No. 17-1771

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIAN C. DAVISON

Plaintiff-Appellant

v.

JAMES PLOWMAN

Defendant-Appellee

Appeal from the United States District Court
For the Eastern District of Virginia
(Honorable James C. Cacheris)

PETITION FOR REHEARING OR FOR *EN BANC* REHEARING

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A. INTRODUCTION

Appellee James Plowman ("Plowman") deleted comments by Appellant Brian C. Davison ("Davison") on Plowman's Loudoun County Commonwealth's Attorney Office ("LCCAO") Facebook page. Plowman then blocked Davison from creating any future comments on the Facebook page and ignored multiple appeals from Davison to remove the block. The district court ruled the facts supported Plowman's deletion of Davison's comments for being "clearly off topic". The district court did not rule on whether the prior restraint against Davison barring future comments on the Facebook page was unconstitutional, but rather granted qualified immunity to Plowman on the basis of unsettled law. The panel affirmed the ruling of the district court.

The panel decision contradicts controlling precedent within the Fourth Circuit (*Baughman v Freienmuth*, 478 F.2d 1345 (4th Cir. 1973) and *Nitzberg v Parks*, 525 F.2d 378 (4th Cir. 1975)), conflicts with decisions of other circuits (*Weaver v Bonner*, 309 F.3d 1312 (11th Cir. 2002)) and the Supreme Court, and raises questions of exceptional importance to the protection of free speech.

B. STATEMENT OF PURPOSE

Appellant's purpose in seeking rehearing and *en banc* review is to secure

uniformity of decisions upon important principles involving prior restraint of speech. The panel's affirmation of the district court ruling:

1) Cannot be reconciled with Supreme Court rulings that any prior restraint of speech carries a heavy presumption against constitutionality and a requirement for the government to use the least restrictive means to achieve its significant interest;
2) Contradicts controlling precedent in This Circuit that any prior restraint requires minimum safeguards to be considered constitutional;
3) Conflicts with settled law in the other Circuits and Supreme Court jurisprudence that past statements may not be used to prohibit future speech; and
4) Abrogates an objective test for the relevance of speech within a limited public forum by allowing subjective interpretations of speaker's motives and thus disparate treatment of speakers based on past speech.

It is of exceptional importance that the panel decision be reviewed and reversed because it allows government actors to not only chill but freeze constitutionally protected speech without incurring any civil liability.

II. DISCUSSION

A. The Trial Record

Plowman created a Facebook page for his LCCAO and invited the public to respond via comments to his posts on the social media page. Plowman adopted the existing Loudoun County social media policy which forbade "clearly off-topic" comments. Shortly after Plowman had assigned special prosecutors to investigate criminal complaints against two rival Loudoun politicians before the November 2015 election, Plowman created an article discussing special prosecutors in December 2015 and posted it on his LCCAO Facebook page. Davison created a comment, critical of Plowman's official actions, under the special prosecutor post on Plowman's Facebook page. The comment referenced Plowman's assignment of a special prosecutor to investigate the Loudoun County Sheriff, mentioned "special prosecutor" three (3) separate times, and requested Plowman assign a special prosecutor to investigate Loudoun officials that Davison accused of perjury.

Within days of Davison's comment, Plowman ordered his Facebook page administrator to remove Davison's comment. Plowman also ordered his administrator to delete similar comments by Davison and to indefinitely ban Davison from making any future comments on the Facebook page. The block barred Davison from commenting not only on Plowman's special prosecutor post

but on all other posts on the LCCAO page.

Davison appealed to Plowman on multiple occasions to unblock him on Plowman's Facebook page and restore the deleted comment. Davison even provided case law to Plowman in support of his arguments. Plowman simply ignored all of Davison's appeals. Plowman even refused to remove the block after Davison's attorney contacted Plowman prior to filing the current litigation.

Approximately sixty (60) days after Davison filed his original Complaint, Plowman restored the deleted comment and removed the block against Davison on the Facebook page. Plowman argued the case was moot.

During the litigation, Plowman sought to modify the Loudoun County social media page to remove the restriction for "clearly off-topic" comments, remove himself from the adjudication of the social media policy on the LCCAO Facebook page, and to provide for citizen appeals of any censorship on social media. During preliminary pleadings and court rulings, all parties agreed that the LCCAO Facebook page constituted a limited public forum.

At trial, Plowman justified his actions by asserting Davison's comments were off topic. Davison provided undisputed testimony that Plowman had assigned special prosecutors to investigate Loudoun officials just months prior to the Facebook post and that his comments on Plowman's Facebook page referenced that

practical application of special prosecutors. Plowman also testified that the modified social media policy would not allow future comments to be removed based on the "off topic" criteria.

B. The District Court Decision

The district court ruled Davison's comment "fell outside the bounds of the limited public forum" and therefore Plowman's deletion of Davison's comments as "clearly off-topic" was constitutional.

The district court also granted Plowman qualified immunity for his prior restraint of Davison's speech. (Memo Decision at 18-21) The district court held that the law was unsettled on the constitutionality of prior restraint against all speech by a particular citizen within a limited forum for an indefinite period, without warning and without any opportunity to appeal, based solely on a handful of prior comments declared off topic by a single moderator. The district court did not require Plowman to carry his "heavy burden" of showing the prior restraint was constitutional but rather concluded no controlling cases existed to put Plowman on notice. In fact, the district court refused to determine whether Plowman's prior restraint was even constitutional given its ruling that the new Loudoun County social media policy made any injunctive relief moot. (Memo Decision at 21)

The panel affirmed the district court's ruling without any further analysis.

C. Analysis

1) Prior Restraint Requires the Use of Least Restrictive Means Necessary and Places the Burden on Government to Justify Restraint

The panel's affirmation of the district court ruling contradicts unambiguous Supreme Court jurisprudence on prior restraint. The law is settled that any prior restraint bears a heavy presumption against its constitutional validity. *Bantam Books, Inc. v Sullivan*, 372 U.S. 58, 70 (1963) The law is also settled that the "[g]overnment 'thus carries a heavy burden of showing justification for the imposition of such a restraint'". *New York Times, Co. v United States*, 403 U.S. 713, 714 (1971) quoting *Org. for a Better Austin v Keefe*, 402 U.S. 415, 419 (1971) Prior restraints must be narrowly tailored to the least restrictive means for achieving a significant government interest. *Griffin v Bryant*, 30 F. Supp. 3d 1139, 1152 (D. NM. 2014) citing *Califano v Yamasaki*, 442 U.S. 682, 702 (1979); *Carroll v Princess Anne*, 393 U.S. 175, 183 (1968); and *Madsen v Women's Health Ctr.*, 512 U.S. 753, 765 (1994) ("must ask . . .whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."). In *Nebraska Press Ass'n v Stuart*, the Supreme Court found defendants failed to carry their burden of demonstrating prior restraint was the least restrictive means necessary to protect the constitutional right to a fair trial and held the prior restraint unconstitutional. 427 U.S. 539, 565 (1976)

Here, Plowman failed to justify why a complete ban on Davison's speech within a limited public forum opened to the general public was necessary and thus failed to carry the heavy burden of countering the presumption that ***any*** prior restraint is unconstitutional.[1] *Nebraska Press Ass'n*, 427 U.S. at 558 citing *Keefe*, 402 U.S. at 418-20; *Carroll*, 393 U.S. at 181; and *Bantam Books*, *Inc.*, 372 U.S. at 70. The district court ruled that Davison had failed to cite controlling cases despite Davison's assertion that all prior restraint was presumptively unconstitutional.[2] (Memo Decision at 18-19) By failing to impose the "heavy burden" on Plowman to show that the prior restraint was the least restrictive means to carry out government interests, the district court disregarded unambiguous Supreme Court jurisprudence.

The Eleventh Circuit explained in *Weaver* that "as in *Near*, *Keefe*, and *Vance*, the cease and desist request, in addition to prohibiting past statements found to be false, also prohibited future statements that had not been found to be false when prohibited … [and] is an unconstitutional prior restraint on speech." 309 F.3d at 1324

[1] In closing, Plowman argued that the Facebook page was a "limited public forum where the Government gets to chose [sic] the restrictions it can impose. And they just.. they need to be reasonable, they need to be viewpoint neutral. They were." Trial Transcript, p154. Plowman failed to even argue that the Facebook block was narrowly tailored, much less the least restrictive means necessary. The district court simply didn't consider the proper standard for prior restraints.

[2] Davison testified about his position on prior restraint: "absent some evidence that I am imminently going to post some dangerous comment that they can never block me period, there can be no prior restraint of speech against me". Trial Transcript, p62.

citing *Near v Minnesota ex. rel. Olson*, 283 U.S. 697 (1931); *Vance v Universal Amusement Co.*, 445 U.S. 308 (1980) and *Keefe*, 402 U.S. at 415. It has been beyond dispute that for decades, even when previous speech has been found to be unlawful, prior restraint against future speech that has not been found to violate any law or rule is unconstitutional.[3] No case has been cited by either the Defendant or the district court to counter the settled nature of the law.

The root cause of this error was that the district court did not distinguish between remedial punishment against speech that has been found to violate constitutional time, place and manner regulations within a limited public forum and presumptively unconstitutional prior restraints on future speech.[4] The district court in *Griffin* clearly distinguishes between true prior restraint, which completely bars speech, and "after the fact speech restrictions". 30 F. Supp. 3d at 1149. The Honorable Judge James O. Browning cites Erwin Chemerinsky in defining prior

[3] The district court ruled, and the panel upheld, a proposition that a Commonwealth's Attorney sworn to uphold and presumed conversant in Constitutional law could reasonably believe he was entitled to permanently enjoin any citizen from all future speech in a forum based on a couple of subjectively determined "off-topic" statements. The district court ruling does not even require the Defendant to make a prima facie showing that the injunction was narrowly tailored or least restricted. If left to stand, state officials throughout the Fourth Circuit will be insulated against liability for enjoining citizens on all future speech in limited public forums solely for any violation of a time, place and manner restriction.

[4] Removal of an individual at a public meeting for violations of a time, place or manner restrictions or the deletion of an off topic comment is remedial and allowed. The district court mistakenly applied the remedial standard to prior restraints.

restraint as "an administrative system or a judicial order that prevents speech from occurring." Constitutional Law: Principles and Policies 11.2.3.1, at 949-50 (3d ed. 2006) Judge Browning also notes that while citizens need not obey an unconstitutional law, they must respect the judiciary's decision whether that law is constitutional. *Id.* at 1150-1152 citing *Walker v City of Birmingham*, 388 U.S. 307 (1967) Thus, courts must determine "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 1153 quoting *Madsen*, 512 U.S. at 765. Such a determination was completely absent from Plowman's defense and the district court ruling.

Here, just like the denial of a permit or an injunction, Plowman's block against Davison on the LCCAO Facebook page was a true prior restraint which Davison could not choose to disobey and suffer the consequences.[5] Plowman's block prevented all speech by Davison within the limited public forum, both the repetition of unprotected "off topic" speech as well as on topic speech which is indisputably protected by the Constitution. In effect, Plowman sought to punish Davison for the content of his past statements. Even if the district court was justified in finding that restricting "clearly off topic" speech was a significant government interest, courts

[5] During the ban, Davison never possessed the ability to engage in protected speech on Plowman's LCCAO Facebook page and resolve any punishment in court. For four months, Davison was irreparably harmed by the unconstitutional prior restraint. *Elrod v Burns*, 427 U.S. 347, 373 (1976)

must ask whether the challenged provisions burden no more speech than necessary. *Id.* at 1152. This Court has held that strict scrutiny applies to the restraint of any persons or speech which fall within the confines of a limited public forum. *ACLU v Mote*, 423 F.3d 438, 444 (4th Cir. 2005) It simply cannot be argued that Plowman's indefinite ban against any and all speech by Davison, on any post within the LCCAO page, burdened no more speech than necessary including protected on topic speech.

Neither can it be argued that the law was unsettled in this area. No Fourth Circuit cases exist to contradict the proposition that past statements cannot be used to enact prior restraint against unknown future speech.[6] In the present case, the district court cited *Barna v Bd. Of Sch. Dirs.* in ruling "no consensus on the issue has arisen". 143 F.Supp 3d 205, 225-26 (M.D. Pa. 2015) The court in *Barna* granted qualified immunity to the defendants based solely on the unsettled nature of the law regarding threatened violence. However, the present case did not involve threatening behavior especially considering a Facebook page is metaphysical in

[6] The Eleventh Circuit ultimately granted qualified immunity to the Defendants in *Weaver v Bonner* but only because a recent case held that an Alabama Canon did not "patently or fragrantly [sic] violate[s] the Constitution in 'every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'" 309 F.3d at 1324. Absent the finding that the Alabama Canon did not restrain all protected speech to which it was applied, the law was considered to be settled. However, as of 2002, the Eleventh Circuit in Weaver made it absolutely clear that prior violative speech cannot be used as a prior restraint against unknown future speech.

nature.[7] The present case is distinguished by the unambiguous precedents of *Near*, *Keefe* and *Vance* establishing that past statements violating a law or rule cannot be used to prohibit future statements that have not been found to violate a law or rule. *Weaver*, 309 F.3d at 1324. Restraints must be the least restrictive possible. *ACLU*, 423 F.3d at 444.

Given that (1) Plowman failed to carry his heavy burden in demonstrating the Facebook block was the least restrictive means to achieve his government interest and (2) no persuasive case law casts doubt on the unconstitutionality of prohibiting future speech based on past statements, Plowman's conduct was knowingly unconstitutional. A violation of a constitutional right under settled law overcomes a defense of qualified immunity. *Hope v Pelzer*, 536 U.S. 730, 739-741 (2002) Thus, the district court erred in granting Plowman qualified immunity and in not granting Davison at least nominal damages.

2) District Court Ruling Conflicts With Controlling Fourth Circuit Precedent

Over four decades ago, This Circuit set out the minimum requirements for any

[7] Davison cited a series of cases in his pleadings, including *Barna*, demonstrating that even when past actual or threatened violence had been used to remove an individual from a public meeting, such behavior could not be used to prohibit future speech within limited public forums. Unless Plowman could find a controlling case that justified the use of a complete ban on future speech, Plowman is not relieved of his own heavy burden in the present case to overcome settled law on the presumption of unconstitutionality against prior restraints.

prior restraint on speech to be considered constitutional. In *Baughman v Freienmuth*, This Court stated that any system of prior restraint was unconstitutional unless it provided the following characteristics: (1) a definition of distribution and application to different kinds of materials; (2) prompt approval or disapproval of what is submitted; (3) specification of the effect for failure of the government actor to act promptly; and (4) an adequate and prompt appeals procedure. 478 F.2d at 1351. Two years later, This Court reiterated those same requirements. *Nitzberg v Parks*, 525 F.2d at 382. There can be no question the law was settled on the minimum requirements for any prior restraint.

Here, the record clearly indicates Plowman's actions in enacting a prior restraint against Davison fail to provide requirements (2) – (4) specified in *Baughman*. Plowman's prior restraint against Davison also chilled speech of other citizens who reasonably feared they would forever be banned from the LCCAO Facebook page if they dared to list a specific factual scenario in their comment and ask for Plowman to act.

Plowman was clearly on notice that his restraint of Davison's speech violated First Amendment protections under controlling precedent. Thus, Plowman was not entitled to qualified immunity and is personally liable for both an as-applied violation, against Davison, as well as a facial violation of the First Amendment. The

panel's affirmation of the district court ruling effectively overturns This Court's decisions in *Baughman* and *Nitzberg* regarding the minimum requirements to implement prior restraint.

3) Independent Review of the Record Reveals Comments Deleted by Plowman Were Not "Clearly Off-Topic"

The district court's ruling that a speaker's subjective intent can be used to censor comments presents a question of exceptional importance to This Court. At trial, Plowman agreed that Davison's comment had both (a) discussed Plowman's assignment of a special prosecutor to investigate his political rival, Loudoun County Sheriff Michael Chapman, just a few months before the article and (b) requested Plowman assign a special prosecutor in Davison's perjury complaint. Trial Transcript, p120-22. (See also Plaintiff Exhibit 1: "The Commonwealth Attorney's office asks for a special prosecutor to investigate Michael Chapman for releasing FOIA emails that had already been cleared through the Leesburg Attorney."; "Why wouldn't you at least assign a special prosecutor in this case?"). [8]

Any reasonable person could not objectively rule a comment discussing the

[8] Contrary to the district court's implication, Davison had requested a special prosecutor be assigned to his perjury complaint well before Plowman wrote the article. At the beginning of the Virginia State Police investigation, Davison "specifically asked … to get it assigned to a special prosecutor". Trial Transcript, p70-71. Thus, Davison's comment was not predicated on his frustration with Plowman's refusing to prosecute school officials after the investigation but rather on Plowman's refusal to allow a special prosecutor to investigate. Future investigations by special prosecutors determined school officials had violated the law. Trial Transcript, p58, 60.

actual assignment of a special prosecutor by the author of the Facebook post to be off topic, much less "clearly off topic".[9] In an appeal of a First Amendment claim, appellate courts are directed to independently review the record to "assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *NY Times, Co. v Sullivan*, 376 U.S. 254, 285 (1964) citing *Pennekamp v Florida*, 328 U.S. 331, 335 (1946) and *Edwards v South Carolina*, 372 U.S. 229, 235 (1963) Without the subjective inferences drawn by the court regarding Davison's intent (addressed infra, p14-15), the actual text of the deleted comments could not be ruled "clearly off topic". Thus, the district court made a clear error in ruling the actual text of the comment warranted deletion per the Loudoun County social media policy at the time.

In ruling the comment off topic, the district court went beyond the actual text of the comment to infer the Plaintiff's intent. The district court reasoned that the Plaintiff's comment was "intended to pressure Defendant" and the comment did not "comport with the purpose of the forum". (Memo Decision at 13-15) Due in large part to these subjective conclusions about the speaker's intent, the district court concluded Davison's comment was off topic. Such a ruling has the effect of giving

[9] The Loudoun social media policy "encourage[d]" commenters "to submit … concerns". Defense Exhibit 1. Davison's frustration with Plowman's refusal to assign a special prosecutor is a concern by definition and specifically related to special prosecutors.

government moderators discretion to interpret identical comments as either off topic of on topic within a limited public forum based solely on the speaker's intent and statements outside of the forum. An inquiry into whether speech is protected by the First Amendment changes from an objective inquiry into a subjective one. This, by itself, is a form of viewpoint discrimination and is unambiguously unconstitutional in all government forums. *Good News Club v Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v Rectors & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995);

This ruling insulates all moderators of limited public forums from civil liability when the moderators not only delete comments based on the subjective intent of the speaker but permanently ban them from participating in the forum. A forum hosted by a Commonwealth Attorney in Virginia is inherently political. Unlike federal prosecutors, a Commonwealth Attorney is elected to office and chooses whether and how to prosecute alleged crimes including whether to assign special prosecutors. The district court ruled that Davison's comments discussing the appointment, or lack thereof, of special prosecutors within Loudoun County inside a limited public forum concerning how special prosecutors are assigned was too political to be considered on topic. The Supreme Court has noted the "broadest protection" is afforded to such political speech so that citizenry may make informed

choices. *Buckley v Valeo*, 424 U.S. 1, 14-15 (1976) However, this district court ruling protects subjective censorship, not legitimate political speech clearly related to the subject matter of the forum. Such an exceptionally important issue warrants a panel rehearing.

REQUEST FOR RELIEF

For the foregoing reasons, Appellant Davison respectfully requests that This Honorable Court conduct either a rehearing or a rehearing *en banc*.

Respectfully Submitted,

By: ____/s/_____

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Date: 26 March 2018

/s/

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 26th day of March, 2018, I filed this Petition for Rehearing using the Fourth Circuit's ECF system. Counsel for the Appellee will receive a copy of the Petition through the ECF system on the same day.

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