No. 22-324

# IN THE Supreme Court of the United States

MICHELLE O'CONNOR-RATCLIFF AND T.J. ZANE, Petitioners,

v.

CHRISTOPHER GARNIER AND KIMBERLY GARNIER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

### JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 4, 2022 CERTIORARI GRANTED APRIL 24, 2023

## TABLE OF CONTENTS

Page

## Materials from District Court Proceedings No. 3:17-CV-02215 (S.D. Cal.)

Complaint for Damages and Declaratory and
Injunctive Relief Based on Violations of
Civil and Other Rights
(Dkt. # 1) (Oct. 30, 2017)1
Excerpt of Exhibit B9
Excerpt of Exhibit C11
Excerpts of Joint Statement of
Undisputed and Disputed Facts
(Dkt. # 36-1) (Mar. 18, 2019)13
Excerpts of Bench Trial – Day 1
(Dkt. # 80) (Sept. 21, 2020)

# UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER GARNIER;	) CASE NO.
and KIMBERLY GARNIER,	) ' <u>17CV2215W JLB</u>
Plaintiffs,	)
VS.	) COMPLAINT FOR
	) DAMAGES AND
POWAY UNIFIED SCHOOL	) DECLARATORY
DISTRICT; MICHELLE	) AND INJUNCTIVE
	) RELIEF BASED ON
ZANE; and DOES 1 through	) VIOLATIONS OF
100,	) CIVIL AND OTHER
Defendants.	) <b>RIGHTS</b>

Plaintiffs CHRISTOPHER GARNIER and KIMBERLY GARNIER ("Plaintiffs") allege as follows:

### **Introductory Statement**

1. As concerned parents with children attending public schools in the Poway Unified School District ("PUSD"), Plaintiffs have consistently spoken their minds whenever it appeared that the best interests of PUSD students were being subordinated to the whims of capricious, corrupt PUSD officials. For example, Plaintiffs were outspoken critics of former PUSD superintendent John Collins, who has since been charged with multiple crimes arising from his management of PUSD's affairs. More recently, Plaintiffs have raised serious concerns about the lack of oversight provided by three particular members of PUSD's governing board, fearing that lax oversight could lead to many of the same problems that infected

\* \* \*

Mr. Collins' tenure. Rather than listen to Plaintiffs, Defendants have shut them down.

2. PUSD and the two board members sued in this lawsuit all maintain Facebook and other social-media websites in order to communicate with the public about official PUSD matters. Members of the public who do not air their concerns about PUSD matters and keep their criticisms to themselves are allowed to post comments on these social-media websites. Plaintiffs are not so lucky; if not both of them, at least one has been completely blocked from posting critical or negative comments on these websites. PUSD and the two board members have blocked Plaintiffs as "pay back" for past criticism and to prevent them from publicizing their concerns in the future.

### Parties

3. Each of the Plaintiffs was at all relevant times a resident of the County of San Diego in the State of California, residing within PUSD's geographic jurisdiction.

4. Defendant PUSD is a local public school district with its primary administrative offices in the County of San Diego in the State of California. Defendants Michelle O'Connor-Ratcliff ("MOR") and T.J. Zane ("ZANE") were at all relevant times members of PUSD's governing board. Neither MOR nor ZANE is currently being sued in an official capacity.

5. Each of the Plaintiffs is informed and believes and on that basis alleges that, at all times stated in this pleading, each Defendant was the agent, servant, or employee of every other Defendant and was, in doing the things alleged in this pleading, acting within the scope of said agency, servitude, or employment and with the full knowledge or subsequent ratification of his principals, masters, and employers. Alternatively, in doing the things alleged in this pleading, each Defendant was acting alone and solely to further his own interests.

6. The true names and capacities of the Defendants identified as DOES 1 through 100 are unknown to Plaintiffs, who will seek the Court's permission to amend this pleading in order to allege the true names and capacities as soon as they are ascertained. Each of the Plaintiff is informed and believes and on that basis alleges that each of the fictitiously named Defendants 1 through 100 has some degree of liability to Plaintiffs or has some other cognizable interest in this lawsuit.

### Jurisdiction and Venue

7. This Court has federal-question jurisdiction over this lawsuit pursuant to Section 1983 of Title 42 of the United States Code.

8. Venue is proper in this District pursuant to Section 1391 of Title 28 of the United States Code because a substantial part of the events or omissions giving rise to the claim occurred in the County of San Diego.

### FIRST CAUSE OF ACTION: Violation of Federal Constitutional Rights (Against All Defendants)

9. The preceding allegations in this pleading are fully incorporated into this paragraph.

10. Plaintiffs are informed and believe and on that basis allege that at all relevant times:

A. PUSD's Facebook website has included the following statement in the "About" section: "The purpose of this site is to promote our District and schools and enhance communication with students, parents/guardians, staff, and community members. The use of this site shall support the District's vision and goals of college and career readiness for all students." A true and correct copy of this portion of PUSD's Facebook website is attached to this pleading as Exhibit "A."

B. ZANE's Facebook website has been described as "the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information." A true and correct copy of this portion of ZANE's Facebook website is attached to this pleading as Exhibit "B."

C. MOR's Facebook website has included a "Political Info" section and listed her "Current Office" as "Board of Education, President, Poway Unified School District"; the website also identifies her as a "Government Official." A true and correct copy of this portion of MOR's Facebook website is attached to this pleading as Exhibit "C."

D. PUSD board member Darshana Patel's Facebook website<sup>1</sup> has included a "Political Info" section and listed her "Current Office" as "Poway Unified School District Board Member & Board Clerk, San Diego County, California, Poway Unified, United States"; the website also identifies her as a "Politician – Government Official." A true and correct copy of this

<sup>&</sup>lt;sup>1</sup> Ms. Patel is not a defendant at this time. She appears not to be retaliating against Plaintiffs through her social-media accounts in the ways that PUSD, MOR, and ZANE are.

portion of Ms. Patel's Facebook website is attached to this pleading as Exhibit "D."

E. PUSD, MOR, and ZANE all use their Facebook websites to distribute information about PUSD matters and allow members of the public other than Plaintiffs to post comments; in contrast, Ms. Patel does not currently block Plaintiffs. A true and correct example of a member of the public being allowed to post a comment (posted by Cory Briggs as "Testing 1, 2, 3") on each of the Defendants' Facebook websites is attached hereto as Exhibit "E."

F. Plaintiff CHRISTOPHER GARNIER was blocked from posting comments on the Facebook websites maintained by PUSD, MOR, and ZANE after they began to be criticized by him concerning PUSD A true and correct copy of Defendants' matters. Facebook websites showing comments by others but providing nowhere for Plaintiff CHRISTOPHER GARNIER to post a comment is attached hereto as Exhibit "F." Plaintiff KIMBERLY GARNIER was blocked from posting comments on the Facebook website maintained by MOR after the latter began to be criticized by the former concerning PUSD matters. A true and correct copy of MOR's Facebook website showing comments by others but providing nowhere for Plaintiff KIMBERLY GARNIER to post a comment is attached hereto as Exhibit "G." In each instance, Plaintiffs were blocked not only as retaliation for their criticisms but to prevent or impede their dissemination of future criticism on matters concerning official PUSD business.

G. MOR's Twitter account ("@MOR4PUSD") describes her as "President, Poway Unified School District Board of Education." A true and correct copy of MOR's Twitter account showing this description is attached to this pleading as Exhibit "H."

H. MOR uses her Twitter account to distribute information about PUSD matters and allow members of the public other than Plaintiff CHRISTOPHER GARNIER to obtain information about such matters and to post comments. A true and correct copy of MOR's Twitter account showing that Plaintiff CHRISTOPHER GARNIER is blocked is attached to this pleading as Exhibit "I."

I. For purposes of members of the public exercising their free-speech and/or governmentpetitioning rights, the Facebook websites maintained by PUSD, MOR, and ZANE and the Twitter account maintained by MOR constitute public forums.

11. Defendants' retaliatory conduct as alleged in this pleading violated and continues to violate, among other things, Plaintiffs' rights of free expression and to criticize the government as guaranteed by the United States Constitution.

12. Defendants' criticism-suppressing conduct as alleged in this pleading violated and continues to violate, among other things, Plaintiffs' rights of free expression and to criticize the government as guaranteed by the United States Constitution.

13. As a result of Defendants' illegal conduct as alleged in this pleading, Plaintiffs have suffered a legally cognizable injury in an amount to be proven at trial and have "chilled" their political speech for fear of being the victim of further retaliation and criticism suppression by Defendants and other public agencies and officials.

### SECOND CAUSE OF ACTION: Violation of State Constitutional Rights (Against All Defendants)

14. The preceding allegations in this pleading are fully incorporated into this paragraph.

15. Defendants' retaliatory conduct as alleged in this pleading violated, among other things, Plaintiffs' rights of free expression and to criticize the government as guaranteed by the California Constitution.

16. Defendants' criticism-suppressing conduct as alleged in this pleading violated, among other things, Plaintiffs' rights of free expression and to criticize the government as guaranteed by the California Constitution.

### Prayer

FOR ALL THESE REASONS, Plaintiff respectfully prays for the following relief against Defendants jointly and severally:

A. General, special, incidental, and/or nominal damages according to proof;

B. Punitive damages according to proof;

C. Any and all legal fees and other expenses incurred by Plaintiffs in connection with this lawsuit, including but not limited to reasonable attorney fees and costs; and

D. Any and all further relief that this Court may deem appropriate.

Date: October 30, 2017.	Respectfully submitted,
	BRIGGS LAW
	CORPORATION
	By: s/ Cory J. Briggs
	Attorneys for Plaintiffs
	Christopher Garnier
	and Kimberly Garnier

\* \* \*

## COMPLAINT FOR DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF BASED ON VIOLATIONS OF CIVIL AND OTHER RIGHTS

Excerpt of Exhibit "B" (formatting altered)

# 9/8/2017 T.J. Zane - About T.J. Zane Constraint fields and the set of the se

## About

PAGE INFO

Edit business typesCONTACT INFO

@ZaneforSchoolBoard

Send Message

http://www.tjzane.com

**MORE INFO** 

6 About

This is the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information.

Government Official

### **STORY**

I am committed to the personal growth and academic progress of my three children – and your children.

My interests include: being accessible and accountable; retaining quality teachers; increasing transparency in decision making; preserving local standards for education; and ensuring our children's campus safety.

## COMPLAINT FOR DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF BASED ON VIOLATIONS OF CIVIL AND OTHER RIGHTS

Excerpt of Exhibit "C" (formatting altered)

### 9/8/2017 Michelle O'Connor-Ratcliff - About



## About

**PAGE INFO** 

### Edit business types

**CAREER AND PERSONAL INFO** 

m Political Info

Current Office

Board of Education, President, Poway Unified School District

**CONTACT INFO** 

@MOR4PUSD	Send Message
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- moconnorratcliff@powayusd.com
- www.linkedin.com/pub/michelle-o-connorratcliff/4/844/b42

### **MORE INFO**

- About www.linkedin.com/pub/michelle-o-connorratcliff/4/844/b42
- Government Official

# UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER GARNIER; Case No.: 3:17-CV-

and KIMBERLY GARNIER,	02215-W-JLB
Plaintiffs, v. POWAY UNIFIED SCHOOL DISTRICT; MICHELLE O'CONNOR- RATCLIFF; T.J. ZANE and DOES 1 through 1000, Defendants.	Judge: Hon. Thomas J. Whelan Dept.: 3C Magistrate: Jill L. Burkhardt Dept.: 5th Floor JOINT STATEMENT OF UNDISPUTED AND DISPUTED FACTS
	NO ORAL ARGUMENT PURSUANT TO LOCAL RULE 7.1.d.1. Date: March 25, 2019 Action Date: October 30, 2017 Trial date: Not Set

Pursuant to this Court's Chamber Rule 3(h), the parties met and conferred to arrive at the below Joint Statement of Disputed and Undisputed Facts. The parties submit this Joint Statement of Disputed and Undisputed Facts for the Court's consideration.

13

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\* \* \*

## ISSUE 3 - THE PLAINTIFFS CANNOT BRING A CLAIM UNDER 42 U.S.C, § 1983, BECAUSE THERE IS NO GOVERNMENT CONTROL OR STATE ACTION OVER T.J. ZANE'S FACEBOOK PAGE

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
26. In or around June 2014, Zane decided to run for a seat on the District's Board of Education.	26. Undisputed.	
Exhibit R, Zane Depo 17:2–10.		
27. He then created a Facebook page to help promote his campaign and political activities.	27. Undisputed.	
Exhibit R, Zane Depo, 17:2–10; 18:1– 12; 22:16–20		
28. The Facebook page is titled, "Zane for School Board." Exhibit R, Zane Depo 58:3–12.	28. Disputed. A Facebook page allows users to select a "Name" and "Username". The Name is for	The evidence cited by Plaintiffs does not create a disputed material fact. Zane's Facebook
Depo 00.0-12.	identification	Username

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	PARTY'S	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
	Post, their photo and Name is placed above the Post to identify the author of the	"T.J. Zane." Plaintiffs' explanation of a Facebook "Name" and "Username" is not supported by any evidence. The only evidence supporting Plaintiffs' "facts" is a copy of Zane's "About" section on his campaign Facebook page.

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
	appears in the web address bar after www.facebook. com/. It can also be found underneath the Name on the user's Facebook page. Zane's Username is "ZaneforSchool Board." The Username is not considered a "Facebook title." Briggs Decl., ¶ 11, Exhibit 11, T.J. Zane "About" Page	
<ul> <li>29. Within the "about" section of the Facebook page, Zane has a link to his campaign website.</li> <li>Exhibit R, Zane Depo, 58:10–17.</li> </ul>	29. Disputed. Nothing on Zane's Facebook page indicates that the website linked under the "About" section, <u>www.tjzane.com</u> , is a political or	The evidence cited by Plaintiffs does not dispute Defendants' facts and evidence. Defendants' cited evidence proves that the website linked on Zane's campaign

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
	campaign- related page. Briggs Decl., ¶ 11, Exhibit 11, T.J. Zane "About" Page	Facebook page is Zane's campaign website. Zane testified: "The website that's linked is not a district website that's linked. <b>It's</b> <b>my campaign</b> <b>website that's</b> <b>linked."</b> (Exhibit R, Zane Depo, 58:10–17.) The only evidence supporting Plaintiffs' "facts" is a copy of Zane's "About" section on his campaign Facebook page.
<ul> <li>30. In addition, Zane included his ballot statement in the "story" section of his Facebook page when he initially created it.</li> <li>Exhibit R, Zane Depo, 59:4–10.</li> </ul>	30. Disputed. When Christopher Garnier was attempting to comment on Zane's Facebook Posts, Zane's ballot statement was not posted	The evidence cited by Plaintiffs does not dispute Defendants' facts and evidence. Defendants' cited evidence proves that the Zane's ballot statement was included in

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	PARTY'S	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
	section of the Facebook page. The "Story" section described Zane's commitment to his work with PUSD. Briggs Decl., ¶ 11, Exhibit 11, T.J. Zane "About" Page	the "story" section of his Facebook page: Q: And then on the right side of Exhibit 8, under the story heading, you typed in the information that appears there, correct? A: That's correct. Q. Okay. A: Which I believe is a cut and paste from my ballot statement in 2014. (Exhibit R, Zane Depo, 59:4– 10.) The only evidence supporting Plaintiffs' "facts" is a copy of Zane's "About" section on his campaign Facebook page.

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
<ul> <li>31. Zane intended to use his Facebook page to portray him "in the most positive light."</li> <li>Exhibit R, Zane Depo 23:13–24:3.</li> </ul>		
<ul> <li>32. He did not intend to use, and does not use, his Facebook page "to solicit comments or input" or as "a public forum."</li> <li>Exhibit R, Zane Depo 19:20–24, 24:24–25:1.</li> </ul>	utilize the social media platform, Facebook. On a public Facebook page, one may limit the page to only allow the administrator to create Posts but there is no way to Post on the Facebook page without soliciting comments or input. On a public Facebook Page each Post is open for reaction and comment by viewers. Viewers	The evidence cited by Plaintiffs does not dispute Defendants' facts and evidence. The evidence cited by Plaintiffs is improper expert testimony and hearsay. (Fed. Rules of Evid. 702.) "It is the 'location and purpose' of the property and <b>the</b> <b>government's</b> <b>subjective</b> <b>intent in having</b> <b>the property</b> <b>built and</b> <b>maintained</b> , <b>that is crucial</b>

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
	to the Post or to engage in discourse with other individuals within that specific Post by commenting on someone else's prior comment. Regardless of Zane's intent, by creating Posts, he cannot avoid providing viewers a field in which	than Zane's —

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
<ul> <li>33. Zane is the only administrator of his Facebook page.</li> <li>Exhibit R, Zane Depo 48:17–19.</li> </ul>	33. Undisputed.	
<ul> <li>34. No one at the District has any control over his page and no District employee has ever posted original content on his Facebook page.</li> <li>Exhibit R, Zane</li> </ul>	34. Undisputed.	
Depo, 62:8–14; Paik Declaration, $\P\P$ 4, 6, 8.		
<ul> <li>35. The District does not and has not spent any money to maintain his Facebook page.</li> <li>Exhibit R, Zane Depo, 15–17;</li> <li>Paik Declaration,</li> <li>¶ 7.</li> </ul>	35. Undisputed.	

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
<ul> <li>36. Zane was initially sworn in to the District's Board of Education in December of 2014.</li> <li>Exhibit R, Zane Depo, 13:7–14.</li> <li>37. He was recently reelected to another four-year</li> </ul>	36. Undisputed. 37. Undisputed.	
term. Exhibit R, Zane Depo, 13:7–14. 38. Zane considered himself "running for [re-election] the day after [he] was sworn in." Exhibit R, Zane	38. Undisputed.	
Exhibit R, Zane Depo, 17:21–25, 38:16–20. 39. Zane continued using the Facebook page to further his campaign efforts.	1.00,	The evidence cited by Plaintiffs does not create a disputed material fact. Plaintiffs misrepresents the

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
Exhibit R, Zane Depo, 17:11–13, 39:6–9.	provide content to viewers concerning non- political PUSD updates and related PUSD information. Briggs Decl., ¶ 11, Exhibit 11, T. J. Zane "About" Page	evidence they cite. Plaintiffs only cite to a portion of Zane's testimony relating to his campaign Facebook page. Zone's full testimony relating to changing is "About" section is set forth below: Q: Okay did you identify yourself on your Facebook page as a political candidate or as a government official? A: Originally as a candidate. After getting sworn in, the moniker was changed to reflect government official. But the description of the page remained

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	PARTY'S	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
		the same inasmuch as it described the page as promoting my political activities and the going on of the district.
		Q: But your political activities dealt with Poway Unified, correct?
		A: Yes, inasmuch as I was running for reelection, yes. They were limited to that, yeah.
		(Plaintiff's Exhibit 4, Zane's Depo. 18:1–12.)
40. Zane shared the same information regarding his political activities during open Board meetings	40. Disputed. Zane could not have presented political information	The evidence cited by Plaintiffs does not create a dispute of material fact.

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
as he did on any Facebook post. Exhibit R, Zane Depo 21:4–9.	may not use taxpayer funded resources to promote political candidacy and may not use public funds to influence voters. <i>See</i> Gov. Code § 54964; Educ. Code § 7054.	The evidence cited by Plaintiffs is improper expert testimony and hearsay. (Fed. Rules of Evid. 702.) Plaintiffs legal arguments are not "facts." Moreover, Plaintiffs' legal argument supports the Defendants' position — Zane can only share information about his campaign on his campaign Facebook page; he cannot campaign while he is acting in his official capacity during Board meetings.

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	PARTY'S	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
	during open Board meetings because each Post on Facebook invites reaction and comments from the person making the Post ( <i>i.e.</i> , Zane) and from other members of the public. People can comment on the Post and engage in conversation by responding to each other's comments within the Post. Listening to a topic during an open Board meeting differs	
	because it may not necessarily open for dialogue and discourse upon each specific announcement	

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	PARTY'S	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
	the same way each specific Post does. Because Zane "banned" the Garniers from his Facebook page, they are prohibited from engaging in the dialogues under each of his Posts. They are unable to react or comment the way other constituents can. Pasin Decl., ¶ 3, 6, 12	
<ul> <li>41. Zane was never told by the District that he could not or should not blocked constituents from his Facebook page.</li> <li>Exhibit R, Zane Depo, 68:23–69:1.</li> </ul>	41. Undisputed.	

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
<ul> <li>42. The District has a "District-Sponsored Social Media" policy" which states that each social media platform shall prominently display: <ul> <li>(3) A statement that the site is regularly monitored, and any inappropriate comments will be promptly removed.</li> <li>Inappropriate comments include those that: <ul> <li>(a) Are obscene,</li> <li>libelous, or so incite individuals as to create a clear and present danger of the commission of unlawful acts, violation of school rules, or substantial</li> </ul> </li> </ul></li></ul>	42. Undisputed.	

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
disruption of the school's orderly operation; (b) Are not related to the stated purpose of the site, including, but not limited to, comments of a commercial nature, political activity, and comments that constitute discrimination or harassment. See Request for Judicial Notice, filed in support of Defendants' MSJ, Exhibit AA, Administrative Regulation 1114(b).		
43. Zane has never posted the District's Social Media Policy on his social media accounts and has never purported	43. Undisputed.	

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	PARTY'S	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
to act pursuant to that policy.		
Zane Decl., ¶ 3.		

## ISSUE 4 - THE PLAINTIFFS CANNOT BEING A CLAIM UNDER 42 U.S.C. § 1983, BECAUSE THERE IS NO GOVERNMENT CONTROL OR STATE ACTION OVER MOR'S FACEBOOK AND TWITTER PAGES

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
44. MOR decided to run for the District's Board of Educators in 2014.	44. Undisputed.	
MOR declaration, ¶ 2.		
45. MOR created her Facebook and Twitter pages to support her political campaign for election to the	45. Undisputed.	

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
District's Board of Education in 2014. Exhibit S, attached to Declaration of Jack Sleeth, MOR Depo (hereinafter "Exhibit S"), 21:3–13.		
<ul> <li>46. She believes that she is "always running for public office," even after being elected as a public official.</li> <li>Exhibit S, MOR Depo, 21:3–22; 22:8–12.</li> </ul>	46. Undisputed.	
<ul> <li>47. She uses her social media accounts to "try to win support" for the next election cycle.</li> <li>Exhibit S, MOR Depo, 21:23–22:3; 22:23–23:1; 50:2–4; 50:10–12.</li> </ul>	47. Disputed. While MOR hopes her content will win her support for the next election cycle, in between elections the content posted by her on her	The evidence cited by Plaintiffs does not create a disputed material fact. In fact, Plaintiff agrees with Defendants facts and evidence —

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	PARTY'S	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
	Exhibit 7, MOR Facebook "Home" Page	"MOR hopes her content will win her support for the next election." This fact is supported by Defendants evidence. MOR testified that "every post promotes [her] reelection." (Exhibit S, MOR Depo, 50:10–12.) MOR testified that she posts "political" messages, because she "wants to continue being in public office." (Exhibit S, MOR Depo, 22:23– 23:1.) "It is the 'location and purpose' of the property and the

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
		government's subjective intent in having the property built and maintained, that is crucial to determining the nature of the property for forum analysis." Jacobson v. Bonine, 123 Ca.3d 1272, 1274 (9th Cir. 1997).
<ul> <li>48. MOR did not intend to use, and does not use, her social media accounts as "feedback forums;" rather, she uses her social media accounts as more of a "bulletin board."</li> <li>Exhibit S, MOR Depo, 24:16–20.</li> </ul>	48. Disputed. MOR chose to utilize the social media platform, Facebook. A public Facebook page does not function as a "bulletin board." On a public Facebook page, one may limit the page to only allow the	The evidence cited by Plaintiffs does not dispute Defendants' facts and evidence. The evidence cited by Plaintiffs is improper expert testimony and hearsay. (Fed. Rules of Evid. 702.)

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
		"It is the 'location and purpose' of the property and the government's subjective intent in having the property built and maintained, that is crucial to determining the nature of the property for forum
	commenting on the Post's	intent.
MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	PARTY'S	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
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	comments. If MOR was	
	interested in	
	setting up an	
	online-bulletin	
	board, social	
	media would not	
	have been her	
	chosen platform.	
	MOR could nave	
	created a	
	website, internet	
	blog, or any other	
	tool that would	
	allow her to	
	present	
	information	
	without receiving	
	feedback or	
	reaction in	
	return. Every	
	Post created by	
	MOR invites	
	reaction and	
	comment, except	
	from the Garniers because	
	they have been	
	banned.	
	Further, MOR	
	actively engaged	

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
	and supported feedback on her Posts. MOR has reacted to comments left within her Posts and has replied to comments left under her Posts. Pasin Decl., ¶ 3, 5, 6, 19, Exhibit 21, MOR FB Feedback Activity	
<ul> <li>49. MOR posts "campaign material" to her social media accounts. This information also tends to include information about the operations of the District.</li> <li>Exhibit S, MOR Depo, 23:2–5; 23:23–24:5, 52:23– 53:1.</li> </ul>	49. Disputed. Between campaigns. MOR uses her Face cook page mostly if not entirely to provide viewers non-political updates regarding both MOR and PUSD. Briggs Decl., ¶ 3, Exhibit 3, MOR Depo., 24:4–5 Briggs Deck, ¶ 7,	The evidence cited by Plaintiffs does not create a disputed material fact. MOR testified that "all of her Facebook posts refer to her campaign. (Exhibit S, MOR depo., 52:23– 53:1.) MOR also testified that

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
	Exhibit 7 MOR Facebook "Home" Page	posts relating to "campaign material" and posts relating to "the operations of Poway Unified" "are one in the same." (Exhibit S, MOR depo., 23:2–5.)
<ul> <li>50. MOR was initially sworn in to the District's Board of Education in November of 2014.</li> <li>Exhibit S, MOR Depo, 11:12–16.</li> </ul>	50. Undisputed.	
<ul> <li>51. She was recently reelected to another four- year term.</li> <li>Exhibit S, MOR</li> <li>Depo, 11:24–12:3</li> </ul>	51. Undisputed.	
52. The District was not involved in any way in the creation or	52. Undisputed.	

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
maintenance of MOR's Facebook or Twitter pages. Exhibit S, MOR Depo, 41:21–42:7;		
<ul> <li>Paik Declaration,</li> <li>¶¶ 5, 6, 8.</li> <li>53. MOR is the only administrator of both her Facebook and Twitter pages.</li> </ul>	53. Undisputed.	
Exhibit S, MOR Depo, 42:8–24		
<ul> <li>54. No one at the District has any control over her social media page and no District employee has ever posted original content on her social media pages.</li> <li>Exhibit S, MOR Depo, 42:8–24;</li> <li>Paik Declaration, ¶¶ 4, 6, 8.</li> </ul>	54. Undisputed.	

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	PARTY'S	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
<ul> <li>55. The District does not and has not spent any money to maintain her social media pages.</li> <li>MOR Decl., ¶ 8; Paik Declaration, ¶ 7.</li> </ul>	55. Undisputed.	
<ul> <li>56. MOR did not talk to anyone at the District about blocking the Garniers before she blocked them.</li> <li>Exhibit S, MOR</li> </ul>	56. Undisputed.	
Depo, 39:10–13; 78:8–18.		
57. The District has a "District- Sponsored Social Media" policy" which states that each social media platform shall prominently	57. Undisputed.	

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
display:		
<ul> <li>(3) A statement that the site is regularly monitored, and any inappropriate comments will be promptly removed.</li> <li>Inappropriate comments include those that: (a) Are obscene, libelous, or so incite individuals as to create a clear and present danger of the commission of unlawful acts, violation of school rules, or substantial disruption of the school's orderly operation; (b) Are not related to the stated purpose of the site, including, but not</li> </ul>		

MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING <u>EVIDENCE</u> :	OPPOSING PARTY'S RESPONSE AND SUPPORTING <u>EVIDENCE</u> :	MOVING PARTY'S REPLY AND SUPPORTING <u>EVIDENCE</u> :
limited to, comments of a commercial nature, political activity, and comments that constitute discrimination or harassment. See Request for Judicial Notice, filed in support of Defendants' MSJ, Exhibit AA, Administrative Regulation 1114(b).		
<ul> <li>58.</li> <li>MOR has never posted the District's Social Media Policy on her social media accounts and has never purported to act pursuant to that policy.</li> <li>MOR Decl., ¶ 3.</li> </ul>	58. Undisputed.	

UNITED STATES DISTRICT COURT		
SOUTHERN	N DISTRICT OF CALIFORNIA	
Before The H District Court Ju	onorable ROGER T. BENITEZ, dge	
CHRISTOPHER	GARNIER, et al.,	
VS.	Plaintiff, ) ) CASE NO. ) 3:17-cv-2215-	
POWAY UNIFIED SCHOOL)3:17-cv-2215-DISTRICT, et al.,)BEN-JLB		
	Defendants. )	
DI	San Diego, California Monday, September 21, 2020	
	NCH TRIAL – DAY 1	
APPEARANCES	:	
For Plaintiffs:	BRIGGS LAW CORPORATION 99 East C Street, Suite 111 Upland, California 91786 BY: CORY J. BRIGGS, ESQ. NORA PASIN, ESQ.	
For Defendants:	ARTIANO SHINOFF 2488 Historic Decatur Road, Suite 200 San Diego, California 92106 BY: DANIEL R. SHINOFF, ESQ. JACK M. SLEETH, JR., ESQ. JESSE B. BASEL, ESQ.	
Reported by:	Ellen L. Simone, RMR, CRR, CSR No. 14261 Official Court Reporter * * *	

42

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## THE COURT: All right. Well, thank you.

With regards to the state action issue, as I said, I have no desire to reinvent the wheel. Judge Whelan spent considerable time, and I thought he did a fantastic job on his order, so I'm not going to go back and revisit that issue. I think that the evidence that was submitted in connection with the state action issue at the summary judgment stage is sufficient.

Obviously, Mr. Sleeth, you're preserving your issue on appeal, but I will not allow evidence to be taken on that issue.

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Page 21

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[Testimony of Christopher Garnier]

Q. So during the School Board meetings, was there a time limit that was imposed on the speaker?

A. Yes. For everyone who speaks, it's three minutes.

Q. Okay. And when you speak, is it a question and answer session, or do the Trustees just sit there and listen?

A. You simply are allowed to speak. There is — it's actually — it gets Brown — it gets — it's a Brown Board violation, if I could speak.

Q. The Brown Act?

A. The Brown Act violation to have the Trustees speak or respond.

- Q. Okay. So it's a one-way information exchange —
- A. Yes, sir.
- Q. is that a fair statement?
- A. That's correct.

Q. Did you ever try to sit down with Trustee Zane or Trustee Ratcliff to share your concerns with them?

A. Multiple. Numerous occasions. Begged. Pleaded. As a Marine, as a combat veteran, as someone that's served — as my children are in your school, as my wife attended Brownie meetings, Girl Scouts with Trustee O'Connor, I begged. I had my wife plead. And they would never, ever respond to me.

\* \* \*

Page 41

## \* \* \*

[Testimony of Christopher Garnier]

Q. Okay. Why did you post the same comment repetitively?

A. There's a couple reasons. The first is, when you have multiple posts, then — that have to do with the School District, my post, or my comment, was relevant to their particular initial post.

There's other reasons for that, as well, too.

One of the reasons is that social media provides an opportunity, as I said, to create engagement, to have discourse, maybe banter. And when you have an opportunity to write a comment — to write a comment after a post, you are able to utilize their platform or their page to engage. So when I see someone else respond or post respond or make a comment to something they post, I find that the information that I was — that I'm going to post, or that maybe I posted, I don't know, the other day, the day before, is relevant to that particular post.

Page 42

Q. So you had a comment, the substance of which you thought was both related to content from the post or related to what some other member of the public submitted as his or her own comment; is that a fair statement?

A. That's the point of social media.

- Q. Did I —
- A. Absolutely.

Q. Okay. And it's also true that those comments you submitted were identical or substantially the same subject matter?

A. The subject matter was Poway Unified School District.

Q. But were the particular comments substantially the same?

A. I would say they were.

Q. Okay. And is that because the content of what you were saying in response, was it important to you or was it frivolous? I'm trying to figure out why you would post the same repetitive comments.

A. Well, the content was relevant to the original post.

Q. Okay.

A. Also, we have to look at the place of being a public servant myself. You know, serving as a Marine Corps officer, we're public servants.

When you serve the country in the capacity that I served the country, and you reach out to your public officials multiple times over multiple years, you begin to feel as if that service and that freedom that you fought for is

Page 43

disregarded and irrelevant.

I say that because the multiple times, the pleading, the begging just for a minute of one meeting with Trustee O'Connor. Just give me a meeting. One meeting with Trustee Zane. Just one.

When there's not a response, you have to figure out a way to utilize that God-given right that we have.

So I utilized the only resource that I had for communication and engagement, and that was through social media.

Q. Were you airing grievances or — I mean, were your comments critical of Trustees Zane and O'Connor?

A. Of course.

Q. Okay.

A. Let me say this: Critical of decisions that they made. It's our responsibility as citizens to question our public officials.

\* \* \*

[Testimony of Thomas Joseph Zane]

Q. Did you ever have any members of the public who showed up regularly at meetings to press the same points?

A. Sure. Yes, we did.

Q. Is it fair to say that there's more than a handful of people who do that?

A. Fair to say.

Q. Okay. And when they press the same points meeting after meeting, you eventually come to anticipate what it is they're going to say the next time; is that a fair statement?

A. You can often assume what they're going to cover.

Q. In general, you know the people, you know their issues, and you know what they're going to say each time.

A. With a few exceptions. Some individuals cover a number of topics.

Q. Okay. But you have others who have a consistent focus, yes?

A. Yes.

Q. Okay. Does it ever get redundant having to listen to them?

A. I wouldn't say redundant. It's part of the job.

<sup>\* \* \*</sup> 

\* \* \*

[Testimony of Thomas Joseph Zane]

MR. BRIGGS: Your Honor, I would like to show the witness Exhibit 6. And it would just be the first page of Exhibit 6.

BY MR. BRIGGS:

Q. And it should show up on your scene, Mr. Zane.

Page 123

A. It is.

Q. Does this look to you like what your Facebook page would have looked like in September of 2017?

A. Yes.

Q. And do you see, on the right side of the page, there's a blue box that says "send message"?

A. Yes.

Q. And below that, you see where it says "government official"?

A. I do.

Q. And you were the only person, in September of 2017, who had administrative access to your Facebook page; is that right?

A. That's correct.

MR. BRIGGS: Your Honor, I'd now like to show the witness Exhibit 7.

BY MR. BRIGGS:

Q. Mr. Zane, on your screen you should see Exhibit 7.

This is the "About" section of your Facebook page in September of 2017. Do you recognize that?

A. I do.

Q. Is that how your page looked back at that time?

A. Yes.

Q. Sorry to be redundant, but this is Facebook. In the "About" section, toward the bottom of that page, above where it says "government official", it says, "This is the official page

Page 124

for T.J. Zane, Poway Unified School District Board Member, to promote public and political information." Do you see that?

A. I do.

Q. You typed that in, yes?

A. Yes, I did.

\* \* \*

Page 147

\* \* \*

[Testimony of Thomas Joseph Zane]

Q. And people other than the Garniers have been able to comment on your Facebook page, correct? Or your Poway Facebook page, correct?

A. In the past, yes.

Q. You mentioned that you viewed the page as a kind of bulletin board. Did I understand that correctly?

A. Correct.

Q. Does that mean you're trying to disseminate information to Poway Unified residents and voters?

A. That's correct.

Q. Fair to say you're trying to educate the public?

A. As to my activities and, sure, occasionally an important piece of information, yes.

Q. I mean, if — for example, I think one of the posts I saw you do was about a school going into lockdown. There was some threat at a school, and I think you posted that the lockdown had been cleared, yes?

Page 148

A. That's correct.

Q. You were trying to let parents and the community know that everything was safe, the kids were safe, right?

A. That's correct.

Q. So you use this as a way of distributing information about Poway Unified official business, yes?

A. And my own political activities, yes, as a bulletin board.

\* \* \*

Page 154

\* \* \*

[Testimony of Michelle O'Connor-Ratcliff]

Q. I call them frequent flyers. Other people have different names. But do you ever have members of the public who come and speak on repetitive subject matter?

A. Some.

Q. And they normally do that during non-agenda public comment?

- A. Yes.
- Q. Do you walk out on them?
- A. No.
- Q. Do you turn off their microphones?
- A. If they go over their allotted time, yes.

Q. But if they come and tell you the same thing meeting after meeting after meeting during their three minutes, you sit there and listen to them, correct?

A. I do. That's the perfect forum for it.

Q. Okay. On your Poway Unified Facebook page, have you ever posted any rules of etiquette?

A. No.

Q. So somebody who goes to your Poway Unified Facebook page would not know what rules you've imposed for submitting

Page 155

comments to your posts; is that correct?

A. That's correct.

\* \* \*

Page 163

\* \* \*

[Testimony of Michelle O'Connor-Ratcliff]

Q. Do you think it's important to be accessible and responsive to your constituents?

A. To my constituents, yes.

Q. Do you think it's important to hear their feedback?

A. I do, yes.

Q. Do you think it's important to hear their criticisms?

A. Sure.

\* \* \*

Page 186

[Testimony of Michelle O'Connor-Ratcliff]

Q. Well, do you — has it been your — was it ever your practice to respond to people —

A. Mm-hmm.

Q. — or did you just —

A. Yes.

Q. Well, under what circumstances would you respond?

A. A question that I was interested in answering.

Q. Did you ever respond when people gave you positive feedback?

A. I haven't looked back at that, but I would assume I would smile or give it a thumbs up or something.

Q. So when people said things you liked, you would go to their comment and give it a thumbs up; is that correct?

A. Sometimes, early on.

Q. So you would react and let them know that you liked when they were giving you positive feedback, correct?

A. Correct, yeah.

\* \* \*

[Testimony of Michelle O'Connor-Ratcliff]

Q. Not interested in what you do as a private person.

As a public official, why don't you unblock my clients and just let the filter do its thing, and then, if you decide to go back to strictly private life, then it's nobody's business what you do with your Facebook page.

A. It means that I can't change the way I use my page. If I decided I wanted to use it to have some back and forth with my constituents at any point in the future, tomorrow maybe, your clients would be spamming again, ruining that for everyone.

Q. How do you know that?

A. It's their history. That's what they've done all along.

Q. But why, if you decided you wanted to do back and forth, do you think it would be okay to do back and forth with me, but not with my clients?

A. It would be fine to do back and forth with your clients if they weren't spamming.

## CERTIFICATION

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with rules and requirements of the United States Judicial Conference.

Dated: October 4, 2020, at San Diego, California.

<u>/s/ Ellen L. Simone</u> Ellen L. Simone, RMR, CRR Official Court Reporter