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July 24, 2017

VIA REGULAR AND ELECTRONIC MAIL

Governor Paul LePage
c/o Chief Legal Counsel Brent Davis
Office of the Governor
#1 State House Station
Augusta, ME 04333-0001
brent.davis@maine.gov

Re: Unconstitutional Censorship of Constituent Facebook Comments

Dear Governor LePage,

On behalf of the American Civil Liberties Union of Maine Foundation and several affected Mainers, I write concerning your practice of deleting comments and permanently blocking individuals from accessing or commenting on your official verified Facebook page: "Paul LePage, Maine's Governor."¹ Among the individuals harmed by this practice are Karin Leuthy, Kelli Whitlock Burton, Susan Lajoie, and other members of the statewide organization Suit Up Maine, whose comments you have hidden or deleted and whom you have blocked from all future postings on your page, seemingly because you did not want to answer their questions on various issues or respond to their concerns.

Censorship of this nature violates the First Amendment to the U.S. Constitution and Article One, Sections 4 and 15, of the Maine Constitution, which guarantee the people of Maine the right to free expression and the right to petition for redress of wrongs and grievances. Your conduct also

¹ Although this Facebook page states that it is "a fan created page that has now become the FB home for those who support Governor Paul LePage and his efforts to improve Maine's economy and bring fiscal responsibility to state government," the page is set up in your name with verification of authenticity from Facebook that it is your page as a public figure. You link to this page from your official governor's office website. And, you have acknowledged in the press that you direct what messages are posted on the page. Many of the posts are written in the first-person voice from you, and the page has a constituent badge, which is a Facebook tool for identifying communications between public figures and their constituents.. Whether you personally create the posts or someone else creates them on your behalf, it is an official page tracking your positions and activities as governor and through which you post frequent links and commentary as a means of engaging Maine voters and keeping your constituents informed.

bypasses Maine's policy on social media for state business, which requires your office to create and publish terms by which unacceptable contributions by constituents on your official Facebook page will be reviewed. Accordingly, we ask that you immediately cease your selective deletion of comments posted by constituents, and reinstate commenting privileges to all those individuals who have been improperly blocked.

Social Media and the Constitution

As you yourself have acknowledged, social media has become a recognized forum in which government officials communicate their messages to constituents and in which citizens can voice their views in response without the filter of the traditional news media. Courts have generally agreed with this characterization. The United States Supreme Court has recently recognized that social media sites, such as Facebook and Twitter, "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). The Supreme Court also stated that social media sites allow citizens to "petition their elected representatives and otherwise engage with them in a direct manner," and that all 50 governors have used social media for that purpose. *Id.* at 1735. Similarly, the United States Court of Appeals for the Fourth Circuit recently recognized that social media has "emerged as a hub for sharing information and opinions with one's larger community," and that "Facebook is a dynamic medium through which users can interact and share news stories or opinions with members of their community." *Liverman v. City of Petersburg*, 844 F.3d 400, 409-10 (4th Cir. 2016).

In an interview on July 6, 2017, on WGAN radio, you stated that you use your Facebook Live video streaming feature to bypass news reporters and address the public directly:

Governor LePage: "You know what we found that works? We go Facebook Live. We ignore them, and they get even angrier."

Radio host: "Kind of go around the press and take it to the people directly."

LePage: "Yes."²

² Newsradio WGAN, Guest: Governor Paul LePage 7:38/7:50, July 6, 2017, <https://soundcloud.com/newsradio-wgan/7617-guest-governor-paul-lepage-738750>

In addition, your office approved a policy established by Maine's Office of Information Technology on the use of social media for state business that anticipates comments and contributions from constituents that may be negative. Regarding negative constituent commentary, the policy states: "Any scandalous, libelous, defamatory, or pornographic material, if posted, is removed as soon as discovered." In another subsection, the policy further states:

Agencies must create and publish a *Terms of Comment* which describes how the Agency will manage user contributions to the extent allowed by the *Social Media* site/application. The *Terms of Comment* shall detail the review criteria for acceptable comments, such as on-topic, non-duplicative, not obscene or offensive etc.³

As governor, you and your office have adopted social media as a key means of communicating with constituents, using your Facebook page to promote your positions, share press releases, broadcast recorded statements, criticize your opponents, and highlight your appearances as governor through photographs and video.

Unlawful Censorship

Many Mainers have used your Facebook page to speak with you on issues of personal concern. In doing so, they have engaged in core political speech that is fully protected by the Constitution, regardless of whether that speech includes praise or criticism of your administration's policies.

For example, Karin Leuthy is a Camden mother and cofounder of Suit Up Maine, an organization with approximately 5,300 members throughout the state. Ms. Leuthy "liked" your Facebook page and began commenting more regularly in the days leading up to the government shutdown in July 2017. On July 6, Ms. Leuthy posted two comments, one quoting you about intentionally misleading the press and another linking to a Bangor Daily News article with a question about why you were not responding to reporters. None of her comments on your page were scandalous, libelous, defamatory, pornographic, off-topic, duplicative, obscene, or offensive. That same day, you or someone acting on your behalf deleted those comments and blocked her from further commenting. This resulted in Ms. Leuthy being unable to

³ See "Social Media for State Business Policy," Maine Office of Information Technology, available at <http://www.maine.gov/oit/policies/SocialMediaStateBusiness.pdf>.

engage in protected political speech, or to petition the government for a redress of wrongs and grievances, by way of your official page.

Similarly, Kelli Whitlock Burton is a Waldoboro mother who works as a science and medical writer and who cofounded Suit Up Maine. She had never commented on your Facebook page until July 6, 2017, when she made two comments. In one comment, she questioned why you blamed the media for your false statement about going on vacation when the information came from a Republican legislator. And, she challenged your practice of deleting comments and blocking constituents from your Facebook page, even when their comments were not inappropriate, profane, or disrespectful. Neither of her comments were scandalous, libelous, defamatory, pornographic, off topic, duplicative, obscene, or offensive. Yet within hours after Ms. Whitlock Burton made those posts, you or someone acting on your behalf deleted her comments and blocked her from commenting further or interacting with your page. This resulted in Ms. Whitlock Burton being unable to engage in political speech, or to petition the government for a redress of wrongs or grievances, by way of your official page.

Another Suit Up Maine member, Susan Lajoie, is lifelong Maine resident who moved to the town of Acton after retiring as a school teacher. She began commenting on your Facebook page several months ago and commented most recently in the period leading up to the government shutdown. Her latest comment disagreed with your position that a three percent state tax surcharge on the wealthy to fund education would drive the wealthy to move from the state. Ms. Lajoie did not notice that her comments had been deleted and she had been blocked from commenting further until July 5 or July 6, when she read on Suit Up Maine's site about people being similarly blocked from commenting your Facebook page. This resulted in Ms. Lajoie being unable to engage in political speech, or to petition the government for a redress of wrongs or grievances, by way of your official page.

Other members of Suit Up Maine were similarly blocked, though none of their comments violated any Maine's social media policy that your administration approved.

Your Censorship of Constituents Based on Their Viewpoint Violates the Law

Because social media has become a popular forum for people to share information and opinions, courts have “repeatedly affirmed the First Amendment significance of social media, holding that speech utilizing Facebook is subject to the same First Amendment protections as any other speech.” *Davison v. Loudoun Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605, 611 (E.D. Va. 2017).

Consequently, the government, and you as Maine’s governor, may not legally establish a Facebook page as a forum for dialogue with constituents and then selectively censor who may speak in that forum based on the viewpoint expressed.

Although state courts in Maine and federal courts within the First Circuit have yet to address legal challenges to censorship on government social media sites, courts in other jurisdictions have begun to address the relatively new issue.

For example, an Indiana city recently settled a lawsuit by two women against its police department for deleting their comments from the police Facebook page and for blocking the women from commenting on the page. The city agreed to pay the women \$7,412.50 in costs and attorneys’ fees and to restore their ability to comment in the city’s Facebook pages.⁴

In addition, a Virginia man recently overcame a motion to dismiss by the Loudoun County Board of Supervisors, after he sued the county for deleting his comments from two separate Facebook pages – one, the board’s official Facebook page, and the other, the board chairwoman’s official Facebook page related to her duties as chairwoman.⁵ In that case, the court found that an official Facebook page is a “limited public forum” that may not be selectively closed based on the viewpoint of the speaker. See *id.* at 611.⁶ The board chairwoman’s argument that her official Facebook page should be treated as a nonpublic forum because she had personally created it and because she maintained it with minimal assistance from her staff was unpersuasive.

⁴ See Cara Anthony, Beech Grove, ACLU reach settlement in Facebook case, *Indianapolis Star* (Aug. 4, 2016), <http://www.indystar.com/story/news/2016/08/04/beech-grove-aclu-reach-settlement-facebook-case/88075666/>.

⁵ See *Davison v. Loudoun Cty. Bd. of Supervisors*, 2017 WL 1929406 (E.D. Va. May 10, 2017), 227 F. Supp. 3d 605 (E.D. Va. 2017) and 2016 WL 4801617 (E.D. Va. Sept. 14, 2016).

⁶ Just last month, the United States Supreme Court reinforced its position that when government creates a limited public forum for private speech “in either a literal or ‘metaphysical’ sense,” it may be allowed “some content- and speaker-based restrictions,” but “‘viewpoint discrimination’ is forbidden.” *Matal v. Tam*, __ U.S. __, 137 S. Ct. 1744, 1763 (2017) (citing *Rosenberger*, 515 U.S. at 830-31).

In the Virginia case, the county also argued that, because it reserved the right to moderate comments, it did not violate the First Amendment by deleting the constituent's comments. The court rejected this:

That is not so. "Once it has opened a limited forum ... the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829. This rule applies as much to Defendants' Facebook page as to any other limited public forum. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013), *as amended* (Sept. 23, 2013) (noting that speech on Facebook is subject to the same First Amendment protections as speech in any other context).⁷

The court further held that the county was bound by its own social media policy that encouraged constituent interaction and that called for removal of only those comments that violated enumerated rules. *See id.* The court also decided that constituent speech was protected equally under the First Amendment whether the constituent was commenting on the county's Facebook page or the board chairwoman's page. *See id.* at 612.

As Governor, you have invited your constituents to engage with you through your Facebook posts in the same way as the board chairwoman in the Virginia case. You have approved a social media policy that calls for the removal of only comments that are "scandalous, libelous, defamatory, or pornographic," and you have directed that agencies adopt similar standards for removing comment that are off-topic, duplicative, obscene, or offensive.⁸ Your Facebook page, however, does not identify any additional terms of comment beyond the suggestions in the policy itself. As the screenshots attached to this letter show, none of the comments at issue here fall into any of the categories identified in the policy.

The ACLU of Maine Foundation demands that you and your office take the following steps:

- 1) Immediately cease your unlawful practice of censoring constituent comments on your Facebook page;
- 2) Restore the posting privileges of each of the constituents named in this letter;

⁷ *Id.* at 2016 WL 4801617, *7.

⁸ *See* Me. Office of Info. Tech., Social Media for State Business Policy (2015), <http://www.maine.gov/oit/policies/SocialMediaStateBusiness.pdf>.

3) Undertake a review of all people whose posting privileges have been censored, and restore all of those who have been unlawfully blocked for commenting.

Because of the importance of individuals' speech rights, I request that you notify me, in writing, within fourteen (14) days regarding whether you agree to these demands. If we do not receive this assurance, we will be forced to take additional action to protect the rights of the people of Maine to communicate with their government. Thank you for your attention to this matter, and I look forward to your reply.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Zachary L. Heiden', with a long horizontal flourish extending to the right.

Zachary L. Heiden
Legal Director, ACLU of Maine Foundation

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Louanne Dyer Pinkham Rosanne M. Broun Rachel L. McCarthy

Use Reps: 20-25

Louande Over Pinkham Hair Shirts

Like Reply: 39 min

John Kosloski @Ha_Your_hilarious_Go_home_You're_drunk!

Like Reph? [Join the Fun!](#)

 Julie Rockwell, Sutherland: Well he doesn't return calls... now he knows how it




feels hana

Like Reply 25/01/2016


Brad S Potter We are so blessed to have him and trump as our leaders

Like Reply 2019/11/06

 Chris Farmer I think it was a good bluff. It worked. The deal is done.



Like · Reply ·  1 12,401


1 Ref:

Jennifer Jones  Apparently people who post things that are not praising the governor and speaking their mind are being deleted from this page. Beware of censorship. Freedom of speech on Maine.gov site is required. This is not the Governor's private page. I have taken a screen shot of my post, in case I too am blocked and my comment deleted and I will share it far and wide that I was deleted for warning people. Take a screen shot of your post after you make it

Like · Reply · 1 · 15 mins

 Bob Mentzinger »Fskelven«

 Samantha Montano  I am MUCH more concerned with the fact that the governor thinks this country would be better off without a free press than some dumb lie about going on vacation.

Like · Reply ·  2 · 16 mins

Kelli Whitlock Burton @ Gov. LePage, it was members of your own party who told reporters that you had said you were taking a vacation. Perhaps you should direct your anger and frustration at those who talked to the media, not at the media for reporting it.

Like Reply 10

 Patty Blackstone Thank you Sir! With most respect!

Live Reply - 11/11/2014

 Corina Janison Paul: you are an embarrassment to the state and an all-around jerk.

1994 Sept: 5000

 Janet Wrenn: Seriously? Are you related to Trump? Would love to see print media go away? Why, is print too easy for people to track your false statements? Maine is an amazing state but how you ever got elected is baffling.

Live Reply: 7/1/2012

