UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

DREW MORGAN and MARY HARGIS,

Plaintiffs,

v.

MATT G. BEVIN, in his official capacity as Governor of Kentucky,

Defendant.

Case No. _____

Electronically Filed

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65(a) and LR 7.1(a), Plaintiffs move for a preliminary injunction enjoining the Defendant, in his official capacity, from enforcing his policy or practice of permanently blocking individuals and organizations from his official social media accounts — GovMattBevin (Facebook) and @GovMattBevin (Twitter) — and to unblock the individuals, including Plaintiffs, who have been affected by the policy. The challenged policy has been (and continues to be) used to permanently deprive hundreds of individuals and organizations, including Plaintiffs, of the ability to exercise their fundamental First Amendment rights in those online public forums.

In support of their motion, Plaintiffs argue that there is a substantial likelihood of their succeeding on the merits of their claims because the challenged policy of permanently blocking individuals from posting comments on those official forums (whether based on the content of the blocked users' past comments or otherwise) is not narrowly tailored to promote any permissible

governmental interest, and because it constitutes an unlawful prior restraint on speech. Thus, absent injunctive relief, Plaintiffs will be irreparably harmed by the continued enforcement of the unconstitutional permanent ban from those designated public forums.

STATEMENT OF FACTS

In 2015, Governor Matt Bevin created his official Facebook and Twitter accounts — GovMattBevin (Facebook) and @GovMattBevin (Twitter). [Verified Complaint (Compl.), ¶¶ 21, 37.] Both accounts are open and accessible to the public [*id.* at ¶¶ 23, 39], and both have a large number of followers.[1] Since their inception, these accounts have been used to communicate information to (and receive information from) the general public on a wide range of topics such as news events, governmental affairs, and political dialogue.[2] Governor Bevin also uses these forums to post videos of himself in which he talks directly to the public discussing issues of importance to him, such as criticisms of a political opponent or support for a political ally, defense of his administration's policies, or recent developments.[3] In addition to viewing the

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[1] *Governor Matt Bevin*, Facebook (last accessed July 26, 2017), https://www.facebook.com/GovMattBevin/ (more than 92,000 followers); *Governor Matt Bevin*, Twitter (last accessed June 27, 2017), https://twitter.com/GovMattBevin (more than 27,000 followers).

[2] *See e.g., Governor Matt Bevin*, Facebook (last accessed July 26, 2017), https://www.facebook.com/GovMattBevin/; *Governor Matt Bevin*, Twitter (last accessed July 26, 2017), https://twitter.com/GovMattBevin/status/885241382423678977; *Governor Matt Bevin*, Twitter (last accessed July 26, 2017), https://twitter.com/GovMattBevin/status/885174420687396865.

[3] *See e.g. Governor Matt Bevin*, Facebook (last accessed July 26, 2017), https://www.facebook.com/pg/GovMattBevin/videos/?ref=page_internal; *Governor Matt Bevin*, Twitter (July 26, 2017), https://twitter.com/GovMattBevin/status/882705363824496641; *Governor Matt Bevin*, Twitter (last accessed July 26, 2017), https://twitter.com/GovMattBevin/status/881135304823914497.

Governor's content on these sites, individuals may post comments of their own and view (and respond to) the comments of others. [Compl., ¶¶ 8, 11, 24, 40.]

Since creating these accounts, however, Governor Bevin, or his agent, has blocked hundreds of users from them. [*Id.*, ¶¶ 1, 28, 43.][4] While the specific reason for each instance of blocking is unknown, a spokesperson for Governor Bevin's office has stated that users are blocked from these forums for engaging in abusive language, obscenity, spam, or repeated off-topic comments. [*Id.*, ¶ 54.][5] Notably, though, neither of these social media accounts contains any kind of disclaimer regarding how the page is monitored, who is permitted to comment, the topics that may be discussed, what comments may be subject to deletion, or what online behavior may result in a user being blocked. [*Id.*, ¶¶ 25, 41.]

Plaintiff Drew Morgan is a Kentucky resident and a registered Twitter user whose Twitter username is BigBlueDrew. [*Id.*, ¶ 29.] Plaintiff uses his Twitter account for, *inter alia*, engaging in political speech that is fully protected by the First Amendment. [*Id.*, ¶ 30.] In February 2017, Mr. Morgan commented on a number of Governor Bevin's Twitter posts inquiring about the status of the Governor's then-overdue property taxes. [*Id.*, ¶ 31.] Plaintiff's comments were not obscene, abusive, defamatory, or otherwise in violation of Twitter's Terms of Service. [*Id.*, ¶ 32.] Nevertheless, on February 8, 2017, Defendant Bevin (or someone acting on his behalf) permanently blocked Plaintiff from the Governor's official Twitter account thus preventing Mr. Morgan from engaging in political speech on that designated public forum,

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[4] PHILIP M. BAILEY & MORGAN WATKINS, *Gov. Matt Bevin blocks hundreds on Twitter and Facebook*, *The Courier-Journal* (June 15, 2017), http://www.courier-journal.com /story/news/politics/2017/06/15/kentucky-gov-matt-bevin-blocks-hundreds-twitter-and-facebook/361281001/.

[5] In at least some instances, it appears that individuals may have been blocked because of content and/or viewpoint discrimination. [*See attached* Exhibit 1: ACLU Letter to Gov. Bevin.]

viewing or sharing the Governor's posts, and viewing (or responding to) the comments and political dialogue of others. [Compl., ¶¶ 33-35.]

Plaintiff Mary Hargis is also a Kentucky resident who uses social media. [*Id.* at ¶ 44-45.] Plaintiff Hargis is a registered Facebook user whose account profile is Mary Hargis. [*Id.* at ¶ 44.] Ms. Hargis uses her Facebook account for, *inter alia*, engaging in political speech that is fully protected by the First Amendment. [*Id.* at ¶ 45.] In late 2016 or early 2017, Plaintiff Hargis posted comments on a Facebook post by Governor Bevin criticizing his right-to-work policies. [*Id.* at ¶ 46.] And on another occasion in late 2016, she posted comments on a Facebook post by Governor Bevin criticizing his skilled labor apprenticeship program. [*Id.* at ¶ 47.] On neither occasion were Plaintiff Hargis' comments obscene, abusive, defamatory, or otherwise in violation of Facebook's Terms of Service. [*Id.* at ¶ 46-47.] Sometime between then and July, 2017 (when Plaintiff next attempted to post a comment on Governor Bevin's official Facebook page), the Defendant, or someone acting on his behalf, permanently blocked Plaintiff Hargis from that online forum thus preventing her from being able to post her comment. [*Id.* at ¶ 48.] Because she is now permanently blocked from that forum, Ms. Hargis cannot engage in political speech on that designated public forum, "like" the content on that forum or the comments posted there by others, or respond to the comments posted by others. [*Id.* at ¶ 49, 51.]

ARGUMENT

In evaluating a request for a preliminary injunction under Fed.R.Civ.P. 65(a), this "court must consider: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest." *Abney v. Amgen, Inc.*, 443 F.3d 540, 546 (6th Cir. 2006) (internal quotations omitted) (quoting *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nasvhille & Davidson Co.*, 274 F.3d 377, 400 (6th Cir. 2001)

cert. denied, 535 U.S. 1073 (2002)). These considerations "are factors to be balanced, not prerequisites that must be met." *U.S. v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004) (citing *Washington v. Reno*, 35 F.3d 1093, 1098 (6th Cir. 1994)). And in First Amendment cases, such as here, the "crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because . . . the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the statute." *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007) (internal quotations omitted) (quoting *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 888 (6th Cir. 2000) (*overruled on other grounds*, *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004)).

Here, preliminary injunctive relief is appropriate because all of the factors weigh in favor of issuing the injunction. Plaintiffs have a substantial likelihood of succeeding on the merits of their First Amendment claims and an injunction would prevent immediate and irreparable harm to them but would not harm Defendant or others. Moreover, because "it is always in the public interest to prevent the violation of a party's constitutional rights," issuance of a preliminary injunction would serve the public interest. *Deja Vu of Nashville, Inc. v. Metro. Govt. of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001) (quoting *G & V Lounge, Inc. v. Michigan Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CLAIMS.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. Amend. I. The First Amendment's protection of speech applies not only to Congress, but also to the states by operation of the Fourteenth Amendment's due process clause. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Moreover, the First Amendment's speech protections extend to online speech occurring on social media sites.

Packingham v. North Carolina, 15-1194, 2017 U.S. LEXIS 3871, at *11 (June 19, 2017) ("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.'" (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997)). *See also Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013), *as amended* (Sept. 23, 2013) (using Facebook's "like" button constitutes both pure speech and symbolic expression under the First Amendment).

Here, Governor Bevin has created online public forums through his official Twitter and Facebook accounts for the dual purposes of communicating information to (and receiving input from) the public regarding a wide range of topics, including such issues as local, state, and federal affairs, politics, and his administration's policies. [Compl. ¶¶ 1, 23-25, 39-41.] These social media forums are open and accessible to the public. [*Id.*] Moreover, there is no limitation on the individuals who may view (and participate in) these public forums (other than the sites' Terms of Service) or the topics they may discuss, nor is there any advance governmental approval required to post comments to these forums. [*Id.*]

Despite creating these online public forums, Governor Bevin, or his agent, has selectively deleted comments that have been posted on these sites and, in hundreds of instances, permanently blocked the organizations and individuals who posted them. [*Id.*, ¶¶ 28, 43.] Thus, these organizations and individuals, including Plaintiffs, have been (and continue to be) deprived of the ability to engage in political speech (and, in the case of Governor Bevin's official Twitter account, also the ability to receive information) in these online public forums. [*Id.*, ¶¶ 36, 51.] Plaintiffs have a substantial likelihood of succeeding on the merits of their First Amendment claims because Governor Bevin, in his official capacity, purposefully created these online accounts to serve as designated public forums, and the policy of permanently blocking

individuals from participating in these online forums (whether because of content-based or content-neutral reasons) is not narrowly tailored to achieve any permissible governmental interest,[6] and because it constitutes an unlawful prior restraint on speech.

A. Governor Bevin's Official Facebook And Twitter Accounts Are Designated Public Forums.

The first step in analyzing Plaintiffs' likelihood of success is determining whether a (and if so what type of) public forum is created by Governor Bevin's official social media sites.[7] *See International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). The type of forum — *i.e.*, traditional public forum, designated public forum, limited public forum, and non-public forum — determines the extent to which government may regulate speech within the forum. *Miller v. Cincinnati*, 622 F.3d 524 (6th Cir. 2010). For example, in a traditional public forum, "[r]easonable time, place, and manner restrictions are allowed . . . but any restriction based on the content of the speech must satisfy strict scrutiny." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

Similarly, a designated public forum is one in which the government intentionally "opens a piece of public property to the public at large, treating as if it were a traditional public forum." *Miller v. City of Cincinnati*, 622 F.3d 524, 534 (6th Cir. 2010) (citation omitted). To determine if such action has taken place, courts look to see if "the government has made the property generally available to an entire class of speakers or whether individual members of that class

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[6] While Plaintiffs do not concede that any purported governmental interest asserted by Defendant would be sufficiently compelling or significant to satisfy either the strict or intermediate scrutiny standards, they focus their argument in this brief on the challenged policy's lack of narrow tailoring.

[7] Plaintiffs have engaged in constitutionally protected political expression in these online public forums, and they intend to do so again in the future. [Compl., ¶¶ 30-32, 35, 45-47, 50.]

must obtain permission in order to access the property." *Putnam Pit, Inc. v. City of Cookeville, Tenn.*, 221 F.3d 834, 844 (6th Cir. 2000). In designated public forums, "[g]overnment restrictions on speech . . . are subject to the same" limitations as those within a traditional public forum. *Summum*, 555 U.S. at 469-70; *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983).

By contrast, a limited public forum is one in which the government opens a public forum "to certain groups" or that is "dedicated solely to the discussion of certain subjects." *Id.* at 470. In these limited public forums, the government "may impose restrictions on speech that are reasonable and viewpoint-neutral." *Id.* Likewise, "government limitations on speech in . . . a nonpublic forum receive the same level of scrutiny [as in a limited public forum] . . . [i]n both instances, any restrictions must be reasonable and viewpoint neutral." *Miller v. City of Cincinnati*, 622 F.3d 524, 535-36 (6th Cir. 2010) (internal quotations omitted).

To determine "whether the government intended a location to be a designated public forum or, instead, a nonpublic forum," courts in this circuit employ a two-step approach: "[f]irst, we look to whether the government has made the property generally available to an entire class of speakers or whether individual members of that class must obtain permission in order to access the property," and "[s]econd, we look to whether the exclusion of certain expressive conduct is properly designed to limit the speech activity occurring in the forum to that which is compatible with the forum's purpose." *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 843-44 (6th Cir. 2000) (internal quotation marks and citation omitted).

Under this analysis, the Governor Bevin's official Facebook and Twitter accounts constitute state-created designated public forums.[8] Specifically, these sites were intentionally created for the purpose of communicating information to (and receiving information from) the general public and, consistent with that purpose, both pages are open and accessible to anyone who chooses to view and comment on them. [Compl., ⁋⁋ 23-24, 39-40.] Anyone (who is not blocked) may "follow" these sites without first receiving permission from the Governor, and they may also "like" any of the content or comments posted on the sites as well as post comments of their own. [Compl., ⁋⁋ 8-9, 11-12, 26, 39.] "This sort of governmental designation of a place or channel of communication for use by the public is more than sufficient to create a forum for speech." *Davison v. Loudoun County Bd. of Supervisors*, 2017 U.S. Dist. LEXIS 116208, at *26 (E.D. Va. July 25, 2017) (internal quotations and citation omitted (holding that public official's "official" Facebook page a designated public forum)). *See also Page v. Lexington County School District One,* 531 F.3d 275, 284 (4th Cir. 2008) (finding school district website a nonpublic forum, but observing that "[h]ad a linked website somehow transformed the . . . website into a type of 'chat room' or 'bulletin board' in which private viewers could express opinions or post information, the issue would, of course, be different."). Thus, because these official social media accounts are generally open to anyone eligible to use the social media sites themselves and contain no express exclusion of expressive conduct, they are designated public forums in which reasonable time, place, and manner restrictions may be allowed, but where content-based restrictions will be subject to strict scrutiny. *Summum*, 555 U.S. at 469.

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[8] These "official" social media accounts (and the Defendant's official-capacity policies governing access to them) represent state action because the sites are distinct from Governor Bevin's personal or campaign pages, they are explicitly identified as the "official" site for the office of the Governor, and they are used as "tool[s] of governance." *Davison v. Loudoun County Bd. of Supervisors*, 2017 U.S. Dist. LEXIS 116208 at *18-20 (E.D. Va. July 25, 2017) (holding that government official's Facebook page state action creating a designated public forum).

B. Permanently Barring Individuals From Participating In Designated Public Forums Is Not Narrowly Tailored To Achieve Any Permissible Governmental Interest.

Despite opening up designated public forums for the exchange of information between himself and the general public, Governor Bevin has permanently blocked hundreds of individuals from participating in these forums. [Compl., ¶¶ 28, 43.] Neither of the Governor's official social media sites clearly articulates what comments or topics are subject to removal or what online behavior may result in being permanently barred from the site. [*Id.*, ¶¶ 25, 41.] While Plaintiffs maintain that they, and likely many more, were blocked from these sites due to their non-threatening, non-abusive, non-defamatory comments that were critical of the Governor or his policies [Compl., ¶¶ 32-33, 47-48], a spokesperson for Governor Bevin has purportedly outlined the circumstances under which individuals would be permanently blocked, stating :

> Gov. Bevin is a strong advocate of constructive dialogue, and he welcomes thoughtful input from all viewpoints on his social media platforms. Unfortunately, a small number of users misuse those outlets by posting obscene and abusive language or images, or repeated off-topic comments and spam. Constituents of all ages should be able to engage in civil discourse with Governor Bevin via his social media platforms without being subjected to blatant vulgarity or abusive trolls.

Twitter, *Posting of Woody Maglinger to Charles Ornstein @charlesornstein*, https://twitter.com/charlesornstein/status/874709491983495168 (June 13, 2017). [Compl., ¶ 54.]

Irrespective, however, of whether the policy of permanently blocking individuals from these sites is due to content-based or content-neutral decisions about their past comments, the permanent ban is nonetheless an unlawful restriction on Plaintiffs' (and others') right to engage in speech (and, in the case of Twitter, their right to receive information from others[9]) in these

[9] Defendant's blocking Plaintiffs on Twitter also constitutes a violation of their right to receive information. "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press) . . . necessarily protects the right to

public forums because it lacks the requisite narrow tailoring under either the strict or intermediate scrutiny standard.

Specifically, narrow tailoring (under strict scrutiny) requires that "[t]he State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (quoting *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983)). In evaluating whether a regulation is necessary, courts assess whether the "challenged restriction is the least restrictive means among available, effective alternatives." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004) (upholding grant of preliminary injunction against enforcement of Child Online Protection Act). *See also U.S. v. Playboy Entm't Group,* 529 U.S. 803, 813 (2000) (stating that narrow tailoring requires that "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative") (citing *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997)). By contrast, narrow tailoring under intermediate scrutiny "is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock*

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receive." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citations omitted). While traditionally such a right has been coupled with areas such as a public library, *see Neinast v. Bd. of Trustees of Columbus Metro. Lib.*, 346 F.3d 585, 591 (6th Cir. 2003), social media sites are becoming everyday sources of information. As the Supreme Court recently stated, social media sites such as Facebook and Twitter, "for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 2017 WL 2621313 at *8.

Being blocked on Twitter involves a substantial restriction on the right to receive information that is absent when one is blocked from a Facebook page. On Facebook, blocked users remain able to access and view posts and comments on public pages that have blocked them. On Twitter, though, the blocked user cannot: follow the account, view the account's list of followers, tag the account in any photos, view any of the account's tweets, or view the comments posted on the account by others. [Compl., ⁋⁋ 10, 26-27.] Thus, Plaintiff Morgan is unable to view Defendant's Twitter posts or other users' comments that are posted on that account. [*Id.*]

Against Racism, 491 U.S. 781, 799 (1989) (internal quotation marks and citation omitted). But even under that more relaxed standard, the regulation nonetheless may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.*

Here, the permanent blocking of individuals and organizations from the Governor's official online forums fails to satisfy either formulation of narrow tailoring: it is neither the "least restrictive means" of achieving any permissible governmental interest, nor would its absence render less effective the ability to achieve a permissible governmental interest. This is confirmed by examination of analogous cases in which policies barring individuals from participating in designated and limited public forums (whether permanently or for much shorter time periods) have been rejected by courts as failing the narrow tailoring requirement.[10] *Barna v. Bd. of Sch. Directors*, 143 F.Supp.3d 205, 216 (M.D. Pa. 2015) (permanent ban from attending school board meetings and entering school property for engaging in disruptive and threatening behavior at school board meeting "not sufficiently narrowly tailored to serve an important governmental interest"); *Cyr v. Addison Rutland Supervisory Union*, 60 F.Supp.3d 536, 548 (D. Vt. 2014) ("categorical ban of a single individual from open school board meetings . . . is not narrowly tailored"); *Brown v. City of Jacksonville*, No. 3:06-cv-122, 2006 U.S. Dist. LEXIS 8162, at *12 (M.D. Fla. 2006) (three-month ban from attending City Council meetings "not . . . 'narrowly tailored' to achieve the significant governmental interest of running the meetings efficiently,

[10] *Virginia v. Hicks*, 539 U.S. 113 (2003) does not compel a different conclusion. In *Hicks*, the Court held that the record did not establish that a policy barring those with "no legitimate business or social purpose" from a housing authority's streets was substantially overbroad. In dicta, the Court further opined that the First Amendment would not be violated by the "punishment of a person who has (pursuant to a lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration." *Id.* at 123. Here, there is no physical trespass (or other criminal conduct) for which affected individuals are prevented from participating in the public forums, and there is no "lawful regulation" underlying the initial decision to block them from the sites.

while successfully preventing her disruptive behavior."). *See also Huminski v. Corsones*, 396 F.3d 53, 92 (2d Cir. 2005) ("categorical ban on expressive speech singling out an individual does not even satisfy the lower threshold of reasonableness review" for a nonpublic forum).

Moreover, the functionality on both Twitter and Facebook provide a range of less restrictive alternatives that, were they employed, would achieve any legitimate governmental interest[11] in moderating its online public forums without permanently blocking individuals from being able to participate. For example, Facebook allows administrators of pages to proactively monitor and moderate their pages through a variety of methods,[12] including a profanity filter to limit profanity appearing on the page, the ability to limit what users can post in terms of photos, videos, *etc.*, and a process to refer objectionable content to Facebook for appropriate action. Likewise, Twitter provides similar tools, such as muting particular words from appearing on one's Twitter feed, limiting the kinds of media one sees on her account, and the ability to report users who violate the Terms of Service.[13] Thus, because other tools and methods exist for handling users who may be engaging in harassing or abusive behavior, the policy of permanently blocking users from these online public forums is not the "least restrictive" alternative available to achieve any compelling governmental interest. Alternatively, Defendant's ability to achieve

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[11] *Davison*, 2017 U.S. Dist. LEXIS 116208, at *31 (recognizing that "a degree of moderation is necessary to preserve social media websites as useful forms for the exchange of ideas" for public officials, and that not all such moderation will violate the First Amendment).

[12] Plaintiffs highlight these tools as less restrictive alternatives to permanently barring individuals from these forums, but any such less restrictive alternatives must likewise comport with the appropriate level of judicial scrutiny reserved for content-based or content-neutral speech restrictions in designated public forums.

[13] For more in-depth explanations of these and other tools, *see Learn how to control your Twitter Experience*, Twitter (last accessed July 26, 2017), <https://support.twitter.com/articles/20170134>; *Banning and Moderation*, Facebook (last accessed July 26, 2017), <https://www.facebook.com/help/248844142141117/?helpref=hc_fnav>.

any compelling governmental interest that is purportedly served by the challenged policy would not be rendered less effective without the policy, and if it that were the case, the policy nonetheless burdens substantially more speech than is necessary. *See Barna*, 143 F.Supp.3d at 223 ("Certainly, if prohibitions on future expressive activity of" three months, two years, and indefinitely "violate the First Amendment, then it follows inexorably that a permanent ban on future expressive activity by logical extension must also be invalidated."). Thus, under either strict or intermediate scrutiny, the challenged policy is not sufficiently tailored to achieve any permissible governmental interest.

C. Permanently Blocking Commenters From Participating In Defendant's Online Designated Public Forums Is An Unlawful Prior Restraint On Speech.

Not only is the challenged policy insufficiently narrowly tailored, it also constitutes an unlawful prior restraint on Plaintiffs' (and others') speech. Prior restraint is generally "used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States,* 509 U.S. 544, 550 (1993) (citation omitted). And "[a]ny system of prior restraint . . . bear[s] a heavy presumption against its constitutional validity.'" *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (citations omitted). "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Id.* at 558-59.

While not all laws that regulate future speech are prior restraints, courts have held that "where a law sets out primarily to arrest the future speech of a defendant *as a result of his past conduct, it operates like a censor, and as such violates First Amendment protections against prior restraint of speech*." *Polaris Amphitheater Concerts, Inc. v. City of Westerville*,

267 F.3d 503, 507 (6th Cir. 2001) (emphasis added). Moreover, an unlawful prior restraint may exist where, even if it is based on a content-neutral regulation, it "[places] unbridled discretion in the hands of a government official or agency . . . [and] may result in censorship." *Id*. at 509 (quoting *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988)). Thus, if "a regulation fails to place appropriate limits on the discretion of public officials to administer the law in a manner that is abusive of speech, the result should be no different than if the law had brazenly set out to discriminate on the basis of content." *Id*. (citing *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *Kunz v. New York*, 340 U.S. 290, 295 (1951)).

Here, the Defendant's challenged policy acts as an unlawful prior restraint on Plaintiffs' (and others') speech because it is a permanent exclusion from designated public forums for past speech, and because Defendant wields it with unbridled discretion. [Compl., ¶¶ 31-33, 46-48.] As for the former, it is evident that, in these online forums that are open and accessible to every user of the particular social media platform, permanently blocking users from participating in them is based on the users' past online conduct. This point is tacitly acknowledged by the Governor's spokesperson, Woody Maglinger, who provided to a reporter for ProPublica the purported bases for permanently blocking individuals from these sites. [14]

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[14] According to Mr. Maglinger's statement:

> Gov. Bevin is a strong advocate of constructive dialogue, and he welcomes thoughtful input from all viewpoints on his social media platforms. Unfortunately, a small number of users misuse those outlets by posting obscene and abusive language or images, or repeated off-topic comments and spam. Constituents of all ages should be able to engage in civil discourse with Governor Bevin via his social media platforms without being subjected to blatant vulgarity or abusive trolls.

[Compl., ¶ 54.]

Even crediting Defendant with faithful adherence to the purported policy and avoiding impermissible content or viewpoint discrimination in blocking users from these forums, the fact that Defendant *permanently* blocks individuals from engaging in future speech on these forums renders the restriction an improper prior restraint that does far more than merely punish alleged violations. That permanent exclusion is analogous to the ordinance struck down in *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986) in which the city sought to revoke the business license of a company that "sold or publicly exhibited obscene materials." *Id.* at 507. In holding that the ordinance violated the First Amendment as an unlawful prior restraint, the Court of Appeals noted that although states may enforce anti-obscenity laws, the challenged ordinance went much further than simply punishing violations; it "essentially prevent[ed] the offending business from engaging in future distribution of protected, nonobscene material anywhere within the City of Paducah." *Id.* at 470. The court thus found the sanction went "beyond merely deterring or punishing individuals who deal in obscene material," and instead sought "to control future expression." *Id.*

Moreover, the policy of permanently blocking individuals from participating in these online forums is not restrained by any meaningful limitations. Even if Mr. Maglinger's articulation is the standard by which individuals are permanently blocked, that formulation does nothing to restrain the Governor's discretion.[15] For example, the sites themselves do not contain a disclaimer or otherwise give notice to users of what topics or subject matter may be discussed, what speech is subject to removal, or what online conduct will result in being permanently

[15] Because of the lack of meaningful standards by which the Governor enforces his policy of permanently blocking individuals from these forums, the challenged policy is also unconstitutionally vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

blocked. [Compl., ⁋⁋ 25, 41.] Thus, individuals may be permanently blocked by the Defendant for "repeated off-topic comments" even though there is nothing to indicate what "topics" are outside the parameters of the public forum. This is particularly problematic here because these forums are used to cover a wide array of topics, ranging from matters of local and national politics to job growth and the media. [*Id*. at ⁋⁋ 24-25.] As with licensing schemes that confer "unguided governmental discretion" to grant or deny a license, such a vague policy conferring on the Governor the ability to permanently bar individuals from participating in designated public forums "provides for potential suppression of a particular point of view" and thus is an unlawful prior restraint. *Plain Dealer Pub. Co. v. Lakewood*, 794 F.2d 1139, 1145 (6th Cir. 1986) (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

II. AN INJUNCTION IS NECESSARY TO PREVENT IMMEDIATE AND IRREPARABLE HARM TO PLAINTIFFS.

As explained above, Defendant's policy or practice of permanently blocking users, including Plaintiffs, from his official social media accounts has deprived (and continues to deprive) them of fundamental First Amendment freedoms. Both the Supreme Court and the Sixth Circuit have held that the violation of First Amendment freedoms constitutes an irreparable injury sufficient to justify the grant of a preliminary injunction. *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury")); *Overstreet v. Lexington-Fayette Urban County Government,* 305 F.3d 566, 578 (6th Cir. 2002); *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014). Simply put, the violation of an individual's constitutional rights alone is sufficient to establish irreparable harm.

Moreover, the harm in this case is not merely speculative. Plaintiffs, and hundreds of other individuals and organizations, have been (and continue to be) affected by the challenged policy of permanently blocking individuals from participating in these online public forums. [Compl., ¶¶ 28, 43.] Thus, Plaintiffs remain unable to comment on, and express their opinions about, matters of public concern in either of these public forums. Further, Plaintiff Morgan is unable to view the content disseminated by the Governor on his official Twitter account or view the comments posted there by others. [*Id*. at ¶ 34.] Absent injunctive relief, Plaintiffs will continue to suffer an irreparable harm by being unable to exercise their fundamental First Amendment rights in public forums created by the government for that purpose. [*Id*. at ¶ 57.]

III. AN INJUNCTION WILL NOT HARM THE DEFENDANT OR OTHERS.

In contrast to the Plaintiffs' immediate, ongoing, and irreparable injury, Governor Bevin would suffer no injury from the issuance of a preliminary injunction because the First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts v. United States*, 394 U.S. 705, 708 (1969) (quoting *New York Times Co*. v. *Sullivan*, 376 U.S. 254, 270 (1964)). However, even if the Governor could point to some harm from enjoining the policy of permanently blocking individuals from participating in these public forums, it would be more than adequately ameliorated by the mechanisms already available to Facebook and Twitter users which include, *inter alia*, the ability to report others who violate the sites' terms of service.[16]

[16] *See* note 14, *supra*.

IV. THE PUBLIC INTEREST IS SERVED BY ISSUING AN INJUNCTION.

Finally, the issuance of an injunction here is in the public interest because "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge*, 23 F.3d at 1079; *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (public "as a whole" has interest in protecting constitutional liberties). That is particularly true where, as here, an injunction is needed to prevent the widespread and continuing constitutional violations occasioned by banning individuals from engaging in constitutionally protected expression in a public forum.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for a Preliminary Injunction was filed with the Clerk of the Court simultaneously with the filing of the Complaint using the CM/ECF system on July 31, 2017, and that upon receipt of the returned summons, I will serve this motion along with the Complaint and Summons to the following:

Matt G. Bevin, Governor
Commonwealth of Kentucky
700 Capital Avenue, Suite 100
Frankfort, Kentucky 40601

s/ William E. Sharp
Counsel for Plaintiffs

I further certify that a true and correct copy of the foregoing will be sent to the following by electronic mail upon electronic filing with the Court on July 31, 2017:

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s/ William E. Sharp
Counsel for Plaintiffs