



# FIRE

Foundation for Individual  
Rights and Expression

April 18, 2023

Danielle Smith  
City Attorney  
City of Bristol  
801 Anderson Street, P.O. Box 1189  
Bristol, Tennessee 37620

*Sent via U.S. Mail and Electronic Mail (dsmith@bristoltn.org)*

Dear Ms. Smith:

The Foundation for Individual Rights and Expression (FIRE)<sup>1</sup> and the National Coalition Against Censorship (NCAC)<sup>2</sup> are concerned by the City of Bristol's Social Media Comments Policy, which unconstitutionally restricts comments on Bristol's social media pages based on viewpoint. When a government entity opens an online forum for public commentary, as Bristol has on its social media pages, the First Amendment prohibits excluding disfavored views or speakers. The policy's speech restrictions are also unconstitutionally vague and overbroad. The city accordingly must revise the policy to remedy its ongoing violation of the First Amendment.

Bristol's Social Media Comments Policy proclaims its Facebook, Twitter, and other social media pages seek to "present matter[s] of public interest in Bristol to our many residents, businesses and visitors."<sup>3</sup> Bristol encourages the pages' visitors to submit "questions, comments, and concerns," but states that the city "reserves the right to delete submissions that contain vulgar language, personal attacks, or disparaging comments of any kind, or offensive comments that target or disparage any ethnic, racial, or religious group."<sup>4</sup> The policy further

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<sup>1</sup> FIRE is a nonpartisan nonprofit dedicated to defending freedom of speech. For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at [thefire.org](http://thefire.org).

<sup>2</sup> NCAC is an alliance of more than 50 national nonprofit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. NCAC has a longstanding interest in assuring the continuance of robust First Amendment protections for those who express unpopular views and those who support those speakers.

<sup>3</sup> *Website / Social Media Policies*, BRISTOL, <https://www.bristoltn.org/578/Website-Social-Media-Policies> [<https://perma.cc/V5CH-B9ES>].

<sup>4</sup> *Id.*

reserves the city’s right to delete comments that “[a]dvocate illegal activity” or “[c]ontain any information or statements that would negatively affect the City’s image.”<sup>5</sup>

The Social Media Comments Policy burdens constitutionally protected expression and must be revised.

The First Amendment applies not only to speech in physical forums, but extends to expression in interactive, online forums. Speech on “social media is entitled to the same First Amendment protections as other forms of media.”<sup>6</sup> As the Supreme Court has observed, “in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views,” but the answer today is clear: “It is cyberspace . . . and social media in particular.”<sup>7</sup>

Although Bristol’s Social Media Comments Policy attempts to claim the comment sections on its pages are “not a public forum,” it is their *nature*—and the policy’s statement that Bristol “welcome[s] your comments” on its social media pages—and not the *label* the city chooses to apply that determines whether they are public forums under the First Amendment.<sup>8</sup> What Bristol writes on its websites is the city’s own speech not subject to First Amendment limitations,<sup>9</sup> but numerous court decisions establish that interactive parts of government social media accounts—including comment sections where the public may engage with the account’s posts—do not constitute the government’s own speech, but instead are public forums where the First Amendment applies.<sup>10</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *vacated as moot sub nom. Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

<sup>7</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

<sup>8</sup> *See, e.g., Satawa v. Bd. of Cnty. Rd. Comm’rs*, 788 F. Supp. 2d 579, 596 (E.D. Mich. 2011) (quoting *Boardley v. Dep’t of Interior*, 615 F.3d 508, 514) (The “protections of the First Amendment do not rise or fall depending on the characterization ascribed to a forum by the government.”).

<sup>9</sup> *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1587 (2022) (when the government creates a forum for expression, the First Amendment prevents it from discriminating against speakers based on their viewpoint, but “when the government speaks for itself, the First Amendment does not demand airtime for all views”).

<sup>10</sup> *See, e.g., Windom v. Harshbarger*, 396 F. Supp. 3d 675 (N.D.W. Va. 2019) (First Amendment challenge survived motion to dismiss where constituent blocked from legislator’s “politician” Facebook page); *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019) (granting summary judgment to nonprofit entity blocked on Twitter by state assembly members); *People for the Ethical Treatment of Animals, Inc. v. Young*, No. 4:18-cv-01547 (S.D. Tex. Sept. 10, 2018), ECF No. 31 (summary order denying motion to dismiss First Amendment claims premised on keyword-based content filters on public university’s Facebook page); *Leuthy v. LePage*, No. 17-cv-00296, 2018 U.S. Dist. LEXIS 146894, \*36–43 (D. Me. Aug. 29, 2018) (governor’s Facebook page was limited public forum); *Dingwell v. Cossette*, 327 F. Supp. 3d 462 (D. Conn. 2018) (applying *Knight* in holding critic blocked from police Facebook page sufficiently alleged his First Amendment rights were violated). *Cf. Shurtleff*, 142 S. Ct. at 1601 (Alito, J., concurring) (explaining that “private-party expression in any type of forum recognized by our precedents does not constitute government speech,” as such expression “does not involve expressing a governmental message”).

By opening its social media pages to public comment and expressly encouraging visitors to submit “questions, comments, and concerns,” Bristol created a public forum.<sup>11</sup> Accordingly, it may not impose restrictions in that forum that discriminate based on viewpoint.<sup>12</sup>

Yet Bristol’s Social Media Comments Policy does exactly that. It permits censorship of comments based on the views they express, including “personal attacks,” “disparaging comments,” “offensive comments,” and any that “[a]dvocate illegal activity” or “would negatively affect the City’s image.”

The Supreme Court has made clear that even a speech restriction that “evenhandedly prohibits disparagement of all groups” constitutes viewpoint discrimination under the First Amendment, as “[g]iving offense is a viewpoint.”<sup>13</sup> The core First Amendment value that the government cannot restrict expression on grounds that others find it subjectively objectionable is why the state cannot outlaw burning the American flag,<sup>14</sup> punish wearing a jacket emblazoned with “Fuck the Draft,”<sup>15</sup> or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.<sup>16</sup> In ruling that the First Amendment protects protesters holding insulting signs outside soldiers’ funerals, the Court reiterated this fundamental principle, recognizing that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”<sup>17</sup>

In addition to the policy’s viewpoint discrimination, its ban on comments that “[a]dvocate illegal activity” is overbroad. While the First Amendment does not protect speech that advocates and is likely to result in immediate illegal activity,<sup>18</sup> mere abstract advocacy of unlawful conduct is fully protected. Were it otherwise, the government could ban speech promoting anything from civil disobedience to the mental health benefits of psychedelic drugs.

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<sup>11</sup> *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 573–75 (S.D.N.Y. 2018).

<sup>12</sup> *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 469 (2009); *Miller v. City of Cincinnati*, 622 F.3d 524, 534–35 (6th Cir. 2010); see also *Davison v. Randall*, 912 F.3d 666, 682 n.3, 686–88 (4th Cir. 2019) (“interactive component” of county political figure’s Facebook page, “in which the public can post comments, reply to posts” and “like” comments and posts, was a public forum where politician unconstitutionally blocked constituent because of his views); *Lewis v. Jones*, 440 F. Supp. 3d 1123 (E.D. Cal. 2020) (issuing preliminary injunction ordering sheriff to unblock critics from Facebook page, noting evidence of viewpoint discrimination where sheriff deleted critical posts by Black Lives Matter member); *Price v. City of New York*, No. 15-cv-5871, 2018 U.S. Dist. LEXIS 105815, \*25–46 (S.D.N.Y. June 25, 2018) (where NYPD precinct blocked Twitter user, whether forum was a “public, designated, or nonpublic” was immaterial, as “viewpoint discrimination . . . is unlawful in *any* forum,” including nonpublic forums) (emphasis in original).

<sup>13</sup> *Matal v. Tam*, 582 U.S. 218, 220 (2017).

<sup>14</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

<sup>15</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>16</sup> *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

<sup>17</sup> *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

<sup>18</sup> The First Amendment’s exception for incitement encompasses speech “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

And even setting aside the issues of viewpoint discrimination and overbreadth, the Social Media Comments Policy fails First Amendment scrutiny for the independent reason that it lacks specificity regarding what speech could “negatively affect the City’s image” or be deemed “disparaging” or a “personal attack.” It is thus unconstitutionally vague in both failing to give persons of ordinary intelligence reasonable opportunity to know what speech is prohibited and affording city officials too much discretion to decide what speech is allowed.<sup>19</sup> Laws and regulations “must provide explicit standards for those who apply them” to prevent “arbitrary and discriminatory enforcement.”<sup>20</sup>

It is all too easy to envision the city using the policy to suppress criticism of government officials and to sweep any complaints related to the city or its administration under the rug. Meanwhile, comments praising the city or its leaders will endure. This is utterly incompatible with the principle that “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”<sup>21</sup> While the city has control over its own speech, it has no authority to curate a public forum to resemble a marketing brochure.

FIRE and NCAC call on the City of Bristol to revise its Social Media Comments Policy to comply with its legal obligations under the First Amendment. We respectfully request a substantive response to this letter no later than May 2, 2023.

Sincerely,



Aaron Terr  
Director of Public Advocacy, FIRE



Christopher Finan  
Executive Director, NCAC

Cc: Vince Turner, Mayor  
Mark Hutton, Vice Mayor  
Mahlon Luttrell, City Council member  
Margaret Feierabend, City Council member  
Lea Powers, City Council member

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<sup>19</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

<sup>20</sup> *Id.*

<sup>21</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 50 (1988).