Case No. G038499

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CALIFORNIANS AWARE, a non-profit corporation; RICHARD P. McKEE, an individual; and STEVE ROCCO, an individual,

Plaintiffs/Appellants,

vs.

ORANGE UNIFIED SCHOOL DISTRICT; a local agency; THOMAS A. GODLEY, Superintendent, in his official capacity,

Defendants/Respondents.

AMICI CURIAE BRIEF OF CALIFORNIA SCHOOL BOARDS ASSOCIATION AND EDUCATIONAL LEGAL ALLIANCE IN SUPPORT OF DEFENDANTS/RESPONDENTS

Appeal from the Superior Court of Orange County
Superior Court Case No. 06CC12217
Honorable Clay M. Smith, Judge

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE:

Pursuant to Rule 8.200 of the California Rules of Court, counsel for Amicus Curiae California School Boards Association and Educational Legal Alliance respectfully request leave to file the attached Brief of Amicus Curiae in this case, in support of Respondents Orange Unified School District and Thomas A. Godley. The California School Boards Association and Educational Legal Alliance are non-profit entities established for the support of school boards throughout California and their authority in the areas of education and governance.

I. INTEREST OF AMICI CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION AND EDUCATIONAL LEGAL ALLIANCE AND SUMMARY OF AMICUS POSITION.

The California School Boards Association ("CSBA") is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county offices of education. As part of CSBA, the Education Legal Alliance (the "Alliance") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to

make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members, over 800 of the state's 1,000 school districts and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation involving the interests of public education.

The Alliance files this *amicus* brief in order to ensure that local school districts and their governing boards retain the authority to fully exercise the responsibilities vested in them by law. In particular, this *amicus* brief aims to clarify the inherent, and necessary, authority vested in school boards to control the decorum and order of board meetings and uphold the integrity of board-accepted governance and personnel policies. School boards, like any other local legislative body, retain the right to express their own political sentiments and, conversely, dissociate themselves from the remarks of an individual board member. It is well settled that local legislative bodies are entitled to employ the legislative mechanism of censure to accomplish these ends. In this regard, the concept of *censure* must be distinguished from *censorship.* Censure by itself is not a form of punishment for speech, but instead is a form of policy-based expression by the government agency. In this regard, censure is a means by which a collective legislative body dissociates itself from the remarks of one member—a means of saying that the remarks of

one person are not reflective of the governing body's feelings or sentiment.

Moreover, it bears emphasis that school boards act in the capacity of an *employer* as well as a legislative body. This means that school boards must maintain workplace integrity as well as political integrity. Like other California public agency employers, school boards must be mindful of the inalienable privacy rights held by their employees—privacy rights that are expressly secured by Article I, Section 1, of the California Constitution. For this reason, the Ralph M. Brown Act, Government Code section 54950, *et seq*.—which typically requires the public airing of all governmental business—permits governing boards to discuss employee disciplinary matters in closed, private session. (*See e.g.,* Gov. Code § 54957.) Where, as in this case, a single board member publicly airs his opinions about a potential employee disciplinary matter and makes threatening statements while sitting in his board capacity, the school board's power of censure is both a collective expression of disapproval for the remarks *and* an affirmation of the board's commitment to employee privacy rights.

II. SUMMARY OF FACTS.

A. Facts Underlying Appellant's Lawsuit.

The relevant facts of this case are largely undisputed. On October 12, 2006, the Board of Trustees ("Board") of the Orange Unified

School District ("District") voted to censure Plaintiff and Board member Steve Rocco ("Rocco") after Rocco stated in a public meeting that he would "fire Ben Rich," a District employee. Rocco further threatened to confront Mr. Rich with the question, "Why aren't you fired yet?" if Rich appeared at a Board meeting. (Clerk's Transcript ("CT") at pp. 10-11.) In fact, Rocco has always freely admitted that he made these statements about Mr. Rich. (*Id*.) It is likewise undisputed that Rocco was sitting in his capacity as a Board member when he made these statements.

On September 28, 2006, the Board was presented with a proposal to censure Rocco's statements. (CT pp. 157-160.) The Board believed that Rocco's statements violated employee privacy rights, Board by-laws and policies regarding employee discipline, and the Brown Act's agenda requirements and closed-session provisions for employee discipline. (*Id.*) Like most school districts, the District has adopted a policy for the conduct and decorum of its Board meetings (the "Board Policy"). (CT pp. 147-150.) The Board Policy specifically requires all Board members to:

- "Keep confidential matters confidential."
- "Act with dignity, and understand the implications of demeanor and behavior."
- "Understand that authority rests with the Board as a whole and not with individuals."

(CT p. 147.) This Board Policy also permits the censure of an individual Board member for "violation of its policies or bylaws" and conduct that tends to "undermine the effectiveness of the Board of Education as a whole." (CT p. 148.)

The Board adopted the censure resolution, following public hearing and discussion on October 12, 2006. (CT pp. 169-170.) The Board's resolution of censure expressed the Board's disapproval of Rocco's statements and threats regarding an employee/personnel matter. (*Id.*) In this regard, the censure did *not* prevent Rocco from speaking his mind, nor did the censure penalize Rocco in any way. (*Id.*) In fact, the censure merely reiterated the Board's expectation that Rocco would "in the future, exhibit the appropriate conduct and judgment warranted in all matters relating to School District or Board of Education affairs." (*Id.*) The censure further advised that Rocco would continue "to be *offered*" training on matters regarding employee confidentiality. (*Id.;* emphasis added.) It bears emphasis that Rocco would only be offered such training, not be forced to participate.

In sum, the Board's censure of Rocco breaks down to three main elements: (1) the governing body's disagreement with Rocco's statements made while sitting in his official capacity as a Board member; (2) an affirmation of the Board's expectations about Board member conduct; and (3) a statement of the Board's continued commitment to offer training on

the issues of employee confidentiality and the Brown Act. In fact, *the censure did not impose anything* on Rocco. The censure resolution was little more than the Board's own expressive reaction to Rocco's comments.

As a result of the Board's censure, Rocco filed suit against the District on November 21, 2006, seeking declaratory and injunctive relief against the District on the theory that the censure violated his First Amendment and civil rights per 42 U.S.C. § 1983. (CT pp. 6-30.)

B. The Trial Court's Dismissal Of Appellant's Lawsuit Pursuant To California's Anti-SLAPP Laws.

The court below granted the District's motion to strike Rocco's complaint, essentially finding that California's anti-SLAPP laws applied as a bar to Rocco's suit because (1) the Board's censure resolution constituted the Board's own engagement in First Amendment expression, and (2) that Rocco could not overcome the anti-SLAPP laws by establishing a probability of success on the merits of his claims. (CT pp. 114-135, 240-249.) The trial court decision was particularly clear in its factual finding that the Board's censure resolution did *not* infringe upon Rocco's free speech:

> Mr. Rocco enjoys a First Amendment right to make [his] statements. That right has not been infringed nor threatened by Respondents [Board or District]. Just as Petitioner Rocco was free to express a disagreeable opinion, Respondents also enjoy the right to express their point of view. . . . Indeed, it seems clear that the Board would have no other means of collective

> expression other than by the adoption of a resolution . . . [the Board] imposed no penalty or constraint whatsoever. The undeniable fact is the Board has done nothing of substance other than express its disapproval of Mr. Rocco's statements.

(CT p. 241.) *Amici* Alliance fully supports the policy of free speech and debate underlying the trial court's reasoning. The Alliance posits that it is crucial that *all* school boards retain the right to express collective disapproval or disavowal of the statements made by an individual. In addition to protecting the rights of a school board to express its own opinions, the type of non-punitive censure resolution at issue in this case furthers important policies of employee privacy and protects the integrity and efficiency of school operations.

III. THE DISTRICT'S ANTI-SLAPP MOTION WAS PROPERLY GRANTED BY THE TRIAL COURT.

As an *Amici Curiae,* Alliance has offered this brief in the interest of assisting the Court's analysis and to generally advocate the inherent powers of California school boards. That said, the Alliance offers the following observations about anti-SLAPP laws and the rights of school boards to express themselves—as a legislative body—through adoption of a censure resolution.

SLAPP is an acronym for "strategic lawsuit against public participation". The procedures and contents of an anti-SLAPP motion are found in Code of Civil Procedure section 425.16, which is designed to

protect a person's right of petition or free speech under the United States or California Constitutions in connection with a public issue and includes "any written or oral statement or writing made in . . . a public forum in connection with an issue of public interest . . . or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16(e).)

Anti-SLAPP motions involve a two-step analysis to effect the dismissal of lawsuits that undermine a right of petition or free speech. "In evaluating an anti-SLAPP motion, the trial court first determines whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "If the court finds the defendant has made the threshold showing, it determines then whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Id.*)

> "In order to establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must '"state[] and substantiate[] a legally sufficient claim."' [Citations.] Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' . . . [The court] should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish

> evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 [123 Cal.Rptr.2d 19, 50 P.3d 733] (*Wilson*); s*ee also Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 317 [126 Cal.Rptr.2d 516].)

(*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1237.)

A. A Cause Of Action Challenging A School Board's Censure Resolution Clearly Implicates First Amendment Protected Activity.

In the interest of all school boards, *Amici* Alliance must emphasize the fact that board-adopted censure resolutions clearly constitute protected speech. A censure resolution allows the board majority to communicate to its constituents that the actions by one board member do not reflect the opinion of the board majority.

"The anti-SLAPP statute targets lawsuits that chill 'a party's constitutional right of petition' or free speech." (*Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1246, quoting *State Farm General Ins. Co. v. Majorino* (2002) 99 Cal.App.4th 974, 975.) Acts "in furtherance of " First Amendment rights are defined in the anti-SLAPP statute as including any of the following: "(1) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue

under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code of Civ. Proc. § 425.16, subd. (e)(1)-(4).)

The Board's resolution of censure was a "written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." (*Id.*) Thus, under the plain language of the anti-SLAPP statute, the censure resolution satisfies the definition of an "act in furtherance of" First Amendment rights. This observation alone satisfies the first anti-SLAPP element in favor of the District.

Nonetheless, Rocco apparently takes the position that anti-SLAPP laws cannot apply to him because his causes of action arise out of his own exercise of First Amendment expression. (Opening Brief, pp. 15-24.) In other words, Rocco's opening brief implies that the District cannot invoke the anti-SLAPP protections for free speech because Rocco's own claims are based in free speech and 42 U.S.C. section 1983. However, the Alliance is not aware of any authority supporting the proposition that a plaintiff can escape the anti-SLAPP laws by simply bringing his/her own

suit under color of the First Amendment or the civil rights statute 42 U.S.C. section 1983.[1]

1. The fact that a governmental body is the speaker does *not* abrogate the anti-SLAPP protections.

The District brought its anti-SLAPP motion as a measure of protecting the Board's own right to express its majority opinion in response to Rocco's opinions. In the interest of all school boards, it must be observed that just because the speaker is a governmental body, the anti-SLAPP protections still apply. The trial court ruling in favor of the District correctly relied upon *Holbrook v. City of Santa Monica, supra,* in support of the conclusion that "the Board's resolution is clearly within the scope of CCP 425.16(e)." (CT pp. 240-241; *Holbrook, supra,* at 1247.) Similarly, *Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 183 specifically observed that courts have consistently "permitted [a

[1] Additionally, the trial court was correct in its decision to dismiss *all* of Rocco's causes of action, even though some of them were brought under color of the procedural requirements of the Brown Act and/or Public Records Act rather than a direct attack upon the Board's protected censure resolution. (CT pp.15-29.) Regardless of how Rocco's causes of action are couched, the essence of these claims lies in the Board's constitutionally-protected expression via the censure resolution. (*See, e.g.,* CT p. 17 [first cause of action under the Brown Act based entirely upon the alleged "punishment of censure."].) A plaintiff cannot, however, escape the application of anti-SLAPP laws by merely couching his/her claims under procedural attacks. "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.)

government] agency to invoke section 425.16" of the anti-SLAPP laws. (*Schroeder, supra*, at pp. 183-184, fn. 3.)

In the present case, the Board's resolution of censure constituted the Board's own measure of First Amendment expression. *Schroeder* and *Holbrook* teach that local governing bodies, such as city councils and school boards, do not lose their anti-SLAPP protection merely because they are governmental assemblies. As in *Schroeder,* the Board's censure of Rocco was a voted expression of the Board's disagreement with Rocco's individual opinion. Indeed, the resolution was nothing more than the collective opinion of individual Board members on a matter of public interest expressed by vote after a public debate. Thus, the trial court was correct to find that the Board's censure resolution implicates the Board's own First Amendment protections. *Amici* Alliance urges this Court to follow the trial court's suit, thereby confirming the right of all school boards to vindicate their First Amendment activities under the anti-SLAPP laws.

2. The type of censure resolution adopted by the Board in this case follows from a long history of Free Speech and democratic ideals of Speech and Debate.

Underlying much of Appellant's opening brief (and his claims below) is the implied notion that "censure" is somehow an "unusual" or "subversive" attempt by government to limit dissension. To the contrary,

the legislative power of censure is historically grounded in the *protection* of free speech and debate.

From the historical perspective, the doctrine of censure was developed to permit a democratic body (i.e., English Parliament) authority to dissent from the statements or opinions of a sovereign individual (i.e., the English Monarch). Legislative censure was largely developed from the sixteenth and seventeenth centuries as *the* mechanism for a Parliamentary majority to express its own dissent from the opinions and policies of a sovereign king. (*Whitener v. McWatters* (4th Cir. 1997) 112 F.3d 740 [describing in detail how censure is tied to the privilege of "speech and debate" and separation of powers doctrines inherited from English Parliament].) With ratification of the U.S. Constitution, the new United States government re-affirmed the congressional power to "punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." (U.S. Const. Art. I, § 5, cl. 2.) Moreover, every governmental body is entitled to enforce its own adopted policies of order and decorum:

> No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. *The humblest assembly of men is understood to possess this power*; and it would be absurd to deprive the councils of the nation

> of a like authority. *But the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior*, or disobedience to those rules.

(*Whitener, supra*, at 744, quoting Joseph Story, *Commentaries on the Constitution of the United States*, § 419; emphasis added.) Indeed, the censure power "has been exercised on at least two occasions to censure United States Senators for speech that the Senate deemed inappropriate." (*Whitener, supra,* at 745, quoting Robert C. Byrd, *The Senate: 1789-1989 671* (1993) [recalling that Timothy Pickering was censured in 1811 for reading documents in the Senate before an "injunction of secrecy" was removed and that Benjamin Tappan was censured in 1844 for leaking the President's message on a treaty to the press].) Thus, the American governmental institution is founded upon the notion that our legislative bodies, no matter how humble, are entitled to debate *and disavow* the opinions of individual assembly members.

The concept of censure has flowed down to local administrative bodies as the "humblest assembly of men." (*Whitener, supra*, at 744.) Within the broad realm of school board powers, the vast majority of school boards nationwide have adopted "Robert's Rules of Order" as the general parliamentary scheme governing public meetings. (*See, e.g., LaFlamme v. Essex Junction Sch. Dist.* (2000) 170 Vt. 475, 479-80.)

Robert's Rules, which was first published in 1876, specifically endorses the concept of censure:

> Censure is a form of reprimand, defined as "the formal resolution of a legislative, administrative, or other body reprimanding a person, normally one of its own members, for specified conduct." Per Robert's Rules, conduct subject to disciplinary action such as reprimand may be divided into two categories: (1) offenses committed during a meeting and (2) offenses committed by members outside a meeting. . . . Public censure or reprimand does not give rise to a procedural due process claim so long as injury is solely to a plaintiff's reputation.

(*LaFlamme, supra,* at 480-81, quoting Black's Law Dictionary 203 (5th ed. 1979).)

While the concept of "punishment" has occasionally been associated with censure, the Alliance cannot stress enough the fact that a declaration of censure—without more—is fundamentally an expression of the governing majority's own opinion. In short, censure is the expressive reaction of the democratic majority to the statements of a minority member:

> Delegates to political conventions are no doubt trustees in a large sense of the word, but they discharge a trust with which the courts do not meddle. They obey or disobey instructions as they see fit, ***and the only remedy for their disobedience is the censure*** of the people expressed at the polls.

(*Hitchinson v. Brown* (1898) 122 Cal. 189, 192; emphasis added.) In the context of local governing boards, censure is an expression that the statements by one board member do not reflect the opinion of the board majority. (*Zilich v. Longo* (6th Cir. 1994) 34 F.3d 359, 364 [a resolution expressing the disapproval and outrage of city council over former council member's conduct, but which did not contain any punishment or penalty, did not violate the plaintiff's First Amendment rights].)

> [S]ome members cast their votes in opposition to other members out of political spite or for partisan, political or ideological reasons. Legislators across the country cast their votes every day for or against the position of another legislator because of what other members say on or off the floor. . . . Voting on legislative resolutions expressing political viewpoints may itself be protected political speech. Such resolutions are simply the expression of political opinion.

(*Zilich, supra,* at 363.) Therefore, the First Amendment principles that insulate an individual's right of speech—such as Rocco's—also protect the Board's right to disavow such opinions via censure. (*Id.*)

Quite simply, censure represents the "two-way street" of legislative discourse. For example, in *Anderson v. U.S. Dept. of Labor* (10th Cir. 2005) 422 F.3d 1155, a board member of a local water board, Anderson, issued repeated statements and opinions that directly contradicted the board's majority-adopted policies on water treatment at a particular site.

Anderson issued these personal opinions in the course of board meetings and in conjunction with her status as a board member. (*Anderson, supra,* at 1163-64.) As a result of Anderson's affront to the board, the water board chairman informed her that a continued commingling of Anderson's personal opinions with her capacity as a board member could lead to censure by a board majority. (*Id.* at 1164.) Anderson sued, but the court found that she failed to establish that the threat of censure was anything more than the board's own right to exercise its expressive and political powers:

> While frustrating and unpleasant, the matters about which [Anderson] complains appear to be part of the rough and tumble of politics and the by-product of a minority position on a political board. . . . A political remedy is best suited to a political wrong. The political process brought Anderson to the Board and she obviously understands its role in board dynamics and decision-making. In concert with others she publicly advocated her position, advertised her disagreement with past decisions, and made her differences with the Board a matter of public debate. . . . Just as clearly, that is her right. Public service should encourage, not muzzle, public debate. On the other hand, Anderson should not have been surprised when bare knuckles were met with bare knuckles. And when the gloves came off bloody knuckles as well as bloody noses were exposed to public view and comment. Her claims that she suffered disparate, even disparaging, treatment was rightfully part of her very public campaign. . . . Apparently, Anderson believes [the Board] should have just sat back and allowed her to

> make such statements without defending itself, in particular its position. . . .

(*Anderson, supra,* at 1182-83; emphasis added.)

The logic applied in *Anderson* and *Zilich* extends to school boards and their First Amendment right of censure. In *Phelan v. Laramie County Comm. College Bd. of Trustees* (10th Cir. 2000) 235 F.3d 1243, a school board censured one board member for violating a board ethics policy. When the board member challenged the censure on First Amendment grounds, the *Phelan* court specifically noted that the censure resolution itself carries significant First Amendment implications: "Although the government may not restrict, or infringe, an individual's free speech rights, it may interject its own voice into the public discourse." (*Phelan, supra,* at 1247.) ***"In censuring [a member], Board members sought only to voice their opinion that she violated the ethics policy."*** (*Id.* at 1248.)

In sum, the exercise of censure by a board majority entails just as many elements of free speech as do the statements of a minority member. In this sense, the doctrine of censure is a crucial exercise of First Amendment protected free speech made in the course of the political process.

3. Conclusion—The trial court was correct in finding that the Board's censure satisfied the first anti-SLAPP requirement as a First Amendment exercise.

The trial court's determination that censure is a First Amendment exercise for purposes of the first prong of anti-SLAPP is correct for at least three reasons. First, a censure resolution falls within the plain language of the anti-SLAPP definition of First Amendment activity as a written or oral statement made in the course of a legislative or legally-authorized official proceeding. Second, the First Amendment activities of governmental bodies, like school boards, are extended the protections of anti-SLAPP just as much as any other speaker. Third, there is no question that a censure resolution—particularly a non-punitive one as in this case—is a fundamental First Amendment activity undertaken in the spirit of political and legislative debate.

As a matter of policy, the Alliance supports the right of school boards to express majority views through a non-punitive act of censure. Censure is a longstanding legislative right ingrained in the notion of free legislative speech and debate. While CSBA generally contemplates censure as a "last resort" option, censure may be the only option reasonably available to a school board seeking to distinguish its own position from the personal opinions of one board member. The Board's censure resolution is consistent with the notion that, on one hand, Rocco

had a right to state his opinion and, on the other, that the Board had the right to collectively state its expressive disavowal of Rocco's opinion.

B. Rocco Failed To Demonstrate That His Own First Amendment Claims Were Likely To Prevail.

If, as demonstrated above, the anti-SLAPP statute applies to an action, the plaintiff may nevertheless avoid dismissal by showing a probability of prevailing at trial. (Gov. Code § 425.16, subd. (b)(1).) The Alliance here discusses two bases for finding that Rocco is unable to make the required showing. First, as specifically found by the trial court, a censure resolution cannot amount to a First Amendment infringement if it does not impose a deterrent that would compel a person of ordinary firmness from future First Amendment activities. Here, there was no such penalty or compulsion associated with the Board's censure. Second, the censure resolution is cloaked in absolute legislative immunity.

1. The trial court was correct in finding that Rocco could not prevail on his claims because there was no infringement to his speech rights.

In this case, the trial court rendered the factual finding that "[t]he undeniable fact is the Board has done nothing of substance other than express its disapproval of Mr. Rocco's statements. Under these circumstances, the resolution is not a violation of any protected right." (CT p. 266.) In other words, the trial court found that the Board's resolution was non-punitive in nature and thus could not be viewed as an

infringement to Rocco's speech rights. *Amici* Alliance agrees and posits that the trial court's decision furthers the important policy of permitting school boards the ability to adopt resolutions expressing their own views and protecting their official positions without fear of reprisal in court.

To constitute an infringement of First Amendment rights, a governmental measure must be shown to punish protected speech by governmental action that is "regulatory, proscriptive, or compulsory in nature." (*Laird v. Tatum* (1972) 408 U.S. 1, 11.) "A discouragement that is 'minimal' and 'wholly subjective' does not, however, impermissibly deter the exercise of free speech rights." (*Phelan, supra,* 235 F.3d at 1247-48, quoting *United States v. Ramsey* (1977) 431 U.S. 606, 623-24; *see also, Zilich v. Longo* (6th Cir. 1994) 34 F.3d 359 [city council resolution did not violate the First Amendment because it was not a law and imposed no penalty for speech].)

Amici Alliance is unaware of any published California cases directly dealing with the question of First Amendment rights and censure by a public school board. Persuasive guidance on the issue, however, has come from other jurisdictions. For example, in *LaFlamme, supra,* 170 Vt. 475, a school board committee member was censured by the board for his failure to attend numerous meetings, leaving meetings early, and generally failing to engage in "[g]ood boardsmanship" by refusing to accept a "fair share" workload of governmental responsibilities. (*LaFlamme,* at 478-

479.) The censured school official sued under 42 U.S.C. section 1983 under the theory that censure denied or significantly altered his liberty or property interests and infringed on his First Amendment rights. The *LaFlamme* court disagreed and held that the censured board member failed to establish any civil rights liability under 42 U.S.C. section 1983 because "public censure did not deny or significantly alter a liberty or property interest." (*Id*. at 485.) Moreover, "[p]ublic censure or reprimand does not give rise to a procedural due process claim so long as injury is solely to a plaintiff's reputation." (*Id.* at 481.) As for the censured official's First Amendment claim, the court upheld the trial court finding that no First Amendment violations will attach to the mere act of public censure (i.e., a resolution merely disavowing an official's statements without imposition of actual speech restrictions).

Similarly, in *Phelan, supra,* 235 F.3d 1243, the Tenth Circuit held that censure of a school board member does not entail any First Amendment related liability. In *Phelan,* a county community college board member was censured by the board when she placed an advertisement in a local newspaper attacking a tax measure that she had initially voted in favor of during a public board meeting. The censure resolution was based upon the board's perception that this dualistic public frontage by a board member was unethical. (*Id.* at 1245-46) The *Phelan* court upheld the board member's censure, noting that "[b]ased on the facts

of this case, the Board's censure is clearly not a penalty that infringes [the individual's] free speech . . . [the censure] carried no penalties; it did not prevent her from performing her official duties or restrict her opportunities to speak. . . ." (*Id.* at 1248.) Thus, the censure implicated no First Amendment infringement or liability under 42 U.S.C. section 1983.

Like the censure resolutions in *Phelan* and *LaFlamme*, the Board's censure of Rocco "carried no penalties; it did not prevent [him] from performing [his] official duties or restrict [his] opportunities to speak . . ." (*Phelan, supra,* at 1248.) Moreover, the mere statement that "it is expected that Steve Rocco will, in the future, exhibit [] appropriate conduct" can hardly be characterized as governmental action that is "regulatory, proscriptive, or compulsory in nature." (*Laird, supra,* 408 U.S. at 11.)

Not surprisingly, Appellant Rocco's opening brief references numerous cases for the proposition that discipline of a public official for his/her speech constitutes a First Amendment violation. These cases, however, uniformly present a fact pattern involving an actual, tangible and very real punitive act, threat of punishment or actual restraint of speech and did not involve criticism of an elected official's performance. Here are just some examples:

- Appellant's opening comments rely upon *Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536, for the proposition that "censure" is pernicious to the values of public comment. *Danskin,* unlike the present case, dealt with an actual prior restraint of speech under which citizens were prohibited from speaking unless they took a loyalty oath.[2]
- Appellant cites *Little v. City of North Miami* (11th Cir. 1986) 805 F.2d 962. (Opening Brief, p. 22.) Again, the case dealt with a governmental action that imposed "real" consequences for the exercised speech. Specifically, the *Little* court dealt with an unlawful bill of attainder that was imposed upon an attorney for his exercise of First Amendment rights. The bill rose to the level of an infringement by "subjecting appellant to official investigation and intentionally placing appellant in potential criminal, professional, social, political and economic jeopardy without any justification." (*Little, supra,* at 968.) Appellant Rocco never came close to making such a showing in the present case.

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[2] The language quoted from *Danskin* in Appellant's opening brief is also somewhat misleading in that the quote, itself taken from John Milton, utilizes the 17th century reference to "censure" to convey the modern concept of "censorship". As discussed at length in Part III, A(2), of this brief, censure is *not* the same as censorship.

- In *McIntyre v. Ohio Elections Comm*. (1995) 514 U.S. 334 (cited by Appellant at Opening Brief p. 23), the First Amendment challenge dealt with an Ohio law that *prohibited* the distribution of certain campaign literature. Again, no such prior restraint or prohibition is at issue in the present case.

Appellant also relies quite heavily upon *Smith v. Novato Unified Sch. Dist*., 150 Cal.App.4th 1439 ("*Novato*"). (Opening Brief, p. 23-24.) A close look at *Novato,* however, demonstrates why Rocco's First Amendment claims fail. In *Novato*, a student sued his school district after the district took several "damage control" measures against an inflammatory student newspaper article about immigrants written by the student. Appellant's opening brief conveniently overlooks the fact that several of the district's reactionary measures were deemed to *not* offend the First Amendment. ***In fact, the Novato court specifically affirmed the fact that a First Amendment infringement will only occur where "a governmental response to speech would chill or silence a person of ordinary firmness from future First Amendment activities."*** (*Novato, supra*, at 1460, quoting *Mendocino Environmental Center v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300.) Applying this rule, the court *rejected* the student's argument that he suffered an infringement of First Amendment rights as a result of a district letter distributed to all parents officially "disavowing" the student's viewpoint. (*Novato, supra,* at

1461.) "A speaker who chooses to speak in a provocative manner cannot complain of infringement simply because some degree of attention is directed toward him." (*Id.*) In contrast to the district's "disavowal" letter, the district response also included an official announcement that the district should *never* have published the student article on "immigration" and the district furthered ordered that remaining copies of the article be retracted. (*Id.* at 1462.) It was only at this point that the district's reaction rose to the level of a First Amendment infringement. (*Id.*)

Amicus Alliance agrees with the logic underlying *Novato* and believes that such logic supports the trial court's outcome in this case. The censure resolution without any penalty here is akin to the school district's mere letter of disavowal in the *Novato* case. The Board's censure resolution did not take any measures to punish or deter Rocco's speech, but rather expressed the Board's own views in reaction to Rocco.

Nor does *Novato* support Rocco's argument that a mere reprimand, without more, rises to the level of a First Amendment infringement. The *Novato* Court points out that the "person of ordinary firmness" changes from context to context. (*Novato, supra*, at 1463 ["In considering the legal effect of the District's response, we must keep in mind that the hypothetical 'person of ordinary firmness' or resolve [in that case] is a teenager, still developing self-confidence and intellectual independence, still subject to peer pressure and more likely to be intimidated by

authority."].) By contrast, Appellant Rocco is an adult and an elected official who has inserted himself into the rough and tumble of politics. "A speaker who chooses to speak in a provocative manner cannot complain of infringement simply because some degree of attention is directed toward him." (*Id.*)

The Alliance posits that the trial court's decision in this case sets sound policy for school boards and the public. Where a censure resolution is merely a "speaking out" by the board majority against the views of an individual, such action is wholly consistent with the process of political debate. The Alliance and CSBA do not, however, support penalizing individual board members for their speech. The trial court's decision correctly strikes this balance between allowing free speech at school board meetings and simultaneously avoiding First Amendment infringements to an individual board member.

2. Appellant's suit against the District also cannot prevail on the merits because the censure resolution is subject to absolute legislative immunity.

In addition to the justifications for dismissal of Rocco's lawsuit stated by the court below, the Alliance is further concerned about how such lawsuits may disrupt the legislative and decision-making process within school boards. In fact, the Alliance posits that absolute legislative immunity provides further grounds for finding that Rocco cannot prevail on the merits of his claims.

a. Legislative immunity absolutely protects legislative actions from judicial interference.

Legislative immunity is a corollary of the separation of powers doctrine in the California Constitution.[3] (*Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1784-86.) A key "corollary of the separation of powers doctrine as it impacts legislatures is legislators have absolute immunity from damage suits based on legislative acts." (*Id.* at 1784.) "Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" (*Bogan v. Scott-Harris* (1998) 523 U.S. 44, 54, quoting *Tenney v. Brandhove* (1951) 341 U.S. 367, 376.) "The doctrine of absolute legislative immunity has been construed expansively. . . . [T]he privilege protects not only the conduct of municipal legislators,

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[3] Like censure, the doctrine of legislative immunity goes back to the 16th and 17th centuries:

> When Parliament attained supremacy after the Glorious Revolution, it clarified many points of law with the English Bill of Rights of 1689 . . . in establishing that members' speech should not be questioned "in any court or place out of parliament". . .

(*Whitener, supra,* at 743; citations omitted.) This history of legislative immunity is reflected in the Speech and Debate Clause of the United States Constitution and many state constitutions:

> The Constitution's framers borrowed the idea that legislators should be protected from arrest and civil prosecution from England, where members of Parliament had enjoyed legislative immunity since 1689. [Citation] Ensuring a strong and independent legislative branch was essential to the framers' notion of separation of powers, which required "some practical security for each [branch] against the invasion of the others." The Federalist No. 48 (Madison).

(*Youngblood v. DeWeese* (3d Cir. 2004) 352 F.3d 836, 839.)

but also the acts of municipal administrators and executives 'taken in direct assistance of legislative activity.'" (*Traweek v. City and County of San Francisco* (N.D. Cal 1984) 659 F.Supp. 1012, 1033, quoting *Aitcheson v. Ruffian* (3rd Cir. 1983) 708 F.2d 96, 99-100.)[4] "The rationale for this extended coverage is that such immunity is essential in that freedom of speech 'is inherent in the idea' of a deliberative assembly." (*Scott v. McDonnell Douglas Corp*. (1974) 37 Cal.App.3d 277, 288.)

> In California, this freedom from liability for statements made before a legislative body is codified in section 47 of the Civil Code. The privilege provided by section 47 (subd. 2) has been held to be absolute. ***Absolute immunity*** attaches to statements made before a legislative body, and the existence of malice on the part of the declarant will not defeat the privilege (Rest., Torts, § 586, com. a) ***when it is shown that the statement . . . bears some connection to the work of the legislative body***.

(*Id.* at 285-286, citations omitted, emphasis added; *see also,* Cal. Civ. Code § 47 [codifying absolute immunity for legislative proceedings].) Absolute immunity for legislative debate and activities also assists to "prevent intimidation by the executive and accountability before a possibly hostile judiciary." (*United States v. Johnson* (1966) 383 U.S. 169, 181.) As the United States Supreme Court has explained, the purpose of absolute legislative immunity is to protect legislators from

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[4] Notably, both state and federal authorities are helpful on this point because "state law mirrors federal law in this area." (*Traweek, supra,* at 1033.)

"deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." (*Tenney v. Brandhove*, *supra*, 341 U.S. 367, 377; *see also, Lake Country Estates v. Tahoe Planning Agcy*. (1979) 440 U.S. 391, 406 [absolute immunity for planning commissioners; immunity is needed to protect "the public good"].)

b. Censure by a school board is a legislative act protected by legislative immunity.

It is undisputed that "a school board of a school district constitutes a 'legislative body' of a 'local agency.'" (Gov. Code §§ 54951, 54952.) "[S]chool board members function at different times in the nature of legislators and adjudicators . . . Each of these functions necessarily involves the exercise of discretion, the weighing of many factors, and the formulation of long-term policy." (*Wood v. Strickland* (1975) 420 U.S. 308.) The United States Supreme Court has long recognized that school boards have broad discretion in the management of school affairs. (*Board of Education v. Pico* (1983) 457 U.S. 853, 863, plur. opn. of Brennan, J.)

As a legislative body, absolute immunity bars damage suits based on legislative acts and statements made in the course of legislative debate before a school board.[5] Because public education is committed to

[5] It is clear that legislative immunity will apply to the statements of individual members of a board. Where, as here, the statement at issue is a majority-adopted resolution, it defies logic to separate liability of the

the control of local school boards, "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." (*Epperson v. Arkansas* (1968) 393 U.S. 97, 104.) School boards and other local legislative bodies, like their counterparts on the state and regional levels, are thus entitled to absolute immunity for their legislative activities. (*Royer v. Steinberg* (1979) 90 Cal.App.3d 490 [since school district board of trustees acts as a local legislative body for the school district, board meetings authorized by law constitute "legislative proceedings" within the meaning of California's codification of absolute legislative immunity in Civil Code section 47]; *see also, Bogan, supra,* 523 U.S. at 49 ["Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities."].)

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individuals from liability of the District. "[W]hether immunity attaches turns not on the official's identity, or even on the official's motive or intent, but on the nature of the act in question." (*Almonte, supra*, 478 F.3d at 106; *see also, National Ass'n of Social Workers v. Harwood* (1st Cir. 1995) 69 F.3d 622, 631 fn. 9.) The policy underlying legislative immunity and the SLAPP statutes are basically the same. (*See,* Code Civ. Proc. § 425.16(a).)

The relevant question of legislative immunity in the present action, then, is whether a school board's resolution of censure is taken "in the sphere of legitimate legislative activity." (*Bogan, supra*, 523 U.S. at 54, quoting *Tenney, supra*, 341 U.S. at 376.) ***"[A] legislative body's discipline of one of its members," has been identified as 'a core legislative act' covered by the legislative privilege."*** (*Whitener, supra,* 112 F.3d 740, 741; emphasis added.) In *Whitener*, the plaintiff, a member of the Loudoun County (Virginia) board of supervisors, was disciplined by the board for making inappropriate comments to two of his fellow board members. He filed an action under section 1983 alleging violation of due process rights, and the board members moved to dismiss on the basis of legislative immunity. The district court concluded that the board's action was within the scope of legislative immunity. The Fourth Circuit agreed and noted that while public employee termination is typically not a legislative act, a local legislative body disciplining one of its own is an entirely different matter. (*Whitener, supra*, 112 F.3d at 742.) After reviewing the history of legislative immunity, the *Whitener* court held that this type of self-policing—as a means by which a legislative body ensures decorum and "institutional integrity"—falls squarely within the legislative privilege: "As legislative speech and voting is protected by absolute immunity, the exercise of self-disciplinary power is likewise protected." (*Id*. at 744.)

In the present case, the Board's censure did not "punish" Rocco as occurred in *Whitener*. Nonetheless, the logic of *Whitener* and other cases of absolute legislative immunity still applies. As described at length above, the censure resolution is speech undertaken during an official meeting—a fact that singularly establishes absolute immunity. More importantly, such censures are clearly "legislative" in nature because they express an *officially-adopted* statement of the legislative body's interpretation and implementation of its own adopted policies. For example, in the present case, the Board's censure of Rocco stated the Board's own implementation of its Board Policy and, in particular, a legislative confirmation of the Board's commitment to employee privacy, expectations of appropriate Board member conduct and promise to offer (without compulsion) training in the area of good boardsmanship. (CT p. 170.)

Even where a censure resolution specifically singles out a board member, such measure still falls squarely within the ambit of absolute immunity since the immunity applies to "alliances struck regarding a legislative matter." (*Almonte, supra,* 478 F.3d at 107.) Furthermore, the fact that a censure resolution is related to an element of speech really does not change the impact of absolute immunity. "Congress frequently conducts committee investigations and adopts resolutions condemning or approving of the conduct of elected and appointed officials, groups,

corporations, and individuals. Members often vote to do so, at least in part, because of what the target of their investigation or resolution has said." (*Zilich v. Longo*, *supra*, 34 F.3d 359, 363.)

3. Conclusion—The trial court was correct in finding that Rocco could not demonstrate a probability of success on the merits, thus satisfying the second anti-SLAPP requirement for dismissal of Rocco's claims.

Amici Alliance agrees with the trial court's reasoning that there simply is no universe of facts under which Rocco could prevail on his challenge against the Board's censure resolution. First, the trial court correctly found that the Board's censure resolution could not rise to the level of a First Amendment infringement because it did not impose a penalty on Rocco. *Amici* Alliance agrees that school boards must have the option of non-punitive censure available to them as a means of governmental expression without fear of legal reprisal. Second, the absolute immunity associated with legislative debate and legislative action protects school board censure measures like the one taken in this case. This immunity for its legislative action of censure is underpinned by the same policy that generated the anti-SLAPP statutes. Such immunity also supplies an independent basis for finding that Rocco is unable to prevail on his challenge against the Board censure.

IV. THE TRIAL COURT'S RULING IN FAVOR OF THE DISTRICT FURTHERS IMPORTANT POLICIES OF EMPLOYEE PRIVACY AND THE DISTRICT'S DUTIES AS A PUBLIC EMPLOYER.

The Board of the Orange Unified School District, like all other school boards in California, is not just a governmental and legislative body—it is also a public employer. As such, the Board is obligated to perform its duties in a managerially-efficient manner and the Board must constantly consider the rights and interests of its employees. In other words, school boards not only have to act as good government, they also have to be good employers.

While issues relating to free speech rights of employees are of concern to both employers and employees, concerns related to public debate and disclosure dealing with employee performance are of equal import. Appellant Rocco would have this Court overturn the trial court decision in favor of a rule that would subvert employee privacy to the whims of public discourse at all costs. To the contrary, there is no "hard and fast" rule for when expectations of privacy should be overridden by the public's right to discuss, debate and criticize the employee's performance. Specifically, Article I, Section 1, of the California Constitution guarantees all citizens the inalienable right of "enjoying and defending life and liberty, acquiring, possessing, and protecting property,

and pursuing and obtaining safety, happiness, ***and privacy.***" (Emphasis added.)

For example, it is well-settled that "information from a personnel file that applies to a specified individual raises significant privacy concerns." (*Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500, 1515; *Versaci v. Superior Court* (2005) 127 Cal.App.4th 805.) In the context of employee privacy rights, courts can *only* overcome the privacy interest by carefully weighing the employee's privacy rights against public rights of free speech, concern for public employee performance and the governmental interest in preventing disruption to personnel-related affairs. (*See, e.g., Pickering v. Board of Education* (1968) 391 US 563; *BRV Inc. v. Superior Court* (2006) 143 Cal.App.4th 742; *Gilbert v. City of San Jose* (2003) 114 Cal.App.4th 606, 613 ["Constitutional privacy interests . . . must be balanced against other important interests."].) "[O]ne does not lose his [or her] right to privacy upon accepting public employment . . ." (*New York Times Co. v. Superior Court* (1997) 52 Cal.App.4th 97, 100.) "There is an inherent tension between the public's right to know and the public interest in protecting public servants, as well as protecting private citizens, from unwarranted invasion of privacy." (*Id.*)[6]

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[6] When the government acts as an employer, the First Amendment requires a delicate balance between society's interest in maintaining

Due to this balancing of interests, federal and state "sunshine" laws—laws intended to open the realm of government discourse to the

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communications free from government restriction and the need for government services to be provided efficiently and effectively. (*Pickering v. Board of Education, supra,* 391 US 563.) Once the employee establishes that the speech is protected by the First Amendment, the burden shifts to the employer to demonstrate that, in fact, the exercise of the speech "disrupts" public employment to the degree that justifies the employer's disciplining the employee. (*Pickering, supra; Gilbrook v. City of Westminster* (9th Cir. 1999) 177 F.3d 839, 867-868; *Nicholson v. Board of Education* (9th Cir. 1982) 682 F.2d 858; *Brewster v. Board of Education of Lynwood Unified School District* (9th Cir. 1998) 149 F.3d 971.)

However, the *Pickering* balancing test for *employee speech* does not apply to the type of *board member speech* at issue in this case. In fact, to the extent that school districts can discipline an employee for substantially disruptive speech, *the district logically has even greater latitude to discipline disruptions* caused by a board member. This exact point was made in *Phelan, supra,* 235 F.3d 1243, a case based upon facts strikingly similar to this case. As noted in discussions above, *Phelan* involved censure of a school board member for certain advertising statements she made in a newspaper. The board member sued, in part, alleging a violation of her First Amendment rights. The *Phelan* court refused to entertain the argument that a school board is limited in its ability to control the speech of one of its own members. (*Phelan, supra,* at 1247.) Unlike cases dealing with public speech by an employee, it is *not* necessary to weigh the speech rights against the government's interest in efficient operations. (*Id.* ["The *Pickering* line of cases does not, however, apply to facts like those in the case we consider today. Ms. Phelan is not a governmental employee or contractor."].)

While the *Phelan* court did not decide exactly how the speech rights of a board member must be weighed in light of the government's interest in efficient operations, it made clear the point that board members may be expected to be more circumspect in their statements than members of the public. Where, as here, a board member's statements pose serious disruption of the school district/employee relationship, the Alliance urges that the school board's power of censure takes on special import—it is the board majority's official mechanism to communicate to employees and constituents that the actions by one board member do not reflect the opinion of the board majority.

public—have typically included express exemptions for personnel-related matters. For example, under California's Public Records Act, Government Code section 6254(c) gives a public agency discretion to withhold personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. Similarly, California's open-government laws under the Ralph M. Brown Act, Government Code section 54950, *et seq*., expressly authorize a public agency to meet in closed session regarding the consideration of "the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee." (Gov. Code, § 54957(b)(1).) The "underlying purposes of the 'personnel exception' are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body." (*San Diego Union v. City Council* (1983) 146 Cal. App. 3d 947, 955.)

> When a school board holds open sessions of its meetings and is addressed by members of the public pursuant to the Brown Act, it is not functioning as an employer, but as a legislative body. . . . In contrast . . . matters related to District's duties as an employer are considered in closed session. See, e.g., § 54956.95.

(*Baca v. Moreno Valley Unified Sch. Dist*. (C.D. Cal. 1996) 936 F.Supp. 719, 732, fn. 13.) The Brown Act also manifests a strong interest in employee privacy through Government Code section 54957.1(a)(5), which specifically allows governmental bodies to *defer* the public

reporting-out of an adverse personnel action taken in closed session until the employee has exhausted all available administrative remedies in response to the action. In short, the Brown Act specifically recognizes that the public does *not* have a right to know about adverse employment actions raised in closed session until the matter has run its course to completion. The Alliance observes that it is standard policy for school boards to adopt closed session policies for the discussion of personnel matters with the potential to intrude upon employee privacy.

In addition to privacy concerns, school districts and other public employers are required to provide a certain degree of security to their employees by providing measures of due process with respect to potential disciplinary measures. "Minimal standards of due process require that a public employee receive, prior to imposition of discipline: (1) Notice of the action proposed, (2) the grounds for discipline, (3) the charges and materials upon which the action is based, and (4) the opportunity to respond in opposition to the proposed action." (*Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736; *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215.) Likewise, Education Code sections 44932, *et seq.,* provide a further gamut of extensive and employee-protective due process rights specifically for the benefit of school employees.

In light of the privacy rights and due process afforded to its employees, the District adopted a policy and practice of addressing

personnel actions in closed session—a policy that is similarly followed by virtually every other public agency employer and school board. (CT 137-138 ¶ 7; CT 152.) Such board policies reiterate the importance of confidential personnel matters by requiring Board members to "[k]eep confidential matters confidential." (*See e.g.,* CT p. 147.) These policies find direct support in the Brown Act's personnel exception and its rule of deferred public reporting of employee discipline until after the exhaustion of administrative remedies that may exonerate the employee.

Amici Alliance takes the position that policies and practices in furtherance of employee privacy are critical to every school board. CSBA has developed model Professional Governance Standards designed to clarify the critical responsibilities of local boards and to support boards in their efforts to govern effectively. CSBA's trainings, publications, and the Professional Governance Standards repeatedly emphasize the importance of maintaining confidentiality, both from a legal sense and the need to maintain the trust of employees, students, fellow board members and the community. When confidential information is disclosed, it invites litigation by violating the privacy rights of employees and students, jeopardizing the district's legal position and exposing the district to financial liability.

A school board's power of censure is a critical mechanism for maintaining the privacy and due process rights of its employees where a

board member potentially interferes with employee privacy or due process rights. In this case, Appellant Rocco's statements potentially undermined the privacy of one employee by disclosing disciplinary issues in light of Rocco's assertion that he "would fire" the employee. Moreover, Rocco's statements tread precariously close to *prematurely* disclosing a report of employee discipline (or what he held out as a disciplinary opinion) without first permitting the employee to confront and contest any basis for discipline. On a more district-wide level, Rocco's statements likely undermined the confidence of other District employees who trust the Board to keep disciplinary matters private in accordance with Board Policy. While the Board might have had recourse in a court of law (such as obtaining an injunction against Rocco's disclosures or filing an accusation for misconduct in office), the Board (as a body) did not have any direct ability to reassure its employees and constituents beyond a censure resolution. (*See* 80 Ops.Cal.Atty.Gen. 231; 76 Ops.Cal.Atty.Gen. 289.)

Finally, because the community elects school board members to set and monitor the direction of the school district, it is vital that the Board and District employees have a respectful and productive working relationship based on trust and, when necessary, confidential communications related to performance and discipline. In this case, for instance, when Appellant Rocco publicly "dressed down" an employee

without warning in the midst of a public meeting, he endangered that trust and ability to review sensitive personnel issues with the fairness and equity expected of a public employer. Through a resolution of censure, the Board was able to reassure its employees of *its collective commitment* to established policies protecting employee privacy and due process rights.

V. CONCLUSION.

Amici Alliance urges this Court to affirm the trial court's decision dismissing Plaintiffs/Appellants' attempt to overturn the Board's resolution of censure. As a matter of policy, the Alliance takes the position that school boards must retain their inherent authority to censure officials and statements that contravene their respective board's political, governmental and managerial philosophy and policies. *Regardless* of the nature of Rocco's statements in this case, the legal reality is that the Board retains the right to express its own responsive opinion to Rocco's remarks, and thereby reaffirm its commitment to board policies designed to promote fair and positive working conditions for school employees.

In this case, Rocco's statements to the effect that he "would fire" an employee and his vehement affront to the Board's officially-adopted policy related to handling personnel matters had the potential to disrupt the Board's relations with its employees. Such statements about confidential personnel matters made out of order by a board member will

tarnish a school board's relationship with its employees by creating the appearance of the board as a "loose cannon" that could go off—to the detriment of some employee—at any time. It is a critical matter of policy that *all* school boards should retain the ability to censure such disruption by one of their own board members.

Dated: December 7, 2007

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rule of Court 8.204(c)(1) the AMICI CURIAE BRIEF OF CALIFORNIA SCHOOL BOARDS ASSOCIATION AND EDUCATIONAL LEGAL ALLIANCE IN SUPPORT OF DEFENDANTS/RESPONDENTS contains 10,014 words (a brief produced on a computer must not exceed 14,000 words, including footnotes).

Dated: December 7, 2007

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