

Government and Speech in the #Era: It's Not Always 👍 and 😊

The Facts of the Case

The issue in *Garnier v. O'Connor-Ratcliff* (41F. 4th 1158 (2022)) arose from the social media conduct of two public officials, Michelle O'Connor-Ratcliff and T.J. Zane, who were each elected members of the School Board of Poway Unified School District ("the District"). Prior to their election, both O'Connor-Ratcliff and Zane (collectively, "the Board Members") each maintained a public Facebook page—separate and distinct from their personal profile—to promote their respective electoral campaigns. The Board Members maintained their respective Facebook campaign pages following their successful elections. However, these pages underwent a de facto transition, as the Board Members began to utilize the profiles in their capacity as public officials.

Among the indicia indicating official use of the profile was the Board Members expressly identifying themselves as public officials on their respective profiles. Specifically, O'Connor-Ratcliff's "About" profile section identified her as a "Government Official," whose current public office was "President of the PUSD Board of Education," and provided at least a portion of her official contact information (e.g., District-issued e-mail address). O'Connor-Ratcliff also created a Twitter profile, which contained similar identifying information and was utilized in a similar manner. Similarly, Zane's "About" profile section contained the following description: "[t]he official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information," and otherwise

identified himself as a "Government Official." Moreover, Zane also modified the title of this profile to indicate his public official status; the profile was titled, "T.J. Zane, Poway Unified School District Trustee." Zane also maintained a Twitter profile, but this profile appears to be exclusively personal, as it was expressly identified as not subject to this litigation.

Beyond the Board Members' identifying information, the content published on these profiles varied from benign or innocuous District-related posts to posts touching and concerning official District or Board business. Or, stated otherwise, the profiles were not exclusively utilized for official District or Board business. The former category of benign posts included content related to student or teacher achievements, such as academic recognitions or sports success. The latter category of Board or District business posts included content related to the following subject matter areas:

1. Solicitation of applications to School Board representative positions, such as the Student
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- Board of Education and advisory committees;
2. Information related to activities or actions undertaken to fulfill Board or District obligations under state law, which included the solicitation of written and community-forum feedback;
 3. Final dispositions of policies or plans adopted by the Board;
 4. Information related to personnel decisions, including the process of dismissing the current Superintendent, and procuring their subsequent replacement—which (again) included solicitation of community involvement and feedback;
 5. Communication of their individual summaries, or “recaps,” of issues the respective Board Member determined to be important, such as contract negotiations or bond issuance decisions;
 6. Publishing alerts related to school safety or security issues within the District, which included evacuation due to a wildfire and lockdowns as a result of threats or nearby active-shooter situations.

The Board Members seemed to genuinely invite participation and engagement, as evidenced by their receptive response to their solicited feedback. Specifically, O’Connor-Ratcliff referenced her receipt of feedback and incorporated it into her approach, as she “received some good comments” and “made some changes to the structure” of her individual Board summaries based upon that feedback. Meanwhile, Zane republished an editorial article related to the political and electoral structure of the District, and indicated his agreement with the editorial, while asking the public at-large, “what say you?”

The Board Members’ profiles were limited to the standard features and moderation tools available on the respective social media platform. The Board Members were the only individuals capable of publishing original content posts on each respective account, but these posts allotted public interaction in the form of a comment section and an emoticon reaction feature. The moderation tools on Facebook involved unilateral deletion or hiding of comment-section posts, and later a word-filter that prohibited the posting of any comment that contained any word from a pre-identified list of “banned” words. The remaining moderation feature is the one that resulted in this cause of action, blocking specific users from interacting with the profile. Beyond these features, there were two notable omissions from the Facebook profiles: (1)

any written rule or requirement related to decorum, and (2) any type of disclaimer to counterbalance a perception of official use.

Christopher and Kimberly Garnier (collectively, “the Garniers”) were outspoken Board critics, who frequently interacted with the Board both at public meetings and social media. The Garniers expressed concern and outrage over racial issues within the District and alleged corruption or impropriety by the Superintendent. Moreover, the Garniers’ interactions became increasingly lively and spirited due to their frustration with the Board’s lack of responsiveness.

Consequently, the Garniers’ social media conduct toward the Board Members seemed to become more passive-aggressive, with an intent to cause an annoyance—but the Garniers never resorted to physical threats or profanity. For example, the Garniers often seemed to “copy-and-paste” extended comments on several of the Board Members’ posts. Specific examples of this conduct include: (1) re-posting comments on 42 posts made by O’Connor-Ratcliff on Facebook; and (2) “spamming” O’Connor-Ratcliff’s Twitter by “copying-and-pasting” the same response to every post she had ever made on Twitter, for a total of 226 identical responses in a ten-minute period.

Accordingly, the Board Members became frustrated with the unconstructive and repetitive commentary, which segued to the Board Members beginning to utilize the aforementioned moderation tools to remove or “hide” comments. Thereafter, the Board Members advanced beyond these incident-based solutions and blocked the Garniers on the relevant social media accounts, which precluded any future interactions. Eventually, the Board Members opted to forego free-form public comment on their social media accounts by utilizing a “word filter” feature, which limited the mode of interaction to emoticon reactions. However, as the Garniers were blocked, this feature remained unavailable to them

The Trial

The Garniers filed a claim in Federal District Court against the Board Members for governmental deprivation of their civil rights under 42 U.S.C. §1983, which sought monetary damages, as well as declaratory and injunctive relief. The Board

Members were granted qualified immunity on the claim for monetary damages, but the other claims were permitted to proceed. The Court determined the Board Members' conduct constituted action under color of state law because the content of their social media posts reflected their status as a public official rather than merely a candidate seeking election or re-election, or "the content of many of their posts was possible because they were 'clothed in the color of state law.'" The Court further found that the Board Members' public social media pages constituted a designated public forum and ordered a trial to determine whether the Board Members' actions constituted a reasonable, content-neutral restriction that was narrowly tailored to fulfill the underlying governmental purpose.

Prior to the trial, the Board Members unblocked the Garniers and sought to have the case dismissed as moot because the Board Members functionally disabled their respective comment sections. This argument failed, as the Court determined there was no assurance that the conduct would not repeat. On the merits, the Court held the Board Members' decision to block the Garniers was a content neutral approach to "enforce an unwritten rule of decorum prohibiting repetitious speech." But, the Court ultimately found in favor of the Garniers, as blocking the Garniers was not a narrowly-tailored approach to preclude repetitive commentary.

The Appeal

The Board Members filed an appeal with the Ninth Circuit Court of Appeals on the basis of mootness, lack of state action, and their approach constituted a narrowly-tailored time, place, or manner restriction—while the Garniers cross-appealed on the basis that the District Court erred in granting qualified immunity, in part, to the Board Members. Ultimately, the Appellate Court upheld the District Court's decision in its entirety. The Court first dispelled any concern of mootness by detailing multiple bases to resolve the issue, with an emphasis on a final dispositive factor, "voluntary cessation of allegedly unlawful conduct" is typically insufficient to render a claim moot—because "[o]therwise, 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."

Not only did the Board Members fail to produce sufficient evidence to satisfy their burden of proof on the issue of mootness, but also significantly undermined their position during their testimony. Specifically, O'Connor-Ratcliff testified that the voluntary conduct undertaken that served as the basis for their mootness argument was impermanent, as she may revert the changes "[to] have some back and forth with my constituents." Thus, raising the specter of the issue explicitly identified as the concern for voluntary cessation in relation to a mootness inquiry. Accordingly, the Ninth Circuit held the case is a "present, live controversy."

Thereafter, the Ninth Circuit proceeded to the merits of the appeal with the consideration of the issue of state action. The Ninth Circuit explained the amorphous nature of state action and characterized as "lack[ing] rigidity" and an exercise of "sifting facts and weighing circumstances." But, the ultimate "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," or "whether the alleged infringement of federal rights is fairly attributable to the government." Accordingly, the Court has a series of doctrinal devices to assist in this scrutinization or determination. The prevalent method utilized in analogous caselaw is the "nexus test," which considers 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."

The Ninth Circuit concluded that the Board Members' conduct constituted state action under the nexus test. The Ninth Circuit relied on precedent and analogized the Board Members profiles containing identifying information related to their status as a public official as akin to an off-duty official identifying themselves as a government agent, and thus invoking the authority of the state. Moreover, the content of their posts reaffirmed that invocation because the posts were generally relevant to official Board or District affairs. Also, the Board Members presented their social media profiles as official accounts related to their official duties within the District, which "had the purpose and effect of influencing the behavior of

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others” and otherwise “related in some meaningful way...to the performance of [governmental] duties.” To support these propositions, the Ninth Circuit cited the general manner in which the Board Members utilized their social media profiles to solicit constituent feedback and interaction related to Board or District business, as well as the previously identified individual examples thereof. However, the Ninth Circuit emphasized the “specific actions giving rise to” the Garniers’ claims were “linked to events which arose out of [the Board Members’] official status.” Specifically, the Garniers’ comments, even if repetitive and unrelated to a particular District subject, were objectively related to other Board or District issues.

Otherwise, the Ninth Circuit was abrupt and dismissive toward the Board Members’ various arguments to preclude a finding of state action. Specifically, the Ninth Circuit rejected (1) the lack of District funding for the social media profiles; and (2) the Board Members cannot be acting in their official capacity because their capacity is limited to offering a matter for a vote at a public meeting and subsequent voting. To this end, the Ninth Circuit reiterated that these types of technical arguments typically fail due to their failure to resolve the subject of the inquiry, which is whether the conduct is “fairly attributable to the State.”

Thereafter, the Ninth Circuit comparatively analyzed its approach to this issue of public officials and social media usage. To this point, only four other Circuit Courts have considered a similar issue, which limited the Ninth Circuit’s analysis to that of the Second, Fourth, Sixth, and Eighth Circuit Courts. Notably, each Circuit utilized the same type of method or framework to assess the issue, but the resulting conclusion varied due to the aforementioned emphasis on particularized facts and circumstances.

In Knight v. Trump, the Second Circuit held that the social media conduct of then-President Trump constituted state action and violated the First Amendment. In this case, the Second Circuit identified attributes of President Trump’s social media usage that were indicative of state action. Specifically, the Twitter account presented President Trump’s official title and identifying information, and frequently published content to set agenda, interact

with other public officials, engage with foreign leaders, announce policy or personnel decisions, and interact with the public regarding his administration. Moreover, President Trump’s Tweets were mandated to be preserved as official records under the Presidential Records Act. Accordingly, President Trump’s Twitter account served as “an important tool of governance and executive outreach,” which displaced any claim regarding the private or secular purpose of the account. But, the Second Circuit emphasized that an official operating a social media account is not determinative of state action, rather the Court must consider “how the official describes and uses account,” “to whom features of the account are made available,” and “how others... regard and treat the account.” Therefore, President Trump’s actions constituted state action when he blocked individuals from viewing or interacting with this Twitter account, and thus violated the First Amendment.

Similarly, in Davison v. Randall, the Fourth Circuit held that the social media conduct of a public official constituted state action and violated the First Amendment. In this Fourth Circuit case, the Chairperson of the County Board of Supervisors banned a constituent from interacting with the Chairperson’s Facebook profile. The circumstances regarding the Chairperson’s profile were substantially similar to the case of Garnier. Specifically, the profile provided the government official’s title in the profile title-headline; contained identifying information expressly related to the official’s governmental status; published content related to the official’s public duties; and solicited constituent feedback and otherwise utilized to interact with constituents. The Fourth Circuit analogized the circumstances to the precedent involving the conduct of off-duty governmental officers invoking authority, and these circumstances constituted a sufficient nexus under the aforementioned nexus test to amount to state action.

The Eighth Circuit applied the same type of analysis in Campbell v. Reisch, but found no state action—which reinforces the fact-oriented nature inherent in this type of inquiry. This case involved a Missouri State Representative’s use of a Twitter account for campaign purposes, which then became seemingly intermingled with official use. However,

the Eighth Circuit found this intermingling to be artificial, as the content published on the account did not change after the Representative's successful election. Instead, the Twitter account continued to be utilized in a manner that was "more akin to a campaign newsletter than to anything else," as its posts typically involved "tout[ing] her record" and the fulfillment of campaign promises—while the instances analogous to official use, such as interacting with constituents about policy or legislation, were "sporadic." Thus, the Eighth Circuit found an absence of state action, which foreclosed any First Amendment violation.

Returning to Garnier, the Ninth Circuit's inquiry shifted to the determination of the forum to assess the governmental action involved, as restrictions to the First Amendment are assessed on a continuum based upon the type of forum. Specifically, a forum may be characterized as a non-public forum, designated public forum, limited public forum, or a public forum. The Ninth Circuit exhaustively considered the nuance amongst the categorizations and determined that the most analogous forum for the Board Members' social media accounts is a designated public forum—and then a limited public forum, as modified by their use of word filters. However, the result is a distinction without a difference, as the Board Members' restrictions violated the First Amendment parameters for each designation.

A designated public forum is formed when the government makes a forum available for public use without a policy or practice for regulating content, with due consideration to the nature of the property and its "compatibility with expressive activity." Governmental restrictions on the First Amendment in a designated public forum must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communications of the information." Or, stated otherwise, restrictions are limited to reasonable "time, place, and manner" restrictions. These types of restrictions cannot "burden substantially more speech than is necessary to further the government's legitimate interests." Meanwhile, a limited public forum is a sub-category of a designated public forum, with its defining characteristic being that the government has limited the forum to "certain groups

or certain topics" with "unambiguous and definite... standards of inclusion and exclusion."

The Ninth Circuit emphasized several circumstances that support its findings that the Board Members' conduct or methods failed under the specified forum scrutiny. First, the Ninth Circuit emphasized the lack of policy regarding decorum or content, which resulted in the Board Members relying on an "unwritten rule" of acceptable conduct on the Internet to censor social media comments. This rationale or approach does not qualify as a compelling governmental interest for a designated public forum restriction, and similarly fails the limited forum analysis due to a lack of ambiguous and definite standards for exclusion or inclusion. Moreover, the Court expressed doubts with the Board Members' claims that the Garniers' repetitive comments constituted a significant impediment due to the practical functionality of the social media platforms. Specifically, the Garniers' comments were more akin to "minimal distractions" rather than bona fide disruptions.

Second, even if the Court presumed the Board Members had a legitimate interest, the Board Members conduct would still not sustain scrutiny, as banning individuals from interacting with their social media profiles burdened significantly more speech than necessary to achieve that presumed interest. The Board Members had "easily available alternative modes of regulation" that would have a significantly less impact on speech beyond the purview of the presumed interest, such as the ability to delete or hide individual posts that they deemed repetitive or distracting. The Board Members even utilized these features, and later decided to block the Garniers, which foreclosed any and all future interaction—even interactions where repetitive commentary was impossible (such as emoticon reactions).

Finally, the Court emphasized that the Board Members' decision to use a word-filter to restrict extended commentary of their profiles undermined their decision to block the Garniers. Specifically, the Board Members blocked the Garniers due to their repetitive comments, but repetitive comments are now a functional impossibility, and thus the continued blocking of the Garniers serves "no purpose."

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Conclusion

The Circuit Courts emphasize that the First Amendment is not merely limited to the constructs of “the corporeal world,” and the ethereal realm of the Internet is firmly within its purview. Pennsylvania is a member-state of the Third Circuit Court of Appeals, which has yet to address a similar type of First Amendment issue. Accordingly, there is no official precedent for this type of governmental speech related to social media. However, it would be short sighted to disregard the clear trending developing amongst other Circuit Courts based upon fundamental pillars of First Amendment jurisprudence.

Practice Note:

The decision to forego social media usage is the most effective means of foreclosing the type of issue presented in these cases, but may be impractical in the social media era. If one opts to engage in social media, it is imperative to have a clear Code of Conduct / Rule of Decorum that unambiguously and definitively defines parameters of appropriate content and identifies the continuum of consequences for violations of those policies. Moreover, if an account is intended to be private, but has any of the aforementioned intermingling of content, a conspicuous disclaimer to that effect is advisable.

charges if they did not receive a tax notice within their first year of owning a property. The homeowners will pay the full amount of the property taxes due and present an affidavit and copy of their deed to prove their date of purchase.

Under Act 57, taxing districts must adopt a resolution or ordinance within 90 days of October 11, 2022 which requires the tax collector to waive additional charges as defined in Act 57 for real estate taxes under certain circumstances beginning in the first tax year after October 11, 2022.

Taxing districts should work with their solicitors to ensure compliance with Act 57 and timely adopting the necessary resolution or ordinance.

Governor Amends Local Tax Collection Law To Provide Waiver Of Property Tax Penalty Charges For New Homeowners

Governor Wolf signed amendments to the Local Tax Collection Law (“LTCL”) into law on July 11, 2022. Act 57 of 2022 becomes effective on October 11, 2022. This legislation amends Section 7 of the LTCL, which addresses the effect of a taxpayer failing to receive the tax notice for assessed real estate taxes, by providing new homeowners the opportunity to request a waiver from the property tax penalty

TWO EDUCATIONAL OPPORTUNITIES

CSIU Virtual Administrative Law Series

Beard Legal Group is partnering with the **Central Susquehanna Intermediate Unit** is hosting a Virtual Administrative Law Series. The first session will occur on September 12, 2022 from 9 a.m. to 12 p.m.

Session 1-Student Discipline & Expulsion (September 12, 2022) - In the last two (2) years, we have had no less than 15 to 20 significant court decisions from the Pennsylvania Commonwealth Court, Pennsylvania Supreme Court, various Federal Courts in Pennsylvania, Third Circuit Court of Appeals and even the U.S. Supreme Court on student free speech, student discipline and student participation in athletics issues. There have also been significant changes and new mandates in a number of areas including student threat assessments. This seminar will cover many of the following areas:

- Discipline of regular and special education students
- Review of current/relevant case law pertaining to student discipline
- Threat assessments
- Properly documenting student discipline issues to withstand legal challenge
- Effectively drafting student discipline and expulsion letters
- Proactive measures to avoid needless litigation
- Discussion of poorly drafted or overbroad statements in student disciplinary handbooks

The deadline to register for the first session is September 9, 2022: <https://mailchi.mp/csiu.org/csiu-administrative-law-series-14164671>

DON'T MISS OUT!

*Pennsylvania School Study Council
School Law Day September 13, 2022*

Location:

Central Intermediate Unit 10 Conference Center
60 Decibel Road, State College, PA

Virtual Option is also Available at: <https://www.psscclawconference.org/register>

This year's topics will focus on Special Education issues in an effort to reduce litigation costs and the unnecessary expenditure of financial resources.

Topics and Speakers are:

Legally Compliant IEPs: Focusing on Behaviors | Dr. David Bateman, Special Education Consultant

Progress Reporting: Soup to Nuts [Legally Measurable and Defensible Goals] | Charles Jelley, Esquire, ODR Special Education Hearing Officer

School District and Special Education Curriculum to Enhance Student Performance | Sarah Schreiber, Supervisor of Special Education | Mollie Anzinger, Ed.D. Special Education Liaison

Special Education Case Law Update/Trends: What you Need to Know to Survive | Carl P. Beard, Esquire, Beard Legal Group, PC

Writing an Evaluation that Can Withstand Legal Challenge | Nicole Engleman, Ed.S., NCSP, Certified School Psychologist

Beard Legal Group Education Law Report

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carriers.

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. Peggy Schooling mxs284@psu.edu.

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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