Case No. S156961

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

SAN LEANDRO TEACHERS ASSOCIATION, ET AL.,

Plaintiffs and Respondents,

v.

GOVERNING BOARD OF THE SAN LEANDRO UNIFIED SCHOOL DISTRICT, ET AL.,

Defendants and Appellants.

First Appellate District, Division One, Nos. A114679, A115686
Alameda Superior Court No. RG05235795
The Honorable Winifred Y. Smith, Presiding

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF POSITION OF DEFENDANTS AND APPELLANTS

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BRIEF OF *AMICUS CURIAE*

I. INTRODUCTION

This case presents a legal issue of great concern to the California School Boards Association (the "CSBA") and its member schools district governing boards and county boards of education: whether a school district must permit an employee organization[1] the right to use district mailboxes to disseminate political campaign materials despite the strict prohibition under Education Code section 7054 against the use of public resources to urge the support or defeat of a ballot measure or candidate. Here, the Court of Appeal, in a well-reasoned opinion, correctly concluded, pursuant to section 7054, that a school district acted properly in prohibiting an employee organization from distributing political campaign materials in teacher mailboxes. This ruling not only correctly interprets California law, it rests on sound public policy.

Section 7054 was implemented to preserve public resources for the purposes for which they were intended and to safeguard the neutrality of school districts in elections. As the California Supreme Court has declared,

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[1] An "employee organization" is "any organization which includes employees of a public school employer and which has as one of its primary purposes representing those employees in their relations with that public school employer." (Gov. Code § 3540.1 subd. (d).) Employee organizations are commonly referred to as "unions" and periodically will be referred to as such in this brief.

it is a "fundamental precept of this nation's democratic electoral process . . . that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions." (*Stanson v. Mott* (1976) 17 Cal.3d 206, 217.)

The selective use of public funds in election campaigns raises the specter of an improper distortion of the democratic electoral process. (*Stanson, supra,* 17 Cal.3d at 217-218.) A ruling that allows district mailboxes to be used by one side of an issue to promote its political campaign threatens the neutrality of government and the integrity of the electoral process, and exposes government employees to undue pressure to support or oppose particular candidates or ballot measures.

The public policy reasons supporting the Court of Appeal's decision here are strong. The CSBA urges the Court to consider the corrosive effects on the fairness of the electoral process of permitting a single employee organization to use public resources to pressure public employees to support or oppose particular candidates or ballot measures. The CSBA also urges the Court to consider the adverse consequences to districts state-wide if district mailboxes, and other means of communication, are opened up for political campaigning. The CSBA respectfully requests that this Court clarify that districts not only may, but also *must*, prevent school district mailboxes from being used to engage in partisan political campaigning.

Part III.A of this Brief sets forth the adverse public policy consequences that would ensue should the positions of the unions here, the San Leandro Teachers Association ("SLTA") and California Teachers Association (collectively the "Associations"), be accepted, and the sound bases for enforcing Education Code section 7054 in this case. Part III.A.1 describes that under the Associations' constitutional analysis, if teacher mailboxes truly are a "public forum," then other groups besides unions could demand access to them, thereby causing serious disruption of their intended function. Part III.A.2 explains that a ruling in favor of the Associations here could easily be interpreted to extend to other sources of communication at educational institutions, and thus have extensive unanticipated and adverse ramifications. Part III.A.3 illustrates how a ruling in favor of the Associations would allow teacher mailboxes (a primary source of communication regarding school business) to be inundated with unrelated political campaigning material, creating work-time distraction and frustrating the work-related purpose the mailboxes were designed to serve.

Part III.A.4 explains that allowing SLTA to avoid section 7054 in the context of teacher mailboxes would frustrate the purposes of the statute, among other ways by allowing an organization to use a government entity's resources to secure an advantage in political debate. Indeed, under the Associations' view, apparently SLTA but not other organizations can use

teacher mailboxes for political campaigning. Also, the ruling requested by the Associations would thwart section 7054's intended purpose of assuring that school resources are used for school purposes.

Part III.A.5 shows how Section 7054 and the District's policy effectuating it do not impose a significant limitation on teachers' constitutional speech rights. Part III.A.6 explains that restrictions on political activities in the government workplace are common and consistent with long-standing public policies preventing distortion of the political process.

Finally, this Brief will go beyond public policy consequences and provide additional discussion concerning the statutes and constitutional doctrines at issue. Part III.B describes why the Associations' statutory arguments lack merit. Education Code section 7054 makes district resources off limits to anyone for enumerated political purposes, be they a district, employee, union, or other organization. It provides: "*No* school district or community college district *funds, services, supplies, or equipment* shall *be used* for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district." (Educ. Code, § 7054 subd. (a) [emphasis added].) The District's metal or wood mailboxes clearly constitute District "equipment" and "services" under the statute. The statute contains no exemption for equipment or services maintained at

a supposedly nominal or incidental cost.

Part III.C explains how constitutional free speech considerations do not preclude application of section 7054 here. While the Educational Employment Relations Act ("EERA")[2] grants employee organizations the right to access district mailboxes for employer-employee relations purposes, the EERA does not provide such representatives with a limitless right to use district mailboxes for any and all purposes (e.g., support or opposition to political candidates). In addition, no authority holds that *one* entity's legal right to a particular area converts the area into a forum for speech by the general public. Also, section 7054 itself does not squarely implicate free speech protection because it does not directly restrict political "speech." Instead, it limits *resources* individuals or organizations may use for political advocacy.

Finally, section 7054's prohibition in any event constitutes a reasonable and viewpoint-neutral regulation. No one, not the district, unions, other organizations, or employees can use the mailboxes for political campaigning. Indeed, apparently no published case in any other state has held that a union's right of access converts a teacher mailbox into a forum for union political speech. The Associations ask that this Court be the first to so hold. This Court should decline to do so, and should affirm the Court of Appeal's decision.

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[2] Gov. Code, §§ 3540 *et seq.*

II. FACTUAL BACKGROUND

The San Leandro Unified School District has constructed mailboxes at the various schools in its jurisdiction, and teachers are assigned mailboxes primarily to receive work-related communications. The Court of Appeal here, evaluating the undisputed facts, described the mailboxes as follows:

> The District's mailboxes are permanent fixtures at each school, consisting of a wooden or metal frame grid that is fixed to the wall in school offices. Each certificated employee is assigned a mailbox. The normal intended purpose of the school mailboxes is to communicate with teachers and staff regarding school-related matters. Nonschool organizations do not have direct access to these mailboxes. Pursuant to District policy, materials generated by such organizations may not be placed in the mailboxes without the District's prior approval.

(*San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.* (2007) 65 Cal.Rptr.3d 288, 293.)

CSBA represents to the Court that the situation described by the Court of Appeal is similar in other school districts across California.

SLTA is the exclusive representative[3] of the District's certificated

[3] The term "exclusive representative" has a specific meaning in public sector labor law. As defined by Government Code section 3540.1(e), an

employees. (*San Leandro, supra,* 65 Cal.Rptr.3d at 293.) It argues that the allegedly offending political materials it placed in teacher mailboxes consist of a newsletter containing only a few sentences of political endorsement. Its legal theories on this appeal, however, seek broader protection for union political speech: in particular, a ruling allowing unions to place any type of political endorsements they wish in teacher mailboxes.

III. ARGUMENT

A. A RULING ALLOWING UNIONS TO DISTRIBUTE POLITICAL CAMPAIGN MATERIALS THROUGH TEACHER MAILBOXES WOULD HAVE SEVERE AND UNNECESSARY ADVERSE PUBLIC POLICY CONSEQUENCES.

1. A Ruling in Favor of the Associations Would Prevent Districts From Preserving Other Communication Forums For Limited Purposes.

The Associations argue that employee organizations' statutorily given right under the EERA to use district mailboxes to communicate with their members regarding employer-employee relations converts such mailboxes into a designated public forum, at least for exclusive representatives.[4] From this argument, no limiting principle appears suggesting that a rule that applies to district mailboxes would not *also* apply to district mail systems or bulletin boards. Indeed, the EERA permits

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"exclusive representative" means the "employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer."

[4] Actually, Gov. Code § 3543.1(b) applies to all employee organizations, not simply to exclusive representatives like SLTA

employee organizations the same type of access to other district forums, such as institutional bulletin boards or internal mail systems, as to mailboxes. One logical extension of the Associations' argument, therefore, is that a union must be given free access to disseminate partisan campaign materials through every district means of communication.

In fact, however, districts have a well-established right to regulate access to such means of communication. For instance, the EERA gives districts the right to adopt reasonable regulations regarding the use of their communications systems. (Gov. Code, § 3543.1(b).) Similarly, the statutory language of Education Code section 7058, which allows a district to open up forums for a consideration of different views, clearly indicates that the decision to open up a forum is altogether *discretionary.* Therefore, districts that do not want to avail their internal mail system—designed to further effective communications with teachers on school-related matters—to political commentary and advocacy may restrict access to their internal mail system for such purposes.

The argument advanced by the Associations regarding an employee organization's ability to use a district's mailboxes for political campaign purposes conflicts with a district's important management prerogative to control access to certain of its communication forums.[5]

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[5] Indeed, recent authority confirms that simply because a labor relations statute opens up an employer's property for use by a union to communicate

2. A Ruling That Deems Teacher Mailboxes An Open Public Forum Could Allow Other Groups, Besides Unions, to Demand Access to District Mailboxes To Disseminate Political Materials.

The adverse impact of a ruling that an internal district mail system constitutes a public forum will be immediate and far-reaching. Other groups—not just a single union—could demand equal access to teacher mailboxes to disseminate their political materials.[6] For example, Education Code section 7058 provides that the use of a forum under a district's control must be "made available to all sides on an equitable basis" once such a forum is provided. One could argue this statute should extend to outside groups, and confer on them a right of access to the forum for political purposes. To avoid bestowing an unfair advantage to one faction,

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with employees does not mean that the union obtains a right to communicate through any means it sees fit, even on core labor-management relations matters. Last year, the National Labor Relations Board held that notwithstanding a union's right of access, private employers may preclude unions from utilizing an employer's electronic communications system for organizational and other purposes. (See *Guard Publishing Co. d/b/a Register-Guard and Eugene Newspaper Guild, CWA Local 37194*, 351 N.L.R.B. No. 70 (Dec. 16, 2007) [under NLRA, a private employer could restrict e-mail communications to essentially work-related matters, as well incidental personal use, while precluding union from soliciting and organizing through e-mail].)

[6] Employee organizations are given unique statutory access rights to district forums, *for labor relations purposes only*. (Gov. Code, § 3543.1(b).) However, when employee organizations act as political advocacy organizations, they enjoy no special standing. (*Cf. Abood v. Detroit Bd. of Educ.* (1977) 431 U.S. 209, 235-36, 97 S.Ct. 1782, 52 L.Ed.2d 261 [employees were not required to fund through their dues the political activities of union unrelated to its role as the exclusive bargaining representative for public school teachers].)

and to avoid a charge of viewpoint discrimination, districts could be forced to give *all* groups equal access to district mailboxes to distribute political campaign materials.

If the Associations' public forum position is adopted, districts across the state may have no power to prohibit outside groups from distributing potentially divisive and disruptive political materials through supposedly internal mailboxes. These groups may be able to demand equal access to teacher mailboxes to disseminate political materials because one political group—in the guise of an employee organization—is already given access to such a communication forum for such purposes. As California's elections become ever more frequent, and as election seasons become ever longer, teacher mailboxes will be clogged with the materials of diverse and sundry groups competing for the votes of district employees.[7] The large volume of campaign materials that likely will be placed in staff mailboxes will render routine school-related communications between districts and their teachers ineffective.

The end result of opening up a limited, internal district mail system

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[7] According to the California Secretary of State's website, the February 2008 election was the ninth primary or general *statewide* election since March 2002. (*See* http://www.ss.ca.gov/elections/elections_elections.htm [last visited May 15, 2008].) In addition, *local* elections are held in over 6,000 California counties, cities, community colleges and school district jurisdictions. (*See, id.*, the California Elections Data Archive, listing local elections data from 1995-2006 [last visited May 15, 2008].)

to political campaign materials will be the virtual elimination of the internal mailboxes' ability to fulfill their original and primary mission, namely, to enhance the educational mission of the schools and to further the open communication between districts and their teachers. Teacher mailboxes will lose their value as cheap, effective, and efficient instruments for official or designated communications, and districts will be forced to resort to alternative channels of communication.

If mailboxes were opened up as a public forum, districts could find that competing claims for access to teacher mailboxes would embroil the districts in needless political controversy. Teachers would not go to their mailboxes to learn the latest information about work-related matters but, potentially, the latest developments in ongoing political debates – probably, and likely, irrelevant to the work of the teachers and to the school district's primary mission.

Because it is important that a district's internal mail system be preserved as an effective and efficient tool for communications between districts and their teachers, this Court should affirm the Court of Appeal's decision in this case.

3. The Ruling Requested by the Associations Would Allow Unions to Inundate Teacher Mailboxes with Materials Unrelated to the Purposes the Mailboxes Were Designed to Serve.

The position advocated by the Associations would open up district

mailboxes to a broad array of disruptive political pamphleteering. This would radically transform the character of district mailboxes. This is especially the case given the increasing length and frequency of election campaigns in California.[8] In the many months leading up to every local, state, and national election, districts and teachers could be subject to a barrage of campaign literature in their mailboxes. The massive volume of political materials that could flood district mailboxes would sharply diminish the ability of districts to use their mailboxes to communicate effectively and efficiently with district staff about school-related matters—the purpose for which these mailboxes were created.

4. A Ruling Finding Teacher Mailboxes Outside the Scope of Education Code Section 7054 Could Essentially Allow a Union, but Not Others, to Have an Unchallenged Right to Communicate Through District-Owned Mailboxes With Teachers Regarding Political Elections.

Education Code section 7054 operates to eliminate the use of school or community college district funds, services, supplies, or equipment, by *anyone*, to influence the political process in enumerated ways. (Educ. Code, § 7054 subd. (a).) By placing such items off limits as part of the political arsenal, section 7054 functions, first, to assure that those with access to the funds, services, supplies, and equipment in question will not use them to provide themselves with an unfair advantage in the political

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[8] *Supra*, note 7.

process. It functions, second, to assure that those items are dedicated to the purposes the taxpayers intend – to benefit school district and community college students and the mission of the educational institutions.

Here, the Associations seek directly to contradict these public interest operations of Section 7054 for their own benefit. If the Associations prevail in their arguments (and the Court's ruling does not prompt a district to open up teacher mailboxes to political pamphleteering from other groups besides the union, as described in the previous Sections), then labor organizations will have succeeded, first, in obtaining access to a district resource through which *only they* can communicate their political messages, and even campaign in favor of (or opposition to) district board members of their choosing. By contrast, the board, its administrators, and other employees, could *not,* as a practical matter, use the same resource, and would be at a distinct disadvantage. Other political groups and individuals could also be at a disadvantage, since they would not have access to school district property in order to use the teacher mailboxes (again, unless they could succeed in making the types of public access arguments outlined in the previous Section, and their success in obtaining such access would only exacerbate the problem of diverting the mailboxes from their intended purposes).

Second, union access to the mailboxes for political purposes would thwart a second purpose of Section 7054, that of assuring that school

resources are used for school purposes. Stuffing teacher mailboxes with political advertisements and campaigning material would distract from the normal intended purpose of the school mailboxes – "to communicate with teachers and staff regarding school-related matters." (*San Leandro Teachers Assoc., supra*, 154 Cal.App.4th at 873.) Indeed, the clear result of the type of ruling requested by the Associations would be to allow unions to clutter teacher mailboxes with campaigning materials. This could cause mailboxes to fill with material to the point at which teachers decline to check their boxes as frequently. It could also cause teachers to spend time during the work-day reading and possibly discussing political materials they receive. Both types of reactions derive ineluctably from human nature, and can prove significant in cumulative effect. The effect would hinder mailboxes in facilitating school business.

5. The District's Restrictions Would Not Have A Significant Adverse Effect On Teachers' Constitutional Right Of Free Speech.

The Associations' arguments also exaggerate the effect of the District's restrictions on teachers' constitutional rights to free speech. The restrictions on use of teacher mailboxes were adopted pursuant to the requirements of Education Code section 7054. Section 7054 restricts use of certain public resources, not employee speech. In addition, section 7054's restriction on the time, place, and manner of expenditures of resources is limited. It prohibits only the use of district funds, services, supplies, and

equipment used for the purpose of urging the support or defeat of any ballot measure or candidate. Nothing prevents employees from engaging in such advocacy using the ample alternative channels of communication that remain open for such purposes, including private email, U.S. Mail, Internet web sites, and in-person solicitation.

Indeed, the Trial Court in this matter set forth a hypothetical that supposedly emphasized how extensive the restrictions on teacher speech were under the District's section 7054 interpretation. The Court reasoned that the District's careful restriction on the use of mailboxes for political campaign purposes is akin to prohibiting two teachers during non-work time from conversing about which school board candidates they support on school grounds simply because "they are 'using' school property when they communicate with each other—sheltered by the school's roof, illuminated by [the] school's light bulbs, [and] warmed by the school's ventilation system." (*Order, supra,* at p. 10.)

However, this analogy is misleading and inapposite. Neither the District's policy, nor section 7054 on which it is based, broadly prohibit teachers from conversing about political matters at a school. Indeed, Education Code section 7056 specifically affirms that district employees may engage in various political activities to promote the support or defeat of any ballot measure on school district property during non-working hours. Section 7054 only prohibits the misuse of public resources to promote a

particular electoral campaign.

In addition, district property such as a roof, or lights, or ventilation are not themselves means of communication likes mailboxes and mail systems. They do not give one side or another unfair advantage in political campaigning, whether financial or by virtue of a perceived government imprimatur. Moreover, applying section 7054's plain language defeats the argument. The statute prohibits equipment from being used "for the purpose of urging the support or defeat of any ballot measure or candidate . . . ." One can use a mailbox for this purpose, but it strains credulity to say that someone can "use" a "ventilation system," roof, or light bulb "for the purpose of urging support" of a ballot measure or candidate.[9]

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[9] The Court in *Herbert v. Washington State Public Disclosure Com'n* (2006) 136 Wash.App. 249, 148 P.3d 1102, 1111, addressed and rejected the same type of argument in connection with Washington's restriction on use of public funds, RCW 42.17.130. In *Herbert*, the plaintiff argued that no rational basis could distinguish the use of funds entailed in mailbox and e-mail political campaigning from the use when "teachers . . . discuss a political campaign in the teacher lunchroom -- which uses electricity and heating and building maintenance . . . ." The Court rejected the argument, reasoning: "[T]he distinction is this: pure political speech is permitted, but using the facilities to deliver speech is prohibited. The use element provides the distinction between talking in the lunchroom and using school computers to e-mail staff members. This distinction is rational and reasonable in light of RCW 42.17.130's policy goals of ensuring that public facilities are used for their intended purposes and in maintaining the State's political neutrality." (*Id.*)

6. Restriction on Political Activities in the Government Workplace Are Common, and Consistent With Sound Public Policy and Principles of Government.

Because the instant case involves political speech, it is easy for the Associations to suggest, as they do even in the "Question Presented" section of their opening brief, that the District has engaged in "censorship," specifically that the District seeks to "censor union communications." These contentions are pabulum, made routinely by anyone who claims in a lawsuit that his or her political speech was unduly restricted.

The fact is that numerous state and federal statutes broadly preclude segments of the public sector from engaging in political speech or activities in particular contexts. They do so in order to protect the public and the democratic process from abuses that could occur should public finances or personnel be used to favor incumbents in government, to favor particular groups entrenched in the political system, or to give rise to any other myriad abuses that could occur should the vast resources of cities, states, schools, or other entities be used to influence the political process.

Statutes that restrict political activities of government organizations or employees include Government Code section 8314, which prohibits state employees (and others) from using public resources for a campaign activity which is not authorized by law. Education Code section 7055 allows schools to establish rules to regulate political activity during working hours

and on agency premises. (Educ. Code, § 7055 subd. (a), (b).) Other statutory provisions include California Government Code Section 3206, which provides: "No officer or employee of a local agency shall participate in political activities of any kind while in uniform." (Gov. Code, § 3206.) The prohibition is part of an Act originally passed in 1963 to regulate the political activities of public employees. *See* Cal. Gov. Code § 3201 ("The Legislature finds that political activities of public employees are of significant statewide concern."). Other portions of the Act regulate campaign contributions and use of political influence. (Gov. Code §§ 3204, 3205, 3205.5.)

In addition, the federal Hatch Act provides: "(a) An employee may not engage in political activity" under certain broad circumstances. (5 U.S.C. § 7324(a).) Federal regulations provide detail on what Section 7324(a) covers. The regulations define "political activity" to include efforts designed to promote particular political groups. The federal Hatch Act contains some provisions applicable to state employees, *see* 5 U.S.C. §§ 1501-1508, relating primarily to influencing elections. California Government Code sections 3201 to 3208, parts of which are cited above, are considered the California counterpart to the Hatch Act, and impose directly in the state and local employment context restrictions akin to those imposed by the Hatch Act in the federal employment context.

The foregoing authorities demonstrate that restrictions on political

activities in the context of public sector employment are routine, if not expected by the American public, to safeguard the democratic process. Section 7054 constitutes just such a statute, which functions broadly to prevent *anyone* from using the apparatus of the government for its own advantage in the political process. Yet here, the Associations seek to do just that – to utilize district owned teacher mailboxes for campaign materials, possibly even to campaign for or against the district, its board, or its interests. Moreover, the unions seek to obtain for themselves the *exclusive right* to communicate through the mailboxes for political purposes. Their seeking this exclusive right contravenes the very purpose for which section 7054 was passed, and the core constitutional principles underlying free speech protection (i.e., to allow all sides to be heard on an issue).

B. THE DISTRIBUTION OF POLITICAL CAMPAIGN MATERIALS HERE THROUGH DISTRICT MAILBOXES VIOLATES THE PLAIN TERMS AND THE PURPOSE OF EDUCATION CODE SECTION 7054.

The Associations argue erroneously that the SLTA's use of District mailboxes to distribute political campaign material does not violate Education Code section 7054. The Associations' argument rests on a misreading of section 7054 and raises the specter of an improper distortion of the democratic electoral process, which section 7054 is specifically designed to protect.

1. The Language of Section 7054 Explicitly Prohibits The Use Of Any District Services Or Equipment, Including Teacher Mailboxes, For Political Campaigning.

Section 7054 provides that

> [n]o school district ... funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district.

The language of this provision is absolute and unambiguous. It explicitly provides that *no* district *services or equipment* may be used to advocate for or against a particular ballot measure or political candidate. Among other things, the references to "equipment" and "services" include teacher mailboxes.[10] Thus, *any* use of school district funds, services, supplies, or equipment for the unlawful purpose of urging the support or defeat of a ballot measure or candidate violates section 7054. School districts that allow any of their resources to be used for partisan political purposes are subject to potentially significant *criminal* sanctions. (Ed. Code, § 7054 subd. (c).)

Despite this clear statutory language, the Associations argue that

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[10] As the Court of Appeal here reasoned, the mailboxes constitute "services" because they are "a prompt and convenient delivery route by which a school district (and others) may effectively communicate with school employees." (*San Leandro, supra,* 65 Cal.Rptr.3d at 295-96.) The mailboxes constitute school district "'equipment' in that they are tangible, specially constructed receptacles that, while not unduly expensive, are created and maintained solely by the district." (*Id.* at 296.)

SLTA's distribution of political flyers through District mailboxes does *not* violate section 7054. The Associations do this by asking this Court to read what is tantamount to a "substantiality" requirement into section 7054, and to determine that use of District mailboxes does not meet the requirement.

Adoption of an unwritten "substantiality" requirement, however, would do violence to the explicit language of section 7054 and would have no basis in law. Section 7054 nowhere states that the usage of district resources must be substantial enough to result in monetary cost to the district.

Indeed, the Legislature knows how to impose a substantiality requirement when it wishes. Contrast Government Code, section 8314, subdivision (b)(4), which limits the prohibited "use" of public resources to the "use of public resources *which is substantial enough to result in a gain or advantage to the user or a loss to the state or any local agency for which a monetary value may be estimated*" (emphasis added). Education Code section 7054, however, expressly provides that *no* school district funds, services, supplies, or equipment may be used for improper political purposes, and does not carve out an exception for relatively minor misuses of taxpayer resources. The Court of Appeal in this case correctly noted that this distinction supports the fact that Section 7054 contains *no* substantiality requirement. (*San Leandro Teachers Association, supra,* 154 Cal.App.4th at p.876 note 9.)

The California Public Employment Relations Board ("PERB"), the expert labor relations agency which oversees public sector collective bargaining in California, has carefully studied this section, and has consistently held that the use of school mailboxes is governed by the prohibition of section 7054. (See, e.g., *San Leandro Unified School District* (2005) PERB Dec. No. 1772, 29 PERC 145; *Am. Fed. of Teachers Guild v. San Diego Community College Dist.* (2001) PERB Dec. No. 1467, 26 PERC 33014 [request for rehearing denied] [stating that there is not "too much room to argue that the use of the District's mail system is not use of a 'service' or that use of the District's mail boxes is not a use of 'equipment'"].)

2. Section 7054 Requires School Districts To Remain Neutral In Election Matters.

The California Legislature, like many other legislatures around the country, has made clear that public resources must be safeguarded, that government must remain nonpartisan and neutral in election matters, and that government employees must be protected from undue pressure to support or oppose candidates or ballot measures.[11] Both statutory law and

[11] For instance, the California Legislature has made it unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or for personal or other purposes not authorized by law. (See Gov. Code, section 8314. See also New York Constitution, Art. VII, section 8(1), *Schultz v. State of New York* (1995) 86 N.Y.2d 225; Louisiana Constitution, Art. XI, section 4, *Godwin v. East Baton Rouge*

case law make clear that school districts have an obligation to remain neutral in political contests and prevent public resources from improper use by entities to advocate for or against electoral candidates or ballot measures. As this Court has emphasized, it is "a fundamental precept of this nation's democratic electoral process [...] that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions." (*Stanson v. Mott* (1976) 17 Cal.3d 206, 217.)

Section 7054 was enacted in 1977, just a year after this Court in *Stanson* considered a State Department of Parks and Recreation director's expenditure of public funds to promote passage of a park bond issue. This Court held that such expenditures of public funds are unlawful because they raise the specter of improperly distorting the democratic electoral process. (*Stanson, supra,* 17 Cal.3d at 217.) The selective use of public resources in election campaigns had the potential to undermine the integrity of government and the electoral process upon which the American democratic system was established. (*Ibid.*) In other words, this Court was not so much concerned with the cost incurred by the state agency as with the potential damage inflicted on the integrity of the democratic electoral process.

Parish School Board et al. (1979) 372 So.2d 1060, writ denied 373 So.2d 527; Washington law, RCW 42.17.130, *Herbert v. Washington State Public Disclosure Comm'n* (2006) 136 Wash.App. 249, 148 P3d 1102; Hawaii law, HRS 84-13, *In re Hawaii Government Employees Ass'n*, 116 Hawaii 73, 170 P.3d 324, 329-30 [describing state bulletin that directly restricts political activities].)

The Legislature enacted section 7054 to codify the *Stanson* Court's holding and to make sure that taxpayer moneys would not be spent to further partisan political campaigns. The Legislature's intent, echoing the concerns expressed in *Stanson*, is explicitly set forth in section 1 of the amended bill:

> in a democratic society, the use of public funds in election campaigns is unjustified and inappropriate. No public entity should presume to use money derived from the whole of taxpayers to support or oppose ballot measures or candidates. (Stats. 1995, c. 879 (S.B. 82), section 1, subd. (a).)

The quick codification of the *Stanson* decision through the enactment of section 7054 indicates a broad legislative intent not only to narrowly restrict the expenditure of public resources for political campaigning purposes and but to preserve government neutrality in electoral contexts.

The Associations (and the Trial Court in this case) have ignored the foregoing principles motivating section 7054 by focusing simply on the extent of financial cost to the District in SLTA's use of District mailboxes to distribute political campaign materials. This focus on costs alone does not account for the extent to which use of equipment or services distorts the democratic electoral process, here by permitting one side of an electoral contest access to a convenient communication forum not available to competing factions.

The language and history of section 7054 make clear that the Legislature intended to avoid *any* use of public resources, including district-provided teacher mailboxes, for political campaign purposes, lest government be perceived as, or actually, aiding one side in an electoral contest. Section 7054 imposes on school districts an active duty to make sure that *no* public resources funded by taxpayer money are used to campaign for or against a particular candidate or ballot measure. School districts thus *must* restrict any employee activities which involve the improper use of public resources for political advocacy.

3. Section 7054 Applies Equally To District Employees And Union Representatives.

Section 7054's language exclusively focuses on *the use of public funds and resources to support or oppose candidates or ballot measures*, and does not distinguish on the basis of who precisely is using the public resources for the prohibited purposes. The legislation does not provide districts with the discretion to permit some, but not other, uses of public resources for political campaigning.

Section 7054 does not provide an exception for particular viewpoints or particular groups or individuals, such as employees or union representatives. Taxpayer money is not to be used to further *any* particular political viewpoint. What matters is not who is doing the campaigning but whether public resources are being used for political

advocacy.

The ruling requested from this Court by the Associations would essentially exempt employees and union representatives from section 7054's prohibition and entitle them to use district resources to support or oppose candidates or ballot measures. This not only goes against the plain reading of the law but also undermines the law's fundamental purpose. A ruling permitting public resources to be used to subsidize political speech, provided only that such speech has the imprimatur of the union, guts the impetus of section 7054 to safeguard public funds from *all* partisan campaigning.[12]

Similarly, the Associations' requested ruling also would seem to permit government to perpetuate itself by allowing third parties to act in its stead. For example, a governing board could allow district employees or the union(s) to urge coworkers to support the incumbents or their allies. This certainly could not have been the intent of the Legislature.

A careful review of the legislative history concerning section 7054

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[12] Indeed, if the Court were to agree with the Associations' argument that Government Code section 3543.1(b) allows an employee organization to use a school district's communication system notwithstanding the provisions of Government Code section 7054, it would mean that an employee organization which represents administrators in a school district could also send out written material in support of or in opposition to political candidates or ballot measures. Such an outcome is both clearly inconsistent with the purposes of Education Code section 7054 as well as contrary to the Associations' claim that districts and administrators should be prevented from using public resources for such political activity.

makes clear that the Legislature's primary focus was on the expenditure of public resources, not on the identity of the speakers. The Legislature wanted to make clear that the use of public funds in election campaigns was inappropriate and unjustified, regardless of who precisely used these resources. According to the Senate Committee on Criminal Procedure analysis of the amended bill, the bill was intended to broadly "conform the rule on the use of public funds by school or community college districts with the rule on the use of public funds by a city, county, or state." (*Senate Committee on Criminal Procedure*, S.B. 82 Bill Analysis, as amended April 24, 1995, April 25, 1995 hearing date*; see also, Senate Rules Committee, Office of Senate Floor Analyses*, S.B. Bill Analysis (May 30, 1995).) A State Senate Committee staff analysis noted that the bill "would *prohibit district employees* from using working hours or district facilities to solicit or receive funds to support or defeat ballot measures that affect their compensation or working conditions." (*Senate Committee on Criminal Procedure*, S.B. 82 Bill Analysis, as amended April 24, 1995, April 25, 1995 hearing date [emphasis added].)

In short, the Legislature did not provide an exception for district employees to use public resources to advance their particular political campaign purposes. Such an interpretation of the Legislative purpose is historically inaccurate and does not accord with the fundamental purpose of the law, namely, to preserve the integrity of government and the electoral

process by keeping taxpayer money far from electoral contests.

C. CONSTITUTIONAL FREE SPEECH PRINCIPLES DO NOT PRECLUDE APPLICATION OF SECTION 7054 TO TEACHER MAILBOXES.

The Associations' arguments based on constitutional free speech analysis also lack merit. They do not override the prohibition of Education Code section 7054.

1. Restrictions On The Use Of District Mailboxes Must Only Meet A Rational Basis Standard Of Review.

The United States Supreme Court has "recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." (*Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 46 [school district may limit access to teachers' mailboxes].) Accordingly, the First Amendment does not require "equivalent access" to every forum "in which some form of communicative activity occurs." (*Id.* at 44.)

The United States Supreme Court has developed a forum analysis framework for determining the appropriate standard to be used to evaluate government restrictions on speech, depending on the character of the public property involved.[13] California courts have explicitly adopted this federal

[13] It should be noted that government agencies, such as school districts, have broader powers to regulate the speech of their employees than in regulating the speech of the general citizenry. (See, e.g., *Waters v. Churchill* (1994)

framework for evaluating restrictions under the California Constitution. (See, e.g., *Lopez v. Tulare Joint Union High School Dist.* (1995) 34 Cal.App.4th 1302, 1328; *Clark v. Burleigh* (1992) 4 Cal.4th 474, 482-84; *Reeves v. Rocklin Unified Sch. Dist.* (2003) 109 Cal.App.4th 652, 661-63; *DiLoreto v. Board of Education.* (1999) 74 Cal.App.4th 267, 281; *Leeb v. DeLong* (1988) 198 Cal.App.3d 47, 56.)

One of the Associations' principal arguments is that this Court should eschew the forum analysis of cases like *Perry* in favor of a balancing test of the type applied to evaluate teacher speech rights in *Los Angeles Teachers Union v. Los Angeles City Board of Educ.* (1969) 71 Cal.2d 551, and *California Teachers Assoc. v. San Diego Unif. School Dist.* (1996) 45 Cal.App.4th 1383. (Associations' Reply, pp. 5-7.) The argument fails, among other reasons, because those cases analyzed the free speech rights of teachers, who are insiders to the school. They did not evaluate the rights of unions, who are outside the institution for purposes of forum analysis. (See, *Perry Ed Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37 [evaluating free speech access rights of rival teacher union to school premises by adopting traditional forum analysis].)[14] Accordingly, the free speech rights of SLTA here are governed by forum analysis. In any

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511 U.S. 661.) Such restrictions are permitted as long as they comply with basic constitutional requirements.

[14] Although union buttons and a union sponsored petition respectively were at issue in those cases, the Courts considered *teachers'* rights on school premises to wear the buttons and circulate the petition.

event, as the Court in *Herbert v. Washington State Public Disclosure Com'n* (2006) 136 Wash.App. 249, 148 P.3d 1102, observed, the current trend is toward applying forum analysis in the school district context even when evaluating the free speech rights of insiders such as teachers. (*Id.* at 260-67; see also, *Berry v. Department of Social Servs.* (9th Cir. 2006) 447 F.3d 642, 652-54.)

According to forum analysis, the most stringent review standard applies to restrictions on speech occurring in traditional public fora, which include places such as public streets or parks that "by long tradition or by government fiat have been devoted to assembly and debate." (*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* (1985) 473 U.S. 788, 802.) To restrict free speech in a traditional public forum, government must demonstrate a compelling interest to do so.

A public forum also may be created by special government designation of a place or channel of communication. However, the government does not create a public forum by inaction or by permitting limited discourse in such a forum; it creates such a public forum only by intentionally opening a non-traditional forum for public discourse. (*Cornelius*, *supra*, 473 U.S. at 802-803 ["We will not find that a public forum has been created in the face of clear evidence of a contrary intent"].) As in a traditional public forum, government must show a compelling state interest to limit free speech if a designated public forum exists.

A less stringent standard of review, however, applies to restrictions on speech that occur on public property that is neither by tradition nor by designation a forum for public communication. Such a forum is considered a nonpublic forum. A district's internal mailboxes, which have not specifically been designated for public use, constitute a nonpublic forum. (*Cornelius, supra,* 473 U.S. 788; *Perry, supra,* 460 U.S.37.)

The United States Supreme Court has specifically stated that a government agency "has the power to preserve [a non-public] property under its control for the use to which it is lawfully dedicated," subject only to a reasonableness test. (*Perry, supra,* 460 U.S. at 46.) Thus, to restrict access to a nonpublic forum, a government agency must simply demonstrate that its restrictions are reasonable and do not constitute an effort to suppress expression merely because public officials oppose the speaker's viewpoint. (*Cornelius, supra,* 473 U.S. at 806 ["Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral"].)

The Associations argue that the District's mailboxes are defined as a designated public forum by statute (specifically, the EERA), the applicable collective bargaining agreement, and the District's conduct. The Associations rely on *Perry* to argue that an exclusive representative like SLTA must be able to express its views on matters *within the scope of its*

representation. (See, *Perry, supra,* 460 U.S. at 52, n.10.) The District, however, did not restrict SLTA's ability to communicate regarding matters within the scope of its representation.

As a general matter, the EERA limits the rights of an employee organization "to represent their members in their employment relations with public school employers" and does not entitle an employee organization or exclusive representative to special privileges unrelated to this *employer-employee representation* context. (See, Gov. Code, §§ 3543.1, 3543.3) Moreover, the EERA specifically limits the scope of representation "to matters relating to wages, hours of employment, and other terms and conditions of employment." (Gov. Code, § 3543.2 subd. (a).) Here, the District only prohibited the distribution of materials relating to partisan politics, which clearly are *not* within the scope of SLTA's representation. Such communications are not protected by the EERA and may be restricted as long as there is a rational basis for such a restriction.

Moreover, here, the District did or said nothing to indicate that it intended to designate its mailboxes as a public forum. On the contrary, the District carefully monitored and restricted access to its internal mailboxes, providing access only to the union *for employee representation purposes* (as statutorily required under the EERA) and to other selected communications of benefit to teachers. The fact that unions and others may have had access to the mailboxes *under limited circumstances* does not

convert these mailboxes into a public forum. (See *Perry, supra,* 460 U.S. at 46 [granting selective access to such outside organizations such as the YMCA, Cub Scouts, and other civil and church organizations "does not transform government property into a public forum"].)[15]

2. The District's Restrictions On The Use Of Its Mailboxes For Political Campaign Activity Are Reasonable And Viewpoint Neutral.

Unions' use of districts' internal means of communication are thus broadly subject to restrictions imposed by the districts. *Such restrictions need only be reasonable and viewpoint neutral.* Here, the District's restrictions of SLTA's speech, based on Education Code section 7054's prohibition against the use of public resources to advocate for or against a

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[15] Indeed, in a case very similar to this one, the Hawaii Supreme Court recently ruled that a state facility bulletin board, on which union notices regularly appeared, constituted a non-public forum. The Court determined that a designated public forum does not arise just because a union has obtained legal access to a source of communication on a government work site: "Appellant does not cite any case law in which a designated public forum was created for use by one group." (*In re Hawaii Government Employees Ass'n, AFSCME, Local 152, AFL-CIO 116 Hawaii 73* (Hawaii 2007) 170 P.3d 324 [determining that public employer action in requiring removal of union political endorsements from the bulletin board was reasonable and viewpoint-neutral].)

The Associations attempt to distinguish *Hawaii Government Employees* by arguing that there, the "mutual aid or protection" statute did not confer a specific right of access to "mailboxes," as does Government Code section 3543.1 here. (Associations' Reply, p.12.) The distinction is not persuasive, however, because no one disputed in the Hawaii case that the union had access to the source of communication at issue (there, bulletin boards). The "specificity" of the statute was irrelevant. Rather, the issue was, among other things, whether the access created a public forum for political expression. As in this case, it did not.

particular political candidate or ballot measure, were eminently reasonable and viewpoint neutral, and should thus be upheld.

Restrictions against expending public funds or resources to support or oppose political candidates or ballot measures are reasonable because they are consistent with the district's purpose of preserving its property for the use to which it is dedicated, that is, communications with and among teachers regarding district-related business, and selected other communications deemed of interest to teachers.

Such a restriction on speech in a nonpublic forum is further reasonable and justified because it avoids the appearance of political favoritism. (*Cornelius, supra,* 473 U.S. at 788; *see also Education Minnesota Lakeville v. Indep. School Dist. No. 194* (D. Minn. 2004) 341 F.Supp.2d 1070 [unions cannot enjoin school district from enforcing policy prohibiting the placement of political brochures in teacher mailboxes].)

Nor are the District's restrictions on political campaigning using the District's internal mailboxes overly burdensome to employees. Employees continue to have abundant alternative channels of communication for political activity available to them, including private email, a union Internet website, U.S. mail, as well as in-person solicitation. Therefore, the District's restrictions on the use of one particular District-controlled and provided forum cannot be deemed unduly restrictive or unreasonable. (See *Perry, supra,* 460 U.S. at 53-55; *Education Minnesota Lakeville, supra*, 341

F.Supp.2d at 1070.)

Such restrictions are reasonable in light of the important purpose served by the forum—to facilitate communications regarding official district business and district-related labor issues. Moreover, as discussed above, since section 7054 restricts *any and all* speech for or against a political candidate or ballot measure, regardless of whether the District may be perceived as supporting or not supporting a particular position, the District's restrictions are content and viewpoint neutral.

There is simply no basis to conclude, as the Associations urge, that strict scrutiny should apply to the District's restrictions on access to the District's internal mailboxes, which have been carefully preserved for a very limited purpose, namely, authorized official communications by the District with its teachers as well as statutorily authorized communications concerning labor relations matters between the union and its teachers. The District never designated its mailboxes as available for communications advocating for or against specific candidates or ballot measures, so that there is no basis to transform the limited communication forum into an open public forum.

It is worth noting that other jurisdictions that have addressed virtually identical situations have concluded that a district's internal mail system constitutes a non-public forum and accordingly have upheld the right of a school district to prohibit the distribution of political materials in

employee mailboxes or in the school district's internal mail system. (See, e.g., *Education Minnesota Lakeville, supra,* 341 F.Supp.2d at 1070; *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools* (D.Md. 2005) 368 F.Supp.2d 416, 426-430; *Herbert v. Washington State Public Disclosure Com'n* (2006) 136 Wash.App. 249, 148 P.3d 1102, 1111 [teacher mailbox and e-mail]; *In re Hawaii Government Employees Ass'n*, 116 Hawaii 73, 170 P.3d 324, 329-30 [school bulletin board].)

Here, the District clearly had no desire to designate its mailboxes as a public forum to be used freely for political campaigning. Instead, it carefully limited access to its teacher mailboxes for specific school-related communications. In directing the SLTA to stop using the mailboxes to distribute impermissible political materials in accordance with Education Code section 7054 and the District's policies, the District was simply protecting its right to reserve the District's internal mailboxes for the purposes for which they were dedicated.

IV. CONCLUSION

For all the reasons set forth above, this Court should affirm the Court of Appeal's decision.

May 19, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed Brief of *Amicus Curiae* is produced using 13-point Roman type including footnotes and contains approximately 9,348 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 19, 2008 LIEBERT CASSIDY WHITMORE

By: Bruce A Barsook
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I am employed in County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 6033 W. Century Boulevard, Suite 500, Los Angeles, California 90045.

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