BY CERTIFIED MAIL

Hon. Phil Scott
Governor of Vermont
109 State Street, Pavilion
Montpelier, VT 05609

June 20, 2018

Re: *Censoring Constituents on the Governor Phil Scott Official Facebook Page*

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Vermont

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Julie Kalish
President

James Lyall
Executive Director

Dear Governor Scott:

On behalf of the American Civil Liberties Union of Vermont, we write regarding your policy and practice of deleting comments and permanently blocking individuals from commenting on the official verified Governor Phil Scott Facebook page.[1] We have been contacted by multiple Vermonters whose posts have been deleted and who have been blocked from your page in recent weeks, apparently because they were critical of your support for gun control legislation. As a growing number of federal courts have recognized, these practices are unconstitutional.

Specifically, deleting comments and permanently blocking constituents from commenting on your page, particularly in response to their critiques or disapproval of you, is a form of viewpoint-based censorship that violates the First Amendment to the U.S. Constitution and Article 13 of the Vermont Constitution.

In addition, your "social media policy," as articulated on your official Facebook page, threatens comment deletion and blocking for violating an array of speech prohibitions. Many of these restrictions use vague terminology that confers overly broad discretion to your office and are thus impermissible under our federal and state constitutions.

We write to insist that you immediately unblock any member of the public that you have banned from commenting on your official Facebook page,[2] end the practice of selectively deleting comments posted by constituents, and revise your social media policy to be consistent with the First Amendment and Article 13 of the Vermont Constitution.[3]

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[1] *See* Governor Phil Scott, Facebook, https://www.facebook.com/GovPhilScott/.

[2] This request and the following legal information apply equally to any blocking or deleting of comments on Governor Phil Scott's Twitter or other official social media accounts with an interactive capacity.

[3] Upon review, Vermont's "Guidelines of Proper Use of Social Media for State of Vermont Government" also requires significant revision and updating to bring it into compliance with the First Amendment. Regarding "monitoring," the guidelines say that "[a]ny inappropriate posting should be removed immediately. Fans who post inappropriate materials may need to be blocked from future use of the site." As described in detail below, the discretion imbued in this policy is far too broad for the First Amendment to

Social Media and the First Amendment

As courts have begun to address the social media landscape, they have recognized that traditional constitutional analysis still applies. As the U.S. Supreme Court recently noted, social media sites, like Facebook and Twitter, "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[4] Similar to the traditional public square, they allow users to "engage in a wide array of protected First Amendment activity on topics as diverse as human thought."[5]

The Fourth Circuit has recognized that "Facebook is a dynamic medium through which users can interact and share news stories or opinions with members of their community."[6] Other 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."[7]

Second Circuit courts have also begun to address the relatively new issue. Just a few weeks ago, the Federal District Court for the Southern District of New York found that President Trump's blocking of Twitter users based on their political speech violated the First Amendment.[8] Granting summary judgment to the plaintiffs, the Southern District decided that the @realDonaldTrump account represents a "designated public forum" because the President, a governmental actor, intentionally created an "interactive space" to communicate with him and others.[9]

More courts will likely be weighing in on these issues soon. In the past year alone, the ACLU has filed legal challenges in several states—including against governors in Maine, Maryland, and Kentucky—whose public officials blocked constituents on their official Facebook pages.[10]

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countenance. *See* http://dii.vermont.gov/sites/dii/files/PDF/Policies_Reports/Social-Networking-Guidelines.pdf.

[4] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

[5] *Id*. at 1735-36 (internal quotation marks omitted).

[6] *Liverman v. City of Petersburg*, 844 F.3d 400, 409-10 (4th Cir. 2016).

[7] *Davison v. Loudoun Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605, 611 (E.D. Va. 2017).

[8] *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 17 CIV. 5205, 2018 WL 2327290, at *22 (S.D.N.Y. May 23, 2018).

[9] *Id*. at 20. In a similar case, the Eastern District of Virginia found that a county board of supervisors' Facebook page was a designated public forum, making clear that whether the forum was physical or "metaphysical" was immaterial to the First Amendment analysis. *Davison,* 227 F. Supp. 3d at 611; *see also Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (government is forbidden from viewpoint discrimination regardless of whether the forum is "literal or metaphysical") (internal quotation marks omitted).

[10] *See e.g., Leuthy et al. v. LePage*, No. 1:17-cv-00296-JAW (D. Me. Aug. 8, 2017); *Laurenson et al. v. Hogan et al.*, No. 17-cv-02162-DKC (D. Md. Aug. 1, 2017); *Morgan et al. v. Bevin*, No. 3:17-cv-00060-GFVT (E.D. Ky. July 31, 2017).

Censorship of Constituents' Comments Based on Their Viewpoint

State officials may not impose restrictions on speech that are content-based or overbroad or that otherwise improperly restrict access to designated or limited public forums.[11] Government officials may not discriminate amongst speakers.[12] "Discrimination against speech because of its message is presumed to be unconstitutional."[13] "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[14]

If an excluded speaker "falls within the class to which a designated public forum is made generally available . . . [the exclusion] is subject to strict scrutiny."[15] Viewpoint discrimination is unconstitutional "even when the limited public forum is" created by the government.[16]

Your office's social media policy recognizes that your official Facebook page and Twitter account exist to engage with constituents. Your policy states that "[a] significant function of the Governor's social media accounts is to open channels for constituent service and engagement." As governor, you have adopted social media as a primary means of communicating with constituents, using your Facebook page to promote your positions, broadcast recorded statements, criticize your opponents, and highlight your appearances as governor. Your posts all allow and include numerous comments from members of the public. Your official Facebook page is undoubtedly a designated public forum. As such, traditional constitutional requirements apply, just as with any other public forum.[17]

The Vermonters who have contacted us, all of whom said that they voted for you in 2016, believe their comments have been deleted and that they have been selectively blocked from your Facebook page because they voiced disapproval of your policy decisions related to gun control. Several said that they had previously commented on your Facebook posts about other issues, but they were only blocked after they began to repeatedly voice opposition to your signing of gun-control legislation. Those who contacted your office to

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[11] *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989).
[12] *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000); *City of Madison Joint Sch. Dist. No. 8 v. Wisc. Employment Relations Comm'n*, 429 U.S. 167, 176 (1976); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–85 (1978).
[13] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Cyr v. Addison Rutland Supervisory Union,* 60 F. Supp. 3d 536, 546 (D. Vt. Sept. 30, 2014) ("[I]n a designated public forum . . . government regulation of speech is subject to the same limitations that govern a traditional public forum.")

complain about being blocked were sent a form response with the social media policy, but were not told how they violated the policy or if that was even the basis for being blocked.

Simply put, censoring comments and blocking constituents based on their viewpoints is unconstitutional. This practice must cease immediately.

Blocking Constituents Will Always Be an Unconstitutional Prior Restraint

Blocking constituents from making future comments is an unconstitutional prior restraint on their speech. A "prior restraint" is an administrative decision that forbids a speaker from issuing certain communications prior to those communications occurring.[18] Regulations that give "public officials the power to deny use of a forum in advance of actual expression" bear a heavy presumption against their constitutional validity.[19]

The Supreme Court holds "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[20] When government officials enforce a prior restraint on publication "each passing day may constitute a separate and cognizable infringement of the First Amendment."[21] The Second Circuit has also found that viewpoint-based prohibitions on speech prior to expression in a designated public forum is an unconstitutional prior restraint.[22]

In this instance, the blocked individuals do not have a history of violating lawful parts of your policy, nor is there any indication they will do so in all future comments. Such prior restraints are baseless and are not a narrowly tailored remedy. Without some specific finding that their future speech will violate a valid policy, prior restraint is strictly prohibited under the First Amendment. As Governor, you cannot permanently block individuals from commenting on your official Facebook posts.

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[18] *Alexander v. United States*, 509 U.S. 544, 549-50 (1993).
[19] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 558-59 (1975); *see also N.Y. Times v. United States*, 403 U.S. 713, 723 (1971).
[20] *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).
[21] *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975).
[22] *Hoefer v. Bd. of Educ. of the Enlarged City Sch. Dist. of Middletown*, No. 10 CIV. 3244 (ER), 2017 WL 2462660, at *5 (S.D.N.Y. June 6, 2017) (holding a reasonable fact-finder could find a government official engaged in prior restraint when he forbid a speaker from speaking at a public meeting because he believed he would defame him); *see also Amandola v. Town of Babylon,* 251 F.3d 339, 344 (2d Cir. 2001) (holding that a town official engaged in unconstitutional prior restraint when he suppressed religious worship services involving proselytizing in a limited public forum that generally allowed religious worship services).

The Governor's Social Media Policy is Unconstitutionally Discretionary and Vague

Several provisions of your "social media policy" clearly violate the First Amendment. As discussed above, government cannot regulate expressive content except by means narrowly tailored to serve a compelling interest. Content-based restrictions, whether targeted or based upon written policy, are those that depend "entirely on the communicative content of the publication"[23] or those that are "justified only by reference to the content of speech."[24]

At least, half of your policy's restrictions depend on or require reference to the communicative content of speech.[25] Your justification for these restrictions as stated in the policy—that "constituents have contacted our office indicating that abusive, nasty, and disrespectful comments . . . have discouraged them from commenting"—is not a compelling interest and is not a permissible justification for such speech regulations.[26]

Regardless, even ostensibly content-neural restrictions are not neutral "if they confer overly broad discretion on the regulating officials."[27] The current social media policy is replete with vague terms. Such vagueness provides overly broad discretion to your comment moderators to discriminate against certain speakers or speech, and thus violates the First Amendment.

Furthermore, the policy's vague terminology fails to provide commenters with notice of what constitutes a violation and encourages discriminatory and arbitrary enforcement, in violation of the Fourteenth Amendment.[28] Imprecise speech regulations are commonly struck down because they are too often "a convenient tool for harsh and discriminatory enforcement . . . against

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[23] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).
[24] *Int'l Action Ctr. v. City of New York*, 587 F.3d 521, 526 (2d Cir. 2009).
[25] The Social Media Policy states, in part, that:

> "Facebook and Twitter accounts should not:
> - Use profane, vulgar, or violent language;
> - Be disrespectful, hostile, or abusive;
> - Comment in a derogatory manner on issues unrelated to the post;
> - Bully or abuse other users . . . . ."

[26] *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.")
[27] *Hous. Works, Inc. v. Kerik*, 283 F.3d 471, 478 (2nd Cir. 2002) (citing *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992)).
[28] *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (holding that a legislative enactment is void for vagueness when it (1) "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or (2) "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement."

particular groups deemed to merit their displeasure."[29] The Constitution does not tolerate such an outcome here.

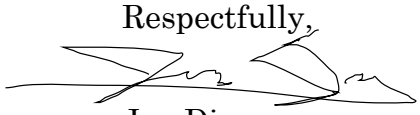
Conclusion

Under our state and federal constitutions, the Governor may not create a public forum—be it digital or physical—for constituents to express themselves, but then subject them to viewpoint-based censorship or ban them from future participation based on their expressed opinions. Similarly, the Governor cannot create speech restrictions that require reference to the content of speech or that are overly discretionary or vague. Your current policy and practices regarding social media violate the First Amendment and Article 13.

Because of the critical importance of respecting the free speech rights of all Vermonters, we request that you respond to this letter on or before **Tuesday, July 3, 2018**, confirming that you have unblocked constituents, ended your practice of censoring constituent comments based on their viewpoint, and suspended enforcement of your social media policy until it conforms with First Amendment, Article 13, and Fourteenth Amendment requirements. A failure to respond may necessitate additional action on the part of the ACLU to protect Vermonters' constitutional right to communicate with and criticize their government officials.

Thank you for your attention to this matter. We look forward to your reply.

Respectfully,



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Cc: Jaye Pershing-Johnson, Governor's legal counsel (via email to jaye.johnson@vermont.gov); Jason Gibbs, Governor's chief of staff (via email to jason.gibbs@vermont.gov)

[29] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (citation and internal quotation marks omitted).