FIRE
Foundation for Individual Rights and Expression

September 11, 2024

Michael Shannon
Interim Director
City of San Antonio Animal Care Services
4710 State Highway 151
San Antonio, Texas 78227

Sent via U.S. Mail and Electronic Mail (Michael.Shannon@sanantonio.gov)

Dear Mr. Shannon:

The Foundation for Individual Rights and Expression (FIRE) is concerned that San Antonio Animal Care Services is hiding or deleting comments on its Facebook page.[1] We write to inform you regarding the duty of government agencies to refrain from restricting constitutionally protected speech on their social media pages.

Our concerns arise because it appears Animal Care Services has deleted or hidden numerous comments from its Facebook page based on apparent disapproval of the viewpoints they express. Although what Animal Care Services posts on social media is the agency's own speech not subject to First Amendment requirements,[2] the comment sections of social media pages are, as San Antonio city policy recognizes,[3] at least limited public forums where First Amendment rules apply.[4] In limited public forums, the government may not "discriminate against

[1] City of San Antonio Animal Care Services, FACEBOOK, www.facebook.com/SanAntonioACS/.

[2] *Shurtleff v. City of Bos.*, 596 U.S. 243, 247–248 (2022) ("[W]hen the government speaks for itself, the First Amendment does not demand airtime for all views.").

[3] San Antonio describes its social media pages as "designated/limited forums." *Privacy Policy and Disclaimer*, CITY OF SAN ANTONIO, https://www.sa.gov/Disclaimer. Although "designated" and limited forums sometimes get used interchangeably, they are not synonymous. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001). Designated public forums are "government property that has not traditionally been regarded as a public forum" but which the government has nevertheless "intentionally opened up for that purpose," so speech restrictions within one "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).

[4] *See, e.g.*, *Lindke v. Freed*, 601 U.S. 187 (2024). The issue in *Lindke* was whether a government official's mixed use of a social media account for personal and government business meant the official engaged in state action

speech on the basis of viewpoint," and any restrictions "must be 'reasonable in light of the purpose served by the forum.'"[5]

Yet during a four-week period beginning May 1, Animal Care Services deleted or hid *over 400 comments*, approximately ***80%*** of which criticized the Animal Care Services euthanasia policy.[6] Examples of restricted comments include (with all original errors left intact):

> You are having an adoption event and killing adoptable puppies on the same day? Give them a chance too. San Antonio you are better than this. The euth list has 2 TWO nursing moms with their babies as well as several 2 month old pups and many others under a year. Let them be seen someplace other than the kill list
>
> Love that you are posting and promoting them! But can we then not plan to kill them the following day and give folks times to respond to the post and save them?
>
> With 28 million dollars given to you this year how can you honestly feel it was necessary to kill 7 beautiful puppies using a heart stick. What a truly barbaric act to do to these beautiful animals. This act alone shows me that your centre has no care for the animals in it at all. Stop using something so inhumane and appalling, and leave it in the middle ages where it belongs!!!! Truly vile 💔💔
>
> Please stop. Don't plead them out because you're choosing to kill them. Plead them out because you want them to be safe. Therefore give them more time. You've been killing puppies far too often recently and tomorrow a return from foster family is due back then you'll have them on the kill list also.
>
> Why are you CHOOSING to kill multiples for ONE kennel ??!!! You refuse to answer that question EVER
>
> Mistreated by humans and then killed by ACS! This inhumane cycle needs to stop! Please speak out against ACS! Don't let them put another uncaring director in charge, who isn't willing to actually work to eliminate the killing of innocent dogs and cats!
>
> Do you tell surrendering owners that their pet usually will only have a few days to be adopted before you kill it?

Animal Care Services has not publicly specified a justification for restricting these comments. Although San Antonio does have a set of rules for comments on city social media pages, these

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when he deleted comments and blocked someone. Not only was there no dispute that if he did engage in state action, then deleting comments and blocking would be a First Amendment violation, but the Court also noted that in cases where, as here, an account belongs to a government subdivision (e.g., a "City of Port Huron" Facebook page), state action is clear. *Id.* at 202.

[5] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–107 (2001) (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

[6] FIRE obtained the comments from a public records request to Animal Care Services. All cited comments are enclosed.

comments, and the many others like them, do not clearly violate any of San Antonio's rules.[7] Arbitrarily restricting comments without any reference to San Antonio's rules would be unconstitutional in any forum, just like with viewpoint discrimination.

To the extent Animal Care Services restricts comments under the city's rule requiring them to be "related to the post topic," its actions are still unconstitutional. A recent case involving the National Institutes of Health is instructive. The U.S. Court of Appeals for the D.C. Circuit held NIH violated the First Amendment by enforcing a prohibition on "off-topic" comments on its social media channels to filter out comments about animal testing.[8] The court acknowledged NIH's off-topic restriction generally furthered a permissible objective, but emphasized that it must "'draw a reasonable line' informed by 'objective, workable standards' between what is considered on-topic and what is considered off-topic."[9] NIH failed that test, as its enforcement of the rule did not "ring of common sense," because it automatically restricted comments about animal testing even though NIH's posts often related to research conducted using animal experiments or to researchers who conducted such experiments.[10]

Moreover, the agency established no definition or guidelines, which made its rule's boundaries unclear. Because reasonable people could disagree about whether certain posts were off-topic, the court emphasized that this sort of "indeterminate prohibition carries with it the opportunity for abuse."[11] The government's social media moderators had no clear standards to apply, and they proceeded to use their discretion "in a way that skew[ed] sharply against" the agency's critics.[12] The indeterminate rule and skewed enforcement led the court to hold NIH's rule "unreasonable under the First Amendment" and therefore unconstitutional.[13]

San Antonio's rule against comments "that are not related to the post topic" similarly provides no definitions or guidelines. If Animal Care Services makes a post about a new dog available for adoption, would a comment urging people to consider dogs on the euthanasia list for adoption, too, violate the rule? Would a comment asking why one dog got an adoption post but one on the euthanasia list did not violate the rule? Would a comment urging adopters to hurry since dogs are sometimes euthanized after only a few days violate the rule? If the dog in the original post was a surrendered pet, would a comment asking whether Animal Care Services tells people it sometimes euthanizes surrendered pets violate the rule? The answer to all these questions is ultimately left to the discretion of the department's social media moderators. If Animal Care Services has a general policy of restricting comments critical of the agency's euthanasia

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[7] *See Privacy Policy & Disclaimer*, CITY OF SAN ANTONIO, https://www.sa.gov/Disclaimer. This is not to say all rules in San Antonio's social media policy are permissible—several of them are unconstitutional, as outlined in FIRE's enclosed letter to the city.

[8] *NIH Comment Guidelines*, NIH, https://www.nih.gov/news-events/social-media-outreach/nih-comment-guidelines.

[9] *People for the Ethical Treatment of Animals v. Tabak*, No. 23-5110, 2024 U.S. App. LEXIS 18723, at *17 (D.C. Cir. July 30, 2024) (quoting *Minn. Voters All. v. Mansky*, 585 U.S. 1, 16, 21 (2018)) (internal citations omitted).

[10] *Id.* at *17-18.

[11] *Id.* at *21 (quoting *Mansky*, 585 U.S. at 21) (cleaned up).

[12] *Id.* at *23.

[13] *Id.*

practices as "off-topic," when many of the agency's posts are about animals potentially subject to those practices, that policy at a minimum would not "ring of common sense,"[14] and would very likely be viewpoint discriminatory.

In fact, like NIH's skewed enforcement against critical comments, the high proportion of Animal Care Services' restricted comments critical of euthanasia indicates it is discriminating against disfavored viewpoints. Such viewpoint discrimination is an "egregious" form of censorship,[15] which is impermissible in any forum.[16]

Additionally, to the extent Animal Care Services uses Facebook features to hide comments automatically, that does not mitigate any First Amendment violation. The government cannot outsource censorship to private entities.[17] For instance, if Animal Care Services is using a Facebook feature that automatically hides comments from someone who has more than three previous violations, that would impermissibly hinder that person from participating on the Facebook page even when his subsequent comments do not violate any of San Antonio's rules. Enforcement of such a rule would be particularly concerning given that previous "violations" may pertain to rules that themselves restrict protected speech.

As another example, if Animal Care Services is using Facebook's profanity filter, that would also result in censorship of constitutionally protected speech. Although San Antonio's social media policy bans "profane" comments,[18] this absolute prohibition is unconstitutional because the First Amendment generally protects profanity. In fact, the Supreme Court has protected the right to wear a jacket with the words "Fuck the Draft" inside a courthouse where children were present.[19] A ban on profanity is also unconstitutionally vague.[20] Outsourcing "profanity" enforcement to Facebook does not at all ameliorate vagueness concerns, especially when Facebook's standard for "profanity" appears to be whatever "the most commonly reported words and phrases marked offensive by the community" are.[21] It is not difficult to imagine that category including words besides those commonly regarded as "profanity." Users could post

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[14] *Id.* at *17-18.

[15] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

[16] *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009) (First Amendment prohibits viewpoint discrimination in public fora); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1177–79 (9th Cir. 2022), *vacated on other grounds sub nom. O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024) (interactive features of government social media account, where public can comment on posts, create public forum where viewpoint discrimination is impermissible).

[17] *NRA of Am. v. Vullo*, 602 U.S. 175, 190 (2024) ("[A] government official cannot do indirectly what she is barred from doing directly.").

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

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

[20] *See Mama Bears of Forsyth Cnty. v. McCall*, 642 F. Supp. 3d 1338, 1354 (N.D. Ga. 2022) (noting "it is not entirely clear what the word profanity means and what type of speech it encompasses" and holding that plaintiffs were substantially likely to succeed on their facial challenge to a ban on profane remarks).

[21] *How do I turn the profanity filter on and off for my Facebook Page?*, FACEBOOK, https://www.facebook.com/help/1017549069082358.

something, fully believing they are complying with San Antonio's (unconstitutional) profanity ban, and still have their comments hidden. They won't even necessarily know their comments have been hidden because Facebook leaves hidden comments visible to the authors and their friends.[22] Ultimately, using Facebook to hide comments automatically is a blunt instrument that is even less likely to respect a citizen's rights than moderator discretion.

Euthanasia in animal shelters is a contentious issue. It imperative that citizens be able to engage with their government and share their views with each other. The Constitution requires nothing less when the government opens a forum like the comment sections of social media pages. Animal Care Services must refrain from hiding or deleting comments based on viewpoint or pursuant to vague or otherwise unconstitutional policies.

We respectfully request a substantive response to this letter no later than September 25, 2024.

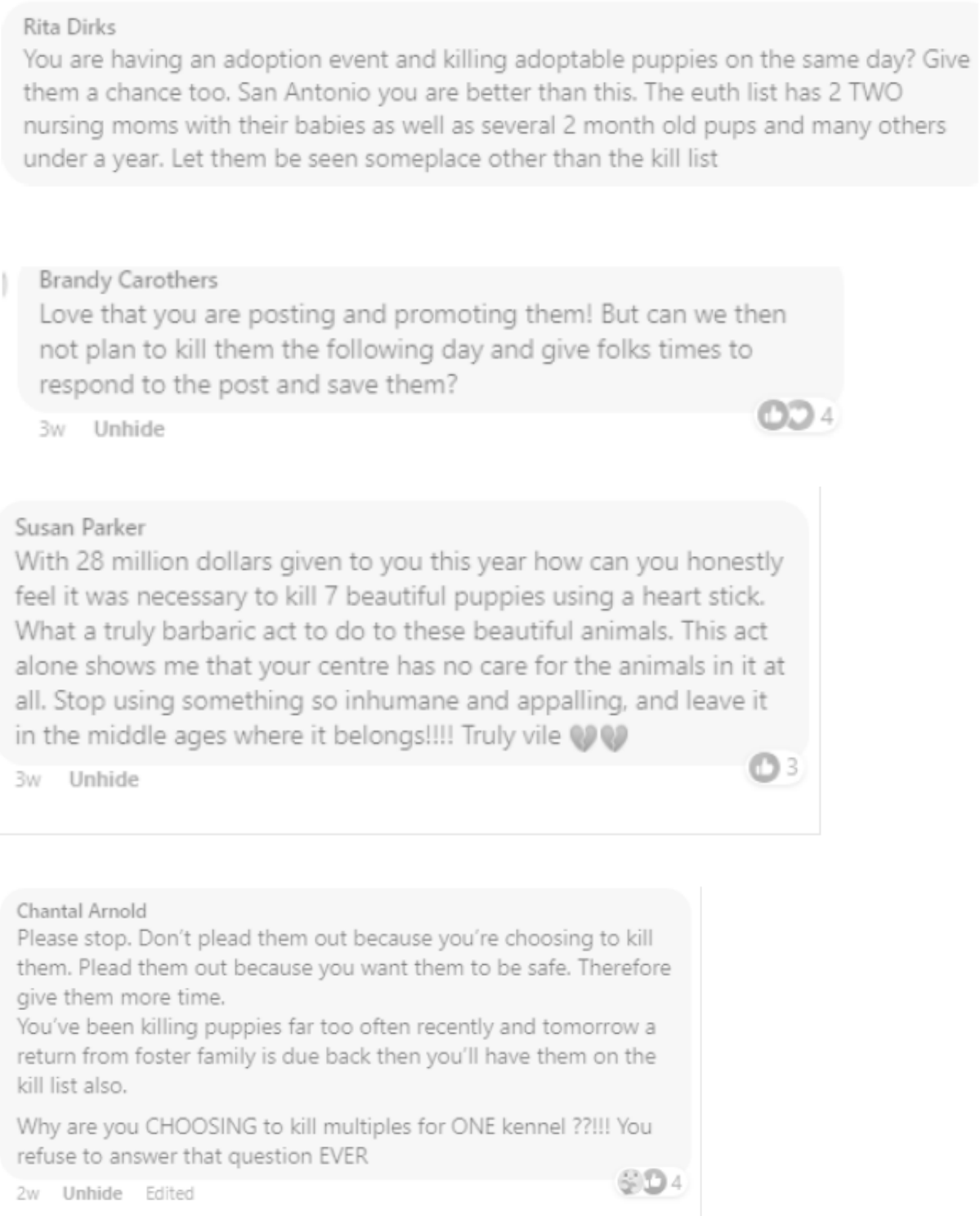
Sincerely,

M. Brennen VanderVeen

M. Brennen VanderVeen
Program Officer, Public Advocacy

[22] *Id.*

Selected Facebook comments hidden by City of San Antonio Animal Care Services during four-week period beginning May 1, 2024



Rita Dirks
You are having an adoption event and killing adoptable puppies on the same day? Give them a chance too. San Antonio you are better than this. The euth list has 2 TWO nursing moms with their babies as well as several 2 month old pups and many others under a year. Let them be seen someplace other than the kill list

Brandy Carothers
Love that you are posting and promoting them! But can we then not plan to kill them the following day and give folks times to respond to the post and save them?
3w Unhide 4

Susan Parker
With 28 million dollars given to you this year how can you honestly feel it was necessary to kill 7 beautiful puppies using a heart stick. What a truly barbaric act to do to these beautiful animals. This act alone shows me that your centre has no care for the animals in it at all. Stop using something so inhumane and appalling, and leave it in the middle ages where it belongs!!!! Truly vile 💔💔
3w Unhide 3

Chantal Arnold
Please stop. Don't plead them out because you're choosing to kill them. Plead them out because you want them to be safe. Therefore give them more time.
You've been killing puppies far too often recently and tomorrow a return from foster family is due back then you'll have them on the kill list also.

Why are you CHOOSING to kill multiples for ONE kennel ??!!! You refuse to answer that question EVER
2w Unhide Edited 4

Mary Bohr
Mistreated by humans and then killed by ACS! This inhumane cycle needs to stop! Please speak out against ACS! Don't let them put another uncaring director in charge, who isn't willing to actually work to eliminate the killing of innocent dogs and cats!

5d **Unhide**

Bj Kalmbach
Do you tell surrendering owners that their pet usually will only have a few days to be adopted before you kill it?

4d **Unhide**

August 19, 2024

Susan Guinn
Deputy City Attorney
City of San Antonio
International Center
203 S. St. Mary's Street
San Antonio, Texas 78205

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.