

July 11, 2017

Matthew G. Bevin, Governor Commonwealth of Kentucky 700 Capital Avenue, Suite 100 Frankfort, Kentucky 40601 fax: (502) 564-2517

Via first-class mail and facsimile transmission

RE: Request pertaining to use of social media

Dear Governor Bevin,

On behalf of the ACLU OF KENTUCKY and several affected Kentuckians, we write concerning your practice of permanently banning or blocking individuals from accessing or commenting on your official social media accounts. We believe that this practice, even if unrelated to the viewpoints expressed by those individuals, violates the free speech guarantees of the First Amendment to the U.S. Constitution and § 8 of the Ky. Constitution. Accordingly, we ask that you immediately cease permanently blocking or banning individuals from being able to engage in political speech on your official social media pages (your official "Governor Matt Bevin" Facebook page and your official @GovMattBevin Twitter account), and that you reinstate access to the hundreds of individuals who have already been blocked from those forums.¹

Specifically, while the use of social media is a relatively new phenomenon, it has quickly become a platform for individuals "to engage in a wide array of protected First Amendment activity on topics as diverse as human thought." 2

PHILLIP M. BAILEY AND MORGAN WATKINS, Gov. Matt Bevin Blocks Hundreds on Facebook and Twitter, http://www.courier-journal.com/story/news/politics/2017/06/15/kentucky-gov-matt-bevin-blocks-hundreds-twitter-and-facebook/361281001/ (last visited July 7, 2017).

² Packingham v. North Carolina, 198 L.Ed.2d 273, 280 (U.S. June 19, 2017) (internal quotations and citation omitted).

Recognizing the popularity and power of social media, you yourself have stated your intention to use it to connect with the public directly *in lieu of* utilizing traditional media outlets.³

However, in this medium, as in other public forum contexts, the Constitution protects individuals' speech rights and conversely limits government's ability to engage in content or viewpoint discrimination.⁴ This is particularly true for those individuals who access your social media pages to engage in political speech, which lies at the heart of the First Amendment's protections as does their right to receive the information you disseminate.⁵ Thus, because your official Facebook and Twitter pages are government-created public forums⁶ set aside for individuals to engage in and receive speech, you lack the authority to censor or otherwise block individuals from participating in these public forums simply because you disagree with the viewpoints they express.

Your spokesperson, Woody Maglinger, has indicated to a senior reporter for ProPublica that the decision to block individuals from these official online forums is not based on their expressed viewpoints, but rather because of posts that contain "obscene and abusive language or images, or repeated off-topic comments and

³ See e.g. GOVERNOR MATT BEVIN, "Media Exposed (Part One)" and "Media Exposed (Part Two)" videos, posted on June 15, 2017, both available at https://www.facebook.com/pg/GovMattBevin/videos/?ref=page_internal.

See Packingham, 198 L.Ed.2d at 282 ("In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."); Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37 (1983); Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1994).

Snyder v. Phelps, 562 U.S. 443, 451-52 (2011) ("[S]peech on matters of public concern . . . is at the heart of the First Amendment's protection."); Stanley v. Georgia, 394 U.S. 557 (1969) (First Amendment protects right to receive information); Neinast v. Bd. of Trs. of the Columbus Metro. Library, 346 F.3d 585 (6th Cir. 2003).

Though some have argued that government-created social media accounts do not constitute designated or limited public forums for which First Amendment protections would apply, we disagree. See Davison v. Loudoun County, 2016 WL 4801617 at *7 (E.D. Va. Sept. 14, 2016) ("Once it has opened a limited forum, the State must respect the lawful boundaries it has itself set'... This rule applies as much to Defendants' Facebook page as to any other limited public forum.").

spam." First, even if true, we do not think that has always been the case. Take, for example, the case of Drew Morgan. In early February, 2017, news broke regarding the property taxes owed on your Cherokee Gardens home. Mr. Morgan, a Kentuckian and former follower of your official Twitter account, commented on a number of your Twitter posts and inquired about the status of those property taxes. Then, on February 8, 2017, you (or someone acting on your behalf) permanently blocked him from your official Twitter account, and he remains blocked as of this date. None of Mr. Morgan's comments on your Twitter account were obscene, abusive, or defamatory, nor were they "off-topic." Instead, it appears that your office permanently blocked Mr. Morgan from your official Twitter account simply because of his viewpoint and the questions he posed. This resulted in Mr. Morgan being unable to engage in political speech on your official account, and being unable to share (or re-Tweet) your officials posts.

Similarly, Tristan Williams was blocked from your official Twitter account in early January, 2017. Just prior to being blocked, Ms. Williams had expressed her concerns about your policies about women's health, particularly concerning reproductive health care. And in response to your Tweet encouraging protection for the unborn, Ms. Williams criticized, in a non-threatening, non-obscene, and non-defamatory way, your administration's policies relating to children who have already been born. Ms. Williams first noticed that she was blocked from your official Twitter account on January 7th, and she, too, has been blocked ever since.

Moreover, *Kentuckians Against Matt Bevin* is a public Facebook page on which political articles, blogs, and commentary are gathered. Currently, 1,827 people "like" the page, which means they follow this page and its posts appear in their timelines. The page began on April 1, 2016, but it was blocked from your official Facebook page less than a month later. Although quite clearly critical of

Posting of CHARLES ORNSTEIN to Twitter, https://twitter.com/charlesornstein/status/874707071572168704 (June 13, 2017, 12:26 EST).

See e.g. MATTHEW GLOWICKI, Records: Gov. Bevin, Wife Owe \$11K in 2016 Property Taxes, Courier-Journal, Feb. 8, 2017. Available at http://www.courier-journal.com/story/news/politics/2017/02/08/ kentucky-governor-matt-bevin-wife-owe-11k-2016-property-taxes/97652528/ (last accessed July 6, 2017).

⁹ See attached Exhibit 1.

¹⁰ *Id.* at 2.

See attached Exhibit 2.

your administration, the posts on this page were not (and are not) vulgar, obscene, or abusive. Rather, this page engages in core political speech that is fully protected by the Constitution notwithstanding that it is critical of your administration's policies.

We think these examples fairly establish your office has, in fact, blocked individuals' access to your official social media accounts because of a disagreement with the messages they expressed. However, even crediting your office with blocking individuals for reasons wholly unrelated to the viewpoints they have expressed, permanently banning those individuals from engaging in the public forum nonetheless violates the First Amendment because a permanent ban lacks the requisite narrow tailoring for any legitimate speech restriction, and because it is tantamount to an unlawful prior restraint on speech.¹³

As Governor, you have made clear how highly you value direct engagement with constituents across the state. You certainly can appreciate, therefore, the importance of not unlawfully (or permanently) blocking individuals' access to the very platforms that you use to do so. Where public forums such as your Facebook and Twitter pages have been opened, traditional First Amendment protections apply and must be protected. Permanently blocking or banning users such as Mr. Morgan, Ms. Williams, and *Kentuckians Against Matt Bevin* (whether based on the viewpoints they express or for any other reason) violates the First Amendment, and we ask that you immediately unblock these three, and the hundreds of others who have likewise been blocked. We further request that your office adopt, and publicize, a constitutionally-sound policy regarding the moderation of these online public forums.

See attached Exhibit 3.

¹³ See Barna v. Bd. of Sch. Dirs., 143 F. Supp. 3d 205, 216 (M.D. Pa. 2015) ("Those courts that have confronted this issue in the context of a challenge to a prohibition on future expression because of past unlawful conduct have found such prohibitions unlawful."); Cyr v. Addison Rutland Supervisory Union, 60 F. Supp. 3d 536, 548 (D. Vt. 2014) ("A categorical ban of a single individual from open school board meetings, however, is not narrowly tailored and does not leave open ample alternative channels of communication."); Brown v. City of Jacksonville, 2006 U.S. Dist. LEXIS 8162, 2006 WL 385085 (M.D.Fla. 2006) (granting preliminary injunction barring City Council from enforcing three-month attendance ban against plaintiff from attending City Council meetings). See also Huminski v. Corsones, 396 F.3d 53, 92 (2d Cir. 2004) ("categorical ban on expressive speech singling out an individual does not even satisfy the lower threshold of reasonableness review" for a nonpublic forum).

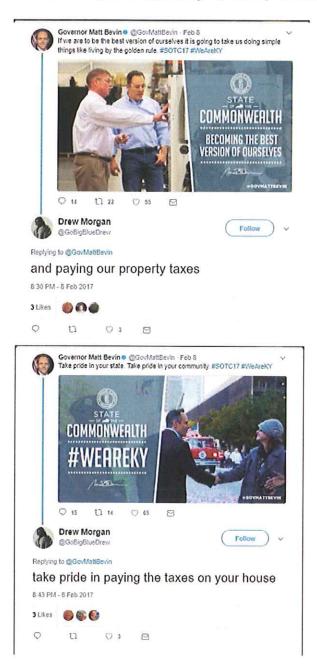
Because of the importance of individuals' speech rights, we request that you notify us, in writing, within ten (10) days of the date of this letter regarding whether (or not) your office will: 1) unblock *all* of the hundreds of individuals who have been blocked from your official Twitter and Facebook forums; 2) abandon the policy of permanently blocking individuals from these forums; and 3) develop and publicize written criteria for how your administration will moderate these online forums moving forward. Failure to respond within that timeframe will be construed as a rejection of our requests. Thank you in advance for your attention to this matter, and we look forward to your reply.

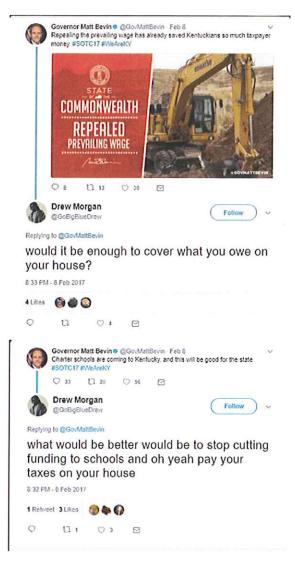
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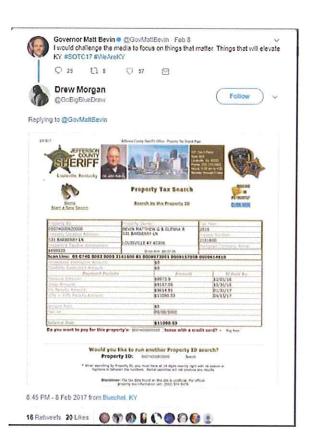
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Drew Morgan February 8, 2017, Twitter comments and block





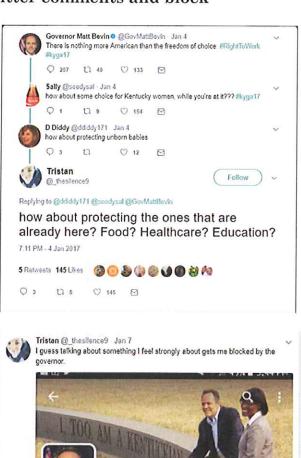




Tristan Williams January 4-7, 2017, Twitter comments and block







Kentuckians Against Matt Bevin Facebook posts and block

