UNITED STATES DISTRICT COURT
for the
DISTRICT OF RHODE ISLAND

DANIEL MAYER

v. C.A.No.: 25-cv-

TOWN OF SMITHFIELD, by and through
CAITLYN CHOINIERE, in her Official Capacity
as Finance Director of the Town of Smithfield; and
DAWN BARTZ, in her official capacity as
the Superintendent of Smithfield Schools

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

I. INTRODUCTION

Pursuant to F.R.Civ.P. 65, Plaintiff Daniel Mayer seeks a preliminary injunction to bar Defendants Dawn Bartz, the Smithfield School Department and Cailyn Choiniere, the Finance Director of the Town of Smithfield, in their official capacities, from banning, blocking or otherwise restricting his access and/or participation with the Smithfield School Department's and the Superintendent of Smithfield Schools' X accounts while the Court considers the merits of Plaintiff's claim that Defendant is violating Plaintiff's rights under the First Amendment of the United States Constitution. Specifically, in or about August 2024 through the present, Superintendent Bartz banned the plaintiff from the Superintendent's X account which prevents and impedes Plaintiff from commenting on, replying to, or interacting with any posts or comments on this account. This ban remains

ongoing. Additionally, the defendants have set the admissions of the specific X accounts to allow only approved individuals/accounts access. Plaintiff submits that Defendants' actions and continued actions violate his freedom of speech and right to petition protected under the First Amendment.

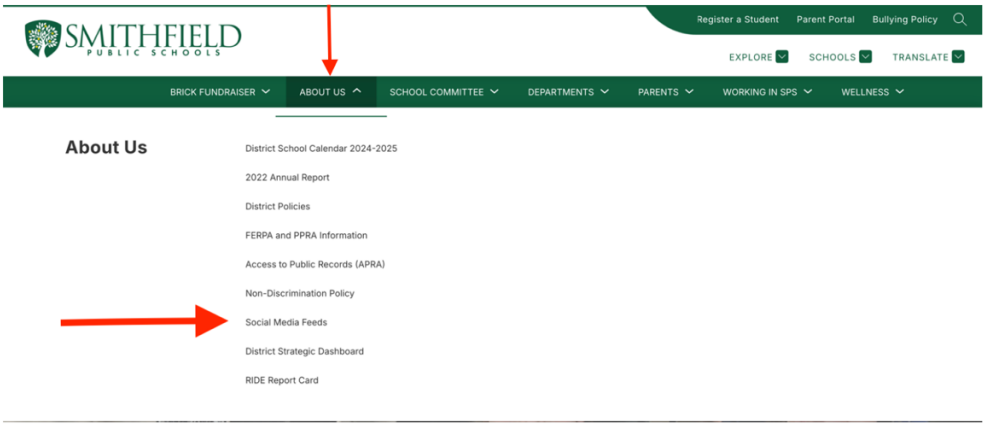
II. STATEMENT OF FACTS

X is a social media platform with millions of active users worldwide. The platform allows users to publish messages, publish media, share what other users publish, and interact with published messages and other users. Speech published on X covers a wide range and variety of topics, but particularly relevant here is that a significant amount of speech posted on the platform is speech by, to, or about the government.

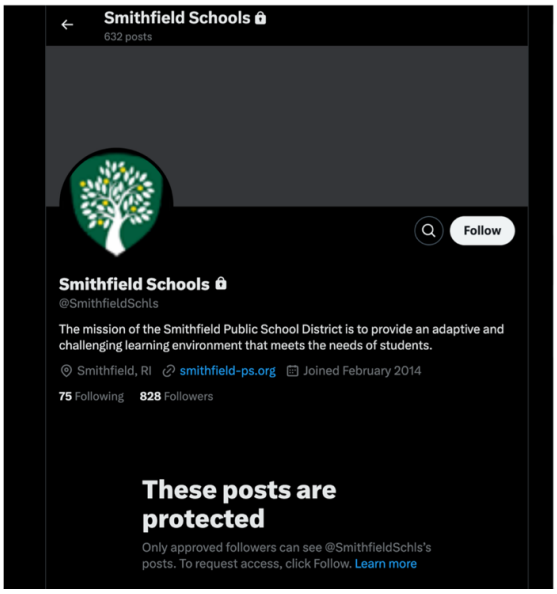
An X "user" is an individual who has created an account on the platform. A user can publish text, media, links, or any combination of the three through the user's "profile." An X user's profile is the single account associated with the user. This profile contains a user's posts. The profile also may contain information about the user. An X user's account allows the user to post written content, documents, videos and links to other content including other X users' posts. Other X users can provide comment and feedback to an X user's post. X allows users to ban or block other users and allows a user to require approval to access their posts and content. When commenting in response to a post, an X user's comment will appear nested below the original post it is in response to. All comments will be nested under the post to which they are replying, creating a comment thread. However, users can tag others by their profile name in their comment, and this will act as a reply without

creating a nested comment thread. Both replying and commenting while tagging a user will send them a notification. Posts, comments, reactions, and shares are controlled by the user who generates them. No other X user can alter the content of any post, comment, or reaction, either before or after it is posted. X users cannot prescreen posts, comments, reactions, or shares that reference their posts or accounts. An X user can block another user which restricts them from writing or commenting on their posts or tagging them in comments or posts. It also can restrict the visibility of content from one user to another. The owner of an X Account can restrict access to approved followers, thereby restricting access to the account to solely those individuals and accounts that have received prior approval from the controller of the account.

The Smithfield School Department operates the Smithfield Public Schools homepage, https://www.smithfield-ps.org/, which links through an "About Us" dropdown menu to a page titled "Social Media Feeds":

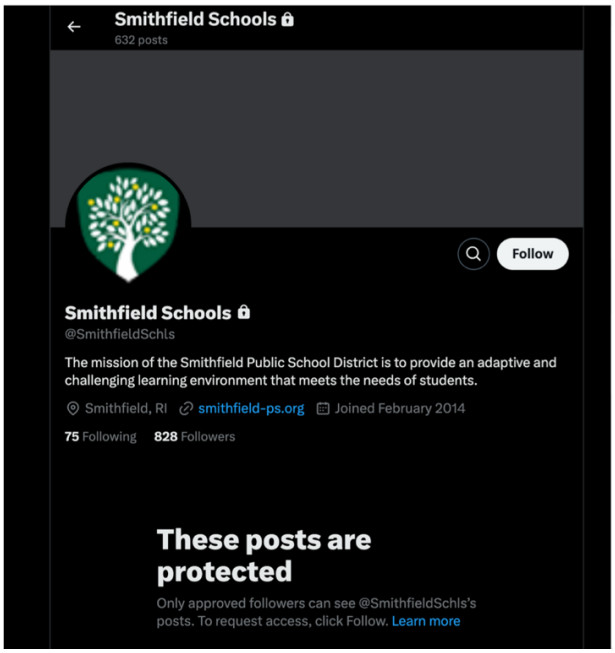


On the Social Media Feeds page is a hyperlink that takes you to the X account for the Smithfield Public Schools:



On the Smithfield Public Schools homepage, https://www.smithfield-ps.org/, if you scroll to the bottom of the page, you will see an icon/link for access to the Smithfield Public Schools' X Account:

When the X icon is clicked, the action opens the Smithfield Public Schools' X Account:



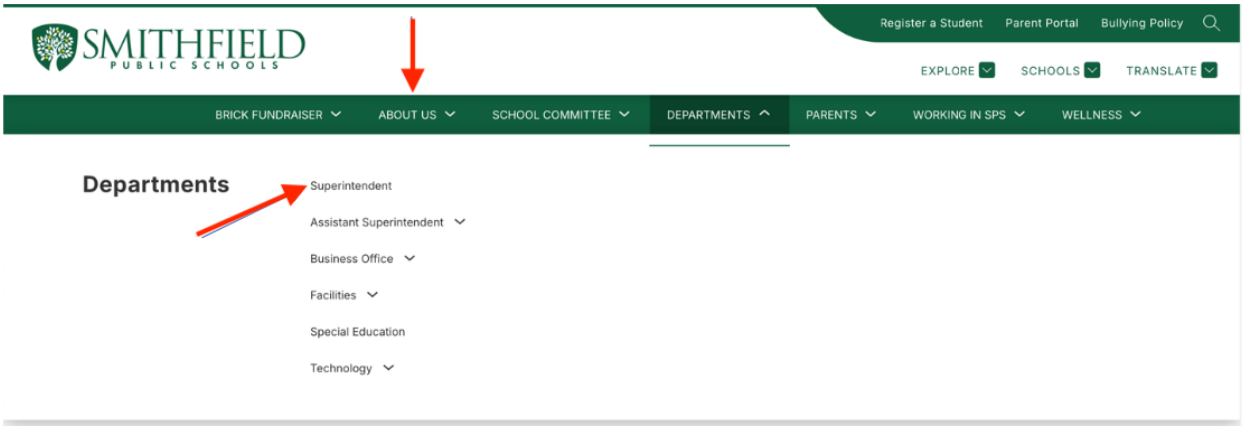
The Smithfield Public Schools X Account, @SmithfieldSchls, is a protected account that requires prior approval for access.

The X account @SmithfieldSchls was, prior to the alleged improper actions of the Defendants, accessible to the public at large without requiring any advance approval but is currently published and limited in access solely to approved followers. The Smithfield School District has not issued any rule or statement purporting to limit (by form or subject matter) the speech of those who interact with this account. Users who cannot interact with the @SmithfieldSchls X account are those who have been banned or not approved as followers.

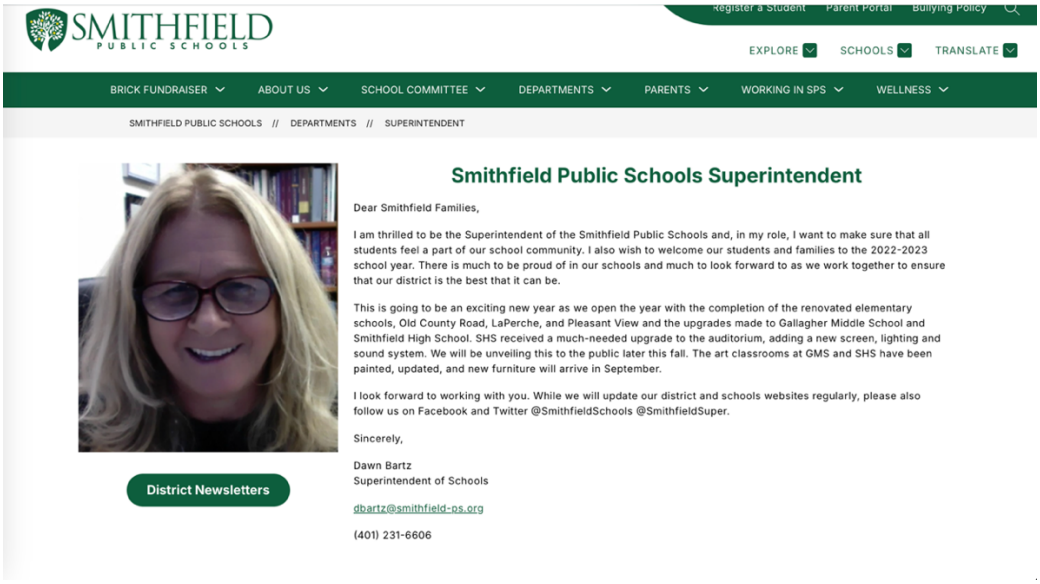
The Smithfield School Department uses the @SmithfieldSchls X account to announce, describe, and defend official policies and the school department's operations; to comment on local issues; to share content produced for the Town of Smithfield; and to communicate with constituents, including responding to their comments. Because of the

way the Smithfield School Department uses this account, the posts are an important source of news and information about the School Department's work. Further, the interactions associated with the posts are important forums for speech by, to, and about the Smithfield School Department and Superintendent Bartz. The Smithfield School Department's restriction of its X account to access for only those they approve prevents or impedes the public's, and specifically any person not approved by school officials, ability to speak and to petition the government for redress of grievances. The restrictive act of requiring approval to access a public form such as the @SmithfieldSchls X account unduly burdens access to the public forum.

The X account @SmithfieldSuper has been utilized and managed by the Defendant Bartz. She has served as the Superintendent of the Smithfield Schools at all times pertinent to this complaint and the interactions plaintiff has had with the @SmithfieldSuper X account. The @SmithfieldSuper X account indicates, in multiple ways, that it is Superintendent Bartz's official X account. The account is titled "Superintendent Dawn Bartz." The Smithfield School Department operates the Smithfield Public Schools homepage, https://www.smithfield-ps.org/, which links through a "Departments" dropdown menu to a page titled: "Superintendent":

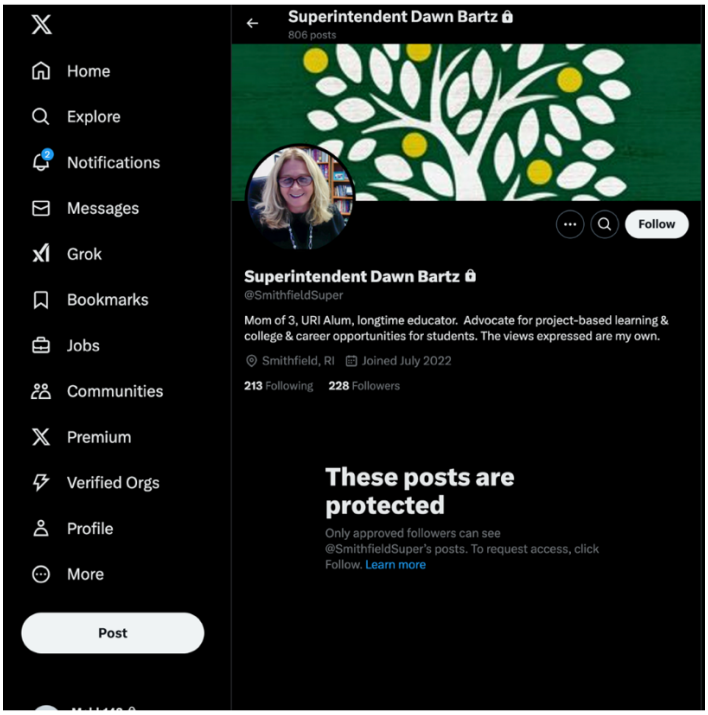


When you click on "Superintendent," it brings you to a landing page with a message from Superintendent Bartz:



The Smithfield Public Schools Superintendent page invites Smithfield families to follow the School Department and the Superintendent on Facebook and Twitter [X] @SmithfieldSchls @SmithfieldSuper in order to obtain information about the school district's activities. The Smithfield Public Schools Superintendent page makes clear that the [X] @SmithfieldSchls @SmithfieldSuper accounts are official accounts of the

school district and are used by the superintendent and school district for official school related, not personal, purposes. The @SmithfieldSuper X account page is:



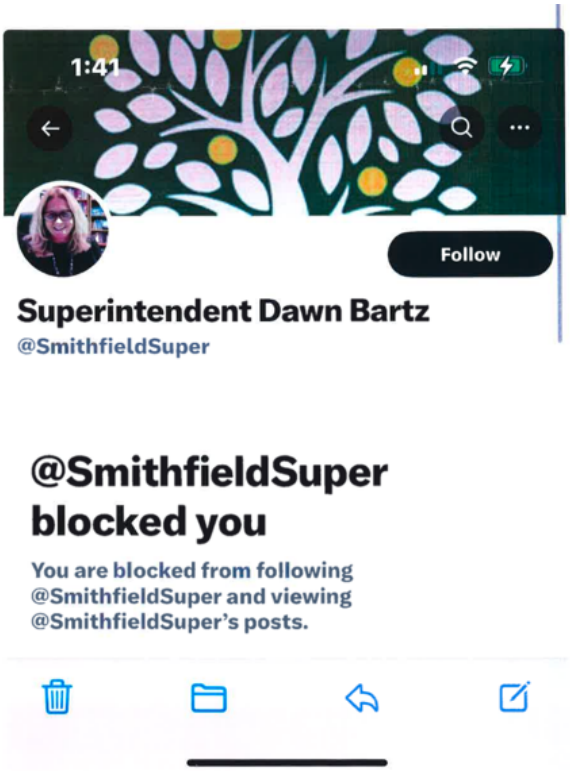
The Smithfield Public Schools Superintendent X Account, @SmithfieldSuper, is a protected account that requires prior approval for access.

The X account @SmithfieldSuper was, prior to the alleged improper actions of the Defendants, accessible to the public at large without requiring any prior approval, but is currently published and limited in access solely to approved followers. Defendants have not issued any rule or statement purporting to limit (by form or subject matter) the speech of those who interact with this account. Users who cannot interact with the @SmithfieldSuper X account are those who have been banned or those who have not been approved as followers. Superintendent Bartz uses the @SmithfieldSuper X account to

announce, describe, and defend her official policies and her office's operations; to comment on local issues; to share content produced for the town's schools; and to communicate with her constituents including responding to their comments. Because of the way she uses this account, Superintendent Bartz's posts are an important source of news and information about her work. Further, the interactions associated with the posts are important forums for speech by, to, and about Superintendent Bartz and the operations of the Smithfield School Department. Superintendent Bartz has posted numerous times from the @SmithfieldSuper X account about matters relating to her official duties.

Superintendent Bartz's restricting her X account to access for only those she approves prevents or impedes the public's, and specifically any person not approved by Superintendent Bartz, ability to obtain access to public information and to speak and petition the government for redress of grievances. The restrictive act of requiring approval to access a public form such as the @SmithfieldSuper X account unduly burdens access to the public forum.

Before he was banned, Plaintiff regularly viewed and interacted with the @SmithfieldSuper X account to stay informed about issues that Superintendent Bartz addressed. Superintendent Bartz blocked him from the @SmithfieldSuper X account on or about August 2024:



In the weeks leading up to this action, on multiple occasions Plaintiff had advocated for Superintendent Bartz to resign from her position. Superintendent Dawn Bartz's banning of Plaintiff from the @SmithfieldSuper X Account prevents or impedes him from commenting on, replying to, or interacting with any posts or comments on this page.

At some point thereafter, the Defendants revised their accounts to require advance approval before any person could gain access to them. Once the @SmithfieldSuper and @SmithfieldSchls X accounts were restricted to approved accounts, Plaintiff requested approval. After more than four months, the requests are still pending, and Plaintiff has not received any reply. Superintendent Bartz's restricting her X account to access for only those she approves prevents or impedes Plaintiff's, and any person not approved by Bartz, ability to obtain access to public information and to speak and petition the government for redress of grievances.

III. STANDARDS OF REVIEW

There are two relevant standards of review: (1) the standard to obtain a temporary restraining order (TRO) and preliminary injunction, which includes (2) the standard to review the constitutionality of a government restriction on Plaintiff' First Amendment rights.

The standard for a TRO or preliminary injunction is well established:

> In order to decide whether a preliminary injunction should issue, the Court must weigh four criteria: [Plaintiff'] likelihood of success on the merits; the likelihood that [plaintiff] will suffer irreparable injury if the [defendants] proposed conduct is not forestalled; whether the [defendants] would suffer a greater burden than [plaintiff] if it is not permitted to follow through with [their action]; and any impact on the public interest. *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1 (1st Cir. 2012). "The purpose of a preliminary injunction is to preserve the status quo, freezing an existing situation so as to permit the trial court, upon full adjudication of the case's merits, more effectively to remedy discerned wrongs." *CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.*, 48 F.3d 618, 620 (1st Cir. 1995).

*Carroll v. Craddock***,** 494 F. Supp. 3d 158, 167 (D.R.I. 2020).

"The *sine qua non* of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *New Comm Wireless Servs., Inc.* v. *SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). "Likelihood of success is the most important of the four factors." *Carroll v. Craddock***,** *supra* at 167, citing *Sindicato Puertoriquene de Trabajadores*, 699 F.3d 1, 10 (1st Cir. 2012).

Additionally, Plaintiff must demonstrate than the injury "cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." *Rio Grande Community Health Center, Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005). The alleged First Amendment violation cannot be adequately compensated by a subsequent action by this Court.

> A deprivation of a First Amendment right, even if brief, is itself an irreparable injury. "As the Supreme Court has explained, '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976).

Carroll v. Craddock, *supra* at 167. "[I]t is important to note that the deprivation of constitutionally-protected rights for even minimal amounts of time constitutes not only injury, but irreparable injury" *Providence Firefighters Local 799 v. City of Providence*, 26 F.Supp.2d 350, 354 (D.R.I. 1998).

In this case, the "likelihood of success" analysis includes the appropriate constitutional standard of review of Defendants' banning of plaintiff based on their posted content and viewpoints. Plaintiff submits the applicable standard is strict scrutiny because Defendant is attempting to censor Plaintiff' political viewpoints. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009).

IV. ARGUMENT

A. Likelihood of Success on the Merits

Plaintiff has asserted a claim for a deprivation of his First Amendment rights to free speech and right to petition that has a clear and unambiguous likelihood of success on the

merits. The implications of a government officials' use of social media has moved quickly through the Courts over the past decade as social media has become an all-encompassing framework on which many of the aspects of daily living have been re-built. With this landscape, government officials have, as have most other social entities, both government and private, taken to the use of social media to increase their digital footprint and engage with their constituencies. In doing so, government officials, including Superintendent Bartz and the Smithfield School Department, have established their social media presence as a public forum unavailable to viewpoint censorship. The Second Circuit Court of Appeals set forth a comprehensive evaluation of the limits of governmental censorship on social media platforms in *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) *vacated on other grounds sub nom., Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 209 L. Ed. 2d 519 (2021).

> As a general matter, social media is entitled to the same First Amendment protections as other forms of media. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36, 198 L. Ed. 2d 273 (2017)(holding a state statute preventing registered sex offenders from accessing social media sites invalid and describing social media use as "protected First Amendment activity"). "[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S. Ct. 777, 96 L. Ed. 1098 (1952)). A public forum, as the Supreme Court has also made clear, need not be "spatial or geographic" and "the same principles are applicable" to a metaphysical forum. *Rosenberger [v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)] at 830.

Trump, *supra* at 237.

The initial inquiry is as to whether the social media account is a public forum. The Superintendent's and School Department's X accounts certainly qualify as such.

> To determine whether a public forum has been created, courts look "to the policy and practice of the government" as well as "the nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802. Opening an instrumentality of communication "for indiscriminate use by the general public" creates a public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

Trump, *supra* at 237. This case does not require any nuanced inquiry into the form of the content to determine whether the account is personal or governmental to make this determination. The two accounts addressed by the complaint and this motion are specifically identified by the defendants as official governmental accounts.

> [I]in addition to official pages of government entities, "individual social media accounts or pages may be considered *official* individual social media pages or accounts if: 1) these are accessible to the public-at-large, regardless of their classification, and 2) their "content . . . is provided by a Main Official, either elected or not or by persons directly supervised by the Main Official, be they public employees, contractors or volunteers, and who promote the Main Official by performing official duties or identifying him/her by his/her post as a Main Official."
>
> To determine whether a page is of an official nature, even if the page is published on a platform that is <u>not</u> controlled or created by the government entity or the Chief Officer, such as, for example, Facebook, Twitter, Instagram, YouTube, among others, the OEC shall examine one or more of the following factors, which were considered in *Knight First Amendment Institute v. Trump*, [928 F.3d 226, 239-40 (2d Cir. 2019)] and *Davidson v. Randall*, [912 F.3d 666, 682 (4th Cir. 2019)], to determine whether a page published on the Internet or social media is official or private:
>
> 1. Whether or not the Chief Officer is identified on the web or social media page with the public position that he holds (either through a description, seals, symbols or logos used on the page);

> 2. Whether or not the Chief Officer uses the web page or social media account to publish official business that he conducts in his capacity as Chief Officer;
> 3. How other agencies or their Chief Officers refer to and treat the web page or social media account.
> 4. Whether employees are used during governmental work time, facilities or resources, or such services are paid for through public funds.

P.R. Ass'n of Mayors v. Vélez-Martínez, 482 F. Supp. 3d 1, 5-6 (D.P.R. 2020).

These accounts are specifically identified, presented and linked by the defendants as their official accounts. The defendants' own designations of the accounts establish unquestioningly that the accounts serve as official vehicles for governance. Thereby, the X accounts are public forums.

"If the Account is a forum—public or otherwise—viewpoint discrimination is not permitted by the government." *Trump, supra* at 237*, citing Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992); *see also Pleasant Grove*, 555 U.S. at 469-70 (viewpoint discrimination prohibited in traditional, designated, and limited public forums); *Cornelius*, 473 U.S. at 806 (viewpoint discrimination prohibited in nonpublic forums). In the matter at hand, a blocked or banned entity is prevented from replying to, commenting on and emoji responding, liking, etc., any of the defendants' posts. Replying, commenting and liking or other emotive responses are all expressive conduct that banning/blocking inhibits. Replying and commenting to a post are messages that a user broadcasts, and, as such, undeniably are speech. *Trump, supra* at 237. "Liking a [post] conveys approval or acknowledgment of a [post] and is therefore a symbolic message with expressive content. *Trump, supra* at 237 *(modified), referencing W. Virginia State Bd. of Educ. v.*

Barnette, 319 U.S. 624, 632-33, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (discussing symbols as speech).

By banning the Plaintiff and preventing Plaintiff from interacting with their posts and those of other constituents, the defendants excluded the Plaintiff from a public forum, something the First Amendment prohibits. See *Trump, supra,* at 238. More profoundly, the restriction of access to those who have been pre-approved excludes all potential dissent and chills the voice of the public at large "[T]he speech restrictions at issue burden the Individual Plaintiff' ability to converse on [X] with others who may be speaking to or about the [defendants]". *Id.* "[O]nce [the defendant] opens up the interactive features of [their] account to the public at large [they are] not entitled to censor selected users because they express views with which [they] disagree[]." *Id.*

The defendants created X accounts which they use as official vehicles of governance. The @SmithfieldSuper and @SmithfieldSchls X accounts, by their creation and use, are public forums. Once a public forum, the usual personal restrictions of banning or blocking another individual based on the content of their comments, be they extended posts, or singular emojis, is an unconstitutional restraint on the free speech and right to petition of each and every person banned or blocked. The defendants, by so restricting the plaintiff has violated their First Amendment rights. Plaintiff have established a likelihood of success on the merits of their complaint.

The United States Supreme Court, in *Lindke v. Freed*, 44 S.Ct. 756, 218 L.Ed.2d 121 (2024), addressed the evaluation of the reach of §1983 for a plaintiff seeking to open

access to a proposed public forum on social media. "[A] public official's social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." *Id* at 766. Each prong of the inquiry is intended to restrict a petitioner's ability to force open access to a social media account solely to accounts which are attributable, by authority and use, to the State. "[T]he conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Lugar* [*v. Edmondson Oil Co.*], 457 U.S. [922] at 937, 102 S.Ct. 2744 (emphasis added). An act is not attributable to a State unless it is traceable to the State's power or authority. *Id* at 767.

> For social-media activity to constitute state action, an official must not only have state authority—he must also purport to use it. *Griffin*, 378 U.S. at 135, 84 S.Ct. 1770. State officials have a choice about the capacity in which they choose to speak. "[G]enerally, a public employee" purports to speak on behalf of the State while speaking "in his official capacity or" when he uses his speech to fulfill "his responsibilities pursuant to state law." *West*, 487 U.S. at 50, 108 S.Ct. 2250. If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.

Id at 769.

In the more abundant cases, this inquiry is intricate and nuanced. Here it is not. The defendants have, by their use of the official websites of the Town, placed these X accounts within the government's own information system, not just attributable to the State but are directly of the State. Equally, the use of the X accounts cannot be other than acting in an official capacity. These are the Town's accounts by their very origin and designation. To

act on them cannot be personal musings but are by their placement on official social media cites, official acts, within the actors' official capacity.

B. Plaintiff Will Suffer Irreparable Injury

With the initial and most substantial prong of the standard for issuance of a preliminary injunction satisfied, the inquiry moves to the likelihood that plaintiff will suffer irreparable injury. *Carroll supra at* 167. As set forth in the preceding section, the defendants' continuation of their ban of the Plaintiff from interacting with the @SmithfieldSuper and @SmithfieldSchls X accounts is a continuing violation of their First Amendment rights to free speech and to petition the government. As set forth above:

> A deprivation of a First Amendment right, even if brief, is itself an irreparable injury. "As the Supreme Court has explained, '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976).

*Carroll v. Craddock***,** *supra* at 167. "[I]t is important to note that the deprivation of constitutionally-protected rights for even minimal amounts of time constitutes not only injury, but irreparable injury" *Providence Firefighters Local 799 v. City of Providence*, 26 F.Supp.2d 350, 354 (D.R.I. 1998).

As the deprivation of the plaintiff' First Amendment rights is ongoing, there is a continuing irreparable injury. The irreparable injury requirement is met.

C. The Balance of Equities Weighs in Favor of the Plaintiff

The balance of harm also weighs in favor of the Plaintiff. "[A] determination of the public interest necessarily encompasses the practical effects of granting or denying preliminary injunctive relief." *Bl(a)ck Tea Soc'y*, 378 F.3d at 15. *Watchtower Bible Tract Soc'y of N.Y., Inc. v. Municipality of Aguada*, 160 F. Supp. 3d 440, 443 (D.P.R. 2016). The effect of denying the Plaintiff' request for injunctive relief is a continuing violation of his First Amendment rights. A granting of the requested injunctive relief will allow the Plaintiff to provide comment and content to the @SmithfieldSuper X account and @SmithfieldSchls X Account. To do so does nothing more than remove improper restrictions on commenting and comment. The worst potential outcome from the granting of the preliminary injunction is that the defendants may suffer some annoyance due to some critical content directed to the defendants by Plaintiff. The scales are clearly weighed in favor of the Plaintiff and the granting of the requested equitable relief. Accordingly, the balance of the equities weighs in Plaintiff's favor.

D. The Issuance of Interim Injunctive Relief Will Serve the Public's Interest.

The final prong of the test requires Plaintiff to establish that granting the preliminary injunction will not adversely affect the public interest. See, e.g., *Sindicato Puertorriqueno de Trabajadores, SEIU Local 1199 v. Fortuno,* 699 F.3d 1, 10 (1st Cir. 2012) (*per curiam*).

> [T]he Supreme Court noted in *Citizens United* [*v. Federal Election Commission,* 558 U.S. 310 (2010)] that the suppression of political speech harms not only the speaker, but also the public to whom the speech would be directed: "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." 130 S. Ct. at 898. To deprive plaintiff of the right to speak will therefore have the concomitant

> effect of depriving "the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." Id. at 899.

Fortuno 699 F.3d at 15. Here, the public interest will be served by granting interim relief. Accordingly, the public interest weighs in favor of Plaintiff' interim injunctive relief.

V. CONCLUSION

The defendants' banning of the Plaintiff from comment on the @SmithfieldSuper and @SmithfieldSchls X accounts unconstitutionally restricts Plaintiff's speech as well as the speech of anyone similarly situated. Plaintiff has a likelihood of success on the merits of his First Amendment violation claims which continue in the form of an irreparable injury to his right to free speech and to petition the government for redress. All equities are in favor of the sought equitable relief both individually, in addressing the parties themselves, but also as to the public interest at large. For the reasons set forth above, the Court should issue a preliminary injunction order requiring the defendants to remove any and all restrictions put in place restricting the Plaintiff from engaging with the @SmithfieldSuper and @SmithfieldSchls X accounts and requiring pre-approved access to these accounts.

Respectfully submitted,
DANIEL MAYER
By and through his attorney,

/s/ David S. Cass

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