UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. [redacted]
Filed Electronically

[redacted] **PLAINTIFF**

v.

[redacted], Individually and in His Official Capacity as [redacted] County Judge Executive **DEFENDANT**

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant, [redacted], Individually and in his Official Capacity as [redacted] County Judge Executive (hereinafter "[redacted]"), by and through Counsel, for his Motion to Dismiss the Complaint filed against him herein, submits as follows:

INTRODUCTION

Judge [redacted] operates and maintains a Facebook page titled, "[redacted] – [redacted] County Judge Executive." [DN 1 ¶ 8]. This page is separate and distinct from [redacted] County's Facebook page. A review of Judge [redacted] Facebook page shows that Judge [redacted] operates this Facebook page primarily to post announcements and communicate information to the public. *Id; See also* https://www.facebook.com/profile.php?id=[redacted]. Specifically, Judge [redacted] frequently posts flyers for community events, information on road and office closures, government announcements and weather updates—all information that is readily available to the public from other sources. *Id*.

On or about March 11, 2025, Plaintiff filed his Complaint in this action against [redacted], Individually and in his Official Capacity as [redacted] County Judge Executive ("Judge

[redacted]"). Plaintiff's Complaint alleges that Judge [redacted] blocked the Plaintiff from viewing his Facebook page, thereby violating his First Amendment rights. However, Plaintiff does not have a clearly established right to not be blocked by a government official, therefore Judge [redacted] is entitled to the protection of qualified immunity as to all claims against him in his individual capacity. Furthermore, Judge [redacted] Facebook page is not a public forum to which the First Amendment applies. As such, Plaintiff's Complaint fails to state a claim upon which relief can be granted, and all claims against Judge [redacted], Individually and in his Official Capacity as [redacted] County Judge Executive must be dismissed as a matter of law.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal for "failure to state a claim upon which relief can be granted[.]" To survive a motion to dismiss, a complaint must contain sufficient facts which, taken as true, "state a claim to relief that is plausible on its face." *Ashcraft v. Iqbal*, 556 U.S. 662,678 (2009) (quoting *Bell Al. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted). A claim is plausible if the complaint includes sufficient facts for the court to infer that the defendant is responsible for the alleged conduct. *Id*.

The complaint must "contain either direct or inferential allegations respecting all material elements necessary for recovery under a viable legal theory." *D 'Ambrosio v. Marino*, 747 F.3d 378, 383 (6th Cir. 2014) (quoting *Philadelphia Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649 (6th Cir. 2013)) (internal quotation marks omitted). Moreover, the complaint is accepted as true, viewed in the light most favorable to the plaintiff, and all reasonable inferences are drawn in the plaintiff's favor. *Gavitt v. Born*, 835 F.3d 623,640 (6th Cir. 2016) (citing *Jelovsekv. Bredesen*, 545 F.3d 431,434 (6th Cir. 2008)). Despite this overwhelmingly generous standard, Plaintiff's Complaint fails to state a claim against Judge [redacted] upon which relief can be granted.

ARGUMENT

Judge [redacted] did not violate a clearly established constitutional or statutory right when he blocked Plaintiff from viewing his Facebook page, therefore Judge [redacted] is entitled to qualified immunity for all claims asserted against him in his individual capacity. Furthermore, Plaintiff has failed to state a valid § 1983 claim, as Defendant [redacted] actions were not attributable to the State and his Facebook page is not a public forum subject to the strictures of the First Amendment.

I. Judge [redacted] is entitled to the protection of qualified immunity for all claims asserted against him in his individual capacity.

Judge [redacted] is entitled to the protection of qualified immunity for all claims against him in his individual capacity, as Judge [redacted] did not violate any clearly established constitutional right belonging to Plaintiff. The United States Supreme Court explained the doctrine of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Therein, the Court held that government officials engaged in the performance of discretionary functions are generally "shielded from liability [and, indeed, from suit] for civil damages insofar as their conduct does not violate **clearly established statutory or constitutional rights** of which a reasonable person would have known." *Id*. (emphasis added); see also *Pray v. City of Sandusky*, 49 F.3d 1154, 1157-58 (6th Cir. 1995); *Ireland v. Tunis*, 113 F.3d 1435, 1448 (6th Cir. 1997); and *Saylor v. Board of Education of Harlin County, Kentucky*, 118 F.3d 507, 512 (6th Cir. 1997). Qualified immunity protects the official from liability for any "objectively reasonable" action, **determined in light of clearly established law at the time of the action.** *Id*. Thus, the Court must determine whether it was reasonable for Defendants to believe that their "conduct was lawful, in light of the **clearly established law** and the information [in their] possession." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (emphasis added).

A right is "'clearly established' if '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Baynes v. Cleland*, 799 F.3d 600, 610 (6th Cir. 2015) (first and second alterations in original) (internal citations omitted). The key question the Court must determine is "whether the state of the law [at the time of the action giving rise to the claim] gave respondents fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Id*. (internal citations omitted). This is an objective inquiry, not subjective. *Id*. Specifically, Courts must first look to "'decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.'" *Brown v. Lewis*, 779 F.3d 401, 418-19 (6th Cir. 2015) (internal citations omitted).

Plaintiff has the ultimate burden to prove that the Defendant is not entitled to qualified immunity. *Rich v. City of Mayfield Hts*, 955 F.2d 1092, 1095 (6th Cir. 1992). To defeat the "clearly established right" element of qualified immunity, a plaintiff may "point either to 'cases of controlling authority in their jurisdiction at the time of the incident' or to 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011) (internal citations omitted).

Judge [redacted] is entitled to qualified immunity because he did not violate a clearly established constitutional right when he blocked the Plaintiff from his Facebook page. Social media is still a relatively new phenomenon, and the Courts have yet to establish clear boundaries and contours of the law surrounding social media interactions. There is no controlling authority in this jurisdiction, nor is there a consensus of cases of persuasive authority—the Courts that have addressed this issue have varied drastically in their holdings. Judge [redacted] could not possibly have had a "fair warning" of the law in this area when the Courts have yet to even establish it.

When evaluating whether a right is clearly established, the Court must first look at Supreme Court cases. In 2024, the Supreme Court established the test to determine when a public official's social media activity constitutes state action. *Lindke v. Freed*, 601 U.S. 187 (2024). However, the Court **did not** establish that state action, such a blocking an individual from a Facebook page, violates the First Amendment. *See Id*. The Court simply remanded the case for further proceedings consistent with the opinion. *Id*. at 204. The Supreme Court has yet to take up a case addressing this issue.

With no binding Supreme Court cases, this Court must now look at Sixth Circuit cases. Again, there appears to be no Sixth Circuit precedent binding on this Court. While the Sixth Circuit did address related issues in *Cooper-Keel v. Michigan*, holding that a Facebook page is a nonpublic forum, that decision is not published and the Court provided no reasoning to support its holding. *Cooper-Keel v. Michigan*, No. 23-1642, 2024 U.S. App. LEXIS 8546 (6th Cir. Apr. 9, 2024). Given that the sole relevant decision is not published, the decision is not binding on this Court. *See Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 283 (6th Cir. 2016) (holding that an unpublished decision is not binding precedent and refusing to follow its holding). "Nonbinding opinions are never enough to clearly establish a point of law." *Brown v. Giles*, 95 F.4th 436, 439 (6th Cir. 2024) (citing *Bell v. City of Southfield*, 37 F.4th 362, 367-68 (6th Cir. 2022)). An unpublished, nonbinding Sixth Circuit opinion is entirely insufficient to put Judge [redacted] on notice that his action at issue here was unconstitutional.

While District Courts within the Sixth Circuit have addressed the issue, there is still no consensus. In the Eastern District of Kentucky, the Court held that a government official's social media page, meant to communicate his own speech and not the speech of his constituents, was not a public forum subject to the First Amendment. *Hargis v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky.

2018). However, in the Eastern District of Michigan, the Court held that a Facebook page intended to create an avenue between the public and the government is a forum for public speech, not merely a conduit of government speech. *Blackwell v. City of Inkster*, 596 F. Supp. 3d 906 (E.D. Mich. 2022).

Extending the analysis to decisions of other circuits only complicates the matter even further. *See Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (holding that a Facebook page intentionally created to allow public discourse is a public forum); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (holding that the President's Twitter was a public forum); *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021) (holding that an official maintaining a campaign social media page is entitled to select her audience and present her page as she sees fit).

In the absence of any controlling authority in this jurisdiction or a consensus of cases of persuasive authority, Judge [redacted] did not violate a "clearly established constitutional right." Therefore, Judge [redacted] is entitled to qualified immunity in his individual capacity on Plaintiff's claim for damages, and all claims against Judge [redacted] in his individual capacity must be dismissed.

II. Plaintiff lacks standing to raise a First Amendment claim.

Plaintiff lacks standing to bring a First Amendment claim against Judge [redacted] because he has not established an injury in fact. As the party invoking federal jurisdiction, Plaintiff bears the burden of establishing standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal citations omitted). To establish standing, the "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*. (internal citations omitted). The plaintiff must

clearly allege facts demonstrating each element of standing. *Id*. (internal citations omitted). Plaintiff's Complaint fails to clearly allege facts demonstrating each element of standing, therefore his Complaint must be dismissed.

An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). In the context of a viewpoint discrimination claim[1] involving social media, "it stands to reason that, to give rise to an injury, the defendant's conduct should *prevent* the plaintiff in some 'concrete and particularized' fashion from expressing a viewpoint." *Chase v. Morgan*, No. 1:24-cv-265, 2025 U.S. Dist. LEXIS 56300 (E.D. Tenn. Mar. 26, 2025). With regard to blocking, there must be a particular post on which the Plaintiff wished to comment to cause a First Amendment injury. *Chase,* 2025 U.S. Dist. LEXIS 56300 at *19 (quoting *Lindke*, 601 U.S. 187 (holding that "[b]ecause blocking operated on a page-wide basis, a court would have to consider whether [Defendant] had engaged in state action with respect to any post on which [Plaintiff] wished to comment.")).

Here, the only allegation Plaintiff makes against Judge [redacted] is that Judge [redacted] blocked him—he does not allege that Judge [redacted] ever deleted any of his comments. [*See* DN 1]. In fact, Plaintiff does not allege he ever commented on Judge [redacted] Facebook page, or that he has a desire to comment or otherwise engage with the page in the future. *Id*. He simply alleges that he is blocked from viewing the page and commenting on the page but provides no allegation that he has the desire to comment. *Id*. With no evidence that Plaintiff ever commented on Judge [redacted] Facebook page, or that he would comment on it if he were able, Plaintiff has not sustained an "actual or imminent" injury. *See Chase,* 2025 U.S. Dist. LEXIS 56300 at *19. Judge [redacted] cannot

[1] Defendant does not concede that this action requires a viewpoint discrimination analysis for reasons further delineated below. Regardless, Plaintiff still has no standing to bring this claim.

violate Plaintiff's First Amendment rights by preventing Plaintiff from commenting, when Plaintiff has not alleged that he ever intended to comment. A *hypothetical* future desire is not an "actual or imminent" injury. And Plaintiff has no constitutional right to simply view Judge [redacted] Facebook page. Because Judge [redacted] has not prevented Plaintiff from commenting, Plaintiff has not sustained an injury-in-fact.

As such, there is nothing for this Court to redress. An order compelling Judge [redacted] to unblock Plaintiff would not redress any alleged First Amendment violation because Plaintiff has not alleged that he has any desire to ever comment or express his viewpoint on Judge [redacted] Facebook page. *See Chase*, 2025 U.S. Dist. LEXIS 56300 at *19. Nothing would change—Plaintiff still would not be exercising his First Amendment rights.

Plaintiff's Complaint fails to clearly allege the facts demonstrating each element of standing. Plaintiff has not established that Judge [redacted] deleted any of his comments, or that he intends to comment on Judge [redacted] Facebook page in the future. Any alleged injury is only conjectural and hypothetical. Therefore, all claims against Judge [redacted] must be dismissed for lack of standing.

III. Plaintiff has failed to state a § 1983 claim for a First Amendment violation.

Furthermore, Plaintiff has failed to state a viable § 1983 claim on the basis of a First Amendment violation. Judge [redacted] has no specific or general authority to operate a Facebook page, nor does he have the specific or general duty to make announcements to the community. However, even if this Court finds that Judge [redacted] actions were attributable to the State, Judge [redacted] Facebook page is not a public forum and is therefore not subject to the First Amendment.

A. Judge [redacted] blocking of Plaintiff is not attributable to the State.

The Plaintiff brings this First Amendment action under the guise of 42 U.S.C. § 1983, which provides that any person who "under color of any statute, ordinance, regulation, customer, or usage, of any State" deprives someone of their constitutional or statutory rights shall be held liable. 42 U.S.C. § 1983. This statute applies only to acts "attributable to a State, not those of a private person." *Lindke v. Freed*, 601 U.S. 187, 194 (2024). Government action is also required for any violation of the Free Speech Clause. *Id*. at 195. The "distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights." *Id*. at 197. Judge [redacted] had no actual state authority to maintain a Facebook page, nor did he have actual state authority to make official announcements, therefore his actions are not attributable to the State.

In *Lindke v. Freed*, the Supreme Court established the test for when a state official's conduct on social media is attributable to the State. *Id*. at 204. The Supreme Court held that a public official's conduct is attributable to the State only if the official "(1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts." *Id*. "The appearance and function of the social media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first." *Id*. at 198.

I. Judge [redacted] lacks actual authority to run an official Facebook page or to make official announcements.

An act is attributable to the State only when "it is traceable to the State's power or authority. Private action—no matter how 'official' it looks—lacks the necessary lineage." *Id*. "When the challenged conduct 'entail[s] functions and obligations in no way dependent on state authority,' state action does not exist." *Id*. at 198-99 (quoting *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981)). If a State does not entrust the public official with social media responsibilities, it cannot

'fairly be blamed' for the way the official discharges them. *Lindke,* 601 U.S. at 199 (quoting *Lugar v. Edmonson Oil Co*., 457 U.S. 922, 936 (1982)).

Courts must "identify the 'nature of the act' that the plaintiff challenges, and to compare that act with the state-assigned 'responsibilities' of the official who committed it. *MacKey v. Rising*, 106 F.4th 552, 559 (6th Cir. 2024) (internal citations omitted). The "scope of an official's power requires careful attention to the relevant statute, ordinance, regulation, customer, or usage," but "courts must not rely on 'excessively broad job descriptions' to conclude that a government employee is authorized to speak for the State." *Lindke,* 601 U.S. at 200-01 (internal citations omitted). In social media scenarios, the question "is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do." *Id.* at 201.

Just recently, the Sixth Circuit Court of Appeals interpreted and applied the *Lindke* test to alleged state action, not involving social media. *See Lawson v. Creely*, No 24-5649, 2025 U.S. App. LEXIS 7251 (6th Cir. Mar. 26, 2025). The Court held that the status of being a school employee alone was not sufficient to attribute the defendant's conduct to the state—the state actor must specifically be granted the authority. *Id*. at *9-15. Although the school employee handbook required employees to "take reasonable and commonly accepted measures to protect the health, safety, and well-being of others, as well as District property," the policy did not require employees to initiate their own investigations. *Id*. at *13-15. The Court refused to extend the defendants' job description, as such an extension of job duties "would constitute the excessively broad construction of their job description foreclosed by *Lindke*." *Id*. at *14-15. With no specific grant of authority, the Court declined to attribute the defendants' actions to the State. *Id*. at *9

KRS 67.710 prescribes the powers and duties of a County Judge/Executive in Kentucky. The entirety of the statute is as follows:

> The county judge/executive shall be the chief executive of the county and shall have all the powers and perform all the duties of an executive and administrative nature vested in, or imposed upon, the county or its fiscal court by law, or by agreement with any municipality or other subdivision of government, and such additional powers as are granted by the fiscal court. The county judge/executive shall be responsible for the proper administration of the affairs of the county placed in his charge. His responsibilities shall include, but are not limited to, the following:
>
> (1) Provide for the execution of all ordinances and resolutions of the fiscal court, execute all contracts entered into by the fiscal court, and provide for the execution of all laws by the state subject to enforcement by him or by officers who are under his direction and supervision;
>
> (2) Prepare and submit to the fiscal court for approval an administrative code incorporating the details of administrative procedure for the operation of the county and review such code and suggest revisions periodically or at the request of the fiscal court;
>
> (3) Furnish the fiscal court with information concerning the operations of the county departments, boards, or commissions, necessary for the fiscal court to exercise its powers or as requested by the fiscal court;
>
> (4) Require all officials, elected or appointed, whose offices utilize county funds, and all boards, special districts, and commissions exclusive of city governments and their agencies located within the county to make a detailed annual financial report to the fiscal court concerning the business and condition of their office, department, board, commission, or special districts;
>
> (5) Consistent with procedures set forth in KRS Chapter 68, prepare and submit to the fiscal court an annual budget and administer the provisions of the budget when adopted by the fiscal court;
>
> (6) Keep the fiscal court fully advised as to the financial condition and needs of the county and make such other reports from time to time as required by the fiscal court or as he deems necessary;

(7) Exercise with the approval of the fiscal court the authority to appoint, supervise, suspend, and remove county personnel (unless otherwise provided by state law);

(8) With the approval of the fiscal court, make appointments to or remove members from such boards, commissions, and designated administrative positions as the fiscal court, charter, law or ordinance may create. The requirement of fiscal court approval must be designated as such in the county administrative code or the county charter. In counties containing a city of the first class, the county judge/executive shall appoint to those seats which are not subject to prior qualification on a board or commission an equal number of members from each district, as defined in KRS 67.045, into which the authority of the board or commission extends. If there are more districts than members of a particular board or commission, he shall not appoint more than one (1) member from any district. If there are more members of a particular board or commission than there are districts, he shall equalize appointments to the extent possible. The county judge/executive shall not be required, but shall use his best efforts, to balance appointments on a board or commission if the appointments are to be made from nominees submitted by other groups or individuals or if nominees must have a professional or technical background, expertise or membership. He shall attempt to balance appointments among all such boards and commissions in order to equalize representation of all districts over the entire range of such boards and commissions; and

(9) When directed by statute or an ordinance of that county to make an appointment and fill a vacancy, nominate a person to fill the vacancy within sixty (60) days of the date of the vacancy. The fiscal court shall approve or disapprove the nomination within forty-five (45) days of the receipt of the nomination. If the county judge/executive fails to nominate a person within sixty (60) days of the date of the vacancy, the fiscal court may fill the vacancy. If the fiscal court fails to approve or disapprove a nomination within forty-five (45) days of the nomination, the county judge/executive's nominee is deemed to have been approved. If the fiscal court disapproves a nomination, the county judge/executive shall nominate another person to fill the vacancy within forty-five (45) days of the disapproval. If the county/judge executive fails to nominate another person within forty-five (45) days, a majority of the fiscal court may fill the vacancy.

KRS 67.710. Similar to the facts of *Lawson*, KRS 67.710 does not give Judge Executives such as Judge [redacted], the power and/or duty to maintain a Facebook page, nor does it require him to share any announcements with the public as part of his official duties.

Judge [redacted] actions on his Facebook page are not attributable to the State—[redacted] has no actual authority to operate the page and his conduct on his page is in no way dependent on state authority. Regardless of how "official" the Facebook page appeared, Judge [redacted] did not have the statutory power or duty to maintain such a page, therefore his actions cannot be attributable to the State. And while making official announcements *could* fit within Judge [redacted] job description, it is not *actually* part of the job the State entrusts him to do. The Kentucky legislature has provided a very detailed and thorough job description of the position of county judge executive—a description that does not require an official Facebook page, nor does it require the county judge executive to make official announcements. Any interpretation of the job description that requires Judge [redacted] to maintain a Facebook page or official announcements would be an expressively broad construction, which is directly prohibited by *Lindke* and *Lawson*.

As to the second element of *Lindke*, Judge [redacted] cannot purport to exercise authority which he does not have. *See MacKey v. Rising*, 106 F.4th 552, 564 (6th Cir. 2024) (declining to address the second element of the *Lindke* test because the first element has not been established).

As evidenced by the plain language in KRS 67.710, Judge [redacted] clearly lacks actual authority to maintain an official Facebook page and to make official announcements, therefore [redacted] County cannot "fairly be blamed" for his actions. As such, Plaintiff has presented no government action to maintain a §1983 Free Speech claim, therefore his claim must be dismissed as a matter of law.

B. Even if this Court finds that Judge [redacted] actions are attributable to the State, Judge [redacted] Facebook page is not a forum subject to the scrutiny requirements of the First Amendment.

Even if this Court determines that Judge [redacted] actions were attributable to the State, Judge [redacted] Facebook page is not a public forum and therefore is not subject to the First Amendment. As such, Plaintiff's claim must still be dismissed.

As previously discussed, there is no clear precedent for this Court to follow determining whether social media pages are considered forums, and if so, what specific type of forum the pages are. While many jurisdictions, and even courts within this circuit, have issued contradictory opinions, one case in particular is more persuasive and on point to this issue—*Hargis v. Bevin*, which held that the former Kentucky Governor Matt Bevin's social media pages were not a public forum. *Bevin*, 298 F. Supp. 3d at 1010-11. For the reasons delineated below, this Court should follow the Eastern District of Kentucky's holding and dismiss Plaintiff's claim as a matter of law.

A. *Hargis v. Bevin* is the most persuasive case addressing this issue.

In March 2018, the Eastern District of Kentucky addressed this issue as a matter of first impression in the Sixth Circuit. *Bevin*, 298 F. Supp. 3d 1003. In its Opinion, the Court extensively analyzed First Amendment jurisprudence and its implications on a government official's social media pages. *Id*. The Court held that Governor Bevin's social media page was not a public forum and declined to issue a temporary injunction as the Plaintiffs had failed to demonstrate a likelihood of success on the merits of their claim. *Id*. Similarly, Judge [redacted] Facebook page is not a public forum, therefore his Facebook page is not subject to the First Amendment.

In *Bevin*, the Court analyzed Governor Bevin's Facebook and Twitter pages after he blocked two individuals from viewing his pages and commenting on his posts. *Id*. at 1006. The record indicates that Bevin created these accounts to communicate his policies and activities to constituents and to receive feedback on specific topics of his choosing—not to create an "open

forum for general discussion of all issues by the public." *Id*. Bevin maintained his Facebook in a way that members of the public could not post on their own to his page but could respond to what he has posted. *Id*. at 1008. He also filtered comments that contained expletives and typical spam words and blocked individuals who routinely posted obscene, abusive, off-topic or spam comments. *Id*. The Court determined that Bevin's privately owned Facebook and Twitter pages were personal speech, and that a forum analysis did not apply. *Id*. at 1010-11. In reaching this holding, the Court considered a multitude of agreements, the most applicable of which are addressed below.

i. Judge [redacted] Facebook page is not an open forum.

First, the *Bevin* Court held that Governor Bevin did not create an open forum. *Id*. at 1012. The Court further noted that property publicly owned or operated "does not become a 'public forum' simply because members of the public are permitted to come and go at will." *Id*. at 1010. (internal citations omitted). The Court extended this rule to the social media pages of government officials. *Id.* at 1011.

The Court held that Bevin's social media pages were created to communicate "his own speech, not for the speech of his constituents." *Id*. Bevin had a specific agenda for his pages and created his accounts in such a way that prohibited individuals from posting directly on his page and prohibited expletive, spam, or off-topic comments. *Id*. at 1011-12. The Court noted that if Bevin wanted to open a forum, he could have created his pages in a way that allowed that. *Id*. at 1012.However he chose not to, and "the First Amendment does not require him to do so." *Id*.

Likewise, Judge [redacted] created his Facebook page in a way to communicate his own speech—not the speech of his constituents. Permitting the public to comment on his page does not transform the page into a public forum. Furthermore, just as in *Bevin*, Judge [redacted] did not create

this Facebook page with the intent to create an open forum. If Judge [redacted] had intended to create an open forum, he could have done so. But he chose not to and as *Bevin* holds, the First Amendment does not require him to.

ii. Application of a forum analysis would essentially lead to the closing of the forum.

The *Bevin* Court also noted that when the application of a forum analysis would essentially close the forum, a forum analysis is out of place. *Id*. at 1010. (internal citation omitted). Requiring a government official to allow anyone to access and post on his social media accounts "could shut down the pages altogether," as the accounts would likely be flooded with spam. *Id.* at 1012. If the Court required Bevin to allow anyone to post and comment, the entire purpose of Bevin's social media accounts would be frustrated, and it would be nearly impossible for him to convey messages to his constituents. *Id*. Therefore, the Court held that the forum analysis was inappropriate in the context of a government official's social media.

By the same token, if this Court required Judge [redacted] to allow anyone to post or comment on his page, the entire purpose of his page would be impossible to achieve and his page would essentially, or literally, be shut down. Judge [redacted] page would likely be flooded with spam posts and comments, and likely obscene, expletive, and off-topic posts and comments as well. Clearly, applying a forum analysis to Judge [redacted] Facebook page would essentially close the page, therefore a forum analysis in this situation is out of place and inappropriate.

iii. Judge [redacted] Facebook page constitutes government speech, therefore forum restrictions are inapplicable.

Bevin also held that Governor Bevin's official social media pages were government speech because he was "speaking on his own behalf." *Id*. at 1010-11. When a public official speaks "on his own behalf, even on his own behalf as a public official, 'the First Amendment strictures that

attend the various types of government-established forums do not apply.'" *Id*. (internal citations omitted).

In reaching this determination, *Bevin* relied heavily on *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, which held that Texas specialty license plates are meant to convey a government message and are therefore government speech. *Bevin*, 298 F. Supp. 3d at 1012. (citing *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 217 (2015)). *Bevin*, applying the holding in *Walker*, held that any posts that appeared on Bevin's social media pages, or were connected to his pages, "convey[ed] that they are coming from him." *Bevin*, 298 F. Supp. 3d at 1012. The Court held that Bevin created his social media pages to "present an image," and was "not required to allow the public to speak for him." *Id*. at 1013.

Judge [redacted] also created a Facebook page to speak on his own behalf. His page is not transformed into a public forum simply because he is speaking on his own behalf as a public official—his Facebook page is still government speech. Each post and/or comment on Judge [redacted] social media page appears to have been posted by and/or been approved by Judge [redacted]. Judge [redacted] is entitled to control the speech he makes on his own behalf, and he is not required to allow the public to speak for him. Therefore, because his page is government speech, it is not subject to the strictures of the First Amendment.

iv. <u>There is no constitutional right to be heard on social media.</u>

Lastly, and potentially most compelling, *Bevin* addressed the fact that "[t]here is 'no constitutional right as members of the public to a government audience for their policy view.'" *Id*. at 1011. (internal citations omitted). The First Amendment does not, nor does any case law, require "government policymakers to listen or respond to individuals' communications on public issues." *Id*. (internal citations omitted). And a "person's right to speak is not infringed when government

simply ignores that person while listening to others." *Id.* at 1013. (internal citations omitted). While the public may disagree with a government official's social media practices, "the place to register that disagreement is at the polls." *Id.*

Furthermore, *Bevin* addressed the fact that Bevin did not suppress speech but, rather he culled his accounts to "present a public image that he desires." *Id*. at 1012. Importantly, *Bevin* acknowledged that no one was blocked from speaking or posting on Facebook or Twitter entirely, the Plaintiffs were only blocked from Bevin's page. *Id*. at 1013. Only the direct relationship between Bevin and the Plaintiffs was blocked—the Plaintiffs were "still free to post on their own walls and on friends' walls whatever they want about Governor Bevin. *Id*. Considering that the Plaintiffs were still entitled to post elsewhere, and that their right to speak was not infringed when the Bevin ignored them, the Court held that Governor Bevin did not suppress any speech. *Id*.

Just as in *Bevin*, Judge [redacted] has not suppressed any speech. Plaintiff has no Constitutional right to be heard by Judge [redacted], and Judge [redacted] is entitled to ignore him. By blocking the Plaintiff, Judge [redacted] is simply choosing to ignore the Plaintiff, which is totally within Judge [redacted] prerogative. Any disagreement or annoyance that Plaintiff may have with this should be registered at the polls—not this Court. Additionally, Judge [redacted] has not suppressed Plaintiff's speech. Plaintiff is still entitled to make posts about Judge [redacted] on his personal page, or the page of others.

The Court's decision in *Bevin* is directly on point with the facts before the Court here. Just as Governor Bevin, Judge [redacted] created his Facebook page to convey messages to his constituents, not to create a public forum. His page is nothing more than Judge [redacted] government speech, which is not translated into a forum just because the public may comment on his posts. Plaintiff has no right to be heard by Judge [redacted] and is still entitled to post on Facebook about

Judge [redacted] as often as he likes—he just cannot do so on Judge [redacted] page. Therefore, given the persuasiveness of *Bevin*, and its applicability to Judge [redacted] Facebook page, this Court should apply *Bevin* and hold that Judge [redacted] Facebook page is not a forum subject to the First Amendment.

B. Despite diffuse opinions across the country, *Bevin* remains the most persuasive.

As noted above, Courts across the country have varied somewhat wildly in attempt to wrestle with the new intersection of social media and the First Amendment. While other Courts have rendered differing decisions, *Bevin* remains the most persuasive as it is the most applicable to the matter before the Court. *Bevin* involves the case of a government official, not a government office, creating a social media page to convey the speech of an official, whereas other decisions have involved the social media pages of government offices or social media pages created specifically to create a stream of communication between the government and the citizenry.

As previously discussed, *Cooper-Keel* is an unpublished Sixth Circuit decision which held that a Circuit Court's Facebook page was a nonpublic forum. *Cooper-Keel*, 2024 U.S. App. LEXIS 8546. This case is unpersuasive for two reasons. First, this case is a suit against the Chief Judge for actions taken on the "circuit court's official Facebook page." *Id*. at *1. Second, and more importantly, while this Court held that the Facebook page was a nonpublic forum, it provided little to no reasoning supporting such a holding. *Id*. at *5. The Court simply provided the rule for a nonpublic forum and stated "[t]hat is what we have here." *Id*. Nothing more.

Furthermore, courts that have classified social media pages as public forums were presented with facts that were significantly different from those presented in the case at the bar. For example, in *Blackwell v. City of Inkster*, the Court held that the police department's Facebook page was a forum. *Blackwell*, 596 F. Supp. 906. However, the page contained specific language

that the page was to "provide an avenue to communicate between the public and the police" and that the police department "welcome[d] your suggestions and/or comments on how well it serves your needs." *Id*. at 912. Unlike Judge [redacted] Facebook page, the entire purpose of the City of Inkster's page was literally to create a public forum where the public could communicate with the police department.

Similarly, in *Davison v. Randall*, the Court held that a chair of the Board of Supervisors' Facebook page was a public forum. *Davison*, 912 F.3d at 682. But again, this page encouraged the public to comment and engage with the posts. *Id*. The chair intentionally opened the comment section of the page "for public discourse" inviting "any" citizen to comment on "any issues, request, criticism, complement, or just your thoughts." *Id*. The purpose of the page was to create an open forum—not just to make announcements.

Moreover, the Second Circuit held that the President's social media page was a forum. *Trump*, 928 F.3d 226. And yet again, a primary purpose of the President's Twitter was to receive feedback from constituents. *Id*. Specifically, President Trump used the "like," "reply," and "retweet" features "to understand and to evaluate the public's reaction to what he says and does." *Id*. at 236. The page was created to receive feedback, not just make announcements.

These cases are inapposite and entirely inapplicable to Judge [redacted] Facebook page. It is evident from reviewing Judge [redacted] Facebook page that his page has been used to publish announcements, events and provide his own thoughts. He does not operate his page as a forum, nor does he encourage or invite citizens to respond and communicate with him. Under these circumstances, the Court should be guided by the *Bevin* opinion.

Finally, in reviewing the Second Circuit's *Trump* decision, the Supreme Court vacated the judgment and dismissed the case as moot as Trump was no longer President at the time of review.

Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220 (2021). However, Justice Thomas provided a compelling concurring opinion cautioning Courts that would inevitably address this issue in the future as "applying old doctrines to new digital platforms is rarely straightforward." *Id*. at 1221.

Justice Thomas explained that the Second Circuit's conclusion that Trump's social media accounts were public forums was "in tension with, among other things, our frequent description of public forums as 'government-controlled spaces'" and that it "seems rather odd to say that something is a government forum when a private company has unrestricted authority to do away with it." *Id*. at 1221-22. (quoting *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018)).

CONCLUSION

The Complaint fails to state a claim upon which relief can be granted. First, Judge [redacted] is entitled to qualified immunity in his individual capacity as he did not violate a clearly established constitutional right. Second, Judge [redacted] did not have any actual authority to maintain a Facebook page or make announcements and so did not undertake state action in operating the Facebook page at issue and in blocking Plaintiff. Finally, Judge [redacted] Facebook page is not a forum subject to the strictures of the First Amendment. Therefore, all claims asserted against Judge [redacted] must be dismissed with prejudice.

WHEREFORE, Defendant [redacted], Individually and in his Official Capacity as [redacted] County Judge Executive, respectfully requests that Plaintiff's Complaint against him be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2026, I electronically filed the foregoing with the clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record and that a copy was sent via electronic mail and/or U.S. Mail to the following:

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