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.	)	
	)	

PLAINTIFF'S RESPONSE MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Mark Nickolas is an online journalist covering issues of Kentucky news and politics on his website, BluegrassReport.org. Plaintiff sued Defendant state officials, claiming that the state's decision to censor his website and other sites the state defines as "blogs" on state computers violates his rights under the First Amendment of the U.S. Constitution and the Equal Protection Clause of the Fourteenth Amendment.

In their Motion to Dismiss, Defendants contend that Plaintiff has no standing to contest the state's decision to ban blogs because he has suffered no injury-in-fact. The state, however, has seriously burdened Plaintiff's distribution of his website to a core audience of the site -- state government employees. Plaintiff has therefore suffered a serious injury to his First Amendment rights and necessarily has standing to contest the state's irrational and invidious policy. Defendants also argue that the Court should dismiss the complaint for failure to state a claim, relying for their argument on unsupported assertions that flatly contradict the factual allegations in the complaint. Defendants argue that the state's policy is both viewpoint-neutral and necessary for workplace efficiency, but fail to articulate a single rational reason why the state

singled out blogs for special treatment when its own reports show that state employees spend much more time on mainstream media websites. In stark contrast to Defendants' claims of neutrality, one state official candidly acknowledged that blogs were banned because they are associated with certain "interest groups." Defendants' argument in effect amounts to an attempt to obtain summary judgment without giving Plaintiff an opportunity for discovery. For these reasons, the Motion to Dismiss should be denied.

BACKGROUND[1]

BluegrassReport.org is an award-winning website devoted to news and information about Kentucky politics. (Compl. ¶ 10.) The website combines Plaintiff's original reporting and political commentary with relevant clips from major media sources. (*Id.*) BluegrassReport.org is on the media distribution lists of several state agencies and regularly receives news releases from these agencies. (*Id.*) Approximately 25,000 readers visit the site each week, about five percent of whom use state-owned computers. (*Id.* ¶¶ 10, 13.)

In addition to his work on BluegrassReport.org, Plaintiff writes a weekly editorial for the Louisville Eccentric Observer (LEO), Louisville's weekly newspaper, with a readership of more than 150,000. (*Id.* ¶ 11.) Plaintiff 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. (*Id.*) In the 2003 Kentucky gubernatorial election, Plaintiff served as campaign manager for U.S. Representative Ben Chandler, who was defeated by Governor Fletcher. (*Id.* ¶ 14.) Plaintiff frequently uses his website to express strong criticism of Governor

[1] Because Defendants ask this Court to dismiss the complaint on its face, Plaintiff limits his discussion in this Memorandum to the reasons why the complaint states a claim for relief. Plaintiff will respond more fully to Defendants' merits-based arguments in his Cross-Motion for a Preliminary Injunction.

Fletcher and his administration and to comment on the governor's indictment on political discrimination charges. (*Id.* ¶¶ 15, 17-18.)

Defendants are state officials responsible for overseeing the state's computer systems and the policies at issue in the complaint. (*Id.* ¶¶ 7-9.) As Defendants concede, the Commonwealth of Kentucky'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 the employees' overall productivity or interfere with the state's normal business operations. (Def.'s Mem. 3, Ex. 1 at 2.) Between June 20 and June 21, 2006, the Commonwealth Office of Technology ("COT"), a division of the Finance and Administration Cabinet, modified its Internet filtering software to block employees from accessing websites the software categorizes as blogs from state computers. (Compl. ¶¶ 25-26.) COT added these sites to a list of categories already blocked by the Webwasher software, including sites related to pornography, lingerie, computer games, hate groups, illegal activity, and chat rooms. (*Id.* ¶ 23.) The ban went fully into effect the day after Plaintiff was quoted in a front-page New York Times article criticizing the administration. (*Id.* ¶ 18.) Pursuant to the new classification, the majority of Kentucky's approximately 33,000 state employees can no longer read BluegrassReport.org from state computers. (*Id.* ¶ 27.) BluegrassReport.org had previously been accessible to all state employees since Plaintiff founded it on June 13, 2005. (*Id.* ¶ 26.)

When state officials encounter a website they wish to block but that is not categorized by Webwasher as a blog, they manually add the website to a state-maintained "blacklist" of sites that are inaccessible from state computers. (*Id.* ¶ 22.) The state then requests that Webwasher recategorize the website so that it falls into a blocked category. (*Id.* ¶ 21.) On the same day the state implemented its blog ban, officials began adding particular blogs to its blacklist and

sending them to Webwasher to be reclassified. (*Id.* ¶¶ 28-31.) Some of the websites manually blocked by the state were websites that had been critical of the state's censorship policy. (*Id.*) For example, the website Talking Points Memo was put on the state's blacklist soon after writing about the state's policy against blogs. (*Id.* ¶ 29.) On June 27, 2006, Plaintiff made his website accessible from the web address http://www.bluegrassreport.com/ in addition to its usual location at http://www.bluegrassreport.org/. (*Id.* ¶ 30.) The next day, an official or intern in the governor's office requested that state administrators add the new website to the blacklist. (*Id.*; Def.'s Mem. 6 n.2.)

On the other hand, the state has allowed employees to read even self-described blogs that meet their approval. For example, the state granted employees access to the Bluegrass Policy Blog, run by the free-market advocacy group Bluegrass Institute for Public Policy Solutions (http://www.bipps.org/blog/), when it determined that the site contained "relevant policies related to the state." (*Id.* ¶ 35.) 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 website-blocking policy, the state once again banned the website. (*Id.* ¶ 36.) In addition, the websites of mainstream newspapers, television stations, and radio stations were not blocked by the state, nor were blogs hosted on those sites. (*Id.* ¶ 34.) 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, entitled "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. (*Id.*)

State officials have publicly justified the ban on blogs by claiming that a Webwasher report showed that employees were spending a significant amount of time on these websites. (*Id.* ¶ 37.) However, the state's reports show that blogs are accessed much less frequently than other categories of websites allowed by the state, including the websites of mainstream newspapers and magazines. (*Id.* ¶¶ 38-39.) The state has provided no rational, viewpoint-neutral reason for its decision to ban blogs at the same time that it allows access to much more popular mainstream media websites carrying the same type of content. In fact, one state official admitted that the state distinguished blogs from mainstream newspaper and magazine websites because blogs are aligned with certain "interest groups." (*Id.* ¶ 40.)

ARGUMENT

I. Plaintiff Has Standing to Bring this Action.

A. Plaintiff Has Sufficiently Pled An Injury to His First Amendment Rights.

Defendants first argue that Plaintiff lacks standing to bring this case because he does not allege any personal injuries resulting from the state's censorship policy. It is, of course, beyond dispute that infringement of the First Amendment right to freedom of speech constitutes a cognizable injury for standing purposes. *See, e.g., G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1075 (6th Cir. 1994). In addition, Defendants' contention that Plaintiff "does not allege any economic harm" (Def.'s Mem. 11) is irrelevant, because "standing may be predicated on noneconomic injury." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (1982).

Defendants nevertheless contend that Plaintiff was not injured because the state has not interfered with his right to publish his website, and because he cannot assert the rights of state employees to read it. (Def.'s Mem. 11-12.) Wholly apart from the question of whether Plaintiff

can allege an infringement of his readers' right to read his website, however, Plaintiff alleges an infringement of his equally important First Amendment right to distribute the contents of his speech. *See, e.g.*, *Martin*, 319 U.S. at 143 ("The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it." (citation omitted)). A major purpose of Plaintiff's website is to influence state policy, and a critical part of his audience is therefore state government employees. Prohibiting these state employees from receiving Plaintiff's speech on state computers not only limits a key element of his readership but also implicates his First Amendment right to petition the government. *See McDonald v. Smith*, 472 U.S. 479, 482 (1985) (noting that the right to petition the government "is implicit in the very idea of government, republican in form" (quotation omitted)).

In a long line of cases, the Supreme Court has protected the rights of pamphleteers to distribute literature in their fora of choice, even when the government did not prevent them from printing their pamphlets in the first place. *See, e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Schneider v. State of N.J*, 308 U.S. 147 (1939). Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, the Supreme Court held unconstitutional Cincinnati's ordinance against commercial newsracks on public property, even though the burden on speech denied speakers access to only "one method of distribution." 507 U.S. 410, 427 (1993). These cases just as clearly protect Plaintiff's standing to contest a limitation on the circulation of his publication to a core element of his readership. As the Court recognized in *Lovell*, "without the circulation, the publication would be of little value." 303 U.S. at 452 (quotation omitted).

Moreover, the Supreme Court has recognized that when a government restricts employee speech, the public's concomitant interest in that speech is equally affected. In *United States v. National Treasury Employees Union*, for example, the Court held that a restriction on the speech of federal employees also "imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said." 513 U.S. 454, 470 (1995); *see also Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995) (holding that the rights of an environmental organization were infringed by a government regulation burdening the right of employees to speak to the organization). Similarly, when a state restricts its employees' right to *read* instead of speak, the rights of the speakers who are no longer able to reach their intended recipients are equally affected. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) ("[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them . . . ."); *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.").[2]

Finally, although the Court need not reach the issue here because Plaintiff's own free speech rights have been infringed, litigants in First Amendment cases are also "permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Sec'y of State v. Joseph*

[2] Plaintiff also suffers injury under the Equal Protection Clause because the state singled him out for special treatment based on his viewpoint. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972). This, in itself, is enough to give Plaintiff standing. *Cf. Allen v. Wright*, 468 U.S. 737, 755 (1984) (noting that those denied equal treatment in violation of the Equal Protection Clause suffer a stigmatizing injury sufficient for standing purposes). The mere classification of Plaintiff's website as a "blog" relegates his site to second-class status. *See Meese v. Keene*, 481 U.S. 465 (1987) (holding that the plaintiff had standing to contest the government's stigmatization of his film as "political propaganda").

H. Munson Co., 467 U.S. 947, 956-57 (1984) (quotation omitted); *see also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988) (holding that booksellers had standing to defend the First Amendment rights of book purchasers). Under this exception to the general rule against third-party standing, Plaintiff is entitled to defend the First Amendment rights of his readers.[3]

B. Plaintiff Suffered a First Amendment Injury Regardless of Whether He Experienced an Absolute Decrease in Readership.

Defendants further argue that Plaintiff lacks standing because Plaintiff has not alleged a decrease in his readership and because state employees could continue to read his website from their home computers. For purposes of a motion to dismiss, the Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the pleader." *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 228 (6th Cir. 2005). Plaintiff alleges that five percent of readers of his site came from state computers prior to the ban and that users of state computers can no longer access the site. (Compl. ¶¶ 13, 27.) It is an obvious inference from these allegations that at least some individual state employees -- the most important target audience for Plaintiff's website -- no longer read the site because they lack the time or ability to read it from home.[4]

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[3] Defendants cite *Raines v. Byrd*, 521 U.S. 811 (1997), in support of their argument that the Court should scrutinize standing more carefully when a case involves separation of powers. (Def.'s Mem. 12-14.) But *Raines* holds only that the standing inquiry is "especially rigorous" when the court is asked to decide on the constitutionality of action taken by a co-equal branch of the *federal* government. 521 U.S. at 819-20. Federal courts routinely examine the constitutionality of actions taken by state governments, and no exceptional standing burden applies in such cases. Regardless, for the reasons already stated, Plaintiff has shown that his injury is "personal, particularized, concrete, and otherwise judicially cognizable" as required by *Raines*. *Id.* at 820.

[4] These allegations set the case apart from *Loving v. Boren*, where the plaintiff failed to present any evidence that he had been impacted in any way by the university's computer policies. 133

In any case, state censorship need not be completely successful to create standing under the First Amendment. *See Va. State Bd. of Pharmacy*, 425 U.S. at 757 n.15 ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . . ."). The state here has cut off the most convenient method for Plaintiff to reach his audience of state employees, who make up a core part of his readership. The fact that Plaintiff could theoretically reach the same readers in other ways does not in any way negate the fact that the state blocked distribution of his website in the most convenient venue. *See Schneider*, 308 U.S. at 163 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."). Defendants cannot insulate their censorship policy from judicial review with unsupported speculation that Plaintiff's readership might find alternate ways to access his website.[5]

In short, Plaintiff need not allege that the state completely shut down his website or reduced his readership by a fixed number. Because the state has chosen to burden the ability of Plaintiff's key audience to read his site, Plaintiff is directly impacted by that policy and has standing to challenge it here.

F.3d 771, 773 (10th Cir. 1998). Furthermore, *Loving* was decided after a bench trial and therefore does not discuss the plaintiff's burden at the pleadings stage of the case. *Id.* at 772.

[5] Defendants go so far as to suggest that Plaintiff lacks standing because it is possible that the notoriety surrounding the state's censorship policy may have temporarily driven up Plaintiff's net readership. Defendants' proposed rule would ensure that the most notorious state censorship actions would be the most immune from judicial scrutiny. Unsurprisingly, they cite no precedent for this perverse result.

II. The Complaint States a Claim for Relief.

Defendants' other argument is that the complaint does not state a claim for relief because the state's Internet system is a non-public forum subject to only minimal judicial scrutiny. But Defendants concede that even under their preferred standard of review, the state's policy would still be unconstitutional unless it is found to be both reasonable and viewpoint neutral. (Def.'s Mem. 19.) Both of these issues are very much in dispute. [6]

Defendants claim that websites "are blocked via the universal parameters of the vendor as a category, not on a case-by-case basis" and that "[t]here is simply no discretion on the part of the Commonwealth to make a decision based upon viewpoint, even if it so chose." (Def.'s Mem. 22.)[7] These unsubstantiated assertions fly in the face of the complaint, which accurately alleges that the state can and does block individual websites by adding them to a "blacklist" and by sending them to Webwasher for reclassification, and that the state added particular websites to its blacklist after the authors of those sites expressed views critical of the state. (Compl. ¶¶ 21-22, 26, 29-31, 43.) The complaint further alleges that the state allows exceptions to its policy for particular sites, but not Plaintiff's site, and that its policy discriminates among sites based on the viewpoints of those sites. (*Id.* ¶ 33-36, 43.) Given the factual disputes at issue, this case cannot be dismissed based on bald assertions of fact in Defendants' brief. Even if Defendants were to submit supporting evidence, Plaintiff must still be given an opportunity to conduct discovery into

[6] Plaintiff refers this Court to the Memorandum in Support of Plaintiff's Cross-Motion for a Preliminary Injunction for a detailed discussion of the Commonwealth's discriminatory and viewpoint-based censorship. As explained there, Defendant's proposed standard is not the most logical standard to apply to this case.

[7] Defendants do not present any evidence in support of these assertions in the form of affidavits or otherwise. Unsupported allegations in a brief have no evidentiary weight. *In re Morris Paint & Varnish Co.*, 773 F.2d 130, 134 (7th Cir. 1985).

the truth of Defendants' claims. *See Tucker v. Union of Needletrades, Indus. and Textile Employees*, 407 F.3d 784, 787-88 (6th Cir. 2005).[8]

Even if the state did not single out particular blogs for special treatment (which, as explained, it does), Defendants do not dispute that they are responsible for the decision to ban all blogs in the first place. Plaintiff alleges that the state had no rational reason for its ban on blogs (Compl. ¶¶ 32-34, 39, 41-43), that its public explanations were a mere pretext (*Id.* ¶¶ 37-38, 43), that Mark Rutledge (the COT official directly responsible for implementing the ban) publicly stated that blogs were blocked because they represent certain "interest groups" (*Id.* ¶ 40), and that Defendants banned blogs in retaliation for Plaintiff's criticism of Governor Fletcher. (*Id.* ¶¶ 1, 26, 37-45.) Although Defendants contend that the state blocked blogs to "improv[e] [the] secure nature of [the state's] computer system and promot[e] efficient and effective use of that system," (Def.'s Mem. 21) they do not explain how blocking access to a website like Plaintiff's, which is devoted to news and information about Kentucky politics, would have any effect on the security or effectiveness of the state's computer systems. And, as Plaintiff alleges in his complaint, the state's own reports show that employees spend significantly more time on mainstream newspaper and magazine websites than they do on blogs. (Compl. ¶¶ 38-39.)[9] Defendants have not articulated a single rational, viewpoint-neutral reason for distinguishing

[8] Plaintiff's allegation that he was targeted as a result of his viewpoint is also sufficient to state a claim for a violation of his rights under the Equal Protection Clause because it constitutes discrimination against Plaintiff based on his exercise of a fundamental right. *See Mosley*, 408 U.S. at 94-95. Defendants' argument that Plaintiff has not stated an Equal Protection claim is therefore groundless.

[9] The complaint alleges that blogs appear nowhere on the list of the twenty most frequently accessed categories of websites. (Compl. ¶ 38.) Upon receiving additional documents from the state, Plaintiff became aware that the category "Usenet News" on the report may contain the category Newsgroups/Blogs. Even if this is true, however, mainstream news and magazine sites still receive many times more traffic from state computers than newsgroups and blogs. (*Id.* Ex. 13.)

news-related blogs, such as Plaintiff's website, from newspaper and magazine websites carrying the same type of content but taking up much more employee time.

The fact that the state's arbitrary distinction between blogs and mainstream news sites may *appear* viewpoint-neutral on its face does not mean that it is not a viewpoint-based restriction on speech. In *Putnam Pit, Inc. v. City of Cookeville*, the Sixth Circuit held that a city's own web page was a nonpublic forum on which the general public could not demand links to their own websites. 221 F.3d 834, 845 (6th Cir. 2000). Despite its application of the nonpublic forum standard, the court reversed the district court's grant of summary judgment to the city, noting that there were indications that the city's policy was implemented for the purpose of discriminating against the plaintiff's website. *Id.* at 845-46. Thus, even a supposedly neutral scheme is still viewpoint-based if the implementation of the scheme was motivated by a desire to target a particular speaker. Similarly, even if, as suggested by Defendants, the state's discretion to select among various speakers could be compared to the traditional discretion allowed to public libraries in assembling their collections, *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) (plurality opinion), the state still could not exercise that discretion "in a narrowly partisan or political manner." *Pico*, 457 U.S. at 870-71 (plurality opinion). The motive behind the state's policy in this case is a question of fact. *Langford v. Lane*, 921 F.2d 677, 680 (6th Cir. 1991). Therefore, even under Defendants' proposed standard, Plaintiff would still be entitled to the opportunity to prove the state's invidious intent.

Because the questions of whether the state's censorship policy is viewpoint-neutral and whether it is reasonable are both very much at issue in this case, and for the additional reasons set forth in Plaintiff's Memorandum in Support of Plaintiff's Cross-Motion for a Preliminary Injunction, dismissal at this stage of the proceedings would be entirely inappropriate.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I mailed on August 21, 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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