citation omitted).

Here, after 2015, Plaintiff suffered additional violations of her First Amendment rights each time she attempted to access the public forum on Defendant's Facebook Page, but was blocked. Am. Compl. ¶¶ 108-11. In 2020 alone, Plaintiff tried to access the Page and was unable to do so on February 2, February 21, March 12, May 20, May 27, and June 19. *See* Pltff Opp. to MTD, Ex. 1 ¶¶ 4-5. She then brought suit on June 22, 2020. Thus, as Plaintiff experienced additional violations within the two years prior to filing her action, her claims are timely.

Additionally, Plaintiff's forum-closure claim first arose shortly before August 24, 2020, when Defendant converted his public-forum Page to be private. This claim was timely asserted less than a month later in Plaintiff's September 11, 2020 Amended Complaint at ¶¶ 83-87, 137-49.

This case is unlike *Lovett v. Ray*, cited by Defendant, in which the Eleventh Circuit found that a denial of parole was a one-time violation with "present consequences." 327 F.3d 1181, 1183 (11th Cir. 2003). Instead, the continued blocking of Plaintiff from 2015 through 2020 is more akin to the statute-of-limitations issue in *Coleman v. Miller*, 885 F.Supp. 1561, 1568 (N.D. Ga. 1995) (dismissed on other grounds), *aff'd*, 117 F.3d 527 (11th Cir. 1997). In *Coleman,* Judge Orinda Evans considered a First Amendment challenge to the then-Georgia flag, which contained the Confederate Battle Flag, on the grounds that "the flag . . . force[d] [plaintiff] to adopt a symbolic message which discriminates against African-American citizens." *Id.* at 1567. Despite the flag's existing since 1956, Judge Evans found that "the case [was] not time-barred because Plaintiff allege[d] continuing torts," *id.* at 1568, given the ongoing use of the flag as a state emblem. *See also Van Orden v. Perry*, 545 U.S. 677, 682 (2007) (not questioning the timeliness of a challenge to a Ten Commandments display filed "[f]orty years after the monument's erection and six years after [the plaintiff] began to encounter the

monument frequently."). Similarly, having been continuously blocked since 2015, Plaintiff experienced an on-going tort each time she tried and failed to be able to access Defendant's Facebook Page in the two-year period prior to filing suit.

III. Defendant Closed the Public Forum Existing on His Facebook Page for the Viewpoint-Discriminatory Purpose of Excluding Plaintiff

The First Amendment does not tolerate viewpoint discrimination in government forums. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009) (viewpoint discrimination prohibited in traditional, designated, and limited public forums); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812-13 (1985) (viewpoint discrimination prohibited in nonpublic forums). The Supreme Court therefore has a long history of reviewing government actors' purpose for imposing speech restrictions on citizens in government forums to determine whether the restrictions are content- or viewpoint-neutral, and if not, whether the restrictions can survive strict scrutiny. *See Boos v. Barry*, 485 U.S. 312, 321 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Cornelius*, 473 U.S. at 811. Indeed, as Justice Elena Kagan has explained, "the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting."[5] Thus, it is appropriate to examine a government

[5] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

official's purpose in closing a government forum, which is an extreme restriction on speech, in order to determine whether the closure was neutral with respect to content and viewpoint, or whether it was discriminatory. *See, e.g., Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989); *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 116 F. Supp. 2d 65, 73 (D.C. Cir. 2000); *ACT-UP v. Walp*, 755 F. Supp. 1281, 1289 (M.D. Pa. 1991); *Mo. Knights of the KKK v. Kansas City*, 723 F. Supp. 1347, 1352 (W.D. Mo. 1989).

Here, Plaintiff alleges that Defendant closed the long-existing public forum on his Facebook Page by converting the Page to be private so that he could continue to exclude Plaintiff, whose viewpoint he disfavors, while avoiding being ordered by the Court to admit her. Am. Compl. ¶¶ 83-87, 137-49. Although shutting down the public forum on his Facebook Page was a closure of general applicability affecting all visitors to the Page, it was still unconstitutional because it was done for the purpose of censoring Plaintiff's expressed viewpoint.

In *ACT-UP*, an analogous case, the district court held that the Pennsylvania legislature's decision to shut down public access to the visitor's gallery of the chamber of the House of Representatives was unconstitutional with respect to the ACT-UP group, even though the gallery, which had previously functioned as a limited public forum, was closed to everyone. 755 F. Supp. at 1289. The legislature's

undisputed purpose in shutting down the forum was to prevent ACT-UP members from accessing the gallery during the governor's address. *Id*. The purported compelling interest in "preserving the decorum" from a group characterized as "boisterous, demonstrative, and often profane" failed because the state could not justify its alleged fear that ACT-UP would cause significant disruption. Moreover, likening the forum closure to using a "club instead of a scalpel," the court held that the government did not use the narrowest means possible to prevent the feared disruption. *Id.* at 1290.

Like the Pennsylvania legislature shutting down the gallery to prevent ACT-UP members from accessing it, Defendant closed the public forum on his Facebook Page so that he could continue to exclude Plaintiff and would not be ordered to do otherwise when the court ruled on Plaintiff's then-pending preliminary injunction motion. Moreover, even if Defendant could establish a compelling interest for excluding Plaintiff (and he cannot for reasons explained below), closing the public forum was not the narrowest means to achieve her exclusion since Defendant could have left the public forum open and simply created a new, private Facebook Page that had never been publicly accessible and was only available to his "friends."

Defendant argues that he was justified in excluding Plaintiff from his Facebook Page because he alleges she engaged in what he calls "hate speech."

Plaintiff vehemently denies engaging in such speech. Am. Compl. ¶ 95. Moreover, "hate speech" does not justify governmental viewpoint discrimination, as illustrated in *Missouri Knights*. 723 F. Supp. at 1347. There, the district court held that the Ku Klux Klan — a group that can readily be categorized as promoting "hate speech" — could challenge the city's decision to shutter a public access television channel. 723 F. Supp. at 1351. Plaintiffs alleged that the forum was eliminated in order to censor their viewpoint. *Id.* at 1352. The court emphasized that "if the purported governmental interest of the City Council in [eliminating the forum] was to prevent the plaintiffs from expressing their view, then the resolution will be viewpoint-based, irrespective of the neutrality of the text." *Id.* Thus, *Missouri Knights* establishes that excluding Plaintiff because she allegedly engaged in "hate speech" falls woefully short of a compelling governmental interest as would be needed to justify Defendant's viewpoint-discriminatory purpose in closing the public forum on his Facebook Page.[6]

Finally, Defendant mischaracterizes *Chabad-Lubavitch of Georgia. v. Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993), asserting that the Eleventh Circuit would

[6] Defendant's analogizing his exclusion of Plaintiff based on her alleged "hate speech" to an employer disciplining an employee for using racial slurs in the workplace is inapposite. Deft. MTD Brief at 22-23. Plaintiff is not an employee, but a private citizen desiring to engage in political speech in a public forum.

endorse a forum closure for any reason, including suppression of viewpoint. Nothing in the *Chabad-Lubavitch* opinion suggests that the Circuit adopted such a broad interpretation that would run counter to decades of law prohibiting viewpoint discrimination in government forums. Rather, the Circuit narrowly suggested, in dicta, that the government might avoid potential liability for an Establishment Clause violation by closing a designated public forum. *Id.* Avoiding an Establishment Clause violation is far afield from closing a public forum to exclude a particular speaker because of their viewpoint, as Defendant has done. *See, e.g.*, *Cornelius*, 473 U.S. 788, 801 (holding that viewpoint-based restrictions, even in a nonpublic forum, will not withstand First Amendment scrutiny).

To summarize, Plaintiff has pled a viable claim of unconstitutional, viewpoint-based forum closure which now excludes Plaintiff and others whose viewpoint Defendant dislikes. The Supreme Court has a long history of reviewing the purpose behind allegedly content- or viewpoint-neutral government regulations of speech, and it is therefore appropriate to allow such inquiry to proceed in this case. *See Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015) (a court must evaluate a speech restriction both on its face and in terms of its purpose when determining whether strict scrutiny applies) (citing cases). Finally, Defendant's shutting down the public forum on his Facebook Page for a viewpoint-discriminatory purpose fails

to pass strict scrutiny because Defendant can show neither a compelling governmental interest, nor narrowly tailored means.

IV. Defendant Is Not Entitled to Qualified Immunity, Nor Would Such Immunity Bar Plaintiff's Claims for Equitable Relief.

Qualified immunity insulates public officials from civil damages unless they violate a statutory or constitutional right that was clearly established at the time of the conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[7] Here, Defendant violated both Plaintiff's First Amendment rights and established law protecting those rights in internet forums.

Defendant engaged in viewpoint discrimination when he blocked Plaintiff from engaging in political speech on his Facebook page, which functioned as a limited or designated public forum. Am. Compl., Ex. B at ¶ 1(a)(ii)(1). It has long been clearly established that the First Amendment prohibits excluding speakers from a forum based on their viewpoint. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 555 (1975).

By blocking Plaintiff from his public-forum Facebook Page subject to no review or regulatory standards, Defendant also engaged in unbridled discretion. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 751 (1988)

[7]Qualified immunity has no bearing on Plaintiff's damages claim for breach of the Settlement contract.

("[P]ermitting communication in a certain manner for some but not for others raises the danger of content and viewpoint censorship, which is at its zenith when the determination of who may speak and who may not is left to an official's unbridled discretion."). The First Amendment prohibits such unbridled discretion in government forums. *See Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1226 (11th Cir. 2017).

Defendant's blocking Plaintiff from his public-forum Facebook Page because he disliked her perspective constituted retaliation against Plaintiff based on her speech and interfered with her right to petition her local government representative for grievances. That these violations occurred in a digital forum does not alter the fact that they were clearly established principles of First Amendment doctrine. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (stating the same First Amendment principles apply to a metaphysical forum).

Precedent has put Defendant squarely on notice that First Amendment protection of Internet speech is clearly established. The Supreme Court has held that the same First Amendment principles that apply to protected speech in traditional forums apply to speech in virtual forums as well. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("the basic principles of freedom of speech . . . do not vary when a new and different medium for communication appears."). The Supreme

Court recognized this early on in Internet cases by ruling that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]." *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

Furthermore, the Supreme Court has ruled that protecting speech on social media platforms does not present a new First Amendment analysis. In *Packingham v. North Carolina*, the Court ruled that "social media users employ these websites to engage in a wide array of protected First Amendment activity." 137 S. Ct. 1730, 1735-36 (2017). In that case, the Court noted the importance of social media to the right to petition: "[O]n Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner." *Id.*

Most recently, the Eleventh Circuit addressed social media blocking directly in *Attwood v. Clemons*, 818 F. App'x 863, 867 (11th Cir. 2020). While the Court did not reach the merits of the plaintiff's First Amendment claims, the Court recognized both the legitimate nature of the claims, as pled, and the holdings of the Second and Fourth Circuits finding official-capacity action in similar cases. *Id.* at 867-68. Thus, *Attwood* lends further support that social media blocking issues do not raise novel First Amendment claims, but instead apply established law to Internet forums.

Additionally, Defendant asserts that he is entitled to qualified immunity against Plaintiff's retaliatory forum-closure claim claiming this area of the law was

not clearly established in 2020. However, it has been established since 1985 that the government cannot limit access to government forums if that limitation "in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). The fact that the forum in this case is digital does not change this basic First Amendment prohibition.

Finally, even if the Court finds Defendant is entitled to qualified immunity on Plaintiff's First Amendment claims, this would only prohibit constitutional tort damages, not declaratory or injunctive relief. *Swint v. City of Wadley*, 51 F.3d 988, 1001 (11th Cir. 1995).

To conclude, qualified immunity is not a bar to the heart of the legal issues that gave rise to this litigation. Plaintiff asks this Court to protect her First Amendment rights by: (1) declaring that Defendant's conduct in blocking her and then shuttering a public forum was unconstitutional; and (2) enjoining Defendant from censoring her again on any Facebook Page forum that he uses to communicate about his official duties.

V. Defendant *Per Se* Breached the Settlement Agreement, Ignoring Plaintiff's Repeated Requests to Cure

Plaintiff's breach-of-contract claim requires showing: "(1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." *See Norton v. Budget Rent a Car Sys.*, 307 Ga. App. 501, 502 (2010).

Defendant breached the core term of his Settlement with Plaintiff by failing to unblock her from his public-forum Facebook Page within 24 hours of receipt of the fully executed Settlement. Am. Compl. ¶¶ 57, 59-61 & Ex. B ¶ 1(a)(ii). Plaintiff, as a party to the Settlement, has a right to complain about this broken contract. The resulting damages consist of the continued violation of Plaintiff's First Amendment rights up to, and including, the forum closure when Defendant converted his Facebook Page to be private. S*ee Elrod*, 427 U.S. at 373 ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). The resulting damages further consist of attorneys' fees and costs associated with pre-litigation efforts to obtain Defendant's compliance with the Settlement A and, when that failed, filing and litigating this action to obtain redress and durable relief from Defendant's unconstitutional conduct towards Plaintiff. *Id*. ¶¶ 158-65.

Defendant's argument that Plaintiff's counsel acquiesced to any alternative course of action by Defendant in lieu of unblocking Plaintiff is utterly without merit. Counsel repeatedly demanded that Defendant cure his breach by allowing Plaintiff, like other members of the public, to access to his then-publicly available Facebook Page containing Defendant's official-capacity posts. Am. Compl. ¶¶ 62-66, 77-79. Counsel made this demand via email on May 20 and May 22, 2020; during a Zoom

meeting between the parties' counsel on May 26; by email on May 27; by letter on June 1, 2020; and finally by email on June 3, 2020 (last substantive statement by Plaintiff's counsel to Defense counsel: "But Ms. Bohanan and others need to be unblocked from the current page and any future ones like it.").[8] *Cf. Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 312 (2012) ("Courts do not presume acquiescence in the loss of fundamental rights") (citation omitted).

When Plaintiff, at last, filed this action on June 22, 2020, Commissioner Robinson's Facebook page remained publicly accessible yet he still had not unblocked her, and thus continued to be in breach of the Settlement. Am. Compl. ¶¶ 80-82. Nor had Defendant even followed through on his counsel's June 3, 2020 alternative proposal — never accepted by plaintiff's counsel — that official content be "removed quickly" from his Page while Defendant continued to block plaintiff. *Id*. ¶¶ 80-81; Pltff's Opp. to MTD, Ex. 2.

For a month or more after Plaintiff's action was filed, Defendant still blocked Plaintiff in contravention of the Settlement while other members of the public could freely access his Facebook Page containing official-duty-related posts. Am. Compl. ¶¶ 80-82, 88-89. As far as Plaintiff can tell, Defendant only unblocked her after he

[8] Exhibit 2 to Plaintiff's Opposition to MTD contains counsel's repeated demands that Defendant cure the breach by unblocking and giving access to Plaintiff.

had converted his Facebook Page to a private setting such that only his Facebook "friends" could view it. *Id*. ¶¶ 83-84. This occurred shortly before Defendant was due to respond to Plaintiff's first-filed Complaint, indicating that this lawsuit — rather than any good faith on Defendant's part — was the catalyst for his belatedly unblocking her.

Defendant claims that his Facebook Page covered by the Settlement Agreement is "defunct." While Defendant changed the username of his Facebook Page several days into his breach of the Settlement in an attempt to skirt compliance, this did not render his Page "defunct." Rather, it was the same Page with the same content (until eventually some posts were removed), simply with a different label — i.e., analogous to changing the license plate on a car and later giving it a new paint job, but it is still the same car.

The bottom line is, to comply with the Settlement Agreement, Defendant need only have unblocked Plaintiff from his public-forum Facebook Page within 24-hours of his counsel being the last to sign, after which Defendant would have been free to make whatever alterations he wished to his Page. However, as a result of Defendant's failure to follow through on this most straight-forward and central term of the Settlement, Plaintiff was forced to endure ongoing violation of her First Amendment rights for several additional months and ultimately an unconstitutional

forum closure, while also incurring the inconvenience and expense of this litigation. Defendant's motion to dismiss Plaintiff's breach-of-contract claim should therefore be resoundingly denied.

CONCLUSION

For all of the foregoing reasons, Plaintiff requests that Defendant's Motion to Dismiss the Amended Complaint be denied in its entirety.

Respectfully submitted this 26th day of October, 2020.

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[9] This Memorandum of Law has been prepared in part by law students Mark Bailey, Anish Patel, and Davis Wright, and Clinic Fellow Samantha Hamilton.

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on October 26, 2020, I filed the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT** 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/ Clare Norins
Attorney for
Plaintiff Brenda Bohanan