No. 21-

IN THE

Supreme Court of the United States

JEFF SWANSON,

Petitioner,

v.

COUY GRIFFIN AND SYLVIA TILLBROOK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Our town square is now digital. Elected officials are capable of hosting thousands of constituents in public town halls to discuss the public's business from a lawn chair in their backyard on social media platforms with greater technical or logistical ease than ever before. More importantly, viewpoints that elected officials disagree with are just as easily excluded from these town halls held in virtual public squares, yet under current precedent from this Court and the Tenth Circuit citizens have no remedy for recognized viewpoint discrimination that violates the protections of the First Amendment. The jurisprudence surrounding social media and protections for First Amendment protected speech is or at least was heading in the proper direction but this Court's decision *in Biden v. Knight First Amendment Inst. At Columbia Univ.*, 141 S. Ct. 1220 (2021) to moot and vacate the Second Circuit's holding in *Knight First Amendment Inst. At Columbia Univ. v. Trump,* 928 F.3d 226 (2019) aborted the progression of that protection for individuals such as Mr. Swanson in the Tenth Circuit the law needs to meets the impacts of technology on the exercise of civil liberties.

Thus, the question presented is: Did the Tenth Circuit err in reversing the decision of the District Court that Commissioner Couy Griffin was not entitled to qualified immunity after the Circuit recognized that Commissioner Griffin had engaged in viewpoint discrimination to exclude Mr. Swanson from his open to the public Facebook page where he openly discussed the public's business that he was elected to attend to?

PARTIES TO THE PROCEEDING AND RELATED CASES

The parties to this proceeding are listed on the front cover.

Related cases to this proceeding are:

- *Jeff Swanson v. Couy Griffin and Sylvia Tilbrook.*, No. 2:20-cv-00496 KG-GJF, U.S. District Court for the District of New Mexico. Memorandum and Opinion Judgment entered Mar. 11, 2021.

- *Jeff Swanson v. Couy Griffin and Sylvia Tilbrook*, Case No. 21-2034, U.S. Court of Appeals for the Tenth Circuit. Judgment entered February 25, 2022.

RULE 29.6

Corporate disclosure statement is not required in this matter.

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PETITION FOR WRIT OF CERTIORARI

It simply cannot be that the protections of the First Amendment against viewpoint discrimination evaporate simply because the elected official uses social media as the medium for a public discussion in a virtual public town square. This case provides yet another example of where this Court's jurisprudence for qualified immunity has become so warped that constitutionally protected rights and the will of Congress in passing 42 U.S.C. § 1983 means virtually nothing in a virtual setting. The Tenth Circuit's holding recognizes unequivocally that Commissioner Griffin engaged in viewpoint discrimination, yet left Mr. Swanson (and ultimately all citizens in the Tenth Circuit) with no remedy to address the constitutional violation other than this Petition.

Mr. Swanson is a citizen advocate watchdog residing in Otero County, New Mexico. In that role Mr. Swanson is a vocal proponent of government transparency and accountability and has at times expressed criticism of Commissioner Couy Griffin's actions as an Otero County Commissioner. Commissioner Griffin has responded to such criticism from Mr. Swanson and other constituents expressing concern with hostility and unprofessionalism. That hostility led to the retaliation of Commissioner Griffin blocking Mr. Swanson and many other constituent citizens from Commissioner Griffin's Facebook page where he discussed public business concerning Otero County. Following a county commission meeting, Cmr. Griffin posted a discussion of that meeting on his Facebook page; Mr. Swanson was alerted to this posting by others but was unable to see the posting about public business because he was blocked by Cmr. Griffin. Mr. Swanson

arranged to have undersigned counsel request these public records about Otero County's public business from Otero County pursuant to the New Mexico Inspection of Public Records Act (IPRA). Mr. Swanson received some of the requested records, which included a list of citizens blocked from Cmr. Griffin's Facebook page where he has commonly discussed the public business of Otero County. Cmr. Griffin then attempted to destroy the requested records by deleting them from his Facebook page out of retaliation and to avoid his responsibility for transparency. Cmr. Griffin's action to block Mr. Swanson, because of his viewpoint, from a public forum where Cmr. Griffin was discussing public business with the general public was viewpoint discrimination under the persuasive authority of *Knight First Amendment Institute at Columbia University v. Trump*, 302 F.Supp.3d 541 (S.D.N.Y. 2018).

The acts of retaliation by Cmr. Griffin relate to the clearly established right to speech that Mr. Swanson engaged in to politely criticize Cmr. Griffin's official actions as Mr. Swanson's elected Otero County Commissioner on a public forum of Cmr. Griffin's creation, controlled by him, where he deliberately and commonly engaged with the public regarding Otero County's public business. And beyond matters of merely chilling Mr. Swanson from continuing to exercise his right to politely criticize his government official's actions; Cmr. Griffin acted to affirmatively block Mr. Swanson's free expression in discrimination of his viewpoint.

Thus, the base factual predicate that Cmr. Griffin missed, and was correctly assumed as true by the District Court, is that he has not only created public records subject to production under the New Mexico Public

Records Act on his Facebook page, but on his Facebook page he created a public forum for discussion of Otero County Commission business with his constituents who included, until he was blocked for his polite criticism of the public service provided by Cmr. Griffin, Mr. Swanson.

The Tenth Circuit, while recognizing the obvious viewpoint discrimination, reversed the District Court's finding that the right to be free from viewpoint discrimination when engaged in discussion in the public square, finding that Commissioner Griffin was entitled to qualified immunity given that while there is clearly established caselaw regarding viewpoint discrimination generally, that discrimination has not been clearly established when achieved through the use of social media platforms. This leaves this Court as the only avenue for citizens in the Tenth Circuit to clearly establish that public officials cannot use social media to engage in viewpoint discrimination.

OPINIONS BELOW

The unpublished judgment of the United States Court of Appeals for the Tenth Circuit in *Swanson v. Griffin,* 2022 WL 570079, dated February 25, 2022, reversing the district court's decision denying qualified is set forth in the appendix hereto pages 1a – 12a.

The Memorandum Opinion and Order Denying the Defendants' Motion to Dismiss and for Qualified Immunity *Swanson v. Griffin*, 526 F. Supp. 3d 1005, dated March 11, 2021, is set forth in the appendix hereto pages 13a – 32a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit reversing the District Court decision denying qualified immunity was entered on February 25, 2022. This petition for writ of certiorari by Jeff Swanson is filed within ninety (90) days from the date of the Order reversing the District Court. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 1:

> The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish…

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. Section 1291

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit)

> shall have jurisdiction of appeals from all final decisions of the district courts of the United States … except where a direct review may be had in the Supreme Court.

28 U.S.C. Section 1343

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: 1) to recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, 2) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; and 3) to recover damages or to secure equitable or other relief under an Act of Congress providing for the protection of civil rights…

42 U.S.C. Section 1983

> Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State…, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

> action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section…

STATEMENT OF THE CASE

A. Right to be Free from Viewpoint Discrimination

Mr. Swanson brought 42 USC §1983 litigation against Commissioner Couy Griffin for his acts to retaliate against Mr. Swanson for the content of his speech that was politely critical of the job that Cmr. Griffin was doing as a county commissioner in the county that Mr. Swanson lives in by excluding his viewpoint from the public square discussions that Cmr. Griffin was having about Otero County's official business.

In sum, Petitioner filed a Complaint alleging (1) First Amendment Retaliation; (2) viewpoint discrimination; and (3) violations of state law regarding the production of public records. Respondents moved for dismissal on qualified immunity on May 29, 2020. After completion of briefing, the District Court denied the motion.

B. District Court Proceedings.

The Complaint was filed in the Twelfth Judicial District Court for the State of New Mexico on April 21, 2020 and removed by Respondents to the Federal District

of New Mexico on May 22, 2020. The Memorandum Opinion and Order denying qualified immunity was entered on the district court docket on March 11, 2021. The notice of appeal was filed on April 9, 2021.

C. Tenth Circuit Decision.

The Tenth Circuit reversed the District Court decision on February 25, 2022. The Appeals Court reversed on the basis that no case from this Court or the Tenth Circuit, nor the weight of authority from other jurisdictions, clearly established that Cmr. Griffin could use social media to engage in viewpoint discrimination or First Amendment retaliation and therefore Cmr. Griffin was entitled to qualified immunity.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT WAS CORRECT TO DENY QUALIFIED IMMUNITY AND THE CIRCUIT COURT ERRED IN REVERSING THE DENIAL.

At the core of the case before the District Court was the basic premise that one may exercise his free speech peacefully in a public forum as protected under the Constitution without fear of reprisal from the government based solely on content of speech that is critical of the government. The Tenth Circuit erred in reversing the denial of qualified immunity because the tool used to retaliate and discriminate on the basis of viewpoint was social media.

A. The Tenth Circuit Erred in Affording Couy Griffin Qualified Immunity

In essence, Cmr. Griffin was able to convince the Tenth Circuit to engage in the exercise of weighing the red jello but not the green before attempting to nail it to the wall. That is to say that the Tenth Circuit, ignored the obvious finding of viewpoint discrimination and retaliation for the exercise of protected speech to traverse down a rabbit hole regarding the used technology of social media to find that the Second Circuit's vacated decision in *Knight First Amendment Inst. At Columbia Univ. v. Trump,* 928 F.3d 226 (2019) was erroneously relied upon by the District Court to weigh the precedent applicable to this case; but that Tenth Circuit gave great weight to the un-joined concurrence of Justice Thomas, vacating that decision as moot in *Biden v. Knight First Amendment Inst. At Columbia Univ.*, 141 S. Ct. 1220 (2021). Of course, the full court's decision was based upon the point that Donald J. Trump was no longer president; but in essence the Tenth Circuit's decision adopts Justice Thomas' concurring opinion for the proposition that the full court would have reversed the Second Circuit and effectively eliminate the entire weight of authority from other circuits that supports the District Court's decision here. Tellingly, the Tenth Circuit instead of finding analogies from other cases that would support holding Cmr. Griffin for the obvious constitutional violation found only the differences, and then heavily discounted the Second Circuit's decision in *Trump* and its reliance on this Court's decision in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

Thus, using the analogy of a hotel from Cmr. Griffin's brief before the Tenth Circuit, the Circuit Court excused

the analogous conduct of Cmr. Griffin to obtain permission from a hotel owner to hold a town hall in the establishment wherein he discussed Otero County official business; but enjoyed immunity for tossing any person out of the meeting for criticizing the job he is doing as County Commissioner, or if they are Democrat, based upon his publicly stated position that the "only good Democrat is a dead democrat"[1] because he does not own the hotel where he held the public forum. More, importantly because Facebook is not owned by Cmr. Griffin and because he didn't call his page his official county commissioner page before opening a public town hall on public business, he should receive the benefit of qualified immunity because there is no case law on Facebook directly and 100% aligned with what he did to Mr. Swanson and others.

1. Mr. Swanson has Stated a Plausible Claim Against Cmr. Griffin.

It is obvious that, under the Second, Fourth, and Fifth Circuit analysis, the question essentially reduces to whether or not the social media account in question is a 'public forum", and Mr. Swanson maintains his agreement with that premise that this case turns on that fact specific determination. Mr. Swanson maintains that Tenth Circuit should have affirmed the District Court's application of *Knight First Amendment Inst. At Columbia Univ. v. Trump,* 923 F.3d 226 (2d Cir. 2019), *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), and *Robinson v. Hunt County, Texas,* 921 F.3d 440 (5th Cir. 2019) because Mr. Swanson respectfully offers that this Court should find that the

1. https://apnews.com/article/338e462b1dde54e926ef4b637b406be7

District Court's analysis to the facts actually alleged in the Complaint to reach its conclusion regarding plausibility of sufficient allegations was proper and uphold the decision. Specifically, the Second Circuit's holding in *Knight* that "the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise open dialogue because they expressed views with which the official disagrees." *Id.* at 230. Cmr. Griffin excluded Mr. Swanson from the "Couy Griffin" Facebook page where Cmr. Griffin discussed and allowed the public to comment on his official business as an Otero County Commissioner. Under *Iqbal* and *Twombly* it was plausibly pleaded by Petitioner that the "Couy Griffin" Facebook page is a public forum that Cmr. Griffin excluded Plaintiff from because of his viewpoint, yet the Tenth Circuit refused to accept this basic and simple premise.

2. The Law Regarding Viewpoint Discrimination and First Amendment Retaliation was Clearly Established.

The Tenth Circuit's reversal of the District Court's decision that the law is clearly established is akin to arguing that Officer Chauvin is entitled to qualified immunity for the excessive force death of George Floyd because he knelt on Mr. Floyd's neck instead of using his baton to choke him. It becomes offensive to say that using social media to retaliate and discriminate to punish a citizen exercising their First Amendment rights to speech and to petition for redress is acceptable because it is a different form of communication used to punish the citizen. It is well understood from this Court that:

> Official reprisal for protected speech "offends the Constitution [because] it threatens to inhibit exercise of the protected right," *Crawford–El v. Britton,* 523 U.S. 574, 588, n. 10, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998), and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out, *id.,* at 592, 118 S.Ct. 1584; see also *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (noting that the government may not punish a person or deprive him of a benefit on the basis of his "constitutionally protected speech"). Some official actions adverse to such a speaker might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution. See *Crawford–El, supra,* at 593, 118 S.Ct. 1584; *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 283–284, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (adverse action against government employee cannot be taken if it is in response to the employee's "exercise of constitutionally protected First Amendment freedoms

Hartman v. Moore, 547 U.S. 250, 256, 126 S. Ct. 1695, 1701, 164 L. Ed. 2d 441 (2006)(emphasis added.) Yet, while recognizing the obvious discrimination and retaliation, the Tenth Circuit ignored its own precedent in *Worrell*

v. Henry, 219 F.3d 1197 (10th Cir. 2000) setting out the factors for such a claim, which Mr. Swanson met in the District Court's analysis. First, Mr. Swanson was engaged in protected speech in a public forum. Second, Mr. Swanson's injury was not chilling his protected speech; it was the outright silencing of his speech through his exclusion from the forum and now it has become inciting defamatory comments made in public in retaliation designed to harm Mr. Swanson's reputation and to expose him to scorn and ridicule. Finally, Cmr. Griffin's actions were solely motivated by the polite criticisms that Mr. Swanson made of Cmr. Griffin in the public forum. Hiding behind the notion that Cmr. Griffin could not have reasonably known that his actions would interfere with Mr. Swanson's First Amendment rights because there is not a case where social media was used in the exact same fashion from either this Court or the Tenth Circuit is patently wrong.

CONCLUSION

It is incumbent upon this Court, rescue the free speech of citizens in the Tenth Circuit, when the Tenth Circuit has so clearly abdicated that responsibility in the face of clear First Amendment retaliation and viewpoint discrimination, simply because the technology used is too confounding in the face of qualified immunity for them. This Court's review is necessary if the boundaries of qualified immunity are to mean anything with respect to official reprisals for the content of protected speech exercised on social media, and the matter is likely capable of being corrected summarily which Petitioner respectfully prays the Court consider.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 25, 2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-2034
(D.C. No. 2:20-CV-00496-KG-GJF)
(D. N.M.)

JEFF SWANSON,

Plaintiff - Appellee,

v.

COUY GRIFFIN, OTERO COUNTY COMMISSIONER, IN HIS INDIVIDUAL CAPACITY ACTING UNDER THE COLOR OF LAW,

Defendant - Appellant,

and

SYLVIA TILLBROOK, OTERO COUNTY RECORDS CUSTODIAN,

Defendant.

Before TYMKOVICH, Chief Judge, PHILLIPS, and McHUGH, Circuit Judges.

Appendix A

ORDER AND JUDGMENT*

In 2019, Defendant/Appellant Couy Griffin, an Otero County Commissioner, blocked Plaintiff/Appellee Jeff Swanson from his Facebook profile after Mr. Swanson posted comments critical of Mr. Griffin's service as a county commissioner. Mr. Swanson commenced an action alleging Mr. Griffin's Facebook profile was a public forum and Mr. Griffin had engaged in viewpoint discrimination, in violation of the First Amendment. Mr. Griffin filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss raising a qualified immunity defense. The district court denied the motion, relying on out-of-circuit authority to conclude the law clearly established that (1) social media platforms are entitled to the same First Amendment protection as other public speech platforms and (2) a government official censoring speech violates the speaker's First Amendment rights. We reverse. The Supreme Court has repeatedly instructed lower courts not to define rights at a high level of generality when considering a qualified immunity defense. Furthermore, two of the three out-of-circuit cases relied on by Mr. Swanson are off-point, and a single out-of-circuit case is not capable of clearly establishing a proposition of law.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

I. BACKGROUND

Mr. Swanson is a self-described "vocal proponent of government transparency and accountability." App. at 12. At times relevant to the allegations in Mr. Swanson's complaint, Mr. Griffin served as an Otero County Commissioner. Mr. Griffin maintained a Facebook profile on which he posted some comments about his work as an Otero County Commissioner. Mr. Swanson posted comments on Mr. Griffin's Facebook profile and "expressed criticism" about Mr. Griffin's actions as an Otero County Commissioner. *Id.* Following the criticism, Mr. Griffin blocked Mr. Swanson from viewing and commenting on his Facebook profile. After being blocked, Mr. Swanson filed a public records request with Otero County for (1) Facebook posts by Mr. Griffin pertaining to Otero County business and (2) a list of individuals whom Mr. Griffin had blocked. Otero County provided Mr. Swanson a list of individuals blocked by Mr. Griffin but informed Mr. Swanson that there were no records of Facebook posts by Mr. Griffin pertaining to Otero County business.

Mr. Swanson filed a complaint in state court advancing two causes of action. The first, which is the only cause of action at issue in this appeal, advances a claim under 42 U.S.C. § 1983 against Mr. Griffin in his individual capacity for First Amendment violations sounding in viewpoint discrimination and retaliation.[1] Mr. Griffin and Ms.

1. The second cause of action advances a state law claim under New Mexico's Inspection of Public Records Act against Sylvia Tillbrook in her official capacity as the Otero County records custodian. This cause of action is not before us on appeal, and we take no position on its viability.

Tillbrook removed the case to federal court based on the first cause of action raising a federal question. Mr. Griffin and Ms. Tillbrook then filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

For his part, Mr. Griffin advanced a qualified immunity defense, contending (1) the allegations do not support the conclusion that his Facebook profile was a public forum such that there could be no First Amendment violation; and (2) even if Mr. Swanson's complaint pleads the elements of a constitutional violation, the applicability of the First Amendment to a government official's personal social media profile was not clearly established at the time Mr. Griffin blocked Mr. Swanson on Facebook. In response, Mr. Swanson argued Mr. Griffin converted his Facebook profile into a public forum by discussing Otero County business and permitting members of the public to comment on his posts.

The district court denied the motion to dismiss. As to whether Mr. Griffin's Facebook profile was a public forum, the district court reasoned that the complaint contained sufficient allegations on this matter where it stated Mr. Griffin identified himself as an Otero County Commissioner, used the profile to post matters relevant to Otero County business and to "garner public support for certain public policies," and "entertained comments from the public" on these matters of public concern. *Id.* at 132. As to the second prong of the qualified immunity analysis, the district court reasoned the law clearly established that (1) social media is entitled to the same First Amendment protections as other forums for speech and (2) viewpoint

discrimination when limiting speech violates the First Amendment. Thus, the district court reasoned the law clearly established that if a government official creates a public forum with his Facebook profile, the official violates the First Amendment by limiting speech and blocking a user based on the content of the user's posts. In support of this analysis, the district court relied heavily on *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2d Cir. 2019). But the district court did not cite any Supreme Court or Tenth Circuit authority addressing when an individual's social media profile becomes a public forum. This appeal followed. *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (permitting appeal from denial of dismissal based on qualified immunity where defense turns on an issue of law).

II. DISCUSSION

A. Standard of Review and Qualified Immunity Framework

We review de novo a district court's denial of a motion to dismiss premised on qualified immunity. *Cummings v. Dean*, 913 F.3d 1227, 1238 (10th Cir. 2019). Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *White v. Pauly*, 137 S. Ct. 548, 551, 196 L. Ed. 2d 463 (2017) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam)). To overcome a qualified immunity defense, "the onus is on the plaintiff to demonstrate '(1) that the official violated a statutory

or constitutional right, *and* (2) that the right was clearly established at the time of the challenged conduct.'" *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). As the plaintiff must satisfy both prongs of this analysis, a court may address the prongs in any order. *Id.*

"In order for a constitutional right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 1004-05 (internal quotation marks omitted). "A plaintiff may satisfy this standard by identifying an on-point Supreme Court or published Tenth Circuit decision; alternatively, the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id.* at 1005 (internal quotation marks omitted). To demonstrate that the law is clearly established under the "weight of authority" approach, a plaintiff must identify more than "a handful of decisions from courts in other circuits that lend support to his claim." *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009); *see also Routt v. Howry*, 835 F. App'x 379, 385 (10th Cir. 2020) (unpublished) ("[O]nly one case from another circuit . . . is insufficient to constitute the weight of authority from other circuits that is necessary to finding it clearly established that defendants' particular conduct violated [plaintiff's] rights."); *Parkhurst v. Lampert*, 339 F. App'x 855, 861 (10th Cir. 2009) (unpublished) (citing *Christensen* and concluding "a lone case from another circuit does not satisfy the 'weight of authority' standard").

While "the Supreme Court has 'repeatedly told courts not to define clearly established law at a high level of generality,'" it has also explained that "'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'" *Quinn*, 780 F.3d at 1005 (first quoting *al-Kidd*, 563 U.S. at 742; and then quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). But more recent Supreme Court case law remarks that "the clearly established law must be 'particularized' to the facts of the case." *White*, 137 S. Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). And plaintiffs may not identify their claim through "extremely abstract rights" because this would "convert the rule of qualified immunity into a rule of virtually unqualified liability." *Id.* (quoting *Anderson*, 483 U.S. at 639). Ultimately, we must assess whether "existing precedent [has] placed the statutory or constitutional question beyond debate." *Id.* at 551 (quoting *Mullenix*, 577 U.S. at 12).

B. Analysis

We conclude Mr. Swanson did not carry his burden on the clearly established prong of the qualified immunity analysis. While Mr. Swanson has identified some generally applicable rules of law, Mr. Swanson has not identified a Supreme Court or Tenth Circuit case addressing a set of facts sufficiently similar to those surrounding Mr. Griffin's Facebook profile. Furthermore, although Mr. Swanson attempts to rely on out-of-circuit authority to demonstrate that the right he asserts is clearly established under the weight of authority approach, only one of the three out-of-

circuit decisions is potentially on-point. But a plaintiff's identification of a single out-of-circuit case is not sufficient to satisfy the weight of authority approach.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). If the government opens "a limited forum, . . . [it] must respect the lawful boundaries it has itself set. [It] may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." *Id.* at 829 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804-06, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)). Furthermore, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006).

These general principles apply not only to traditional forums like a public sidewalk, but also to "metaphysical" forums. *Rosenberger*, 515 U.S. at 830. Thus, the First Amendment protects against viewpoint discrimination by the government in government-created public forums on social media. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017).

But Mr. Swanson, critically, has not identified law clearly establishing when an individual government

official's social media profile becomes a public forum. The Supreme Court has not addressed this question. *See Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019) ("[T]he Supreme Court nor any Circuit has squarely addressed whether, and in what circumstances, a governmental social media page . . . constitutes a public forum[.]"); *see also Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221, 209 L. Ed. 2d 519 (2021) (Thomas, J., concurring) (observing that "applying old doctrines to new digital platforms is rarely straightforward" and suggesting that First Amendment protection might not extend to social media pages where a private company controls the platform and could suspend or ban any user); *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1009 (E.D. Ky. 2018) ("This [c]ourt is mindful that it is one of the first to wrestle with the intersections of the application of free speech to developing technology and First Amendment rights of access to public officials using privately-owned channels of communication. It is a case of first impression in the Sixth Circuit and, if appealed, would be a case of first impression to the Supreme Court of the United States as well."). Nor has Mr. Swanson identified any decision by this court addressing this question. Rather, Mr. Swanson relies upon three out-of-circuit cases: (1) *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); (2) *Robinson v. Hunt Cnty.*, 921 F.3d 440 (5th Cir. 2019); and (3) *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2d Cir. 2019). We discuss each in turn.

In *Davison*, Phyllis Randall, the chair of a county board of supervisors blocked the plaintiff from a Facebook page after the plaintiff posted a series of comments critical

of Ms. Randall and the Board and suggested that Board members were operating under a conflict of interest. 912 F.3d at 675-76. The Fourth Circuit held Ms. Randall's action violated the First Amendment because it amounted to an effort "to suppress speech critical of [her] conduct of official duties or fitness for public office." *Id.* at 680 (quoting *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003)). On the surface, this case appears to support Mr. Swanson's position. But a closer review demonstrates that the facts of *Davison* are sufficiently distinguishable from those alleged by Mr. Swanson.

The Fourth Circuit concluded Ms. Randall's Facebook page was a public forum based on when she created the page, how she labeled the page, and how she used the page. *Id.* at 680-81. On the former two considerations, Ms. Randall created the page the day before she was sworn in as Chair of the Board, titling the page "Chair Phyllis J. Randall" and designating the page as a "governmental official" page. *Id.* at 673. Thus, while Mr. Swanson's complaint alleges Mr. Griffin used his Facebook profile in a manner similar to Ms. Randall, it is devoid of allegations that Mr. Griffin created and titled his Facebook profile in a manner similar to the facts at issue in *Davison*.

Turning to *Robinson*, there the plaintiff raised a First Amendment claim after being blocked from accessing and commenting on a Facebook page. 921 F.3d at 445. The Fifth Circuit held that "[o]fficial censorship based on a state actor's subjective judgment that the content or protected speech is offensive or inappropriate is viewpoint discrimination." *Id.* at 447. But this holding was in the context of a Facebook page maintained by

and titled under the name of the Hunt County Sheriff's Office. *Id.* at 445. This fact makes *Robinson* entirely distinguishable from the alleged facts underlying Mr. Griffin's creation and maintenance of his Facebook profile because the Hunt County Sheriff's Office, who created the social media forum, is a government entity rather than a private individual who also serves as a government official. Furthermore, where the Hunt County Sheriff's Office never contested whether its Facebook page was a public forum, the Fifth Circuit did not need to decide whether or when a social media account can become a public forum. *Id.* at 448. Thus, *Robinson* does not help clearly establish the missing aspect of Mr. Swanson's argument against qualified immunity.

Finally, Mr. Swanson relies upon the Second Circuit's decision in *Knight First Amendment Institute*. We need not analyze whether this decision is on-point with the facts alleged in Mr. Swanson's complaint. This is because a single out-of-circuit case does not satisfy the weight of authority approach for demonstrating the law is clearly established. *See Christensen*, 554 F.3d at 1278; *see also Routt*, 835 F. App'x at 385; *Parkhurst*, 339 F. App'x at 861. Accordingly, even assuming the Second Circuit decision is on-point, Mr. Swanson has not carried his burden on the clearly established prong of the qualified immunity analysis.[2]

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2. Even if we had concluded *Davison* shared a sufficient nexus of facts with the allegations in Mr. Swanson's complaint, two out-of-circuit decisions—*Davison* and the Second Circuit's decision in *Knight First Amendment Institute*—would not amount to a sufficient body of out-of-circuit case law to satisfy the weight of authority approach.

III. CONCLUSION

We REVERSE the district court's denial of Mr. Griffin's motion to dismiss based on qualified immunity and REMAND for further proceedings consistent with this decision.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, FILED MARCH 11, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 20-496 KG/GJF

JEFF SWANSON,

Plaintiff,

v.

COUY GRIFFIN, OTERO COUNTY COMMISSIONER IN HIS INDIVIDUAL CAPACITY ACTING UNDER THE COLOR OF LAW, AND SYLVIA TILLBROOK, OTERO COUNTY RECORDS CUSTODIAN,

Defendants.

March 11, 2021, Filed

MEMORANDUM OPINION AND ORDER

This case involves two questions: when does a public official's Facebook page become subject to (1) the First Amendment's prohibitions against viewpoint discrimination and retaliation, and (2) the New Mexico Inspection of Public Records Act (IPRA)? Defendants

filed the instant “Defendants’ Motion to Dismiss and for Qualified Immunity” (Motion to Dismiss) on May 29, 2020, in which they move to dismiss this lawsuit under Fed. R. Civ. P. 12(b)(6). (Doc. 6). Defendants filed a Notice of Errata the following day. (Doc. 7). The matter is now fully and timely briefed. *See* (Docs. 10, 11, 12, and 13). The Court notes jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction) and § 1367 (supplemental jurisdiction).

Having considered the “Complaint to Recover Damages Due to Deprivation of Civil Rights Violations of the United States and the New Mexico Constitutions and for Violations of the New Mexico Inspection of Public Records Act” (Complaint) (Doc. 1-2), the briefing, the Notice of Errata, the controlling law, and for the following reasons, the Court denies the Motion to Dismiss.[1]

I. The Complaint

Plaintiff alleges that he “is a vocal proponent of government transparency and accountability and has at times expressly critici[zed] Defendant Commissioner Couy Griffin’s actions as an Otero County Commissioner.” (Doc. 1-2) at 1. Plaintiff further alleges that Defendant Griffin has responded to that criticism “with hostility and unprofessionalism.” *Id*

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1. The Court notes that Defendants request oral argument on the Motion to Dismiss. Considering the Complaint as well as the briefing on the Motion to Dismiss and the Notice of Errata, the Court does not find that oral argument would be helpful or necessary for the Court to rule on the Motion to Dismiss. The Court, therefore, denies Defendants’ request for oral argument.

Plaintiff contends that sometime in 2019 or before 2019 Defendant Griffin blocked Plaintiff from his Facebook page. *Id.* at 2, ¶ 6. Plaintiff alleges that Defendant Griffin uses his Facebook page to discuss "the public business of Otero County with constituents." *Id.* It also is undisputed that Defendant Griffin's "Facebook page is an individual profile;" Defendant Griffin "does not refer to himself as a County Commissioner in the 'about' section of his ... Facebook page;" and "[t]here is no written invitation to submit comment regarding public business."[2] (Doc. 7) at 1.

Following a recent Otero County Commission meeting, Defendant Griffin allegedly "posted a discussion of that meeting on his Facebook page...." (Doc. 1-2) at 1. Given that Defendant Griffin had blocked Plaintiff from his Facebook page, Plaintiff asked his attorney to make an IPRA request from Otero County to inspect blocked posts from Defendant Griffin's Facebook page. *Id.* at 1-2.

On March 29, 2020, Plaintiff's attorney emailed Defendant Sylvia Tillbrook, the Otero County Administration Executive Assistant, to make an IPRA request for the following documents:

> 1. A copy of the Facebook page evincing the people Couy Griffin on his page had blocked as of today's date.

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2. The Court observes that Plaintiff does not object to these descriptions of Defendant Griffin's Facebook page provided in the Notice of Errata.

> 2. Copies of all Facebook messenger messages regarding public business sent or received by Couy Griffin[.]
>
> 3. Copies of every post including the comments from Couy Griffin's Facebook page regarding county business for the last 12 months.

Id. at 11.

On April 14, 2020, the Otero County Attorney responded to the IPRA request. *Id.* at 10. The Otero County Attorney provided "four screenshots showing people blocked on Facebook by" Defendant Griffin, including Plaintiff. *Id.* at 9-10. The Otero County Attorney, however, did not provide copies of "Facebook messenger messages regarding public business" because Defendant Griffin indicated "that there are no records responsive to [that] request." *Id.* at 10. Finally, with respect to the request for copies of Facebook posts and comments "regarding county business for the last 12 months," the Otero County Attorney stated that Defendant Griffin unblocked Plaintiff on Facebook so he "may review this material online on" Defendant Griffin's Facebook page. *Id.*

Plaintiff alleges that "[s]ometime between March 29, 2020 and April 16, 2020 Defendant Griffin undertook to destroy the requested records by deleting them from his Facebook page...." *Id.* at 2, ¶ 8: Nonetheless, Plaintiff attached to the Complaint posts from Defendant Griffin's

Facebook page dating from January 9, 2019, to July 20, 2019.[3] *Id.* at 12-29.

Plaintiff brings his First Cause of Action against Defendant Griffin, in his individual capacity, pursuant to 42 U.S.C. § 1983. Plaintiff asserts two First Amendment claims in the First Cause of Action. First, Plaintiff alleges that Defendant Griffin violated the First Amendment by engaging in viewpoint discrimination. Plaintiff contends the viewpoint discrimination occurred when Defendant Griffin blocked Plaintiff from his Facebook page, which Plaintiff alleges is a public forum. (Doc. 1-2) at 3-4, ¶ 14. Second, Plaintiff alleges that Defendant Griffin violated the First Amendment by retaliating against Plaintiff's exercise of his First Amendment rights. Plaintiff contends that the retaliation occurred when Defendant Griffin withheld and destroyed posts and materials from his Facebook page, documents Plaintiff alleges constitute public records.

Finally, Plaintiff brings a Second Cause of Action against Defendant Tillbrook in her capacity as an Otero County records custodian.[4] Plaintiff alleges that Defendant Tillbrook violated IPRA "by failing to

3. Although a Rule 12(b)(6) motion to dismiss examines "the sufficiency of a complaint [which] must rest on its contents alone," a court ruling on such a motion to dismiss may rely on documents attached to the complaint as exhibits without converting the motion to dismiss to a motion for summary judgment. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010).

4. Plaintiff inadvertently refers to a "Defendant Montoya" in the Second Cause of Action. *See* (Doc. 1-2) at 4.

respond or provide for inspection" the Facebook posts and materials Plaintiff's attorney requested on March 29, 2020. *Id.* at 4, ¶ 18. Plaintiff maintains that those posts and materials constitute "public documents" subject to an IPRA inspection.

II. The Motion to Dismiss

Defendants move under Rule 12(b)(6) to dismiss all claims with prejudice. Defendants assert that Defendant Griffin is entitled to qualified immunity with respect to the First Cause of Action. Specifically, Defendants argue that Plaintiff has not stated a plausible First Amendment viewpoint discrimination claim against Defendant Griffin, and the law regarding that First Amendment viewpoint discrimination claim was not clearly established at the time the alleged viewpoint discrimination occurred. With respect to the Second Cause of Action, Defendants assert that Plaintiff has failed to state a plausible IPRA claim against Defendant Tillbrook. Plaintiff opposes the Motion to Dismiss in its entirety.

III. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Emps.' Ret. Sys. of R.I. v. Williams Cos., Inc.*, 889 F.3d 1153, 1161 (10th Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that

the defendant is liable for the misconduct alleged." *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788, 792 (10th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). In making this plausibility assessment, courts "accept as true 'all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff.'" *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1280 (10th Cir. 2013) (quoting *Kerber v. Qwest Grp. Life Ins. Plan*, 647 F.3d 950, 959 (10th Cir. 2011)).

IV. Discussion

A. The First Cause of Action: First Amendment Claims and Qualified Immunity

Defendants argue that Defendant Griffin is entitled to qualified immunity with respect to the First Amendment claims raised in the First Cause of Action. In evaluating a qualified immunity defense in the context of 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." *Crall v. Wilson*, 769 Fed. Appx. 573, 575 (10th Cir. 2019) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). Here, Defendants assert that Plaintiff had not pled facts demonstrating that he meets either prong of the qualified immunity analysis and, thus, the Court should dismiss the First Cause of Action under Rule 12(b)(6) with prejudice.

1. First Qualified Immunity Prong: Violation of the First Amendment

a. Whether Plaintiff has Stated a Plausible First Amendment Viewpoint Discrimination Claim Against Defendant Griffin

"When the government provides a forum for speech (known as a public forum), the government may be constrained by the First Amendment, meaning that the government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint...." *Manhattan Community Access Corp. et al. v. Halleck et al.*, 587 U.S. , 139 S.Ct. 1921, 204 L. Ed. 2d 405 (2019). "As a general matter, social media is entitled to the same First Amendment protections as other forms of media," including to be free from viewpoint discrimination. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019). However, "not every social media account operated by a public official is a government account" or a public forum. *Id.* at 236.

Generally, "[t]o determine whether a public forum has been created, courts look 'to the policy and practice of the government' as well as 'the nature of the property and its compatibility with expressive activity to discern the government's intent.'" *Id.* at 237 (citation omitted). Moreover, "[o]pening an instrumentality of communication 'for indiscriminate use by the general public' creates a public forum." *Id.* Applying these general principles to whether a public official's social media account constitutes

a public forum, courts examine "how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account." *Id.* at 236.

For example, conduct that creates a public forum in the social media context includes "intentionally open[ing]" a social media account "for public discussion... upon assuming office, repeatedly us[ing] the [a]ccount as an official vehicle for governance and ma[king] its interactive features accessible to the public without limitation." *Id.* at 237. Other such conduct includes inviting the public to post "matters of public concern" and seeking an "exchange of views," i.e., making the social media account "compatib[le] with expressive activity." *Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019), *as amended* (Jan. 9, 2019) (citation omitted). In addition, the following conduct supports a finding that a Facebook page, in particular, is a public forum: designating a Facebook page "as belonging to a 'governmental officials'" "cloth[ing] the page in the trappings of [the] public office," listing "official contact information on the page," and having the authority to control "the interactive component of the page," including blocking users. *Id.* at 683.

In this case, Plaintiff generally alleges that Defendant Griffin's Facebook page is a public forum in which he "discuss[es] public business with the general public...." (Doc. 1-2) at 3, ¶ 11. Admittedly, Plaintiff does not allege (1) that Otero County had a policy and practice regarding the use of Facebook pages by public officials; (2) that

Defendant Griffin created the Facebook page upon becoming an Otero County Commissioner or designated the Facebook page as belonging to an Otero County Commissioner; (3) that Defendant Griffin explicitly invited "an exchange of views" by the public or clothed the Facebook "page in the trappings of [the] public office" by including, for instance, "official contact information;" or (4) how "others, including government official and agencies, regard and treat the" Facebook page. *See Knight First Amendment Inst. at Columbia Univ.*, 928 F.3d at 236-37; *Davison*, 912 F.3d at 682-83. Indeed, it is undisputed that Defendant Griffin's "Facebook page is an individual profile," not a government page; Defendant Griffin "does not refer to himself as a County Commissioner in the 'about' section of his personal Facebook page;" and "[t]here is no written invitation to submit comment regarding public business." (Doc. 7) at 1.

Nonetheless, viewing the Complaint as true and viewing both the Complaint and attached Facebook posts in the light most favorable to Plaintiff, the Court reasonably infers from the Complaint and those Facebook posts that Defendant Griffin made clear in his Facebook page that he is an Otero County Commissioner. The Court also reasonably infers that Defendant Griffin entertained comments from the public, without limitation, prior to exercising his authority to block those commentators who oppose his viewpoint. (Doc. 7) at 1. Additionally, having viewed the Facebook posts attached to the Complaint in the light most favorable to Plaintiff, the Court reasonably infers from those posts that they concerned public busines and that Defendant Griffin, in fact, repeatedly used his

Facebook page "as an official vehicle for governance." *See Knight First Amendment Inst. at Columbia Univ.*, 928 F.3d at 237. More specifically, the Court reasonably infers from the Facebook posts that Defendant Griffin, in his capacity as an Otero County Commissioner, created the posts to garner public support for certain public policies and to advance those policies in the Otero County Commission in order to shape the governance of Otero County. For instance, Defendant Griffin created posts in which he:

1. congratulated Hidalgo County for authoring a letter seeking resources to cope with illegal immigration and congratulated Chavez County for approving an asylum seeker resolution;

2. discussed meeting with the Otero County Attorney about drafting a resolution regarding Otero County's status as a sanctuary county for an upcoming Otero County Commission agenda;

3. coordinated a post-Otero County Commission meeting to discuss Otero County's status as a sanctuary county and Second Amendment rights;

4. encouraged people to support local county commissions and county sheriffs who supported former President Donald Trump's national emergency declaration;

5. shared a letter he sent to Congresswoman Small regarding border security, which Defendant Griffin signed in his capacity as an Otero County Commissioner;

6. commented that if the Governor threatens to use appropriations control against Otero County the Governor still cannot take way "our guns;"

7. posted the Otero County Law Enforcement Appreciation Day Proclamation, which the Otero County Commission issued;

8. endorsed statements by two Otero County Commissioners who do not support housing immigrants within the county;

9. referred to a newspaper article to explain why he and another Otero County commissioner "passed a resolution to protect tax dollars and resources from being spent on illegal aliens/asylum seekers;"

10. posted a letter that several New Mexico county elected officials sent to the New Mexico Congressional Delegation seeking more resources for border security, which Defendant Griffin joined in his capacity as "Otero County Commission Chair;"

11. encouraged people to call county commissioners to "demand resolutions to be put in place to safeguard taxpayer monies and county resources against illegals/asylum seekers;" and

12. criticized the Governor for not reaching out to the Otero County Sheriff and Otero County Government. (Doc. 1-2) at 12, 14, 16-19, 21-25, 27, and 29.

Additionally, Defendant Griffin's actions with respect to his Facebook page, as alleged and demonstrated in the posts attached to the Complaint, exemplify why the First Amendment prohibits viewpoint discrimination. Viewing the Complaint and its attached posts in the light most favorable to Plaintiff, the Court can reasonably infer from the allegations in the Complaint and from the posts, that Defendant Griffin, as an avid Facebook user, is familiar with how to maintain a private Facebook page not accessible to the public. The Court reasonably infers from Defendant Griffin's failure to maintain a private Facebook page that he knowingly intended for his Facebook to have a public reach. A public official, like Defendant Griffin, cannot block opposing views from a personal Facebook page that is open to the public and discusses matters of public concern and then claim that the Facebook page does not have sufficient indicia of a public forum to be subject to the First Amendment. In other words, Defendant Griffin, cannot use a social media platform such as Facebook as both a sword and shield.

For the foregoing reasons, the Court concludes that Plaintiff has pled facts and included evidence attached to the Complaint demonstrating that Defendant Griffin's Facebook page is a public forum subject to the First Amendment and that Defendant Griffin blocked Plaintiff from that public forum because his views differed from Defendant Griffin's. Consequently, Plaintiff has stated a plausible First Amendment claim for viewpoint discrimination.

b. Whether Plaintiff has Stated a Plausible First Amendment Retaliation Claim Against Defendant Griffin

Although Defendants move to dismiss all of Plaintiff's claims, Defendants do not explicitly argue that Plaintiff failed to state a plausible First Amendment retaliation claim against Defendant Griffin. Presumably, Defendants would argue that Plaintiff cannot state a plausible First Amendment retaliation claim associated with Defendant Griffin's Facebook page when no First Amendment right exists as to that Facebook page. *See Shero v. City of Grove, Okl.*, 510 F.3d 1196, 1203 (10th Cir. 2007) (noting that one element of First Amendment retaliation claim requires "that the plaintiff was engaged in constitutionally protected activity") (citations omitted). Considering the Court, in fact, concluded that Plaintiff pled facts and, otherwise shown, that Defendant Griffin's Facebook page is a public forum subject to the First Amendment, the aforementioned argument for dismissal of the First Amendment retaliation claim lacks merit.

Furthermore, viewing the allegations in the Complaint as true, and viewing the Complaint and its attachments in the light most favorable to Plaintiff, the Court determines that Plaintiff has pled a plausible First Amendment retaliation claim by alleging facts that show: (1) Plaintiff "engaged in constitutionally protected activity" by posting on Defendant Griffin's Facebook page, a public forum; (2) Defendant Griffin's withholding and destruction of Facebook posts and materials caused Plaintiff "to suffer

an injury that would chill a person of ordinary firmness from continuing to engage" in Defendant Griffin's Facebook page; and (3) Defendant Griffin's withholding and destruction of Facebook posts and materials were "substantially motivated as a response to" Plaintiff's posts on Defendant Griffin's Facebook page. *See id.* (setting forth elements of First Amendment retaliation claim).

In sum, Plaintiff has met the first prong for defeating Defendant Griffin's qualified immunity defense, namely, that Plaintiff has pled facts and attached evidence to the Complaint that plausibly allege Defendant Griffin violated the First Amendment by engaging in viewpoint discrimination and retaliation. The Court, therefore, proceeds to examine the second qualified immunity prong: whether Plaintiff has pled facts showing that his First Amendment right to be free from viewpoint discrimination and retaliation were clearly established during the times relevant to this lawsuit.

2. Second Prong: Clearly Established Law

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010) (quotation omitted). Ordinarily, "a preexisting Supreme Court or Tenth Circuit decision, or the weight of authority from other circuits, must make it apparent to a reasonable [official] that the nature of his conduct is unlawful." *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1210 (10th

Cir. 2017). In deciding whether a precedent provides fair notice to a defendant, the United States Supreme Court has instructed courts "not to define clearly established law at a high level of generality." *Kisela v. Hughes*, ___ U.S. ___ , 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018). Rather, "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, ___ U.S. ___ , 137 S. Ct. 548, 552, 196 L. Ed. 2d 463, (2017) (*per curiam*) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). Although there need not be "a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question *beyond debate*."[5] *Kisela*, 138 S. Ct. at 1152 (emphasis added) (quoting *White*, 137 S. Ct. at 551). To summarize, "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016) (quoting *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015)).

a. Whether a First Amendment Right Based on Viewpoint Discrimination Carried Out on a Social Media Account was Clearly Established in 2019

It has been clearly established since 2017 that "social media is entitled to the same First Amendment protections

5. "The law is also clearly established if the conduct is so obviously improper that any reasonable [official] would know it was illegal." *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015). Plaintiff does not argue that this alternative "clearly established law" principle applies in this case.

as other forms of media." *Knight First Amendment Inst. at Columbia Univ.*, 928 F.3d at 237 (citing *Packingham v. North Carolina*, ___ U.S. ___ , 137 S.Ct. 1730, 1735-36, 198 L. Ed. 2d 273 (2017)). Moreover, it has been clearly established since 1992 that First Amendment "viewpoint discrimination is not permitted by the government." *Id.* (citing *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992)). Importantly, the United States Supreme Court clearly established in 1995 that the public forum requirement for First Amendment viewpoint discrimination "need not be 'spatial or geographic' and the 'the same principles are applicable' to a metaphysical forum." *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)).

The Court concludes from the above clearly established United States Supreme Court precedent that in 2019 it was "beyond debate" that a public official violates the First Amendment by using a social media account, like Facebook, as a public forum and then engaging in viewpoint discrimination with respect to that account. *See Davison*, 912 F.3d at 682 (acknowledging that in 2017 "Supreme Court ... analogized social media sites, like the Chair's Facebook Page, to 'traditional' public forums, characterizing the interne as 'the most important place [ ] (in a spatial sense) for the exchange of views'") (quoting *Packingham*, 137 S.Ct. 1730 at 1735, 198 L. Ed. 2d 273). In other words, in 2019, it would have been clear to a reasonable public official that a public official violates the First Amendment by establishing a Facebook page as a public forum and then blocking people from that page

because their views differed from the public official's views. Defendant Griffin, therefore, had fair notice that such conduct would violate the First Amendment's prohibition against viewpoint discrimination. Consequently, Plaintiff has met the second prong for defeating qualified immunity with respect to the First Amendment viewpoint discrimination claim against Defendant Griffin.

Given that Plaintiff has satisfied both prongs of the qualified immunity analysis with respect to the First Amendment viewpoint discrimination claim against Defendant Griffin, the Court concludes that Defendant Griffin is not entitled to qualified immunity as to that First Amendment claim. Furthermore, as the Court determined *supra*, Plaintiff has stated a plausible First Amendment viewpoint discrimination claim against Defendant Griffin. For both those reasons, Plaintiff's First Amendment viewpoint discrimination claim survives this Rule 12(b)(6) Motion to Dismiss.

b. Whether a First Amendment Right to be Free from Retaliation Premised on Viewpoint Discrimination Carried Out on a Social Media Account was Clearly Established in 2020

Defendants do not contest that a general claim for retaliation under the First Amendment was clearly established in 2020. *See Shero*, 510 F.3d at 1203 (2007 Tenth Circuit case setting forth elements for First Amendment retaliation claim). Nonetheless, considering Defendant moves to dismiss all of Plaintiff's claims, the Court

assumes, arguendo, that Defendant would assert that a First Amendment retaliation claim based on viewpoint discrimination resulting from a public official blocking an individual from a Facebook page constituting a public forum was not clearly established in 2020. That argument, however, fails because, as the Court determined, such a First Amendment viewpoint discrimination claim was clearly established by 2019.

As with the First Amendment viewpoint discrimination claim, the Court determines that Defendant Griffin is not entitled to qualified immunity with respect to the First Amendment retaliation claim. In addition, as discussed previously, the Court has determined that Plaintiff stated a plausible First Amendment retaliation claim. For those two reasons, the First Amendment retaliation claim, likewise, survives this Rule 12(b)(6) Motion to Dismiss.

B. The Second Cause of Action: IPRA Claim

Subject to certain exceptions not applicable to this case, IPRA provides that "[e]very person has a right to inspect public records of this state...." NMSA 1978, § 14-2-1 (2015 Cum. Supp.). "Public records" are any "materials regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained...." NMSA 1978, § 14-2-6(G) (2015 Cum. Supp.).

Defendants argue that "if the Court declares Defendant Griffin's personal Facebook Page is not a public

forum, it necessarily follows that the materials posted or contained therein are not public records" under IPRA. (Doc. 12) at 5. Under that scenario, Defendants conclude that Defendant Griffin's Facebook page would not be subject to IPRA's inspection requirement. However, given the Court concluded that Plaintiff plausibly pled and demonstrated that Defendant Griffin's Facebook page is a public forum, Defendants' argument for dismissing the IPRA claim has no merit. In fact, as discussed *supra*, Plaintiff has plausibly pled and provided evidence that Defendant Griffin, a member of the Otero County Commission, "a public body," created and received Facebook posts and materials "relate[ed] to public business." As such, Plaintiff has plausibly shown that those posts and materials constitute "public records" as defined by IPRA and, thus, are subject to the IPRA inspection requirement. For the foregoing reasons, the Court concludes that Plaintiff has stated a plausible IPRA claim that survives this Rule 12(b)(6) Motion to Dismiss.

IT IS ORDERED that

1. Defendants' request for oral argument on Defendants' Motion to Dismiss and for Qualified Immunity (Doc. 6) is denied; and

2. Defendants' Motion to Dismiss and for Qualified Immunity (Doc. 6) is denied.

/s/ Kenneth J. Gonzales
UNITED STATES DISTRICT JUDGE