UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

MARK NICKOLAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:06-cv-43-KKC
	)	
GOVERNOR ERNIE FLETCHER, et al.,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Mark Nickolas is a popular online journalist and a frequent critic of Defendant Governor Ernie Fletcher. Plaintiff covers issues of Kentucky news and politics on his website, BluegrassReport.org. On June 20-21, 2006, the Commonwealth of Kentucky reconfigured its Internet filtering software to block state employees from reading websites the state defines as "blogs," including Plaintiff's site, on state-owned computers. The state's policy distinguishes among individual websites based on the content and viewpoint of those sites, draws an illegitimate distinction between news-related blogs and mainstream media websites, and leaves enforcement decisions to the standardless discretion of administrators. Although the state publicly claims that it instituted the ban for efficiency reasons, it has presented no rational or viewpoint-neutral reason for distinguishing Plaintiff's news-related website from newspaper and magazine websites, to which employees continue to enjoy access. The state's arbitrary, irrational, and viewpoint-based discrimination against Plaintiff's website infringes Plaintiff's rights under both the First Amendment of the U.S. Constitution and the Equal Protection Clause

of the Fourteenth Amendment. Plaintiff seeks a preliminary injunction prohibiting Defendant state officials from continuing to enforce their unconstitutional policy.

BACKGROUND

The relevant factual background to this case is set forth in Plaintiff's Response Memorandum in Opposition to Defendant's Motion to Dismiss. The factual allegations in Plaintiff's verified complaint have the same force as those in an affidavit. *Lavado v. Keohane*, 992 F.2d 601, 605 (6th Cir. 1993). Additional facts are set forth in the relevant sections below. An affidavit in support of these facts (Ex. 1), and supporting exhibits are attached to this memorandum.

ARGUMENT

The Sixth Circuit requires courts to consider four factors in determining whether to issue a preliminary injunction:

> (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998). "None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them." *Id.* (quotation omitted). Even if a court is uncertain about the likelihood of success on the merits, a preliminary injunction is nevertheless appropriate when there are "serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant." *In re Delorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (quotation omitted).

Plaintiff easily meets the criteria for issuance of a preliminary injunction. First, he can establish a substantial likelihood of success on his claim that the state's censorship of his news-related website, as well as its selective and arbitrary ban on certain other websites, violates both

the First Amendment and Equal Protection Clause. Second, an injunction is necessary to prevent continuous irreparable harm to plaintiff's free speech rights resulting from the state's restriction on his speech. Third, a preliminary injunction against the state's policy will not seriously harm the state's interests because the state always allowed employees to read blogs prior to June 20, 2006, and continues to allow access to much more popular mainstream news and media sites. Fourth, the public interest favors an injunction because it is in the public interest to expose state employees to the widest possible array of viewpoints on policy matters.

I. PLAINTIFF HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

The state's censorship of selected websites on state-owned computers, and in particular of BluegrassReport.org, is a content- and viewpoint-based restriction on core political speech for three distinct but interrelated reasons. First, the state targets particular websites for differential treatment based on the content and viewpoint of those sites, and the evidence suggests that it particularly targeted Plaintiff's website because of his longstanding criticism of the Fletcher administration. Second, the policy singles out a particular segment of the media known for its nonconformist and sometimes provocative viewpoints (non-traditional online media, or "blogs"), while continuing to allow access to traditional online media sites, including self-described blogs hosted on those sites. Finally, the policy fails to draw rational lines between the sites that are banned and those that are not, leaving standardless discretion about which sites to censor in the hands of administrators.

Defendants argue in their Motion to Dismiss that the state's policy is justified by concerns of employee efficiency. Although Defendants do not say so, this kind of justification for restraints on free speech activities by state employees is analyzed by the courts under the standard set forth by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563

(1968). Under the *Pickering* test, the state's interest in the efficiency of its workplace operations is weighed against the countervailing interests in the free speech suppressed. *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229 (6th Cir. 2005). When, as here, a government employer imposes restrictions on speech based on the content or viewpoint of that speech, the government's burden under the *Pickering* test is substantially increased. *See Johnson v. County of L.A. Fire Dep't*, 865 F. Supp. 1430, 1436 (C.D. Cal. 1994) ("[T]he Courts have generally found that content-based regulations pose a greater burden on the individual's rights than regulations which are content neutral."). Even the *risk* that the government may be using a purportedly neutral justification to mask invidious discrimination "justifies an additional thumb on the . . . scales" against the government. *Sanjour v. EPA*, 56 F.3d 85, 97 (D.C. Cir. 1995). Defendants, however, have not presented a single rational or viewpoint-neutral reason for distinguishing Plaintiff's news-related website from mainstream newspaper and magazine websites that the state allows employees to read. They have therefore asserted *no* interest capable of outweighing the substantial countervailing interests in the free speech infringed.

A. The State's Restriction on Blogs is Not Content- or Viewpoint-Neutral.

1. The State Purposefully Targets Specific Websites Based on the Content or Viewpoint of Those Sites.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Yet, the evidence in this case suggests that the state has done exactly that.

As Defendants concede (Defs.' Mem. 3), the state's Internet and Email Acceptable Use Policy allows state employees to use the state's Internet and email systems for personal reasons as long as their use does not have a negative impact on their overall productivity or interfere with

normal business operations of the state. *See* Internet and Electronic Mail Acceptable Use Policy (Defs.' Mem. Ex. 1). Although the policy specifically prohibits employees from using the state's Internet connection for certain purposes, such as procuring pornography or spreading computer viruses, it does not prohibit employees from reading news-related websites. (*Id.* at 4-5.)

Nevertheless, the state is engaged in a process of selectively denying employees access to particular news and political websites that it arbitrarily defines as "blogs." When state officials encounter a website they wish to block but that is not categorized by Webwasher as a blog, the state manually adds the website to a state-maintained "blacklist" of websites that are inaccessible from state computers. *See* Black List (Ex. 2); E-Mail from Chris Johnson, Commonwealth Office of Technology ("COT"), to Shawn Thomas and Kendall Parmley (June 21, 2006, 3:11 p.m.) (Ex. 3) (ordering five blogs added to the state blacklist). Websites added by the state to its blacklist include http://www.bluegrassreport.com/, an alternate address for Plaintiff's website (Ex. 2), Talking Points Memo (http://www.talkingpointsmemo.com/), a website that was added to the blacklist soon after it publicly criticized the state's policy (Compl. ¶ 29), and the Rural Blog (http://www.uky.edu/CommInfoStudies/IRJCI/blog.htm), a website devoted to rural issues operated by a reporter who was quoted along with Plaintiff in the New York Times criticizing Governor Fletcher the same day the blog ban went into effect. (Ex. 3.) After a site is added to the state's blacklist, the state requests that Webwasher reclassify it so that it falls into a category banned by the state. *See* E-Mail from Shawn Thomas, COT, to Mark Rutledge and Chris Johnson (June 27, 2006, 10:22 a.m.) (Ex. 4) (noting that a list of blogs had been submitted to Webwasher for reclassification because they "did not appear to be categorized correctly"); E-Mail from Shawn Thomas, COT, to Mark Rutledge, Phillip Ward, and Chris Johnson (June 30,

2006, 4:40 p.m.) (Ex. 5). State records show that officials have requested dozens of such reclassifications, frequently for websites related to news and politics. (Ex. 4, 5.)

On the other hand, the state allows employees access to certain websites banned by Webwasher by adding them to a state "whitelist" that overrides Webwasher's default settings. (Ex. 6, selections from state whitelist and blacklist.) Among the hundreds of websites on the state's whitelist are self-described blogs like SCOTUSblog (http://www.scotusblog.com/) and InfoWorld Blogs (http://weblog.infoworld.com/), and political websites like the website for the Rush Limbaugh show (http://www.rushlimbaugh.com/). (*Id.*) The state also selectively granted access to the Bluegrass Policy Blog, run by the free-market advocacy group Bluegrass Institute for Public Policy Solutions (http://www.bipps.org/blog/), because it found that the site contained "relevant policies related to the state." (Cmplt. ¶ 35.) After substantial media criticism, however, the state once again blocked the website. (*Id.* ¶ 36.)

The government's attempt to separate blogs from non-blogs is, at a minimum, a content-based restriction on speech. State regulation of speech is considered content-neutral as long as it is "justified without reference to the content of the regulated speech." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 811 (2000) (quotation omitted). The Supreme Court in *City of Cincinnati v. Discovery Network, Inc.*, for example, invalidated a city ordinance that banned newsracks containing commercial handbills but not newspapers. 507 U.S. 410 (1993). The Court held that, because the question "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack," the ban was content-based under "any commonsense understanding of the term." *Id.* at 429. Like *Discovery Network*, the government's distinction between blogs and non-blogs is at least content based. Both news-related blogs and mainstream newspapers are hosted on web pages that can be

accessed by employees using web browsers on state computers. Whether a particular website constitutes a "blog" therefore does not depend on the form of the medium, but rather on the content of the particular site. *See FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984) (striking down a statute that prohibited public television stations from broadcasting editorial opinion because enforcement authorities "must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern 'controversial issues of public importance'"). In fact, a policy recently implemented by the state explicitly requires state officials look at each website to which employees request access to determine if it should be added to the whitelist. *See* Internet Exception Process (Ex. 7) (requiring administrators to verify that a website is consistent with a request before adding it to the whitelist). "Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

Even worse, the state distinguishes among particular blogs based on the *viewpoints* expressed on those sites. In an interview with WKYT reporter Bill Bryant, Stan Cave, Governor Fletcher's Chief of Staff, explained why certain blogs were exempt from the policy:

> When there are blogs there that are purely policy-oriented that may relate to policy formation, analysis of problems where you're trying to improve the lives of Kentuckians, there is a process we've put in place to unblock those sites. We're working through it day by day.

Posting of Caleb O. Brown, to Bluegrass Policy Blog, http://www.bipps.org/blog/ (July 1, 2006, 11:23 a.m.) (Ex. 8). State officials must therefore examine each website to determine whether it is sufficiently "policy-oriented" to meet with the state's approval. However, although the state examines blogs to determine whether they are "purely policy-oriented," and although

BluegrassReport.org is devoted entirely to discussion of Kentucky news and politics, Plaintiff's website remains forbidden to state employees.

Indeed, the state's policy raises serious concerns that it is targeted specifically at the viewpoints expressed on Plaintiff's website. Plaintiff is a longtime critic of Governor Fletcher's administration and managed the campaign of the Governor's Democratic opponent in the 2003 Kentucky gubernatorial election. (Cmplt. ¶¶ 14-15.) Of the sites classified by the state as blogs, Plaintiff's website was the most popular news-related website among state employees. *See* Top 20 Newsgroup/Blog Sites by Hits (Ex. 9) (showing BluegrassReport.org as the tenth most popular newsgroup/blog and the only news-related blog in the top twenty). Despite Defendant Secretary John Farris's public claim that he was responsible for directing the policy change, (Compl. Ex. 7) state records show that it was actually the Governor's office that ordered the new policy. *See* E-Mail from Aaron L. Peterson, COT, to Ken Schwenderman (June 29, 2006, 10:23 a.m.) (Ex. 10) (noting that "a directive has been initiated from the Governor's Office to block access to all internet sites pertaining to 'Malicious Software' and 'Newsgroups/Blogs'"); E-Mail from Phillip Ward, COT, to Benjamin D. McKown (June 28, 2006, 2:49 p.m.) (Ex. 11); *see also* E-Mail from Mark Wash, COT, to Tony Henderson (June 27, 2006, 11:48 a.m.) (Ex. 12) (noting that the policy was "a high level initiative"). When Plaintiff made his website available at an alternate address, http://www.bluegrassreport.com/, it was again an official in the governor's office who, the next day, asked the site be blocked as a "back door" for access to "the blog." *See* E-Mail from Benjamin D. McKown, Governor's Office, to Service Desk (June 28, 2006, 9:10 a.m.) (Ex. 13). Defendants do not explain why the Governor's office would be directly involved in these decisions involving the configuration of the state's computer system unless it was to silence a longtime critic popular among state employees.

Moreover, the state's purported reason for banning blogs -- employee efficiency -- appears to be pretextual. Mark Rutledge, the COT official primarily responsible for implementing the new policy on blogs, cited unspecified "complaints from agencies" about blogs to justify the ban to his staff. *See* E-Mail from Mark Rutledge, COT, to Chris Johnson and Paul Sommerfield (June 9, 2006, 8:10 a.m.) (Ex. 14). On August 7, 2006, however, Plaintiff's attorney, Jennifer A. Moore, sent an Open Records Act request to the Finance and Administration Cabinet asking for all documents related to "agency complaints." (Ex. 1 ¶ 8.) The state responded to Plaintiff's Open Records Act request for these complaints by stating that it has no responsive records, indicating that no such complaints actually exist. (*Id.*) There is simply no evidence that blogs caused any particular disruption in the workplace that would justify the ban.

In implementing the new policy, the state also bypassed its Change Management Procedure, which requires COT to review the risks and benefits of a proposed change to computer systems and to inform departments potentially affected by the change. *See* Change Management Procedure at 8-9 (Ex. 15). Instead of following its own procedure, the state implemented the policy in less than two weeks, without notifying or seeking input from the affected departments. In fact, Rutledge was instructed to keep the policy change quiet until after it had been initiated, a decision that resulted in substantial disruptions in the ability of some departments to complete their day-to-day work. *See* E-Mail from Mark Rutledge to Kathy Harp (June 29, 2006, 8:19 a.m.) (Ex. 16) (stating that "usually we communicate actions such as these well in advance[] but we were instructed to contact agencies after the action"); *see also, e.g.*, E-Mail from Aaron L. Peterson, COT, to Ken Schwenderman (June 29, 2006, 10:23 a.m.) (Ex. 10) (noting a complaint by Schwenderman that "I [] need access to politics sites in the course of my

work"); E-Mail from Mark Farrow, Department of Agriculture, to Mark Rutledge (June 28, 2006, 1:04 p.m.) (Ex. 17) (noting that "[t]he recent expansion of URL blocking imposed by COT has hampered the ability of some Kentucky Department of Agriculture employees . . . to access information necessary for them to effectively carry out their responsibilities"). And, the state began implementing the blog ban on June 20, 2006, the same day that Plaintiff was quoted in a New York Times article in terms strongly critical of the administration. (Compl. ¶ 18, 25-26; Defs.' Mem. Ex. 3).

Finally, the illogical nature of the state's policy is itself compelling evidence of its invidious motive. As discussed further below, there is little, if anything, distinguishing independent news-related blogs from mainstream media websites, and state employees spend far more time reading mainstream news sites than blogs. Absent an intent to block certain sites based on viewpoint, it simply makes no sense for the state to distinguish news-related blogs from mainstream newspaper sites and to group them instead with sites related to pornography and computer viruses. *See The Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (professing "serious doubts about whether [the government] is, in fact, serving . . . the significant interests which [it] invoke[d]" where it had failed to regulate a substantial part of the activity giving rise to the alleged harm); *Hays County Guardian v. Supple*, 969 F.2d 111, 120 (5th Cir. 1992) (holding that a university's rule prohibiting distribution of some newspapers but exempting another with a larger circulation undercut the university's claimed interest in campus beautification); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1075 (N.D. Ill. 2005) (noting that a regulation singling out violent video games, when violence is more accessible to minors in other forms of media, indicates that the regulation "is not really intended to serve the proffered purpose"). A state action that restricts certain categories of speech but excludes a significant

number of communications raising the same problem that the action was intended to solve lends itself to invidious use and raises the suspicion that a content-based restriction on speech actually masks more insidious viewpoint-based discrimination. *See Hill v. Colorado*, 530 U.S. 703, 723 (2000).

2. The State's Policy Creates an Illegitimate Distinction Between News-Related Websites it Classifies as "Blogs" and Mainstream Newspaper and Magazine Websites.

There are no rational, viewpoint-neutral distinctions between news-related blogs and mainstream media websites. By singling out blogs for special treatment, the state illegitimately discriminates against non-traditional media sources in favor of established media companies. The state's arbitrary distinction is both a content- and viewpoint-based restriction on speech.

a. Defendants Provide No Rational, Viewpoint-Neutral Distinction Between Blogs and Mainstream Media Websites.

The word "blog" is a new addition to the English language and, as yet, has no firmly settled meaning. *See 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). Often, the term is defined as a website where regular entries are presented in reverse-chronological order. *See* Wikipedia, http://en.wikipedia.org/wiki/Blog (last visited Aug. 17, 2006). Another characteristic commonly associated with blogs is that they frequently allow readers to post comments, although this is not always the case. *See id.*; Pew Internet and American Life Project, *Bloggers*, at 20, *available at* http://www.pewinternet.org/PPF/r/186/report_display.asp (concluding that eighty-seven percent of self-identified blogs allow readers to post comments).

The first blogs were little more than online diaries, and many definitions still reflect this original meaning of the term. *See* Wikipedia, *supra*; Merriam-Webster's Collegiate Dictionary (11th ed. 2005) (defining a blog as "an online personal journal with reflections, comments, and

often hyperlinks provided by the writer"). In recent years, however, common use of the word has expanded beyond personal journals to include websites covering a whole range of topics, including news, politics, and law. *See* Wikipedia, *supra.* Now, well over three hundred mainstream journalists write their own blogs, and there are a growing number of examples of major national news stories that were originally broken by blogs. *See id.* 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.* Blogs still used as personal diaries are now often referred to as "online diaries" or "personal blogs" to distinguish them from these newer kinds of blogs. *See* Wikipedia, http://en.wikipedia.org/wiki/Online_diary (last visited Aug. 17, 2006).

Like mainstream reporters, online journalists "gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience." *O'Grady*, 44 Cal. Rptr. 3d at 106. Many bloggers, including Plaintiff, engage in activities typically performed by traditional journalists, such as directly quoting sources, fact checking, posting corrections, and linking to original source materials. Bloggers, *supra*, at iv, 22. Indeed, "[w]eb sites are highly analogous to printed publications: they consist predominantly of text on 'pages' which the reader 'opens,' reads at his own pace, and 'closes.'" *O'Grady*, 44 Cal. Rptr. 3d at 103. For these reasons, the California Court of Appeals in a recent opinion applying the reporter's privilege to the authors of blogs wrote that there is no "sustainable basis to distinguish [online journalists] from the reporters, editors, and publishers who provide news to the public through traditional print and broadcast media." *Id.* at 106.

In their Motion to Dismiss, Defendants rely on Webwasher's definition of "Newsgroups/Blogs" as "Web sites that enable the sharing of information such as on a bulletin

board." (Defs.' Mem. Ex. 3). Apparently this standard refers to the common but not universal practice on blogs of allowing users to post comments. In practice, however, the state's implementation of the policy is totally arbitrary and inconsistent with this definition. Like blogs, the mainstream media websites allowed by the state are updated frequently throughout the day and allow users to post comments in response to stories or on message-boards, but are nevertheless allowed by the state. (Compl. ¶¶ 39-42.) The websites of the Louisville Courier-Journal (http://www.courier-journal.com/), the Lexington Herald-Leader (http://www.kentucky.com/), the New York Times (http://www.nytimes.com/), the Washington Post (http://www.washingtonpost.com/), CNET News (http://www.news.com/), and Salon.com (http://www.salon.com/), to name just a few examples, all share these characteristics. At the same time, the state blocked access to websites like Talking Points Memo (http://www.talkingpointsmemo.com/) (*Id.* ¶ 29), the Rural Blog (http://www.uky.edu/CommInfoStudies/IRJCI/blog.htm) (*Id.* ¶ 28), and Drudge Report (http://www.drudgereport.com/) that do not allow readers to post comments. Sarah Vos, *State's Ban on Blogs Doesn't Get Them All*, Lexington Herald-Leader, Jul. 18, 2006 (Ex. 18) (noting that the state requested that Webwasher reclassify Drudge Report).

Moreover, news- and politics-based websites that allow comments and explicitly describe themselves as blogs are allowed by the state, apparently because these websites are associated with mainstream media companies. Thus, self-described blogs by 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/), and Bill Bryant of WKYT (http://www.wkyt.com/Global/story.asp?S=3931248) remain unblocked. (Compl. ¶ 34.) The state also allows other blogs like the SCOTUSblog and InfoWorld Blogs, as well as the

thousands of discussion forums available on Google Groups (http://groups.google.com/). *See* E-Mail from Chris Johnson to Mark Rutledge and Rick Boggs (June 9, 2006, 11:31 a.m.) (noting that Google Groups would allow employees to access newsgroups even after the ban on blogs) (Ex. 19.) On the other hand, BluegrassReport.org, which is devoted solely to political news and commentary, is classified by the state as a blog even though the word "blog" appears nowhere on the website and the site bears little resemblance to the online diaries that were originally called blogs. *See* http://www.bluegrassreport.org/ (describing itself as "An Unfiltered and Candid Look at Politics, Politicians and the Media in Kentucky") (Compl. ¶ 12.) [1]

Even assuming that the state could validly distinguish news-related websites from online personal diaries, it cannot justify the ban here, which draws a meaningless distinction between news-related websites and news-related blogs. The only apparent viewpoint-neutral difference between BluegrassReport.org and mainstream media sites is that the mainstream sites do not always present articles in reverse-chronological order, which is surely not a distinction of substantial interest to the state.

[1] Since the complaint in this case was filed, the state has apparently blocked access to some websites cited in the complaint as examples of the state's uneven enforcement of its policy. Thus, the state has now blocked access to certain blogs on the website of the Lexington Herald-Leader that have a different web address than the newspaper's main site. Vos, *supra* (Ex. 18.) However, the state still allows access to blogs on the Louisville Courier-Journal's website and other mainstream media websites. (*Id.*) The state's ineffectual effort to revise its policy only highlights the disparity between mainstream media websites and blogs. When the state finds user comments on a mainstream media website, it blocks just the comments if possible, leaving the main portion of the webpage accessible to state employees. If the state cannot segregate the comments from the rest of the website, however, it leaves the entire website, including comments, available. (*Id.*) In contrast, when the state encounters a website it considers a blog, it simply blocks the entire website. If Plaintiff's website were treated equivalently to mainstream media websites, the state would either block just the comments portion of his website, which is separate from the main page, or else leave the entire website available.

b. The State's Policy Creates an Illegitimate Distinction Between News-Related Blogs and Mainstream Media Websites.

Restrictions on speech are presumptively unconstitutional when they target a "narrow segment of the media" for special treatment. *Pitt News v. Pappert*, 379 F.3d 96, 105 (3d Cir. 2004). In *Grosjean v. American Press Co.*, for example, the Supreme Court struck down a Louisiana tax that applied only to newspapers with weekly circulations of more than 20,000 because the tax targeted "a selected group of newspapers." 297 U.S. 233, 251 (1936). The Court found the tax to be a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled." *Id.* at 250. As later decisions make clear, this presumption of unconstitutionality is not limited to instances where there is evidence that the state's action represents a purposeful attempt to interfere with protected speech. Even where "there is no evidence of an improper censorial motive," state action that singles out particular members of the press "poses a particular danger of abuse by the State." *Ark. Writers' Project*, 481 U.S. at 228 (striking down tax on general interest magazines that exempted religious, professional, trade, and sports journals). There is a significant risk that a state could use the supposedly "neutral" criteria of a certain segment of the media—such as "blogs"—as a screen for viewpoint-based restrictions on speech.

Thus, in an opinion written by then-Judge Alito, the Third Circuit in *Pitt News* struck down a Pennsylvania statute that prohibited college newspapers from receiving payment for alcoholic beverage advertisements. 379 F.3d at 101. Because the statute targeted only a narrow portion of the media -- college newspapers -- the court held the law to be presumptively unconstitutional. *Id.* at 111. Similarly, the court in *ForSaleByOwner.com Corp. v. Zinnemann* struck down a California real-estate licensing scheme that required a license for websites related to real estate but exempted newspapers offering nearly identical services, holding that the

scheme "impermissibly differentiate[d] between certain types of publications carrying the same basic content." 347 F. Supp. 2d 868, 877 (E.D. Cal. 2004); *cf. Reno v. ACLU*, 521 U.S. 844, 879-80 (1997) (rejecting the government's argument "that a statute could ban leaflets on certain subjects as long as individuals are free to publish books").

Like *Pitt News*, the state in this case targets only a narrow segment of the media -- certain websites that the state classifies as "blogs" -- while allowing employees to access mainstream media sites belonging to newspapers and magazines. The state has thus made the determination that mainstream media websites, such as the websites of the Louisville Courier-Journal and the Lexington Herald-Leader, are acceptable for state employees, but that independent reporters who deliver their own news on blogs are not. The First Amendment, however, does not tolerate a state treating certain news-related websites it defines as blogs as different and somehow less legitimate than established, mainstream media websites. Any attempt by a state to separate "legitimate" from "illegitimate" sources of news would "imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace." *O'Grady*, 44 Cal. Rptr. 3d at 97. Like statutes that regulate violent video games but not violence in more established forms of media, a rule that singles out blogs "discriminate[s] against a disfavored 'newcomer'" in the media marketplace. *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 654 (E.D. Mich. 2006).

The Supreme Court's concern with the First Amendment rights of independent speakers, who may not be able to gain access to mainstream channels of communication, is demonstrated by its longstanding and vigorous protection of pamphleteers. In *Lovell v. City of Griffin*, for

example, the Court invalidated an ordinance forbidding the distribution of pamphlets or other literature without the written permission of a city official. 303 U.S. 444 (1938). In reversing the conviction of a Jevohah's Witness for violating the ordinance, the Court wrote:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

Id. at 452. Expression by pamphlet is of critical constitutional importance because it gives an outlet to those who lack the resources to use the mainstream media to distribute their message. *See Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) ("Liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.").

Like pamphlets, news-related websites also give a voice to those who have no outlet through newspapers, magazines, or radio, and allow them to present points of view that would otherwise be neglected by the mainstream media. *See* David Kline & Dan Burstein, *Blog!: How the Newest Media Revolution is Changing Politics, Business, and Culture* 5-7, 10-13 (2005). Indeed, the Internet allows online speakers to reach an audience faster and more cheaply than any pamphleteer ever could. As the Supreme Court wrote in *Reno v. ACLU*:

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

521 U.S. at 870.

In fact, it is precisely the freethinking nature of blogs that has subjected them to scrutiny by the state. In stark contrast to the state's claims of viewpoint neutrality, Mark Rutledge,

Deputy Commissioner of the COT, told Paul Kiel of TPMMuckraker.com that blogs were blocked because, unlike mainstream media sites, they are generally aligned with certain "interest groups." (Compl. ¶ 40.)[2] News-related blogs provide a distinctly alternative voice to the relatively narrow range of issues and speakers in the mainstream media. Blog!, *supra*, at 8. They also challenge the monopoly of the mainstream media on the public discourse by covering controversial issues that might otherwise be ignored by mainstream outlets. *Id.* at 9-13. There is no question, for example, that the coverage on BluegrassReport.org is far more vociferous in its challenges to the Fletcher administration than mainstream Kentucky newspapers. By targeting only a particular segment of the media known for its provocative style, the state's policy threatens to "distort the market for ideas" and to "hinder the press as a watchdog of government activity." *Leathers v. Medlock*, 499 U.S. 439, 447-48 (1991). At the very least, the arbitrary and illogical policy of singling out blogs for special treatment, which happens to have its greatest impact on a longtime critic of a governor under indictment for political discrimination, is "structured so as to raise suspicion that it was intended to" interfere with protected speech. *Id.* at 448.

3. The Government's Selective Ban on Certain Sites It Characterizes as "Blogs" Subjects Websites to the Standardless Discretion of Administrators.

Unfettered discretion to distinguish among different members of the media invites arbitrary enforcement and inevitably chills free speech rights. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). In *City of Lakewood*, the Supreme Court struck down an ordinance giving Lakewood's mayor discretion to decide which publishers may place newsracks

[2] The state's low opinion of the blogs is summed up by the fact that Defendant Farris told Jill Midkiff, Director of Communications, not to respond to questions from bloggers because he does not consider them to be reporters. E-mail from Jill Midkiff, Finance Secretary's Office, to Jodi M. Whitaker and Mark Rutledge (June 21, 2006, 4:17 p.m.) (Ex. 20.)

on public property. *Id.* at 770. The Court wrote that "a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship," and that "[t]his danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id.* at 763.

The state's decision to ban blogs does not sufficiently limit the discretion of administrators or give them enough guidance to implement the policy in a content- and viewpoint-neutral manner. As noted in the previous section, viewpoint-neutral differences between news-related blogs and mainstream news sites are essentially nonexistent, and the state's arbitrary and inconsistent enforcement of the ban in itself demonstrates the unworkability of the distinction. In *Discovery Network*, the Supreme Court struck down the Cincinnati ordinance that attempted to distinguish between "commercial handbills" and "newspapers" by defining newspapers as publications that are "published daily and/or weekly and primarily present coverage of, and commentary on, current events." 507 U.S. at 419-20 (quotation and alterations omitted). The Court noted that both commercial handbills and newspapers contained some combination of current events and advertising material, and stressed the difficulty of drawing lines between two types of publications which "share important characteristics." *Id.* at 419. It wrote:

> [B]ecause Cincinnati's regulatory scheme depends on a governmental determination as to whether a particular publication is a "commercial handbill" or a "newspaper," it raises some of the same concerns as the newsrack ordinance struck down in *Lakewood* . . . . [B]ecause the distinction between a "newspaper" and a "commercial handbill" is by no means clear . . . the responsibility for distinguishing between the two carries with it the potential for invidious discrimination of disfavored subjects.

Id. at 423 n.19.

The threat of viewpoint-based discrimination is particularly strong here because the administration is engaged in a case-by-case determination of which sites are suitable to be read by state employees, and the evidence indicates that this determination may be based on the political orientation of the particular website at issue. Moreover, the state has reversed course several times on the status of websites, including Drudge Report (initially not blocked, but now blocked), the Bluegrass Policy Blog (initially blocked, then unblocked, then blocked again after criticizing the state's policy), and Larry Dale Keeling's blog (blocked at one point, but now unblocked) without offering any rational explanation to the targeted websites. *See* Larry Dale Keeling, *Blocked? Unblocked? Who Knows?*, KYKurmudgeon, http://blogs.kentucky.com/kykurmudgeon/ (June 26, 2006) (Ex. 21.) Under these circumstances, the risk that the state is surreptitiously engaging in viewpoint censorship is obvious.[3]

B. The State's Imagined Interest in Distinguishing Blogs from Mainstream Media Websites Is Heavily Outweighed by the Interests in the Free Speech Suppressed.

1. This Court Can Best Analyze the State's Policy Under the *Pickering* Framework.

Unless a defendant can show that a lesser standard of review should apply, courts subject content- or viewpoint-based restrictions on speech to a strict scrutiny test under which the

[3] In their Motion to Dismiss, Defendants appear to suggest that, because the state has delegated its censorship decisions to the company that administers Webwasher, it can somehow escape liability for its actions. (Defs.' Mem. 4-5.) The state, however, regularly overrides Webwasher's classifications by adding websites to its blacklist and whitelist, and by asking Webwasher to reclassify websites that would not otherwise be blocked. The state also admits that it made the decision to ban blogs in the first place, thereby drawing the invidious distinction between blogs and mainstream media sites. Even if the state did not manually override the default Webwasher settings to target individual websites, its standardless delegation of censorship decisions to a private company would not shield it from liability. It is precisely the state's act of delegating overly broad discretion to the decisionmaker that raises First Amendment questions in the first place. Furthermore, the state cannot claim a strong interest in deferring to a private entity's irrational classification scheme, especially when, as here, the state has shown the ability to override the scheme when it feels it appropriate.

restrictions will be found unconstitutional unless they are "narrowly tailored to promote a compelling Government interest." *Playboy Entm't Group*, 529 U.S. at 813. Defendants do not even attempt to argue that the state has a compelling interest in distinguishing blogs from mainstream media websites, nor, given the lack of significant distinction between these two forms of media, could they possibly do so. Defendants do argue, however, that the policy is justified by the state's interest in promoting the efficiency of its employees in the workplace. Although they do not appear to recognize it, Defendants' argument amounts to a claim that the state's restriction on speech is justified under the framework of *Pickering v. Board of Education*, 391 U.S. 563. Under the test set forth by the Court in *Pickering*, a state's restriction on speech pursuant to its interest as an employer in promoting employee efficiency violates the First Amendment if 1) the speech is directed at an issue of public concern, and 2) the state's claimed interest in employee efficiency is outweighed by the countervailing interests in the speech suppressed. *Evans-Marshall*, 428 F.3d at 229.

To be sure, *Pickering* and most subsequent cases applying it were brought by state employees contesting a government's restriction on their First Amendment rights. Although this case, in contrast, involves the right of a publisher to distribute his speech to state employees who wish to read it, the proper constitutional standard for reviewing the state's action cannot be made to depend on the identity of the party bringing suit. [4] The Supreme Court has recognized that when a government restricts its employees from speaking, the interest of the public in *receiving* the restricted speech is simultaneously affected. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995) ("NTEU") (holding that a restriction on the speech of federal

[4] As explained in Plaintiff's Response Memorandum in Opposition to Defendant's Motion to Dismiss, Plaintiff was directly impacted by the state's policy and therefore has standing to contest the restriction on his speech.

employees also "imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said" and weighing this interest against the government's asserted interest in regulating its workplace). Thus, courts apply *Pickering* regardless of whether a challenge to employee speech is brought by an employee or by a third party directly affected by the restriction on employee speech. *See Sanjour*, 56 F.3d at 94 (holding the right of an environmental organization was infringed by a government regulation burdening the right of employees to speak to the organization).

This case also differs from the typical *Pickering* scenario because the government has restricted its employees' freedom to *read* Plaintiff's speech, rather than to speak to him. Nevertheless, the Supreme Court has repeatedly held that the right to receive information and ideas is an "inherent corollary" to the right of free speech. *Bd. of Educ. v. Pico*, 457 U.S. 853, 866-67 (1982) (plurality opinion). The right to read and to speak are therefore equally protected by the First Amendment. *See Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc) (applying the *Pickering* test to a state's prohibition on employees' access to sexually explicit materials on state computers).[5] And when a state restricts its employees' right to receive certain speech, the rights of the speakers are affected just as much as the rights of the intended recipients. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both."); *see also Pico*, 457 U.S. at 866-67 (plurality opinion). The right of Plaintiff to distribute his website and the right of state employees to read it are opposite sides of the same coin.

[5] The court in *Urofsky* ultimately concluded, for reasons not applicable to this case, that the plaintiffs failed to satisfy their threshold burden under the *Pickering* test. *See* Section I.B.2, *infra*.

The mere fact that a government office building is typically closed to the public does not mean that the state has unfettered authority to restrict free speech activities there. Many cases examined under the *Pickering* test involve speech that occurred in the workplace. *See, e.g., Rankin v. McPherson*, 483 U.S. 378 (1987) (finding unconstitutional the firing of an employee based on a private statement to another employee in an area closed to the public); *see also Urofsky*, 216 F.3d at 407 (noting that, for purposes of the *Pickering* test, "the place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace"). As the Supreme Court recently wrote in *Garcetti v. Ceballos*, "[m]any citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like any member of the general public to hold that all speech within the office is automatically exposed to restriction." 126 S. Ct. 1951, 1959 (2006) (citation and quotation omitted). Although the context of the speech is relevant to determining whether it is directed to a matter of public concern and therefore survives *Pickering*'s threshold test, even private free speech activities in nonpublic areas of a government building are entitled to constitutional protection if the court finds the speech related to a matter of public concern. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 147-48 & 148 n.8 (1983); *see also Rankin*, 483 U.S. at 389.

For these reasons, *Pickering* provides the most logical framework in which to analyze Defendants' workplace efficiency rationale.[6]

[6] As discussed in Section I.C, *infra*, Plaintiff would also prevail under a nonpublic forum analysis.

2. Plaintiff's Website Involves Matters of Public Concern.

The threshold question in the *Pickering* test asks whether the restricted speaker spoke "as a citizen on a matter of public concern." *Ceballos*, 126 S. Ct. at 1958. There is little question that the issues of Kentucky news and politics that are regularly discussed on BluegrassReport.org are issues of public concern. Indeed, these issues lie at the "heart of First Amendment protection." *League of Women Voters*, 468 U.S. at 381. Therefore, employees who read the website are also exercising their First Amendment rights regarding a matter of public concern.

The Fourth Circuit's decision in *Urofsky* in no way undercuts this conclusion. In *Urofsky*, the Fourth Circuit upheld the constitutionality of a state ban on using state computers to view sexually explicit materials on the Internet. 216 F.3d 401. The court reasoned that state employees were acting in their capacity as employees when using state computers and therefore that they were only speaking as employees rather than as citizens on an issue of public concern. *Id.* at 408-09. The plaintiffs in *Urofsky*, however, confined their challenge to the restriction of access for work-related purposes. *Id.* at 405-06. The court therefore held only that "access to certain materials using computers owned or leased by the state *for the purpose of carrying out employment duties* [] is clearly made in the employee's role as employee" and is not subject to First Amendment protection. *Id.* at 408-09 (emphasis added). As noted by one of the *Urofsky* concurrences, the case "leave[s] unanswered the question of whether a governmental employee who seeks to access and disseminate sexually explicit materials rising to the level of matters of public concern, not in his or her role as a governmental employee, but rather as a private citizen, is entitled to some measure of First Amendment protection." *Id.* at 426 (Hamilton, J., concurring).

The Supreme Court clarified the rationale of *Urofsky* in rejecting the First Amendment claim of a deputy district attorney who alleged that he was fired because of the contents of a memorandum prepared as part of his job responsibilities. *Ceballos*, 126 S. Ct. 1951. The Court in *Ceballos* noted that not all speech that occurs inside the workplace is performed as part of an employee's job responsibilities. *Id.* at 1959. The Court held that an employee's expression falls outside the protection of the First Amendment only when the expression is "made pursuant to official responsibilities." *Id.* at 1961. In this case, the state prohibits not only reading blogs pursuant to work-related duties, but *all* reading of blogs, even during breaks or after hours for purely personal reasons, and even though it otherwise permits employees to use computers for personal reading. The case therefore implicates an issue of public concern.

3. The State Has No Interest in Prohibiting Access to News-Related Blogs.

a. The State's Interest Must Be Extremely Strong to Justify Its Restriction on Political Speech.

In the typical *Pickering* case, a single employee has brought suit after being disciplined for his or her protected First Amendment activities. When, as here, a government policy instead restricts the present and future expression of a large group of employees, the government's burden under the *Pickering* test is substantially increased. *See NTEU*, 513 U.S. at 466-68. In *NTEU*, for example, the Supreme Court struck down a policy that prohibited federal employees from accepting honoraria for speaking engagements. *Id.* at 477. The Court wrote that, although the *Pickering* test applied even in the context of a general policy instead of a particular disciplinary action, a general policy works as a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," and therefore "gives rise to far more serious concerns than could any single supervisory decision." *Id.* at 467-68; *see also Montgomery v. Carr*, 101 F.3d 1117, 1129 (6th Cir. 1996); *Sanjour*, 56 F.3d at 90-91.

To win the *Pickering* balancing test with respect to a general policy, "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the government." *NTEU*, 513 U.S. at 468 (quotation omitted). Under the *Pickering/NTEU* standard, the government must demonstrate not only that the harms it asserts are "real" and "not merely conjectural," but also that the rule used to address them is a "reasonable response to the threat" which will alleviate the harms "in a direct and material way." *Id.* at 475 (quotation omitted); *see also Sanjour*, 56 F.3d at 98 (noting that the government's burden is "not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" (quotation and alterations omitted)).

Furthermore, when an employer discriminates against speech because of the content and viewpoint of that speech, the government's burden is especially heavy. *See Johnson*, 865 F. Supp. at 1436 ("[T]he Courts have generally found that content-based regulations pose a greater burden on the individual's rights than regulations which are content neutral"); *see also Sanjour*, 56 F.3d at 97. Even the risk that the government may be using a purportedly neutral justification to mask invidious discrimination "justifies an additional thumb on the employees' side of [the] scales." *Sanjour*, 56 F.3d at 97; *see also Rankin*, 483 U.S. at 390 (striking down the termination of a county employee that was based on the content of her speech).

b. The State Has *No* Legitimate Interest in Controlling Which Particular News-Related Websites Its Employees May Read.

Although "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, [] the restrictions it imposes must be directed at speech that has some

potential to affect the entity's operations." *Ceballos*, 126 S. Ct. at 1958. Any interest in regulating the political views of its employees are simply "not interests that the government has in its capacity as an employer." *Rutan v. Republican Party*, 497 U.S. 62, 70 n.4 (1990). For example, even if the government has a legitimate interest in promoting efficiency by prohibiting newspapers at work, the government has no interest in allowing employees to read the Louisville Courier-Journal but prohibiting the Lexington Herald-Leader because it disapproves of the Herald's political views. *See Rankin*, 483 U.S. at 384 ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."). As long as the state allows employees reasonable use of the Internet to read news at work, it therefore has *no* protectable interest in controlling which sources of news an employee reads.

c. The State's Restriction on Blogs is Both Drastically Overinclusive and Underinclusive of Its Purported Interest in Workplace Efficiency.

The state's only justification that is *not* based on the viewpoint of the websites it prohibits is its purported concern for workplace efficiency.[7] However, in response to Plaintiff's Open Records Act request, the state produced *no* documents showing complaints about employees spending too much time on blogs, indicating that no such complaints actually exist. (Ex. 1 ¶ 8.) In fact, the state has not produced any evidence that blogs have caused a drain on efficiency.

[7] The state also contends that blocking blogs "improv[es] [the] secure nature of its computer system," (Defs.' Mem. 21) but does not explain how Plaintiff's political news website or any other website it classifies as a blog poses any threat to the security or effectiveness of the state's computer systems. Prior to June 20, 2006, the state allowed employees access to these sites without problems.

Furthermore, the decision to ban blogs is both overinclusive and underinclusive of this purported goal and is therefore not entitled to any constitutional weight. The state's policy is overinclusive because it applies even when employees are off the clock, at lunch, or on breaks. If the state's true goal is to prevent employees from wasting time at work, there is no reason to apply the ban outside normal work hours. *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1217 (9th Cir. 1996) (striking down a policy banning religious advocacy at work in part because it "prevents free expression by employees, whenever they are in the workplace, even during lunch breaks, coffee breaks, and after-hours"); *see also Johnson*, 865 F. Supp. at 1437 (finding a state's prohibition on firefighters reading *Playboy* at work "to be particularly onerous because it restricts the reading of *Playboy* at all times, including times when the behavior of the fire fighters is otherwise unrestricted").

The state already has an acceptable-use policy that limits Internet use on work computers to reasonable levels. (Defs.' Mem. Ex. 1.) There is no reason why the state could not satisfy its asserted interest simply by enforcing its existing policy instead of resorting to restricting the political speech of *all* its employees. *See Johnson*, 865 F. Supp. at 1440 (noting that the government could address its interest in avoiding sexual harassment claims resulting from employees reading sexually oriented magazines by enforcing its sexual harassment policy).[8] The 2004 Program Review and Investigations Committee research report, cited by the state in support of its policy, actually recommends this alternative, noting that a "block-first strategy" conflicts

[8] The state's argument that enforcing its acceptable use policy would be more onerous on state employees than its use of an Internet filtering system (Defs.' Mem. 4) gets the law completely backward. *NTEU* makes it clear that a government employer's restraint on speech is subjected to a significantly enhanced level of scrutiny because such a policy chills speech before it happens. *NTEU*, 513 U.S. at 468. Furthermore, the state could minimize intrusion on the reading habits of employees by viewing aggregate reports of employee Internet usage instead of reviewing every website visited by every employee.

with state policy and "render[s] incidental Web use meaningless for many users." (Ex. 22 at 51-52.)[9] And if the state is interested in blocking only *personal* blogs, instead of news-related blogs, it could block only the "Personal Homepages" Webwasher category, which includes personal blogs. (Ex. 19.) Indeed, this was the state's policy prior to the June 20 reconfiguration. (*Id.*)

Moreover, the ban on blogs is drastically underinclusive because it does not stop employees from reading news on mainstream news sites, which, according to the state's own logs, are far more popular among state employees than blogs. *See* Top 20 Categories by Hits (Ex. 23.) A report by the state shows that this category of website, including the websites of the Louisville Courier-Journal and the Lexington Herald-Leader, received more than three million hits from government computers on June 16, 2006. (*Id.*) In contrast, the Webwasher "Usenet News" category, of which blogs are a part, received approximately 370,000 hits. (*Id.*) A separate report shows that the Lexington Herald-Leader's website received nearly 200,000 hits on June 16, while BluegrassReport.org, the most popular news-related blog read by state employees, received only 6,592 hits. *Compare* Ex. 9 to Top 20 Sites by Hits (Ex. 21) (showing 196,641 hits to the Herald-Leader's website kentucky.com).

Aside from mainstream news sites, the state also continues to allow state employees access to a range of other websites that are far more popular among state employees than blogs. For example, although the state's reports show that state employees spend more time shopping online than they do on blogs (Ex. 23), the state continues to allow access to Amazon.com, eBay.com, and a range of other shopping websites. *See* E-Mail from Mark Rutledge to Kendall

[9] Because the state did not attach a complete copy of the report to its Motion to Dismiss, Plaintiff attaches additional pertinent pages as Exhibit 22.

Parmley, Chris Johnson, and Rick Boggs (June 21, 2006, 7:44 a.m.) (ordering that these two websites be added to the whitelist) (Ex. 25). The state also allows employees access to personal finance websites like Citibank's website and Bloomberg.com, and to a variety of self-described blogs and online message boards, including Google Groups. (Ex. 6.) The state's policy also allows other analogous activities during work time, such as reading a printed newspaper, listening to the radio, or engaging in political discussions with other employees. As noted by the state's research report, the problem of employees "wasting time occurred before the advent of computers," and computers can be misused in ways other than browsing the Internet (for example, by playing Solitaire, listing to music, or writing personal letters) (Ex. 19 at 10.) The report thus urges that personal use of computers be treated identically to other kinds of incidental activities at work. (Ex. 22 at 28.) After disregarding this recommendation, the state cannot now rely on the report to justify its flawed policy.[10]

Similarly, the Court in *Discovery Network* rejected the city's claim that the ban on commercial newsracks was instituted because of the unsightly nature of the newsracks, noting that the ban affected only sixty-two commercial newsracks while leaving unaffected between 1,500 and 2,000 newspaper racks. *Discovery Network*, 507 U.S. at 417-18. As the Court explained, "the city's primary concern . . . is with the aggregate number of newsracks on its streets," but as to that perceived evil, "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault." *Id.* at 426. "In fact," the Court noted, "the newspapers are arguably the greater culprit because of their superior number." *Id.*

[10] The state also admits that employees can still browse the web from the workplace using personal wireless devices. (Defs.' Mem. 6.) It is unclear why the state believes evidence of its policy's ineffectiveness in any way justifies the policy. The state does not contend that *all* of its employees have access to wireless devices that allow them to bypass its filter. If that were true, the state's policy would serve *no* purpose.

The distinction drawn by the city between newspapers and handbills therefore bore "no relationship *whatsoever* to the particular interests that the city [] asserted" and was "an impermissible means of responding to the city's admittedly legitimate interests." *Id.* at 424; *see also League of Women Voters*, 468 U.S. at 385 n.16 ("That the provision is so unrelated to [the Government's] asserted purpose suggests that the Government's interest is not substantial."); *Tucker*, 97 F.3d at 1215 (concluding that the state was "not reasonable to allow employees to post materials around the office on all sorts of subjects, and forbid only the posting of religious information and materials").

Like the city in *Discovery Network*, the state claims to have responded to an admittedly legitimate interest—that of employee efficiency—by adopting a distinction wholly unrelated to its stated purpose. The state regulated a category of news-related websites visited relatively infrequently by state employees, while leaving unregulated nearly identical websites that consume approximately nine times more employee time. In this case, however, rather than banning commercial speech as the city did in *Discovery Network* (a form of speech subject to a relatively relaxed standard of review), the state has chosen to implement its claimed interest by banning political speech and editorial comment that is at the core of the First Amendment's protection. Given the lack of *any* evidence produced by the state in response to Plaintiff's Open Records Act requests, and the particularly poor fit between the state's remedy and its claimed goals, the state's policy cannot be given *any* weight in the *Pickering* balancing test.

4. State Employees, as well as Plaintiff and the General Public, Have a Strong Countervailing Interest in Allowing State Employee Access to Blogs.

Because Defendants have failed to articulate any reasonable basis for distinguishing Plaintiff's blog from mainstream media websites, there is no need to proceed further with the *Pickering* balancing test. *Locurto v. Giuliani*, 447 F.3d 159, 175-76 (2d Cir. 2006) (noting that

the government has the initial burden of showing "that an employee's activity was likely to interfere with government operations" and "that the Government acted in response to that likely interference and not in retaliation for the content of the speech"); *Belk v. City of Eldon*, 228 F.3d 872, 881 (8th Cir. 2000) ("[T]o put the *Pickering* balancing test at issue, the public employer must proffer sufficient evidence that the speech had an adverse impact on the department."). Even if this Court were to proceed to conduct a balancing of interests, the free speech interests at issue here are extremely significant.

When weighing the countervailing interests to a government restriction on employee speech, the court should consider the interests of both the affected employees and the general public in the restricted speech. *See NTEU*, 513 U.S. at 468. The interests of state employees in this case in reading the news sources of their choice and being informed on a wide range of topics not frequently covered by mainstream media sources are very strong. Because the speech restricted is *political* in nature, this interest is given additional weight. *See Connick*, 461 U.S. at 152 ("We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."); *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (recognizing that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values"). Furthermore, when state employees are insulated from the criticism and robust political debate that occurs on blogs, they are denied the benefit of this debate and the public accordingly suffers. In *Ceballos*, the Supreme Court recognized "the necessity for informed, vibrant dialogue in a democratic society" and that "widespread costs may arise when dialogue is repressed." 126 S. Ct. at 1959.

By restricting access to blogs, the state also has burdened Plaintiff's access to his core audience. A major goal of Plaintiff's website is to influence state policy, and a critical part of his

audience is therefore state government employees. The challenged policy burdens not only Plaintiff's right to speak, but also his right to use his website to petition the government. *See McDonald v. Smith*, 472 U.S. 479, 482 (1985). The protections of the First Amendment were fashioned for the very purpose of "assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quotation omitted). Editorial opinion of the kind frequently found on blogs, in particular, has traditionally held an important role in "criticizing and cajoling those who hold government office in order to help launch new solutions to the problems of the time." *League of Women Voters*, 468 U.S. at 382. Indeed, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Defendants cannot show that these critical interests of state employees, Plaintiff, and the general public in free expression are outweighed by that expression's necessary impact on the actual operation of the government. The state's selective censorship policy is therefore unconstitutional.

C. Plaintiff Would Also Prevail Under a Forum Analysis Approach.

1. Traditional Forum Analysis Doctrines Make Little Sense In the Context of a State's Restriction on Employee Free Speech on the Internet.

As noted in the previous section, the Supreme Court's established framework for workplace restrictions on speech provides the most logical framework for analyzing Plaintiff's claims. Plaintiff recognizes, however, that the factual situation in this case is novel and it may not be completely clear to the Court which constitutional test to apply. Defendants suggest that the Court should apply nonpublic forum analysis pursuant to the Supreme Court's decision in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985). In

Cornelius, a legal defense fund sought permission to be included in fundraising campaign literature distributed in government offices. *Id.* Although the Court in *Cornelius* held that the charity had a First Amendment right to solicit funds, *id.* at 799, there was no contention that government employees had a substantial reciprocal right to be *solicited* that would have implicated the *Pickering* analysis. If the lawsuit in *Cornelius* had instead been brought by government employees claiming that their First Amendment right to read the legal defense fund's solicitation had been infringed, the Court presumably would have applied *Pickering* instead. *See Urofsky*, 216 F.3d 401 (applying *Pickering* to a claim of employees' right to read). And, because the proper standard to apply cannot depend on the identity of the party bringing suit, the Court would also have applied *Pickering* if a non-employee had instead raised the reciprocal right to speak. *See Pico*, 457 U.S. at 867 (plurality opinion) ("[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them . . . ."); *cf. NTEU*, 513 U.S. at 470.

Given that this case involves public employees' use of the Internet, the relevance of traditional forum analysis principles is especially doubtful. State employees' connection to the Internet from their desks cannot easily be described as a "forum" in the sense the term is generally used, and in *United States v. American Library Association*, the Supreme Court in a plurality opinion for this reason questioned the relevance of traditional forum principles to Internet filtering software at a public library. 539 U.S. 194, 207 n.3 (2003) (plurality opinion).[11]

[11] Defendants rely heavily on the plurality opinion in *American Library Association* without acknowledging that it is without precedential value. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when no single rationale supporting the result commands a majority of the Court, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"). Both Justice Kennedy and Justice Breyer concurred with the plurality opinion on narrower grounds.

Rather than hinging its decision on any particular constitutional test, the plurality in *American Library Association*—along with Justice Kennedy in his concurrence—relied heavily on the conflicting interests of the parties to justify the conclusion that the state did not infringe the First Amendment rights of library patrons. The regulation at issue in *American Library Association* was a restriction on access to obscenity and child pornography from public library computers, designed to protect children from coming into contact with this material. *Id.* at 199. None of the Justices questioned that the state had a compelling interest in this goal. *Id.* at 215 (Kennedy, J., concurring). In contrast, the countervailing interest of library patrons was minimal, given that anybody could ask to have the filtering software disabled without being required to give a reason. *Id.* at 209 ("[T]he Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.").

Thus, when taken together, the plurality opinion in *American Library Association* and Justice Kennedy's concurrence are best understood as a weighing of the state's compelling interest in protecting children from psychological harm against an insubstantial countervailing interest of the public in access to pornographic material. Justice Breyer, in his separate concurring opinion, made this approach explicit, examining "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives." *Id.* at 217. Although Justice Breyer "examin[ed] the statutory requirements in question with special care," he also allowed room for the library to exercise its significant discretion in the selection of its materials. *Id.* at 216-18 (Breyer, J., concurring). Justice Breyer's proposed test is similar to the comparison of interests that takes place under the *Pickering* analysis, in which the state's substantial discretion in the regulation of its employees is also limited by First Amendment concerns.

In the context of a case like this one, where the state's restriction affects its own employees rather than library patrons, the established framework of *Pickering* provides the most natural framework. Whether this Court uses the *Pickering* balancing test or the more ad hoc weighing of interests suggested by *American Library Association*, however, the result here would be the same. Because the state has *no* legitimate interest in distinguishing blogs from mainstream media websites that carry nearly indistinguishable content and which are much more frequently read by state employees, the state's interest cannot possibly outweigh the substantial interests in political free speech infringed by the policy.

2. Plaintiff Would Prevail Under the Traditional Nonpublic Forum Test Because the State's Restriction is Neither Reasonable Nor Viewpoint-Neutral.

Although it is therefore doubtful whether the traditional nonpublic forum test is a suitable approach for analyzing the state's restriction on employee speech on the Internet, Plaintiff would be equally likely to prevail if this Court were to apply that standard. Restrictions on speech in a nonpublic forum must be both viewpoint neutral and reasonable in light of the purpose served by the forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). The state's policy in this case is neither.

First, the policy is not viewpoint neutral. As discussed in Section I.A.1, *supra*, the state singles out particular websites for differential treatment based on the viewpoints expressed on those sites, and the evidence suggests that the ban on blogs may be targeted specifically at Plaintiff's website. In *Putnam Pit, Inc. v. City of Cookeville*, the Sixth Circuit reversed summary judgment for the defendant when similar evidence suggested that the city may have developed its supposedly neutral criteria for placing links on its web page (a nonpublic forum) as part of an intentional effort to target the plaintiff. 221 F.3d 834, 845-46 (6th Cir. 2000). Furthermore, the

state's arbitrary distinction between blogs and mainstream media websites, and its delegation of unreviewable authority to distinguish between the two, also raises a significant concern that purportedly neutral or content-based restrictions on speech may mask viewpoint-based discrimination. *Id.* (noting that the city's policy gave "broad discretion to city officials, raising the possibility of discriminatory application of the policy based on viewpoint" in a nonpublic forum); *see also Cornelius*, 473 U.S. at 811-12 (remanding for a determination of whether the government had targeted a specific viewpoint and noting that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination").

Second, the policy is not reasonable in light of the purpose served by the so-called "forum." The state's acceptable-use policy allows state employees to spend a reasonable amount of time reading news on state-owned computers. There is no reason why, given this allowable purpose, that the state should restrict access to *particular* news sites. Even if the state was not required to allow its employees to read news on state computers in the first place, once it has made the decision to do so it cannot unreasonably distinguish among the sources of news it allows employees to read. *Burnham v. Ianni*, 119 F.3d 668, 677 (8th Cir. 1997). As explained in Part I.B.3, the state has no interest whatsoever in distinguishing between mainstream media sites and news-related blogs.

The relevant facts in this case are the same regardless of which standard this Court decides to apply: The state has instituted a viewpoint-based restriction on core political speech for which it has *no* rational interest. Under any standard, Plaintiff is likely to succeed on the merits of his claim.

II. AN INJUNCTION IS NECESSARY TO SAVE THE PLAINTIFF FROM IRREPARABLE HARM.

The Supreme Court and the Sixth Circuit repeatedly have held that infringement of First Amendment freedoms constitutes irreparable injury; that alone justifies a preliminary injunction. *See, e.g.*, *Connection Distrib.*, 154 F.3d at 288 (the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury" (quotation omitted)). In this case, however, Plaintiff has suffered much more than a technical violation of his rights. The state's policy limits *political* speech that lies at the core of First Amendment protection. Furthermore, the policy does not merely limit Plaintiff's access to five percent of his readership -- it limits access to the *most important* five percent of his readers. Through BluegrassReport.org, Plaintiff criticizes and cajoles state officials, identifies and discourages corruption, and promotes specific policies. As a result of the state's unconstitutional discrimination against his website, Plaintiff's ability to disseminate his message and influence government action is substantially reduced. As the Supreme Court has made clear, "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell*, 303 U.S. at 452 (quotation omitted).

III. AN INJUNCTION WILL DO NO HARM AND WILL SERVE THE PUBLIC INTEREST.

In contrast to plaintiff's immediate and irreparable injury, the state will suffer no injury if it must suspend its policy regarding blogs pending the outcome of this case. The state allowed employees to access BluegrassReport.org, along with other sites the state now classifies as blogs, without serious disruption in the workplace from the date it was created on June 13, 2005, until the ban went into effect on June 21, 2006. Furthermore, the state continues to allow state employees to view websites of newspapers and other mainstream media sites, which include self-

described blogs, even though its own logs show that employees spend significantly more time on these sites than on so-called "blogs" (as previously mentioned, mainstream media sites received more than three million hits over the reporting period, while BluegrassReport.org received only 6,592 hits). Finally, compliance with an injunction would be a simple matter of changing a setting on the Webwasher software and will not require significant effort or expense. Under these circumstances, the balance of equities strongly weighs toward the conclusion that the state should be enjoined from enforcing its policy of selective censorship until plaintiff's claims can be resolved on the merits.

Issuance of an injunction is also 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, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Moreover, by limiting a vital source of news, information, and opinion to state employees, the state burdens the interest of the public in having educated and informed public servants. The state has decided to restrict its employees from tapping into a vital part of the public discourse on issues of importance to Kentucky. When public officials are denied access to diverse views on issues of policy, the entire state suffers. *Ceballos*, 126 S. Ct. at 1959 (noting "the necessity for informed, vibrant dialogue in a democratic society" and that "widespread costs may arise when dialogue is repressed").

CONCLUSION

For the foregoing reasons, the Court should grant the Plaintiff's motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I mailed on August 22, 2006 the foregoing document and the notice of electronic filing by U.S. Mail to the following non-CM/ECF participants:

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