Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

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DATE: April 9, 2021

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Case Law Update on Elected Officials' Use of Social Media: *Garnier v. O'Connor-Ratcliff*

In December 2020, this Office issued a legal memorandum discussing amendments to the Ralph M. Brown Act clarifying that members of a legislative body may communicate with the public on social media platforms. City Att'y MS 2020-30 (Dec. 14, 2020). As this type of activity grows more common, courts are being asked to determine whether activities like blocking individuals from posting on elected officials' social media accounts violate the First Amendment. This memorandum discusses a recent local federal court case evaluating these issues. *Garnier v. O'Connor-Ratcliff*, No. 3:17-cv-02215-BEN-JLB, 2021 WL 129823 (S.D. Cal. Jan. 14, 2021). Although the outcome is currently being appealed and subject to change, the case merits consideration by elected officials in their use of social media.[1]

I. FACTS

In *Garnier*, two members (Board Members) of the Poway Unified School District (PUSD) Board of Trustees blocked a husband and wife (Plaintiffs) from their public Facebook pages after Plaintiffs posted numerous repetitive comments. The Facebook accounts were established before the Board Member were elected to the PUSD Board to promote their campaigns and political activities. The Board Members updated their Facebook pages after their election to reflect their new positions and provide information about PUSD and their participation in PUSD activities. PUSD did not regulate or control the pages or spend money maintaining these accounts. Also, the Board Members did not have in place social media rules of etiquette or decorum.

Plaintiffs' children were enrolled in public schools within PUSD, and Plaintiffs regularly attended Board meetings to voice concerns on PUSD issues. Plaintiffs began posting comments to the Board Members' social media accounts when they believed the Board Members were not responding to their emails and other communication efforts.[2]

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[1] Although this Office can only advise on social media accounts used to discuss official City business, the issues discussed in *Garnier* are equally applicable to private campaign and personal social media accounts.

[2] Evidence shows Plaintiffs emailed one of the Board Members at her PUSD email address 780 times, and Plaintiffs testified that email messages sent to the Board Members either went unanswered or the recipient refused to talk or meet. *Garnier*, 2021 WL 129823, at *3.

None of Plaintiffs' comments used profanity or threatened physical harm, and almost all related to PUSD. Plaintiffs' comments were often repetitive, however. For example, one of the Plaintiffs posted the same comment to 42 Facebook posts made by one of the Board Members and posted the same reply on Twitter to 226 separate tweets made by that Board Member in a 10-minute period. *Garnier*, 2021 WL 129823, at *6.

The Board Members testified they blocked Plaintiffs due to the disruptive and repetitive nature of their comments and not due to the content of the comments.[3]

II. LEGAL CLAIMS AND RULING

On October 30, 2017, Plaintiffs filed suit in the United States District Court for the Southern District of California against the Board Members in their individual capacities. Plaintiffs alleged the Board Members violated their First Amendment rights by blocking them from their public social media pages. Plaintiffs also named PUSD in the lawsuit but voluntarily dismissed the District in January 2018.[4]

Plaintiffs' federal claim arises out of 42 U.S.C. section 1983 (1996), 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 (1996). 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. Plaintiffs allege that the Board Members violated section 1983 by restraining their ability to participate in a public forum (Facebook).

Under the First Amendment, the government may regulate speech in a public forum by imposing reasonable time, place, or manner restrictions, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Here, the District Court found the Board Members were acting in their official capacity as PUSD board members in blocking Plaintiffs. *Garnier*, 2021 WL 129823, at *10. Because the Board Members "could not have used their social media pages in the way they did but for their

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[3] One of the Board Members blocked Plaintiffs after contacting Facebook. The other Board Member implemented a 2,000-word filter preventing all Facebook users from commenting on his posts. Although this Board Member may not have intentionally blocked Plaintiffs, the District Court found the result of the Board Member's actions was that he prevented Plaintiffs from commenting on any of his posts, which is consistent with what a blocked user would experience. *Garnier*, 2021 WL 129823, at *7.

[4] PUSD is defending the Board Members in this action. This is consistent with California Government Code section 995, which requires a public entity to defend public officials or employees if the civil action is being brought on account of an act or omission within the scope of employment. Here, Plaintiffs alleged the Board Members used their private social media accounts as a tool for governance and thus were acting in "under the color of law" in blocking Plaintiffs.

positions on PUSD's Board," the Court found their blocking of Plaintiffs "satisfies the state -action requirement for a section 1983 claim." *Id.* The Court's ruling is consistent with other recent cases which found legislators acted in their official governmental capacity in making blocking decisions on social media. *See, e.g.*, *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019) (county board chair); *Campbell v. Reisch*, 367 F. Supp. 3d 987, 994 (W.D. Mo. 2019) (state representative); and *Felts v. Reed*, No. 20-cv-821-JAR, 2020 WL 7041809, at *6 (E.D. Mo. Dec. 1, 2020) (municipal alderman).

The District Court recognized that whether Plaintiffs' repetitive comments and replies disrupted the Board Members' original posts, making the Board Members' blocking of Plaintiffs a reasonable time, place, or manner restriction on Plaintiffs' speech was an issue of first impression. *Garnier*, 2021 WL 129823, at *11. The Court found that the blocking of Plaintiffs' repetitive posts was content-neutral and "promoted the legitimate interest in facilitating discussion on the[] 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*." *Id.* at *13 (emphasis added).[5] The Court expressed a need to intervene because the 3-year length of blocking "applies a regulation on speech substantially more broadly than necessary to achieve the government interest." *Id.* at *14.

The District Court suggested the Board Members "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." *Garnier*, 2021 WL 129823, at *14. Those rules "could contain reasonable restrictions prohibiting the repeated posting of comments and include sanctions such as blocking for a limited period of time." *Id.* Although the Court stated that it "cannot decide a precise time limit that might be reasonable," it did suggest that "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" while "[b]locking for three years, on the other hand, cannot." *Id.*

III. RECOMMENDATIONS

As demonstrated by *Garnier*, elected officials should use caution when blocking individuals from their public-facing social media accounts. The first step in making a blocking decision, as suggested by the District Court, is the adoption of content-neutral guidelines or rules of decorum. Regularly monitoring and reviewing comments with the potential for removing comments or users (also known as "moderating" comments) should be performed without consideration of the viewpoint expressed by the user. The rules should expressly state that prohibited activity will lead to user-generated posts being rejected or removed, or the user being temporarily blocked from the account. For example, the rejection or removal of an offending post, or temporary blocking of a user, could be warranted against users who on multiple occasions posts a comment that:

[5] The Court commented that it was "undeniable that Defendants, by creating and maintaining public Facebook pages and Twitter accounts, serve a substantial government interest," by "leverag[ing] technology to provide new ways for their constituents to gain awareness of their activities and initiatives as elected officials." *Garnier*, 2021 WL 129823, at *14. According to the Court, the Board Members' social media accounts facilitate "transparency in government" which "is one of the most 'significant government interests' the Court could imagine." *Id.*

a. contains sexually explicit, profane, or obscene language or content;
b. would be threatening, abusive, or harassing to a reasonable person;
c. incites or promotes violence or illegal activities;
d. contains information that reasonably could compromise individual or public safety;
e. contains or links to malicious or harmful software;
f. violates the copyright, trademark or other intellectual property rights of any person or entity; or
g. violates a local, state, or federal regulation or law, including privacy laws.

Detailed documentation on any blocking decision should be meticulously maintained and include the reason for the blocking. Decisions cannot be based on the content of the speech.

Elected officials may also consider adding a disclaimer as applicable. If, for instance, the elected official maintains a personal Facebook page, the official may wish to post on the page that the page is maintained for personal purposes and is not affiliated with official government business. The elected official should refrain from using the forum for anything other than personal business.

In addition, if social media is used for government business, the elected official may wish to note on social media that the site is not regularly checked or maintained, if that is the case, and refer the public to an alternative mode of communication that may be more responsive to the public, such as an office phone number, website, or even the Get It Done app.

The City's Communications Department maintains social media standards for City department use in developing and maintaining social media pages that may prove helpful when addressing issues that arise on City officials' private social media accounts. We are also available to address specific questions related to official City websites and social media.

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By ***/s/ David J. Karlin***
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