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

JOHN DOE PLAINTIFF

vs NO: 3:15-cv-00014-GFVT

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

COMMONWEALTH OF KENTUCKY, *ex rel.,*
et al.

DEFENDANTS

* * * * * * * * *

INTRODUCTION

This is an action seeking to have KRS 17.546(2) and KRS 17.510(10) (c) and (13) struck down as an unconstitutional and, therefore, illegal abridgement of the Free Speech rights of the Plaintiff . . . a convicted "sex offender" who, per Kentucky statutory law, is legally obliged to be listed on the state Sex Offender Registry as well as submit to a myriad of other restrictions over and above the typical restrictions of a felon convicted in a Kentucky court.

This action does not seek to debate the efficacy or wisdom of the public policies underlying these types of restrictions on a person convicted of a "sex crime" in Kentucky. To the contrary, the issue is discrete: are the restrictions placed upon the use of digital/electronic social media by a sex offender registrant a violation of his rights secured by the First and Fourteenth Amendments?

Respectfully, based upon the pleadings filed to date, Declarations, and applicable law, the Plaintiff, John Doe, it is appropriate and warranted for the Court to enter a preliminary injunction

enjoining the Defendants from enforcing the provisions of KRS 17.546(2) and 17.510(10)(c) and (13).

BRIEF FACTUAL SUMMARY

The Plaintiff is a registrant on the Kentucky Sex Offender Registry due to his conviction in 2007 for a single count of possession of material portraying a sexual performance by a minor. *Complaint*, ¶3. He received no custodial sentence, was probated, and was discharged from probation so that all that remains as "consequences" is his felon status and registration. *Id.*

In its 2009 General Session, the Kentucky General Assembly enacted what became codified as KRS 17.546 and 17.510(10) & (13). This statutory scheme uses the mechanism of the Sex Offender Registry to prevent any use for any purpose of any social networking site – public and private – by registrants. *Complaint*, ¶*8.*

The statute requires a registrant to provide to his probation office, or other applicable agency, his e-mail and "name identities" for social networking sites (public and private). Any registrant who violates the registration requirements is guilty of a Class D felony; and, if he uses any social networking site (public and private platforms) he is guilty of a Class A misdemeanor. *KRS 17.546(2) and KRS § 17.510(10) (c) and (13).*

The use of social networking platforms is a common, routine and integral mode of communication whether in the context of personal, business, private, commercial, or political. *Complaint*, ¶*11-13.* Indeed, courts, including this one, frequently communicate via electronic/digital, and federal, state and local government agencies of all types employ social media platforms like Facebook to communicate. It is hard to envision any political campaign for any office in any town, city, county, state, or the country that does not use Facebook, Twitter,

Reddit, or any of the myriad of social networking sites that are within the scope of these Kentucky statutes that are the subject of Plaintiff's challenge. *Id.*

ARGUMENT

Standard for Entry of a Preliminary Injunction

The standard for whether or not to issue a preliminary injunction is met when:

1. Whether the movant has a strong likelihood of success on the merits;

2. Whether the movant would suffer irreparable injury absent a stay;

3. Whether granting the stay would cause substantial harm to others; and,

4. Whether the public interest would be served by granting the stay.

NOCFHSEIU v. Blackwell, 467 F.3d 999 (6th Cir. 2006), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Plaintiff will address each in turn as the outline of his Argument.

Elements of the Injunctive Relief Sought As Applied *Sub Judice*

1. The Plaintiff Is Likely to Succeed on the Merits

While the Plaintiff bears the burden of demonstrating the likelihood of success on the merits insofar as the preliminary injunction is concerned, the government retains the burden of establishing the constitutionality of the statute at issue wherever it seeks to restrict speech. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). Here, KRS § 17.546(2) and KRS § 17.510(10)(c) and (13) are restrictions of the Plaintiff's attempt at free speech.

These statutes plainly and expressly deal with speech:

> No registrant shall knowingly or intentionally use a social networking Web site or an instant messaging or chat room program if that Web site or program allows a person who is less than eighteen (18) years of age to access or use the Web site or program.

KRS 17.546(2).[1]

[1] KRS 17.546(1) defines "Social networking Web site" as used in subpart (2).

And,

> If the electronic mail address or any instant messaging, chat, or other Internet communication name identities of any registrant changes, or if the registrant creates or uses any new Internet communication name identities, the registrant shall register the change or new identity, on or before the date of the change or use or creation of the new identity, with the appropriate local probation and parole office in the county in which he or she resides.

KRS 17.510(10)(c).

And,

> (a) The cabinet shall verify the addresses and the electronic mail address and any instant messaging, chat, or other Internet communication name identities of individuals required to register under this section. Verification shall occur at least once every ninety (90) days for a person required to register under KRS 17.520(2) and at least once every calendar year for a person required to register under KRS 17.520(3). If the cabinet determines that a person has moved or has created or changed any electronic mail address or any instant messaging, chat, or other Internet communication name identities used by the person without providing his or her new address, electronic mail address, or instant messaging, chat, or other Internet communication name identity to the appropriate local probation and parole office or offices as required under subsection (10)(a), (b), and (c) of this section, the cabinet shall notify the appropriate local probation and parole office of the new address or electronic mail address or any instant messaging, chat, or other Internet communication name identities used by the person. The office shall then forward this information as set forth under subsection (5) of this section. The cabinet shall also notify the appropriate court, Parole Board, and appropriate Commonwealth's attorney, sheriff's office, probation and parole office, corrections agency, and law enforcement agency responsible for the investigation of the report of noncompliance.
> (b) An agency that receives notice of the noncompliance from the cabinet under paragraph (a) of this subsection:
>
> 1. Shall consider revocation of the parole, probation, post-incarceration supervision, or conditional discharge of any person released under its authority; and
> 2. Shall notify the appropriate county or Commonwealth's Attorney for prosecution.

KRS 17.510(13).

A violation of KRS 17.546(2) is a Class A Misdemeanor, and this can cause a revocation of probation by the Department of Corrections or possible prosecution by either the County or

Commonwealth's Attorney for the county of residence of the registrant. *17.546(4) and 17.510(13)(b)1 and 2.* In other words, a registrant, regardless of the conduct that led to the conviction *or* regardless for the reason is forbidden, with criminal liability, from using an extremely wide array of web sites and services. *See,* David Post Declaration at ¶¶ 58-60.

When the application of KRS 17.546(2) and 510(10) & (13) are understood then there can really be no other conclusion but that they embody an unconstitutional restriction on the Plaintiff's First Amendment rights, *including* the right to speak anonymously. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("Under our Constitution, anonymous [speech] is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority.")

While the Plaintiff more than agrees that the Commonwealth clearly has an interest in preventing sexual violence and abuse, particularly as it impacts minors, these laws burden substantially more speech than is necessary to further these state interests in that they apply globally to all registrants, regardless of supervision status or underlying offense, *and* apply to all speech regardless of whether that speech is protected or not.

Plaintiff's is not a novel or lone wolf attack on this type of impingement on speech. In recent years, the proper use and scope of a sex offender registry and its registrants has been heavily litigated . . . including the very type of social networking as that in KRS 17.546 and 17.510(10).

Similar statutes have been passed in other jurisdictions, and there have been numerous legal challenges to them. We believe that all challenges have, thus far, successfully lead to the striking down of the statute on First Amendment grounds. *See Doe v. Prosecutor, Marion County* , 705 F.3d 694 (7th Cir. 2013) (reversing district court finding on abuse of discretion

standard that social media and instant messaging ban on sex offenders was narrowly tailored to important governmental interests); *White v. Baker*, 696 F.Supp.2d 1289 (N.D. Ga. 2010) (issuing preliminary injunction against the enforcement of a Georgia statute requiring the registration of online identifiers); *Doe v. Jindal*, 853 F.Supp.2d 596, (M.D. La. 2012) (striking down social media ban) *Doe v. Nebraska*, 898 F. Supp.2d 1086 (D. Neb. 2012) (striking down registration statute requiring registration of online identifiers and social media ban); *Doe v. Shurtleff*, 2008 WL 4427594 (D. Utah 2008) (striking down requirement of registration of online identifiers where those identifiers would be re-disclosed to the public) later modified subsequent to amendment of the law, *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010); *Doe v. Harris*, 772 F.3d 563, (9th Cir. 2014) (affirming district court's issuance of preliminary injunction on statute requiring, *inter alia*, registration of online identifiers within 24 hours of use or creation); *Does v. Snyder*, 12-cv-11194 (E.D. Mich. 2015) (striking down aspects of Michigan's sex offender registry scheme dealing with online identifiers because of onerous and vague reporting requirements). *See also State v. Packingham*, 748 S.E.2d 146 (N.C. Ct. App. 2013) (striking down social media ban applicable to sex offenders as overbroad and vague); *Coppolino v. Noonan*, 102 A.3d 1254 (Pa. Commw. Ct. 2014) (holding that, because state statutory scheme requiring registration of online identifiers does not disclose the same to the general public, it is not unconstitutional).

While similar in that those were all bans relating to the use of social media by registrants and/or cases dealing with the registration of online identifiers, in many the statutes struck down were *less* restrictive than the scheme enacted here by the Commonwealth. For instance, a Georgia statute that required registrants to inform law enforcement of their e-mail addresses, user names, and passwords, unlike the much broader prohibition in KRS 17.510(10(c), was deemed

too broad and thus unconstitutionally infringed upon the a registrant's First Amendment rights noting that "[f]or the regulation to be valid, what a registrant can be required to report must be related to the internet communication means used by predators to communicate with children. In the Court's experience, these communications are those that occur privately in direct email transmissions, usually using a pseudonym, and in instant messages. They generally do not occur in communications that are posted publicly on sites dedicated to discussion of public, political, and social issues." *Baker*, 696 F.Supp.2d at 1310. Here, Kentucky's statute expressly pulls "public" social networking sites into its scope.

Similarly, the Louisiana statute which the court in *Jindal* struck down on First Amendment grounds allowed for a registrant to petition the court of original jurisdiction for an exemption from the social media ban. *Jindal*, 853 F.Supp.2d at 610. Kentucky's statutory scheme offers no such process. The registration statutes in *Harris* (California) and *Baker* (Georgia) allowed for registrants to register their online identifiers at least one day after their first creation or use, whereas the Kentucky statute requires that the registration occur on or before the day that the identifier is created. Furthermore, the scheme found to be unconstitutional in *Harris* allows for a person required to register to send written notice of the online identifier, whereas Kentucky's scheme has no provision for mail-in registration.

The point being that these less restrictive statutes than the one in Kentucky were all found to violate the First Amendment rights of a registrant.

While the purpose of this filing is not to fully set out Plaintiff's argument, the point is that on the basis of decisions from numerous other jurisdictions and the relative severity of Kentucky's statutory scheme, the Plaintiff has a strong likelihood of success on the merits and therefore the first prong of the preliminary injunction standard is met.

2. The Plaintiff Would Suffer Irreparable Injury Absent a Stay

On the basis that the Plaintiff has demonstrated a likelihood of success on the merits of the instant challenge, the Plaintiff would therefore suffer irreparable harm absent an injunction because his First Amendment rights are *in fact* threatened as a matter of present tense and his liberty interest is clearly at stake as well.

The United States Supreme Court has recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for injunctive purposes. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *see also McNeilly v. Land*, 684 F.3d 611, 620-621 (6th Cir. 2012) (where Plaintiff demonstrates likelihood of success on the merits of First Amendment claim, irreparable harm follows).

The statutes before the Court unquestionably implicate the Plaintiff's First Amendment rights. Because the Plaintiff is also likely to succeed on the merits of the case, irreparable injury would then result absent a stay. Therefore, this prong of the injunction standard is also met.

3. A Stay Would Not Cause Substantial Harm to Others

A stay in the enforcement of these statutes would not result in substantial harm to others, including minors or others who use social media. Without question, the stated purpose of these statutes is to prevent the online solicitation of minors for sexual purposes by sex offenders. By arguing that a stay on the enforcement of these statutes would not result in substantial harm to others, the Plaintiff does not attempt dispute the worthiness of that purpose, nor does the Plaintiff intend to state that such offenses are not serious.

The point is that the statutory scheme violates the First Amendment rights of the Plaintiff and others similarly situated *without offering any* appreciable benefit to public safety. As the

declaration of Dr. Finklehor attests, technologically-facilitated sexual offenses against children account for 1% of all sexual offenses against children. Of those 1% of cases, only 4% of them involve registered sex offenders. (Exhibit A, Finklehor Decl. at pp. 2-3, Summary of Declaration 1, e) The purported justification for these bans (i.e., that sex offenders would use social media to find victims) is simply not reflective of the reality of sexual offending and thus its usefulness as a public safety measure.

To be sure, even one victim is a serious matter, and the point of the foregoing is not to say otherwise. Rather it is to say that the foundation of these statutes appears to be based upon something other than empirical evidence. Most registrants, even those in jurisdictions without such bans, do not troll social media to find victims, whereas the people who do are unlikely to be deterred by the presence of laws. Indeed, the use of a computer to solicit a minor for sexual purposes is already a Class D felony in the Kentucky. *KRS 510.155.* It stands to reason that an individual who is not deterred by the prospect of the commission of a felony offense would likewise not be deterred by the misdemeanor offense at issue here. The statutes only burden the speech of those individuals who desire to comply with the laws of the Commonwealth and therefore the statutes fail to remedy the evil that they target.

Issuing a stay on these statutes would also neither impair the ability of the Commonwealth to investigate online sexual offenses. *See Shurtleff*, 2008 WL at *9 (noting that investigators of internet crime already have tools, such as administrative subpoenas, to determine to whom anonymous accounts belong). Because of the limited reach of these statutes in combating online crime, and because of the fact that investigators retain effective tools to investigate and prosecute offenders, issuing an injunction would not result in substantial harm to others.

This prong of the injunction standard is also met.

4. Public Interest Would be Served by Granting a Stay

The Sixth Circuit has recognized, when evaluating the public interest factor of an injunction, that "it is *always* in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071 at 1079 (6th Cir. 1994) *citing Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979) (emphasis added).

The ostensible purpose of these public safety statutes is crime prevention and control, which, as we have noted, is a proper deployment of the government's police power. "The prospect of crime, however, by itself does not justify laws suppressing protected speech. [] 'Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech.'" *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) *citing Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (citations omitted).

As detailed above, certainly there is a public interest in preventing crime, but these statutes simply do not meet that intended goal. Because the Plaintiff's First Amendment rights are violated by these statutes, this prong of the injunction standard is also met.

CONCLUSION

The Plaintiff has met the rigorous elements for preliminary injunctive relief in the context of a restriction on his First Amendment rights by a law of the Commonwealth. As such, we respectfully request that the Court enjoin the Defendants or their agents from enforcing the provisions of KRS § 17.546(2), KRS § 17.510(10)(c) and KRS § 17.510(13)(a).

Respectfully Submitted this 11th day of May, 2015.

/s/ Scott White
Attorney for Plaintiff John Doe
Morgan & Pottinger, PSC
133 W Short Street
Lexington, KY 40507
O: 859.226.5288
F: 859-255-2038
tsw@m-p.net

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was filed via CM/ECF on all attorneys of Record on May 11, 2015.

/s/ Scott White