

SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT (hereinafter, "**Agreement**") is entered into by (i) Drew Morgan and Mary Hargis ("Plaintiffs") and (ii) the Office of the Governor of the Commonwealth of Kentucky ("**Governor's Office**"), effective as of July 1, 2020 ("**Effective Date**"). All of the foregoing parties shall be referred to collectively as the "**Parties**."

RECITALS

WHEREAS, the Office of former Kentucky Governor Matt Bevin adopted a social media policy that allowed employees in the Governor's Office to block or ban users who posted comments those employees deemed, in their sole judgment, to be "off-topic" or otherwise inappropriate; and

WHEREAS Plaintiffs were blocked by the former Governor's Office from accessing his social media account(s) for making constitutionally protected comments in the interactive sections of the social media account(s); and

WHEREAS the ACLU-KY filed a lawsuit on behalf of Plaintiffs styled *Morgan et al. v. Bevin*, No. 3:17-cv-00060-GFVT (E.D. Ky.) (the "**Federal Action**"), to challenge the constitutionality of the former Governor's social media policy; and

WHEREAS the Office of the former Governor refused to provide relevant discovery, forcing Plaintiffs' counsel, the ACLU of Kentucky ("ACLU-KY") to spend time and money successfully litigating unnecessary discovery disputes; and

WHEREAS ACLU-KY also incurred substantial litigation costs to bring this suit, including filing fees and deposition costs; and

WHEREAS the district court initially denied plaintiffs' motion for a preliminary injunction, reasoning that any comments made on the Governor's social media pages constituted "government speech" and therefore the Governor's social media policy need not be content- or viewpoint-neutral; and

WHEREAS it is the policy of the Office of Governor Andy Beshear to allow vigorous and robust public discourse on its social media platforms consistent with commenters' First Amendment rights; and

WHEREAS, it is the express intent of the Parties to establish a constitutionally permissible social media policy and to resolve the Federal Action;

NOW, THEREFORE, in consideration of the foregoing premises which are not mere recitals but which are an integral part of this Agreement, and in exchange for the consideration described herein, the Parties hereby agree as follows:

SETTLEMENT TERMS

Settlement of All Claims. The Parties agree to fully and finally resolve the Federal Action for and in consideration of the promises and covenants set forth herein including: (1) the Office of the Governor's adoption of the new social media policy attached hereto as **Appendix A**; (2) the Office of the Governor's agreement not to oppose Plaintiff's Motion to vacate the prior preliminary

injunction ruling issued by the district court in the Federal Action; (3) the Office of the Governor's payment to the ACLU of Kentucky Foundation, Inc. of \$25,000 for legal fees and expenses on or before July 21, 2020, which shall be delivered to its Legal Director, Corey Shapiro, 325 W. Main St., Suite 2210, Louisville, KY 40202; (4) the Office of the Governor shall make best efforts to unblock Drew Morgan and Mary Hargis from any official accounts maintained by the Office of the Governor and inform the ACLU of Kentucky of the results.

Dismissal of Pending Matters. Promptly upon receipt of the payment set forth in the preceding paragraph, the parties will jointly file a joint stipulation of dismissal of the Federal Action.

Review and Understanding of Agreement. The Parties represent that prior to signing this Agreement, they read it, understood its terms and conditions, were given an opportunity to consult with counsel of their choosing, and voluntarily signed it or authorized counsel to sign it as their act of free will and deed.

Integration. This Agreement sets forth the entire agreement among the Parties and supersedes any and all prior conversations, writings, agreements, and/or understandings among the Parties pertaining to this subject matter.

Modification. This Agreement may not be modified or changed orally, but only by an agreement in writing signed by the party against whom enforcement of any such change is sought.

Choice of Law. This Agreement shall be subject to and governed by the laws of Kentucky.

Construction. This Agreement will be construed as if it had been drafted by the Parties jointly and therefore without any presumption or other rule requiring construction against the party who caused it to have been drafted.

Cooperation/Further Assurances. The Parties agree to cooperate fully and to assist in a reasonable manner in taking any and all additional actions that may be necessary or appropriate to give full force and effect to the basic terms and intents of this Agreement, which are not inconsistent with the terms of the Agreement.

Counterparts/Copies Same as Originals. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same Agreement. Facsimile and/or electronic mail transmissions shall be considered original documents for all purposes of this Agreement as if part of the numbered paragraphs herein.

Having read and understood the terms of this Agreement, the Parties hereby execute this Agreement as indicated below.

IN WITNESS WHEREOF, I have hereto set my hand:

Plaintiffs Drew Morgan and Mary Hargis

By: 

Date: 7/1/2020

Name: Corey Shapiro, Counsel for Plaintiffs

Title: Legal Director, ACLU of Kentucky Foundation, Inc.

Office of the Governor

By: 

Date: 7/6/2020

Name: S. Travis Mayo

Title: Chief Deputy General
Counsel, Office of the Governor

Appendix A

Office of Governor Social Media Policy

Social Media Platforms. This document constitutes the Office of the Governor's Social Media Policy (the "Policy"). As described below, this Policy applies to the following social media platforms:

- Facebook: [insert Facebook page]
- Twitter: @GovAndyBeshear;
- Snapchat: [insert]
- Instagram [insert];
- YouTube: [insert]; and
- Other social media platforms that the Office of the Governor elects to use.

Purposes. The social media platforms promote and disseminate information about Gov. Andy Beshear's initiatives, events, and personnel announcements. These platforms exist for discussion with and among social media users about any topic related to governmental concerns. The Office of the Governor reserves the right to review, hide, and/or delete comments on all of the Governor's official social media platforms, consistent with this Policy.

The Office of the Governor at all times strives to uphold users' right to Freedom of Speech. It is the Office of the Governor's policy to allow vigorous and robust public discourse on its social media platforms.

Comments.

"Comments" mean all public discourse, interaction and communication on social media platforms including but not limited to likes, comments, shares, messages, tags, replies and retweets.

The Office of the Governor is interested to hear the Comments of users on each of those social media platforms the Office elects to use. This policy is intended to maintain Comments on the Governor's social media platforms in a manner that is viewpoint neutral.

However, the Office of the Governor may report the user and/or temporarily restrict access to the Office of the Governor's social media platforms for violating the Rules set forth in this Policy below, and may report the user or the user's comments to a social media platform for comments if the Governor's Office believes in good faith the comments may violate the social media platform's terms of service or rules, and may hide or otherwise block the reported comments from the Office of the Governor's social media platforms during the time of such a report. Further, social media platforms may have automated mechanisms that hide or otherwise block comments which are beyond the control of the Office of the Governor.

In addition to restricting further user access in accord with this Policy, the Office of the Governor may hide or delete Comments, as applicable to the respective platform, if they contain, constitute, or link to any of the following, which collectively shall be "Prohibited Content":

- Malicious or harmful software;
- Advertisements, promotions, or solicitations of a commercial product or service;
- Confidential, personally identifying, or private information;

- Material that, taken as a whole: appeals to the prurient interest in sex; describes or portrays sexual conduct in a patently offensive way; or contains explicit sexual content that does not have serious literary, artistic, political, or scientific value;
- Threatening statements within the meaning of KRS 508.075 to 508.080¹ or harassment within the meaning of KRS 525.070(1)(a), (b), (d), (e), or (f); or
- SPAM, consisting of disruptive and repetitive unsolicited messages sent indiscriminately on the Internet to a large number of recipients or posted in a large number of places.

Rules. The following rules apply to the social media platforms:

- Any content removed pursuant to this Policy will be retained by the Office of the Governor for one year.
- Upon the Office of the Governor discovering that users may have made Comments containing Prohibited Content, such users may be immediately blocked, and remain blocked for a time period of up to 48 hours, in order for the Office of the Governor to make a determination as to whether the users have made Comments containing Prohibited Content.
- Users may be temporarily restricted, for a period not longer than six months, from the social media platforms if they make Comments containing Prohibited Content, subject to the following: 1) a user's access shall only be restricted from the social media platform on which the user made the Comment containing Prohibited Content; and 2) the user has repeatedly and consistently violated this Policy or the Office of the Governor reasonably believes the user will repeatedly and consistently violate this Policy.
- If the Office of the Governor restricts any person's access to social media platforms under either of the two preceding paragraphs, it must provide written notice to the restricted individual (provided the user's contact information is available on the social media platform) that informs such individual of the restriction and the procedure by which a blocked user may be unblocked from the Office of the Governor's social media accounts. The Office of the Governor shall retain a record of the reason for restricting that person's access for one year.
- To appeal the restriction of access to a social media platform, the user must submit to the _____ at _____@ky.gov a written statement providing grounds for reinstatement. Requests shall be responded to on a reasonably timely basis, and access shall be restored if it is determined that the grounds for reinstatement are sufficient. A statement that the user will abide by this Policy in the future shall be sufficient, except when a user has continued to violate the Policy after having made such a statement. In the latter case, the user must submit a written statement providing grounds for reinstatement, and access shall be restored if it is determined the grounds for reinstatement are sufficient.
- Any denial of restatement by the Office of the Governor shall also be done in writing and specifically describe the grounds for denial.
- Any user denied reinstatement is entitled to seek reinstatement after three months.
- The Office of the Governor shall notify the public of any changes to this Policy and identify the changes.

¹ Users that make express or implied threats of violence or to public safety may be reported to the Kentucky State Police for investigation.

Public Records and Retention. Any content removed or hidden pursuant to this Policy will be retained for one year. The Office of the Governor's social media platforms are subject to applicable public records and records management laws. Any record maintained on or regarding the Office of the Governor's social media platforms, including Comments and restriction appeals, will be maintained consistent with the Kentucky Open Records Act.

User-generated content. The Office of the Governor reserves the right to monitor the social-media platforms, but is not responsible for content generated by users on these platforms nor is user-generated content government speech. A Comment is the opinion of the commentator only. Publication of a Comment does not imply endorsement of, or agreement by, the State of Kentucky or Governor Beshear. Comments and content should be understood to be entirely public, and users should not write Comments with any information that they consider, or would like to keep, confidential. The Office of the Governor is not responsible for content removed or hidden by any social media platform.