

Case No. 20-16541

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CEDRIC EPPLE

Plaintiff-Appellant,

v.

ALBANY UNIFIED SCHOOL DISTRICT, ET AL.

Defendants-Appellees.

Appeal From a Judgment of The United States District Court,
Northern District of California, Case No. 3:17-cv-03657-JD,
Honorable James Donato

**MOTION OF FIRST AMENDMENT COALITION, AMERICAN
CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND
AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN
CALIFORNIA FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*
REGARDING PETITION FOR REHEARING**

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Pursuant to Federal Rule of Appellate Procedure 29(b) and Circuit Rule 29-2, the First Amendment Coalition, American Civil Liberties Union of Northern California, and American Civil Liberties Union of Southern California respectfully move for leave to file the accompanying brief of *amici curiae* regarding the pending petition for rehearing and addressing the Court's discussion of California Education Code section 48907(a).

Counsel for appellant consents to the filing of the proposed brief. Undersigned counsel sought consent from appellees, but their counsel have not responded to two email messages and four voicemail messages requesting consent.

**INTEREST OF *AMICI CURIAE* AND REASONS WHY THE
MOTION SHOULD BE GRANTED**

The First Amendment Coalition ("FAC") is a nonprofit advocacy organization based in San Rafael, California, dedicated to freedom of speech and government transparency and accountability. Founded in 1988, FAC's activities include free legal consultations on First Amendment issues, educational programs, and public advocacy, including extensive litigation and appellate work. FAC's members include news media outlets, both national and California-based, traditional media and digital, together with law firms, journalists, community activists, and ordinary persons.

The American Civil Liberties Union of Northern California and the American Civil Liberties Union of Southern California are California affiliates of the national American Civil Liberties Union (ACLU), a non-profit, non-partisan civil liberties organization with more than 1.8 million members. The ACLU is dedicated to defending the principles of liberty and equality embodied in the United States Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has vigorously defended free speech rights, frequently serving as either direct counsel or amicus curiae in key cases before the United States Supreme Court, this Court, and other federal courts. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021); *United States v. Hansen*, 25 F.4th 1103 (9th Cir. 2022). Of particular relevance, the ACLU California affiliates have appeared in free speech cases turning on the interpretation of state constitutional and statutory law in the school setting. *See, e.g., Smith v. Novato Unified Sch. Dist.*, 150 Cal. App. 4th 1439, 1457-68 (2007) (construing the protections afforded by California Education Code section 48907); *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal. App. 4th 1302 (1995); *Leeb v. DeLong*, 198 Cal. App. 3d 47 (1988).

The Opinion in this matter addresses the scope and application of California Education Code section 48907(a), a landmark statute protecting student speech beyond the minimum required by the First Amendment. The proposed brief would be helpful to the Court due to movants' substantial experience representing parties and acting as *amici curiae* in other cases addressing the scope of section 48907(a). As discussed in the brief, the Opinion's discussion of section 48907(a) conflicts with relevant precedent and risks creating confusion with state law. Although movants do not dispute the Court's ultimate conclusion that appellees did not violate the First Amendment or section 48907(a), movants respectfully submit that the opinion should be amended to construe section 49807(a) consistently with California precedent.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to grant leave to file the accompanying brief of *amici curiae*.

Dated: January 17, 2023

FIRST AMENDMENT COALITION

By: /s/ David Loy
John David Loy
Attorney for *Amici Curiae*

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**BRIEF OF *AMICI CURIAE* FIRST AMENDMENT COALITION,
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN
CALIFORNIA, AND AMERICAN CIVIL LIBERTIES UNION OF
SOUTHERN CALIFORNIA REGARDING PETITION FOR
REHEARING, IN SUPPORT OF NEITHER PARTY**

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A),
amici curiae state they do not have a parent corporation and no publicly held
corporation owns 10% or more of their stock.

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	3
INTEREST OF <i>AMICI CURIAE</i>	1
AUTHORITY TO FILE	2
FED. R. APP. P. 29(a)(4)(E) STATEMENT	2
INTRODUCTION	3
ARGUMENT	3
I. The Text and Legislative History of Section 48907(a) Demonstrate its Expansive Protections for all Student Speech, in Newspapers or Otherwise	4
II. California Courts Have Consistently Held That Section 48907(a) Establishes More Protection for Student Speech Than the First Amendment Requires.	6
III. The Court Should Amend its Opinion to Construe Section 48907(a) Consistently With California Precedent.	9
CONCLUSION	12
FORM 8	13

TABLE OF AUTHORITIES

	<u>Page(s)</u>
FEDERAL CASES	
<i>Brandenburg v. Ohio</i> 395 U.S. 444 (1969).....	1
<i>Brown v. Entm’t Merchs. Ass’n</i> 564 U.S. 786 (2011).....	7
<i>C.R. v. Eugene Sch. Dist. 4J</i> 835 F.3d 1142 (9th Cir. 2016)	11
<i>Chen v. Albany Unified Sch. Dist.</i> Nos. 20-16540, 20-16541, 2022 U.S. App. LEXIS 35654 (9th Cir. Dec. 27, 2022)	3, 9, 10
<i>Mahanoy Area Sch. Dist. v. B.L.</i> 141 S. Ct. 2038 (2021).....	2, 11
<i>Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.</i> 15 F.4th 885 (9th Cir. 2021)	4
<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i> 393 U.S. 503 (1969).....	8
<i>United States v. Hansen</i> 25 F.4th 1103 (9th Cir. 2022)	2
STATE CASES	
<i>Grenier v. Taylor</i> 234 Cal. App. 4th 471 (2015)	8
<i>Hamilton v. State Bd. of Educ.</i> 117 Cal. App. 3d 132 (1981)	10
<i>Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist.</i> 117 Cal. App. 4th 47 (2004)	10
<i>Leeb v. DeLong</i> 198 Cal. App. 3d 47 (1988)	2, 8

Lexin v. Superior Court
47 Cal. 4th 1050 (2010) 10

Lopez v. Tulare Joint Union High Sch. Dist.
34 Cal. App. 4th 1302 (1995) 2, 4, 5, 6

Major v. Silna
134 Cal. App. 4th 1485 (2005) 5

People v. Adelmann
4 Cal. 5th 1071 (2018) 11

Smith v. Novato Unified Sch. Dist.
150 Cal. App. 4th 1439 (2007) 2, 7, 8, 9

STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

California Education Code

§ 48900.4..... 11

§ 48907.....*passim*

§ 48907(a)*passim*

§ 48907(b)-(g) 6

§ 49800(r)..... 11

INTEREST OF *AMICI CURIAE*

The First Amendment Coalition (“FAC”) is a nonprofit advocacy organization based in San Rafael, California, dedicated to freedom of speech and government transparency and accountability. Founded in 1988, FAC’s activities include free legal consultations on First Amendment issues, educational programs, and public advocacy, including extensive litigation and appellate work. FAC’s members include news media outlets, both national and California-based, traditional media and digital, together with law firms, journalists, community activists, and ordinary persons.

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Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021); *United States v. Hansen*, 25 F.4th 1103 (9th Cir. 2022). Of particular relevance, the ACLU California affiliates have appeared in free speech cases turning on the interpretation of state constitutional and statutory law in the school setting. *See, e.g., Smith v. Novato Unified Sch. Dist.*, 150 Cal. App. 4th 1439, 1457-68 (2007) (construing the protections afforded by California Education Code section 48907); *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal. App. 4th 1302 (1995); *Leeb v. DeLong*, 198 Cal. App. 3d 47 (1988).

AUTHORITY TO FILE

This brief is accompanied by a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(b) and Circuit Rule 29-2.

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici declare that:

1. No party's counsel authored the brief in whole or in part;
2. No party's counsel contributed money intended to fund preparing or submitting the brief; and
3. No person other than amici, their members or their counsel contributed money intended to fund preparing or submitting the brief.

INTRODUCTION

Amici do not dispute this Court’s conclusion that the discipline imposed on plaintiffs comported with the First Amendment and California law on student speech. However, amici respectfully submit that the Court’s brief discussion of Education Code section 48907(a) conflicts with California precedent. The Opinion states that section 48907(a) “provides no greater protection than the First Amendment” except as to student newspapers. *Chen v. Albany Unified Sch. Dist.*, Nos. 20-16540, 20-16541, 2022 U.S. App. LEXIS 35654, *41 n.5 (9th Cir. Dec. 27, 2022). In fact, however, California courts have long held that section 48907(a) provides important protections for all student speech that are greater than those provided by the First Amendment. Amici therefore respectfully request that the Court amend its Opinion to construe section 48907(a) consistently with California precedent.¹

ARGUMENT

When interpreting state law, this Court is “bound to follow the decisions of the state’s highest court, and when the state supreme court has

¹ Amici take no position on the issues presented in the petition for rehearing.

not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises.” *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021). Absent “convincing evidence that the state’s supreme court” would rule otherwise, this Court “will ordinarily accept the decision of an intermediate appellate court as the controlling interpretation of state law.” *Id.*

Here, the California Court of Appeal has definitively construed section 48907(a), and there is no reason to believe the California Supreme Court would disagree. Accordingly, this Court should follow the Court of Appeal’s decisions, which confirm that the protections of section 48907(a) exceed those of the First Amendment for all student speech, in newspapers or otherwise.

I. The Text and Legislative History of Section 48907(a) Demonstrate its Expansive Protections for all Student Speech, in Newspapers or Otherwise.

As the Court of Appeal has explained, California led the country in adopting “the nation’s first statutory scheme for protecting students’ free expression on school campuses.” *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal. App. 4th 1302, 1311 (1995). Originally, the statute provided:

Students of the public schools have the right to exercise free expression *including, but not limited to*, the use of bulletin

boards, the distribution of printed materials or petitions, and the wearing of buttons, badges, and other insignia, except that expression which is obscene, libelous, or slanderous according to current legal standards, or which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school, shall be prohibited.

Id. (emphasis added). Thus, by its terms, the statute applied to all forms of student speech, not merely expression in print. *See Major v. Silna*, 134 Cal. App. 4th 1485, 1495 (2005) (“The phrase ‘including, but not limited to’ is a term of enlargement, and signals the Legislature’s intent that [a statute] applies to items not specifically listed in the provision.”).

Although the statute “enhanced the protection of student expression in general,” it “quickly became controversial because it contained no specific reference to official student newspapers.” *Lopez*, 34 Cal. App. 4th at 1311. And so, after some debate, “the Legislature eventually passed legislation in 1978 that became section 48907” and “specifically protected student expression in official school publications.” *Id.* at 1312.

In doing so, the Legislature added language “to include ‘the right of expression in official publications’ within the statute’s protective sweep.” *Id.* at 1321. The Legislature also revised “[o]ther language in the first paragraph,” which is now section 48907(a), but as the Court of Appeal

opined, “there was no significant change in the paragraph’s import.” *Id.*

Therefore, it is clear that the addition of “official publications” to section 48907(a) was intended to expand the statute’s reach, not contract it, and the statute continues to cover all student speech, in newspapers or otherwise.²

II. California Courts Have Consistently Held That Section 48907(a) Establishes More Protection for Student Speech Than the First Amendment Requires.

California courts have expressly rejected the contention that “the Legislature intended that the free speech rights protected by section 48907 be no broader than those protected by the United States Constitution.” *Lopez*, 34 Cal. App. 4th at 1317 (*citing Leeb v. DeLong*, 198 Cal. App. 3d 47, 54 (1988)). As the Court of Appeal explained, “neither the legislative history of section 48907 nor California case law supports the conclusion that a student’s free speech rights under section 48907 are only coextensive with those guaranteed by the First Amendment and federal case law.” *Id.* at 1319.

In particular, by protecting student speech unless it “so *incites* pupils as to create a clear and present danger of the commission of unlawful acts on

² The statute contains provisions not at issue here that govern official school publications, authorize schools to adopt otherwise valid rules and regulations, and prohibit retaliation against staff. *See* Cal. Educ. Code § 48907(b)-(g). It also now applies to students of “charter schools.” *Id.* § 48907(a).

school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school,” Cal. Educ. Code § 48907(a) (emphasis added), the statute codifies stronger protections for student speech than the First Amendment. The statute’s “plain language” protects student speech unless it “incites” a prohibited result, with “incite” meaning “to arouse; urge; provoke; encourage; spur on; goad; stir up; instigate; set in motion.” *Smith v. Novato Unified Sch. Dist.*, 150 Cal. App. 4th 1439, 1455 (2007). “The definition focuses on conduct that is directed at achieving a certain result.” *Id.*

Therefore, “the plain language of section 48907 mandates that a school may not prohibit student speech simply because it presents controversial ideas and opponents of the speech are likely to cause disruption.” *Id.* at 1457. Instead, “[s]chools may only prohibit speech that incites disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance.”³ *Id.*

³ The prohibition of “obscene, libelous, or slanderous” speech is not at issue. Cal. Educ. Code § 48907(a). Obscenity covers “only depictions of ‘sexual conduct.’” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792–93 (2011) (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)). The prohibition of libel or slander requires reasonable belief that the speech constitutes

This standard goes beyond the First Amendment, under which public schools may restrict student speech based on “facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,” regardless of whether the speech incited such a result. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969). By contrast, even if substantial disruption results, section 48907 prohibits public schools from punishing student speech unless the speech incited the disruption. *Smith*, 150 Cal. App. 4th at 1458 (“Even if we assume that the disruption that followed the publication of [student’s editorial] constituted ‘substantial disruption of the orderly operation of the school’ and that there was a ‘clear and present danger’ of disruption as required by section 48907, [the student’s] opinion editorial could only be prohibited under section 48907 if it incited the disruption.”). Although *Smith* arose from speech published in a school newspaper, its holding is not limited to that context, because the holding derives from the plain language of section

“actionable defamation.” *Leeb*, 198 Cal. App. 3d at 60. The speech at issue in the present cases, although subject to discipline on other grounds, is not actionable defamation because it “cannot be reasonably interpreted as stating actual facts about an individual,” rather than “rhetorical hyperbole, vigorous epithets,” or other “expressions of contempt and language used in a loose, figurative sense.” *Grenier v. Taylor*, 234 Cal. App. 4th 471, 486 (2015).

48907(a), which applies to all student speech, not merely publications or other media.

III. The Court Should Amend its Opinion to Construe Section 48907(a) Consistently With California Precedent.

Although the protections of section 48907(a) are greater than those provided by the First Amendment and apply to all student speech, that does not mean this Court's conclusion as to section 48907(a) was incorrect. On the facts stated in the Opinion, which involved "vicious invective that was targeted at specific individuals" and resulted in substantial disruption deriving from one student's "ticking bomb of vicious targeted abuse" and another's egging on of "a bully who torments classmates," *Chen*, 2022 U.S. App. LEXIS 35654 at *24, 37, 39, this Court might conclude that "the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance," *Smith*, 150 Cal. App. 4th at 1457. If the plaintiffs had expressed controversial or offensive ideas without targeting particular students, the result might be different. *See id.* at 1458 (holding editorial "was not inciting speech that the District was authorized to prohibit under section 48907," although it communicated student's "viewpoint in a disrespectful and unsophisticated manner"). On this record, however, the *Smith* standard for incitement appears to be met.

In the event of any question whether section 48907(a) might protect the speech at issue here, it should be construed together with the Education Code’s “generally applicable and speech-neutral prohibitions” of harassment and bullying. *Chen*, 2022 U.S. App. LEXIS 35654 at *34. California statutes that “relate to the same person or thing” or “to the same class of person[s]” must “be construed together so that all parts of the statutory scheme are given effect.” *Lexin v. Superior Court*, 47 Cal. 4th 1050, 1090-91 (2010). In particular, “when possible, sections of the Education Code bearing on the same subject must be read and construed together.” *Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 117 Cal. App. 4th 47, 60 (2004); *see also Hamilton v. State Bd. of Educ.*, 117 Cal. App. 3d 132, 141 (1981) (noting “[s]ections of the Education Code *in pari materia* must be read and construed together where possible,” in accord with general rule that “a statute must be construed within the context of the entire statutory system of which it is a part, with a view toward harmonization”).

As this Court noted, *Chen*, 2022 U.S. App. LEXIS 35654 at 34 n.4, the Education Code authorizes suspension or expulsion of a student who has engaged in “harassment” or “bullying,” which are narrowly defined as “severe or pervasive” harmful conduct directed at specific individuals,

Cal. Educ. Code §§ 48900.4, 49800(r). Like section 48907(a), sections 48900.4 and 48900(r) concern the subject of regulating public school students, and therefore this Court should “harmonize them if possible.”

People v. Adelman, 4 Cal. 5th 1071, 1075 (2018). Construed together and harmonized with sections 48900.4 and 48900(r), section 48907(a) should be read to exclude any protection for severe or pervasive conduct that meets the definition of harassment or bullying. *Cf. Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (2021) (noting “behavior that may call for school regulation” includes “serious or severe bullying or harassment targeting particular individuals”); *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1153 (9th Cir. 2016) (upholding school district’s decision to suspend student for “sexual harassment” based on abuse targeted at specific individuals that “interfered with the younger students’ rights to be secure and let alone”).

Under either or both of the above rationales, this Court’s conclusion as to section 48907(a) remains correct. But amici respectfully ask the Court to amend its opinion to conform to California precedent and avoid confusing the law. Specifically, amici ask the Court to reaffirm that the protections of section 48907(a) apply to all student speech in public schools and exceed

those of the First Amendment, even if section 48907(a) does not immunize the conduct at issue in this case.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to amend its discussion of California Education Code section 48907(a).

Dated: January 17, 2023

FIRST AMENDMENT COALITION

By: /s/ David Loy
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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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