IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No: S156961

SAN LEANDRO TEACHERS ASSOCIATION, CTA/NEA, AND CALIFORNIA TEACHERS ASSOCIATION,
Petitioners,

v.

GOVERNING BOARD OF THE SAN LEANDRO UNIFIED SCHOOL DISTRICT, SAN LEANDRO UNIFIED SCHOOL DISTRICT, CHRISTINE LIM AND MIKE MARTINEZ,
Respondents.

APPLICATION TO FILE AMICUS BRIEF AND [PROPOSED] AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA IN SUPPORT OF PETITIONER'S BRIEF ON THE MERITS

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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS

Pursuant to California Rule of Court 8.520(f), proposed *amici curiae* American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California and American Civil Liberties Union of San Diego and Imperial Counties respectfully request leave to file the attached brief in support of Petitioners. This request is timely made within thirty days after April 17, 2008, the date on which Petitioners filed their reply brief.

Interest of *Amici Curiae*

Proposed *amici* are the three California affiliates of the American Civil Liberties Union, a national, nonprofit, nonpartisan civil liberties organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nations' civil rights law. Since their founding, the national and local ACLU affiliates have had an abiding interest in the promotion of the guarantees of liberty and individual rights embodied in the federal and state constitutions, including the freedom of speech guaranteed by the First Amendment to the United States Constitution and the Liberty of Speech Clause of the California Constitution.

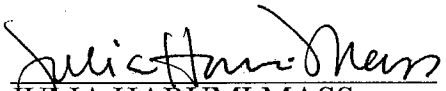
The California affiliates of the ACLU have been involved in a number of cases regarding the Liberty of Speech Clause of the California

Constitution, including submission of amicus briefs and/or participation in the oral arguments in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal. 3d. 899, *Fashion Valley Mall v. National Labor Relations Board* (2007) 42 Cal.4th 850, and *Golden Gateway Center v. Golden Gateway Center Tenants Association* (2001) 26 Cal. 4th 1013, and representing plaintiffs in *Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536, *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal. App. 4th 352, *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157, and *Lopez v. Tulare Joint Union High School District* (1995) 34 Cal.App.4th 1302. *Danskin* enforced free speech rights of non-school personnel on school campuses and *U.C. Nuclear Weapons Labs* used an incompatible use test to allow public access to a nontraditional public forum, both of which are important precedents to be considered in this case.

Because this case raises an important question concerning the interpretation of the Liberty of Speech Clause, proper resolution of the matter is of significant concern to *amici* and their members. *Amici* believe their expertise in constitutional issues, including the application of the Liberty of Speech Clause on school property and other public property that has not been opened up for general use by public speakers, will make this brief of service to the Court.

Dated: May 16, 2008

Respectfully submitted,



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INTRODUCTION

The San Leandro Unified School District has banned the San Leandro Teachers Association from communicating information about ballot initiatives and candidates for school board elections through the Association's newsletters distributed, at the Association's expense, through the District's employee mailboxes. The questions before this Court are: (1) whether Education Code § 7054 requires such a ban, and (2) whether the California Constitution's Liberty of Speech Clause allows it.

The Association and other *amici curiae* in support of the Association have addressed the first question, and we agree with their analysis that the Education Code neither requires nor allows the censorship at issue in this case.[1] We submit this brief to address the second question, which provides an opportunity for this Court to consider the scope of state constitutional speech rights on government property that is not open to the public generally, including whether California should adopt the federal forum analysis applied by the Court of Appeal.

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[1] The Court need not reach the constitutional question if it finds that the Court of Appeal erred in its interpretation of Education Code § 7054. The doctrine of constitutional avoidance supports such a result here. *Miller v. Municipal Court of City of Los Angeles*, (1943) 22 Cal. 2d 818, 828 ("If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.")

We urge this Court to reaffirm that the proper approach under the Liberty of Speech Clause for analyzing the permissibility of speech restrictions requires practical consideration of whether the restricted speech is functionally compatible with the forum in which it is expressed and close scrutiny of content discrimination. The functional compatibility test has its roots in federal case law, (*see Grayned v. City of Rockford* (1972) 408 U.S. 104, 116-17), and has been long been the law of this state. (*In re Hoffman* (1967) 67 Cal.2d 845, 848-51; *Prisoners Union v. California Department of Corrections* (1982) 135 Cal.App.3d 930 (*Prisoners Union*); *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157 (*U.C. Nuclear Weapons Labs*).)

ARGUMENT

I. THIS COURT SHOULD DECLINE TO ADOPT THE FEDERAL FORUM DOCTRINE IN APPLYING CALIFORNIA'S LIBERTY OF SPEECH CLAUSE.

The federal public forum doctrine scrutinizes speech restrictions on public property based on the government's intended use of the location of the expression. Almost from its inception, the federal forum doctrine has been criticized by scholars and jurists as both difficult to apply and insufficiently protective of speech. (*See United States v. Kokinda*, (1990) 497 U.S. 720, 740, n. 1 (*Kokinda*) (citing scholarly criticism) (Brennan, J., dissenting); Daniel Farber & John Nowak, (1984) *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219; *People for the*

Ethical Treatment of Animals v. Giuliani (S.D.N.Y. 2000) 105 F.Supp.2d 294, 307-309 (*People for the Ethical Treatment of Animals*).) Given such extensive criticism of the federal forum doctrine, it is both appropriate and consistent with California precedent for the Court to apply a more speech-protective mode of analysis for the Liberty of Speech Clause of the California Constitution.[2]

A. The Federal Forum Doctrine Is Difficult to Apply and Leads to Inconsistent Results.

The federal forum doctrine requires that courts first categorize the government property where the speech was sought to occur as 1) a "traditional" public forum, such as a street, sidewalk or park, 2) a "limited" or "designated public forum", *i.e.* "public property which the state has opened for use by the public as a place for expressive activity," or 3) a "nonpublic forum," *i.e.* "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry Educ. Ass'n. v. Perry Local Educators' Assn.* (1982) 460 U.S. 37, 45-46 (*Perry*); *Clark v. Burleigh* (1992) 4 Cal. 4th 474, 483 (*Clark*).[3] Different levels of scrutiny apply to each type of forum. For both traditional and designated forums, strict scrutiny applies to content-based restrictions, and the

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[2] While this Court gives "respectful consideration to decisions of the United States Supreme Court construing federal constitutional guarantees," (*People v. Bustamante* (1981) 30 Cal.3d 88, 97), it has in the past relied on strong dissenting opinions and/or academic criticism as a basis not to follow a United States Supreme Court opinion. (*See People v. Teresinski* (1982) 30 Cal.3d 822, 836.)

[3] The Court in *Clark* limited its inquiry to whether a candidate's statement in a pamphlet produced by a county registrar constituted a nonpublic forum under the First Amendment, and explicitly did not consider what standards apply under Article I, § 2 of the California Constitution. (*Clark, supra,* 4 Cal.4th at p. 481-82.)

government may impose reasonable time, place and manner restrictions which are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. (*Clark*, *supra*, 4 Cal. 4th at p. 483.) In a designated public forum, however, the state may limit the class of speakers entitled to participate or limit access to speech on a particular subject matter. (*Arkansas Educ. Television Comm'n v. Forbes* (1998) 523 U.S. 666, 679 (*Forbes*).) In all other types of government property, *i.e.* nonpublic forums, "the State may reserve the forum for its intended purposes," subject only to reasonableness review and a prohibition against viewpoint discrimination. (*Perry*, *supra*, 460 U.S. at 46.)

Given the broad range of uses different types of government property can have at different times and for different speakers, the first step of labeling the forum can be exceedingly complex. Public school campuses—the forums at issue in this case—provide a useful example.

Federal and California courts have sometimes held that school campuses are nonpublic forums to justify the exclusion of outside speakers. (*Reeves v. Rocklin Unified Sch. Dist.* (2003) 109 Cal.App.4th 652 (*Rocklin*) (school was nonpublic forum as to anti-abortion members who sought to distribute literature on campus; exclusion was reasonable to maintain order); *DiLoreto v. Downey* (1999) 87 Cal.Rptr.2d 791 (*DiLoreto*) (school district's exclusion of Ten Commandments banner from baseball field did not violate state constitutional speech rights because the advertising space was a nonpublic forum); *DiLoreto v. Downey* (1999)

196 F.3d 958 (9th Cir.) (baseball field fence opened for commercial advertising was a nonpublic forum and school could exclude banner that was disruptive to school's educational purpose).)

However, schools are used for many expressive activities, both during and after school hours. Under California's Civic Center Act, public school campuses are available for the use of community groups to "meet and discuss, from time to time, as they may desire, any subjects and questions that in their judgment pertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside." (Education Code § 38130 *et seq.*) Where schools open up their facilities to outside speakers on a particular subject, for community use, or for public discussion in school board meetings, the state may not exclude certain speakers based on their ideology or the content of their speech. (*Good News Club v. Milford Cent. Sch.* (2001) 533 U.S. 98 (*Good News Club)* (state law allowing use of school district property after school hours for community use created limited public forum; exclusion of religious group violated First Amendment); *Widmar v. Vincent* (1981) 454 U.S. 263, 267-68 (*Widmar*) (general access to student groups created designated public forum in university); *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n* (1976) 429 U.S. 167, 176 ("when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech"); *Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536

(*Danskin*) (pre-federal forum case applying "clear and present danger" test to exclusion of speakers who refused to disclaim affiliation with subversive groups from "civic center" on school property).)

Moreover, the forum analysis is not always applied to review the constitutionality of speech restrictions on public school campuses. For example, because public school students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate," student expression at school cannot be censored unless it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "collide with the rights of other [students]." (*Tinker v. Des Moines Community Sch. Dist.* (1969) 393 U.S. 503, 509, 513 (*Tinker*). *Cf. Hazelwood Sch. Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 271-72 (school has more authority to limit student speech in a school-sponsored newspaper which may bear the imprimatur of the school); *Bethel Sch. Dist. No. 403 v. Fraser* (1986) 478 U.S. 675 (First Amendment allowed discipline for student's lewd and indecent speech in school-sponsored speech).)[4]

[4] California's public school students are statutorily entitled to more speech protection than has been recognized by post-*Tinker* U.S. Supreme Court decisions under the First Amendment. Education Code § 48907; *Lopez v. Tulare Joint Union High Sch. Dist.* (1995) 34 Cal.App.4th 1302, 1318 (holding that the predecessor to § 48907 was the "statutory embodiment" of *Tinker* and that its "language cannot reasonably be construed to indicate any legislative intent that the rights protected by statute would expand or contract according to subsequent developments in federal law").)

Similarly, the free speech rights of teachers on campus are analyzed without reference to the forum doctrine. (*See Givhan v. Western Line Consolidated Sch. Dist.* (1979) 439 U.S. 410 (teacher's private conversations with principal concerning race discrimination protected by First Amendment); *Los Angeles Teachers Union v. Los Angeles City Bd. of Educ.* (1969) 71 Cal.2d 551 (school employer cannot prohibit teachers from circulating petition related to public financing of private schools during duty-free periods on school premises); *California Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist.* (1996) 45 Cal.App.4th 1383 (*California Teachers Ass'n*) (school district can restrict teachers from wearing political buttons in instructional setting only).) When schools are not considered designated public forums, they are nonpublic forums, or not forums at all. (*Clark*, *supra*, 4 Cal.4th at p. 483, n. 9.) However, it is clear that for speakers—like teachers and students—who have regular access to government property that is not open to the public, the "nonpublic" character of that property does not open the door to censorship based on the content of their speech.

Thus, depending on the speaker, the audience, the subject matter, the time of day, and the exact place speech occurs on a school campus, the forum doctrine may or may not apply, and may require different results just as to the first step of the inquiry—what type of forum is at issue. Defining the mailboxes as a nonpublic forum as the Court of Appeal did in this case would allow the District to engage in content discrimination and limit judicial review to a reasonableness

inquiry. Alternatively, if Education Code § 7054 were applied to exclude candidate endorsements from a community debate which was held in a school auditorium on current political issues pursuant to the Civic Center Act, the school property would more likely be characterized as a designated public forum and the exclusion of partisan speech would be content discrimination, subject to strict scrutiny. (*Perry, supra*, 460 U.S. at p. 45-46.) Automatic application of such different standards of review for "nonpublic" versus "designated public" forums makes little sense where the message, the speaker, and the right of the speaker to use the particular forum are the same in both cases.[5] It also provides little guidance to speakers and government officials who seek to regulate speech about what speech must be permitted and what speech may be censored in any particular situation.

B. The Federal Forum Doctrine Provides Insufficient Protection against Content-Based Discrimination.

This case presents a troubling question under the federal forum doctrine—how to identify and remedy content discrimination in forums that are not entirely open to the public. While content discrimination in a designated public forum is still subject to strict scrutiny, the scope of the subject matter allowed within the forum—and hence the permitted content of any speech—remains within the

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[5] Between the hypothetical options presented, the teacher's message to a limited audience of coworkers in the less public mailbox setting would be *less* likely to infringe on any interests of the school district's, such as suggesting an imprimatur of approval by the district.

control of the government. If the location of the speech is defined as a nonpublic forum (or in some formulations, a "limited" public forum), the federal scheme provides *no* protection against content discrimination.[6] In addition to the complex and confusing rules governing the proper labeling of less public government property for speech purposes, determining and faithfully applying the appropriate level of scrutiny can be both difficult and insufficiently protective of speech. After reviewing the relevant U.S. Supreme Court decisions and controlling decisions of the Second Circuit Court of Appeals, a federal district court in New York observed:

> It appears therefore that the case law identifying the limited public forum has defined it as (1) a term synonymous and used interchangeably with a designated public forum; (2) a distinct subcategory of the designated forum; and (3) an outgrowth of a nonpublic forum. And the pertinent standard of First Amendment review has been applied either as strict scrutiny or as the minimal standard of reasonableness, or both. Where does this analysis lead, and what conclusions may a court draw from it when presented with a controversy whose resolution rests precisely on the application of

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[6] *Cf. Widmar, supra,* 454 U.S. 263 (university that made facilities generally available to registered student groups created a designated public forum and could not engage in content discrimination; strict scrutiny applied) *with Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819 (university created a "limited public forum" by distributing funds for use by student groups; withholding funding for Christian group's newsletter was impermissible viewpoint discrimination) *and Good News Club, supra,* 533 U.S. 98 (applying a reasonableness standard in limited public forum); *Cf. Hill v. Scottsdale Unified Sch. Dist.* (9th Cir. 2003) 329 F.3d 1044 (policy and practice of allowing certain outside groups to distribute or display brochures and other promotional literature created a "limited" public forum subject to reasonableness review; exclusion of summer camp brochure describing classes with religious content was impermissible viewpoint discrimination) with *Searcy v. Harris* (11th Cir. 1989) 888 F.2d 1314 (Career Day with outside speakers on career opportunities was a nonpublic forum, but exclusion of peace recruiters was viewpoint discrimination).

these principles? To say that the ambiguities described have left this Court benumbed and bewildered is only modestly overstated.

(People for the Ethical Treatment of Animals. supra, 105 F.Supp.2d at p. 309.)

1. The Federal Doctrine Limits Full Protection to Speech that Occurs in Streets and Parks.

The federal forum doctrine drastically departs from the general constitutional prohibition on content discrimination. While content-based restrictions on speech occurring in streets and parks are entitled to strict scrutiny, freedom of speech on all other public property has been transformed into a privilege rather than a right. Any protection depends on the government's willingness to open up the property for expressive purposes. As Justice Kennedy has pointed out, this intent-based approach is not only unprotective of speech, it also relies on a legal fiction. The "principal purpose of streets and sidewalks . . . is to facilitate transportation, not public discourse and . . . the purpose for the creation of public parks may be as much for beauty and open space as for discourse." (*International Society for Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672, 696-97 ("*ISKON*") (Kennedy, J. concurring).) Given the insubstantial and unreliable protection provided by this approach, perhaps it should not be surprising that even a public sidewalk—usually considered a quintessential public forum—has been characterized as a nonpublic forum, where speech restrictions were subject only to reasonableness review. (*Kokinda*, *supra*, 497 U.S. at p. 732 (sidewalk adjacent to post office held to be *nonpublic* forum

because "the purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system").)

2. Contrary to Core Constitutional Principles of Free Speech, the Federal Forum Doctrine Allows Content Discrimination through the Government's Definition of a Designated Forum and within any Nonpublic Forum.

Protection against content discrimination is a core concern of constitutional free speech protections. This is true for good reason: government manipulation of public debate through content-based restrictions distorts the marketplace of ideas that is so central to the success of our democratic system of government.

> Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' . . . Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government . . . may not select which issues are worth discussing or debating in public facilities.

(*Police Dept. of Chicago v. Mosley* (1972) 408 U.S. 92, 96, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270. *See* Susan H. Williams, *Content Discrimination and the First Amendment* (1991) 139 U. of Pa. L. Rev. 615, 674, 676-96 ("If . . . a law disadvantages one content category of speech, then it can lead to serious social harms, including distortion of the public debate, interference with the democratic process, and a possible consequent loss of political legitimacy") and *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 388, (*R.A.V.*) quoting *Simon & Schuster v. Members of the N.Y. State Crime Victims Board*, (1991) 502 U.S. 105, 116 ("content discrimination 'raises the specter that the

Government may effectively drive certain ideas or viewpoints from the marketplace'").) This especially true in California, "because of the obligation and right of our citizens to be actively involved in government through the processes of initiative, referendum and recall which distinguish our state constitutional system." (*U.C. Nuclear Weapons Labs*, *supra*, 154 Cal.App.3d at p. 1163.)

Accordingly, "[c]ontent–based regulations are presumptively invalid." (*R.A.V., supra,* 505 U.S. at p. 382.) In fact, even within categories of *unprotected speech*, content discrimination is subject to strict scrutiny. (*Id.* at p. 386 ("fighting words" that otherwise may be prohibited may not be regulated based on their subject matter or message).) The federal forum doctrine, by contrast, has the anomalous effect of allowing content discrimination on any public property other than traditional public forums.

Having eliminated any *right* to speak on government property other than the traditional public forum, the federal forum doctrine goes on affirmatively to allow content discrimination in nontraditional public forums in two ways. First, by allowing the government to designate the speakers and issues for discussion in designated and/or limited public forums, the government is entitled to exclude certain messages. The very act of defining the subject matter to be permitted in a designated or nonpublic forum is content-based regulation, but seems to be subject to no scrutiny whatsoever. Second, within a nonpublic forum, restrictions need only be "reasonable" and viewpoint-neutral; content-based restrictions are not subject to any review. (*Perry*, 460 U.S. at p. 46.)

3. Prohibitions on Viewpoint Discrimination Are Insufficiently Protective of Free Speech.

Because the federal doctrine allows content discrimination subject to mere reasonableness review in less public forums, it is particularly important that courts strongly enforce the remaining prohibition against viewpoint discrimination. However, this is a difficult enterprise because the distinction between viewpoint and content discrimination depends almost entirely upon how one frames the debate at issue. For example, in *Boos v. Barry*, the U.S. Supreme Court considered an ordinance that banned the display of any sign within 500 feet of a foreign embassy if the sign tended to bring that foreign government into "public odium" or "public disrepute." (*Boos v. Barry* (1988) 485 U.S. 312, 315 (*Boos*).) While it seems obvious that the ordinance sought to regulate only messages communicating viewpoints *against* foreign governments, and would allow messages in support of foreign governments, the U.S. Supreme Court nevertheless found the restriction to be viewpoint-neutral. (*Id.* at p. 319 ("The display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments").)

As one constitutional scholar has noted, "it is hard to identify a content-discriminatory regulation that does not restrict the expression of a viewpoint in some hypothetical debate." (Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, (1999) 16 Constitutional Commentary 101, 105.) For example, if a school imposed a ban on speech related to homosexuality while

students were organizing to establish a club focused on sexual orientation and gender identity issues, the restriction would be viewpoint neutral on its face, but viewpoint discriminatory in its effect. (*See Faith Ctr. Church Evangelistic v. Glover* (9th Cir. 2007) 480 F.3d 891, 912-13 (citing *Boos, supra*, as exemplifying "the difficulty of identifying whether a regulation excludes an entire category of speech or restricts a prohibited viewpoint"); *Tucker v. State of Cal. Dept. of Educ.* (9th Cir. 1996) 97 F.3d 1204, 1216 ("[T]he line between content and viewpoint discrimination is a difficult one to draw. . ."); *Peck ex rel. Peck v. Baldwinsville Central Sch. Dist.* (2d Cir. 2005) 426 F.3d 617, 630 ("drawing a precise line of demarcation between content discrimination . . . and viewpoint discrimination . . . is, to say the least, a problematic endeavor").) This "problematic endeavor" is too thin a reed to support the constitutional guarantee of liberty of speech in less public forums.

By focusing on the government's intended use of the property, the federal forum doctrine allows the government to define the limitations on speech by its own characterization of the forum. Since government property is rarely intended primarily for communication, the doctrine can have the effect of limiting more speech than it protects. Justice Kennedy and others have criticized the forum doctrine as allowing the government to determine when it can restrict speech on public property.

> Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis

> protective of expression into one which grants the government authority to restrict speech by fiat.

(ISKON, supra, 505 U.S. at p. 693-94.) Instead, Justice Kennedy recommended an objective standard similar to that employed by this Court in *In re Hoffman*—whether "the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses." (*Id.* at p. 698; *In re Hoffman, supra*, 67 Cal.2d at p. 850-51.)

II. THE ASSOCIATION'S POLITICAL SPEECH IS ENTITLED TO PROTECTION UNDER CALIFORNIA'S FUNCTIONAL COMPATIBILITY ANALYSIS.

California has a venerable tradition of protecting more speech than is guaranteed by the First Amendment to the United States Constitution. (*See, e.g. In re Lane* (1969) 71 Cal.2d 872; *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899.) Most recently, in *Fashion Valley Mall v. National Labor Relations Board*, this Court affirmed its commitment to protecting speech in privately-owned public spaces as well as its departure from federal constitutional doctrine in this area. (*Fashion Valley Mall v. National Labor Relations Board* (2008) 42 Cal.4th 850, 860-84 (*Fashion Valley*); *Cf. Hudgens* v. *NLRB* (1976) 424 U.S. 507, 518 (First Amendment does not restrict private property owner from restricting speech in shopping center). *Cf. also In Re Hoffman* (1967) 67 Cal.2d 845, 850 (privately owned train station open to leafletters who did not did not interfere with the use of the property) *with ISKON, supra*, 505 U.S. 672 (publicly owned airport

terminals not a public forum) *and Gerawan Farming Inc. v. Lyons* (2000) 24 Cal.4th 468, 475 (California free speech provision does not allow compelling a speaker to fund speech in the form of advertising that he or she otherwise would not fund even where a commercial speaker's message is about a lawful product or service and is not otherwise false or misleading) with *Glickman v. Wileman Brothers & Elliott, Inc.* (1975) 521 U.S. 457, 469.)

This commitment to freedom of speech has included vigilance against content discrimination exceeding that found in decisions based on the First Amendment. For example, in *Wirta v. Alameda-Contra Costa Transit Dist.* (1967) 68 Cal.2d 51 (*Wirta*), this Court held that public bus system's categorical exclusion of political advertisements—except those related to a specific election—was subject to the strictest scrutiny and could not be justified. By contrast, the U.S. Supreme Court upheld a broader political speech restriction in public bus advertising in *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298 (public transit system was not a public forum; restriction on political, but not commercial, advertising was reasonable and did not violate First or Fourteenth Amendments). *See also Fashion Valley, supra*, 42 Cal.4th at p. 869 (applying strict scrutiny to content-based regulation on private property).

A. The Functional Incompatibility Test Protects the Government's Ability to Control its Facilities while Protecting Speakers from Content Discrimination.

As discussed above, an inquiry driven by the government's intention to create a less public forum cannot strongly protect against content and viewpoint

discrimination. However, both California and early federal cases provide a good alternative approach—the functional compatibility test—which protects the government's control over less public forums without sacrificing protection against content discrimination. In *Grayned v. City of Rockford*, the U.S. Supreme Court explained:

> The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library . . . , making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time*. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest.

(*Grayned v. City of Rockford* (1972) 408 U.S. 104, 116-117, emphasis added, citations omitted. *See also Prisoners Union*, *supra*, 135 Cal.App.3d at p. 935-36, citing cases.) Even after the introduction of the tripartite federal forum analysis, and in implementing that analysis, the federal courts have frequently looked to the compatibility of the restricted speech with the use of the place at issue when assessing the appropriateness of any restriction. (*ISKON*, *supra*, 505 U.S. at p. 690 ("it is difficult to point to any problems intrinsic to the act of leafleting that would make it naturally incompatible with a large, multipurpose forum such as those at issue here") (O'Connor, J.); *Cornelius v. NAACP Legal Defense & Education Fund* (1985) 473 U.S. 788, 817 (*Cornelius*) (in public and limited public forums, expression compatible with use of forum must be balanced with

other uses served by the property); *Widmar*, *supra*, 454 U.S. at p. 274 n. 5 (1981) (university may impose reasonable regulations compatible with educational mission).)

California constitutional jurisprudence has long looked to whether speech activities were consistent with the *use* of particular forums, rather than the intent of the government or property owner. In *In re Hoffman*, this Court considered whether a city ordinance could be applied to prevent anti-war activists from leafleting in a railway station. The Court explicitly rejected the city's argument that the leafletters' presence went beyond the railroads' consent "to open their property . . . for a limited and specific purpose only, namely, for the use of the transportation facilities offered." (*In re Hoffman*, *supra*, 67 Cal.2d at p. 848.)[7] Instead, the Court held that the primary uses of both municipal property and railway stations "can be amply protected by ordinances prohibiting activities that interfere with those uses," and that speech activities cannot be prohibited "solely because the property involved is not maintained primarily as a forum for such activities." (*Id.* at p. 850-51.) Since the leafletters' activities did not interfere with the use of the station, impede the movement of passengers or trains, block access, or otherwise interfere with the railroad employees' conduct of their business,

[7] California decisions under the First Amendment and those that "cite federal law that subsequently took a divergent course," are persuasive in interpreting California's liberty of speech clause. (*Fashion Valley*, *supra*, 42 Cal.4th at p. 864, n. 6.)

application of the loitering ordinance to exclude them was unconstitutional. (*Id.* at p. 851.)

California's test governing private property owners' ability to restrict speech is also tied to practical considerations regarding their use of the property. "Shopping malls may enact and enforce reasonable regulations of the time, place and manner of . . . free expression to assure that these activities *do not interfere with the normal business operations* of the mall . . . ." (*Fashion Valley*, *supra*, 42 Cal.4th at p. 870, emphasis added.) In *Fashion Valley*, the Court applied strict scrutiny to content discrimination by shopping centers, striking down a rule against "speech that urges a boycott of one or more of the stores in the mall," despite arguments that such content *did* interfere with the normal operations of the businesses there. (*Id.*)

Courts of Appeal in California followed the incompatible use test in *Prisoners Union*, *supra*, and *U.C. Nuclear Weapons Labs*, *supra*. In *Prisoners Union*, the court rejected the "all-or-nothing" argument that leafleting could not be allowed in a prison parking lot because characterizing the property as a "public forum" would render the government unable to maintain sufficient control for security purposes. (135 Cal.App.3d at pp. 939-41.) Finding that the record did not contain evidence that the Prisoners Union's activities had actually interfered with security or other practical concerns of the prison and that the prison parking lot was particularly appropriate for the union's communicative purposes, the court

ordered that the prison be enjoined from prohibiting the Prisoners Union from distributing literature to visitors of the prison. (*Id.*)

In *U.C. Nuclear Weapons Labs*, *supra*, the Court of Appeal applied a "basic incompatibility" test to uphold an injunction requiring the Lawrence Livermore Laboratory to allow opponents of the Laboratory's work to display literature and show slideshows in the Laboratory's Visitor Center. The court held that under California's Liberty of Speech Clause, the visitors center fell "somewhere in the middle of the continuum" between of public places and that distribution of literature opposing the government's work was compatible with both the purpose and function of the visitors center as a location for informing the public about nuclear power. (154 Cal.App.3d at p. 1168.)[8]

It is important to note that an inquiry focused on objective factors would not change the outcomes of most California cases previously decided under the federal forum doctrine. For example, based on the facts presented in *Rocklin*, *supra*, the abortion protestors who sought access to that public school campus could appropriately be excluded as disruptive to the orderly operation of the school, a governmental interest long accepted as compelling. (*Rocklin*, *supra*, 109 Cal.App.4th 652. *Tinker*, *supra*, 393 U.S. 503; Educ. Code § 48907.) The religious speech of the advertiser in *DiLoreto*, *supra*, would not be excluded based

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[8] The Federal Court of Appeals for the Ninth Circuit has also recognized the test under California's Liberty of Speech Clause to be "whether the communicative activity is basically incompatible with the normal activity of a particular place at a particular time." (*Kuba v. 1-A Agricultural Ass'n* (9th Cir. 2004) 387 F.3d 850, 857.)

on incompatibility with the forum because he sought to display a banner on a baseball field just as other advertisers did. However, the school's compelling interest in avoiding the appearance of endorsing a particular religion would justify its denial of his proposal to display the Ten Commandments on school property, visible from the neighboring freeway. (*DiLoreto*, *supra*, 87 Cal.Rptr.2d 791.)

Lopez v. Tulare Joint Union High School Dist. (1995) 34 Cal.App.4th 1302 (*Lopez*) and *Leeb v. Long* (1988) 198 Cal.App.3d 47 (*Leeb*) addressed federal and state constitutional protections for student speech and were informed by the terms of Education Code § 48907, which grants more protection to student speech than has been recognized by the U.S. Supreme Court. However, the interests cited in those cases as justifying schools' restrictions on student speech would also be available under the incompatible use test. The educational goal of teaching journalistic standards in a school sponsored film project—as opposed to an independent student publication—constitutes a government use that could justify regulations against profanity. (*Lopez*, 34 Cal.App.4th at p. 1329 (speech regulations prohibiting profanity in classroom film project upheld as narrowly drawn to achieve a compelling state interest).) Similarly, a school district's interest in avoiding liability for defamation would pose a serious enough threat to the orderly operations of the school to justify censorship of *actionable* defamation, as the Court of Appeal held in *Leeb v. Long*. (198 Cal.App.3d at p. 62 ("[f]reedom of speech may not be allowed to hinge on the subjective pique of an offended prospective plaintiff in a frivolous and doubtful lawsuit," but prior restraint of

school-sponsored newspaper is permissible where an offended plaintiff "would have a clear chance of prevailing in a tort action against the school district").

By focusing on the incompatibility of particular speech with the actual use of public property, the functional incompatibility test preserves the government's interest in controlling its facilities and avoiding disruption of its day-to-day operations. The only rationale for according diminished speech protection in less public forums is that the government's primary, non-expressive use of the forum should not be undermined by expressive activities. However, as long as the communication does not interfere with the government's use of and reasonable control over the forum, there is no reason the California Constitution should categorically allow more content discrimination in a less public forum than in one that is completely open to the public. In order to protect the government's use of a forum, courts should consider objective facts about the forum: who has access to it, the degree and regularity of access enjoyed by the speaker, the physical limitations of the forum, and the use to which it is actually put. Speech that falls within the reasonable boundaries of those factors, such that it does not disrupt the government's or other participants' use of the forum, should be accorded protection, and any content-based regulation of such speech should be viewed with strict scrutiny.[9]

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[9] In *In re Hoffman*, *Prisoners Union*, and *U.C. Nuclear Weapons Labs*, *supra*, speakers were excluded from the respective forums without particular reference to the content of their messages, and the opinions in those cases therefore did not have occasion to scrutinize the restrictions as content-based. However, it follows

B. The Association's Political Endorsements Should Be Protected Under the Liberty of Speech Clause.

1. The Association's Communications Were Consistent and Compatible with the Mailbox Forum.

The Legislature has granted access to District mailboxes to the exclusive bargaining representatives of District employees, including the Association. (Govt. Code §3543.1 ("EERA").) The mailboxes are regularly used for the communication of District business and for communications from the Association to its members. The audience in the forum is limited to those for whom such communications are particularly suited. Newsletters are written communications, and therefore exactly the type medium which mailboxes are intended to hold. The newsletters at issue were not alleged to have been so bulky, or distributed with such frequency as to interfere with the District's own use of the mailboxes. Thus, under a functional compatibility test, restrictions based on the content of the newsletters should be subject to close scrutiny. (*In re Hoffman*, *supra*, 67 Cal.2d at 851-52.)[10]

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from this Court's decision in *Fashion Valley*, *supra*, that strict scrutiny is appropriate in the event speech compatible with the forum is restricted based on its content. (*Fashion Valley*, *supra*, 42 Cal.4th at p. 870 (shopping centers are free to adopt regulations to ensure that speech activities do not interfere with normal business operations, but regulations that limit speech based on its message are subject to strict scrutiny).)

[10] The test need not include consideration of alternative channels for communication. "Absent the presence of some conflicting interest" that could not be protected without censorship of the speaker's message, "[i]t is immaterial that another forum, equally effective, may have been available." *In re Hoffman*, 67 Cal.2d at 852, n. 7.

2. The Censorship Was Not Narrowly Tailored to Further a Compelling State Interest.

The only possible interests to justify censorship in this case are: 1) compliance with Education Code § 7054, 2) avoiding misattribution of the Association's political endorsements to the District, and 3) the privacy interests of teachers to whom the newsletter was directed. Avoiding disruption to the District's educational mission—frequently a concern in school speech cases—is not an issue here because the only audience members in the forum at issue are the Association's members.

The District's stated interest is compliance with Education Code § 7054. As noted previously, we agree with the Association that its use of District mailboxes to communicate about its endorsements for school board elections did not violate § 7054. However, even assuming *arguendo* that § 7054 applies to the passive use of District equipment, this application of the statute will not mass muster under the Liberty of Speech Clause unless it is narrowly tailored to further a compelling state interest. (*Danskin, supra,* 38 Cal.2d at pp. 540, 555.)

Education Code § 7054 is intended to prevent undue governmental influence in elections. It is one of several laws aimed at preventing government officials from using taxpayer dollars to influence politics for personal or institutional gain. *See Stanson v. Mott,* (1976) 17 Cal.32d 206; *League of Women Voters v. Countrywide Criminal Justice Coordination Comm.* (1988) 203 Cal.App.3d 529; *Choice-in-Education League v. Los Angeles Unified Sch. Dist.*

(1993) 17 Cal.App.4th 415.) Applying the statute to the speech of *nongovernmental* speakers who are not making use of valuable public services or equipment does not further the governmental interest embodied in the statute.

The District could argue, as the transit district did in *Wirta v. Alameda-Contra Costa Transit District*, that it has an interest in avoiding the appearance of endorsing particular candidates or positions on ballot initiatives. (*Wirta*, *supra*, 68 Cal.2d at p. 61.) However, there is no reason to think the teachers would attribute the District's endorsement to the Association's speech simply because the newsletter came—like most Association communications to its members—through District mailboxes. Public sector employee unions engage in local political campaigns to elect officials who will support their efforts in collective bargaining. Advocacy of political causes related to the improvement of working conditions is within the recognized scope of concerted activity protected by labor relations laws. (*Eastex, Inc. v. National Labor Relations Board* (1978) 437 U.S. 556, 569-70 (union newsletter urging political action regarding a constitutional amendment on the right to work was protected as concerted activity under Section 7 of the National Labor Relations Act).)[11] Given the Association's regular use of

[11] While political advocacy has been held to be outside the scope of representation that public sector unions could charge unwilling members, the rights of union members not to fund speech with which they disagree, *i.e.* compelled speech, is not at issue here. However, the District's prohibition of speech regarding candidate endorsements or arguments in favor or opposing ballot initiatives would also bar the Association from using the mailboxes to provide an accounting of its political spending for purposes of *allowing* members to choose to limit their dues

District mailboxes and its collective bargaining relationship with the District, there was no danger that Association members would misattribute the Association's political endorsements to their employer.

In *Wirta*, this court rejected the transit district's argument that its prohibition on political advertising was necessary "to keep the Government outside the arena of partisan affairs" and avoid the "impression that the district endorses the views of the advertiser." (*Wirta*, *supra*, 69 Cal.2d at p. 61.) The Court noted that the transit district was "insulated from implied endorsement" since it required disclaimers in the text of advertisements that were submitted. Similarly here, while avoiding misattribution of partisan endorsements to the District is a compelling governmental interest, it is not one that is actually threatened by allowing the *Association's* communications of its political endorsements through its own newsletter.

In *California Teachers Association*, *supra*, the Court of Appeal distinguished the school district's legitimate concern that teachers wearing political buttons in the classroom would convey the impression of district endorsement from the teachers' right to wear political buttons outside of the classroom on school property. With respect to teachers' communication with each other outside of the classroom, the court observed, "The relationship between coemployees has none of the elements of power and influence which exist

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payments or participation in the Association's political action committee. (*Cf. Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292, 302.)

between elementary and secondary students and their instructors. Thus when teachers and other district employees express their political views to each other, there is very little risk their view will be unduly influential and thereby implicitly attributed to the school district. (*California Teachers Ass'n, supra*, 45 Cal.App.4th at p. 1392.)

Finally, unlike the privacy concerns that might underlie a prohibition on leafleting in the interior hallways and entryways of an apartment building (*Golden Gateway Center v. Golden Gateway Tenants Association* (2001) 26 Cal.4th 1013, 1036), there is no reason to suppose the Association's members suffer undue intrusion by receiving the Association's newsletters in their mailboxes. The very purpose of employee mailboxes is to carry messages from District personnel, the Association, and other school-related speakers to District employees. In addition, unlike members of the general public who may receive leaflets from strangers in a public forum, the audience here is comprised of members of the group sending the message. They pay dues, vote in union elections, and participate in strategy decisions around collective bargaining. Moreover, District employees who receive Association newsletters are free to save them to read at a later time or discard them immediately. (*See Wirta, supra*, 68 Cal.2d at p. 60, n.3 (bus passengers were not a "captive audience") and *ISKON, supra*, 505 U.S. at p. 690 ("The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to

read the message at a later time") (O'Connor, J.), quoting *Kokinda*, *supra*, 497 U.S. at p. 734.)

3. The Court of Appeal's Application of the Federal Forum Doctrine in this Case Highlights the Dangers of that Doctrine.

There is a "spectrum" or "continuum" of more and less public places and different speakers have different levels of access to each place. *Perry*, *supra*, 460 U.S. at p. 45 (describing the "spectrum" of places in which speech occurs); *U.C. Nuclear Weapons Labs*, *supra*, 154 Cal.App.3d at p. 1164 (acknowledging the "continuum" of public forums). The Court of Appeal's application of the federal forum doctrine's categorical approach to this spectrum in this case illustrates some of the doctrinal problems described above.

The Court of Appeal held that the mailboxes were a nonpublic forum because the District had not "opened its mail system for indiscriminate use by the general public," and "granting selective access to [certain] outside organizations . . . 'does not transform government property into a public forum.'" (*San Leandro Teachers Ass'n v. Governing Bd. Of San Leandro Unified Sch. Dist.*, 154 Cal.App.4th at pp. 890, 892, quoting *Perry*, *supra*, 460 U.S. at p. 46.) However, even under the federal forum doctrine, when the government allows a class of speakers—such as registered student groups—access to its facilities, it creates a designated public forum, and content discrimination against speakers within that class is subject to strict scrutiny. (*Widmar*, *supra*, 454 U.S. at p. 270.) Here, the Legislature, through EERA, granted the Association access as a matter of law. It

thereby created a "designated public forum" for use by the Association and other employee representatives to communicate with District employees about matters related to the District. While we are aware of no cases making this point explicitly, the federal forum doctrine must allow that a particular place can be a "designated pubic forum" for those who have been granted access as a class and a nonpublic forum for anyone who has not been categorically granted access (such as the rival union in *Perry*).

In *Forbes*, *supra*, the U.S. Supreme Court explained that the key difference between a "designated public forum" and a "nonpublic forum" is whether the government granted general access to a class of speakers or retained the authority to grant selective access. "[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to a particular class of speakers, whose members must then, as individuals 'obtain permission' [citation] to use it." (*Forbes*, *supra*, 523 U.S. at p. 679 (quoting *Cornelius v. NAACP Legal Defense and Educational Fund*, (1985) 473 U.S. 788, 804 (*Cornelius*)).)

The instant case differs from the facts in both *Perry* and *Cornelius* in that the legislature has granted general access to school district mailboxes for employee representatives as a class. EERA does not allow a school district to require permission before each individual certified bargaining representative is given access, and it does not allow school districts to deny exclusive representatives permission to use the mailboxes based on the messages they will

communicate to their members. In *Perry*, the unions challenging restrictions on the use of the mailboxes did not have access pursuant to legislation and "[t]he practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted." (*Cornelius*, *supra*, 473 U.S. at p. 803.) In *Cornelius*, the government had retained authority to limit participation in the Combined Federal Campaign to certain types of agencies and "to require agencies seeking admission to obtain permission from federal and local Campaign officials." (*Id.* at p. 804.) Unlike the access at issue in *Perry* and *Cornelius*, the Association (and other certified bargaining representatives) have unqualified access to school district mailboxes pursuant to state statute. Thus, even under the federal forum doctrine, the Court of Appeal erred in defining the forum as "nonpublic" as to the Association.

The foregoing discussion illustrates just a few of the subtleties involved in distinguishing "designated" public forums from "limited" or "nonpublic" forums. The categories are so difficult to apply, and the case law so inconsistent, that it is easy for courts to apply the wrong label, as the Court of Appeal did here. Because the federal doctrine allows content discrimination in a "nonpublic forum," the result of the categorization process can be determinative.

Having categorized the forum as "nonpublic," the Court of Appeal held that District could engage in content discrimination because "it is reasonable to limit a school district's involvement in partisan politics." 154 Cal.App. 4th at 309-10. While we question whether the regulation of the Association's speech was

reasonably related to the goal of limiting the District's involvement in partisan politics, the Court of Appeal's holding well illustrates the danger of applying such little judicial review to content discrimination on public property.[12]

Had the Court of Appeal focused on whether the Association's speech was actually incompatible with the District's use of the mailboxes (and found it compatible), it would not have allowed the District's content-based exclusion of the Association's political endorsements unless it was narrowly tailored to a compelling state interest. Under the incompatible use test, if an outside group sought access to the mailboxes, a court would consider whether providing the requested access were compatible with the District's actual and efficient use of its mailboxes. To the extent such access would require non-school personnel to come on campus or for District-paid staff to distribute the communications, the District could argue that allowing such access was incompatible, due to expense or for security reasons, but could not exclude the group based on its message alone.

CONCLUSION

The federal forum doctrine produces arbitrary results that are not sufficiently protective of speech, particularly with respect to content-based

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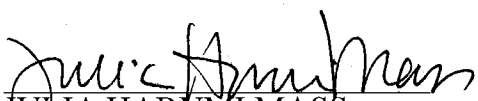
[12] As explained by the Association and other *amici curiae* in support of the Association, § 7054 should not be interpreted to bar the use of school district mailboxes where the communications are produced and distributed at the Association's expense. (*See League of Women Voters*, *supra*, 203 Cal. App. 3d 529, *Choice-In-Education*, *supra*, 17 Cal. App. 4th 415.) Since § 7054 does not bar the Association's use of mailboxes to communicate political endorsements and since there is no danger of misattribution of the Association's endorsement to the District, the censorship would not even be reasonably related to a valid state interest, and thus would be unconstitutional even in a nonpublic forum.

regulations in nontraditional public forums. According to this Court's precedents under the Liberty of Speech Clause, "[n]o doctrinal pigeonholing, complex formula, or multipart test" can obscure the conclusion that "a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur" in California. (*Kokinda*, *supra*, 497 U.S. at 743 (Brennan, J., dissenting).) With respect to government property that is less open to the public, but compatible with some communicative use, the same considerations that have governed this Court's analysis of shopping malls and train stations should apply. If the Court decides to reach the constitutional question presented by this case, we urge it to continue its tradition of applying strict scrutiny to content-based regulation and judging speech restrictions based on objective facts, rather than governmental intent.

Dated: May 16, 2008

Respectfully Submitted:



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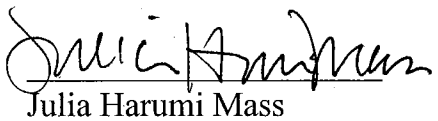
CERTIFICATION OF WORD COUNT

I, Julia Harumi Mass, hereby declare:

1. This brief complies with the type-volume limitation rule C.R.C. 8.520(c)(1) because this brief contains 7,366 words, excluding the parts exempted by C.R.C. 8.520(c)(3).

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed this 16th day of May, 2008 in San Francisco, California.



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PROOF OF SERVICE BY U.S. MAIL

San Leandro Teachers Association, CTA/NEA, and California Teachers Association v. Governing Board of the San Leandro Unified School District, San Leandro Unified School District, Christine Lim and Mike Martinez
Case No. S156961

I, Cynthia D. Williams, declare that I am a citizen of the United States, employed in the City and County of San Francisco; I am over the age of 18 years and not a party to the within action or cause; my business address is 39 Drumm Street, San Francisco, CA 94111.

On May 16, 2008, I served a copy of the attached

APPLICATION TO FILE AMICUS BRIEF AND [PROPOSED] AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA IN SUPPORT OF PETITIONER'S BRIEF ON THE MERITS

On each of the following by placing true copies in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 16, 2008 at San Francisco, California.

Cynthia D. Williams

Cynthia D. Williams