

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN, *et al.*,

Plaintiffs,

v.

ELISABETH DEVOS, Secretary, U.S.
Department of Education, *et al.*,

Defendants.

Civil Action No. 1:19-cv-986-RDM

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Public Citizen and David Halperin brought this action seeking declaratory and injunctive relief against defendants Elisabeth DeVos and the Department of Education (collectively, the Department) for blocking Public Citizen's website, in violation of the First Amendment and the Administrative Procedure Act. After plaintiffs moved for a preliminary injunction, the Department voluntarily ceased blocking Public Citizen's website and then moved to dismiss the case as moot. Because, as a general rule, a defendant cannot moot a live controversy by voluntarily ceasing the conduct that is the subject of the lawsuit, the Department's motion should be denied.

BACKGROUND

Plaintiffs brought this action after learning that the Department's internal and guest Wi-Fi networks blocked users' access to Public Citizen's website, citizen.org. Users seeking access to that website instead received a message that access to "URL: www.citizen.org/" is "in violation of your Internet usage policy," and that Public Citizen's URL falls within "Category: Advocacy Organization." ECF-1 (Compl.) ¶¶ 14, 16. The complaint sought declaratory and injunctive relief

on the grounds that the Department's action blocking Public Citizen's website violated the First Amendment and the Administrative Procedure Act. *Id.* ¶¶ 25-35.

After plaintiffs moved for a preliminary injunction, the Department filed a declaration from its Chief Information Security Officer Steven Hernandez. *See* ECF 16-2 (First Hernandez Decl.). The declaration states that the Department had "submitted a request to its vendor to grant access to Public Citizen's website" and that Public Citizen's website was accessible on the Department's networks as of June 6, 2019. *Id.* ¶¶ 4, 5. It also represents that the "Department will not take any action to block access to Public Citizen's website through its internal and guest-WiFi networks," unless the site poses a threat to the Department's networks. *Id.* ¶ 6.

In a second declaration submitted with the Department's motion to dismiss, Mr. Hernandez set forth the Department's explanation of why Public Citizen's website was blocked. *See* ECF 19-2 (Second Hernandez Decl.). According to Mr. Hernandez, in or about 2017, the Department began using a company called Fortinet to meet "cyber security and web filtering service requirements," through a service called FortiGuard Web Filtering. *Id.* ¶ 5. Mr. Hernandez explains that Fortinet uses "proprietary software" to classify web pages into six categories, including "Adult/Mature Content." *Id.* ¶¶ 7, 8 & Exh. 1. The Adult/Mature Content category contains subcategories such as "Alternative Beliefs," "Dating," "Gambling," "Nudity and Risque," "Pornography," "Sports Hunting and War Games," and "Weapons (Sales)," but also "Abortion" (covering sites with data, legal discussion, and other information about abortion), "Sex Education" (covering sites with educational materials about sex and sexuality), and, relevant here, "Advocacy Organizations." *Id.*; Exh. A to Declaration of Nandan M. Joshi (Joshi Decl.), attached hereto. According to Fortinet's website, the Advocacy Organizations subcategory includes "organizations that campaign or lobby

for a cause by building public awareness, raising support, influencing public policy, etc.” See Exh. A, p.1 to Joshi Decl.

Mr. Hernandez states that the “operation of FortiGuard’s proprietary filtering system” placed Public Citizen’s website in the Advocacy Organizations subcategory. Second Hernandez Decl. ¶ 10. The FortiGuard system “allows the customer” to allow, block, or take other actions with respect to categories and subcategories. *Id.* ¶ 9. The Department, “as a customer,” elected to block the Adult/Mature Content category, including all of its subcategories. *Id.* As a result, the Department blocked websites subcategorized under Advocacy Organization, including Public Citizen’s website. *Id.* ¶¶ 9, 10.

Fortinet provides two ways of overriding its web filtering system. *Id.* ¶ 13. The first method involves changing the category to which the website is assigned. *Id.* The second method is called “administrative override or allow blocked override.” *Id.* According to Fortinet’s website, this second override method is “not indefinite”: the “longest that an override can be enabled is for 1 year less a minute.” Exh. B, p.4 to Joshi Decl. To stop the Department’s blocking of Public Citizen’s website, Mr. Hernandez states that the Department requested that the Fortinet service be configured “to override the web filtering that, by operation of the FortiGuard proprietary system, had assigned Public Citizen to a blocked subcategory.” Second Hernandez Decl. ¶ 14. Mr. Hernandez does not specify which override method the Department used, but he does not suggest that the Department has chosen to stop blocking the Advocacy Organization subcategory on its internal and Wi-Fi networks.

ARGUMENT

“Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.” *Walling v. Helmerich & Payne*, 323 U.S. 37, 43 (1944). Rather,

“a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC)*, 528 U.S. 167, 190 (2000). Here, plaintiffs brought this case to vindicate their First Amendment rights to speak, and receive speech, on the Department’s networks on a par with other similarly situated voices. In seeking to dismiss this case as moot, the Department does not concede the merits of plaintiffs’ claims. Rather, it asserts that “the assignment of Public Citizen’s website to a blocked category occurred by operation of the vendor’s propriety system” and “has been overridden as it pertains to the Public Citizen website.” ECF 19 (Mot. to Dismiss) 6. The Department’s technical correction in response to plaintiffs’ lawsuit is not sufficient to satisfy its “heavy burden” of demonstrating mootness. *Friends of the Earth*, 528 U.S. at 189 (internal quotation marks omitted).

As an initial matter, the Department’s attempt to lay responsibility for blocking Public Citizen’s website on Fortinet downplays the Department’s own actions. Even assuming the accuracy of the representation that the Department did not direct Fortinet “to assign Public Citizen’s website to a blocked category,” Mot. to Dismiss 7, the Department acknowledges that it directed Fortinet to block the entire Adult/Mature Content category on the Department’s networks, including the Advocacy Organizations subcategory. Second Hernandez Decl. ¶ 9. The Department does not contest that it may not, consistent with the First Amendment, block websites meeting Fortinet’s definition of Advocacy Organizations—“organizations that campaign or lobby for a cause by building public awareness, raising support, influencing public policy, etc.” Exh. A, p.1 to Joshi Decl. And the Department makes plain that it retains the right “as a customer” to direct Fortinet either to block or to allow access to that subcategory (or any subcategory). *See* Second Hernandez Decl. ¶ 9; *see also* Exh. A, p.1 to Joshi Decl. Yet the Department has declined to take

the action—directing Fortinet not to block the Advocacy Organization subcategory—that would resolve the problem both now and in the long term.

In these circumstances, the Department has not provided “enough clarity fully to assess the agency’s intentions” with regard to its future policy on blocking constitutionally protected websites, including Public Citizen’s website. *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, 918 F.3d 151, 158 (D.C. Cir. 2019). Mr. Hernandez represents that the Department “will not take any action to block access to Public Citizen’s website through its internal and guest-WiFi networks.” First Hernandez Decl. ¶ 6. But he does not describe any affirmative steps that the Department will take to address the causes that led to the violation. Without such a showing, the Department cannot “demonstrate that there is no reasonable expectation that the wrong will be repeated,” *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988) (internal quotation marks omitted), because “[m]ere assurances that the challenged conduct will not recur ... have never been enough to sustain the ‘heavy’ burden borne by defendants in invoking the mootness doctrine,” *Wills v. U.S. Parole Comm’n*, 882 F. Supp. 2d 60, 71 (D.D.C. 2012). Mr. Hernandez, moreover, does not suggest he has authority to bind the Department, making the assurances given here particularly “weak.” See *Payne Enterprises, Inc.*, 837 F.2d at 492 (giving little weight to affidavit from Air Force major that did “not pretend to speak for her superiors”).

In describing the action taken in response to this lawsuit, Mr. Hernandez states that the Department’s “service providers configured the Fortinet service to override the web filtering that, by operation of the FortiGuard proprietary system, had assigned Public Citizen to a blocked category.” Second Hernandez Decl. ¶ 14. But Mr. Hernandez identifies “two different ways to override the web filtering”—manually changing the website’s category and “administrative override or allow blocked override”—and fails to clarify which method the Department used. *Id.*

¶ 13. The administrative-override or allow-blocked-override method overrides the FortiGuard web filtering for only a limited period of time of no more than 1 year. Exh. B, p.4 to Joshi Decl. If the Department used this override method, nothing in Mr. Hernandez’s declaration provides any basis for concluding that the Department has put in place processes and procedures to guarantee that any administrative or allow-blocked override is renewed before it expires.

A deeper problem, however, shows that a live case or controversy remains, regardless of the override method used for Public Citizen’s website. Mr. Hernandez’s declaration suggests that the Department has no mechanism to ensure that its use of web-filtering contractors complies with the agency’s First Amendment obligation not to infringe on protected speech. The Department has not, for example, committed to unblocking the Advocacy Organization subcategory, even though the Department has no plausible constitutional basis for excluding “organizations that campaign or lobby for a cause by building public awareness, raising support, influencing public policy, etc.” from the agency’s networks. Exh. A, p.1 to Joshi Decl. Nor has the Department explained how it intends to avoid this constitutional problem as technologies or vendors change. The “total lack of *any* indication that the agency has taken steps” to prevent Public Citizen’s website from being caught up again in whatever web filter service the Department uses, *In re Ctr. For Auto Safety*, 793 F.2d 1346, 1353 n.43 (D.C. Cir. 1986), represents a significant risk that dismissal of this lawsuit would leave the Department “free to return to [its] old ways,” *id.* at 1352 (internal quotation marks omitted).

That risk is “heighten[ed]” by the Department’s “refusal to admit the illegality of its past conduct.” *Id.* at 1353. If the Department, without acknowledging its error, could “moot a challenge” to its website-blocking actions simply by creating an override for the party bringing the lawsuit, it “could forever avoid judicial review” of the continuing unlawful action. *Reeve Aleutian*

Airways, Inc. v. United States, 889 F.2d 1139, 1142 (D.C. Cir. 1989) (internal quotation marks omitted). So long as the Department fails to acknowledge the significant First Amendment implications of a government agency blocking the websites of “Advocacy Organizations” such as Public Citizen, “the likelihood of recurrence of challenged activity is more substantial.” *Armster v. U.S. Dist. Court*, 806 F.2d 1347, 1359 (9th Cir. 1986).

Thus, in *Knight First Amendment Institute at Columbia University v. Trump*, No. 18-1691-CV, 2019 WL 2932440 (2d Cir. July 9, 2019), the Second Circuit held that the President’s “[v]oluntary discontinuance of an alleged illegal activity”—blocking critics on his Twitter feed—did not moot a declaratory-judgment action challenging the original blocking under the First Amendment. *Id.* at *4 n.3 (quoting *Walling*, 323 US. at 43). Likewise here, given the Department’s failure to acknowledge its First Amendment violation, as well as that the override may last one year or less, a declaratory judgment in plaintiffs’ favor is needed to “ensure” that the Department does not “continue to fail to meet” its constitutional responsibilities. *Forest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006); see *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321 (D.C. Cir. 2009) (stating that “even though the specific action that the plaintiff challenges has ceased, a claim for declaratory relief will not be moot even if the plaintiff ... merely attacks an isolated agency action, so long as the specific claim ... falls within the voluntary cessation doctrine”) (internal quotation marks, brackets, and punctuation omitted).

A declaratory judgment is particularly critical here because the Department’s management of its internal and guest Wi-Fi networks will occur behind the scenes and outside of public view. For this reason, this case is unlike those on which the Department relies, where the courts could take comfort in government policymakers’ formal or, at least, public rejection of the policy that had led to underlying litigation. See *Chichakli v. Trump*, 714 Fed. Appx 1, 2 (D.C. Cir. 2017)

(holding case moot in light of the elimination of regulations and removal of plaintiff from sanctions list); *National Black Police Ass'n v. Dist. of Col.*, 108 F.3d 346, 348 (D.C. Cir. 1997) (holding action moot in light of the “passage of ... new legislation”); *Citizens for Responsibility & Ethics in Washington v. SEC*, 858 F. Supp. 2d 51, 56, 62 (D.D.C. 2012) (holding action moot in light of a letter sent to Congress by a high-ranking agency official). Nor is this a case where recurrence of the challenged conduct “requires [the court] to imagine a sequence of coincidences too long to credit.” *People for the Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 424 (D.C. Cir. 2005). Although the Department implemented a (potentially temporary) override, the Department apparently has no plans to ensure that Public Citizen is not blocked again, for example by requesting that Fortinet allow access to the Advocacy Organization subcategory. “[A] case ‘becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.’” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Service Employees Intern. Union*, 567 U.S. 298, 307 (2012)). Here, however, absent a declaratory judgment by this Court, plaintiffs remain at a heightened risk that the Department will again block access to Public Citizen’s website.

CONCLUSION

For the foregoing reasons, the Court should deny defendants’ motion to dismiss this case as moot.

July 24, 2019

Respectfully submitted,

/s/ Nandan M. Joshi

Nandan M. Joshi (DC Bar No. 456750)

Allison M. Zieve (DC Bar No. 424786)

Scott L. Nelson (DC Bar No. 413548)

Public Citizen Litigation Group

1600 20th Street NW

Washington, DC 20009

(202) 588-1000

Counsel for Plaintiffs