

# Garnier v. O'Connor-Ratcliff

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41 F.4TH 1158 (9TH CIR. 2022)

In *Garnier v. O'Connor-Ratcliff*, the Ninth Circuit addressed the question of whether two school board members violated their constituents' First Amendment rights by blocking them from their social media pages.<sup>1</sup> The Ninth Circuit rejected all of the Board members' arguments on appeal and ultimately affirmed the district court's decision, holding that blocking the constituents did, in fact, violate the First Amendment.<sup>2</sup> This case was argued before the U.S. Supreme Court on October 31, 2023, and on March 15, 2024, the Supreme Court published a per curiam order vacating and remanding the case back to the Ninth Circuit.<sup>3</sup>

## I. BACKGROUND

In November 2014, Michelle O'Connor-Ratcliff and T.J. Zane (Trustees) created public social media pages to promote their campaigns for positions on the Poway Unified School District (PUSD) Board of Trustees.<sup>4</sup> They each created a Facebook page, and O'Connor-Ratcliff would later also go on to create a Twitter page in 2016.<sup>5</sup> After winning seats on the Board, the Trustees continued to operate their public pages for various purposes related to their position as Board members.<sup>6</sup> The public was able to engage with the Trustee's posts and pages through emoticon reactions and comments.<sup>7</sup> Christopher and Kimberly Garnier were two parents of children in the District, and in 2015, the Garniers began to repeatedly post lengthy comments on the Trustees' social media posts critiquing the PUSD Board.<sup>8</sup> The Trustees began deleting and hiding the Garniers' comments and, eventually, went on to block the Garniers entirely in October 2017.<sup>9</sup> Subsequently, the Trustees also began using a "word filter" feature to filter out any comments on their page that included specific words.<sup>10</sup> Since the Trustees added several

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1. *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1167 (9th Cir. 2022), *cert. granted*, 143 S.Ct. 1779 (Apr. 24, 2023) (No. 22-324).

2. *Id.*

3. *O'Connor-Ratcliff v. Garnier*, No. 22-324, 2024 WL 1120878 (2024) (per curiam) *vacating and remanding, Garnier*, 41 F.4th 1158 (9th Cir. 2022).

4. *Garnier*, 41 F.4th at 1163.

5. *Id.*

6. *Id.* at 1164.

7. *Id.*

8. *Id.* at 1165-66.

9. *Id.* at 1166.

10. *Garnier*, 41 F.4th at 1166.

commonly used English words to their filtration system, this effectively eliminated all comments on their public pages.<sup>11</sup>

Shortly after being blocked, the Garniers filed suit under § 1983 seeking damages, declaratory relief, and injunctive relief, claiming the Trustees violated their First Amendment rights by removing them from the social media pages—which constituted public fora.<sup>12</sup> The district court found that the Trustees acted under color of state law in blocking the Garniers, and the social media pages were designated public fora, so a trial was required to determine disputed factual issues about whether the blocking was a content-neutral restriction of the repetitive comments.<sup>13</sup> After a two-day bench trial, the district court granted judgment for the Garniers, finding that the Trustees' indefinite blocking of the Garniers was not a narrowly tailored restriction and taxed costs in favor of the Garniers.<sup>14</sup> The Trustees appealed, challenging the judgment and the decision to award costs, and the Garniers cross-appealed, asserting the district court erred by granting qualified immunity to the Trustees for the damages claims.<sup>15</sup>

## II. ANALYSIS

### A. Trustees' Arguments

The Trustees put forward four arguments on appeal. First, the Trustees contended that the case was moot because the implementation of word filters effectively blocked comments from all users, and therefore this closed any public fora that may have previously existed.<sup>16</sup> Next, they maintained that blocking the Garniers did not constitute state action under § 1983.<sup>17</sup> Third, they argued that the decision to block the Garniers constituted a narrowly tailored time, place, and manner restriction.<sup>18</sup> Finally, the Trustees asserted that the district court erred by denying, without prejudice, their motion to retax costs.<sup>19</sup> The court rejected each of these arguments and framed their analysis accordingly.

#### 1. Mootness

The court rejected the Trustees' argument that their use of the word filter feature deemed this case moot on three grounds.<sup>20</sup> First, the court pointed to the fact that the word filter feature was only utilized on the Trustees' Facebook page—so Christopher Garnier's claim against O'Connor-

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11. *Id.*

12. *Id.* at 1166-67; 42 U.S.C. § 1983.

13. *Garnier*, 41 F.4th at 1167.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 1168-69.

18. *Id.* at 1177-78.

19. *Garnier*, 41 F.4th at 1184..

20. *See id.* at 1167-69.

Ratcliff's Twitter page would still survive.<sup>21</sup> Next, the court identified that the word filter feature only implicated a user's ability to comment, not their ability to register emoticon reactions (e.g., likes, hearts).<sup>22</sup> As a result, a live controversy still existed because the Garniers were deprived of providing non-verbal feedback other users were capable of providing.<sup>23</sup> Finally, and "independently dispositive," was the fact that the Trustees *voluntarily* made use of the word filtering system.<sup>24</sup> The court noted that a defendant's voluntary cessation of an activity does not moot a case unless the defendant can meet the heavy burden of showing they would not revert to their prior behavior.<sup>25</sup> Ultimately, the court concluded that the Trustees had not adequately proven they would continue using the word filter and close off all verbal comments from the general public - so this case was not moot.<sup>26</sup>

## 2. State Action

To determine whether the Trustees were acting under the color of state law, the court applied the "nexus test," which looks for whether there is 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."<sup>27</sup> The court analogized the facts of this case to other state action cases involving off-duty state officers and concluded that since the nexus test was applied in those instances, it would also be appropriate in this context.<sup>28</sup>

To guide its application of the nexus test, the court utilized a set of factors discussed in a previous case, *Naffe v. Frey*.<sup>29</sup> The first *Naffe* factor is whether "the employee purports to act under the color of law."<sup>30</sup> Here, the court found that the Trustees satisfied this factor by prominently displaying themselves as government officials on their social media pages and primarily posting content about official Board activities to engage with the public.<sup>31</sup> The second factor is whether the defendant's actions in the performance of their duties "had the purpose and effect of influencing the behavior of others."<sup>32</sup> On this point, the court determined that the Trustees' behavior had the purpose and effect of influencing constituents because they presented their social media pages as official outlets of information from the Board.<sup>33</sup> Each Trustee had hundreds of followers and actively solicited public feedback—

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21. *Id.* at 1168.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Garnier*, 41 F.4th at 1168.

26. *Id.*

27. *Id.* at 1169 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)).

28. *See id.* at 1174-77 (noting that the Second, Fourth, and Eighth Circuits have aligned with this reasoning in deciding state action issues in cases involving similar facts, while the Sixth Circuit has rejected analogizing government social media cases to cases involving off-duty law enforcement).

29. *Id.*

30. *Id.* (quoting *Naffe v. Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015)).

31. *Garnier*, 41 F.4th at 1171.

32. *Id.* at 1170 (quoting *Naffe*, 789 F.3d at 1037).

33. *Id.* at 1171.

none of which would be possible without their governmental status.<sup>34</sup> Finally, the last *Naffe* factor asks whether the harm inflicted on the plaintiff was meaningfully related to the defendant's "governmental status or performance of their duties."<sup>35</sup> The court determined that the Trustees' maintenance of their social media platforms as though they were an official organ for Board duties satisfied this element, as it was linked to blocking the Garniers.<sup>36</sup> Since all three factors were satisfied, the court concluded that the Trustees "unequivocally cloaked their social media accounts with the authority of the state," thus constituting state action under § 1983.<sup>37</sup>

### 3. First Amendment Analysis

In conducting a forum analysis, the court found that the Trustees' social media pages constituted a designated public forum prior to the establishment of word filters.<sup>38</sup> While the Trustees asserted that they intended their social media pages to serve as a one-way channel of communication to constituents, the court rejected this because the pages were open to the public to comment on and did not contain unambiguous and definite etiquette rules, as required for limited public fora.<sup>39</sup> However, the court noted that after the addition of word filters, the characteristics of the Trustees' pages changed, such that it became a limited public forum.<sup>40</sup> Additionally, since O'Connor-Ratcliff's Twitter page never utilized word filters, the court treated it as a designated public forum.<sup>41</sup>

The court decided it did not need to resolve the question of whether blocking the Garniers was viewpoint-discriminatory because blocking the Garniers violated the First Amendment, even when blocking was framed as a content-neutral time, place, and manner restriction.<sup>42</sup> In designated public fora, time, place, and manner restrictions are acceptable only if they are narrowly tailored to serve a legitimate government interest and if alternative channels for communication of the information exist.<sup>43</sup> First, the court found that there was no evidence the Garniers' comments actually disturbed the Trustees' pages by creating "visual clutter" or prevented other users from engaging in discussion.<sup>44</sup> Therefore, the court concluded that there was no significant government interest to justify the blocking.<sup>45</sup> Moreover, the court noted that even if the Garniers' comments were found to have interfered with a significant government interest, the act of blocking them was not narrowly tailored because the Garniers were entirely prevented from leaving comments

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34. *Id.*

35. *Id.* at 1170 (quoting *Naffe*, 789 F.3d at 1037).

36. *Id.* at 1172.

37. *Garnier*, 41 F.4th at 1173 (quoting *Howerton v. Gabica*, 708 F.2d 380, 384-85 (9th Cir. 1983)).

38. *Id.* at 1178-79.

39. *Id.* at 1178.

40. *Id.* at 1179.

41. *Id.*

42. *Id.* at 1180.

43. *Garnier*, 41 F.4th at 1180.

44. *Id.* at 1181-82.

45. *Id.* at 1182.

and from even viewing the Twitter page.<sup>46</sup> The court noted that this burdened substantially more speech than necessary when the Trustees could have used alternate methods like deleting only repetitive comments and establishing clear rules of etiquette on their pages.<sup>47</sup>

Moreover, the court found that it was not reasonable for the Trustees to continue blocking the Garniers after they installed word filters, in light of the purpose of the limited public forum.<sup>48</sup> Determining reasonableness requires courts to determine “whether the limitation is consistent with preserving the property for the purpose to which it is dedicated.”<sup>49</sup> Here, the Trustees’ implementation of word filters was driven by their interest in limiting public comments on their pages.<sup>50</sup> However, after using word filters, continuing to block the Garniers effectively served no purpose.<sup>51</sup> The only remaining impact was that the Garniers would not be able to participate in providing non-verbal emoticon reactions to posts, but the Trustees never asserted an interest in limiting emoticon reactions on their pages.<sup>52</sup> Therefore, the court concluded the continued blocking of the Garniers was unreasonable.<sup>53</sup>

#### 4. Costs

With respect to the Trustees’ claim that the district court erred by denying, without prejudice, their motion to retax costs, the court stated it lacked the appropriate jurisdiction to address this question.<sup>54</sup> The district court had clearly intended to revisit the question following the appeal, and so this did not constitute a “final decision” that the Ninth Circuit would be able to hear.<sup>55</sup>

#### *B. Garniers’ Cross-Appeal*

The Garniers cross-appealed, contending the district court erred by granting the Trustees qualified immunity as to the Garniers’ damage claim.<sup>56</sup> The district court granted qualified immunity on the basis that at the time the Trustees blocked the Garniers, there was no established First Amendment right to post comments on a public official’s social media page.<sup>57</sup> The court agreed with this logic, noting the lack of controlling authority or consensus of

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46. *Id.*

47. *Id.*

48. *Id.* at 1182-83.

49. *Garnier*, 41 F.4th at 1183 (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 967 (9th Cir. 1999)).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 1184.

55. *Garnier*, 41 F.4th at 1184-85.

56. *Id.* at 1183.

57. *Id.*

cases clearly establishing such a right in the fall of 2017 when the Trustees blocked the Garniers.<sup>58</sup>

### III. CONCLUSION

For the foregoing reasons, the Ninth Circuit affirmed the district court's judgment that the Trustees violated the First Amendment by restricting the Garniers' expression on their social media pages.<sup>59</sup> O'Connor-Ratcliff petitioned the Supreme Court of the United States for a writ of certiorari, and this was granted in April 2023.<sup>60</sup> The Supreme Court heard the case on October 31, 2023.<sup>61</sup> On March 15, 2024, the Court issued a per curiam order vacating and remanding the case to the Ninth Circuit for further proceedings consistent with the reasoning the Court articulated in *Linkde v. Freed*—another state action case that also dealt with the use of social media by public officials.<sup>62</sup>

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58. *Id.* at 1183-84.

59. *Id.* at 1185.

60. *Id.*, cert. granted, 143 S.Ct. 1779 (Apr. 24, 2023) (No. 22-324).

61. O'Connor-Ratcliff v. Garnier, No. 22-324, 2024 WL 1120878 (U.S. 2024) (per curiam) vacating and remanding Garnier, 41 F.4th 1158.

62. *Id.*