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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER GARNIER; KIMBERLY GARNIER, *Plaintiffs-Appellees / Cross-Appellants,* v. MICHELLE O'CONNOR-RATCLIFF; T.J. ZANE, *Defendants-Appellants / Cross-Appellees.*	Nos. 21-55118, 21-55157 D.C. No. 3:17-cv-02215-BEN-JLB OPINION

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Argued and Submitted March 11, 2022
Pasadena, California

Filed July 27, 2022

Before: Marsha S. Berzon, Richard C. Tallman, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Berzon

SUMMARY*

Civil Rights

The panel affirmed the district court's bench trial judgment in favor of plaintiffs in an action brought pursuant to 42 U.S.C. § 1983 alleging that two members of the Poway Unified School District Board of Trustees violated plaintiffs' First Amendment rights by ejecting plaintiffs from social media pages that the Trustees had used to communicate with constituents about public issues.

The panel noted that plaintiffs' claims presented an issue of first impression in this Circuit: whether a state official violates the First Amendment by creating a publicly accessible social media page related to his or her official duties and then blocking certain members of the public from that page because of the nature of their comments.

The panel held that, under the circumstances presented here, the Trustees acted under color of state law by using their social media pages as public fora in carrying out their official duties. The panel further held that, applying First Amendment public forum criteria, the restrictions imposed on the plaintiffs' expression were not appropriately tailored to serve a significant governmental interest and so were invalid. The panel concluded that the Trustees violated plaintiffs' First Amendment rights and that the district court was therefore correct to grant plaintiffs declaratory and injunctive relief.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel rejected the Trustees' assertion that the dispute was moot because after plaintiffs filed their lawsuit, the Trustees began using a word filter on Facebook to prevent any new comments from being posted on their Facebook pages, thereby closing the Facebook pages as public fora. The panel held that: (1) using a word filter on Facebook would not affect plaintiff Christopher Garnier's claims involving being blocked from Twitter; (2) the word filter limit did not change Facebook's non-verbal "reaction" feature; and (3) the Trustees failed to carry their burden of showing they would not, in the future, remove the word filters from their Facebook pages and again open those pages up for verbal comments from the public.

The panel next rejected the Trustees' assertion that creating, maintaining, and blocking plaintiffs from their social media accounts did not constitute state action under § 1983. Both through appearance and content, the Trustees held their social media pages out to be official channels of communication with the public about the work of the Poway Unified School District Board. Given the close nexus between the Trustees' use of their social media pages and their official positions, the Trustees in this case were acting under color of state law when they blocked plaintiffs.

The panel rejected the Trustees' assertion that blocking plaintiffs was a narrowly tailored time, place, or manner restriction. Even if plaintiffs' comments did interfere with the Trustees' interests in facilitating discussion or avoiding disruption on their social media pages, the Trustees' decision to block plaintiffs burdened substantially more speech than was necessary and therefore was not narrowly tailored.

Addressing plaintiffs' cross appeal, the panel held that the district court correctly concluded that at the time the Trustees blocked plaintiffs, it was not clearly established that plaintiffs had a First Amendment right to post comments on a public official's Facebook or Twitter page. The district court therefore did not err by granting qualified immunity to the Trustees as to plaintiffs' damages claim. Finally, the panel determined that it lacked jurisdiction to consider whether the district court erred by denying, without prejudice, defendants' motion to retax costs.

COUNSEL

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OPINION

BERZON, Circuit Judge:

Today, social media websites like Facebook and Twitter are, for many, "the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Accordingly, social media sites "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.*

Unsurprisingly, social media's capacity for facilitating communication and stirring public debate has not been lost on public officials. From local county supervisors and state representatives to the President of the United States, elected officials across the country increasingly rely on social media both to promote their campaigns and, after election, to communicate with constituents and seek their input in carrying out their duties as public officials.

This case concerns a dispute arising from two public officials' use of social media to communicate with constituents about public issues. Beginning around 2014, two members of the Poway Unified School District ("PUSD" or the "District") Board of Trustees, Michelle O'Connor-Ratcliff and T.J. Zane (together, "the Trustees"), created public Facebook and Twitter pages to promote their campaigns for office. After they won and assumed office, the two used their public social media pages to inform constituents about goings-on at the School District and on the PUSD Board, to invite the public to Board meetings, to solicit input about important Board decisions, and to communicate with parents about safety and security issues at the District's schools.

But public engagement with their social media pages was not all 👍s and ❤s. Two parents of children in the School District, Christopher and Kimberly Garnier, frequently left comments critical of the Trustees and the Board on the Trustees' pages, sometimes posting the same long criticisms repeatedly. After deleting or hiding the Garniers' repetitive comments for a time, the Trustees eventually blocked the Garniers entirely from their social media pages. The Garniers sued, asserting that

the Trustees violated their First Amendment rights by ejecting them from the social media pages. After a bench trial, the district court agreed with the Garniers that their First Amendment rights had been violated. Both parties appeal.

The Garniers' claims present an issue of first impression in this Circuit: whether a state official violates the First Amendment by creating a publicly accessible social media page related to his or her official duties and then blocking certain members of the public from that page because of the nature of their comments. For the following reasons, we hold that, under the circumstances presented here, the Trustees have acted under color of state law by using their social media pages as public fora in carrying out their official duties. We further hold that, applying First Amendment public forum criteria, the restrictions imposed on the Garniers' expression are not appropriately tailored to serve a significant governmental interest and so are invalid. We therefore affirm the district court judgment.

I. BACKGROUND

A. Facts

Michelle O'Connor-Ratcliff and T.J. Zane successfully ran for election to the PUSD Board of Trustees in November 2014, positions they still hold. In addition to their private Facebook pages, which they shared only with family and friends, O'Connor-Ratcliff and Zane created public Facebook pages to promote their political campaigns. In 2016, O'Connor-

Ratcliff also created a public Twitter page related to her activities as a PUSD trustee.[1]

Only the Trustees could create original "posts" on their public Facebook pages. Members of the public who chose to like or follow the public pages were able to post "comments" beneath the Trustees' posts. Viewers could also register non-verbal emoticon "reactions" to posts, such as a "thumbs-up" reaction to "like" the post, a heart, or an angry face. Facebook automatically truncates lengthy comments that a Facebook user makes on another user's posts. Viewers of the post on which the comment was made must click a "See More" button on the comment to read more than the first few lines of a comment's text. Accordingly, viewers of the Trustees' Facebook pages could easily scroll past the truncated version of long comments they did not wish to read. Unlike on Facebook, when viewing another person's Twitter profile, comments left by other Twitter users on the account owner's posts—called "replies," rather than comments—are not immediately visible. To see those replies, viewers must click on the specific Tweet and then scroll down to see individual replies.

Both Facebook and Twitter provide the Trustees with some ability to moderate the content of comments on their pages. Although the Trustees cannot turn off comments on either platform, they can "delete" or "hide" individual comments, thereby removing them entirely or making them visible only to the Trustee and the person who posted the

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[1] Zane's Twitter page is not at issue in this appeal.

comment.[2] Additionally, the Trustees can limit verbal comments by using Facebook's "word filter" function, which allows a page owner to create a list of words that, if used in a comment, will prevent the comment from appearing beneath the page owner's post.

The Trustees can also "block" Facebook and Twitter users. Blocking a Facebook user prevents that user from commenting on or registering a non-verbal reaction to the posts on the blocker's page, but the user is still able to continue viewing the public Facebook page. In contrast, on Twitter, once a user has been "blocked," the individual can neither interact with nor view the blocker's Twitter feed.

Although before assuming office, the Trustees originally used their social media pages to promote their campaigns, they continued to use those pages to post content related to PUSD business and the activities of the Board after winning their elections. In the "About" section of her public Facebook page, O'Connor-Ratcliff described herself as a "Government Official," listed her "Current Office" as President of the PUSD Board of Education, and provided a link to her PUSD official email address. Zane titled his Facebook page "T.J. Zane, Poway Unified School

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[2] At the time the Garniers filed their lawsuit, Twitter did not permit users to hide other users' replies to their Tweets without blocking those users entirely. Twitter adopted a reply-hiding feature in 2019. Kayla Yurieff, *Twitter Now Lets You Hide Replies to Your Tweets*, CNN Bus. (Nov. 21, 2019), https://www.cnn.com/2019/11/21/tech/twitter-hide-replies/index.html; *see also About Replies and Mentions*, Twitter Help Ctr., https://help.twitter.com/en/using-twitter/mentions-and-replies#hidden-reply-video (last visited June 14, 2022).

District Trustee," and in the "About" section, he described his Facebook as "the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information." Like O'Connor-Ratcliff, Zane described himself as a "Government Official," and he described his interests as including "being accessible and accountable; retaining quality teachers; increasing transparency in decision making; preserving local standards for education; and ensuring our children's campus safety."

Some of the Trustees' posts described visits to PUSD's schools and promoted the achievements of the District's students and teachers. In other posts, O'Connor-Ratcliff and Zane reported on PUSD Board-related business. For instance, on several occasions, O'Connor-Ratcliff posted announcements soliciting students and community members to apply for representative positions with the PUSD Board, including the PUSD Student Board of Education, the Budget Review Advisory Committee, and the Educational Technology Advisory Committee. The Trustees also posted information about PUSD's Local Control Accountability Plan ("LCAP")—a three-year budgetary plan required by California law "that describes the goals, actions, services, and expenditures to support positive student outcomes that address state and local priorities."[3] *See* Cal. Educ. Code § 52060. In those posts, the Trustees invited the public to fill out surveys related to the LCAP formulation process, shared information about

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[3] *See Local Control and Accountability Plan (LCAP)*, Cal. Dep't of Educ. (Apr. 13, 2022), https://www.cde.ca.gov/re/lc/.

in-person community fora related to LCAP planning, and reported on the plans ultimately adopted by the Board.

Additionally, the Trustees posted about the PUSD Board's superintendent hiring and firing decisions, including announcing the Board's decision to terminate then- Superintendent John Collins, inviting members of the public to fill out online surveys and attend community fora regarding the selection of a new superintendent, and providing updates regarding superintendent applicants and the ultimate hiring decision. The Trustees also posted reminders to the public about upcoming PUSD Board meetings and regularly shared their own recaps of important issues discussed at Board meetings, such as bond issuance decisions, employee contract negotiations, and priorities for the upcoming school year.

Occasionally, the Trustees also used their social media pages to alert the public about safety and security issues at PUSD. For instance, Zane posted about lockdowns following threats to students, an active shooter incident near one PUSD school, and an ongoing brush fire that forced the evacuation of another PUSD school.

Neither O'Connor-Ratcliff nor Zane established any rules of etiquette or decorum regulating how the public was to interact with their social media accounts. There were, for example, no size or subject limits set for comments. The Trustees both occasionally solicited feedback from constituents through their posts or responded to constituent questions and comments. For instance, in a post

providing a summary of important issues discussed at a PUSD Board meeting—one in a series of posts O'Connor-Ratcliff called "The Board according to Michelle"—O'Connor-Ratcliff noted that she had "received some good comments" to prior posts and had "made some changes to the structure" of her Board meeting summaries in response to those comments. In June 2017, Zane posted a San Diego Union-Tribune editorial about PUSD's move from at-large voting to a single-member district system, noting that he "agree[d] with this editorial" and asking constituents, "what say you?"

Among the constituents who frequently commented on the Trustees' social media pages were Christopher and Kimberly Garnier. The Garniers, who have children attending PUSD schools, have for years been active members of the PUSD community. In the years leading up to the dispute at issue in this case, the Garniers were especially vocal critics of the Board, particularly regarding race relations in the District, and alleged financial wrongdoing by then-Superintendent John Collins.[4] To express their concerns about these and other issues, the Garniers regularly attended public meetings of the PUSD Board of Trustees, emailed PUSD Trustees regarding their concerns, and met with individual Trustees.

Over time, the Garniers became frustrated with the Trustees' unresponsiveness in these encounters. Starting sometime in 2015, the Garniers began

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[4] Relations between the Garniers and PUSD further soured around 2014. Following two incidents involving Christopher Garnier, District officials and the Garniers filed a series of legal actions against each another.

commenting on the Trustees' social media posts. The Garniers' social media comments did not use profanity or threaten physical harm, and almost all of their comments related to PUSD. But the Garniers' comments were often quite lengthy and were frequently repetitive of other comments they had posted on the Trustees' social media communications. For instance, Christopher Garnier posted nearly identical comments on 42 separate posts O'Connor-Ratcliff made to her Facebook page. On one occasion, within approximately ten minutes Christopher Garnier posted 226 identical replies to O'Connor-Ratcliff's Twitter page, one to each Tweet O'Connor-Ratcliff had ever written on her public account. Although there was some variation in their comments, the Garniers' complaints primarily concerned alleged wrongdoing by Superintendent John Collins and race relations at PUSD.

Frustrated with the repetitive nature of the Garniers' comments, the Trustees began deleting or hiding the comments from their Facebook pages. Later, tired of monitoring and deleting or hiding the Garniers' comments individually, the Trustees took more decisive action: Around October 2017, O'Connor-Ratcliff blocked both the Garniers from her Facebook page and blocked Christopher Garnier from her Twitter page. Zane likewise blocked the Garniers from his Facebook page.[5]

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[5] At trial, Zane maintained that he never blocked the Garniers from his public Facebook page, only from his personal pages. Screenshots of Christopher Garnier's view of Zane's page show, however, that the comment box and the emoticon reaction features, which appear underneath posts when a user is not

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 filter.[6] The Trustees' use of word filters as a practical matter eliminated all new verbal comments from the Facebook posts, but did not affect viewers' abilities to register non- verbal reactions, such as "liking" their posts with a thumbs- up symbol or selecting another one of Facebook's reaction buttons. Because they were blocked, the Garniers were unable to leave these nonverbal reactions on the Trustees' Facebook pages.

B. Procedural History

After the Trustees blocked the Garniers from their social media pages, the Garniers filed suit against the Trustees under 42 U.S.C. § 1983, seeking damages and declaratory and injunctive relief. As relevant here, the Garniers alleged that the Trustees' social media pages constitute public fora and that, by

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blocked, were disabled. Although Kimberly Garnier was blocked from Zane's public Facebook page at the time that the Garniers filed this lawsuit, the district court found that Zane had unblocked her shortly before trial.

[6] It is not clear exactly when O'Connor-Ratcliff began using word filters on her Facebook page. She testified that she believed she began using word filters sometime in 2017, although she was not certain. Screenshots of her Facebook page in the record show that the public could still leave comments on her page as of September 2017.

blocking them, the Trustees violated the Garniers' First Amendment rights.

After discovery, the Trustees moved for summary judgment. The district court granted the Trustees qualified immunity as to the Garniers' damages claims but otherwise permitted the case to proceed. On the merits, the district court concluded that O'Connor-Ratcliff and Zane acted under color of state law for purposes of 42 U.S.C. § 1983 when they banned the Garniers from their social media pages, noting that the Trustees' "posts were linked to events which arose out of their official status as PUSD Board members," that the content of their posts "went beyond their policy preferences or information about their campaigns for reelection," and that "the content of many of their posts was possible because they were 'clothed with the authority of state law.'" The district court next concluded that the comment portions of the Trustees' public social media pages were designated public fora and that a trial was necessary to determine disputed issues of fact as to whether the Trustees' blocking of the Garniers was a reasonable, content-neutral restriction on repetitive comments.

The case proceeded to a two-day bench trial. Both the Garniers and the Trustees testified. After trial, the district court issued findings of fact and conclusions of law and awarded declaratory and injunctive relief to the Garniers. The district court concluded that although Zane had unblocked Kimberly Garnier on Facebook a few days before trial, her claims against Zane were not moot because it was "not absolutely clear that Zane could not block Kimberly Garnier again." The district court next determined that the Trustees' decision to block the

Garniers was content neutral and intended "to enforce an unwritten rule of decorum prohibiting repetitious speech on their social media pages." The district court nevertheless granted judgment to the Garniers because blocking them indefinitely was not narrowly tailored to the avoidance of repetitive comments on the Trustees' pages. The district court also taxed costs in favor of the Garniers and denied without prejudice the Trustees' motion to re-tax costs, noting that they could re- file their motion after appeal.

The Trustees appealed, challenging both the district court's judgment and the decision to award costs to the Garniers. The Garniers cross-appealed, arguing that the district court erred by granting qualified immunity to the Trustees as to the Garniers' damages claims.

II. DISCUSSION

On appeal, the Trustees contend that they closed any public fora they may have created on their social media pages by blocking almost all comments on their posts through the use of word filters, mooting the dispute; that creating, maintaining, and blocking the Garniers from their social media accounts did not constitute state action under § 1983; and that, in any event, blocking them indefinitely is a narrowly tailored time, place, or manner restriction. We reject these arguments and affirm.

A. Mootness

We first address the Trustees' contention that this case is moot.

As described, sometime after the Garniers filed their lawsuit, the Trustees began using the word filter function on Facebook to prevent any new comments

from being posted on their Facebook pages. The Trustees assert that, by implementing word filters, they effectively closed their Facebook pages as designated public fora, and that the Garniers therefore "do not have standing" to challenge the decision to block them. Although the Trustees' use of word filters on Facebook is relevant in some respects to the First Amendment analysis of the Garniers' claims, *see infra* Section II.C., we disagree with the Trustees that the use of word filters on Facebook moots this case.

First, in addition to blocking the Garniers on Facebook, O'Connor-Ratcliff also blocked Christopher Garnier from viewing her Twitter page or replying to her Tweets. The Trustees testified at trial only that they used word filters on Facebook. There is no evidence in the record that O'Connor-Ratcliff similarly could or did restrict public comments on her Twitter page. So, whatever changes the Trustees may have made to their Facebook pages, such changes would not affect Christopher Garnier's claim against O'Connor-Ratcliff for blocking him from her Twitter page.

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,

notwithstanding the Trustees' adoption of word filters. *See McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015) (quoting *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 559 (9th Cir. 2009)). The Garniers' case therefore retains "its character as a present, live controversy." *Id.* (quoting *Siskiyou*, 565 F.3d at 559).

Last, and independently dispositive, the voluntary nature of the Trustees' use of word filters means the dispute here is not moot with respect to the Facebook pages or with respect to the blocking of verbal comments, as voluntary cessation of allegedly unlawful activity ordinarily does not moot a case. "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Accordingly, the party asserting mootness following the voluntary cessation of allegedly illegal conduct bears the "'heavy burden' of making 'absolutely clear' that it could not revert" to its prior behavior. *Fikre v. FBI*, 904 F.3d 1033, 1038 (9th Cir. 2018) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017)).

The Trustees have not carried that burden. They have provided no assurance that they will not, in the future, remove the word filters from their Facebook pages and again open those pages for verbal comments from the public. To the contrary, at trial, O'Connor-Ratcliff contemplated the possibility that she might one day change her Facebook page to again "have some back and forth with my constituents." And although the Trustees have, for now, effectively

precluded any new comments on their Facebook pages, they remain "practically and legally 'free to return to [their] old ways' despite abandoning them in the ongoing litigation." *Id.* at 1039 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).[7] We therefore have jurisdiction to consider the legality of the Trustees' decision to block the Garniers on Facebook both before and after the Trustees began using word filters.

B. State Action

"To state a claim under § 1983, a plaintiff must allege the violation of" a federal right "committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Whether a government actor "is acting under color of law is not always an easy call, especially when the conduct is novel," and "there is no rigid formula for measuring state action for purposes of section 1983 liability." *Gritchen v. Collier*, 254 F.3d 807, 813 (9th Cir. 2001) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)).[8] Rather,

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[7] For similar reasons, Zane's decision to unblock Kimberly Garnier from his Facebook page on the eve of trial does not moot her claim against him. Zane has put in place no "procedural safeguards" to ensure that he will not again block Kimberly Garnier from his Facebook page. *See Fikre*, 904 F.3d at 1039 (citations omitted). His decision, without explanation, to unblock Kimberly Garnier just days before trial is not the kind of "unambiguous renunciation of [his] past actions" that "can compensate for the ease with which [he] may relapse into them." *Id.*

[8] Because the "'color of law' requirement of § 1983 is treated as the equivalent of the 'state action' requirement under the Constitution," *Jensen v. Lane County*, 222 F.3d 570, 574 (9th Cir. 2000), we use those phrases interchangeably in this opinion.

determining whether a public official's conduct constitutes state action "is a process of 'sifting facts and weighing circumstances.'" *Id.* (quoting *McDade*, 223 F.3d at 1139). "[N]o one fact can function as a necessary condition across the board." *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 751 (9th Cir. 2020) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)), *cert. denied*, 142 S. Ct. 69 (2021). "At bottom, the inquiry is always whether the defendant has exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 748 (internal quotation marks omitted) (quoting *West*, 487 U.S. at 49).

Although "[w]hat is fairly attributable" to the state "is a matter of normative judgment, and the criteria lack rigid simplicity," *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (quoting *Brentwood*, 531 U.S. at 295), we have recognized "at least four different criteria, or tests, used to identify state action," the satisfaction of any one of which "is sufficient to find state action, so long as no countervailing factor exists," *id.* Those tests include: the "public function test," applicable when private individuals are "endowed by the State with powers or functions" that are "both traditionally and exclusively governmental" and therefore "become agencies or instrumentalities of the State," *id.* at 1093 (quoting *Lee v. Katz*, 276 F.3d 550, 554–55 (9th Cir. 2002)); the "joint action test," applicable when "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity," *id.* (quoting *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1486 (9th Cir.

1995)); the "compulsion test," applicable when "the coercive influence or 'significant encouragement' of the state effectively converts a private action into a government action," *id*. at 1094 (quoting *Sutton v. Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 842 (9th Cir. 1999)); and the "nexus test," applicable when there is "such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself," *id*. at 1094–95 (quoting *Brentwood*, 531 U.S. at 295). The fourth category most closely fits the facts of this case. Whichever test applies, "the central question remains whether 'the alleged infringement of federal rights [is] fairly attributable to the government.'" *Id*. at 1096 (alteration in original) (quoting *Sutton*, 192 F.3d at 835).

1. State Action Nexus Analysis

We have never addressed whether a public official acts under color of state law by blocking a constituent from a social media page. Doing so now, we conclude that, given the close nexus between the Trustees' use of their social media pages and their official positions, the Trustees in this case were acting under color of state law when they blocked the Garniers.

The Trustees' use of their social media accounts was directly connected to, although not required by, their official positions. "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *McDade*, 223 F.3d at 1139. That is why "seemingly private behavior may be fairly treated as that of the State" if there is "a close nexus between the

State and the challenged action." *Kirtley*, 326 F.3d at 1094–95 (quoting *Brentwood*, 531 U.S. at 295).

Viewed in this light, the line of precedent most similar to this case concerns whether off-duty governmental employees are acting under color of state law. As here, the focus in such cases is on whether the public official's conduct, even if "seemingly private," is sufficiently related to the performance of his or her official duties to create "a close nexus between the State and the challenged action," or whether the public official is instead "pursu[ing] private goals via private actions." *Naffe v. Frey*, 789 F.3d 1030, 1037–38 (9th Cir. 2015) (quoting *Brentwood*, 531 U.S. at 295).

Synthesizing such cases, *Naffe* explained that, when a "state employee is off duty, whether he or she 'is acting under color of state law turns on the nature and circumstances of the'" employee's conduct "and the relationship of that conduct to the performance of his official duties." *Id.* at 1036 (quoting *Anderson v. Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006)). Specifically, *Naffe* held that a "state employee who is off duty nevertheless acts under color of state law when (1) the employee 'purport[s] to or pretend[s] to act under color of law,' (2) his 'pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others,' and (3) the harm inflicted on plaintiff 'related in some meaningful way either to the officer's governmental status or to the performance of his duties.'" *Id.* at 1037 (alterations in original) (first quoting *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 838 (9th Cir. 1996); then quoting *Anderson*, 451 F.3d at 1069; and then

quoting *Martinez v. Colon*, 54 F.3d 980, 987 (1st Cir. 1995)).

For example, an off-duty jail officer acted under color of state law while assaulting someone when he "prevented bystanders from intervening in his attack by claiming that he was 'a cop.'" *Id*. at 1037 (quoting *Anderson*, 451 F.3d at 1065–66). By asserting that his actions were "police business," the officer invoked "his law enforcement status," thereby creating a sufficiently "close nexus between his work at the jail" and the assault to constitute state action. *Id*. (quoting *Anderson*, 451 F.3d at 1066). In contrast, an off- duty officer did not act under color of state law while attempting to rob someone when, at the time of the robbery, he "was attired not in a uniform but in blue jeans," "wore a mask, sunglasses and cap in an attempt to conceal his identity," "did not display a badge," and "denied being a police officer." *Stanewich*, 92 F.3d at 833–34, 838. Under those circumstances, the nexus between the officer's actions and his official duties was insufficient because "[a]t no point did [he] purport to be acting as a policeman." *Id*. at 839. What matters, in other words, is whether the state official "abused her responsibilities and purported or pretended to be a state officer" at the time of the alleged constitutional violation. *Naffe*, 789 F.3d at 1036 (quoting *McDade*, 223 F.3d at 1141).

Applying *Naffe*'s framework here, O'Connor-Ratcliff's and Zane's use of their social media pages qualifies as state action under § 1983.

First, the Trustees "purport[ed] . . . to act in the performance of [their] official duties" through the use of their social media pages. *Anderson*, 451 F.3d at

1069 (quoting *McDade*, 223 F.3d at 1140). The Trustees identified themselves on their Facebook pages as "government official[s]," listed their official titles in prominent places on both their Facebook and Twitter pages, and, in O'Connor-Ratcliff's case, included her official PUSD email address in the page's contact information. Zane, for his part, wrote that his Facebook page was "the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information."

Consistent with the Trustees' official identifications on their social media pages, the content of the Trustees' pages was overwhelmingly geared toward "provid[ing] information to the public about" the PUSD Board's "official activities and solicit[ing] input from the public on policy issues" relevant to Board decisions. *Davison v. Randall (Davison II)*, 912 F.3d 666, 680 (4th Cir. 2019). O'Connor-Ratcliff and Zane regularly posted about school board meetings, surveys related to school district policy decisions, the superintendent hiring process, budget planning, and public safety issues. So, both through appearance and content, the Trustees held their social media pages out to be official channels of communication with the public about the work of the PUSD Board.

Second, the Trustees' presentation of their social media pages as official outlets facilitating their performance of their PUSD Board responsibilities "had the purpose and effect of influencing the behavior of others." *Naffe*, 789 F.3d at 1037 (quoting *Anderson*, 451 F.3d at 1069). Zane's Facebook page, as of 2017, had nearly 600 followers, and O'Connor-Ratcliff's had nearly 300. Both Trustees actively solicited constituent input about official PUSD

matters, including encouraging constituents to mark their calendars for upcoming Board meetings, to fill out surveys relating to Board decision-making, and to apply for volunteer committees run by the Board. And both Trustees sought feedback from constituents, and responded to their comments. It was by "invoking" their "'governmental status' to influence the behavior of those around" them that the Trustees were able to muster this kind of public engagement with their social media pages. *Anderson*, 451 F.3d at 1069.

Finally, the Trustees' management of their social media pages "related in some meaningful way" to their "governmental status" and "to the performance of [their] duties." *Naffe*, 789 F.3d at 1037 (quoting *Anderson*, 451 F.3d at 1069). The Trustees used their social media pages to communicate about, among other things, the selection of a new superintendent, the formulation of PUSD's LCAP plan, the composition of PUSD's Budget Advisory Committee, the dates of PUSD Board meetings, and the issues discussed at those meetings. Those posts related directly to the Trustees' duties. More generally, the Trustees' use of social media to keep the public apprised of goings-on at PUSD accords with the Board's power to "[i]nform and make known to the citizens of the district, the educational programs and activities of the schools therein." Cal. Educ. Code § 35172(c).[9]

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[9] *See also Role of the Board*, BB 9000(a), Poway Unified Sch. Dist. (adopted Aug. 9, 2018), https://www.powayusd.com/PUSD/media/Board-Images/BoardPolicy/9000/BB-9000-Role-of-the-Board.pdf (requiring the Board to "ensure that the district is responsive to the values, beliefs, and priorities of the community"

Moreover, "the specific actions giving rise to" the Garniers' claim—the Trustees' blocking of the Garniers from their social media pages—were "linked to events which arose out of [the Trustees'] official status." *Davison II*, 912 F.3d at 681 (quoting *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003)). Although the Garniers' repetitive comments often were not directly responsive to any particular post by the Trustees, their comments predominantly dealt with issues related to the PUSD Board's governance of the District, particularly concerns about race relations in the District and racial disparities in suspension rates between white and black PUSD students, as well as allegations of financial wrongdoing by then-PUSD Superintendent John Collins. And the Trustees' stated reasons for blocking the Garniers, discussed in more detail below, were that the Garniers' comments, in their view, tended to "fill up the page," and detract from the messages they wished to communicate in their posts, many of which pertained to "the performance of [their] official duties." *Naffe*, 789 F.3d at 1036 (quoting *Anderson*, 451 F.3d at 1069). In other words, because the Trustees presented and administered their social media pages as official organs for carrying out their PUSD Board duties, the Trustees' decision to block the Garniers for allegedly interfering with that use of the social media pages "related in some meaningful way either to the [Trustees'] governmental status or

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and to set "the direction for the district through a process that involves the community, parents/guardians, students, and staff").

to the performance of [their] duties." *Id.* at 1037 (quoting *Anderson*, 451 F.3d at 1069).

Even though they clothed their pages in the authority of their offices and used their pages to communicate about their official duties, the Trustees contend that their use of social media did not constitute state action because the pages, they maintain, were personal campaign pages designed only to advance their own political careers, and because PUSD provided no financial support or authorization for the pages. Many of the Trustees' posts did concern workaday visits to schools and the achievements of PUSD's students and teachers, material that could promote the Trustees' personal campaign prospects. But the Trustees' posts about PUSD school activities generally do not read as advertising "campaign promises" kept or touting their own political achievements. After their election in 2014, the Trustees virtually never posted overtly political or self-promotional material on their social media pages. Rather, their posts either concerned official District business or promoted the District generally.

As to the lack of PUSD funding or authorization, the Trustees' pages did not contain any disclaimer that the "statements made on this web site reflect the personal opinions of the author" and "are not made in any official capacity." *Naffe*, 789 F.3d at 1033. To the contrary, both in the appearance and the content of the pages, the Trustees effectively "display[ed] a badge" to the public signifying that their accounts reflected their official roles as PUSD Trustees, whether or not the District had in fact authorized or

supported them. *Id.* at 1036 (quoting *Stanewich*, 92 F.3d at 838).

The Trustees also contend that their use of social media cannot constitute state action because a legislator "may only act at a properly convened meeting of the legislative body and may only offer a matter for consideration or vote on a matter." This argument is unconvincing.

For one thing, the duties of elected representatives extend beyond "participating in debates and voting." *Williams v. United States*, 71 F.3d 502, 507 (5th Cir. 1995); *accord Does 1–10 v. Haaland*, 973 F.3d 591, 600–02 (6th Cir. 2020); *Council on Am. Islamic Rels. v. Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006). In addition to those duties, "a primary obligation" of legislators "in a representative democracy is to serve and respond to [their] constituents." *Ballenger*, 444 F.3d at 665 (quoting *Williams*, 71 F.3d at 507). Likewise, in defining the contours of legislative immunity, we have recognized that "not all governmental acts by a local legislator . . . are necessarily legislative in nature," and that conduct of an "administrative or executive" nature, even if outside a legislator's core duties, may be actionable under § 1983. *Trevino ex rel. Cruz v. Gates*, 23 F.3d 1480, 1482 (9th Cir. 1994) (quoting *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984)).

In any event, the core of our state action inquiry is whether the defendant's conduct is "fairly attributable to the State," *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 923 (1982))—that is, whether there is "such a close nexus between the State and the challenged

action that the seemingly private behavior may be fairly treated as that of the State itself," *Kirtley*, 326 F.3d at 1095 (quoting *Brentwood*, 531 U.S. at 295). By representing themselves to be acting in their official capacities on their social media and posting about matters that directly related to their official PUSD Board duties, the Trustees "exercised power possessed by virtue of state law and made possible only because" they were "clothed with the authority of state law." *Rawson*, 975 F.3d at 748 (internal quotation marks omitted) (quoting *West*, 487 U.S. at 49).

Given all these attributes of the Trustees' social media pages, we hold that the Trustees' maintenance of their social media pages, including the decision to block the Garniers from those pages, constitutes state action under § 1983.

Although the Trustees acted under color of state law in this case, we reiterate that finding state action "is a process of 'sifting facts and weighing circumstances.'" *Gritchen*, 254 F.3d at 813 (quoting *McDade*, 223 F.3d at 1139). Given the fact-sensitive nature of state action analyses, "not every social media account operated by a public official is a government account." *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019), *cert. granted, judgment vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220 (2021). Rather, courts should look to considerations such as "how the official describes and uses the account," "to whom features of the account are made available," and how members of the public and government officials "regard and treat the account." *Id.* In this case, the pertinent factors all indicate that O'Connor-Ratcliff and Zane

unequivocally "cloaked" their social media accounts "with the authority of the state." *Howerton v. Gabica*, 708 F.2d 380, 384–85 (9th Cir. 1983). We hold that the Trustees acted under color of state law when they blocked the Garniers from their social media accounts.

2. Decisions of Other Circuits

In recent years, the Second, Fourth, Sixth, and Eighth Circuits have each addressed claims regarding the blocking of access to government officials' social media pages. Three of those courts' applications of the state action doctrine in those similar cases are consistent with the approach we take here.

In *Davison II*, 912 F.3d 666, the Fourth Circuit held that the Chair of the Loudoun County, Virginia, Board of Supervisors acted under color of state law and violated the First Amendment when she banned a constituent from the "Chair Phyllis J. Randall" Facebook page she created the day before she took office, *id.* at 672–73. Like the posts to the Trustees' pages here, Randall's posts to her "governmental official" Facebook page dealt "with numerous aspects of Randall's official responsibilities," including posting "to notify the public about upcoming Loudoun Board meetings, and the subjects to be discussed during those meetings," "to inform Loudoun County residents about significant public safety issues," and "to communicate with constituents regarding which municipal streets required plowing" following a large snowstorm. *Id.* at 673–74. Additionally, like the Trustees here, Randall used her page to invite members of the public to participate in certain constituent commissions and "to advise the public regarding official actions taken by the Loudoun

Board." *Id*. at 674. *Davison II* also noted that Randall identified herself as a "government official" on the page and listed her official county email address in the page's contact info. *Id*.

Citing, as we have, cases involving the conduct of off-duty state officers, the court concluded that Randall's "purportedly private actions" bore a "sufficiently close nexus" with the Board of Supervisors "to satisfy Section 1983's color-of-law requirement." *Id*. at 680 (quoting *Rossignol*, 316 F.3d at 524). Randall's actions, *Davison II* emphasized, were "linked to events which arose out of [her] official status." *Id*. (quoting *Rossignol*, 316 F.3d at 524). In particular, *Davison II* stressed that Randall "used the Chair's Facebook Page 'as a tool of governance'" by providing information to the public about the Board's official activities, soliciting input from constituents on policy issues, and keeping the public informed about public safety issues. *Id*. (quoting *Davison v. Loudoun Cnty. Bd. of Supervisors (Davison I)*, 267 F. Supp. 3d 702, 713 (E.D. Va. 2017)). Additionally, by listing her title and official contact information and categorizing the page as that of a "government official," Randall "swathe[d] the" page "in the trappings of her office." *Id*. at 680–81 (quoting *Davison I*, 267 F. Supp. 3d at 714). The Fourth Circuit concluded that because Randall "clothed the Chair's Facebook Page in 'the power and prestige of h[er] state office" and administered the page to "perform[] actual or apparent dut[ies] of h[er] office," a "private citizen could not have created and used" the page in the same manner that she did. *Id*. at 681 (alterations in original) (first quoting *Harris v. Harvey*, 605 F.2d 330,

337 (7th Cir. 1979); and then quoting *Martinez*, 54 F.3d at 986).

The Second Circuit conducted a similar analysis in *Knight*, 928 F.3d 226.[10] *Knight* held that the President acted in a governmental capacity when he blocked followers of his Twitter account because they posted Tweets critical of him and his policies. 928 F.3d at 234–36. The court first stressed the "substantial and pervasive government involvement with, and control over," the President's Twitter account. *Id.* at 235. *Knight* emphasized that the account was "presented by the President" as "belonging to, and operated by, the President" and was registered to "Donald J. Trump, '45th President of the United States of America, Washington, D.C.'" *Id.* The President's Tweets were also "official records that must be preserved under the Presidential Records Act." *Id.*

Knight further explained that the President had used his Twitter account "as a channel for communicating and interacting with the public about his administration," including to announce "matters related to official government business," "to engage with foreign leaders," and "to announce foreign policy decisions and initiatives." *Id.* at 235–36. The account's "like," "retweet," and "reply" functions also helped the President "to understand and to evaluate

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[10] Although the Supreme Court vacated *Knight* as moot after President Donald Trump left office, the opinion nonetheless has persuasive value. *See Spears v. Stewart*, 283 F.3d 992, 1017 n.16 (9th Cir. 2002) (en banc); *DCD Programs, Ltd. v. Leighton*, 90 F.3d 1442, 1448 n.9 (9th Cir. 1996).

the public's reaction to what he says and does." *Id*. at 236.

Altogether, the court determined, these facts established that the account was "an important tool of governance and executive outreach," and therefore that the evidence of "the public, non-private nature of the Account" was "overwhelming." *Id*. The court acknowledged, as we have, that "not every social media account operated by a public official is a government account," and instructed that courts should look to "how the official describes and uses the account," "to whom features of the account are made available," and "how others . . . regard and treat the account." *Id*.

In contrast to *Davison II* and *Knight*, the Eighth Circuit in *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021), concluded that Missouri state representative Cheri Toalson Reisch was not acting under color of state law when she blocked a constituent from her Twitter account, *id*. at 823. The court reasoned that Reisch created her Twitter account "when she announced her candidacy for state representative" and that, after taking office, Reisch continued to run the Twitter account "in a private capacity, namely, as a campaigner for political office" rather than as a public official. *Id*. at 823–25.

In support of its conclusion, the court cited, for instance, one Tweet in which Reisch stated she was "proud to deliver results during the first half of session" and another in which she asserted she was "making good on" a promise "to improve our #economy." *Id*. at 824. In contrast to the account in *Davison II*, the Eighth Circuit concluded, the "overall

theme of Reisch's tweets—that[] she's the right person for the job—largely remained the same after her electoral victory" and focused on touting "her success in fulfilling" promises made on the campaign trail. *Id.* at 826. Although Reisch "occasionally used the account to provide updates on where certain bills were in the legislative process or the effect certain recently enacted laws had had on the state," those Tweets were "fully consistent with Reisch using the account to tout her record." *Id.*

Campbell acknowledged that "Reisch's official duties as a representative extend beyond voting or participating in committee meetings and include things like communicating with constituents about legislation." *Id.* at 827. And the court recognized that a "private account can turn into a governmental one if it becomes an organ of official business." *Id.* at 826. But the majority in *Campbell* ultimately concluded "that is not what happened here." *Id.* Reisch's "sporadic engagement in" communication about legislation did "not overshadow" her otherwise clear "effort to emphasize her suitability for public office." *Id.* at 827. Unlike the Facebook page in *Davison II*, Reisch's page contained only "occasional stray messages that might conceivably be characterized as conducting the public's business." *Id.* "In short," *Campbell* concluded Reisch's Twitter account was "more akin to a campaign newsletter than to anything else," and so Reisch retained the "prerogative to select her audience and present her page as she sees fit." *Id.*

Although the results in *Davison II* and *Knight*, on the one hand, and *Campbell*, on the other, were different, *Campbell* expressly applied the approach adopted in *Davison II* and *Knight*, so the mode of

analysis in these cases was generally consistent.[11] Applying that approach, we conclude that the Trustees' administration of their social media accounts in this case much more closely resembles the use of the accounts in *Davison II* and *Knight* than the use of the account in *Campbell*, as recounted by the majority opinion.

First, as in *Davison II* and *Knight*, the Trustees presented their social media pages as belonging to "government officials." O'Connor-Ratcliff listed her official PUSD contact information on her Facebook page and identified herself as "President" of the Poway Unified School District Board of Education on her Twitter page. Zane similarly described his Facebook page as "the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information." *See Davison II*, 912 F.3d at 674; *Knight*, 928 F.3d at 235. Moreover, unlike the representative in *Campbell*, who the majority opinion in that case determined used her account not in service of her official duties but rather "as a campaigner for political office," 986 F.3d at 823–25, the Trustees routinely used their social media "as a tool of governance," *Davison II*, 912 F.3d at 680 (quoting *Davison I*, 267 F. Supp. 3d at 713). They posted on their social media pages "to notify the public

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[11] We note that Judge Kelly's dissent in *Campbell* makes a strong case that, applying *Davison II* and *Knight* to the facts of *Campbell*, the conclusion should have been that Reich's blockage of *Campbell* from her Twitter page was state action. *Campbell*, 986 F.3d at 828–29 (Kelly, J., dissenting). For present purposes, however, the pertinence of *Campbell* is that its general approach is in accord with ours and with that in *Davison II* and *Knight*, not whether it was correctly decided on its facts.

about" PUSD Board meetings and the subjects "discussed during those meetings," *id.* at 673, "to inform" parents "about significant public safety issues" such as fires and active shooters, *id.*, to announce "policy decisions and initiatives" such as the selection of a new PUSD superintendent, *Knight*, 928 F.3d at 236, and "to understand and to evaluate the public's reaction to what" they did in office, *id.* at 236.

We note that the Sixth Circuit recently held in *Lindke v. Freed* that city manager James Freed was not a state actor when he blocked a citizen from his public Facebook page, adopting a somewhat different analysis from ours and that of the Second, Fourth, and Eighth Circuits. 37 F.4th 1199, 1201 (6th Cir. 2022). Although the court also applied a nexus test for state action, it expressly "part[ed] ways" with the other Circuits. *Id.* at 1206. In doing so, the Sixth Circuit held inapposite state action cases involving off-duty police officers, on the ground that a police officer's appearance plays a unique role in the ability to invoke state authority. *Id.* Instead, the court relied on prior Sixth Circuit precedents that addressed similar questions by applying a "state-official test," inquiring whether a public official is performing an actual or apparent official duty or whether the action could have been taken without the authority of the person's position. *Id.* at 1202–03. Thus, "[i]nstead of examining a [social media] page's appearance or purpose," the court "focus[ed] on the actor's official duties and use of government resources or state employees." *Id.* at 1206.

We decline to follow the Sixth Circuit's reasoning. Although the uniform of a police officer carries particular authority, our Circuit's analysis of whether

a police officer acts under color of law does not turn only on the person's sporting of a uniform or the person's "appearance" alone. Rather, we consider whether the officer self-identified as a state employee and generally "purported . . . to be a state officer" at the time of the alleged violation, an inquiry that considers actions in addition to appearance. *Naffe*, 789 F.3d at 1036–37 (quoting *McDade*, 223 F.3d at 1141); *see also Stanewich*, 92 F.3d at 833 (noting the officer denied being a police officer and did not show a badge). We thus conclude, as did the Fourth Circuit in *Davison II*, that off-duty officer cases are instructive as to analysis of other state employees' conduct, including in the arena of social media.

In short, we follow the mode of analysis of the Second, Fourth, and Eighth Circuits to hold that the Trustees used their social media accounts as "an organ of official business." *Campbell*, 986 F.3d at 826. As with the Facebook page in *Davison II*, a "private citizen could not have created and used" the Trustees' pages in the manner that they did because the Trustees "clothed" their pages in "the power and prestige of" their offices "and created and administered" the pages "to 'perform[] actual or apparent dut[ies]'" of their offices. 912 F.3d at 681 (alterations in original) (first quoting *Harris*, 605 F.2d at 337; and then quoting *Martinez*, 54 F.3d at 986). Because they so used their social media pages, the Trustees were state actors.

C. First Amendment Violation

As state actors, the Trustees violated the First Amendment when they blocked the Garniers from their social media pages. The interactive sections of

the Trustees' social media accounts constituted public fora. And even assuming that the Trustees blocked the Garniers only to enforce an unspoken, content-neutral rule against repetitive comments, the Trustees' decision to block the Garniers is not sufficiently tailored to a significant governmental interest to pass First Amendment scrutiny.[12]

3. Forum Analysis

The "extent to which the Government may limit access" to a government forum "depends on whether the forum is public or nonpublic." *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)). "A designated public forum exists where 'the government intentionally opens up a nontraditional forum for public discourse.'" *Id.* (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999)). To determine whether the government has created a designated public forum, we look "to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum," as well as "the nature of the property and its compatibility with

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[12] We review constitutional facts de novo in First Amendment cases, conducting "an independent examination of the whole record" to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 742 (9th Cir. 2021) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)). We also review de novo the application of law to facts "on free speech issues." *Lair v. Motl*, 873 F.3d 1170, 1178 (9th Cir. 2017) (quoting *Lair v. Bullock*, 798 F.3d 736, 745 (9th Cir. 2015)).

expressive activity." *Id.* at 1075 (quoting *Cornelius*, 473 U.S. at 802). In a designated public forum, "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions" are "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

A limited public forum, by contrast, is "a sub-category of a designated public forum that 'refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.'" *Hopper*, 241 F.3d at 1074 (alteration in original) (quoting *DiLoreto*, 196 F.3d at 965). The "[s]tandards for inclusion and exclusion" for a limited public forum "must be unambiguous and definite"; without "objective standards, government officials may use their discretion . . . as a pretext for censorship." *Id.* at 1077 (quoting *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 251 (3d Cir. 1998)). In a limited public forum, restrictions on speech and speakers are permissible so long as they are "viewpoint neutral and reasonable in light of the purpose served by the forum." *Id.* at 1074–75 (quoting *DiLoreto*, 196 F.3d at 965). Put another way, the restriction must be "consistent with preserving the property for the purpose to which it is dedicated." *DiLoreto*, 196 F.3d at 967.

Social media websites—Facebook and Twitter in particular—are fora inherently compatible with expressive activity. "While in the past there may have been difficulty in identifying the most important

places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, . . . and social media in particular." *Packingham*, 137 S. Ct. at 1735 (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)). Social media sites allow users "to gain access to information and communicate with one another about it on any subject that might come to mind" and thereby "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* at 1737.

The Trustees contend that they always intended their social media pages to be a "one-way" channel of communication. But what matters in forum analysis "is what the government actually does—specifically, whether it consistently enforces the restrictions on use of the forum that it adopted." *Hopper*, 241 F.3d at 1075. Before the Trustees began using word filters, their social media pages were open and available to the public without any restriction on the form or content of comments. And far from forbidding comments, the Trustees occasionally solicited feedback from constituents through their posts and responded to individuals who left comments. Although the Trustees eventually began deleting or hiding some lengthy or repetitive comments, they never adopted any formal rules of decorum or etiquette for their pages that would be "sufficiently definite and objective to prevent arbitrary or discriminatory enforcement." *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1130 (9th Cir. 2018). The Trustees' suggestion that they had an unspoken policy against repetitive comments does not satisfy the requirement that "[s]tandards for inclusion

and exclusion" "must be unambiguous and definite" to create a limited public forum. *Hopper*, 241 F.3d at 1077 (quoting *Christ's Bride*, 148 F.3d at 251). Even an "abstract policy statement purporting to restrict access to a forum is not enough." *Id*. at 1075. *No* policy statement is surely not enough.

Where, as here, the government has made a forum "available for use by the public" and "has no policy or practice of regulating the content" posted to that forum, it has created a designated public forum. *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001). We conclude that O'Connor-Ratcliff's Twitter page is a designated public forum, and that before the Trustees began using word filters to curtail comments on their Facebook posts, the interactive portions of the Trustees' Facebook pages were designated public fora.

As recounted earlier, sometime after blocking the Garniers from their Facebook pages, the Trustees began using a Facebook feature that allows the administrators of public pages to create a list of words and then filter out any comments that use any word on that list. The Trustees assert that, by implementing word filters, they effectively closed their Facebook pages as public fora. But even with the addition of word filters, members of the public not blocked from the Trustees' pages remain able to register non-verbal "reactions" to the Trustees' posts. The Trustees therefore have not closed the interactive portion of their pages entirely. The Trustees' use of word filters has, however, changed the characteristics of the public forum that now exists on those pages.

That is to say, before adding word filters to their Facebook pages, the Trustees had "no policy or

practice of regulating the content" posted to the fora. *Id*. They have since restricted public interaction with their Facebook pages to the use of Facebook's non-verbal reaction icons. In so doing, the Trustees now "exercise the clear and consistent control" over the interactive portions of their Facebook pages "that our cases require to maintain a limited public forum." *Hopper*, 241 F.3d at 1080.[13]

In sum, the Trustees' Facebook pages, before the implementation of word filters on Facebook, constituted designated public fora, and O'Connor-Ratcliff's Twitter page remains a designated public forum. With the addition of word filters that prohibit comments and restrict users to non-verbal reactions, the Trustees' Facebook pages are limited public fora.

4. Governmental Interest and Tailoring

Having determined the types of public fora at issue, we now analyze whether the Trustees' decisions to block the Garniers from their social media pages violated the First Amendment. They did.

We note at the outset that it is a close question whether the Trustees' decisions to block the Garniers were viewpoint discriminatory. Whether in a designated public forum or a limited public forum, "restrictions based on viewpoint are prohibited." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469

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[13] The Garniers do not contend, and the record here does not suggest, that the Trustees began using word filters for viewpoint discriminatory reasons or that the word filters themselves block comments based on their content or viewpoint. We therefore do not address how our analysis might be different if the Trustees' use of word filters was designed to block only critical comments or only comments concerning particular subjects.

(2009). The Trustees maintain that they blocked the Garniers because of the repetitive nature of their comments, not because of their often-critical opinions of the Trustees. Specifically, the Trustees testified that they blocked the Garniers because the Garniers were "spamming [them] repetitively," and the repetitive nature of their comments tended to "fill up the page."

There are reasons to doubt that explanation. For one, even lengthy comments on Facebook and replies on Twitter do not significantly detract from or overwhelm the original post. Facebook automatically truncates lengthy posts. On Twitter, replies to a user's Tweets are not visible from the user's home page. So the Trustees' contention that the Garniers' comments "fill[ed] up the page" and detracted from the "streamlined, bulletin board nature" of their accounts is inconsistent with the technological reality. What is more, the record shows that the Trustees hid or deleted negative comments from the Garniers that were not repetitive but did not similarly hide or delete positive comments from other people. And to the extent the Trustees maintain that they intended to keep their pages as a "streamlined," one-way channel of communication, their replies to constituents' comments undermines that assertion.

In the end, we need not resolve whether the Trustees' decision to block the Garniers was viewpoint discriminatory. Even when viewed as a content-neutral time, place, or manner restriction intended to eliminate repetitive comments, the Trustees' complete blocking of the Garniers from their social media pages violates the First Amendment.

In a designated public forum, such as O'Connor-Ratcliff's Twitter page or the Trustees' Facebook pages before the implementation of word filters, "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions" are "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293). Likewise, "speakers can be excluded" only when that exclusion is "narrowly drawn." *Hopper*, 241 F.3d at 1074 (quoting *Cornelius*, 473 U.S. at 800). A time, place, or manner restriction "need not be the least restrictive or least intrusive means of" serving the government's content-neutral interests. *Ward*, 491 U.S. at 798. But it may not "burden substantially more speech than is necessary to further the government's legitimate interests," nor may the government "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id*. at 799. Accordingly, "the existence of obvious, less burdensome alternatives is 'a relevant consideration in determining whether the "fit" between ends and means is reasonable.'" *Berger v. City of Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009) (en banc) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993)).

Under this standard, O'Connor-Ratcliff's decision to block Christopher Garnier from her Twitter page and the Trustees' initial decision to block the Garniers from their Facebook pages were not narrowly tailored to serve a significant governmental interest.

(i) First, on the record of this case, the Trustees' decision to block the Garniers from the designated public fora did not advance a significant governmental interest. At trial, the Trustees testified that they blocked the Garniers from their social media pages because they believed that the Garniers' repetitive comments had "a net effect of slightly pushing down anything" that the Trustees posted to their pages and tended "to just fill up the page" with irrelevant comments and "visual clutter." In its narrow tailoring analysis, the district court concluded that blocking the Garniers "promoted the legitimate interest of facilitating discussion on [the Trustees'] social media pages." Alternatively, the district court analogized to our case law assessing the application of rules at in-person local government meetings to conclude that the Garniers' comments were "disruptive" because they were "unduly repetitious or largely irrelevant." *See White v. City of Norwalk*, 900 F.2d 1421, 1425–26 (9th Cir. 1990). On appeal, the Trustees rely on the two rationales cited by the district court to support their contention that blocking the Garniers advanced a significant governmental interest.

The record in this case does not support the Trustees' contention that the Garniers' comments actually disrupted their pages or interfered with their ability to host discussion on their pages. Again, Facebook automatically trims lengthy comments, such as some of those left by the Garniers, requiring viewers interested in reading those comments to click a "See More" button to read beyond the first few lines of text. Similarly, on Twitter, replies to a user's Tweets are not automatically visible; a viewer interested in reading replies to a Tweet must click on

a particular Tweet and scroll to the replies to view them. And on either platform, viewers of the Trustees' social media pages can, with the flick of a finger, simply scroll past repetitive or irrelevant comments. Indeed, no matter how many comments or reactions are left in the interactive spaces underneath a Facebook post or a Tweet, the content of the original post remains prominent and unaffected; comments therefore do not, as the Trustees assert, have the effect of "pushing down anything" that they posted or meaningfully distracting from the "streamlined, bulletin board" appearance they say they wanted for their social media pages.

It is apparent that the Garniers' repetitive comments bothered the Trustees. But there is no evidence that the repetitive comments "actually disturb[ed] or imped[ed]" the Trustees' posts or prevented other viewers of the Trustees' accounts from engaging in discussion. *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010) (en banc).

Our cases governing the application of rules of decorum at local government meetings are not to the contrary, as they address a meaningfully different risk of disruption than the risk presented by the Garniers' comments. In physical city hall meetings, where there is limited time and space available for public remarks, lengthy, "irrelevant or repetitious" comments "interfere with the rights of other speakers" or prevent the government "from accomplishing its business." *White*, 900 F.2d at 1425–26. The only way to keep unruly speakers from impeding the ability to hear out a broad range of opinions from the public may be to cut off the microphone or to eject the speaker from the room. *See id.* Accordingly, rules of decorum

applied to limit disruption at city council meetings "are not facially over-broad where they only permit a presiding officer to eject an attendee *for actually disturbing or impeding a meeting*." *Norse*, 629 F.3d at 976 (emphasis added); *accord White*, 900 F.2d at 1425–26.

In contrast to meetings in the physical world, the features of Facebook and Twitter rendered the Garniers' repetitive comments only minimally distracting. The Garniers' lengthier Facebook comments were automatically truncated, and viewers of the Trustees' pages could easily ignore their comments on either platform by scrolling past them. For that reason, the Garniers' comments did not prevent the Trustees "from accomplishing [their] business in a reasonably efficient manner." *White*, 900 F.2d at 1426. Nor did the Garniers' comments "interfere with the rights of other speakers," who remained free to ignore the Garniers' comments and to leave their own. *Id.*

"Actual disruption means actual disruption," not "constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption." *Norse*, 629 F.3d at 976. The Trustees' concerns about the "visual clutter" created by the Garniers' comments, or the risk that their comments would upset the "nice and streamlined" appearance of their pages, do not on the present record amount to the kind of disruption that alone can support the decision to block the Garniers.

In sum, the Trustees' decision to block the Garniers did not serve a significant governmental interest.

(ii) Even if the Garniers' comments did interfere with the Trustees' interests in facilitating discussion or avoiding disruption on their social media pages, the Trustees' decision to block the Garniers "burden[s] substantially more speech than is necessary" and therefore is not narrowly tailored. *Ward*, 491 U.S. at 799. Blocking the Garniers did not stop them from leaving only long, repetitive comments. The blocking prevented them from leaving any comments at all, no matter how short, relevant, or non-duplicative they might be. Further, O'Connor-Ratcliffe's blocking of Christopher Garnier on Twitter prevented him from even viewing her Tweets.

The overbreadth of the Trustees' decision to block the Garniers is particularly apparent on Facebook, where the Trustees had at their disposal "easily available alternative modes of regulation" that would have had "considerably less impact on speech"—namely, the ability to delete or hide unduly repetitive comments. *Berger*, 569 F.3d at 1043 (quoting *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1041 (9th Cir. 2006)). The Trustees did exactly that before blocking the Garniers. The Trustees testified that deleting the Garniers' comments took only a few seconds. The easily available alternative of deleting only repetitive comments rather than blocking the Garniers entirely accomplished the same goal—avoiding potentially disruptive repetitive posts—without eliminating the Garniers' ability to interact with the Trustees' pages to the extent they did so in an appropriate manner.[14]

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[14] As noted above, Twitter began permitting users to hide replies to their Tweets in 2019.

Alternatively, the Trustees could have established and enforced clear rules of etiquette for public comments on their pages, including rules against lengthy, repetitive, or off-topic comments. Had the Trustees established such rules, it is possible that the Garniers would not have continued to post the same messages repeatedly, knowing that such comments could lead to their being blocked from the page. But the Trustees never established any rules of engagement with their social media pages and so never determined whether such rules would be an effective means of reducing assertedly disruptive comments.

Although the narrow tailoring requirement is "just moderately stringent," regulations of speech must "be targeted at real problems, and carefully calibrated to solve those problems." *Id.* at 1059. In light of the minimal disturbance caused by the Garniers' comments and replies and the alternative methods available to the Trustees to address any such disturbances, we conclude that the Trustees' blocking of the Garniers on Twitter and on Facebook was not narrowly tailored.

(iii) Nor is the Trustees' decision to continue blocking the Garniers after the Trustees began using Facebook's word filter feature to block all comments "reasonable in light of the purpose served by the forum." *Hopper*, 241 F.3d at 1075 (quoting *DiLoreto*, 196 F.3d at 965). Whether a speech restriction in a limited public forum is reasonable in light of the forum's purpose depends on "whether the limitation is consistent with preserving the property for the purpose to which it is dedicated," in this case, as a space where the Trustees can post content of their

choice without any verbal comments from the public. *DiLoreto*, 196 F.3d at 967.

Given their implementation of word filters, the Trustees' continued ban of the Garniers serves no purpose at all relating to the Garniers' repetitive comments. The Trustees' extensive word filters prevent the Garniers or anyone else from commenting on their Facebook posts. The only impact presently of blocking the Garniers is that it prevents them from registering non-verbal emoticon reactions to the Trustees' posts. But the Trustees have not asserted *any* interest in limiting non-verbal reactions. Nor does the record provide any reason to believe the Garniers' use of non-verbal reactions, even repetitively, would disrupt or detract from the Trustees' pages or the content of their posts. Because blocking the Garniers from their Facebook pages, in their present form, adds nothing to the Trustees' goal of eliminating comments on their posts, that restriction is not "reasonable in light of the purpose served by the forum." *Hopper*, 241 F.3d at 1075 (quoting *DiLoreto*, 196 F.3d at 965).

At trial, O'Connor-Ratcliff suggested that even though nobody can comment on her Facebook page any longer, unblocking the Garniers would prevent her from changing the way she uses her Facebook page—for instance, by deciding at some future date "to have some back and forth with my constituents." But O'Connor-Ratcliff's suggestion that she might choose in the future to include more back and forth with the public undermines her articulated rationale for excluding the Garniers—that their comments detracted from the streamlined, bulletin board functioning of her social media pages. And, in any

event, if the Trustees later decided to open their Facebook pages to public comments again, they would still be able to hide or delete unduly repetitious comments or establish express rules of decorum prohibiting such comments. Until that time, the Trustees' speculative concerns about future disruption are not a sufficient reason to block the Garniers from interacting with their pages when those pages now block all comments anyway. Again, "[a]ctual disruption means actual disruption." *Norse*, 629 F.3d at 976.

We conclude that the Trustees violated the Garniers' First Amendment rights by blocking them from the Trustees' social media accounts and that the district court was therefore correct to grant the Garniers declaratory and injunctive relief.

D. Qualified Immunity

We need not dwell on the Garniers' contention, on cross- appeal, that the district court erred by granting qualified immunity to the Trustees as to the Garniers' damages claim. The district court concluded that, at the time that the Trustees blocked the Garniers, it was not clearly established that the Garniers had a "First Amendment right to post comments on a public official's Facebook or Twitter page." We agree.

"Qualified immunity shields federal and state officials from money damages" unless the official violated a statutory or constitutional right that "was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Until now, no Ninth Circuit or Supreme

Court authority definitively answered the state action and First Amendment questions at issue in this case.

"[A]bsent controlling authority," "a robust 'consensus of cases of persuasive authority'" can clearly establish law for purposes of qualified immunity. *Id.* at 742 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). But there was no such consensus here. At the time the Trustees blocked the Garniers from their pages in the fall of 2017, there were no court of appeals cases addressing similar facts. Only in the five years since the Trustees blocked the Garniers did four circuits decide cases concerning the First Amendment's application to the decisions of government officials to block members of the public from their government social media accounts. As discussed, applying similar modes of analysis, two of those circuits found First Amendment violations and one did not, while one circuit applied a different mode of analysis and found no violation. *See supra* Section II.B.2. Whether or not those four cases (one vacated, *see Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220 (2021)), taken together, would constitute a sufficient consensus for qualified immunity purposes, the contours of the right asserted here were not at the time of the events in question "'sufficiently clear' that every 'reasonable official would [have understood] that'" the actions taken violated that right. *al-Kidd*, 563 U.S. at 741 (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The Garniers attempt to avoid this conclusion by describing the right at issue in this case extremely generally, as the "right to criticize public officials" free from retaliation. But the Supreme Court has

exhorted us "not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015)). Given the novelty of applying the First Amendment and state action doctrines implicated here to the burgeoning public fora of social media, we cannot say that reasonable officials in the Trustees' position were on notice that blocking the Garniers from individual government officials' public social media pages could violate the First Amendment.

E. Costs

Finally, the Trustees contend that the district court erred by denying, without prejudice, their motion to retax costs. We lack jurisdiction to address that question.

Following trial, the district court taxed costs in favor of the Garniers. The district court then denied the Trustees' motion to re-tax costs, noting that "[t]his case is currently on appeal" and that "[t]he grounds for appeal implicate any decision the Court would render on Defendants' Motion to Re-Tax Costs." Accordingly, the district court denied the motion "without prejudice to Defendants' refiling their motion after the appeal has concluded."

Under 28 U.S.C. § 1291, this Court "has jurisdiction to hear appeals of 'final decisions' of the district court." *Reed v. Lieurance*, 863 F.3d 1196, 1212 (9th Cir. 2017) (quoting *Wakefield v. Thompson*, 177 F.3d 1160, 1162 (9th Cir. 1999)). "A ruling is final for purposes of § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter." *Id.* (quoting *Elliott*

v. White Mountain Apache Tribal Ct., 566 F.3d 842, 846 (9th Cir. 2009)). Consistently with those criteria, where the district court denies a party's motion for attorney fees or costs "without prejudice to renewal, if appropriate, following final disposition of all matters on appeal," we lack jurisdiction to review the district court's denial without prejudice. *Id.* at 1203, 1212–13.

As in *Reed*, the district court here denied the Trustees' motion to re-tax costs without prejudice and "clearly intended to revisit the question" following appeal. *Id.* at 1212. We therefore lack jurisdiction to review the district court's order denying the motion to re-tax costs.[15]

III. CONCLUSION

The protections of the First Amendment apply no less to the "vast democratic forums of the Internet" than they do to the bulletin boards or town halls of the corporeal world. *Packingham*, 137 S. Ct. at 1735 (quoting *Reno*, 521 U.S. at 868). That is not to say that every social media account created by public officials is subject to constitutional scrutiny or that, having created a public forum online, public officials are powerless to manage public interaction with their profiles. As this case demonstrates, analogies

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[15] *Reed* concerned an award of attorney fees, not costs as here. *Reed*, however, turned not on the relief requested but on the conclusion that the district court in that case, by denying the motion for fees without prejudice, "made no 'final decision'" and did not "clearly evidence[]" an intention that its ruling "be the court's final act in the matter." 863 F.3d at 1212 (first quoting *Wakefield*, 177 F.3d at 1160; and then quoting *Elliott*, 566 F.3d at 846).

between physical public fora and the virtual public fora of the present are sometimes imperfect, and courts applying First Amendment protections to virtual spaces must be mindful of the nuances of how those online fora function in practice. Whatever those nuances, we have little doubt that social media will continue to play an essential role in hosting public debate and facilitating the free expression that lies at the heart of the First Amendment. When state actors enter that virtual world and invoke their government status to create a forum for such expression, the First Amendment enters with them.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER GARNIER; and KIMBERLY GARNIER, Plaintiffs, v. MICHELLE O'CONNOR-RATCLIFF; and THOMAS JOSEPH ZANE, Defendants.	Case No.: 3:17-cv-02215-BEN-JLB **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiffs Dr. Christopher Garnier and Ms. Kimberly Garnier (collectively, "Plaintiffs") are parents of children in the Poway Unified School District ("PUSD"). Defendants Ms. Michelle O'Connor-Ratcliff and Mr. Thomas Joseph Zane (collectively, "Defendants") are members of the PUSD Board of Trustees. Plaintiffs allege Defendants blocked them from commenting on their Facebook and Twitter pages, depriving them of their federal constitutional rights in violation of 42 U.S.C. § 1983. Compl., ECF No. 1. Plaintiffs also allege violation of their state constitutional rights. *Id.*

This case is one of a growing number applying the First Amendment to the activities of elected officials on social media platforms. *See, e.g.*, *Knight First Amendment Inst, at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (finding President Donald Trump's Twitter account to be a designated public

forum and that blocking users was unconstitutional viewpoint discrimination); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (holding that a public official who used a Facebook page as a tool of her office exercised state action when blocking a constituent); *Robinson v. Hunt Cty., Texas*, 921 F.3d 440 (5th Cir. 2019) (finding that a government official's act of blocking a constituent from an official government social media page was unconstitutional viewpoint discrimination); *Faison v. Jones*, 440 F. Supp. 3d 1123 (E.D. Cal. 2020) (granting plaintiffs' motion for a preliminary injunction and ordering defendant county sheriff to unblock plaintiffs on his official Facebook page by finding the relevant page was a public forum); *Campbell v. Reisch*, 367 F. Supp. 3d 987 (W.D. Mo. 2019) (denying motion to dismiss and finding that defendant state legislator was acting under color of law when she blocked plaintiff from her official Twitter account); *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018) (denying plaintiffs' motion for a preliminary injunction prohibiting defendant state governor from blocking plaintiffs on Facebook by finding the relevant page was not a public forum).

The Court conducted a two-day bench trial on Plaintiffs' claims on September 21 and 22, 2020. The following is a brief procedural background of this case, along with the Court's findings of fact and conclusions of law from that trial. *See* Fed. R. Civ. P. 52(a). As explained below, the Court finds in favor of Plaintiffs' on their Section 1983 claim. Because Plaintiff did not offer evidence or argue the state law claim, the Court declines to find Defendants' conduct violated the California Constitution.

I. PROCEDURAL BACKGROUND

On October 30, 2017, Plaintiffs filed suit alleging one claim for violation of federal constitutional rights and one claim for violation of state constitutional rights, seeking general and punitive damages as well as injunctive and declaratory relief.[1] Compl., ECF No. 1, 5. Prior to the case's transfer to this Court, Defendants moved for summary judgment on all claims. Mot., ECF No. 34. On September 26, 2019, Judge Thomas J. Whelan issued an order granting Defendants' motion with respect to Plaintiffs' damages claim reasoning that damages were barred by qualified immunity. Order, ECF No. 42, 24. Judge Whelan denied Defendants' motion with respect to Plaintiffs' requests for injunctive and declaratory relief. *Id.*

Following transfer, the case proceeded to a bench trial. At the beginning of trial, the Court informed the Parties that it had reviewed Judge Whelan's order and that it adopted the rulings set forth in the order. Trial Tr., ECF No. 80, 5:21–24. To formalize those rulings, the Court finds Defendants: (1) are entitled to qualified immunity for Plaintiffs' damages claims; (2) acted under color of state law in blocking Plaintiffs from their social media pages; and (3) created designated public forums on their social media pages. The reasoning for these determinations is set forth in Judge Whelan's order, which the Court adopts for these findings of fact and conclusions of law except for the ruling on standing. *See* Order, ECF No. 42.

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[1] Plaintiffs initially also named PUSD in this lawsuit but voluntarily dismissed the district on January 26, 2018. ECF No. 9.

The exception for the standing ruling is necessary because the evidence presented at trial indicated that Zane may have "unblocked" Kimberly Garnier before trial. "The Supreme Court has noted that the doctrine of mootness requires that the 'requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *McKercher v. Morrison*, Case No. 18-cv-1054-JTM-BLM, 2019 WL 1098935, at * 2 (S.D. Cal. Mar. 8, 2019) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68, n.22 (1997)). Because the evidence received at trial regarding standing differed in some respects from the Parties' claims in their briefing on the motion for summary judgment, the Court also makes findings of fact and conclusions of law with respect to each Plaintiffs standing as to each Defendant's alleged actions.

Aside from the continuing analysis of standing, the remaining issue for trial was whether Plaintiffs' comments and replies disrupted Defendants' original posts on their social media pages, "because if [Plaintiffs'] comments did not disrupt the original posts, then it is reasonable to infer that [Defendants'] claimed justification for blocking [Plaintiffs] was a pretext and that they actually blocked [Plaintiffs] because of the content of their comments." Trial Tr., ECF No. 80, 6:4–11.

Plaintiffs claim that: (1) Defendants blocked them from posting on their social media pages; (2) Plaintiffs' comments and replies prior to blocking did not disrupt Defendants' original posts; and (3) the blocking was impermissibly content-based. *See generally* Pls.' Br., ECF No. 85. Defendants argue that: (1) any blocking

left open alternative channels of communication; (2) the blocking was content-neutral and narrowly tailored; and (3) as officials of the legislative branch, their social media accounts should be treated differently from those of executive branch officials. *See generally* Defs.' Br., ECF No. 84.

II. FINDINGS OF FACT

Following the testimony and exhibits received at trial, the Court makes the following findings of fact.

A. Parties and Pages

Plaintiffs Christopher Garnier and Kimberly Garnier are parents of children who are students in PUSD. Trial Tr., ECF No. 80, 87:20–23. Defendants Michelle O'Connor- Ratcliff and T.J. Zane are members of PUSD's Board of Trustees. *Id.* at 112:7; 153:1. Both Defendants were first elected in 2014, and both still serve on PUSD's Board of Trustees. *Id.* at 114:11; 153:5.

Zane has a Facebook account and maintains at least two pages. *Id.* at 112–115. He has a personal profile page that he uses for family and friends as well as a public page he uses for campaigning and issues related to PUSD. *Id.* at 113:25–114:20. Zane created the public page in 2014. *Id.* at 114:3–6. Zane is the only administrator of the public page. *Id.* at 114:12–25. Zane also has a Twitter account that he rarely uses but has interacted with Christopher Garnier on Twitter, which eventually led to an in-person meeting between the two. *Id.* at 138:8–10. Zane testified that Plaintiffs also posted on his personal and business Facebook pages, after which he blocked them from posting there. *Id.* at 137:12–13. Zane's decision to

block Plaintiffs on his personal and business Facebook pages is not at issue here.

Like Zane, O'Connor-Ratcliff has a Facebook account. *Id.* at 153:13. She has both a personal page that she uses for family and friends as well as a public page she uses for campaigning and issues related to PUSD. *Id.* O'Connor-Ratcliff created her public page sometime before 2017. *Id.* Since 2017, O'Connor-Ratcliff has also used a Twitter account for PUSD and campaign purposes. *Id.* at 184:6–8.

O'Connor-Ratcliff and Zane successfully created and published original social media content on Facebook and Twitter — known as "posts" and "tweets," respectively — related to PUSD on their public Facebook pages Twitter feeds. *See, e.g.*, Pls.' Ex. 4, 1; Ex. 5, 1–25; Ex. 6, 1–88; Ex. 7,1; Defs.' Ex. "U," 25–130. Neither O'Connor-Ratcliff nor Zane established rules of etiquette or decorum regulating how the public interacted with their social media accounts. Trial Tr., ECF No. 80, 115:6–9; 154:21–23.

Defendants testified that they intended their Facebook and Twitter pages to be used in a "bulletin board" manner—providing one-way communication from themselves to their constituents. *See, e.g.*, *id.* at 130:10–16, 131:6–19, 133:11–12, 147:13–15, 148:7, 168:15–16, 174:1–8, 185:16–19. However, at least through 2017, both also used Facebook for interactive purposes by replying to comments on their posts from other constituents about PUSD issues. *See generally* Pls.' Exs. 3–4. There is no evidence O'Connor-Ratcliff used Twitter for similar interactions because her Twitter feed shows only posts, not comments and replies to others. Pls.' Ex. 5. Zane used Twitter to

interact—indeed, even with Christopher Garnier. He has not blocked Plaintiffs on Twitter.

B. PUSD Boarding Meetings in the Physical World

At public meetings of PUSD's Board of Trustees, members of the public can express their views to board members. Trial Tr., ECF No. 80, 178:3–24. Public comments may be made on any topic of the speaker's choosing but do not allow for a response from members of the Board of Trustees. *Id.* at 21:20; 179:1–8. Public comments are also limited to three minutes per speaker. *Id.* at 178:7–12. There are several members of the public who appear at each meeting and often press the same points. *Id.* at 113:6–16. PUSD does not have a policy prohibiting members of the public from appearing at subsequent meetings and repeatedly addressing the same issues to the Board. *Id.* at 133:22. Both Defendants testified that they do not leave the room during the public comment time, even when the comments they are hearing are repetitive. *Id.* at 154:4–20.

C. Other Alternate Avenues of Communication

Both Defendants testified that receiving feedback from constituents is an important part of their duties as Trustees. In addition to the public comment portions of Board meetings discussed above, both Defendants maintain email addresses provided by PUSD that they use to conduct official business. The PUSD Board of Trustees also has a policy for the public to make a complaint about a Trustee. *Id.* at 58:6.

Both Defendants testified that the public frequently uses in-person comments and their PUSD email addresses to contact them. *Id.* at 134:16–18; 168:25. O'Connor- Ratcliff testified Plaintiffs emailed her PUSD email address 780 times. *Id.* at 173:15. Plaintiffs testified that email messages sent to Defendants went unanswered or the recipient refused to talk or meet. *See, e.g.*, *id.* at 21:15–22:11, 89:21–90:5. Christopher Garnier also submitted complaints about both Defendants pursuant to the Board of Trustees' policy but received no response. *Id.* at 58:2–24.

However, Defendants never attempted to prevent Plaintiffs from speaking during the public comment period of a Board meeting and never attempted to prevent Plaintiffs from sending emails to their PUSD email addresses. Moreover, Zane has even met with Christopher Garnier in-person on at least two occasions. *Id.* at 138:6–7.

D. Facebook Page and Twitter Account Functionality

The crux of this case focuses on the alleged disruption of Defendants' Facebook pages and Twitter feeds. To analyze whether and how disruption on those platforms can occur, an understanding of how the platforms display content is required.[2]

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[2] The Court notes its findings of fact here are limited by the evidence received at trial. Other cases examining social media blocking have attempted to make similar descriptions of social media platforms' functionality based on the evidence submitted in those cases, *see, e.g.*, *Morgan*, 298 F. Supp. 3d at 1007, but the Court is hesitant to adopt anything outside of the record in this

On both Defendants' public Facebook pages, Defendants, respectively, are the only people who can create original "posts." *Id.* at 115:17. Nonetheless, members of the public are generally allowed to interact with the content Defendants post through "comments" and "reactions" on the Defendants' original posts. When accessing Defendants' Facebook pages, Facebook automatically truncates lengthy posts, requiring a viewer interested in reading the full post to click a "See More" button beneath the truncated post. *See, e.g.*, Trial Tr., ECF No. 80, 29:5–19,1 93:11–95:2; Pls.' Ex. 3, 3 and 19; and Defs.' Ex. U, 150. For viewers who have not clicked "See More" on the post, Facebook shows only the beginning of the post and only the most recent or most relevant comments.

An illustration may be beneficial to the reader. The picture below depicts a post made by O'Connor-Ratcliff on August 28, 2017. O'Connor-Ratcliff s post is long enough that a viewer is required to click "See More" to read her entire post.

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case because the functionality of these platforms constantly changes, making adoption inappropriate for judicial notice.


Michelle O'Connor-Ratcliff
August 28 at 12:53pm
Invitation to provide important public input (via PUSD Director of Communications):
In the weeks to come, we need your help in planning our new by-district Board of Trustee elections. PUSD is changing the process by which voters select our elected officials. Currently, more than 60 other cities and 150 school districts across the state are being impacted and must implement these changes by the next election cycle.
Beginning in 2018, elections for PUSD school board members wi...
See More
PUBLIC
HEARING
Like
Comment
Share
1
Write a comment...
Michelle O'Connor-Ratcliff
August 26 at 8:04am
ABC News did this piece on the incomparable Megan Gross from Del Norte HS and how she inspired her student to become an adaptive PE teacher. That's our National Teacher of the Year!

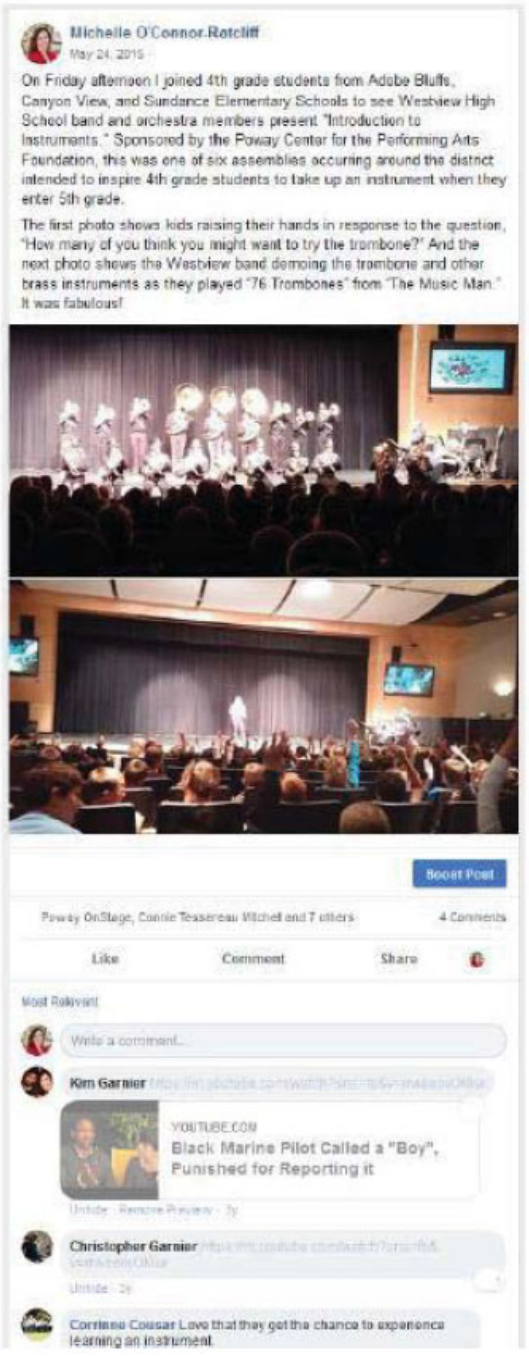
Pls.' Ex. 3, 3. If a Facebook user wishes to skip past this post, she need only scroll past the truncated post, which takes a brief amount of time. Indeed, as shown above, O'Connor-Ratcliff s next post (dated August 26, 2017) is also visible on this screenshot.

Lengthy comments are treated similarly to lengthy posts. On Facebook, comments in response to a post appear below the post. *See, e.g.*, Pls.' Ex. 3, 4–6; Pls.' Ex. 6, 6 and 10. There is no limit on the number of comments that can be made within a specific period of time, and the evidence produced at trial indicates such comments can be quite lengthy. *See generally*, Defs.' Ex. U. To read a lengthy comment, the viewer must click "See More" on the truncated beginning of a comment. Pls. Ex. 3, 75. The individual viewer selects whether they will see the most recent or most relevant comments. Trial Tr, ECF No. 80, 183:10–13.

The picture below depicts a Facebook post shared by O'Connor-Ratcliff on August 10, 2016. There are thirteen reactions to the post using the "thumbs-up" symbol from other members of the public. The picture displays the beginning of a lengthy comment on the post made by a non-party to this action. A Facebook user must click "See More" to show any text beyond the truncated beginning of the comment. In this instance, O'Connor-Ratcliff also replied to the comment.

Pls.' Ex. 6, 6. Again, if a Facebook user wishes to skip past this comment, she need only scroll past the truncated comment, which takes a small amount of time.

When a video is linked in a comment to a Post, the video does not play automatically when a Facebook user reads the comment. Instead, the user must click a link to watch the video or can scroll past the comment containing the video link almost instantaneously. Trial Tr., ECF No. 80, 108:20–109:12. The picture below depicts a Facebook post made by O'Connor-Ratcliff on May 24, 2015. Below the post, Kimberly Garnier posted a comment containing video link. Christopher Garnier also posted a comment containing a link.


Michelle O'Connor-Ratcliff
May 24, 2015
On Friday afternoon I joined 4th grade students from Adobe Bluffs, Canyon View, and Sundance Elementary Schools to see Westview High School band and orchestra members present "Introduction to Instruments." Sponsored by the Poway Center for the Performing Arts Foundation, this was one of six assemblies occurring around the district intended to inspire 4th grade students to take up an instrument when they enter 5th grade.
The first photo shows kids raising their hands in response to the question, "How many of you think you might want to try the trombone?" And the next photo shows the Westview band demoing the trombone and other brass instruments as they played "76 Trombones" from "The Music Man." It was fabulous!
Boost Post
Poway OnStage, Connie Teasereau Mitchell and 7 others
4 Comments
Like
Comment
Share
Most Relevant
Write a comment...
Kim Garnier
YOUTUBE.COM
Black Marine Pilot Called a "Boy", Punished for Reporting it
Christopher Garnier
Corriane Cougar Love that they get the chance to experience learning an instrument

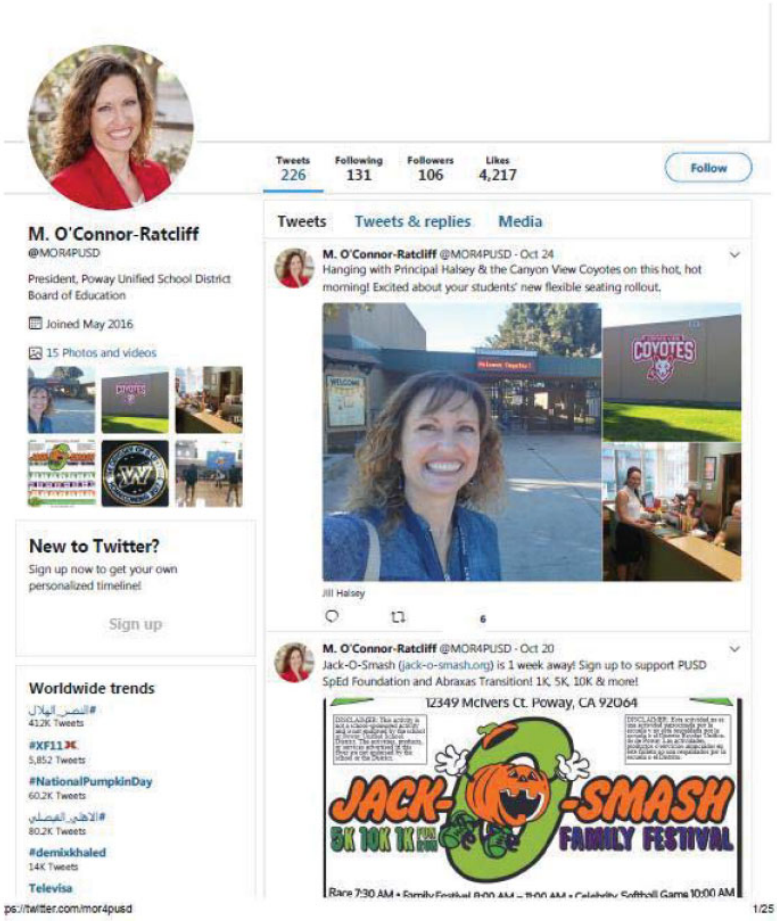
Defs.' Ex. U, 10. Plaintiffs' comments are light in color because O'Connor-Ratcliff "hid" those comments on her page, discussed further below. Scrolling past these video link comments is quick and straightforward.

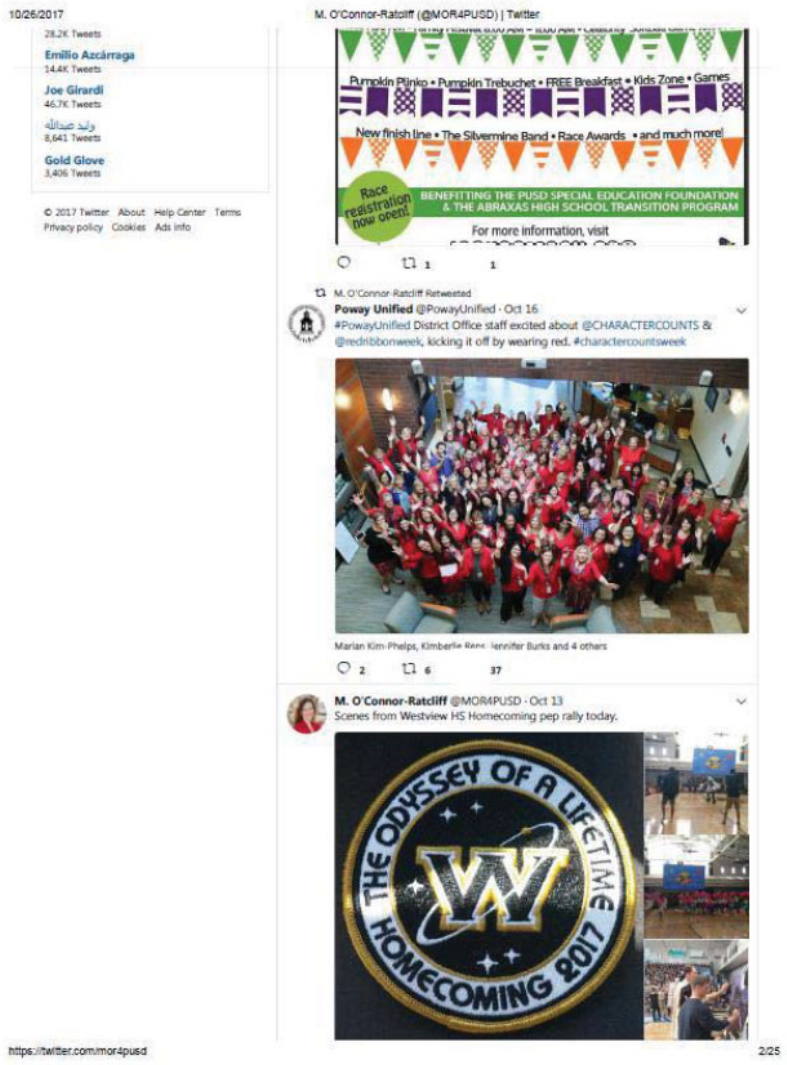
Zane testified that because of this truncation as well as Facebook's other features designed to streamline a page's appearance, even repeated comments only had "a net effect of slightly pushing down anything that I would have put up there." Trial Tr., ECF No. 80, 133:15–17. Scrolling past even numerous, repeated comments or links to videos would take minimal time due to Facebook's truncation of comments. *Id.* at 94:22. As quickly as the user can click his finger, he can disregard the truncated comments. *Id.* at 109:9–10.

Any Facebook user may comment on a post on a public page such as those used by Defendants. *Id.* at 115:20. The comment does not necessarily relate to the original post. *Id.* at 81:14–20. When a person comments, the page administrator for that page may leave a comment visible to other Facebook users. *Id.* at 120:4–19. The page administrator can also delete a comment, removing it entirely from appearing beneath the post, or "hide" the comment. *Id.* The "hide" feature allows a page administrator to make comments on posts invisible to other viewers. *Id.* The only people who can view a comment that has been hidden are the page administrator and the person who posted the hidden comment. *Id.* Another Facebook user viewing a post would not see any hidden comments. *Id.* at 121:1–5.

In addition to deleting or hiding individual comments, Facebook also allows page administrators to block people from posting on their page. While users generally may respond to a post with a comment—whether germane or not to the post—or by making a non-verbal reaction, such as by "liking" a post or give a "thumbs up" emoticon, a blocked user cannot comment or make a non-verbal reaction. *See, e.g.*, Trial Tr., ECF No. 80, ECF No. 80, 186:8–188:2; Pls.' Ex. 3, 2 (showing "thumbs up" and smiley-face emoticons to the left of "16" reactions). Instead, a blocked user can only view the public Facebook page. *Id.*

On Twitter, the equivalent of an original post is called a "tweet." A Twitter user's tweets are displayed on a "feed," similar to how a Facebook user's posts are displayed on her page. The pictures below depict the top of O'Connor-Ratcliff s Twitter feed as of October 26, 2017. As can be seen, when viewing a user's feed, replies to the user's tweets are not visible. Instead, a user must click on a specific tweet to view replies to that tweet. Thus, a user's ability to "disrupt" another user's Twitter feed—the page she wishes to display to other users—is minimal because replies are only visible when clicking on a particular tweet.


Tweets 226
Following 131
Followers 106
Likes 4,217
Follow
M. O'Connor-Ratcliff
@MOR4PUSD
President, Poway Unified School District Board of Education
Joined May 2016
15 Photos and videos
Tweets
Tweets & replies
Media
M. O'Connor-Ratcliff @MOR4PUSD · Oct 24
Hanging with Principal Halsey & the Canyon View Coyotes on this hot, hot morning! Excited about your students' new flexible seating rollout.
Jill Halsey
6
M. O'Connor-Ratcliff @MOR4PUSD · Oct 20
Jack-O-Smash (jack-o-smash.org) is 1 week away! Sign up to support PUSD SpEd Foundation and Abraxas Transition! 1K, 5K, 10K & more!
12349 McIvers Ct. Poway, CA 92064
JACK-O-SMASH
5K 10K 1K FUN RUN
FAMILY FESTIVAL
New to Twitter?
Sign up now to get your own personalized timeline!
Sign up
Worldwide trends
#النصر الهلال
41.2K Tweets
#XF11
5,852 Tweets
#NationalPumpkinDay
60.2K Tweets
#الاهلي الفيصلي
80.2K Tweets
#demixkhaled
14K Tweets
Televisa
ps://twitter.com/mor4pusd
1/25



Pls.' Ex. 5, 1–2.

On Twitter, a user may also block another user. Blocking prevents the blocked user from seeing the blocker's Twitter feed and replying to the blocker's tweets. In other words, the blocked user cannot see any of the content posted by the blocker while logged

into his Twitter account or interact with the blocker on the site.

E. Plaintiffs' Interactions with Defendants' Pages and Accounts

Christopher Garnier began posting on Defendants' Facebook pages when he believed they were not satisfactorily responding to his emails and other communications. Trial Tr., ECF No. 80, 37:14–18. None of Plaintiffs' comments used profanity or threatened physical harm, and almost all related to PUSD. *Id.* at 39:1–9. Plaintiffs' comments were not commercial in nature. *Id.* at 39:11.

However, Plaintiffs acknowledged their posts were often repetitious. *Id.* at 41:4; 100–103. On Facebook, Christopher Garnier made the same comment on forty-two posts made by O'Connor-Ratcliff. *Id.* at 180:16. On another occasion, Christopher Garnier posted the same reply to every tweet O'Connor-Ratcliff posted within approximately ten minutes. *Id.* at 176:18. This involved repeating the same reply 226 times. *Id.* As discussed above, these replies would only be visible by (1) visiting Christopher Garnier's Twitter feed or (2) clicking on a tweet on O'Connor-Ratcliff s feed to which Christopher Garnier replied. For example, looking at O'Connor-Ratcliff s Twitter feed, the following tweet appears from October 13, 2017.

Pls.' Ex. 5, 3. A user can see that there is one reply to this tweet, indicated by the "1" next to the cartoon dialogue icon, but cannot see that reply on O'Connor-Ratcliff s feed.

Moreover, not all of Plaintiffs' comments were the same. O'Connor-Ratcliff s documentary evidence shows Christopher Garnier posting more than 20 unique comments and Kimberly Garnier posting more than 15 unique comments in response to O'Connor-Ratcliff s original Facebook posts. *See* Defs.' Ex. U, 25–130. Plaintiffs testified they repeated comments because they wanted to reach other Facebook users who might only look at one particular post made by Defendants. Trial Tr., ECF No. 80, 107:2–7. By repeating their message on each post, Plaintiffs reasoned, they would raise the issues that mattered to

them involving PUSD to a broader audience. *Id.* at 102:17–103:11.

Assessing the full scope of these comments' disruption is difficult because Zane deleted some of Plaintiffs' comments on his Facebook page while O'Connor-Ratcliff "hid" or deleted others. In addition, the Parties' exhibits generally show the pages as they appeared in 2017 when the suit was filed. More recent screenshots were not submitted in evidence. Nonetheless, Zane testified that deleting comments was not onerous and that he did so to ensure his Facebook page had a "streamlined" appearance. *Id.* at 133:13–21. On some of O'Connor-Ratcliff s Facebook posts, she "hid" Plaintiffs' comments and still replied to comments made by other members of the public. *See, e.g.*, Defs.' Ex. "U," 26, 28, 30 and 32; *and* Trial Tr., ECF No. 80 189:24–190:12.

F. Use of Word Filters

In general, Facebook allows a page administrator to block a particular user from commenting on his page but does not allow a page administrator to entirely block comments from all other Facebook users. Though not addressed extensively at trial, the reasoning for Facebook's policy is intuitive: Facebook is a social media platform, not a website designed for the one-way presentation of information to a reader. It seeks interaction between users, not just dissemination of content to a recipient.

However, after this suit was filed, Facebook created a new feature that allows a page administrator to use word filters. Word filters are designed to allow a page administrator to moderate potentially offensive content on their page. If a page administrator adds a

word to the filter, a comment including that word will not appear as a comment on any post. Trial Tr., ECF No. 80, 116:1–15.

Zane began using word filters on his page in December 2018. Zane testified that his intent is not to limit only potentially offensive content. *Id.* Instead, he seeks to preclude *all* comments on his public page. *Id.* To accomplish this intent, he added more than 2,000 words to his word filter. *Id.* The words include basic words likely to appear in any comment, such as "he, she, it, [and] that," to ensure all comments are filtered out from his page. *Id.* O'Connor-Ratcliff has also adopted word filters, though uses a much smaller set of words. *Id.* at 160:24–25. Her intent, likewise, is now to eliminate all comments and use her public Facebook page as a "bulletin board." *Id.* at 168:16.

G. Blocking

Christopher Garnier testified that in October 2017, he was blocked from posting on Zane's public Facebook page and remains so blocked today. *Id.* at 45:4; 56:1–2. Zane denies this, stating he never blocked Christopher Garnier on his public Facebook page — only on his personal and business pages. *Id.* at 117:7. Zane also testified that he has deleted specific comments and used word filters, discussed above, attempting to prevent all Facebook users from commenting on his posts. *Id.* at 117:8–20. He stated that as Facebook's features have evolved, his use of the platform evolved as well. He now tries to prevent any comments on his page by using an extensive word filter instead of deleting individual comments. *Id.* at 117:19–25. The Parties did not address whether

blocking an individual from one page automatically blocks that same person from other pages run by the same page administrator, but this could likely be the case here.

Christopher Garnier and Zane offered directly conflicting testimony. While dated, the documentary evidence supports the conclusion that Zane blocked Christopher Garnier from his public Facebook page. Christopher Garnier appears unable to comment on any post made by Zane on his page, *see* Pls.' Ex. 15, which is consistent with what a blocked user would experience on a Facebook page. Accordingly, the Court finds that although Zane may not have acted with the intent to block Christopher Garnier, the result of his action is that he has blocked and continues to block Christopher Garnier on Facebook.

With respect to Kimberly Garnier, the evidence is different. Kimberly Garnier testified that at the time she filed suit, Zane blocked her from posting on his Facebook page. Trial Tr., ECF No. 80, 88:17–18. Kimberly Garnier testified, however, that only days before trial Zane appeared to unblock her from his Facebook page. *Id.* at 92:10–11. As discussed above, Zane denies he blocked anyone from his public Facebook page. *Id.* at 117:7. Where there is no dispute, the Court readily finds Zane is not currently blocking Kimberly Garnier on Facebook.

Plaintiffs do not allege Zane has ever blocked either of them on Twitter. As such, the Court makes no finding in this regard.

The evidence regarding O'Connor-Ratcliff is much clearer. O'Connor-Ratcliff reported Plaintiffs' comments on her page to Facebook on two occasions.

Id. at 175:2–4. A representative from Facebook informed O'Connor-Ratcliff that they were looking into the matter, but Facebook did not end up taking any action against Plaintiffs. The representative also recommended O'Connor-Ratcliff block Plaintiffs on the platform, which she did. *Id.* at 175:5–6. O'Connor-Ratcliff has also blocked Christopher Garnier on Twitter. *Id.* at 193:25. She has not unblocked either Christopher Garnier or Kimberly Garnier on those platforms. *Id.* at 45:11; 155:11.

H. Rationale

Zane testified the content of Christopher Garnier's posts were "not particularly" of any concern to him. *Id.* at 132:25; 133:1–7. Instead, Zane's issue with Plaintiffs' posts on his social media page was the alleged disruption and "spamming" nature of the comments, which went against Zane's intent to have the page "just be very streamlined" in a "bulletin board nature." *Id.* at 133:11–12. Zane stated he never understood Christopher Garnier's decision to repeat comments beneath each post Zane made. *Id.* at 137:23–25. He testified that a comment repeated below each post "wasn't what I wanted for the page, so that's why I chose the settings that I did." *Id.* at 138:1–2.

Likewise, O'Connor-Ratcliff testified her reason for blocking Plaintiffs on her Facebook page and Christopher Garnier on Twitter was the repetition, not content, of his posts. *Id.* at 180:20. She testified that she has received negative comments from other members of the public on her Facebook page but has not blocked them. *Id.* at 194:23–195:6. The record also reflects O'Connor-Ratcliff frequently responded

to positive comments on her page with "thumbs-up" reactions and responses such as "Thank you for the kind words," *id.* at 186:8–188:22, but does not show evidence that Plaintiffs were blocked due to the content (vice repetition) of their comments.

III. CONCLUSIONS OF LAW

Plaintiffs' federal claim arises out of 42 U.S.C. § 1983, pursuant to which "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." 42 U.S.C. § 1983. To state a claim under Section 1983, a plaintiff must allege: (1) the violation of a right secured by the Constitution and laws of the United States; and (2) that the alleged deprivation was committed by a person acting under color of state law. *Id.*; *see also West v. Atkins*, 487 U.S. 42, 48 (1988); *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020). "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

As discussed below, this Court concludes that Plaintiffs have demonstrated the requisite elements for a Section 1983 claim, namely: (1) state action, as was determined prior to trial, *see* Order, ECF No. 42; and (2) deprivation of a constitutional right. Before turning to the claim, however, the Court briefly addresses standing.

A. Plaintiffs have Standing for their claims

While the Parties' briefs assume Defendants blocked Plaintiffs on Facebook and O'Connor-Ratcliff blocked Christopher Garnier on Twitter, the evidence presented at trial requires the Court to closely examine this issue.

The jurisdiction of federal courts is limited by Article III, § 2, of the Constitution to "Cases" or "Controversies. *Arizonans*, 520 U.S. at 64. This requires a litigant to show "an invasion of a legally protected interest" that is "concrete and particularized," as well as "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations omitted). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint was filed.'" *Arizonans*, 520 U.S. at 67 (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). However, "[i]t is undisputed that as a general rule voluntary cessation of challenged conduct moots a case . . . only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Carlson v. United Academics – AAUP/AFT/APEA AFL-CIO*, 265 F.3d 778, 786 (9th Cir. 2001) (internal quotations omitted).

Here, Plaintiffs seek declaratory and injunctive relief against Defendants. Compl., ECF No. 1. An injunction issued by this Court would require Defendants to unblock Plaintiffs on Facebook and would require O'Connor-Ratcliff to unblock Christopher Garnier on Twitter. However, there is evidence that Zane unblocked Kimberly Garnier on

Facebook shortly before trial. Accordingly, the general rule would suggest that Kimberly Garnier's claims for injunctive and declaratory relief against Zane are moot. *See Arizonans*, 520 U.S. at 67; *see also Wagschal v. Skoufis*, 442 F. Supp. 3d 612, 622 (S.D.N.Y. 2020) (finding plaintiffs claim for declaratory and injunctive relief mooted because defendant state senator unblocked plaintiff) *and McKercher*, 2019 WL 1098935, at *3 (dismissing claims as moot where defendant added plaintiff on Facebook as a friend during the pendency of litigation, allowing plaintiff to post on defendant's Facebook page). Nonetheless, because Zane unblocked Kimberly Garnier only days before trial, the Court finds it is not absolutely clear that Zane could not block Kimberly Garnier again. *See Carlson*, 265 F.3d at 786. Accordingly, the Court concludes Kimberly Garnier has standing for her claims against Zane.

As discussed above, the Court finds that both Defendants blocked and continue to block Christopher Garnier on Facebook, that O'Connor-Ratcliff blocked and continues to block Christopher Garnier on Twitter, and that O'Connor-Ratcliff blocked and continues to block Kimberly Garnier on Facebook. These claims therefore involve an actual controversy and the Court's analysis on these alleged Section 1983 violations proceeds below.

B. Defendants' Conduct Constitutes State Action

First, although not alleged in the complaint, Plaintiffs have filed suit against Defendants on the basis that their actions qualify as state action. Judge Whelan's order on Defendants' motion for summary

judgment already concluded that Defendants acted under color of state law, satisfying the first element for a Section 1983 action. *See generally* ECF No. 42. Despite Judge Whelan's ruling, Defendants noted at the beginning of trial that this case involved a question of "whether there was state action." Trial Tr., ECF No. 80, 13:8–12. Although recognizing that Judge Whelan had found state action when denying their motion for summary judgment, they intended to present evidence on that issue to preserve the record for appeal. *Id.* At the conclusion of trial, the Court stated that it recognized a difference between this case and the *Knight* and *Morgan* cases, both of which involved an executive, because unlike the legislators here who have regular meetings at which the public can appear and provide comment, the executives in *Knight* and *Morgan* lacked such a forum. *Id.* at 199:7–11. The Court noted that in this case, Plaintiffs could come into a Board meeting and "express the very same views . . . that they could . . . on Facebook or Twitter." *Id.* at 199:1–6. As a result, the Court asked the Parties to address whether the fact that Defendants' actions were taken outside of a meeting could preclude those actions from being considered state action sufficient to allow a Section 1983 action to proceed.

Plaintiffs argue that Defendants' status as legislators vice executive branch officials does not change the analysis of whether Defendants acted under color of state law in blocking Plaintiffs. Pls.' Br., ECF No. 86, 9–11. Plaintiffs urge the Court to adopt a "totality of the circumstances" test for determining state action, citing the Fourth Circuit's decision *in Davison*. *Id.* (citing 912 F.3d 666). Defendants argue extensively that they did not act

under color of state law because they are members of the legislative branch and cannot take official action outside of a meeting of their legislative body. Defs.' Br., ECF No. 84, 13–15 (citing Cal. Gov't Code § 54950 *et seq*.). On these grounds, they attempt to distinguish other cases that have found similar conduct to violate the First Amendment. *Id.* at 14.

As stated above, the Court adopts the reasoning and conclusions articulated by Judge Whelan in his order on Defendants' motion for summary judgment that "[t]he content of [Defendants'] posts, considered in totality, went beyond their policy preferences or information about their campaigns for reelection." ECF No. 42 at 14:2–4. Because Defendants "could not have used their social media pages in the way they did but for their positions on PUSD's Board, their blocking of [Plaintiffs] satisfies the state-action requirement for a section 1983 claim." *Id.* at 14. Further, "the content of many of their posts was possible because they were 'clothed with the authority of state law.'" *Id.* (citing *Davison*, 912 F.3d at 679). Finally, other recent cases addressing blocking on social media have found legislators to be acting under color of state law in making blocking decisions. *See, e.g.*, *Davison*, 912 F.3d at 680 (county board chair); *Campbell*, 367 F. Supp. 3d at 994 (state representative); *and Felts v. Reed*, Case No. 20-cv-821-JAR, 2020 WL 7041809, at *6 (E.D. Mo. Dec. 1, 2020) (municipal alderman). For these reasons, the Court concludes Defendants acted under color of state law despite Defendants' positions as legislators, not executives.

C. Deprivation of a Constitutional Right Under the First Amendment

Second, Plaintiffs argue that they suffered a deprivation of a constitutional right in the form of a violation of their First Amendment rights to free speech. First Amendment cases involving social media address many issues. Some of these issues have already been addressed by Judge Whelan's order on Defendants' motion for summary judgment, including but not limited to his conclusions that: (1) Plaintiffs have standing to bring their claims; (2) Defendants are entitled to qualified immunity; and (3) Defendants' accounts are designated public forums. ECF No. 42. As noted, the Court adopts those conclusions here.[3] Other potentially relevant issues, such as whether a plaintiff can require a defendant to listen to their speech—she cannot, *see Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 283 (1984) (a plaintiff has "no constitutional right to

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[3] Whether Defendants' accounts remain a public forum today is a close question. It is undisputed that the government may close a designated public forum. *See DiLoreto* v. *Unified Sch. Dist. Bd. Of Educ.*, 196 F.3d 958, 970 (9th Cir. 1999) ("The government has an inherent right to control its property, which includes the right to close a previously open forum."). Since the Complaint was filed, Facebook introduced the word filter feature and Defendants have started using word filters extensively to attempt to block all comments. It may be that by doing so Defendants closed the public forums on their public Facebook pages. However, the Parties did not brief and the Court is not aware of any authority holding that a social media public forum is closed when broad word filters are used. These are simply uncharted seas with plenty of icebergs. To proceed circumspectly, the Court does not make that holding here, but notes the difficulty of applying First Amendment analysis to technology platforms that change rapidly during a single case.

force the government to listen to their views")—are addressed by other cases but have not been raised on the facts here.[4]

Instead, this dispute addresses an apparent issue of first impression in the digital domain: whether Plaintiffs' repetitive comments and replies on Defendants' social media pages actually disrupted Defendants' original posts, making Defendants' blocking a reasonable time, place, or manner restriction on Plaintiffs' speech. As outlined below, the Court concludes that while the blocking was content-neutral, Defendants' continued blocking constitutes a burden on speech that is no longer narrowly tailored to serve a substantial government interest.

1. Defendants' Blocking was a Content-Neutral Rule of Decorum

Having concluded Defendants' pages are public forums and that they acted under color of state law in maintaining those pages, the Court turns to whether the blocking at issue here was content-based or content-neutral because "[v]iewpoint discrimination is prohibited in all forums." *Faison*, 440 F. Supp. 3d at 1135 (citing *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992)). Thus, if Defendants' blocking was content-based, it would be subject to strict scrutiny. Alternatively, if Defendants' blocking was content-neutral, the Court would analyze whether the blocking constituted

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[4] Plaintiffs' also briefly touch on the issue of "hiding" and deleting comments, but do not argue these actions constituted a violation of Section 1983. Accordingly, those actions are not analyzed in these conclusions of law.

"reasonable restrictions on the time, place, or manner of protected speech" under the framework set forth by the Supreme Court in *Ward v. Rock Against Racism*. 491 U.S. 781,791 (1989).

"Viewpoint discrimination is apparent . . . if a government official's decision to take a challenged action was 'impermissibly motivated by a desire to suppress a particular point of view.'" *Davison*, 912 F.3d at 687 (quoting *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 812–13 (1985)). By contrast, a regulation on speech is "content-neutral" if it is "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*

Plaintiffs argue Defendants' blocking was content-based because their social media comments "were addressing what even Defendants acknowledged to be serious, persistent, legitimate PUSD issues." Pls.' Br., ECF No. 86, 4. Defendants' counter that they blocked Plaintiffs "because of the 'manner' [i.e., the repetition] of the posting and not because of the content of the posts." Defs.' Br., ECF No. 84, 4.

The evidence presented at trial favors Defendants. To begin with, it is undisputed that Defendants' did not adopt formal rules of decorum or etiquette for their social media pages. Trial Tr., ECF No. 80, 115:6–9; 154:21–23. However, to survive a challenge that their decision to block Plaintiffs' was content-based (and thus subject to strict scrutiny — *see Boos v. Barry*, 485 U.S. 312, 321 (1988), Defendants'

necessarily argue that the blocking was to enforce an unwritten rule of decorum prohibiting repetitious speech on their social media pages.

In Defendants' favor, there is ample testimony that once Facebook introduced the word filter feature, Defendants intended their pages to be "bulletin boards" and tried to block *all* comments on their pages. Plaintiffs' repetitive posting was also clearly established by the evidence at trial. Christopher Garnier sent 226 tweets to O'Connor-Ratcliff in the span of ten minutes on October 17, 2017, sending each tweet as a reply to every tweet she ever posted. On Facebook, Plaintiffs repeatedly posted comments — though not all were identical — to both Defendants' pages. This evidence distinguishes the case at bar from others addressing First Amendment challenges to social media blocking, which did not involve repeated comments and acknowledged the blocking in those cases was content-based. *Cf. Knight First Amendment Inst, at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 553–54 (S.D.N.Y. 2018) ("Defendants do 'not contest Plaintiffs' allegation that the Individual Plaintiffs were blocked from the President's Twitter account because the Individual Plaintiffs posted tweets that criticized the President or his policies'") *and Davison*, 912 F.3d at 687 (defendant county board chair blocked plaintiff "because she viewed the allegations [in his Facebook comments] as 'slanderous'").

However, O'Connor-Ratcliff's testimony also describes interacting with constituents on Facebook who had nice things to say by either replying to their comments or responding through an emoticon. The documentary evidence further indicates that while

Zane may have intended his page to be a "bulletin board" and only deleted Plaintiffs' comments because "that's not what I wanted for my page," other positive comments remained on his page when the suit was originally filed. For example, Zane made an original post on June 29, 2017, on which it appears the official PUSD Facebook account made a comment. Pls.' Ex. 6, 5–6. That positive comment was still visible on the date the screenshot was taken, September 8, 2017. *Id.* Thus, at least when the suit was filed, there is strong evidence these pages were not "bulletin boards."[5]

On this record, the evidence shows that Defendants' blocked Plaintiffs due to the repetitive manner of their posts, vice the negative content of those posts. Accordingly, the Court concludes Defendants' blocking was content-neutral.

One final note on content-neutrality is appropriate. Both parties argue that Facebook and Twitter's community standards support their claims. Defendants assert that Plaintiffs' comments violated those community standards by "engaging] with content at very high frequencies." Defs.' Br., ECF No. 84, 8. Plaintiffs respond that O'Connor-Ratcliff attempted to bring these posts to Facebook's attention, but that Facebook took no action against them. Pls.' Br., ECF No. 86, 11, n. 14. Plaintiffs argue

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[5] As discussed above in note 3, the Court declines to hold that Defendants' later use of extensive word filters here effectively closed the public forum. If the public forum was now closed, it would moot Plaintiffs' claims. *See Karras v. Gore*, Case No. 14-CV-2564-BEN-KSC, 2015 WL 74143, at *3–4 (S.D. Cal. Jan. 6, 2015) (denying as moot the plaintiff's request for an injunction allowing him to post on the defendant's public Facebook page where the defendant had already closed the page).

Facebook's inaction confirms Plaintiffs' posts did not violate Facebook's community standards, and therefore, the comments should be considered protected speech. *Id.* Notably missing from these arguments, however, is citation to authority approving the use of Facebook or Twitter's community standards in analyzing whether the First Amendment is infringed. The Court declines the invitation to do so here. The First Amendment is interpreted by the courts, not tech companies. *Cf. Prager Univ. v. Google, LLC*, 951 F.3d 991, 999 (9th Cir. 2020) (state action doctrine precluded First Amendment scrutiny of YouTube's content moderation policy pursuant to its terms of service and community guidelines).

2. Defendants' blocking is no longer narrowly tailored

Having found the blocking to be content-neutral, the Court next turns to whether Defendants' blocking and use of word filters are narrowly tailored. Plaintiffs argue Defendants' blocking was not narrowly tailored because their comments did not "disrupt, disturb, or otherwise impede" Defendants' social media pages. Pls.' Br., ECF No. 86, 13–14 (*citing White v. City of Norwalk*, 900 F.2d 1421, 1424 (9th Cir. 1990)). Defendants argue that because they intended to use their pages in a "bulletin board type manner," the use of expansive word filters to attempt to block all comments supports the conclusion that Defendants' blocking was narrowly tailored. Defs.' Br., ECF No. 84, 11. While the Court concludes Defendants' blocking was initially narrowly tailored, the fact that blocking has gone on for nearly three years requires the Court to reach a different conclusion now.

To be "narrowly tailored," a regulation "need not be the least restrictive or least intrusive means" of serving "the government's legitimate, content-neutral interests." *Ward*, 491 U.S. at 798. "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). However, "this standard does not mean that a time, place, or manner regulation may burden substantially more speech that is necessary to further the government's legitimate interests." *Id.*

In the physical world, the Ninth Circuit has held that a city council may remove a person from a meeting without offending the First Amendment "when someone making a proscribed remark is acting in a way that actually disturbs or impedes the meeting." *White v. City of Norwalk*, 900 F.2d 1421, 1424 (9th Cir. 1990). The city ordinance at issue there provided that an offending individual must first be provided a warning before persistent disrupting action could result in ejection from the meeting and a misdemeanor citation. *Id.* The court elaborated that "the nature of a [c]ouncil meeting means that a speaker can become 'disruptive' in ways that would not meet the test of an actual breach of the peace." *Id.* "A speaker may disrupt a [c]ouncil meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies." *Id.* at 1426. While "the point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable," the test is whether the city council "is prevented from accomplishing business in a

reasonably efficient manner." *Id.* The court also emphasized that "such conduct might interfere with the rights of other speakers." *Id.*

In *Norse v. City of Santa Cruz*, the Ninth Circuit addressed another case involving an individual who was ejected from a city council meeting for giving a silent Nazi salute to the city council mocking a decision the council had made. 629 F.3d 966, 969–70 (9th Cir. 2010). Though the text of the ordinance does not appear in the court's opinion, it is clear from the opinion that the plaintiff never received an indefinite ban from city council meetings. Indeed, he sought leave to amend his complaint two years after it was initially filed to add another ejection for a subsequent alleged disruption. *Id.* at 970. Addressing the plaintiffs disruption, the Ninth Circuit explained that *White* stands for the proposition that "[a]ctual disruption means actual disruption." 629 F.3d 966, 976 (9th Cir. 2010) (en banc). "It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption." *Id.* The Court remanded for trial the issue of whether the plaintiffs actions constituted an actual disruption. *Id.* at 978.

While, "as a general matter, social media is entitled to the same First Amendment protections as other forms of media," *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735–36 (2019), the Court notes that applying the First Amendment to social media is a relatively new task. Accordingly, it "proceed[s] circumspectly, taking one step at a time." *Id.* at 1744 (Alito, J., concurring). Thus, the Court applies the narrow tailoring test articulated in *Ward*, while acknowledging the "actual disruption" standard in

White and *Norse*, which have not been applied outside the context of a city council meeting.

On Facebook, Plaintiffs' repeatedly posted the same or similar comments at high frequency during a short period of time. Trial Tr., ECF No. 80, 68:13–15. While Plaintiffs' comments on posts appeared beneath Defendants' original content, Facebook truncated long posts, and comments such that only an interested reader would see the entirety of a lengthy comment, blocking promoted the legitimate interest of facilitating discussion on these social media pages and did not burden substantially more speech than necessary because it immediately responded to high frequency posting during a short period of time. *See Ward*, 491 U.S. at 799. Alternatively, applying the "unduly repetitious or largely irrelevant" threshold the Ninth Circuit articulated in *White*, Plaintiffs' comments surely also met this standard. 900 F.2d at 1426. In other words, at the time Defendants' blocked Plaintiffs, Plaintiffs' repetitive comments on Defendants' Facebook posts were narrowly-tailored grounds for ejection from the forum.

On Twitter, the reasonableness of O'Connor-Ratcliff s initial decision to block Christopher Garnier is even more apparent. The testimony received shows that Christopher Garnier "tweeted at" O'Connor-Ratcliff 226 times in less than ten minutes. Trial Tr., ECF No. 80, 180:16. While the Court concurs with Christopher Garnier that it "is a beautiful thing [to be] able to engage [ ] elected officials' social media pages," *id.* at 76:19–20, this repetitive posting is far from "the banter" he asserts it is, *id.* at 76:24. Instead, O'Connor-Ratcliff s blocking of Christopher Garnier was narrowly tailored because it constituted a very

limited blocking induced only by an excessive "Tweet storm." While this conclusion differs from other social media cases, it does so because those cases did not address repetitive posts. Alternatively applying *White*'s "actual disruption" standard, Christopher Garnier's tweets once again crossed the line into "unduly repetitious or largely irrelevant." 900 F.2d at 1426. Accordingly, the Court finds O'Connor-Ratcliff initially ejecting Christopher Garnier from her Twitter forum for narrowly tailored reasons.

The issue then becomes whether Defendants' continued blocking, which has now gone on for more than three years, continues to "'promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (quoting *Albertini*, 472 U.S. at 689)). Here, the Court concludes the blocking has run its course — for now.

In *White* and *Norse*, the respective city councils both eventually allowed the plaintiffs into subsequent meetings. Not so here. Defendants continue to block Plaintiffs more than three years after initially doing so. While blocking was initially permissible, its continuation applies a regulation on speech substantially more broadly than necessary to achieve the government interest. *See Ward*, 491 U.S. at 800. Requiring Defendants to unblock Plaintiffs' following a three-year ban is also consistent with the Ninth Circuit's holding in *White*, which held the city ordinance at issue to be valid because it could be applied in a permissible manner. *See* 900 F.2d at 1426. Accordingly, the Court finds Defendants' blocking is no longer narrowly tailored.

However, the Court's conclusion is not free reign for Plaintiffs' to repeatedly post on Defendants' social media pages again. As noted above, the Court finds Defendants' *initial* blocking decision responded to repetitive and largely unreasonable behavior, and was therefore narrowly tailored to serve a substantial government interest. *See Ward*, 491 U.S. at 799. Only the fact that the blocking has gone on for three years requires the Court to intervene here. Plaintiffs should not interpret these conclusions of law as an invitation to flaunt and mock the First Amendment's important protections.

3. Substantial Government Interest

Having found the blocking is no longer narrowly tailored, Plaintiffs are entitled to the injunctive relief they request. Nonetheless, the Court turns to whether Defendants' blocking furthered a significant government interest because of the important consequences the Court's ruling may have here.

It is undeniable that Defendants, by creating and maintaining public Facebook pages and Twitter accounts, serve a substantial government interest. They have leveraged technology to provide new ways for their constituents to gain awareness of their activities and initiatives as elected officials. In short, they have used their pages to facilitate transparency in government. This is one of the most "significant government interests" the Court could imagine. Ensuring those platforms are not cluttered with repetitive posts monopolizing the pixels on the screen is important, and their role as "moderator[s] involves a great deal of discretion." *White*, 900 F.2d at 1426. It is a challenging role, but one that public officials

should not be scared away from as they seek to increase the public's access to themselves and their offices.

For these reasons, the Court notes that Defendants could adopt content-neutral rules of decorum for their pages to further the substantial government interest of promoting online interaction with constituents through social media. For example, those rules could contain reasonable restrictions prohibiting the repeated posting of comments and include sanctions such as blocking for a limited period of time. Though the Court cannot decide a precise time limit that might be reasonable, blocking for one month may pass muster given the ease at which a page administrator can block and unblock a user from a particular page. Blocking for three years, on the other hand, cannot.

4. Alternative Channels of Communication Exist

Again, while the foregoing is sufficient to grant Plaintiffs their requested injunctive relief, the Court briefly addresses the final factor in the *Ward* analysis. 491 U.S. at 802. Defendants argue that their decision to block Plaintiffs on social media left open "ample alternative channels for communication." Defs.' Br., ECF No. 84, 12.

Ample alternative channels for communication exist when a regulation "does not attempt to ban any particular manner or type of expression at a given place or time." *Ward*, 491 U.S. at 802. "An alternative is not ample if the speaker is not permitted to reach the intended audience." *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (internal quotation marks omitted).

Plaintiffs do not argue that ample alternatives are lacking, and the evidence confirms this is a wise concession. Whether Plaintiffs' intended audience for their comments and replies was Defendants themselves or other constituents within PUSD, Plaintiffs are able to communicate their concerns through Board meetings, emails, and their own social media accounts. Accordingly, the Court finds Defendants' blocking does not offend the third step of the *Ward* analysis.

5. Prior Restraint

Based on the foregoing, the Court need not reach the thorny question of whether an expansive use of word filters designed to block every comment constitutes an impermissible prior restraint on protected speech or whether it closes the public forum. "A prior restraint is an administrative or judicial order that forbids certain communications issued before those communications occur." *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 142 F.3d 414,430 (9th Cir. 2014) (citing *Alexander v. United States*, 509 U.S. 544, 549–50 (1993)). "Any prior restraint on expression comes to [the Court] with a heavy presumption against its constitutional validity," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976) (internal quotations omitted). As discussed above, "social media is entitled to the same First Amendment protections as other forms of media," *Packingham*, 137 S.Ct. at 1735–36 (2019), but the Court again "proceed[s] circumspectly, taking one step at a time." *Id.* at 1744 (Alito, J., concurring). That caution counsels the Court against making a finding regarding word filters here, when the Court can decide the issue on narrower grounds.

IV. CONCLUSION

The Court is aware of the consequences of its ruling today, but it is bound to follow the law as it has been interpreted by the Supreme Court and Ninth Circuit Court of Appeals. It may be that, faced with the choice between unblocking Plaintiffs and closing their public pages entirely, Defendants choose the latter. That would be a sad conclusion. The actions of a few repetitive actors should not deprive so many of this important civic tool, and the Court hopes that Defendants do not choose this course of action.

The Court finds that based on the record and the applicable law, Plaintiffs have proven Defendants violated 42 U.S.C. § 1983 by depriving Plaintiffs of their right to free speech while acting under color of state law. Specifically, the violation began at some time late in 2017 when the blocking of Plaintiffs had continued for too long a time and continues to the present. The Court does not find Defendants' conduct violated the California Constitution. Plaintiffs are entitled to declaratory and injunctive relief on their Section 1983 claim. Judgment will be entered accordingly.

IT IS SO ORDERED.

Dated: January 14, 2021

HON. ROGER T. BENITEZ
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER GARNIER; et al., Plaintiffs, v. POWAY UNIFIED SCHOOL DISTRICT, et al., Defendants.	Case No.: 17-cv-2215-W (JLB) **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [DOC. 34]**

Pending before the Court is Defendants Michelle O'Connor-Ratcliff and T.J. Zane's summary-judgment motion. Plaintiffs Christopher Garnier and Kimberly Garnier oppose.

The Court decides the matter on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' summary-judgment motion [Doc. 34].

I. BACKGROUND[1]

Defendants Michelle O'Connor-Ratcliff ("MOR") and T.J. Zane are members of the Poway Unified School District's ("PUSD") Board. (*MOR Decl.* [Doc. 34-6] ¶ 1; *Zane Decl.* [Doc. 34-5] ¶ 1.) Before being elected in late 2014, MOR and Zane created public Facebook pages, and in 2016 MOR also created a public Twitter page, to help promote their PUSD Board campaigns and political activities. (*MOR Decl.* ¶ 2; *Zane Decl.* ¶ 2; *Sleeth Decl.* [Doc. 34-2] ¶¶ 35, 36, *Ex. R* [Doc. 34-26] 4:6–10, *Ex. S* [Doc. 34-27] 5:3–13.[2]) MOR and Zane also have personal Facebook pages for communicating with close friends and family. (*Briggs Decl.* [34-4] ¶ 4, *Ex. 4* [Doc. 35-8] at 2; *Sep. Statement* [Doc. 36-1] 92:21–22, 99:28–100:3.)

After MOR and Zane were elected, each changed their public Facebook pages to reflect their Board positions. MOR added a "Political Info" section that listed her "Current Office" as "Board of Education President, Poway Unified School District," and her "About" section identified her as a "Government Official" and included her official PUSD email address under her "Contact Info." (*Briggs Decl.* ¶ 8, Ex. 8 [Doc. 35-12] at 2.) Zane changed his Facebook page to identify his position as a "Poway Unified School District Trustee," he added a picture of a PUSD sign,

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[1] Generally, parties and witnesses are referred to by their last name. The exceptions are Defendant Michelle O'Connor-Ratcliff, who refers to herself as "MOR" (*see P&A* [Doc. 34-1] 5:3), and Plaintiffs, who will be referred to as Mr. Garnier and Ms. Garnier to avoid any confusion.

[2] Page references for exhibits are to the CM/ECF page stamp, not the individual exhibit's page number.

and in the "About" section he also identified himself as a "Government Official." (*Briggs Decl.* ¶ 11, *Ex.* 11 [Doc. 35-15] at 2; *Sleeth Decl.* ¶ 35, *Ex. R* 5:4–6.) Additionally, MOR and Zane used their Facebook pages to provide information about their participation in PUSD activities, as well as other PUSD and Board information. (*See, e.g.*, *Vaughn Decl.* [Doc. 34-3] ¶¶ 11–12, *Ex. T* [Doc. 34-28] at 2, 3, *Ex. U* [Doc. 34-29] at 2, 6, 8, 10, 12, 14, 16, 28, 32; *see also Briggs Decl.* ¶ 9, *Ex. 9* [Doc. 35-13] at 2, 11–15, 20–22, *Ex. 10* [Doc. 35-14] at 9, 11, 15, 24–25.) Besides MOR and Zane, no PUSD employee regulated, controlled, or spent money maintaining any of their social media pages. (*Paik Decl.* [Doc. 34-4] ¶¶ 6–7.)

Plaintiffs Christopher Garnier and Kimberly Garnier reside within PUSD boundaries, and their children attend public schools within the district. (*C. Garnier Decl.* [Doc. 35-1] ¶ 2; *K. Garnier Decl.* [Doc. 35-2] ¶ 2.) Mr. Garnier was also a part-time PUSD employee from approximately 2011 to 2013. Both have attended many PUSD Board meetings where they frequently voice their concerns on issues. (*Sleeth Decl.* ¶¶ 33–34, *Ex. P* [Doc. 34-24] 6:5–22, *Ex. Q* [Doc. 34-25] 5:8–13.)

After MOR and Zane were elected to the PUSD Board, the Garniers began posting comments on their Facebook page. MOR contends the comments were "repetitive and unrelated" to her Facebook and Twitter posts, which "caused [her] original posts to be buried under the Garniers' posts." (*MOR Decl.* ¶ 5.) In approximately July 2016, she "blocked the Garniers from posting on [her] Facebook campaign page . . . , and [she] blocked Mr. Garnier from [her] Twitter campaign page soon thereafter." (*Id.* ¶ 6.)

Zane also contends the Garniers posted "repetitive and unrelated" comments that "caused [his] original posts to be buried under the Garniers' posts." (*Zane Decl.* ¶ 5.) Zane also eventually effectively blocked Mr. Garnier's ability to comment on his page. (*Id.* ¶ 9.)

The Garniers eventually realized they were blocked from MOR's Facebook page, and Mr. Garnier realized he was blocked from MOR's Twitter page and Zane's Facebook page. (*C. Garnier Decl.* ¶¶ 8, 10; *K. Garnier Decl.* ¶ 9.) The Garniers dispute they posted repetitive and unrelated comments, and instead assert they were blocked in retaliation for criticizing MOR and Zane regarding PUSD matters. (*Compl.* [Doc. 1] ¶ 10F; *Opp'n* [Doc. 35] 9:21–22.)

On October 30, 2017, the Garniers filed this lawsuit against MOR and Zane in their individual capacities, alleging they violated the Garniers' federal and state constitutional rights by blocking them from exercising their free-speech and/or government-petitioning rights in a public forum, namely on their public social-media pages.[3] MOR and Zane now seek summary judgment on the following grounds: (1) the Garniers lack standing because they have not suffered an "injury in fact"; (2) MOR and Zane are entitled to qualified immunity; (3) MOR and Zane are not liable under 42 U.S.C. § 1983 because they did not act under color of state law; (4) MOR and Zane's social media

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[3] Zane also blocked the Garniers from posting on his personal Facebook page. (Zane Decl. ¶ 8.) However, the Garniers' First Amendment claims are based on being blocked only from MOR and Zane's public Facebook pages, not their personal or business pages. (Compl. ¶¶ 10–16; P&A at 8 n. 1.)

pages are not public forums; and (5) even if MOR and Zane's social media pages are public forums, blocking the Garniers constitutes a reasonable time, place and manner regulation.

II. LEGAL STANDARD

Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322–23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the

nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party meets this initial burden, the nonmoving party cannot avoid summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *In re Citric Acid Litig.*, 191 F.3d 1090, 1094 (9th Cir. 1999) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson*, 477 U.S. at 252) ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient."). Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Ford Motor Credit Co. v. Daugherty*, 279 Fed. Appx. 500, 501 (9th Cir. 2008) (citing *Celotex*, 477 U.S. at 324). Additionally, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587.

III. EVIDENTIARY OBJECTION

As a preliminary matter, MOR and Zane object to Nara Pasin's declaration, which was filed in support of the Garniers' opposition. (*See Defs' Obj.* [Doc. 36-2].) MOR and Zane contend the declaration is improper expert opinion because the information contained therein is based on technical and specialized knowledge. (*Id.* 5:25–6:10.)

According to her declaration, Pasin has been a Facebook user for over 10 years. (*Pasin Decl.* [Doc. 35-3] ¶¶ 1, 20.) Pasin describes how Facebook is structured for the typical user, and the different ways Facebook pages may be customized. (*Id.* ¶¶ 3–6, 8–16.) She has not "received any outside tutorials or assistance in relation to utilizing Facebook." (*Id.* ¶ 1.) All the information she provides is based on her experience as a "Facebook user and reading Facebook's Settings." (*Id.* ¶ 18.)

Pasin is also an active Twitter user, and she discusses how Twitter accounts are structured and typically used. (*Id.* ¶¶ 20–26.) She has not "received any outside tutorials or assistance in relation to utilizing Twitter," but instead obtained all of the information discussed in her declaration "by acting as a Twitter user and reading Twitter's Settings." (*Id.* ¶¶ 20, 28.)

Contrary to MOR and Zane's argument, the information discussed in Pasin's declaration does not require technical or specialized knowledge, but instead involves information known to the typical user. Because Pasin has been using Facebook for over 10 years and is an active Twitter user, her testimony is proper. Accordingly, MOR and Zane's objection is overruled.

The parties also assert a number of other objections. (*See Defs' Obj.*; *Plts' Obj.* [Doc. 35-30].) All remaining objections to evidence cited in this order are overruled. To the extent the parties object to evidence not cited in this order, the Court declines to rule on the objections.

IV. DISCUSSION

A. The Garniers have standing.

MOR and Zane argue the Garniers do not have standing to pursue a First Amendment claim because they have not been "injured in fact." (*P&A* [Doc. 34-1] 12: 19–20.) According to MOR and Zane, the Garniers have not been harmed because they have other avenues to voice their concerns and opinions outside of MOR and Zane's public Facebook and Twitter pages. (*Id.* 13:17–14:7.)

To establish standing, a plaintiff must show (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). An "injury in fact" is an "invasion of a legally protected interest" that is both (a) "concrete and particularized," and (b) "actual or imminent, not conjectural or hypothetical." *Id.* at 560. To meet the imminence requirement, the injury must be "certainly impending." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). A "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). To be particularized, an injury "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. —, —, 136 S. Ct. 1540, 1548 (2016). "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id.* However, an injury need not be tangible to satisfy the concreteness

requirement, and "intangible injuries can nevertheless be concrete." *Id.* at 1549.

In *Knight First Amendment Institute at Columbia University v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018)[4], the plaintiffs were blocked from President Trump's public Twitter account after each of them tweeted a message criticizing him or his policies. The plaintiffs then sued President Trump, among others, for violating their First Amendment rights. The district court evaluated whether plaintiffs satisfied the "injury-in-fact" element of standing despite having "alternative means" of viewing and responding to the President's tweets.

The court began by recognizing plaintiffs had a "number of limitations" on their use of Twitter that encumbered their ability to communicate using the social media platform. *Id.* at 557. The court found the limitations constituted past harms that were "virtually certain" to continue because the individual plaintiffs continued to be blocked. *Id.* at 557–58. Furthermore, although plaintiffs' injuries were not tangible, they were nevertheless concrete, as the limitations on plaintiffs' ability to communicate were "squarely within the 'intangible injuries' previously determined to be concrete." *Id.* at 558. The injuries were also particularized because each plaintiff was affected in a "personal and individual way," because each personally owned a Twitter account that was blocked. *Id.* The court, therefore, held plaintiffs established an injury in fact. *Id.*

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[4] The Second Circuit affirmed the district court's decision on July 9, 2019. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019).

Here, the Garniers injuries are actual and imminent. Although they can communicate their opinions and concerns to MOR and Zane through "alternative means," such as email, regular mail, and at Board meetings, it is undisputed that MOR and Zane have blocked the Garniers from communicating on Twitter and Facebook. (*MOR Decl.* ¶ 6; *Zane Decl.* ¶ 7.) As a result, the Garniers can no longer comment on or react to any of MOR or Zane's posts. (*C. Garnier Decl.* ¶ 8, *K. Garnier Decl.* ¶ 9.) Similarly, Mr. Garnier cannot view any of MOR's Twitter posts or participate in the interactive portions of her Twitter conversations. (*C. Garnier Decl.* ¶ 10.) Thus, as in *Knight*, the Garniers have been injured because their ability to communicate using social media has been limited, and their injuries are "virtually certain" to continue because the Garniers remain blocked. The Garniers' injuries are also concrete and particularized because, like the Twitter users in Knight, Mr. and Mrs. Garnier personally own the accounts that were blocked and are each affected in a "personal and individual way." The Court, therefore, finds the Garniers have been injured in fact and have standing to sue MOR and Zane.[5]

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[5] MOR and Zane assert an additional reason the Garniers lack standing. In their moving papers, MOR and Zane describe several lawsuits between the Garniers and PUSD. (*See P&A* 6:9–8:6.) Based on that litigation, MOR and Zane contend the Garniers benefitted from being blocked because it allowed them to file more litigation and to continue to harass PUSD. (*Id.* 12:24–13:16.) Not surprisingly, MOR and Zane provide no legal support for this argument, and they appear to abandon the theory in their Reply. (*See Reply* [Doc. 36] 2:24–3:23.) To the extent, MOR and Zane did not abandon the argument, the Court finds it meritless and, simply put, silly.

B. MOR and Zane are entitled to qualified immunity for damage claims.

MOR and Zane argue they are entitled to qualified immunity because the Garniers' right to free speech on MOR and Zane's social media pages was not clearly established when they were blocked. (*P&A* 23:27–28.)

Public officials are entitled to qualified immunity from liability for monetary damages unless the plaintiff establishes (1) the conduct violated a constitutional right, and (2) the right was "clearly established" when the alleged violation occurred. *Saucier v. Katz*, 533 U.S. 194 (2001). In evaluating this two-step inquiry, district courts have discretion in deciding which prong to address first depending on the facts of the particular case. *Pearson v. Callahan*, 555 U.S. 223, 232, 236–42 (2009).

The second prong requires the plaintiff to show the right a government official is alleged to have violated was "'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). While it is not necessary for the exact action in question to have been previously held unlawful, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* In obvious cases, a right can be clearly established "even without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *see also Hope v. Pelzer*, 536 U.S. 730 (2002) (because the Eighth Amendment violation was "obvious," the right was clearly established even without a materially similar case). Thus, in evaluating whether a right is

clearly established, it is necessary to consider the particular circumstances involving the alleged violation. *See Anderson*, 483 U.S. at 641 (considering the circumstances surrounding an FBI agent's decision to conduct a warrantless search in evaluating qualified immunity).

Here, the Garniers contend that when they were blocked from MOR and Zane's social media accounts, it was already clearly established "that retaliation for the exercise of one's First Amendment rights amounts to a constitutional violation." (*Opp'n* 11:2–3.) Although correct, what was not yet established was the First Amendment right to post comments on a public official's Facebook or Twitter page. That right was first established in May 2018 in *Knight*, 302 F. Supp. 3d 541. Because MOR and Zane blocked the Garniers approximately two years before *Knight* (*see MOR Decl.* ¶ 6; *Zane Decl.* ¶ 9), the Garniers' constitutional right was not yet clearly established.

The Garniers also argue qualified immunity does not apply to this case because the doctrine only bars damages and not claims for declaratory or injunctive relief. While qualified immunity does not bar claims for declaratory and injunctive relief, the Garniers are also seeking monetary damages.[6] (*See Compl.*) Thus, MOR and Zane are entitled to summary adjudication

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[6] Although the Garniers' opposition contends they are seeking declaratory and injunctive relief, only the Complaint's caption mentions that relief. (*See Compl.* 1:11–13.) MOR and Zane's reply, however, simply points out that the Complaint's prayer does not request declaratory or injunctive relief. (*Reply* 7:21–23.) They do not then argue or cite any authority for the proposition that the Garniers cannot seek declaratory or injunctive relief.

of the damages claim. *See Greene v. Terhune*, 2 Fed. Appx. 750, 752 (9th Cir. 2001) (finding that qualified immunity did not apply to the plaintiff's declaratory and injunctive relief claim, but nevertheless barred the damages claim).

C. MOR and Zane acted under color of state law.

MOR and Zane contend the Garniers cannot bring a claim under 42 U.S.C. § 1983 because MOR and Zane did not act under color of state law when they blocked the Garniers from their social media pages. (*P&A* 14:8–18:9.)

"To state a claim for relief in an action brought under § 1983, [plaintiffs] must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). Traditionally, "acting under color of state law requires that the defendant in a § 1983 action has exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326, (1941)). "In general, section 1983 is not implicated unless a state actor's conduct occurs in the course of performing an actual or apparent duty of his office, or unless the conduct is such that the actor could not have behaved in that way but for the authority of his office." *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). The Supreme Court has held that if a defendant's conduct meets the state-action requirement under the Fourteenth Amendment,

"then that conduct [is] also action under color of state law and will support a suit under § 1983." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982). Both require "the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." Id. at 937. There must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

There is no single formula for determining state action. *Melara v. Kennedy*, 541 F.2d 802, 805 (9th Cir.1976). Rather, the analysis "is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). When determining whether an individual or entity's conduct amounts to state action, courts look at the totality of circumstances. *Skinner v. Ry. Labor Executives' Assoc.*, 489 U.S. 602, 614–15 (1989) (whether a private party's conduct amounts to state action is "resolved 'in light of all the circumstances'"); *Rossignol v. Voorhaar*, 316 F.3d 516, 523 n. 1 (4th Cir. 2003) (explaining the Supreme Court "look[s] at that totality of circumstances that might bear on the question of the nexus between the challenged action and the state"); *Howerton v. Gabica*, 708 F.2d 380, 384 (9th Cir.1983) (in order to determine whether defendant acted under color of state law, "the circumstances surrounding the [conduct] must be examined in their totality").

While there is no Ninth Circuit authority addressing state action in the context of a government official blocking someone from a social media

platform, the Fourth Circuit has dealt with the issue. In *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), a county resident brought a section 1983 action against the Chair of the County Board of Supervisors after the Chair blocked the resident from her public Facebook page. The Fourth Circuit affirmed the district court's finding that the defendant acted under color of state law in blocking the plaintiff. *Id.* at 681. The court focused on the Chair's use of her Facebook page "as a tool of governance," noting that the defendant used the page to inform the public about her and the county board's official activities, as well as public safety events and the county's response to such events. *Id.* at 680. The court also found persuasive that the defendant "swathe[d] the [Chair's Facebook Page] in the trappings of her office." *Id.* at 680–81 (brackets in original). This included categorizing her page as belonging to a government official, including her official title on the page, adding her county email address and the county office's phone number to the page's contact information section, including the official county website on the page, and posting content with a "strong tendency toward matters related to [the defendant]'s office." *Id.* The court reasoned that "a private citizen could not have created and used the Chair's Facebook Page in such a manner." *Id.* at 681. The court also reasoned that because the Chair's challenged actions were "linked to events which arose out of h[er] official status," her "purportedly private actions b[ore] a 'sufficiently close nexus' with the State to satisfy Section 1983's color-of-law requirement." *See id.* at 680, 681 (quoting *Rossignol* 316 F.3d at 524).

Here, like *Davison*, MOR and Zane's Facebook pages were used "as a tool of governance" because they were used to inform the public about MOR and Zane's official activities, as well as information related to PUSD and the Board. For example, in a Facebook post from March 12, 2015, MOR provided a link to the Pomerado News' online synopsis of a PUSD meeting. (*Vaughn Decl.* ¶ 12, *Ex. U* at 2.) On April 1, 2015, MOR informed readers about the "FINAL community forum where you can share your priorities for the school district and participate in creating next year's Local Control Accountability Plan." (*Id.* at 6.) On June 22, 2015, MOR again provided notice about the "Board meeting tonight" and stated that the "big items up for approval are next year's Local Control Accountability Plan (LCAP), General Fund budget, and Special Education budget." (*Id.* at 14.) The post also provides a link to the "[f]ull agenda packet for tonight." (*Id.*) On June 26, 2015, MOR's post reported that "the Board adopted the district's 2015–2016 Local Control Accountability Plan" and provided readers with a link to a "quick primer on the LCAP and LCFF." (*Id.* at 16.) In August 2015, MOR shared that she was honored to have received an award from the local Girl Scouts chapter for PUSD's support of the organization's mission. (*Id.* at 28.) In another post from March 2016, MOR shared about being invited to a PUSD elementary school to speak to students and their parents about women working in public service and government. (*Id.* at 132.) On her Twitter page in August 2017, MOR posted a picture from the orientation for new teachers with a caption that included: "Welcome to #TeamPUSD!" (*Briggs Decl.* ¶ 9, *Ex. 9* at 22.) In September 2017, she

tweeted a picture of her, Zane, another PUSD Board member, and a school principal at the "Salute to Teachers" event. (*Id.* at 11). MOR also shared posts from PUSD's official Facebook and Twitter pages. (*See, e.g.*, *Vaughn Decl.*¶ 12, *Ex. U* at 8; *Briggs Decl.* ¶ 9, *Ex. 9* at 11–14, 20, 21.)

Similarly, in March 2015, Zane posted about his visit to a PUSD high school to see how students were doing after a threat of violence. (*Vaughn Decl.* ¶ 11, *Ex. T* at 2.) On January 5, 2017, Zane posted about serving as "Emcee for the third year in a row" at the Character and Ethics Film Festival where "[s]tudents are invited to create and submit a video showing good character." (*Briggs Decl.* ¶ 10, *Ex. 10* at 24–25.) On January 11, 2017, Zane posted about "need[ing] your input for PUSD's LCAP (Local Control Accountability Plan)" and explained "[t]his is how District budget priorities are set for our schools . . . ." (*Id.* at 24.) In March 2017, Zane provided a link for information about the PUSD Board's passage of a "safe haven" resolution, and the next month Zane provided information about "RB High's Fight Against Hunger Club." (*Id.* at 11, 15). In May 2017, Zane notified and kept constituents up to date on a lockdown at a PUSD high school through a series of three posts. (*Id.* at 9.) And like MOR, Zane also shared posts from PUSD's Facebook page. (*See, e.g.*, *Vaughn Decl.* ¶ 11, *Ex. T* at 3.)

Just as in *Davison*, MOR and Zane's posts were linked to events which arose out of their official status as PUSD Board members. The content of their posts, considered in totality, went beyond their policy preferences or information about their campaigns for reelection. Instead, the content of many of their posts

was possible because they were "clothed with the authority of state law." *Davison*, 912 F.3d at 679. Their ability to post about district events they attended and share Board information was due to their positions as public officials within PUSD. Thus, MOR and Zane's actions on their social media pages bore a sufficiently close nexus with the state.

Furthermore, similar to the defendants in *Davison*, both MOR and Zane "swathed [their social media pages] in the trappings of [their] office." *Id.* at 680. MOR's Facebook page lists her "Current Office" as "Board of Education President, Poway Unified School District," and the "About" section identifies her as a "Government Official" and includes her official PUSD email address under "Contact Info." (*Briggs Decl.* ¶ 8, Ex. 8 at 2.) MOR's Twitter page also identifies her as "President, Poway Unified School District Board of Education," and lists her Twitter handle as @MOR4PUSD. (*Id.* ¶ 9, *Ex. 9* at 2.) Zane's Facebook page lists his position as a "Poway Unified School District Trustee," includes a picture of a PUSD sign, and identifies Zane as a "Government Official." (*Briggs Decl.* ¶ 11, *Ex.* 11 at 2.)

Because MOR and Zane could not have used their social media pages in the way they did but for their positions on PUSD's Board, their blocking of the Garniers satisfies the state-action requirement for a section 1983 claim.

D. MOR and Zane created public forums.

MOR and Zane argue that even if they did act under color of state law, their social media pages are not public forums. In support of this contention, MOR and Zane emphasize that their social media pages

were intended to promote their campaigns, "not to allow any and all political speech and debate." (*P&A* 19:6–11.)

In deciding whether a space is a public forum, courts look at "the policy and practice of the government," as well as "the nature of the property and its compatibility with expressive activity" to determine the government's intent. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); *see also Davison*, 912 F.3d at 682 (finding public official's Facebook page had "the hallmarks of a public forum" because of the page's "compatib[ility] with expressive activity"). "We will not find that a public forum has been created in the face of clear evidence of a contrary intent . . . nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Cornelius*, 473 U.S. at 803. However, "[o]pening an instrumentality of communication 'for indiscriminate use by the general public' creates a public forum." *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)); *see also Davison*, 912 F.3d at 682 (finding public official's Facebook page a public forum where official "placed no restrictions on the public's access to the page or use of the interactive component"). Additionally, a public forum need not be "spatial or geographic," rather "the same principles are applicable" to a "metaphysical forum." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995).

In *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2d Cir. 2019), President Trump appealed the district court's finding

that his Twitter account was a public forum. The Second Circuit affirmed the decision reasoning that the "Account was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation." *Id.* at 237. This conclusion was based on the following: (1) Trump and the White House staff presented the account "as belonging to, and operated by the President"; (2) the White House official Twitter account directed users to follow Trump's account for updates about his administration; (3) his tweets were considered official public records; and (4) Trump regularly used the account to communicate and interact with the public regarding his administration, including announcing "matters related to official government business," such as national policy and executive staff changes. *Id.* at 235–36. According to the Second Circuit, these facts demonstrated Trump "consistently used the Account as an important tool of governance and executive outreach," and were "overwhelming" evidence of the "public, non-private nature of the Account." *Id.* at 236. These facts also established "substantial and pervasive government involvement with, and control over, the Account." *Id.* at 235.

Here, as demonstrated in the previous sections, MOR and Zane kept constituents updated on PUSD events through their social media pages. As in *Knight*, where Trump's tweets regularly notified the public about his administration and announced matters related to official government business, MOR and Zane's posts provided notice about issues before the PUSD Board, and provided information relevant

to their positions and duties as Board members. (*See, e.g.*, *Vaughn Decl.* ¶¶ 11–12, *Ex. T* at 2, 3, *Ex. U* at 2, 6, 8, 10, 12, 14, 16, 28, 32; *see also Briggs Decl.* ¶ 9, *Ex. 9* at 2, 11–15, 20–22, *Ex. 10* at 9, 11, 15, 24–25.) Also similar to Trump, MOR and Zane highlighted their positions as government officials on their social media pages. By listing their official titles, providing district contact information, and identifying themselves as "Government Officials," MOR and Zane established a government presence on their public pages. (*Briggs Decl.* ¶¶ 8–9, 11, *Ex. 8, Ex. 9* at 2, *Ex. 11*.)

Moreover, MOR and Zane do not argue that they set any general limitations on who could follow or comment on their pages, nor on the language the public could use when commenting. Thus, MOR and Zane opened their pages "for indiscriminate use by the general public," and as a result created public forums. *Knight*, 928 F.3d at 237.

MOR and Zane nevertheless argue their social media pages are not public forums because PUSD did not own or control their accounts. "[T]hat the government does not 'own' the property in the sense that it holds title to the property, is not determinative of whether the property is, in fact, sufficiently controlled by the government to make it a forum for First Amendment purposes." *Knight*, 928 F.3d at 235 (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547–52 (1975)). Although neither PUSD nor any other PUSD employee besides MOR and Zane managed or funded their social media pages, MOR and Zane are themselves government officials who decided what to post and who could access their pages. (*MOR Decl.* ¶¶ 7–8; *Zane Decl.* ¶¶ 10–11.) Thus,

although PUSD did not control MOR and Zane's pages, they, as government officials, did.

MOR and Zane also contend their social media pages are not public forums because they created them before becoming Board members and used them solely to promote their campaigns. However, it is undisputed that since their election to the Board, MOR and Zane's posts have related to their governmental duties and positions as Board members. (*MOR Decl.* ¶ 2; *Zane Decl.* ¶ 2.) As noted in *Knight*, "[the] litigation concerns what the Account is now," not how the account was used prior to litigation or how it will be used when MOR and Zane are no longer Board members. *Knight*, 928 F.3d at 231. Because MOR and Zane were posting content related to their positions as public officials and had opened their pages to the public without limitation when they blocked the Garniers, the Court finds the interactive portion of their social media pages are public forums.

E. <u>The category of forum created by MOR and Zane.</u>

Having determined that MOR and Zane created public forums, the Court must determine the category of forum they created.

The Supreme Court has recognized three categories of public fora: "traditional public forums," "designated public forums," and "limited public forums." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010). A traditional public forum is a place which "by long tradition or by government fiat ha[s] been devoted to assembly and debate," such as a public street or park. *Perry Educ. Ass'n*, 460 U.S. at 45. The government

creates a designated public forum when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). "[T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802. Limited public forums are spaces "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove*, 555 U.S. at 470.

MOR and Zane argue that their social media pages are neither traditional public forums nor designated public forums. Although their pages do not constitute traditional public forums, for the reasons that follow the Court finds they are designated public forums.

1. MOR and Zane's social media pages are designated public forums.

MOR and Zane argue that their social media pages are not designated public forums because they "did not 'dedicate the property for First Amendment activity'" and the "'principal function' of the pages is to promote the Defendants' individual campaigns and show the Defendants in the best light possible." (*P&A* 20:14–16.)

In *Knight*, the district court found President Trump's Twitter account was a designated public forum. *Id.* 302 F.Supp.3d at 574. While the court acknowledged that "government intent" is "the touchstone for determining whether" the space is a designated public forum, it explained that "intent is not merely a matter of stated purpose." *Id.* Rather,

intent must be inferred from objective factors, including the government's policy and practice, the nature of the property, and its compatibility with expressive activity. *Id.* Because Trump's Twitter account was "generally accessible to the public at large" and Twitter itself is designed to allow users to interact with each other, the court held that the interactive space of Trump's account was a designated public forum. *Id.*

Just as in *Knight*, MOR and Zane opened their social media pages to the general public for comments without setting any limiting criteria. Any member of the public could access their social media pages and use the platforms to interact with MOR and Zane through their posts, unless they were blocked. Indeed, although MOR and Zane contend they intended to use their social media pages solely to promote their campaigns and not to interact with constituents, this contention is contradicted by their Facebook pages. MOR and Zane's posts frequently invite readers to "write a comment." (*See, e.g.*, *Briggs Decl.* ¶ 10, *Ex. 10* at 3, 4, 6–11; *Vaughn Decl.* ¶ 12, *Ex. U* at 2, 5–10.) Their Facebook pages also ask followers to "Invite your friends to like this Page" and, next to a "Send Message" link, followers are informed that MOR and Zane "Typically repl[y] within an hour." (*Pasin Decl.* ¶ 19, *Ex. 21* [Doc. 35-25] at 2–4; *Briggs Decl.* ¶ 10, *Ex. 10* at 2.) MOR's page also encourages followers to "Ask [MOR]" a question. (*Pasin Decl.*¶ 19, *Ex. 21* at 2.) Moreover, aside from encouraging interaction, there is evidence in the record of MOR and Zane interacting with users. (*See, e.g.*, *Vaughn Decl.* ¶ 12, *Ex. U* at 152–53; *Briggs Decl.* ¶ 10, *Ex. 10* at 7, 65.)

Additionally, the interactive nature of Facebook and Twitter is one of their defining characteristics. On its own Facebook page, Facebook describes its mission as to: "Give people the power to build community and bring the world closer together." (*Briggs Decl.* ¶ 12, *Ex. 12* [Doc. 35-16].) Similarly, in addressing its values, Twitter states, "We believe in free expression and think everyone has the power to impact the world." (*Id.* ¶ 17, *Ex. 22* [Doc. 35-26] at 2.) Although some expressive activity might disrupt MOR and Zane's purpose for using the pages, the nature of Facebook and Twitter is consistent with expressive activity. Social media users can use Facebook and Twitter to comment on, react to/like, mention another user, or share another user's posts. (*Pasin Decl.* ¶¶ 6, 22–24.) In fact, there are many comments, posts, and likes on MOR and Zane's pages from various users. (*See, e.g.*, *Vaughn Decl.* ¶¶ 11–12, *Ex. T* at 2–3, *Ex. U* at 3–5, 25.) Therefore, Facebook and Twitter's interactive nature demonstrates the pages' compatibility with expressive activity.

For these reasons, the Court finds the interactive portion of MOR and Zane's social media pages constitute designated public forums.

2. MOR and Zane's social media pages are not limited public forums.

MOR and Zane alternatively contend their social media pages constitute limited public forums, to which a more lenient standard of review applies. (*P&A* 22:8–19.)

"[A] limited public forum is a sub-category of a designated public forum that 'refers to a type of

nonpublic forum that government has intentionally opened to certain groups or to certain topics." *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (citing *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999)). Restrictions in a limited public forum are permissible as long as they are "viewpoint neutral and reasonable in light of the purpose served by the forum." *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956, 971 (9th Cir. 2008).

In evaluating whether a forum is a limited public forum or designated public forum, courts "must examine the terms on which the forum operates . . . ." *Hopper*, 241 F.3d at 1075. Government intent is critical in this determination, which in turn is evaluated by looking at the government's policy and practice. *Id.* (quoting *Cornelius*, 473 U.S. at 802). "The 'policy' and 'practice' inquiries are intimately linked in the sense that an abstract policy statement purporting to restrict access to a forum is not enough. What matters is what the government actually does—specifically, whether it consistently enforces the restrictions on use of the forum that it adopted." *Id.*

Here, MOR and Zane contend that their social media pages are limited public forums because they "have not 'opened' up their social media pages to certain groups or categories of speech" and instead maintain "their social media pages to promote themselves for the next upcoming election." (*P&A* 22:3–5.) The Court is not persuaded for at least two reasons.

First, MOR and Zane have failed to identify any policies or restrictions limiting the groups or

categories of speech. While they emphasize that their original reason for creating the social media pages was to campaign for office (*see MOR Decl.* ¶ 2; *Zane Decl.* ¶ 2), there is no limit on who could "speak" or what topics could be addressed implicit in their reasoning. In contrast, where courts have found a limited public forum, the government had explicit policies or restrictions governing the groups that could "speak" or topics that could be discussed. *See Arizona Life Coalition Inc.*, 515 F.3d 956 (finding Arizona specialty license plate program constituted limited public forum); *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489 (9th Cir. 2008) (finding County's Metro bus advertising program a limited public forum); *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007) (finding election to university's student senate a limited public forum); *Faith Ctr Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007) (finding library meeting room a limited public forum); *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044 (9th Cir. 2003) (finding school's distribution of advertisements a limited public forum); *DiLoreto*, 196 F.3d 958 (finding school's baseball fence a limited public forum). For this reason alone, MOR and Zane's social media pages are not limited public forums.

Second, assuming MOR and Zane meant to limit "speech" on their social media pages to issues involving their campaigns, the evidence establishes that MOR and Zane failed to consistently apply that restriction. As demonstrated in the previous sections, MOR and Zane's posts frequently provided information on a wide array of topics involving the Board and PUSD in general, and their pages

encouraged all users to interact with MOR and Zane. Because the evidence indicates MOR and Zane failed to consistently enforce their purported restrictions, their social media pages are not limited public forums.

3. A disputed issue of material fact exists regarding whether MOR and Zane's blocking of the Garniers was content neutral.

MOR and Zane argue that even if their social media pages are designated public forums, blocking the Garniers represents reasonable time, place and manner regulations. (*P&A* 20:21–23:21.)

"In a designated public forum, speakers cannot be excluded unless it is 'necessary to serve a compelling state interest' and the exclusion is 'narrowly drawn to achieve that interest.'" *Arizona Life Coalition Inc.*, 515 F.3d at 968 (citing *Sammartano v. First Judicial District Court*, 303 F.3d 959, 965 (9th Cir. 2002)). The Supreme Court follows a three-part test for evaluating the constitutionality of government regulations of the time, place or manner of protected speech: the regulations must (1) be content-neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 271 (9th Cir. 1995) (finding rent control board's time restrictions on public commentary during meetings were "reasonable time, place, and manner restrictions that preserve a board's legitimate interest in conducting efficient, orderly meetings").

Regulations are "content-neutral" if they are "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* A regulation "need not be the least restrictive or least intrusive means" of serving a government's content-neutral interest, in order to be "narrowly tailored." *Id.* at 798. Instead, a regulation is "narrowly tailored" "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The "ample alternative channels for communication" requirement is met when a regulation "does not attempt to ban any particular manner or type of expression at a given place or time." *Id.* at 802. Regulations that meet this requirement "continue[ ] to permit expressive activity." *Id.*

MOR and Zane contend the Garniers were blocked because they "inundated the Defendants' social media pages with hundreds of comments unrelated to the original post" causing "the original post to be buried by the Plaintiffs' comments." (*P&A* 21:11–14.) As a result, MOR and Zane argue "Plaintiffs' posts prevented the Defendants' from accomplishing their business—showing potential voters their involvement in the District." (*Id.* 21:15–16.)

The Garniers dispute that they disrupted MOR and Zane's social media pages and instead contend MOR and Zane engaged in viewpoint discrimination. (*Opp'n* 9:21–22.) In support of this argument, the

Garniers point out that they did not post repetitive comments within the same "dialogue as Defendants suggest," but instead posted "[c]omments of a similar nature . . . underneath different Posts to reach audiences within different interactive portions of the Facebook page . . . ." (*Id.* 9:25–27.) The Garniers also assert that all of their "comments dealt with PUSD and Defendants' roles in PUSD- related matters." (*Id.* 10:1–2.)

The evidence currently before the Court confirms that although the Garniers posted repetitive comments, they did not post repetitive comments within the same post. (*See e.g. Briggs Decl.* ¶ 1, *Ex. 1* [Doc. 35-5] 9:7–14; *C. Garnier Decl.* ¶ 7.) The evidence also indicates that Facebook automatically edits the display of lengthy comments to only display the first few lines. (*Pasin Decl.* ¶ 9.) Users may then choose to enlarge the comment to display the entire comment. (*Id.*) Additionally, Facebook also sorts and displays comments by the "most relevant." (*Id.* ¶ 8.) Based on these undisputed facts, there exists a disputed issue of material fact regarding whether the Garniers' comments actually disrupted MOR and Zane's original posts. This is important because if the Garniers' comments did not disrupt the original posts, it is reasonable to infer that MOR and Zane's claimed justification for blocking the Garniers was a pretext and that they actually blocked the Garniers because of the content of their comments. Accordingly, the Court finds summary judgment is not appropriate because a disputed issue of material facts exists regarding whether MOR and Zane's conduct was content neutral. *See Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010) (explaining that in order

to find plaintiff's ejection from city council meetings did not violate the First Amendment, plaintiff's conduct had to actually disrupt or disturb the meetings) (citing *White v. City of Norwalk*, 900 F.2d 1421, 1424–26 (9th Cir. 1990)).

V. CONCLUSION & ORDER

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** MOR and Zane's motion [Doc. 34] as follows:

1. Defendants MOR and Zane are entitled to summary adjudication of Plaintiffs' damages claim because Defendants MOR and Zane are entitled to qualified immunity.
2. Defendants MOR and Zane are not entitled to summary adjudication of Plaintiffs' claims for injunctive and declaratory relief because disputed issues of fact exist regarding whether Plaintiffs were blocked because of the content of their messages.

Dated: September 26, 2019

Hon. Thomas J. Whelan
United States District Judge

APPENDIX D

United States Constitution
Amendment I

Congress shall make no law respecting 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.

United States Constitution
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

42 U.S.C. § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.