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## Ninth Circuit Holds Blocking Public from Officials' Social Media Accounts May Violate First Amendment

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New case law suggests social media accounts created by public officials may be considered public forums subject to constitutional scrutiny under the First Amendment. In the recently decided case, *Garnier v. O'Connor-Ratcliff* (9th Cir. 2022, Nos. 21-55118, 2155157) \_\_F.4th \_\_ [2022 WL 2963453], the Ninth Circuit Court of Appeals discusses these principles, holding that it is a violation of the First Amendment for a public official to block members of the public from their social media pages, when those pages are held out as official channels of communication about agency business.

### Background

In 2014, two members of the Poway Unified School District Board of Trustees created public Facebook and Twitter pages to promote their campaigns for public office. The two trustees (Trustees) won their respective races. However, after their races concluded, the Trustees continued to use their public social media pages to invite the public to board meetings, solicit input regarding board decisions, and to communicate with parents.

Christopher and Kimberly Garnier are the parents of two children in the school district. The Garniers regularly left comments on the Trustees' respective pages. Their comments were often repetitive and critical in nature. On one occasion, Christopher Garnier posted 226 identical replies to one Trustee's Twitter page within ten minutes. The Trustees began deleting or hiding the parents' comments from their Facebook pages and in October 2017, blocked the parents from their social media pages.

After that, the Trustees implemented a "word filter" on their Facebook accounts essentially eliminating the public's ability to leave written comments on the Trustees' Facebook pages. However, viewers were still able to register nonwritten communications such as "liking" or "disliking" posts with thumbs-up and thumbs-down emojis.

### Procedural History

The Garniers filed a lawsuit against the Trustees alleging the Trustees' social media pages constituted public forums and, by blocking the Garniers, the Trustees violated the Garniers' First Amendment rights. After the trial court awarded relief to the

parents, both parties appealed the verdict. The Court of Appeal ultimately upheld the trial court's verdict.

## **Blocking the Garniers from Social Media Constituted "State Action"**

The United States Supreme Court has previously established a test to determine whether there is a "nexus" between x and y, in order to establish whether an action taken by a governmental agency is a "state action," and therefore potentially subject to challenge under federal law for a "civil action for deprivation of rights." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n* (2001) 531 U.S. 288. Using the nexus test articulated in *Brentwood*, the court determined the Trustees' conduct, even though "seemingly private," was sufficiently related to the performance of their official duties to create "a close nexus between the State and the challenged action" resulting in "state action" under 42 U.S. Code § 1983 "civil action for deprivation of rights."

Of critical importance was the fact that the Trustees held their social media pages out to be official channels of communication with the public about the work of the school district's board. Specifically, the content of the pages was geared toward providing information to the public about school district activities, and the Trustees identified themselves as government officials on the social media pages. Furthermore, the content of the Trustees' posts had the purpose and effect of influencing the behavior of others. The court noted that the Trustees actively solicited input from the public, and encouraged members of the public to fill out surveys and apply for volunteer opportunities. The court concluded that the harm inflicted on the Garniers related in a meaningful way to the Trustees' governmental status or to the performance of their duties, recognizing that the Trustees used their social media pages as a political mouthpiece to relay updates to their constituents. Based on all three of these factors, the court ruled that the Trustees' conduct constituted state action.

## **Blocking the Garniers Violated the First Amendment**

The court then turned its attention to whether the Trustees violated the First Amendment by blocking the Garniers from their respective Facebook pages. At the outset, the court found that the Trustees' respective social media pages constituted public forums because the Trustees made a forum "available for use by the public" and had "no policy or practice of regulating the content." While the court noted that 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," the decision to block the Garniers from the designated public forums did not advance a significant governmental interest. The court reasoned that there was not sufficient evidence to support the Trustees' claim that the comments actually disrupted their social media pages because viewers could simply scroll past the repetitive comments.

Also, the Trustees' act of blocking the Garniers from their social media pages was not narrowly tailored because it "burdened substantially more speech than was necessary" and other reasonable alternatives existed, such as deleting or hiding repetitive posts. The court also noted that blocking the Garniers from the Trustees' social media pages was not reasonable in light of the purpose served by the forum. Given the implementation of word filters, the public could no longer post comments on the Trustees' Facebook pages and the risk of the Garniers posting repetitive comments was essentially eliminated, thereby rendering the continued decision to block the Garniers unreasonable.

The court ultimately concluded that the Trustees violated the Garniers' First Amendment rights by blocking them from the Trustees' social media accounts and that the trial court was correct in granting the Garniers declaratory and injunctive relief.

## Takeaways

Courts are extremely wary when a government official seeks to limit speech in a public forum. This case does not stand for the principle that every social media account created by public officials is subject to constitutional scrutiny. Nor does it stand for the principle that public officials are unable to manage the interactions occurring on a social media pages even once they do meet the definition of a designated public forum. Rather it serves as a reminder that "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." It should be noted that this case addressed Facebook pages created by two trustees, not the school district itself. However, given the same facts, the outcome would likely have been the same. Public officials considering blocking members of the public or deleting posts should carefully consider these principles and consult with legal counsel to avoid legal challenge.

If you have any questions about this case, or any issue relating to protected speech on social media platforms, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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