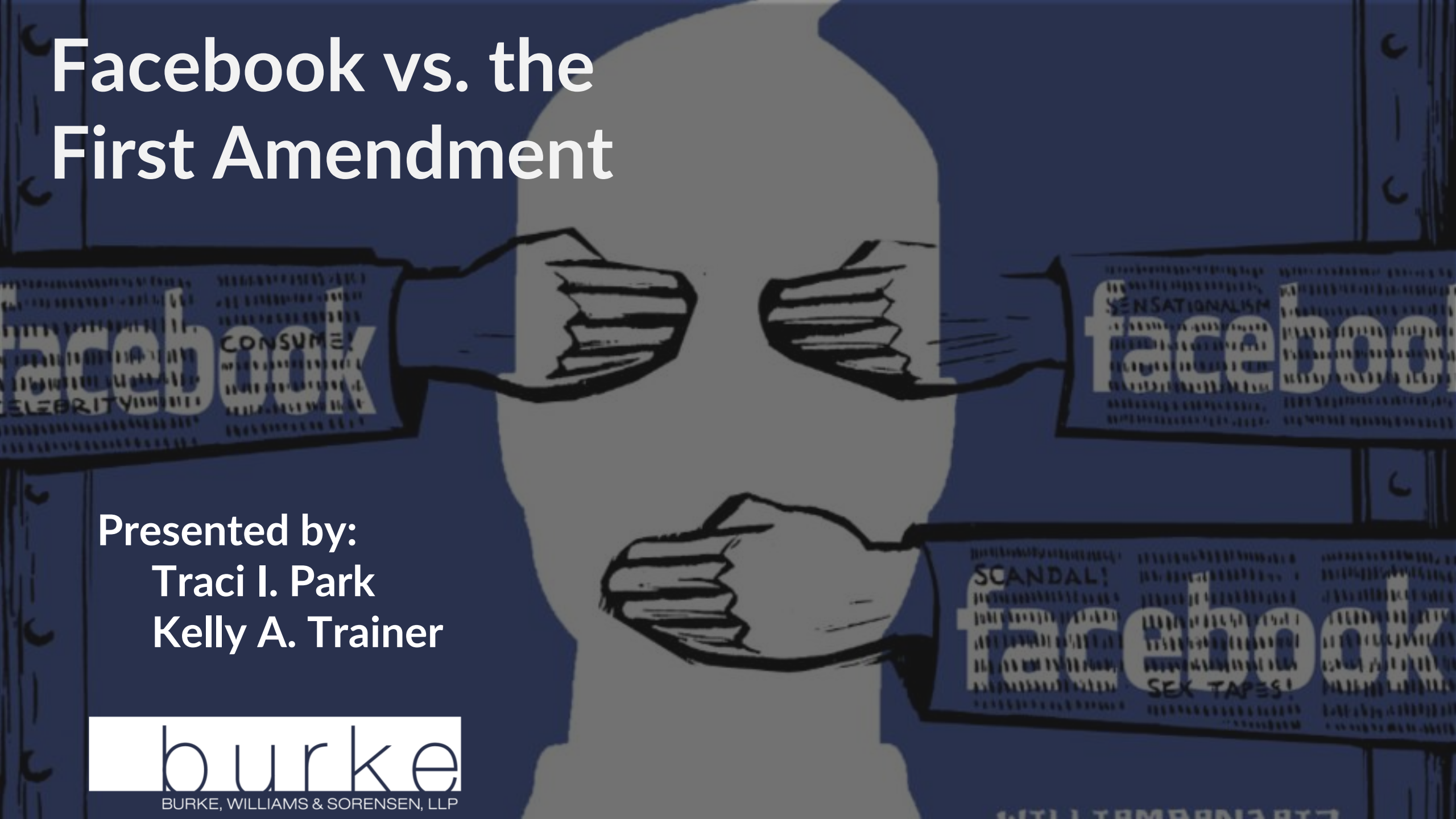


Facebook vs. the First Amendment

Presented by:
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burke

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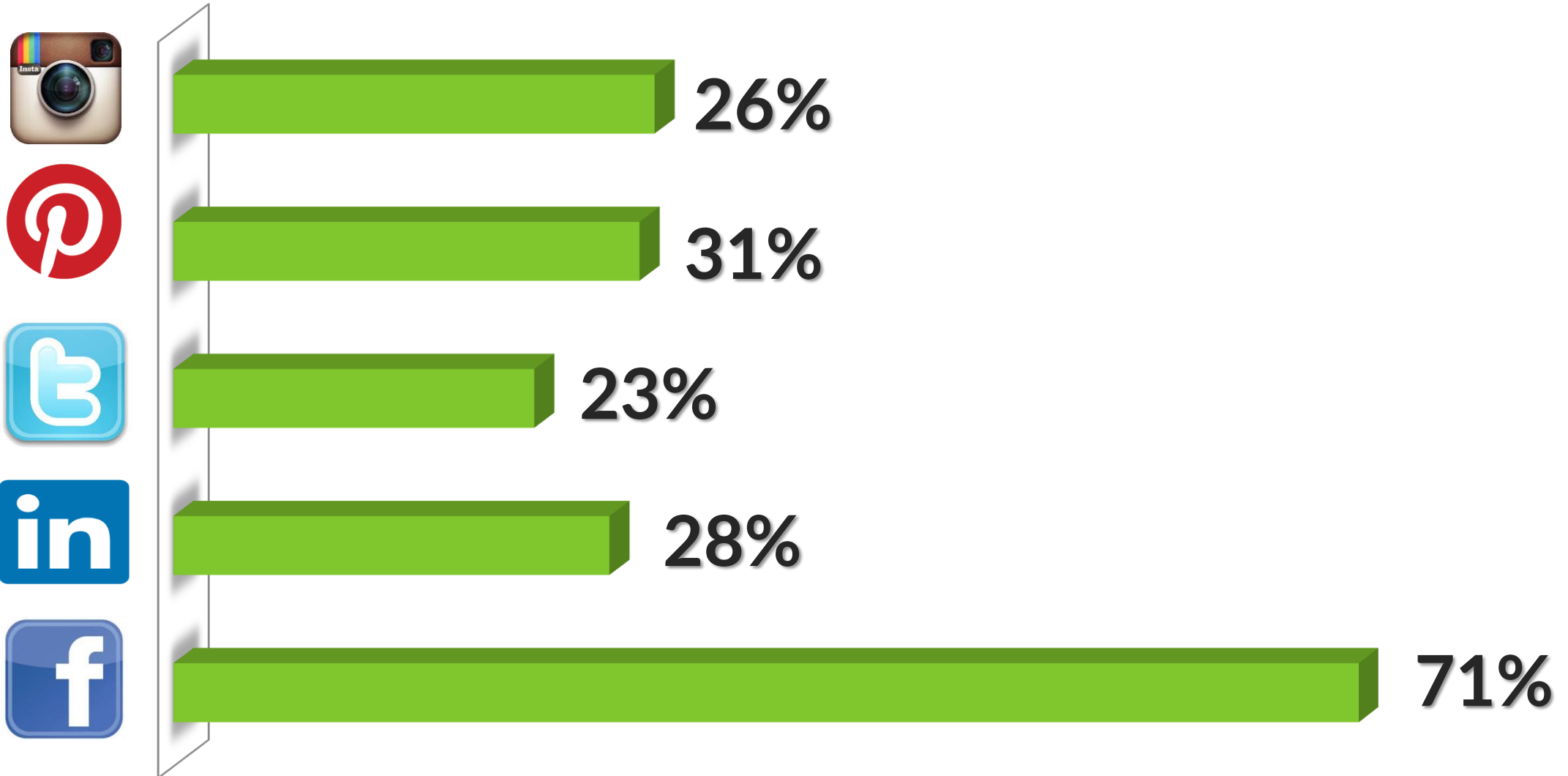


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WHERE PEOPLE ARE SOCIALIZING ONLINE...



Percentage of internet users who use these social networking sites

A Social Media Minute on the Internet

Snapchat

2.4 million
snaps created

Twitter

481,000
tweets sent

YouTube

4.3 million
videos viewed



Facebook

973,000
logins

Instagram

174,000
scrolling Instagram

LinkedIn

120+
new accounts

SOCIAL MEDIA IS AWESOME, BUT...

- The Internet never forgets
- Perception IS reality
- Your critics will be your closest followers
- Anything you say can and will be held against you
- Once you say it, you can't take it back
- Mistakes are magnified
- Online conduct can be used as evidence in litigation
- As an elected official or high-ranking employee, the line between public and private is blurred

SOCIAL MEDIA IS AWESOME, BUT...



- Social media in the public sector raises numerous First Amendment issues:
 - Establishment of a public forum
 - Take down policies
 - Banning/reporting users



FREE SPEECH AND PUBLIC FORUMS



THE MOST IMPORTANT MODERN FORUM



*Packingham v. North
Carolina, 137 S. Ct.
1730 (2017)*

Social media has become a vital platform for speech of all kinds. Indeed, social media may now be “the most important” modern forum “for the exchange of views.”



www://

PUBLIC FORUM?



*Vargas v. City of
Salinas (Cal. 2009)*
46 Cal.4th 1

A traditional website pushing out information in one direction—to the public—does not establish a public forum, and that means the entity does not risk violating First Amendment rights when it excludes content.



PUBLIC FORUM



*Perry Education
Ass'n v. Perry Local
Educators' Ass'n,
460 U.S. 37 (1983)*

In a true public forum, speech restrictions are subject to the highest level of scrutiny and must be narrowly drawn to effectuate a compelling government interest.



www://

LIMITED PUBLIC FORUM



*Christian Legal Soc.
Chap. of the Univ. of
Calif. v. Martinez,
561 U.S. 661 (2010)*

In a limited public forum, a public entity has somewhat greater latitude to regulate speech. However, any restrictions still must be reasonable and neutral as to the speaker's viewpoint.

www://

TAKE-DOWN LITIGATION

Hawaii Defense Foundation v. City & County of Honolulu (D. Hi. 2014)

- The Honolulu Police Department operated a Facebook page described as “a forum open to the public” and encouraged users to “share your experiences with us, either good or bad”
- The page administrator deleted comments and banned two users from further posts because of comments critical of the Department
- The two users sued for First Amendment retaliation in federal court

TAKE-DOWN LITIGATION

Karras v. Gore (S.D. Cal. 2014)

- The San Diego Sheriff's Department operated a Facebook page inviting users to post comments, but requesting they remain "civil, respectful, and on-topic"
- Despite the Department's posting guidelines indicating that it was not opposed to "dissenting opinions," it had a practice of removing unfavorable comments
- In litigation, hundreds of posted comments in favor of free speech were deleted, and the Department shut down the entire page

BANNING + BLOCKING USERS

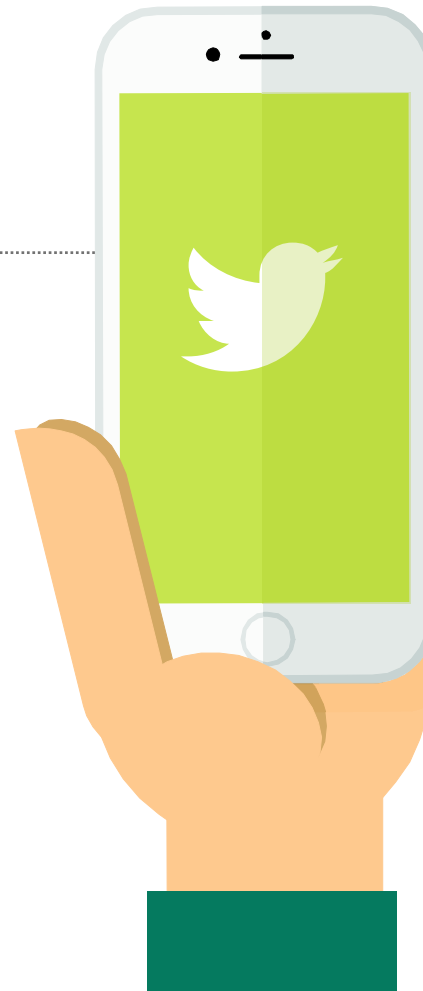
ACLU of Indiana v. City of Beech Grove (S.D. Ind. 2016)

- The ACLU of Indiana sued the City of Beech Grove over its removal of two women's posts and blocking them on the City's Facebook posts
- Posts were polite, but critical of the city and its police department
- Parties settled for \$7,412.50 (costs and fees) and a policy change that prohibits blocking users and viewpoint-based determinations
- Following the settlement, the City Attorney stated that the City did not believe Facebook was a public forum and settled it to avoid future litigation costs

FIRST AMENDMENT CONSTRAINTS

Public Agencies Cannot Prohibit

Comments
critical of an
official or the
City based on
policy issues

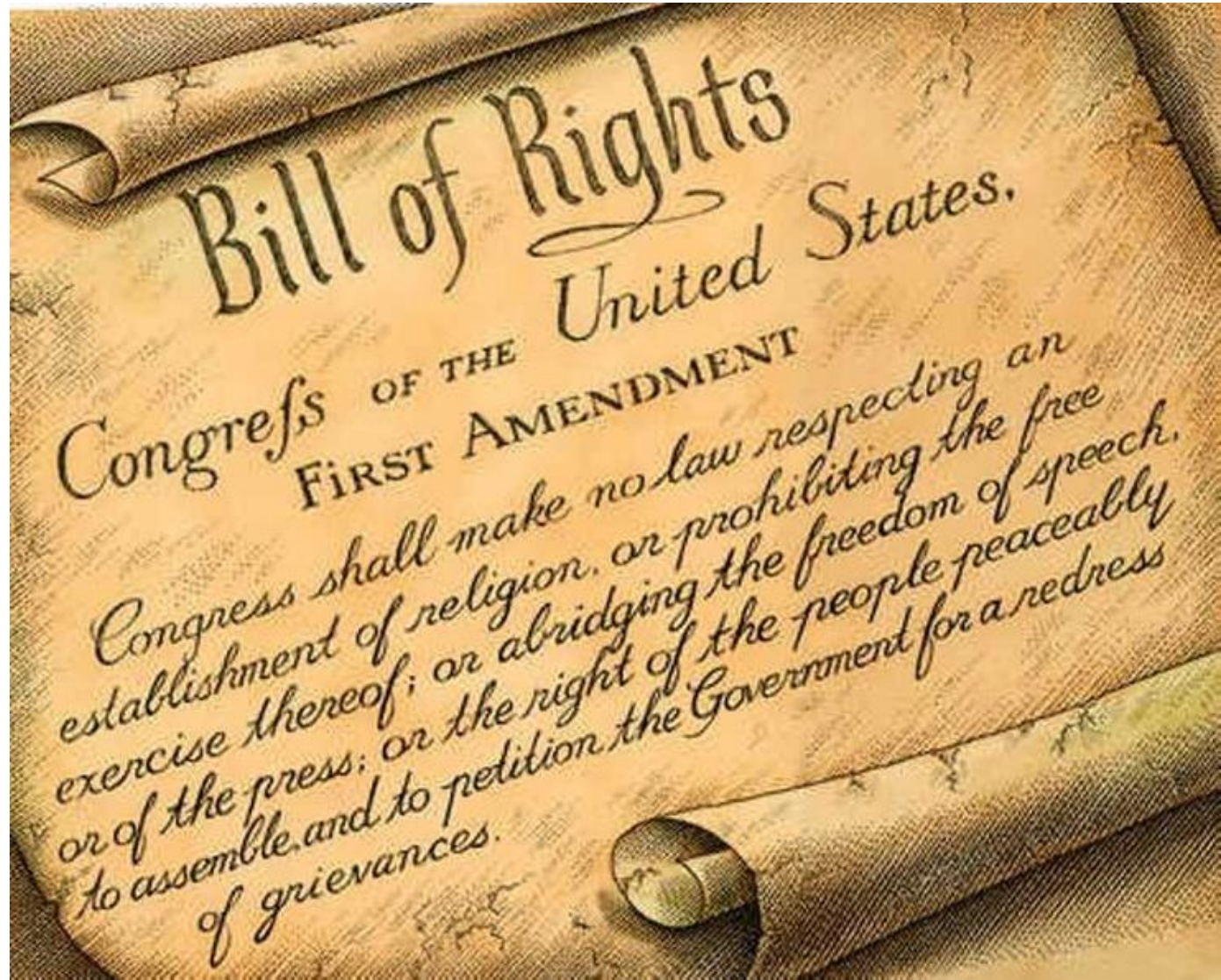


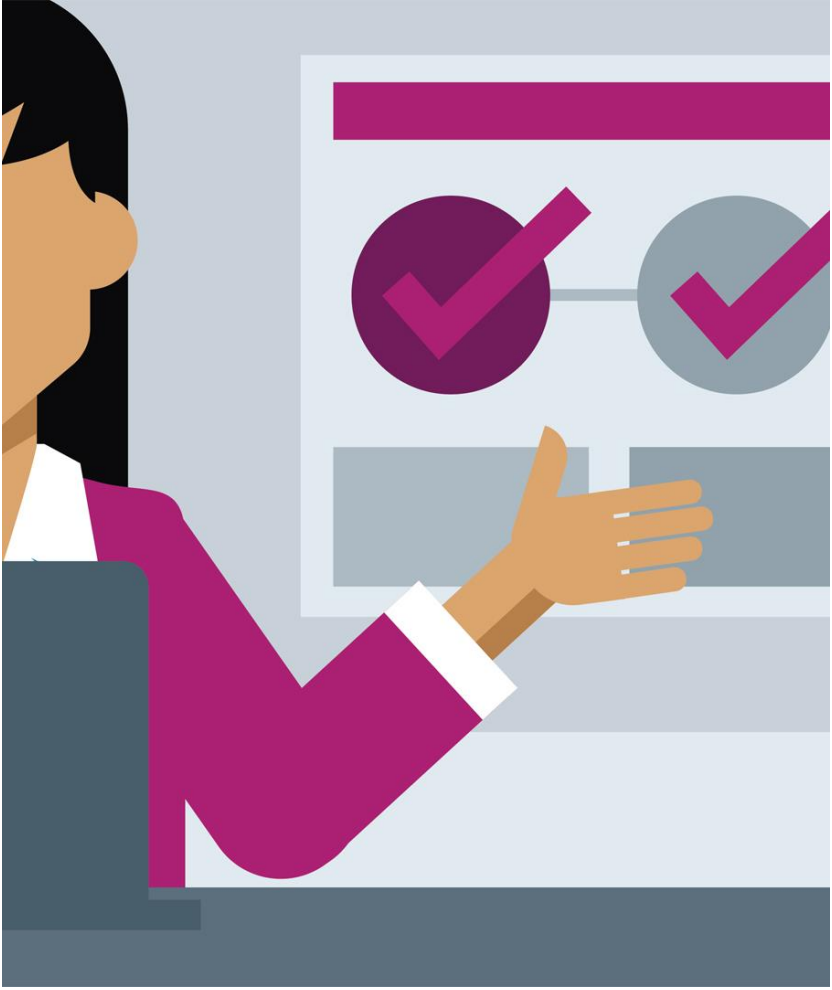
Comments
based on the
viewpoint
expressed

FIRST AMENDMENT CONSTRAINTS

The Gray Areas of Prohibited Content Include:

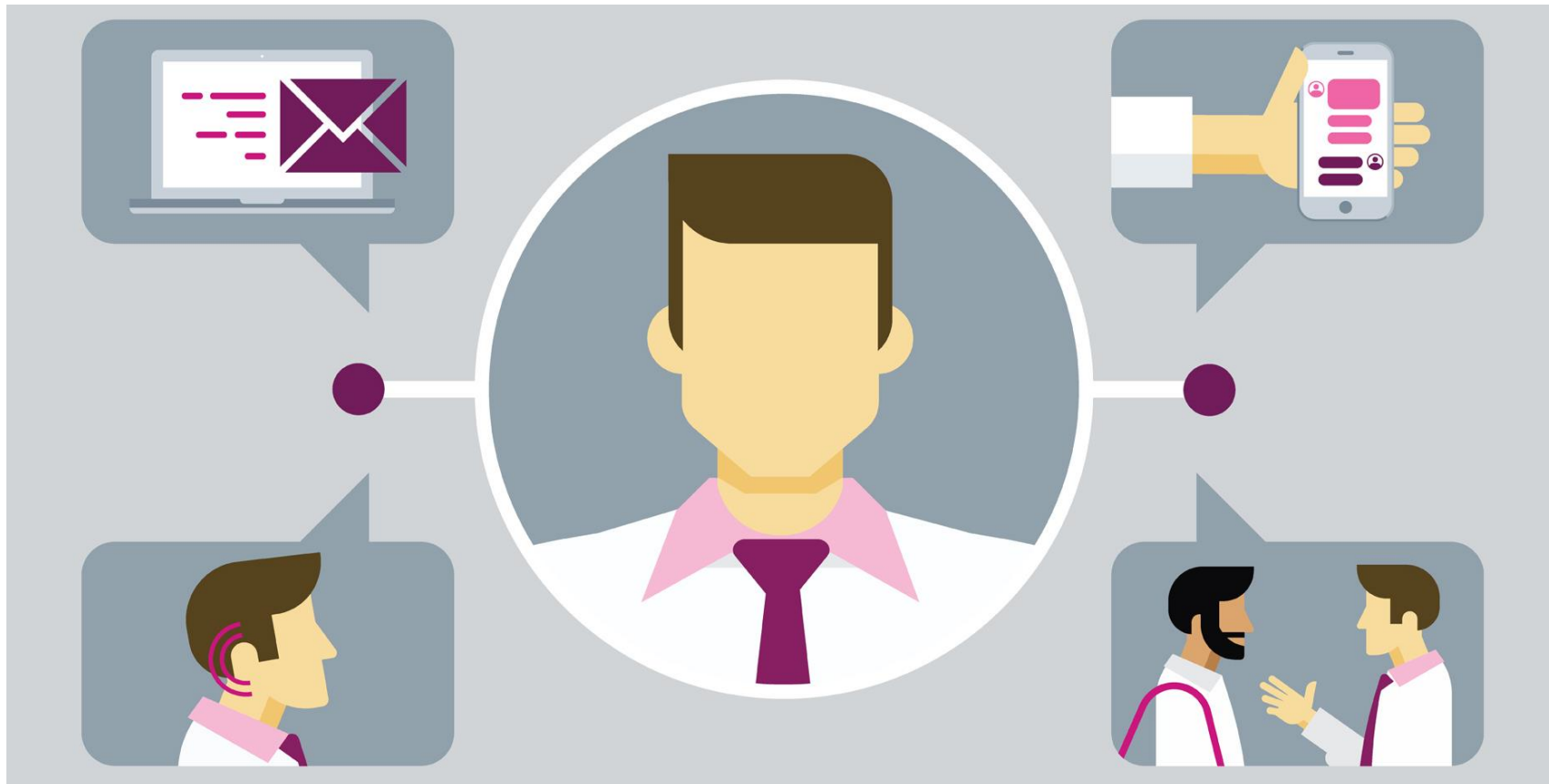
- 01 Profanity
- 02 “Defamatory” statements
- 03 Personal attacks
- 04 “Offensive” statements
- 05 Implied threats
- 06 Off-topic comments





PUBLIC FORUM AND TAKE DOWN POLICIES

- Establish a limited public forum
- Post user guidelines
- Take down policies must be narrowly tailored
- No view-point discrimination
- Critical comments must be tolerated





USE OF SOCIAL MEDIA BY ELECTED OFFICIALS



IS A “PERSONAL” PAGE A PUBLIC FORUM?

The case law is still developing, but possibly YES. Factors to consider:
Does the official...

- ... identify as a government official?
- ... use it to address constituents?
- ... use it to share information of importance to the community?
- ... post photos of community events?
- ... use it to acknowledge their colleagues or City employees?
- ... use it to discuss their work as government official?
- ... use any City resources?
- ... link to the City's website or social media pages?
- ... provide access to constituents?

DAVISON V. LOUDOUN COUNTY BOARD OF SUPERVISORS

267 F.Supp.3d 702 (E.D. Va. 2017)

Currently on appeal to the Fourth Circuit

- Phyllis Randall “Chair Phyllis Randall” Facebook page which was created the day before she was sworn in, which she used primarily to post about things related to the Board.
- Plaintiff Davison participated in a joint town hall of the Board of Supervisors and the School Board. He submitted a question, but believed Randall’s answer was inadequate. When Randall posted about this event on her Facebook page, Davison commented on it, alleging corruption by the school board. Randall took issue with his comment and deleted her original post, which included Davison’s comment. She also blocked Davison from her page.
- Randall unblocked Davis the next morning. He was blocked for 12 hours.

DAVISON V. LOUDOUN COUNTY BOARD OF SUPERVISORS

- Randall acted under color of state law in maintaining her page and in blocking Davison from it.
- “The suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards.”
- “Criticism of official conduct is not just protected speech, but lies at the very heart of the First Amendment.”
- The Facebook page “operates as a forum for speech under the First Amendment to the Constitution.”



Donald J. Trump

@realDonaldTrump

Follow



My use of social media is not Presidential -
it's MODERN DAY PRESIDENTIAL. Make
America Great Again!

3:41 PM - 1 Jul 2017

55,437 Retweets **194,865** Likes



76K



55K



195K

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY V. TRUMP ET AL.

302 F.Supp.3d 541 (S.D.N.Y. 2018)

Currently on appeal to the Second Circuit

- Donald Trump established @realDonaldTrump in March 2009, which he has used since his inauguration to communicate with the public about his administration.
- The 7 individual defendants tweeted a critical message in reply to a tweet, and were blocked by the President. The government did not dispute that they were blocked because of the content of their tweets.
- Plaintiffs could not view, reply to, or retweet original tweets, but they could still engage via other users' replies. They could also see the original tweets from a secondary account or when not signed into their blocked account.

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY V. TRUMP ET AL.

Questions considered by the Court:

- May a public official, consistent with the First Amendment, “block” a person from his Twitter account in response to the political views that person has expressed? NO
- Is the analysis different if that public official is the President of the United States? NO

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY V. TRUMP ET AL.

“We hold that portions of the @realDonaldTrump account – the “interactive space” where Twitter users may directly engage with the content of the President’s tweets -- are properly analyzed under the “public forum” doctrines set forth by the Supreme Court, that such space is a designated public forum, and that the blocking of the plaintiffs based on their political speech constitutes viewpoint discrimination that violates the First Amendment. In so holding, we reject the defendants’ contentions that the First Amendment does not apply in this case and that the President’s personal First Amendment interest supersede those of plaintiffs.”



WHEN IT ALL
COMES
TOGETHER...



GREBEN V. CITY OF SAN MATEO



Angela Greben

@AngelaGreben

Creator of the Wage Theft Wedding Dress. 1st Amendment Fan! Raising awareness of unlawful Twitter blocking & censorship. Paralegal. Loved by @Twitter.

📍 San Jose, CA

🌐 wagetheftweddingdress.blogspot.com

*Meet Angela
Greben*



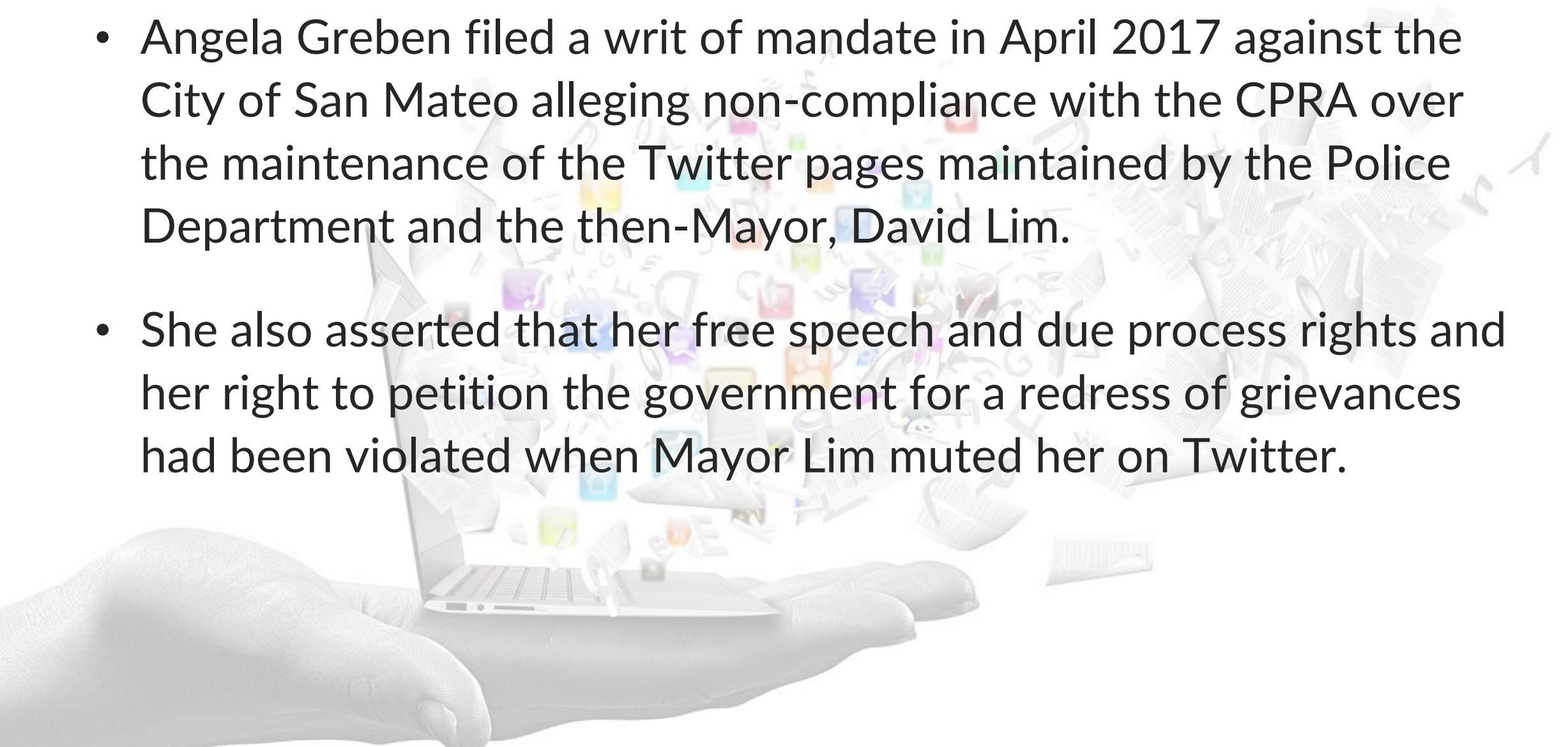
Politicians use Twitter's block button, and citizens feel censored

Among them are comedians, veterans, entrepreneurs, journalists, a professional athlete, a mom, staunch liberals and registered Republicans. ...

sfchronicle.com

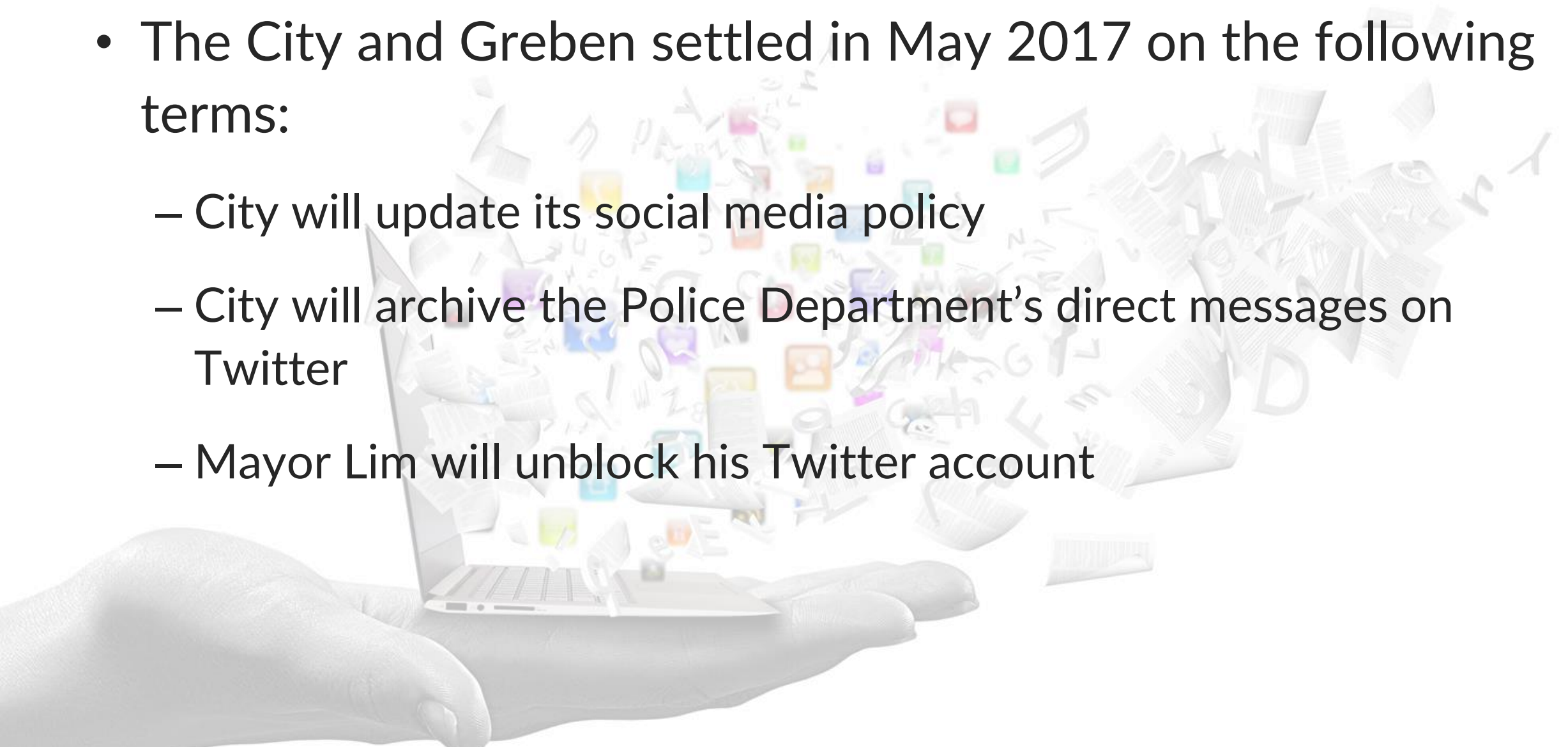
GREBEN V. CITY OF SAN MATEO

- Angela Greben filed a writ of mandate in April 2017 against the City of San Mateo alleging non-compliance with the CPRA over the maintenance of the Twitter pages maintained by the Police Department and the then-Mayor, David Lim.
- She also asserted that her free speech and due process rights and her right to petition the government for a redress of grievances had been violated when Mayor Lim muted her on Twitter.



GREBEN V. CITY OF SAN MATEO

- The City and Greben settled in May 2017 on the following terms:
 - City will update its social media policy
 - City will archive the Police Department's direct messages on Twitter
 - Mayor Lim will unblock his Twitter account





David Lim @SanMateoDavid · 18 May 2017

Unblocked my twitter 2 all so everyone can c important things I do. Like eat this donut. 🤪 @smdailyjournal @JonMays



David Lim @SanMateoDavid · Jan 17

Blocked my first account post-City Council. It felt AWESOME. @CityofSanMateo @AngelaGreiben



Following

Marilyn K. Geary

@MarilynKGeary2 Follows you

Way ahead o'y'all.



91 Fo

Twee



Block @MarilynKGeary2

@MarilynKGeary2 will no longer be able to follow or message you, and you will not see notifications from @MarilynKGeary2.

Cancel

Block



STERN V. CITY OF MIAMI

- Grant Stern, a local radio host and activist, sued the City of Miami and Mayor Philip Levine, over access to the list of people Levine has blocked on his Facebook account; audio recordings of “The Mayor,” a Sirius/XM show Levine hosts, and a month’s worth of Levine’s Twitter posts.
- Miami and the Mayor tried to stop the deposition of Mayor Levine, claiming that the litigation was “being utilized for the purpose of annoying and embarrassing the City.”





POLICY DEVELOPMENT



POLICY DEVELOPMENT

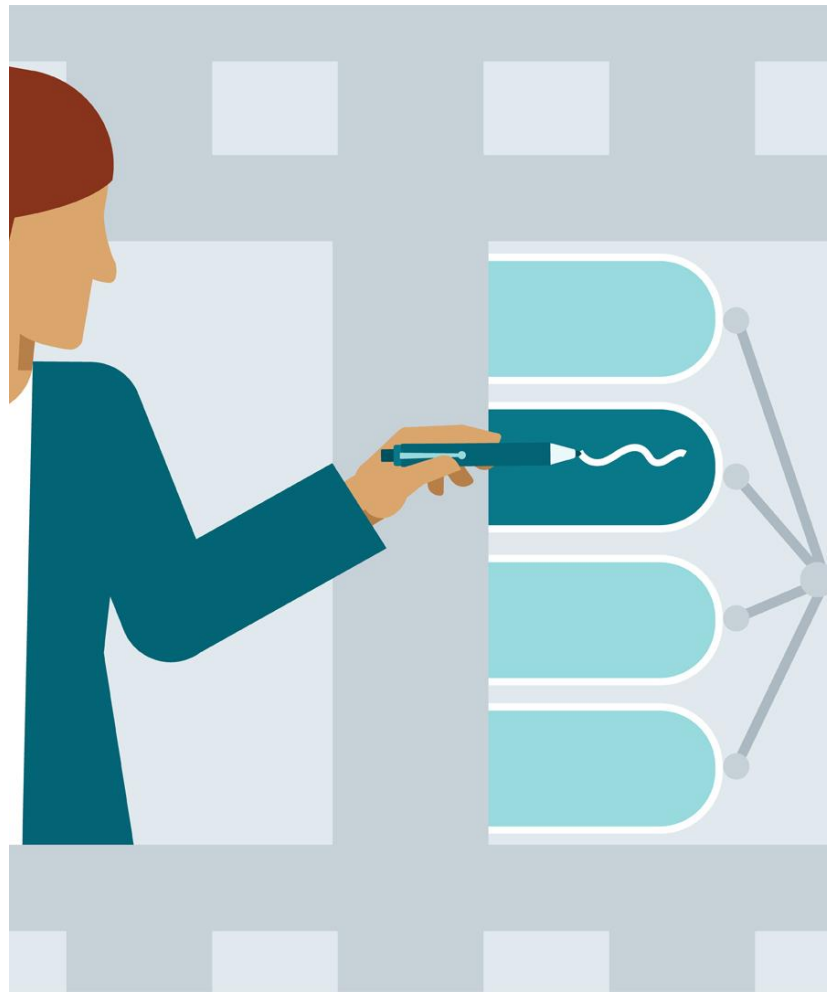
- Adopting a social media policy establishes the procedures and policies of your City regarding its social media presence
- Can potentially limit the public's right to claim the social media site as a general public forum and other First Amendment concerns
- Revise policies when new laws, court decisions or technologies/platforms emerge
- All new platforms should be City-approved



- Comply with Brown Act, PRA, Elections Code
- Terms of Proper Use
- Limited Public or Non-Public Forum statement

POLICY PROVISIONS

- Retention and Archiving Procedures
- Incorporate Take Down Policy



- Designate person(s) who may post on behalf of the City
- Statement concerning right to revise policy

DESIGNATING AN EMPLOYEE TO SPEAK ON BEHALF OF THE CITY

Has knowledge of
all aspects of the
City (or knows
who to contact to
get that
information)



Sufficient
training,
knowledge, and
expertise to
make decisions



Appreciates the
legalities involved in
managing a social
media site for a public
agency



Has the time to
devote to
maintaining the
City's social media
presence





EMOJIS IN THE LAW

╰_(ツ)_╯



EMOJI EVIDENCE

- When a man secretly bought a plane ticket next to a colleague who clearly did not wish to see him again, “surprised” her on her flight to Paris, then boasted to friends in a text:
“Was next to [the woman] on the plane to Paris and she switched seats ;)”
the man claimed that the wink showed he had just been joking around.
- The judge disagreed, interpreting the wink as a sign that the man “was amused by yet another opportunity to harass” his target.

In re: Shawe & Elting LLC (Court of Chancery of Delaware 2015)

EMOJI EVIDENCE

- Defendant argued before a jury that his threatening post on Facebook was clearly meant in jest because he followed the threat with the "sticking your tongue out" smiley face.
- When the case was remanded by the Supreme Court, the appeals court upheld his conviction because the jury could easily conclude that the smiley face did not dilute the threat created by the powerful vile words that preceded it.

United States v. Elonis, 841 F.3d 589 (3d Cir. 2016).

GHANAM V. JOHN DOES (MICHIGAN 2014)

- Public Works Director sues for defamation over anonymous comments on an internet message board.
- The use of the “:P” emoticon makes it patently clear that the commenter was making a joke.



They are only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets :P





EMOJI EVIDENCE

In California, the use of laughing emojis or a laughing devil emoji did not prevent a court from concluding that threats in a tweet were a crime.

In re L.F., 2015 Cal. App. Unpub. LEXIS 3916 (Ct. App. Cal. 1st Dist 2015).



EMOJI EVIDENCE

- Employer was charged with sexual harassment because he sent an applicant "a picture of a tumescent penis."
- Applicant replied with sexual innuendos and emojis of blowing a kiss and three winking emojis.
- Court held there was insufficient evidence to establish a claim for emotional distress for the applicant: Blowing kisses and excessive winking hardly suggest emotional distress, even in an emoji world.

Stewart v. Durham, 2017 U.S. Dist. LEXIS 88656 (D.S.D. Miss. 2017).

ANY QUESTIONS?



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