UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

DEAN FOX *Plaintiff,* v. REPRESENTATIVE JEREMY FAISON, State Representative, representing the 11th District of Tennessee House of Representatives, in his official capacity, *Defendant.*	Hon. Aleta A. Trauger Civil No. 3:22-cv-00691

REPRESENTATIVE JEREMY FAISON'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional and Statutory Provisions

INTRODUCTION

The Court should deny Plaintiff Dean Fox's request for a preliminary injunction. The law allows that "extraordinary and drastic remedy" only upon a "*clear showing*" of an entitlement to equitable relief. *Enchant Christmas Light Maze & Mkt. v. Glowco, LLC*, 958 F.3d 532, 539 (6th Cir. 2020) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1977)). Fox has not carried that burden. Jeremy Faison's personal decision to "block" Fox's Facebook account—using a feature available to every other Facebook user—is not fairly attributable to the State, so no cause of action exists under 42 U.S.C. § 1983. Moreover, the Free Speech Clause does not provide a constitutional right to post on privately owned, privately controlled social-media accounts, even accounts operated by government officials. Lacking a deprivation of rights, Fox cannot identify any irreparable harm. And the equities and public interest likewise cut against discretionary equitable relief, particularly given that Fox waited *over a year* after the challenged actions to file suit and seek preliminary relief.

BACKGROUND

This case involves a public official who blocked someone from posting on his privately owned Facebook page.

Facebook is a social-media platform that enables users to create accounts for the purpose of exchanging information and disseminating content through online "posts." Facebook generally allows users to create two types of accounts on its platform: "profiles" and "pages." *See* Ex. B. A profile typically consists of a picture, a banner image, and a "wall" where users can post pictures, videos, and other media. *See* Ex. C; Decl. Faison, ¶ 6. Whereas, a page acts as a public-facing webpage where artists, public figures, businesses, brands, organizations, and nonprofits can

promote themselves or provide information to those who have chosen to "follow"—i.e., interact with—their page. Exs. B, D.

Facebook gives page administrators (users with administrative privileges for a page) the ability to control the level of interaction on the page. Page administrators can allow Facebook users to create and publish posts directly on the page, or they can limit Facebook users to commenting in response to posts made by administrators. Ex. J. Facebook also provides tools to hide or delete comments, implement word restrictions on comments, limit access to the page by age or geography, and block user accounts from the page. *Id.*

If page administrators "block" user accounts from their page, it prevents those accounts from interacting with the page. Ex. L. Blocked accounts remain free to post on their own wall, on friends' walls, or anywhere else on Facebook that the accounts have access. *See id.* They simply cannot post directly on the page that has blocked their account. *Id.* And while a user cannot view a page when logged into a blocked account, D.E. 1 (Compl.) at 18 (¶ 53), the user can log out of the blocked account and continue to view the page since Facebook pages are accessible even to those without a Facebook account. Decl. Faison, ¶ 10; *see also* Ex. F.

Jeremy Faison created a Facebook profile in December 2008. Decl. Faison. ¶ 7. In 2015, he created a Facebook page named "Jeremy Faison." *Id.* ¶ 11. To prevent others from impersonating him on Facebook, Faison had his page "verified" in December 2019—a process whereby Facebook confirms the authenticity of a page or profile. *Id.* ¶ 17. After that verification, Facebook merged Faison's profile friend list with his page followers. *Id.* Faison also changed the page name to "State Representative Jeremy Faison." *Id.* ¶ 11.

Faison publishes a variety of posts on his page: some personal, others relating to campaign efforts, others related to legislative accomplishments, and still others akin to public service

announcements. *Id*. ¶ 16. While Faison has provided his legislative staff access to the page, no state employee has ever posted on the page, blocked a user account, or removed a comment. *Id*. ¶ 19. Only Faison and social-media consultants hired with campaign funds have posted on the page, and only Faison has removed comments and blocked user accounts. *Id*. ¶ 19-20.

Plaintiff, Dean Fox, has a history of posting harassing, inappropriate comments in response to posts on Faison's page. In July 2021, Fox commented: "Bill Barr, who would have done anything for the former President short of giving him a blow job, has said there was no fraud [in the election]. . . . Your own people have said there was no fraud. Deal with it." Ex. N. A couple weeks later, while engaging with another user on Faison's page, Fox stated: "It's just fun tormenting you. I leave bait, and you go for it like a big, stupid fish. . . . You . . . are neither a conservative nor a Republican – you're a cult member, and if people can't mess with stupid cult members, what's the point." Ex. O. In August 2021, in response to a post about mask mandates, Fox asserted that Faison had sold his soul, and "Satan has the receipts." Ex. P.

Soon thereafter, on September 6, 2021, consultants hired by Faison published a Labor Day post on Faison's page. Decl. Faison ¶ 20; *see also* Compl. at 14 (¶ 36). In response to comments on that post, Fox made an inflammatory comment directed at Faison. Decl. Faison. ¶ 26; *see also* Ex. M; Compl. at 16 (¶ 42). He asserted that Faison was "a selfish, power-hungry glad-hander whose only motivation is to keep dining at the trough." Ex. M. And, among other things, Fox also called Faison a liar who neglected his constituents. *Id.* Faison removed that comment (making it unviewable to the public) and blocked Fox's account from interacting with the page. Decl. Faison. ¶ 27.

A year later, Fox filed suit seeking an order requiring Faison to unblock his account and stop removing his comments from the Faison page. Fox's complaint alleges that Faison violated

the First Amendment of the U.S. Constitution, Compl. at 19 (¶¶ 54-62), as well as the parallel provision in Article 1, Section 19 of the Tennessee Constitution, Compl. at 20 (¶¶ 63-71). Nine days after filing his complaint, Fox moved for a preliminary injunction—asking this Court to up-end the status quo based on nothing more than a desire to post on Faison's Facebook page. For the reasons set out below, the Court should deny that motion.

ARGUMENT

There is no basis on which to grant Fox's requested relief. A preliminary injunction is an "extraordinary and drastic remedy." *Glowco*, 958 F.3d at 539 (quoting *Mazurek*, 520 U.S. at 972). It "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Id.* To do so, "[a] plaintiff . . . *must* establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, *and* [4] that an injunction is in the public interest." *Id.* at 535-36 (internal quotation marks omitted) (emphases added); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (clarifying that the plaintiff must establish all four factors).[1] Even then, the Court retains discretion to deny or limit relief as it deems appropriate. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982); *cf. GMA Accessories, Inc. v. Positive Impressions, Inc.*, 181 F.3d 82 (2d Cir. 1999) (unpublished) (noting that the district court could have denied equitable relief even if the plaintiff "had otherwise satisfied all of the prerequisites"). Fox has not carried the burden of persuasion at any step of the analysis.

[1] To the extent other Sixth Circuit case law excuses a plaintiff from establishing all four factors, it is inconsistent with *Winter* and should be disregarded. *See D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 328-29 (6th Cir. 2019) (Nalbandian, J., concurring).

I. Fox Has No Likelihood of Success on the Merits.

Fox's failure to show a "likelihood of success on the merits" is "fatal to [his] quest for a preliminary injunction." *Glowco*, 958 F.3d at 539 (cleaned up). Fox's contentions disregard the governing state-action standard, ignore the limits of First Amendment protections, and adopt internally inconsistent reasoning to avoid the government-speech doctrine. For each of these reasons, Fox cannot show a likelihood of success.

A. Faison's actions are not fairly attributable to the State.

Section 1983 provides a cause of action for the violation of federal rights by someone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. Public officials act "under color of state law" when they "exercise[] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (internal quotation marks omitted). But not every action taken by a government official exercises "some right or privilege created by the State." *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks omitted). The "cornerstone question" is whether the official's action is "fairly attributable" to the State. *Lindke v. Freed*, 37 F.4th 1199, 1203 (6th Cir. 2022).

In the context of social media, the state-action inquiry starts, as always, with the "identif[ication of] the specific conduct of which the plaintiff complains." *Sullivan*, 526 U.S. at 51 (internal quotation marks omitted). From there, the caselaw is a bit "murky as to when a state official acts personally and when he acts officially." *Lindke*, 37 F.4th at 1202. Some circuits have "focus[ed] on a social-media page's purpose and appearance." *Id.* at 1205-06. But the Sixth Circuit, in *Lindke v. Freed*, eschewed that approach and opted for a stricter, more regimented inquiry. *Id.* at 1206-07 (acknowledging the creation of circuit split on applicable state-action

standard). In this Circuit, courts analyze "whether [1] the official [wa]s performing an actual or apparent duty of his office, or [2] if he could not have behaved as he did without the authority of his office." *Id.* at 1202-03 (internal quotation marks omitted). A straightforward application of that test dooms Fox's claim.

1. The challenged actions fall outside of Faison's actual or apparent duties.

The challenged actions—blocking Fox's account and removing his post—were not performed as part of Faison's actual or apparent duties as a legislator. "[N]o state law, ordinance, or regulation compelled [Faison] to operate his Facebook page." *Id.* at 1204. And state law certainly did not impose a duty on Faison to remove Fox's post or block his account. *See Sullivan*, 526 U.S. at 51 (analyzing challenged conduct).

Nor does the administration of the page indicate that Faison acted to fulfill an actual or apparent duty. Contrary to Fox's contention, *see* D.E. 6-1 (Mot. Mem.) 4, 8; Compl. at 8 (¶¶ 23-24), Faison did not "rely on government employees to maintain his Facebook page." *Lindke*, 37 F.4th at 1205. While Faison provided his staff access to his page, they never posted any content on the page, never deleted comments by others, and never blocked any user account from engaging with the page. Decl. Faison, ¶¶ 13, 19. Put simply, Faison used no "employees . . . on the state's payroll" to manage his page or perform the challenged actions. *See Lindke*, 37 F.4th at 1204.

Similarly, Faison never expended "government funds [to] operate[] the page." *Id.* at 1204-05. Quite the contrary, the only money spent by Faison to operate his page came from *campaign funds*, Decl. Faison, ¶ 13, and campaigns are personal for purposes of § 1983, *see Campbell v. Reisch*, 986 F.3d 822, 827-28 (8th Cir. 2021). This use of personal funds only highlights that Faison operated his page and took the actions at issue "in the ambit of [his] personal pursuits," not as a part of his "official responsibilities pursuant to state law." *See Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001).

Fox's contrary arguments rest on an incorrect understanding of the governing state-action standard. Mot. Mem. 7-8. *Lindke*'s governing test does not ask whether Faison's actions merely "*relate*[] to his actual or apparent duties." Mot. Mem. 7 (emphasis added). Rather, it asks whether the challenged actions occurred during the "perform[ance] an actual or apparent duty of [the Representative's] office." *Lindke*, 37 F.4th at 1203. Fox can point to no such duty.

In fact, *Lindke* directly refutes the two arguments advanced by Fox here. *First*, relying on a vacated Second Circuit decision, Fox points to the fact that "[t]he posts on Representative Faison's page are addressed to constituents" as evidence of state action. Mot. Mem. 7 (citing of *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 234 (2d Cir. 2019), *judgment vacated sub nom. Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021)). But "[t]his argument proves too much." *Lindke*, 37 F.4th at 1205. When a government official "visits the hardware store, chats with neighbors, or attends church services, he isn't engaged in state action merely because he's 'communicating' [with constituents]—even if he's talking about his job." *Id.* The same goes for Facebook. The mere use of a Facebook page to communicate with constituents does not mean that every act related to that page is "state action." *Id.* The Sixth Circuit, in *Lindke*, explicitly "part[ed] ways with other circuits[]" that have adopted that boundless approach to state action. *Id.* at 1206-07 (citing *Knight*).

Second, relying on a Fourth Circuit decision, Fox claims that Faison engaged in state action by using his Facebook page to "further official duties and provide information to the public." Mot. Mem. 7 (citing *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019)). But, again, *Lindke* rejected that argument. There, a city manager included "posts about new policies" and "shar[ed] the policies he initiated" on his Facebook page, *Lindke*, 37 F.4th at 1201, but the Sixth Circuit found "there's nothing to suggest operating the page was [the manager's] official responsibility." *Id.* at

1205. And, again, *Lindke* specifically considered and rejected the authority relied upon by Fox. *Id.* at 1206 (citing *Davison*).

The governing test appropriately focuses on whether state law "compelled" performance of the challenged action. *Id.* at 1204. And Tennessee law unquestionably did not compel Faison's actions here.

2. The challenged actions did not depend on state authority.

Faison's use of his Facebook page, including the blocking function, does not involve any "right or privilege created by the State," *Sullivan*, 526 U.S. at 50, and is not "made possible only because [he] is clothed with the authority of state law," *West*, 487 U.S. at 49 (internal quotation marks omitted). An analysis of both the page as a whole and the specific acts challenged demonstrates that Faison did not wield state authority.

Faison's Facebook Page. Faison's Facebook page as a whole does not depend on his state authority. Anyone can create a Facebook page, not just state officials. And unlike, for example, the White House Facebook page or the @POTUS twitter account (over which the President may exercise control only by virtue of his office), Faison's page "d[oes] *not* belong to the office." *Lindke*, 37 F.4th at 1205 (emphasis added); *see also* Decl. Faison ¶ 21. The page belongs to Faison personally and "will belong to [him] after he leaves office." *Lindke*, 37 F.4th at 1204; *see also* Decl. Faison ¶ 23. Fox implicitly acknowledges as much by requesting injunctive relief that attaches to Faison personally, not his office. D.E. 6 (Mot.) at 4. Thus, the page itself in no way qualifies as a "right or privilege created by the State." *Sullivan*, 526 U.S. at 50.

According to Fox, various "factors" purportedly "demonstrate that Representative Faison's official page was created based on his authority as a state representative." Mot. Mem. 9. Fox starts by pointing out that the page includes a government email, "bears a 'Politician label'[,] and

describes [Faison] as 'representing the people of Cocke County.'" Mot. Mem. 9. But including this information does not require or even implicate the invocation of state authority. In fact, *Lindke* rejected the argument that mere inclusion of "a city address, email, and website on the Facebook page" could somehow be treated as the use of state authority. 37 F.4th at 1206.

Fox next claims that Facebook could not have "verified" the page without "the authority of [Faison's] office." Mot. Mem. 9. Not true. Facebook verifies pages for any number of reasons, and the pages of "public figures"—like Jeremy Faison—are verified independent of any government authority. *See* Decl. Faison ¶ 17.

Fox concludes by speculating as to the purpose of the Faison's page, claiming it "was not for personal use because [he] maintains a separate, [personal] Facebook profile." Mot. Mem. 9. But the fact that Faison has a profile separate from his page proves nothing. For one, to create a page, a user *must* have a separate Facebook profile. *See* Ex. B. More importantly, the state-action inquiry does not require an analysis of the subjective intentions underlying the use of a page. In the Sixth Circuit, "[i]nstead of examining a page's appearance *or purpose*, [courts must] focus on the actor's official duties and use of government resources or state employees." *Lindke*, 37 F.4th at 1206 (emphasis added). That is, whatever Faison's purposes in maintaining his page, Fox must point to a state law that "compelled" performance of the challenged action or to state authority exercised when performing that action. *Id.* at 1204. Fox can do neither.

At bottom, Fox asks this Court to rely on out-of-circuit precedent applying a "purpose and appearance" approach to determine whether "the presentation of the account is connected with the official's position." *Id.* at 1205-06. But that is not the governing test in the Sixth Circuit.

Challenged Actions. An analysis of "the specific conduct of which the plaintiff complains" only confirms the lack of state action. *See Sullivan*, 526 U.S. at 51 (quoting *Blum v. Yaretsky*, 457

U.S. 991, 1004 (1982)). "When [Faison] deleted comments and blocked [Fox's account] from the personal page, [he] exercised power granted by Facebook to all users, not authority he 'possessed by virtue of state law.'" *Sgaggio v. Weiser*, 2022 WL 252325, at *4 (D. Colo. Jan. 27, 2022) (quoting *West*, 487 U.S. at 49), *report and recommendation adopted*, 2022 WL 425240 (D. Colo. Feb. 8, 2022). Facebook—not the State of Tennessee—controls the platform and the features available to users. And, when blocking Fox's account, Faison used a feature available equally to every other Facebook user; he did not take action "made possible only because [he] is clothed with the authority of state law." *West*, 487 U.S. at 49 (internal quotation marks omitted).

Fox claims that Faison could not have "offer[ed] to support" constituents or "act[ed] upon the feedback elicited from constituents" without state authority. Mot. Mem. 8. But merely communicating with constituents does not require the use of state authority or create state action. *See supra* at 7. And any action taken by Faison *outside of Facebook* based on feedback received from constituents is untethered from the challenged conduct. The Supreme Court has "insisted *that the conduct allegedly causing the deprivation of a federal right* be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (emphasis added).

Rather than analyze "the specific conduct of which the plaintiff complains," *Sullivan*, 526 U.S. at 51, Fox relies on cherry-picked actions (which Fox characterizes as governmental) to treat other, *different* actions as governmental. That is, under Fox's view, the use of private property (a Facebook page) in a manner supposedly relating to official duties converts *all* acts related to that property (including blocking certain users) to state action. That approach leads to absurd results. Many public officials conduct business from their private homes, for example. That does not make every action taken by officials in their homes attributable to the State.

"By enforcing th[e] constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Faison has liberty interests in the use of his own property (his page) on a private forum (Facebook) in a manner available to all private citizens. Those interests are not negated unless the challenged actions involve the use of state authority, and they unquestionably do not. In short, there is no state action to which the First Amendment applies.

B. The First Amendment Does Not Regulate Private Speech on Private Property.

Even assuming the presence of state action, Fox cannot establish a constitutional violation. The First Amendment does not protect free speech on private property.[2] And Faison's decision to block Fox's account from his page does not impinge on Fox's broader ability to communicate.

1. The Free Speech Clause does not provide a constitutional right to post on privately owned, privately controlled social-media accounts.

The protections provided by the Free Speech Clause differ based on the type of property at issue. On government property, the First Amendment applies, and a "forum analysis" dictates "when a governmental entity, in regulating property in its charge, may place limitations on speech." *Christian Legal Soc. Chapter v. Martinez*, 561 U.S. 661, 679 (2010); *see Int'l Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (explaining the "'forum based' approach for assessing restrictions that the government seeks to place on the use of *its property*" (emphasis added)). But, generally, the First Amendment does *not* govern speech restrictions on private property or provide a constitutional right to access private property for expression. *See Hudgens*

[2] Although Fox's complaint includes a claim under the Tennessee Constitution, his request for a preliminary injunction focuses entirely the U.S. Constitution—meaning that Fox forfeited any argument that the state-law claim supports a preliminary injunction. *See Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31, 80 (D.D.C. 2020). Regardless, "Tennessee does not recognize a private cause of action for violations of the Tennessee Constitution." *Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1996).

v. NLRB, 424 U.S. 507, 520-21 (1976); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972); *cf. Manhattan Cmty.*, 139 S. Ct. at 1930 ("[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment . . . ."). Only when private property qualifies as a "government-controlled space[]" do the restrictions of the Free Speech Clause apply. *See Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018).

Under the government-control doctrine, courts treat private property as government property and apply the concomitant forum analysis *if* the government exercises substantial control over the private property at issue. *See, e.g.*, *Se. Promotions v. Conrad*, 420 U.S. 546, 547, 555 (1975) (holding that "a privately owned Chattanooga theater under long-term lease to the city" was a "public forum[]"). But the government must control the forum itself—after all "[t]he First Amendment, by its terms, prohibits only *governmental* abridgment of speech." *Campbell*, 986 F.3d at 824 (emphasis added). An example illustrates the point: "[A] government agency that leases a conference room in a hotel to hold a public hearing about a proposed regulation cannot kick participants out of the hotel simply because they express concerns about the new regulation." *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring). On the other hand, "government officials who informally gather with constituents in a hotel bar can ask the hotel to remove a pesky patron who elbows into the gathering to loudly voice his views." *Id.* "The difference is that the government controls the space in the first scenario, the hotel, in the latter." *Id.*

Applying these principles to Faison's Facebook page demonstrates the weakness of Fox's First Amendment claim. Facebook is a "privately owned channel[] of communication." *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1011 (E.D. Ky. 2018); *see also Sgaggio*, 2022 WL 252325 at *4 (same). The State does not own the Facebook platform; it does not even own the Facebook page

at issue. Decl. Faison ¶ 21, 23. And the government exercises no control over the forum or the interactive features on the page. A private company, Facebook, has ultimate control and decides how content is moderated in its forum.

That should end the inquiry. The Supreme Court has repeatedly rejected attempts to impose free-speech restrictions on private property that the government does not control. *See, e.g.*, *Hudgens*, 424 U.S. at 520-21*; Lloyd*, 407 U.S. at 569. And Facebook pages are private property over which the government exercises no control. *Morgan*, 298 F. Supp. 3d at 1011; *Sgaggio*, 2022 WL 252325 at *4.

Fox nevertheless contends that "the interactive portion [of the page]—namely, the public comments section—constitutes a public forum." Mot. Mem. 13. But private property "is not converted to a public [forum] merely because the Defendant . . . is a public official." *Sgaggio*, 2022 WL 252325 at *4; *see also Morgan*, 298 F. Supp. 3d at 1011. "Nor does property lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd*, 407 U.S. at 569. Were the rule otherwise, "all private property owners . . . who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise" control over their property. *Manhattan Cmty.*, 139 S. Ct. at 1930-31.

"Where, as here, private parties control the avenues for speech, [the] law has typically addressed concerns about stifled speech through other legal doctrines, which [in turn] may have a secondary effect on the application of the First Amendment." *Knight First Amend.*, 141 S. Ct. at 1222 (Thomas, J., concurring); *see Morgan*, 298 F. Supp. 3d at 1011 (holding that a Facebook page "is unlike any type of property typically protected by First Amendment forum analysis law"). It makes little sense to "say that something is a government forum when a private company has unrestricted authority to do away with it" and the government exercises no control. *Knight First*

Amend., 141 S. Ct. at 1221 (Thomas, J., concurring). The First Amendment does not apply to the private property at issue in this case.

2. Faison did not restrain Fox's ability to speak.

Faison denied Fox access to private property, but he did not restrain Fox's ability to speak or to communicate. Fox is not "blocked from speaking on . . . Facebook." *Morgan*, 298 F. Supp. 3d at 1013. He remains "free to post on [his] own wall[] and on friends' walls" about Faison. *Id.* He remains free to exchange information and ideas on Facebook. And, contrary to the complaint's allegation, Fox even remains free to "view[]" Faison's page "to stay informed about legislative decisions in Tennessee," Compl ¶¶ 35, 53, as the entire public can view the page (even if they do not have a Facebook account). Decl. Faison ¶ 10; *see also* Ex. F.

Faison simply prevented Fox from posting messages directly on his page. If an official distributed a "newsletter" and solicited public input in response, the Court would not deprive that official of the discretion to choose what responses to publish. *Cf. Campbell*, 986 F.3d at 827. The same goes here. "Nothing in the First Amendment or in [the Supreme] Court's case law . . . suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues"—let alone publish their thoughts. *See Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 285 (1984); *Smith v. Arkansas State Highway Emp., Loc. 1315*, 441 U.S. 463, 465 (1979).

Put simply, blocking Fox's account did not stifle his speech; it merely prevented Fox from interacting directly with, and speaking directly on, private property.

C. Alternatively, Faison's Facebook page constitutes government speech.

Fox contends that Faison's page contains governmental involvement and control so pervasive that the constitutional restraints applicable to state action and government property

should govern. That is wrong. *See supra* Part I.A-B. But if Fox were correct, then the page would reflect government speech to which the First Amendment does not apply.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). If, as Fox contends, Faison's "page as a whole" constitutes state action and the government controls the forum, Mot. Mem. 9, 13, then Faison has the "freedom to select the messages [he] wishes to convey" through the page—just as he would through a newsletter. *See Walker v. Texas Div., Sons of Confederate Veterans*, 576 U.S. 200, 208 (2015) (internal quotation marks omitted). Fox has no right to piggyback off Faison's Facebook posts (which Fox admits constitute government speech, Mot. Mem. 13) to amplify his voice and convey his own message on the page. "A person's right to speak is not infringed when government simply ignores that person while listening to others." *Minnesota State Bd.*, 465 U.S. at 288.

Fox claims that "[a]lthough portions of social media accounts controlled by government users can qualify as government speech," the "interactive portion" that allows public comment is not government speech. Mot. Mem. 13. That argument is entirely inconsistent with Fox's position on state action. Fox focuses broadly on the status of the "page as a whole" for purposes of state action, Mot. Mem. 9, and then narrowly focuses on a specific aspect of the page for purposes of government speech. He cannot have it both ways. If Faison's posts and page status somehow transformed his blocking decisions into governmental action, Mot. Mem. 7-9, then they likewise transformed his blocking decisions into governmental speech—i.e., an official refusal to consider Fox's speech and convey Fox's message. In other words, if Faison's page were governmental, then the account would convey a government message in both the posts themselves *and* in the page's "interactive space."

* * *

"Though [Fox] and others may not like how [Faison] runs h[is] page, the place to register that disagreement is at the polls or, at least, on [Fox]'s own page." *Campbell*, 986 F.3d at 827-28 (cleaned up). For the three independent reasons laid out above, Fox fails to establish a likelihood of success on his claims.

II. The Other Equitable Factors Favor Faison.

Equity also cuts against preliminary relief. The doctrine of laches bars Fox's request for a preliminary injunction. And the remaining preliminary-injunction factors weigh further against relief: Fox fails to bear his burden of establishing irreparable harm, ignores the harm an injunction would impose on Faison's free-speech rights, and disregards the public's interest. The Court can and should deny Fox's request for preliminary relief on these independent grounds.

A. Fox's delay in suing should foreclose preliminary relief.

Fox's year-long delay alone justifies denial of his motion for preliminary injunctive relief under the laches doctrine. This Court's power to issue injunctions is bounded by the principles of equity, *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982), and "equity will not aid those who have slept upon their rights," *Cont'l Can Co. v. Graham*, 220 F.2d 420, 422 (6th Cir. 1955). "A district court thus enjoys considerable discretion to apply . . . laches to a particular equitable remedy," such as a preliminary injunction or temporary restraining order. *See A.S. v. Lee*, 2021 WL 3421182, at *2 (M.D. Tenn. Aug. 5, 2021). The laches doctrine generally kicks in when a "lack of diligence" has "prejudice[d]" a defendant. *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 793 (M.D. Tenn. 2020) (quoting *United States v. Loveland*, 621 F.3d 465, 473 (6th Cir. 2010)).

Here, Fox's lack of diligence has prejudiced Faison. Fox had "everything [he] needed to file the present lawsuit" a year before he initiated litigation. *See Corizon, LLC v. Wainwright*, 2020 WL 6323134, at *7 (M.D. Tenn. Oct. 28, 2020). Yet, he failed to press his (supposed) free-speech rights. Waiting over a year before "asking for a preliminary injunction was far too long." *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057, 1062 n.27 (7th Cir. 2016) (two month delay inexcusable); *see Corizon*, 2020 WL 6323134 at *7 (three-month delay inexcusable).

"[N]ot much prejudice is required given the substantial delay." *Hargett*, 473 F. Supp. 3d at 800. And the prejudice is evident here: Faison has structured his operations based on the reasonable expectation that he could communicate campaign messages and other information to the public through a Facebook page conveying *his message*. If an injunction issues now, it would "disturb[] expectations reasonably formed based on the status quo and impart[] expectations-based prejudice." *A.S.*, 2021 WL 3421182 at *8.

On laches grounds alone, this Court should deny relief.

B. Fox has not demonstrated irreparable harm.

Fox also fails to bear his "burden of establishing a clear case of irreparable injury," *Garlock v. United Seal*, 404 F.2d 256, 257 (6th Cir. 1968). Fox offers three distinct arguments in support of irreparable injury. Each fails.

First, Fox says irreparable harm necessarily flows from his alleged deprivation of rights. Mot. Mem. 14. Not so. Although a demonstrated "threat[]" to First Amendment rights could "mandate[]" "a finding of irreparable harm," *ACLU of Ky. v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003), Fox has established no such threat. And his choice to wait a year before pressing his claim undermines the legal fiction that the denial of rights constitutes irreparable harm.

Second, Fox claims that he "cannot view the content posted on the 'State Representative Jeremy Faison' page." Mot. Mem. 14. Not true. Fox can, in fact, view Faison's page. Decl. Faison ¶ 10; Ex. F. The page is viewable by the public; all Fox has to do is use an internet browser that is not logged into his Facebook account. *Id.*

Third, Fox points out that he cannot "comment directly on [the page's] posts." Mot. Mem. 14. But Fox's general inability to post directly on the page hardly qualifies as a "certain and immediate" irreparable injury. *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020). Even assuming a constitutional violation, Fox's claimed injury remains "speculative [and] theoretical" until he identifies a particular post that he wishes to comment on. *Id.* And, even then, no irreparable harm exists because Fox remains free to express his thoughts anywhere on Facebook (and off Facebook) except on Faison's privately owned page. *Supra* at 14.

C. The balance of equities favor Faison.

The balance of the equities tips sharply in favor of denying an injunction. The only material impact that blocking Fox's account has on Fox's ability to express himself on Facebook is that it prevents him from speaking directly to Faison by responding to posts on his page—one of many avenues of expression on the Facebook platform. An injunction requiring Faison to unblock Fox, on the other hand, would interfere with his communications operations and significantly impair Faison's First Amendment rights.

"[A] citizen who works for the government is nonetheless a citizen," so the First Amendment protects the right of public officials to "speak[] as citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). That includes the ability "to exclude a message [one does] not like from the communication [one chooses] to make." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 574 (1995). If forced to unblock Fox's account and cease removing his comments,

though, Faison would be largely deprived that right. He would be unable "to select h[is] audience and present h[is] page as []he sees fit"—effectively gutting his ability to freely associate and use Facebook as a channel to communicate his message. *See Campbell*, 986 F.3d at 827; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

Fox conspicuously ignores the concrete harm Faison would suffer, claiming that his posts contain "no inaccurate information." Mot. Mem. 15. That contention is, ironically, inaccurate. Fox has not proven that Faison is "a selfish, power-hungry glad-hander whose only motivation is to keep dining at the trough." Ex. M. Nor that Faison "lied about racial issues," "helped exacerbate the pandemic," or "neglect[ed] the people of [his] district." *Id.* Yet, Fox wants to force Faison to transmit those very messages to followers of *his own page*. Reality—and basic common sense—refute Fox's characterization of the harm as merely the "inconvenience" of taking a few minutes to unblock Fox. *See* Mot. Mem. 15.

Analyzing the comparative harm, the balance of equities weighs heavily against an injunction that modifies that status quo.

D. The public interest weighs against injunctive relief.

The public interest also weighs against preliminary relief. Faison's constituents and the public generally have an "interest in receiving information" through Faison's page. *See Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 538 (6th Cir. 2020) (quoting *Banks v. Wolfe Cty. Bd. of Educ.*, 330 F.3d 888, 896 (6th Cir. 2003)). An injunction allowing Fox to drown out and distract from the messages conveyed would significantly diminish the value and functionality of the page and, as a result, harm the public.

Worse still, an injunction would deter public officials—including Faison—from using social media to communicate to a broad public audience. Social media has provided the public

unprecedented access to the government as well as the views, lives, and campaign messages of elected officials. But if officials were forced to accept all comments on their page, their social media pages inevitably would be "overrun with harassment, trolling, and hate speech, which officials [would be] be powerless to filter." *Knight First Amend. Inst. v. Trump*, 953 F.3d 216, 231 (2d Cir. 2020) (Park, J., dissenting from the denial of rehearing en banc). Faced with "the unappetizing choice of allowing all comers or closing the platform altogether," *Manhattan Cmty.*, 139 S. Ct. at 1931, many public officials (from both sides of the aisle) will choose to shut down their accounts. That would harm, not help, the public. The public interest favors encouraging officials to communicate and make themselves available through social media, not imposing an all-comers policy that would "have the unintended consequence of creating *less* speech." *Knight First Amend.*, 953 F.3d at 231 (Park, J., dissenting) (emphasis added).

Fox ignores these interests and, instead, rests his public-interest argument on the erroneous theory that the First Amendment guarantees him a right to express himself on someone else's private property. *See* Mot. Mem. 16-17. But Plaintiff has not shown a likelihood of success on that claim. *See supra* Part I. And, again, Fox's contention that Faison has prevented him "from sharing [critical] views" to "the public" is simply not accurate. Mot. Mem. 17. Faison has not prevented Fox from expressing himself on Facebook or more generally; he has simply prevented Fox from commandeering private property to amplify his expression.

The public interest cuts against this Court's intervention, especially at this early stage.

CONCLUSION

The Court should deny the motion for preliminary injunctive relief.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

J. MATTHEW RICE (BPR# 040032)
Special Assistant to the Solicitor General

/s/Pablo A. Varela
PABLO A. VARELA (BPR# 029436)
Assistant Attorney General
Office of the Attorney General and Reporter
P.O. Box 20207
Nashville, Tennessee 37202-0207
Off. (615) 741-7069
Fax (615) 532-4892
Pablo.Varela@ag.tn.gov

Counsel for Representative Jeremy Faison

CERTIFICATE OF SERVICE

I certify that I filed the above document using the Court's CM/ECF system on October 18, 2022, which electronically served a copy to all counsel of record:

Susan L. Kay
Susan.kay@vanderbilt.edu
Jennifer Safstrom
Jennifer.safstrom@vanderbilt.edu
William Anderson
Jamie Michael
Daniel Kopolovic

Vanderbilt Law School Stanton Foundation First Amendment Clinic
131 21st Ave South
Nashville, TN 37203-1181
(615) 322-4964

Date: October 18, 2022

/s/Pablo A. Varela
PABLO A. VARELA