

No. 07-1697  
In the  
**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**RANDALL S. PAGE,**  
Plaintiff-Appellant

v.

**LEXINGTON COUNTY SCHOOL DISTRICT ONE,**  
Defendant-Appellee

On Appeal from the United States District Court  
for the District of South Carolina (Columbia Division)

**BRIEF OF *AMICI* NATIONAL SCHOOL BOARDS ASSOCIATION,  
AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS,  
NATIONAL LEAGUE OF CITIES, NATIONAL PARENT TEACHER  
ASSOCIATION, NATIONAL SCHOOL PUBLIC RELATIONS  
ASSOCIATION, MARYLAND ASSOCIATION OF BOARDS OF  
EDUCATION, NORTH CAROLINA SCHOOL BOARDS  
ASSOCIATION, SOUTH CAROLINA SCHOOL BOARDS  
ASSOCIATION AND VIRGINIA SCHOOL BOARDS ASSOCIATION  
IN SUPPORT OF AFFIRMANCE**

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## **STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE**

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of 49 state associations of school boards across the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA also represents the nation's 95,000 school board members who, in turn, govern approximately 15,000 local school districts that serve more than 47 million public school students. NSBA has long advocated for clear interpretations of the First Amendment that take into account the operational realities and special mission of public schools.

The American Association of School Administrators (AASA), founded in 1865, is a professional organization representing over 14,000 educational leaders across America and in other countries. AASA's mission is to support and develop school district leaders who are dedicated to the highest quality public education for all children.

The National League of Cities (NLC) is the country's largest and oldest organization serving municipal government, representing more than 19,000 United States cities and towns. Founded in 1924, NLC strengthens local government through advocacy, research, and information sharing on behalf of hometown America.

The National Parent Teacher Association (PTA) is a non-profit organization consisting of parent, student, and teacher members of 26,000 local PTAs from every state in the union, the District of Columbia, the United States Virgin Islands and Department of Defense schools abroad. Our mission is to support and speak on behalf of children and youth in the schools, in the community and before government bodies and other organizations that make decisions affecting children, to assist parents in developing skills necessary to raise children, and to encourage parent and public involvement in the public schools of this nation. Originally known as the National Congress of Mothers, the PTA was founded in 1897 with the following mission: “The National Congress of Mothers, irrespective of creed, color, or condition, stand for all parenthood, childhood, homehood. Its platform is the universe, its organization, the human race.”

The National School Public Relations Association (NSPRA) is a non-profit, professional association providing school communication training and services to school leaders throughout the United States, Canada, and the U.S. Dependent Schools worldwide since 1935. NSPRA’s mission is to advance education through responsible communication that leads to success for all students. In keeping with our mission, NSPRA provides resources and workshop assistance to school districts, state departments of education,

regional service agencies, and state and national associations. NSPRA believes that school districts must have the ability to openly and honestly communicate their position on public policies that directly impact the education of students.

The Maryland Association of Boards of Education (MABE) is a private, non-profit organization to which all twenty-four (24) local boards of education in Maryland voluntarily belong. Founded in 1957, MABE is recognized across the State as an advocate for public schools and their governing bodies, representing their interests in legislative and other governmental matters and in relations with the State and Federal education authorities. MABE is also active with programs to enhance the quality of the work that Maryland's boards of education and board members do in furtherance of public education.

The North Carolina School Boards Association (NCSBA) is a nonprofit association formed to support local school boards across the state. Although participation is voluntary, all 115 county and city boards of education in North Carolina are members. The Association advocates for the concerns of local school boards in the state and federal courts and legislatures. There is no other state level entity that represents the interests



of North Carolina boards of education. All of the Association's members will be affected by the outcome of this litigation.

The South Carolina School Boards Association (SCSBA), a non-profit organization, serves as a source of information and as a statewide voice for boards governing the state's 85 public school districts. SCSBA's mission is to ensure excellence in school board performance through advocacy, training and service as catalysts for positive change. To fulfill this mission, SCSBA works closely with local school boards and often represents their interests in the South Carolina legislature. For instance, as an advocate for public schools, SCSBA expressed public opposition to the proposed Put Parents in Charge (PPIC) Act. Although SCSBA did not request the connection, Lexington County School District One, like many other districts throughout the state, included a link on its website to SCSBA's website, which enabled viewers to access the organization's position statements and other advocacy resources on PPIC and other issues of critical import to public education in South Carolina.

The Virginia School Boards Association (VSBA) is a private, voluntary non-partisan organization representing every local school board in Virginia. VSBA's primary mission is the advancement of education through

local control of the public schools. VSBA's members are the school divisions that actually teach students.

Each of the *amici* has a strong interest in ensuring school boards' effective participation in important education-related policy debates. *Amici* also share a strong interest in ensuring school districts' ability to control access to their distribution networks to ensure that such networks continue to fulfill schools' educational mission.

All parties have consented to the filing of this brief.

## **ARGUMENT**

Because school boards and school officials have substantial expertise and interest in the issues raised by education-related legislation, their participation in such debates significantly informs the ensuing policy discussion. Members of the public thus have a strong interest in learning the views of their school board on important education-related policy matters so that they can make more informed decisions of their own. Indeed, the public relies on school boards to serve as vigorous advocates for policy that enhances educational quality. For these reasons, the government speech doctrine permits school boards (and other government entities) to convey their own policy positions to the public—either directly or through others—

without requiring that they provide a forum for the dissenting views of other speakers.

More specifically, the government speech doctrine permits school boards (and other governmental bodies) to ensure that their communication of their views is not distorted or misappropriated by third parties. Finally, the First Amendment also permits school districts to control access to their distribution networks to ensure that such networks continue to fulfill schools' educational mission. For all these reasons, *amici* urge this Court to affirm the lower court's disposition of this case.

**I. THE GOVERNMENT SPEECH DOCTRINE SUPPORTS SCHOOL BOARDS' IMPORTANT INTEREST IN COMMUNICATING THEIR VIEWS ON EDUCATION POLICY AND THE PUBLIC'S STRONG INTEREST IN LEARNING THOSE VIEWS.**

The government speech doctrine protects a school board's use of public resources to communicate its views on contested education-related legislation to the public. *See Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559 (2005) (“Compelled support of government”—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest.”). The contrary view would frustrate the valuable exchange of information that occurs when a school board or other governmental body openly shares its position on important

policy debates with the community it represents (and beyond) so that members of the public can make more informed decisions of their own.

Recognizing that government speech serves a valuable public function, the Supreme Court has made clear that political accountability, rather than First Amendment litigation, provides the appropriate recourse for those unhappy with their government's views. In other words, a citizen displeased with particular government speech may in the next election vote against those in office expressing the offending view or—if more immediate recourse is desired—subject the elected officials to recall. *Board of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“When the government speaks, for instance to promote its own policy or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.”); *Sons of Confederate Veterans v. Commissioner of the Virginia Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) (“The rationale behind the government’s authority to draw otherwise impermissible viewpoint distinctions in the government speech context is the accountability inherent in the political process.”).

This is particularly true in the case of school boards, where local school board members face the will of the electorate at the polls on a regular basis and more than ninety percent of members serve terms of no more than four years. *See* Frederick M. Hess, *School Boards at the Dawn of the 21st Century* 28 (National School Boards Association 2002). Perhaps more than any other politically accountable body, local school boards are “uniquely . . . democratic institutions,” *Pico v. Board of Educ.*, 457 U.S. 853, 894 (1982) (Powell, J., dissenting), whose most important constituents are parents with children attending the local public schools governed by the board.

Because of government speech’s great value, controlling authority permits school boards and other governmental bodies to expend public resources when communicating their views on public policy issues. *See Southworth*, 529 U.S. at 229 (“[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.”); *see also* Appellee’s Br. at 18-24 (discussing relevant precedent).<sup>1</sup> Indeed, as courts and commentators have long noted,

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<sup>1</sup> As the Appellee’s brief makes clear, virtually all of the cases Appellant cites in support of its position were decided under state law rather than the First Amendment grounds, and thus are easily distinguished. *See* Appellee’s Br. at 20-23. The sole exception is *Bonner-Lyons v. School Comm. of City of Boston*, 480 F.2d 442 (1st Cir. 1973). Predating the emergence of the Supreme Court’s government speech doctrine by nearly two decades, the

government speech on contested public policy issues enhances citizens' capacity to participate in democratic self-governance. *E.g.*, *Kidwell v. City of Union*, 462 F.3d 620, 626 (6th Cir. 2006) (“[A] limit on government speech during elections would allow hecklers to silence the government on issues in which it has an interest and expertise—and on which citizens have

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First Amendment issue in that case almost assuredly would be decided differently today.

There, the school board adopted an official resolution ordering notices to be sent to all Boston parents urging them to support a march and rally in opposition to busing legislation. *Id.* at 442-43. The plaintiffs brought a First Amendment challenge seeking to stop the board's communication of its position altogether or, in the alternative, to be permitted to use the school system's distribution networks to disseminate their own contrary views to Boston parents. *Id.* at 443. At the time of the *Bonner-Lyons* decision, no court had yet recognized the possibility of government speech, and the First Circuit apparently saw no choice other than to characterize the government's action as creating some type of forum for private speech. *Id.* But the expression in that case easily satisfied the Supreme Court's recent emphasis in *Johanns* that the government speech defense is available when “the government sets the overall message to be communicated and approves every word that is disseminated,” *see* 544 U.S. at 562, because the board simply took a position on proposed legislation and then distributed information to the public urging them to take action consistent with that position.

Even though the government's expression in *Bonner-Lyons* poses no First Amendment problem once it is recognized as the government's own speech, however, that expression may violate other constitutional or other legal safeguards. For example, if the board's speech was motivated by racial hostility, it ran afoul of the Fourteenth Amendment's equal protection clause.

an interest in hearing their government’s perspective.”); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 11 (2000) (“[G]overnment speech can help foster debate, fleshing out views, and leading toward a more educated citizenry and a better chance of reaching the right answer.”); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 604-05 (1980) (“Governments, then, can justify the speech of public officials, not to reelect them or others, but because there is a substantial interest in hearing what they have to say.”).

This is particularly so for school boards and

most public schools in the United States [where] the *parents* have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children’s education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly ‘of the people and by the people.’

*Pico*, 457 U.S. at 891 (Burger, C.J., dissenting). The ability of school boards to communicate clearly with their constituents is key to encouraging parental involvement in setting local education policy, and their governance “has long been thought essential . . . to the maintenance of community concern and support for public schools.” *See Milliken v. Bradley*, 418 U.S. 717, 741 (1974). This engagement between a local school board and its community “takes many forms” throughout the country. *See* Michael A. Resnick,

*Communities Count: A School Board Guide to Public Engagement 2*

(National School Boards Association, 2000). Some school boards conduct focus and study groups with parents; others hold large public meetings; and still others actively communicate with constituents through electronic mail, public-access cable television, or other technologies. *Id.* at 15-18; *see also* Anne Wright & Judith Brody Saks, *The Community Connection: Case Studies in Public Engagement* (National School Boards Association, 2000) (profiling the community involvement strategies implemented in fifteen different school districts). Overall, there is no uniform method by which local school boards engage with the public. But the goal of public engagement by local school boards is the same everywhere: to forge ties with the community the school board serves, in a collaborative effort to enhance the quality of public education there.

For these reasons, Lexington School District One's communication of its position on pending education legislation is a commonplace exercise of government speech. *See, e.g., Wake County (NC) Public School System 2007 Legislative Agenda*, [www.wcpss.net/Board/legislative-agenda.html](http://www.wcpss.net/Board/legislative-agenda.html) (last visited October 22, 2007) (setting forth Wake County's position on issues from limited English proficiency funding to construction funding); *Board of Education of Carroll County (MD) Legislative Position Statements*



*2008 General Assembly,*

[www.carrollk12.org/whatsnew/pdf/legislative08.pdf](http://www.carrollk12.org/whatsnew/pdf/legislative08.pdf) (last visited October 22, 2007) (specifying Carroll County's stance on multiple issues including charter schools, teacher recruitment and collective bargaining). Moreover, it is also exactly the kind of valuable communication that the government speech doctrine is intended to protect because the board's views added an important perspective for the public's consideration.

Appellant's view would stymie such expression to the detriment of the public. For example, Appellant's approach would mean that a public health department could not respond on government time to reporters' requests for its position on bills regarding substance abuse or mental health, a police chief could not write an op-ed communicating her department's position on legislation related to law enforcement, the President could not hold a press conference expressing his views on congressional proposals involving tax reform or the military, and a school board could not publicly share its opinion on proposed state budget cuts that would slash education funding. In each of these cases, Appellant's approach would prevent the public from receiving the views of knowledgeable government officials and thus limit their understanding of the basis for a particular course of government action.

These concerns are especially acute in the realm of education policy. Because school boards and school officials have substantial expertise and interest in the issues raised by education-related legislation, their participation in such debates significantly enhances the policy discussion. For these reasons, state legislators often rely on school boards to offer their knowledge and experience when evaluating legislation involving educational matters. *See Hess, supra* at 29 (showing that approximately half of all school boards maintain a legislative/government issues committee). Recognizing the value of participating in education-related legislative debates, some school districts maintain governmental relations offices. *See, e.g., Fairfax County (VA) Public Schools Government Relations, www.fcps.edu/legupdate/index.htm* (last viewed October 22, 2007) (“[T]he Office of Government Relations initiates and sustains liaison activities with state and national policymakers in order to achieve the legislative goals of the School Board.”). In addition, school boards across the nation organize themselves into state and national associations to advocate for legislation and influence public policy in support of public education, including “aligning the power of the community on behalf of education.” National School Boards Association, *State Associations*,

[http://www.nsba.org/site/page\\_micro.asp?TRACKID=&CID=69&DID=201](http://www.nsba.org/site/page_micro.asp?TRACKID=&CID=69&DID=201)

(last viewed October 22, 2007).

The public, moreover, profits when these views are shared openly. Indeed, the community expects school boards to advocate for public education at the local, state, and federal levels on a wide range of policy issues, such as proposed changes to education funding, student safety initiatives, and programs for at-risk students. *See* Center for Public Education, *The Role of School Boards*,

[http://www.centerforpubliceducation.org/site/c.kjJXJ5MPIwE/b.1505871/k.5F50/The\\_Role\\_of\\_School\\_Boards.htm](http://www.centerforpubliceducation.org/site/c.kjJXJ5MPIwE/b.1505871/k.5F50/The_Role_of_School_Boards.htm) (last viewed October 22, 2007)

(“School boards are the education watchdog for their communities, ensuring that students get the best education for the tax dollars spent.”). Like many other school districts, the District adopted a policy defining its advocacy role:

If the board is to meet its responsibilities to the residents and students of this community, it must work vigorously for the passage of new laws designed to advance the cause of good schools and for the repeal or modification of existing laws that impede this cause. Therefore, board members will keep themselves informed of pending legislation and actively communicate board positions and concerns to elected representatives at both the state and national level.

*Lexington One (SC) Schools B- School Board Governance and Operations Policy BJ School Board Legislative Program*, [http://nt5.scbbs.com/cgi-bin/om\\_isapi.dll?clientID=382215304&depth=2&infobase=lex.nfo&record={30C0}&softpage=PL\\_frame](http://nt5.scbbs.com/cgi-bin/om_isapi.dll?clientID=382215304&depth=2&infobase=lex.nfo&record={30C0}&softpage=PL_frame) (last viewed October 22, 2007).

In the instant case, for example, the District concluded that the proposed legislation threatened “the state’s commitment to ensure that all South Carolina children enjoy the right to a free, quality public education” and voted to communicate that view to its constituents and legislators. J.A. 144. Given the depth of its concern over the proposal’s potential effects on public education, the board—as an elected body—would have been irresponsible if it failed to share with the public its position on a matter of such high stakes to schools. Voters who disagree with the board’s position, of course, remain at all times free to seek to recall current board members and elect new board members who share their policy positions; indeed, the board’s speech enhanced democratic accountability by educating the public about their elected representatives’ views. *See Hess, supra* at 5 (reporting that more than 93% of school boards are entirely elected). Appellant’s approach, in contrast, would deny school boards the ability to share their

informed analysis of education-related legislation with the public, and would deprive the public of the valuable opportunity to learn their boards' views.<sup>2</sup>

II. THE GOVERNMENT SPEECH DOCTRINE PERMITS A SCHOOL BOARD TO INCORPORATE THIRD PARTY MATERIALS THAT SUPPORT AND EXPLAIN ITS VIEWS WITHOUT ALLOWING OTHER SPEAKERS TO DISTORT ITS COMMUNICATION—AND UNDERMINE THE PUBLIC'S UNDERSTANDING—OF ITS POLICY POSITIONS.

A school district's inclusion in its public communications of third-party materials that support its position on proposed legislation or other policy issues does not convert the board's expression into a forum for private speech. Indeed, the Supreme Court recently concluded that a government speaker may rely on suggestions and support from others when crafting its expression without relinquishing its claim to those views as its own: "When, as here, the government sets the overall message to be

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<sup>2</sup> Appellant's claim that government's participation in public policy debates threatens to skew those debates, Appellant's Br. at 20-22, is without merit, as limitations other than the First Amendment's free speech clause still constrain government speech. Government expression may, for example, contravene the Constitution's establishment or equal protection clauses if it endorses religion or furthers racial discrimination. Moreover, legislatures remain free to choose to curb government speech—and often do. Government speech of a partisan nature, for instance, may violate state and/or federal statutes prohibiting the use of government resources for campaign speech. South Carolina law, as an example, prohibits the use of public resources to influence the outcome of an election or a state ballot measure. S.C. Code Ann. § 8-13-1346 (2006). The District's speech in this case, of course, did not violate any such constraints.

communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.” *Johanns*, 544 U.S. at 562; *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995) (observing that the Court’s government speech doctrine “permits the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message”). The law should not be interpreted in a manner that forces school boards and other governmental speakers to choose between citing others or risking the creation of a forum that allows third parties to express opposing views that garble or distort the government’s position.

School boards’ important interest in expressing their views on education-related policy proposals—as well as the public’s strong interest in learning those views—requires that they and other governmental bodies be allowed to employ effective means of communication. Like many government speakers, school boards often rely on a variety of communications channels—including newsletters, e-mails, and websites—to convey their views to staff, parents, and the broader public. *See, e.g., J.A.* 144-49, 154 (describing various means of communication used by Lexington

School District One). In so doing, school boards and other government bodies—like most other speakers—may draw upon credible third-party sources to illustrate, bolster, and explain the positions they’ve taken. *Amici* urge this court to eschew any ruling that a government speaker’s inclusion of supportive third-party views automatically creates a forum for private speech that would inhibit a wide range of government expression that is both valuable and commonplace.

For example, under the approach urged by the Appellant, a governor who announces her opposition to pending gun control legislation at a press conference where she invites National Rifle Association leaders to join her on the podium has now created a forum for private speech that compels her to share her microphone with gun control advocates. Similarly, under Appellant’s view, a Surgeon General who approvingly quotes the American Lung Association in an op-ed supporting tobacco regulation engages in impermissible viewpoint discrimination unless he also permits a tobacco company to supply a quotation. The Appellant’s view would thus force a government speaker either to refrain from referencing supportive sources or to share its podium with dissenting voices in a way that would distort the government’s communication of its position to the public. As this Court has recognized, “[t]he government is entitled . . . ‘to take legitimate and

appropriate steps to ensure that its message is neither garbled nor distorted.”<sup>3</sup> *Griffin v. Department of Veterans Affairs*, 274 F.3d 818, 822 (4th Cir. 2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995)).

Nor should this analysis change if, instead of referencing supportive third-party materials in an in-person press conference or in a hard-copy pamphlet, the government speaker chooses to include on its website links to supportive materials on third-party websites.<sup>3</sup> The purposes behind the government speech doctrine should apply with equal force to communication via the internet as well as to more “traditional” expressive means.

School boards, like other governmental and non-governmental speakers, increasingly use websites as critical vehicles for communicating with parents, students, staff, and the public on many subjects.<sup>4</sup> *See, e.g.,*

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<sup>3</sup> In all of these cases, it matters not whether the government speaker discovers the supportive source on its own or whether a third party initially suggests it to the government. So long as the context makes clear that the government speaker intends to cite or reference the third-party speech to bolster its explanation of its own position to the public, the government’s inclusion of third-party materials in support of its own views does not strip those views of their governmental character.

<sup>4</sup> Indeed, South Carolina law requires school districts with websites to post certain information—such as meeting notices, agendas, and minutes—on



Jennifer Wolcott, *Wired Schools Help Keep Parents in the Know*,

<http://www.edline.com/press-articles/christian-science-monitor-2-17-04.html>

(last viewed October 22, 2007) (describing 2002 study by the National Center for Education Statistics concluding that 86% of schools host a website and 66% of those schools update their websites at least once a month). Indeed, websites are particularly crucial communications vehicles for government entities to convey their views to their constituents. *See* Pew Internet & American Life Project, *Study: The Internet was a Key Force in 2004 Politics*,

[http://www.pewtrusts.org/our\\_work\\_ektid23098.aspx?category=66](http://www.pewtrusts.org/our_work_ektid23098.aspx?category=66) (last viewed October 22, 2007) (reporting that 75,000,000 Americans used the Internet in 2004 to receive political news, discuss candidates in emails, and participate directly in the political process).

Links to other websites thus provide a widespread and useful means of citing to additional resources in the internet age, offering another helpful tool for school boards and other government speaker to explain and illustrate their policy positions. *See, e.g.*, Bitlaw: A Resource on Technology Law,

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their websites for public viewing. South Carolina General Assembly, 117th Sess., 2007-08, H.3620 General Appropriation Bill for fiscal year 2007-08 as enacted, Part 1B, section 1.43.

*Web Site Legal Issues*, <http://www.bitlaw.com/internet/linking.html> (last viewed October 22, 2007) (“Links allow quick access to information that otherwise could take days or even years to find. Linking also permits the user to determine how deeply to explore a particular topic.”). Whether a government’s link to another website constitutes its own expression depends on its purpose and context. If the government’s accompanying text makes clear that the link to a third-party source is intended to provide further support for the government’s position, then the link serves the same expressive function as a hard-copy citation to a supportive reference. Indeed, the documents that appeared on the District’s “Current Issues/Voucher Legislation” page were all clearly intended to educate readers about the reasons for the district’s opposition to the PPIC Act, thus making clear that the external link on the same page to an organization that shared the board’s legislative view also served the district’s legitimate expressive interest in effectively communicating its policy position to the public. J.A. 21-22.

The district’s links to the South Carolina School Board Association (SCSBA) website performed a similar expressive function. State school board associations like the SCSBA serve, among other things, as liaisons on education-related legislative matters among local boards, state associations,

and state legislative delegations. *See, e.g.*, National School Boards Association, *State Associations*, [http://www.nsba.org/site/page\\_micro.asp?TRACKID=&CID=69&DID=201](http://www.nsba.org/site/page_micro.asp?TRACKID=&CID=69&DID=201) (last viewed October 22, 2007). Linking to the SCSBA website—which provides information on a variety of education policy matters that include, but are not limited to, the PPIC Act—thus also served the board’s expressive interest in further explaining and supporting its policy views.

For all of these reasons, the district court’s identification of the link itself as the government’s speech accurately reflects the expressive character of that association. *See* J.A. at 139 (“[T]he District has done something akin to publishing a list of sources for further information in support of its position on the legislation (particularly as to the then issue-specific CCF website) or for more general information of frequent interest to website visitors (as to the more general SCSBA website).”). Focusing on the link itself as the government’s speech also appropriately recognizes the impracticality—precisely because information on the internet can change frequently and quickly—of requiring that a government speaker be aware of and accept responsibility for all subsequent changes to the content of

supportive third-party websites it cites.<sup>5</sup> This Court should not place school boards and other government entities in the untenable position of either refraining entirely from linking to third party websites despite their informational value or—as the district court noted—“creating a forum to which any third party discussing any topic covered by the linked website might have access.” J.A. at 140 n.25. To encumber a school district’s use of so fundamental a 21<sup>st</sup> century communications tool as the internet simply because of the district’s inclusion of a supportive informational link would be profoundly problematic.

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<sup>5</sup> Indeed, the District’s website can be thought of as a virtual version of the bulletin board in *Downs v. Los Angeles Unified Sch. Dist.* 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001). There the school established a bulletin board inviting faculty and staff submissions to promote the district’s celebration of Gay and Lesbian Awareness Month. *Id.* at 1005-06. The Ninth Circuit rejected a First Amendment challenge by a teacher who sought to post materials questioning homosexuality’s morality. *Id.* at 1013. Just as the postings on a government bulletin board are not static, neither are website postings: both can change over time. The Ninth Circuit had no trouble concluding that the bulletin board’s contents reflected the district’s own expression, and the district could not be compelled to allow others to distort its position. *See id.*

### III. THE FIRST AMENDMENT PERMITS SCHOOL BOARDS TO LIMIT ACCESS TO THEIR DISTRIBUTION NETWORKS BASED ON SPEAKERS' RELEVANCE TO SCHOOLS' EDUCATIONAL MISSION.

As discussed above, the First Amendment poses no bar to school boards' communication of their views on contested education-related legislation to the public. Nor, as the Supreme Court has recognized, does the First Amendment strip schools of the authority to limit access to their communication channels to ensure that such networks work effectively in support of schools' educational mission. For example, the Supreme Court and this Court have repeatedly recognized that school districts and other government bodies may impose reasonable limitations on access to certain distribution networks like take-home flyer programs and internal mail systems. *E.g.*, *Perry Educ. Ass'n v. Perry Local Educ. Ass'n* 460 U.S. 37, 46 n.7 (1983) ("A public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects.") (citations omitted); *American Civil Liberties Union v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005) (observing that First Amendment permits a public university to draw reasonable distinctions between speakers to ensure that a speech venue fulfills its educational mission).

As the Supreme Court has made clear, school districts may impose reasonable content-based regulations to ensure that communications fostered

or disseminated by the school system remain focused on the relevant subject matter. *See Perry*, 460 U.S. at 46 n.7. For example, a school board that opens a meeting to public comment on a bond referendum may exclude speakers who instead seek to discuss the World Series or the war in Iraq. *See, e.g., City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976) (“Plainly, public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business.”). In this case, Lexington School District One—like many other school districts—restricts access to its take-home flyer program to nonprofit groups that seek to publicize sporting events and other extracurricular activities available to students that reinforce the district’s educational mission, like the YMCA and the Girl Scouts. *See* J.A. 95-96, 109, 268, 271. Such content-based, yet viewpoint-neutral, access limitations to schools’ distribution networks preserve their utility for their intended educational purposes and prevent their exploitation by those seeking access to students and the wider school community to promote their own interests, whether commercial, political or otherwise.

Similarly, schools may also make reasonable distinctions based on private speakers’ special relationship to the schools. In *Perry*, for instance, the Supreme Court upheld a school’s decision to grant privileged access to

its internal mail system to the union that was legally authorized to represent the staff on labor relations matters because of the unique function that the union served in school operations. 460 U.S. at 39-40, 51 (“Use of school mail facilities enables [the authorized union] to perform effectively its obligations as exclusive representative of *all* Perry Township teachers.”).

Again mirroring the practice of many other school districts, Lexington School District One provides parent-teacher associations (PTAs) with special access to its distribution networks—allowing them to provide their newsletters to homeroom teachers for distribution to students—because of such associations’ unique relationship to the schools. *See* J.A. 126-28.

Indeed, PTAs are created “to encourage and facilitate communication between parents, teachers, administrators, and other concerned adults associated with the school system.” *PTA Bridges Communication Gap Between Parents and School*,

[www.edwards.af.mil/news/story.asp?id=123066518](http://www.edwards.af.mil/news/story.asp?id=123066518) (last viewed October

22, 2007). PTAs’ primary purpose is to help achieve “effective and maximum feasible involvement of parents and guardians of students” in school affairs. *Relations with Parent Organizations*,

<http://jeffcodir.jeffco.k12.co.us/board/policies/kj.html> (last viewed October

22, 2007). Because PTAs exist solely to facilitate communications and

volunteer activities between parents and their schools, they—like the authorized union in *Perry*—serve an unusually valuable and distinctive function that justifies their privileged access to schools’ communications networks.

Finally, in addition to providing PTAs with privileged access to their distribution networks, schools often speak jointly with such associations. For example, a school board and a PTA could choose to convene a joint press conference or jointly write an op-ed or newsletter article in opposition to proposed legislation. In that case, the school board is itself a speaker, and the government speech doctrine permits the school board to decline to share its microphone or its pen with dissenters. As explained above, viewpoint neutrality rules do not apply to the government’s own speech: political accountability, rather than First Amendment litigation, provides the appropriate remedy for those displeased with their government’s views.

Indeed, schools and PTAs routinely engage in mutually supportive expressive activities to such a degree that the larger school community often perceives them to be speaking with one voice. This melding of messages is frequently reinforced by widely accepted practices such as posting a link to the school PTA on the school’s website, including the name of the school in the title of the PTA newsletter, and allowing school principals to review and



approve the content of PTA communications distributed through school channels. Indeed, one of the National Parent Teacher Association Standards for Family-School Partnerships reflects this very dynamic and proclaims “[f]amilies and school staff are equal partners in decisions that affect children and families and together inform, influence, and create policies, practices, and programs.” *See* [http://www.pta.org/archive\\_article\\_details\\_1182798030578.html](http://www.pta.org/archive_article_details_1182798030578.html) (last viewed October 22, 2007).

#### CONCLUSION

For the foregoing reasons, this Court should affirm the District Court’s grant of summary judgment and protect the ability of school boards and other government entities to engage in valuable government speech free from outside distortion and to preserve schools’ communications channels for their intended purpose of fulfilling schools’ educational mission.

Respectfully submitted,

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