



1/6/2021

BY MAIL to:

Mayor Hal Marx
149 W 8th Ave
Petal, MS 39465

Re: Blocking members of the public on Mayor Hal Marx's official Facebook Page

Dear Mayor Marx:

I understand that your attention is currently focused on ensuring that the City of Petal is safe and its future protected during this time. There is no time however when the government can censor speech based on its viewpoint. No government official can allow positive commentary and silence the critical. We write regarding allegations that members of the public had been blocked from commenting on your Facebook Page ("Official Page") after posting critical comments. Such action violates the First Amendment and is unconstitutional. **While it appears the Facebook pages at issue have been deleted, we had reports that your constituents had been blocked from commenting on those pages. We are also aware that Petal still has an Official Page, titled the "City of Petal - Government." Although we do not know if you, the Mayor of Petal, run that Page, or if it is run at your discretion, we wanted to inform you of the law on social media pages as we see a new page has been created.**

1. Public Officials Cannot Censor Critical Viewpoints on Social Media.

The ACLU of Mississippi received complaints from individuals who were blocked after posting comments that were critical of you, the Mayor of Petal. These comments involved criticism of you and your position on various issues. As a public official, this is a violation of the First Amendment.

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

The speech censored by you 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).

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The interactive sections of government social media pages – the comment section of the Official Page – 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*, 928 F.3d 226, 237 (2d Cir. 2019) (holding that the reply/retweet thread on President Trump’s Twitter account is a designated public forum); *Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019), *as amended* (Jan. 9, 2019) (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 other social media sites (e.g. 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. Mayor Marx Intentionally Opened His Social Media Account as a Forum for Speech and Interaction.

The Official Page was your “official” account as Mayor Hal Marx of Petal, Mississippi and managed by you or at your direction. The Official Page classified you as a Politician and was frequently used to convey information to your citizens. It is dedicated to public use and a tool for you, a public official, to communicate information to the public within your jurisdiction, as well as interact with the public for their comments. This public discourse occurred in actuality as well: a poignant example would be on April 18, 2020 when a post was made informing citizens of the risk of severe weather. The post reads, in part: “Our area has been upgraded to a risk level 4 out of 5 for severe weather tomorrow.”

<https://www.facebook.com/cityofpetal/posts/955558184894692>. (This link no longer works, as it appears the post, or page itself, has been deleted)

Another example is a post made on April 7, 2020 when to communicate a message about water pressure in the area. This post reads: “For those who may be experiencing low water pressure in the area near Smithville Road, it is due to a water line being punctured. Our crews are working to restore pressure. If it is deemed to require a boil water notice, we will post on this page.

<https://www.facebook.com/cityofpetal/posts/946836235766887>. **(This link no longer works, as it appears the post, or page itself, has been deleted).**

The action of using this Official Page on Facebook to communicate with the citizens of Petal is followed with the requirement that the page allow all citizens that wish to engage to do so and not be censored on the basis of their viewpoint.

Yet another example is from a July 15, 2020 post where Mayor Marx reports on the sales tax collections from the month of May within the city. This post claims that sales tax collections hit a record high, and uses this information to state that the local economy is strong and that people in Mississippi are choosing Petal to shop. <https://www.facebook.com/cityofpetal/posts/1020802865036890>. **(This link no longer works, as it appears the post, or page itself, has been deleted)**

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 the Official Page posts on Facebook, but rather the ability to comment, as a member of the public, on your posts. The relevant speech is the public’s comments in the interactive spaces on the Official Page. *See Knight*, 928 F.3d at 239 (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. Mayor Hal Marx’s Blocking of Online Critics was Viewpoint Discrimination, Which is Unconstitutional.

Blocking and banning members of the public who provided critical comments about Mayor Marx’s posts 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”).

We understand that your current priority is to keep the City of Petal safe during this COVID-19 pandemic, and we appreciate everything that your administration is doing to ensure that. However, blocking constituents on your Official Page is unconstitutional and a court would very likely find as such. It is paramount that your constituents have access to the Official Page, so that they may exercise their First Amendment rights. This is never truer than during a crisis.

We would be happy to discuss these matters with you further in order to ensure that the Official Page’s policy complies with the Constitution.

Thank you again and we look forward to hearing from you.

Sincerely,



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