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Sent via U.S. Mail and Electronic Mail (susan.guinn@sanantonio.gov)

Dear Ms. Guinn:

The Foundation for Individual Rights and Expression (FIRE)[1] is concerned by a San Antonio policy that unconstitutionally restricts comments on the city's social media accounts. When a government entity opens an online forum for public commentary, such as on a social media page, the First Amendment prohibits excluding disfavored views or speakers. The city accordingly must revise the policy and commit to leaving up comments containing protected speech.

San Antonio's social media policy

San Antonio's social media policy states the city "may hide comments . . . if the comment meets one of the following conditions":

1. Comments that are not related to the post topic are not allowed;
2. Violates the Social Media Platform's terms of service;
3. Contains information about official City business that is legally deemed confidential and should not be made public;
4. Profane and obscene comments or submissions are not allowed;
5. Comments that are racist, sexist, homophobic, transphobic or otherwise discriminatory based on a protected class as per Title VI, Civil Rights Law, and the City of San Antonio's Non-Discrimination Ordinance are not allowed;
6. Include information that may compromise the safety or security of the public or public systems;

[1] FIRE is a nonpartisan nonprofit dedicated to defending freedom of speech. More information about our mission and activities is available at thefire.org.

7. Solicitations and advertisements are not allowed. This includes promotion or endorsement of any financial, commercial or non-governmental agency;
8. Comments that suggest or encourage violence or illegal activity are not allowed.[2]

Several of these restrictions infringe on First Amendment-protected expression. Although the commentary San Antonio or its departments post on social media is the city's own speech and not subject to the First Amendment,[3] comment sections are, as San Antonio recognizes,[4] at least limited public forums where constitutional protections apply.[5] As such, the city may not discriminate against comments based on viewpoint, and any restrictions "must be reasonable in light of the purpose served by the forum."[6]

Ban on discriminatory comments

San Antonio's ban on comments that are "racist, sexist, homophobic, transphobic or otherwise discriminatory based on a protected class" is unconstitutional viewpoint discrimination. A regulation discriminates based on viewpoint where, as here, it "reflects the Government's disapproval of a subset of messages it finds offensive."[7] Even a speech restriction that "even-handedly prohibits disparagement of all groups" constitutes viewpoint discrimination because "[g]iving offense is a viewpoint."[8] And viewpoint discrimination is an "especially egregious" First Amendment violation that is "impermissible in any forum."[9] San Antonio must therefore

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[2] *Privacy Policy and Disclaimer*, CITY OF SAN ANTONIO, https://www.sanantonio.gov/disclaimer, https://www.sa.gov/Disclaimer.

[3] *Shurtleff v. City of Bos.*, 596 U.S. 243, 248 (2022) ("[W]hen the government speaks for itself, the First Amendment does not demand airtime for all views").

[4] San Antonio describes its social media pages as "designated/limited forums." Although "designated" and "limited" public forums are sometimes viewed as interchangeable, they are not synonymous. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001). *See also*, *Miller v. City of Cincinnati*, 622 F.3d 524, 535 n. 1 (6th Cir. 2010) ("In [*Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)], the Supreme Court clarified that the designated public form [sic] and the limited public forum are distinct forum types."). A designated public forum is "government property that has not traditionally been regarded as a public forum" but which the government has nevertheless "intentionally opened up for that purpose," such that speech restrictions "are subject to the same strict scrutiny as restrictions in a traditional public forum." *Pleasant Grove City*, 555 U.S. at 469–70. Limited public forums are distinguishable in that they are set up for discussion of particular subjects or for use by particular groups. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

[5] *See, e.g.*, *Lindke v. Freed*, 601 U.S. 187 (2024). Although the parties in *Lindke* disputed whether an official's mixed use of a social media account for personal and government business meant he engaged in state action when deleting comments or blocking someone, there was no dispute that if it was state action, such deletion or blocking would violate the First Amendment. The Court noted in some cases, such as accounts of a government subdivision (e.g., a "City of Port Huron" Facebook page), state action is clear. *Id.* at 202.

[6] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (cleaned up).

[7] *Matal v. Tam*, 582 U.S. 218, 249 (2017) (Kennedy, J., concurring).

[8] *Id.* at 243.

[9] *Ctr. For Investigative Reporting v. SEPTA*, 975 F.3d 300, 313 (3rd Cir. 2020) (quoting *Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 436 (3rd Cir. 2019); *see also Rosenberger*, 515 U.S. at 829 ("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.").

"abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[10]

A ban on "racist, sexist, homophobic, transphobic or otherwise discriminatory" comments is also unconstitutional for the separate reason that it is vague. A rule is vague when people "of common intelligence must necessarily guess at its meaning."[11] Rules must "provide explicit standards for those who apply them" to prevent "arbitrary and discriminatory enforcement."[12] San Antonio's ban fails these tests.

What counts as "discriminatory" is unclear, and reasonable people can and do disagree over the contours of the policy's operative terms. For instance, some hail affirmative action policies as means to advance racial equity,[13] while others argue affirmative action is racist.[14] Some argue transgender athletes competing in women's sports is a civil rights issue and threatens women and girls,[15] while others argue excluding transgender athletes is transphobic.[16] What qualifies under San Antonio's policy thus necessarily involves subjectivity. Even if some comments were viewed by most people as plainly discriminatory, deciding where the line is would ultimately be up to a government employee's personal discretion. As the First Amendment does not allow the freedom to speak to depend on the government's whim, San Antonio must rescind this ban.

Ban on profane and obscene comments

San Antonio bans profane and obscene comments. While obscenity properly defined is unprotected,[17] the First Amendment generally protects profane speech. The Supreme Court

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[10] *See Rosenberger*, 515 U.S. at 829.

[11] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

[12] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[13] *See, e.g., Affirmative Action in Education Matters for Equity, Opportunity, and the Nation's Progress*, NAACP, https://naacp.org/resources/affirmative-action-education-matters; Connor Maxwell and Sara Garcia, *5 Reasons to Support Affirmative Action in College Admissions*, CTR. FOR AM. PROGRESS (Oct. 1, 2019), https://www.americanprogress.org/article/5-reasons-support-affirmative-action-college-admissions/.

[14] *See, e.g.,* John Stossel, *Affirmative Action is Racist and Therefore Wrong*, REASON (July 12, 2023), https://reason.com/2023/07/12/affirmative-action-is-racist-and-therefore-wrong/; Wai Wah Chin, *Reparations are the new affirmative action — and even more racist and divisive*, N.Y. POST (Jan. 28, 2024), https://nypost.com/2024/01/28/news/reparations-are-the-new-affirmative-action-and-even-more-racist-and-divisive/.

[15] *See, e.g.,* Riley Gaines, *Riley Gaines: Trans athletes make women's sports a civil rights issue*, N.Y. POST (June 2, 2024), https://nypost.com/2024/06/02/opinion/trans-athletes-make-womens-sports-a-civil-rights-issue/.

[16] *See, e.g.,* Derrick Clifton, *Anti-Trans Sports Bills Aren't Just Transphobic — They're Racist, Too*, THEM (Mar. 31, 2021), https://www.them.us/story/anti-trans-sports-bills-transphobic-racist; Alex Cooper, *Caitlyn Jenner Says Florida Gov.'s Transphobia Is Just 'Common Sense'*, ADVOCATE (Mar. 25, 2022), https://www.advocate.com/news/2022/3/25/caitlyn-jenner-says-florida-govs-transphobia-just-common-sense.

[17] "Obscenity" has a technical, legal meaning narrower than its colloquial usage, which a regulation must satisfy to reach only unprotected expression. Speech is legally obscene only if (1) the average person, applying contemporary community standards, would find that the speech, taken as a whole, appeals to the "prurient interest"; (2) the speech depicts or describes, in a "patently offensive" way, sexual conduct defined

has protected, for instance the right to wear a jacket bearing the words "Fuck the Draft" inside a courthouse where children were present,[18] in part because communication involves not only "precise, detached explication" of ideas, but also "inexpressible emotions."[19] The Court noted that "words are often chosen as much for their emotive as their cognitive force."[20] Prohibiting profanity thus limits expression. If the government cannot ban profanity in a courthouse, it can hardly be "reasonable" to ban profanity on a social media page open for public discussion.

Moreover, any ban on "profanity" is unconstitutionally vague. San Antonio does not define the term, leaving people to guess what speech the rule disallows. Definitions of "profane" can range from the generally offensive, to sexually explicit or graphic, to irreverent towards the sacred.[21] To the extent the rule captures generally offensive or irreverent messages, it is unconstitutionally viewpoint-based. But even if "profane" is meant to refer to specific words, banning "profanity" still presents a vagueness problem. Although some words could arguably qualify as obvious profanity, other words are much more questionable. This kind of uncertainty led one court to refer to a profanity prohibition as "perhaps the most challenging" rule in the case before it because "it is not entirely clear what the word profanity means and what type of speech it encompasses."[22] Citizens commenting on city social media pages—and government officials enforcing social media rules—must have clear standards. San Antonio should accordingly remove its ban on "profane" comments.[23]

Restriction on information that may compromise safety or security

San Antonio's restriction on comments that include "information that may compromise the safety or security of the public or public systems" is also unconstitutionally vague, as it does not allow readers to understand what speech it prohibits. Language like "may compromise" exacerbates the vagueness. People therefore "must necessarily guess" at the rule's meaning,"[24] and it lacks "explicit standards" to avoid "arbitrary and discriminatory enforcement."[25] San Antonio should clarify this rule or rescind it altogether.

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specifically by the applicable state law; and (3) the speech, taken as a whole, "lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

[18] *Cohen v. California*, 403 U.S. 15, 16, 26 (1971).

[19] *Id.* at 26.

[20] *Id.*

[21] *Mama Bears of Forsyth Cnty. v. McCall*, 642 F. Supp. 3d 1338, 1354–55 (N.D. Ga. 2022). To the extent profanity is meant to include sexually explicit or graphic speech, only speech that meets the above-stated obscenity definition is unprotected.

[22] *Mama Bears of Forsyth Cnty.*, 642 F. Supp. 3d at 1354.

[23] And it must implement the ban on "obscene" comments as capturing only those that satisfy the *Miller* test. *See supra* note 17.

[24] *See Connally*, 269 U.S. at 391. The ban is especially vague because other rules already ban disclosures of confidential information and comments suggesting or encouraging violence or illegal activity (as noted in the next section). Presumably San Antonio did not intend to create redundant rules, so "information that may compromise the safety or security of the public" should mean something other than disclosing confidential information or encouraging violence. What that may be, however, is eminently unclear.

[25] *See Grayned*, 408 U.S. at 108.

Ban on comments suggesting or encouraging violence or illegal activity

The ban in San Antonio's policy on comments that "suggest or encourage" violence or illegal activity is overbroad. Under the Supreme Court's landmark decision in *Brandenburg v. Ohio*, the First Amendment does not protect speech (1) directed at inciting or producing imminent lawless action and (2) likely to incite or produce it, but mere abstract "suggestion" or even "encouragement" of unlawful conduct is fully protected.[26] Were it otherwise, the government could ban speech promoting anything from civil disobedience to the mental health benefits of psychedelic drugs. Rather than banning comments that suggest or encourage violence or illegal activities, San Antonio may limit only comments that meet the legal test for incitement under *Brandenburg* and its progeny.

Ban on promotions and endorsements

San Antonio's ban on solicitation and advertisement that includes "promotion or endorsement of any financial, commercial or non-governmental agency" is unconstitutionally overbroad. A policy is unconstitutionally overbroad when it "prohibits a substantial amount of protected speech,"[27] as here. "Promotion" and "endorsement" reasonably include not only paid advertising but *any* positive descriptions or testimonials, and the city may not categorically prohibit commenters from speaking positively about a particular "financial, commercial or non-governmental agency"—especially (but not only) when speech relates to the city because, for example, it has a relationship with an agency or business. San Antonio should thus remove or narrow its language defining solicitations and advertisements to eliminate its overbreadth.

Restriction on comments that violate a social media platform's terms of service

San Antonio also overreaches in purporting to restrict comments that violate social media platforms' terms of service. Social media companies are private actors and can adopt policies more restrictive than the First Amendment allows for governments. However, the government cannot adopt and enforce private rules as *government* speech regulations.[28]

For example, Meta's community standards, which apply to Facebook, generally do not allow claims that vaccines are not effective at preventing disease.[29] However, expression of vaccine skepticism is constitutionally protected, as the "government must abstain from regulating

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[26] 395 U.S. 444, 447 (1969).

[27] *United States v. Williams*, 553 U.S. 285, 292 (2008).

[28] *See e.g.*, *Engdahl v. Kenosha*, 317 F.Supp 1133 (E.D. Wis. 1970) (rejecting a city's attempt to prevent minors from viewing "adult" movies, as determined by the MPAA); *Swope v. Lubbers*, 560 F.Supp 1328 (W.D. Mich. 1983) (rejecting a college's attempt to refuse funding for movies based on their MPAA rating); *Entm't Software Ass'n v. Hatch*, 443 F.Supp 2d 1065 (D. Minn. 2006) (rejecting a state law that blocked people under 17 from renting or buying video games with certain ESRB ratings).

[29] *Community Standards, Misinformation*, META, https://transparency.meta.com/policies/community-standards/misinformation/.

speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[30]

If by operation of a social media platform's rules *the platform* blocks a comment, that is permissible—but the city may not do so on its own accord.

Conclusion

FIRE calls on San Antonio to revise its social media policy to comply with its legal obligations under the First Amendment. We respectfully request a substantive response to this letter no later than September 3, 2024.

Sincerely,

M. Brennen VanderVeen

M. Brennen VanderVeen
Program Officer, Public Advocacy

Cc: Ron Nirenberg, Mayor
Andy Segovia, City Attorney

[30] *Rosenberger*, 515 U.S. at 829.