



SOCIAL MEDIA & TODAY'S 24 HOUR NEWS CYCLE

League of California Cities
January 2019

Information Sources 20 Years Ago



The New Daily Information Diet



We Are Addicted to Media!



per day watching, reading, listening to or
simply interacting with media

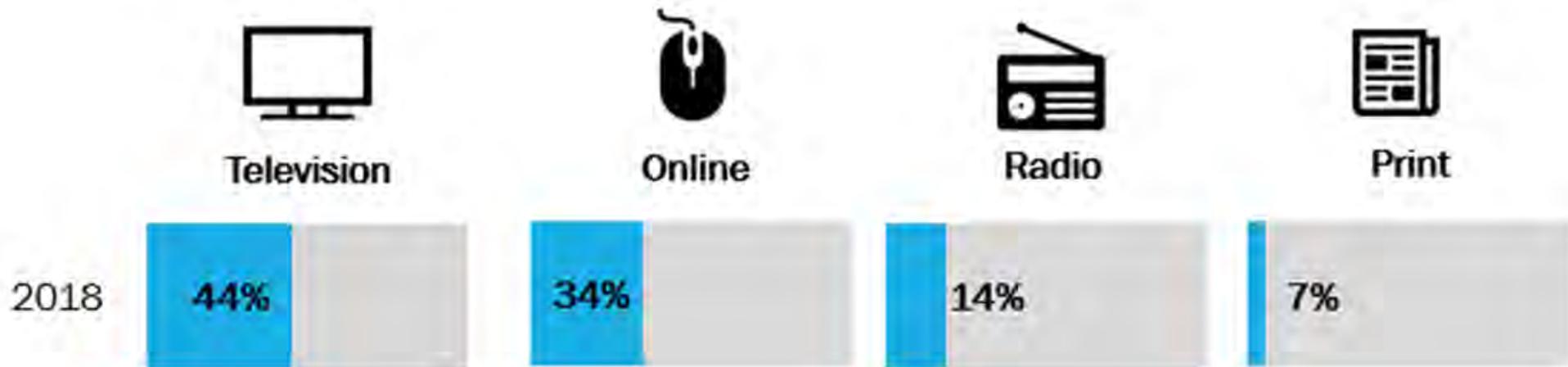
We Are Addicted to Our Phones!

- People spend around 6 hours per day consuming digital media
- On average, we check our phones 50 times per day



Most adults still consume news on the television

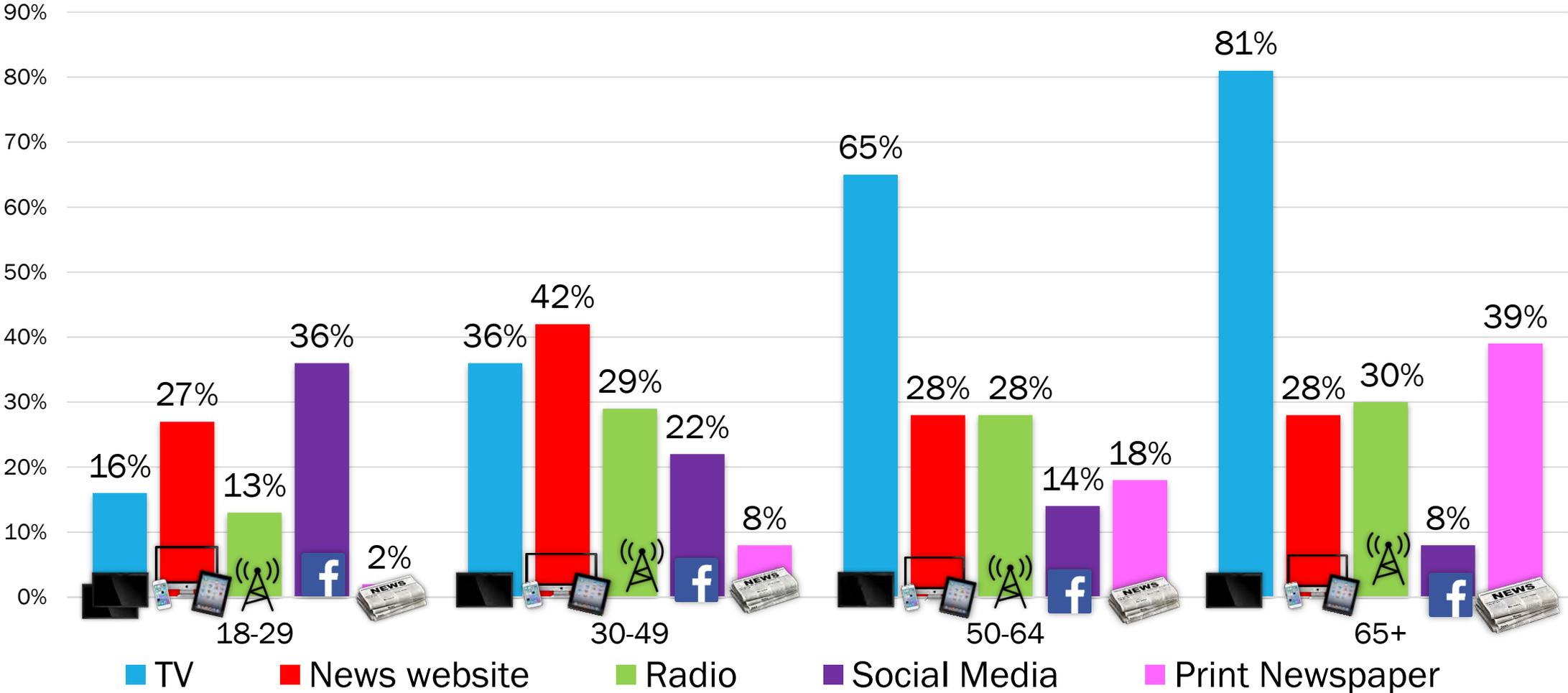
Question: "Which of the following would you say you prefer for getting news?"



Source: <http://www.journalism.org/2018/12/03/americans-still-prefer-watching-to-reading-the-news-and-mostly-still-through-television/>

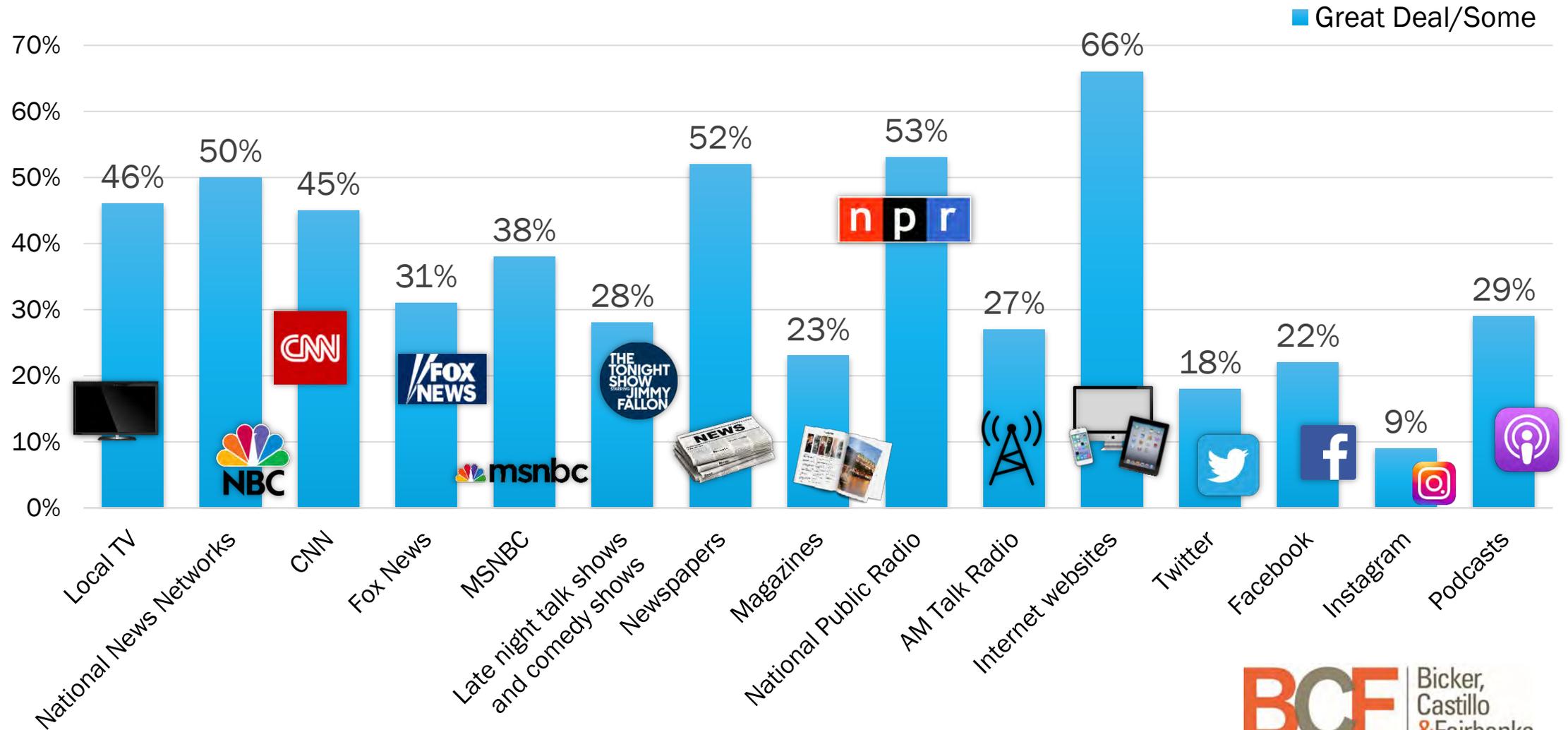
Age Dictates How Americans Get their News

% of each age group who often get news on each platform



Source: <http://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>

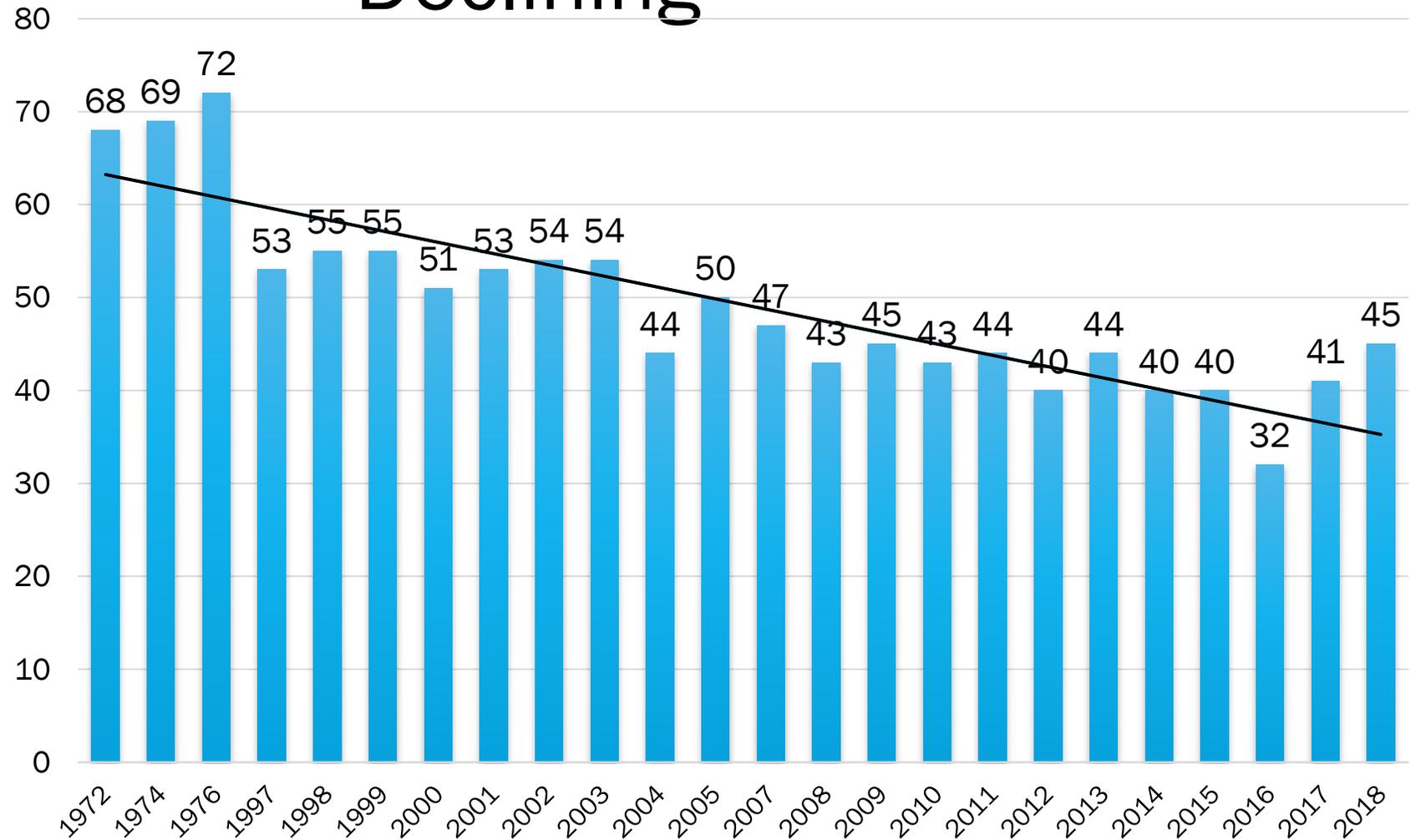
California Voters Get Their Political/Election News From a Variety of Sources



"Below is a list of sources from which people get information about politics and elections. For each one, please indicate if you rely on that source a great deal, just some, very little, or not at all." (FM3I Poll, October - November 2018)

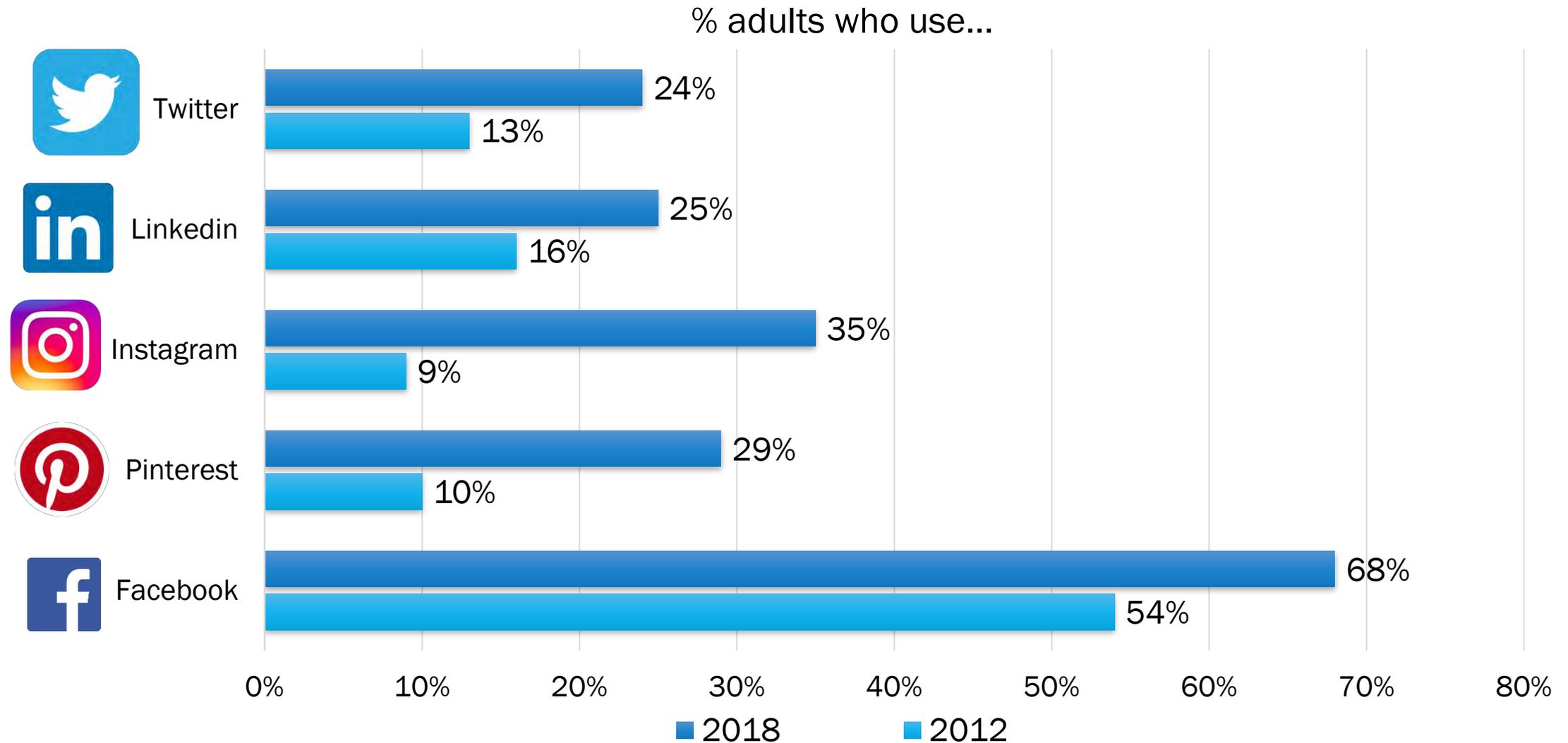
Americans' Trust in Mass Media Steadily Declining

Question: "In general, how much trust and confidence do you have in the mass media – such as newspapers, T.V. and radio – when it comes to reporting the news fully, accurately, and fairly – a great deal, a fair amount, not very much, or none at all?"



Source: <https://news.gallup.com/poll/243665/media-trust-continues-recover-2016-low.aspx>

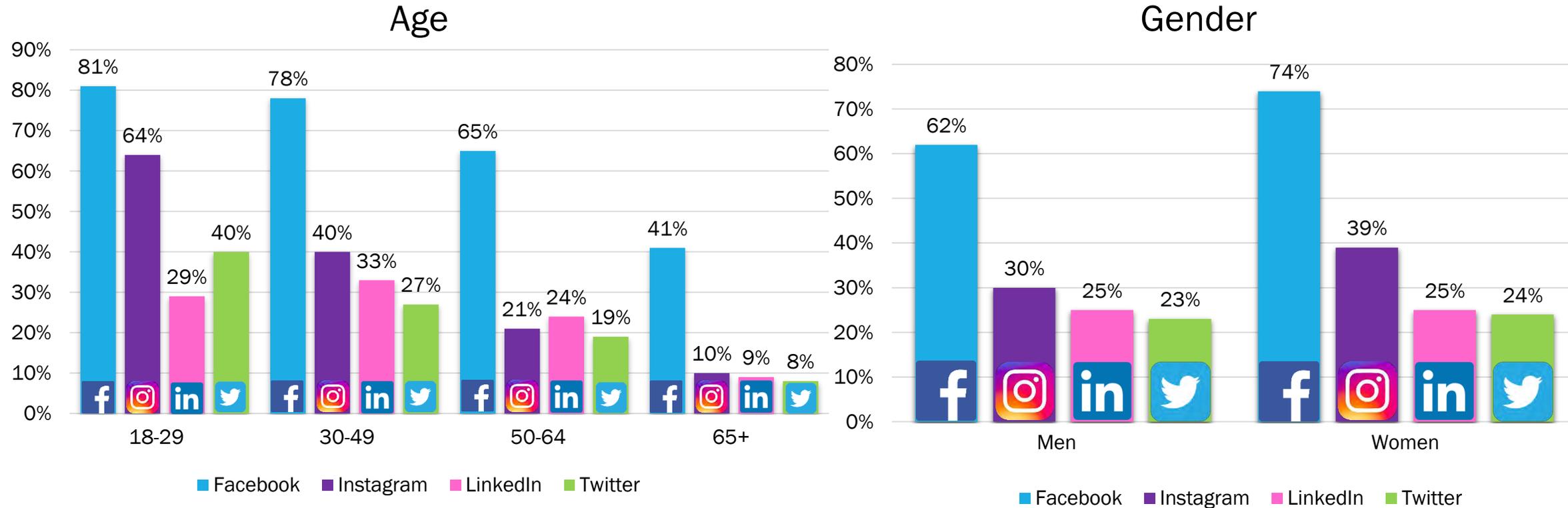
Facebook Is the Most Used Social Media Platform



Source: <http://www.pewinternet.org/fact-sheet/social-media/>

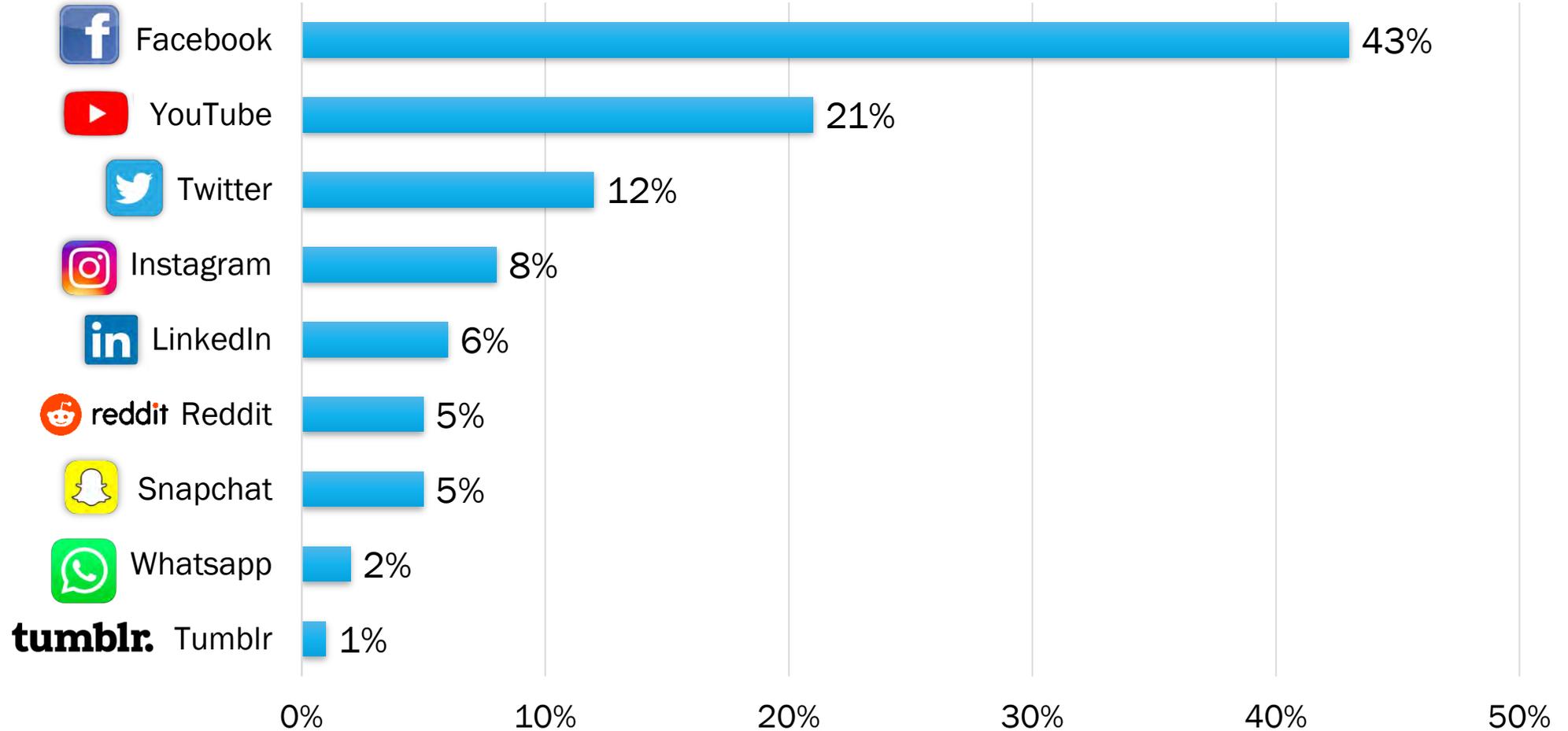
Social Media Use by Demographic Factors

% of U.S. adults who use each social media platform



Facebook is also the most popular social media site for news

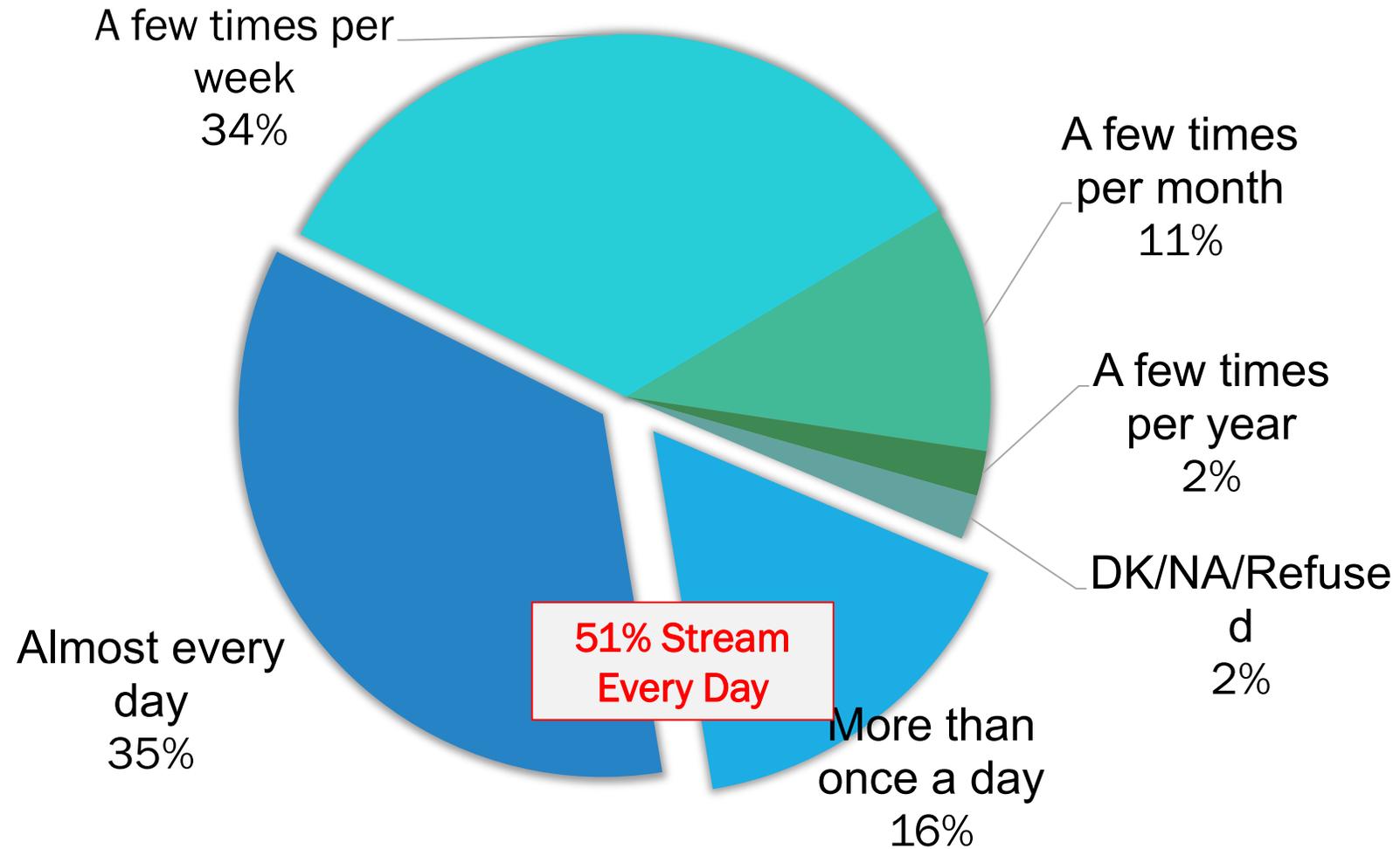
% of U.S. adults who get news on each social media site:



Source: <http://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/>

Californians spend a lot of time streaming on-line

Question: “How frequently do you watch shows online using a streaming service or app”



“How frequently do you watch shows online using a streaming service or app”, (FM3 Poll, November 2018)

Attention Span and Digital Media



Goldfish = 9 Seconds



Human = 8 Seconds

What Does This Mean for Elected Officials?

- You're Always "On the Record"
- Treat Your Social Media Page Like an Open Mike – and Living Record of Everything You've Ever Said
- Be Transparent and Open – All the Time
- Be Prepared and Have a Plan for When News Breaks About You or Your City
- Use Social Media to Have 'Public Conversations' with Your Constituents – and Treat Them Like Everyone is Listening



Social Media Can Be Used to Your Advantage

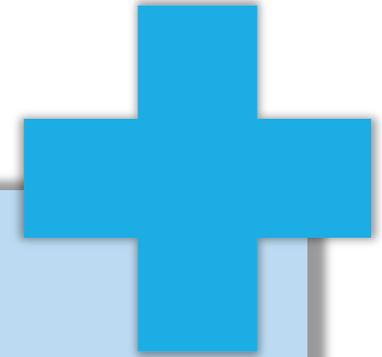


- Have a direct line to your constituents.
- Tell your story without the media filtering it.
- Target your message to specific constituency groups.
- Engage your constituents in new and personal ways.
- Connect with constituents and groups you might not reach through traditional media.
- BUT, You don't have to weigh in on everything

How Do You Do It?

OUT

IN



- Long press releases

*BLAH... BLAH...
BLAH... BLAH...
BLAH... BLAH...
BLAH... BLAH...
BLAH... BLAH...
BLAH... BLAH...
BLAH... BLAH...*

- Relying only on traditional media to tell your story



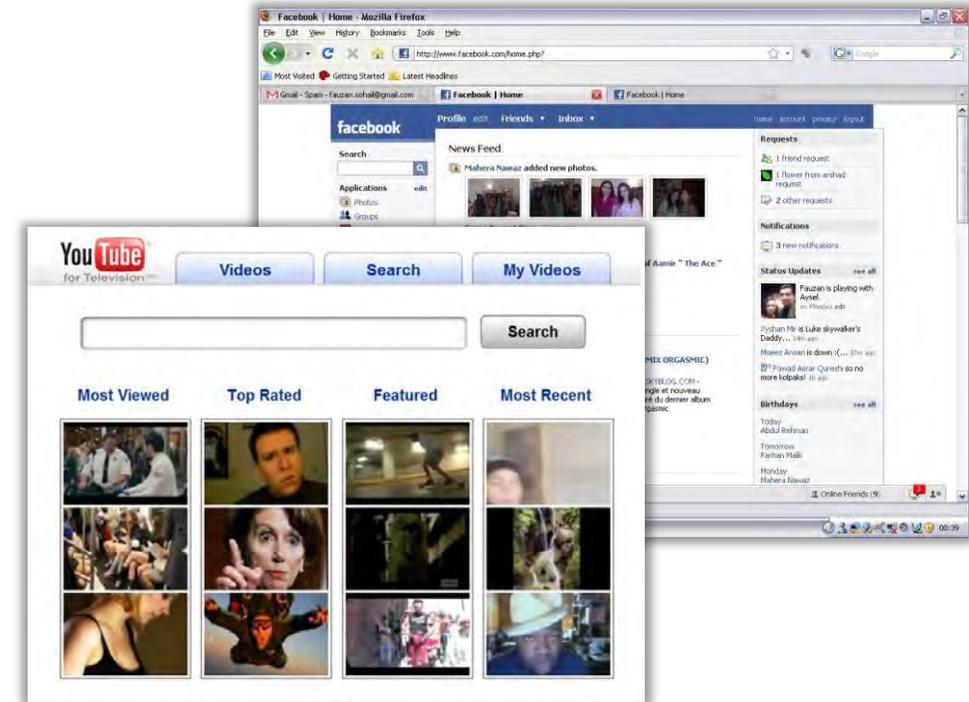
- Video
- Photos
- Shareable content



- Directly connecting with your constituents

How Do You Do It?

- Build an audience gradually over time
 - Paid strategies
 - Organic
- Customize your message to your audience
- Be open, transparent
- Develop engaging content focused on issues people care about



Social Media Do's and Don'ts

Do:

- Engage with your constituents, represent your voters
- Develop shareable information – videos and photos king
- Take a stand, share your position, show your leadership
- Follow normal ‘rules of engagement’ for conversation
- Keep the public informed
- Share news articles, be a source for good city information
- Remember that everything online lives forever

Don't:

- Argue, provoke, or respond to ‘Trolls’ trying to start a fight
- Remove comments you don't like, because you don't like them
- Over-inform
- Take on a reporter – because a good fight sells newspapers
- Post when angry, impaired, or not in a good frame of mind



LEGAL CONCERNS WITH USE OF SOCIAL MEDIA





PRIVACY & THE INTERNET



SOCIAL MEDIA USERS LOVE TO SHARE!



- Birthdate
- Place of Employment
- Relationship Status
- Family Members
- Places Visited
- Home and Email Addresses and Phone Numbers
- Photos
- Schools Attended
- Political, Religious, Social Viewpoints and Causes
- Clubs, Civic Activities, Networking Groups
- Life Events
- How much they Hate Their Boss
- Offensive Costumes and Remarks
- What They Did on the Day They Called in Sick
- How Much They Drank Over the Weekend
- How They Plan To Ruin Their Ex's Life

USES DURING LITIGATION

- 01 Impeachment
- 02 Photographs
- 03 Solicitation of Class Members
- 04 Sub Rosa
- 05 Jury Selection & Voir Dire
- 06 Juror Misconduct



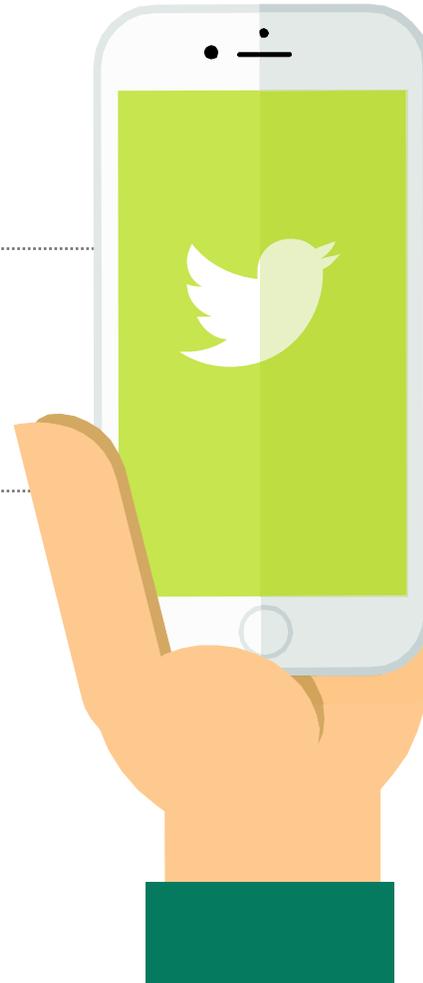
BUT, WHAT ABOUT PRIVACY SETTINGS?

Moreno v. Hanford Stentinel, Inc. (2009)

No reasonable person who takes the affirmative act of posting information on a social media website has an expectation of privacy.



State v. Harris (2012)
One has no reasonable expectation of privacy in information intentionally broadcasted to the world on Twitter.



Romano v. Steelcase, Inc. (2010)

The sharing of personal information is the very nature and purpose of social networking sites, else they would cease to exist.

“A good rule of thumb for any public official is to never put anything on any social network that you wouldn’t be comfortable with appearing on the front page of your local paper...When you put something out there digitally, it’s out there forever.”

Pennsylvania State Representative Michael Schlossberg



**WORDS OF
ADVICE**





FREE SPEECH AND PUBLIC FORUMS





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

TRADITIONAL WEBSITE

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.





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

PUBLIC FORUM

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

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.



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



SOCIAL MEDIA IS PUBLIC FORUM

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.”



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



TAKE-DOWN LITIGATION

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.”



*Hawaii Defense
Foundation v. City
of Honolulu, (D. Hi.
2014)*



TAKE-DOWN LITIGATION

Public entities face litigation for deleting comments and banning users from the page that are critical of the entity.



*Hawaii Defense
Foundation v. City
of Honolulu, (D. Hi.
2014)*



TAKE-DOWN LITIGATION

A practice of removing unfavorable comments invites a lawsuit.

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

www://



TAKE-DOWN LITIGATION

Civil rights organizations are now bringing lawsuits on behalf of members of the public who have comments deleted or are blocked/banned from a public entity's social media page.

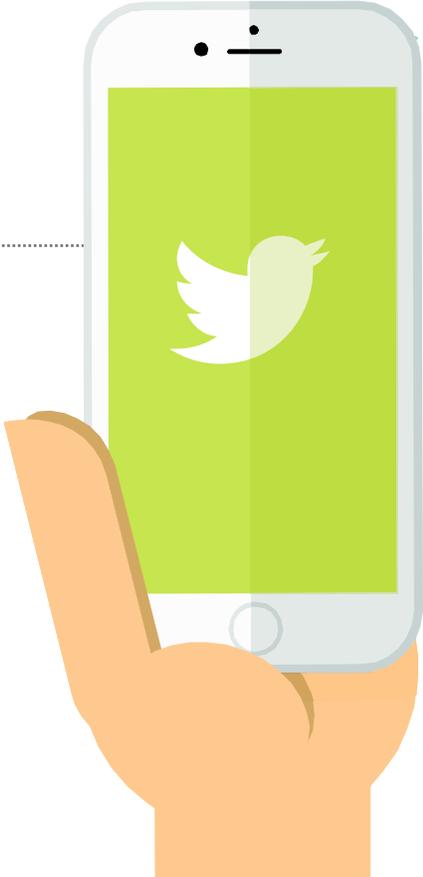


*ACLU v. City of
Beech Grove, (S.D.
Ind. 2016)*

FIRST AMENDMENT CONSTRAINTS

Public Agencies Cannot Prohibit

Comments critical of
you or your City
based on policy
issues



Comments
based on the
viewpoint
expressed

FIRST AMENDMENT CONSTRAINTS

The Gray Areas Include:

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



“LIKING” AND THE FIRST AMENDMENT

Bland v. Roberts (4th Cir. 2013)

- Sheriff terminated employees who supported his opponent in an election, allegedly for poor performance
- Many of the employees had only “liked” his opponents Facebook page
- The Court held that “liking” a page was pure speech and symbolic expression, and that the Sheriff’s interests in maintaining effective services to the public were outweighed by the employees’ interest in highly-protected political speech
 - Likened it to the modern-day equivalent of a front yard campaign sign or bumper sticker
 - Court engaged in a detailed analysis of what it means to “like” something on Facebook



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?
 - Does the official use it to address constituents?
 - Does the official use it to share information of importance to the community?
 - Does the official post photos of community events?
 - Does the official use it to acknowledge their colleagues or City employees?
 - Does the official use it to discuss their work as government official?
 - Are there any links to the City's website or social media pages?
 - Do the official's constituents have access to the page?
 - Does the official use any City resources?

BANNING + BLOCKING USERS

Davison v. Loudoun County Board of Supervisors (E.D. Va. 2017) – Local politician temporarily banned a constituent who posted about County corruption on the politician’s “personal” Facebook page. The case proceeded to a bench trial.

- “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.”
 - Held, the politician’s Facebook page “operates as a forum for speech under the First Amendment to the Constitution.”
 - But, allowing online speakers to hijack or filibuster online conversations would “impinge on the First Amendment rights” of other forum participants.
- THIS IS WHY YOU NEED POSTING GUIDELINES!**



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

BANNING + BLOCKING USERS

Knight First Amendment Institute at Columbia University, et al v. Donald Trump, et al.
(SDNY May 23, 2018; *on appeal*)

- Donald Trump established @realDonaldTrump in March 2009.
- Before his inauguration, he used it to tweet about a variety of topics, including politics and pop culture.
- Since his inauguration, he has used it to communicate and interact with the public about his administration, and to occasionally communicate about other issues.
- President Trump has not issued any rule or statement purporting to limit (by form or subject matter) the speech of those who reply to his tweets.
- The account has been operated with the assistance of Daniel Scavino, White House Social Media Director and Assistant to the President. It is used multiple times per day, to announce and defend policies, promote his legislative agenda, announce official decisions, engage with foreign leaders, challenge media organizations who he finds unfair, and other matters related to his office.

BANNING + BLOCKING USERS

Knight First Amendment Institute at Columbia University, et al v. Donald Trump, et al.

- The national Archives and Records Administration has advised the White House that the President's tweets from @realDonaldTrump are official records that must be preserved under the Presidential Records Act.
- Twitter users engage frequently with the President's tweets, and it is not uncommon for them to receive more than 15,000-20,000 retweets and tens of thousands of replies.
- The 7 individual defendants tweeted a critical message in reply to a tweet. They were each 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.

BANNING + BLOCKING USERS

Knight First Amendment Institute at Columbia University, et al v. Donald 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

BANNING + BLOCKING USERS

Knight First Amendment Institute at Columbia University v. Donald Trump, Sean Spicer and Daniel Scavino (SDNY 2017) – pending

- “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.”

<https://knightcolumbia.org/content/knight-institute-v-trump-lawsuit-challenging-president-trumps-blocking-critics-twitter>



Bess Kalb ✓

@bessbell



Thank you to the Knight Foundation for legally forcing @realDonaldTrump to take out his sticky little phone, scrunch his nose, open Twitter, search my name, shout "Do I seriously have to fucking do this," be told yes by Dan Scavino, take a deep breath, and click "Unblock."

7:47 PM - Aug 28, 2018

♥ 7,530 💬 807 people are talking about this



J.D. Durkin ✓

@jiveDurkey



NEW -- important update to this -- thanks to @KatieFallow and @knightcolumbia, I've been officially UNBLOCKED by @realDonaldTrump after 14 months

did I miss anything



Blocked

Donald J. Trump ✓

@realDonaldTrump

@realDonaldTrump is blocked



Jules Suzdaltsev ✓

@jules_su



First order of business now that I've been #unblocked.

5:15 PM - Aug 28, 2018

♥ 472 💬 50 people are talking about this



PUBLIC RECORDS AND BROWN ACT ISSUES





PUBLIC RECORDS ACT

“Records” include all communications related to public business “regardless of physical form or characteristics, including any writing, picture, sound, or symbol, whether paper...magnetic or other media.”

ELECTRONIC RECORDS

Electronic records are specifically included.
Govt. Code Sec. 6252(e).



IS THE CITY'S SOCIAL MEDIA COVERED?



- Content that has to be produced includes anything that relates to the conduct of government
- Polls, surveys, data collection
- Metadata, which shows how and when a document was created or revised and by whom may also have to be produced
- Retention guidelines are based on content, not medium
- What about comments and deleted content?

WHAT ABOUT COMMUNICATIONS ON PRIVATE DEVICES?

City of San Jose v. Superior Court

EMAILS & TEXTS

Emails and text messages by public officials are subject to the CPRA regardless of location, including personal accounts and devices



PRIMARY FOCUS

Primary focus is whether the message is related to public business, based upon context, content, purpose, audience, and role of individual when message was written or received



AS AN OFFICIAL

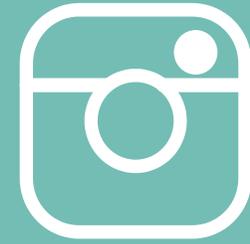
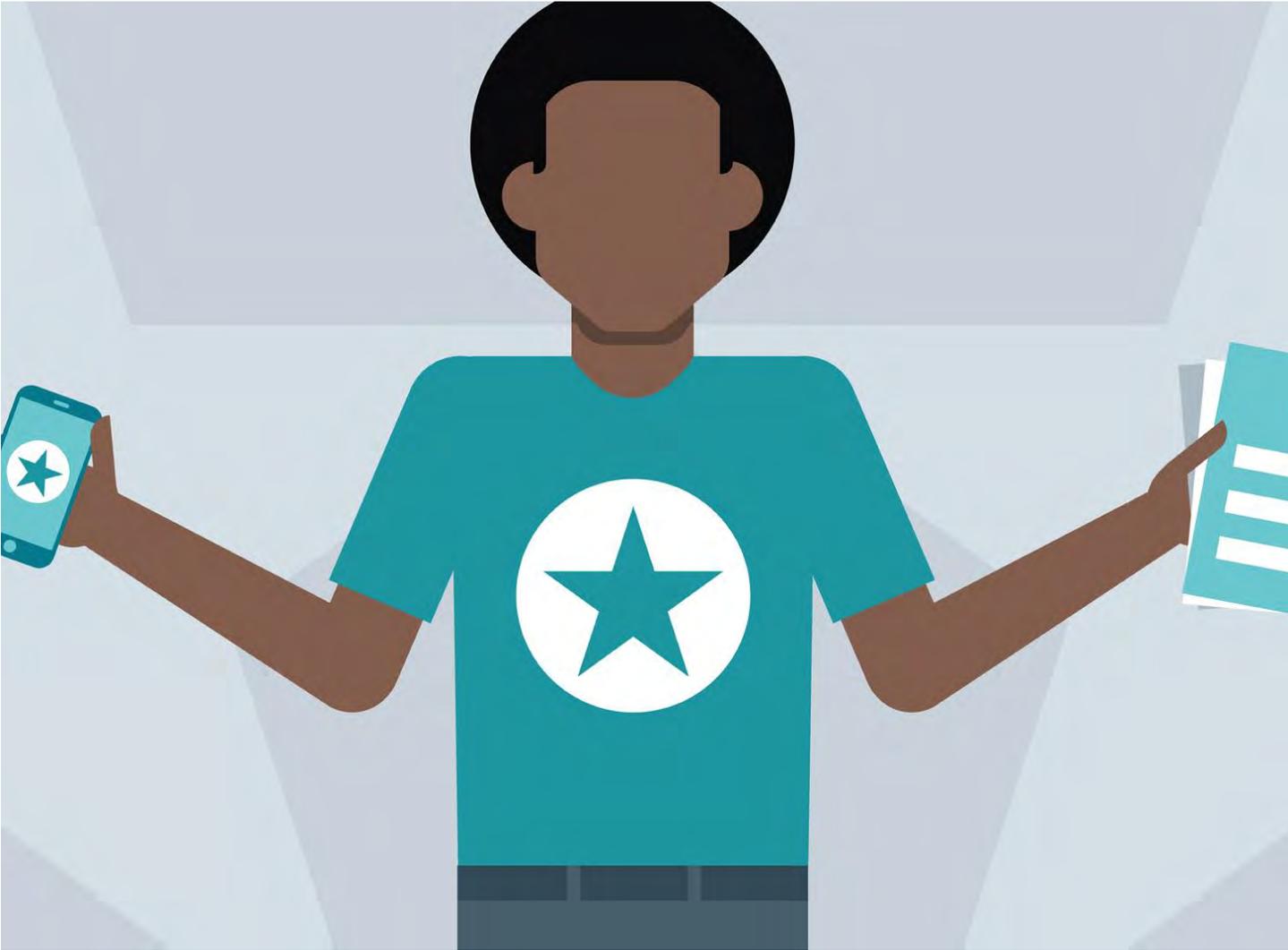
You, as an official, may now be required to:

- search your private emails or personal phones for responsive records if you use your private email account or personal phone to communicate with others concerning public business; and*
- certify or provide a factual basis as to whether responsive records exist and/or withheld*



COMPLIANCE

Claiming that the records are not on entity email accounts, computers or servers is NOT enough for compliance now



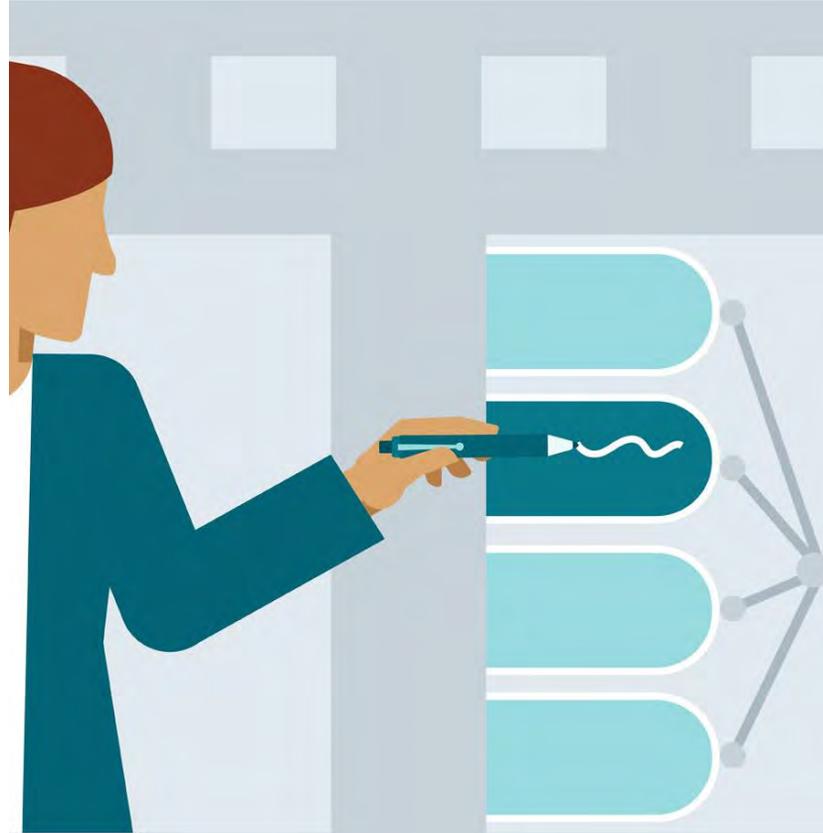
Is My Personal Social Media Page Covered by the PRA?

- Were public resources used?
- Is there a definable, well-publicized use for the site, i.e., acting as a candidate, purely personal use, or a separate business use?
- Do users visit the site based on your personal or official contacts?
- Is it being used for any official purpose?

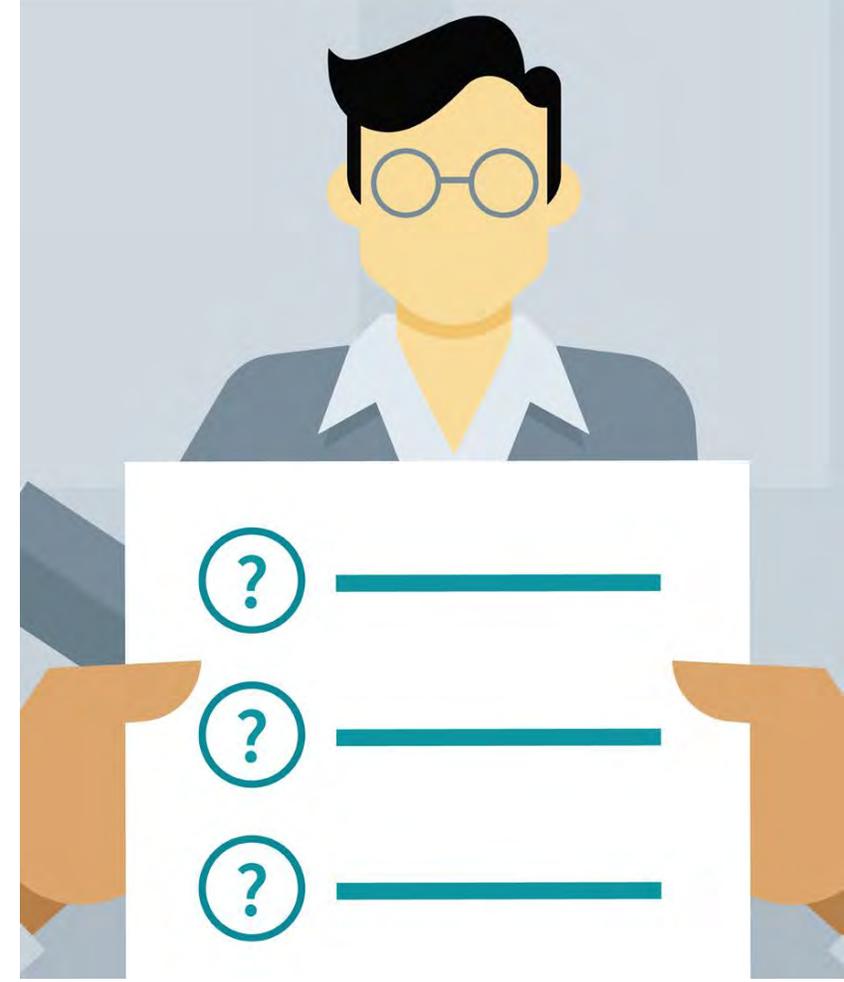


SOCIAL MEDIA & THE BROWN ACT

Members of legislative bodies cannot meet to discuss official business unless the meeting complies with the Brown Act



Must have public notice and access to the meeting



The Brown Act does not prevent individual members from publishing their own comments and opinions

SOCIAL MEDIA AND SERIAL MEETINGS

A “Serial Meeting” is a series of communications that individually do not include a quorum but collectively involve a quorum

- California courts have not definitively ruled on the issue of on-line communications between elected officials and the Brown Act
- However, the usual serial meeting rules likely apply

HYPOTHETICAL

A local newspaper writes an on-line article critical of your City's proposal to build a new community center. Dozens of comments by members of the community are posted on-line in response to the article. One City Council Member reads the article and posts her own comment about the issue.

A second Council Member also posts a comment. A third Council Member "Likes" the comments of the first two Council Members.

Has the Brown Act been violated?





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, a paralegal and activist on matters related to public officials' use of social media, filed a writ of mandate in April 2017 against the City of San Mateo alleging non-compliance with the CPRA. Specifically, she objected to 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 under the US and California constitutions had been violated by Mayor Lim because he 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



🗨️ ↻️ 2 ❤️ 9 ✉️



David Lim @SanMateoDavid · Jan 17

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



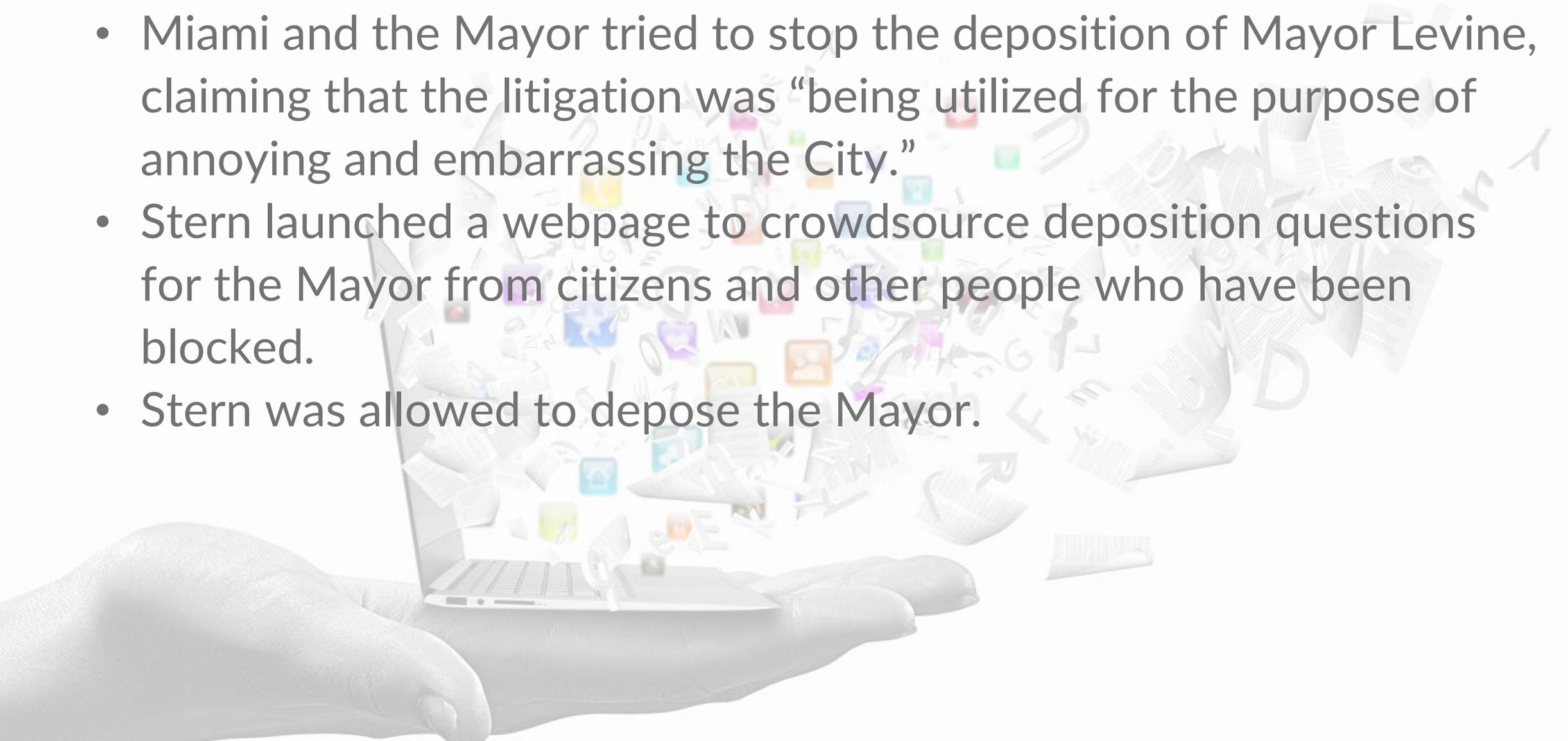
🗨️ 3 ↻️ 5 ❤️ 8 ✉️

STERN V. CITY OF MIAMI

- Grant Stern, a local radio host and activist, sued the City of Miami and its 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.
- Levine identifies himself as the Miami Mayor on his Twitter and Facebook pages, and posts about official city business and political issues.
- Levine blocked Stern after Stern responded to a Levine tweet where he was critical of potential pollution into Biscayne Bay by the City’s stormwater system.

STERN V. CITY OF MIAMI

- 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.”
- Stern launched a webpage to crowdsource deposition questions for the Mayor from citizens and other people who have been blocked.
- Stern was allowed to depose the Mayor.





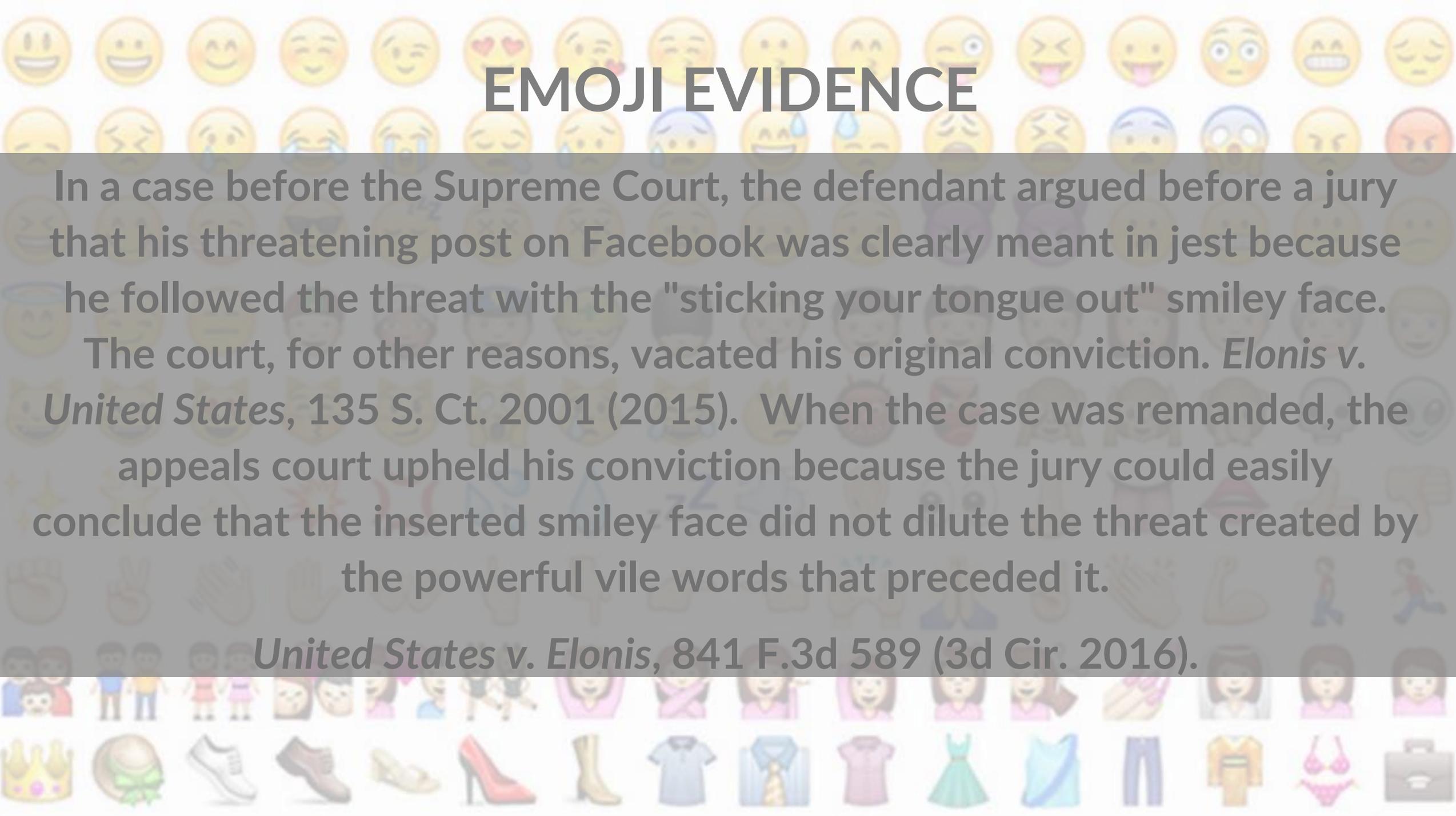
EMOJIS IN THE LAW

~_(ツ)_/~



EMOJI EVIDENCE

A Delaware judge interpreted a winking emoticon as a menacing signal. 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

In a case before the Supreme Court, the 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. The court, for other reasons, vacated his original conviction. *Elonis v. United States*, 135 S. Ct. 2001 (2015). When the case was remanded, the appeals court upheld his conviction because the jury could easily conclude that the inserted 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.
- Court held: "This statement on its face cannot be taken seriously as asserting a fact. The use of the ":P" emoticon makes it patently clear that the commenter was making a joke. As noted earlier, a ":P" emoticon is used to represent a face with its tongue sticking out to denote a joke or sarcasm. Thus, a reasonable reader could not view the statement as defamatory."



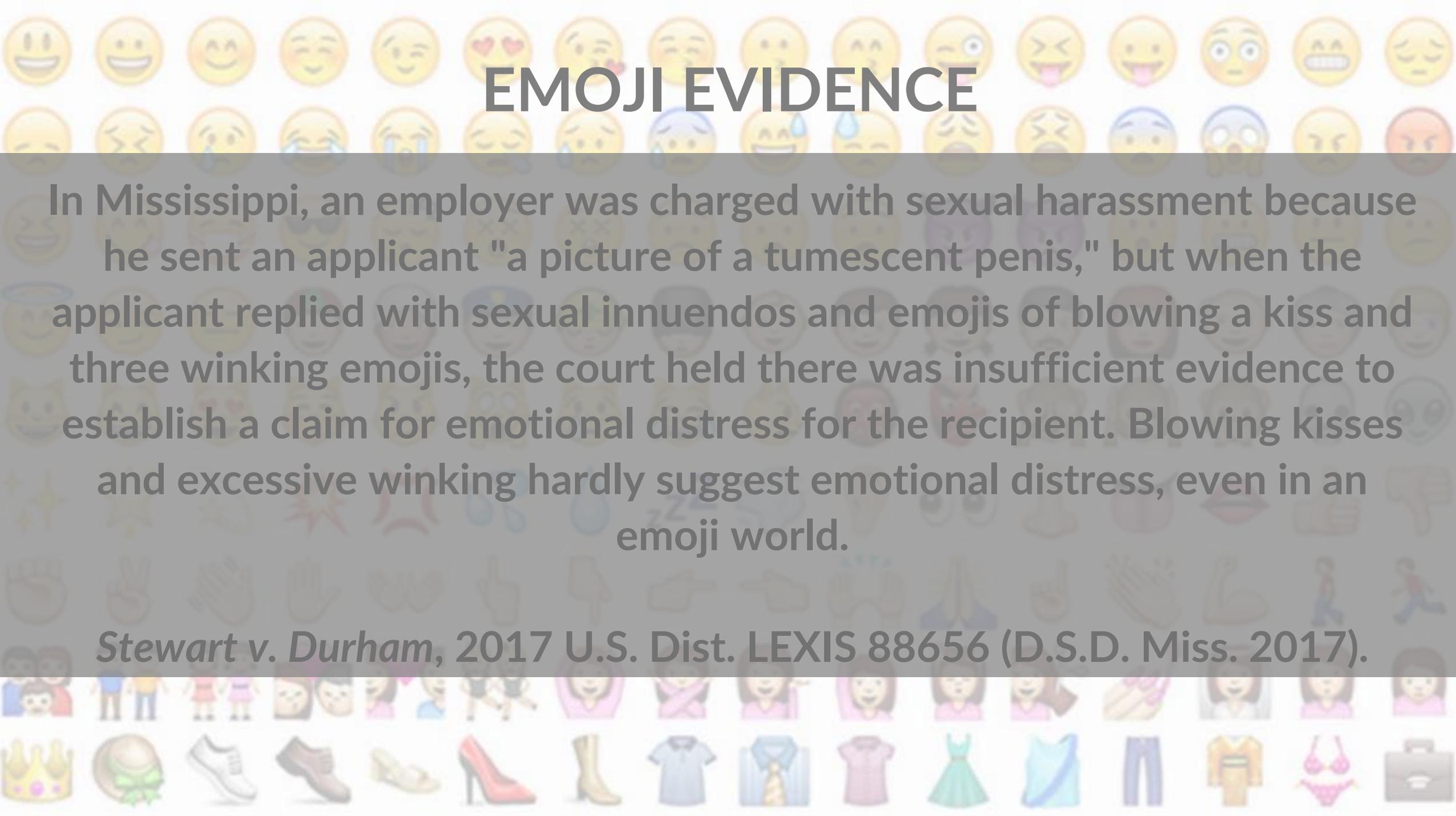
They are only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets :P



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

In Mississippi, an employer was charged with sexual harassment because he sent an applicant "a picture of a tumescent penis," but when the applicant replied with sexual innuendos and emojis of blowing a kiss and three winking emojis, the court held there was insufficient evidence to establish a claim for emotional distress for the recipient. 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).

EMOJI EVIDENCE

The following text message was interpreted by a court in Israel to indicate acceptance of a proposed residential lease:

“Good morning  interested in the house    

just need to discuss the details ... When's a good time for you?”

**ANY
QUESTIONS?**



Traci I. Park, Partner



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