No. 22-324

IN THE

# Supreme Court of the United States

MICHELLE O'CONNOR-RATCLIFF AND T.J. ZANE,
*Petitioners,*

v.

CHRISTOPHER GARNIER AND KIMBERLY GARNIER,
*Respondents.*

**On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF *AMICUS CURIAE* CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS


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# TABLE OF CONTENTS

**Page**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

IDENTITY AND INTEREST OF AMICUS CURIAE..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 5

I. THE NINTH CIRCUIT'S DECISION DOES NOT PROVIDE SCHOOL BOARDS WITH A CLEAR TEST TO DETERMINE IF THEIR MEMBERS HAVE "CLOAKED" THEIR SOCIAL MEDIA ACCOUNTS WITH "AUTHORITY OF THE STATE."..... 4

A. The Ninth Circuit Test Creates An Undue Burden On School Boards and Their Lay Board Members..... 6

II. THE "STATE-OFFICIAL" TEST IS EASIER FOR SCHOOL BOARDS AND THEIR MEMBERS TO FOLLOW AND IS PREDICTABLY APPLIED..... 10

III. THE NINTH CIRCUIT'S DECISION DISREGARDS THE LAW CONCERNING THE LIMITS OF INDIVIDUAL BOARD MEMBER AUTHORITY AND CAUSES CONFUSION..... 14

IV. THE NINTH CIRCUIT TEST IS NOT WORKABLE IN A REAL-WORLD CONTEXT AND THE UNINTENDED CONSEQUENCES ARE WIDE-RANGING..... 18

A. School Board Member Personal Lives And Support Of School Community Are Intertwined On Social Media..... 19

B. A School Board Member Running For Re-Election Will Have More Restrictions On Social Media Speech Than Will His/Her Challengers, Which Is Unfair And Could Impact Elections. ..... 21

C. The *Garnier* Test Will Result In School Boards Policing Members' Posts And Expose Districts To Liability. ..... 22

D. The Ninth Circuit Test Will Infringe On Individual Liberties And Chill Speech And Civic Engagement in School Boards. ..... 24

V. IF THE NINTH CIRCUIT TEST IS ADOPTED, AMICI URGE THE COURT TO FIND THAT A DISCLAIMER WOULD HAVE RESULTED IN A DIFFERENT OUTCOME ..... 28

CONCLUSION ..... 31

# TABLE OF AUTHORITIES

**Page**

## FEDERAL CASES

*American Mfrs. Mut. Ins. Co. v. Sullivan,*
526 U.S. 40 (1999) ..... 11

*Am. Freedom Def. Initiative v. King County*,
904 F.3d 1126 (9th Cir. 2018) ..... 29

*Anderson v. Warner*,
451 F.3d 1063 (9th Cir. 2006)..... 16

*Biden v. Knight First Amend. Inst.*,
141 S.Ct. 1220 (2021)..... 5, 10

*Campbell v. Reisch,*
986 F.3d 822 (8th Cir. 2021) ..... 21

*Charudattan v. Darnell*,
834 Fed.Appx. 477 (11th Cir. 2020)..... 28

*City of San Diego, Cal. v. Roe*,
543 U.S. 77 (2004) ..... 26

*Davison v. Loudoun Cnty. Bd. of Supervisors*,
267 F. Supp.3d 702 (E.D. Va. 2017) ..... 24

*Davison v. Randall*,
912 F.3d 666 (4th Cir. 2019) ..... 23, 24

*Garnier v. O'Connor-Ratcliff*,
41 F.4th 1158 (9th Cir. 2022)...2-7, 9-11, 13, 14, 18-20, 22-25, 27-29, 31

*Howerton v. Gabica*,
708 F.2d 380 (9th Cir. 1983) ..... 5

*Kennedy v. Bremerton School District*,
142 S.Ct. 2407 (2022).....26

*Kirtley v. Rainey*,
326 F.3d 1088 (9th Cir. 2003).....5

*Knight First Amend. Inst. v. Trump*,
928 F.3d 226 (2d Cir. 2019).....5

*Knight First Amend. Inst. v. Trump*,
953 F.3d 216 (2nd Cir. 2020).....11, 13, 20, 26

*Lugar v. Edmondson Oil Co.,*
457 U.S. 922 (1982) .....11

*Lassonde v. Pleasanton Unified Sch. Dist.*,
320 F.3d 979 (9th Cir. 2003) .....29

*Lindke v. Freed,*
37 F.4th 1199 (6th Cir. 2022) ..... 4, 10-13, 20, 27, 30

*McDade v. West*,
223 F.3d (9th Cir. 2000).....6

*Morgan v. Bevin*,
298 F.Supp.3d 1003 (E.D. Ky. 2018) .....25

*Naffe v. Frey*,
789 F.3d 1030 (9th Cir. 2015) ..... 3, 6, 8, 25, 28

*Pembaur v. City of Cincinnati*,
475 U.S. 469 (1986) .....23

*Spell v. McDaniel*,
824 F.2d 1380 (4th Cir. 1987) .....23

*Waters v. City of Morristown*,
242 F.3d 353 (6th Cir. 2001) ..... 11, 13

**STATE CASES**

*El Camino Community Coll. Dist. v. Superior Ct*,
173 Cal.App.3d 606 (1985).....17

*Miller v. McKinnon*,
20 Cal.2d 83 (1942).....17

*Santa Monica Unified School District v. Persh,*
5 Cal. App. 3d 945 (1970).....17

**STATUTES**

42 U.S.C. § 1983..... 5, 6, 18, 23, 24, 28

Cal. Ed. Code § 221.6.....18

Cal. Ed. Code § 221.9 .....18

Cal. Ed. Code § 221.61.....18

Cal. Ed. Code § 5017.....22

Cal. Ed. Code § 5145 .....14

Cal. Ed. Code § 17604.....17

Cal. Ed. Code § 35107.....10

Cal. Ed. Code § 35120(a)(3).....9

Cal. Ed. Code § 35163..... 14, 17

Cal. Ed. Code § 35164.....14

Cal. Ed. Code § 35172.....14

Cal. Gov't Code § 53235.....10

Cal. Gov't Code § 53908.....18

Cal. Gov't Code § 54950 ..... 18

Cal. Gov't Code § 54954.2 ..... 18

Cal. Gov't Code § 54956 ..... 18

**OTHER AUTHORITIES**

CSBA, Governance and Policy, *Role and Responsibilities* ..... *15*

Poway Board Bylaw 9005 ..... 15

Poway Board Bylaw 9010 ..... 15, 16

Poway Board Bylaw 9200 ..... 15

Poway Board Policy 1114 ..... 17

**RULES**

Supreme Court Rule 37 ..... 1

**REGULATIONS**

34 C.F.R. § 106.45(b)(10) ..... 18

34 C.F.R. § 106.8(b)(2) ..... 18

## IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Amicus Curiae, the California School Boards Association ("CSBA") and its Education Legal Alliance ("ELA") submit this brief supporting Petitioners Michelle O'Connor-Ratcliff and T.J. Zane.[1]

CSBA is a member-driven, not-for-profit association composed of the governing boards of nearly 1,000 school districts and county offices of education[2] and over 5,000 board members. As part of CSBA, the Education Legal Alliance ("ELA") helps to ensure that local governing boards retain the authority to fully exercise the responsibilities vested in them by law to make policy and decisions on behalf of California school districts.

CSBA provides a wide range of services to its members including preparation of model governance policies, training on governance responsibilities and the proper exercise of authority, and professional development on social media use. CSBA members are often lay people seeking to engage in public service at the local level and give back to their community. They typically promote their school board campaigns through a variety of social media platforms and

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

[2] For ease of readability, the brief refers to school districts and school boards. However, the same analysis applies to CSBA members that are County Offices of Education and serve the education community on a broader scale.

continue to highlight their role in the community on social media once elected.

The Ninth Circuit decision in *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1169 (9th Cir. 2022), resulted in a wave of confusion from CSBA school board members on how to navigate the social media accounts of their members and raised a myriad of concerns about personal and school district liability. CSBA fielded many questions concerning the impact of the *Garnier* decision on re-election campaigns, school boards policing personal board member social media activity, legal exposure and the potential chilling effect on online speech and civic participation in school boards.

CSBA urges the Court to provide clear guidance to school board members regarding when school-related social media speech will be considered state action and to establish a framework that can apply across all social media platforms, which have varying features, instead of the unwieldy test found in *Garnier*.

## SUMMARY OF ARGUMENT

School board members are lay people whose social media pages are reflections of their commitment to serving the school community as well as their re-election efforts. They generally highlight issues that are of importance to them about their work as trustees, re-post information found on the school district's official webpages, and share details from their personal lives. School boards need a clear test to determine when the "appearance and content" of school board members' social media pages transforms those pages from personal to public and cloaks their individual actions with governmental authority.

The *Garnier* test will be difficult for school boards to follow and will have significant unintended consequences. The risk of increased litigation will cause school boards to police the social media accounts of board members, thus infringing on their individual liberties. The possibility of increased litigation is also likely to chill school board member speech and civic participation in school boards altogether. Board members may opt to close their pages to public engagement rather than risk liability for moderating disruptive posts. The application of the *Garnier* test will also impact school board elections because incumbent school board members will be limited in their use of social media accounts, whereas challengers will be free to craft a positive image of themselves and delete negative comments.

Practical impacts aside, the Ninth Circuit decision disregards legal limitations on individual board member authority enacted to ensure oversight and protect the expenditure of public funds. An individual school board member's authority to act on behalf of the board is purposefully limited by the California Education Code, school board bylaws, and caselaw. There is simply no law giving a board member authority to take official action in his/her individual capacity. School board governance is deliberately collective. This public policy is so strong that caselaw provides that the public is charged with knowledge that one board member has no authority to contractually bind the governing board and, thus, the school district. The Ninth Circuit's test blurs the distinction between the legal authority of an individual board member and the legal authority of the governing board, creating confusion in the law.

The Ninth Circuit's reliance on the *Naffe* test developed in off-duty officer misconduct cases is misplaced in

this context. Law enforcement officers are cloaked with different authority than individual board members. Unlike law enforcement officers, school board members are prohibited from acting with individual authority and the public is charged with knowing this limitation. The nature and extent of the actor's authority should therefore factor into the test.

CSBA urges the Court to adopt the "state official" test applied by the Sixth Circuit in *Lindke v. Freed*, 37 F.4th 1199, 1207 (6th Cir. 2022). Focusing on the actor's official required duties, his/her use of government resources, and ownership of the page brings the clarity of bright lines to a real-world context that is "often blurry." *Id.* It can also be cleanly applied across current and future social media platforms.

If the Court is inclined to follow the Ninth Circuit's test, CSBA would request that the Court address the use of a disclaimer identifying the page as personal, as it was suggested that such inclusion may have yielded a different result. While we maintain that courts should not compel speech, a disclaimer is a tool that school board members can easily utilize.

## ARGUMENT

### I. THE NINTH CIRCUIT'S DECISION DOES NOT PROVIDE SCHOOL BOARDS WITH A CLEAR TEST TO DETERMINE IF THEIR MEMBERS HAVE "CLOAKED" THEIR SOCIAL MEDIA ACCOUNTS WITH "AUTHORITY OF THE STATE."

The *Garnier* decision requires "a process of 'sifting facts and weighing circumstances'" to determine whether a board member's social media activity will be "fairly attributable to the state." *Garnier*, 41 F.4th at 1169. Under the Ninth

Circuit standard, school board members act under color of state law when there is "such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." *Id.,* quoting *Kirtley v. Rainey*, 326 F.3d 1088, 1094-95 (9th Cir. 2003).

The Ninth Circuit acknowledged that "not every social media account operated by a public official is a government account." *Id.* at 1173, citing *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019), *cert. granted, judgment vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220 (2021). Nonetheless, rather than create a workable test, *Garnier* ominously charged courts, after public officials have been sued, to "look to considerations such as 'how the official describes and uses the account,' 'to whom features of the account are made available,' and how members of the public and government officials 'regard and treat the account.'" *Id.* at 1173. They attempted to explain that "whether a board member is acting under color of law will turn on the nature and circumstances of his conduct and 'the relationship of that conduct to the performance of his official duties.'" *Id.* But this circuitous analysis is not useful and the test ultimately applied is unclear.

The Ninth Circuit held that the "Trustees' maintenance of their social media pages, including the decision to block the Garniers from those pages" constituted state action under 42 U.S.C. § 1983 ("Section 1983") because they "'cloaked' their social media accounts 'with the authority of the state.'" *Id.* at 1173, citing *Howerton v. Gabica*, 708 F.2d 380, 384-85 (9th Cir. 1983). Board members need a practical test reflecting when and how the "cloak" materializes and

when social media activity transforms from personal to state action.

Additionally, the rapidly evolving nature of social media platform features highlights the importance of a workable test that applies uniformly across all current and future social media platforms. The Ninth Circuit repeatedly refers to the specific features of the social media platforms used by the Trustees as reasons why blocking the users was inappropriate. *Garnier*, 41 F.4th at 1164. If the Ninth Circuit's "appearance and duty" test is adopted, the issue of whether a specific account or platform displays an official appearance will be back in the courts.

### A. The Ninth Circuit Test Creates An Undue Burden On School Boards and Their Lay Board Members.

The purpose of Section 1983 is "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Garnier,* 41 F.4th at 1170, citing *McDade v. West*, 223 F.3d at 1139 (9th Cir. 2000). As such, the Ninth Circuit elected to apply precedent involving off-duty law enforcement officer misconduct as set forth *Naffe v. Frey*, 789 F.3d 1030 (9th Cir. 2015).

Under *Naffe*, liability is imposed when an (1) off duty employee "purport[s] to or pretend[s] to act under color of law," (2) with the "pretense of acting in the performance of his[/her] duties ... [and with] the purpose and effect of influencing the behavior of others," and (3) the harm inflicted on plaintiff "relate[s] in some meaningful way either to the officer's governmental status or to the performance of his[/her] duties." *Garnier*, 41 F.4th at 1170, citing *Naffe v.*

*Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015)(alterations in original).

Applying the first prong, the Ninth Circuit found that "both through appearance and content, the Trustees held their social media pages out to be official channels of communication with the public about the work of the [Poway Unified School District ("PUSD") governing board ("Board")]." *Id.* But, actually the pages were about *their* work as Trustees on the PUSD Board, *not* official channels of the PUSD Board. Nothing in the facts reflected that these Trustees held their pages out to be official pages of the PUSD Board. It appears the sole reason for holding that the Trustees "purport[ed] ... to act in the performance of [their] official duties" was the "Trustees' official identifications on their social media pages." *Id.*[3]

The appearance and content of the social media pages of the Trustees in *Garnier* are similar to those of many board members. The *Garnier* Trustees regularly posted about PUSD Board meetings, the superintendent hiring process, budget planning, formulation of the Local Control and Accountability Plan, composition of the Budget Advisory Committee, and public safety issues. *Garnier,* 41 F.4th at 1165, 1171-72. They occasionally solicited constituent input on PUSD matters, encouraged Board meeting attendance,

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[3] "The Trustees identified themselves on their Facebook pages as 'government official[s],' listed their official titles on their pages. O'Connor-Ratcliff included her official PUSD email address. Zane wrote that his Facebook page was 'the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information.'" *Id.* The word "official" is commonly used on social media to mean "not an imposter" social media site and should not be construed as an attempt to cloak oneself with Board authority.

and responded to commenters. *Id.* They asked constituents to fill out surveys relating to Board business and to apply for Board committees. *Id.* A majority of posts appeared to be recaps of official collective Board action and discussions.

Applying the second prong, the Ninth Circuit found that the Trustees' social media pages were "official outlets facilitating their performance of their PUSD Board responsibilities" which had the "purpose and effect" of influencing the behavior of others. *Id.* Their social media interactions were viewed as "invoking" their "governmental status" to influence and increase the level of public engagement. *Id.* However, all social media posts are likely designed to have the "purpose" of influencing behavior, particularly those of elected officials. Citizens become school board members because they want to influence education. Trustee reports inform others and demonstrate continued engagement. Many of the Trustees' posts concerned workaday visits to schools and the achievements of PUSD's students and teachers, successes that subtly promote the Trustees' personal campaign prospects. But, actual evidence that behavior was influenced was not apparent and would be speculative to prove. *Id.* at 1171.

Applying the third prong, the Ninth Circuit found that the Trustees' social media activity "related in some meaningful way" to their "governmental status" and "to the performance of [their] duties." *Id.* at 1172, citing *Naffe*, 789 F.3d at 1037. Liability arose because "the Trustees' use of their social media accounts was directly connected to,

although not required by, their official positions" and this created a "close nexus." *Id.* at 1170.[4]

The difficulty with this approach is that it forces board members to choose whether to forego a social media presence reflecting any aspect of their office or, alternatively, maintain a social media presence with district-related posts and risk school district and personal liability for moderating disruptive posts.

This is an undue burden for school boards and their members. Board members typically represent a cross-section of the community. They often have "day jobs" and are motivated by a sense of civic duty and to improve educational opportunities for students.[5] School board members may be retired, looking to give back. They may be parents, seeking a greater impact on local policy.[6] Board members may get a nominal stipend or may be volunteers.[7]

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[4] The fact that the Trustees had reasons for blocking the Garniers, unrelated to the content of their speech was not considered by the Court in its state action analysis. The Garniers' goal was to disrupt the effectiveness of any content.

[5] Sixty-seven percent of trustees are currently employed. https://www.csba.org/About/AboutCSBA/CSBAFactsandFigures#gsc.tab=0

[6] Sixty-one percent of trustees have either children/grandchildren currently attending California public schools. https://www.csba.org/About/AboutCSBA/CSBAFactsandFigures#gsc.tab=0

[7] Cal.Ed.Code § 35120(a)(3) provides that school districts with an average daily attendance between 25,000-60,000 may compensate board members $750.00 per month, with annual increases not to exceed five percent.

There are few requirements to hold this office. A board member must be at least 18 years old, a citizen of California, a resident of the district/trustee area, a registered voter, not disqualified from office, and not an employee. Cal.Ed.Code § 35107. There are no "further qualifications" and the only training requirement is for ethics. Cal. Gov't Code § 53235.

"Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors" which highlights the need for a clear test that can be applied simply or, alternatively, strong guidance for local public officials. *Biden v. Knight First Amendment Institute at Columbia Univ.* 141 S.Ct. 1220, 1221 (2021)( Thomas,J. concurring). That is not what the *Garnier* decision provides.

## II. THE "STATE-OFFICIAL" TEST IS EASIER FOR SCHOOL BOARDS AND THEIR MEMBERS TO FOLLOW AND IS PREDICTABLY APPLIED

In contrast to the Ninth Circuit's ambiguous and unwieldy test, the Sixth Circuit's test espoused in *Lindke v. Freed,* 37 F.4th 1199 (6th Cir. 2022) is practical and yields more predictable results. The "state-official" test provides concrete guidance for school boards and their members maintaining social media pages and can be applied across all platforms. The *Lindke* test will guide school board members to safe and predictable social media engagement. The *Lindke* Court held that the only time a public official's social media activity is "fairly attributable" to the state is when he/she "operates a social-media account either (1) pursuant to his[/her] actual or apparent duties or (2) using his[/her] state authority" (i.e. "the actor could not have behaved as he[/she]

did without the authority of his[/her] office.")[8] *Lindke,* 37 F.4th at 1203-04, citing *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001).

The *Lindke* Court provided several examples of the application of this test. If a law, ordinance, or regulation requires the officeholder to maintain a social media account, like an ordinance requiring the police chief to operate a public safety page, then the officeholder would be a state actor. *Id.* at 1203-05. Another example of state action is when government funds or resources are utilized to operate a social media page. *Id.* Such expenditures demonstrate that operation was an official responsibility and the actor operated the page in his/her official capacity. *Id.*

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[8] This prong appears to embrace the well-established state-action requirement that the act must be one that an ordinary citizen could not have accomplished. The *Garnier* Court ignored this requirement. In the *American Mfrs. Mut. Ins. Co. v. Sullivan* case, the Court rebuked a litigant that ignored the Court's "repeated insistence that state action requires both an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State and that the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" 526 U.S. 40, 50 (1999). "Although related, these two principles are not the same. They collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his[/her] decisions…[But] [t]he two principles diverge when the constitutional claim is directed against a party without such apparent authority, i.e., against a private party." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). This case falls into the latter category, so this is a required prong in order to find state action. Here, the Trustees did not exercise some right or privilege created by the state. See, *Knight,* 953 F.3d at 226-227 *(J.Park, dissenting.)*, dissenting.)

The "state-official" test[9] focuses on the actor's official duties and his/her use of government resources, rather than "the social media page's appearance or purpose." *Id.* at 1203, 1206. These "state-action anchors" "offer predictable application for state officials and district courts alike, bringing the clarity of bright lines to a real-world context that's often blurry." *Id.* at 1207.

In *Lindke*, Freed, the City Manager of Port Huron, had a social media page that looked much like many other board member's—a "medley of posts" covering a variety of aspects of his personal life and work as a city manager. *Id.* at 1201. Lindke saw Freed's posts about new Covid-19 policies and responded with criticism in the comments section. *Id.* at 1202. Freed did not appreciate the comments, so he deleted them and eventually "blocked" Lindke from the page. *Id.* at 1201-1202.

Applying the state-official test, the *Lindke* Court found that Freed did not transform his Facebook page into official action by posting about his government job. *Id.* Operating a Facebook page was not designated by law as one of the actual or apparent duties of his office.[10] *Id.* at 1204-05. Nor did he use government funds or resources to operate his Facebook account. *Id.* Freed's Facebook page did not belong to the office of the City Manager. *Id.* Even though Freed identified himself as a public official, the Court found that Freed

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[9] The "state-official test" is how the Sixth Circuit applies the Supreme Court's nexus test when the alleged state actor is a public official. *Lindke,* 37 F.4th at 1203.

[10] As discussed in Section V., a disclaimer could dispel any misconception of social media commentary as an "actual or apparent duty."

operated his "Facebook page in his personal capacity, not his official capacity." *Id.* at 1204.

The *Lindke* Court distinguished the legal precedent founded on off-duty officer misconduct on the basis that "appearance is relevant to the question whether an officer could have acted as he did without the 'authority of his office.'" *Lindke*, 37 F.4th at 1206 citing *Waters*, 242 F.3d at 359. Whereas, Freed gained no authority by identifying himself as the "City Manager, Chief Administrative Officer for the citizens of Port Huron" on his Facebook page. *Lindke*, 37 F.4th at 1201, 1206. His posts did "not carry the force of law simply because the page says it belongs to a person who's a public official." *Id.* at 1206.

The outcome should be the same here because the Trustees' comments and actions on their social media did not carry the force of law.[11] The Trustees gained no authority on their pages by identifying themselves as PUSD Board members and "governmental officials," and providing their PUSD contact information. *Garnier*, 41 F.4th at 1165, 1171-1172. The Trustees lack authority to use their personal social media as a "tool of governance" because the source of all governance at PUSD comes from the PUSD Board acting collectively. *Id.*

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[11] The nature and extent of the authority held by the public official should be given consideration. Certain public officials can unilaterally set policy and conduct government business. See, *Knight*, 953 F.3d at 219-220. Board members cannot.

## III. THE NINTH CIRCUIT'S DECISION DISREGARDS THE LAW CONCERNING THE LIMITS OF INDIVIDUAL BOARD MEMBER AUTHORITY AND CAUSES CONFUSION

An individual school board member's authority to act on behalf of a school board is limited by the California Education Code, school board bylaws, and caselaw. In holding that a single board member's online actions could be "fairly attributable" to the state depending on the appearance and content of the board member's personal social media pages, the Ninth Circuit disregarded longstanding law setting forth limitations on board member authority. California does not permit an individual board member to "act under color of law" when reporting or addressing school district business on personal social media because a school board may only act as a collective body.

A school board acts by majority vote of all of the membership constituting the governing board and every official action taken by the governing board must be affirmed by a formal vote of the board. Cal.Ed.Code §§ 35163, 35164. Cal. Ed. Code § 35172 accords *the governing board* with power to "[i]nform and make known to the citizens of the district, the educational programs and activities of the schools therein."[12] Moreover, only a quorum of the governing board, acting at a properly noticed and agendized meeting, may conduct school business. Cal.Ed.Code § 5145. There is no law granting board

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[12] The Ninth Circuit apparently misunderstood the significance of the reference to the "governing board," which acts collectively as explained herein—wrongly finding this "power" was in accord with the "Trustees' use of social media to keep the public apprised of goings-on at PUSD." *Garnier*, 41 F.4th at 1171-72 n.9. This reference to "governing board" must be understood as applying to the collective board, via official board action, and not to individual members.

members the authority to take official action in their individual capacity. CSBA Model Bylaws[13] and PUSD Board Bylaws reinforce the collective nature of school governance. Bylaw 9200, which is published on the PUSD website and titled "Limits of Board Member Authority," provides that "the Governing Board recognizes that the Board is the unit of authority over the district and that a Board member has no individual authority." Bylaw 9200.[14] Members are instructed to understand that "authority rests with the Board as a whole and not with individuals." Bylaw 9005.[15] Limitations on authority are the subject of many CSBA trainings, resources, and publications.[16]

Unless agreed to by the Board as a whole, individual members of the Board are expressly instructed that they are not authorized to exercise any administrative responsibility with respect to PUSD schools or command the services of any school employee. *Id.*

Bylaws address the content, nature, and delivery of statements by individual Board members. Bylaw 9010.[17]

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[13] CSBA provides proprietary model board bylaws and policies, which may be adopted in whole or in part by school boards throughout the State of California. All policies referenced herein were adopted in full by the PUSD Board.

[14] https://www.powayusd.com/PUSD/media/Board-Images/BoardPolicy/9000/BB-9200-Limits-of-Board-Authority.pdf

[15] https://www.powayusd.com/PUSD/media/Board-Images/BoardPolicy/9000/BB-9005-Governance-Standards.pdf

[16] https://www.csba.org/GovernanceAndPolicyResources/EffectiveGovernance/RoleandResponsibilitiesofSBMs#gsc.tab=0

[17] https://www.powayusd.com/PUSD/media/Board-Images/BoardPolicy/9000/BB-9010-Public-Statements.pdf

Notably, Bylaw 9010 encourages Board members to be community leaders and participate in public discourse on matters of civic or community interest, yet it also requires Board members "to respect the authority of the Board to choose its representatives to communicate" *Id.*

In *Garnier*, the Trustees argued that their use of social media could not constitute state action because a Board member could only act at "a properly convened meeting of the legislative body and may only offer a matter for consideration or vote on a matter." *Garnier,* 41 F.4th at 1173. The Ninth Circuit rejected this argument in a discussion that included no statutes or case citations involving board members, making the apparent assumption that board members can perform tasks of an executive or administrative nature without collective board action. *Id.* This is an inaccurate assumption. Regardless of the activity, an individual board member cannot usurp the governing board's collective authority.

That the Ninth Circuit in *Garnier* repeatedly falls back on the argument that the Trustees were "clothed with the authority of the state," 41 F.4th at 1167, and invoked their "'governmental status' to influence the behavior of those around' them," *Id.* at 1171, citing *Anderson v. Warner*, 451 F.3d 1063, 1069 (9th Cir. 2006) evinces a misunderstanding of, or disregard for, the well-known limitations on board member authority. Board member posts do not carry the force of law—and no one should believe they do—even when board members, such as the Trustees here, identify themselves as government officials and solicit input from the public that may inform their official functions.

Every official action taken by the governing board of every school district must be affirmed by a formal vote of the board. Cal.Ed.Code §§ 17604, 35163. For example, contracts not approved or ratified by the board are unenforceable. *Santa Monica Unified School District v. Persh*, 5 Cal. App. 3d 945, 952 (1970); *El Camino Community Coll. Dist. v. Superior Ct.*, 173 Cal.App.3d 606, 616-617 (1985). In fact, the public policy that no individual board member can bind the district is so strong that persons dealing with a school district are "chargeable with notice of limitations on its power to contract". *Id.*; see also *Miller v. McKinnon*, 20 Cal.2d 83, 89–90 (1942) (contracts made in excess of a public agency's power are void and the contractor acts at his/her peril and cannot recover payment for the work performed.) Similarly, school board members are legally unable to take "state action" on behalf of the district in a social media context and persons dealing with an individual board member are charged with knowing the limits of such authority.

Community members should know to rely upon information from official, district-sanctioned social media accounts and not individual board member pages. School districts and school sites have official social media platforms containing useful information, describing district and school upcoming events and achievements and other official communications. These accounts are the "official organs" of school district business. CSBA crafted Model Board Policy 1114 specifically addressing "District-Sponsored Social Media." Adopted by PUSD, Board Policy 1114 provides, in pertinent part, that "the purpose of any official district social media platform shall be to further the district's vision and mission, support student learning and staff professional development, and enhance communication with students, parents/guardians,

staff, and community members."[18] Members of the school community understand that this is where they should seek out official school district information—not individual board member social media pages.

It should be noted that there are numerous California and federal laws that compel a school district to post certain information online. *See*, e.g. Cal.Gov't Code §§ 54954.2, 54956(agenda posting); Cal.Gov't Code § 53908 (annual compensation); Cal.Ed. Code §§ 221.6, 221.9 and 221.61 (Title IX); 34 C.F.R. § 106.8(b)(2) (Title IX coordinator); 34 C.F.R. § 106.45(b)(10) (grievance process), etc. If a community member wants to know when the next board meeting is, or what will be discussed, he/she can visit the official district website where the Ralph M. Brown Act (Cal. Gov't. Code §§ 54950 *et seq.*) requires agenda postings. Any gratuitous posting of board agendas on a board member's personal social media page or webpage would not meet the requirements of law. It should only be seen as a courtesy and/or as self-promotional. Imposing Section 1983 liability for the "appearance and content" of the Trustees' social media pages in *Garnier* causes confusion about who may actually act for the district and where the public should look to find official district information.

## IV. THE NINTH CIRCUIT TEST IS NOT WORKABLE IN A REAL-WORLD CONTEXT AND THE UNINTENDED CONSEQUENCES ARE WIDE-RANGING

The Ninth Circuit test in *Garnier* does not work in the real world. It could have a devastating impact on board elections and civic participation in school boards. The Ninth

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[18] https://www.powayusd.com/PUSD/media/Board-Images/BoardPolicy/1000/BP-1114.pdf

Circuit's test is likely to result in the infringement on individual liberty by school boards policing board members' social media and expose school districts and board members to increased litigation.

Following *Garnier*, a school board will now feel compelled to monitor individual board members' social media to ensure their accounts are not "fairly attributable" to the district. However, school boards do not necessarily even have access to their members' accounts. Moreover, a school board has little recourse to "discipline" a board member if the member were to post a discriminatory comment or improperly block a user.

On the other hand, if a school board "polices" the social media activity of its members to prevent speech, the individual school board member might sue the school district for infringing on his/her civil liberty and First Amendment rights. This bleak landscape creates a proverbial "Catch 22" for school district governing boards.

The *Garnier* test will increase litigation and serve as a distraction from the important work of school boards: serving students and supporting public education. It is already a challenging and sometimes contentious atmosphere of local politics and inviting litigation may lead to community members foregoing school board participation.

### A. School Board Member Personal Lives And Support Of School Community Are Intertwined On Social Media.

The *Garnier* test makes it impossible for a school board to know when a board member has crossed the line and

his/her posts become state action. Following *Garnier*, it is unclear whether a board member posting about attending commencement exercises or a ground-breaking ceremony for a new school site is "pretending to act under color of law" or simply demonstrating his/her commitment to serving the community.

Whereas, the *Lindke* Court was able to clearly apply the "state-official" test to determine that state action did not arise, even though the social media account at issue included both personal posts, such as birthday and vacation photos, and work-related posts. *Lindke*, 37 F.4th at 1201. The dissent in *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 953 F.3d 216 (2d Cir. 2020) illustrates the confusion:

> For example, it is not clear from the panel's decision *when* President Trump's Twitter activity crossed into state action. Did it happen on Inauguration Day? Upon a particular "official announcement" from @realDonaldTrump? And how many "official" tweets does it take to convert "personal" tweets into state action? The panel decision raises difficult questions but provides little guidance for officials today or to litigants, lawyers, and judges tomorrow.

953 F.3d at 228 (J. Park, dissenting.) For the same reasons here, school board member accounts are often intertwined and the *Garnier* test does not provide clear guidance on when a personal post becomes state action.

### B. A School Board Member Running For Re-Election Will Have More Restrictions On Social Media Speech Than Will His/Her Challengers, Which Is Unfair And Could Impact Elections.

Upholding the Ninth Circuit test would create a significant imbalance in school board elections and may influence election outcomes. A sitting board member running for re-election, whose social media presence includes board/district-related content, would either turn off comments altogether (and limit constituent interaction) or tolerate the possibility of being harassed by trolls (or, at a minimum, include opposition content on his/her own social media). The challenger, on the other hand, has the freedom to engage with the community via comments on matters of district policy, carefully crafting an image of support by deleting, blocking, and hiding comments that may be critical to his/her position. The average voter may not understand that the incumbent's online activity is limited, while the challenger has no such limitations. This may create an inaccurate image that the incumbent's performance or positions are disfavored by the community, while the incoming candidate has popular approval, and such imbalance could impact election results.

The Eighth Circuit partially addressed the campaign issue in *Campbell v. Reisch,* 986 F.3d 822 (8th Cir. 2021). "[I]f Reisch had been a public official at the time [she created the account], we would still hold that she had not created an official government account because she used it overwhelmingly for campaign purposes." *Campbell*, 986 F.3d at 826. Regardless of whether a candidate is an incumbent or a challenger, the act of running for public office is a private activity.

*Garnier* was improperly dismissive of the Trustees' arguments that their social media accounts were personal campaign pages designed only to advance their own political careers. Many of the Trustees' posts concerned material that would promote the Trustees' personal campaign prospects, highlighting their engagement, visits to schools, and the achievements of PUSD students and teachers. The court finding that the Trustees' posts did not read as advertising is misplaced. Social media influence is more subtle than direct advertising. Social media influence combines personal posts to build relationships and weaves in promotional content. School board members must run for re-election every four years and, as such, they are always in a state of self-promotion for re-election by demonstrating their achievements and dedication to the school community on social media. Cal.Ed.Code § 5017.

### C. The *Garnier* Test Will Result In School Boards Policing Members' Posts And Expose Districts To Increased Litigation.

Following *Garnier,* individual board member speech on social media could result in increased legal exposure.[19] School boards are composed of multiple members, often with disparate ideas and perspectives, that can only officially act by a majority vote. Currently there are many controversial, divisive, and important issues before school boards including parents' rights, the rights of LGBTQIA+ students, Critical Race Theory, social justice, sexual harassment, strategies to

[19] Lawsuits are filed naming the school district and sometimes even the governing board in its official capacity and/or board members in their official/individual capacity. Plaintiffs generally cast a wide net. Immunity, qualified immunity, indemnification and other legal principles can come into play, all adding to the cost of defense.

combat gun violence, and vaccine mandates/public health, to name a few. Under *Garnier*, a "rogue" board member's personal opinion on one of these controversial topics on social media, although not representative of the board, may be deemed state action, creating exposure to legal liability for the school district for his/her online activity. Adversaries may seize upon *Garnier* in an attempt to silence board members with opposing views, or tie up school districts in litigation. With *Garnier* requiring a "sifting of facts" to make a determination, it is inevitable these cases will wind up before the courts.

A single decision by a policymaker may impose municipal liability under Section 1983 for constitutional rights violations where the official making the decision possesses "final authority to establish municipal policy with respect to the action ordered." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Delegation of this final policymaking authority can be implied "from a continued course of knowing acquiescence by the governing body in the exercise of policymaking authority by an agency or official." *Davison v. Randall, 912 F.3d 666, 689-90 (4th Cir. 2019)* quoting *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987).

Fortunately for the County Board in *Davison*, final policymaking authority was not implied as to the Chair of the County Board of Supervisors because there was no evidence that the Board knew about the Chair's Facebook page that she designated as a "governmental official page." *Id.* Nor was there evidence that the Board acquiesced to the Chair's administration of the page or the banning of Davison. *Id.*

Therefore, the County was not liable under Section 1983. *Id.*[20]

It is unclear what evidence future plaintiffs will have to submit to prove "acquiescence" by a governing body as to the social media use of its board members. With the nebulous test provided by the *Garnier* court, school boards will be charged with yet another politically-charged and delicate task: determining whether a board member's social media activity could cause liability exposure and, relatedly, whether the district's response might infringe on that board member's individual liberties. Such board policing of social media will be disruptive to the effective operation of local government.

### D. The Ninth Circuit Test Will Infringe On Individual Liberties And Chill Speech And Civic Engagement in School Boards.

Upholding the *Garnier* decision would deprive school board members and other local government officials of the freedom to express themselves on digital platforms, effectively chilling their speech and expression. The district court in *Garnier* recognized the impact of its decision:

> The Court is aware of the consequences of its ruling today, but it is bound to follow the law as it has been interpreted by the Supreme Court and

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[20] The Chair was; however, found to be "state actor". *Davison*, 912 F.3d at 680-681, 687-688. She acted out of "censorial motivation" to block speech critical of the ethics and conduct of government officials, which is a "cardinal sin under the First Amendment." Id. Notably, she used county resources to support her Facebook page. *Davison v. Loudoun Cnty. Bd. of Supervisors,* 267 F. Supp.3d 702, 707 (E.D. Va. 2017).

> Ninth Circuit Court of Appeals. It may be that, faced with the choice between unblocking Plaintiffs and closing their public pages entirely, Defendants choose the latter. That would be a sad conclusion. The actions of a few repetitive actors should not deprive so many of this important civic tool, and the Court hopes that Defendants do not choose this course of action.

*Garnier v. O'Connor-Ratcliff*, 513 F.Supp.3d 1229, 1253 (2021).

The net effect of *Garnier* may be to require board members maintaining social media to tolerate "trolls." Trolling and spamming has become commonplace for online speech. It is intended to overwhelm and disrupt an owner's feed. Spam messages can be used to degrade or spread misinformation. Spam messages can also be generated automatically through a "bot." It is not realistic that a school board member would or could block these comments one by one, as suggested by the Ninth Circuit in *Garnier*. School board governance is the most local form of government and vital to civic participation. If tolerating and trying to manage trolls is now the standard to be followed, it may simply chill participation in school board governance altogether.

Courts have acknowledged the chilling effect of allowing anyone access to a public official social media page without the ability to block spam. "[H]is[/her] accounts could be flooded with internet spam such that the purpose of conveying his[/her] message to his[/her] constituents would be impossible and the accounts would effectively, or actually, be closed…." *Morgan v. Bevin*, 298 F.Supp.3d 1003, 1012 (E.D. Ky. 2018). The Sixth Circuit in *Naffe* also recognized the

potential danger to chill speech by interpreting "state action" too broadly in the context of social media. "Indeed, if we were to consider every comment by a state employee to be state action, the constitutional rights of public officers to speak their minds as private citizens would be substantially chilled to the detriment of the 'marketplace of ideas.'" *Naffe*, 789 F3d at 1038, citing, *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 82 (2004).

Similarly, the dissent in *Knight* noted the potential to chill social media speech:

> The panel pointed to numerous instances when the President tweeted about his work in office, but that is not enough to make his personal account a "right or privilege created by the State." Such a rule would preclude government officials from discussing public matters on their personal accounts without converting all activity on those accounts into state action.

953 F.3d at 227 (J.Parks, dissenting.).

The Ninth Circuit's ruling does not give sufficient consideration to a board member's freedom of speech. Just like teachers and coaches do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," nor do board members when they are elected to a governing board. *See*, e.g. *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2423-2426 (2022). In maintaining their social media pages, board members may now feel pressured to suppress otherwise protected First Amendment activities. Requiring them to disaggregate statements expressing personal passion for educational issues (protected speech) from

prohibited content "relat[ing] in some meaningful way" to the "performance of [their] duties" abridges their First Amendment rights. *Garnier*, 41 F.4th at 1172.[21]

In *Kennedy*, the Court discussed individual rights and the complex "interplay" between free speech and government employment. While this case does not involve government employees,[22] the Court's analysis warrants discussion. The Court began with a threshold inquiry into the nature of the speech at issue. The Court explained that when an employee speaks "pursuant to [his/her] official duties," that speech is "ineligible for First Amendment protection" and the employee generally will not be shielded from disciplinary action or employer control. 142 S.Ct. at 2423-24. Conversely, when the employee's speech is not part of his/her actual job responsibilities, it is protected. *Id*. The Court cautioned public employers not to rely on "excessively broad job descriptions" by treating everything said in the workplace "as government speech subject to government control" and "subverting" the Constitution's protections. 142 S.Ct. at 2424-2425. As a result, if a school board were to attempt to moderate an individual school board member's social media, it may result in a First Amendment violation and lawsuit against the school district.

The *Lindke* test aligns nicely here because under that test, the social media activity of a public official will not be fairly attributable to the state unless there is an actual or apparent duty that the officeholder maintain a social media account as part of his/her official duties. *Lindke*, 37 F.4th 1203-1205.

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[21] This would be a difficult policing task for school districts as well.

[22] There are vast differences between an elected school board member and and a government employee that are beyond the scope of this discussion.

Importantly, board members are not required under California law to maintain social media accounts to fulfill their duties as trustees. This is a matter of personal choice. Board members who do not have social media pages can still act as board members. It is the governing board that has the legal duty to "speak" on the district's official webpage or social media pages. On their social media pages, individual board members speak as citizens "addressing matters of public concern" and their speech is protected by the First Amendment.

## V. IF THE NINTH CIRCUIT TEST IS ADOPTED, AMICI URGE THE COURT TO FIND THAT A DISCLAIMER WOULD HAVE RESULTED IN A DIFFERENT OUTCOME.

The Ninth Circuit's ruling in *Garnier* implies that the use of a disclaimer may have yielded a different result. The Ninth Circuit pointed out that the Trustees lacked a disclaimer like the one found in *Naffe*, declaring that "statements made on this web site reflect the personal opinions of the author" and "are not made in any official capacity." *Garnier*, 41 F.4th at 1172, citing *Naffe*, 789 F.3d at 1033. *Naffe* referenced the disclaimer when supporting its conclusion that Mr. Frey did not purport to or pretend to act under color of state law when he made the complained of comments on his personal Twitter page and blog. *Naffe*, 789 F.3d at 1038. The court's repeated focus on the use of a disclaimer implies a different outcome had the Trustees used one in *Garnier*.

The Eleventh Circuit upheld a disclaimer in the form of a reservation rights to limit speech in the social media context for public officials. *Charudattan v. Darnell*, 834 Fed.Appx. 477, 479 (11th Cir. 2020). In *Charudattan* there was no Section 1983 liability for a sheriff who deleted comments and banned a

ommunity member from her Facebook page titled "Sheriff Sadie Darnell" because she "had a specific notice regarding [her] ability to block or restrict 'off-topic posts.'" *Id.*

A disclaimer and basic rules of decorum by public officials should eliminate the need for arbitrary distinctions between social media platforms and functions. In *Garnier*, the court held that "the Trustees … never adopted any formal rules of decorum or etiquette for their pages that would be 'sufficiently definite and objective to prevent arbitrary or discriminatory enforcement.'" *Garnier*, 41 F.4th at 1178, quoting *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1130 (9th Cir. 2018). Direct guidance on what meets the criteria for a "sufficient disclaimer" would provide state actors with a clear, uniform policy to follow when utilizing digital platforms to directly reach their constituents.[23]

It is acknowledged that disclaimers are not a panacea. The Ninth Circuit held that disclaimers are insufficient in coercive contexts. *See, e.g., Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, (9th Cir. 2003). The social media accounts of school board members can be distinguished here; students are only exposed to such social media accounts by choice, which is different than students being forced to listen to a "proselytizing speech at a public school's graduation ceremony." *Id.* A school board member's personal social media account is not a coercive

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[23] For example, a school board member's social media account could state: "This is a personal account, not an official account of [insert district name] or its governing board. All opinions are my own and not made in an official capacity. The Board acts only by majority vote at properly noticed and agendized meetings. Official communication from the Board is found at [insert website address here]. This is not a public forum. I reserve the right to block or restrict any posts, including but not limited to those that are obscene, vulgar, threatening, redundant, or off-topic."

context, and disclaimer guidelines tailored to the social media setting can easily be distinguished from precedent.

Guidance from this Court that a disclaimer is sufficient to dispel the appearance of state-action would eliminate substantial confusion by board members and the community.

## CONCLUSION

The Ninth Circuit judgment in *Garnier* should be reversed. The *Garnier* decision does not provide school boards and their members with a clear test to determine when they have cloaked their social media accounts with the authority of the state. It disregards the law regarding the limits of individual board member authority and its analogy to off-duty law enforcement misconduct is misplaced. Upholding the Ninth Circuit's decision in *Garnier* could have catastrophic consequences by increasing the risk of litigation and, as a result, chilling speech and civic participation in school boards. CSBA urges the Court to adopt a clear test, like the Sixth Circuit's "state-official" test set forth in *Lindke,* that can easily applied by all school boards and school board members on any social media platform.

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