



July 5, 2017

The Honorable Mary Pilcher-Cook
Kansas State Senator
13910 West 58th Place
Shawnee, KS 66216

Re: Unconstitutional Censorship of Constituent Facebook Comments

Dear Senator Pilcher-Cook:

We write on behalf of the American Civil Liberties Union of Kansas and Stephanie Morgan, a constituent of your State Senate district. Earlier this year, Ms. Morgan posted numerous comments on your official State Senate Facebook page, but those comments were subsequently deleted from that page. Furthermore, Ms. Morgan has been blocked from following, commenting on, or liking any of your posts. It seems that Ms. Morgan was blocked and her comments were deleted because she expressed opinions that were opposed to policy positions you took as a State Senator. Instead of letting your constituents see differing viewpoints and instead of replying to her comments, you chose to silence Ms. Morgan’s ability to express her opinions on your official Facebook page.

As explained below, such censorship violates the First Amendment to the United States Constitution. Accordingly, we ask that you immediately cease your selective deletion of comments posted by constituents and reinstate posting privileges to all those individuals that have been improperly blocked, including Ms. Morgan.

Social Media and the Nature of the Facebook Page at Issue

Social media has become an essential tool for communications between elected officials and their constituents. Indeed, the Supreme Court recently stated that social media is the “modern public square” and that foreclosing access to it “prevents users from engaging in the legitimate exercise of First Amendment rights.” *Packingham v. North Carolina*, 2017 U.S. LEXIS 3871 (U.S. June 19, 2017). “These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to ‘become a town crier with a voice that resonates further than it could from any soapbox.’” *Id.*, quoting from *Reno v. American Civil Liberties Union*, 512 U.S. 844, 870 (1997). Moreover, the Fourth Circuit recently noted that Facebook “is a dynamic medium through which users can interact and share news stories or opinions with members of their community in a manner similar to writing a letter to a local newspaper.” *Livermore v. City of Petersburg*, 844 F.3d 400, 408 (4th Cir. 2016) (internal cites and quotations omitted).

Whenever the government opens a forum to the public for the purpose of expressive activity, the First Amendment applies, and the government may not exclude a speaker from that public forum based on the speaker's viewpoint. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). This is true "even when the limited public forum is one of [the government's] own creation," *id.* at 829-30, and even when the forum exists only in cyberspace, *Davison v. Loudoun County*, 2017 WL 58294, at *5 (E.D. Va. Jan. 4, 2017) (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"). Although the government may impose reasonable time, place, and manner restrictions in a designated public forum, it may not exclude speakers or specific speech simply because the government disagrees with the speaker or the speech.

Your official State Senate Facebook page is a public forum for First Amendment purposes. Once a public forum is created, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

As a State Senator, you and your office have embraced social media as a key means of communicating with constituents, using your Facebook page to promote your positions on issues, to correspond with constituents, and to criticize political opponents. An elected representative's Facebook page becomes increasingly vital when constituents lack opportunities to communicate with their representative through other means, such as in person, by phone, or through e-mail.

Unlawful Censorship in the Administration of Your Facebook Page

On February 3, 2017, you shared on your Facebook page an article ("Kansas Republicans Reach Consensus on Tax Package? Not So Fast") in which the Kansas Sentinel criticized the Kansas Senate leadership for suggesting that a majority of Kansas Senate Republicans supported proposals for new tax increases. That article quoted you as saying that "[t]his plan may have been offered by certain Senators who call themselves Republicans, but it is not a Republican plan." Ms. Morgan responded to that post by challenging the article's representations about the proposed tax increases. Shortly after Ms. Morgan posted her comment about the Sentinel article, you posted that "People will be banned if they post false Facebook comments on this page[.]" In response to your threat to ban people from your Facebook page, Ms. Morgan replied:

[I]f you ban individuals who post counter information to the Sentinel/KPI that is actually factual but runs counter to your message, you will be doing this on a page paid partly with matching (taxpayer) funds. You're a representative of everyone in Kansas. Threatening to silence and ban the people who seek to redress their grievances with you when you are using this as your official platform does not exactly show dedication to that representation[.]

Shortly after Ms. Morgan posted that retort, you deleted all of Ms. Morgan's comments and blocked her from your official State Senate Facebook page.

The Censorship at Issue Here is Unconstitutional

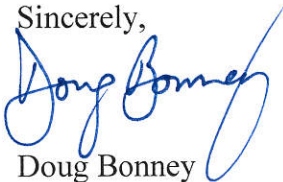
“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972). Furthermore, “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Most importantly, the government cannot play umpire and decide what is true and what is false. “Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.” *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012). “The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.” *Id.* at 2550.

In addition, citizens have a well-established First Amendment right to criticize their elected representatives and to speak out on issues of public concern. The First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957). The First Amendment also protects “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964).

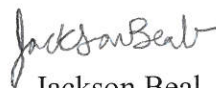
Blocking people from your Facebook page and deleting selected comments or criticisms posted by citizens and constituents who disagree with your posts is unconstitutional. *See Davison v. Loudoun County*, 2016 WL 4801617 (E.D. Va. Sept. 14, 2016) and 2017 WL 58294 (E.D. Va. Jan. 4, 2017). By establishing a subjective rule that “People will be banned if they post false Facebook comments,” you set yourself up as the sole censor and arbiter of truth on your official Facebook page. You censored Ms. Morgan based on her viewpoint, and that censorship violated the First Amendment’s Speech Clause.

For these reasons, we urge you to immediately cease your unlawful censorship of constituent comments on your Facebook page, to stop blocking people from your Facebook page, and to restore the posting privileges of Ms. Morgan and all other similarly situated people who have been unlawfully blocked for speaking their minds. Please contact us at your earliest opportunity to discuss the issues addressed in this letter.

Sincerely,



Doug Bonney
Legal Director
Direct: (913) 490-4102



Jackson Beal
Law Clerk
Direct: (913) 490-4107