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

RANDALL S. PAGE,
Plaintiff-Appellant

v.

LEXINGTON COUNTY SCHOOL DISTRICT ONE,
Defendant-Appellee

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

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

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

The National School Public Relati

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

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

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

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

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

All parties have consented to the filing of this brief.

ARGUMENT

Because school boards and school officials have substantial expertise and interest in the issues raised by education-related legislation, their participation in such debates significantly informs the ensuing policy

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

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

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

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

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

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

government speech on contested public policy issues enhances citizens' capacity to participate in democratic self-governance. *E.g.*, *Kidwell v. City*

an interest in hearing their government's perspective."); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 11 (2000) ("[G]overnment speech can help foster debate, fleshing out views, and leading toward a more educated citizenry and a better chance of reaching the right answer."); Steven Shiffrin,

Communities Count: A School Board Guide to Public Engagement 2 (National School Boards Association, 2000). Some school boards conduct focus and study groups with parents; others hold large public meetings; and still others actively communicate with mlth

2008 General Assembly,

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

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

These concerns are especially acute in the realm of education policy.

http://www.nsba.org/site/page_micro.asp?TRACKID=&CID=69&DID=201 (last viewed October 22, 2007).

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

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

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

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

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

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

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[2] Appellant's claim that government's participation in public policy debates threatens to skew those debates, Appellant's Br. at 20-22, is without merit, as limitations other than the First Amendment's free speech clause still constrain government speech. Government expression may, for example, contravene the Constitution's establishment or equal protection clauses if it endorses religion or furthers racial discrimination. Moreover, legislatures remain free to choose to curb government speech—and often do. Government speech of a partisan nature, for instance, may violate state and/or federal statutes prohibiting the use of government resources for campaign speech. South Carolina law, as an example, prohibits the use of public resources to influence the outcome of an election or a state ballot measure. S.C. Code Ann.

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

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

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

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

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

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

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

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

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

Jennifer Wolcott, *Wired Schools Help Keep Parents in the Know,* http://www.edline.com/press-articles/christian-science-monitor-2-17-04.html (last viewed October 22, 2007) (d

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

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

and state legislative delegations. *See, e.g.*, National School Boards Association, *State Associations*, http://www.nsba.org/site/page_micro.asp?TRACKID=&CID=69&DID=201 (last viewed October 22, 2007). Linking to the SCSBA website—which provides information on a variety of education policy matters that include, but are not limited to, the PPIC Act—thus

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

III. THE FIRST AMENDMENT PERMITS SCHOOL BOARDS TO LIMIT ACCESS TO THEIR DISTRIBUTION NETWORKS BASED

or disseminated by the school system remain focused on the relevant subject matter. *See Perry,* 460 U.S. at 46 n.7. For example, a school board that opens a meeting to public comment on a bond referendum may exclude speakers who instead seek to discuss the World Series or the war in Iraq. *See, e.g., City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175 n.8 (1976) ("Plainly, public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business."). In this case, Lexington School District One—like many other school districts—restricts access to its take-home flyer program to nonprofit groups that seek to publicize sporting events and other extracurricular activities available to students that reinforce the district's educational mission, like the YMCA and the Girl Scouts.

its internal mail system to the union that was legally authorized to represent the staff on labor relations matters because of the unique function that the union served in school operations. 460 U.S. at 39-40, 51 ("Use of school mail facilities enables [the authorized union] to perform effectively its

volunteer activities between parents

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

CONCLUSION

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

Respectfully submitted,

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