

1 LINDA MILLER SAVITT, SBN 94164
lsavitt@brgslaw.com
2 JOHN J. MANIER, SBN 145701
jmanier@brgslaw.com
3 BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 Ventura Boulevard, Eighteenth Floor
4 Encino, California 91436
T: (818) 508-3700 | F: (818) 506-4827
5

6 Attorneys for Defendants GLENDALE UNIFIED
SCHOOL DISTRICT (on behalf of itself and its BOARD
OF EDUCATION), VIVIAN EKCHIAN, Ed.D, and
7 KRISTINE TONOLI, and Defendants DARNEIKA
WATSON, Ph.D., KATHLEEN CROSS, INGRID
8 GUNNELL, SHANT SAHAKIAN, JENNIFER
FREEMON, and NAYIRI NAHABEDIAN, in their
9 individual and representative capacities as pleaded

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

12 RAY SHELTON,
13
14 Plaintiff,
15 vs.

16 GLENDALE UNIFIED SCHOOL
DISTRICT, et al.,
17 Defendants.

Case No. 2:23-cv-10427-CBM-SSC

[Hon. Consuelo B. Marshall]

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS AND/OR STRIKE
SECOND AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION
OF JOHN J. MANIER**

[Fed. R. Civ. P. 12(b)(6), (e)]

Date: October 8, 2024
Time: 10:00 a.m.
Ctrm: 8D

18
19
20
21
22 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

23 PLEASE TAKE NOTICE that on October 8, 2024, at 10:00 a.m. or as soon
24 thereafter as the matter may be heard before the Honorable Consuelo B. Marshall in
25 Courtroom 8D of the above-entitled Court, located at the First Street Courthouse,
26 350 West First Street, 8th Floor, Los Angeles, CA 90012, Defendants Glendale
27 Unified School District, on behalf of itself and the Board of Education of the
28 Glendale Unified School District (School Board or Board) (collectively GUSD or

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 the District), Vivian Ekchian, Ed.D., and Kristine Tonoli, and Defendants Darneika
2 Watson, Ph.D., Kathleen Cross, Ingrid Gunnell, Shant Sahakian, Jennifer Freemon,
3 and Nayiri Nahabedian, in their respective individual capacities and official
4 capacities as pleaded (the Official Capacity Defendants), and each of them
5 (collectively Defendants) will, and hereby do, move this Court pursuant to Fed. R.
6 Civ. P. 12(b)(6) for an Order dismissing, with prejudice, the Second Amended
7 Complaint for Injunctive/ Declaratory Relief and Damages (Dkt. No. 26) (SAC)
8 filed by Plaintiff Ray Shelton (Shelton), and Count 1, Count 2, Count 3, and Count 4
9 therein, on the grounds that the SAC fails to state a claim upon which relief can be
10 granted against Defendants, or any of them, that Defendants Ekchian, Watson,
11 Cross, Gunnell, Sahakian, Freemon, Nahabedian and Tonoli in their individual
12 capacities (collectively the Individual Defendants) are entitled to qualified immunity
13 under 42 U.S.C. § 1983, and that GUSD is entitled to sovereign immunity under the
14 Eleventh Amendment.

15 All Defendants further will, and hereby do, move this Court pursuant to Fed.
16 R. Civ. P. 12(e) for an order striking the SAC, on the grounds that Plaintiff did not
17 comply fully with this Court’s Order of July 12, 2024, requiring him to provide a
18 more definite statement. (Dkt. No. 22 at 19-21.)

19 This Motion is based on this Notice, the Memorandum of Points and
20 Authorities and Declaration of John J. Manier attached hereto, the Request for
21 Judicial Notice (RJN) submitted herewith, all pleadings and papers on file in the
22 instant action, and any other matters that may be considered by the Court at any
23 hearing on this Motion.

24 ///

25 ///

26 ///

27 ///

28 ///

1 This Motion is made following a conference of counsel pursuant to L.R. 7-3
2 which occurred on August 5, 2024.

3 DATED: September 3, 2024

BALLARD ROSENBERG
GOLPER & SAVITT, LLP

5 By: 

6 _____
7 Linda Miller Savitt
8 John J. Manier
9 Attorneys for all Defendants

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES
TABLE OF CONTENTS

		Page
1		
2		
3		
4	I. INTRODUCTION.....	10
5	II. FACTS ALLEGED IN THE SAC AND SUBJECT TO	
6	JUDICIAL NOTICE	11
7	A. The Parties, GUSD’s “Policies,” and Shelton’s Beliefs.....	11
8	B. Shelton’s Brief Speech.....	12
9	C. Dr. Watson’s Letter re: “Administrative Leave with Pay”.....	12
10	D. Principal Tonoli’s Email to Keppel Families	13
11	E. Vague Allegations of Defendants’ Involvement	14
12	F. School Board “Review” and Shelton’s Voluntary Retirement.....	15
13	G. Nonfactual Arguments About Impact of Paid Leave.....	16
14	H. Vague Allegations of Disparate Treatment.....	17
15	I. Purported Claims for Relief.....	18
16		
17		
18		
19	III. SHELTON’S SAC FAILS TO STATE A § 1983 CLAIM.	19
20	A. Shelton’s Allegations Remain Too Vague and Conclusory to	
21	Establish Actionable Conduct by Any Specific Individual.	19
22		
23	1. School Board Members	19
24	2. Dr. Ekchian, Dr. Watson, and Principal Tonoli	21
25	B. Shelton Fails to Plead Essential Elements Of His § 1983 Claims.....	22
26		
27	1. He Still Hasn’t Pleaded “Petitioning” Activity At All.	22
28	2. He Still Hasn’t Sufficiently Pleaded an Adverse Action.	23

BALLARD ROSENBERG GOLPER & SAVITT, LLP
 15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
 ENCINO, CALIFORNIA 91436

TABLE OF CONTENTS (continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

3. He Still Hasn't Sufficiently Pleaded Causation.....25

C. Shelton's Allegations Don't Overcome Qualified Immunity.....27

D. GUSD Is Absolutely Immune Under the Eleventh Amendment.....28

E. Alternatively, Shelton Fails to Allege Municipal Liability.29

F. The Conspiracy Count Fails As Well.31

IV. SHELTON'S NEW STATE-LAW CLAIM IS FATALY DEFICIENT. ..31

V. THIS COURT SHOULD STRIKE THE SAC PURSUANT TO
RULE 12(e).33

VI. CONCLUSION34

DECLARATION OF JOHN J. MANIER35

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

TABLE OF AUTHORITIES

1				
2				Page(s)
3				
4				
5	FEDERAL CASES			
6				
7	<i>American Mfrs. Mut. Ins. Co. v. Sullivan,</i>			
8	526 U.S. 40 (1999)			22
9	<i>Anderson v. Creighton,</i>			
10	483 U.S. 635 (1987)			27
11	<i>Ashcroft v. al-Kidd,</i>			
12	563 U.S. 731 (2011)			27
13	<i>Ashcroft v. Iqbal,</i>			
14	556 U.S. 662 (2009)			19, 21
15	<i>Bell Atl. Corp. v. Twombly,</i>			
16	550 U.S. 544 (2007)			19, 21
17	<i>Borough of Duryea v. Guarnieri,</i>			
18	564 U.S. 379 (2011)			22
19	<i>Burlington N. & Santa Fe Ry. v. White,</i>			
20	548 U.S. 53 (2006)			23, 28
21	<i>Central Va. Cmty. Coll. v. Katz,</i>			
22	546 U.S. 356 (2006)			28
23	<i>City & Cnty. of S.F. v. Sheehan,</i>			
24	575 U.S. 600 (2015)			27
25	<i>Dahlia v. Rodriguez,</i>			
26	735 F.3d 1060 (9th Cir. 2013) (<i>en banc</i>).....			23, 24, 27, 28
27	<i>Dodge v. Evergreen Sch. Dist. #114,</i>			
28	56 F.4th 767 (9th Cir. 2022)			23
	<i>Eng v. Cooley,</i>			
	552 F.3d 1062 (9th Cir. 2009).....			22
	<i>Garrison v. Louisiana,</i>			
	379 U.S. 64 (1964)			25

BALLARD ROSENBERG GOLPER & SAVITT, LLP
 15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
 ENCINO, CALIFORNIA 91436

TABLE OF AUTHORITIES (continued)

	Page(s)
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

Hart v. Parks,
450 F.3d 1059 (9th Cir. 2006) 31

Health Freedom Def. Fund v. Carvalho,
104 F.4th 715 (9th Cir. 2024) 29

Kama v. Mayorkas,
107 F.4th 1054 (9th Cir. 2024) 26

Keates v. Koile,
883 F.3d 1228 (9th Cir. 2018) 27, 28

Lytle v. Carl,
382 F.3d 978 (9th Cir. 2004) 29, 30, 31

McMillian v. Monroe Cnty.,
520 U.S. 781 (1997) 31

Monell v. Department of Soc. Servs.,
436 U.S. 658 (1978) 29, 30

Moore v. Garnand,
83 F.4th 743 (9th Cir. 2023) 24, 28

Moore v. Kayport Package Express,
885 F.2d 531 (9th Cir. 1989) 34

Mullenix v. Luna,
577 U.S. 7 (2015) (*per curiam*) 28

Sato v. Orange Cnty. Dep’t of Educ.,
861 F.3d 923 (9th Cir. 2017) 28

Savage v. Glendale Union High School, Dist. No. 205, Maricopa Cnty.,
343 F.3d 1036 (9th Cir. 2003) 28

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 28

St. Amant v. Thompson,
390 U.S. 727 (1968) 25

BALLARD ROSENBERG GOLPER & SAVITT, LLP
 15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
 ENCINO, CALIFORNIA 91436

TABLE OF AUTHORITIES (continued)

1				Page(s)
2				
3				
4	<i>United Steelworkers of Am. v. Phelps Dodge Corp.</i> ,			
	865 F.2d 1539 (9th Cir. 1989).....			31
5	<i>Weisbuch v. County of L.A.</i> ,			
6	119 F.3d 778 (9th Cir. 1997).....			21
7	<i>Will v. Michigan Dep’t of State Police</i> ,			
8	491 U.S. 58 (1989)			29
9	<i>Ex Parte Young</i> ,			
10	209 U.S. 123			29
11				
12	STATE CASES			
13	<i>Caldwell v. Montoya</i> ,			
14	10 Cal. 4th 972 (1995).....			32
15	<i>Katzberg v. Regents of Univ. of Cal.</i> ,			
16	29 Cal. 4th 300 (2002).....			32
17	<i>Miklosy v. Regents of Univ. of Cal.</i> ,			
18	44 Cal. 4th 876 (2008).....			32
19	<i>State of Cal. v. Superior Court (Bodde)</i> ,			
20	32 Cal. 4th 1234 (2004).....			33
21				
22	FEDERAL STATUTES AND RULES			
23	42 U.S.C. § 1983.....			2, 10, 18, 19, 22, 23, 29, 31, 32
24	Fed. R. Civ. P. 11			22
25	Fed. R. Civ. P. 12.....			1, 2, 10, 33, 34
26				
27				
28				

BALLARD ROSENBERG GOLPER & SAVITT, LLP
 15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
 ENCINO, CALIFORNIA 91436

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (continued)

Page(s)

STATE STATUTES

Cal. Gov’t Code

§ 815	32
§ 820.2	32
§ 905	33
§ 911.2	33
§ 911.4	33

OTHER AUTHORITIES

California Constitution

Article I.....	31, 32, 33
----------------	------------

United States Constitution

First Amendment	10, 22, 23, 24, 25, 28, 31
Eleventh Amendment	11, 28, 29

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 **I. Introduction**

2 This Court issued an order (Dkt. No. 22) granting Defendants’ motion to
3 dismiss Plaintiff Ray Shelton’s First Amended Complaint (FAC) (Dkt. No. 11), with
4 leave to amend, for failure to state a claim, and partially granting their motion for a
5 more definite statement. Fed. R. Civ. P. 12(b)(6), (e). Shelton’s SAC (Dkt. No. 26)
6 does not sufficiently cure the defects this Court identified, and fails to comply in
7 multiple respects with the order for a more definite statement.

8 The SAC *and* public records referenced therein reveal that after applying for
9 early retirement, Shelton spoke at a School Board meeting in opposition to
10 “transgender ideology.” A Board member later expressed sadness that a swastika
11 was in the room during the meeting. The next day, GUSD placed Shelton on *paid*
12 leave pending an investigation of misconduct allegations made by another teacher,
13 told him not to report to work until further notice, and advised him not to discuss the
14 confidential personnel matter with anyone except his union representative. Shelton’s
15 Principal also sent an email to families referencing official complaints of the actions
16 of *an unnamed teacher*, who was not currently on campus. The email indicated
17 GUSD was investigating the matter, expressed sadness for the employee’s actions,
18 assured they did not represent GUSD’s values, and stated hate speech *and symbols*
19 have no place in the community. The investigation concluded *Shelton displayed a*
20 *swastika at the meeting*, but GUSD closed the matter because he had already retired.

21 Shelton argues the administrative leave and email were in retaliation for his
22 *speech* at the Board meeting. Notably, the SAC now *omits* the FAC’s reference to
23 Shelton’s “choice of ... images.” (Dkt. No. 11 ¶ 84.) It reiterates the FAC’s
24 purported claims under 42 U.S.C. § 1983 for viewpoint discrimination and
25 retaliation in violation of the First Amendment and for conspiracy. It adds a fourth
26 count for violation of the California Constitution’s free speech provision. And it
27 adds GUSD and its Board (which aren’t separate entities) as Defendants, in addition
28 to the eight persons previously sued in their individual and official capacities.

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 The SAC, like the FAC, fails to state any claim. Its vague and conclusory
2 allegations establish no actionable conduct by any Defendant, still identify no
3 petitioning activity, allege no adverse employment action, and state no facts
4 showing *protected speech* was a substantial or motivating factor for any action.
5 GUSD is absolutely immune under the Eleventh Amendment, and Shelton again
6 fails to establish municipal liability—let alone any actionable “conspiracy.” The
7 state-law claim suffers from a host of fatal flaws. This time, dismissal *with* prejudice
8 is warranted—as is an order striking the SAC because it fails in multiple respects to
9 provide the more definite statement this Court ordered. (Dkt. No. 22 at 19-21.)

10 **II. Facts Alleged in the SAC and Subject to Judicial Notice**

11 **A. The Parties, GUSD’s “Policies,” and Shelton’s Beliefs**

12 GUSD employed Shelton for 25 years as a fifth-grade teacher at the Mark
13 Keppel Visual and Performing Arts Elementary School (Mark Keppel, Keppel, or
14 the School). (SAC ¶¶ 7, 13-16, 37-40.) Shelton submitted a Certificated Retirement
15 Form to GUSD on March 3, 2023, and requested early retirement effective June 9,
16 2023. (Req. for Jud. Notice (RJN) ¶ 1, Ex. A.) At all relevant times, Keppel’s
17 Principal was Kristine Tonoli. (FAC ¶ 33.) Vivian Ekchian, Ed.D., now retired, was
18 GUSD’s Superintendent. (*See id.* ¶¶ 26-29.) The current Superintendent, Darneika
19 Watson, Ph.D., was GUSD’s Chief Human Resources (HR) and Operations Officer.
20 (*Id.* ¶¶ 30-32.) Kathleen Cross, Ingrid Gunnell, Shant Sahakian, Jennifer Freemon,
21 and Nayiri Nahabedian all were “Board Members.” (*Id.* ¶¶ 17-22.)

22 Shelton taught his students that “the human species has two sexes”—male and
23 female—which he describes as his “belief” and a “fact” attacked by “politically-
24 motivated activists,” including Defendants, who believe “there are more than two
25 sexes” and “biological sex itself is a social construct.” (SAC ¶¶ 41-43.) The SAC
26 alleges “these activist-driven ideas have started creeping into official GUSD policy”
27 (*id.* ¶ 44), which it describes and labels as harmful “Sex-Change Policies” and as
28 implicating educators’ free speech rights (*id.* ¶¶ 45-49-52).

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 **B. Shelton’s Brief Speech**

2 Shelton attended a School Board meeting on April 18, 2023—about six weeks
3 after his retirement request (RJN ¶ 1, Ex. A)—“as a private citizen” and community
4 member. (SAC ¶¶ 8, 53.) During a “public comment portion of the meeting,”
5 Shelton gave “a short speech” stating in full as follows:

6 Two plus two equals four. The world is not flat. Boys have penises.
7 Girls have vaginas. Gender is binary and cannot be changed. Biology is
8 not bigotry. Heterosexuality is not hate. Gender confusion and gender
9 delusion are deep psychological disorders. No caring profession or
10 loving parent would ever support the chemical poisoning or surgical
11 mutilation of a child’s genitalia. Transgender ideology is anti-gay. It is
12 anti-woman and is anti-human. It wants to take away women’s sports,
13 women’s rights, women’s achievements. It is misogyny writ large. And
14 I can say this also as a gay man, the gay people d-- ... [*speech ends*].

15 (RJN ¶ 2; SAC ¶¶ 8, 54-59.) More than three hours later, Board Member Ingrid
16 Gunnell opened her remarks by stating that “*on this Holocaust Remembrance Day,*
17 and moving towards Armenian Genocide Recognition on Monday, that it very much
18 saddens me that *there was a swastika in this board room today,* and I appreciate the
19 swift action that was taken against this hate symbol.” (RJN ¶ 3, italics added.)

20 **C. Dr. Watson’s Letter re: “Administrative Leave with Pay”**

21 When Shelton “arrived to teach his class the morning after the meeting” (*i.e.*,
22 April 19, 2023), Principal Tonoli allegedly “pulled” him “out of his class and
23 directed him to Tonoli’s office,” where an *unnamed* “GUSD administrator sat
24 waiting.” (SAC ¶ 60.) The administrator handed Shelton “a letter from Defendant
25 Watson” and read it aloud, “but refused to provide any additional information or
26 answer” Shelton’s questions. (*Id.* ¶ 61.) This hand-delivered letter states in part:

27 This letter serves to confirm the District’s decision to place you on
28 Administrative Leave with Pay effective April 19, 2023. The purpose

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 of this leave is to allow the District time to conduct its investigation
2 into allegations of misconduct made by another teacher in the Glendale
3 Unified School District. [¶] This Administrative Leave will remain in
4 effect pending the completion of the District’s investigation and the
5 District’s notice to you. You are not to report to school or any other
6 District site during the Administrative Leave except to Payroll or
7 Human Resources until further notice. You will continue to receive
8 your pay during this leave. If you receive a paycheck, it will be mailed
9 ... unless you notify Payroll in writing to hold your paycheck for
10 pickup (you must personally pick up your own paycheck with proper
11 ID) [¶] **You are to remain available to the District by telephone
12 or video conference during your regular work hours You are
13 tentatively scheduled to meet with Human Resources
14 Representatives on Tuesday, April 25, 2023, from 10:30 AM to
15 11:00 AM, when you will be provided with more information on
16 the allegations. You have the right to have a union representative
17 at this meeting, held in the Human Resources Office.** [¶] Because
18 this is a confidential personnel matter, we would recommend that you
19 not discuss this investigation or any of the information related to it with
20 your co-workers or others, other than your representative. Further, all
21 information from this investigation should be kept confidential....

22 (RJN ¶ 4, Ex. B, original emphasis; SAC ¶¶ 61-64.)

23 **D. Principal Tonoli’s Email to Keppel Families**

24 The SAC alleges that “Defendant Tonoli published an email to the entire
25 Mark Keppel community later that same day.” (SAC ¶ 65.) The text of this email,
26 addressed “Dear Keppel Families” from Ms. Tonoli, stated in part:

27 We have received official complaints about the actions of one of our
28 Keppel teachers at the Glendale Unified Board of Education meeting

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 last night. Our district has processes in place to investigate and address
2 these complaints and is following up immediately. As this is a
3 personnel matter, I am unable to share additional information, but I can
4 confirm that the teacher is not currently on campus. [¶] I am deeply
5 saddened by our employee’s actions and assure you they do not
6 represent the values of our Keppel and our Glendale Unified
7 community.... Student and employee safety is and always will be our
8 top priority. We will continue to foster a positive culture that
9 emphasizes the safety and wellbeing of all of our students and staff. [¶]
10 Hate speech and hate symbols have no place in our community....

11 (RJN ¶ 5, Ex. C; SAC ¶¶ 65-69.) The SAC argues the email was “false and
12 inflammatory,” but identifies no portions that fit this depiction. (SAC ¶ 71.)

13 **E. Vague Allegations of Defendants’ Involvement**

14 The SAC argues the Board Members, Dr. Watson, and Dr. Ekchian
15 “conspired” with Principal Tonoli “regarding the content and publishing of the
16 email.” (SAC ¶ 70.) The lone basis for this assertion is the *unsupported contention*
17 that such “public statements of a sensitive and controversial nature ... require
18 approval by the District before they are disseminated to the entire community.” (*Id.*)

19 The SAC argues all named Defendants are responsible for placing Shelton on
20 administrative leave. (SAC ¶ 74.) As to the Board Members, the SAC only asserts
21 they “witnessed” Shelton’s speech and somehow “set in motion the chain of events
22 leading to his administrative leave the very next morning”—with *no factual*
23 *information* describing any supposed setting in motion. (*Id.*) The SAC identifies
24 Principal Tonoli as Shelton’s “direct supervisor” and alleges—with no supporting
25 factual basis—that she “had authority and responsibility for governing and
26 regulating Mark Keppel teachers.” (*Id.* ¶¶ 34, 74.) It identifies Dr. Watson as “head
27 of Human Resources” and author of the letter placing Shelton on leave. (*Id.* ¶¶ 31-
28 32, 74.) And it identifies Dr. Ekchian as the “chief executive officer” and argues she

1 was “responsible for taking disciplinary actions against teachers on the District’s
2 behalf”—but alleges *no facts* supporting this description of her responsibility, *or*
3 that the paid administrative leave was “disciplinary.” (*Id.* ¶¶ 27-29, 61-64, 74.)

4 **F. School Board “Review” and Shelton’s Voluntary Retirement**

5 According to the SAC, “GUSD’s general counsel informed plaintiff’s
6 counsel” that any “decision to reinstate him—while normally in the hands of Human
7 Resources—had to be made by the School Board.” (SAC ¶ 72.) The SAC alleges
8 that in “early June 2023”—several weeks after Shelton was removed from his
9 classroom and placed on paid leave—the School Board “reviewed” these decisions
10 in some unspecified context, after which it somehow “sanctioned” the actions *in*
11 *some unspecified manner* “and refused to reinstate him or reverse his [so-called] ban
12 from the school or any other district site.” (*Id.* ¶ 73.) The SAC belatedly admits that
13 Shelton “retired at the end of the school year” (*id.* ¶ 96)—*i.e.*, June 9, 2023, after
14 submitting his paperwork on March 3, 2023 (RJN ¶ 1, Ex. A).

15 GUSD issued Shelton letters dated October 10, 2023, identifying persons who
16 formally complained to HR and “alleged that [Shelton] brought a swastika into the
17 Board of Education meeting,” which “is directed at Jewish women.” (RJN ¶ 6, Exs.
18 D, E.) The letters further stated:

19 In reviewing the evidence and from witness statements, the District
20 determined that you did attend Glendale Unified’s April 18, 2023
21 Board of Education meeting with a placard depicting a swastika
22 arranged from four Progress Pride Flags that you held up and waved for
23 others in attendance to see. Swastikas are a recognized form of hate
24 speech against Jewish people.

25 (*Id.*) The letter quoted GUSD’s non-discrimination policy, and then concluded: “As
26 you are no longer employed with Glendale Unified, the District finds this matter to
27 be closed.” (*Id.*)

28 ///

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 **G. Nonfactual Arguments About Impact of Paid Leave**

2 The SAC *argues* that being placed on paid leave, “as outlined” in Dr.
3 Watson’s letter, “barred” Shelton “from school-related activities and events,” “kept”
4 him “from returning to his classroom for the rest of the school year,” and “barred”
5 him “from District sites until ‘further notice’”—including from “his students’ fifth-
6 grade graduation,” which “he deeply cherished” and describes as “a devastating
7 loss.” (SAC ¶¶ 75-76.) However, the SAC admits this letter only told Shelton “not
8 to *report* to school or to any other GUSD site until further notice.” (*Id.* ¶ 62, italics
9 added; RJN ¶ 4, Ex. B.) Shelton offers *no factual basis* for arguing he was “barred”
10 from attending—or asking to attend—his students’ graduation or similar events.

11 The SAC repeats earlier allegations that by placing him on leave, unspecified
12 “Defendants” attacked Shelton’s “credibility as an educator” and “sullied his
13 personal and professional reputation,” and now argues the leave and the Principal’s
14 email “publicly humiliated” him. (SAC ¶¶ 77-78.) It also contends Shelton lost
15 “opportunities to develop his skills as an educator” and “mentor his students because
16 of the forced time away from his classroom” (*id.* ¶ 79)—but fails to provide a more
17 definite statement on this point, as ordered (Dkt. No. 22 at 19).

18 The SAC states Shelton’s “personnel file now contains the suspension [*sic*]
19 letter and other [*unspecified*] derogatory information” that “is harming” his
20 prospective employment prospects and “currently preventing him from exploring
21 opportunities and further developing his teaching skills in all other educational
22 environments and jurisdictions.” (SAC ¶ 80.) But the SAC *does not allege* that
23 Shelton has made any attempt to obtain new employment, or that prospective
24 employers may access documents in his personnel file. (*Id.*)

25 The SAC blanketly alleges all Defendants “sent a message to all GUSD
26 employees that speaking on matters of public concern that conflict with
27 [*unspecified*] District heterodoxy will be met with punishment, including suspension
28 and termination,” that they acted “with the intent to chill” the speech of Shelton and

1 “other employees who disagree with GUSD’s radical, child-harming policies,” and
2 that these “actions were reasonably likely to deter” someone in Shelton’s position
3 “from speaking out against these policies.” (SAC ¶¶ 82-83.) Again, the SAC fails to
4 provide a more definite statement on this point, as ordered. (Dkt. No. 22 at 19-20.)

5 **H. Vague Allegations of Disparate Treatment**

6 The SAC alleges employees speaking “in favor of these policies have never
7 been punished or disciplined in any way.” (SAC ¶ 84.) But the only example
8 remains *one* third-grade teacher (at an *unspecified* school) who supposedly showed
9 her class “content” identified only as “sexually inappropriate” and “in furtherance of
10 Defendants’ policies,” and which caused “a public outcry by parents.” The SAC
11 argues the School Board “publicly supported” this teacher because it “defended her
12 [*unspecified*] actions” in an *unspecified* manner. (*Id.* ¶ 85.)

13 Other teachers, identified only as having “supported the Sex-Change
14 Policies,” allegedly subjected Shelton to “a public campaign of harassment and
15 personal attacks,” which the SAC describes as “rumors” spread “in person and on
16 social media” that Shelton “was a bigot and a Nazi,” with one post ostensibly
17 implicating Shelton “of ‘genocide’—a common trope used against individuals who
18 want to protect children from the types of policies enacted by GUSD.” (SAC ¶ 86.)
19 *The SAC does not attach or otherwise quote any social media posts*, but nevertheless
20 argues the “harassment” and the Principal’s email somehow “caused” Shelton to
21 experience “homophobic slurs” and “death threats” from unidentified sources. (*Id.* ¶
22 87.) The SAC alleges that Shelton “reported” this conduct to GUSD, which “took no
23 action” on the ground that the conduct “took place outside of school hours and,
24 therefore, did not violate any policies or rules”—a description Shelton contends
25 applies to “his speech” at a School Board meeting and “shows that GUSD
26 selectively punished [*sic*]” him. (*Id.* ¶¶ 88-91. *But see* RJN ¶ 6, Exs. D, E.)

27 The SAC accuses the School Board of retaliating against “non-employee
28 individuals and families who opposed the Sex-Change Policies” (SAC ¶ 92) and of

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 having “explicitly changed the rules of its meetings to prevent individuals from
2 being able to voice their opposition to its policies ... in direct retaliation for these
3 individuals’ previous efforts to convince the Board to change the Sex-Change
4 Policies.” (*Id.* ¶ 93.) The only identified rule changes were to allow only “one
5 person to speak on a topic,” after “several people spoke out per meeting against the
6 Sex-Change Policies,” limiting speaking time from five minutes to three, and
7 banning “speakers from bringing signs, including a single sheet of paper, because
8 they were popular with people who spoke out against the Sex-Change Policies.”
9 (*Id.*) The SAC does not specify whether this rule change was made before or after
10 Shelton’s speech, nor does it provide any examples of “signs” or “single sheets of
11 paper”—just as it deletes prior references to Shelton’s own “choice of ... images”
12 (Dkt. No. 1 ¶ 73; Dkt. No. 11 ¶ 84; *see* § III.B.3, *infra.*)

13 The SAC reiterates one final, vague anecdote about “a special needs GUSD
14 student and her mother” who allegedly “attended a Board meeting and voiced their
15 opposition to these policies” *in some unspecified manner and time.* (SAC ¶ 84.) The
16 student supposedly faced abuse and harassment from her teacher “and the
17 [*unspecified*] school,” but the only detail is the “teacher and principal ... calling her
18 a ‘bigot’ as well as targeting her disproportionately for [*unspecified*] discipline.”
19 (*Id.*) The SAC claims “Defendants took no action against the teacher because she
20 was aligned with their ideological beliefs,” but does not allege such action was
21 requested. (*Id.*) Nor does it provide the information that ostensibly causes Shelton to
22 believe any of this happened, as this Court ordered. (Dkt. No. 22 at 20.)

23 I. Purported Claims for Relief

24 Shelton originally purported to state two counts under § 1983 for violation of
25 speech and petition rights. (Dkt. No. 1 ¶¶ 69-86.) The FAC added a third count for
26 conspiracy (Dkt. No. 11 ¶¶ 100-07), and the SAC adds a *fourth* count under the
27 California Constitution’s free speech clause (SAC ¶¶ 123-30), plus two new
28 defendants—GUSD and the Board (which are not separate entities).

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 **III. Shelton’s SAC Fails to State a § 1983 Claim.**

2 “To survive a motion to dismiss, a complaint must contain sufficient *factual*
3 *matter*, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
4 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (italics added) (quoting *Bell Atl. Corp.*
5 *v. Twombly*, 550 U.S. 544, 570 (2007)). It must allege “factual content that allows
6 the court to draw the reasonable inference that the defendant is liable for the
7 misconduct alleged.” *Id.* This standard does not demand detailed factual assertions,
8 but requires “more than an unadorned, the-defendant-unlawfully-harmed-me
9 accusation,” and more than “facts that are ‘merely consistent with’ a defendant’s
10 liability” or that offer the “sheer possibility that a defendant has acted unlawfully.”
11 *Id.* It “will not do” for a pleading to offer mere “labels and conclusions” or “a
12 formulaic recitation of the elements of a cause of action,” *Twombly*, 550 U.S. at 555,
13 or “naked assertion[s]” without “further factual enhancement,” *id.* at 557. This Court
14 need not accept “legal conclusions” or threadbare, conclusory recitals “of the
15 elements of a cause of action.” *Id.* at 555.

16 **A. Shelton’s Allegations Remain Too Vague and Conclusory to**
17 **Establish Actionable Conduct by Any Specific Individual.**

18 This Court ruled that the FAC’s “conclusory and unsupported” allegations
19 were insufficient to state a claim against any of the Board Defendants (Dkt. No. 22
20 at 4-5), and that its allegations as to Defendants Tonoli, Ekchian, and Watson failed
21 to “give these Defendants ‘fair notice’ of what claims are against each defendant
22 specifically, or what actions of each defendant give rise to each cause of action
23 against them” (*id.* at 5, citations omitted). The SAC does not cure these fatal defects,
24 and should be dismissed with prejudice as to all Individual Defendants.

25 **1. School Board Members**

26 The SAC now contends the Board Members “set in motion the chain of
27 events leading to [Shelton’s] administrative leave” the morning after his speech, but
28 pleads *no facts* to support this conclusory assertion. (SAC ¶ 74.) Notably, the SAC

1 admits any decision to “reinstate” an employee would “normally [be] in the hands of
2 Human Resources” (*id.* ¶ 72)—which contradicts the notion that the Board
3 “normally” has any role in decisions to place employees on leave in the first place.

4 The SAC alleges the Board Members “conspired” in Principal Tonoli’s email,
5 based solely on the bare, new assertion that “public statements of a sensitive and
6 controversial nature ... require approval by the District” before dissemination,
7 which “necessarily includes the School Board.” (SAC ¶ 70.) *The SAC identifies no*
8 *factual basis for this new argument*, even though GUSD’s policies are a matter of
9 public record. *See, e.g.,* https://www.gusd.net/8454_3 (last visited Sept. 3, 2024).

10 The SAC newly alleges GUSD’s general counsel stated the Board would have
11 to make any decision to “reinstate” Shelton, “due to the highly publicized nature” of
12 what it baselessly calls his “punishment.” (SAC ¶ 72.) The SAC contends the Board
13 “reviewed” these decisions in “early June 2023,” but “sanctioned” them *in some*
14 *unspecified manner* “and refused to reinstate him or reverse his ban.” (*Id.* ¶ 73.) But
15 these new allegations raise many questions, answer none, and fail to state a claim.

16 The SAC violates this Court’s order requiring Shelton to state *when his leave*
17 *and his employment ended* (Dkt. No. 22 at 20), except to admit he “retired at the end
18 of the school year” (SAC ¶ 96)—which his judicially-noticeable retirement request
19 reveals was June 9, 2023 (RJN ¶ 1, Ex. A). The SAC also evades alleging whether
20 the Board’s “early June” review, or its supposed decision not to “reinstate him or
21 reverse his ban,” occurred before or after Shelton’s retirement date. (*Id.* ¶ 73.) In
22 fact, GUSD’s letter of October 10, 2023 determined he “held up and waved” a
23 placard depicting a swastika at the April 18, 2023 Board meeting, but “closed” the
24 matter because Shelton had retired four months earlier. (RJN ¶ 6, Exs. D, E.)
25 Shelton cannot further amend his allegations in good faith to allege the Board took
26 any action against him *before* he officially retired.

27 Moreover, Ninth Circuit precedent *explicitly precludes* Shelton from basing
28 his claim against the Board Members on their alleged refusal to “reinstate him” or

1 “overrule” his administrative leave or supposed “ban.” *Weisbuch v. County of L.A.*,
2 119 F.3d 778, 781 (9th Cir. 1997) (rejecting argument that board members “refused
3 to overrule” demotion “and reinstate” plaintiff, “because it would always permit an
4 ‘end run’ around *Monell* ...” and impermissibly “smuggle *respondeat superior*
5 liability into section 1983 liability”) (cleaned up); *see* § III.E, *infra*.

6 Shelton provides no support for the notion that individual Board Members
7 may be personally liable for the Board’s collective action. And even if that were so,
8 he continues to offer *mere conclusions*, not facts, which are insufficient to establish
9 a claim against any Board Member. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S.
10 at 555-557; *Weisbuch*, 119 F.3d at 781. For these and other reasons (*see* § III.B, C,
11 E, F, & § IV, *infra*), the Board Defendants should be dismissed with prejudice.

12 **2. Dr. Ekchian, Dr. Watson, and Principal Tonoli**

13 The SAC’s only basis for accusing Drs. Ekchian and Watson of conspiring in
14 Principal Tonoli’s email is the same *unsupported* assertion as for the Board
15 Defendants—“public statements of a sensitive and controversial nature ... require
16 approval by the District” before dissemination, which “necessarily includes ... its
17 chief executive officer” and “head of Human Resources.” (SAC ¶ 70.) Such
18 conclusions are insufficient factual matter to withstand dismissal under *Iqbal* and
19 *Twombly*. (*See* § III.A.1, *supra*.) Nor does the Principal’s email establish an adverse
20 employment action. (*See* § III.B.2, *infra*.)

21 The SAC also fails to support Shelton’s assertion that Dr. Ekchian was
22 responsible for his paid administrative leave. It merely *argues* that as “chief
23 executive officer,” she was “responsible for taking disciplinary actions against
24 teachers on the District’s behalf.” (SAC ¶ 74.) But the SAC alleges *no facts* to
25 support labeling paid leave pending an investigation a “disciplinary action,” let
26 alone that the Superintendent participates in paid leave decisions. (*Id.*)

27 The SAC *argues* Dr. Watson was responsible for Shelton’s leave because she
28 “was head of Human Resources and authored the letter placing [him] on leave,” and

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 that Principal Tonoli was also responsible because she was “Shelton’s direct
2 supervisor” with “authority and responsibility for governing and regulating Mark
3 Keppel teachers.” (SAC ¶¶ 30-35, 74.) But the SAC alleges *no facts* to connect these
4 premises to the conclusion that either Dr. Watson or Principal Tonoli—let alone
5 both—participated in the paid leave *decision*, which was not an adverse action in
6 any event. (*See* § III.B.2, *infra*.)

7 Shelton originally filed this action nearly nine months ago. He has had more
8 than enough time to marshal factual support for his allegations against each
9 individual he sues as a Defendant. *See* Fed. R. Civ. P. 11(b)(3). Instead, he
10 continues to offer conclusory assertions that are insufficient under *Iqbal* and
11 *Twombly* to state a claim against *any* Defendant in their individual capacity. The
12 action against the Individual Defendants should be dismissed with prejudice.

13 **B. Shelton Fails to Plead Essential Elements Of His § 1983 Claims.**

14 Shelton’s § 1983 claims require him to plead and prove he was deprived of a
15 First Amendment right “under color of state law.” *American Mfrs. Mut. Ins. Co. v.*
16 *Sullivan*, 526 U.S. 40, 49-50 (1999). He bears the burden of proving he spoke or
17 petitioned (1) “on a matter of public concern” and (2) “in the capacity of a private
18 citizen and not a public employee,” and (3) the government “took adverse
19 employment action” in which the speech or petitioning “was a substantial or
20 motivating factor.” *Eng v. Cooley*, 552 F.3d 1062, 1070-71 (9th Cir. 2009) (cleaned
21 up, citations omitted), *cert. denied*, 558 U.S. 1110 (2010); *see Borough of Duryea v.*
22 *Guarnieri*, 564 U.S. 379, 398-99 (2011) (petition clause claims).

23 **1. He Still Hasn’t Pleaded “Petitioning” Activity At All.**

24 Shelton “gave a short speech” at the School Board meeting, but has *never*
25 *alleged* that he petitioned GUSD, its Board, or any other entity to redress
26 grievances. (SAC ¶¶ 54-57, 83; RJN ¶ 2.) This Court already found Shelton’s
27 identical allegations *insufficient* to show “that his causes of action arise under the
28 petition clause.” (Dkt. No. 22 at 9.) Once again, Shelton alleges *no facts* to support

1 his conclusory assertion that his “speech” constituted a “petition.” (SAC ¶¶ 98, 100,
2 108, 125-26.) The third time is not the charm. This Court should dismiss Shelton’s
3 claims with prejudice to the extent they purport to arise under the petition clause.

4 **2. He *Still* Hasn’t Sufficiently Pleaded an Adverse Action.**

5 The Ninth Circuit has defined an adverse employment action under § 1983 as
6 one that was “reasonably likely to deter employees from engaging in protected
7 activity.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir. 2013) (*en banc*), *cert.*
8 *denied sub nom. City of Burbank v. Dahlia*, 571 U.S. 1198 (2014). This standard is
9 “derived” from Title VII cases, *id.* at 1079, under which a plaintiff “must show that
10 a reasonable employee would have found the challenged action materially adverse.”
11 *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006). “Minor annoyances”
12 are “normally” insufficient, because “it is important to separate significant from
13 trivial harms.” *Id.*; *cf. Dahlia*, at 1079 (depending on the circumstances, “minor acts
14 of retaliation can infringe on an employee’s First Amendment rights”) (cleaned up).

15 The Ninth Circuit has held “that, under some circumstances, placement on
16 administrative leave could constitute an adverse employment action.” *Dahlia*, at
17 1078. The *Dahlia* plaintiff “was placed on administrative leave pending discipline”
18 after he participated in an internal affairs investigation. *Id.* at 1064-65. He alleged
19 “that administrative leave prevented him from taking the sergeant’s exam, required
20 him to forfeit on-call and holiday pay, and prevented him from furthering his
21 investigative experience.” *Id.* at 1079. The court found these impacts plus “the
22 general stigma resulting from placement on administrative leave appear ‘reasonably
23 likely to deter employees from engaging in protected activity.’” *Id.* (citation
24 omitted); *see Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 779-80 (9th Cir.
25 2022) (triable issue where principal told plaintiff “needed to use ‘better judgment’
26 and not have his MAGA hat,” swore and called him a “racist,” “bigot,”
27 “homophobe,” and “liar,” and suggested “disciplinary action” which could be
28 “reasonably interpreted ... as a threat against his employment”).

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 This Court concluded the FAC’s allegations were insufficient to establish
2 Shelton’s administrative leave amounted to an adverse employment action. (Dkt.
3 No. 22 at 10.) The SAC fares no better.

4 As with Shelton’s earlier pleadings, the SAC vaguely refers to “disciplinary
5 measures” but *never identifies any that were imposed* (SAC ¶¶ 25, 28-29, 63), and
6 instead alleges Shelton was “in serious fear of discipline and that his employment
7 was in danger” (*id.* ¶ 67). This is a tacit concession *Shelton was never disciplined*.

8 The SAC admits Shelton was paid while on administrative leave (SAC ¶ 62),
9 and alleges no lost pay or promotional opportunities—similar to the FAC (*see* Dkt.
10 No. 22 at 10) and contrary to *Dahlia*, 735 F.3d at 1079. Also like the FAC, the SAC
11 does not allege the investigation was an adverse action—nor does it describe the
12 investigation itself. (*See* SAC ¶¶ 62-67.) This is an implicit concession that even an
13 allegedly retaliatory investigation does not “per se” violate the First Amendment by
14 itself. *Moore v. Garnand*, 83 F.4th 743, 752-53 (9th Cir. 2023).

15 The SAC repeats the allegation that Shelton “lost opportunities to develop his
16 skills as an educator and to mentor his students.” (SAC ¶ 79.) But as with the FAC,
17 Shelton “provides no further specific allegations about what those opportunities
18 were or how his leave prevented him from taking those opportunities” (Dkt. No. 22
19 at 10 n.3)—*in violation of this Court’s order granting a more definite statement* (*id.*
20 at 19). Shelton’s vague and conclusory assertions literally could be applied to *every*
21 instance a teacher is placed on administrative leave—contrary to *Dahlia*’s holding
22 that such a leave “*could*” be an adverse action “*under some circumstances*” as
23 opposed to all circumstances. *Dahlia*, 735 F.3d at 1078 (*italics added*).

24 This Court also ordered Shelton to provide a more definite statement as to
25 which Defendants “did not allow [him] to return to his classroom and barred him
26 from graduation.” (Dkt. No. 22 at 19.) At most, however, the SAC *infers* that
27 Shelton was “barred ... from graduation” from Dr. Watson’s letter, which actually
28 told him “*not to report* to school or any other GUSD site until further notice.” (SAC

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 ¶ 62, italics added; RJN ¶ 4, Ex. B.) The SAC alleges *no facts* suggesting an
2 unremarkable directive “not to report” to the workplace during a paid leave is
3 somehow tantamount to a restraining order barring the employee from the premises
4 *for all purposes*, including graduation ceremonies and the like.

5 Shelton is once again left with Principal Tonoli’s email, which he depicts as
6 making accusations against him personally (SAC ¶ 66), even though *the email never*
7 *identified him by name*. (RJN ¶ 5, Ex. C.) The email thus did not reveal Shelton’s
8 “personnel matter.”* And the SAC fails to provide the Court-ordered more definite
9 statement on how this would have been “unlawful” (Dkt. No. 22 at 19), but merely
10 notes that *Dr. Watson’s* letter “advised” him that the matter was “confidential” and
11 “should not” be discussed (SAC ¶ 64; RJN ¶ 4, Ex. B)—a far cry from showing
12 illegality. Shelton again fails to sufficiently plead any adverse employment action.

13 3. He *Still* Hasn’t Sufficiently Pleaded Causation.

14 Shelton also has not cured the FAC’s failure to “allege sufficient facts
15 showing Defendants’ actions were taken *because of* Plaintiff’s speech.” (Dkt. No. 22
16 at 11, italics added.) He again alleges *no* “non-conclusory facts about Ekchian or the
17 Board Defendants’ conduct at all,” or facts “suggesting” Dr. Watson’s letter or
18 Principal Tonoli’s email were issued “in retaliation for his speech.” (*Id.*)

19 The SAC argues “Defendant Tonoli’s email was a tacit admission that
20 Defendants’ conduct against Mr. Shelton was in direct retaliation for the personal
21 views he expressed at the school board meeting.” (SAC ¶ 68.) *But that email did not*
22 *mention Shelton or his expression of views*. (RJN ¶ 5, Ex. C.) It only confirmed
23 “official complaints” about an unnamed teacher’s “actions,” and stated “hate speech
24

25 * The email also addressed a matter of public interest—just as Shelton argues his
26 own speech did—and merits the highest First Amendment protection. *See St. Amant*
27 *v. Thompson*, 390 U.S. 727, 731 (1968) (speech imputing criminal conduct to public
28 official not actionable unless published with actual malice); *Garrison v. Louisiana*,
379 U.S. 64, 74-75 (1964) (“speech concerning public affairs is more than self-
expression; it is the essence of self-government”). Shelton cannot deny the public’s
right to know GUSD was investigating alleged use of hate symbols.

1 and *hate symbols* have no place in our community.” (*Id.*, italics added.) This is
2 consistent with a Board Member describing “a swastika in this board room” during
3 the meeting as a “hate symbol” (RJN ¶ 3, italics added), and *GUSD’s conclusion*
4 *that Shelton waved that swastika* (RJN ¶ 6, Exs. D, E).

5 The SAC does not allege Shelton was retaliated against for “symbols” he used
6 (RJN ¶ 2; SAC ¶¶ 8, 54-59), or that Principal Tonoli even attended the Board
7 meeting or otherwise learned about Shelton’s “short speech” (SAC ¶¶ 53-69, 74)—
8 and it alleges no complaints about that relatively anodyne speech (RJN ¶ 2).
9 Conversely, the SAC *conspicuously deletes* prior references to Shelton’s “choice of
10 ... images.” (*Compare* SAC ¶ 99 with Dkt. No. 1 ¶ 71 and Dkt. No. 11 ¶ 84.) The
11 SAC was filed *after* two meet-and-confer letters pursuant to Defendants’ prior Rule
12 12 motions both attached photos of Shelton displaying a placard of “Progress Pride”
13 flags arranged to form a swastika. (Dkt. No. 10 at 34, 36; Dkt. No. 16 at 35-36, 39.)
14 Shelton tacitly concedes that *he is not basing his claims on his use of “images” or*
15 *“symbols” as stated by the Principal* (RJN ¶ 5, Ex. C), and that *it not would have*
16 *violated his free speech rights* to place him on paid leave pending an investigation of
17 complaints that he displayed a swastika at a School Board meeting, or to describe
18 the swastika (as opposed to Shelton’s speech) as a symbol of “hate.”

19 The SAC also alleges *no facts* to support any suggestion that the Principal’s
20 email referred to his *verbal speech* at the Board meeting, as opposed to his choice of
21 symbols—and *no facts* to support the notion that his administrative leave *or* the
22 Principal’s email were substantially motivated by his verbal speech. To the contrary,
23 Dr. Watson’s letter referred to another teacher’s “allegations of misconduct” (RJN ¶
24 4, Ex. B), which evidently referred to Shelton displaying a swastika (*id.* ¶¶ 3, 6, Exs.
25 D, E), and was not a plausible reference to his *choice of words* (*id.* ¶ 2).

26 Under these circumstances, “temporal proximity cuts both ways,” at best, and
27 is insufficient, without more, to establish causation. *See Kama v. Mayorkas*, 107
28 F.4th 1054, 1060 (9th Cir. 2024) (if “an adverse action follows on the heels of *both*

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 a protected activity *and* an independent reason for adverse action,” temporal
2 proximity may not establish retaliation under Title VII) (original italics). Because
3 the SAC does not plead sufficient facts to establish petitioning activity, an adverse
4 action (even in the aggregate), *or* causation, it should be dismissed with prejudice.

5 **C. Shelton’s Allegations Don’t Overcome Qualified Immunity.**

6 This Court denied the Individual Defendants’ previous motion based on
7 qualified immunity, “without prejudice to renewal,” because it granted leave for
8 Shelton to “allege sufficient facts to state a claim.” (Dkt. No. 22 at 17.) Defendants
9 submit Shelton has failed to allege such facts—but *even if* this Court concludes
10 otherwise, it should dismiss the Individual Defendants based on qualified immunity,
11 because the alleged constitutional violation *was not* “clearly established in light of
12 the specific context of the case.” (*Id.* at 16-17, quoting *O’Brien v. Welty*, 818 F.3d
13 920, 936 (9th Cir. 2016).) The discussion above (§ III.B, *supra*) shows Shelton has
14 not alleged sufficient facts to show that any Individual Defendant engaged in
15 conduct that “violated clearly established constitutional rights” of which the
16 Individual Defendant reasonably would have been aware in light of the specific
17 context of this case. *Keates v. Koile*, 883 F.3d 1228, 1235 (9th Cir. 2018).

18 None of the FAC’s allegations would have put any Individual Defendant on
19 notice that their personal actions caused Shelton to experience an adverse
20 employment action. The Ninth Circuit has held administrative leave “could” be an
21 adverse action “under some circumstances,” *Dahlia*, 735 F.3d at 1078, but has never
22 held as such under facts similar to those vaguely alleged in Shelton’s SAC. It is a
23 central tenet of qualified immunity that courts are “not to define clearly established
24 law at a high level of generality.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)
25 (citations omitted). Instead, the law must be “particularized” to the case’s facts, to
26 avoid converting qualified immunity into “virtually unqualified liability simply by
27 alleging violation of extremely abstract rights.” *Anderson v. Creighton*, 483 U.S.
28 635, 639-40 (1987). This is an “exacting standard,” *City & Cnty. of S.F. v. Sheehan*,

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 575 U.S. 600, 611 (2015), and requires a high “degree of specificity,” *Mullenix v.*
2 *Luna*, 577 U.S. 7, 13 (2015) (*per curiam*). Shelton’s allegations are the *polar*
3 *opposite* of “particularized,” and fail to establish any Individual Defendant was on
4 reasonable notice that placing him on *paid leave* constituted an adverse action.

5 Furthermore, the Ninth Circuit has specifically held there is no clearly-
6 established law under which an allegedly retaliatory investigation by itself may
7 violate the First Amendment. *Moore*, 83 F.4th at 752-53. And the text of Principal
8 Tonoli’s email—which never mentions Shelton by name—does not support the
9 notion that it was an adverse action at all, much less under clearly-established law.
10 *Burlington Northern*, 548 U.S. at 68; *Dahlia*, 735 F.3d at 1078; § III.B.2, *supra*.

11 The SAC’s allegations are insufficient to establish that any of the Individual
12 Defendants “violated clearly established constitutional rights” of which they
13 reasonably would have been aware under the facts alleged by Shelton. *Keates*, 883
14 F.3d at 1235. Qualified immunity is an additional basis for granting dismissal with
15 prejudice in favor of the Individual Defendants. *Id.*

16 **D. GUSD Is Absolutely Immune Under the Eleventh Amendment.**

17 The Eleventh Amendment strips “federal jurisdiction over suits against
18 unconsenting States.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).
19 Arms of the state are entitled to Eleventh Amendment sovereign immunity. *See*
20 *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 360 (2006); *Savage v. Glendale*
21 *Union High School, Dist. No. 205, Maricopa Cnty.*, 343 F.3d 1036, 1040 (9th Cir.
22 2003) (state agencies are immune under 11th amend.).

23 “State sovereign immunity does not extend to county and municipal
24 governments, *unless state law treats them as arms of the state.*” *Sato v. Orange*
25 *Cnty. Dep’t of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017) (*italics added*). The Ninth
26 Circuit has long “held that California school districts and county offices of
27 education ... are ‘arms of the state’ entitled to state sovereign immunity.” *Id.* at 926
28 (citing, *inter alia*, *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir.

1 1992)). In *Sato*, the Ninth Circuit expressly rejected the argument that this principle
2 was abrogated in 2013 by Assembly Bill No. 97, and held California school districts
3 “remain arms of the state and cannot face suit” in federal court. *Id.*

4 Shelton makes the same argument rejected in *Sato* (FAC ¶ 15), and relies on a
5 concurring opinion that calls for reassessing “whether California school districts are
6 an ‘arm of the state.’” *Health Freedom Def. Fund v. Carvalho*, 104 F.4th 715, 727
7 (9th Cir. 2024) (R. Nelson, J., concurring). *But see id.* at 726 (this was “not at issue”
8 in the appeal). Unless and until the Ninth Circuit were to expressly abrogate
9 precedents such as *Sato*, they remain binding on this Court, and confer absolute
10 Eleventh Amendment immunity on GUSD (including its Board of Education).

11 **E. Alternatively, Shelton Fails to Allege Municipal Liability.**

12 Even if GUSD were not deemed an arm of the state, it cannot be vicariously
13 liable for its employees’ alleged torts. *Monell v. Department of Soc. Servs.*, 436 U.S.
14 658, 691 (1978). Instead, municipal liability may attach only “when execution of a
15 government’s policy or custom, whether made by its lawmakers or by those whose
16 edicts or acts may fairly be said to represent official policy, inflicts the injury.” *Id.* at
17 694. The same is true of the claims against the Official Capacity Defendants, which
18 are “no different” from those against GUSD to the extent they are premised on
19 municipal liability. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989);
20 *cf. Ex Parte Young*, 209 U.S. 123, 155-56 (injunction may issue against certain state
21 officials, notwithstanding absolute 11th amend. immunity from damages).

22 The Ninth Circuit has held a plaintiff seeking to impose municipal liability
23 under § 1983 must proceed on one of three distinct theories: that a municipal
24 employee was acting (1) “pursuant to an expressly adopted official policy,” (2)
25 “pursuant to a longstanding practice or custom,” or (3) “as a ‘final policymaker.’”
26 *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004) (citation omitted). However,
27 Shelton’s SAC fails to plead sufficient facts under any of these theories—as was the
28 case with his FAC. (Dkt. No. 22 at 13-16.)

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 The SAC describes what it calls GUSD’s “Sex-Change Policies” (SAC ¶ 45),
2 but does not specify whether they were “expressly adopted” and “official,” or rather
3 “pursuant to a longstanding practice or custom.” *Lytle*, 382 F.3d at 982; *see Monell*,
4 436 U.S. at 691 (custom must be so “persistent and widespread” that it constitutes a
5 “permanent and well settled” policy). Moreover, *the SAC does not allege that any of*
6 *these policies inflicted injury on Shelton—i.e., caused Shelton to be subjected to an*
7 *adverse employment action—as the law requires. Monell*, 436 U.S. at 694.

8 Like the FAC, the SAC alleges *no policy or longstanding custom* “of
9 silencing opponents of the Sex-Change Policies or those who disagree with GUSD’s
10 other policies.” (Dkt. No. 22 at 13.) Apart from its deficient allegations of adverse
11 action against Shelton (SAC ¶¶ 82-83; *see* § III.B.2), the SAC vaguely claims the
12 School Board retaliated against *unidentified* individuals’ *unspecified* “previous
13 efforts to convince the Board to change the Sex-Change Policies” by changing “the
14 rules of its meetings to prevent individuals from being able to voice their opposition
15 to its policies.” (FAC ¶ 93.) The only other anecdotal allegation of “retaliation” is an
16 unidentified teacher and *unidentified* “School” ostensibly calling a student “a ‘bigot’
17 [and] targeting her disproportionately for [unspecified] discipline,” and barring her
18 “from attending class” for an unspecified period, after she and her mother voiced
19 opposition to “the Sex-Change Policies.” (*Id.* ¶ 94.) The SAC alleges “Defendants
20 took no action,” but alleges *no request* for action. (*Id.*) These allegations do not even
21 purport to constitute an official policy or longstanding custom or practice of
22 adversely acting against *employees* who speak publicly against GUSD policies—
23 whether in the context of gender identity (or “Sex-Change”) issues or otherwise.

24 Conversely, the SAC notes that “GUSD employees who have spoken publicly
25 in favor of these policies have never been punished or disciplined in any way”—but
26 the only “example” consists of *one* teacher being “lauded” for unspecified content
27 she supposedly showed her class, not for speaking “publicly” regarding policies.
28 (SAC ¶¶ 84-85.) The SAC also accuses unidentified teachers of harassment and

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 personal harassment against Shelton, and claims “Defendants took no action against
2 these teachers” in response to Shelton’s reports. (*Id.* ¶¶ 85-89.) But allegations of
3 the *lack* of discipline for unspecified conduct do not establish an official policy or
4 longstanding custom or practice of affirmatively acting against employees who
5 speak publicly *against* GUSD policies. Shelton fails to show otherwise.

6 The SAC also *does not allege* that any GUSD employee “was acting as a
7 ‘final policymaker’” in connection with any “particular area” or “issue.” *McMillian*
8 *v. Monroe Cnty.*, 520 U.S. 781, 785 (1997). *Only the School Board collectively* has
9 “final policymaking” authority for “the actions challenged herein.” (SAC ¶ 23.) As
10 with the claims against Board Members (*see* § III.A.1, B, *supra*), it will not suffice
11 for the SAC to allege knowledge of an ostensible constitutional violation and failure
12 to take corrective action. *See, e.g., Lytle*, 382 F.3d at 987. Shelton fails to allege any
13 facts that could establish the GUSD (including its Board) or Official Capacity
14 Defendants may be held liable under § 1983 and the *Monell* line of authority.

15 **F. The Conspiracy Count Fails As Well.**

16 The SAC’s third count for conspiracy is not a separate basis for liability, and
17 instead requires actual deprivation of Shelton’s First Amendment rights. *Hart v.*
18 *Parks*, 450 F.3d 1059, 1071 (9th Cir. 2006). Shelton cannot establish any such
19 deprivation, which is fatal to his conspiracy count. *Id.* He also pleads *no facts* even
20 suggesting a “meeting of the minds” among *any* combination of Defendants to
21 violate his rights. *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d
22 1539, 1540–41 (9th Cir. 1989) (cleaned up). His lone attempt to do so pertains
23 solely to Principal Tonoli’s email (SAC ¶ 70), and is patently deficient (*see* § III.A,
24 *supra*). The conspiracy count should be dismissed with prejudice.

25 **IV. Shelton’s New State-Law Claim Is Fatally Deficient.**

26 Shelton took the unauthorized liberty of adding a fourth count for violation of
27 free speech under Article I, § 2 of the California Constitution, based on the same
28 allegations as his § 1983 claims. (SAC ¶¶ 123-30.) But Shelton fails to state a claim

1 under Article I, § 2 for the same reasons his allegations fail to state a claim under §
2 1983. (*See* § III.A, III.B, *supra*.)

3 This new count suffers from additional fatal defects. Under the Government
4 Claims Act (GCA), a California public entity cannot be liable for injuries unless
5 otherwise provided *by statute*. Cal. Gov’t Code § 815. By comparison, the state
6 Supreme Court has held “that courts, *exercising their authority over the common*
7 *law*, may, in appropriate circumstances, recognize a tort action for damages to
8 remedy a constitutional violation”—although it found no basis to allow such an
9 action for violation of the liberty interest under Article I, § 7(a). *Katzberg v. Regents*
10 *of Univ. of Cal.*, 29 Cal. 4th 300, 325 (2002) (italics added). Article I, § 2 was added
11 in 1974 by the same voter initiative as § 7(a) (Prop. 7) and last amended in 1980
12 (Prop. 5; *see* RJN ¶¶ 7-8, Exs. F, G). Neither of those ballot materials suggest the
13 issue of tort liability “was considered at all” by voters. *Katzberg* at 319. Defendants
14 submit that California courts likewise would reject any action for damages under
15 Article I, § 2—and under *Katzberg*, any such claim would be a creature of *common*
16 *law, not statute*, and cannot lie against public entities such as GUSD. *See Miklosy v.*
17 *Regents of Univ. of Cal.*, 44 Cal. 4th 876, 899-900 (2008) (GCA bars common law
18 wrongful discharge actions against public entities).

19 Moreover, under California common law, only the employer—not the
20 Individual Defendants—can be personally liable for adverse employment actions.
21 “An individual who is not an employer cannot commit” such torts, but “can only be
22 the agent by which *an employer* commits that tort.” *Miklosy* at 900. Public
23 employees also are immune from liability for injuries resulting from “the exercise of
24 the discretion vested” in them, even if abused. Cal. Gov’t Code § 820.2. This is
25 exactly what the SAC attempts to allege against the Individual Defendants
26 (unsuccessfully, *see* § III.A, III.B, *supra*). *See Caldwell v. Montoya*, 10 Cal. 4th 972,
27 983-84 (1995) (school board members’ decision not to renew superintendent’s
28 contract was discretionary and immune under § 820.2). Shelton has no legal basis

1 for holding *any* Defendants liable for alleged adverse actions under Article I, § 2.

2 Lastly, any state-law claim would be barred by the GCA’s jurisdictional
3 requirement that “all claims for money or damages against local public entities” to
4 be presented in accordance with the claim-presentation statutes, with exceptions that
5 are inapplicable here. Cal. Gov’t Code § 905. This requirement applies to claims
6 against current or former public employees arising from acts or omissions “in the
7 scope” of their public employment, *id.* § 950.2, which is what Shelton alleges as to
8 the Individual Defendants (SAC ¶¶ 36). Such compliance is a condition precedent to
9 suit, *and must be pleaded and proved. State of Cal. v. Superior Court (Bodde)*, 32
10 Cal. 4th 1234, 1243 (2004). But the SAC does not plead compliance with the GCA,
11 or any excuse for noncompliance. (SAC ¶¶ 123-30.) Shelton cannot cure this defect.
12 He retired from GUSD on June 9, 2023 (RJN ¶ 1, Ex. A)—placing him beyond the
13 GCA’s six-month statute of limitations for tort claims and its one-year period for
14 seeking permission to bring a late claim. Cal. Gov’t Code §§ 911.2(a), 911.4(b).
15 Count 4, like the rest, should be dismissed with prejudice.

16 **V. This Court Should Strike the SAC Pursuant to Rule 12(e).**

17 As discussed above, the SAC fails to comply with this Court’s order for a
18 more definite statement regarding allegedly lost opportunities “to develop skills,”
19 which actions allegedly were intended to “chill” and “deter” Plaintiff and others
20 “from speaking out,” “what information causes Plaintiff to believe” a student and
21 mother were retaliated against, abused and harassed for opposing “the Sex-Change
22 Policies,” when Plaintiff’s leave and employment ended, or “why or how Tonoli’s
23 revealing of Plaintiff’s personal matter was unlawful.” (*Compare* Dkt. No. 22 at 19-
24 20 *with* SAC ¶¶ 64-71, 79, 82-84, 96.) This Court should therefore strike the SAC.
25 *See* Fed. R. Civ. P. 12(e) (“the court may strike the pleading or issue any other
26 appropriate order” for failure to timely obey order requiring more definite
27 statement).

28 ///

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 **VI. Conclusion**

2 Defendants respectfully ask this Court to grant their Motion to Dismiss, with
3 prejudice, and to strike the SAC under Fed. R. Civ. P. 12(e). *See Moore v. Kayport*
4 *Package Express*, 885 F.2d 531, 538 (9th Cir. 1989) (leave needn't be given "if a
5 complaint, as amended, is subject to dismissal").

6 DATED: September 3, 2024

BALLARD ROSENBERG
GOLPER & SAVITT, LLP

8

By: 

9

Linda Miller Savitt
John J. Manier
Attorneys for all Defendants

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

DECLARATION OF JOHN J. MANIER

I, John J. Manier, declare as follows:

1. I have personal knowledge of the facts set forth herein, which are known by me to be true and correct, and if called as a witness, I could and would competently testify thereto.

2. I am a member of the State Bar of California and am admitted to practice as an attorney before the Supreme Court of the United States, the United States Courts of Appeals for the Third, Ninth, Tenth, and District of Columbia Circuits, and all state and federal courts in California. I am a Senior Counsel with the law firm of Ballard Rosenberg Golper & Savitt, LLP, counsel of record in the above-captioned lawsuit for Defendants Glendale Unified School District, on behalf of itself and its Board of Education (which is not a separate legal entity) (collectively GUSD), Vivian Ekchian, Ed.D., and Kristine Tonoli, and Defendants Darneika Watson, Ph.D., Kathleen Cross, Ingrid Gunnell, Shant Sahakian, Jennifer Freemon, and Nayiri Nahabedian, in their respective individual and official capacities as pleaded.

3. On February 16, 2024, I emailed a meet-and-confer letter to David Pivtorak, counsel for Plaintiff Ray Shelton, which explained Defendants’ intent to file a Motion to Dismiss and for a More Definite Statement as to Shelton’s original Complaint (Dkt. No. 1), summarized the factual bases for it, and requested a conference of counsel. (See Dkt. No. 10 at 33-36.) Mr. Pivtorak and I conducted the conference of counsel on March 5, 2024, but we were unable to reach a resolution that eliminated the necessity for a hearing on Defendants’ Motion. Accordingly, Defendants filed their Motion on March 27, 2024 (Dkt. No. 10). Just six days later, on April 2, 2024, Shelton filed his First Amended Complaint (FAC) (Dkt. No. 11). Defendants’ Motion was withdrawn as moot on April 5, 2024 (Dkt. No. 12).

4. On April 10, 2024, I emailed another meet-and-confer letter to Mr. Pivtorak, which explained Defendants’ intent to file a Motion to Dismiss and for a

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

BALLARD ROSENBERG GOLPER & SAVITT, LLP
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436

1 More Definite Statement as to Shelton’s FAC, summarized the factual bases for it,
2 and requested a conference of counsel. (Dkt. No. 16 at 35-39.) Mr. Pivtorak and I
3 conducted the conference of counsel on April 15, 2024, but we were unable to reach
4 a resolution that eliminated the necessity for Defendants’ proposed Motion or a
5 hearing thereon. Accordingly, Defendants filed their Motion on April 26, 2024 (Dkt.
6 No. 16). This Court granted the Motion in part on July 12, 2024 (Dkt. No. 22).

7 5. Shelton filed his Second Amended Complaint (SAC) on July 26, 2024.
8 (Dkt. No. 26.) On July 30, 2024, I emailed another meet-and-confer letter to Mr.
9 Pivtorak and his recently-added co-counsel, which explained Defendants’ intent to
10 file a Motion to Dismiss the SAC, summarized the factual bases for it, and requested
11 a conference of counsel. A true and correct copy of this letter is attached as **Exhibit**
12 **1**. Plaintiff’s counsel and I conducted the conference of counsel on August 5, 2024,
13 and agreed that the meet-and-confer requirement of L.R. 7-3 had been satisfied, but
14 we were unable to reach a resolution that eliminated the necessity for Defendants’
15 proposed Motion or a hearing thereon. We also discussed potential motion hearing
16 dates, and we agreed that Defendants would notice their motion for hearing on
17 October 8, 2024, and file it no later than September 3, 2024—21 days before the
18 deadline for GUSD (which waived service), and 24 days after the deadline for the
19 other Defendants.

20 I declare under penalty of perjury under the laws of the United States of
21 America that the foregoing is true and correct.

22 Executed on September 3, 2024, at Encino, California.

23 

24 _____
25 John J. Manier
26
27
28

**BALLARD ROSENBERG
GOLPER & SAVITT, LLP**

The Law Firm For Employers

jmanier@brgslaw.com

July 30, 2024

VIA ELECTRONIC MAIL ONLY

David Pivtorak, Esq.
The Pivtorak Law Firm
611 Wilshire Boulevard, Suite 911
Los Angeles CA 90017
E-Mail: david@piv4law.com

Re: *Shelton v. Ekchian, et al.*
U.S.D.C. (C.D. Cal.) No. 2:23-cv-10427

Dear Mr. Pivtorak:

On behalf of all Defendants, I am writing to initiate a conference of counsel pursuant to L.R. 7-3 regarding Defendants' proposed motion to dismiss for failure to state a claim as to Plaintiff Ray Shelton's Second Amended Complaint (SAC) (Dkt. No. 26). Fed. R. Civ. P. 12(b)(6).

The SAC fails to cure the fatal defects identified by the District Court in its order granting Defendants' Motion to Dismiss the First Amended Complaint (FAC) with leave to amend. (Dkt. No. 22.) As to the School Board Members, the SAC pleads no facts to show that they "set in motion the chain of events leading to [Mr. Shelton's] administrative leave" the morning after his speech, or that "public statements of a sensitive and controversial nature," such as those in Principal Tonoli's email, "require approval by the District" before dissemination, which "necessarily includes the School Board." The SAC also alleges the Board "refused" to "reinstate" Mr. Shelton, but does not plead facts showing when any such decision was made—and specifically whether it came after Shelton's decision to retire and the effective date of his retirement. As you are aware, Plaintiff submitted his retirement papers in March 2023—one month before the speech in question—and his retirement was effective on or about June 9. But the Board's action on Plaintiff's administrative leave came several months later, by which time the matter had been mooted by his retirement.

The SAC's only basis for accusing Drs. Ekchian and Watson of conspiring in Principal Tonoli's email is the same unsupported assertion as for the Board Defendants. The SAC likewise argues mere argument, without supporting facts, to support the assertion that Dr. Ekchian, Dr. Watson, and Principal Tonoli each were responsible for placing Plaintiff on paid leave.

The SAC still pleads no petitioning activity at all, so this allegation should be dismissed with prejudice. It also fails to successfully plead an adverse employment action or show that protected speech was a substantial or motivating factor in any such action. The SAC does not

Ex. 1

David Pivtorak, Esq.
July 30, 2024
Page 2

provide the more definite statement ordered by the Court on matters such as lost opportunities to develop Plaintiff's skills and mentor students, and fails to support the inference that Dr. Watson's letter directing him "not to report to school or any other GUSD site" somehow meant he was barred from graduation. The SAC's descriptions of Principal Tonoli's email are similarly deficient to establish an adverse action.

Like the FAC, the SAC only alleges conclusory assertions regarding the Board Members and Dr. Ekchian's conduct, and no facts alleging that either Dr. Watson's letter or Principal Tonoli's email were issued in retaliation for protected speech. Indeed, there is no allegation that Dr. Watson or Principal Tonoli even attended the Board meeting or knew of the content of Mr. Shelton's short speech. The SAC pleads no facts that would support an inference that the email's reference to "hate speech" pertained to what Mr. Shelton said, as opposed to his display of a sign with four "Progress Pride" flags arranged to form a swastika—which the SAC never mentions. (*See* last page of this correspondence.)

Plaintiff also has not cured the other defects identified by the District Court, including those on *Monell* liability and the conspiracy count. Defendants plan to reassert these issues, as well as qualified immunity, which the Court previously denied without prejudice to renewal.

Plaintiff's purported additions of GUSD and the Board of Education as defendants, and a fourth count under the California Constitution, only provide further bases for dismissal. We are unaware of any attempt to serve the newly-named entities, and in any event, they are entitled to sovereign immunity from suit under the Eleventh Amendment. *See, e.g., Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923 (9th Cir. 2017) (California school districts and departments of education are arms of the state and entitled to 11th Amendment immunity). Moreover, we believe there is no private right of action under the free speech clause in the California Constitution. Even if there were, Plaintiff's count would be barred because he has failed to plead—and cannot prove—compliance with the Government Claims Act, which is a prerequisite to suit against public entities and employees for acts in the scope of employment.

I would like to have the required conference of counsel no later than this Friday, August 2. Please contact me to schedule it. Thank you.

Very truly yours,

BALLARD ROSENBERG GOLPER & SAVITT, LLP



John J. Manier

cc: Linda Miller Savitt, Esq.

David Pivtorak, Esq.
July 30, 2024
Page 3

