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 April 24, 2018

PLAINTIFFS' RESPONSE TO SUPPLEMENTAL MEMORANDUM

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ARGUMENT

This case involves a constitutional challenge to Defendant Governor LePage's decision to block certain constituents from his official Facebook page based on the content and viewpoint of their comments. On April 20, 2018, Governor LePage filed a supplemental memorandum of law in support of his motion to dismiss, regarding the recent decision in *Morgan v. Bevin*, 2018 WL 1557300, No. 3:17-cv-00600 (E.D. Ky. Mar. 30, 2018). Gov. Mem. at 2, ECF No. 13 (Apr. 20, 2018). Contrary to the Governor's arguments, however, *Morgan v. Bevin* does not support dismissal, for multiple reasons.

As an initial matter, the procedural posture alone merits a different result. The plaintiffs in *Morgan* sought a preliminary injunction, which is an "extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Morgan*, 2018 WL 1557300 at *3 (quoting *Overstreet v. Lexington–Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002)). This case, by contrast, is at the motion-to-dismiss stage, in which all well-pleaded facts are taken as true, and "all reasonable inferences" must be drawn in Plaintiffs' favor. *Guadalupe-Baez v. Pesquera*, 819 F.3d 509, 514 (1st Cir. 2016) (citations omitted).

The procedural posture is especially important because *Morgan* hinges on several findings that diverge from the facts alleged in the Plaintiffs' Complaint. As discussed below, Governor LePage relies on three primary factual findings from *Morgan*—each of which conflicts with the allegations in this case and is based on a misunderstanding of how Facebook works.[1]

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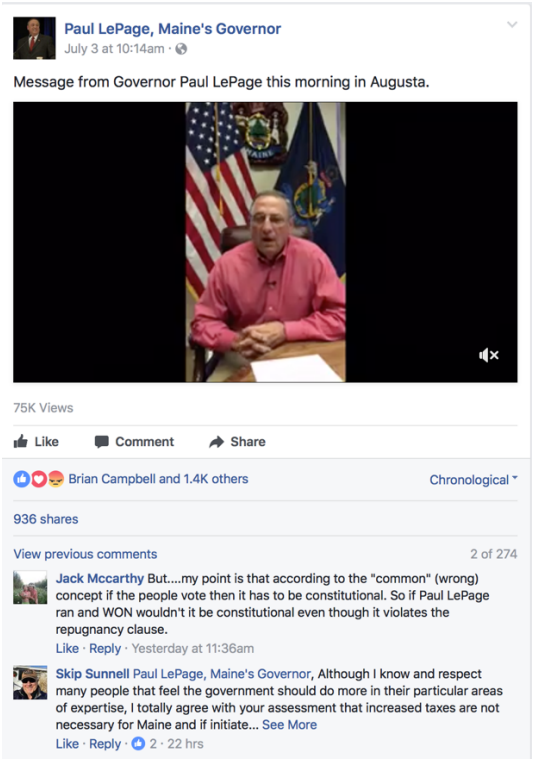
[1] Far from making broad legal holdings, the *Morgan* court issued a narrow decision limited to its findings—stating that it proceeded "circumspectly" and "tread[] lightly," mindful of the "narrow[]" question before it. *Morgan*, 2018 WL 1557300.

[2] The settlement agreement is available at http://www.aclu-md.org/uploaded_files/0000/0988/final_settlement_agreement.pdf, and the new social media

First, *Morgan* hinges on the mistaken finding that public officials who ban constituents from Facebook merely refuse "to listen" to commenters' views, rather than silencing them altogether. Gov. Mem. at 1 (citing *Morgan*, 2018 WL 1557300 at *1). But the "banning" function does not merely allow the page owner to refuse "to listen" to constituents' views; it also prevents blocked constituents from speaking on that platform altogether. As alleged in Plaintiffs' Complaint, "banning" prevents a user from "publish[ing] to that page, react[ing] to posts on that page, or comment[ing] on the posts on that page." Compl. at ¶ 26, ECF No. 1 (Aug. 8, 2017). In short, banning a user prevents the user from speaking. The contrary finding in *Morgan* thus contradicts the allegations in Plaintiffs' Complaint—which must be taken as true at this stage.

Second, the court found that there was no public forum because complying with the First Amendment would flood the Governor's pages "with internet spam" sufficient to "effectively, or actually" close the account. Gov. Mem. at 2-3 (quoting *Morgan*, 2018 WL 1557300 at *6). Again, that finding belies the allegations in this case. Governor LePage's Facebook page already garners "from tens to thousands of comments, likes, and shares," without flooding his Facebook page with spam. *See* Compl. at ¶ 6. Facebook's automatic display focuses attention on posts (rather than comments) by showing only several comments at a time and at a smaller size than posts. *See* Compl. at ¶ 41; *see also* Pls. Opp. at 19-20, ECF No. 11 (Nov. 3, 2017).



Compl. at ¶ 41 (displaying 2 of 274 comments, with the post remaining prominent).

Further undermining the finding in *Morgan*, a recent settlement regarding the Maryland Governor's social media pages shows that it is entirely feasible to operate a Governor's Facebook page in a manner that comports with the First Amendment. *See* Order of Dismissal, *Laurenson v. Hogan*, Case No. 17-cv-02162-DKC, ECF No. 24 (D. Md. Feb. 24, 2018).[2] Likewise here, Governor LePage would remain free to regulate his page using viewpoint- and content-neutral regulations and social media policies that comply with the First Amendment.

Finally, Governor LePage also relies on the *Morgan* court's finding that Governor Bevin's social media accounts "are not converted to public property by the use of a public official." Gov. Mem. at 2 (citing *Morgan*, 2018 WL 1557300 at *6). Yet that finding is

[2] The settlement agreement is available at http://www.aclu-md.org/uploaded_files/0000/0988/final_settlement_agreement.pdf, and the new social media policy adopted pursuant to the settlement is available at http://www.aclu-md.org/uploaded_files/0000/0992/social-media-policy.pdf (last visited April 24, 2018).

inconsistent with the Complaint in this case, which alleges that Governor LePage "owns and operates [his] official Facebook page entitled 'Paul LePage, Maine's Governor.'" Compl. at ¶ 36. Furthermore, the forum analysis applies whenever the forum is "under [the] control" of public officials, which is true in this case. *See* Pls. Opp. at 22, ECF No. 11 (Nov. 3, 2017) (citing *Southeastern Promotions v. Conrad*, 420 U.S. 553, 555 (1975))

In sum, *Morgan* is not binding or persuasive authority in this case. More persuasive is the prior decision in *Davis v. Loudoun County Board of Supervisors* (not even cited in *Morgan*), which found a First Amendment violation on similar facts to this case. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017), *appeal filed*; *see also* Pls. Opp. at 11-12, ECF No. 11 (Nov. 3, 2017). Plaintiffs here have not sought preliminary injunctive relief. All they are seeking at this stage is the opportunity to develop and present their case.

CONCLUSION

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

Respectfully submitted,

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Dated: April 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2018, 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
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