IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

BOBBIE MCDOW,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
LORA REINBOLD,	)	
	)	
Defendant.	)	
	)	Case No. 3AN-21-05615CI

ORDER RE MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

This case involves a claim that State Senator Lora Reinbold is suppressing the free speech rights of a constituent, Bobbie McDow. Senator Reinbold maintained a Facebook Page, and Ms. McDow claims that Senator Reinbold engaged in viewpoint discrimination by banning her from posting comments on the Senator's page.

The following motions are now before the Court: (1) Plaintiff Bobbie McDow's ("Ms. McDow") October 21, 2021 *Motion for Partial Summary Judgment* and (2) Defendant Lora Reinbold's ("Senator Reinbold") November 15, 2021 *Cross-Motion for Summary Judgment*. Oral Argument was held on June 8, 2022. Ms. McDow argues that Senator Reinbold violated Article 1, Section 5 of the Alaska Constitution by banning Ms. McDow from the "Senator Lora Reinbold" Facebook page ("Page"). Senator Reinbold counters that the Page is not a public forum and that her actions on the Page do not constitute government action. For the reasons stated below, Ms. McDow's *Motion for Partial Summary Judgment* is granted in part and denied in part, and Senator Reinbold's *Cross-Motion for Summary Judgment* is denied.

The Court concludes that Senator Reinbold was acting as a government actor when she banned Ms. McDow from the Page, and the Page is a public forum. Therefore, Senator Reinbold's actions may have violated the free speech rights of Ms. McDow. However, disputed issues of fact preclude summary judgment on whether Senator Reinbold's actions amount to unconstitutional viewpoint discrimination.

I. BACKGROUND[1]

Social media use in the United States and Alaska is now ubiquitous. A significant percentage of adults, and children with cell phones utilize social media platforms as consumers of information and news. As a result, social media platforms like Facebook have become integral to the exchange of information and the debate of ideas and opinions. Media personalities and politicians alike have moved online forcing the Courts to grapple with questions about how social media use impacts our constitutional principles of free speech and debate.

The United States Supreme Court recognizes the constitutional implications of social media speech, explaining that under the First Amendment, all persons should have "access to places where they can speak and listen, and then, after reflections, speak and listen once more."[2] In *Packingham*, the Supreme Court identified social media as a modern-day forum for the exercise of First Amendment principles:

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general and social media in particular. Seven in ten American adults use at least one Internet social networking service. . . . One of the most popular of these sites is Facebook the site used by petitioner . . . in this case. . .. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. . .. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought."[3]

Consequently, social media platforms like Facebook represent a critically important venue for viewpoint expression and exchange in this country implicating a full array of Free Speech and First Amendment questions.

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[1] Unless otherwise stated, the undisputed facts in this section are taken from the *Motion for Partial Summary Judgment* and *Cross-Motion for Summary Judgment* and exhibits thereto.
[2] *Packingham v North Carolina*, _ US _, 137 S. Ct. 1730, 1735 (2017).
[3] *Packingham,* 137 S.Ct. at 1735-1736 (internal citations omitted.)

Defendant, Lora Reinbold, is an Alaska State Senator. At the time this case was filed, Senator Reinbold maintained a Facebook page titled "Senator Lora Reinbold." The Page was designated as that of a "Government Official." The "About" section of the Page stated, in its entirety: "Intent of page is to help educate viewers about issues facing our state. Be respectful of those posting/commenting or your comments may not be up for long. No trollers, profanity, cruelty [sic] or bullying." The Page was created on January 25, 2013. At that time, the Page was titled "Representative Lora Reinbold." The name of the Page was changed to "Senator Lora Reinbold" on January 25, 2019. Senator Reinbold also maintained a separate personal Facebook "Profile" titled "Lora Reinbold." A "Profile" is a personal profile, while a "Page" is managed by a person using their "Profile."[4] "Profile" and "Page" are terms of art and not interchangeable.

Plaintiff, Bobbie McDow, is a resident of Eagle River and, therefore, one of State Senator Reinbold's constituents. Ms. McDow maintains a personal Facebook Profile titled "Bobbie McDow." Ms. McDow has commented on the "Senator Lora Reinbold" Facebook page, on posts by Senator Reinbold herself and by other users. The parties do not dispute that, on April 29, 2021, Ms. McDow was banned from the "Senator Lora Reinbold" Facebook page for at least one day.

II. ARGUMENTS

In her October 21, 2021 *Motion for Partial Summary Judgment*, Ms. McDow argues that Senator Reinbold violated Article 1, Section 5 of the Alaska Constitution by banning Ms. McDow from the "Senator Lora Reinbold" Facebook. In particular, Ms. McDow seeks summary judgment on the following points: (1) Senator Reinbold was acting as a government actor when she banned Ms. McDow from the Page; (2) the Page is a "public forum"; and (3) the banning was driven by Ms. McDow's expressed viewpoint and amounted to viewpoint discrimination – or, alternatively, even if the banning was for content-neutral reasons, it was still unconstitutional.

[4] *Davison v. Randall*, 912 F.3d 666, 673 (4th Cir. 2019), as amended (Jan. 9, 2019) (internal citations omitted).

On November 15, 2021, Senator Reinbold filed an *Opposition to Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment.* In her Cross-Motion, Senator Reinbold argues that her acts were her own, done in her personal capacity, not in her official capacity, or by anyone on her legislative staff. Accordingly, Senator Reinbold seeks summary judgment on the following points: (1) the Page is not a public forum; (2) the Communications Decency Act ("CDA") prohibits civil liability actions such as this action Ms. McDow has brought against Senator Reinbold; and (3) any actions taken on the Page by Senator Reinbold are her private actions, not those of the State.

III. APPLICABLE LAW

A. Free Speech Under the Constitution

The central legal issue in this case is whether Senator Lora Reinbold violated the free speech clause of the Alaska Constitution by banning constituent Bobbie McDow from the "Senator Lora Reinbold" Facebook page.

Whether or not a government official is acting under the color of law while operating a social media page relating to their official position is a matter of first impression for this Court. However, a number of circuit courts, including the Ninth Circuit, have held that a governmental official is acting under the color of law while managing a social media page under their title.

The Alaska Constitution recognizes the right of free speech as well as the responsibility of speakers for the consequences of their speech.[5] Article 1, Section 5 of the Alaska Constitution, regarding freedom of speech, states, in its entirety: "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." "[T]he Alaska Constitution protects free speech at least as broad[ly] as the U.S. Constitution and in a more explicit and direct manner."[6]

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[5] *See* ALASKA CONST. art. 1, § 5.

[6] *Alsworth v. Seybert*, 323 P.3d 47 (Alaska 2014) (quoting *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 198 (Alaska 2007) (alteration in original) (footnotes omitted) (quoting *Vogler v. Miller*,

Neither the United States Supreme Court nor the Alaska Supreme Court have explicitly decided whether or not a government official is acting under the color of law while operating a social media page relating to their position.

B. Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[7] The moving party has the initial burden of making that prima facie showing through admissible evidence.[8] Once the moving party meets that burden, the burden shifts to the non-moving party to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists.[9]

When evaluating a summary judgment motion, the court draws all reasonable inferences in favor of the non-moving party, requiring only that the evidence proposed for trial not be based entirely on unsupported assumptions and speculation, and not be too incredible to be believed by reasonable minds.[10] After the court makes reasonable inferences from the evidence in favor of the non-moving party, summary judgment is appropriate only when no reasonable person could discern a genuine factual dispute on a material issue.[11]

The Court has the duty to review the entirety of the record on a motion for summary judgment to determine whether any of the evidentiary material presented "suggests the existence of any other triable genuine issues of material fact."[12]

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651 P.2d 1, 3 (Alaska 1982); *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1980)) (internal quotation marks omitted)).

[7] ALASKA R. CIV. PROC. 56(c).

[8] *Winschel v. Brown*, 171 P.3d 142, 145 (Alaska 2007).

[9] *Thomas v. Archer*, 384 P.3d 791 (Alaska 2016).

[10] *Thomas v. Archer*, 384 P.3d 791 (Alaska 2016).

[11] *Thomas v. Archer*, 384 P.3d 791 (Alaska 2016).

[12] *Prentzel v. State, Dept. of Public Safety,* 169 P.3d 573, 582 (Alaska 2007) (quoting *Jennings v. State,* 566 P.2d 1304, 1310 (Alaska 1977)).

IV. DISCUSSION

The Court turns now to each of Ms. McDow's points in turn. First, the Court will address whether Senator Reinbold was acting as a government actor when she banned Ms. McDow from the Page. Second, the Court will address Senator Reinbold's argument that the Communications Decency Act ("CDA") insulated her from actions such as this by Ms. McDow. Third, the Court will discuss whether the Facebook Page is a "public forum." The public forum analysis depends on whether or not Senator Reinbold was acting as a government official. Last, the Court will address whether the banning was driven by Ms. McDow's expressed viewpoint and amounted to viewpoint discrimination.

A. State Senator Reinbold operated the "Senator Lora Reinbold" Facebook Page as a government actor and not a private speaker.

The Alaska Supreme Court has not decided if a person operating a Facebook Page can be acting under the color of law.[13] However, other courts have made the determination when a person is operating a Facebook Page related to their official government position, that person is operating under the color of law.[14] When a court is determining if a person is a government actor operating under the color of law, courts look to 42 USCA § 1983 to make their determination.[15] The Alaska Supreme Court has

[13] The United States Supreme Court has held "[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (internal quotations omitted) (internal citations omitted).
[14] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022); *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019), as amended (Jan. 9, 2019); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 234, 236 (2d Cir. 2019), cert. granted, judgment vacated sub nom. *Biden v. Knight First Amend. Inst. At Columbia Univ.*, 209 L. Ed. 2d 519, 141 S. Ct. 1220 (2021) (vacated for mootness).
[15] The Supreme Court of the United States has interpreted a claim brought under § 1983 in *West v. Atkins*. In *West*, the Court held "[t]o constitute state action, the deprivation must be caused by the exercise of some right or privilege created by the State ... or by a person for whom the State is responsible, and the party charged with the deprivation must be a person who may fairly be said to be a state actor." *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)) (internal quotations omitted).

not applied the color of law to social media specifically, but it has analyzed § 1983 in order to determine if a person was acting under the color of law.[16]

Under 42 USCA § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects...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."[17]

The Ninth Circuit, in *Garnier v. O'Connor-Ratcliff*, held that a person is operating under the color of law when there is a close nexus between the State and the challenged action.[18] In particular, the Ninth Circuit has held that a government official is acting under the color of law when operating social media pages named after their government position.[19] In *Garnier*, the Court held that the Governmental Officials were not required to create or use social media pages, but regardless, the accounts were still directly linked to their official positions.[20]

"[W]hen a state employee is off duty, whether he or she is acting under color of state law turns on the nature and circumstances of the employee's conduct and the relationship of that conduct to the performance of his official duties."[21] *Garnier* applied this reasoning and held that the Government Officials' use of social media pages were state actions under § 1983.[22] The social media pages had official identifications of the

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[16] *DeNardo v. Cutler*, 167 P.3d 674 (Alaska 2007) (the Alaska Supreme Court upheld the Superior Court's dismissal of § 1983 claims because the defendants/appellees were not acting under the color of law. In this case, there was an argument that defendants/appellees were acting under the color of law because, even though they were a private corporation, a private citizen, and a private law firm, they were acting as state actors through the use of the court system. The Supreme Court rejected this argument holding that private parties using the court system for private litigation was not sufficient to conclude the parties were operating under the color of law.)

[17] 42 USCA § 1983.

[18] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022).

[19] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022).

[20] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022).

[21] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022) (citing *Naffe v. Frey*, 789 F.3d 1030, 1037–38 (9th Cir. 2015) (quoting *Anderson v. Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006)) (internal quotes omitted).

[22] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1171 (9th Cir. 2022).

government officials, the content of pages were "overwhelmingly" related to their official positions, providing information to the public.[23] Therefore, through the appearance and content of their Pages, the Government Officials held their social media pages out to be official channels of communication with the public.[24] The Government Officials were "invoking their governmental status to influence the behavior of those around them that the [Government Officials] were able to muster this kind of public engagement with their social media pages."[25] Additionally, the "management of the social media pages related in some meaningful way to their governmental status and to the performance of [their] duties."[26] The Government Officials blocking a constituent on social media "arose out of" their status as government officials.[27] Overall, the Ninth Circuit held that the Government Officials were acting under the color of law while operating their social media accounts related to their positions.[28]

In addition to the Ninth Circuit, the Fourth Circuit has also held that a government official is acting under the color of law while operating a social media page associated with the official's position.[29] In *Davison*, the Fourth Circuit upheld the district court's finding that the Chair of a county board of supervisors was acting under color of law when she banned a member of the public from the Chair's Facebook page.[30] The Fourth Circuit stated there is no specific formula to determine when a person is operating under the color of law, but rather there are multiple factors to consider.[31]

No one factor is determinative, but the Fourth Circuit held the color of law applies when there is a sufficiently close nexus between the action and the State.[32] A non-

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[23] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1171 (9th Cir. 2022).
[24] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1171 (9th Cir. 2022).
[25] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1171 (9th Cir. 2022) (quoting *Anderson v. Warner*, 451 F.3d 1063, 1069 (9th Cir. 2006)) (internal quotes omitted).
[26] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1171 (9th Cir. 2022) (quoting *Naffe v. Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015) (internal citation omitted)) (internal quotations omitted).
[27] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1171 (9th Cir. 2022) (internal citations omitted).
[28] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1173 (9th Cir. 2022).
[29] *See generally Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), as amended (Jan. 9, 2019).
[30] *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019), as amended (Jan. 9, 2019).
[31] *Davison v. Randall*, 912 F.3d 666, 679 (4th Cir. 2019), as amended (Jan. 9, 2019) (citing *Holly v. Scott*, 434 F.3d 287, 292 (4th Cir. 2006)).
[32] *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019), as amended (Jan. 9, 2019) (citing *Rossignol v. Voorhaar*, 316 F.3d 516, 524-25 (4th Cir. 2003).

comprehensive list of other factors to consider include: if the action is fairly attributable to the State; the totality of circumstances; and if the actions are linked to events that arose out of official status.[33]

The Fourth Circuit made it clear that the close nexus analysis is fact dependent and the outcome will depend on the circumstances.[34] In *Davison*, they considered posts on the Chair's Page, and how the Chair used the Page.[35] The Court concluded that "[a] private person could not have created and used the Chair's Page in the such a manner."[36] Overall, the Court affirmed the district court's finding that the government official, "the Chair," was acting under the color of law when they banned a person from the Chair's Facebook Page.[37]

Furthermore, the Second Circuit has held that a government official is acting under the color of law while operating their social media pages.[38] In *Knight*, the Court used a fact-specific analysis and held that the President of the United States' Twitter account and tweets were official government action.[39] The Court came to this holding because the President was holding the account out to the public as an official account, and used it to interact with the public.[40]

In the present case, Senator Reinbold was operating a Facebook Page titled "Senator Lora Reinbold." Senator Reinbold argues that the Facebook Page is her

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[33] *Davison v. Randall*, 912 F.3d 666, 679-80 (4th Cir. 2019), as amended (Jan. 9, 2019) (internal cites omitted).
[34] Reinbold's argument that there are factual differences between *Davison* and this case is a minor detail because the analysis depends on a totality of the circumstances in this particular case.
[35] *Davison v. Randall*, 912 F.3d 666, 680-81 (4th Cir. 2019), as amended (Jan. 9, 2019).
[36] *Davison v. Randall*, 912 F.3d 666, 681(4th Cir. 2019), as amended (Jan. 9, 2019) (citing *Rossignol v. Voorhaar*, 316 F.3d 516, 526 (4th Cir. 2003).
[37] *Davison v. Randall*, 912 F.3d 666, 681(4th Cir. 2019), as amended (Jan. 9, 2019).
[38] *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), cert. granted, judgment vacated sub nom. *Biden v. Knight First Amend. Inst. At Columbia Univ.*, 209 L. Ed. 2d 519, 141 S. Ct. 1220 (2021); Senator Reinbold argues that the Court should ignore the decision in *Knight* because it was vacated by the Supreme Court. However, the opinion was vacated because of mootness when Mr. Trump was no longer President. The opinion was not vacated based on merits.
[39] *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 234, 236 (2d Cir. 2019), cert. granted, judgment vacated sub nom. *Biden v. Knight First Amend. Inst. At Columbia Univ.*, 209 L. Ed. 2d 519, 141 S. Ct. 1220 (2021) (vacated for mootness).

personal Page and she is not acting in her official capacity.[41] On the other hand, Ms. McDow argues Senator Reinbold was acting as a government actor.[42] This Court agrees with Ms. McDow and finds that Senator Reinbold was operating under the color of law while managing the "Senator Lora Reinbold" Facebook Page.[43]

This Court applies the close nexus test to determine if Senator Reinbold was acting under the color of law.

Senator Reinbold used the "Senator Lora Reinbold" Page to update her constituents, allowed them to discuss politics in the comments sections of her posts, and replied to some of those comments on the Page.[44] The Page would publish videos of Senator Reinbold and her staff speaking about political issues.[45] Some posts contain photos that included Senator Reinbold speaking about legislative issues, and other photos included legislative and political documents.[46] There are numerous posts and comments about politics and announcements relating to the Senator's official position,[47] including posts asking people to take action and call in public testimony.[48]

Senator Reinbold claims that the Page is her personal Page, but there is nothing to indicate that it was her personal Page. Instead, the Page was titled "Senator Lora Reinbold," and labeled as a "Government Official." Senator Reinbold also argues that the Page was linked to her personal Profile and the Page was merely an extension of the Profile.[49] However, there is nothing to indicate to the public that the two, the Page and the Profile, were linked. Facebook "Pages are managed by people who have

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[40] *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 234, 236 (2d Cir. 2019), cert. granted, judgment vacated sub nom. *Biden v. Knight First Amend. Inst. At Columbia Univ.*, 209 L. Ed. 2d 519, 141 S. Ct. 1220 (2021) (vacated for mootness).
[41] Opp'n to Mot. for Partial Summ. J. & Cross-Mot. for Summ. J. at 7-10.
[42] Pl.'s Mot. for Partial Summ. J. at 9-14.
[43] This Court also acknowledges Plaintiff's claim that Defendant's response is copied, often verbatim with no attribution or context, and the Court wants to remind attorneys to properly cite any quotations used in briefing.
[44] First Am. Compl. at 13; Admitted in First Am. Answer.
[45] First Am. Compl. at 6-7; Admitted in First Am. Answer.
[46] First Am. Compl. at 7-8; Admitted in First Am. Answer.
[47] First Am. Compl. at 8; Admitted in First Am. Answer.
[48] First Am. Compl. at 9; Admitted in First Am. Answer.
[49] Reply to Pl.'s Opp'n to Cross-Mot. for Summ. J. at 5.

personal profiles."[50] Meaning, Senator Reinbold can have her personal Profile linked to the Page so that she can manage both accounts, but the public could not see that her personal Profile was linked to the Page. The only connection between the Profile and the Page was that Senator Reinbold can manage both. Senator Reinbold's personal Profile is irrelevant in this case because only the "Senator Lora Reinbold" Facebook Page blocked Ms. McDow.

To reiterate, the Facebook Page at issue is the "Senator Lora Reinbold" Facebook Page, and not the Senator's personal Profile.[51] The Fourth Circuit, in *Davison*, used Facebook, Inc.'s explanation of Facebook "Pages" to distinguish between "Pages" and "Profiles."[52] The Fourth Circuit stated "[a]ccording to Facebook, Inc., unlike personal Facebook profiles, which are for non-commercial use and represent individual people, Facebook 'Pages'—like the Chair's Facebook Page— 'help businesses, organizations, and brands share their stories and connect with people.'"[53] Facebook Pages are meant to be used to connect with the public, while Facebook Profiles are meant to be personal.

Similar to the Chair's Facebook Page in *Davison*, Senator Reinbold's Facebook Page is a way for the public to stay informed about issues relating to the Senator's position. Senator Reinbold "clothed the [ ] Facebook Page in the power and prestige of h[er] state office and created and administered the page to perform[ ] actual or apparent dut[ies] of h[er] office."[54]

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[50] *Davison v. Randall*, 912 F.3d 666, 673 (4th Cir. 2019), as amended (Jan. 9, 2019) (internal quotations omitted) (internal citations omitted).
[51] Both parties refer to Senator Reinbold's personal profile frequently, however the defendant's personal page is not at issue.
[52] *Davison v. Randall*, 912 F.3d 666, 673 (4th Cir. 2019), as amended (Jan. 9, 2019) (internal citations omitted).
[53] *Davison v. Randall*, 912 F.3d 666, 673 (4th Cir. 2019), as amended (Jan. 9, 2019) (internal citations omitted).
[54] *Davison v. Randall*, 912 F.3d 666, 681(4th Cir. 2019), as amended (Jan. 9, 2019) (quoting *Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1979) and *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995)) (internal quotations omitted).

Senator Reinbold also argues that the Page is personal to the Senator, and not a state action, because the Senator was able to deactivate the account on her own.[55] However, part of Senator Reinbold's earlier argument was that the Page belonged to her personally because she had operated the Page before the election and would likely continue to have the Page after she no longer held office.[56] Therefore, the deletion of the Page makes this argument less persuasive. Additionally, Senator Reinbold states that the State cannot control access to the Page,[57] but she ignores the fact that the State is an entity made up of government officials, including herself. The Senator is part of the State while acting in her capacity as Senator, including when she is holding herself out to the public as a Senator, like on her Facebook Page.

In addition, Senator Reinbold argues that she was not required to create the Page and that she did so voluntarily.[58] While this was a voluntary act and she is not required to do so, Senator Reinbold was holding herself out to the public as a Senator while operating the Facebook Page. The title of the Page was "Senator Lora Reinbold," and the Page is labeled as a "Government Official."[59] On the Page, there is a "Call Now" button, an option to send a message to the Senator, the "About" section which talks about educating viewers about issues facing the State.[60] While it was not required for Senator Reinbold to operate a Facebook Page, the Page is clearly related to her official position as a Senator.[61]

Overall, this Court finds Senator Reinbold's arguments to be unpersuasive. In appearance, the Page presents itself as an official page and there are no express or implied statements that the Facebook Page is not an official way to communicate with the Senator. It would be unreasonable to assume that a member of the public is to know that this is not an official Facebook Page for the Senator. Senator Reinbold was holding

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[55] Reply to Pl.'s Opp'n to Cross-Mot. for Summ. J. at 6.
[56] Opp'n to Mot. for Partial Summ. J. & Cross-Mot. for Summ. J. at 14.
[57] Reply to Pl.'s Opp'n to Cross-Mot. for Summ. J. at 6.
[58] Reply to Pl.'s Opp'n to Cross-Mot. for Summ. J. at 4.
[59] First Am. Compl. at 4; Admitted in First Am. Answer.
[60] First Am. Compl. at 4; Admitted in First Am. Answer.
[61] *See Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022) (the Court held even though they were not required to maintain social media pages related to their official positions, the government officials were operating under the color of law).

herself out as a Senator and Government Official on the Facebook Page, there was an option to message her, and most of her posts, if not all, were related to her position as a Senator. For all the foregoing reasons, this Court finds there was a close nexus with the State and Senator Reinbold was acting under the color of law while operating the "Senator Lora Reinbold" Facebook Page.

B. The CDA Does Not Apply to Senator Reinbold.

Senator Reinbold argues that the Communications Decency Act ("CDA") prohibits civil liability actions, such as the action Ms. McDow has brought against Senator Reinbold.[62] Senator Reinbold claims that the facts are undisputed relating to the CDA argument, but the facts are disputed and there is a disagreement about why Ms. McDow was blocked from the Facebook Page. The CDA says that no user can be liable for restricting access to someone who uses "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected;"[63] but the parties differ on the reasoning as to why Ms. McDow was blocked and what type of language was used by Ms. McDow.[64]

Most importantly, the CDA does not apply to government officials acting under the color of law, and as this Court already found Senator Reinbold was acting under the color of law while operating the Facebook Page. "Section 230 [of the CDA] is devoid of any language allowing a state official acting under color of state law to censor individual speech in a public forum."[65] It was not Congress's intent to allow government officials to interfere with people's First Amendment rights. Senator Reinbold was acting under the color of law and thus the CDA does not apply in this case. This Court is not persuaded by the CDA argument and considers it not applicable in this situation.

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[62] Opp'n to Mot. for Partial Summ. J. & Cross-Mot. for Summ. J. at 13.
[63] 47 U.S.C.A. § 230 (c)(2)(A).
[64] Ms. McDow claims she was blocked from the "senator Lora Reinbold" Facebook Page because she criticized Covid protocol. While, Senator Reinbold contends she blocked Ms. McDow for discriminating against religion, and calling for the Senator's resignation. This is further discussed later in this Opinion in Section C.
[65] *Attwood v. Clemons*, 526 F. Supp. 3d 1152, 1170 (N.D. Fla. 2021).

C. The "Senator Lora Reinbold" Facebook Page is a Limited Public Forum.

The United States Supreme Court has held "the extent to which the Government can control access depends on the nature of the relevant forum."[66] The Government cannot deny a person access to a public forum without a compelling government interest.[67] However, access to a nonpublic forum can be restricted "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."[68] Therefore, it is pertinent that this Court analyze whether or not Senator Reinbold's Facebook Page constitutes a public forum.

A traditional public forum is "the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve the interest."[69] The Supreme Court of the United States has held "[i]n addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[70]

A limited public forum allows for time, place, and manner restrictions as long as there is an alternative method of communication available content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[71] Additionally, any restriction must be content-neutral.[72]

The Alaska Supreme Court has acknowledged that "there is authority for the proposition that a publication may be considered a public forum to which equal access

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[66] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).
[67] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).
[68] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (citing *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983) (internal quotations omitted)).
[69] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (citing *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)).
[70] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (citing *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)).
[71] *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)).
[72] *Carey v. Brown*, 447 U.S. 455, 463 (1980) (internal citations omitted).

must be afforded,"[73] and the Court ultimately held the "further distribution of the publication in its present form constitutes a continuing violation of appellant's constitutional rights."[74] This Court sees little difference between a publication with equal access and a website with equal access. Facebook is a free networking site and provides equal access for anyone to create an account.[75]

In regards to social media, the Ninth Circuit, in *Garnier*, applied the public forum requirements to hold a Facebook Page was a limited public forum. The Court held "[w]ith the addition of word filters that prohibit comments and restrict uses to non-verbal reactions, the Trustees' Facebook pages are limited public fora."[76]

The Fourth Circuit has come to the same conclusion and held that a social media page is a public forum. In *Davison*, the Court held the Chair's Facebook Page constituted a public forum because there were interactive components.[77]

Moreover, the Second Circuit, in *Knight*, made a quick analysis and held the President's Twitter account was a public forum. The Court held "[t]he Account was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation. We hold that this conduct created a public forum."[78] Overall, multiple circuit courts have held that social media accounts are traditional public forums or limited public forums.

In this case, Senator Reinbold created the Page, she titled it as a government official, and she posted about political matters; clearly Senator Reinbold "clothed the page in the trappings of her public office."[79] Also, on or before August 9, 2021, the Page

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[73] *Alaska Gay Coal. v. Sullivan*, 578 P.2d 951, 956-57 (Alaska 1978).
[74] *Alaska Gay Coal. v. Sullivan*, 578 P.2d 951, 960 (Alaska 1978).
[75] Facebook has a requirement that users must be over the age of thirteen.
[76] *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1179 (9th Cir. 2022).
[77] *Davison v. Randall*, 912 F.3d 666, 688 (4th Cir. 2019), as amended (Jan. 9, 2019).
[78] *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst. At Columbia Univ.*, 209 L. Ed. 2d 519, 141 S. Ct. 1220 (2021) (vacated on mootness and not on the merits).
[79] *Davison v. Randall*, 912 F.3d 666, 683 (4th Cir. 2019), as amended (Jan. 9, 2019).

had 3,000 "followers" and was "liked" by 2,568 people.[80] Senator Reinbold's constituents were able to make comments on the Facebook Page's posts and reply to other commenters and Senator Reinbold.

Senator Reinbold argues that the State of Alaska does not support or fund the Page and therefore it should not be a public forum.[81] Reinbold contends the Facebook Page is not a function of the legislature, it was Reinbold's personal choice to create the page, and this is not an official way to communicate with her.[82] However, the Court disagrees with this argument. As this Court has concluded above, Senator Reinbold was acting under the color of law while operating the Facebook Page. Therefore, this Court does not accept Senator Reinbold's argument that the Facebook Page is not a public forum because of the lack of the State of Alaska's involvement since Senator Reinbold was acting under the color of law while operating her "Senator Lora Reinbold" Facebook Page. Considering Senator Reinbold was acting under the color of law, the State of Alaska was involved with operating the Facebook Page. Therefore, Senator Reinbold's argument that the Page is not a public forum because of lack of state involvement is rejected.

Further, Senator Reinbold argues that the Facebook Page belongs to herself, Lora Reinbold, and Facebook.[83] She claims that neither the State of Alaska nor the public at large has control over the Page.[84] Senator Reinbold believes that the Page should not be a public forum because the Page was not created by the IT department and not an official State of Alaska Page.[85]

The Court disagrees with this argument. Facebook is a free social media site and does not require funding by the Senator or the State. The Senator holds herself out to the public as a senator while operating the Page. The Page's main purpose and

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[80] Senator Reinbold attached a screenshot of the Page as Exhibit B of her August 9, 2021 Motion to Dismiss. At the time the screenshot was taken, the Page had 3,000 "followers" and was "liked" by 2,568 people.
[81] Opp'n to Mot. for Partial Summ. J. & Cross-Mot. for Summ. J. at 4.
[82] Opp'n to Mot. for Partial Summ. J. & Cross-Mot. for Summ. J. at 4.
[83] Opp'n to Mot. for Partial Summ. J. & Cross-Mot. for Summ. J. at 4.
[84] Opp'n to Mot. for Partial Summ. J. & Cross-Mot. for Summ. J. at 4.
[85] Opp'n to Mot. for Partial Summ. J. & Cross-Mot. for Summ. J. at 4.

production is sharing legislative content. The public can follow the Page, react (like, love, sad, anger, and more) to the posts, comment on the posts, and have discussions with other members of the public. The Page allows for people (including constituents) to message the Senator. Senator Reinbold decided to create the Page, but since she is holding herself out to be a senator while managing the Page, she can still be held accountable for her decisions because it is directly linked to her position as a senator.

Additionally, Senator Reinbold argues Facebook Pages are not public forums. Specifically, she claims the "Senator Lora Reinbold" Page, is a "mere mechanism[ ] through which Facebook users may express their views and engage—or decline to engage—with other users, they are not themselves a 'forum' in any sense of the word, public or otherwise."[86] However, Black's Law Dictionary defines forum as "1. [a] public place, esp. one devoted to assembly or debate."[87] Furthermore, Black's Law Dictionary defines a public forum as "[a] public place where people traditionally gather to express ideas and exchange views."[88] Senator Reinbold's Facebook Page is a forum in every sense of the word because it is a virtual place for users to gather and discuss their views while interacting with others as well.

The Court is not persuaded by any of Senator Reinbold's arguments that the Page is not a public forum. This Court finds that Facebook, in general, is a virtual "channel of communication for use by the public at large for assembly and speech for use by certain speakers, or for the discussion of certain subjects,"[89] and as such, is a limited public forum.

Furthermore, Senator Reinbold had a restriction on the "Senator Lora Reinbold" Facebook Page. On the Page, it states "[i]ntent of page is to help educate viewers about issues facing our state. Be respectful of those posting/commenting or your comments may not be up for long. No trollers, profanity, cruelty or bullying."[90] This restriction does

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[86] Opp'n to Mot. for Partial Summ. J. & Cross-Mot. for Summ. J. at 4.
[87] FORUM, Black's Law Dictionary (11th ed. 2019).
[88] PUBLIC FORUM, Black's Law Dictionary (11th ed. 2019).
[89] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (citing *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)).
[90] Mot. to Dismiss at Def.'s Ex. B.

not change the conclusion that the Facebook Page is a limited public forum. Rather, the restriction reinforces the Court's finding because limited public forums allow for content-neutral, time, place, manner restrictions.[91] Considering there was a reasonable viewpoint neutral restriction on the Facebook Page, the "Senator Lora Reinbold" Facebook Page was a limited public forum.

For the foregoing reasons this Court finds that Senator Reinbold's Facebook Page was a limited public forum. Now, the Court turns to whether Senator Reinbold's act of blocking Ms. McDow amounts to viewpoint discrimination.

D. Disputed issues of fact preclude summary judgment to Ms. McDow on the following point: State Senator Reinbold engaged in illegal viewpoint discrimination.

In a public forum, or a limited public forum, time, place, and manner restrictions are allowed when they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[92] If there is a content-based exclusion the regulation must be necessary to serve a compelling state interest and be narrowly tailored to serve that interest.[93]

In this case, it is unclear what actions lead to Ms. McDow being blocked. The facts are disputed. Ms. McDow claims she was blocked after criticizing Senator Reinbold's COVID protocols.[94] On the other hand, Senator Reinbold claims that Ms. McDow was blocked for discriminating against others' religion and calling for Senator Reinbold's resignation.[95] The parties do not agree on why Ms. McDow was blocked,

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[91] *See Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158,1179 (9th Cir. 2022) (The Court held a government actor that used word filters on a Twitter page created the page to be a limited public forum). *See also Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *Carey v. Brown*, 447 U.S. 455, 463 (1980) (internal citations omitted).

[92] *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983). *United States Postal Service v. Council of Greenburgh,* 453 U.S. 114, 132, 101 S.Ct. 2676, 2686, 69 L.Ed.2d 517 (1981); *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 535–536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980); *Grayned v. City of Rockford, supra,* 408 U.S., at 115, 92 S.Ct., at 2302; *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Schneider v. State of New Jersey,* 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

[93] *Carey v. Brown*, 447 U.S. 455, 461 (1980). *See also Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983).

[94] Pl.'s Mot. for Partial Summ. J. at 18.

[95] Opp'n to Mot. for Partial Summ. J. & Cross-Mot. for Summ. J. at 11.

they only agree that Senator Reinbold did in fact block Ms. McDow. However, since the reason why Ms. McDow was blocked is disputed, this Court cannot say Ms. McDow is entitled to judgment as a matter of law.

Senator Reinbold had a description on the Page about what content was allowed, meaning that there was a limited public forum and that in order for there to be a restriction of speech, the restriction must be reasonable and viewpoint neutral.[96] The restriction itself was to "[b]e respectful of those posting/commenting or your comments may not be up for long. No trollers, profanity, cruelty or bullying."[97] On its face, the restriction appears to be content-neutral. However, since there is a factual discrepancy about why Ms. McDow was blocked from Senator Reinbold's Facebook page, this Court cannot determine whether or not the discrimination was in fact in line with the restriction and viewpoint neutral. The Court cannot grant summary judgment when there are facts in dispute, which is the case here. This Court must deny summary judgment on the issue that Senator Reinbold engaged in illegal viewpoint discrimination.

V. SUMMARY

The Court grants in part, and denies in part, Ms. McDow's Motion for *Partial Summary Judgment* and denies Senator Reinbold's *Cross-Motion for Summary Judgment*.

Senator Reinbold was acting under the color of law as a government actor while operating the Page. The Page was titled "Senator Lora Reinbold," and was identified as a "Government Official." The Senator voluntarily created the Page, and used it to inform her constituents about political matters. The Court finds Senator Reinbold was acting under the color of law while operating the "Senator Lora Reinbold" Facebook Page.

The Facebook Page was a limited public forum. A traditional public forum is a place that people gather to exchange and express ideas, and Facebook is a virtual way for people to gather and exchange ideas. However, a limited public forum allows for

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[96] *Carey v. Brown*, 447 U.S. 4555, 463 (1980) (internal citations omitted).
[97] Mot. to Dismiss at Def.'s Ex. B.

content-neutral, time, place, and manner restrictions on speech. Facebook Pages, in general, are traditional public forums, unless there is a restriction on the Page, making it a limited public forum. In this case, the "Senator Lora Reinbold" Page had a content-neutral restriction, therefore making it a limited public forum.

Lastly, there are factual disputes as to why Senator Reinbold blocked Ms. McDow. Ms. McDow claims she was blocked after criticizing Senator Reinbold's COVID protocols. Senator Reinbold claims that Ms. McDow was blocked for discriminating against others' religion and calling for Senator Reinbold's resignation. Since there are factual disputes, the Court cannot grant summary judgment on whether Senator Reinbold engaged in illegal viewpoint discrimination.

VI. ORDER

For the reasons stated herein, Ms. McDow's *Motion for Partial Summary Judgment* is **GRANTED IN PART AND DENIED IN PART**, and Senator Reinbold's *Cross-Motion for Summary Judgment* is **DENIED**.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 9th day of December, 2022.

Thomas A. Matthews
Superior Court Judge

I certify that on 12/09/22 a copy of
the above was mailed to the parties of record:
N. Ferenti
H Brown
Judicial Assistant