

1st Amendment

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PRESENTED BY: Mark R. Weaver, Esq.



**COMMUNICATIONS
COUNSEL**

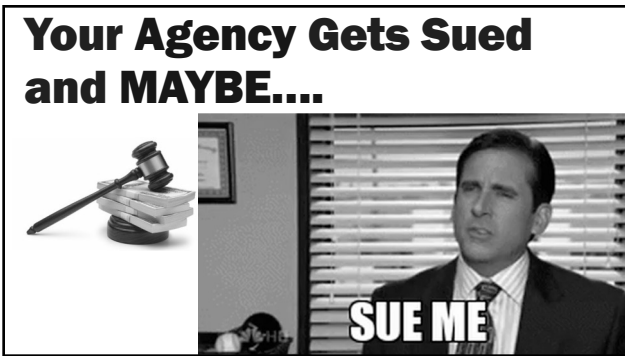


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FAILURE TO TRAIN

A government agency that fails to train social media staff on recent First Amendment caselaw is valid proof that the agency acted with “deliberate indifference” and can be successfully sued by someone who had a social media comment improperly deleted from a government Facebook page.

Scarborough v. Frederick County School Board
Western District of Virginia Federal District Court (2021)

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NO POLICY

Having no policy OR having a policy that violates settled law is also evidence of “deliberate indifference.”

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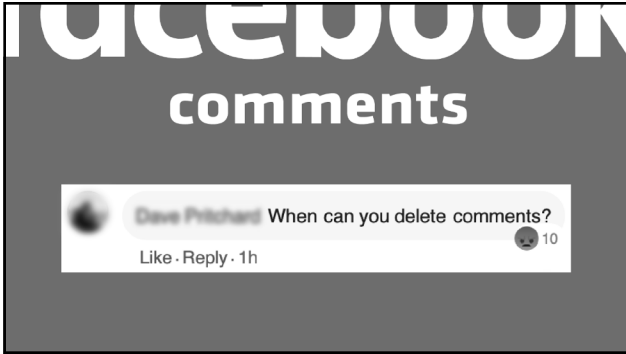


What does it cost?

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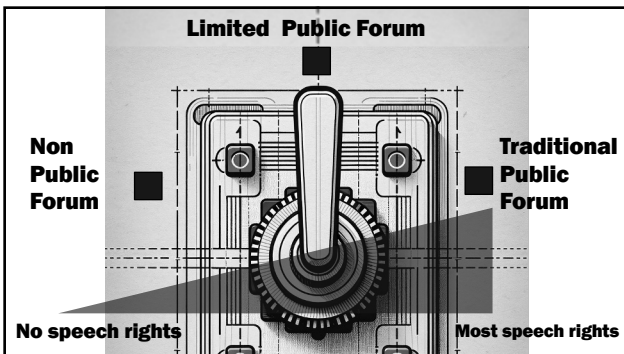
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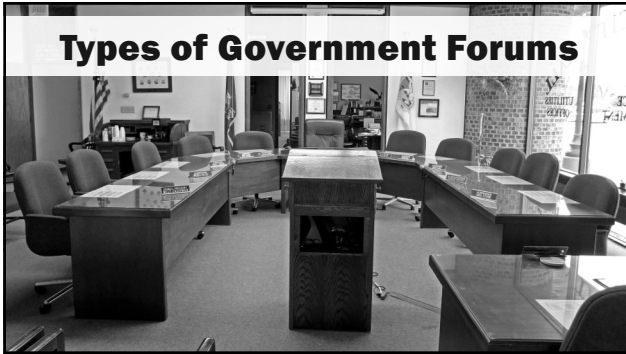
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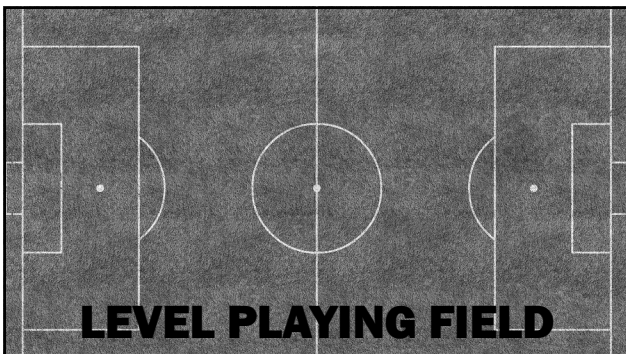
**TIME
PLACE
MANNER**

22

**Can we tell
them they
can't
criticize us
by name?**



23



LEVEL PLAYING FIELD

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Someone tried that!

12 GARNIER V. O'CONNOR-RATCLIFF

Garnier from her Twitter page. Zane likewise blocked the Garniers from his Facebook page.⁵

Sometime after they blocked the Garniers, the Trustees began using Facebook's "word filter" feature effectively to preclude all verbal comments on their public pages. Specifically, in December 2018, Zane added a list of approximately 2,000 commonly used English words to his Facebook word filter, so that any comment using one of those words could not be posted. O'Connor-Ratcliff added a smaller list of about 20 commonly used words to her own

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Court said:



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The Court appears to say:

That MIGHT be a problem because the presence of
 👍❤️🤔😂 **keeps the comments as a limited public forum**

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Court said:

Second, although word filters have limited the public's ability to write verbal comments in response to the Trustees' posts, the word filters have not changed Facebook's non-verbal "reaction" feature, which allows users to offer an emotional reaction emoticon to Facebook posts, such as a "like," "angry face," or "sad face" emoticon. Individuals who have been blocked from a Facebook page, such as the Garniers, cannot provide this non-verbal feedback. Regaining the ability to provide non-verbal feedback to the Trustees' posts would constitute effective relief,

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ALSO:



No Comments = Less Engagement!

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NO 1st Amendment Protection:

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



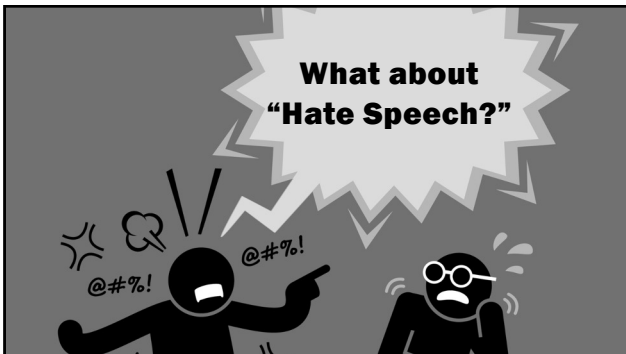
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NO 1st Amendment Protection:

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



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Matal v. Tam (2017)

UNANIMOUS DECISION FOR TAM
 MAJORITY OPINION BY SAMUEL A. ALITO, JR.


The Disparagement Clause prohibits trademarks that disparage the members of a racial or ethnic group and violates the Free Speech Clause of the First Amendment

Kennedy Ginsburg Alito Kagan



Roberts Thomas Breyer Sotomayor Gorsuch

37



Matal v. Tam (2017)

And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”

38



The Washington Post
 Sections

The Volokh Conspiracy • Opinion
**Supreme Court unanimously reaffirms:
 There is no ‘hate speech’ exception to the
 First Amendment**

By Eugene Volokh June 22



Most #
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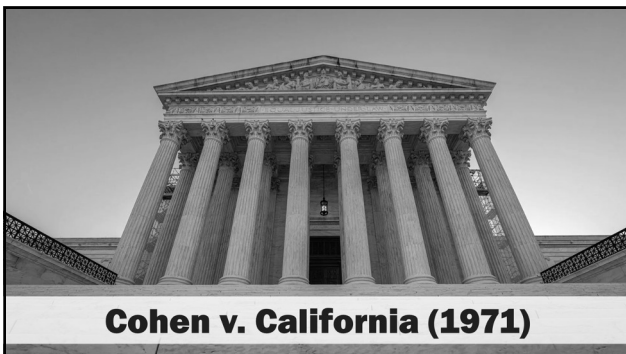
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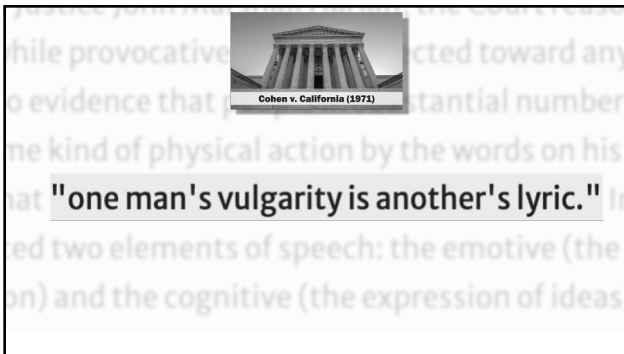
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Should government outsource the definition of “profanity” to “the community?”



46

Profanity Filter



Does using Facebook’s profanity filter violate the 1st Amendment?

47



The Arkansas State Police have a public Facebook page

48



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51

facebook **ASP Page Settings**

Page Moderation	these words are being blocked from the Page Pig, copper, jerk
Profanity Filter	Set to strong Edit
Similar Page Suggestions	Choose whether your Page is recommended to others Edit
Page Updates	Page posts are automatically published when you update Page info, reach milestones, receive reviews and more. Edit

52

Here comes Tanner's comments...

53

Tanner's comment on an unrelated photo of the trooper he disliked:

54

His comment was deleted automatically due to the custom list of moderated words uploaded by ASP:

Tanner All these pigs are the same. Willfully violating my civil rights!
Like · Reply · 1h

55

Tanner then sends this direct message to the page, which results in him being banned due to his "profanity"

you s [redacted] removed some of my [redacted] comments because i cussed!
what the f [redacted]

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“The State Police violated the First Amendment in blocking Tanner from Facebook page based on Tanner’s use of profanity in private messages.”



59



“The State Police’s use of Facebook’s “strong” profanity filter and its inclusion of the words pigs, copper and jerk violate the First Amendment.”

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3. Based on the jury's special verdicts 2 and 3, the Court enters judgment for James Andrew Tanner on his Fourth Amendment claim and echoing Arkansas law claim about the December 2014 Wal-Mart encounter against Kurt Ziegenhorn, in his individual capacity, for \$1.00 in nominal damages, post-judgment interest at a rate of 0.09%, and a reasonable attorney's fee and costs as may be allowed on later timely motion, on these seizure claims. FED. R. CIV. P. 54(d); 28 U.S.C. § 1920; 42 U.S.C. § 1988.

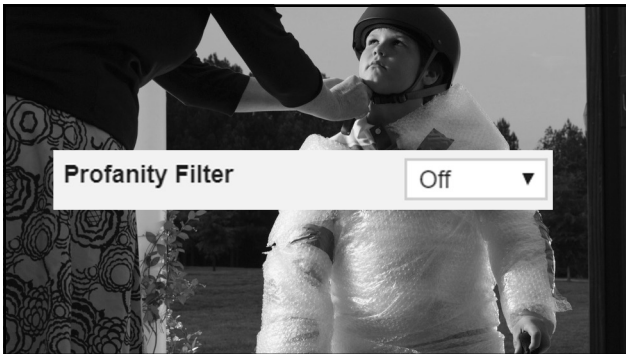


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What's offers the smallest chance of being successfully sued?



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Profanity Filter Off ▼

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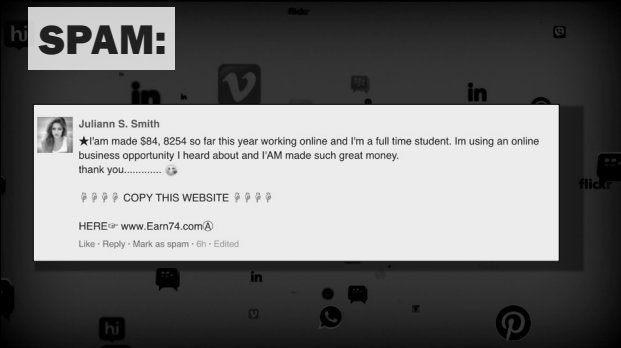
DEFAMATION:



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

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SPAM:

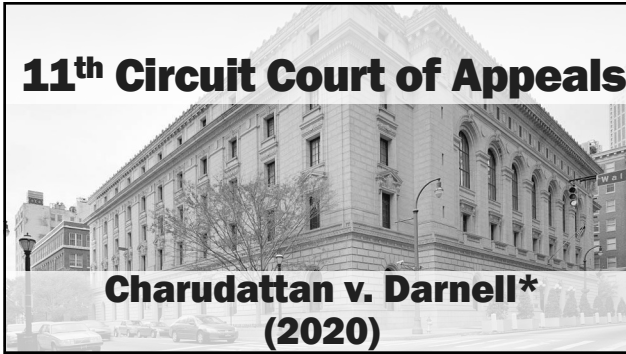


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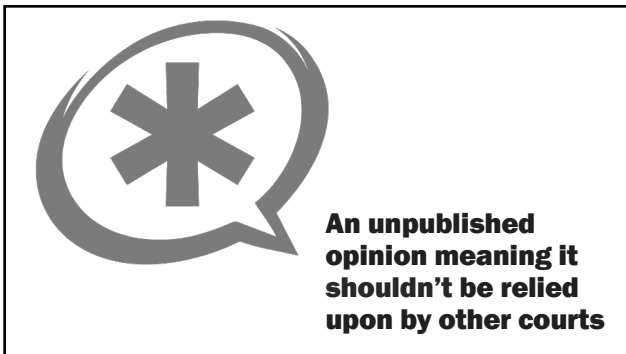


Can you delete "off topic" posts?

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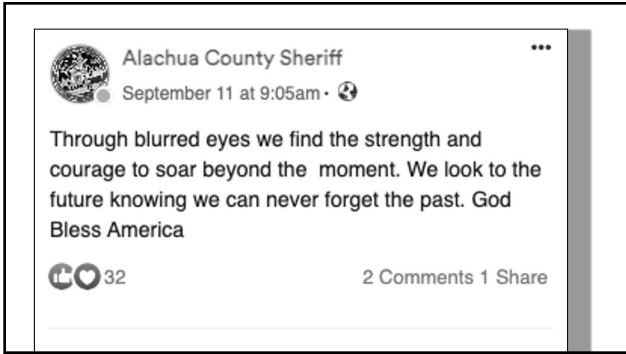
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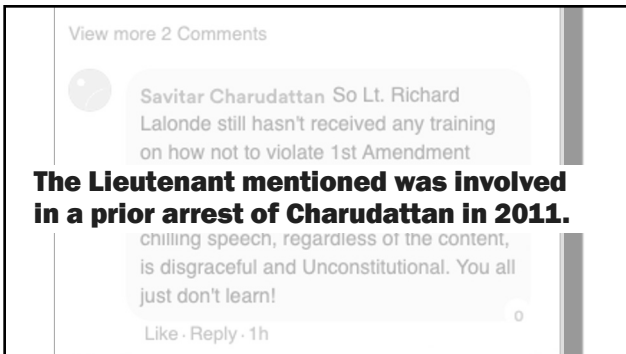
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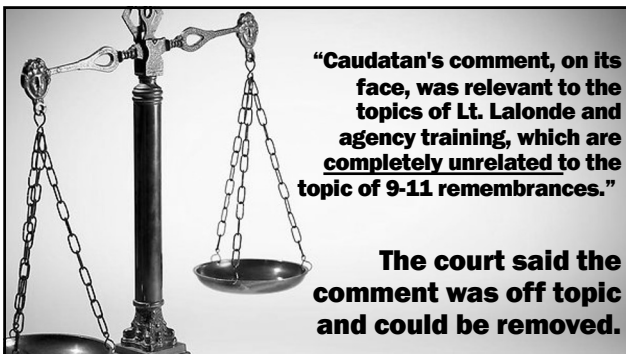
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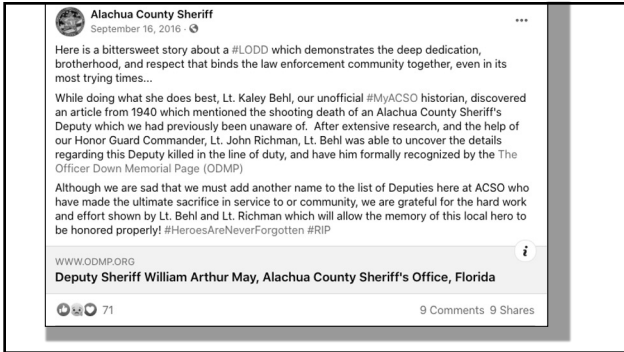
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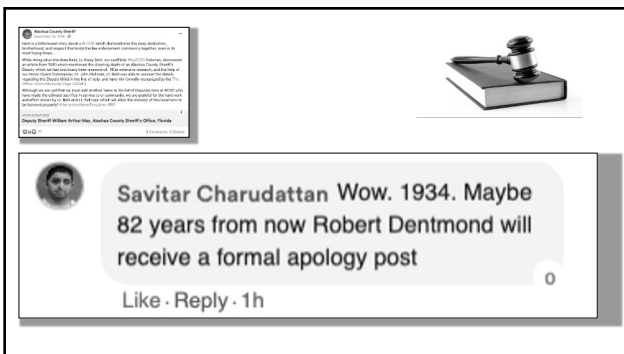
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The Court suggests criticism is protected -- but only when it's clearly aimed at the original topic.

Legit Criticism **yes** *First Amendment*

Off Topic Criticism **no** 

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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.



80

Illegal Activities:

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



81



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84

But our POLICY says we CAN delete offensive comments!




Social Media Terms and Conditions
 We are delighted to have you as a member of our community. In order to ensure that our community is a safe and respectful place for everyone, we have established these terms and conditions. We reserve the right to remove any content that is deemed to be offensive, defamatory, or otherwise inappropriate. We also reserve the right to suspend or terminate the accounts of any user who violates these terms and conditions. Thank you for your understanding and cooperation.

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A NEW case!

86



Felts v. Green
(8th Cir. 2024)

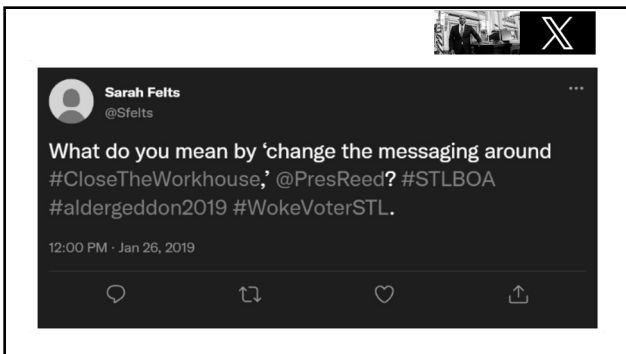
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President Lewis Reed ✓
@PresReed

@PresReed blocked you
You are blocked from following @PresReed and viewing @PresReed's Tweets.

What did President Lewis do?

91



President Lewis Reed ✓
@PresReed

@PresReed blocked you
You are blocked from following @PresReed and viewing @PresReed's Tweets.

92



Felt sues. What did the 8th Circuit Court of Appeals say?

93

Blocking critics is unconstitutional

The City didn't even appeal whether it could block critics. The city only hoped to avoid liability by saying the President wasn't making policy for the City. The City hoped to avoid the liability and force Reed to pay the attorney fees himself.

The 8th Circuit didn't buy it.



94

“Reed’s decision to block Felts was a deliberate choice of a guiding principle and procedure to silence online critics.”



95



“Reed made a deliberate choice to block Felts among various alternatives—ignoring the tweet, muting her account, replying from the account, replying from a pseudonymous ‘burner’ account, or replying from a personal account not administered under color of law as an official governmental account.”

96

“Because of the unique power of the President of the Board of Aldermen, Reed exercised final policymaking authority when he blocked Felts. The City of St. Louis is liable.”



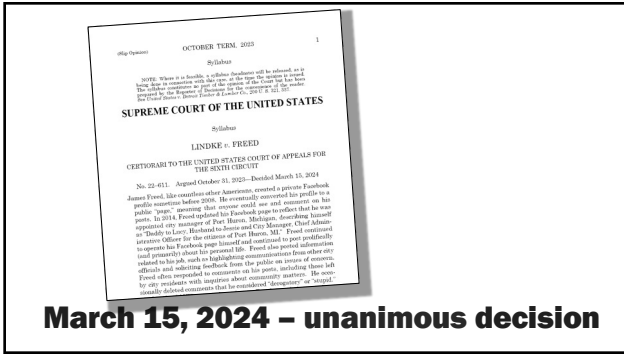
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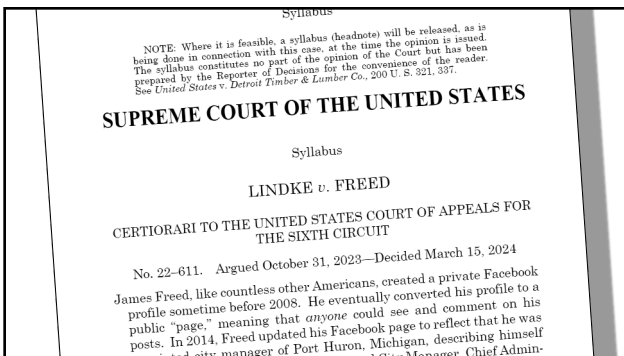
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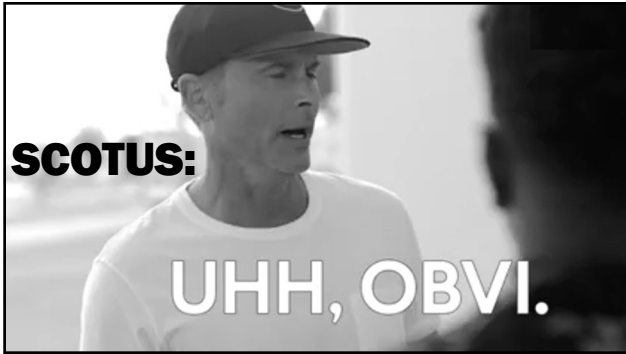
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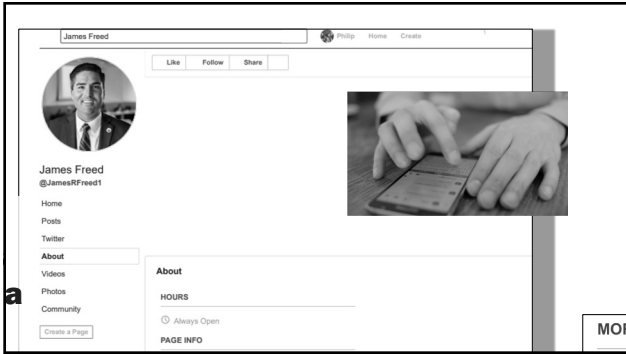


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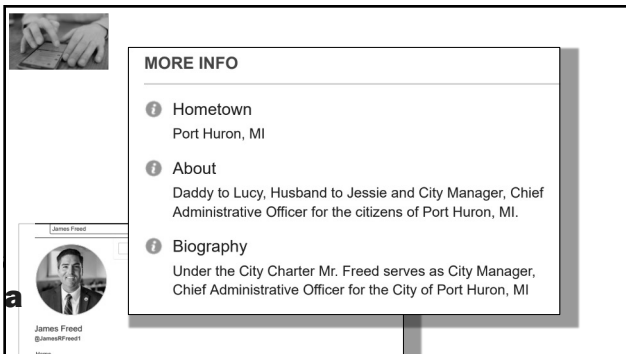
QUESTION: when is a government official feed a government feed?

104

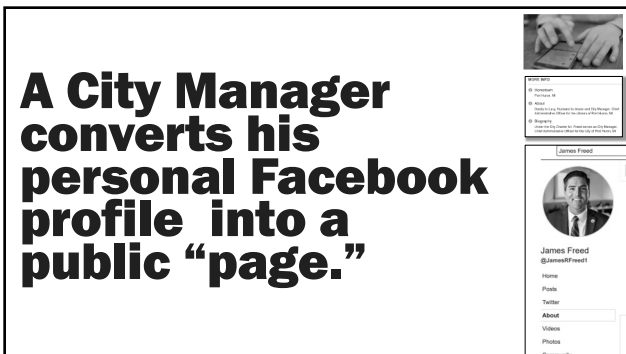
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Lindke made Facebook comments on Freed's Facebook page that were critical of his policies.

Freed blocked him.



109

Freed said it was a private Facebook page where he occasionally posted stuff about work.



110

Posts from Freed's Facebook Page:



Ted's Coney Island takeout never fails. never.

111


Posts from Freed's Facebook Page:



Happy 7th Birthday, Winston!

112

Posts from Freed's Facebook Page:



Mayor Repp and Council practiced social distancing to hear and act upon the People's business and to hear a report from our Health Director on the COVID-19 crisis. Councilmember's Worden and Harris are slightly out of view because the spacing requirements put them of to the left and right. Our Council Chambers allow for live tv and YouTube Broadcasts. You can watch their work here: <https://youtu.be/DR9FXpdIMLw>

113

Posts from Freed's Facebook Page:



I like to think that I've perfected her spike.

114



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Is THIS state action?

119

THE NEW TEST!

120

A government official's social media feed is ONLY "state action" when BOTH of these prongs are true:

- (1) Possessed actual authority to speak on the agency's behalf on a particular matter**
- (2) Seems to be exercising the agency's authority when posting**

121

Actual authority to speak on agency's behalf

- **It's not enough to just be an agency employee**
- **Unless an official has AUTHORITY to post agency updates and address citizen concerns, it's not state action**
- **The social media post in question must be connected to speech on a matter within the government official's authority**

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Actual authority to speak on agency's behalf

- **Actual authority can come from the law, longstanding custom and traditional usage, HR descriptions, and more.**
- **A governor, sheriff, city manager, township trustee and similar positions will typically have broad authority to speak to the public on the agency's behalf. The IT guy? Not so much.**

123

Actual authority to speak on agency's behalf



Yes!



No!

124

- **Adding a disclaimer helps but it's not 100%**
- **A post that makes a government announcement of information that's not available elsewhere is likely state action**
- **Merely repeating information that's available on the agency website of social feed is likely not state action**

Other key points

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Other key points

- **A page wide block (Facebook) is likely a violation if there's even one agency post on the page. Deleting or hiding an individual comment is safer.**

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A NEW Tool to Help You Figure This Out
CommunicationsCounsel.com/resources



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NOTHING IN THIS CASE AFFECT YOUR AGENCY FEEDS!



128



REMEMBER

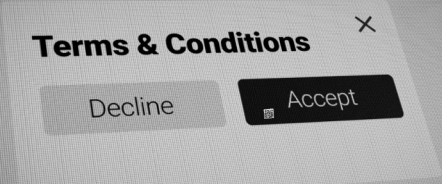
VIEWPOINT NEUTRAL

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Best Practice:

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

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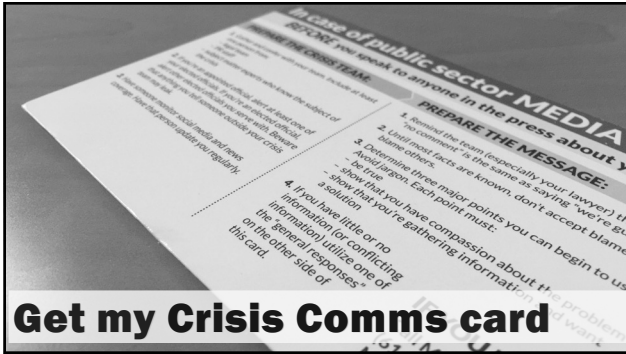
Want a Sample Policy?

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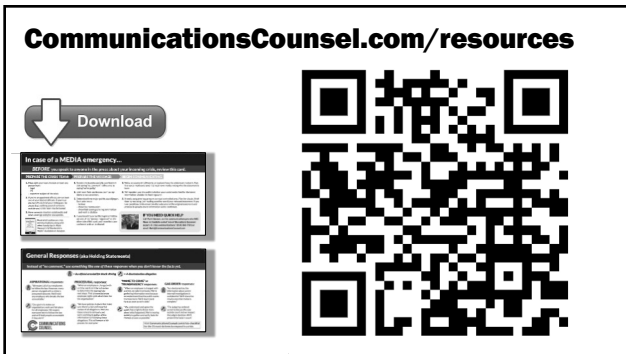
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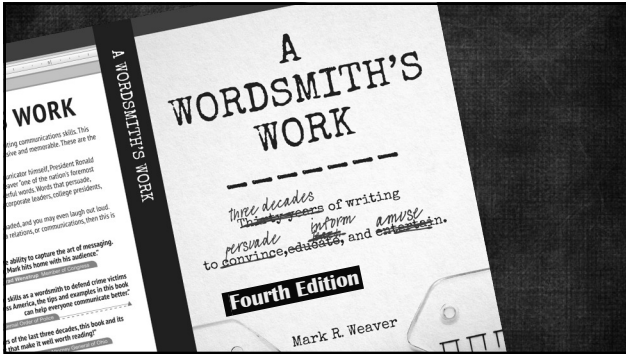


Get my Crisis Comms card

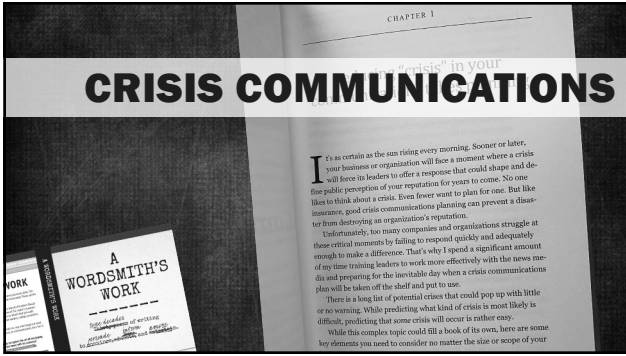
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SPECIFIC CHAPTERS ON:

Crisis Communications for:

- Healthcare
- Law Enforcement
- Restaurant
- Higher Education

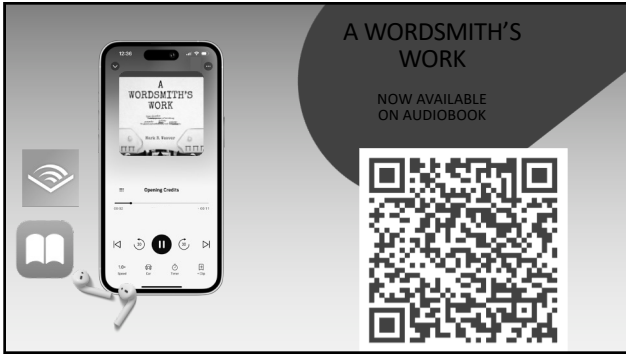
Writing Op-eds **Ghost writing**
Better Speeches **Sharpen Writing Skills**

137

Available at amazon

AWordsmithsWork.com

138



139



140

ATTORNEY READING LIST

Your attorney is likely smart. I've been an attorney advising government for three decades and most of those who do this work are accomplished and savvy. But attorneys who advise state and local government are typically generalists, who don't have the time to specialize in things like the First Amendment. Before your attorney gives you advice on moderating comments on government social media feeds, please ask the attorney to read the cases on the following slides. This material is too new to have been taught when your attorney was in law school. Once your attorney has read these cases, you can be assured that the legal advice you get will be based on the latest caselaw.

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ATTORNEY READING LIST

LIMITED PUBLIC FORUM

Lindke v. Freed 601 U.S. ____ (2024)
 O'Connor-Ratcliff v. Garnier, 601 U.S. ____ (2024)
 Garnier v. O'Connor-Ratcliff 41 F.4th 1158 (9th Cir. 2022)
 Felts v. Green, 91 F.4th 938 (8th Cir. 2024)
 Scarborough v. Frederick Cnty. Sch. Bd. 517 F. Supp. 3d 569 (W.D. Va. 2021)
 Charudattan v. Darnell, No. 20-10519 (11th Cir. 2020)
 Tanner v. Ziegenhorn 4:17-cv-780-DPM (E.D. Ark. 2019)
 Knight 1st Amendment Institute v. Trump, 928 F.3d 226 (2nd Cir. 2019)
 Davison v. Randall 912 F.3d 666 (4th Cir. 2019)
 Robinson v. Hunt Cnty.,Tex. 921 F.3d 440 (5th Cir. 2019)



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ATTORNEY READING LIST

OFFENSIVE or HATE SPEECH

Ison v. Madison Local Sch. Dist. Bd. of Educ., 3 F.4th 887 (6th Cir. 2021)
 Iancu v. Brunetti, No. 18-302, 588 U.S. ____ (2019)
 Matal v. Tam, 582 U.S. 218 (2017)
 Snyder v. Phelps, 562 U.S. 443 (2011)
 Texas v. Johnson, 491 U.S. 397 (1989)

OBSCENITY v. PROFANITY

Miller v. California, 413 U.S. 15 (1973)
 Cohen v. California, 403 U.S. 15 (1971)



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CRITICISM OF PUBLIC EMPLOYEES

Marshall v. Amuso 571 F. Supp. 3d 412 (E.D. Pa. 2021)
 Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972)

MISINFORMATION

Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014)
 United States v. Alvarez, 567 U.S. 709 (2012)



THREATS

Watts v. United States 394 U.S. 705 (1969)

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SEE ALSO

Graf v. Christensen 4:22-cv-00212-DCN (D. Idaho 2023)
Czosnyka v. Gardiner 21-cv-3240 (N.D. Ill. 2021)



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"SOCIAL MEDIA & FIRST AMENDMENT READING LIST"

[CommunicationsCounsel.com/resources](https://communicationscounsel.com/resources)



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