ACLU
AMERICAN CIVIL LIBERTIES UNION
Southern California

February 23, 2018

Tony Rackauckas
District Attorney – Orange County
Office of the District Attorney
401 Civic Center Drive West
Santa Ana, CA 92701

Re: Unconstitutional Removal of Social Media Comments and Blocking of Users that Make Critical Comments

Dear District Attorney Rackauckas,

We are deeply concerned by the Orange County District Attorney's Office's illegal suppression of free speech on its official Facebook and Twitter pages. Orange County employees, under your supervision and leadership, have repeatedly deleted critical comments from the Orange County District Attorney's official Facebook page, while allowing neutral and laudatory comments, in violation of the First Amendment. At the same time, your office has repeatedly blocked individuals who have made critical tweets directed at your @OCDATony Twitter account. We strongly urge your Office to cease its unconstitutional censorship.

At a recent press conference, the DA's Office attempted to "debunk" a Harvard-commissioned study that concluded that the Orange County District Attorney's rate of prosecutorial misconduct is one of the worst nationwide. Because of the highly anticipated nature of the event, the DA's Office "live streamed" the event on Facebook Live. People subsequently left critical comments on the live-streamed video and articles about the conference shared by the Office. The comments were on-topic and related to the prosecutorial misconduct that plagues the Orange County District Attorney's Office. For example, one comment queried, "How do you respond to the California Court of Appeals' finding that '…the OCDA on its own violated targeted defendants' constitutional rights through its participation in the CI program'? What about their conclusion that the magnitude of the systemic problems cannot be overlooked'?" Another commenter echoed those sentiments. Within a few hours of their posting, the critical comments were all deleted, and at least one commenter was blocked from commenting on your page going forward.

At the same time that your Office deletes comments that are critical of its history of prosecutorial misconduct, particularly its handling of informants and failure to turn over evidence that is favorable to defendants as the Constitution requires, it allows comments that defend your Office's reputation to remain on the page. For example, on your Office's livestream, one individual's laudatory comment, "You are doing a great job, court of appeals got it wrong and the grand jury was right that there was no informant program !" remains on the page.

Likewise, your Office has also blocked users who make critical tweets to you on your Twitter page, preventing them from viewing and responding to your tweets from their accounts. For example, one person retweeted at your official page a tweet about the ACLU's lawsuit against the New Orleans District Attorney's office with the hashtag "prosecutorialmisconduct." Another person tweeted "There's #crisisoflegitimacy @OCDATony How many more cases will be impacted by prosecutorial misconduct" along with a link to an article about the Cole Wilkins case, in which former Deputy DAs from your Office were recused because of their failure to fulfill their obligations to disclose favorable information to the defense as required by *Brady*.

Your Office's deletion of on topic, but critical comments from your Facebook page, and its blocking of individuals who make critical tweets at your official Twitter page, constitute unconstitutional viewpoint discrimination in important and ubiquitous forums, which violates the First Amendment. *See Davison v. Loudoun County Board of Supervisors*, 2017 WL 3158389 (E.D. Va. 2017). Social media is increasingly the locus of discussion of important social issues. As the Supreme Court recognized, "[w]hile 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 . . . and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

And there can be no doubt that the commenters' speech is protected. "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). Indeed, such speech lies "at the heart of the First Amendment's protection." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978). When an office that is supposed to seek justice is embroiled in a scandal that throws into question its ability to fairly administer justice, it unsurprisingly and rightfully becomes an issue of public concern. Moreover, although you may not like it, the First Amendment's protection "include[s] vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

By deleting critical comments, while allowing laudatory and neutral comments, and by blocking critical users, your Office impermissibly discriminates against commenters based on the viewpoint of their speech. "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. …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." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (internal citations omitted).

Furthermore, when your Office blocks users who make critical comments on your social media pages from accessing those pages, it also violates their right to receive information and to "access [] news regarding activities and operations of government. This right includes, at a minimum, a right of access to information made available to the public or made available generally to the press." *Times-Picayune Pub. Corp. v. Lee*, 1988 WL 36491, at *9 (E.D. La. 1988); *see also Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 US 853 (1982). These are not matters involving sensitive information where the government might have a significant interest in restricting or foreclosing access to information; you are restricting some people from accessing information that you have voluntarily chosen to share broadly through social media. As you surely know, by blocking those who have criticized you or your Office, you make it far more difficult for those individuals to engage with both your Office and others who use social media for the discussion of important topics, including your malfeasance. The right to receive information, especially from the government, is critical because it is "a necessary predicate to the recipient's meaningful exercise of [their] own rights of speech, press, and political freedom." *Pico*. 457 U.S. at 867. You cannot constitutionally provide information to only those who flatter you.

Your Office must follow the law, respect the constitutional rights of your constituents, and cease deleting constitutionally-protected, critical comments on your official Facebook page, as well as blocking users who make critical comments to you on Twitter. Because of the importance of the rights at stake, I ask you to inform me by March 9, 2018 whether you intend to respect the First Amendment rights of community members on your, or your Office's official Facebook, Twitter, and other social media pages. If you have any questions or wish to discuss this issue further, please feel free to contact me at (714) 450-3963 or via e-mail at BHamme@aclusocal.org.

Sincerely,
Brendan Hamme
Staff Attorney
ACLU OF SOUTHERN CALIFORNIA