UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES BLACKWELL,

Plaintiff,

v.

CITY OF INKSTER, Municipal Corporation, and PATRICK ANDRE WIMBERLY, individually in his official capacity as Inkster Mayor,

Defendants.
_____/

Case No. 21-cv-10628

Hon. Linda V. Parker
Hon. Mag. J. Elizabeth A. Stafford

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PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND (b)(6)

TABLE OF CONTENTS

CONCISE STATEMENT OF ISSUES PRESENTED

I. Whether this Court should deny Defendants' motion to dismiss Plaintiff's claims for injunctive and declaratory relief as moot because Defendants carry a heavy burden of proving it is absolutely clear that their wrongful conduct will not recur but they have already violated this Court's preliminary injunction; their assertions of voluntary cessation are ad hoc, discretionary, and easily reversible; and the timing of Defendants' assurances indicate that they are not genuine but introduced solely in response to the litigation.

II. Whether this Court should deny Defendants' motion to dismiss for failure to state a claim because Defendants created a public forum for private speech on their municipal Facebook pages and the government speech doctrine does not bar Plaintiff's claims; Plaintiff has sufficiently pled his First Amendment claim because Defendants prohibited his free expression in a public forum; and Defendant Wimberly is not entitled to qualified immunity.

Plaintiff answers: "Yes"

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Cornelius v. NAACP Legal Def. & Ed. Fund, Inc., 473 U.S. 788 (1985)

Davison v. Randall, 912 F.3d 666 (4th Cir. 2019)

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000)

Grawey v. Drury, 567 F.3d 302, 313 (6th Cir. 2009)

Humphrey v. Mabry, 482 F.3d 840 (6th Cir. 2007)

Kincaid v. Gibson, 263 F.3d 342 (6th Cir. 2001) (en banc)

Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1220 (2021)

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)

Packingham v. North Carolina, -- U.S. --, 137 S. Ct. 1730 (2017)

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)

Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)

Pleasant Grove v. Summum, 555 U.S. 460 (2009)

Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995)

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

STATEMENT OF FACTS

Plaintiff filed this action initially *pro se* to vindicate his First Amendment rights and challenge the City of Inkster's unconstitutional policy of censoring speech its officials disagree with. (ECF No. 25, PageID.271). Defendants created municipal Facebook pages and opened forums for private speech, but then blocked Plaintiff from interacting with others in those forums and deleted his comments because of their political nature criticizing the City over the Alex Legion embezzlement investigation and the Mayor's delinquent property taxes. (*Id*., PageID.272-73, 276-79, 284).

On April 12, 2021, the parties stipulated to a preliminary injunction allowing Plaintiff to post on Defendants' municipal Facebook and Instagram pages. (ECF No. 9). Despite Plaintiff's early attempts to resolve this case (ECF No. 10), Defendants opposed settlement and continued to dispute Plaintiff's claims (ECF No. 13, 18). On or around June 1, 2021, Defendants violated the preliminary injunction when they deleted Plaintiff's comment on the City's Instagram page and blocked him. (ECF No. 22, PageID.212, 215, 216). Plaintiff filed a motion for contempt. (ECF No. 17). Plaintiff retained counsel from the American Civil Liberties Union of Michigan and filed an amended complaint on July 2, 2021. (ECF No. 25). Now Defendants move to dismiss Plaintiff's claims and for the first time, raise a challenge to subject-matter jurisdiction. (ECF No. 27).

ARGUMENT

I. DEFENDANTS' INSUFFICIENT ASSURANCES OF VOLUNTARY CESSATION DO NOT MOOT PLAINTIFF'S CLAIMS AND THEREFORE DO NOT REMOVE THIS COURT'S SUBJECT-MATTER JURISDICTION.

Defendants contend that this Court lacks subject-matter jurisdiction over Plaintiff's claims for injunctive and declaratory relief because they are moot. Defendants' mootness argument is governed by the "voluntary cessation" doctrine, described by the Supreme Court as follows:

> It is well settled that a defendant's voluntary cessation of a challenged practice ***does not*** deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways. In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is ***stringent***: A case might become moot if subsequent events made it ***absolutely clear*** that the allegedly wrongful behavior could not reasonably be expected to recur. The ***heavy burden*** of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (emphases added).[1] The Court should reject Defendants' mootness argument because there are three reasons why it is far from "absolutely clear" that Defendants' wrongful behavior could not reasonably be expected to recur: (1) Defendants have already violated the preliminary injunction in this case; (2)

[1] Internal citations and quotations omitted throughout unless otherwise noted.

Defendants' asserted change in behavior is wholly discretionary and not based on a legislative or regulatory change in policy; and (3) the timing of Defendants' asserted change raises strong suspicions that their assurances are not genuine.

A. It Is Far From Absolutely Clear That Defendants' Wrongful Conduct Will Not Recur Because They Have Already Violated This Court's Preliminary Injunction To Refrain From That Conduct.

Defendants' own actions in this case show that they are unable to provide clear and equivocal proof that the alleged violations will not recur. On April 12, 2021, the Court entered a preliminary injunction which specifically allowed Plaintiff to post on Facebook pages and/or Instagram accounts under the control of the City of Inkster. (ECF No. 9, PageID.51). Defendants then violated the injunction. (ECF No. 22, PageID.212, 215, 216). Mr. Seaton, an employee of Defendant City of Inkster who oversaw the City's Instagram account, deleted a new comment posted by Plaintiff on the City's page, and blocked Plaintiff from viewing the page. (ECF No. 22, Page ID.215; No. 22-3, PageID.232). Plaintiff filed a motion for contempt, which remains pending. (ECF No. 17).

Even after the violation of the preliminary injunction occurred, Defendants present no evidence that they took sufficient remedial steps to ensure that the wrongful conduct will not recur in the future. While some city employees filed affidavits saying they will refrain from blocking/banning individuals, no formal procedures have been promulgated or communicated to the public which would

bind Defendants, including Mr. Seaton and other employees who manage the city's municipal social media pages. Without new protections in place, it is likely that Defendants will resume the wrongful conduct in the future, and certainly they cannot carry their heavy burden of proving that they will not.

B. Defendants Cannot Demonstrate Mootness Because Their Asserted Voluntary Cessation Is Ad Hoc, Discretionary, And Easily Reversible, Not Legislative Or Legislative-Like.

Defendants' assertion of voluntary cessation is insufficient to prove mootness for the additional reason that it is neither a legislative or formal regulatory change. In determining whether the ceased action "could not reasonably be expected to recur," *Friends of the Earth*, 528 U.S. at 189, the court takes into account the totality of the circumstances surrounding the voluntary cessation, including the manner in which the cessation was executed. *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019). If the voluntary cessation took the form of newly enacted legislation or repeal of the challenged legislation, those legislative actions will presumptively moot the case unless there are clear contraindications that the change is not genuine. *See Hill v. Snyder*, 878 F.3d 193, 204 (6th Cir. 2017). If the change is regulatory, the government must show that the regulatory processes leading to the change involved legislative-like procedures. *Speech First*, 939 F.3d at 768. Neither situation is present here. Rather, Defendants' alleged cessation appears "ad hoc,

discretionary, and easily reversible," *id.* – precisely the type of voluntary cessation that does not satisfy the stringent standard and heavy burden of proving mootness.

When a defendant's asserted change in policy or practice lies within the discretion of one agency or individual, the Sixth Circuit has repeatedly recognized that "significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Id.*; *see also Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) (holding that new work rules lay solely within the discretion of the MDOC and there was no guarantee that MDOC would not change back to its older stricter rule as soon as the action terminated). Here, Defendants present affidavits from four city employees that merely provide individual promises that they will refrain from blocking/banning users and that no comments will be hidden without consultation with the city attorney and a determination that the speech is unprotected. (ECF No. 27, PageID.349-350; No. 27-A, 27-B, 27-C, 27-G). However, as in the cases cited above, these affidavits do not demonstrate a city-wide binding and legislative-like policy or rule prohibiting the wrongful conduct. Rather, they are ad hoc statements by some, but not all, individuals who administer Defendants' Facebook pages, and show that sole discretion lay with each individual and only one agency within the city.

Furthermore, the city attorney's ability to advise Defendants and their employees regarding the First Amendment and Plaintiff's constitutional rights has

already been called into question by their prior handling of Plaintiff's comments. Well before commenting on Defendants' Facebook page, Plaintiff notified the city attorney's office of his intent and made clear that his comments were afforded First Amendment protections. (ECF No. 25, PageID.294). Despite this advance notice, the city attorney nonetheless allowed Defendants to block Plaintiff and censor his speech on or around March 19, 2021. (ECF No. 27-2, PageID.370; No. 27-3, PageID.375-376; No. 27-5, PageID.388). None of the Facebook administrators who censored Plaintiff stated that they first sought the advice of legal counsel before deleting Plaintiff's comments and banning/blocking him. (*Id*.). But even if they did, the city attorneys themselves operated under the same unconstitutional policy and custom. (ECF No. 25-11). Defendants thus provide insufficient evidence that they have made a change that cannot be easily undone.

Defendants' reliance on *Wagschal v. Skoufis*, a decision from the Southern District of New York that was affirmed in an unpublished summary order, is misplaced. 442 F. Supp. 3d 612 (S.D.N.Y. 2020), *aff'd*, 2021 WL 1568822 (2d Cir. 2021). There, the court noted that the representations by the senator, standing alone, may not be enough to moot the case, but it was the totality of the circumstances and various other steps the senator took that mooted the plaintiff's claim. *Id*. at 621. Unlike in this case, the defendant in *Wagschal* restored the plaintiff's comments to the Facebook page, he refrained from further violations, the defendant admitted that

his conduct was contrary to binding precedent, and most importantly, there was no dispute amongst the parties about the senator's current conduct, as there is here. *Id*.

The Court should also be wary of relying on the affidavits submitted by Defendants because the parties have not engaged in discovery and Plaintiff has had no opportunity to be heard on the factual matters underlying Defendants' new claims of voluntary cessation. When a defendant raises new facts in its motion to dismiss as to subject-matter jurisdiction that are disputed, the plaintiff should have an opportunity to develop and argue the facts. *See Sapperstein v. Hager*, 188 F.3d 852, 856 (7th Cir. 1999) (district court abused its discretion by relying upon an affidavit from defendant's manager as to subject matter jurisdiction "when plaintiff had no real opportunity to contest the allegation"); *Century Prod., Inc. v. Sutter*, 837 F.2d 247, 251 (6th Cir. 1988) ("courts have refused to grant such a motion before a plaintiff has had a chance to discover the facts necessary to establish jurisdiction"). Plaintiff has had no such opportunity here.

C. The Timing Of Defendants' Assurances Weighs Strongly Against Mootness Because It Raises Suspicions That They Are Not Genuine, Were Introduced Solely In Response To Litigation, And Indicates That The Wrongful Conduct Will Likely Recur.

The timing of Defendants' alleged cessation also raises suspicions that these "assurances" are not genuine. Where the voluntary cessation appears to have occurred only in response to the litigation, courts are wary of the assurances' credibility. *See A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 713 (6th Cir.

2016) ("[T]he circumstances of the Secretary's issuance of the new form do not inspire confidence in his assurances regarding the likelihood of recurrence – he issued that new form on the same day as the parties' final merits briefs were due before the district court, attaching the form as an exhibit to his brief and only then presenting his mootness argument. This fact makes the Secretary's voluntary cessation appear less genuine."), *rev'd on other grounds*, -- U.S. --, 138 S. Ct. 1833 (2018); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 342-43 (6th Cir. 2007) ("In this case, that burden is increased by the fact that the voluntary cessation only appears to have occurred in response to the present litigation, which shows a greater likelihood that it could be resumed.").

Defendants here changed course only after being served with Plaintiff's lawsuit and after attorneys from the ACLU filed an appearance on behalf of Plaintiff. Defendants temporarily unblocked/unbanned Plaintiff from the IPD page after this lawsuit was filed. (ECF No. 27, PageID.349). It was Plaintiff who attempted to resolve this case prior to and early on in the litigation (ECF No. 10), but Defendants refused and filed an initial motion to dismiss. (ECF No. 18). In that motion, Defendants did not raise the mootness argument or claim that their wrongful conduct ceased. (*Id.*). Only now, after Plaintiff retained ACLU counsel and filed an amended complaint, do Defendants raise the voluntary cessation argument and submit affidavits of city employees in support. (ECF No. 27). At the

same time, they continue to argue that their conduct is not unlawful, further undermining their contention that there is no live controversy between the parties.

In sum, Defendants have not carried their "heavy burden" of making "absolutely clear" that they could not revert to their policy of excluding individuals from commenting on and engaging with their municipal Facebook pages. Accordingly, their motion to dismiss on mootness grounds should be denied.[2]

II. PLAINTIFF'S COMPLAINT STATES A PLAUSIBLE CLAIM THAT DEFENDANTS VIOLATED HIS FIRST AMENDMENT RIGHTS BY PROHIBITING HIS CONSTITUTIONALLY PROTECTED SPEECH IN A PUBLIC FORUM.

The First Amendment, applicable to the states through the Fourteenth Amendment, prohibits the government from "abridging the freedom of speech." U.S. Const. amend I. "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Brown v. Hartlage,* 456 U.S. 45, 52 (1982). The Free Speech Clause was created "to assure a society in which uninhibited, robust, and wide-open public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." *Buckley v.*

[2] Although Defendants do not contend otherwise, it is worth noting that Plaintiff's claims for damages are not subject to the mootness challenge. *See Powell v. McCormack*, 395 U.S. 486, 498 (1969); *Ermold v. Davis*, 855 F.3d 715, 719 (6th Cir. 2017). Therefore, even Plaintiff's claims for prospective relief were moot, Plaintiff's case overall would not be.

Valeo, 424 U.S. 1, 93 n.127 (1976) (per curiam). The First Amendment creates "an open marketplace" in which differing ideas, about political, economic, and social issues – no matter how uncomfortable or opposed – can compete freely for public acceptance without improper government interference. *New York State Bd. of Elections v. Lopez Torres,* 552 U.S. 196, 208 (2008).

Here, Defendants' censorship of Plaintiff's speech on their Facebook pages, while allowing others' speech to be expressed uninhibited in the same forum, offends the core principles of the First Amendment. Defendants' argument that Plaintiffs' complaint should be dismissed for failure to state a claim should therefore be denied. Specifically, Plaintiff has pled sufficient facts from which the Court may reasonably infer that: (1) Defendants created public forums for private speech on their municipal Facebook pages which are entitled constitutional protection, and thus the government speech doctrine does not bar Plaintiff's claims; (2) Defendants are liable for violating Plaintiff's constitutional right to freedom of speech when they opened the forum up to the public but then censored Plaintiff's speech because it was political and/or they disagreed with its message; and (3) Mayor Wimberly is not entitled to qualified immunity because it is clearly established that viewpoint-based discrimination in any forum is unconstitutional.

A. The Government Speech Doctrine Does Not Bar Plaintiff's Claims Because Defendants Created A Public Forum For Private Speech On Their Municipal Facebook Pages.

The Supreme Court's "public forum analysis" governs the extent to which state actors may restrict private parties' expression in spaces owned or controlled by the government. *See Kincaid v. Gibson*, 263 F.3d 342, 347 (6th Cir. 2001) (en banc). Public forum analysis can apply to social media like Facebook because public forums need not be "spatial or geographic"; rather, "the same principles are applicable" to a "metaphysical forum." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995). Even with ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium or communication appears." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011). The Supreme Court has specifically recognized that one of "the most important places for the exchange of views[] today . . . is cyberspace—the vast democratic forums of the Internet in general, and social media in particular." *Packingham v. North Carolina*, -- U.S. --, 137 S. Ct. 1730, 1735 (2017); *id.* at 1735-36 (observing that "social media users employ" Facebook, LinkedIn, and Twitter "to engage in a wide array of protected First Amendment activity," including "petition[ing] . . . elected representatives and otherwise engag[ing] with them in a direct manner").

Specifically with regards to Facebook, federal courts have repeatedly held that when government officials or agencies open Facebook pages to public use with limited or no restrictions on expressive activity, the government has transformed

that nontraditional space into a public forum where First Amendment protections apply. *See Davison v. Randall,* 912 F.3d 666 (4th Cir. 2019); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), *vacated as moot*, 141 S. Ct. 1220 (2021); *Wagschal v. Skoufis*, 442 F. Supp. 3d 612 (S.D.N.Y. 2020), *aff'd*, No. 20-871, 2021 WL 1568822 (2d Cir. Apr. 22, 2021); *Faison v. Jones*, 440 F. Supp. 3d 1123 (E.D. Cal. 2020); *West v. Shea*, 500 F. Supp. 3d 1079 (C.D. Cal. 2020); *Swanson v. Griffin*, No. CV 20-496 KG/GJF, 2021 WL 930615 (D. N.M. Mar. 11, 2021); *Anderson v. Hansen*, No. 20-C-1305, 2021 WL 535429 (E.D. Wis. Feb. 12, 2021); *Garnier v. Poway Unified Sch. Dist.*, No. 17-cv-2215-W (JLB), 2019 WL 4736208 (S.D. Cal. Sept. 26, 2019). And this makes sense, because as technology advances and new mediums are developed to facilitate public discourse and political speech, First Amendment protections cannot be left behind.

By contrast, the government speech doctrine applies where there is no public forum because the government determines the overarching message and retains the power to approve the words and messages that are disseminated. *See Pleasant Grove v. Summum*, 555 U.S. 460 (2009). Government speech is not regulated by the First Amendment because the government can choose which views to express. *Id*. at 467-68. However, "[w]hile government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property." *Id*. at 469. And the Supreme Court has specifically warned

that the government speech doctrine is "susceptible to dangerous misuse," because "if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal v. Tam*, -- U.S. --, 137 S. Ct. 1744, 1758 (2017).

Here, the expressive activity that Defendants permit on their Facebook pages – comments, likes, shares, dialogue, and other symbolic expressions by private citizens – are views of the public, not "government speech." Because the government speech doctrine applies only to speech the government itself expresses, and Defendants here are not arguing that the public's comments or symbolic expressions on their Facebook pages are the government's speech, the government speech doctrine does not apply to shield them from public forum analysis.

Instead, Defendants' actions illustrate a clear intent to create public forums for private speech on their municipal Facebook pages. When determining whether a space is a public forum, courts look at (1) "the policy and practice of the government" and (2) "the nature of the property and its compatibility with expressive activity" to determine the government's intent. *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985). Both factors demonstrate Defendants' creation of a public forum on their Facebook pages.

1. By their policy and practice, Defendants intentionally created public forums on their municipal Facebook pages.

Defendants intentionally opened their municipal Facebook pages for private speech protected by the First Amendment. The Inkster Police Department ("IPD") page was created in 2016 by a full-time employee of the Inkster Police Department. (ECF No. 27-2, PageID.368, 370). The municipal employee, with the authorization of the chief of police and assistant chief, developed terms for the IPD Facebook page. (*Id*. at PageID.368-69). The City's intentions were expressly stated on the Facebook page itself. In the "About" and "Additional Information" sections of the IPD page, the City states:

> This page was developed to assist us in providing the highest level of service possible in our community. **The hope is that this page will provide an avenue to communicate between the public and the police on breaking news or need to know issues that impact the fine citizens of Inkster** . . . Our highest priority is to protect [the residents and visitors of our city] against the criminal activities of others and to enhance their sense of security, safety and well being . . . **I encourage you to contact us if you have a safety concern or if you feel that you need our services. I hope your visit to this page will be beneficial. We welcome your suggestions and/or comments on how well it serves your needs.**

(ECF No. 25, PageID.280) (emphasis added). The City publicized that the IPD page was intended to function as an open forum for the public to engage in dialogue with the city and other Facebook users about a variety of issues related to the city, its residents and visitors. (ECF No. 25, PageID.280). At all times relevant to the Complaint, the IPD page was administered and controlled by an employee of the

City. (ECF No. 27-2, PageID.368-370). IPD employees created and posted original content on the IPD page. (ECF No. 27-2, PageID.369).

Similarly, the page for Patrick Wimberly-Mayor City of Inkster was created by or at the direction of Mayor Wimberly as an instrumentality of his official office. (ECF No. 25, PageID.282). Wimberly is an administrator of his municipal page. (*Id*. at PageID.1307). When Wimberly administers his municipal page during times when he is in office, municipal funds are used to operate the page. (ECF No. 25, PageID.282). The page itself displays a banner photo above the title bearing the City of Inkster logo and tagline "Inkster Let's Stay Home & Stay Safe." (ECF No. 25, PageID.282). Defendant Wimberly uses the page to disseminate information about city-related activities and issues, and routinely shares information from other municipal Facebook pages. (*Id*. at PageID.283). He also uses the page to engage in two-way dialogue with members of the public about issues concerning the city, including in the form of Community Conversations with him that are livestreamed on the municipal page. (*Id*.)

2. Defendants' municipal pages, by their nature, are compatible with and encourage expressive activity.

Defendants have set up their municipal Facebook pages – the IPD page and the Patrick Wimberly-Mayor City of Inkster page – to allow any Facebook user to view all the content posted on the page and to engage in expressive activity on the page. (ECF No. 25, PageID.280-84). Defendants allow any Facebook user to "Like"

the page and "follow" them. Both pages allow users to express their support or feelings about the content posted on the page because they enabled the "like/thumbs up" function which permits a user to "like, love, show support, laugh, be surprised, show sadness, or show anger" towards any of the posts. (ECF No. 25-6, 25-9). Choosing one of those symbols as a response to the government's post conveys approval, opposition or acknowledgement of the post and is therefore a symbolic message with expressive content. *See Knight*, 928 F.3d at 237. This expressive activity is conveyed to the rest of the government page's followers.

Defendants have also enabled any user, regardless of whether they have officially "Liked" and followed the page, to comment under any of the posts made by the government. (ECF No. 25-6, 25-9). Any user is permitted to "like" or reply to comments made by other members of the public. (ECF No. 25, PageID.283, 25-6, 25-9). Even Defendant Inkster's own employee regularly viewed and commented on the IPD page well before she was an employee of the police department. (ECF No. 27-3, PageID.374). Defendants have also enabled any user to "share" the government's posts. (ECF No. 25, PageID.283, 25-6, 25-9). These actions, whether symbolic or in the form of actual dialogue within the municipal Facebook pages, are expressive conduct that blocking or banning may inhibit. When Defendants blocked and/or banned Plaintiff from their municipal Facebook pages, he was unable to "like" or use other symbols to approve, disprove or acknowledge any

posts, comment beneath any posts, share posts, or send direct messages to the page administrators. (ECF No. 25, PageID.279, 284).

The totality of Defendants' statements and actions in setting up the municipal Facebook pages thus show a clear intent to create public forums for private speech where any individual Facebook user can comment and interact with one another and the government's post. By contrast, a Facebook page reserved exclusively for government speech looks much different. *See, e.g.*, *Morgan v. Bevin,* 298 F. Supp. 3d 1003, 1011 (E.D. Ky. 2018). For example, if the government intended for a Facebook page to be used exclusively for government speech, the page may explicitly state that the purpose of the page was to communicate the administrator's own views and policies and not for the expression of public views. The administrator could prevent all other users from commenting beneath posts made by the administrator. The administrator can also disable other forms of symbolic activity such as liking, sharing or showing forms of support or acknowledgement on the Facebook page by the general public. This case is thus distinguishable from *Morgan* and other cases involving government websites and pages that are exclusively dedicated to government speech.

B. Plaintiff Pleaded Sufficient Facts To Demonstrate A Plausible Violation of His First Amendment Rights Because Defendants Prohibited His Free Expression In A Public Forum.

When a government opens a designated or limited public forum, it must respect the lawful boundaries of the First Amendment. *Rosenberger*, 515 U.S. at 829 (1995). The government may not exclude speech from a designed public forum based on its content, *Cornelius,* 473 U.S. at 804–06; *see also Perry Ed. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983), and the government may not engage in viewpoint discrimination regardless of forum. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992); *Pleasant Grove*, 555 U.S. at 469–70 (viewpoint discrimination prohibited in traditional, designated, and limited public forums). Although the government has no obligation to view or respond to the public expressions on the Facebook pages, *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285 (1984), once it opens a forum for private speech, it may not exclude speakers on the basis of their viewpoint.

Defendants repeatedly engaged in unconstitutional censorship of Plaintiff's speech within the public forums on their municipal Facebook pages. Plaintiff alleges that Defendants deleted his comments critical of the police chief, mayor, and city government, while allowing positive comments about the police chief, mayor, and city government from other members of the public to remain. (ECF No. 25, PageID.272-273). Outside the pleadings, Officer Summers acknowledges: "During my short tenure as the administrator of the IPD Facebook page, I recall hiding several comments by Plaintiff . . . ." (ECF No. 27-3, PageID.376). She did so

with the specific intent to "prevent[] Plaintiff from future commenting on the IPD page." (*Id*.). After banning Plaintiff from the IPD page, she "went back to the administrator page, Inkster Mod, and blocked Plaintiff." (*Id*.). Defendants acknowledge that by banning and blocking Plaintiff from the IPD page, the government prevented Plaintiff from interacting with the IPD page and making any comments on any of the posts within the page. (*Id*. at PageID.377).

Similar action was taken against Plaintiff on or around March 19, 2021, when Plaintiff commented on the Patrick Wimberly-Mayor City of Inkster Facebook page. (ECF No. 27-5, PageID.388). The administrator for the page then hid or deleted the comment. (*Id*.). Noticing that his comment was removed, Plaintiff proceeded to comment again underneath the Mayor's post notifying the administrator that he has a right to post his comment and not be censored while other comments are allowed to remain viewable to all users. (*Id*.). Despite that notice, the administrator again hid or deleted Plaintiff's comment and banned him from the Mayor's municipal Facebook page. (*Id*.). He had previously been blocked from the page. (*Id*.). By banning and blocking Plaintiff from the Patrick Wimberly-Mayor City of Inkster page, the government prevented Plaintiff from interacting with the page or making comments on the posts within the page.

Defendant Wimberly argues that Plaintiff's allegations against him are "insufficient under the pleading standards," but points only to two specific

allegations while ignoring the many other factual allegations concerning his actions. (ECF No. 27, PageID.359). For purposes of Defendants' motion to dismiss under Rule 12(b)(6), the Court must "construe the complaint in the light most favorable to the plaintiff, draw all reasonable inferences in [his] favor, and accept all well-pleaded allegations in the complaint as true." *Keene Grp., Inc. v. City of Cincinnati*, 998 F.3d 306, 310 (6th Cir. 2021). "If a reasonable court can draw the necessary inference from the factual material stated in the complaint, the plausibility standard has been satisfied." *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012).

Applying that standard here, Plaintiff clearly states a claim against Wimberly. The First Amended Complaint states that Wimberly "intentionally created the Patrick Wimberly-Mayor City of Inkster Facebook page and operates it as an extension of his political office," that Wimberly, "while acting under color of law, maintains, operates, and posts on the municipal Facebook page," that "Wimberly's municipal Facebook page was intentionally created by Defendant Wimberly," and that "Wimberly maintains and controls the Mayor's municipal Facebook page." (ECF No. 25, PageID.282.). Even if Wimberly created the Facebook page prior to holding political office, he now uses it as the municipal page of the Mayor, as evidenced by the title of the page, the banner, the City's logo, tagline, and because Wimberly presents himself as speaking on behalf of his office and the City while controlling the page. (ECF No. 25, PageID.282-83). The totality of Defendant

Wimberly's actions indicate that he operates the page as the Mayor of the City of Inkster, not a candidate or a private citizen.[3] (ECF No. 25, PageID.282-85).

Defendant City of Inkster is also liable for Defendant Wimberly's actions in this § 1983 action because Wimberly is a final authorized decision-maker who set municipal policy. An act of official government policy includes the adoption of a particular course of action by that government's authorized decision-makers. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). "Where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Pembaur*, 475 U.S. at 481. When a subordinate's decision is subject to and reviewed by the municipality's authorized decision-makers, the decision-maker's ratification is chargeable to the municipality because their decision is final. *City of St. Louis v. Praprotnik*, 485 U.S. 112,127 (1988). The municipality may also be responsible for Defendant Wimberly's actions and decisions because he failed to train and/or supervise other

[3] As the Second and Fourth Circuits have held in similar cases involving government officials deleting or blocking constituents on social media, when public officials use their social media accounts to inform the public about their official duties with their official titles and logos, they are deemed to be acting under color of law for purposes of 42 U.S.C. § 1983. *See Knight*, 928 F.2d at 231, 234-36; *Davison*, 912 F.3d at 674, 681.

administrators of his municipal Facebook page. *Wright v. City of Euclid, Ohio*, 962 F.3d 852, 881 (6th Cir. 2020).

Here, Plaintiff alleges that Defendant Wimberly, a final decision-maker, created and operated the Mayor's municipal Facebook page. (ECF No. 25, PageID.282). Although Defendant Wimberly states outside the pleadings that he had no knowledge that another individual removed particular comments or banned/blocked anyone from his municipal page (ECF No. 28-1, PageID.1307, 1308), Wimberly and the City are nonetheless liable for acts that are caused by their unconstitutional policy and custom of allowing users to be blocked and/or comments removed based on the content and viewpoint of the user's speech. (ECF No. 25, PageID.285). Plaintiff has thus stated a plausible claim for relief.

C. Defendant Wimberly Is Not Entitled To Qualified Immunity Because He Violated Plaintiff's Clearly Established First Amendment Rights.

Defendant Wimberly is not entitled to qualified immunity from liability for Plaintiff's request for monetary damages. In evaluating a qualified immunity defense for a Rule 12(b)(6) motion to dismiss, courts must determine whether the plaintiff pled facts indicating (1) the defendant violated a statutory or constitutional right, and (2) that right was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Plaintiff has pleaded sufficient facts to satisfy both prongs.

First, as discussed above, Defendants violated Plaintiff's First Amendment rights when they deleted his comments and banned and blocked him from the municipal Facebook pages. (ECF No. 25, PageID.285-295). And contrary to Defendants' assertion, the right Plaintiff possesses here is not the right to be heard by the government, but rather the right to be free from government censorship of his political speech when expressed in a public forum. (ECF No. 25, PageID.286-88, 290-293). An individual's right to express their views with others does not involve the government's obligation to listen, nor is Plaintiff asking the Court to reach that conclusion. *See Minn. State Bd. for Cmty. Colleges*, 465 U.S. at 287.

Second, the right was clearly established. To satisfy the "clearly established" prong of the qualified immunity test, a plaintiff need not identify "a case with the exact same fact pattern or even fundamentally similar or materially similar facts." *Grawey v. Drury*, 567 F.3d 302, 313 (6th Cir. 2009). "Even when confronting a novel factual situation, a reasonable [official] is on notice that his conduct violates clearly established constitutional right if the state of the law at the time of the alleged deprivation provides fair warning that his actions are unconstitutional." *Humphrey v. Mabry*, 482 F.3d 840, 852 (6th Cir. 2007). The unlawfulness of an act "can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs." *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003).

That standard is satisfied here. The rules of forum analysis – that the First Amendment protects the right to free expression in public forums, that forums include metaphysical as well as geographic spaces, and that viewpoint discrimination is not permitted in any forum – have all been clearly established for decades. *See Pleasant Grove*, 555 U.S. at 469–70; *Rosenberger*, 515 U.S. at 830. Since the Supreme Court's decision in *Packingham*, it has also been clearly established that "social media is entitled to the same First Amendment protections as other forms of media." *Knight*, 928 F.3d at 237 (citing *Packingham*, 137 S. Ct. at 1735-36). And as evidenced by the many cases cited above, courts have clearly established that when the government intentionally creates public forums for private speech on social media platforms like Twitter and Facebook, restricting that speech through viewpoint discrimination is unconstitutional. *See supra* Section II.A.

This case is distinguishable from *Novak v. City of Parma*, 932 F.3d 421 (6th Cir. 2019) because the challenged conduct at issue in that case took place in March 2016. *See Novak v. City of Parma*, No. 17-CV-2148, 2018 WL 1791538 (N.D. Ohio Apr. 5, 2018). At that time, few cases had looked to the specific issue of First Amendment protections on Facebook; none of the cases about First Amendment rights on social media cited in Section II.A, *supra*, had been decided. The Sixth Circuit only considered *Morgan v. Bevin*, which was a case of first impression and did not rule on the issue directly, and *Davison v. Randall*, which held that a

government official violated the First Amendment rights of his constituent when blocking him from his Facebook page. *Novak*, 932 F.3d at 434. Since then, so many courts have decided the issue squarely in favor of First Amendment rights on Facebook that there now exists a "consensus of cases of persuasive authority," *Wilson v. Layne*, 526 U.S. 603, 617 (1999), that was simply not present in 2016.

By March 2021, therefore, it was beyond debate that a public official violates the First Amendment by creating a social media account, like Facebook, as a public forum and then engaging in viewpoint discrimination with respect to that account. Consequently, Plaintiff has met both prongs for defeating qualified immunity with respect to his First Amendment damages claim against Mayor Wimberly in his individual capacity.

CONCLUSION

Defendants' motion to dismiss should be denied because Plaintiff's claims are not moot, and Plaintiff has pled sufficient facts to state plausible claims.

Respectfully submitted,

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Dated: August 10, 2021

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2021, I electronically filed this paper and all attachments with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

Respectfully submitted,

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