ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Southern California

March 22, 2018

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

Re: Concerns about Revised Social Media Policy

Dear District Attorney Rackauckas and Assistant District Attorney Baytieh,

We appreciate your Office's recognition that it violated the law when it deleted critical comments and blocked critical users on its official social media pages. The concerns we expressed about the illegal censorship of your Office's social media pages are not related to your aggressive pursuit of sexual offenders and gang members – contrary to the assertions of your Office's official spokesperson[1] – but, rather, stem from serious and legitimate concerns about the constitutionality of your Office's policies and practices. In that spirit, while your new social media policy is an improvement over your prior blanket censorship of critical comments and commenters, the new policy too raises significant constitutional questions that we hope your Office will address. Simply put, the replacement policy is unconstitutionally restrictive and does little to establish clear standards for speech on the OCDA's social media platforms.

Foremost, your assertion that your page is a "moderated online discussion site" cannot be used to delete constitutionally protected speech. Although the OCDA may "welcome[] polite and constructive comments on the shared matters of public interest" discussed on its social media pages, it cannot constitutionally prohibit or delete comments that are impolite or sharply critical. As the Supreme Court stated in 1949 and has repeatedly echoed, "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech…is [] protected against censorship or punishment…There is no room under our Constitution for a more restrictive view." *Id*. (internal citations omitted).

Moreover, as currently written, your policy is so broad that it provides tremendous discretion to censors looking to silence the Office's critics or to otherwise restrict constitutionally protected speech. The Office claims the ability, for example, to delete anything that "… hinders or distracts from useful discussions." The determination of whether a comment hinders or distracts from discussions, as well as whether a discussion is useful in the first instance, has no legal or objective basis, however; the decision rests entirely on the whims of

[1] Gabriel San Roman, *OCDA Adopts New Social Media Policy After ACLU's Scolding Letter*, *available at*: https://www.ocweekly.com/aclu-rips-da-tony-rackauckas-suppressing-speech-social-media/ (quoting OCDA spokeswoman Michelle Van Der Linden dismissing our concerns and saying, "The ACLU routinely attacks the Orange County District Attorney's Office due to our aggressive pursuit of sexual offenders and gang members.").

your Office. "Such discretion grants officials the power to discriminate and raises the spectre of selective enforcement on the basis of the content of speech." *NAACP Western Region v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir. 1984); *accord Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992).

Likewise, under the policy, your Office claims the ability to delete comments that it finds "offensive to a reasonable person." This metric also provides no insight or objective measurement that would cabin your discretion as offensiveness is particularly difficult to gauge and will inherently vary from person to person. Indeed, the U.S. Supreme Court has already held that the standard "patently offensive as measured by contemporary community standards" is unconstitutionally vague. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871, (1997).

These vague, poorly defined metrics also unconstitutionally chill protected speech. "[V]ague laws chill speech [because] [p]eople 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010) (citing *Connally v. General Constr. Co*., 269 U.S. 385, 391 (1926)). Because users have no way of knowing in advance what speech "hinders or distracts from useful discussion," is offensive, etc. they will naturally refrain from fully engaging in otherwise protected speech to avoid censorship of their comments, effectively neutering what might otherwise be vigorous debate on important issues.

Additionally, your blanket prohibition on false and misleading comments explicitly violates the Constitution, as well as raising complicated issues of defining what is false and misleading.[2] The Supreme Court held that false speech can enjoy First Amendment protection. *United States v. Alvarez*, 567 U.S. 709, 719 (2012). As Justice Kennedy explained, "The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection." *Id*. The prohibition on misleading comments also raises the question of how your Office will treat satirical speech and biting sarcasm.

Moreover, as the snitch scandal pointedly demonstrates, one entity's version of the truth can differ vastly from another's. For example, your Office has repeatedly denied the existence of a systemic informant program and its accompanying suppression of evidence of that program, despite reams of evidence and a Court of Appeals' opinion to the contrary. How an OCDA employee would treat an assertion of systemic misconduct by your Office is, therefore, an open question.

Your prohibition on profanity fares no better. The Supreme Court held more than forty years ago that profanity enjoys constitutional protection. *Cohen v. California*, 403 U.S. 15, 25 (1971) (holding that the phrase "Fuck the Draft," worn on a jacket in a courtroom, was protected speech and could not be banned for being offensive). As the Supreme Court explained, "it is [] often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id*.

Other of your restrictions are illegal because they are not reasonable in light of the purpose served by the forum. *See*, *Rosenberger v. Rector*, 515 U.S. 819, 829-30 (1995). For

[2] Curiously, at the same time you assert your ability to delete false and misleading comments, your policy explicitly disclaims the accuracy of anything posted on the Office's social media pages.

example, your office will censor speech containing any individual's contact information, including addresses, e-mail addresses, and phone numbers. Such a sweeping prohibition would prevent an individual from posting such things as publically available contact information for people employed by your Office or even a person's own contact information if, for example, they want others who are interested in advocating with your Office on a particular issue to reach out to them so they can coordinate an advocacy campaign.

Your Office will also delete posts that repeat substantially similar comments. In addition to the inherent vagueness in determining which comments are substantially similar, to the extent that this provision is intended to cover posts by different individuals expressing the same sentiment, enforcing it would violate the constitutional rights of the persons whose comments are deleted. Expressions of agreement with other's sentiments are among the most basic and essential ways of communicating one's opinion. When your Office receives dozens of comments reflecting identical concerns it sends a powerful message of dissatisfaction with your actions to you and your staff that cannot be conveyed when only a few posts are allowed to stand—not to mention the stifling effect this practice would have on organizing by preventing people from identifying likeminded individuals. Although there may be circumstances in which the government can place reasonable restrictions on the volume of comments, no physical or temporal restrictions exist on the internet. Review of scores of websites demonstrate that comments may run into the hundreds and thousands.

Nor can we identify any valid reason for your Office to prohibit individuals from posting links to other websites. The exchange of information on social media is predominately accomplished by sharing links to articles elsewhere on the internet. Sharing a link is an easy and efficient way of sharing an opinion. In many contexts, particularly on Twitter given its character limits, sharing links to articles on other sites is the only practical way of communicating one's opinion on complex matters.

Finally, we would like you to clarify your Office's interpretation of when a campaign, candidate and the like are "inherently related to discussion of an item posted by the OCDA." With the June election for Orange County District Attorney rapidly approaching, community members may wish to highlight the stances of candidates that differ from those you may express in a post. Their right to do so is of critical importance and among the highest level of speech protected by the First Amendment.

We strongly urge you to amend and clarify your new social media policy so that it accords with both the Constitution and sound public policy. No less than our democracy rests on the ability of the community to engage in vigorous and pointed debate. 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.

Regards,
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Staff Attorney
ACLU FOUNDATION OF SOUTHERN CALIFORNIA