IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

KARIN LEUTHY and KELLI WHITLOCK BURTON, Plaintiffs, v. PAUL R. LEPAGE, Governor of Maine, in his individual and official capacity, Defendant.	Civil Action No. 1:17-cv-00296-JAW November 3, 2017

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Viewpoint discrimination distorts the marketplace of ideas and is "presumptively unconstitutional." *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–829 (1995). Yet that is exactly what Governor LePage has done in this case, and his motion to dismiss does not attempt to argue otherwise. After opening his official "Maine's Governor" Facebook page for public comment, the Governor banned certain speakers because he disagreed with their views. Not only that, but when plaintiff Kelli Whitlock Burton posted a comment revealing the Governor's practice of censorship, he deleted that comment, too. By silencing critics and removing evidence of his censorship, the Governor doubly violated core First Amendment principles. Not only did he distort the marketplace of ideas, he also sought to conceal that distortion by projecting the appearance of an open and public exchange.

The Governor's motion to dismiss does not dispute that he silenced certain speakers based on viewpoint. Instead, the Governor makes four primary arguments for dismissal, each of which is unpersuasive. **First**, the Governor claims that there was no state action because the Facebook page was operated in a purely private capacity. Gov. Mot. at 7-15. As alleged in the complaint, however, the Governor's Facebook page (1) is the official page for "Paul LePage, Maine's Governor," (2) participates in Facebook's "Town Hall" feature for government representatives, (3) links to the official Maine.gov website, and (4) engages citizen responses on matters of public concern. Taking these allegations as true and drawing all inferences in plaintiffs' favor (as the Court must at the motion-to-dismiss stage), the complaint easily passes the threshold required for state action. **Second**, the Governor contends that even if there is state action, his censorship qualifies as valid government speech. *Id.* at 15-19. He is wrong again. This is not a case about what Governor LePage may say in his own posts, but rather about his

censorship of comments by members of the public. As shown by Facebook's display—which lists the speakers' names and profile pictures alongside their speech—it is commenters like the plaintiffs who speak through Facebook's public comment feature, not Governor LePage. **Third**, the Governor maintains that his Facebook page is immune from the public forum analysis. *Id.* at 19-22. Yet by opening an online platform for public comment, the Governor has created a designated public forum. And, in any event, viewpoint restriction (as practiced by the Governor) is impermissible even in a non-public forum. **Finally**, the Governor relies on the same state-action and government-speech arguments to oppose the plaintiffs' right-to-petition and state-law claims. *Id.* at 22-24. Not only are the Governor's arguments wrong, they also fail to recognize the unique contours of the plaintiffs' rights under the petition clause and the Maine Constitution.

BACKGROUND

I. Governor LePage's Official Facebook Page

Social media platforms like Facebook have become a crucial venue for public officials to share news and information, and for the public to respond with their views. *See* Compl. ¶ 2. "Social media offers 'relatively unlimited, low-cost capacity for communication of all kinds,'" and provides "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, 1735-37 (2017) (citation omitted). It can be used for "a wide array of protected First Amendment activity." *Id.* at 1735.

Governor Paul LePage owns and operates an official Facebook page under the banner "Paul LePage, Maine's Governor." Compl. ¶ 36. "[T]he Governor and his staff" use the Governor's Facebook page "for sharing information such as news, press releases, announcements, and action items[.]" Compl. ¶ 37; *see also* Gov. Mot. at 4 n.3. As stated in the "About" section of the page, this is the Governor's "official" page. Compl. ¶ 39. Facebook has

"verified" the "Maine's Governor" page as belonging to Governor LePage, as shown by a blue checkmark below the title of "Maine's Governor."

Compl. ¶ 40. Numerous posts are written in the first-person—like a post declaring that "I submitted a budget more than six months ago"—confirming that Governor LePage controls the page. Compl. ¶ 45. When the complaint was filed, 39,773 users had "liked" the Governor's page. Compl. ¶ 40. In addition to his official page, Governor LePage also operates a separate personal page simply titled "Paul LePage." Compl. ¶ 38.

The Governor's Facebook page has been linked to the official State of Maine Governor's website ("Maine.gov") in numerous ways. As of July 24, 2017, the Maine.gov website featured a Facebook button linked to the Governor's Facebook page, urging visitors to "Stay Connected."

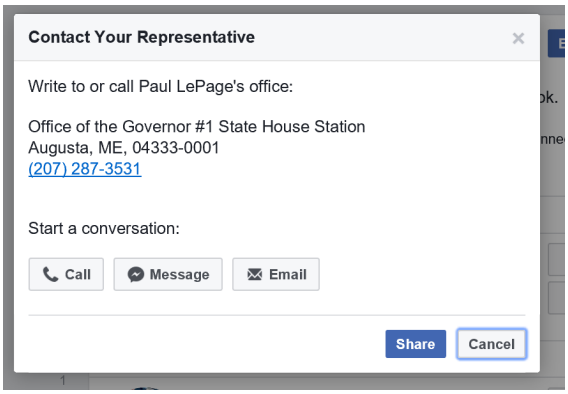
Compl. ¶ 42. Although this link was later disabled, the "Maine's Governor" page still links to the Maine.gov website. For instance, the "contact info" section of the Governor's Facebook page lists the Maine.gov website as one of two ways to contact the Governor:

Maine's Governor, FACEBOOK, https://goo.gl/Vpcgjs.[1] The second option sends a message to the Governor's Facebook page. *Id.* By listing both options, the page shows that Maine.gov and Facebook are alternative means to contact Governor LePage, the government official.

Facebook's Town Hall feature confirms that the Governor's Facebook page represents the government official. The Town Hall feature is a tool to help Facebook users contact their government representatives and to increase users' "civic engagement" with public officials. Compl. ¶ 29 (citation omitted). That feature lists Governor LePage as "Governor of Maine."

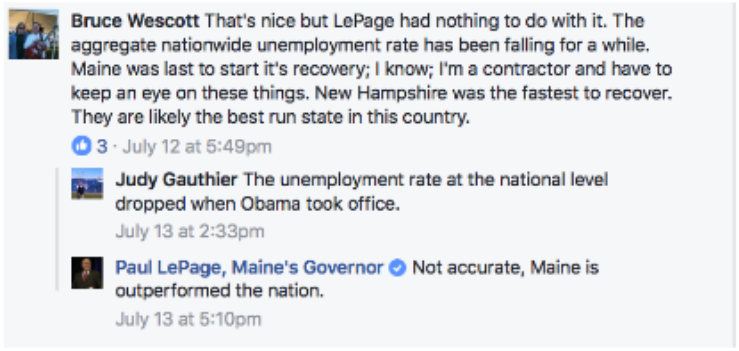
Compl. ¶ 33. The Town Hall provides two options: (1) the "Follow" button enables the user to follow Governor LePage's Facebook page, and (2) the "Contact" button links the user to the Governor's address, phone number, email, and Facebook messenger.

[1] We agree that the Court may take judicial notice of additional content on the Governor's Facebook page, *see* Gov. Mot. at 3 n.2 (citations omitted), but only for the purpose of noticing that such content is "available to the public"—not for "the truth of the matters asserted" therein. *Spy Optic, Inc. v. Alibaba.Com, Inc.*, 163 F. Supp. 3d 755, 762 (C.D. Cal. 2015) (citation omitted); *see also Staehr v. Hartford Fin. Servs. Grp.*, 547 F.3d 406, 425 (2d Cir. 2008).



Maine's Governor, FACEBOOK, https://goo.gl/n1V2wr (click "contact"). By listing the Facebook messenger alongside the Governor's official address, telephone number, and email, the Town Hall feature confirms that all methods connect to Governor LePage, the government official.[2]

Governor LePage uses his official Facebook page to perform government business, including relaying video messages directly to constituents. Compl. ¶ 41. In the summer of 2017, for example, he posted a video and other posts about contentious budget negotiations. Compl. ¶¶ 41, 45. Additionally, Governor LePage has enabled public comments on his Facebook page; constituents can use the comment feature to express their views on the Governor's posts. Compl. ¶¶ 5, 47. Governor LePage, in turn, can reply with his own message. Compl. ¶ 47.



[2] Although the "Personal Information" section now states that "[m]essages sent through Facebook are not as direct" as using Maine.gov, that qualification confirms that Facebook is an alternative (albeit less direct) method of contacting the Governor in his official capacity. *See* Maine's Governor, FACEBOOK, https://goo.gl/fbnSzo (last visited Nov. 2, 2017).

Compl. ¶ 47. According to Governor LePage, he uses his Facebook page to bypass the news media and communicate directly with the public. Compl. ¶ 46 (citation omitted).

II. Governor LePage Banned Plaintiffs Because of Their Views

The plaintiffs in this case are two Maine residents, Karin Leuthy and Kelli Whitlock Burton. Compl. ¶¶ 10, 11. Both posted critical comments on the Governor's Facebook page. Ms. Leuthy, for example, posted a comment stating that the Governor had intentionally mislead the press, and another questioning why the Governor had refused to respond to reporters. Compl. ¶ 52. Ms. Whitlock Burton, in turn, posted a comment criticizing the Governor's practice of deleting comments, and a second comment responding to the Governor's attack on the media. Compl. ¶¶ 58-60. After plaintiffs posted these critical comments, the Governor (or his agent) deleted their comments and banned them from his page. Compl. ¶¶ 53, 61. By banning Ms. Leuthy and Ms. Whitlock, Governor LePage removed their ability to interact on his official page. Compl. ¶¶ 26, 55, 61.

III. Plaintiffs Filed a Complaint Against Governor LePage

On August 8, 2017, plaintiffs filed a complaint against the Governor in this Court, seeking declaratory and injunctive relief. They alleged violations of the right to free expression and right to petition under the First Amendment of the United States Constitution, and violations of numerous provisions of the Maine Constitution. Compl. ¶¶ 64-79. The Governor responded with a motion to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Gov. Mot., ECF No. 9 (Oct. 13, 2017).

ARGUMENT

I. Legal Standards

To survive a motion to dismiss under Rule 12(b)(6), the factual allegations in the

plaintiffs' complaint must "set forth a plausible claim upon which relief may be granted." *Foley v. Wells Fargo Bank*, 772 F.3d 63, 71 (1st Cir. 2014) (quotation marks and citation omitted). "[P]laintiffs are not required to submit evidence to defeat a Rule 12(b)(6) motion, but need only sufficiently allege in their complaint a plausible claim." *Id.* at 72. "The court must take all of the pleaded factual allegations in the complaint as true," *id.* (citation omitted), and "must draw all reasonable inferences" in plaintiff's favor. *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 78 (1st Cir. 2002) (citations omitted).

"To state a claim for relief in an action brought under [42 U.S.C.] § 1983," plaintiffs must establish that (1) "they were deprived of a right secured by the Constitution or laws of the United States," and (2) "the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). Where plaintiffs assert deprivation under the Fourteenth Amendment, the "state-action requirement of the Fourteenth Amendment" converges with 1983's requirement for action under color of state law. *Id.* at 50 & n.8.

II. Governor LePage Violated Section 1983 By Depriving the Plaintiffs of their First Amendment Right to Free Expression

Governor LePage banned Ms. Leuthy and Ms. Whitlock Burton from his Facebook page because of their views. Such viewpoint discrimination is unconstitutional under the First Amendment's protection of free expression. U.S. Const. Am. 1; *Rosenberger*, 515 U.S. at 828.

Governor LePage does not dispute that he silenced plaintiffs because of their views, instead arguing that he acted in his personal capacity rather than under color of state law. Gov. Mot. at 8-15. In the alternative, Governor LePage maintains that any state action qualifies as protected government speech that is not subject to the First Amendment's forum analysis. *Id.* at 15-22. Each of these arguments is unpersuasive and does not justify dismissal under the generous standard at the motion-to-dismiss stage.

A. Governor LePage Engaged in Prohibited Viewpoint Discrimination

Viewpoint discrimination is unconstitutional in any type of forum. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828 (citing *Police Dep't of Chi. v. Mosley,* 408 U.S. 92, 96 (1972)). "In the realm of private speech or expression, government regulation may not favor one speaker over another." *Id.* (citing *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* (citing *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 641–643, (1994)).

In *Matal v. Tam*, for example, the Supreme Court held that the federal government's prohibition against registering "disparaging" trademarks "discriminate[d] on the bases of 'viewpoint.'" *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017); *see also id.* at 1765-67 (Kennedy, J., concurring). Although "the clause evenhandedly prohibit[ed] disparagement of all groups," it denied registration to trademarks that gave offense. *Id.* at 1763. "Giving offense is a viewpoint." *Id.*

In this case, likewise, the Governor discriminated against plaintiffs because of their views. Ms. Leuthy posted a comment regarding her view that the Governor was intentionally misleading the press, and another comment critiquing the Governor for failing to respond to reporters. Compl. ¶ 52. Ms. Whitlock Burton, in turn, posted a comment criticizing the Governor's practice of censorship, and another comment correcting one of the Governor's posts about the media. Compl. ¶¶ 59-60. These views were treated differently than other comments that Governor LePage agreed with and left undisturbed, thus qualifying as "viewpoint discrimination." *See Matal*, 137 S. Ct. at 1763.

This case presents even more egregious viewpoint discrimination than *Matal v. Tam*,

because of the ad hoc and secretive nature of the Governor's censorship. Viewpoint discrimination is forbidden because of its ability to "silence dissent and distort the marketplace of ideas." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring). That distortion is even more corrosive when the government censors on its own whim, without any set of rules or standards, and seeks to conceal evidence of its censorship. The Governor's motion confirms that he has not followed any rules or standards in his censorship of constituent speech, instead claiming that Maine's official social media policy (the only applicable source of such standards) does not apply. Gov. Mot. at 5-6; *see also* Compl. ¶ 48. Instead, the Governor engages in ad hoc review of comments, deleting those that offend him. And he imposes bans (prior restraints) on future comments by those individuals. At the same time, the Governor seeks to project the appearance of public debate by deleting even those comments that reveal his practice of censorship. *See* Compl. ¶¶ 58, 61. Such action represents precisely the type of "unbridled discretion" and "censorship" forbidden by law. *Southeastern Promotions v. Conrad*, 420 U.S. 546, 553 (1975) ("Our distaste for censorship . . . is deep-written in our law").

As another count in plaintiffs' favor, the Governor engaged in viewpoint discrimination in the realm of "core political speech." *Rideout v. Gardner*, 838 F.3d 65, 75 (1st Cir. 2016). That is particularly concerning because, as the Governor agrees, political speech is "an area highly protected by the First Amendment." Gov. Mot. at 8 (quoting *Rideout*, 838 F.3d at 75). Even worse, the Governor barred plaintiffs from an official platform in one of the "most important places . . . for the exchange of views"—social media. *See Packingham*, 137 S. Ct. at 1736.

B. Governor LePage Acted Under Color of State Law

Governor LePage acted under color of state law in banning plaintiffs from his page.[3] Under "color" of law means action that is "fairly attributable to the State," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), or "under 'pretense' of law," *Screws v. United States*, 325 U.S. 91, 111 (1945). Although an officer's "purely personal pursuits" do not qualify, challenged conduct is under "color" of law when it is "related in some meaningful way either to the officer's governmental status or to the performance of his duties." *Parrilla-Burgos v. Hernandez-Rivera*, 108 F.3d 445, 449 (1st Cir. 1997) (citing *Martinez v. Colon*, 54 F.3d 980, 987 (1st Cir. 1995)). "[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50 (1988).

The question of state action "is rarely problematic, of course, when acts are taken by state or local officers exercising their authority or appearing to exercise their authority." Section 1983 Actions, 13D Fed. Prac. & Proc. Juris. § 3573.2 (3d ed.). Accordingly, many in-depth discussions of the state action doctrine appear in cases involving a private actor, an off-duty government official, or a personal frolic. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (private insurer); *Parrilla–Burgos*, 108 F.3d 445 (off-duty officer); *Martinez*, 54 F.3d at 987 (personal frolic). In this case, by contrast, Governor LePage is a public official whose Facebook page is "related in some meaningful way" to his status as Governor and the performance of his duties as Governor. *See Parrilla-Burgos*, 108 F.3d at 449 (citation omitted).

[3] "Section 1983's 'under color of state law' requirement is the functional equivalent of the Fourteenth Amendment's 'state action' requirement. Accordingly, [courts] regard case law dealing with either of these formulations as authoritative with respect to the other, and . . . use the terminologies interchangeably." *Santiago v. Puerto Rico*, 655 F.3d 61, 68 (1st Cir. 2011) (citing, *e.g.*, *United States v. Price,* 383 U.S. 787, 794 n. 7 (1966)).

Even in "nonobvious" cases involving private conduct, moreover, courts have cautioned that the state action question is intensely factual, and requires "sifting facts and weighing circumstances." *Santiago v. Puerto Rico*, 655 F.3d 61, 68 (1st Cir. 2011) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)). The Governor concedes that courts must "examine[] the totality of the circumstances" to determine whether private conduct qualifies as state action. Gov. Mot. at 12-13 (quoting *Davignon v. Hodgson*, 524 F.3d 91, 112 (1st Cir. 2008)). The factual nature of that inquiry favors the plaintiffs at the motion-to-dismiss stage, where courts must draw all inferences in favor of the plaintiffs. *Aldridge*, 284 F.3d at 78.

In a recent case involving a public official's Facebook page, for example, the court held that the Facebook page was operated "under color of state law," and was not "merely a personal website." *Davison v. Loudoun Cty. Bd. of Supervisors*, No. 16-932, 2017 WL 3158389, at *5-9 (E.D. Va. July 25, 2017) (citing, *e.g.*, *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003)). In reaching that conclusion, the court considered, among other factors, (1) that the official used her Facebook page "as a tool of governance," including a means to hold "back and forth constituent conversations," (2) that "the title of the page" included the official's title, (3) that newsletters from the official's office often "included links promoting" the Facebook page, and the Facebook page linked to the official County website, (4) that the page listed her official email address and telephone, and (5) that the content posted had "a strong tendency toward matters related to Defendant's office." *Id.*

Similar reasoning requires finding state action here. The well-pleaded facts in this case allege, among other things, that Governor LePage (1) labels his page as "official" and participates in Facebook's Town Hall feature for government representatives, (2) operates his Facebook page under the verified banner of "Maine's Governor," (3) links his Facebook page to

the Maine.gov website, (4) includes his official email address, physical address, and phone number on his Facebook page, and (5) uses his Facebook page to interact with the public on matters of government business, including "the job creating, budget fixing & pro-liberty efforts of Gov. Paul LePage." Compl. ¶ 36-39, 41, 44, 47. As in *Davison*, this case falls on the "state action" side of the line.

The Governor argues that this case is distinguishable from *Davison* because his page "was created prior to his election." Gov. Mot. at 15. But the Governor fails to explain why the Court should consider this new factual contention (which is not alleged in the complaint) at the motion-to-dismiss stage. In any event, plaintiffs have not alleged that the Governor created a Facebook page titled "Paul LePage Maine's Governor" before he assumed that position—that would have been presumptuous. Instead, they allege that Governor LePage began using the page as his official government Facebook page after he took office. Compl. ¶ 6. And even if Governor LePage created the page before election, he signaled the official nature of the post-election page by changing the title to "Maine's Governor."

The Governor also argues that his Facebook page is categorized as a "Public Figure" rather than a "Government Official," and "was created *by* LePage supporters *for* LePage supporters." Gov. Mot. at 15. Yet that history—of beginning as a "Public Figure" page for supporters—makes perfect sense if the page started as a campaign tool, as the Governor maintains. In any event, the page's origin is merely one of many factors that may be considered in deciding the fact-laden question of whether there is state action. *See Santiago*, 655 F.3d at 68–69. Most persuasive in this case is that Governor LePage has signaled his official government role—by, for example, speaking as "Maine's Governor" and participating in Facebook's Town Hall feature for government representatives.

The Governor nevertheless argues that his Facebook activity is "private," because state law does not "require or otherwise provide for the administration of a governor Facebook account." Gov. Mot. at 13. That frames the question far too narrowly. The Governor is a high-ranking state official who operates his Facebook page to advance his duties as "the supreme executive power of this State." Me. Const. Art. V, § 1. In that role, he shoulders broad authority and responsibility to, among other things, to "take care that the laws be faithfully executed." Me. Const. Art. V, § 12. Additional duties include giving "the Legislature information of the condition of the State," and recommending consideration of the Governor's preferred measures. *Id.* Art. V, § 9. One element of discharging those roles is using publicity to advance the gubernatorial agenda. As indicated by the legislature's creation of the "Governor's Office of Communications," that includes communication and interaction with the constituents of Maine. *See* 2 M.R.S. § 10.

The Governor uses his Facebook page as a publicity tool. As the Governor has explained, he uses his Facebook page as a method of bypassing the news media and communicating directly with the public. Compl. ¶ 46 (Newsradio WGAN, Guest: Governor LePage, 7:38/7:50, July 6, 2017, goo.gl/Hr4WzW). And he communicates on topics such as budget negotiations with the legislature, Compl. ¶ 45, which are related to his duties and authority under the Maine Constitution. Me. Const. Art. V, §§ 9, 12. In short, the Governor's Facebook communications are "related in some meaningful way" to his official duties. *See Parrilla-Burgos*, 108 F.3d at 449.

Nor is it determinative that "holding public office is not a prerequisite to creating and operating a political Facebook page." Gov. Mot. at 14 (citing *Davignon*, 524 F.3d at 112). Again, the Governor states the test too narrowly. Under his test, a police officer who punches an arrestee is not a state actor because "holding public office is not a prerequisite" to beating someone up.

Cf. Gov. Mot. at 14. That is not the law. Instead, state action applies when a public official's conduct relates to "an actual or apparent duty of his office," *Davignon*, 524 F.3d at 112 (citing *Martinez*, 54 F.3d at 986), or is "related in some meaningful way either to the officer's governmental status or to the performance of his duties." *Parrilla-Burgos*, 108 F.3d at 449. Only "purely personal pursuits" do not qualify. *Id.* The Governor's Facebook page—which operates under the banner of Maine's Governor and communicates on topics of governmental importance—relates in a meaningful way to the Governor's status and duties.

The Governor also relies on a Washington Post article containing a law professor's personal views about the use of social media by the President of the United States. Gov. Mot. at 13 (citing Eugene Volokh, *Is @RealDonaldTrump Violating the First Amendment by Blocking Some Twitter Users?*, The Volokh Conspiracy (Wash. Post June 6, 2017), http://goo.gl/G8Qfus). That article is not binding or persuasive authority on this, or any, Court.

The Governor's reliance on a dissent from an Establishment Clause case is no more illuminating. Gov. Mot. at 13-14 (quoting *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting). Relying on Justice Stevens' dissent from *Van Orden*, the Governor argues that speeches by government officials are not "exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity." Gov. Mot. at 13-14 (quoting *Van Orden*, 545 U.S. at 723 (Stevens, J., dissenting)). Yet that dissent addresses the legality of public officials "express[ing] their blessings" when delivering public speeches. *Van Orden*, 545 U.S. at 723 (Stevens, J., dissenting). The reason why such speeches may not violate the Establishment Clause is because they are government speech—not, as the Governor suggests, because they are private (rather than state) action. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 483

(2009) (Scalia, J., concurring). "Nothing in" *Van Orden* (the case cited by the Governor) "suggested that the outcome turned on a finding that the monument was only 'private' speech," and "[t]o the contrary, all the Justices agreed that government speech was at issue." *Id.* Accordingly, to the extent the Governor analogizes the Governor's Facebook page to public officials giving blessing, that argument supports the existence of state action rather than undermining it.

The Governor also argues that that he has freedom of expression to tailor the messages on his Facebook page. Gov. Mot. at 8-12. But that argument does not shed light on the state action question. The Governor argues, for example, that the First Amendment protects one's autonomy "to exclude a message [one does] not like[.]" Gov. Mot. at 8 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995)). Yet the Court in *Hurley* simply held that the government could not compel an indisputably *private* group to alter the expressive content of their parade. *Hurley*, 515 U.S. at 574. The Governor cites another case for the proposition that elected officials should be "allowed freely to express themselves." Gov. Mot. at 9 (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 781-82 (2002)). But that case too involved the speech of a private entity—the Republic political party. *Republican Party of Minn.*, 536 U.S. at 781-82; *see also* Gov. Mot. at 9-10 (citing *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996)) (involving a permit for a private political campaign).[4] Here, by contrast, nothing in the complaint alleges that the Governor banned plaintiffs from his Facebook page while acting in his role as a candidate for political office, 21-A M.R.S. § 1(5), or as a political party, *id.* § 1(22), (24), (28).

[4] When holding candidates' forums, political parties engage in "private action." *See Kay v. New Hampshire Democratic Party*, 821 F.2d 31, 33 (1st Cir. 1987).

Finally, the Governor cites only one case involving the speech of a government official, but that case contains no discussion of the private or state action distinction. Gov. Mot. at 9 (citing *Bond v. Floyd*, 385 U.S. 116, 136 (1966)). It thus fails to disturb the conclusion that the Governor acted under color of state law.[5]

B. Governor LePage's Censorship Was Not Government Speech

The Governor argues in the alternative that, even assuming state action, the First Amendment still doesn't apply because management of the Governor's Facebook page qualifies as government speech. Gov. Mot. 15-19. That argument is wrong. Although the Governor's own posts may be government speech, comments on those posts reflect the speech of the commenter (here, the plaintiffs). By silencing the plaintiffs' comments, the Governor censored private speech rather than engaging in affirmative government speech.

"[T]he Free Speech Clause . . . does not regulate government speech." *Matal*, 137 S. Ct. at 1757 (quoting *Pleasant Grove City*, 555 U.S. at 467). Government speech occurs "[w]hen a government entity embarks on a course of action," and "necessarily takes a particular viewpoint" while rejecting others. *Id*. For instance, when distributing posters to promote the war effort in the Second World War, the government adopted the viewpoint of urging enlistment and the purchase of war bonds. *Id.* at 1758. "The Free Speech Clause does not require the government to maintain viewpoint neutrality" when engaging in such government speech. *Id.* at 1757.

Yet the doctrine of government speech "is susceptible to dangerous misuse." *Id.* at 1758. "If private speech could be passed off as government speech simply by affixing a government

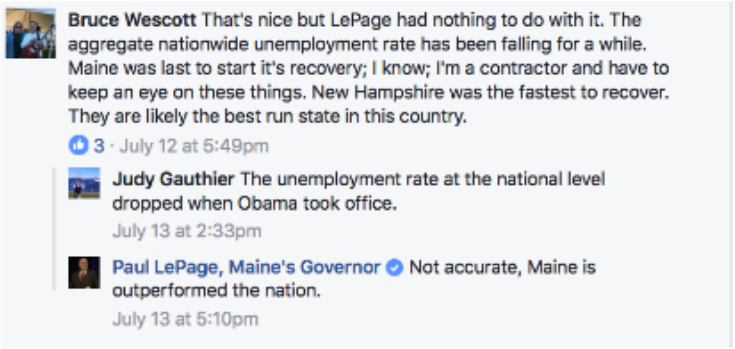
[5] Although *Weise v. Casper* also involved a government official (the President), the district court case quoted by the Governor is no longer good law because it was supplanted by an appellate decision that affirmed the result only on qualified immunity grounds. Gov. Mot. at 10-11 (citing *Weise v. Casper*, 2008 WL 4838682, at *8 (D. Colo. 2008), *aff'd on other grounds*, 593 F.3d 1163, 1167-69 (10th Cir. 2010)).

seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Id.* "For this reason," the Supreme Court has warned, "we must exercise great caution before extending our government-speech precedents." *Id.* The Court has also cautioned against assuming "that the First Amendment provides scant protection for access" to social media. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). Taken together, these warnings counsel against adopting the Governor's arguments regarding online government speech.

The correct approach is instead to find that Governor LePage's own posts, photos, and videos are government speech, but that comments from private members of the public are not. This approach is supported by Facebook's display, which clearly shows who is speaking on any given post or comment. When Governor LePage posts on his own page, for example, his post appears under a banner titled "Paul LePage, Maine's Governor," complete with the Governor's profile picture, signaling the Governor's own speech:

Compl. ¶ 45. By contrast, when members of the public comment on the Governor's posts, their comments appear next to their own names and profile pictures, showing that they (not the Governor) are speaking. *See, e.g.*, Compl. ¶ 47. And when the Governor replies to a third-party

comment, his own title and profile picture accompany his reply, again clearly signaling the Governor's own speech. Compl. ¶ 47. A sample exchange between third parties and the Governor demonstrates the point. *See id.*

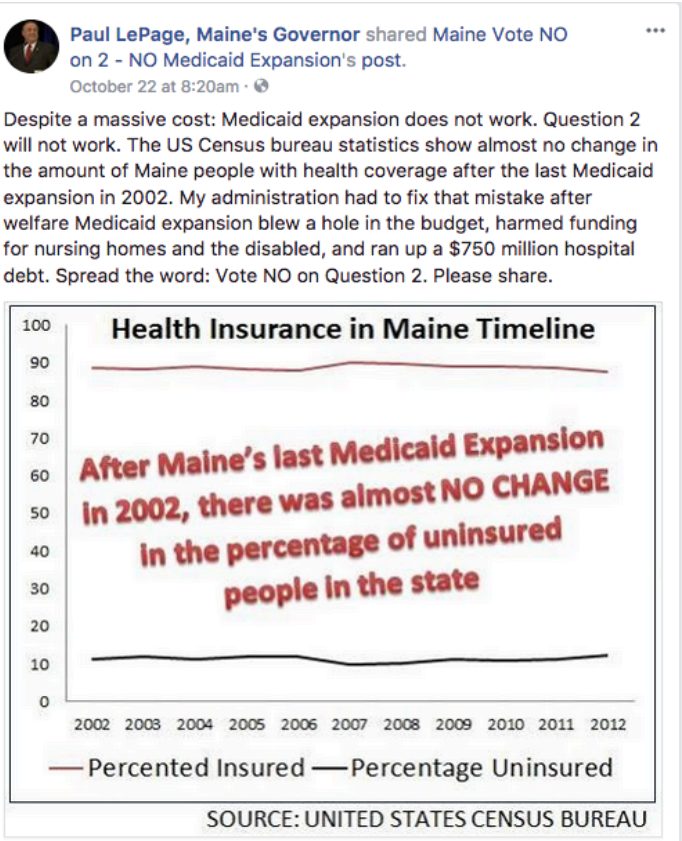


Compl. ¶ 47. A member of the public viewing that exchange would understand it as a conversation between different speakers, not as monolithic government speech. And given the potential for disagreement in such interactions, it makes little sense to say (as the Governor does) that private commenters are merely providing "assistance from private sources" for the government "to express its views." Gov. Mot. at 16 (quoting *Pleasant Grove*, 555 U.S. at 468). Even the Governor's own motion refers to "third-party comments," Gov. Mot. at 4, reflecting the common understanding that comments reflect the speech of third parties, not the page-owner.

The Governor nonetheless contends that Facebook's commenting feature simply reflects the Governor's adoption of others' speech, and thus qualifies as government speech. Gov. Mot. at 16. According to the Governor, Facebook comments are akin to the donation of a monument for display in a public park, or to the town's inclusion of private-company links on the official Town website—both of which have been held to be government speech. Gov. Mot. at 16 (citing *Pleasant Grove*, 555 U.S. at 468; *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 330 (1st Cir. 2009)). That analogy misunderstands the nature of Facebook comments, in which the commenter controls the content and timing of Facebook comments—without any prior review from the

page-owner. Such comments are not akin to government-controlled messages that merely "solicit[] assistance from nongovernmental sources." *Sutliffe*, 584 F.3d at 330 (quoting *Pleasant Grove*, 555 U.S. at 468).

Facebook's "sharing" feature provides a better analogy to *Pleasant Grove* and *Sutliffe*. As shown in the example below, content originally posted by a third party and shared by the Governor appears on the Governor's page next to the Governor's name and profile picture.



Maine's Governor, FACEBOOK, https://goo.gl/6PFiLH. As with the government speech in *Pleasant Grove*, Facebook's "sharing" feature enables the Governor to speak with assistance from private sources. In pages open to public comment, by contrast, the commenter controls when to comment and what to say—all without any prior review from the page-owner and while displaying the commenter's name alongside her own speech.

The Governor contends that allowing third-party comment "risks flooding government

websites with outside messages" that dilute the Governor's own messages. Gov. Mot. at 18 (citing *Sutliffe*, 584 F.3d at 334). But that is no justification for withdrawing First Amendment protections for third-party speech. Adopting such reasoning would risk making government speech the rule (instead of the exception), contrary to the Supreme Court's warning to "exercise great caution" before expanding categories of government speech. *See Matal*, 137 S. Ct. at 1758. In any event, comments do not dilute the page-owner's message because Facebook's automatic display features make the posts more prominent than the comments. *See, e.g.*, Compl. ¶ 41. Facebook automatically displays only a small portion of total comments, with other comments viewable by clicking to "view previous comments." *See id.* Nor is viewpoint discrimination the narrowest method to address concerns of message dilution; for example, Maine's social media policy provides that agencies may establish rules to review and remove "[]duplicative" comments. Compl. ¶ 48 (citing Me. Office of Info. Tech., available at https://goo.gl/xnxQsd).

Finally, the Governor maintains that an essential part of government speech is the "right not to be forced to adopt someone else's speech." Gov. Mot. at 16 (quoting *Newton v. LePage*, 849 F. Supp. 2d 82, 118 (D. Me. 2012)). But, unlike the government's display of the "state-owned" mural in *Newton*, Governor LePage does not "adopt" the speech of third-party commenters. Other features, such as posting or sharing, enable the page-owner to "adopt" the speech of others; commenting, by contrast, is intended to be an interactive exchange between numerous speakers. The comments reflect the plaintiffs' speech, not the Governor's.

In sum, because third-party Facebook comments are not the Governor's speech, he cannot censor them. To hold otherwise would be tantamount to authorizing the government to censor speech at public city council or school board meetings, all in the name of the government's right "to tailor [its] message." *See* Gov. Mot. at 8; *see also Musso v. Hourigan*,

836 F.2d 736, 742 (2d Cir.1988); *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir.1989). Such a holding would turn basic First Amendment principles on their head.

C. Governor LePage Restricted Speech in a Limited Public Forum

It does not matter which type of forum the Governor's Facebook page created because viewpoint discrimination (as occurred here) is prohibited in all forums. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). Yet the Governor argues that the forum analysis should not apply at all. Gov. Mot. at 19-21. That argument is wrong, as shown by the recent decision in *Packingham*, in which the Supreme Court confirmed the importance of Facebook and other social media as forums under the First Amendment. 137 S. Ct. at 1735.

The Supreme Court has been clear that areas of open communication on the Internet are "forums" for First Amendment purposes. *See Packingham*, 137 S. Ct. at 1735 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997)). As the Court explained in *Packingham*, the "most important places . . . for the exchange of views" are "cyberspace" in general and "social media in particular." *Packingham*, 137 S. Ct. at 1735 (citations omitted). "[T]oday the answer is clear" that expression on social media is even more "important" than expression in traditional public forums like "a street or a park." *Id.* Given the importance and "historic proportions" of social media in the "Cyber Age," courts must "exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks" such as Facebook. *See id.* at 1736.

In this case, the best interpretation is that the Governor's Facebook page (including its public-comment feature) created a designated public forum, analogous to a town hall or public school board meeting. *See Cornelius*, 473 U.S. at 802-03 (citing, *e.g.*, *Madison Joint Sch. Dist. v. Wis. Empl. Rel. Comm'n*, 429 U.S. 167, 174 (1976)). Yet even if access to the page were more

limited, it would still remain a non-public forum. *See id.* Viewpoint discrimination is prohibited in both. *Id.* at 806; *Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001).

The Governor makes several arguments to the contrary. First and foremost, the Governor contends that the "[f]orum analysis does not apply to government speech." Gov. Mot. at 19. As discussed above, however, the Governor's censorship of plaintiffs' comments does not qualify as government speech.

As a second argument that the forum analysis should not apply, the Governor claims that he uses his Facebook page for participation "in the marketplace of ideas" rather than for "government regulation of . . . publicly-owned real property." Gov. Mot. at 19-20 (citing *Student Gov't Ass'n v. Bd. of Trustees of Univ. of Mass.*, 868 F.2d 473, 477 (1st Cir. 1989)). But *Student Government Association* (on which the Governor relies) was a "subsidy" case, holding that the First Amendment did not bar a university from withdrawing funding for a legal services organization. 868 F.2d at 476-77. Paying for legal services made the university "a player," rather than a "regulator," in the marketplace of ideas. *Id.* at 477. In this case, by contrast, the Governor acted as a regulator when he deleted plaintiffs' speech and banned plaintiffs from participating on his official Facebook page. Compl. at ¶¶ 53, 61. Such censorship is analogous to removing constituents from a public town hall meeting, not to withdrawing a government subsidy.

To the extent the Governor argues that the forum analysis applies only to publicly-owned real property, Gov. Mot. at 19, that is clearly wrong. One public-forum case, for example, involved a government-leased (not publicly-owned) theatre. *Southeastern Promotions*, 420 U.S. at 555. Important in *Southeast Promotions* was that the municipal theatre in question was "under [the] control" of public officials. *Id.* The same conclusion applies here, where the Governor controls his public Facebook page. Notably, moreover, "[s]tate property" can include property

"owned or leased by *or in the control of* the State or any department or agency of the State or independent state agency." *See* 5 M.R.S. § 20(2) (emphasis added).

Nor is there any requirement that forums be "real," rather than "intangible," property. For over thirty years, the Court's precedent has "extended the concept of a forum to include intangible channels of communication." *Student Gov't Ass'n*, 868 F.2d 473 (citing *Cornelius*, 473 U.S. 788 (government's charitable fundraising drive); *Perry Education Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983) (school's internal mail system)). The Court's recent opinion in *Packingham* confirms that Facebook and other social media are "places" where people "can speak and listen," and are subject to the forum analysis. *Packingham*, 137 S. Ct. at 1735.

The Governor's next argument—that plaintiffs seek to "co-opt" his Facebook page—completely misunderstands the purpose of social media. Gov. Mot. at 19. Public comment is precisely the kind of interaction meant to take place on a public Facebook page. Far from co-opting the page-owner's message, such comments expand the marketplace of ideas and allow the page-owner to reply with his own views. If the Governor wants to disseminate his own message without such interaction, he could display his message on a static webpage, or devise narrowly tailored, content-neutral, time, place, or manner restrictions to make his own posts even more prominent. *See Perry Educ.*, 460 U.S. at 45 (citing, *e.g.*, *U.S.P.S. v. Council of Greenburgh*, 453 U.S. 114, 132 (1981)). But what he cannot do is to create an ostensibly public space for comment, and then censor certain messages based upon viewpoint.[6]

The Governor also argues that plaintiffs remain free to "share a political message in the

[6] The Governor's claim that he has limited participation to third parties who "support Governor Paul LePag[e]" is precisely the sort of viewpoint-based restriction forbidden by the First Amendment. *See* Gov. Mot. at 12 (citing Compl. ¶ 39). Nor is the claim factually correct, because the Governor's page is accessible to the public and (aside from viewpoint-based bans) invites public comment from all Facebook users. Compl. ¶ 5.

'vast democratic forums of the Internet,'" and thus need not participate on the Governor's Facebook page. Gov. Mot. at 19 (citation omitted). But such considerations have no role in the forum analysis. To the contrary, the Court in *Southeastern Promotions* expressly rejected a similar argument, holding that the potential availability of "some other, privately owned, theatre . . . is of no consequence." *Southeastern Promotions*, 420 U.S. at 556. The fact that plaintiffs may air their views on other corners of the Internet matters no more than the fact that someone excluded from an open school board meeting could speak her views in a nearby public park. *Cf. Cornelius*, 473 U.S. at 803 (citing *Madison Joint School Dist.*, 429 U.S. at 174 & n.4) (holding that open school board meetings created "a forum for citizen involvement"). The potential availability of other venues does not deprive a forum of First Amendment protection.

III. Governor LePage Violated the Plaintiffs' First Amendment Right to Petition

In addition to violating plaintiffs' First Amendment right to free expression, the Governor's ban violated plaintiffs' right to petition the government for redress of grievances. U.S. Const. Amend. 1. In arguing for dismissal of the right-to-petition claim, the Governor relies on the same arguments regarding state action and government speech. Gov. Mot. at 22. For the same reasons discussed above, however, those arguments are wrong.

It is also wrong to suggest that the right-to-petition claim necessarily rises and falls with the free-expression claim. Gov. Mot. at 22 (quoting *McDonald v. Smith*, 472 U.S. 479, 485 (1985)). "Both speech and petition are integral to the democratic process, although not necessarily in the same way." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011). "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas[.]" *Id*.

Plaintiffs have adequately pleaded a violation of the right to petition. As alleged in the complaint, the Governor banned plaintiffs from his Facebook page. Compl. ¶¶ 53, 61. Whereas other constituents may use Facebook's comment and message features to petition the Governor for redress of grievances, plaintiffs cannot. Not only are they barred from petitioning the Governor's page, but they are barred based on viewpoint. Nor does it matter that plaintiffs may have an alternative "method" to petition the government. Gov. Mot. at 22. Having opened a public channel for petition, the Governor may not exclude petitioners based on viewpoint.

IV. Governor LePage Violated the Plaintiffs' Rights Under the Maine Constitution

Finally, the Court should deny the Governor's motion to dismiss the plaintiffs' state law claims arising under the Maine Constitution. The Governor is wrong that these claims are "duplicative of the federal claims." Gov. Mot. at 23. That Maine's freedom-of-speech provision "'is no *less* restrictive than the Federal Constitution,'" and that there is "sparse" jurisprudence on Maine's right-to-petition are reasons to litigate those claims, not to dismiss them. Gov. Mot. at 23-24 (citations omitted) (emphasis added). And, in any event, the different language in Maine's constitutional provisions should yield a different, more generous result. *Cf. Finks v. Me. State Highway Comm'n*, 328 A.2d 791, 799 (Me. 1974) (stating "nothing should be treated as surplusage" in textual interpretation).

CONCLUSION

For these reasons, the Governor's motion to dismiss should be denied.

Respectfully submitted,

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Dated: November 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2017, a copy of the foregoing was electronically filed. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Emma E. Bond
Emma E. Bond
Counsel for Plaintiffs