

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

MARK NICKOLAS,)
)
 Plaintiff,)
)
 v.) Civil Action No. _____
)
 GOVERNOR ERNIE FLETCHER, in his official)
 capacities as Governor and Chief Executive Officer)
 of the Commonwealth of Kentucky; SECRETARY)
 JOHN FARRIS, in his official capacity as)
 Secretary of the Finance and Administration)
 Cabinet; and SECRETARY ROBBIE RUDOLPH,)
 in his official capacity as Secretary of the Executive)
 Cabinet,)
)
 Defendants.)
 _____)

VERIFIED COMPLAINT

I. Preliminary Statement

1. This is a suit for injunctive and declaratory relief under 42 U.S.C. § 1983 against Governor Ernie Fletcher, Secretary John Farris, and Secretary Robbie Rudolph, challenging their decision to block access on state computers to certain websites that the state classifies as “blogs.” The state’s policy selectively classifies websites as blogs because those websites contain viewpoints and content of which the state disapproves.

2. Although there are many conflicting definitions of the word “blog,” the term is usually defined as a website where regular entries are presented in reverse-chronological order. See Wikipedia, <http://en.wikipedia.org/wiki/Blog> (last accessed July 7, 2006); see also *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 103 n.21 (Cal. Ct. App. 2006) (noting the “rapidly evolving and currently amorphous meaning” of the term). Originally, the term primarily referred to online personal diaries or journals, but in more recent years use of the word has expanded to

include websites covering a whole range of topics, including news and politics. *See* Wikipedia, *supra*. Many newspapers, magazines, and television and radio stations have portions of their websites that they designate as blogs, as do universities, private corporations, public-interest organizations, government agencies, and political candidates. *See id.*

3. Plaintiff Mark Nickolas is an online journalist whose political news website was classified as a blog and therefore censored on state computers the day after he was quoted in a front-page New York Times article criticizing defendant Governor Ernie Fletcher. The state's decision to censor Nickolas's website on state computers infringes his rights under both the First Amendment and the Equal Protection Clause of the United States Constitution.

II. Jurisdiction and Venue

4. The Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343.

5. Venue is proper in the Eastern District of Kentucky under 28 U.S.C. § 1391, because the defendants reside there and the relevant events transpired there.

III. Parties

6. Plaintiff Nickolas is an adult citizen of Kentucky domiciled in Bourbon County, Kentucky, and Chairman of The Foundation for Kentucky's Future, Inc. Nickolas is a popular online journalist covering issues of Kentucky politics on his website, BluegrassReport.org. <http://www.bluegrassreport.org/>. Nickolas owns the domain names bluegrassreport.org and bluegrassreport.com, writes articles and editorials for the sites, and, through The Foundation for Kentucky's Future, sells advertisements and conducts fundraising to maintain the sites.

7. Defendant Governor Fletcher is the current Governor and chief executive officer of the Commonwealth of Kentucky. As the chief executive officer, Fletcher has supervisory authority over all administrative agencies, including the Finance and Administration Cabinet.

8. Defendant Secretary John Farris is the Secretary of the Finance and Administration Cabinet and has supervisory authority over all employees within the Cabinet. The Finance and Administration Cabinet is a Kentucky administrative agency that directly oversees the Commonwealth Office of Technology.

9. Defendant Secretary Robbie Rudolph is the Secretary of the Governor's Executive Cabinet. In that capacity, he sets executive branch policy and actions, including the actions challenged here. Secretary Rudolph is Governor Fletcher's running mate for the 2007 Kentucky gubernatorial election.

IV. Factual Allegations

A. Nickolas's Public Criticism of Governor Fletcher

10. BluegrassReport.org is an award-winning website devoted to news and information about Kentucky politics founded by Nickolas on June 13, 2005. BluegrassReport.org combines Nickolas's original reporting and political commentary with relevant clips from major media sources. The website is on the media distribution lists of several state agencies and regularly receives news releases from these agencies. BluegrassReport.org receives approximately 25,000 visitors per week.

11. In addition to his work on BluegrassReport.org, Nickolas writes a weekly editorial for the Louisville Eccentric Observer (LEO), Louisville's weekly newspaper, with a readership of more than 150,000. Nickolas is a regular guest on a number of television and radio shows and has appeared on the public television show Comment on Kentucky, a weekly roundtable of the state's journalists.

12. Nickolas describes his political website as “An Unfiltered and Candid Look at Politics, Politicians and the Media in Kentucky.” Although Nickolas occasionally refers to his website as a blog, the word “blog” does not appear anywhere on his website.

13. Nickolas’s political website is popular among state government employees. Approximately five percent of his site’s readers use state computers to access the site.

14. In the 2003 Kentucky gubernatorial election, Nickolas served as campaign manager for U.S. Representative Ben Chandler, who was defeated by Governor Fletcher.

15. Nickolas frequently uses his website to express strong criticism of Governor Fletcher and his administration, including defendant Secretary Rudolph.

16. Readers of BluegrassReport.org also post comments on the website that are frequently critical of Governor Fletcher, his administration, and Secretary Rudolph.

17. On May 11, 2006, Governor Fletcher was indicted on three misdemeanor charges of conspiracy, official misconduct, and political discrimination for allegedly illegally forcing Democrats out of state civil service jobs and giving the jobs to political allies. *See* Ian Urbina, *Governor’s Troubles Threaten the G.O.P. in Kentucky*, New York Times, June 20, 2006 (Exhibit 1).

18. On June 20, 2006, a front-page New York Times article about the indictments referenced BluegrassReport.org and quoted Nickolas as saying: “The administration keeps peddling these ludicrous conspiracy theories Really, what we have here is a microcosm of the Republicans’ national problem, which is they play by their own rules even if it’s against the law.” *Id.*

B. Kentucky's Selective Internet Censorship

19. The Commonwealth Office of Technology, a division of the state Finance and Administration Cabinet, uses Internet filtering software called Webwasher to block state employees' access to certain websites using state computers.

20. Webwasher uses a national database that sorts web content into sixty-four categories, one of which is entitled "news groups/blogs." State officials can choose which Webwasher categories are blocked on state computers.

21. When state officials wish to block a website that is not part of Webwasher's national database, they contact Webwasher to request that the site be categorized and added to the database. *See Tom Loftus, State's Effort to Block Web Sites Has Plenty of Holes*, Louisville Courier-Journal, June 27, 2006 (Exhibit 2).

22. While waiting for Webwasher to categorize a requested website, state officials can temporarily block access to the site by adding it to a "blacklist" -- a manually inputted list of blocked websites maintained by the Commonwealth Office of Technology. *See Joe Biesk, State Includes Religious Site, Others on List of Blocked Sites*, Lexington Herald-Leader, June 26, 2006 (Exhibit 3). Sites are held on the blacklist until Webwasher is able to classify them. *Id.* The state's blacklist has two categories of sites: 1) sites that are allegedly blogs, and 2) sites that are subject to restriction for other reasons, including pornographic materials and other materials that an agency or manager requested to be blocked. *Id.*

23. Prior to June 21, 2006, the state banned several Webwasher categories of websites, including sites related to pornography, lingerie, computer games, hate groups, illegal activity, and chat rooms, but did not ban the category of blogs. *See Tom Loftus, Political Blogs Off-Limits for State Workers*, Louisville Courier-Journal, June 22, 2006 (Exhibit 4).

24. All state workers are given a general Internet use policy that prohibits accessing websites related to online investments, sexual content, chat rooms, games, and gambling. The policy also warns employees against excessive personal use of state computers. The policy does not regulate viewing news-related websites or blogs.

25. At 5:00 p.m. on June 20, 2006, the same day that the New York Times published its quotation of Nickolas, the state turned on the Webwasher filter that blocked access to blogs from state computers. At the same time, the state also turned on Webwasher filters to block access to websites involving entertainment, motion pictures, auctions, classified ads, humor, comics, and sites with malicious source code. Paul Kiel, *Kentucky Tech Official Responds on Blog Ban*, TPM Muckraker.com, June 21, 2006, available at <http://www.tpm muckraker.com/archives/000963.php> (Exhibit 5).

26. At 7:00 a.m. on June 21, 2006, the state made an “adjustment” to the Webwasher system, apparently for the first time classifying BluegrassReport.org as a blog. *Id.*; see Ryan Alessi, *Fletcher Administration Blocks State Employees’ Access to Political Blogs*, Lexington Herald-Leader, June 21, 2006 (Exhibit 6). On information and belief, state officials requested that Webwasher categorize BluegrassReport.org as a blog in retaliation for Nickolas’s political speech on the website and in the New York Times. Bluegrass Report had been accessible to all state employees since its inception on June 13, 2005 until June 21, 2006.

27. Pursuant to the ban, the majority of Kentucky’s approximately 33,000 state employees can no longer access BluegrassReport.org from state computers. The ban includes employees in the offices of independently elected constitutional state officials, State Treasurer Jonathan Miller and Agriculture Commissioner Richie Farmer. Because the computer systems in the offices of Secretary of State Trey Grayson, Attorney General Greg Stumbo, and State

Auditor Crit Luallen do not use the same Internet filtering system, the Internet access of employees in those offices was not affected. After State Treasurer Miller complained publicly about the ban, the state later removed the ban for employees in his office.

28. On June 21, 2006, or shortly thereafter, the state also blocked employees' access to the Rural Blog (<http://www.uky.edu/CommInfoStudies/IRJCI/blog.htm>), run by Al Cross at the University of Kentucky's Institute for Rural Journalism. Cross is a former political reporter for the Louisville Courier-Journal who was also quoted in the June 20 New York Times article in terms critical of the governor.

29. On June 21, 2006, many online news sites heavily criticized Kentucky's decision to ban blogs. State officials responded to the criticism by adding critical websites to the state blacklist throughout the day shortly following the online criticism. For example, the website TPMuckraker.com, which critically commented on Kentucky's censorship of blogs, was put on the state blacklist within an hour of calling the governor's office and writing about the controversy. *See Alessi, Fletcher Administration Blocks State Employees' Access to Political Blogs, supra.* Although TPMuckraker.com's parent website, Talking Points Memo (<http://www.talkingpointsmemo.com/>), was not initially blocked, the state added it to the blacklist later in the day after it too criticized the state's censorship policy.

30. On June 27, 2006, Nickolas made his website accessible from the web address <http://www.bluegrassreport.com/> in addition to its usual location at <http://www.bluegrassreport.org/>. The next day, state officials added the new website address to the state's blacklist.

31. Defendant Secretary Farris admitted in a letter to the editor in the Louisville Courier-Journal that the state has asked Webwasher to "categorize sites that were not initially

identified” by the software. John R. Farris, *Blocking Web Sites Combats ‘Misuse, Waste’ by Workers*, Louisville Courier-Journal, June 29, 2006 (Exhibit 7).

32. State officials do not have a specific policy outlining why it classifies certain websites but not others as blogs. See Ryan Alessi, *State Lifts Blog Ban on One Web Site*, Lexington Herald-Leader, June 23, 2006 (Exhibit 8).

33. The state’s ban on blogs is inconsistently applied. In particular, several prominent conservative websites commonly referred to as blogs remained available on state computers as of June 30, 2006, including the popular site Drudge Report (<http://www.drudgereport.com/>) and a website belonging to conservative commentator Ann Coulter (<http://www.anncoulter.com/>).

34. In addition, the websites of mainstream newspapers, television stations, and radio stations are not censored by the state, nor are blogs that are hosted on those sites. See Patrick Crowley, *State Blacks Out Blog of Fletcher Critic*, Kentucky Enquirer, June 22, 2006 (Exhibit 9); *Banning the Blogs*, Louisville Courier-Journal, June 22, 2006 (Exhibit 10). Therefore, websites belonging to Larry Dale Keeling of the Lexington Herald-Leader (<http://blogs.kentucky.com/kykurmudgeon/>), Pat Crowley of the Kentucky Enquirer (<http://frontier.cincinnati.com/blogs/gov2/>), WKYT anchor Bill Bryant’s website “Bill’s Political Blog” (<http://www.wkyt.com/Global/story.asp?S=3931248>), and others remain accessible to state employees even though these websites have the word “blog” in their web addresses or titles.

35. Although the state initially blocked access to the Bluegrass Policy Blog, run by the free-market advocacy group Bluegrass Institute for Public Policy Solutions, Jill Midkiff, Executive Director of the Office of Public Information, called the blog’s administrator on June 22, 2006, to tell him his site was no longer blocked. Caleb O. Brown, *BIPPS Blocked by Fletcher Administration No More*, June 22, 2006, available at

http://www.bipps.org/blog/archives/2006/06/bipps_blocked_b.html (Exhibit 11). Midkiff told the Lexington Herald-Leader that the decision to unblock the Bluegrass Policy Blog was made because the website contained relevant policies related to the state. *See Alessi, State Lifts Blog Ban on One Web Site, supra.* Midkiff did not explain why the state did not consider BluegrassReport.org, a site devoted to Kentucky news and politics, to contain relevant policies related to the state.

36. After substantial media criticism of the state's decision to selectively unblock the Bluegrass Policy Blog, and after the website urged all bloggers to petition the state to release its written blocking policy, the state once again banned the website. *See Tom Loftus, State Treasurer Fights Blockage of Internet Sites, Louisville Courier-Journal, June 24, 2006* (Exhibit 12).

C. *The State's Pretextual Explanations for Its Selective Censorship*

37. In a June 21, 2006, statement to the Louisville Courier-Journal, Midkiff said the state censored categories of websites that a two-week old Webwasher report showed were being frequently visited by state employees but which had no value to state government. *See Loftus, Political Blogs Off-Limits for State Workers, supra.* Defendant Secretary Farris also asserted in his Courier-Journal letter to the editor that, according to the Webwasher report, "[s]everal categories, including entertainment and blogs, showed large state employee usage volume." John R. Farris, *Blocking Web Sites Combats 'Misuse, Waste' by Workers, supra.*

38. However, the June 16, 2006 Webwasher report of the twenty most frequently accessed website categories does not show blogs anywhere on the list. (Exhibit 13).

39. The state continues to allow access to newspaper and magazine sites that are not classified as blogs, even though this category of website is the third most popular category on the

June 16 Webwasher report. According to Midkiff, newspaper sites are among the sites that state employees “need to have access to.” Joe Biesk, *State Adds Weblogs to Off-Limits Sites for State Employees*, Lexington Herald-Leader, June 21, 2006 (Exhibit 14). The state has not provided any rational basis for distinguishing mainstream media websites such as newspaper and magazine sites from independent news sites that the state characterizes as blogs.

40. Also on June 21, 2006, Mark Rutledge, Deputy Commissioner of the Commonwealth Office of Technology, told Paul Kiel of TPMuckraker.com that blogs were blocked while mainstream media sites were not because mainstream media sites are more likely to have “some value, some relevance to somebody’s job,” while blogs are generally aligned with certain “interest groups.” The state’s disapproval of certain “interest groups” is a content-based and unconstitutional criterion for censoring websites. Midkiff later told the New York Times that “using state computers to view some of these sites on state time is not an efficient use of state tax dollars or state resources.” Ian Urbina, *Besieged Governor Draws Fire From a New Quarter*, New York Times, June 23, 2006 (Exhibit 15).

41. There is no content-neutral basis for distinguishing BluegrassReport.org from self-described blogs run by reporters for mainstream media companies. Like BluegrassReport.org, for example, WKYT anchor Bill Bryant’s blog, “Bill’s Political Blog,” is presented in reverse-chronological order, allows users to post comments, and includes news and commentary on issues of Kentucky politics. *See* <http://www.wkyt.com/Global/story.asp?S=3931248>. The same is true for Lexington Herald-Leader columnist Larry Dale Keeling’s blog, “KYKurmudgeon” (<http://blogs.kentucky.com/kykurmudgeon/>), and Pat Crowley’s Kentucky Enquirer blog, “N. Ky. Politics” (<http://frontier.cincinnati.com/blogs/gov2/>).

42. Indeed, it is difficult to distinguish BluegrassReport.org from even mainstream news websites such as the Louisville Courier-Journal (<http://www.courier-journal.com/>), the Lexington Herald-Leader (<http://www.kentucky.com/>), CNET News (<http://www.news.com/>), and Salon.com (<http://www.salon.com/>), which are also updated frequently throughout the day and allow users to post comments in response to stories or on message-boards, but nevertheless remain unblocked. The only significant non-content-based distinction between BluegrassReport.org and these mainstream media sites is that the mainstream sites do not always present articles in reverse-chronological order. Nevertheless, state employees continue to enjoy access to these sites.

43. The state's arbitrary blocking of websites that it considers to be blogs evinces a policy of targeting websites based on the viewpoint and content of the websites. The state's other public explanations for the censorship are inconsistent, not supported by the evidence, and are mere pretexts to justify the state's content- and viewpoint-based discrimination against certain online news sites.

V. Claim for Relief

44. The defendants' censorship of BluegrassReport.org on state computers constitutes viewpoint-based discrimination against Nickolas' political speech in retaliation for his criticism of Governor Fletcher and his administration.

45. The defendants' censorship of all sites the state classifies as blogs is arbitrary, standardless, and constitutes content-based discrimination against non-traditional news websites, including BluegrassReport.org, in favor of mainstream news websites.

46. The defendants have deprived the plaintiff of rights secured by the First Amendment of the U.S. Constitution, as applied to the states through the Fourteenth Amendment to the Constitution, and by the Equal Protection Clause of the Fourteenth Amendment.

WHEREFORE, Plaintiff requests that this Court

1. Declare unconstitutional the state's policy of blocking access to all blogs from state computers, and in particular of blocking access to <http://www.bluegrassreport.org/> and <http://www.bluegrassreport.com/>;
2. Issue a preliminary and permanent injunction against the state's continued blocking of access to all blogs from state computers, and in particular of blocking access to <http://www.bluegrassreport.org/> and <http://www.bluegrassreport.com/>;
3. Award Plaintiff his costs, including reasonable attorney fees, pursuant to 42 U.S.C. § 1988; and
4. Grant any additional relief to which Plaintiff may be entitled.

Respectfully submitted,

/s/ Jennifer A. Moore
Jennifer A. Moore
H. Philip Grossman
Fernandez Friedman Grossman & Kohn PLLC
2400 National City Tower
101 South 5th Street
Louisville, KY 40202
Phone: (502) 589-1001
Fax: (502) 589-7333
E-mail: jmoore@ffgklaw.com
pgrossman@ffgklaw.com

and

Gregory A. Beck
DC Bar No. 494479, *pro hac vice* to be filed
Paul Alan Levy
DC Bar No. 946400, *pro hac vice* to be filed
Brian Wolfman
DC Bar No. 427491, *pro hac vice* to be filed
Public Citizen Litigation Group
1600 20th St., NW
Washington, DC 20009
Phone: (202) 588-1000
Fax: (202) 588-7795
Email: gbeck@citizen.org
plevy@citizen.org
brian@citizen.org

Counsel for Plaintiff