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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

**GAIL NAZARENE**,

*Plaintiff*,

v.

**KEVIN DEHMER**,
as New Jersey Department of Education Commissioner;

**ROBERT W. BENDER**,
as New Jersey School Ethics Commission Chairperson;

**MICHAEL CARUCCI**, **MARK J. FINKELSTEIN**, **DENNIS ROBERTS**, **CAROL E. SABO**, and **RICHARD TOMKO**,
as New Jersey School Ethics Commission members,

*Defendants.*

Civil Action No. 1:25-cv-17770

**REPLY BRIEF SUPPORTING PLAINTIFF'S PRELIMINARY INJUNCTION MOTION**

Motion day: January 20, 2026

Oral argument requested

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## INTRODUCTION

The state contends Gail Nazarene's concerns and self-censorship in the face of a pending School Ethics Act complaint against her and the School Ethics Commission's oft-repeated interpretation of the Act is unfounded. But the state's opposition shows that local school board members who discuss matters online risk punishment if they exceed the state's "guardrails" separating officials from their constituents. Opp'n 10. The First Amendment prohibits such interference with protected speech.

First, the state argues Nazarene lacks standing to challenge the state's interpretation and enforcement of the Act, claiming she lacks a credible enforcement threat. Yet the state does not dispute that Nazarene's intent to speak out on school issues parallels prior efforts of board members to speak with constituents that the commission punished.

Second, the state contends it does not interpret the Act as broadly as Nazarene. More aptly, the state *now* contends the Act does not restrict board members' speech as Nazarene claims and past decisions reflect. But the state has not disavowed its opinions and decisions. Nor has it assured that the commission will forgo pursing Nazarene. In fact, the state has not even screened the complaint filed against Nazarene.

Third, the state asserts Nazarene's reasonable fear of punishment does not cause irreparable harm and that protecting her speech rights harms the state. This conflicts with fundamental First Amendment principles that the loss of speech rights is quintessential irreparable harm, underscoring the importance of interim relief to protect free speech.

This Court should preliminarily enjoin the state from enforcing the Act against Nazarene's protected online speech and communications with constituents regarding important public matters.

## I. Nazarene has pre-enforcement standing.

Nazarene has standing under *Susan B. Anthony List v. Driehaus* (*SBA List*), 573 U.S. 149, 161–64 (2014), because she intends to engage in arguably protected speech, which the Act arguably bars, and she faces a credible threat of future enforcement against it. *Schrader v. Dist. Att'y of York Cnty.*, 74 F.4th 120, 124–25 (3d Cir. 2023).

The state tries to discount Nazarene's injury, arguing she should wait until her speech leads to civil enforcement. Opp'n 19. But when "First Amendment rights [are] at stake, a plaintiff need not wait." *Mahmoud v. Taylor*, 606 U.S. 522, 559–60 (2025). And threat of civil enforcement and penalties, such as removal from elected office, suffices for

pre-enforcement standing. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *FEC v. Ted Cruz for Senate*, 596 U.S. 289 (2022).

The state's remaining arguments conflate standing with success on the merits. *See* Opp'n 18–21 (analyzing standing and merits together). But standing "in no way depends on the merits." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). To avoid confusing the analyses, this Court "accept[s] as valid the merits of [Nazarene's] legal claims," *FEC*, 596 U.S. at 298, including her claim that her speech enjoys First Amendment protection, *see* Compl. ¶¶ 73–79, 91, and her reasonable interpretation that the statute, as the state applies it, proscribes her speech, *Schrader*, 74 F.4th at 125; Prelim. Inj. Br. 21–22, Dkt. No. 4-1 (detailing past enforcement).

That leaves whether Nazarene's threat of future enforcement is substantial. *SBA List*, 573 U.S. at 164. Given the "history of past enforcement," it is. *Id.* The state admits to punishing board members for speech, and it fails to distinguish those cases. *See* Opp'n 15–18.

Start with *Pinto v. Cusato*, No. C74-23 (Sch. Ethics Comm'n July 22, 2025). The state punished the board member for referencing his board role without a disclaimer. Opp'n 15. Nazarene's intended speech necessarily references her board role, and she has not always included

disclaimers, let alone ones that would apparently satisfy the state. *See* Compl. ¶¶ 61, 78.

Then consider *In re Treston*, No. C71-18 (Sch. Ethics Comm'n Apr. 17, 2021), and *In re Skurbe*, No. C75-21 (Sch. Ethics Comm'n July 22, 2025). The state punished both board members for using "we" or "our" to refer to the board, referencing board matters, and using an insufficient or inconsistent disclaimer. Opp'n 16–17. Nazarene's intended speech might use similar pronouns; she will reference board matters and her role, *see, e.g.*, Compl. ¶¶ 73–79; she has not always used disclaimers, *see, e.g.*, Compl. ¶ 61; and the disclaimers she used have sometimes been like Treston's, which the state found lacking, *see, e.g.*, Compl. ¶¶ 38, 64.

And those are just the cases the state bothers to try distinguishing. It ignores other enforcement. For example, it fails to address *Kwapniewski v. Curioni*, No. C70-17 (Sch. Ethics Comm'n Dec. 17, 2019), where the state punished a board member for referencing his board status when criticizing a board hiring decision. *Id.* at 6; *see also* Br. 21. This not only ignores that Nazarene's intended speech must reference her board status, Compl. ¶¶ 73–79, it undermines the claim that a dissenting statement "would be especially free from enforcement risk." Opp'n 25 n.6.

The state then cites cases in which it allowed board members to engage in protected speech, arguing they undermine Nazarene's credible threat. *See* Opp'n 13 (collecting cases). But its cited cases all involve board members including all-caps disclaimers or not referencing their roles. *See* Opp'n 13 (collecting cases). When board members reference their roles without the state's rigid disclaimer, the state punishes them. Br. 8–10. Because that is what Nazarene wants to do, the state's "history of past enforcement against nearly identical conduct" helps establish a credible threat. *303 Creative*, 600 U.S. at 583 (quotation marks omitted).

The state's cited cases are not just distinguishable but illustrate the constitutional problem. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). That is why standing considers past enforcement, not nonenforcement. Though the state promises Nazarene *might* be able to say everything she wishes without punishment, courts do "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.*; *see also Schrader*, 74 F.4th at 125 (noting DA suggested "he would not prosecute [for] sharing the Facebook documents [but] has not disavowed that possibility").

Even without this history, the threat of future enforcement remains substantial, for three reasons. First, past commission decisions, even if inconsistent, have reasonably chilled Nazarene, and she proffers "ample allegations of a present and continuing injury." *Const. Party of Pa. v. Aichele*, 757 F.3d 347, 364 (3d Cir. 2014). Those decisions put her in the crosshairs of potential sanctions whenever she speaks online about board matters or references her board role, "which inherently burdens" her speech. *Id.* This chill is aggravated by the commission failing to "screen[]" the complaint against her for probable cause. Opp'n 20.

Second, the threat's credibility "is bolstered by the fact that" anyone can file a complaint, including "political opponents." *SBA List*, 573 U.S. at 164; *see* N.J.S.A. § 18A:12-29(a) (allowing "[a]ny person" to file an ethics complaint). The ethics complaint process thus can "be used as a political tool." *Const. Party of Pa.*, 757 F.3d at 364. This already happened to Nazarene when a fellow board member filed a complaint against her. Compl. ¶ 67. And it has happened to others across the state.[1]

[1] *See* Julie O'Connor, *Is NJ's School Ethics Law Being Used to Silence Critics?*, NJ Spotlight News (Jan. 6, 2026), https://perma.cc/Z2YK-DBWQ ("In practice, [the Act] has been used as a cudgel to silence dissent."); Shauna Williams, *From Accountability to Attrition*, NJ21st (Jan. 7, 2026), https://perma.cc/L839-3YDP (noting board members use the Act to "silence dissent and disparage each other").

Third, ethics proceedings are not rare. *SBA List*, 573 U.S. at 164. Complaints have risen to over 100 in 2025,[2] and they often involve board members' speech; the state's brief cites fifteen relevant decisions, the oldest from 2021 and five from 2025. *See generally* Opp'n 11–27.

Nazarene's credible threat of enforcement establishes an injury in fact that is traceable to the state and redressable by this Court. Br. 23. She thus has pre-enforcement standing to bring this lawsuit.

## II. Nazarene is likely to succeed on the merits.

Nazarene is also likely to succeed on the merits because she has satisfied her burden to show the state's interpretation of the Act restricts protected speech, and the state failed to justify its speech restriction. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 180 n.5 (3d Cir. 2023).

### A. The School Ethics Act restricts protected speech.

The state's arguments that its interpretation of the Act does not restrict protected speech lack merit. It asserts it does not restrict personal speech, Opp'n 22, but it defines personal speech as limited to speech unrelated to the board, 2022 Advisory Op. at 3. So that leaves the Act as proscribing protected speech that mentions a member's role or comments

[2] O'Connor, *supra* ("Not all threats of ethics complaints get written up, but about 75 cases were filed in 2019 and at least 101 in 2025, according to the NJSBA.").

on board issues—such as Nazarene's intended speech, Compl. ¶ 78. The state's interpretation thus restricts protected speech. *See* Opp'n 15–17.

The state next argues it restricts only Nazarene's official speech and can "regulate speech made in the course of official duties." Opp'n 22 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 418, 422 (2006)). But speaking on social media is not within Nazarene's duties, so it remains private—and protected—even when it concerns the board or her role or uses public information she acquired through it. *Lane v. Franks*, 573 U.S. 228, 240 (2014). Notably, the state stops short of arguing *Garcetti* applies and fails to address how Nazarene's speech could be in her official capacity under *Lane*. It instead argues *Garcetti*'s principles "are properly analogized to this context." Opp'n 24 n.5. But it is difficult to analogize those principles because an elected board member works for the people who elected her, not the board or the state. Her speech "is neither controlled nor created in the same way that an employer controls" speech, and "there is no truly comparable analog to managerial discipline" of elected officials. *Werkheiser v. Pocono Twp.*, 780 F.3d 172, 178 (3d Cir. 2015) (cleaned up).[3]

[3] Every circuit to address the issue has doubted the principles in *Garcetti* and related government-speech cases apply to elected officials. *See Warren v. DeSantis*, 90 F.4th 1115, 1128–34 (11th Cir. 2024) (collecting cases), *vacated as moot*, 125 F.4th 1361 (11th Cir. 2025).

Finally, the state argues Nazarene "demands an enhanced level of First Amendment protection [because] she is an elected official." Opp'n 23. But Nazarene argued that her speech deserves "the highest levels of First Amendment protection" because it is "core political speech," not because of her elected status. Br. 25–26 (quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988)). She seeks no greater protection than is given to an average citizen, who certainly cannot be punished for asking questions about tax increases or regionalization online.

**B. The state failed to justify its speech restriction.**

Nazarene showed the state's interpretation restricts protected speech, so the state must "justify its restriction," *Reilly*, 858 F.3d at 180 n.5, but cannot do so. The state assumes strict scrutiny applies, Opp'n 24, and it does, *see* Br. 27–28, but the state fails on all three prongs.

First, the state fails to prove its interpretation of the Act serves a compelling interest. It asserts an interest in "public confidence," citing an unpublished opinion noting that interest's strength when placing a criminally charged teacher on leave, Opp'n 24 (citing *Jerrytone v. Musto*, 167 F. App'x 295, 301 (3d Cir. 2006)), but it lacks authority holding this interest, or that in avoiding public confusion, is compelling, Opp'n 25.

Moreover, the state cannot prove an actual problem exists and that the restriction materially alleviates it. *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993). No problem exists: the state has not shown public confidence is impaired by board members' posts. *Cf. United States v. Alvarez*, 567 U.S. 709, 726 (2012) (plurality op.) ("The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims ...."). In fact, board members discussing board matters likely *increases* public confidence because it enables effective representation of constituents by those they elect. *See Bond v. Floyd*, 385 U.S. 116, 136–37 (1966). So, if anything, the state's interpretation undermines rather than improves public confidence.

There is also no evidence the public views board members' op-eds or social media posts, with or without disclaimers, as official positions. In its brief, advisory opinion, and decisions, the state *presumes* confusion will occur. *See, e.g.*, 2022 Advisory Op. at 3 ("People in your community … would likely attribute any statement from you as being … on behalf of the Board."). But courts reject such "conclusory statements" under strict scrutiny. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803,

822 (2000). And here, it is unlikely a problem exists for school board members when no other state elected official is subject to similar restrictions.

Second, the state's interpretation is not narrowly tailored. The state, quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 452 (2015), says its interpretation of the Act only "restricts a narrow slice of speech." Opp'n 25–26. But the *Williams-Yulee* restriction left "judicial candidates free to discuss any issue with any person at any time." 575 U.S. at 452. The state's restriction here, in contrast, prevents board members from discussing ideas if they mention their board role. *See* Opp'n 15–17. That is overinclusive because it broadly curtails speech, punishing expression no reasonable person would think was on the board's behalf. *See* Br. 31 (discussing past cases).

Third, the state's interpretation is not the least restrictive means of achieving its asserted interests because it cannot negate Nazarene's three proposed alternatives, *see Playboy Ent. Grp.*, 529 U.S. at 816, one of which—interpreting the Act in a common-sense way, Br. 34—the state ignored altogether. And it fails to show the other two, applying *Lindke v. Freed*, 601 U.S. 187 (2024), and relying on more speech rather than on a speech restriction, would be ineffective.

The state argues *Lindke* is "indistinguishable" from its own test, Opp'n 28, but its test looks nothing like *Lindke*'s. For example, *Lindke* requires that officials purport to exercise state authority and affords disclaimers "a heavy (though not irrebuttable) presumption" of personal speech. 601 U.S. at 202. Conversely, the state spurns disclaimers as "futile" and treats them as serving no purpose if a board member refers to their board role or uses "we" or "our." 2022 Advisory Op. at 3; Opp'n 15.

*Lindke* also requires actual authority to speak for the government to separate private speech from speech attributable to the government. 601 U.S. at 198. The state contends this has no application here, Opp'n 28, but because that separation is the state's purported reason for its interpretation, this part of *Lindke* is directly relevant.

The state also fails to prove that more speech will be ineffective. *See* Br. 34–35. It argues the board cannot speak in real time and is unaware of all posts. Opp'n 29. But posts that impair the state's purported interests will draw the board's attention. And a board statement, even if delayed, can clarify the board's position or lack thereof.

All told, the state fails to assert an interest that is compelling, prove its speech restriction serves its asserted interest by materially

addressing an actual problem, show it is narrowly tailored, and refute Nazarene's alternatives. It has thus failed to carry its burden, so Nazarene's likelihood of success favors a preliminary injunction.

## III. Nazarene is suffering irreparable harm.

The state cannot avoid a preliminary injunction by arguing Nazarene failed to show irreparable harm because complaints against her must be put in abeyance during litigation. Opp'n 30. Delayed punishment for speech fails to undermine the presumption of irreparable injury when it is chilled, especially as First Amendment activity "can be especially time-sensitive." *Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec.* (*DSSA*), 108 F.4th 194, 204 (3d Cir. 2024) (cleaned up).

That's Nazarene's situation. She wishes to speak *now* about board matters, including regionalization. Compl. ¶ 73. Due to the Act, however, she has not spoken. Compl. ¶ 76. Abeyance fails to cure this harm. As *DSSA* clarifies, the irreparable-harm inquiry focuses on whether speech is suppressed—not whether punishment will be delayed. 108 F.4th at 204–05. Here, the state has not disavowed its authority to punish Nazarene and continues to defend enforcement actions for materially similar speech and insists those decisions correctly applied the Act. *See* Opp'n 16.

Nor, contrary to the state's argument, does it undermine Nazarene's case that she waited months to sue after the ethics complaint. Opp'n 32. While *DSSA* recognized delay can undermine an irreparable harm showing, it emphasized that "equity is contextual," 108 F.4th at 203, and the present case is distinguishable. Unlike *DSSA*—a Second Amendment case that did not presume irreparable harm and had plaintiffs who waited four months after filing their complaint before seeking a facial preliminary injunction, *id.* at 198, 203–06—Nazarene filed her complaint and as-applied preliminary injunction motion simultaneously.

Any delay in her initial filing occurred because she could not afford counsel and struggled securing pro bono help. As the Ninth Circuit recognized, courts should not "withhold preliminary relief from a constitutionally suspect government practice on the basis that an injunction should have been requested sooner." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 n.12 (9th Cir. 2013). The same is true when the delay is based on a plaintiff's good faith efforts to seek counsel. *BP Chemicals Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 264 (3d Cir. 2000). Because Nazarene is censoring herself and brought this motion as soon as practicable, she is suffering irreparable harm.

## IV. The other factors favor a preliminary injunction.

Contrary to the state's argument, an injunction would not injure the state because Nazarene seeks an as-applied injunction against the state's enforcement of the Act to silence her. Opp'n 33. New Jersey suffers no harm from being enjoined from enforcing its unconstitutional speech restriction against Nazarene, while the public interest is served by the immediate protection of her speech rights. *See Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 109 (3d Cir. 2022). This is especially true where Nazarene seeks only an as-applied injunction preventing enforcement against her. *See Schrader*, 74 F.4th at 129. As such, the public interest clearly favors a narrow injunction.

## CONCLUSION

This Court should grant the preliminary injunction motion.

Dated: January 13, 2026

Respectfully submitted,

/s/ *Greg Harold Greubel*

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