Elisabeth S. Smith
Legislative Director

November 28th, 2017

Dear Lawmakers:

On behalf of the ACLU of Washington, I write regarding complaints we have received alleging that certain Washington state lawmakers are unconstitutionally censoring and/or blocking constituents from social media pages on which they discuss policy and other matters related to their elected office, on the basis of the viewpoints of those constituents. The ACLU of Washington is an organization of over 75,000 members dedicated to protecting civil liberties for all in our state. We have consistently advocated to protect freedom of speech in public forums—whether that speech takes place in a physical "town square" or the modern-day equivalent, the virtual town square forums created via social media platforms such as Facebook and Twitter—and wish to remind lawmakers of the constitutional rules pertaining to such spaces.

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Such virtual town squares are protected as limited public forums under the First Amendment. While lawmakers may reasonably regulate speech on such forums, they may not censor or block speakers based on those speakers criticizing or disagreeing with their viewpoints. Efforts by lawmakers to do so elsewhere have resulted in lawsuits.[1] We encourage all lawmakers to ensure they are avoiding such unconstitutional censorship, and to unblock users and restore content that may have been removed based on viewpoints expressed.

Social Media Platforms are the New Town Square

Social media has become a recognized forum that enables government officials to communicate their messages to constituents, receive feedback from constituents, and foster debate about policies relating to the official work of those government officials. Courts have generally agreed with this characterization—for example, in its recent *Packingham* decision, the U.S. Supreme Court recognized that social media platforms like Facebook and Twitter provide "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[2] The court went on to explain that these platforms have allowed citizens to "petition their elected representatives and otherwise engage with them in a direct manner,"[3] and acknowledged the large number of elected officials who had set up social media accounts to foster such direct engagement. Because government officials use them to allow public expression regarding official business—here, policy feedback and debate—by their constituents, such social media

[1] See, for example, *Knight First Amendment Institute at Columbia University et al v. Trump et al*, U.S. Dist. Ct., SDNY, No. 17-cv-5205 (NRB).
[2] *Packingham v. North Carolina*, 137 S. Ct. 1730, at 1737 (2017).
[3] *Id.*

pages are limited public forums, which are characterized by purposeful government action to make a forum accessible for the purpose of public expression.[4]

Social media platforms where public officials allow or invite feedback from the public are limited public forums regardless of whether they are actually designated as "government" accounts or "private" accounts. The test of whether a given Facebook page or Twitter account falls under the limited public forum rules is functional, rather than nominal. In other words, if a given social media account is used by a public official as a space to engage with the public and/or their constituents, and the public does, in fact, use that account for such purposes, it is immaterial whether the account is designated as "official" or not.[5] In practice, any page on which open constituent or public feedback is solicited by a public official is subject to First Amendment limited public forum rules.

Viewpoint-Based Censorship on Such Platforms Violates the First Amendment

Where public officials have opened a limited public forum such as a Facebook page or Twitter account for the purpose of feedback on official policy or business, they cannot silence the speech of particular users simply because they disagree with their viewpoint.[6] A public official may retain the right to engage in some reasonable, content-based regulation of the speech to preserve the purpose of the limited public forum[7]—for example, limiting posts that stray from the topic at hand, are spam, or that use obscene or vulgar language or racial epithets. But viewpoint discrimination—for example, removing posts or blocking particular users entirely on the basis of the point of view expressed—is never permissible since it violates the First Amendment right to free speech.

Yet complaints we have received suggest that at least some lawmakers are engaging in exactly this kind of unconstitutional censorship. For example, particular posts expressing viewpoints critical of the way a given lawmaker does his or her job have simply been deleted by the administrator of the Facebook page at issue, making it invisible to other members of the public engaging in the policy debate at issue. In other instances, users have been blocked from a Facebook page entirely, limiting their ability both to see content posted by the lawmaker and to engage in the limited public forum's policy debate by responding to that content.

In these instances, none of the speech that resulted in the censorship appears to deviate from the topic at hand, or to trigger any other restriction against impermissible content in this context (such as vulgar language, for example). This leads us to the conclusion that the lawmaker at hand and/or the administrators of his or her social media platform

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[4] See, for example, *Davison v. Loudoun County*, 2016 WL 4801617 (E.D. Va. Sept. 14, 2016) and 2017 WL 58294 (E.D. Va. Jan, 4, 2017). In this case, a constituent sued a public official for deleting his comments from both an individual and an "official" Facebook page.

[5] *Id.* The Court held here that the same First Amendment standards apply to an "individual" page as an "official" one, given that the public officials in question were effectively inviting public comment on official business on both pages, rendering them limited public forums.

[6] See *Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995).*

[7] *Id.*

deleted particular posts and/or blocked particular individuals from participation based solely on the viewpoints expressed in those posts—a form of government censorship that violates the First Amendment.

Lawmakers Should Review Their Use of Social Media and Restore Content and/or Unblock Users Who Were Unconstitutionally Censored

Washington lawmakers are sworn to uphold our nation's Constitution, including its First Amendment free speech protections, which are vital to ensuring the vibrancy of our democracy. Where lawmakers invite their constituents and the public to engage with them on matters of concern to their elected office on a social media platform, they cannot then selectively censor certain voices from participating in that discussion simply because they disagree with their viewpoint.

Accordingly, all lawmakers should carefully review their use of social media platforms, whether nominally designated as personal/individual or official, to determine whether such platforms are subject to the limited public forum rules described above. Where such platforms meet that test, lawmakers should carefully review any content that has been removed and individuals who have been blocked to ensure that those actions were not taken on the basis of viewpoints expressed. And if there has indeed been viewpoint-based censorship, lawmakers should restore the content and unblock the individuals in question immediately. We would also be more than happy to engage with your offices to clarify acceptable parameters that preserve Constitutional freedoms in these important spaces for public discourse.

Thank you for your immediate action.

Sincerely,

Elisabeth S. Smith

cc: Governor Jay Inslee
All Washington state lawmakers