No. 20-5852

In the United States Court of Appeals
for the Sixth Circuit

JOHN DOE; TARA BLESSING; CHRIS BLESSING, Parents and Natural Guardians of their minor son Next Friend Charles B. Blessing; JENNIFER FOUST; JOHN FOUST, Parents and Natural Guardians of their minor son Next Friend Austin Foust; GINA FRIES; DANIEL FRIES, Parents and Natural Guardians of their minor son Next Friend William Fries; SHANNON CRAIG; ANTHONY GARDNER, Parents and Natural Guardians of their minor son Next Friend Evan Anthony Gardner; LORI GRAY; MICHAEL GRAY, Parents and Natural Guardians of their minor son Next Friend Liam Gray; SAUNDRA SMITH; MICHAEL SMITH, Parents and Natural Guardians of their minor son Next Friend Charlie Smith; ERIC CURK; ANDREW GIBSON; PATRICK KENNEDY; WYATT SCHWARTZ; BRADLEY KATHMAN; NADINE PALEY; KEVIN PALEY, Parents and Natural Guardians of their minor son Next Friend Sam Paley

Plaintiffs – Appellants

v.

KATHY GRIFFIN

Defendant – Appellee

Appeal from the United States District Court, Eastern District of Kentucky at Covington, Case No. 2:19-cv-00126, Hon. William O. Bertelsman

BRIEF OF APPELLEE KATHY GRIFFIN

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. App. R. 26.1 and 6 Cir. R. 26.1, Defendant-Appellee Kathy Griffin makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **No**.
2. Is there a publicly-owned corporation, not a party to the appeal that has a financial interest in the outcome of this case? **No**.

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STATEMENT ON ORAL ARGUMENT

Ms. Griffin disagrees with Plaintiffs-Appellants' statement that this case involves any issues of first impression under Kentucky law, but agrees that it does involve substantial Constitutional questions that are of wide public interest. Ms. Griffin therefore respectfully requests oral argument.

STATEMENT OF ISSUES FOR REVIEW

I. Whether the District Court correctly concluded that Ms. Griffin did not waive her personal jurisdiction defense by the mere filing of an attorney notice of appearance when she filed a motion to dismiss based on lack of personal jurisdiction pursuant to FRCP 12(b)(2) just two weeks later and there had been no prior proceedings in the case.

II. Whether the District Court correctly concluded that Ms. Griffin's publication while in California of social media posts addressed to a national audience concerning the conduct of students from a Kentucky high school during a controversial and highly publicized event occurring at the Lincoln Memorial in Washington, D.C. are an insufficient basis to establish personal jurisdiction over Ms. Griffin under Kentucky's long-arm statute and the Due Process Clause.

III. Alternatively, whether the Complaint fails to state a viable claim for relief for the violation of criminal harassment, threatening and menacing

statutes or invasion of privacy where such claims are premised on Ms. Griffin's publication of four comments on Twitter addressed to a national audience concerning the conduct of students from a Kentucky high school during a controversial and highly publicized event occurring at the Lincoln Memorial in Washington, D.C.

IV. Whether, as applied to Ms. Griffin's tweets, the state tort law claims asserted in the Complaint can withstand strict scrutiny under the First Amendment.

STATEMENT OF THE CASE

Plaintiffs' Allegations

On January 18, 2019, Plaintiffs, who at the time were Covington Catholic High School ("CCHS") students, participated in a March for Life rally in Washington, D.C. (Complaint, R. 1, Page ID #2-3 ¶¶2, 5) After the March, Plaintiffs assembled at the Lincoln Memorial. (*Id.*, Page ID #3 ¶5) There, "an incident occurred involving CCHS students, including Plaintiffs, and other visitors such as Nathan Phillips, a self-described Native American Elder." (*Id.*) The Complaint alleges that "[i]mages of Plaintiffs and the Lincoln Memorial incident were disseminated world-wide, including through media broadcasts and publications, social media interchanges, and other internet communications, igniting a profound and powerful controversy concerning the Lincoln Memorial

incident and the Plaintiffs." (*Id*., Page ID #4 ¶6) According to the Complaint, the incident "incited a hoard of reactive commentary, often consisting of vile, hateful, and noxious narrative and opinion." (*Id*. ¶7)

On January 20, 2019, Ms. Griffin, from her residence in California, published the following on her Twitter account, @kathygriffin:

> *Ps. The reply from the school was pathetic and impotent. Name these kids. I want NAMES. Shame them. If you think these fuckers wouldn't dox you in a heartbeat, think again.*

(*Id*., Page ID #4 ¶11; *see* Complaint Exhibit. 1, R. 1-1, Page ID #11) This tweet linked to a *ThinkProgress* website news article that included video footage from the Lincoln Memorial incident, and also linked to a tweet from Fox television host Laura Ingraham supporting the student March for Life participants. (Complaint Exhibit 1, R. 1-1, Page ID #11)

Shortly thereafter, Ms. Griffin tweeted the following:

> *Names please. And stories from people who can identify them and vouch for their identity. Thank you.*

(Complaint, R. 1, Page ID #4-5 ¶12; *see* Complaint Exhibit 2, R. 1-2, Page ID #12)

A few hours later on the same day, Ms. Griffin tweeted as follows:

> *Maybe you should let this fine Catholic school know how you feel about their students behavior toward the Vietnam veteran, Native American #NathanPhillips.*

(Complaint, R. 1, Page ID #5 ¶13; *see* Complaint Exhibit 3, R. 1-3, Page ID #23)

The next morning, another Twitter user posted a photo of CCHS student Nicholas Sandmann next to a photo of Supreme Court Justice Brett Kavanaugh, stating that they shared the "look of white patriarchy." In response, Ms. Griffin tweeted as follows:

> *Oooh gurrrl, you've triggered lots of verrry threatened bros. Yummy. It's delicious.*

(Complaint, R. 1, Page ID #5 ¶14; *see* Complaint Exhibit 4, R. 1-4, Page ID #14)

Relevant Procedural History

On November 16, 2019, Plaintiffs filed a Complaint in the United States District Court for the Eastern District of Kentucky asserting five claims against Ms. Griffin based on her four tweets. (Complaint, R. 1, Page ID #1-10) Four of Plaintiffs' claims are premised on KRS 446.070, which creates a private right of action for the violation of penal statutes. (*Id.* ¶¶ 23-47) The Complaint alleges that by publishing her four tweets, Ms. Griffin violated criminal statutes prohibiting harassment, terroristic threatening, and menacing. (*Id.*) Plaintiffs' fifth claim for invasion of privacy is based on allegations that by publishing her tweets, Ms. Griffin "intruded upon the solitude or seclusion of the Plaintiffs in their private affairs or concerns[.]" (*Id.* ¶49)

On October 22, 2019, counsel for Ms. Griffin filed a one-page form document entitled "Appearance of Counsel" (R. 6, Page ID #28) and a *pro hac vice* motion (R. 7, Page ID #29-31). On November 8, 2019, Ms. Griffin filed her Rule

12(b) motion to dismiss for lack of personal jurisdiction and failure to state a claim. (Motion, R. 9, Page ID #32-34) In seeking dismissal, Ms. Griffin argued that she was not subject to Kentucky long-arm jurisdiction and the exercise of jurisdiction over her would offend due process. (Memorandum, R. 9-1, Page ID #45-48) Ms. Griffin further argued that the Complaint was subject to dismissal pursuant to Rule 12(b)(6) on the grounds Plaintiffs failed to state viable claims against her and Plaintiffs' claims were barred by the First Amendment. (*Id.*, Page ID #48-56)

Plaintiffs filed their opposition to Ms. Griffin's motion on November 11, 2019. (R. 14, Page ID #70-102) Among other things, Plaintiffs argued that Ms. Griffin waived her personal jurisdiction defense when her attorney filed his Appearance of Counsel. (*Id*., Page ID #84-85) Ms. Griffin filed her reply brief on December 18, 2019. (R. 18, Page ID #113-134).

The District Court (Hon. William O. Bertelsman) heard oral argument on Ms. Griffin's motion to dismiss on March 10, 2020, during which Plaintiffs raised the argument — not addressed in the Complaint or their briefing — that Ms. Griffin's tweets constituted "true threats" and, as such, provided the Court with personal jurisdiction over her pursuant to KRS 454.210(2)(a)(3). (Transcript, R. 47, Page ID #304-307) The Court ordered additional briefing on the question of personal jurisdiction (Order, R. 34, Page ID #178), and the parties filed

supplemental memoranda on March 16, 2020 (Pl. Memorandum, R. 35, Page ID #179-188; Def. Memorandum, R. 36, Page ID #189-204).

On April 9, 2020, the District Court issued a Memorandum Opinion and Order ("Dismissal Order") granting Ms. Griffin's motion to dismiss for lack of personal jurisdiction and entered Judgment dismissing the matter without prejudice. (Dismissal Order, R. 38, Page ID #220-234) The District Court rejected Plaintiffs' argument that Ms. Griffin waived her personal jurisdiction defense, finding no basis for such a waiver. (Dismissal Order, R. 38, Page ID #223-225) The District Court concluded that Plaintiffs failed to establish that Ms. Griffin was subject to personal jurisdiction under the Kentucky long-arm statute (*Id*., Page ID #226-231), and that the exercise of jurisdiction over Ms. Griffin would offend due process. (*Id*., Page ID #231-234)

Plaintiffs filed a motion for reconsideration of the District Court's Dismissal Order on May 6, 2020 (Motion, R. 40, Page ID #236-237), arguing that the Court had committed a "clear error of law" and "to prevent manifest injustice." (Memorandum, R. 40-1, Page ID #238-249) Ms. Griffin filed her response on May 21, 2020 (Response, R. 41, Page ID #251-263), and Plaintiffs filed their reply brief on June 3, 2020 (Reply Brief, R. 42, Page ID #265-272). On June 23, 2020, the District Court issued a Memorandum Opinion and Order denying Plaintiffs' motion for reconsideration in its entirety ("Reconsideration Order").

(Reconsideration Order, R. 43, Page ID #273-289) Plaintiffs timely filed a notice of appeal from the Dismissal and Reconsideration Orders and Judgment. (Notice, R. 44, Page ID #281-282)

SUMMARY OF THE ARGUMENT

This appeal tests a core feature of our democracy: the ability to participate in debate on a public issue without fear of punishment under state law. It arises out of a controversial and widely publicized incident in which Plaintiffs, students who attend CCHS in Kentucky, encountered a Native American Elder at the Lincoln Memorial following the March for Life in Washington, D.C., in January of last year. In an attempt to stifle protected speech on a matter of legitimate public concern, Plaintiffs seek to impose tort liability on comedian Kathy Griffin for statements she made on Twitter calling out their conduct in connection with the incident. The First Amendment prohibits them from doing so. Thus, whatever theory of recovery Plaintiffs bounce to, the Complaint fails to state a viable claim.

Without reaching the constitutional merits of Plaintiffs' claims, the District Court correctly dismissed their Complaint for lack of personal jurisdiction over Ms. Griffin, a resident of California. That she published comments accessible to anyone who uses Twitter does not give Plaintiffs jurisdictional recourse in a Kentucky court to complain about her statements. Neither Kentucky's long-arm statute nor the Constitution's Due Process clause permitted the District Court to

exercise personal jurisdiction over Ms. Griffin for her out-of-state expressive activity. As Judge Bertelsman held in following established precedent, the use of an electronic communications platform to publish information, absent more, is insufficient to establish personal jurisdiction in any forum where an online statement allegedly injures someone. Plaintiffs' arguments attempting to overcome this barrier would throw the courthouse doors open for social media commentators to face suit in any and all jurisdictions, thereby demolishing traditional due process limitations on a forum's adjudicative authority over a nonresident defendant. Twice, the District Court correctly rejected as incompatible with the requirements of FRCP 12 and irreconcilable with this Circuit's case law Plaintiffs' argument that Ms. Griffin waived her personal jurisdiction defense by the routine administrative filing of a single-page Appearance of Counsel.

Although the District Court correctly dismissed this case because it lacked jurisdiction over Ms. Griffin, that ground for dismissal is ancillary to the fact that Plaintiffs have failed to state a claim upon which relief may be granted. Ms. Griffin moved for dismissal on that basis in addition to the jurisdictional ground, but the District Court opted not to rule on that issue in light of its decision finding an absence of personal jurisdiction. But this Court may affirm the dismissal for reasons presented to, but not considered by, the District Court. Given that Plaintiffs' Complaint is so obviously lacking in merit, it would be appropriate for

this Court to dismiss on that basis and definitively end this litigation, once and for all.

Plaintiffs' claims fail as a matter of law because the Kentucky criminal statutes pleaded in the Complaint — Harassment, Harassing Communications, Terroristic Threatening, and Menacing — on their face do not apply to Ms. Griffin's tweets *to the public*. Each of these laws applies to conduct by an alleged aggressor that is *personally directed against the complainant*. The Complaint itself makes clear that Ms. Griffin never spoke to, addressed, or communicated with Plaintiffs in any way. Rather, she simply broadcast her views to the public. The substance of the tweets also did not invite or threaten any imminent physical harm or danger. Ms. Griffin's tweets are outside the purview of the statutes cited by Plaintiffs as a matter of law.

As the preceding paragraph makes clear, Ms. Griffin's adding her voice to public discourse on social media cannot be labeled as "doxing," criminal conduct, or a "true threat." These arguments — manufactured by Plaintiffs to try and evade the obvious jurisdictional impediments to suing Ms. Griffin in Kentucky — are plainly unavailing. They assign a meaning to her tweets that they cannot reasonably bear. Ms. Griffin did not release any private personal information about Plaintiffs, and did not call for anyone else to do so. Moreover, this case involves no criminal act or conduct apart from Ms. Griffin's alleged violation of

Kentucky statutes by engaging in pure political speech on a social media platform. And while many might disagree with her point of view, and find her choice of words distasteful, for constitutional purposes she made no true threats — a theory of recovery nowhere alleged in the Complaint — or otherwise made any unprotected comments.

Should this Court elect to reach the First Amendment issues at the heart of this case, the Complaint's statutory claims are concededly based on the *content* of Ms. Griffin's speech. To the extent the Kentucky statutes relied on by Plaintiffs could be read to cover Ms. Griffin's Twitter commentary, they are therefore subject to strict scrutiny under the First Amendment. Yet, in the context of this case, those statutes fail to serve a compelling state interest and are not narrowly tailored. They are therefore overbroad and unconstitutionally invalid as applied to Ms. Griffin's statements. They collide with the established principle that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). The tweets challenged by Plaintiffs are constitutionally protected forms of expression and cannot be punished by state law claims, whether sounding in civil harassment or related statutes or invasion of privacy.

Thus, the District Court's Judgment should be affirmed, either because personal jurisdiction cannot be maintained over Ms. Griffin in Kentucky, or because the Complaint's causes of action are defectively pleaded and are barred by the First Amendment.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY APPLIED SIXTH CIRCUIT PRECEDENT IN REJECTING PLAINTIFF'S WAIVER THEORY

A. Ms. Griffin Did Not Waive Her Personal Jurisdiction Defense.

Ms. Griffin properly asserted the defense of lack of personal jurisdiction in moving to dismiss the Amended Complaint pursuant to FRCP 12. Her attorneys filed a routine "Appearance of Counsel" on October 22, 2019 (Appearance of Counsel, R. 6, Page ID #28), and promptly filed her motion to dismiss on November 8, 2019 (Motion to Dismiss, R. 9, Page ID #32-34). It could hardly have come as a surprise to Plaintiffs that if they sued Ms. Griffin 2,000 miles from her home for something she said in California, she would contest jurisdiction. Ms. Griffin did so by threshold motion practice as authorized by Rule 12(b)(2).

In support of their contention that a defendant waives a personal jurisdiction defense merely by filing a notice of appearance, Plaintiffs rely on this Court's split decision in *Gerber v. Riordan*, 649 F.3d 514 (6th Cir. 2011), which is not nearly as blunt and untextured as Plaintiffs would have it. To determine whether personal

jurisdiction has been waived through conduct, *Gerber* made clear that "'a defendant must give a plaintiff a reasonable expectation that it will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking.'" *Id*. at 519 (quoting *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir. 2010)). In applying this standard, *Gerber* painstakingly recounted the numerous litigation activities conducted by the defendants for ***almost three years*** before they contested personal jurisdiction. The case was filed in June 2006, and after initially filing a defective motion to dismiss for lack of personal jurisdiction, the defendants filed their notice of appearance and then waited until April 2009 to renew their motion to dismiss. *Gerber,* 649 F.3d at 518. In the meantime, the defendants participated in discovery, mediation, case management conferences, and Rule 26 exchanges. *Id*. at 518-19. They consented to the magistrate judge's jurisdiction, and even went so far as to file several motions, including for a stay to conduct mediation, to vacate a default judgment, and to enforce a settlement agreement. *Id*. at 516-17. As the *Gerber* court noted, only "[a]fter participating in the above-described proceedings" and drawing extensively on the resources of the trial court did the defendants seek to litigate their personal jurisdiction defense. *Id*. at 517.

There were no such "above-described proceedings" in this case. Prior to any substantive pleadings, Ms. Griffin's counsel filed a single page "Appearance of Counsel" and immediately followed it with a Rule 12 motion challenging personal jurisdiction as her "first defensive move." 2A J. Moore & J. Lucas, MOORE'S FEDERAL PRACTICE ¶ 12.23 (2d ed. 1982). Unlike the defendants in *Gerber*, Ms. Griffin has "consistently and diligently protested personal jurisdiction," *Chinnock v. Navient Corp.*, 2018 WL 5312462, *2 (N.D. Ohio Oct. 26, 2018), and "did nothing to lead plaintiffs or the [district] [c]ourt to believe that such defense would not be asserted." (Reconsideration Order, R. 43, Page ID #275) In sum, she took no actions that caused the district court "to engage in any efforts that would be wasted if such defense proved successful" (Dismissal Order, R. 38, Page ID #225) or that amounted to "a legal submission to the jurisdiction of the court." *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 905 (6th Cir. 2006). *Gerber* is therefore readily distinguishable on its facts. (Reconsideration Order, R. 43, Page ID #274)

To borrow a phrase, Plaintiff's argument that the district court failed to apply *Gerber* as controlling precedent "is not well taken." (*Id.*, Page ID #273) Plaintiffs gloss over that *Gerber* is not a "first filing" case as they use that term, where a general appearance by defense counsel precedes all other submissions to the court. Rather, a careful reading of *Gerber* confirms that, as their first step in that case, the defendants "filed a motion to dismiss the amended complaint for lack

of personal jurisdiction," and subsequently entered a general appearance while engaging in extensive litigation conduct and electing not to pursue their jurisdictional motion. 649 F.3d at 516. And as Judge Bertelsman correctly pointed out, *Gerber*'s holding — which Plaintiffs aggrandize in a manner that would nullify the waiver by conduct standard it adopted — has been circumscribed as incompatible with established precedent from this Court.[1] (Reconsideration Order, R. 43, Page ID #273-274)

For example, in *King v. Taylor*, a case decided thirteen months later, this Court rejected *Gerber* as not controlling and held that the filing of an attorney's notice of appearance alone does not relinquish an insufficient service of process

[1] To bolster their narrow reading of *Gerber*, Plaintiffs rely solely on *M & C Corp. v. Erwin Behr GmbH & Co.*, 508 Fed. Appx. 498 (6th Cir. 2012) — an opinion issued three months *after* this Court's decision in *King v. Taylor*, 694 F. 3d 65 (6th Cir. 2012). However, according to this Court's rules, as an unpublished opinion *M & C Corp.* is not binding precedent. 6 Cir. R. 32.1 In addition, *M & C Corp.* has been criticized as "resting on a questionable reading of circuit precedent" and for its "perplexing" application of *Gerber* given that the nonparties' attorneys' general appearances "were for the purpose of contesting jurisdiction." Julia K. Schwartz, "*Super Contacts:" Invoking Aiding-and-Abetting Jurisdiction to Hold Foreign Nonparties in Contempt of Court*, 80 U. CHI. L. REV. 1961, 1976, 1977 n.98 (2013). In any event, the facts in *M & C Corp.* are closer to *Gerber* and distinguishable here because that case also involved extensive proceedings prior to the filing of the notice of appearance, and the nonparty respondents filed their notice of appearance in response to the court's order to appear and show cause why they should not be held in contempt. *M & C Corp*., 508 Fed. Appx. at 501. Under those circumstances, respondents' "first filing in response to the district court's show-cause order" was rationally deemed a voluntary acceptance of the district court's jurisdiction. *Id.*

defense:[2] "The written appearance filed by [defendant's] counsel one month before [defendant] moved for dismissal on the basis of lack of service does not constitute forfeiture." 694 F.3d at 650, 660 n.7. Indeed, the *King* court expressly referenced *Gerber* in emphasizing that "[i]nsofar as some of our more recent cases might suggest otherwise," they "must yield" to this principle (citing *Friedman v. Estate of Presser*, 929 F.2d 1151, 1157 n.7 (6th Cir. 1991)). *See also M & C Corp.,* 508 Fed. Appx. at 504 ("I also do not agree that this panel is bound to follow such a rule, because published decisions of this Court before *Gerber* have held that the filing of a notice of appearance is insufficient to waive a personal-jurisdiction defense.") (Moore, J., concurring); *Mattson*, 2016 WL 5338061, at *2 ("it is equally clear that subsequent Sixth Circuit panels have declined to consider

[2] In a striking departure from the parsimonious interpretation proffered by Plaintiffs here, the *King* panel viewed the issue addressed in *Gerber* as "whether the defendant had forfeited its personal-jurisdiction defense through its conduct." *King*, 694 F.3d at 659 n.5; *see also ABG Prime Grp., LLC v. Innovative Salon Prods.*, 326 F.Supp.3d 498, 505 (E.D. Mich. 2018) ("So *King* places *Gerber* squarely on its foundation: a case-specific analysis of a defendant's conduct."). We submit that Judge Griffin's interpretation in *King* accounts for the common sense, practical accommodation of Rule 12's requirements adopted in *Gerber*, reflected in the opinion's comprehensive recitation of the parties' litigation conduct and explanation of what particular motions by the defendants failed to qualify as a jurisdictional waiver. Plaintiffs' myopic focus on *Gerber*'s concluding paragraph untethered from the remainder of the opinion renders superfluous this Court's detailed waiver-by-conduct analysis in that case. *Mattson v. Troyer*, 2016 WL 5338061, *3 (N.D. Oh. Sept. 23, 2016) ("If *Gerber* had intended to establish a bright-line rule with respect to a general notice of appearance, its lengthy discussion of all of the other aspects of the litigation would be entirely superfluous.").

[*Gerber*] as having established a bright-line rule"); *Chinnock*, 2018 WL 5312462, at *3 ("Taken at face value, *Gerber*'s language directly conflicts with an earlier Sixth Circuit case that stated, '[i]n order to object to a court's exercise of personal jurisdiction, it is no longer necessary to enter a "special appearance."'") (footnote and citation omitted). Many district courts in this Circuit have similarly held. *See, e.g., ABG Prime Grp.*, 326 F.Supp.3d at 505 (following *King* and holding that defendants did not waive personal jurisdiction defense by filing a general appearance); *Mattson*, 2016 WL 5338061, at *3 (holding defendants did not waive personal jurisdiction defense by filing a general appearance).

While *King* involved a claim of insufficient service, Plaintiffs offer no reason why a defective service of process defense asserted under Rule 12(b)(5) somehow stands on a different footing for purposes of waiver than a lack of personal jurisdiction defense asserted under Rule 12(b)(2). Indeed, as this Court pointed out in *King*, preservation of the latter merits more solicitude than the former: "Recognizing that service of process is simply the means by which a defendant receives notice of an action and is formally brought within a Court's jurisdiction, whereas personal jurisdiction concerns the fairness of requiring a defendant to appear and defend in a distant form, . . . as between the two defenses, it is relatively easier to find forfeiture of a service defense." *King*, 694 F.3d at 659.

Contrary to the "bright-line rule" espoused by Plaintiffs, this Court recently held that "[d]etermining what constitutes waiver by conduct is more [an] art than a science . . . and *there is no bright line rule*." *Boulger v. Woods*, 917 F.3d 471, 477 (6th Cir. 2019) (emphasis added) (internal quotations and citations omitted); *see also Mattson,* 2016 WL 5338061, at *3 (rejecting notion that *Gerber* created "bright-line rule"). In assessing a waiver by conduct claim, a court must "consider all of the relevant circumstances" in applying the *Gerber* standard, and must also be "deferential to the district court's assessment of the situation."[3] *Boulger*, 917 F.3d at 477 (citing *King*, 694 F.3d at 659). As a result, courts find a waiver by conduct only where the defendant has participated extensively and for a prolonged period in the litigation prior to moving to dismiss based on a personal jurisdiction defense. *See, e.g., Horn v. City of Covington*, 2019 WL 2344773, *4 (E.D. Ky. Jun. 3, 2019) (holding defendant forfeited personal jurisdiction defense where he waited until after the summary judgment stage to raise the defense); *Johnson v. Soal, Inc.*, 2019 WL 333557, *2-3 (E.D. Ky. Jan. 25, 2019) (holding defendant forfeited personal jurisdiction defense where he asserted counterclaims, and engaged in discovery, mediation and motion practice); *Schall v. Suzuki Motor of Am., Inc.*, 2017 WL 2059662, *4 (W.D. Ky. May 12, 2017) (holding defendant

[3] While noting the peculiar procedural posture of *Gerber* on appeal — "the defendant never appeared or filed a brief in the appellate proceedings" (*id.*) — *King* emphasized that "*Gerber* does not require *de novo* review of forfeiture findings." *Id.*

forfeited personal jurisdiction defense where it actively engaged in substantial discovery, withdrew an initial motion to dismiss, and waited over two years before re-filing the motion).

B. Plaintiffs' Waiver Theory Is Incompatible With FRCP 12.

Plaintiffs' argument is plagued by yet another fundamental deficiency: it contravenes the elements of FRCP 12(h)(1)(B), which confer upon a defendant the right to raise a lack of personal jurisdiction in a pre-answer motion or in an answer, whichever comes first. *Gerber*, 649 F.3d at 518, 521-22, 525; *ABG Prime Grp.*, 326 F.Supp.3d at 504. Based on the express requirements of that Rule, a waiver of personal jurisdiction is restricted to a failure to raise the defense in those circumstances. *Gerber*, 649 F.3d at 521-22 ("Rule 12(h)(1) now sets out the circumstances in which a challenge to personal jurisdiction can be waived.") (Moore, J., concurring). Neither is present here, where Ms. Griffin, in full compliance with Rule 12(h)(1)(B)(i), contested personal jurisdiction at the outset of the case through comprehensive briefing on a Rule 12(b)(2) motion to dismiss. As the District Court elaborated:

> Rule 12 provides that a defendant must only raise any objection to personal jurisdiction in his or her first response to plaintiff's complaint, i.e., an answer or a pre-answer motion. An attorney's notice of appearance, of course, is neither. As this Court already noted, the Federal Rules of Civil Procedure abolished the distinction between general and special appearances. A defendant thus need not enter a special appearance to assert a lack of personal

> jurisdiction; he or she must only comply with Rule 12. And defendant did so here.

(Reconsideration Order, R. 43, Page ID #274)

Judge Bertelsman's reasoning is not only compelling but exposes Plaintiffs' argument as "badly out of step with the modern approach to personal jurisdiction and the plain text of Rule 12, which ties waiver to factors other than the manner of appearance." *Chinnock*, 2018 WL 5312462, *3 (footnotes omitted). In the final analysis, Plaintiffs' position rests on "the procedure that Rule 12 was designed to change, not reinforce." *Gerber*, 649 F.3d at 525 (Moore, J., concurring). Ms. Griffin preserved her defense by including it in her Rule 12(b)(2) motion, which is all she was required to do. *See* FRCP 12(h)(1)(B)(i); *Swanson v. City of Hammond*, 411 Fed. Appx. 913, 915 (7th Cir. 2011) (entering a general appearance "complied with the rules and, accordingly, the defendants did not waive their Rule 12(b) defenses"). She therefore never waived her due process rights, either explicitly or implicitly, and her action did not amount to a legal submission to the jurisdiction of the Court.

C. Plaintiffs' "First Filing" Position Ignores the Requirements for Waiver and Violates Due Process.

As discussed above, Plaintiffs argue that even if Ms. Griffin has a completely valid jurisdictional defense — and she does — the "first filing" of an "Appearance of Counsel" constitutes a waiver of her rights. However, a waiver is

a knowing relinquishment of a specified right. *United States v. Soto*, 794 F.3d 635, 649 (6th Cir. 2015) ("[W]aiver is the intentional relinquishment or abandonment of a known right."). The "Appearance of Counsel" says nothing about jurisdiction or a knowing waiver by the named party. Instead, it is specifically titled "Appearance of ***Counsel***" and not "Appearance of ***Party***." It is simply a ministerial notice to the Court that certain counsel would be appearing in the case:[4]

> ***Appearance of Counsel.*** Unless the Court orders otherwise, an attorney is deemed an attorney of record by:
> (a) appearing in court on behalf of a party;
> (b) filing an ***entry of appearance***;
> (c) ***signing a pleading***, motion or other paper as attorney for a party; or
> (d) listing his or her name as an attorney -- other than of counsel -- on a pleading, motion, or other paper.

E.D. Ky. LR 83.5 (emphasis added). If counsel had submitted only the signed motion to dismiss, that would have the same effect as filing the Appearance of Counsel. Neither of these acts is a knowing waiver of jurisdictional defenses, and neither can deprive Ms. Griffin of her due process rights.

Contrary to Plaintiffs' position, the administrative step of filing a notice of appearance by counsel does not come remotely close to the "intentional

[4] In rejecting the notion that the mere filing of a notice of appearance waived personal jurisdiction under Florida law, the Florida Supreme Court noted that such a document "indicates no acknowledgment of the court's authority, contains no request for the assistance of its process, and, most important, reflects no submission to its jurisdiction . . . Such a conclusion [of waiver] represents . . . no less than the apotheosis of a meaningless technicality." *Public Gas Co. v. Weatherhead Co.*, 409 So.2d 1026, 1027 (Fla. 1982) (internal quotations omitted).

relinquishment or abandonment" (*United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Osborne*, 402 F.3d 626, 630 (6th Cir. 2005)) required for the waiver of a defense based on lack of personal jurisdiction. *Gerber*, 649 F.3d at 521 ("a formalistic, one-sentence notice of appearance as counsel simply cannot amount to a waiver of the right to file a motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2)") (Moore, J., concurring). As the District Court recognized, Plaintiffs are attempting to resurrect the appearance doctrine long interred by the Federal Rules.[5] *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871, 874 (3d Cir. 1944) (*en banc*) ("Rule 12 . . . abolished for the federal courts the age-old distinction between general and special appearances."); *Cty. Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d 477, 483 (6th Cir. 2002) ("In order to object to a court's exercise of personal jurisdiction, it is no longer necessary to enter a 'special appearance.'"). There is no reason for doing so here, where Ms. Griffin contested personal jurisdiction at the first procedural opportunity afforded under the Federal Rules.

Compounding this error, Plaintiffs' dogmatic insistence that a waiver of personal jurisdiction is triggered by the filing of a "perfunctory document"

[5] Dismissal Order, R. 38, Page ID #225 n.1 ("the Federal Rules of Civil Procedure abolished the technical distinction between general and special appearances"); *see also M & C Corp.*, 508 Fed. Appx. at 504 (Moore, J., concurring) ("to the extent that the *Gerber* principle cited by the majority relies on a distinction between special and general appearances, this distinction was abolished by Federal Rule of Civil Procedure 12").

(*Gerber*, 649 F.3d at 524 (Moore, J., concurring)) that "does nothing more than give notice of the identity of the defendant's counsel of record" (*id*.) violates a defendant's due process rights. Plaintiffs are effectively asking this Court to abandon "[t]he principal inquiry in cases of this sort," which is "whether the defendant's activities manifest an intention to submit to the power of a sovereign." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011). By allowing a waiver any time a non-resident defendant, from Swaziland to Switzerland, files a single-page document necessary for access to the federal courts' ECF filing system,[6] Plaintiffs' theory dispenses with any determination of whether a defendant's purposeful availment of a foreign state is sufficient to establish specific jurisdiction, a requirement that "flows from the Due Process Clause and protects an individual liberty interest." *Days Inns Worldwide*, 445 F.3d at 905. Thus, according to Plaintiffs, "'traditional notions of fair play and substantial justice'" may be sacrificed to a technicality. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The longstanding jurisdictional requirements mandated by the Fifth and Fourteenth Amendments may not be so casually or cavalierly tossed aside. As exemplified by the decisions appealed from, the courts in this Circuit have refused to do so.

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[6] *ABG Prime Grp.*, 326 F.Supp.3d at 505 ("Plus, filing an appearance allowed [defendant] to receive notification of docket entries by email, offering the most efficient way to stay current in the case.")

POINT II

THE DISTRICT COURT CORRECTLY CONCLUDED THAT MS. GRIFFIN IS NOT SUBJECT TO JURISDICTION IN KENTUCKY

Contrary to Plaintiffs' contention, this case raises no personal jurisdiction issue of first impression. (Pl. Br. 12) The District Court got it exactly right when it held that Plaintiffs cannot satisfy either the Kentucky long-arm statute or constitutional due process. Regardless of the label Plaintiffs apply to Ms. Griffin's four tweets — doxing, true threats, or criminal tortious conduct — there is simply no basis for the exercise of personal jurisdiction over Ms. Griffin in Kentucky.

A. The District Court Correctly Held That the Kentucky Long-Arm Statute Does Not Confer Personal Jurisdiction Over Ms. Griffin.

In arguing that Ms. Griffin is subject to jurisdiction, Plaintiffs rely exclusively on subpart (a)(3) of Kentucky's long-arm statute, which authorizes personal jurisdiction over a foreign defendant only if the defendant has caused "tortious injury by an act or omission **in** this Commonwealth." KRS 454.210(2)(a)(3) (emphasis added). The District Court's common-sense conclusion that subpart (a)(3) of the long-arm statute is inapplicable because Ms. Griffin published her tweets from outside Kentucky is unassailable.

Citing ample authority, the District Court held that it is not enough that out-of-state conduct causes "tortious and harmful consequences" in Kentucky. (Dismissal Order, R. 38, Page ID #227-228) Rather, the defendant's allegedly

tortious act "must occur within the Commonwealth to satisfy KRS 454.210(2)(a)(3)." (*Id*., Page ID #27) (citing *Pierce v. Serafin*, 787 S.W.2d 705 (Ky. Ct. App. 1990)))

The District Court buttressed its conclusion by reference to subpart (a)(4) of the long-arm statute, which allows Kentucky "to assume personal jurisdiction over a nonresident tort-feasor whose activities **outside** the state result in injury in this state **only if** that tort-feasor regularly does or solicits business within the state or has other substantial connection to the Commonwealth." *Pierce,* 787 S.W.2d at 707 (Ky. Ct. App. 1990) (emphasis added); *see* Ky. Rev. Stat. § 454.210(2)(a)(4). As the District Court recognized, KRS 454.210(2)(a)(4) "'would be completely obviated' if plaintiffs' theory were accepted[.]" (Dismissal Order, R. 38, Page ID #228 (quoting *Barker v. Collins*, No. 3:12-cv-372, 2013 WL 3790904, *5 (W.D. Ky. July 19, 2013)))

The District Court easily rejected Plaintiffs' belated efforts to circumvent the plain language of KRS 454.210(2)(a)(3) by arguing that Ms. Griffin's tweets were "true threats." (Dismissal Order, R. 38, Page ID #229-331; Reconsideration Order, R. 43, Page ID #275-278) Plaintiffs theorized, as they do again here on appeal, that Ms. Griffin's tweets constitute harassment, threatening and menacing and

subject her to criminal prosecution in Kentucky;[7] that KRS 446.070 provides a private civil right of action for the violation of criminal statutes; and therefore KRS 454.210(2)(a)(3) authorizes suit over Ms. Griffin. (Dismissal Order, R. 38, Page ID #229; Reconsideration Order, R. 43, Page ID #276)

Rejecting this syllogism as "flawed logic," the District Court observed that "the fact that the legislature has created a civil cause of action does not, *ipso facto*, answer the question of whether a defendant is subject to personal jurisdiction when sued for such a claim." (Reconsideration Order, R. 43, Page ID #276) Even assuming Ms. Griffin's tweets were "legally cognizable 'threats,'" the District Court concluded "they were not 'communication acts' in Kentucky" within the meaning of KRS 454.210(2)(a)(3). (*Id.*) The District Court noted that Plaintiffs' arguments were predicated on cases addressed to criminal jurisdiction and thus had "no bearing on the question of personal jurisdiction." (*Id.*, Page ID #277; *see also* Dismissal Order, R. 38, Page ID #229 (noting that the case on which Plaintiffs relied "has nothing to do with personal jurisdiction or the Kentucky long-arm statute"))

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[7] This first presumption on which Plaintiffs' theory relies—that Ms. Griffin violated KRS 525.070, 525.080, 508.050, and 508.080—borders on the frivolous and is addressed in Part III, below. As noted there, this Court may affirm dismissal "because, irrespective of the [Kentucky] court's personal jurisdiction, it is clear that the [Plaintiffs] failed to state a plausible claim" based on the purported violation of Kentucky criminal law. *Harmer v. Colom*, 650 Fed. Appx. 267, 271 (6th Cir. 2016).

Plaintiffs identify no error in the District Court's analysis of this issue. Yet, Plaintiffs urge this Court to conclude that the Kentucky Supreme Court would interpret KRS 454.210(2)(a)(3) as covering out-of-state "criminal tortious communications" that allegedly cause injury in Kentucky. (Pl. Br. 34) Of course, Plaintiffs cite no caselaw or other authority in support of this novel proposition. Rather, Plaintiffs rely on an 1889 case involving the Hatfields and McCoys and the criminal jurisdiction concept of territorialism. (*Id*. 33) Plaintiffs' discussion of territorial principles and criminal jurisdiction with respect to "true threats" is an extended exercise in irrelevancy. As the District Court aptly noted, "this is a civil case. Whether defendant would be subject to criminal prosecution in Kentucky has no bearing on whether she is subject to personal jurisdiction in this matter." (Reconsideration Order, R. 43, Page ID #277)

Plaintiffs have identified no "'authoritative signals from the state's legislature or judiciary'" that the Kentucky Supreme Court would interpret KRS 454.210(2)(a)(3) to cover out-of-state criminal acts. (Pl. Br. 23 (citing *State Auto Property & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 195 (6th Cir. 2015))) To the contrary, Plaintiffs urge this Court to adopt an illogical and unsupported "'substantive innovation' in state law." *Hargis*, 785 F.3d at 195. As succinctly stated by the District Court, "Plaintiffs cite no Kentucky authority to support their theory, and this Court cannot by judicial decision achieve a result that neither the

Kentucky legislature nor Kentucky courts have permitted." (Reconsideration Order, R. 43, Page ID #278)

The best evidence of what the "Kentucky General Assembly intended to be included within" KRS 454.210(2)(a)(3) (Pl. Br. 31) is the plain language of the statute. Indeed, the Kentucky Supreme Court made clear "that in determining the meaning of a statute, [courts] must defer to the language of the statute and are not at liberty to add or subtract from the legislative enactment or interpret it at variance from the language used." *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 56 (Ky. 2011). The Kentucky Supreme Court also made clear that while the provisions of the Kentucky long-arm statute are to be liberally construed, "their limits upon jurisdiction must be observed as defined." *Id.*

KRS 454.210(2)(a)(3) is applicable only where the defendant has caused "tortious injury by an act or omission in this Commonwealth." There is no dispute that Ms. Griffin did not publish her tweets in Kentucky, and therefore subpart (a)(3) is inapplicable and long-arm jurisdiction over Ms. Griffin is absent. The District Court's decision should therefore be affirmed.

B. The District Court Correctly Concluded That the Exercise of Personal Jurisdiction Over Ms. Griffin Would Offend Due Process.

The District Court properly found that Plaintiffs not only failed to satisfy the Kentucky long-arm statute, but also could not show that personal jurisdiction over Ms. Griffin would comport with due process. (Dismissal Order, R. 38, Page ID

#233-234; Reconsideration Order, R. 43, Page ID #278-279) The **only** conduct on the part of Ms. Griffin alleged in the Complaint are her four tweets, posted 2,000 miles away in California. (Complaint, R. 1, Page ID #4-5 ¶¶11-14) Her tweets were neither aimed at nor related to Kentucky, but rather were addressed to a national audience and concerned a "profound and powerful controversy" occurring at the Lincoln Memorial in Washington, D.C. (*Id*. ¶6; *see* Complaint Exhibits, R. 1-1, 1-2, 1-3, 1-4, Page ID #11-14) The only connection between Ms. Griffin and Kentucky is that Plaintiffs attend high school in the Commonwealth and were allegedly harmed there. However, it is well-established that this connection is insufficient. *Walden v. Fiore*, 571 U.S. 277, 290 (2014) ("[M]ere injury to a forum resident is not a sufficient connection to the forum.").

Due process is satisfied where a plaintiff shows "minimum contacts" between the defendant and the forum, thus ensuring that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *J. McIntyre Mach.,* 564 U.S. at 880 (quoting *Int'l Shoe Co.*, 326 U.S. at 316). The defendant "must have purposefully availed himself of the privilege of acting in the forum state or causing a consequence in the forum state." *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968). "This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous or attenuated contacts or of the unilateral

activity of another party or third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (internal quotation omitted). As the Supreme Court has recently reaffirmed, the minimum contacts analysis must consider the contacts between the defendant and the forum, not the contacts between the plaintiff and the defendant or the forum state. *Walden*, 571 U.S. at 285 (emphasizing the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there").

Applying these standards, courts routinely reject the notion that an out-of-state defendant's postings on social media that concern a plaintiff are sufficient to establish personal jurisdiction over the defendant in the plaintiff's home state. *See, e.g., Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (holding a plaintiff must show "something more than posting and accessibility" of online material concerning the plaintiff to establish jurisdiction over an out-of-state defendant); *Alexander v. Diet Masison Avenue*, 2020 WL 4035551, *4 (E.D. Va. Jul. 17, 2020) (having "little difficulty concluding" that jurisdiction was lacking over out-of-state defendants who published online articles and tweets about Virginia resident accessible to a national audience); *Binion v. O'Neal*, 95 F.Supp.3d 1055, 1061 (E.D. Mich. 2015) (holding out-of-state defendant's social media posts mocking and ridiculing photographs of plaintiff were insufficient to establish personal jurisdiction).

Applying these principles, the District Court correctly found that the exercise of jurisdiction over Ms. Griffin would be inconsistent with due process.

> It is a mere fortuity that plaintiffs are residents of Kentucky as it relates to their claims; defendant "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to" Kentucky. Plaintiffs are defendant's only connection to Kentucky for purposes of their claims, and *Walden* makes clear that that is insufficient to allow her to be sued here.

(Dismissal Order, R. 38, Page ID #233 (quoting *Walden*, 571 U.S. at 289)) While Plaintiffs take issue with these conclusions (Pl. Br. 39), they identify no facts or law overlooked by the District Court.

Plaintiffs' due process arguments on appeal hinge on their mischaracterization of Ms. Griffin's tweets as "criminally tortious acts" that "necessarily occurred in Kentucky." (Pl. Br. 39; *see also id.* 38 (claiming Ms. Griffin committed "criminal tortious conduct in Kentucky")) However, Plaintiffs' contentions in this regard are once again predicated solely on criminal law principles irrelevant to the due process inquiry in civil cases. (Pl. Br. 38 (quoting extensively from *United States v. Wood*, 364 F.3d 704, 710 (6th Cir. 2004)))

Plaintiffs' contentions that Ms. Griffin's tweets were "intentional," tortious, and "necessarily had to be received in Kentucky" (Pl. Br. 39) similarly fall far short of demonstrating the necessary contacts with Kentucky. Not surprisingly, Plaintiffs fail to identify a single case where personal jurisdiction over an out-of-state defendant was established based solely on social media comments. Rather,

Plaintiffs rely on cases involving out-of-state defendants who "directed numerous intentional, fraudulent communications at the plaintiffs themselves in the forum state over considerable periods of time." (Reconsideration Order, R. 43, Page ID #278; *see* Pl. Br. 27-28 (citing *Power Investments, LLC v. SL EC, LLC*, 927 F.3d 914 (6th Cir. 2019), *Neal v. Jassen*, 270 F.3d 328 (6th Cir. 2001), and *Air Prod. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 551 (6th Cir. 2007))) As the District Court noted, "[t]he facts here are qualitatively different."

The District Court correctly concluded that the exercise of personal jurisdiction over Ms. Griffin would not comport with due process. Accordingly, dismissal of the Complaint should be affirmed.

POINT III

ALTERNATIVELY, THE COMPLAINT IS SUBJECT TO DISMISSAL UNDER RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM

In addition to moving to dismiss based on lack of personal jurisdiction, Ms. Griffin sought dismissal pursuant to FRCP 12(b)(6) for failure to state a claim. (Motion, R. 9, Page ID #32-34; Memorandum, R. 9-1, Page ID #48-56; Reply, R. 20, Page ID #126-133; Supplemental Memorandum, R. 36, Page ID #197-203) The District Court did not reach this ground for dismissal, which constitutes an alternative basis to affirm the District Court.[8]

[8] "A decision below must be affirmed if correct for any reason, including a reason not considered by the lower court." *Russ' Kwik Car Wash, Inc. v. Marathon*

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a complaint need not provide "detailed factual allegations," the plaintiff must advance "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," or "a formulaic recitation of the elements of a cause of action." *Id*. (citing *Twombly*, 550 U.S. at 555). And while courts must accept all factual assertions as true, they "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id*. (citing *Twombly*, 550 U.S. at 556).

A. Plaintiffs' Claims Premised on the Purported Violation of Criminal Statutes Are Unsupported and Fail as a Matter of Law.

The Complaint asserts four claims based on KRS 446.070, which is a codification of the negligence *per se* doctrine and creates a private cause of action for the violation of any Kentucky penal statutes. "Negligence *per se* is merely a negligence claim with a statutory standard of care substituted for the common law standard of care." *Young v. Carran*, 289 S.W.3d 586, 588-89 (Ky. Ct. App. 2009) (internal quotation omitted). To state a colorable claim for negligence *per se* based on KRS 446.070, the plaintiff must allege facts plausibly demonstrating that the

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Petroleum Co., 772 F.2d 214, 216 (6th Cir. 1985) (citing *J. E. Riley Inv. Co. v. Commissioner*, 311 U.S. 55, 59 (1940)); *see also Murphy v. Nat'l City Bank*, 560 F.3d 530, 535 (6th Cir. 2009) ("Appellate courts may affirm on alternative grounds supported by the record.").

defendant violated a criminal statute. *See Vanhook v. Somerset Health Facilities, LP,* 67 F.Supp.3d 810, 820-21 (E.D. Ky. 2014); *Christensen v. ATS, Inc.*, 24 F.Supp.3d 610, 615 (E.D. Ky. 2014). In considering a claim under KRS 446.070, courts apply the rule of lenity, which "requires any ambiguity in a statute to be resolved in favor of a criminal defendant." *Littrell v. Bosse*, 581 S.W.3d 584, 588 (Ky. Ct. App. 2019) (citing *White v. Kentucky*, 178 S.W.3d 470 (Ky. 2005)).

Plaintiffs' conclusory allegations in support of their statutory claims consist of nothing more than "a formulaic recitation" of the criminal statutes on which they rely. *Iqbal*, 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 555). Moreover, their claims are refuted by the actual text of Ms. Griffin's comments, which are neither harassing, threatening, nor menacing — not even close.

1. Plaintiffs Cannot Plausibly Allege Harassment in Violation of KRS 525.070.

Count One of the Complaint purports to allege a violation of KRS 525.070(1)(e), which provides that "a person is guilty of harassment when, with the intent to intimidate, harass, annoy, or alarm another person, he or she . . . '[e]ngages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and serve no legitimate purpose[.]'" Plaintiffs did not and cannot allege any facts that support this claim. (Complaint, R. 1, Page ID #6-7 ¶¶25-29)

First, harassment under KRS 525.070 "requires proof of the additional fact of *intent to harass, annoy or alarm another person*." *Hart v. Commonwealth*, 768 S.W.2d 552, 554 (Ky. Ct. App. 1989) (emphasis in original). Here, Plaintiffs allege no facts to support their conclusory allegation that Ms. Griffin published her tweets "with intent to intimidate, harass, annoy or alarm the Plaintiffs." (Complaint, R. 1, Page ID #6 ¶25) Moreover, Ms. Griffin's tweets belie this allegation, since they are directed to third parties, not Plaintiffs. (Complaint Exhibits, R. 1-1, 1-2, 1-3, 1-4, Page ID #11-14)

Second, Plaintiffs do not allege, nor could they reasonably assert, any facts to support their conclusory allegation that Ms. Griffin's tweets "alarmed or seriously annoyed" them. (Complaint, R. 1, Page ID #6 ¶25) Indeed, Plaintiffs do not allege that they even saw Ms. Griffin's tweets. Moreover, no reasonable CCHS student would be "alarmed or seriously annoyed" by Ms. Griffin's tweets within the meaning of KRS 525.070. "Mere discomfort about the revelation of a fact in which there is no privacy interest is insufficient to support a claim under the provisions of KRS 525.070(1)(e)." *Talley v. MAC Auto Team, LLC*, 2016 WL 44100091, *3 (Ky. Ct. App. Aug. 19, 2016).

Third, Plaintiffs have alleged no "course of conduct" by Ms. Griffin. Rather, she sent four tweets addressing the events occurring at the National Mall over the course of less than two days. (Complaint, R. 1, Page ID #4-5, ¶¶11-14)

This is insufficient as a matter of law to constitute a violation of KRS 525.070(1)(e). *See Montell v. Diversified Clinical Servs. Inc.*, 969 F.Supp.2d 798, 808 (E.D. Ky. 2013) (holding three comments over eighteen months did not constitute a course of conduct), *aff'd in relevant part* 757 F.3d 497 (2014).

Finally, it cannot reasonably be disputed that Ms. Griffin's comments regarding a controversial and highly publicized incident at the National Mall served a "legitimate purpose." KRS 525.070(1)(e).

2. Plaintiffs Cannot Plausibly Allege Harassing Communications in Violation of KRS 525.080.

Count Two of the Complaint alleges a violation of KRS 525.080(1)(a) which provides that "a person is guilty of harassing communications when, with the intent to intimidate, harass, annoy, or alarm another person, he or she . . . [c]ommunicates with a person, anonymously or otherwise, by telephone, telegraph, mail or any other form of electronic communication in a manner which causes annoyance or alarm and serves no purpose of legitimate communication[.]" This claim is also based on nothing more than boilerplate statutory language. (Complaint, R. 1, Page ID #6-7 ¶¶ 31-35)

As noted above, Plaintiffs have not alleged any facts suggesting that Ms. Griffin published her tweets with an "intent to intimidate, harass, annoy or alarm" the Plaintiffs, as required under KRS 525.080(1)(a). Also fatal to Plaintiffs' claim is their inability to allege that Ms. Griffin's tweets were directed solely to them. It

is well settled that KRS 525.080 does not apply to communications in a public forum, but rather concerns a "form of communication [that] intrudes upon a justifiable privacy interest of the recipient[.]" *Yates v. Commonwealth*, 753 S.W.2d 874, 875 (Ky. Ct. App. 1988). Indeed, the statute "does not regulate speech but rather the intentional use of *private communication* to annoy, alarm, or harass the receiver which also serves no legitimate communication." *Id.* Moreover, the statute has no application where the challenged communication is directed to a third person, not the plaintiff. *See Littrell*, 581 S.W.3d at 589 (holding defendant's communication to third party about the plaintiff could not state violation of KRS 525.080). Thus, Plaintiffs did not and cannot state a claim premised on the violation of KRS 525.080.

3. Ms. Griffin's Tweets Cannot Plausibly Be Construed as Terroristic Threatening in Violation of KRS 508.080.

Count Three of the Complaint alleges a violation of KRS 508.080(1)(a) which provides that "a person is guilty of terroristic threatening in the third degree when . . . [h]e threatens to commit any crime likely to result in death or serious injury to another person or likely to result in substantial property damage to another person[.]" "'Examples of the types of conduct contemplated by this section are threats to commit murder, aggravated assault and arson.'" *Stone v. Commonwealth*, 2013 WL 1919566, *10 (Ky. Ct. App. May 10, 2013) (citing KRS 508.080 Kentucky Crime Commission/LRC Commentary).

While the Complaint parrots Section 508.080(1)(a) in alleging that Ms. Griffin "threatened to commit a[ ] crime," it is devoid of any facts to support this allegation. (Complaint, R. 1, Page ID #8 ¶37) At best, Plaintiffs allege that Ms. Griffin's comments were directed to others and constitute "doxing" (*Id.*, Page ID #5 ¶15) which, even if true, is insufficient as a matter of law. Even a cursory review of Ms. Griffin's tweets demonstrates she did not threaten the Plaintiffs. (Complaint Exhibits, R. 1-1, 1-2, 1-3, 1-4, Page ID #11-14)

4. Plaintiffs Cannot Plausibly Allege Menacing in Violation of KRS 508.050.

Count Four of the Complaint alleges a violation of KRS 508.050, which provides that "a person is guilty of menacing when he intentionally places another in reasonable apprehension of imminent physical injury." "Menacing involves antagonistic behavior focused at another person, and some of the hallmarks include moving closer, using a raised voice or threatening tone, and making physical contact or gestures." *Estep v. Combs*, 2020 WL 3270379, *8 (E.D. Ky. June 17, 2020) (internal citations omitted).

Here, there is utterly no basis to conclude that Ms. Griffin's four tweets placed Plaintiffs in reasonable apprehension of injury, much less imminent physical injury. Plaintiffs' menacing claim fails as a matter of law. *See Ayala v. Hogsten*, 2019 WL 1338391, *5 (E.D. Ky. Mar. 25, 2019) (where defendant was yelling, cursing and pointing his finger at individual several feet away from the

plaintiff, finding claim that "he was menacing, as defined by the Kentucky statute, strains the bounds of credibility").

B. Plaintiffs' Claim for Invasion of Privacy Fails as a Matter of Law.

Count 5 of the Complaint purports to state a claim for invasion of privacy based on conclusory and unsupported allegations that Ms. Griffin "intruded upon the solitude or seclusion of the Plaintiffs in their private affairs or concerns[.]" (Complaint, R. 1, Page ID #9 ¶49) These allegations fail to state a viable claim for invasion of privacy under Kentucky law.

It is settled law that the tort of invasion of privacy "does not prohibit . . . any publication of a matter which is of public or general interest[.]" *McCall v. Courier-Journal and Louisville Times Co.* 623 S.W.2d 882, 887 (Ky. 1981). Moreover, "there can be no invasion of privacy where a plaintiff engages in conduct in a public place." *Patterson v. NBC Universal, Inc.*, 2012 WL 3779118, *6 (W.D. Ky. Aug. 31, 2012).

Here, Ms. Griffin tweeted about the conduct of CCHS students immediately following a March for Life rally occurring at the National Mall in Washington, D.C., a quintessential public forum. (Complaint, R. 1, Page ID #3-5 ¶¶5-14) Plaintiffs thus could and should have expected that their conduct in such a public place was subject to "a hoard of reactive commentary." (*Id.*, Page ID #4 ¶7) As a matter of law, Plaintiffs cannot establish a claim for invasion of privacy.

C. Plaintiffs Cannot Circumvent the First Amendment by Labeling Ms. Griffin's Tweets as "True Threats" and Criminal Conduct.

In a transparent attempt at circumventing the First Amendment limitations that require dismissal of their claims (*see* Point IV, *infra*), Plaintiffs assert that Ms. Griffin's tweets constitute "Doxing," "True Threats," and unprotected criminal conduct rather than protected speech. Specifically, Plaintiffs argue that Ms. Griffin's exhortations were "integral to actionable criminal conduct." (Pl. Br. 3). However, their mantra-like repetition of the conclusory label "doxing" throughout their brief and Complaint (*see* Complaint, R. 1, Page ID #5 ¶¶ 15-18), cannot obscure the actual text of Ms. Griffin's tweets, which do no such thing. If accepted, this crude alchemy would eviscerate the First Amendment.

Plaintiffs' theory would allow for the punishment of broad swaths of protected speech. Never again would courts need to analyze whether a criminal statute infringing on speech passes strict scrutiny — they could merely hold that the speech has been criminalized, apply the exception, and be done with it. *See United States v. Matusiewicz*, 84 F.Supp.3d 363, 369 (D. Del. 2015) ("[I]f the government criminalized any type of speech, then anyone engaging in that speech could be punished because the speech would automatically be integral to committing the offense. That interpretation would clearly be inconsistent with the First Amendment[.]").

This case involves no criminal act or conduct separate and apart from Ms. Griffin's alleged violation of Kentucky's statutes by speaking out on a public controversy. Crucially, the only "conduct" that Ms. Griffin is charged with here is using Twitter to communicate her message to a public audience. Tweeting comments about a matter of public controversy is an "act" only in the sense that all speech involves acts: putting ink on paper, opening one's mouth, carrying a sign. If that was considered independent conduct sufficient to transmogrify Ms. Griffin's commentary into a criminally punishable act, it would essentially turn every social media user into a potential criminal.

1. Ms. Griffin Did Not "Dox" the Plaintiffs — Or Even Call for Them To Be "Doxed."

The challenged tweets did not "dox" Plaintiffs. Ms. Griffin did not even have their names, let alone any of their personal information such as email contacts or home addresses. She did not invite anybody to disseminate Plaintiffs' private information on the internet, nor did she do so herself. She did not say they should be subject to threats or violence. She did not ask anyone to target them in their homes or otherwise disturb their privacy. Ms. Griffin's sole use of the word "dox" was to suggest that Plaintiffs would not hesitate to dox others. That is hardly an invitation to "dox" Plaintiffs. Thus, on their face, the tweets fail the very definition of "doxing" offered by Plaintiffs, which requires "*publicly releasing*" someone's

"personal and private information." (Complaint, R. 1, Page ID #4 ¶9; emphasis supplied) That did not happen here.

2. Ms. Griffin's Tweets About a Matter of Public Concern Do Not Constitute a "True Threat."

Plaintiffs' strained effort to evade the First Amendment by wedging Ms. Griffin's speech into the "true threat" doctrine — nowhere pleaded in the Complaint — fares no better. A statement qualifies as a "true threat" only "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003); *see also United States v. Alkhabaz*, 104 F.3d 1492, 1505 (6th Cir. 1997) ("true threat" is a statement that an "objective, rational observer would tend to interpret, in its factual context, as a credible threat"). Importantly, however, even a threatening statement "directed at specific individuals can be protected depending on the context in which it is spoken." *Cole v. Barnes*, 128 F.Supp.3d 1002, 1017 (M.D. Tenn. 2015). Accordingly, to distinguish "political hyperbole" from a "true threat," statements must be analyzed "in context" to ascertain whether they are "punishable by law." *United States v. Morales*, 272 F.3d 284, 287 (5th Cir. 2001).

The recent decision in *United States v. Cook*, 2020 WL 3958194 (N.D. Miss. July 13, 2020) is instructive in its application of the true threat doctrine to social media posts. The defendant in *Cook*, a local businessman, had been prosecuted on

drug charges in a case that was "widely publicized in the local news." *Id*. at *1. After he was acquitted of all charges, the defendant "made disparaging remarks" on his Facebook page about various government officials responsible for his prosecution. *Id*. at *1-2. These included the post of an "*Image appearing to be a screenshot of information found on the internet regarding Mississippi Bureau of Narcotics officer Jon Lepicier, including an address and potential aliases.*" *Id*. at *1 (emphasis in original).

When viewed in their entirety, the *Cook* Court held the Facebook posts as "nothing more than a manifesto of [defendant's] grievances regarding people and processes which he perceived to have wronged him; they do not rise to the level of true threats." *Id*. at *7. The court elaborated:

> Cook's Facebook posts are not "true threats" precluding him from First Amendment protection. Cook's posts, when read in context, lack entirely the specificity required to bring them under the umbrella of a true threat. Nowhere in any post does Cook explicitly state that he plans to physically harm Lepicier, or any other named public official. "God willing I'm going to take them out" is not the same as telling an FBI agent you have a pistol and you will use it to kill the president or repeatedly and directly telling another person in a chat room that you were going to kill the students in your high school while making references to one of the Columbine shooters.

Id. (distinguishing "bulletin board threat" on social media from "true threat" "made directly to the intended target"); *see also United States v. Weiss*, 2020 WL 4340162, *14 (N.D. Cal. July 28, 2020) ("no reasonable jury could find that

[defendant's] statements predicting that other people would harm Senator McConnell met the definition of true threats").

So too here, where Ms. Griffin's opinionated cajoling and exhortatory statements simply expressed her objection to what she felt was the lack of appropriate punishment from CCHS for its students' conduct in connection with the Lincoln Memorial incident. *United States v. Bagdasarian*, 652 F.3d 1113, 1122-24 (9th Cir. 2011) (reversing defendant's conviction for internet statements threatening to kill Barack Obama, because "predictive" and "exhortatory" statements were not true threats). Considered in the full context of their publication, no reasonable person would have expected that Ms. Griffin's tweets would be interpreted by those to whom they were communicated "as a serious expression of an intent to harm or assault." *Cole*, 128 F.Supp.3d at 1017. She said nothing that would place Plaintiffs in "reasonable apprehension of imminent physical injury" (KRS 508.050(1)), nor did she threaten to commit a crime "likely to result in death or serious physical injury" (KRS 508.080(1)(a)) to Plaintiffs. While "vituperative, abusive and inexact," as "the language of the political arena" often is, Ms. Griffin's speech falls far short of a true threat. *Watts v. United States*, 394 U.S. 705, 708 (1969).

POINT IV

ALTERNATIVELY, IF INTERPRETED TO APPLY TO MS. GRIFFIN'S TWEETS, THE KENTUCKY CRIMINAL STATUTES PLED IN THE COMPLAINT VIOLATE THE FIRST AMENDMENT

A. Plaintiffs' Statutory Claims, Which Seek to Punish the "Communicative Nature" of Ms. Griffin's Tweets, Cannot Survive Constitutional Strict Scrutiny.

"Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Thomas v. Bright*, 937 F.3d 721, 729 (6th Cir. 2019). A law is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014). Content-based restrictions are "presumptively invalid" and must satisfy strict scrutiny under the First Amendment. *Planet Aid v. City of St. Johns*, 782 F.3d 318, 326 (6th Cir. 2015) ("Broadly speaking, content-based regulations on protected speech 'can stand only if [they] satisf[y] strict scrutiny.'") (citation omitted).

Here, "this is neither a close call nor a difficult question." *Thomas*, 937 F.3d at 729. Plaintiffs assert that "*the content* of [Ms. Griffin's] communications was the core of her tortious activity[.]" (Pl. Br. 27-28, emphasis supplied) Thus, Plaintiffs admit that in seeking to punish the "communicative nature" (*id*. at 27) of

Ms. Griffin's tweets — in other words, her message — the application of the Kentucky criminal statutes they rely on is necessarily content-based. *Planet Aid*, 782 F.3d at 327 (regulation that "hampers the communicative impact of [the speaker's] expressive conduct" requires strict scrutiny) (internal quotations and citation omitted). Their claims are therefore subject to the demanding requirements of strict scrutiny.

To withstand strict scrutiny, Plaintiffs must justify their attempt to impose statutory liability on Ms. Griffin's speech as the least restrictive means to further a compelling government interest. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2015). As this Court has noted, "[i]t is the rare case in which a speech restriction withstands strict scrutiny." *Id*. (internal quotations omitted). For the reasons elaborated below, this is plainly not such a case.

B. <u>Suppressing Speech on Public Issues Is Not a Compelling Government Interest</u>.

Ms. Griffin "issue[d] a series of tweets in response to a widely publicized incident on the National Mall in which Plaintiffs were involved." *Does v. Haaland*, 2020 WL 5242402, *2 (6th Cir. Sept. 3, 2020). Plaintiffs acknowledge that the incident "ignit[ed] a profound and powerful controversy" that generated "world-wide" publicity. (Complaint, R. 1, Page ID #4 ¶6) By communicating her viewpoint concerning that incident through "appropriate and commonplace means — messages sent via Twitter" (*Haaland*, 2020 WL 5242402, *14), Ms. Griffin

participated in public debate "on an event that had received widespread press attention" and that resonated with the general public. *Id*. at *13.

While Ms. Griffin's messages employed hyperbolic language and profanity, the "inappropriate or controversial character of a statement is irrelevant" to the question of whether it addresses a matter of public concern. *Snyder*, 562 U.S. at 453. This is because "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1998). Plaintiffs' objection to her commentary does "not change the fact that the overall thrust and dominant theme" of Ms. Griffin's tweets related to a pressing public issue. *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) (speech addressing public concern relates to "a subject of general interest and of value and concern to the public at the time of publication"). Simply put, Plaintiffs cannot demonstrate a compelling interest in punishing a politically engaged citizen from condemning, in public speech on social media, their public acts. *Haaland*, 2020 WL 5242402, *12 ("each comment constituted a condemnation of a political adversary's public acts").

This Court's recent decision in *Higgins v. Kentucky Sports Radio, LLC*, 951 F.3d 728 (6th Cir. 2020), which emphatically rejected the notion that the torts of harassment or incitement can be expanded to create liability based on commentary

on matters of public debate, is instructive. In that case, a radio show relentlessly criticized a referee (John Higgins) for his game-ending call during a University of Kentucky basketball game, including circulating tweets critical of him, and encouraged listeners to leave bad reviews on the webpage of Higgins's roofing business. *Id*. at 732-33. Higgins received thousands of angry calls, tweets, and online reviews, which disrupted his business and required a bodyguard to accompany him at the next game he refereed. *Id*. at 733. Notwithstanding these egregious facts, whereby Higgins "became the target of an online campaign orchestrated by Kentucky fans who pinned the loss" on him, this Court held the radio station's speech did not rise to the level of a tortious threat:

> We cannot curtail a speaker's First Amendment protection on the grounds that an otherwise permissible message might touch a nerve with an easily agitated audience. If we applied that standard, few could speak freely. The internet is a "vast and often unpleasant place." The public has a right to know about that unpleasantness. . . . Any other approach would especially burden the speech most in need of a safe harbor: discussions of hot-button and divisive social issues.

Id. at 738-39 (citations omitted).

The same reasoning compels rejection of the claims alleged in the Complaint. Plaintiffs allege only that Ms. Griffin tweeted "Name these kids . . . Shame them." (Complaint, R. 1, Page ID #4 ¶11) "Shaming" is communicative. It is consistent with democratic discourse, and protected under the First Amendment, to express that another citizen's actions are something they should be

ashamed of. As noted above, her four tweets were part of a polarized national discourse about controversial events that unfolded at the Lincoln Memorial. There is nothing in them which "specifically advocate[d]" for any unlawful or violent action. *Id*. at 736. In short, this Court's decision in *Higgins* reaffirms that public criticism of persons taking part in public events and public debates, ***even when it results in threats by others***, does not constitute a tort, let alone a crime, in the first instance. On this record, for a court to permit recovery against Ms. Griffin — out of thousands of individuals who participated in the fractious debate over the Lincoln Memorial incident — would stifle free expression and chill debate on important public issues. Along with numerous other cases, *Higgins* forecloses such an outcome.

C. Plaintiffs Erroneously Assume That Speech on a Matter of Public Interest May Be Criminalized to Shield Recipients' Sensibilities.

Plaintiffs contend that Ms. Griffin tweeted "for the purposes of harassing and humiliating them" (Pl. Br. 3) and to "engender[ ] fear and disruption in them and their lives." (*Id*. 29) This claim runs headlong into the principle that "a restriction is content-based if it regulates speech based on the effect that speech has on an audience." *United States v. Cassidy*, 814 F.Supp.2d 574, 584 (D. Md. 2011). It flouts the Supreme Court's unequivocal holding that speech cannot be punished because it "may have an adverse emotional impact upon the audience." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988); *Snyder*, 562 U.S. at 458

("speech cannot be restricted simply because it is upsetting or arouses contempt"). To the contrary, "the right to provoke, offend, and shock lies at the core of the First Amendment." *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2009). There is no exception to the First Amendment for speech that is intended to harass, upset, or offend someone. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001) (Alito, J.). Rather, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1985).

The decision in *United States v. Cassidy, supra,* underscores that the interest invoked by the Plaintiffs in attempting to criminalize Ms. Griffin's speech is not compelling as a matter of First Amendment law. In *Cassidy*, the defendant was accused of violating a criminal anti-stalking statute when he allegedly engaged "in a course of conduct that caused substantial emotional distress to a person whose initials are A.Z. by posting messages on www.Twitter.com." 814 F.Supp.2d at 576. According to the government, the defendant's tweets "caused A.Z. substantial emotional distress" and "to fear for her own safety." *Id.* at 579. Moreover, because of the alleged harassment, A.Z. was placed in such fear that she did not leave "her house for a year and a half, except to see her psychiatrist." *Id.*

The *Cassidy* court began its analysis of the free speech interests implicated by the defendant's prosecution by rejecting the government's argument that it "has a compelling interest in protecting victims from emotional distress sustained through an interactive computer service" for the simple reason that "A.Z. had the ability to protect her own sensibilities simply by averting her eyes from . . . and not looking at, or blocking, his Tweets." *Id*. at 584 (internal quotations and citations omitted). Unlike telephone calls, letters, or other tangible communications "directed to a specific person[,]" Ms. Griffin's tweets, directed to a public audience, "existed in cyberspace" and Plaintiffs were "free to ignore them." *Id*. at 586 n.13.

Cassidy confirms that Plaintiffs' "interest in criminalizing speech that inflicts emotional distress is not a compelling one." *Id*. at 585. As applied to Ms. Griffin's comments, the Kentucky statutes Plaintiffs have conscripted for that purpose do "not survive strict scrutiny." *Id*. As a federal district court recently emphasized, "the benefit of the content-based restriction to shield sensibilities of the listener or reader is *just not enough* to supplant a citizen's right to uncomfortable public discourse." *Cook*, 2020 WL 3958194, *11 (footnote omitted; emphasis in original).

As the *Cassidy* court observed in dismissing the defendant's cyber-stalking indictment, "the Supreme Court has consistently classified emotionally distressing

or outrageous speech as protected" under the First Amendment. 814 F.Supp. at 582. The same principle controls here. To hold otherwise would ignore our "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

D. The Complaint's Overbroad Application of Kentucky Criminal Statutes to Ms. Griffin's Social Media Expression Violates the First Amendment's Narrow Tailoring Requirement.

The Complaint's statutory causes of action also fail to pass constitutional muster because of their overly broad impact on protected speech. A law is not narrowly tailored "if it implicates more speech than necessary to advance the claimed interest." *Thomas*, 937 F.3d at 935. As applied to Ms. Griffin, the criminal statutes relied on by Plaintiffs cannot achieve their goal of protecting citizens from harassment, as they fail even to require that harassing conduct actually occur as defined by repeated, unwanted contact (*see* KRS 525.070(1)(e)) or through an anonymous or telephonic communication (*see* KRS 525.080(1)(a)). The statutes' overinclusive application to Ms. Griffin highlights this problem, as they do not carve out protected speech on public issues. *Cassidy*, 814 F.Supp.2d at 586-87 (noting government's interest in protecting others from infliction of emotional distress over the internet would still be furthered if the "statute did not apply to individuals engaging in political debate or critiques of religious leaders");

United States v. Popa, 187 F.3d 672, 677 (D.C. Cir. 1999) ("[T]he statute could have been drawn more narrowly, . . . by excluding from its scope those who intend to engage in public or political discourse."); *Musselman v. Commonwealth*, 705 S.W.2d 476, 477-78 (Ky. 1986) (reversing intermediate court and setting aside defendant's conviction under KRS 525.070 because the statute was impermissibly overbroad and imposed an undue restriction on constitutional guarantees of free speech).

Likewise, a reading of KRS 525.070(1)(e), which proscribes a "course of conduct" or "repeated[] . . . acts which alarm or seriously annoy" another person, to forbid and punish Ms. Griffin's communications on Twitter, would invalidate the statute as unconstitutionally vague and overbroad. Her comments, limited to four tweets over two days (Complaint, R. 1, Page ID #4-5 ¶¶11-14), were directed at a national audience, not at Plaintiffs, and expressed her disagreement and disgust with Plaintiffs' behavior at the Lincoln Memorial incident. If the statute can be read to punish Ms. Griffin's tweets, then it could be read to reach all manner of protected expression where persons seek to identify and engage their adversaries on controversial political and social issues.

1. The Overbreadth of Kentucky's Criminal Harassment Statutes Is Compounded by Their Focus on the Speaker's Motivation.

Sections 525.070 and 525.080 punish a wide range of speech that may in part be motivated by an "intent to intimidate, harass, annoy, or alarm another

person." The failure of Kentucky's criminal harassment laws to define these terms exacerbates their overbreadth and "will provoke uncertainty among speakers about how the [four verbs] relate to each other and just what they mean." *Reno v. Am. Civ. Lib. Union*, 521 U.S. 844, 871 (1997). This is particularly so considering that "each of these terms, given their ordinary meaning, can be understood as encompassing forms of expression that are constitutionally protected." *Church of the Am. Knights of the Ku Klux Klan v. City of Erie*, 99 F.Supp.2d 583, 591 (W.D. Pa. 2000) (striking down statute which prohibited wearing a mask "with the intent to intimidate, threaten, abuse or harass any other person"); *see Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002) ("'Harassment,' when targeted on the basis of its expressive content, encompasses speech within the area protected by the First Amendment."). A speaker in an internet forum for new mothers could "harass" an anti-vaxxer to take her child to the doctor. A different speaker could "seriously annoy" (KRS 525.070(1)(e)) Harvey Weinstein through abusive language on Twitter criticizing him for his sexual assault conviction. Yet another speaker might "intimidate" or "alarm" the members of a public school board by using Facebook to implore citizens to rally against their decisions. As these examples demonstrate, "[s]uch glaring oversteps are not narrowly tailored" and put the constitutional inadequacy of Plaintiffs' statutory claims on full display. *Driehaus*, 814 F.3d at 476.

CONCLUSION

Based on the foregoing reasons and authority, Defendant-Appellee Kathy Griffin respectfully requests that this Court affirm the Orders and Judgment of the District Court for the Eastern District of Kentucky.

Dated: October 6, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B)(i) because, as counted by the Microsoft Word 2016 word count tool, this brief contains 12,830 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements in Rule 32(a)(5)(A) and the type-style requirements in Rule 32(a)(6) because this brief has been prepared in proportionally spaced 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF.

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ADDENDUM

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