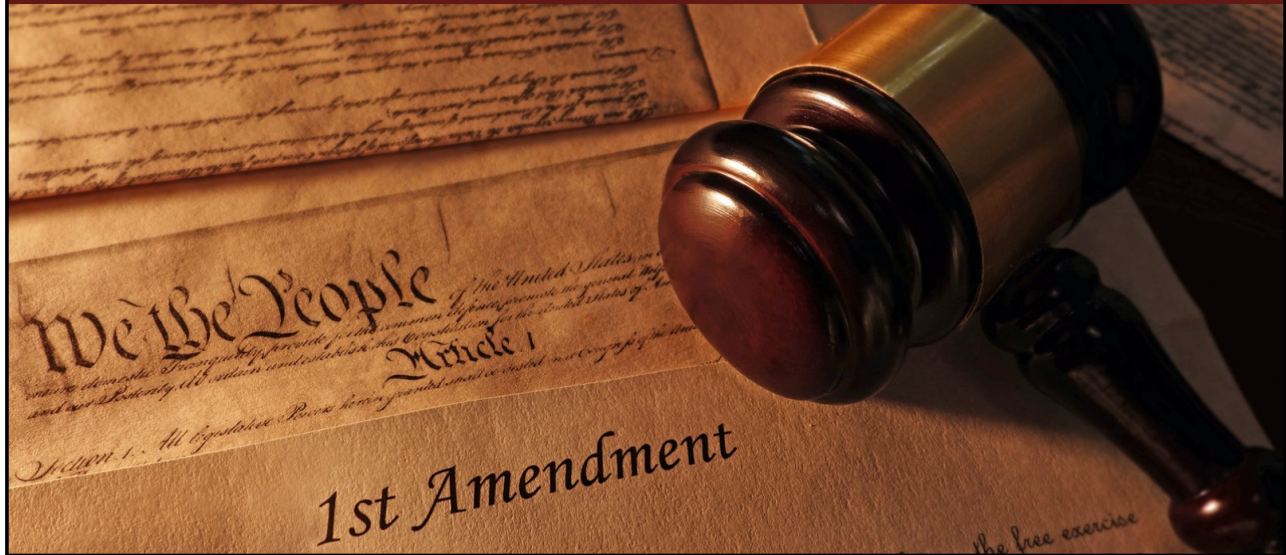


# 1<sup>st</sup> Amendment Considerations for Government Social Media



1

**PRESENTED BY: Mark R. Weaver, Esq.**



**(614) 368-7501**

**Mark@CommunicationsCounsel.com**



2

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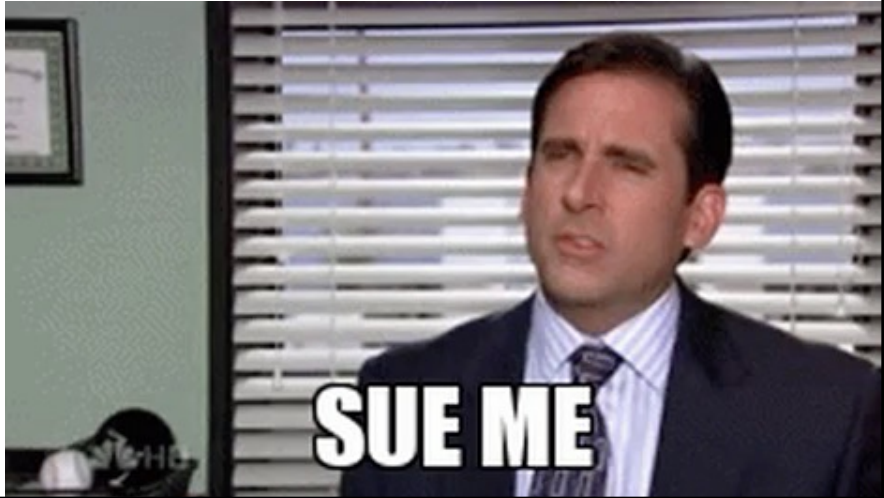
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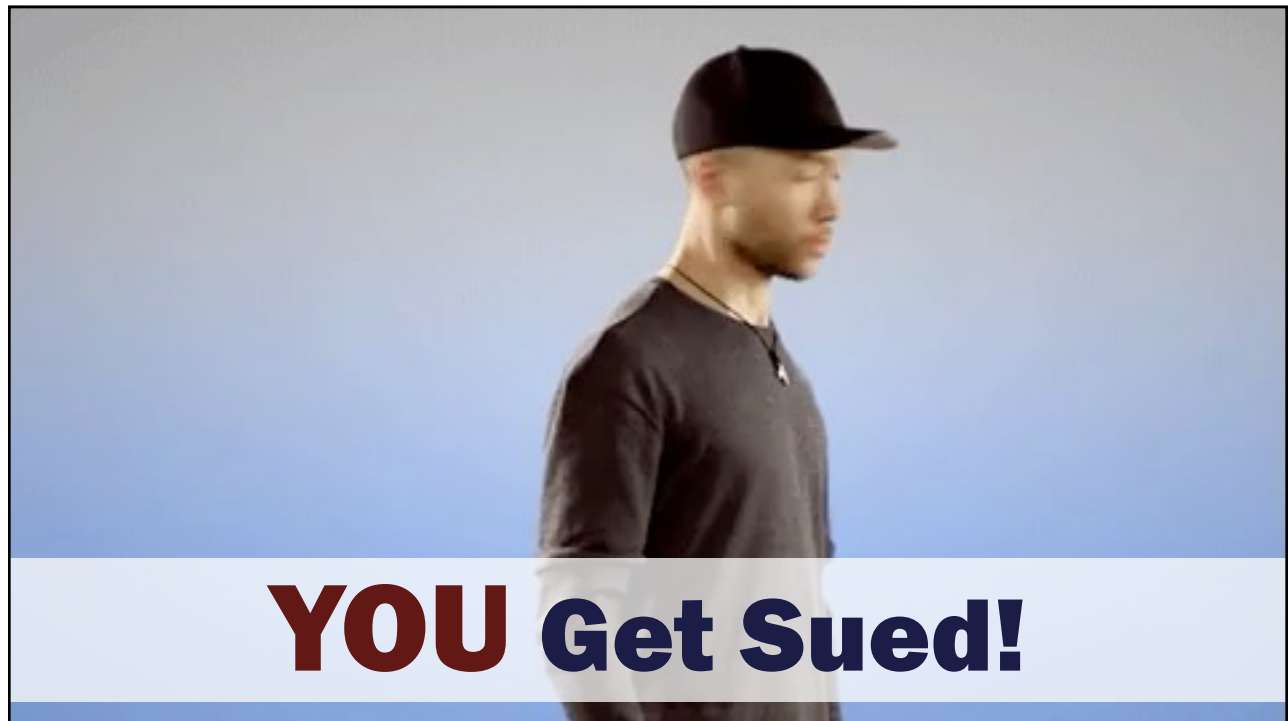


4

# **Your Agency Gets Sued and MAYBE....**

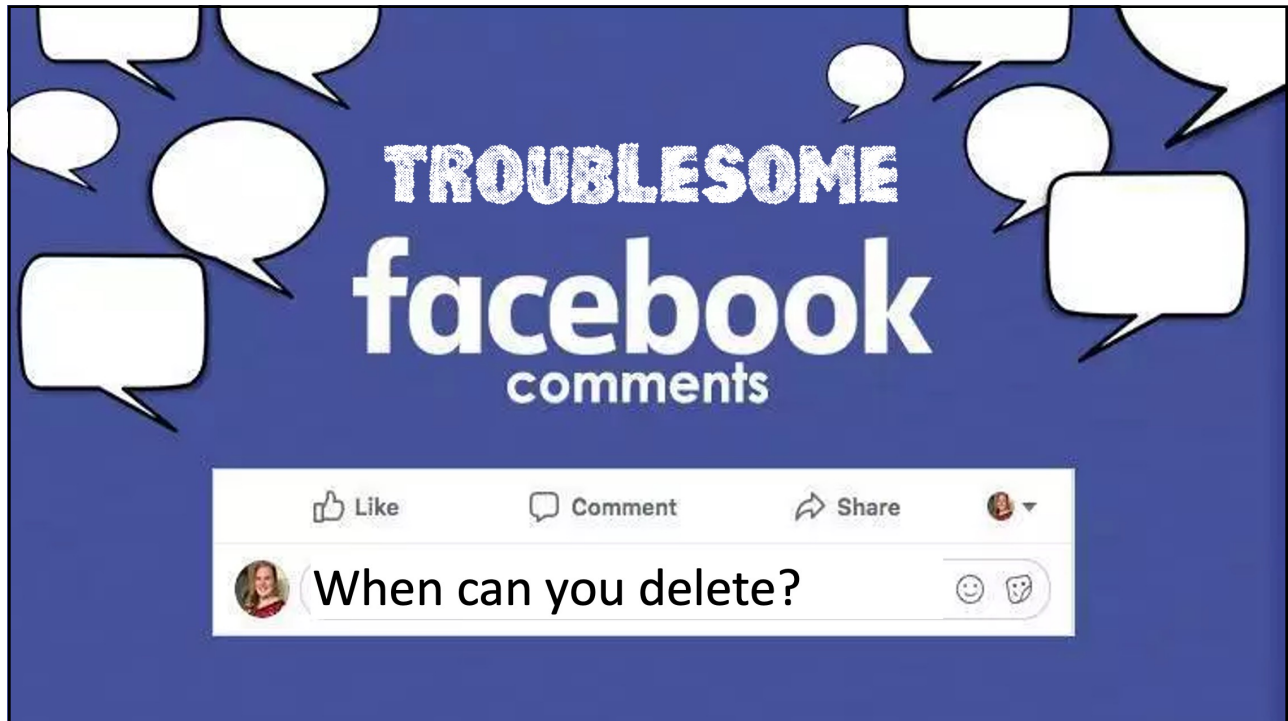


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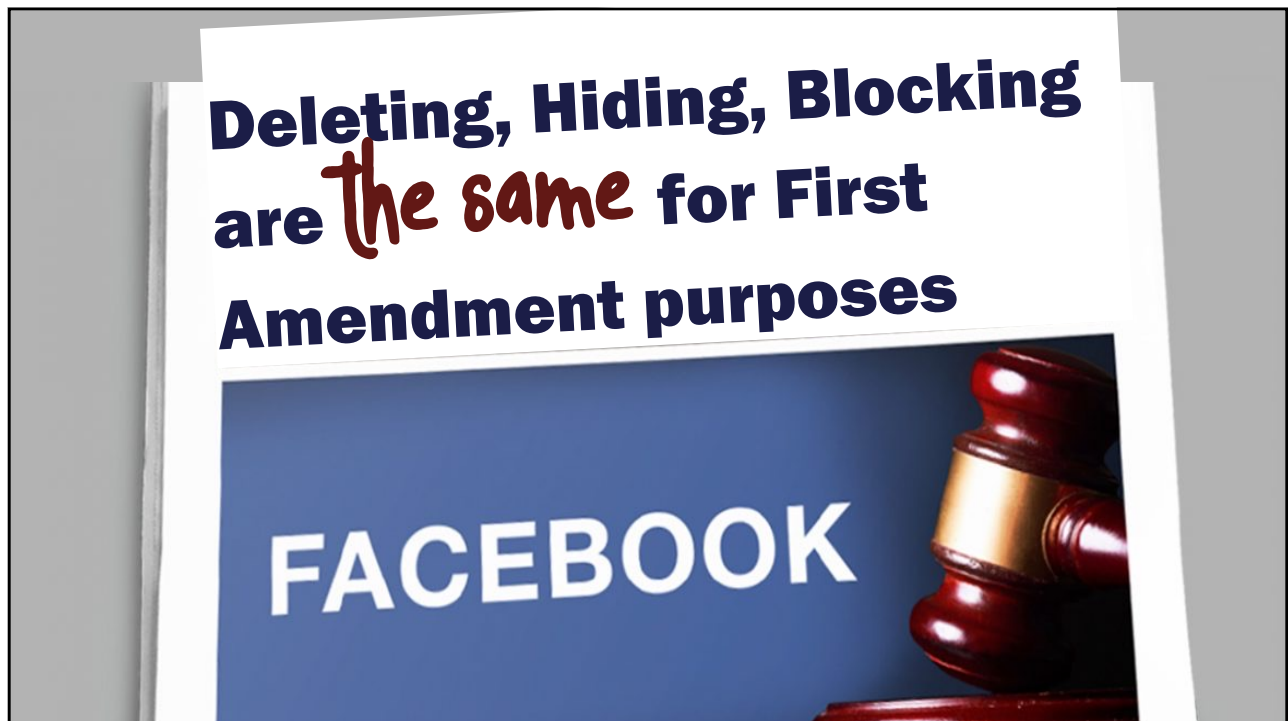


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9



**Your Elected Officials Are **Worried...****

10

**THE FIRST AMENDMENT**  
CONGRESS SHALL MAKE NO LAW RESPECT-  
ING AN ESTABLISHMENT OF RELIGION, OR  
PROHIBITING THE FREE EXERCISE THEREOF;  
OR ABRIDGING THE FREEDOM OF SPEECH, OR  
OF THE PRESS; OR THE RIGHT OF THE PEOPLE  
PEACEABLY TO ASSEMBLE, AND TO PETITION THE  
GOVERNMENT FOR A REDRESS OF GRIEVANCES.

11

**STATE**

**ACTION**

12



13

## Balancing of Interests



14





15



16



17



18





## **INCUMBENT PROTECTION**

19



## **LEVEL PLAYING FIELD**

20





21

## The law **probably** is:

Since Social Media is a **Limited Public Forum**:

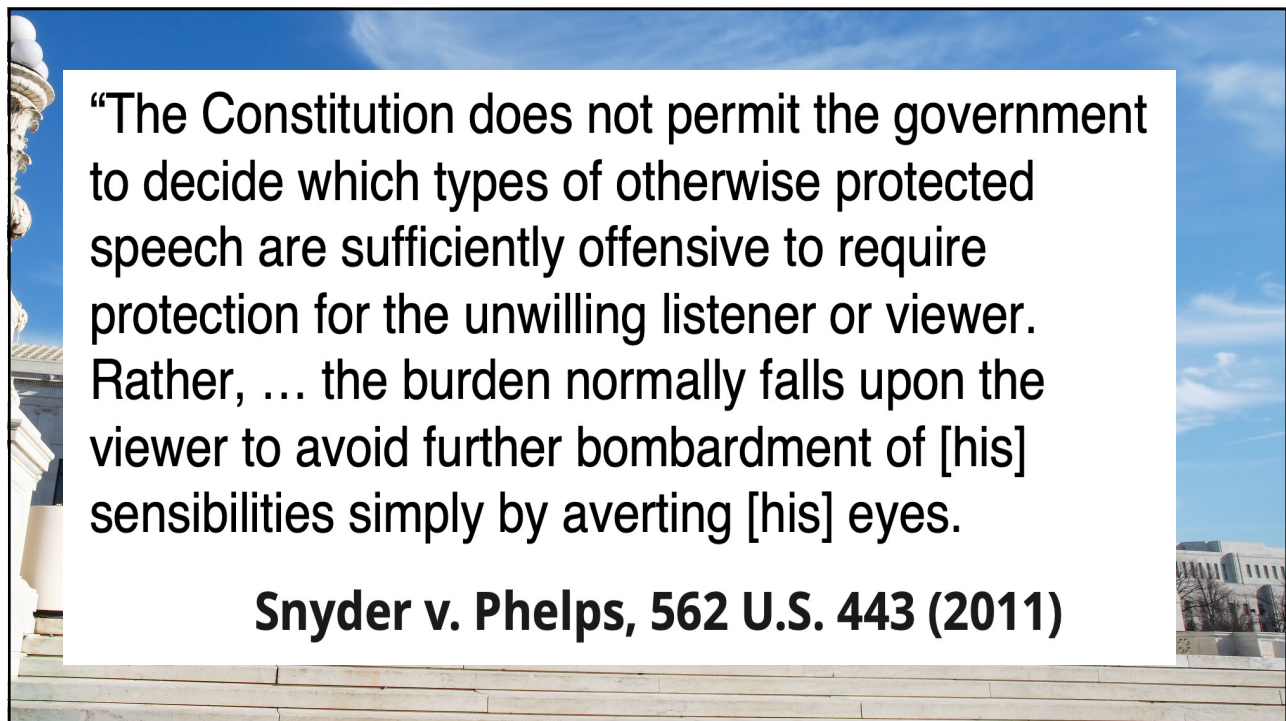
Speech can be regulated with valid **time, place** and **manner** restrictions



22



23



24

## NO 1<sup>st</sup> Amendment Protection:

- **Obscenity**
- **Defamation**
- **Actual Threats**
- **Spam**



25

## NO 1<sup>st</sup> Amendment Protection:

- **Illegal Activities**
- **Promotes Illegal Discrimination**
- **Malware Links**
- **Copyright of Another**

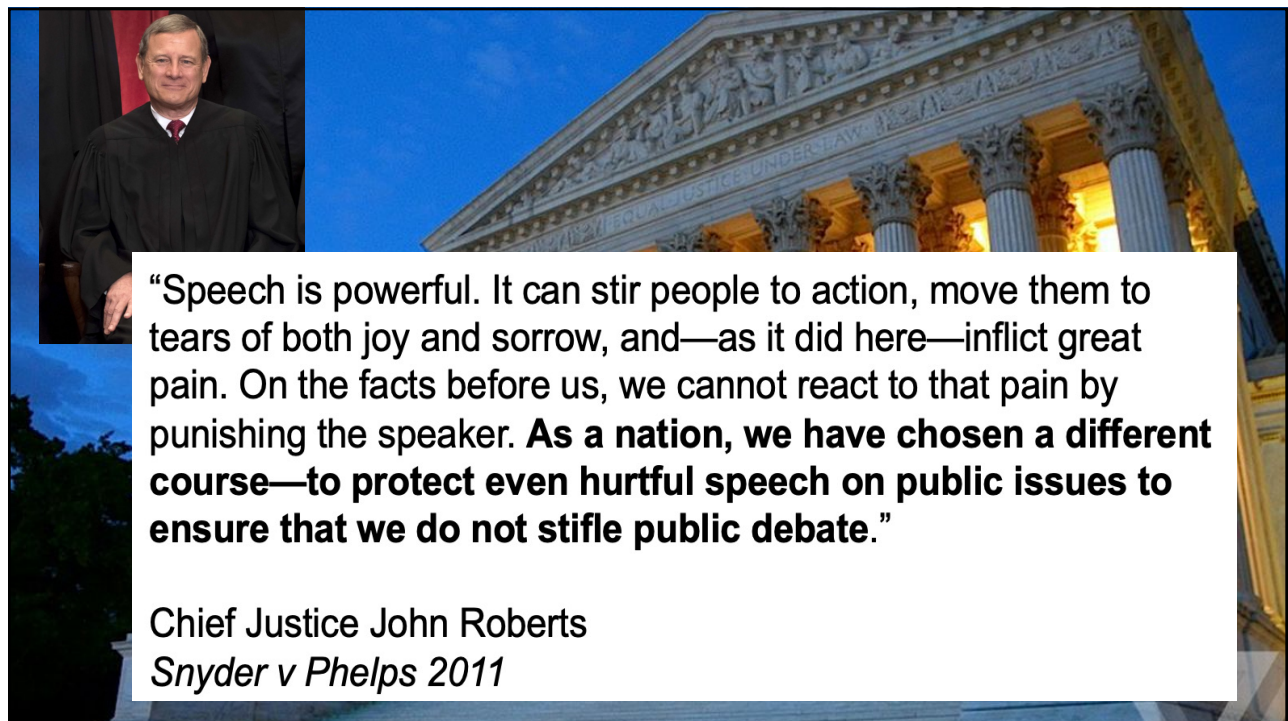


26





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28

*“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability or any other similar grounds is hateful; but **the proudest boast of our free speech jurisprudence is that we protect the freedom to express the ‘thought we hate.’**”*

9-0 SCOTUS opinion in *Matal v. Tam* (2017)

29



30

## **OBSCENITY:**

**You're unlikely to see it successfully posted on social media.**

31

**But what about profanity?**

**AW, HELL!  
DIDDILY-DING-DONG CRAP!**

32





***Cohen v. California***, 403 U.S. 15 (1971), was a [landmark decision](#) of the [US Supreme Court](#) holding that the [First Amendment](#) prevented the conviction of Paul Robert Cohen for the crime of [disturbing the peace](#) by wearing a jacket displaying "Fuck [the Draft](#)" in the public corridors of a California courthouse.

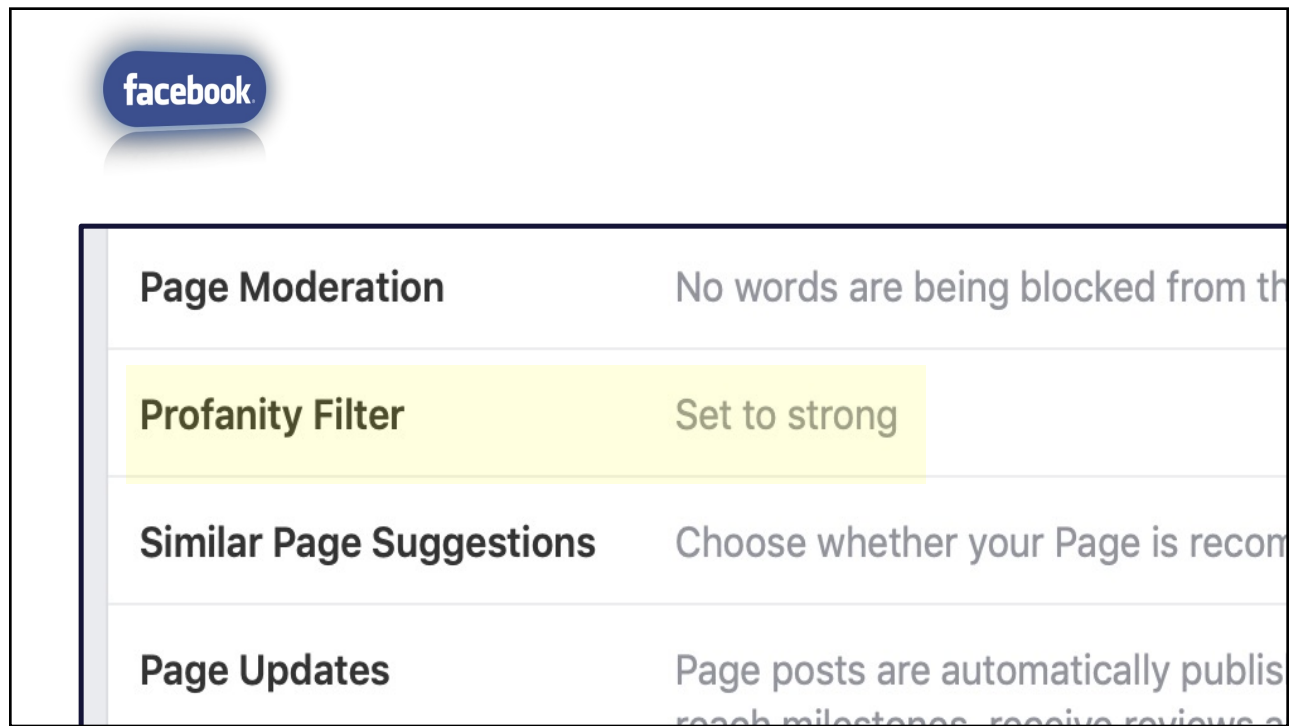
The Court ultimately found that displaying a mere four-letter word was not sufficient justification to allow states to restrict [free speech](#) and that free speech can be restricted only under severe circumstances beyond offensiveness. The ruling set a [precedent](#) used in future cases concerning the power of states to regulate free speech in order to maintain public civility.

33



Page Moderation	No words are being blocked from the Page.	<a href="#">Edit</a>
Profanity Filter	Set to strong	<a href="#">Edit</a>
Similar Page Suggestions	Choose whether your Page is recommended to others	<a href="#">Edit</a>
Page Updates	Page posts are automatically published when you update Page info, reach milestones, receive reviews and more.	<a href="#">Edit</a>

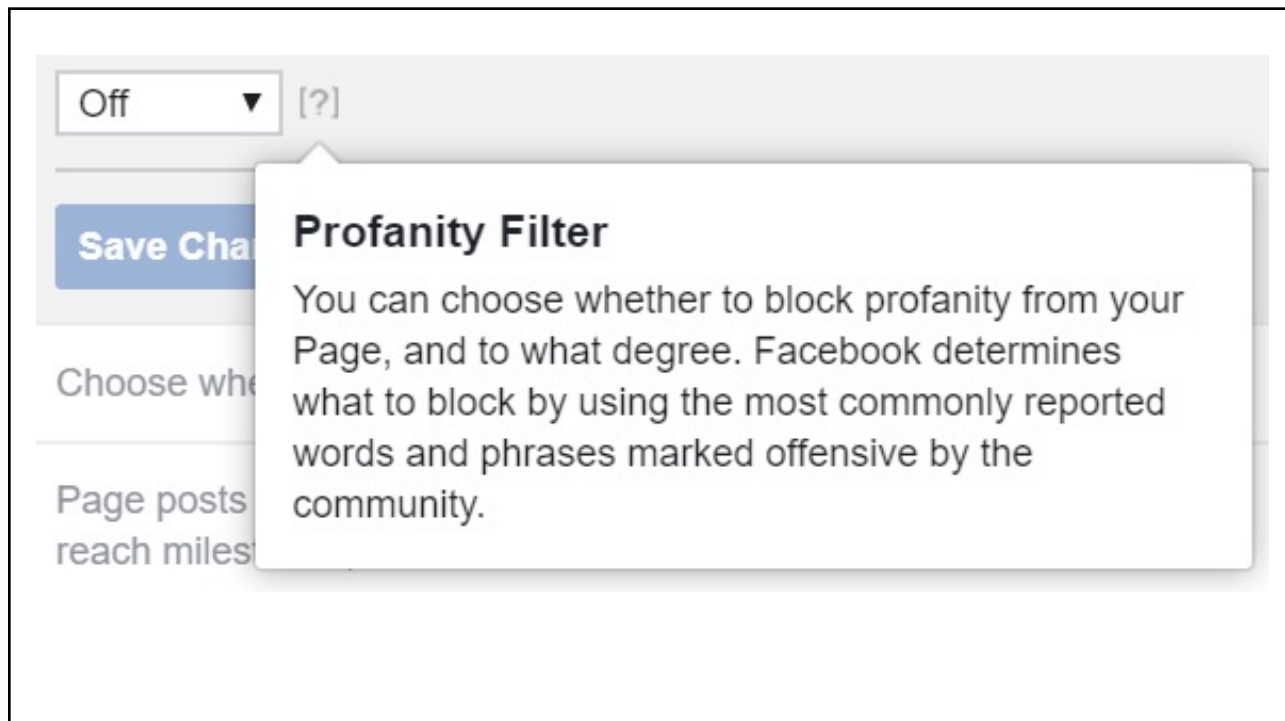
34




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37



**Facebook determines what to block by using the most commonly reported words and phrases marked offensive by the community.**

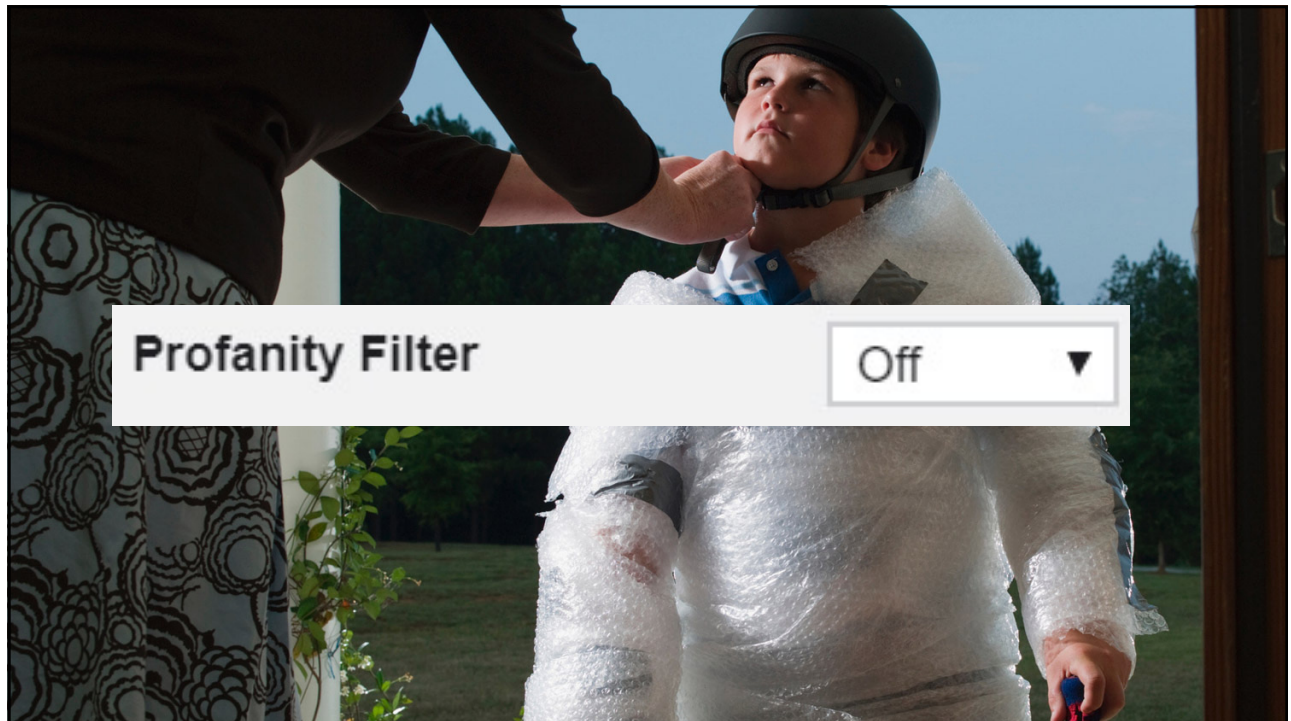
38



**What's offers  
the **smallest**  
**chance** of  
being  
successfully  
sued?**



39



40

## DEFAMATION:



- 1. False**
- 2. Assertion of fact**
- 3. Causes damage**

41

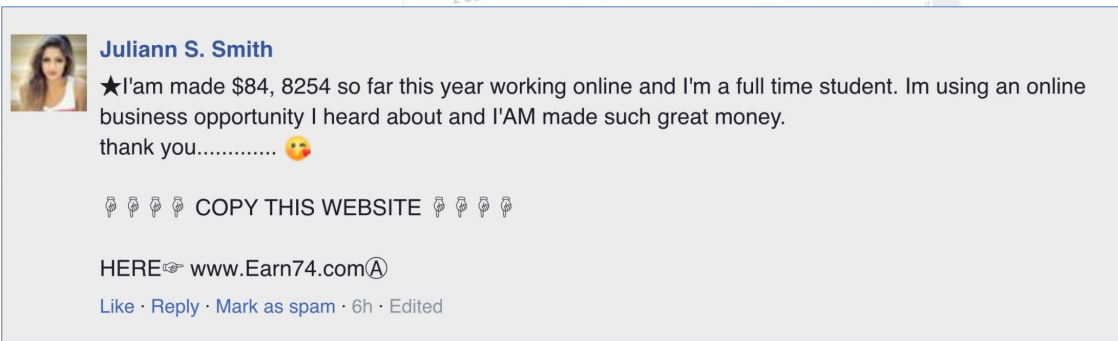
## ACTUAL THREATS:



**A communicated intent to inflict harm or loss on another**

42

## SPAM:



43





## Can you delete “off topic” posts?

44

# 11<sup>th</sup> Circuit Court of Appeals

**Charudattan v. Darnell\***  
**(2020)**

45



**An unpublished  
opinion meaning it  
shouldn't be relied  
upon by other courts**

46





47

**The Court suggests criticism is protected -- but only when it's **clearly aimed** at the original topic.**

Legit Criticism



yes



Off Topic Criticism



no



48

**The safest advice is to remove “off-topic” posts sparingly, if at all. The more what you’re deleting looks like content-based moderation the more trouble you’re asking for.**



49

## **Illegal Activities:**

**Committing a crime, attempting to commit a crime, or encouraging others to commit a crime on your social media site.**



50



51



52

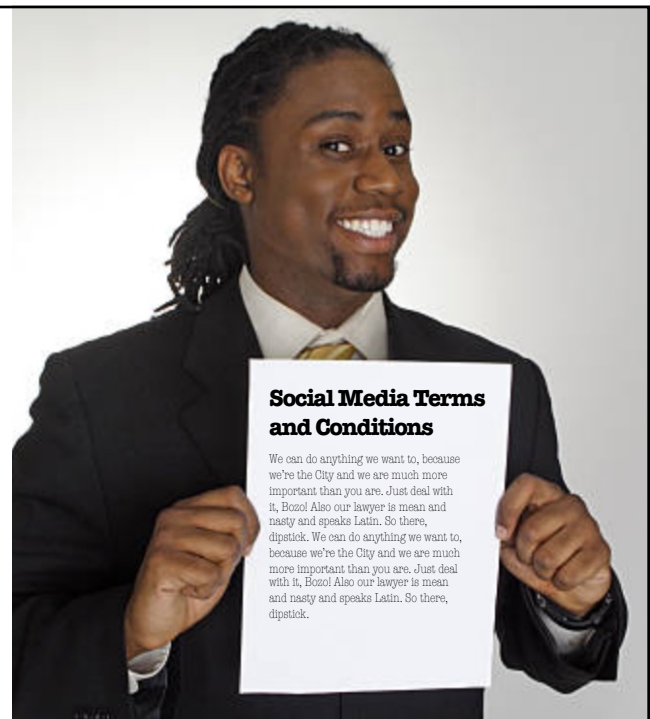


## Copyright of others:



53

**But our  
POLICY says  
we CAN  
delete  
offensive  
comments!**

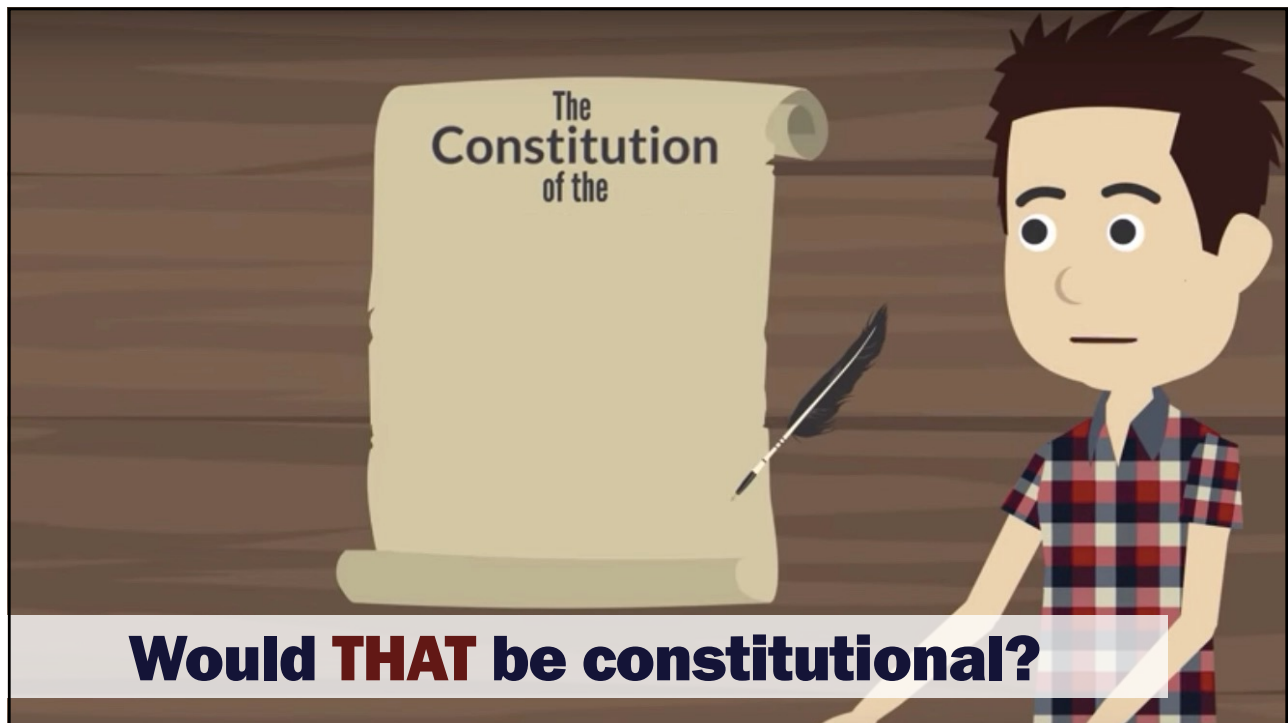


54

## OUR POLICY:

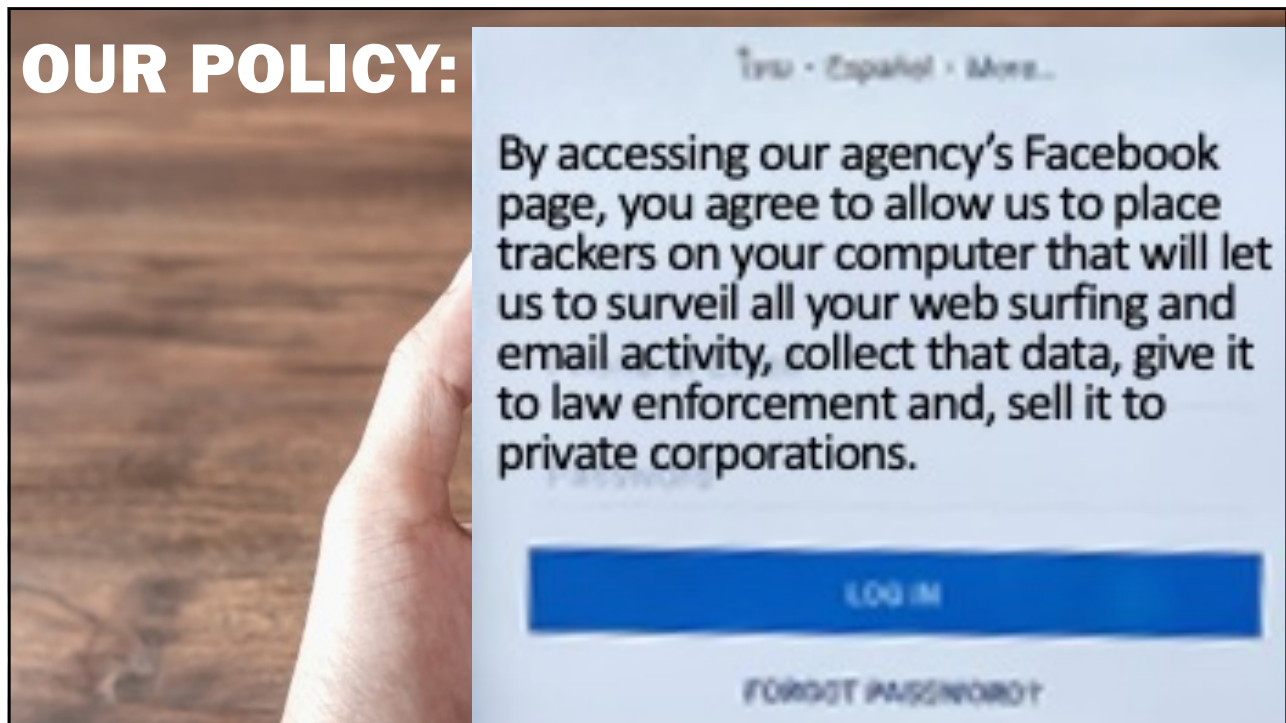


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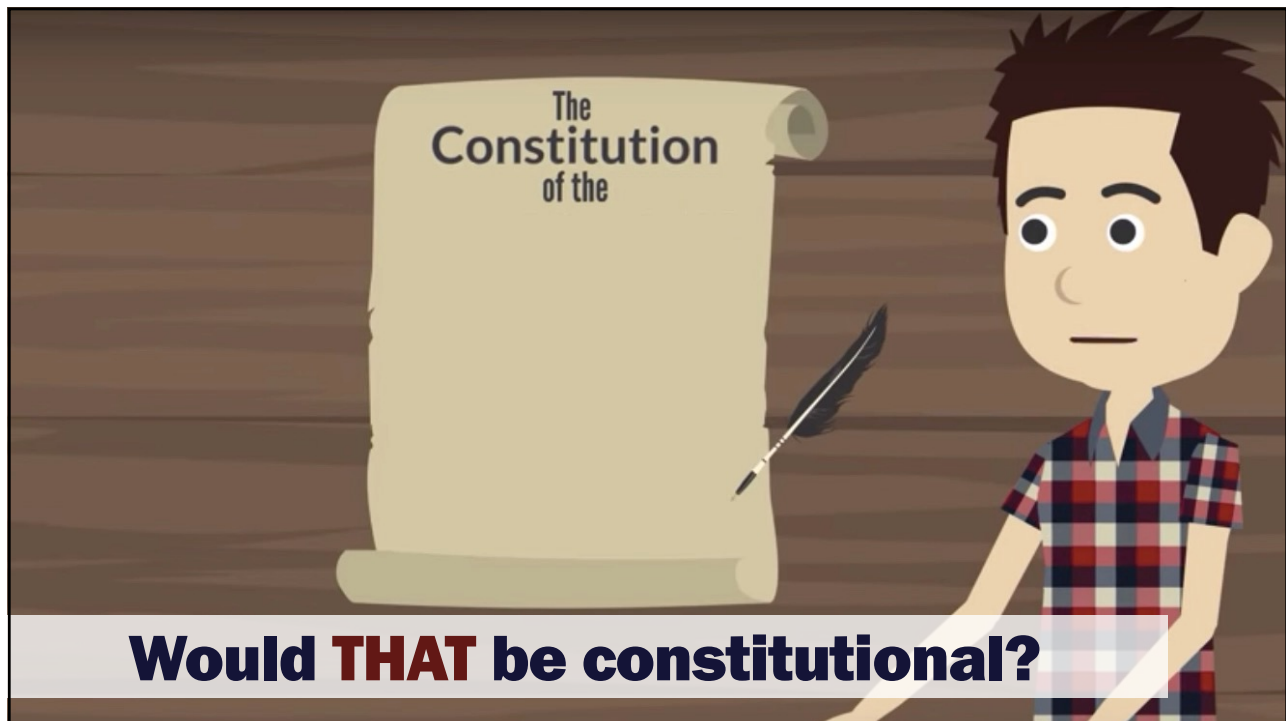


56

## OUR POLICY:



57

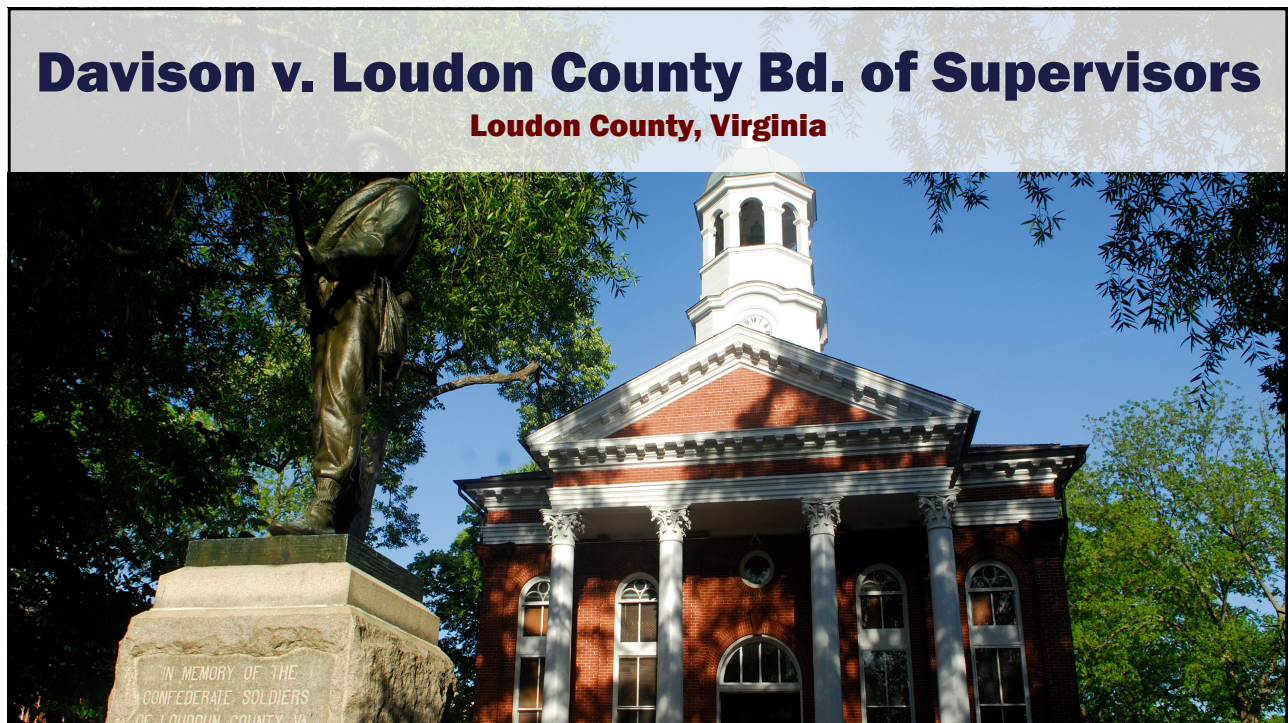


58



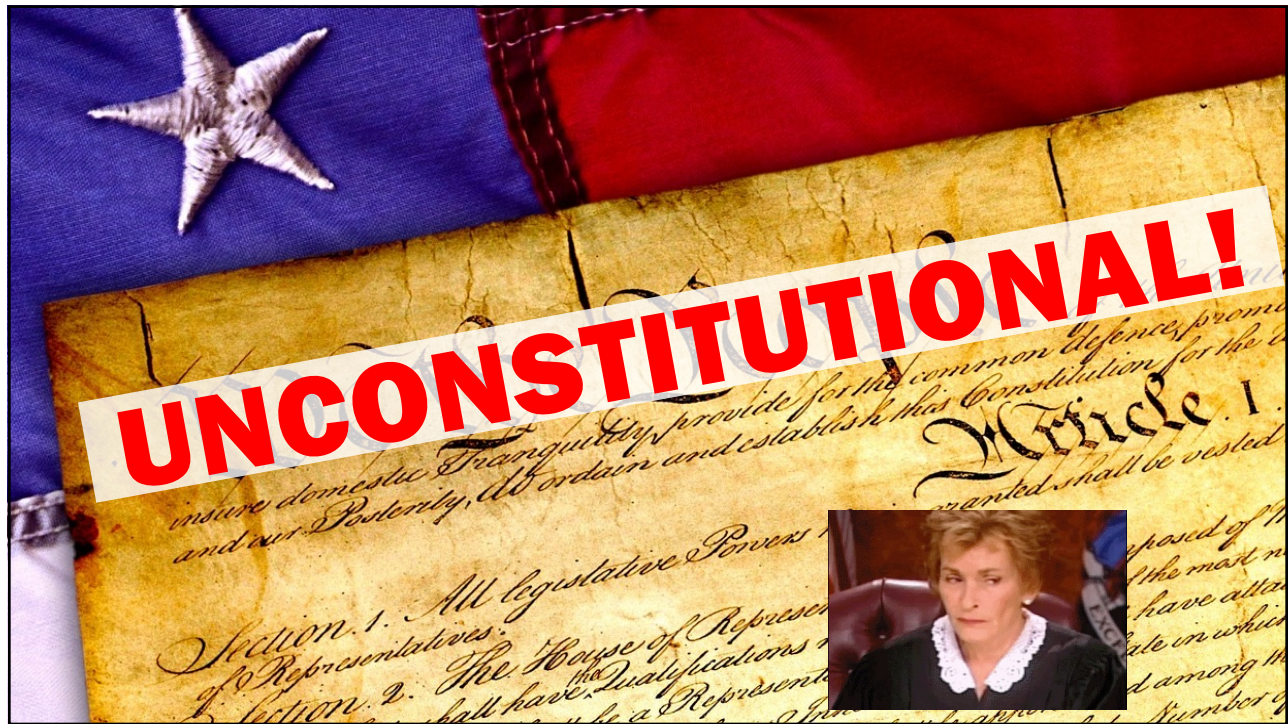


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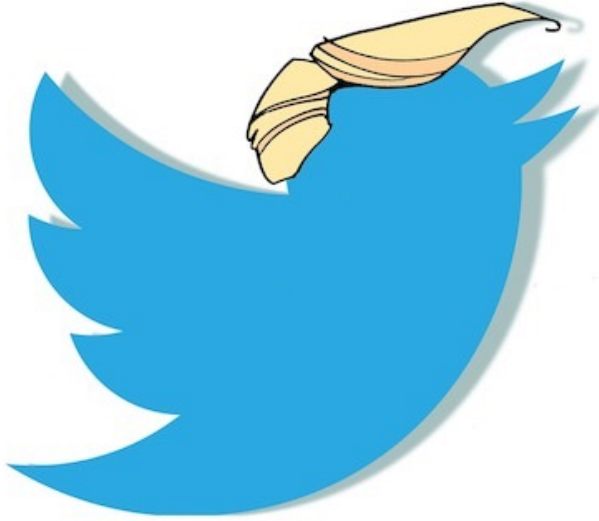


62

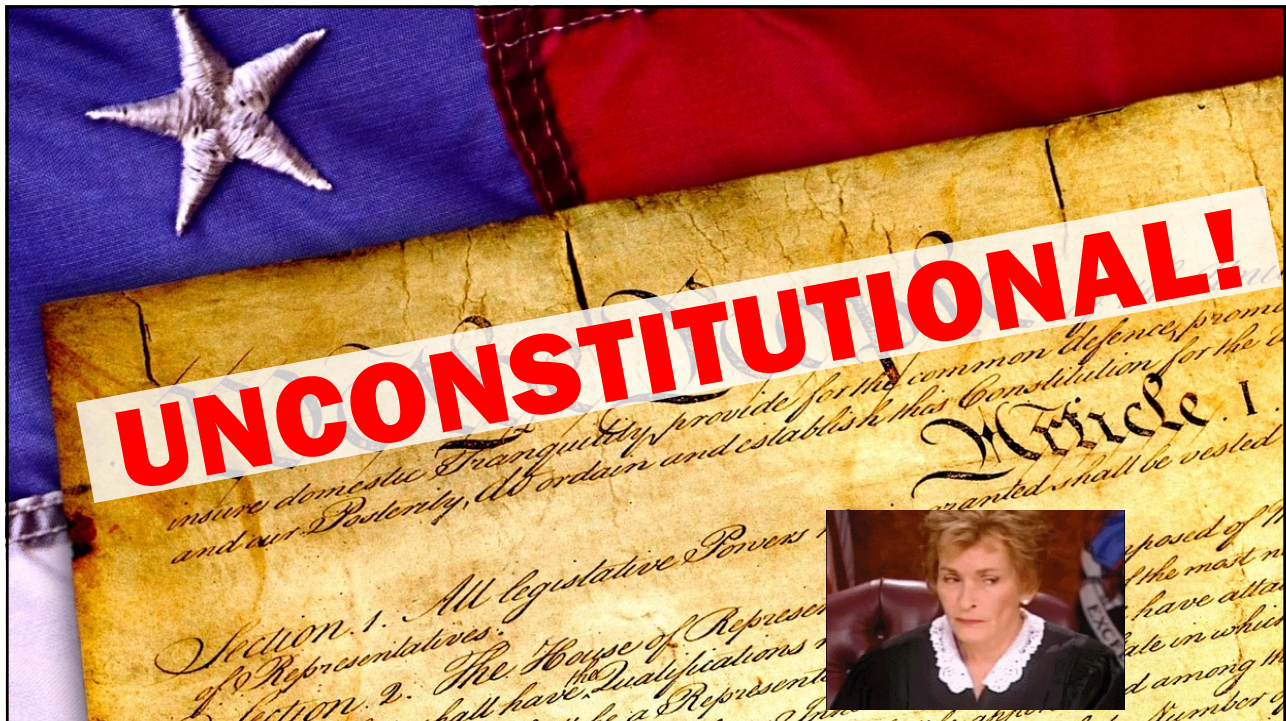


# Knight Foundation v. Donald Trump

Second Circuit Court of Appeals



63



64

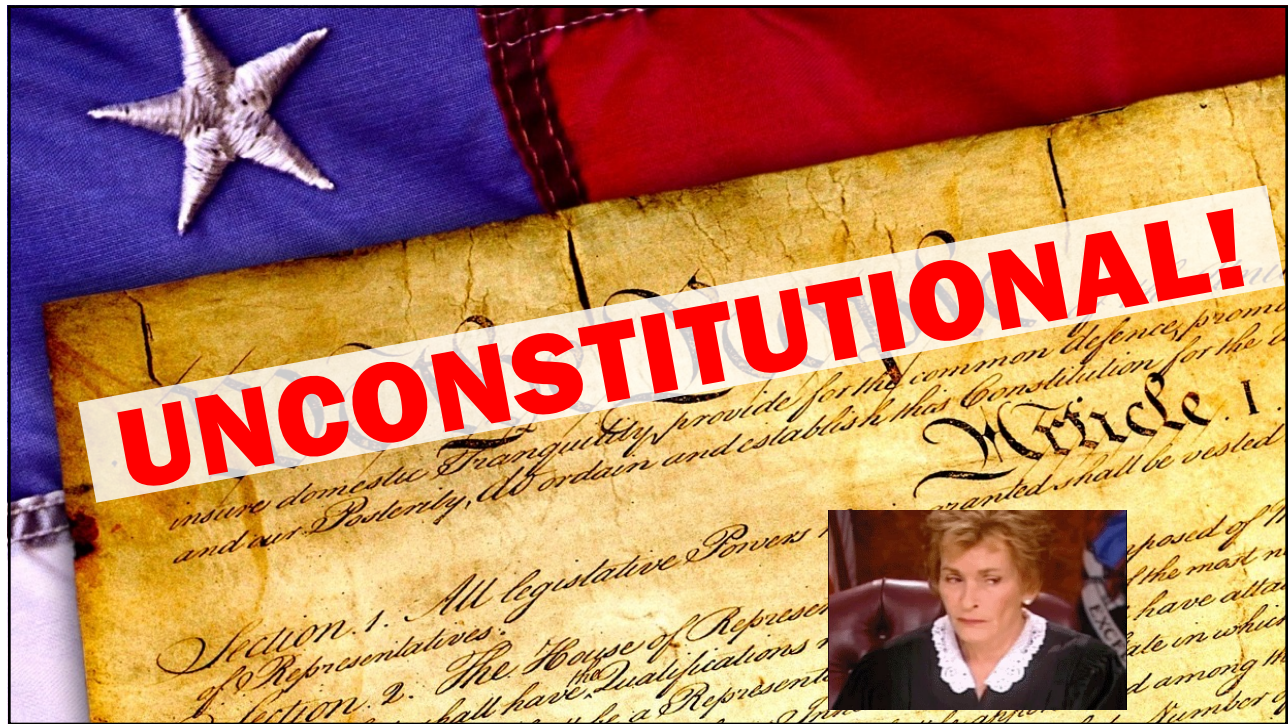




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66



67

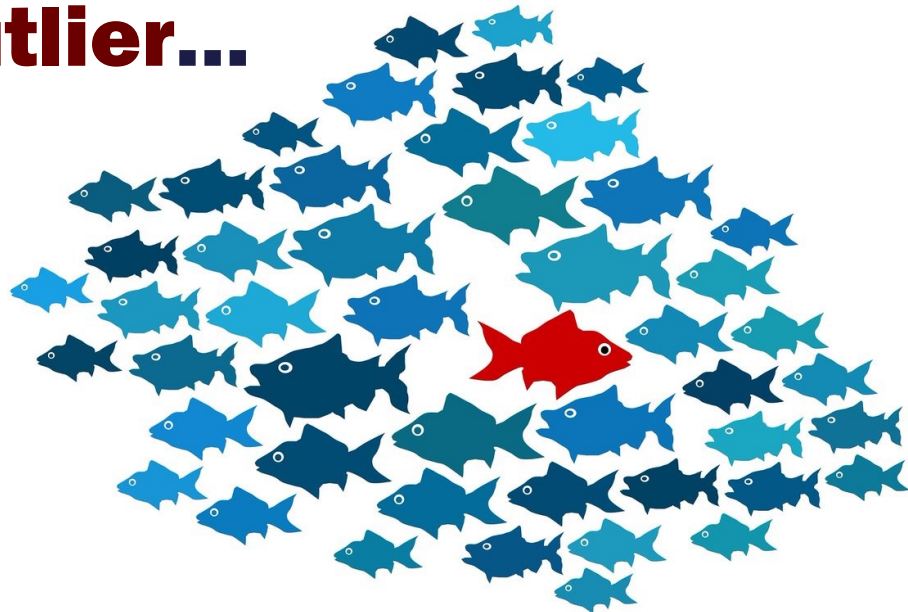
## Viewpoint Discrimination violates the First Amendment



68



**An outlier...**



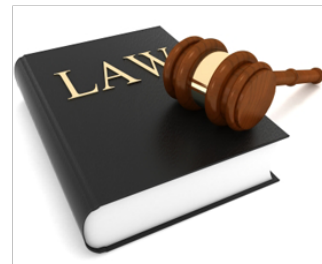
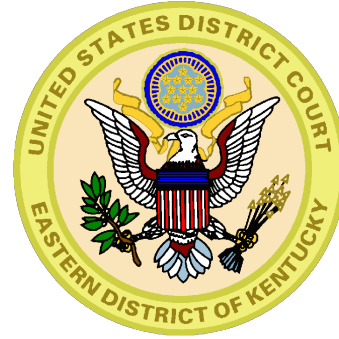
69



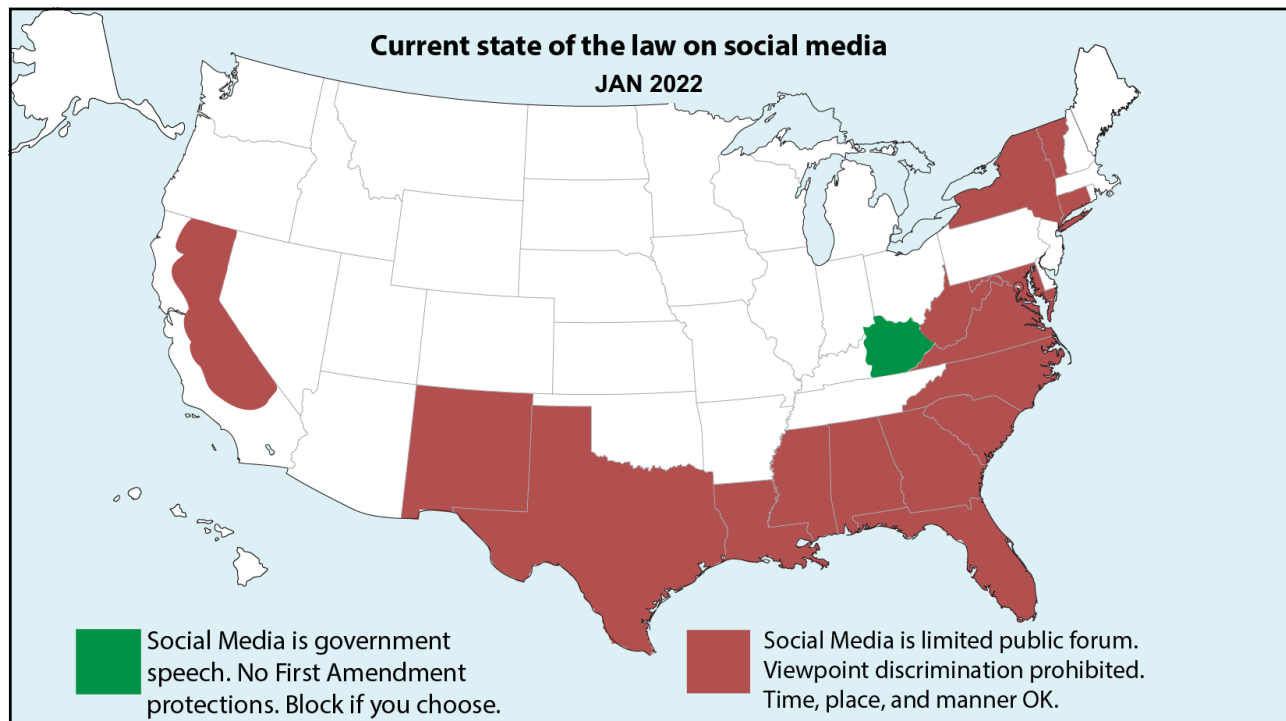
70



**“His social media is government speech and he may choose what he says. The 1<sup>st</sup> Amendment doesn’t require him to have his message be an open forum. Viewpoint discrimination is permissible in this kind of speech.”**



71



72



73



74

## Best Practice:

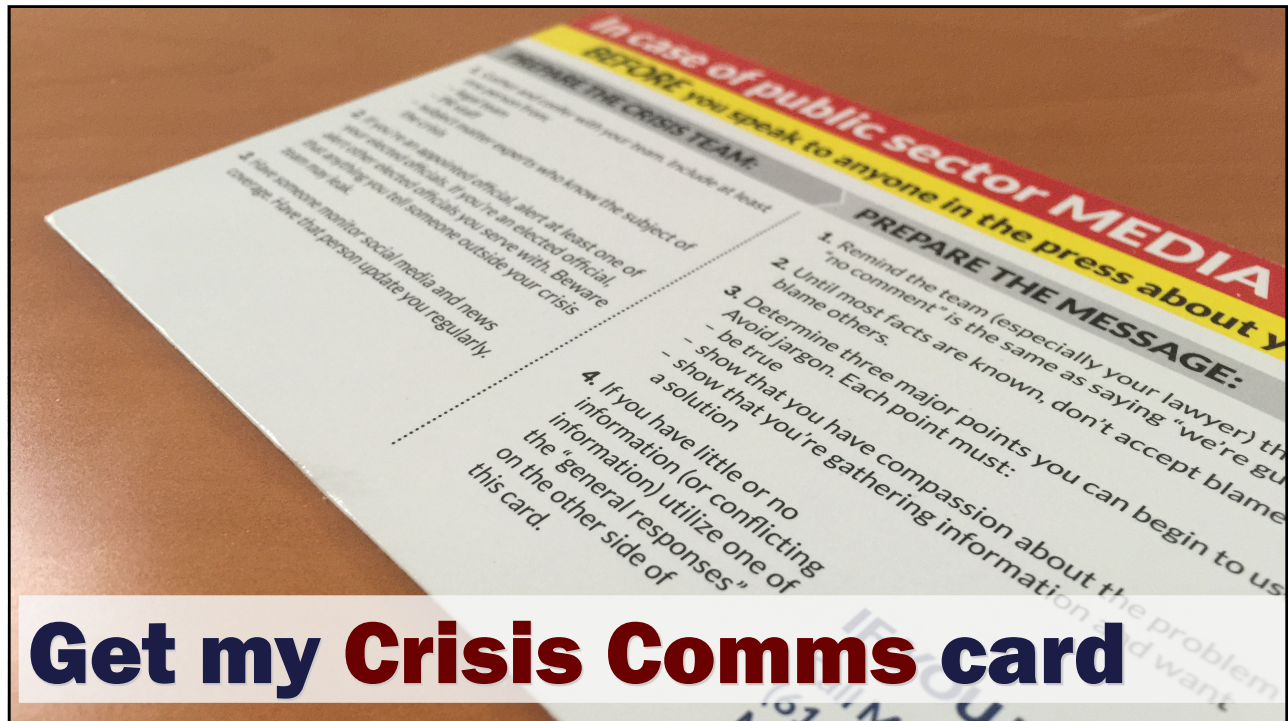
- ✓ **TRAINING**
- ✓ **POLICIES**
- ✓ **ACCOUNTABILITY**

75



76





**Get my Crisis Comms card**

77



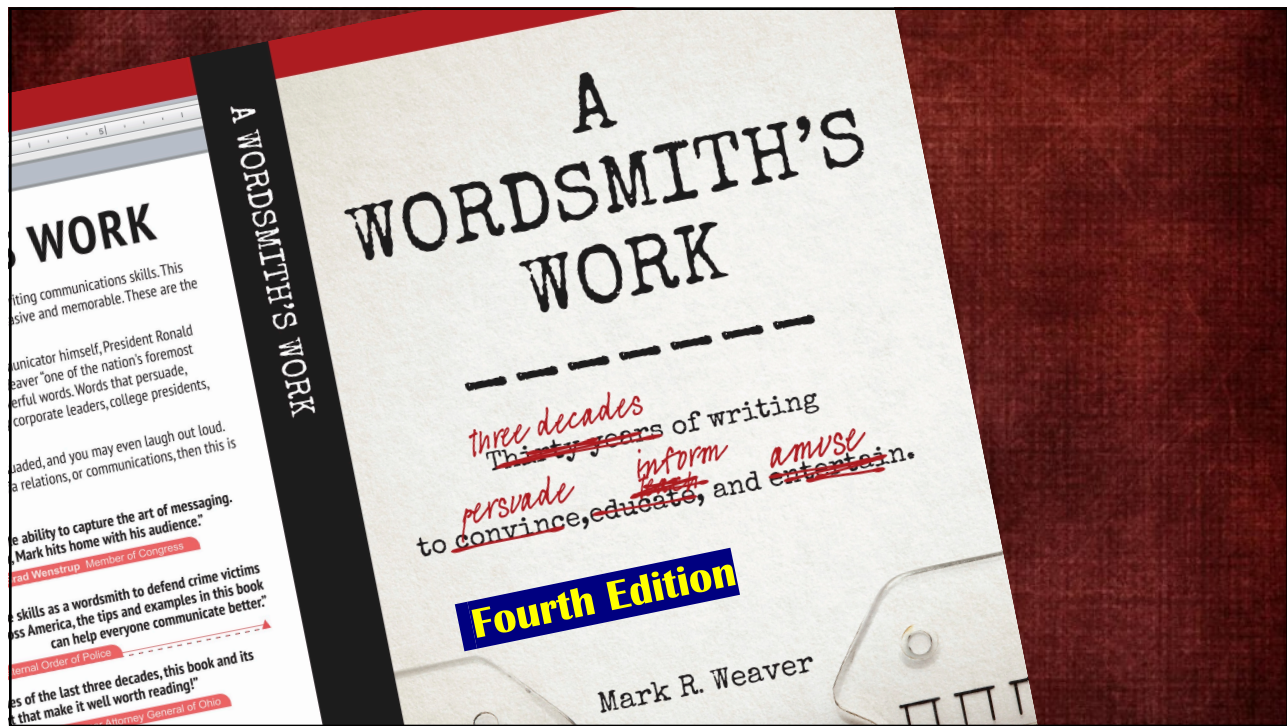
**Download**

# tinyurl.com/CrisisCard2022






78



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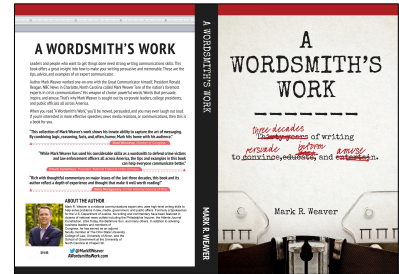
80



# SPECIFIC CHAPTERS ON:

## Crisis Communications for:

- Healthcare
- Law Enforcement
- Restaurant
- Higher Education



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