AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI
P.O. BOX 2242
JACKSON, MS 39225
T/601.354.3408
F/601.355.6465
WWW.ACLU-MS.ORG

July 24, 2018

BY EMAIL to:

Pelicia E. Hall
Commissioner
633 North State Street
Jackson, MS 39202
phall@mdoc.state.ms.us

Leonard Vincent
General Counsel
633 North State Street
Jackson, MS 39202
lvincent@mdoc.state.ms.us

Grace Fisher
Communications Director
633 North State Street
Jackson, MS 39202
gfisher@mdoc.state.ms.us

Re: Blocking members of the public on MDOC's social media

Dear Commissioner Hall, Mr. Vincent, and Ms. Fisher:

On behalf of the ACLU of Mississippi, I write regarding allegations that members of the public have been unconstitutionally censored and blocked from the Mississippi Department of Corrections' ("MDOC") social media accounts, including its Facebook Page (https://www.facebook.com/MississippiDepartmentOfCorrections) and Twitter account (https://twitter.com/MS_MDOC?lang=en).

1. MDOC Cannot Censor Critical Viewpoints on Social Media.

The ACLU of Mississippi received multiple complaints from individuals whose comments – which expressed viewpoints that were critical of MDOC – were deleted and their accounts subsequently blocked and banned from MDOC's official Facebook Page. Similarly, the ACLU of Mississippi received complaints from individuals alleging that they were blocked from MDOC's Twitter account after posting critical viewpoints or dissatisfaction with MDOC's policies and performance. Specifically, these individuals posted critical viewpoints of MDOC by: questioning why MDOC did not provide timely updates on a stabbing incident in its facilities; criticizing MDOC's statements on how inmates should police themselves; commenting on how an MDOC lockdown was not necessary to stop the flow of

contraband because guards, not family visitors, are more likely to bring in contraband; and various other statements.

2. The First Amendment Protects Speech on Social Media about MDOC Policies and Practices.

The speech censored by MDOC is undoubtedly protected speech under the First Amendment, as it is "speech on matters of public concern," which lies at the core of First Amendment protection of speech. *Engquist v. Oregon Dept. of Agri.*, 553 U.S. 591, 600 (2008). Speech that criticizes the government has long been protected by the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 405 (holding that flag burning as a form of protest against the Reagan administration is protected by the First Amendment); *see also Tinker v. Des Moines*, 393 U.S. 503, 514 (1969) (holding wearing black armbands by students to protest the Vietnam War is protected by the First Amendment).

The interactive sections of government social media pages – the comment section of MDOC's Facebook Page and the reply/retweet threads of MDOC's Twitter– are designated public forums, which are public forums "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP*, 473 U.S. 788, 802 (1985); *see also Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983) ("[P]roperty which the state has opened for use by the public as a place for expressive activity."); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F.Supp.3d 541 (S.D.N.Y. 2018) (holding that the reply/retweet thread on President Trump's Twitter account is a designated public forum); *Davison v. Loudon County Bd. of Supervisors*, 267 F.Supp.3d 702 (E.D. Va. 2017) (holding that the County opened a forum for speech when the Chair of its Board of Supervisors started a Facebook Page for her role as Chair and solicited public comments). In fact, the Supreme Court has recognized that the internet and social media are among the most important places for speech:

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997), and social media in particular…In short, social media users…engage in a wide array of protected First Amendment activity on topics as 'diverse as human thought'

Packingham v. North Carolina, 137 S.Ct. 1730, 1735-36 (2017). Furthermore, the Supreme Court has recognized Facebook and Twitter specifically as places where

"users can debate religion and politics" and where "users can petition their elected representatives and otherwise engage with them in a direct manner." *Id.* at 1735.

3. MDOC Has Intentionally Opened Its Social Media Accounts as a Forum for Speech and Interaction.

MDOC's social media accounts are the "official" accounts of the MDOC and managed by the MDOC. They are dedicated to public use and a tool for the MDOC to communicate information about the MDOC and its mission as well as interact with the public for their comments. This public discourse occurs in actuality as well: a poignant example would be a May 1, 2018 MDOC post on prison contraband that garnered hundreds of comments and replies by members of the public. *See* Mississippi Department of Corrections, Facebook, https://www.facebook.com/pg/MississippiDepartmentOfCorrections/posts/?ref=page_internal.

4. The Speech at Issue is Not Government Speech.

The kind of speech that the complainants engaged in and the type of access they seek are not covered by the Government Speech doctrine. To be clear, the plaintiffs do not seek to gain control over MDOC's own posts on Facebook or Twitter, but rather the ability to comment, as a member of the public, on MDOC's posts. The relevant speech is the public's comments in the interactive spaces on MDOC's social media accounts. *See Knight*, 302 F. Supp. 3d at 541 (holding that the interactive space where Twitter users may engage with the content of the President Trump's tweets are not government speech and properly subject to forum analysis).

5. MDOC's Blocking of Online Critics Is Viewpoint Discrimination, Which is Unconstitutional.

Blocking and banning of members of the public who provide critical comments about MDOC is unconstitutional because it is viewpoint discrimination. The Supreme Court of the United States has made clear that viewpoint discrimination is never constitutionally permissible in any type of forum, including designated public forums, as here. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The 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"); *see also Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees."); *Police Department of*

Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *Chiu v. Plano Independent School Dist.*, 260 F.3d 330, 350 (5th Cir. 2001) ("Viewpoint discrimination is a clearly established violation of the First Amendment in any forum.").

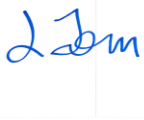
Even in a limited public forum or a nonpublic forum, where the standard of analysis may be more permissive than in a designated public forum, viewpoint discrimination is unconstitutional. *See Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001) ("The State's power to restrict speech [in a limited public forum] is not without limits. The restriction must not discriminate against speech on the basis of viewpoint."); *see also Cornelius*, 473 U.S. at 806 (in a nonpublic forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Perry*, 460 U.S. at 46 (in a nonpublic forum, "the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

Please respond to this letter on or before August 7, 2018 by confirming that you have unblocked and unbanned any individuals whom you have blocked or banned from your Facebook Page or Twitter and that you will cease the unlawful practice of deleting comments or blocking and banning individuals on your Facebook Page or Twitter based on their viewpoint.

We would be happy to discuss these matters with you further. If we do not receive a response by August 7, 2018, we will interpret your silence as a rejection of this request and will take all appropriate steps to protect constitutional rights.

We look forward to hearing from you.

Sincerely,



Joshua F. Tom
Legal Director
ACLU of Mississippi
P: (601) 354-3408
jtom@aclu-ms.org