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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CHRISTOPHER GARNIER; and  
12 KIMBERLY GARNIER,

13 Plaintiffs,

14 v.

15 MICHELLE O’CONNOR-RATCLIFF;  
16 and THOMAS JOSEPH ZANE,

17 Defendants.

Case No.: 3:17-cv-02215-BEN-JLB

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

18 Plaintiffs Dr. Christopher Garnier and Ms. Kimberly Garnier (collectively,  
19 “Plaintiffs”) are parents of children in the Poway Unified School District (“PUSD”).  
20 Defendants Ms. Michelle O’Connor-Ratcliff and Mr. Thomas Joseph Zane (collectively,  
21 “Defendants”) are members of the PUSD Board of Trustees. Plaintiffs allege Defendants  
22 blocked them from commenting on their Facebook and Twitter pages, depriving them of  
23 their federal constitutional rights in violation of 42 U.S.C. § 1983. Compl., ECF No. 1.  
24 Plaintiffs also allege violation of their state constitutional rights. *Id.*

25 This case is one of a growing number applying the First Amendment to the  
26 activities of elected officials on social media platforms. *See, e.g., Knight First  
27 Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (finding  
28 President Donald Trump’s Twitter account to be a designated public forum and that

1 blocking users was unconstitutional viewpoint discrimination); *Davison v. Randall*, 912  
2 F.3d 666 (4th Cir. 2019) (holding that a public official who used a Facebook page as a  
3 tool of her office exercised state action when blocking a constituent); *Robinson v. Hunt*  
4 *Cty., Texas*, 921 F.3d 440 (5th Cir. 2019) (finding that a government official’s act of  
5 blocking a constituent from an official government social media page was  
6 unconstitutional viewpoint discrimination); *Faison v. Jones*, 440 F. Supp. 3d 1123 (E.D.  
7 Cal. 2020) (granting plaintiffs’ motion for a preliminary injunction and ordering  
8 defendant county sheriff to unblock plaintiffs on his official Facebook page by finding  
9 the relevant page was a public forum); *Campbell v. Reisch*, 367 F. Supp. 3d 987 (W.D.  
10 Mo. 2019) (denying motion to dismiss and finding that defendant state legislator was  
11 acting under color of law when she blocked plaintiff from her official Twitter account);  
12 *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018) (denying plaintiffs’ motion for a  
13 preliminary injunction prohibiting defendant state governor from blocking plaintiffs on  
14 Facebook by finding the relevant page was not a public forum).

15 The Court conducted a two-day bench trial on Plaintiffs’ claims on September 21  
16 and 22, 2020. The following is a brief procedural background of this case, along with the  
17 Court’s findings of fact and conclusions of law from that trial. *See* Fed. R. Civ. P. 52(a).  
18 As explained below, the Court finds in favor of Plaintiffs’ on their Section 1983 claim.  
19 Because Plaintiff did not offer evidence or argue the state law claim, the Court declines to  
20 find Defendants’ conduct violated the California Constitution.

## 21 **I. PROCEDURAL BACKGROUND**

22 On October 30, 2017, Plaintiffs filed suit alleging one claim for violation of federal  
23 constitutional rights and one claim for violation of state constitutional rights, seeking  
24 general and punitive damages as well as injunctive and declaratory relief.<sup>1</sup> Compl., ECF  
25 No. 1, 5. Prior to the case’s transfer to this Court, Defendants moved for summary  
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27 <sup>1</sup> Plaintiffs initially also named PUSD in this lawsuit but voluntarily dismissed the  
28 district on January 26, 2018. ECF No. 9.

1 judgment on all claims. Mot., ECF No. 34. On September 26, 2019, Judge Thomas J.  
2 Whelan issued an order granting Defendants’ motion with respect to Plaintiffs’ damages  
3 claim reasoning that damages were barred by qualified immunity. Order, ECF No. 42,  
4 24. Judge Whelan denied Defendants’ motion with respect to Plaintiffs’ requests for  
5 injunctive and declaratory relief. *Id.*

6 Following transfer, the case proceeded to a bench trial. At the beginning of trial,  
7 the Court informed the Parties that it had reviewed Judge Whelan’s order and that it  
8 adopted the rulings set forth in the order. Trial Tr., ECF No. 80, 5:21-24. To formalize  
9 those rulings, the Court finds Defendants: (1) are entitled to qualified immunity for  
10 Plaintiffs’ damages claims; (2) acted under color of state law in blocking Plaintiffs from  
11 their social media pages; and (3) created designated public forums on their social media  
12 pages. The reasoning for these determinations is set forth in Judge Whelan’s order,  
13 which the Court adopts for these findings of fact and conclusions of law except for the  
14 ruling on standing. *See* Order, ECF No. 42.

15 The exception for the standing ruling is necessary because the evidence presented  
16 at trial indicated that Zane may have “unblocked” Kimberly Garnier before trial. “The  
17 Supreme Court has noted that the doctrine of mootness requires that the ‘requisite  
18 personal interest that must exist at the commencement of the litigation (standing) must  
19 continue throughout its existence (mootness).’” *McKercher v. Morrison*, Case No. 18-  
20 cv-1054-JTM-BLM, 2019 WL 1098935, at \* 2 (S.D. Cal. Mar. 8, 2019) (quoting  
21 *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68, n.22 (1997)). Because the  
22 evidence received at trial regarding standing differed in some respects from the Parties’  
23 claims in their briefing on the motion for summary judgment, the Court also makes  
24 findings of fact and conclusions of law with respect to each Plaintiff’s standing as to each  
25 Defendant’s alleged actions.

26 Aside from the continuing analysis of standing, the remaining issue for trial was  
27 whether Plaintiffs’ comments and replies disrupted Defendants’ original posts on their  
28 social media pages, “because if [Plaintiffs’] comments did not disrupt the original posts,

1 then it is reasonable to infer that [Defendants’] claimed justification for blocking  
2 [Plaintiffs] was a pretext and that they actually blocked [Plaintiffs] because of the content  
3 of their comments.” Trial Tr., ECF No. 80, 6:4-11.

4 Plaintiffs claim that: (1) Defendants blocked them from posting on their social  
5 media pages; (2) Plaintiffs’ comments and replies prior to blocking did not disrupt  
6 Defendants’ original posts; and (3) the blocking was impermissibly content-based. *See*  
7 *generally* Pls.’ Br., ECF No. 85. Defendants argue that: (1) any blocking left open  
8 alternative channels of communication; (2) the blocking was content-neutral and  
9 narrowly tailored; and (3) as officials of the legislative branch, their social media  
10 accounts should be treated differently from those of executive branch officials. *See*  
11 *generally* Defs.’ Br., ECF No. 84.

## 12 **II. FINDINGS OF FACT**

13 Following the testimony and exhibits received at trial, the Court makes the  
14 following findings of fact.

### 15 **A. Parties and Pages**

16 Plaintiffs Christopher Garnier and Kimberly Garnier are parents of children who  
17 are students in PUSD. Trial Tr., ECF No. 80, 87:20-23. Defendants Michelle O’Connor-  
18 Ratcliff and T.J. Zane are members of PUSD’s Board of Trustees. *Id.* at 112:7; 153:1.  
19 Both Defendants were first elected in 2014, and both still serve on PUSD’s Board of  
20 Trustees. *Id.* at 114:11; 153:5.

21 Zane has a Facebook account and maintains at least two pages. *Id.* at 112-115. He  
22 has a personal profile page that he uses for family and friends as well as a public page he  
23 uses for campaigning and issues related to PUSD. *Id.* at 113:25-114:20. Zane created the  
24 public page in 2014. *Id.* at 114:3-6. Zane is the only administrator of the public page.  
25 *Id.* at 114:12-25. Zane also has a Twitter account that he rarely uses but has interacted  
26 with Christopher Garnier on Twitter, which eventually led to an in-person meeting  
27 between the two. *Id.* at 138:8-10. Zane testified that Plaintiffs also posted on his  
28 personal and business Facebook pages, after which he blocked them from posting there.

1 *Id.* at 137:12-13. Zane’s decision to block Plaintiffs on his personal and business  
2 Facebook pages is not at issue here.

3 Like Zane, O’Connor-Ratcliff has a Facebook account. *Id.* at 153:13. She has  
4 both a personal page that she uses for family and friends as well as a public page she uses  
5 for campaigning and issues related to PUSD. *Id.* O’Connor-Ratcliff created her public  
6 page sometime before 2017. *Id.* Since 2017, O’Connor-Ratcliff has also used a Twitter  
7 account for PUSD and campaign purposes. *Id.* at 184:6-8.

8 O’Connor-Ratcliff and Zane successfully created and published original social  
9 media content on Facebook and Twitter – known as “posts” and “tweets,” respectively –  
10 related to PUSD on their public Facebook pages Twitter feeds. *See, e.g.,* Pls.’ Ex. 4, 1;  
11 Ex. 5, 1-25; Ex. 6, 1-88; Ex. 7, 1; Defs.’ Ex. “U,” 25-130. Neither O’Connor-Ratcliff nor  
12 Zane established rules of etiquette or decorum regulating how the public interacted with  
13 their social media accounts. Trial Tr., ECF No. 80, 115:6-9; 154:21-23.

14 Defendants testified that they intended their Facebook and Twitter pages to be used  
15 in a “bulletin board” manner—providing one-way communication from themselves to  
16 their constituents. *See, e.g., id.* at 130:10-16, 131:6-19, 133:11-12, 147:13-15, 148:7,  
17 168:15-16, 174:1-8, 185:16-19. However, at least through 2017, both also used  
18 Facebook for interactive purposes by replying to comments on their posts from other  
19 constituents about PUSD issues. *See generally* Pls.’ Exs. 3-4. There is no evidence  
20 O’Connor-Ratcliff used Twitter for similar interactions because her Twitter feed shows  
21 only posts, not comments and replies to others. Pls.’ Ex. 5. Zane used Twitter to  
22 interact—indeed, even with Christopher Garnier. He has not blocked Plaintiffs on  
23 Twitter.

#### 24 **B. PUSD Boarding Meetings in the Physical World**

25 At public meetings of PUSD’s Board of Trustees, members of the public can  
26 express their views to board members. Trial Tr., ECF No. 80, 178:3-24. Public  
27 comments may be made on any topic of the speaker’s choosing but do not allow for a  
28 response from members of the Board of Trustees. *Id.* at 21:20; 179:1-8. Public

1 comments are also limited to three minutes per speaker. *Id.* at 178:7-12. There are  
2 several members of the public who appear at each meeting and often press the same  
3 points. *Id.* at 113:6-16. PUSD does not have a policy prohibiting members of the public  
4 from appearing at subsequent meetings and repeatedly addressing the same issues to the  
5 Board. *Id.* at 133:22. Both Defendants testified that they do not leave the room during  
6 the public comment time, even when the comments they are hearing are repetitive. *Id.* at  
7 154:4-20.

### 8 **C. Other Alternate Avenues of Communication**

9 Both Defendants testified that receiving feedback from constituents is an important  
10 part of their duties as Trustees. In addition to the public comment portions of Board  
11 meetings discussed above, both Defendants maintain email addresses provided by PUSD  
12 that they use to conduct official business. The PUSD Board of Trustees also has a policy  
13 for the public to make a complaint about a Trustee. *Id.* at 58:6.

14 Both Defendants testified that the public frequently uses in-person comments and  
15 their PUSD email addresses to contact them. *Id.* at 134:16-18; 168:25. O'Connor-  
16 Ratcliff testified Plaintiffs emailed her PUSD email address 780 times. *Id.* at 173:15.  
17 Plaintiffs testified that email messages sent to Defendants went unanswered or the  
18 recipient refused to talk or meet. *See, e.g., id.* at 21:15-22:11, 89:21-90:5. Christopher  
19 Garnier also submitted complaints about both Defendants pursuant to the Board of  
20 Trustees' policy but received no response. *Id.* at 58:2-24.

21 However, Defendants never attempted to prevent Plaintiffs from speaking during  
22 the public comment period of a Board meeting and never attempted to prevent Plaintiffs  
23 from sending emails to their PUSD email addresses. Moreover, Zane has even met with  
24 Christopher Garnier in-person on at least two occasions. *Id.* at 138:6-7.

### 25 **D. Facebook Page and Twitter Account Functionality**

26 The crux of this case focuses on the alleged disruption of Defendants' Facebook  
27 pages and Twitter feeds. To analyze whether and how disruption on those platforms can  
28

1 occur, an understanding of how the platforms display content is required.<sup>2</sup>

2 On both Defendants' public Facebook pages, Defendants, respectively, are the only  
3 people who can create original "posts." *Id.* at 115:17. Nonetheless, members of the  
4 public are generally allowed to interact with the content Defendants post through  
5 "comments" and "reactions" on the Defendants' original posts. When accessing  
6 Defendants' Facebook pages, Facebook automatically truncates lengthy posts, requiring a  
7 viewer interested in reading the full post to click a "See More" button beneath the  
8 truncated post. *See, e.g.,* Trial Tr., ECF No. 80, 29:5-19, 93:11-95:2; Pls.' Ex. 3, 3 and  
9 19; and Defs.' Ex. U, 150. For viewers who have not clicked "See More" on the post,  
10 Facebook shows only the beginning of the post and only the most recent or most relevant  
11 comments.

12 An illustration may be beneficial to the reader. The picture below depicts a post  
13 made by O'Connor-Ratcliff on August 28, 2017. O'Connor-Ratcliff's post is long  
14 enough that a viewer is required to click "See More" to read her entire post.  
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25 <sup>2</sup> The Court notes its findings of fact here are limited by the evidence received at  
26 trial. Other cases examining social media blocking have attempted to make similar  
27 descriptions of social media platforms' functionality based on the evidence submitted in  
28 those cases, *see, e.g., Morgan*, 298 F. Supp. 3d at 1007, but the Court is hesitant to adopt  
anything outside of the record in this case because the functionality of these platforms  
constantly changes, making adoption inappropriate for judicial notice.



Pls.’ Ex. 3, 3. If a Facebook user wishes to skip past this post, she need only scroll past the truncated post, which takes a brief amount of time. Indeed, as shown above, O’Connor-Ratcliff’s next post (dated August 26, 2017) is also visible on this screenshot.

Lengthy comments are treated similarly to lengthy posts. On Facebook, comments in response to a post appear below the post. *See, e.g.,* Pls.’ Ex. 3, 4-6; Pls.’ Ex. 6, 6 and



1 10. There is no limit on the number of comments that can be made within a specific  
2 period of time, and the evidence produced at trial indicates such comments can be quite  
3 lengthy. *See generally*, Defs.’ Ex. U. To read a lengthy comment, the viewer must click  
4 “See More” on the truncated beginning of a comment. Pls. Ex. 3, 75. The individual  
5 viewer selects whether they will see the most recent or most relevant comments. Trial  
6 Tr., ECF No. 80, 183:10-13.

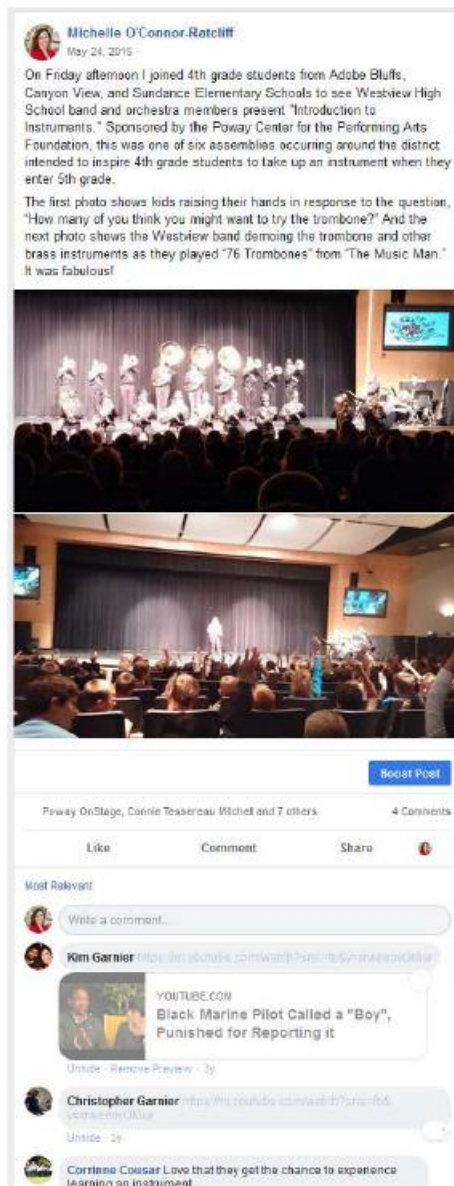
7 The picture below depicts a Facebook post shared by O’Connor-Ratcliff on August  
8 10, 2016. There are thirteen reactions to the post using the “thumbs-up” symbol from  
9 other members of the public. The picture displays the beginning of a lengthy comment  
10 on the post made by a non-party to this action. A Facebook user must click “See More”  
11 to show any text beyond the truncated beginning of the comment. In this instance,  
12 O’Connor-Ratcliff also replied to the comment.



28 Pls.’ Ex. 6, 6. Again, if a Facebook user wishes to skip past this comment, she need only

1 scroll past the truncated comment, which takes a small amount of time.

2 When a video is linked in a comment to a Post, the video does not play  
3 automatically when a Facebook user reads the comment. Instead, the user must click a  
4 link to watch the video or can scroll past the comment containing the video link almost  
5 instantaneously. Trial Tr., ECF No. 80, 108:20-109:12. The picture below depicts a  
6 Facebook post made by O'Connor-Ratcliff on May 24, 2015. Below the post, Kimberly  
7 Garnier posted a comment containing video link. Christopher Garnier also posted a  
8 comment containing a link.



28 Defs.' Ex. U, 10. Plaintiffs' comments are light in color because O'Connor-Ratcliff

1 “hid” those comments on her page, discussed further below. Scrolling past these video  
2 link comments is quick and straightforward.

3 Zane testified that because of this truncation as well as Facebook’s other features  
4 designed to streamline a page’s appearance, even repeated comments only had “a net  
5 effect of slightly pushing down anything that I would have put up there.” Trial Tr., ECF  
6 No. 80, 133:15-17. Scrolling past even numerous, repeated comments or links to videos  
7 would take minimal time due to Facebook’s truncation of comments. *Id.* at 94:22. As  
8 quickly as the user can click his finger, he can disregard the truncated comments. *Id.* at  
9 109:9-10.

10 Any Facebook user may comment on a post on a public page such as those used by  
11 Defendants. *Id.* at 115:20. The comment does not necessarily relate to the original post.  
12 *Id.* at 81:14-20. When a person comments, the page administrator for that page may  
13 leave a comment visible to other Facebook users. *Id.* at 120:4-19. The page  
14 administrator can also delete a comment, removing it entirely from appearing beneath the  
15 post, or “hide” the comment. *Id.* The “hide” feature allows a page administrator to make  
16 comments on posts invisible to other viewers. *Id.* The only people who can view a  
17 comment that has been hidden are the page administrator and the person who posted the  
18 hidden comment. *Id.* Another Facebook user viewing a post would not see any hidden  
19 comments. *Id.* at 121:1-5.

20 In addition to deleting or hiding individual comments, Facebook also allows page  
21 administrators to block people from posting on their page. While users generally may  
22 respond to a post with a comment—whether germane or not to the post—or by making a  
23 non-verbal reaction, such as by “liking” a post or give a “thumbs up” emoticon, a blocked  
24 user cannot comment or make a non-verbal reaction. *See, e.g.*, Trial Tr., ECF No. 80,  
25 ECF No. 80, 186:8-188:2; Pls.’ Ex. 3, 2 (showing “thumbs up” and smiley-face  
26 emoticons to the left of “16” reactions). Instead, a blocked user can only view the public  
27 Facebook page. *Id.*

28 On Twitter, the equivalent of an original post is called a “tweet.” A Twitter user’s

1 tweets are displayed on a “feed,” similar to how a Facebook user’s posts are displayed on  
2 her page. The pictures below depict the top of O’Connor-Ratcliff’s Twitter feed as of  
3 October 26, 2017. As can be seen, when viewing a user’s feed, replies to the user’s  
4 tweets are not visible. Instead, a user must click on a specific tweet to view replies to that  
5 tweet. Thus, a user’s ability to “disrupt” another user’s Twitter feed—the page she  
6 wishes to display to other users—is minimal because replies are only visible when  
7 clicking on a particular tweet.

The screenshot shows the Twitter profile of M. O'Connor-Ratcliff (@MOR4PUSD). The profile includes a circular profile picture of a woman with brown hair wearing a red jacket. Below the picture are statistics: 226 Tweets, 131 Following, 106 Followers, and 4,217 Likes. A 'Follow' button is visible. The bio identifies her as the President of Poway Unified School District Board of Education, joined in May 2016, with 15 photos and videos. A 'New to Twitter?' sign-up prompt is present. A 'Worldwide trends' section lists hashtags like #النصر\_الخال, #XF11K, #NationalPumpkinDay, #الاختي\_الفصلي, and #demixkhaled. The main feed shows two tweets. The first tweet, dated Oct 24, features a photo of Jill Halsey and text about a flexible seating rollout. The second tweet, dated Oct 20, is a promotional poster for the 'Jack-O-Smash Family Festival' with event details and a 'Rare' label.

ps://twitter.com/mor4pusd 1/25



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10/26/2017

28.2K Tweets

**Emilio Azcárraga**

14.4K Tweets

**Joe Girardi**

46.7K Tweets

وليد عبدالله

8,641 Tweets

**Gold Glove**

3,406 Tweets

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Privacy policy Cookies Ads Info

M. O'Connor-Ratcliff (@MOR4PUSD) | Twitter



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M. O'Connor-Ratcliff Retweeted



**Poway Unified** @PowayUnified · Oct 16

#PowayUnified District Office staff excited about @CHARACTERCOUNTS & @redribbonweek, kicking it off by wearing red. #charactercountsweek



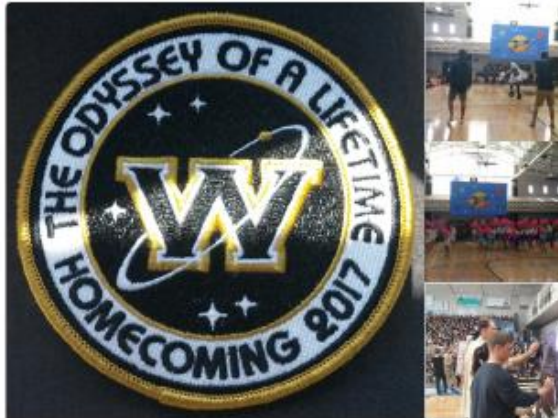
Marian Kim-Phelps, Kimberlie Renc, Jennifer Burks and 4 others

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**M. O'Connor-Ratcliff** @MOR4PUSD · Oct 13

Scenes from Westview HS Homecoming pep rally today.



<https://twitter.com/mor4pusd>

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Pls.' Ex. 5, 1-2.

On Twitter, a user may also block another user. Blocking prevents the blocked user from seeing the blocker's Twitter feed and replying to the blocker's tweets. In other words, the blocked user cannot see any of the content posted by the blocker while logged into his Twitter account or interact with the blocker on the site.

1           **E. Plaintiffs’ Interactions with Defendants’ Pages and Accounts**

2           Christopher Garnier began posting on Defendants’ Facebook pages when he  
3 believed they were not satisfactorily responding to his emails and other communications.  
4 Trial Tr., ECF No. 80, 37:14-18. None of Plaintiffs’ comments used profanity or  
5 threatened physical harm, and almost all related to PUSD. *Id.* at 39:1-9. Plaintiffs’  
6 comments were not commercial in nature. *Id.* at 39:11.

7           However, Plaintiffs acknowledged their posts were often repetitious. *Id.* at 41:4;  
8 100-103. On Facebook, Christopher Garnier made the same comment on forty-two posts  
9 made by O’Connor-Ratcliff. *Id.* at 180:16. On another occasion, Christopher Garnier  
10 posted the same reply to every tweet O’Connor-Ratcliff posted within approximately ten  
11 minutes. *Id.* at 176:18. This involved repeating the same reply 226 times. *Id.* As  
12 discussed above, these replies would only be visible by (1) visiting Christopher Garnier’s  
13 Twitter feed or (2) clicking on a tweet on O’Connor-Ratcliff’s feed to which Christopher  
14 Garnier replied. For example, looking at O’Connor-Ratcliff’s Twitter feed, the following  
15 tweet appears from October 13, 2017.



28 Pls.’ Ex. 5, 3. A user can see that there is one reply to this tweet, indicated by the “1”

1 next to the cartoon dialogue icon, but cannot see that reply on O'Connor-Ratcliff's feed.

2 Moreover, not all of Plaintiffs' comments were the same. O'Connor-Ratcliff's  
3 documentary evidence shows Christopher Garnier posting more than 20 unique  
4 comments and Kimberly Garnier posting more than 15 unique comments in response to  
5 O'Connor-Ratcliff's original Facebook posts. *See* Defs.' Ex. U, 25-130. Plaintiffs  
6 testified they repeated comments because they wanted to reach other Facebook users who  
7 might only look at one particular post made by Defendants. Trial Tr., ECF No. 80,  
8 107:2-7. By repeating their message on each post, Plaintiffs reasoned, they would raise  
9 the issues that mattered to them involving PUSD to a broader audience. *Id.* at 102:17-  
10 103:11.

11 Assessing the full scope of these comments' disruption is difficult because Zane  
12 deleted some of Plaintiffs' comments on his Facebook page while O'Connor-Ratcliff  
13 "hid" or deleted others. In addition, the Parties' exhibits generally show the pages as  
14 they appeared in 2017 when the suit was filed. More recent screenshots were not  
15 submitted in evidence. Nonetheless, Zane testified that deleting comments was not  
16 onerous and that he did so to ensure his Facebook page had a "streamlined" appearance.  
17 *Id.* at 133:13-21. On some of O'Connor-Ratcliff's Facebook posts, she "hid" Plaintiffs'  
18 comments and still replied to comments made by other members of the public. *See, e.g.,*  
19 Defs.' Ex. "U," 26, 28, 30 and 32; *and* Trial Tr., ECF No. 80 189:24-190:12.

#### 20 **F. Use of Word Filters**

21 In general, Facebook allows a page administrator to block a particular user from  
22 commenting on his page but does not allow a page administrator to entirely block  
23 comments from all other Facebook users. Though not addressed extensively at trial, the  
24 reasoning for Facebook's policy is intuitive: Facebook is a social media platform, not a  
25 website designed for the one-way presentation of information to a reader. It seeks  
26 interaction between users, not just dissemination of content to a recipient.

27 However, after this suit was filed, Facebook created a new feature that allows a  
28 page administrator to use word filters. Word filters are designed to allow a page

1 administrator to moderate potentially offensive content on their page. If a page  
2 administrator adds a word to the filter, a comment including that word will not appear as  
3 a comment on any post. Trial Tr., ECF No. 80, 116:1-15.

4 Zane began using word filters on his page in December 2018. Zane testified that  
5 his intent is not to limit only potentially offensive content. *Id.* Instead, he seeks to  
6 preclude *all* comments on his public page. *Id.* To accomplish this intent, he added more  
7 than 2,000 words to his word filter. *Id.* The words include basic words likely to appear  
8 in any comment, such as “he, she, it, [and] that,” to ensure all comments are filtered out  
9 from his page. *Id.* O’Connor-Ratcliff has also adopted word filters, though uses a much  
10 smaller set of words. *Id.* at 160:24-25. Her intent, likewise, is now to eliminate all  
11 comments and use her public Facebook page as a “bulletin board.” *Id.* at 168:16.

#### 12 **G. Blocking**

13 Christopher Garnier testified that in October 2017, he was blocked from posting on  
14 Zane’s public Facebook page and remains so blocked today. *Id.* at 45:4; 56:1-2. Zane  
15 denies this, stating he never blocked Christopher Garnier on his public Facebook page –  
16 only on his personal and business pages. *Id.* at 117:7. Zane also testified that he has  
17 deleted specific comments and used word filters, discussed above, attempting to prevent  
18 all Facebook users from commenting on his posts. *Id.* at 117:8-20. He stated that as  
19 Facebook’s features have evolved, his use of the platform evolved as well. He now tries  
20 to prevent any comments on his page by using an extensive word filter instead of deleting  
21 individual comments. *Id.* at 117:19-25. The Parties did not address whether blocking an  
22 individual from one page automatically blocks that same person from other pages run by  
23 the same page administrator, but this could likely be the case here.

24 Christopher Garnier and Zane offered directly conflicting testimony. While dated,  
25 the documentary evidence supports the conclusion that Zane blocked Christopher Garnier  
26 from his public Facebook page. Christopher Garnier appears unable to comment on any  
27 post made by Zane on his page, *see* Pls.’ Ex. 15, which is consistent with what a blocked  
28 user would experience on a Facebook page. Accordingly, the Court finds that although



1 Zane may not have acted with the intent to block Christopher Garnier, the result of his  
2 action is that he has blocked and continues to block Christopher Garnier on Facebook.

3 With respect to Kimberly Garnier, the evidence is different. Kimberly Garnier  
4 testified that at the time she filed suit, Zane blocked her from posting on his Facebook  
5 page. Trial Tr., ECF No. 80, 88:17-18. Kimberly Garnier testified, however, that only  
6 days before trial Zane appeared to unblock her from his Facebook page. *Id.* at 92:10-11.  
7 As discussed above, Zane denies he blocked anyone from his public Facebook page. *Id.*  
8 at 117:7. Where there is no dispute, the Court readily finds Zane is not currently  
9 blocking Kimberly Garnier on Facebook.

10 Plaintiffs do not allege Zane has ever blocked either of them on Twitter. As such,  
11 the Court makes no finding in this regard.

12 The evidence regarding O'Connor-Ratcliff is much clearer. O'Connor-Ratcliff  
13 reported Plaintiffs' comments on her page to Facebook on two occasions. *Id.* at 175:2-4.  
14 A representative from Facebook informed O'Connor-Ratcliff that they were looking into  
15 the matter, but Facebook did not end up taking any action against Plaintiffs. The  
16 representative also recommended O'Connor-Ratcliff block Plaintiffs on the platform,  
17 which she did. *Id.* at 175:5-6. O'Connor-Ratcliff has also blocked Christopher Garnier  
18 on Twitter. *Id.* at 193:25. She has not unblocked either Christopher Garnier or Kimberly  
19 Garnier on those platforms. *Id.* at 45:11; 155:11.

## 20 **H. Rationale**

21 Zane testified the content of Christopher Garnier's posts were "not particularly" of  
22 any concern to him. *Id.* at 132:25; 133:1-7. Instead, Zane's issue with Plaintiffs' posts  
23 on his social media page was the alleged disruption and "spamming" nature of the  
24 comments, which went against Zane's intent to have the page "just be very streamlined"  
25 in a "bulletin board nature." *Id.* at 133:11-12. Zane stated he never understood  
26 Christopher Garnier's decision to repeat comments beneath each post Zane made. *Id.* at  
27 137:23-25. He testified that a comment repeated below each post "wasn't what I wanted  
28 for the page, so that's why I chose the settings that I did." *Id.* at 138:1-2.

1 Likewise, O’Connor-Ratcliff testified her reason for blocking Plaintiffs on her  
2 Facebook page and Christopher Garnier on Twitter was the repetition, not content, of his  
3 posts. *Id.* at 180:20. She testified that she has received negative comments from other  
4 members of the public on her Facebook page but has not blocked them. *Id.* at 194:23-  
5 195:6. The record also reflects O’Connor-Ratcliff frequently responded to positive  
6 comments on her page with “thumbs-up” reactions and responses such as “Thank you for  
7 the kind words,” *id.* at 186:8-188:22, but does not show evidence that Plaintiffs were  
8 blocked due to the content (vice repetition) of their comments.

### 9 **III. CONCLUSIONS OF LAW**

10 Plaintiffs’ federal claim arises out of 42 U.S.C. § 1983, pursuant to which “[e]very  
11 person who, under color of any statute, ordinance, regulation, custom, or usage, of any  
12 State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the  
13 deprivation of any rights, privileges, or immunities secured by the Constitution and laws,  
14 shall be liable to the party injured in an action at law.” 42 U.S.C. § 1983. To state a  
15 claim under Section 1983, a plaintiff must allege: (1) the violation of a right secured by  
16 the Constitution and laws of the United States; and (2) that the alleged deprivation was  
17 committed by a person acting under color of state law. *Id.*; *see also West v. Atkins*, 487  
18 U.S. 42, 48 (1988); *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020). “Section 1983 ‘is not  
19 itself a source of substantive rights,’ but merely provides ‘a method for vindicating  
20 federal rights elsewhere conferred.’” *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

21 As discussed below, this Court concludes that Plaintiffs have demonstrated the  
22 requisite elements for a Section 1983 claim, namely: (1) state action, as was determined  
23 prior to trial, *see* Order, ECF No. 42; and (2) deprivation of a constitutional right. Before  
24 turning to the claim, however, the Court briefly addresses standing.

#### 25 **A. Plaintiffs have Standing for their claims**

26 While the Parties’ briefs assume Defendants blocked Plaintiffs on Facebook and  
27 O’Connor-Ratcliff blocked Christopher Garnier on Twitter, the evidence presented at  
28 trial requires the Court to closely examine this issue.

1           The jurisdiction of federal courts is limited by Article III, § 2, of the Constitution  
2 to “Cases” or “Controversies. *Arizonans*, 520 U.S. at 64. This requires a litigant to show  
3 “an invasion of a legally protected interest” that is “concrete and particularized,” as well  
4 as “actual or imminent.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)  
5 (internal quotations omitted). “To qualify as a case fit for federal-court adjudication, ‘an  
6 actual controversy must be extant at all stages of review, not merely at the time the  
7 complaint was filed.’” *Arizonans*, 520 U.S. at 67 (quoting *Preiser v. Newkirk*, 422 U.S.  
8 395, 401 (1975)). However, “[i]t is undisputed that as a general rule voluntary cessation  
9 of challenged conduct moots a case . . . only if it is absolutely clear that the allegedly  
10 wrongful behavior could not reasonably be expected to recur.” *Carlson v. United*  
11 *Academics – AAUP/AFT/APEA AFL-CIO*, 265 F.3d 778, 786 (9th Cir. 2001) (internal  
12 quotations omitted).

13           Here, Plaintiffs seek declaratory and injunctive relief against Defendants. Compl.,  
14 ECF No. 1. An injunction issued by this Court would require Defendants to unblock  
15 Plaintiffs on Facebook and would require O’Connor-Ratcliff to unblock Christopher  
16 Garnier on Twitter. However, there is evidence that Zane unblocked Kimberly Garnier  
17 on Facebook shortly before trial. Accordingly, the general rule would suggest that  
18 Kimberly Garnier’s claims for injunctive and declaratory relief against Zane are moot.  
19 *See Arizonans*, 520 U.S. at 67; *see also Wagschal v. Skoufis*, 442 F. Supp. 3d 612, 622  
20 (S.D.N.Y. 2020) (finding plaintiff’s claim for declaratory and injunctive relief mooted  
21 because defendant state senator unblocked plaintiff) *and McKercher*, 2019 WL 1098935,  
22 at \*3 (dismissing claims as moot where defendant added plaintiff on Facebook as a friend  
23 during the pendency of litigation, allowing plaintiff to post on defendant’s Facebook  
24 page). Nonetheless, because Zane unblocked Kimberly Garnier only days before trial,  
25 the Court finds it is not absolutely clear that Zane could not block Kimberly Garnier  
26 again. *See Carlson*, 265 F.3d at 786. Accordingly, the Court concludes Kimberly  
27 Garnier has standing for her claims against Zane.

28           As discussed above, the Court finds that both Defendants blocked and continue to

1 block Christopher Garnier on Facebook, that O’Connor-Ratcliff blocked and continues to  
2 block Christopher Garnier on Twitter, and that O’Connor-Ratcliff blocked and continues  
3 to block Kimberly Garnier on Facebook. These claims therefore involve an actual  
4 controversy and the Court’s analysis on these alleged Section 1983 violations proceeds  
5 below.

6 **B. Defendants’ Conduct Constitutes State Action**

7 First, although not alleged in the complaint, Plaintiffs have filed suit against  
8 Defendants on the basis that their actions qualify as state action. Judge Whelan’s order  
9 on Defendants’ motion for summary judgment already concluded that Defendants acted  
10 under color of state law, satisfying the first element for a Section 1983 action. *See*  
11 *generally* ECF No. 42. Despite Judge Whelan’s ruling, Defendants noted at the  
12 beginning of trial that this case involved a question of “whether there was state action.”  
13 Trial Tr., ECF No. 80, 13:8-12. Although recognizing that Judge Whelan had found state  
14 action when denying their motion for summary judgment, they intended to present  
15 evidence on that issue to preserve the record for appeal. *Id.* At the conclusion of trial,  
16 the Court stated that it recognized a difference between this case and the *Knight* and  
17 *Morgan* cases, both of which involved an executive, because unlike the legislators here  
18 who have regular meetings at which the public can appear and provide comment, the  
19 executives in *Knight* and *Morgan* lacked such a forum. *Id.* at 199:7-11. The Court noted  
20 that in this case, Plaintiffs could come into a Board meeting and “express the very same  
21 views . . . that they could . . . on Facebook or Twitter.” *Id.* at 199:1-6. As a result, the  
22 Court asked the Parties to address whether the fact that Defendants’ actions were taken  
23 outside of a meeting could preclude those actions from being considered state action  
24 sufficient to allow a Section 1983 action to proceed.

25 Plaintiffs argue that Defendants’ status as legislators vice executive branch  
26 officials does not change the analysis of whether Defendants acted under color of state  
27 law in blocking Plaintiffs. Pls.’ Br., ECF No. 86, 9-11. Plaintiffs urge the Court to adopt  
28 a “totality of the circumstances” test for determining state action, citing the Fourth

1 Circuit’s decision in *Davison*. *Id.* (citing 912 F.3d 666). Defendants argue extensively  
2 that they did not act under color of state law because they are members of the legislative  
3 branch and cannot take official action outside of a meeting of their legislative body.  
4 Defs.’ Br., ECF No. 84, 13-15 (citing Cal. Gov’t Code § 54950 *et seq.*). On these  
5 grounds, they attempt to distinguish other cases that have found similar conduct to violate  
6 the First Amendment. *Id.* at 14.

7 As stated above, the Court adopts the reasoning and conclusions articulated by  
8 Judge Whelan in his order on Defendants’ motion for summary judgment that “[t]he  
9 content of [Defendants’] posts, considered in totality, went beyond their policy  
10 preferences or information about their campaigns for reelection.” ECF No. 42 at 14:2-4.  
11 Because Defendants “could not have used their social media pages in the way they did  
12 but for their positions on PUSD’s Board, their blocking of [Plaintiffs] satisfies the state-  
13 action requirement for a section 1983 claim.” *Id.* at 14. Further, “the content of many of  
14 their posts was possible because they were ‘clothed with the authority of state law.’” *Id.*  
15 (citing *Davison*, 912 F.3d at 679). Finally, other recent cases addressing blocking on  
16 social media have found legislators to be acting under color of state law in making  
17 blocking decisions. *See, e.g., Davison*, 912 F.3d at 680 (county board chair); *Campbell*,  
18 367 F. Supp. 3d at 994 (state representative); *and Felts v. Reed*, Case No. 20-cv-821-  
19 JAR, 2020 WL 7041809, at \*6 (E.D. Mo. Dec. 1, 2020) (municipal alderman). For these  
20 reasons, the Court concludes Defendants acted under color of state law despite  
21 Defendants’ positions as legislators, not executives.

### 22 **C. Deprivation of a Constitutional Right Under the First Amendment**

23 Second, Plaintiffs argue that they suffered a deprivation of a constitutional right in  
24 the form of a violation of their First Amendment rights to free speech. First Amendment  
25 cases involving social media address many issues. Some of these issues have already  
26 been addressed by Judge Whelan’s order on Defendants’ motion for summary judgment,  
27 including but not limited to his conclusions that: (1) Plaintiffs have standing to bring their  
28 claims; (2) Defendants are entitled to qualified immunity; and (3) Defendants’ accounts

1 are designated public forums. ECF No. 42. As noted, the Court adopts those conclusions  
2 here.<sup>3</sup> Other potentially relevant issues, such as whether a plaintiff can require a  
3 defendant to listen to their speech—she cannot, *see Minnesota State Bd. for Cmty.*  
4 *Colleges v. Knight*, 465 U.S. 271, 283 (1984) (a plaintiff has “no constitutional right to  
5 force the government to listen to their views”)—are addressed by other cases but have not  
6 been raised on the facts here.<sup>4</sup>

7 Instead, this dispute addresses an apparent issue of first impression in the digital  
8 domain: whether Plaintiffs’ repetitive comments and replies on Defendants’ social media  
9 pages actually disrupted Defendants’ original posts, making Defendants’ blocking a  
10 reasonable time, place, or manner restriction on Plaintiffs’ speech. As outlined below,  
11 the Court concludes that while the blocking was content-neutral, Defendants’ continued  
12 blocking constitutes a burden on speech that is no longer narrowly tailored to serve a  
13 substantial government interest.

14 ***1. Defendants’ Blocking was a Content-Neutral Rule of Decorum***

15 Having concluded Defendants’ pages are public forums and that they acted under  
16 color of state law in maintaining those pages, the Court turns to whether the blocking at  
17

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18 <sup>3</sup> Whether Defendants’ accounts remain a public forum today is a close question. It  
19 is undisputed that the government may close a designated public forum. *See DiLoreto v.*  
20 *Unified Sch. Dist. Bd. Of Educ.*, 196 F.3d 958, 970 (9th Cir. 1999) (“The government has  
21 an inherent right to control its property, which includes the right to close a previously  
22 open forum.”). Since the Complaint was filed, Facebook introduced the word filter  
23 feature and Defendants have started using word filters extensively to attempt to block all  
24 comments. It may be that by doing so Defendants closed the public forums on their  
25 public Facebook pages. However, the Parties did not brief and the Court is not aware of  
26 any authority holding that a social media public forum is closed when broad word filters  
27 are used. These are simply uncharted seas with plenty of icebergs. To proceed  
28 circumspectly, the Court does not make that holding here, but notes the difficulty of  
applying First Amendment analysis to technology platforms that change rapidly during a  
single case.

<sup>4</sup> Plaintiffs’ also briefly touch on the issue of “hiding” and deleting comments, but  
do not argue these actions constituted a violation of Section 1983. Accordingly, those  
actions are not analyzed in these conclusions of law.

1 issue here was content-based or content-neutral because “[v]iewpoint discrimination is  
2 prohibited in all forums.” *Faison*, 440 F. Supp. 3d at 1135 (citing *Int’l Soc. for Krishna*  
3 *Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992)). Thus, if Defendants’ blocking  
4 was content-based, it would be subject to strict scrutiny. Alternatively, if Defendants’  
5 blocking was content-neutral, the Court would analyze whether the blocking constituted  
6 “reasonable restrictions on the time, place, or manner of protected speech” under the  
7 framework set forth by the Supreme Court in *Ward v. Rock Against Racism*. 491 U.S.  
8 781, 791 (1989).

9 “Viewpoint discrimination is apparent . . . if a government official's decision to  
10 take a challenged action was ‘impermissibly motivated by a desire to suppress a  
11 particular point of view.’” *Davison*, 912 F.3d at 687 (quoting *Cornelius v. NAACP Legal*  
12 *Defense and Education Fund, Inc.*, 473 U.S. 788, 812–13 (1985)). By contrast, a  
13 regulation on speech is “content-neutral” if it is “justified without reference to the content  
14 of the regulated speech.” *Ward*, 491 U.S. at 791. “A regulation that serves purposes  
15 unrelated to the content of expression is deemed neutral, even if it has an incidental effect  
16 on some speakers or messages but not others.” *Id.*

17 Plaintiffs argue Defendants’ blocking was content-based because their social media  
18 comments “were addressing what even Defendants acknowledged to be serious,  
19 persistent, legitimate PUSD issues.” Pls.’ Br., ECF No. 86, 4. Defendants’ counter that  
20 they blocked Plaintiffs “because of the ‘manner’ [i.e., the repetition] of the posting and  
21 not because of the content of the posts.” Defs.’ Br., ECF No. 84, 4.

22 The evidence presented at trial favors Defendants. To begin with, it is undisputed  
23 that Defendants’ did not adopt formal rules of decorum or etiquette for their social media  
24 pages. Trial Tr., ECF No. 80, 115:6-9; 154:21-23. However, to survive a challenge that  
25 their decision to block Plaintiffs’ was content-based (and thus subject to strict scrutiny –  
26 *see Boos v. Barry*, 485 U.S. 312, 321 (1988), Defendants’ necessarily argue that the  
27 blocking was to enforce an unwritten rule of decorum prohibiting repetitious speech on  
28 their social media pages.

1 In Defendants’ favor, there is ample testimony that once Facebook introduced the  
2 word filter feature, Defendants intended their pages to be “bulletin boards” and tried to  
3 block *all* comments on their pages. Plaintiffs’ repetitive posting was also clearly  
4 established by the evidence at trial. Christopher Garnier sent 226 tweets to O’Connor-  
5 Ratcliff in the span of ten minutes on October 17, 2017, sending each tweet as a reply to  
6 every tweet she ever posted. On Facebook, Plaintiffs repeatedly posted comments –  
7 though not all were identical – to both Defendants’ pages. This evidence distinguishes  
8 the case at bar from others addressing First Amendment challenges to social media  
9 blocking, which did not involve repeated comments and acknowledged the blocking in  
10 those cases was content-based. *Cf. Knight First Amendment Inst. at Columbia Univ. v.*  
11 *Trump*, 302 F. Supp. 3d 541, 553-54 (S.D.N.Y. 2018) (“Defendants do ‘not contest  
12 Plaintiffs’ allegation that the Individual Plaintiffs were blocked from the President’s  
13 Twitter account because the Individual Plaintiffs posted tweets that criticized the  
14 President or his policies”) and *Davison*, 912 F.3d at 687 (defendant county board chair  
15 blocked plaintiff “because she viewed the allegations [in his Facebook comments] as  
16 ‘slanderous’”).

17 However, O’Connor-Ratcliff’s testimony also describes interacting with  
18 constituents on Facebook who had nice things to say by either replying to their comments  
19 or responding through an emoticon. The documentary evidence further indicates that  
20 while Zane may have intended his page to be a “bulletin board” and only deleted  
21 Plaintiffs’ comments because “that’s not what I wanted for my page,” other positive  
22 comments remained on his page when the suit was originally filed. For example, Zane  
23 made an original post on June 29, 2017, on which it appears the official PUSD Facebook  
24 account made a comment. Pls.’ Ex. 6, 5-6. That positive comment was still visible on  
25 the date the screenshot was taken, September 8, 2017. *Id.* Thus, at least when the suit  
26 was filed, there is strong evidence these pages were not “bulletin boards.”<sup>5</sup>

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27  
28 <sup>5</sup> As discussed above in note 3, the Court declines to hold that Defendants’ later use of extensive  
word filters here effectively closed the public forum. If the public forum was now closed, it would moot



1 On this record, the evidence shows that Defendants’ blocked Plaintiffs due to the  
2 repetitive manner of their posts, vice the negative content of those posts. Accordingly,  
3 the Court concludes Defendants’ blocking was content-neutral.

4 One final note on content-neutrality is appropriate. Both parties argue that  
5 Facebook and Twitter’s community standards support their claims. Defendants assert  
6 that Plaintiffs’ comments violated those community standards by “engag[ing] with  
7 content at very high frequencies.” Defs.’ Br., ECF No. 84, 8. Plaintiffs respond that  
8 O’Connor-Ratcliff attempted to bring these posts to Facebook’s attention, but that  
9 Facebook took no action against them. Pls.’ Br., ECF No. 86, 11, n. 14. Plaintiffs argue  
10 Facebook’s inaction confirms Plaintiffs’ posts did not violate Facebook’s community  
11 standards, and therefore, the comments should be considered protected speech. *Id.*  
12 Notably missing from these arguments, however, is citation to authority approving the  
13 use of Facebook or Twitter’s community standards in analyzing whether the First  
14 Amendment is infringed. The Court declines the invitation to do so here. The First  
15 Amendment is interpreted by the courts, not tech companies. *Cf. Prager Univ. v. Google,*  
16 *LLC*, 951 F.3d 991, 999 (9th Cir. 2020) (state action doctrine precluded First Amendment  
17 scrutiny of YouTube’s content moderation policy pursuant to its terms of service and  
18 community guidelines).

19 **2. Defendants’ blocking is no longer narrowly tailored**

20 Having found the blocking to be content-neutral, the Court next turns to whether  
21 Defendants’ blocking and use of word filters are narrowly tailored. Plaintiffs argue  
22 Defendants’ blocking was not narrowly tailored because their comments did not “disrupt,  
23 disturb, or otherwise impede” Defendants’ social media pages. Pls.’ Br., ECF No. 86,  
24 13-14 (*citing White v. City of Norwalk*, 900 F.2d 1421, 1424 (9th Cir. 1990)).  
25 Defendants argue that because they intended to use their pages in a “bulletin board type  
26

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27 Plaintiffs’ claims. *See Karras v. Gore*, Case No. 14-CV-2564-BEN-KSC, 2015 WL 74143, at \*3-4  
28 (S.D. Cal. Jan. 6, 2015) (denying as moot the plaintiff’s request for an injunction allowing him to post  
on the defendant’s public Facebook page where the defendant had already closed the page).

1 manner,” the use of expansive word filters to attempt to block all comments supports the  
2 conclusion that Defendants’ blocking was narrowly tailored. Defs.’ Br., ECF No. 84, 11.  
3 While the Court concludes Defendants’ blocking was initially narrowly tailored, the fact  
4 that blocking has gone on for nearly three years requires the Court to reach a different  
5 conclusion now.

6 To be “narrowly tailored,” a regulation “need not be the least restrictive or least  
7 intrusive means” of serving “the government’s legitimate, content-neutral interests.”  
8 *Ward*, 491 U.S. at 798. “[T]he requirement of narrow tailoring is satisfied ‘so long as the  
9 . . . regulation promotes a substantial government interest that would be achieved less  
10 effectively absent the regulation.” *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S.  
11 675, 689 (1985)). However, “this standard does not mean that a time, place, or manner  
12 regulation may burden substantially more speech that is necessary to further the  
13 government’s legitimate interests.” *Id.*

14 In the physical world, the Ninth Circuit has held that a city council may remove a  
15 person from a meeting without offending the First Amendment “when someone making a  
16 proscribed remark is acting in a way that actually disturbs or impedes the meeting.”  
17 *White v. City of Norwalk*, 900 F.2d 1421, 1424 (9th Cir. 1990). The city ordinance at  
18 issue there provided that an offending individual must first be provided a warning before  
19 persistent disrupting action could result in ejection from the meeting and a misdemeanor  
20 citation. *Id.* The court elaborated that “the nature of a [c]ouncil meeting means that a  
21 speaker can become ‘disruptive’ in ways that would not meet the test of an actual breach  
22 of the peace.” *Id.* “A speaker may disrupt a [c]ouncil meeting by speaking too long, by  
23 being unduly repetitious, or by extended discussion of irrelevancies.” *Id.* at 1426. While  
24 “the point at which speech becomes unduly repetitious or largely irrelevant is not  
25 mathematically determinable,” the test is whether the city council “is prevented from  
26 accomplishing business in a reasonably efficient manner.” *Id.* The court also  
27 emphasized that “such conduct might interfere with the rights of other speakers.” *Id.*

28 In *Norse v. City of Santa Cruz*, the Ninth Circuit addressed another case involving

1 an individual who was ejected from a city council meeting for giving a silent Nazi salute  
2 to the city council mocking a decision the council had made. 629 F.3d 966, 969-70 (9th  
3 Cir. 2010). Though the text of the ordinance does not appear in the court’s opinion, it is  
4 clear from the opinion that the plaintiff never received an indefinite ban from city council  
5 meetings. Indeed, he sought leave to amend his complaint two years after it was initially  
6 filed to add another ejection for a subsequent alleged disruption. *Id.* at 970. Addressing  
7 the plaintiff’s disruption, the Ninth Circuit explained that *White* stands for the proposition  
8 that “[a]ctual disruption means actual disruption.” 629 F.3d 966, 976 (9th Cir. 2010) (en  
9 banc). “It does not mean constructive disruption, technical disruption, virtual disruption,  
10 *nunc pro tunc* disruption, or imaginary disruption.” *Id.* The Court remanded for trial the  
11 issue of whether the plaintiff’s actions constituted an actual disruption. *Id.* at 978.

12 While, “as a general matter, social media is entitled to the same First Amendment  
13 protections as other forms of media,” *Packingham v. North Carolina*, 137 S.Ct. 1730,  
14 1735-36 (2019), the Court notes that applying the First Amendment to social media is a  
15 relatively new task. Accordingly, it “proceed[s] circumspectly, taking one step at a  
16 time.” *Id.* at 1744 (Alito, J., concurring). Thus, the Court applies the narrow tailoring  
17 test articulated in *Ward*, while acknowledging the “actual disruption” standard in *White*  
18 and *Norse*, which have not been applied outside the context of a city council meeting.

19 On Facebook, Plaintiffs’ repeatedly posted the same or similar comments at high  
20 frequency during a short period of time. Trial Tr., ECF No. 80, 68:13-15. While  
21 Plaintiffs’ comments on posts appeared beneath Defendants’ original content, Facebook  
22 truncated long posts, and comments such that only an interested reader would see the  
23 entirety of a lengthy comment, blocking promoted the legitimate interest of facilitating  
24 discussion on these social media pages and did not burden substantially more speech than  
25 necessary because it immediately responded to high frequency posting during a short  
26 period of time. *See Ward*, 491 U.S. at 799. Alternatively, applying the “unduly  
27 repetitious or largely irrelevant” threshold the Ninth Circuit articulated in *White*,  
28 Plaintiffs’ comments surely also met this standard. 900 F.2d at 1426. In other words, at

1 the time Defendants’ blocked Plaintiffs, Plaintiffs’ repetitive comments on Defendants’  
2 Facebook posts were narrowly-tailored grounds for ejection from the forum.

3 On Twitter, the reasonableness of O’Connor-Ratcliff’s initial decision to block  
4 Christopher Garnier is even more apparent. The testimony received shows that  
5 Christopher Garnier “tweeted at” O’Connor-Ratcliff 226 times in less than ten minutes.  
6 Trial Tr., ECF No. 80, 180:16. While the Court concurs with Christopher Garnier that it  
7 “is a beautiful thing [to be] able to engage [] elected officials’ social media pages,” *id.* at  
8 76:19-20, this repetitive posting is far from “the banter” he asserts it is, *id.* at 76:24.  
9 Instead, O’Connor-Ratcliff’s blocking of Christopher Garnier was narrowly tailored  
10 because it constituted a very limited blocking induced only by an excessive “Tweet  
11 storm.” While this conclusion differs from other social media cases, it does so because  
12 those cases did not address repetitive posts. Alternatively applying *White*’s “actual  
13 disruption” standard, Christopher Garnier’s tweets once again crossed the line into  
14 “unduly repetitious or largely irrelevant.” 900 F.2d at 1426. Accordingly, the Court  
15 finds O’Connor-Ratcliff initially ejecting Christopher Garnier from her Twitter forum for  
16 narrowly tailored reasons.

17 The issue then becomes whether Defendants’ continued blocking, which has now  
18 gone on for more than three years, continues to “promote[] a substantial government  
19 interest that would be achieved less effectively absent the regulation.” *Ward*, 491 U.S. at  
20 799 (quoting *Albertini*, 472 U.S. at 689)). Here, the Court concludes the blocking has run  
21 its course – for now.

22 In *White* and *Norse*, the respective city councils both eventually allowed the  
23 plaintiffs into subsequent meetings. Not so here. Defendants continue to block Plaintiffs  
24 more than three years after initially doing so. While blocking was initially permissible,  
25 its continuation applies a regulation on speech substantially more broadly than necessary  
26 to achieve the government interest. *See Ward*, 491 U.S. at 800. Requiring Defendants to  
27 unblock Plaintiffs’ following a three-year ban is also consistent with the Ninth Circuit’s  
28 holding in *White*, which held the city ordinance at issue to be valid because it could be

1 applied in a permissible manner. *See* 900 F.2d at 1426. Accordingly, the Court finds  
2 Defendants’ blocking is no longer narrowly tailored.

3       However, the Court’s conclusion is not free reign for Plaintiffs’ to repeatedly post  
4 on Defendants’ social media pages again. As noted above, the Court finds Defendants’  
5 *initial* blocking decision responded to repetitive and largely unreasonable behavior, and  
6 was therefore narrowly tailored to serve a substantial government interest. *See Ward*,  
7 491 U.S. at 799. Only the fact that the blocking has gone on for three years requires the  
8 Court to intervene here. Plaintiffs should not interpret these conclusions of law as an  
9 invitation to flaunt and mock the First Amendment’s important protections.

### 10                   **3.       Substantial Government Interest**

11       Having found the blocking is no longer narrowly tailored, Plaintiffs are entitled to  
12 the injunctive relief they request. Nonetheless, the Court turns to whether Defendants’  
13 blocking furthered a significant government interest because of the important  
14 consequences the Court’s ruling may have here.

15       It is undeniable that Defendants, by creating and maintaining public Facebook  
16 pages and Twitter accounts, serve a substantial government interest. They have  
17 leveraged technology to provide new ways for their constituents to gain awareness of  
18 their activities and initiatives as elected officials. In short, they have used their pages to  
19 facilitate transparency in government. This is one of the most “significant government  
20 interests” the Court could imagine. Ensuring those platforms are not cluttered with  
21 repetitive posts monopolizing the pixels on the screen is important, and their role as  
22 “moderator[s] involves a great deal of discretion.” *White*, 900 F.2d at 1426. It is a  
23 challenging role, but one that public officials should not be scared away from as they  
24 seek to increase the public’s access to themselves and their offices.

25       For these reasons, the Court notes that Defendants could adopt content-neutral  
26 rules of decorum for their pages to further the substantial government interest of  
27 promoting online interaction with constituents through social media. For example, those  
28 rules could contain reasonable restrictions prohibiting the repeated posting of comments

1 and include sanctions such as blocking for a limited period of time. Though the Court  
2 cannot decide a precise time limit that might be reasonable, blocking for one month may  
3 pass muster given the ease at which a page administrator can block and unblock a user  
4 from a particular page. Blocking for three years, on the other hand, cannot.

#### 5 **4. *Alternative Channels of Communication Exist***

6 Again, while the foregoing is sufficient to grant Plaintiffs their requested injunctive  
7 relief, the Court briefly addresses the final factor in the *Ward* analysis. 491 U.S. at 802.  
8 Defendants argue that their decision to block Plaintiffs on social media left open “ample  
9 alternative channels for communication.” Defs.’ Br., ECF No. 84, 12.

10 Ample alternative channels for communication exist when a regulation “does not  
11 attempt to ban any particular manner or type of expression at a given place or time.”  
12 *Ward*, 491 U.S. at 802. “An alternative is not ample if the speaker is not permitted to  
13 reach the intended audience.” *Bay Area Peace Navy v. United States*, 914 F.2d 1224,  
14 1229 (9th Cir. 1990) (internal quotation marks omitted).

15 Plaintiffs do not argue that ample alternatives are lacking, and the evidence  
16 confirms this is a wise concession. Whether Plaintiffs’ intended audience for their  
17 comments and replies was Defendants themselves or other constituents within PUSD,  
18 Plaintiffs are able to communicate their concerns through Board meetings, emails, and  
19 their own social media accounts. Accordingly, the Court finds Defendants’ blocking  
20 does not offend the third step of the *Ward* analysis.

#### 21 **5. *Prior Restraint***

22 Based on the foregoing, the Court need not reach the thorny question of whether an  
23 expansive use of word filters designed to block every comment constitutes an  
24 impermissible prior restraint on protected speech or whether it closes the public forum.  
25 “A prior restraint is an administrative or judicial order that forbids certain  
26 communications issued before those communications occur.” *Greater Los Angeles*  
27 *Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 430 (9th Cir. 2014)  
28 (citing *Alexander v. United States*, 509 U.S. 544, 549-50 (1993)). “Any prior restraint on

1 expression comes to [the Court] with a heavy presumption against its constitutional  
2 validity,” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 558 (1976) (internal quotations  
3 omitted). As discussed above, “social media is entitled to the same First Amendment  
4 protections as other forms of media,” *Packingham*, 137 S.Ct. at 1735-36 (2019), but the  
5 Court again “proceed[s] circumspectly, taking one step at a time.” *Id.* at 1744 (Alito, J.,  
6 concurring). That caution counsels the Court against making a finding regarding word  
7 filters here, when the Court can decide the issue on narrower grounds.

#### 8 **IV. CONCLUSION**

9 The Court is aware of the consequences of its ruling today, but it is bound to  
10 follow the law as it has been interpreted by the Supreme Court and Ninth Circuit Court of  
11 Appeals. It may be that, faced with the choice between unblocking Plaintiffs and closing  
12 their public pages entirely, Defendants choose the latter. That would be a sad conclusion.  
13 The actions of a few repetitive actors should not deprive so many of this important civic  
14 tool, and the Court hopes that Defendants do not choose this course of action.

15 The Court finds that based on the record and the applicable law, Plaintiffs have  
16 proven Defendants violated 42 U.S.C. § 1983 by depriving Plaintiffs of their right to free  
17 speech while acting under color of state law. Specifically, the violation began at some  
18 time late in 2017 when the blocking of Plaintiffs had continued for too long a time and  
19 continues to the present. The Court does not find Defendants’ conduct violated the  
20 California Constitution. Plaintiffs are entitled to declaratory and injunctive relief on their  
21 Section 1983 claim. Judgment will be entered accordingly.

22 **IT IS SO ORDERED.**

23  
24 Date: January 14, 2021

25   
26 **HON. ROGER T. BENITEZ**  
27 United States District Judge  
28