No. 25-____

IN THE

# Supreme Court of the United States

FREEDOM FOUNDATION, a not-for-profit organization,

*Petitioner,*

v.

RITA GAIL TURNER, *et al.*,

*Respondents,*

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD, *et al.*,

*Intervenor-Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

On June 27, 2018, the day this Court decided *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31,* the California legislature openly declared war on that decision by passing a series of laws to prevent *Janus* from having its full intended effect. One of those laws was California Government Code § 3556 ("Section 3556"), which forbids anyone but incumbent labor unions from finding out when and where new public employee orientations occur. At these orientations, public sector unions manipulate new employees into becoming union members and intentionally conceal employees' *Janus* rights to refuse to join a union or pay dues.

California employs 3.5 million public employees, 280,000 of which go through new employee orientation every year. The Freedom Foundation, and others, seek to speak to these public employees outside of their orientations to inform them of their *Janus* rights, but under Section 3556 cannot do so because they are forbidden from knowing when and where these orientations occur.

The question presented is:

Whether a law that prevents anyone but incumbent unions from accessing information necessary to communicate with public employees before they are recruited into union membership is unlawful viewpoint discrimination under the First Amendment.

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Freedom Foundation was the Plaintiff-Appellant in the court below.

Respondents Rita Gail Turner, in her official capacity as Litigation Research Coordinator in the Public Records Act Unit of the Office of General Counsel for the Los Angeles Unified School District; Devora Navera Reed, in her official capacity as General Counsel for Los Angeles Unified School District; and Alberto Carvalho, in his official capacity as Superintendent of Los Angeles Unified School District were Defendant-Appellees in the court below.

Intervenor-Respondent California Public Employment Relations Board, a state agency; United Teachers Los Angeles and Service Employees International, Local 99, labor organizations, were Intervenor-Defendant-Appellees in the court below.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rules 14.1(b)(ii) and 29.6, petitioner states as follows:

Freedom Foundation is a Texas state 501(c)(3) nonprofit corporation with no parent company, affiliates, or subsidiaries. Because Freedom Foundation issues no stock, no publicly held corporation owns ten percent or more of its stock. In addition, no publicly held company has a financial interest in the outcome of this proceeding.

## STATEMENT OF RELATED PROCEEDINGS

This petition arises from and is directly related to the following proceedings:

1. *Freedom Foundation v. Turner, et al.,* No. 24-768, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 10, 2025.
2. *Freedom Foundation v. Turner, et al.,* No. 23-03286, U.S. District Court for the Central District Court of California. Judgment entered January 16, 2024.

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## OPINIONS BELOW

The district court's order granting the Intervenor-Respondents' motions to dismiss in *Freedom Found. v. Turner,* is reported at 711 F.Supp.3d 1172 (C.D. Cal. 2024), and reproduced at Appendix C, Pet.App. 41a. The Ninth Circuit's memorandum opinion affirming that order is reported as *Freedom Found. v. Turner,* No. 24-768, 2025 WL 752484 (9th Cir. Mar. 10, 2025) and is reproduced at Appendix B, Pet.App. 36a.

## JURISDICTION

The Ninth Circuit issued its memorandum opinion below on March 10, 2025. Pet.App. 36a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Free Speech Clause of the First Amendment to the United States Constitution states, in pertinent part: "Congress shall make no law…abridging the freedom of speech…" The text of the First Amendment is reproduced as Appendix D, Pet.App. 57a.

California Government Code § 3556(a) is reproduced as Appendix E, Pet.App. 58a.

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. Supreme Court frees employees from involuntary union payments.

On June 27, 2018, this Court handed down its landmark decision in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31,* 585 U.S. 878 (2018). *Janus* held that no money may be deducted from a non-consenting public employee for use in a union's

political speech, nor may any attempt be made for such a deduction, unless that employee affirmatively consents to the payment. *Id* at 930. Affirmative consent means the employee was sufficiently informed of the consequences of waiving his First Amendment right and acted knowingly and voluntarily. *Id*. at 929-30. Prior to *Janus*, government unions were allowed to use state law to compel non-members to financially support union political activities, even over employee objections. Pet.App. 7a. After *Janus*, a major source of government union dues was removed, imperiling unions' revenue streams, and securing new members, and membership dues, critical to unions' future operation. *Id*.

### 2. California lawmakers make their anti-*Janus* intentions clear.

After this Court decided *Janus*, California lawmakers moved quickly to denounce it publicly, for obvious reasons. Pet.App. 7a.

California State Senate President Pro Tem Toni Atkins stated: "Today, the U.S. Supreme Court sided with forces that are waging a direct and coordinated attack on working people and their ability to collectively bargain for better pay and working conditions." *Id.*

Assembly Speaker Anthony Rendon stated: "*Janus* is just the latest weapon being wielded by anti-government billionaires… I will continue to stand with the teachers, and first responders and other union members in my district and throughout California who serve our state every day." *Id*.

State Sen. Kevin De León stated: "Today, SCOTUS sided with corporate billionaires to threaten hardworking families, but here in California, we won't let one

politically motivated ruling undo so many years of progress. We will continue fighting to make it easier for working people to stand together." *Id*. at 7a-8a.

Assemblywoman Blanca Rubio stated: "The U.S. Supreme Court's decision today hurts teachers, police officers, firefighters and public servants in California…I look forward to working with the unions and will continue to fight for workers' rights." *Id* at 8a.

Assemblyman David Chiu stated: "I stand with the working people of our State, and am ready to pursue options to ensure labor unions still have the ability to effectively represent and champion workers." *Id*.

Sen. Steve Glazer stated: "The decision of the Supreme Court in *Janus v. AFSCME* threatens to undermine this movement by allowing employees who decide not to join a union to also avoid paying their share of the cost of the representation the union is required to provide to all employees, regardless of their membership status." *Id.*

Sen. Bill Dodd stated: "The U.S. Supreme Court's decision to reject reasoned, decades-old precedent is deplorable…While this is an unfortunate hurdle for working families, I am confident that, in spite of this ruling, the labor movement will redouble efforts to build the middle class and preserve the American Dream." *Id*.

Then Lt. Gov Gavin Newsom stated: "I strongly reject the reasoning underlying this ruling and California must chart its own path to strengthen the rights of workers." *Id.*

### 3. California lawmakers' response to *Janus*: Senate Bill 866.

What California lawmakers failed to mention in their post-*Janus* public statements is that they had already been hard at work for months, hand-in-hand with California unions, to craft legislation designed to undermine the case. Dave Low, Executive Director of the California School Employees Association, stated just prior to the decision: "Once *Janus* is decided, and we feel very much that it is going to be decided against us, we will be moving other legislation." Pet.App. 12a. The answer to this dilemma for government unions and their legislative allies was 2018 Cal. Legis. Serv. Ch. 53 (S.B. 866) (West) ("SB 866"). *Id*.

SB 866 was a collection of statutes that were intentionally designed to blunt the effect of the *Janus* decision and protect and bolster the flow of dues payments to unions. Pet.App. 11a. This package of statutes included the addition of California Government Code § 3550, which makes it illegal for public employers to communicate with their employees regarding their First Amendment rights. *Id.* at 12a. It also included the addition of California Government Code § 3553(b), which prevents employers from communicating with employees regarding the *Janus* case and the related First Amendment issues. *Id*. Additionally, SB 866 added California Government Code § 1153(h), which forces employees to take union payroll deduction issues to unions instead of their own payroll department or employer. *Id*.

Specifically relevant to the instant case, SB 866 also amended the previous version of Section 3556 of the California Government Code, adding the sentence in italics, below. Pet.App. 58a.

3556. Each public employer described in subdivision (a) of Section 3555.5 shall provide the exclusive representative mandatory access to its new employee orientations…*The date, time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation.*

Prior to the *Janus* decision, the previous version of the statute contained no such restriction on public access to the dates, times, and places of new employee orientations. *Id*. at 13a. The previous version of Section 3556 simply allowed government unions mandatory access to new employee orientations. *Id*. at 83. At no time prior to the enactment of Section 3556 did any member of the public having access to this information disrupt government unions' mandatory access rights. *Id*. Nor was the privacy or security of any public employee threatened by the public having access to the dates, times, and places of new employee orientations. *Id*.

**4. Unions and their supporters were public and explicit that they helped pass SB 866 to protect unions from *Janus*.**

SB 866 was neither neutral in intent nor application and was designed as a union-protection measure meant to blunt the financial blow this Court's decision in *Janus* inflicted on public sector unions.

For example, in a "Bargaining Advisory" document produced by CTA, the union admits that prior to SB 866, "some employers proposed allowing competing or opposing groups access to the orientations and/or publicizing the orientations to encourage opposing groups to attend and protest the existing exclusive representative. These actions were intended to discourage

new employees from joining the union." Pet.App. 14a. Not only is such a statement an admission that unions use new employee orientations as recruitment opportunities, but that the intent of modifying Section 3556 was to favor incumbent union recruitment by silencing all other viewpoints. *Id* at 15a.

The California Labor Federation described SB 866 as "Protections from Union Busting." *Id*. Teamsters Joint Council 7 stated that SB 866 "contains several other provisions that should be helpful in pushing back against *Janus* proponents…These provisions in SB 866 should help limit mischief-making by anti-union ideologues in this post-*Janus* landscape." *Id.*

The California Federation of Teachers directly "collaborated with the California Labor Federation [in 2018] to include provisions in Senate Bill 866," to aid new member recruitment. *Id.*

But it was not only the government unions that recognized the purpose and function of SB 866. *Id*. The California Public Employer Relations Board, the agency tasked with enforcing SB 866 (and an Intervenor-Appellee in this case), recognized that the bill was enacted in direct response to the *Janus* case. *Id*. This fact was also acknowledged by the California School Board Association, which wrote that SB 866 was "legislation designed to blunt the impact of *Janus*." *Id*.

The San Diego Bar Association produced an article in which it acknowledged that SB 866 had specifically been enacted to "mitigate the effects of the Supreme Court's decision" in *Janus*. *Id*. at 16a. Similarly, the California Policy Center, a state-based think tank, published a list of legislative measures it identified as intended to undermine *Janus*, which includes SB 866.

*Id*. Aaron Tang, professor at U.C. Davis School of Law and supporter of government unions, specifically identifies SB 866's secret orientations provision as a "protective measure of insulating employee contact information from anti-union groups…[s]uch efforts seem likely to help stem the tide of membership losses." *Id*.

**5. Freedom Foundation's mission is to communicate with public employees before they sign restrictive union membership agreements.**

Freedom Foundation's mission is to communicate with and inform new public employees of their First Amendment right to make their own decisions regarding union membership and dues payments. Pet.App. 4a. This mission necessitates submitting public record act requests to government employers seeking public information about how to reach employees. *Id*. at 21a. Based on the results of these requests, the Foundation then conducts face-to-face outreach to potential union members. *Id.*

It is crucial to the Foundation's mission to communicate with new public employees before they attend legally required new employee orientations. *Id*. Employees attending orientations are not only denied the full range of information necessary to make an informed choice regarding union association but are also routinely given false information by union officials and are thus pressured to join. *Id*. at 22a. Once a new employee signs a union card, perhaps unwittingly, the union can divert his or her lawfully earned wages for use in political speech, even if such spending offends the employees' most deeply held religious, moral, or political beliefs. *Id.* Often, this compelled speech can last for a year or more. *Id.*

Additionally, the Foundation has never sought to attend the new employee orientations. Instead, it seeks to leaflet and speak to public employees *outside* of government offices, on public streets and sidewalks. *Id*. at 21a.

**6. Unions go beyond the scope of informing new employees about their duties as exclusive representatives, instead using orientations as captive audience pitches for union membership and dues deductions.**

The legislative findings of Section 3556 focus on preserving the ability of exclusive representatives to communicate with represented employees. *See* Cal. Gov't Code § 3555. This necessary communication specifically includes "an opportunity to discuss the rights and obligations created by the contract [the collective bargaining agreement between the government union and public employer] and the role of the representative, and to answer questions." *Id.* The necessary communication does not include using new employee orientations as an opportunity to pressure new employees into becoming full members of a private political entity (a union). *Id*. at 16a-17a.

However, the latter is precisely how government unions in California use their exclusive access to new employee orientations. *Id*. at 17a. California government unions consider new employee orientations to be a prime recruitment opportunity. *Id.* California government unions abuse their exclusive access to secret employee orientations through both what they do not tell employees, and through what they do tell them. *Id*. For example, a research report produced by Jobs with Justice, a pro-government union organization

in 2016 and titled "Making the Case for Union Membership: The Strategic Value of New Hire Orientations," is designed to train government union representatives to use orientations to pressure new employees to join unions. *Id*. This report explicitly describes the goal of the training and guidance offered to government unions: "A crucial, if not the primary, objective of the formal orientation is to sign up new members." *Id*. at 18a. This goal is more than theoretical – it is put into practice at every available opportunity. *Id*. For example, a video shown during Los Angeles County Department of Public Social Services IHSS Provider Online Orientation by SEIU 2015 exemplifies the goal of unions to use new employee orientations to recruit new members. *Id.* Rather than provide information regarding its role as exclusive representative, or applicable contracts affecting new IHSS workers, SEIU 2015's message is pure promotion for union membership. *Id*. at 19a. These tactics are consistent across new employee orientations attended by unions in California. *Id*.

Once a new employee signs a document with a government union at a new employee orientation, perhaps unknowingly, the union may use it to compel continued dues deductions to support its political speech, whether the employee supports the specific speech or not. *Id*. at 22a. Many times, this compelled speech contradicts the employees' most deeply held moral and political values. *Id*. These restrictive provisions typically last for a full year, sometimes longer, with an ability to extend the time unilaterally. *Id.*

**7. California denied the Foundation's request for public records regarding the date, time, and place of new employee orientation pursuant to Section 3556, enacted as part of SB 866.**

In January 2023, the Foundation submitted a public records request to the office of Appellee Devora Navera Reed, General Counsel for the Los Angeles Unified School District. Pet.App. 23a. In this request, the Foundation asked for the "date, time, and place of all orientations for new district employees scheduled from February 1, 2023, to August 30, 2023." *Id.* The purpose of this request was to enable the Foundation to conduct voluntary face-to-face outreach and communicate with new public employees, either verbally or by providing them with written information through leafletting, about the employees' First Amendment rights to decline union membership and dues deductions, in public fora (sidewalks) outside orientation locations. *Id*. However, Appellee Rita Gail Turner, a Litigation Research Coordinator in the District's Public Records Act Unit, denied the Foundation's request. *Id.* Specifically, Turner wrote that: "Per California Government Code section 3556, the date, time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation." *Id*. at 23a-24a.

## B. Proceedings Below

### 1. District Court Proceedings

The Foundation sought equitable relief against Turner, Reed, and Appellee District Superintendent Alberto M. Carvalho, seeking a judicial declaration that Section 3556 is a facially discriminatory content-

based speech regulation (either based on the function or purpose test, or because it is viewpoint discriminatory), and a permanent injunction preventing its enforcement. Pet.App. 33a-34a.

After the filing of its First Amended Complaint, and the intervention of several additional appellee-intervenors espousing an interest in defending the constitutionality of Section 3556, including unions (United Teachers of Los Angeles and Service Employees International Union, Local 99), PERB, and the Attorney General of California, the Appellee-Intervenors moved to dismiss. The district court granted the motions to dismiss based on two primary reasons, both of which were error. Pet.App. 41a-56a.

First, the district court erred by failing to apply the correct test to the Foundation's facially content-based speech claim by conflating that claim with the Foundation's facially neutral viewpoint discrimination claim, and dismissing both based on supposed lack of sufficient allegations of animus or bias by California lawmakers. *Id.* at 46a. But the former claim, unlike viewpoint discrimination, does not require allegations or evidence of bias. All the Foundation was required to show was that Section 3556 treats different speakers differently based on their speech and it did. And strict scrutiny should have immediately applied.

Second, the court erred by failing to give the Foundation's viewpoint discrimination the full benefits of the Rule 12(b)(6) standard. *Id*. at 49a-50a. The Foundation extensively alleged animus in its amended complaint and the district court failed to give those allegations full credit in a Rule 12(b)(6) motion.

### 2. Ninth Circuit Proceedings

In an unpublished memorandum opinion, the Ninth circuit affirmed the lower court's granting of the motion to dismiss. The Ninth Circuit held that Section 3556 was neither content nor viewpoint discriminatory because Section 3556 drew distinctions on access to government held information based on "legal status" and "not the content of their speech or the viewpoint they convey." Pet.App. 37a-38a (9th Cir. decision) citing to *Boardman v. Inslee*, 978 F. 3d, 1092, 1112 (9th Cir. 2020).

Further, the Ninth Circuit, like the lower court below, refused to credit the Foundation's evidence in its amended complaint that Section 3556 was adopted by the government to protect unions against the effects of *Janus* even though the motion before the lower court was a Rule 12(b)(6) motion.

## REASONS FOR GRANTING THE PETITION

The decision below upholds a law that limits access to speech-enabling information to a single speaker and was drafted for the avowed purpose of frustrating the exercise of the First Amendment rights this Court vindicated in *Janus*. Through Section 3556, California is attempting to circumvent *Janus* by enabling unions to cajole public employees to sign up for union membership before they are knowingly and intelligently informed of their First Amendment right to not join a union and pay dues. Discrimination in favor of incumbent unions is discrimination in favor of a particular viewpoint about the value of union membership and the merits of *Janus*. Indeed, a central premise of *Janus* is that unions take distinct positions on controversial issues, and that advancing views on those issues is so central to the mission of a union that subsidizing a

union through agency fees necessarily means subsidizing its speech. Thus, in this context, discriminating in favor of the incumbent union is discriminating against the contrary viewpoint.

Additionally, the Ninth Circuit decision here conflicts with this Court's First Amendment precedents. The Court has repeatedly made clear that laws discriminating on the basis of speaker are inherently suspect and hence warrant more careful scrutiny to assess whether viewpoint- and/or content-based discrimination is afoot.

In *Boardman*, the Ninth Circuit concluded otherwise only by giving this Court's 5-4 decision in *Perry Educ. Ass'n v Perry Educators' Ass'n* 460 U.S. 37 (1983) a sweeping reading that converts it into a cover for blatant viewpoint discrimination and leaves *Perry* irreconcilable with a host of more recent decisions, including *Janus*. In reality, *Perry*, which was used as a justification for Section 3556 in this case as well, is readily distinguishable because, among other differences, it is admittedly limited to the nonpublic forum context. By extending *Perry* to apply to cases entirely unrelated to the nonpublic forum analysis, the Ninth Circuit comes in conflict with this Court's precedents such as *Rosenberger, Sorrell* and *Reed,* and precedents in other Courts of Appeal such as the Seventh, Fourth and Eighth Circuits. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015). And worse, it gives the cover of "status" to what is really viewpoint discrimination.

Public-sector unions throughout the country have not given up their long-enjoyed state-conferred monopoly without a fight. They have been actively trying to enlist courts, legislatures, and others to prevent this Court's decisions from achieving their promises of

protecting free speech and liberty. Now that this most aggressive of resistance efforts has been endorsed by the Ninth Circuit, it will be replicated elsewhere absent this Court's review. The Court should grant certiorari and ensure that this viewpoint discrimination does not prevent the promise of *Janus* from becoming a reality.

## I. Section 3556 Is Indisputably Viewpoint Discrimination That Conflicts with This Court's Precedent.

### A. Section 3556 is facial viewpoint discrimination.

Simply looking at the statute itself reveals the viewpoint discrimination on its face. The italicized sentence below was added as part of SB 866 to Section 3556.

> (a) Each public employer described in subdivision (a) of Section 3555.5 shall provide the exclusive representative mandatory access to its new employee orientations.
>
> *The date, time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation.*

By giving new employee orientation information solely to incumbent unions, Section 3556 promotes only one side of an overall debate, favoring a positive view of incumbent unions while imposing a significant burden on everyone who wishes to promote an opposing perspective. *Matal v. Tam*, 582 U.S. 218, 234 (2017) (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)) ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at

the expense of others."). Blatantly choosing the content of the unions' speech and prohibiting the content of all others is discriminatory on its face. Taken together with the animus toward this Court's decision in *Janus* described in Section A (1) above, it is obvious that favoring union speech above all others was unabashedly intended to favor the pro-union viewpoint.

### B. Section 3556 conflicts with this Court's precedent which prohibits burdening speech in order to tilt public debate in a preferred direction.

It is bedrock law that the government may not restrict speech "based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377 at 386 (1992). Even when it comes to otherwise unprotected speech, discrimination based on viewpoint is verboten. *Id.* Content-based discrimination is problematic enough and triggers strict scrutiny, *see*, *e.g.*, *Reed*, 576 U.S. at 169-70, but viewpoint discrimination is worse. A law that targets "particular views taken by speakers on a subject" is an even "more blatant" and "egregious" violation of the First Amendment. *Rosenberger,* 515 U.S. at 829.[1]

[1] In *Rosenberger*, a university student organization which published newspaper with Christian editorial viewpoint brought action against university challenging denial of funds from a fund created by university to make payments to outside contractors for printing costs of publications of student groups. 515 U.S. at 819. This Court held that denial of funding amounted to viewpoint discrimination because "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Id*. at 828 (internal citations omitted). While no student group is entitled to have the university pay for its printing costs, the selective funding policy "discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and childrearing

Simply put, even when it comes to fighting words, government funding, and access to speech-enabling information, the government "may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578-79.

In keeping with those principles, this Court has been "deeply skeptical" of laws that "'distinguis[h] among different speakers, allowing speech by some but not others.'" *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 778 (2018) (*NIFLA*). A "speaker" and his "viewpoints" are so frequently "interrelated" that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2009). Moreover, "[s]peaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own.'" *NIFLA*, 585 U.S. at 778 (quoting *Sorrell*, 564 U.S. at 580). Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United*, 558 U.S. at 340, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Reed*, 576 U.S. at 170 citing to *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994).

*Sorrell* is particularly instructive. There, this Court considered a law that "restrict[ed] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors." *Sorrell*, 564 U.S. at 557. The law contained numerous exemptions but stated that "pharmaceutical manufacturers" could not

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except those dealing with the subject matter from a religious standpoint." *Id*. at 830.

use that information for "marketing" purposes. *See id.* In other words, "[t]he law on its face burden[ed] disfavored speech by disfavored speakers." *Id.* at 564. By preventing *only* pharmaceutical manufacturers "from communicating with physicians in an effective and informative manner," the law went "even beyond mere content discrimination, to actual viewpoint discrimination." *Id.* at 564-65. Because Vermont had "not shown that its law ha[d] a neutral justification," the Court held it unconstitutional even though it impacted commercial, rather than political, speech. *Id.* at 579-80. The state "burdened a form of protected expression that it found too persuasive" while leaving "unburdened those speakers whose messages are in accord with its own views"—and "[t]his the State cannot do." *Id.* at 580.

Moreover, eight Justices writing separately in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), made clear that the First Amendment would forbid a State from conditioning access to government-held information based on viewpoint. *See id.* at 42 (Scalia, J., joined by Thomas, J., concurring); *id*. at 43 (Ginsburg, J., joined by O'Connor, Souter, and Breyer, JJ., concurring); *id*. at 46 (Stevens, J., joined by Kennedy, J., dissenting). As this Court later explained, these separate writings all "recognized that restrictions on the disclosure of government held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment." *Sorrell*, 564 U.S. at 569; *see also Fusaro v. Cogan*, 930 F.3d 241, 254 (4th Cir. 2019) ("United Reporting provides affirmative support for a First Amendment challenge to certain types of conditions being placed on the dissemination of government information.").

Section 3556 thus plainly triggers strict scrutiny, and it just as plainly cannot survive "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Not only is there zero evidence to support respondents' patently pretextual claim that the law is necessary for "privacy and safety concerns," Pet.App. 43a, but Section 3556 is patently not "narrowly drawn to serve [any] interest" the state may claim, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011)—as evidenced by a very important fact: others' right to know of the time and place of a new employee orientation in no way affects the incumbent unions' ability to maintain its monopoly to speak at the closed-door orientations. The fact that others may speak on the public sidewalks has no effect on the unions' ability to recruit new members in the confines of the orientation room. And, privacy is not an issue on public sidewalks.

Section 3556 intentionally cuts off *Janus* rights information at the source and reserves it for one side in an intense and important debate on which the very constitutionality of public-sector-union regimes depends. That law conflicts with this Court's decisions condemning viewpoint discrimination and it cannot stand.

### C. Section 3556 eviscerates the protections set out in *Janus* to prohibit employees' compelled financial support of union speech.

Section 3556 guts the protections against compelled speech set out in *Janus* and is thus in further conflict with a decision of this Court. In *Janus*, this Court held that (1) "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively

consents to pay," (2) "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed," and (3) "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." 585 U.S. 930 (cleaned up).

Here, in order to be voluntarily and knowingly free to opt-in to union membership and union dues, public employees must have access to information both for and against union membership. California already gives unions a monopoly to provide the pro-union position at the closed-door orientations. But by preventing the Foundation, and others, from having the ability to speak to employees at the key moment before they are locked into a room with union representatives, California is choosing to provide employees with pro-union positions and shielding them from all others.

Worse still, by failing to provide employees with full information regarding their *Janus* rights, those employees are often locked into years long dues deduction agreements that only expire if the employee remembers to opt-out during a short window on the anniversary date of their sign up. Failure to remember to opt-out at that exact moment can leave the employee paying dues for another year. And in cases where the collective bargaining agreement governs opt-out windows, the time to opt out may not come for years or may be extended unilaterally by the union.

## II. The Ninth Circuit's "Status-Based" Distinction Argument Leaves *Janus* with No Life.

In a terse unpublished memorandum opinion, the Ninth Circuit upheld Section 3556 by relying on a previous decision, *Boardman*, arguing that Section 3556 does not discriminate but rather "ensur[es] that

an exclusive bargaining representative has access to carry out the duty of communicating with public employees at an orientation." Pet.App. 38a, citing to *Boardman*, 978 F.3d at 1118. "The fact that Section 3556 has the 'incidental effect' of denying Appellant access to the orientation information does not negate the law's neutral purpose." *Id*. citing to *Boardman*, 978 F.3d at 1113. Further, the Ninth Circuit explained that the First Amendment isn't implicated at all because "3556 regulates the dissemination of information based on the receiver's legal status—the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation—not the content of their speech or the viewpoint they convey." Pet.App. 38a, citing to *Boardman*, 978 F.3d at 1112.

As to the first point, it is almost as though the Ninth Circuit did not read the statute. The change in Section 3556 does not "ensure" that incumbent unions have access to carry out their duties of communicating with public employees – it only prevents others from doing so. Before the June 27, 2018 change in the law, incumbent unions had access to new employee orientations. After June 27, 2018, that portion of the law remains the same.[2] That others are prevented from finding out the time and place of new employee orientations isn't an "incidental effect," it is the whole shebang.

Second, the Memorandum Opinion's position that Section 3556 regulates the "receiver's legal status" and not viewpoint is in conflict with several of this Court's

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[2] The only change in Section 3556 that occurred on June 27, 2018 was the legislature's addition of the following: "The date, time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative."

decisions. The "status" distinction originates from this Court's decision in *Perry*, a readily distinguishable case. *Perry* involved a challenge to a collective-bargaining agreement that granted the incumbent union exclusive access to an "interschool mail system and teacher mailboxes." 460 U.S. at 38-40. The rival union brought a viewpoint-discrimination challenge, and a bare majority of the Court upheld that policy, finding it "more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views," because there was "no indication that the School Board intended to discourage one viewpoint and advance another." *Id.* at 49. *Perry* did not involve access to speech enabling-information, but rather dealt with access to a single channel for communicating with teachers in a traditional public workplace.

In fact, the decision hinged specifically on the fact that the distinguished speech would have occurred in a nonpublic forum. The Court explained that "[w]hen speakers and subjects are similarly situated, the state may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the state may draw distinctions which relate to the special purpose for which the property is used." *Perry,* 460 U.S. at 55. Similarly, the dissent, while disagreeing with the ability to discriminate based on public versus nonpublic forum, agreed that the majority's opinion hinged on that very notion of *location* of the speech. *Id.* at 61 ("Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not") (Brennan, J., joined by Marshall, Powell, and Stevens, JJ., dissenting).

At its most expansive, *Perry* is a forum case and there was no good reason to extend it in a public records context. Doing so conflicts with this Court's precedent and "sits uncomfortably with th[is] Court's modern jurisprudence concerning public-sector unions." *Boardman,* 978 F. 3d at 1132 (Bress, J., dissenting). The whole reason this Court held that public and quasi-public employees cannot be forced to pay even a portion of union dues is because unions have and often espouse particular viewpoints. *Janus*, 585 U.S. at 898, n.5, 912. Efforts to separate out "germane" speech are fruitless because everything the union does embodies a distinct perspective that public-sector employees should not be compelled to support. Thus, whatever can be said about distinguishing between speakers and viewpoints in other contexts, this is a classic context in which the "speaker" and its "viewpoints" are so "interrelated" that discrimination in favor the speaker is necessarily "a means to control content." *Citizens United*, 558 U.S. at 340.

And it is not just *Janus* with which an extension of *Perry* sits uncomfortably. *Perry* is in considerable tension with a string of recent cases rejecting attempts to characterize discrimination based on the identity of the speaker as viewpoint-neutral. Indeed, it was just a few terms ago that the Court admonished that "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." *Reed*, 576 U.S. at 170. It was just a few Terms before *Reed* that the Court struck down as viewpoint-discriminatory Vermont's effort to distinguish on the basis of a speaker's "status" as a pharmaceutical manufacturer. *See*, *Sorrell*, 564 U.S. at 564. And it was only a few Terms before *Sorrell* that the Court reminded, in striking down a law that discriminated on the basis of corporate status, that "[s]peech restrictions based on

the identity of the speaker" are inherently suspect. *Citizens United*, 558 U.S. at 340.

In short, the notion that there is some category of speakers as to which discrimination is categorically permissible is exceedingly difficult to reconcile with this Court's First Amendment jurisprudence. Several commentators have questioned the vitality of *Perry* for precisely that reason.[3] But whatever its continuing vitality more generally, *Perry* cannot save a law that prevents anyone but the incumbent union from even identifying the relevant audience. Reserving an audience—as opposed to a single means of reaching that audience—to a single, highly interested speaker cannot be understood as anything other than viewpoint discrimination. If *Perry* tolerates that kind of viewpoint discrimination, then *Perry* must give way. Extending *Perry* outside of the context of a nonpublic forum to government-held speech-enabling information is simply just a cover for blatant viewpoint discrimination.

In sum, the decision below, and in *Boardman,* reached a result that is impossible to reconcile with

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[3] *See, e.g.*, Michael Kagan, Speaker Discrimination: The Next Frontier of Free Speech, 42 Fla. St. U. L. Rev. 765, 781 (2015) (explaining how *Citizens United* held that "discrimination based on speaker identity is a free speech problem sufficient to trigger heightened scrutiny," but "*Perry* … said the opposite"); Nicole B. Cásarez, Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination, 64 Alb. L. Rev. 501, 536-37 (2000) ("[T]he *Perry* Court erred in treating 'speaker identity' as distinguishable from 'speaker perspective' in these circumstances. If the state can freely tailor speech restrictions on the basis of speaker status, then the state can eliminate unwanted points of view in nonpublic forums at will."); Steven G. Gey, Reopening the Public Forum-From Sidewalks to Cyberspace, 58 Ohio St. L.J. 1535, 1579 (1998) (describing *Perry*'s reasoning as "very formalistic" and "unconvincing").

this Court's precedent, and did so by construing one of those precedents (*Perry*) to effectively render all the others a dead letter. There is no reason to read *Perry* to countenance that untenable result. But to the extent that it does, it should be overruled. Either way, the Court should grant certiorari and invalidate Section 3556 as the blatant viewpoint discrimination it is.

## III. This Case Is an Ideal Vehicle to Nip Rank Viewpoint Discrimination Disguised as a "Status" Distinction in the Bud.

This case demonstrates an urgent and nationally consequential concern: whether states may systematically suppress disfavored viewpoints under the thinly veiled guise of "status" in order to diminish the negative impact of this Court's *Janus* decision on public sector labor unions. The answer should be a resounding no.

California is now the second state to attempt to circumvent the protections set forth in *Janus* by preventing groups with a particular pro-*Janus* viewpoint from gaining access to speech-enabling information. In 2021, the Ninth Circuit decided a similar viewpoint discrimination-cum-status distinction case in *Boardman*. 978 F.3d at 1092. In *Boardman*, the voters of the State of Washington passed an initiative amending Washington's public-records laws to deny virtually everyone but the incumbent unions access to public records containing the contact information of in-home health care providers. *Id*. at 1098. By barring everyone but incumbent unions from gaining access to this information, union opposition groups could not contact in-home health care providers to inform them about their *Janus* rights to not join a union or pay dues or to organize to vote in a rival union. *Id*. at 1100.

Just as the Memorandum Opinion here relies on "legal status" to disguise viewpoint discrimination, the Ninth Circuit in *Boardman* similarly relied on such fiction. 978 F.3d at 1110 ("[T]he Unions' current access to provider information is based entirely on their *legal status* as certified exclusive bargaining representatives under Washington law."). As discussed above, this Court has made clear in several decisions that "the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral." *Reed*, 576 U.S. at 170; *see, also, Rosenberger*, 515 U.S. at 828-30; *Sorrell,* 564 U.S. at 566.

Yet even as suspect as the ballot initiative was in *Boardman*, this case presents an even better vehicle to expose the "legal status" fiction for what it really is, viewpoint discrimination in favor of union speech.

First, and most importantly, the evidence of the California legislature's anti-*Janus* sentiment here is much stronger and more direct than the animus laid out in *Boardman*. In *Boardman*, while the supporters and funders of the ballot initiative demonstrated anti-*Janus* hostility, it is much more attenuated to say that the voters themselves harbored the same animosity. 978 F.3d at 1124. Here, however, the legislators themselves passed an amendment to Section 3556 for the explicit purpose of "blunt[ing] the impact of *Janus*." Pet.App. 15a.

Second, while the ballot initiative in *Boardman* was stylized to "protect the safety and security of seniors and vulnerable individuals from various financial crimes," *Boardman* 978 U.S. at 1100, the amendment to Section 3556 had no other provision (let alone purpose) but the one that limited access to speech-enabling government-held records to everyone but

unions. In other words, Section 3556 is much more discriminatory on its face.

Third, Section 3556 is much less narrowly tailored than the ballot initiative in *Boardman*. In *Boardman*, appellees presented evidence of privacy concerns for elderly home health care workers. The public records themselves that appellants sought contained inherently private contact information. 978 F.3d 1092 at 1101. Here, the Foundation seeks to know the dates and times of new employee orientations, which occur on state-owned property during working hours. Nothing about this information is inherently private. Even if it were, the Foundation does not need to know what room in a large government building the orientations occur because the Foundation seeks only to speak to public employees on public sidewalks near government buildings, not inside them. Pet.App. 19a, 21a, 28a.

When petitioners in *Boardman* petitioned this Court for a writ of certiorari, this Court almost granted the petition, denying the grant with three dissents (from Justices Gorsuch, Thomas and Alito). This case presents an even better vehicle than *Boardman* and this petition should be granted.

## IV. The Decision Below Conflicts with Decisions from Other Courts of Appeals.

The decision below conflicts not only with this Court's precedent, but with decisions from several other circuits recognizing that discrimination based on "status" and discrimination based on "viewpoint" are often two sides of the same coin. As those courts have correctly recognized, "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." *Reed*, 576 U.S. at 170. And when the speaker's status is inextricably intertwined with one

side of a contentious debate, these circuits have recognized that discrimination based on status and viewpoint are one and the same.

In *Southworth v. Board of Regents of University of Wisconsin System*, 307 F.3d 566 (7th Cir. 2002), for example, the Seventh Circuit examined the criteria a university used for disbursing certain funds to student organizations. Those criteria provided, among other things, that a student organization could not qualify for funds unless the university had provided funds to that organization for at least two prior years. *See id.* at 593. Although those criteria merely purported to favor organizations that had achieved incumbent status, the court nevertheless rejected them as "[i]mpermissibl[y] [v]iewpoint-[b]ased." *Id.* at 592. As the court explained, "until recently, the University prohibited funding of activities which were politically partisan or religious in nature," and "there were no procedures designed to assure the distribution of funds in a viewpoint-neutral manner." *Id.* at 594 (quotation marks and alterations omitted). Further, "historically popular viewpoints are at an advantage compared with newer viewpoints." *Id.* The court thus concluded that incumbent status could not "be said to be unrelated to viewpoint." *Id*. at 593-94.

The Fourth Circuit expressly followed the Seventh Circuit's lead in rejecting as viewpoint-discriminatory a similar school policy favoring "incumbent" student groups. *See Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1074 (4th Cir. 2006) ("Our analysis parallels that of the Seventh Circuit in *Southworth*[.]"). And, more recently, the Fourth Circuit reiterated that "status"-based distinctions necessitate careful scrutiny for viewpoint discrimination. *See Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019).

The Eighth Circuit has likewise recognized the need to closely scrutinize status-based favoritism for viewpoint discrimination. In *Turning Point USA at Arkansas State University v. Rhodes*, 973 F.3d 868 (8th Cir. 2020), the court examined a university policy that allowed students to set up tables for advocacy purposes only if they had first registered as a student organization—a status that required them to have five members, a faculty or staff advisor, and a constitution. *See id.* at 873-74. The court warned that such "status-based discrimination" would constitute "viewpoint-based discrimination" if the requirements to obtain registered-student-organization status "could not be met due to an organization's views." *Id.* at 875-76.

The viewpoint discrimination dressed up as a speaker status distinction is far more blatant here, as only one incumbent can qualify for favored access to speech-enabling data, and that incumbent has a distinct viewpoint; indeed, no incumbent public-sector union is going to have an anti-union or pro-*Janus* viewpoint. These decisions scrutinizing and often condemning far less blatant discrimination are exceedingly difficult to square with the Ninth Circuit's seeming views that status and viewpoint are distinct, and that discrimination based on the former is unproblematic. The Ninth Circuit's decision here (and in *Boardman)* thus conflicts not only with this Court's precedents, but with the decisions of other circuits more faithfully applying those precedents.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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August 7, 2025

# APPENDIX

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**APPENDIX A**

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Case No.: 2:23-cv-03286

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FREEDOM FOUNDATION, a not-for-profit organization,

*Plaintiff,*

v.

RITA GAIL TURNER, in her official capacity as Litigation Research Coordinator in the Public Records Act Unit of the Office of General Counsel for the Los Angeles Unified School District; DEVORA NAVERA REED, in her official capacity as General Counsel for Los Angeles Unified School District; and ALBERTO M. CARVALHO, in his official capacity as Superintendent of Los Angeles Unified School District; CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD, a state agency; UNITED TEACHERS LOS ANGELES and SERVICE EMPLOYEES INTERNATIONAL, LOCAL 99, labor organizations,

*Defendants.*

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FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, AND NOMINAL DAMAGES FOR VIOLATION OF CIVIL RIGHTS.
[42 U.S.C. § 1983]

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## INTRODUCTION

In response the forthcoming Supreme Court decision in *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council* 31, 138 S. Ct. 2448 (2018), which held that government labor unions could no longer compel non-members to pay dues to support the unions' political activities, unions in California encouraged their Democratic allies in the Legislature to enact various protections for their power, including California Government Code § 3556 (Section 3556).

At issue in this case, Section 3556 prohibits anyone but government unions from knowing the date, time, and place of new public employee orientations, where government unions first solicit and pressure new employees to become full union members and pay union dues. This statute silences all non-union viewpoints from providing new employees with vital information before they sign restrictively designed union membership cards at new employee orientations. The result is that the unions pro-membership message goes unchallenged, employees sign restrictive cards without full knowledge of their First Amendment rights, and Democratic lawmakers can rest assured that millions of dollars of union members money given to them by union leaders will continue to flow unhindered.

One such silenced contrary viewpoint is expressed by Freedom Foundation. Freedom Foundation is a § 501 (c)(3) non-profit whose mission includes informing public employees about their First Amendment rights to refuse union membership and subsidizing union political speech through the extraction of dues' deductions. In order to carry out its mission to communicate with public employees, directly, through mail, or via electronic means, the Foundation regularly submits requests for information pursuant to the California Public Records Act, Cal. Gov't Code § 6250, *et seq*. However, when it submitted a request for information regarding upcoming new employee orientations to the Los Angeles Unified School District (LAUSD), the Foundation's request was denied based solely on the prohibition contained in Section 3556. But for this denial, the Foundation would have communicated, and in the future would communicate, directly with new employees about their First Amendment rights in public spaces outside LAUSD orientation locations.

The Civil Rights Act of 1871, codified at 42 U.S.C. § 1983 (Section 1983), guarantees state citizens a federal forum to challenge state officials' violations of federally protected rights. Section 3556 is a content-based regulation that discriminates between viewpoints by favoring union speech to the detriment of all other views, functions as a prior restraint on protected speech, unconstitutionally denies access to government-held information, and calls for the strictest constitutional scrutiny. Therefore, the Foundation brings this action under Section 1983 for the violation of its First Amendment rights, and seeks injunctive relief, a declaratory judgment, and nominal damages.

## JURISDICTION AND VENUE

1. This action arises under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983 (action for deprivation of federal civil rights), and 28 U.S.C. §§ 2201-2202 (action for declaratory relief), including relief pursuant to Federal Rule of Civil Procedure 65 (permanent injunctive relief).

2. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 (federal questions) and 28 U.S.C. § 1343 (deprivation of federal civil rights).

3. Venue is proper in the Central District of California pursuant to 28 U.S.C. § 1391, because the Defendants reside in California, and a substantial part of the events giving rise to this action occurred in this judicial district.

4. The Defendants are "persons" within the meaning of Section 1983, either because they may be sued in their official capacities for equitable relief under *Ex parte Young*, 209 U.S. 123 (1908), including for non-compensatory nominal damages, or because they are state actors, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

## PARTIES

5. Founded in 1991, Plaintiff Freedom Foundation is a national § 501(c)(3) non-profit that educates public employees about their First Amendment rights to refrain from union membership and the payment of union dues, and provides information regarding service providers alternate to unions. Often, this outreach occurs through direct face-to-face contact, either at public fora near their places of work, or upon invitation, inside their homes. Incorporated in

Washington State, Freedom Foundation is headquartered in Olympia, WA.

6. Defendant Rita Gail Turner, sued in her official capacity, is a Litigation Research Coordinator in the Public Records Act Unit of the Office of the General Counsel for the Los Angeles Unified School District. In this role, Ms. Turner is responsible for overseeing and managing incoming requests for public records submitted to her office under the California Public Records Act, Cal. Gov't Code § 6250, *et seq*., including decisions denying access to records. Ms. Turner's office is located at 333 South Beaudry Avenue, Los Angeles, CA 90017.

7. Defendant Devora Navera Reed, sued in her official capacity, serves as General Counsel for Los Angeles Unified School District. In this role, Reed is responsible for overseeing and managing the Public Records Act Unit of the Office of the General Counsel, and thus all requests for public records submitted to her office under the California Public Records Act. Reed's duties include deciding whether to deny requests for access to records. Ms. Reed's office is located at 333 South Beaudry Avenue, Los Angeles, CA 90017.

8. Defendant Alberto M. Carvalho, sued in his official capacity, is Superintendent of Los Angeles Unified School District, the nation's second-largest school district. In this role, Mr. Carvalho is responsible for overseeing and managing all subsidiary departments, including the Office of the General Counsel for the District, which is tasked with overseeing and managing all requests for public records under the California Public Records Act. Mr. Carvalho's office is located at 333 South Beaudry Avenue, Los Angeles, CA 90017.

9. Defendant Public Employment Relations Board (PERB) is a California agency tasked with enforcing labor statutes, including Section 3556. PERB's motion to intervene as of right to defend the constitutionality of Section 3556 was unopposed by the originally admitted parties. PERB is located at 1031 18th Street, Sacramento, CA 95811.

10. Defendants United Teachers Los Angeles (UTLA) and Service Employees International Union, Local 99 (SEIU 99), are government labor unions in California who regularly use their exclusive access to new public employee orientations to pressure employees to become members of private political organizations. The Unions motion to intervene as of right was opposed, but ultimately granted. UTLA is located at 3303 Wilshire Blvd., 10th Floor, Los Angeles, CA 90010, and SEIU 99 is located at 2724 W 8th St, Los Angeles, CA 90005.

## FACTUAL ALLEGATIONS

### A. Supreme Court Frees Employees from Involuntary Union Payments

11. On June 27, 2018, the United States Supreme Court handed down its landmark decision in *Janus*, 138 S. Ct. 2486.

12. *Janus* held that no money may be deducted from a non-consenting public employee for use in a union's political speech, nor any attempt made for such a deduction, unless that employee affirmatively consents to the payment. *Id.* at 2486.

13. This standard can be met only when an employee knowingly, voluntarily, and when sufficiently informed about the consequences of their action, waives their First Amendment right to refuse the union subsidy. *Id.*

14. Further, *Janus* states that this waiver may not be presumed, and must instead be freely given and demonstrated by clear and compelling evidence. *Id.*

15. Prior to *Janus*, government unions were allowed to use state law to compel non-members to support their political activities, even over their objections.

16. After *Janus*, a major source of government union dues was removed, imperiling their revenue stream, and making securing new members, and membership dues, critical to their future operation.

B. Democratic Lawmakers Decry the *Janus* Decision

17. After the Supreme Court decided the *Janus* decision, Democratic lawmakers in California moved quickly to denounce it publicly, including their intention to work against it. A true and correct copy of these statements are included as **Ex. A**.

18. Senate President Pro Tem Toni Atkins stated: "Today, the U.S. Supreme Court sided with forces that are waging a direct and coordinated attack on working people and their ability to collectively bargain for better pay and working conditions." *Id.*

19. Assembly Speaker Anthony Rendon stated: "*Janus* is just the latest weapon being wielded by anti-government billionaires. . . I will continue to stand with the teachers, and first responders and other union members in my district and throughout California who serve our state every day." *Id.*

20. State Sen. Kevin De León stated: "Today, SCOTUS sided with corporate billionaires to threaten hardworking families, but here in California, we won't let one politically-motivated ruling undo so many years of progress. We will continue fighting to

make it easier for working people to stand together." *Id.*

21. Assemblywoman Blanca Rubio stated: "The U.S. Supreme Court's decision today hurts teachers, police officers, firefighters and public servants in California. . . I look forward to working with the unions and will continue to fight for workers' rights." *Id.*

22. Assemblyman David Chiu stated: "I stand with the working people of our state, and am ready to pursue options to ensure labor unions still have the ability to effectively represent and champion workers." *Id.*

23. Sen. Steve Glazer stated: "The decision of the Supreme Court in *Janus v. AFSCME* threatens to undermine this movement by allowing employees who decide not to join a union to also avoid paying their share of the cost of the representation the union is required to provide to all employees, regardless of their membership status." A true and correct copy of this statement is included as **Ex. B**.

24. Sen. Bill Dodd stated: "The U.S. Supreme Court's decision to reject reasoned, decades-old precedent is deplorable. . .While this is an unfortunate hurdle for working families, I am confident that, in spite of this ruling, the labor movement will redouble efforts to build the middle class and preserve the American Dream." A true and correct copy of this statement is included at **Ex. C**.

25. Then Lt. Gov Gavin Newsom stated: "I strongly reject the reasoning underlying this ruling and California must chart its own path to strengthen the rights of workers." **Ex. A**.

C. Democratic Lawmakers Are Beholden to Government Unions

26. Given the financial benefits Democratic lawmakers in California receive from government unions, their desire to both generally support union-empowering measures, as well enact specific legislation like SB 866 in order to bolster the unions' new member base in the wake of Janus, is more than ideological.

27. For example, an analysis of the California Teachers Association's political contributions based on data from the California Secretary of State website found that government unions donate over $2,200,000 to political candidates, almost exclusively Democrats, across California annually. A true and correct copy of this data is included as **Ex. D**.

28. Focusing on two of the largest government unions in California, this data shows that 71.1% of the lawmakers in both chambers of the state legislature have received contributions from either the California Teachers Association or California Federation of Teachers. *Id.*

29. In the time between Jan. 1, 2017, and Nov. 3, 2020, the CTA made contributions to fifty-five of the current seventy-nine members, or 69.6% of the California State Assembly. *Id.*

30. Fifty-four of the fifty-five recipients were Democrats. *Id.*

31. In the time between Jan. 1, 2017, and Nov. 3, 2020, the CTA made contributions to twenty-three of the then current thirty nine members, or 59.0% of the California State Senate. *Id.*

32. All twenty-three recipients were Democrats, and none of the chamber's nine Republicans received contributions. *Id.*

33. Based on campaign finance data derived from the California Secretary of State's CAL-ACCESS campaign finance filing and disclosure system, Democratic members of the California Senate's Standing Committee on Budget and Fiscal Review, responsible for drafting and promulgating SB 866, were the beneficiaries of hundreds of thousands of dollars in government union contributions in 2018. A true and correct copy of this data is included as **Ex. E.**

34. This includes, but is not limited to:

- $137,577 for Sen. Holly Mitchell;
- $114,100 for Sen. Richard Pan;
- $95,400 for Sen. Mike McGuire;
- $69,300 for Sen. Robert Wieckowski;
- $19,600 for Sen. Jim Beall;
- $12,350 for Sen. Richard D. Roth;
- $ 5,800 for Sen. Nancy Skinner. *Id.*

35. In total, the California lawmakers directly responsible for SB 866 received approximately $460,000 from government unions, including UTLA and SEIU 99, in 2018.

36. This amount, for the Committee alone, represents 21% of the total annual government union contributions to the California Legislature. *See id.*

37. That leaves approximately $1,500,000 annually for the rest of the Democratic Caucus. **Ex. D**.

38. This government union financial support directly translates into political support for government unions in the California Legislature.

39. According to voting data compiled by the California Labor Federation, eighteen out of forty state senators, or 45%, voted **100%** in favor of union-empowering legislation in 2018. A true and correct copy of this report is included as **Ex. F**.

40. This includes members of the Senate Standing Committee, Richard Pan, Robert Wieckowski, Mike McGuire, Jim Beall, Nancy Skinner, and Holly Mitchell, responsible for SB 866. *Id.*

41. For the State Assembly, twenty one out of eighty members, or 25%, voted **100%** in favor of union-empowering legislation in 2018. *Id.*

42. Each and every single one of these individuals is a member of the Democratic Party receiving money in exchange for supporting legislation requested or desirable to the government unions.

D. Democratic Lawmakers' Response to Janus: Senate Bill 866

43. Given the financial benefits these Democratic politicians receive from government unions in California, their desire to blunt the likely effect of the *Janus* case and protect union power is more than just ideological.

44. In order to continue receiving government union contributions, it was necessary to protect and bolster continuing union dues in the wake of the *Janus* case.

45. Thus, Janus' perceived threat to government union coffers was seen as a threat to the finances of Democratic lawmakers.

46. Dave Low, Executive Director of the California School Employees Association, stated just prior to the decision: "Once *Janus* is decided, and we feel very much that it is going to be decided against us, we will be moving other legislation."

47. The answer to this dilemma for government unions and their Democratic allies was SB 866.

48. SB 866 comprised a package of statutes adding sections to the California Government Code that were intentionally designed to blunt the effect of the *Janus* case and protect and bolster government union coffers.

49. This package of statutes included the addition of California Government Code § 3550, which makes it illegal for public employers to communicate with their employees regarding their First Amendment rights.

50. It also included the addition of California Government Code § 3553(b), which prevents employers from communicating with employees regarding the *Janus* case and the related First Amendment issues.

51. Additionally, SB 866 added California Government Code § 1153(h), which forces employees to take union payroll deduction issues to the union instead of their own payroll department or employer.

52. In line with the goal of protecting and bolstering union power, specifically bolstering new membership, SB 866 also added Section 3556 to the California Government Code, which grants government unions "mandatory access" to new public employee orientations in order to pressure new employees to join and authorize payroll deductions.

53. Section 3556 further provides that "[t]he date, time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation." (emphasis added).

54. After the *Janus* case was perceived as threatening the continued flow of dues into union coffers, the California Legislature created out of thin air "concerns" over new employees privacy as a justification for restricting access to the dates, times, and places of orientations.

55. However, prior to the *Janus* decision, the previous version of the statute contained no such restriction on public access to the dates, times, and places of new employee orientations based on any alleged privacy concern. A true and correct copy of this statute is included as **Ex. G**.

56. The previous version of Section 3556 simply allowed government unions mandatory access to new employee orientations.

57. It did not contain any prohibition on members of the public accessing the dates, times, and places of new employee orientations.

58. At no time prior to the enactment of Section 3556 did any member of the public having access to this information disrupt government unions' mandatory access rights.

59. Nor was the privacy or security of any public employee threatened by the public having access to the dates, times, and places of new employee orientations.

60. Any supposed privacy protections included in Section 3556 do not apply to the majority of public employees, who come and go from government office buildings and other locations every day without incident.

E. Widespread Acknowledgement that SB 866 Undermines *Janus* and Favors Union Speech

61. The idea that SB 866 was neutral in intent, or application, simply was not present in the California Legislature, government unions, or by any other interested party at the time it was enacted.

62. Republican Senator Stone was the only State senator to express concerns over the bill on the Senate floor prior to the final vote approving SB 866: "There are many provisions in this bill that are in direct response to a very important labor case being heard by the U.S. Supreme Court. . .this is more than just a trailer bill. In fact, this is a bill that is going to empower unions in control of their union employees by making a number of changes."

63. Having helped draft it, government unions across California understood that SB 866 was intended to protect their power by bolstering their membership and subsequent dues collection.

64. For example, in a "Bargaining Advisory" document produced by CTA, the union admits that prior to SB 866, "some employers proposed allowing competing or opposing groups access to the orientations and/or publicizing the orientations to encourage opposing groups to attend and protest the existing exclusive representative. These actions were intended to discourage new employees from joining the union." A true and correct copy of this document is included as **Ex. H**.

65. Not only is such a statement an admission that unions use new employee orientations as recruitment opportunities, but that the intent of SB 866 was to favor union membership by silencing all other viewpoints.

66. The California Labor Federation described SB 866 as "Protections from Union Busting."

67. Teamsters Joint Council 7 stated that SB 866 "contains several other provisions that should be helpful in pushing back against *Janus* proponents . . . These provisions in SB 866 should help limit mischief-making by anti-union ideologues in this post-*Janus* landscape."

68. The California Federation of Teachers directly "collaborated with the California Labor Federation [in 2018] to include provisions in Senate Bill 866," designed to help the union gain new members.

69. But it was not only the government unions that recognized the purpose and function of SB 866.

70. When it was approved, SB 866 was widely understood across ideological perspectives and functions to be a measure designed to undermine *Janus* in favor of government union power.

71. The California Public Employer Relations Board, the agency tasked with enforcing SB 866, recognized that the bill was enacted in direct response to the *Janus* case. A true and correct copy of this statement is included as **Ex. I**.

72. This fact was also acknowledged by the California School Board Association, which wrote that SB 866 was "legislation designed to blunt the impact of Janus." A true and correct copy of this statement is included as **Ex. J**.

73. The San Diego Bar Association produced an article in which it acknowledged that SB 866 had specifically been enacted to "mitigate the effects of the Supreme Court's decision" in Janus. A true and correct copy of this statement is included as **Ex. K**.

74. Similarly, the California Policy Center, a state-based think tank, published a list of legislative measures it identified as intended to undermine Janus, which includes SB 866. A true and correct copy of this article is included as **Ex. L**.

75. Aaron Tang, professor at U.C. Davis School of Law and supporter of government unions, specifically identifies SB 866's secret orientations provision as a "protective measure of insulating employee contact information from anti-union groups. . .[s]uch efforts seem likely to help stem the tide of membership losses." A true and correct copy of this statement is included as **Ex. M**.

F. Union Orientations are Treated as Forced Recruitment Opportunities

76. The legislative findings section of Section 3556 is focused on preserving the ability of exclusive representatives to communicate with represented employees. See Cal. Gov't Code § 3555.

77. This necessary communication specifically includes "an opportunity to discuss the rights and obligations created by the contract [the collective bargaining agreement between the government union and public employer] and the role of the representative, and to answer questions."

78. The necessary communication does not include using new employee orientations as an opportunity to

pressure new employees into becoming full members of a private political entity.

79. However, the latter is precisely how government unions in California use their exclusive access to new employee orientations.

80. California government unions consider new employee orientations to be a prime recruitment opportunity.

81. California government unions abuse their exclusive access to secret employee orientations through both what they do not tell employees, and through what they do tell them.

82. For example, a research report produced by Jobs with Justice, a pro-government union organization in 2016 and titled "Making the Case for Union Membership: The Strategic Value of New Hire Orientations," is designed to train government union representative to use orientations to pressure new employees to join unions. A true and correct copy of this report is included as **Ex. N**.

83. Government unions take the opportunity of using new employee orientation for membership recruitment seriously. *Id.*

84. The tactics laid out in the above cited report are based on "relevant social science research, an electronic survey of 49 unions, interviews with officers and staff responsible for their unions' orientation programs, content analysis of union welcome packets, and observations of existing orientation programs." *Id.*

85. These recruitment tactics include both formal socialization and informal socialization. *Id.*

86. Formal socialization is a more structured and organized experience, typically occurring in a group setting. *Id.*

87. Formal socialization's purpose is to instill in new members a sense of loyalty or commitment to the organization, to teach new members about the organization's rules and processes, and to introduce a group's formal expectations to new members. *Id.*

88. Informal socialization is less structured, is adaptive by nature, and is more likely to occur at the individual level. *Id.*

89. Informal socialization can be used to reinforce information presented in a formal socialization setting, and it can provide further guidance to new members about the unwritten customs, traditions, and practices that may exist. *Id.*

90. This report explicitly describes the goal of the training and guidance offered to government unions: "A crucial, if not the primary, objective of the formal orientation is to sign up new members." *Id.*

91. This goal is more than theoretical, but is put into practice at every available opportunity by government unions in California.

92. For example, a video shown during Los Angeles County Department of Public Social Services IHSS Provider Online Orientation by SEIU 2015 exemplifies the goal of government unions to use new employee orientations to recruit new members.[1]

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[1] https://my.dpss.lacounty.gov/dpss/ihssorientation/video.cfm?video=seiu&token=590903&code=3A27DA7E-537B-49D9-B739-1437C7D50934

93. Rather than provide information regarding its role as exclusive representative, or applicable contracts affecting new IHSS workers, SEIU 2015's message is pure promotion for union membership.

94. These tactics are consistent across new employee orientations and government unions.

G. Freedom Foundation's Mission to Communicate With Public Employees

95. Matthew Hayward is the National Outreach Director at Freedom Foundation.

96. In his position as National Outreach Director, he is responsible for canvassing, mail and email to public employees to inform them of their First Amendment rights.

97. As part of his job, he regularly interacts with canvassers, who speak directly with public employees prior to, and during, new employee orientations in the state of Washington.

98. These canvassers also report directly to Mr. Hayward.

99. Freedom Foundation canvassers stood outside of over one hundred new employee orientations, and spoke to employees that attended these orientations.

100. Other canvassers were able to actually attend new employee orientations throughout the state of Washington.

101. After doing so, canvassers reported their conversations directly to Mr. Hayward, or, reported what they saw and heard at the new employee orientations directly to Mr. Hayward.

102. After either personally attending these orientations or speaking to public employees after their

orientations, the canvassers reported the same pattern.

103. In all new employee orientations, the union representative spent roughly 50% of the allotted time discussing the Freedom Foundation itself and the "difficulties" the Foundation has caused public sector unions.

104. The government union representative then spent the majority of the remaining time attempting to convince new employees to become union members.

105. The government union representative spent very little, and often no time, discussing the details of the relevant collective bargaining agreement, or the wages, hours, or working conditions of represented employees.

106. In almost all instances, many of which have been documented and recorded by the Freedom Foundation, the union representative used intimidation, coercion, pressure, and factual inaccuracies to convince new employees to join as union members.

107. In rare meetings where an individual employee stood up and explained to other new employees that they were not obligated to become unions members, the number of new employees that would join a union would drop from 90% of those attending to 10%.

108. Within minutes and hours after the new employee orientations, Mr. Hayward received countless calls, emails and other communications from new employees asking to opt-out of their membership, and explaining that they signed membership and dues authorization cards only because of the pressure the

union representatives exerted on them during the orientations.

109. Freedom Foundation's mission to communicate with public employees requires submitting public record act requests to government employers seeking public information about how to reach the employees.

110. Based on the results of these requests, the Foundation then conducts face-to-face outreach to prospective and current public union members.

111. These conversations take place outside government offices, in other protected public places, and upon invitation, within public employees' homes.

112. Foundation staff and supporters are regularly present outside government office buildings across California, and have been since at least 2014, without incident.

113. Any interactions between Foundation supporters or employees and public employees outside orientation locations to discuss the public employees' First Amendment rights are entirely voluntary, occur peacefully in protected public places, and present no more security threats or threats of harassment than two citizens having a peaceful conversation on any street or sidewalk in America

114. In particular, it is important to the Foundation's mission to communicate with new public employees before they attend the State required new employee orientation.

115. This specific timing is important because government unions use new employee orientations to pressure new employees to become members in private political organizations, the unions.

116. Once a new employee signs a document with a government union at a new employee orientation, perhaps unwittingly, the government union uses it compel continued dues deductions to support its political speech, typically for a full year, sometimes longer, with an ability to extend the time unilaterally.

117. This political spending using employees lawfully earned wages often contradicts and offends their mostly deeply held beliefs.

118. While encouraging union membership, the union representatives specifically exclude information necessary for the employees to make an informed decision.

119. This includes withholding the fact that employees have a constitutional right to refuse union membership pursuant to the First Amendment, and that union representation in contract negotiations is not dependent on membership.

120. Government unions also regularly mislead potential new members by informing them that their pay could be cut, they could lose benefits, or be subject to social ostracization by co-workers by refusing union membership.

121. Once the employees sign union membership and dues agreements, whether properly informed or not, it is difficult to impossible for them to end the deductions without union permission. A true and correct copy of a restrictive union membership and dues authorization agreement is included as **Ex. O**.

### H. Freedom Foundation Denied Access to Orientation Information

122. On January 19, 2023, the Foundation submitted a request for public records to the Office of the General Counsel for LAUSD, under the California Public Records Act, California Government Code §§ 2650, *et seq*. A true and correct copy of this request is included as Exhibit P.

123. In this request, the Foundation asked for the "date, time, and place of all orientations for new District employees scheduled from February 1, 2023, to August 30, 2023." *Id.*

124. The purpose of this request was to enable the Foundation to communicate with new public employees about their First Amendment rights in protected public fora outside the location of the orientations, either with face-to-face conversations or providing them with written information.

125. On January 25, 2023, Miriam Gonzalez, a legal secretary with the Office of the General Counsel for the District, acknowledged the Foundation's request for public records. A true and correct copy of this email is included as Exhibit Q.

126. On January 30, 2023, Defendant Rita Gail Turner, a Litigation Research Coordinator in the Public Records Act Unit of the Office of the General Counsel for the District, denied the Foundation's request for public records regarding the date, time, and place of planned new employee orientations. A true and correct copy of this letter is included as Exhibit R.

127. Specifically, Ms. Turner wrote that: "Per California Government Code section 3556, the date,

time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation." *Id.*

128. Further, Ms. Turner states that: "[A]ccording to California Government Code section 7927.705, the Public Records Act recognizes exemptions to the disclosure of a record which is exempted or prohibited from disclosure pursuant to state law. As such, the District is precluded from providing the requested information." *Id.*

129. Ms. Turner denied the Foundation's request pursuant to the prohibition contained in Section 3556. I. Allegations Applicable to Request for Equitable Relief

130. But for the prohibition contained in Section 3556, Ms. Turner would have granted the Foundation's request for the applicable records concerning new employee orientations.

131. Such information is vital for the Foundation to accomplish its mission to inform employees about their First Amendment rights.

132. But for the operation of Section 3556, the Foundation would have access to information regarding the dates, times, and locations of new LAUSD employee orientations.

133. But for the prohibition contained in Section 3556, the Foundation would be on site in public fora during the applicable new employee orientations, communicating with new employees regarding their First Amendment rights and union membership. A

true and correct copy of a supporting declaration is included as Exhibit S.

134. Freedom Foundation will submit future requests to LAUSD for public records concerning new employee orientations in order to complete its mission. *Id.*

135. The controversy between the Foundation and PERB is a concrete dispute concerning the legal relations of parties with adverse legal interests.

136. The dispute is real and substantial.

137. LAUSD denied and continues to deny the Foundation access to information under Section 3556 vital to complete its mission to inform new LAUSD employees about their First Amendment rights.

138. Injunctive relief is appropriate, as the Foundation is suffering a continuing irreparable injury to its First Amendment rights for which there is no adequate remedy at law.

139. The declaratory relief sought is not based on a hypothetical state of facts, nor would it amount to a mere advisory opinion.

140. The Foundation, PERB, and the Unions dispute the constitutionality of the ongoing denial of information regarding the new LAUSD employee orientations occurring under a state statute, Section 3556.

141. As a result of the foregoing, an actual and justiciable controversy exists between the Foundation, PERB, and the Unions regarding their respective legal rights.

142. The matter is ripe, and judicial review is appropriate.

## CAUSES OF ACTION

### COUNT I
### Discrimination in Provision of Information Based on Viewpoint of the Speaker First Amendment (42 U.S.C. § 1983)

143. The Foundation re-alleges and incorporates by reference each and every paragraph set forth above.

144. Viewpoint discrimination can occur through the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker, or the prohibition of public discussion of an entire topic, even where the regulation is facially neutral as to the content of the speech.

145. In other words, viewpoint discrimination exists where a law targets particular views taken by speakers on a subject.

146. Specifically, the First Amendment forbids a state from discriminating among viewpoints in the provision of information within its control.

147. When the government selectively discloses information within its control, a First Amendment claim will lie if the government denies access to information based on an illegitimate criterion such as the viewpoint of the requestor.

148. Thus, a state violates the First Amendment by imposing viewpoint-based conditions on access to government-controlled information or by otherwise discriminating among viewpoints in the information's provision.

149. Section 3556 impermissibly discriminates in the provision of information based on the viewpoint of the requestor.

150. The state assigns a higher value to union speech, the purpose of which in this context is to recruit new union members and secure their authorization to deduct dues for use in the unions' political speech, over alternative views like the Foundation's, which seeks to inform employees of their First Amendment rights to refuse union membership, and how to avail themselves of alternative avenues of services for themselves and their families.

151. Under Section 3556, unions espousing pro-membership views, are granted exclusive access to new employee orientations, and are even permitted inside the orientation location to make their pitch.

152. Meanwhile, all other parties espousing an alternative view, such as the Foundation, are denied access even to information regarding when and where those orientations will be held.

153. When the Defendants denied the Foundation's request for the dates, times, and places of planned new employee orientations, they did so based on Section 3556, which is unconstitutional because it discriminates in the provision of information based on the viewpoint of the requestor.

154. Laws that discriminate based on viewpoint are subject to strict scrutiny.

155. Under strict scrutiny, the burden is on the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

156. Section 3556 fails strict scrutiny.

157. The government has no legitimate, let alone compelling, interest in denying the Foundation's

access to the dates, times, and places of new employee orientations so Foundation staff is unable to communicate with new employees outside the orientation locations.

158. Even if Section 3556 did have a legitimate or compelling purpose, it is not narrowly tailored to support that interest, as there are ample more narrowly tailored alternatives available.

159. For example, the state could still have provided the unions mandatory access to new employee orientations without making information regarding such orientations a secret to all but the unions.

160. The only explanation for this choice was to favor union speech to the detriment of all other forms of speech.

161. Hence, the Foundation seeks injunctive and declaratory relief against all Defendants to enjoin enforcement of Section 3556 under 28 U.S.C. §§ 2201-2202, and nominal damages of $1.00 from each Defendant under Section 1983.

COUNT II
Unconstitutional Content-Based Speech Regulation
Based on Function or Purpose of Speech
First Amendment
(42 U.S.C. § 1983)

162. The Foundation re-alleges and incorporates by reference each and every paragraph set forth above.

163. Government regulations based on the content of a speaker's message, are unconstitutional under the First Amendment unless they satisfy strict scrutiny.

164. Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed.

165. This requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys.

166. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose.

167. Section 3556 is facially content-based because it regulates speech based upon the function and purpose of the views espoused.

168. Under Section 3556, unions acting as the exclusive representatives of LAUSD employees and espousing pro-membership views, are granted exclusive access to new employee orientations in order to sign up new members and convince them to authorize the deduction of dues to subsidize the unions' political speech.

169. These unions are also permitted inside the orientation locations.

170. All other parties that wish to espouse an alternative view to union membership, like the Foundation, are denied access to information even regarding the dates, times, and places of the orientations.

171. The statute assigns a higher value to pro-union speech, the function and purpose of which is to recruit new union members, than the value assigned to alternative views like the Foundation's, the function and purpose of which is to inform employees of their First Amendment rights to refuse union

membership and the subsidization of union political speech.

172. Section 3556 thus facially discriminates between pro-union and alternative forms of speech based on the content of the speech because it draws distinctions based on the function and purpose of the views espoused, or the content of the message conveyed.

173. When the Defendants denied the Foundation the ability to access the requested information based on the function and purpose of the Foundation's union-opposed speech, the Defendants violated the Foundation's First Amendment.

174. Content-based speech restrictions are subject to strict scrutiny.

175. Under strict scrutiny, the burden is on the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

176. Section 3556 fails strict scrutiny.

177. The government has no legitimate, let alone compelling, interest in denying the Foundation's access to the dates, times, and places of new employee orientations.

178. Even if Section 3556 did have a legitimate or compelling purpose, it is not narrowly tailored to support that interest, as there are ample more narrowly tailored alternatives available.

179. Hence, the Foundation seeks injunctive and declaratory relief against all Defendants to enjoin enforcement of Section 3556 under 28 U.S.C. §§ 2201-2202, and nominal damages of $1.00 from each Defendant under Section 1983.

COUNT III
Speech Chilled through Prior Restraint
First Amendment
(42 U.S.C. § 1983)

180. The Foundation re-alleges and incorporates by reference each and every paragraph set forth above.

181. A prior restraint on protected speech exists when the government can deny access to a forum for expression before the expression occurs.

182. Prior restraints are prohibited by the First Amendment, as one of the most serious and the least tolerable infringements on free speech rights.

183. A system of prior restraints bears a heavy presumption against its constitutional validity, and the government carries a heavy burden of showing justification for the imposition of such a restraint.

184. Prior restraints on speech occur based on the content of the speech.

185. In order to qualify as a prior restraint a statute must: 1) forbid a party from engaging in future expressive activities, 2) require the party to obtain prior approval for the future expressive activities, and 3) must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat to free speech rights.

186. In order to justify a prior restraint, the government must demonstrate that the restraint is justified without reference to the content of the speech, and is narrowly tailored to serve a compelling governmental interest.

187. Section 3556 and the Defendants' denial of the Foundation's requested information meet each of these requirements.

188. The Defendants denial of information based on Section 3556 regarding the date, time, and place of planned new employee orientations operated to forbid the Foundation from engaging in future expressive activities, specifically communicating with new employees on those dates, times, and places regarding their First Amendment rights.

189. Under Section 3556, the Foundation is denied the approval of the Defendants prior to engaging in future expressive activities, as the Defendants are specifically prohibited from releasing information under the California Public Records Act that, but for Section 3556, they would release.

190. Section 3556 is directly related to the expressive activities of the Foundation and all other non-union members of the public, and thus poses a real and substantial threat to free speech rights.

191. Hence, the Foundation seeks injunctive and declaratory relief against all Defendants to enjoin enforcement of Section 3556 under 28 U.S.C. §§ 2201-2202, and nominal damages of $1.00 from each Defendant under Section 1983.

COUNT IV
Denial of Access to Government-Held Information
First Amendment
(42 U.S.C. § 1983)

192. The Foundation re-alleges and incorporates by reference each and every paragraph set forth above.

193. By protecting those who wish to enter the marketplace of ideas from government attack, the

First Amendment protects the public's interest in receiving truthful information.

194. The public's access to government-held information need not be premised on a claimed special privilege of access, but flows rather from the First Amendment itself.

195. The government thus may not, consistent with the spirit of the First Amendment, contract the spectrum of available knowledge.

196. The right to receive information is a necessary predicate to the recipient's meaningful exercise of their own rights of speech.

197. Thus, without the right to receive information, the right to speak freely on protected topics of public importance would necessarily be imperiled.

198. To the extent the information is withheld by the government to discourage the exercise of First Amendment freedoms, even a minor burden may violate the Constitution.

199. By denying the Foundation access to the dates, times, and places of new employee orientations, the LAUSD violated the Foundation's First Amendment right to receive truthful information.

200. Hence, the Foundation seeks injunctive and declaratory relief against all Defendants to enjoin enforcement of Section 3556 under 28 U.S.C. §§ 2201-2202, and nominal damages of $1.00 from each Defendant under Section 1983.

## PRAYER FOR RELIEF

Wherefore, the Foundation respectfully requests that this Court:

A. Issue a declaratory judgment:

- That the challenged portion of Cal. Gov't Code § 3556 restricting access to the dates, times, and places of new employee orientations is viewpoint discriminatory regulation regarding the provision of government-controlled information which favors union speech to the detriment of all other viewpoints, facially and as applied to the Foundation, and is unconstitutional and unenforceable;

- That the challenged portion of Cal. Gov't Code § 3556 restricting access to the dates, times, and places of new employee orientations is a facially content-based speech regulation that violates the First Amendment, facially and as applied to the Foundation, and is unconstitutional and unenforceable;

- That the challenged portion of Cal. Gov't Code § 3556 restricting access to the dates, times, and places of new employee orientations is an unconstitutional prior restraint violating the First Amendment, facially and as applied to the Foundation, and is unconstitutional and unenforceable;

- That the challenged portion of Cal. Gov't Code § 3556 restricting access to the dates, times, and places of new employee orientations unconstitutionally denies the public access to government-held information violating the First Amendment, facially and as applied to the Foundation, and is unconstitutional and unenforceable.

B. Issue a permanent injunction:

- Enjoining the Defendants from enforcing the challenged portion of Section 3556 insofar as it denies the Foundation and other members of the public access to the date, time, and place of new employee orientations.

C. Enter judgment:

- Awarding the Foundation $1.00 in nominal damages from each of the Defendants for the deprivation of the Foundation's First Amendment rights;

- Award the Foundation its costs and attorneys' fees under Section 1983 and 42 U.S.C. § 1988;

- Award the Foundation any further relief to which it may be entitled and any other relief this Court deems just and proper.

Date: October 24, 2023

Respectfully submitted,

FREEDOM FOUNDATION

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**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: March 10, 2025]

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No. 24-768
D.C. No. 2:23-CV-03286-WLH-JPR

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FREEDOM FOUNDATION, a not-for-profit organization,

*Plaintiff-Appellant,*

v.

RITA GAIL TURNER, in her official capacity as Litigation Research Coordinator in the Public Records Act Unit of the Office of General Counsel for the Los Angeles Unified School District, et al.,

*Defendant-Appellee,*

and

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD, et al.,

*Intervenor Defendant-Appellee.*

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On Appeal from the United States District Court for the Central District of California
Hon. Wesley L. Hsu, presiding

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MEMORANDUM[*]

Submitted March 6, 2025[**] Pasadena, California

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: TALLMAN, IKUTA, and CHRISTEN, Circuit Judges.

Plaintiff-Appellant Freedom Foundation, a non-profit organization dedicated to educating public employees about their right to refrain from paying union dues, appeals the district court's dismissal of its First Amendment claim for failing to state a claim. Appellant alleged that California Government Code Section 3556 ("Section 3556"), which prohibits disclosing the time, date, and location of public employee orientations to anyone other than "the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation," Cal. Gov't Code § 3556, is a viewpoint-based and content-based restriction and a prior restraint on speech. We review de novo the district court's grant of a Rule 12(b)(6) motion for failure to state a claim, *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1093 (9th Cir. 2017) (citation omitted), and we affirm.

Even taking Appellant's non-conclusory factual allegations as true, Appellant did not state a plausible claim that Section 3556 violates the First Amendment as either a content-based or viewpoint-based restriction on speech, or as a prior restraint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell All. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

1. Appellant failed to plausibly allege that Section 3556 is content or viewpoint discriminatory either on its face or in its "justification or purpose." *See Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015) (citations omitted). First, Section 3556 is not facially dis-

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

criminatory because it does not "draw[] distinctions based on the message a speaker conveys." *See id.* at 163 (citation omitted). Like the regulation at issue in *Boardman v. Inslee*, 978 F.3d 1092 (9th Cir. 2020), Section 3556 regulates the dissemination of information based on the receiver's legal status—the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation—not the content of their speech or the viewpoint they convey. *See Boardman*, 978 F.3d at 1112.

Second, Section 3556 does not discriminate in its "purpose and justification." *Reed*, 576 U.S. at 166. Its legislative history reflects a content and viewpoint neutral purpose and Appellant did not plead sufficient facts to show otherwise. Legislative reports show that the confidentiality provision arose out of "incidents of workers being targeted at public gatherings" that caused "privacy and safety concerns" for public employees. This is content and viewpoint neutral and concerns legitimate state interests. *See Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 271 (9th Cir. 1995). So, too, is ensuring that an exclusive bargaining representative has access to carry out the duty of communicating with public employees at an orientation. *Boardman*, 978 F.3d at 1118; *see Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 898–99 (2018). The fact that Section 3556 has the "incidental effect" of denying Appellant access to the orientation information does not negate the law's neutral purpose. *Boardman*, 978 F.3d at 1113.

Appellant's theory is that Section 3556 was "adopted by the government because of disagreement with the message [the speech] conveys" based on the

Legislature's allegedly pro-union bias. *See Reed*, 576 U.S. at 164 (alteration in original) (internal quotation marks and citation omitted). But none of Appellant's alleged evidence establishes a plausible connection between legislators' perceived pro-union bias and Section 3556.

2. Appellant failed to plausibly allege that Section 3556 amounts to a prior restraint, considering that the law does not forbid any speech. *See Twitter, Inc. v. Garland*, 61 F.4th 686, 702-03 (9th Cir. 2023), *cert. denied sub nom. X Corp. v. Garland*, 144 S. Ct. 556 (2024). Section 3556 does not allow the government to issue or threaten to issue an order forbidding speech, and it does not give the government discretion to approve or disapprove of Appellant's speech. The law allows the exclusive representatives of the employees to receive information about the location and timing of the orientation session based solely on legal status, which we affirmed in *Boardman*. *Boardman*, 978 F.3d at 1110. As the district court explained, Appellant did not state a claim by simply alleging that Section 3556 burdens Appellant's ability to efficiently locate and speak to new employees at orientations. Appellant acknowledged that Section 3556 does not bar it from reaching public employees to convey its message. Appellant can locate the names of new employees under the California Public Records Act.

3. Since Section 3556 does not implicate First Amendment rights, it is subject to rational basis review, which presumes the law is constitutional. *Id.* at 1118 (citations omitted). Appellant does not contest that Section 3556 has a rational basis. It admits that the concern for employee privacy is "generally important," and "might suffice as support

for a government interest under a rational basis approach . . . ." *See also id.* (holding that analogous law survived rational basis review because the state has a legitimate public interest in privacy and safety of the workers, as well as the "special responsibilities of an exclusive bargaining representative" (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 54 (1983))).

**AFFIRMED**

**APPENDIX C**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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Case No. 2:23-CV-03286-WLH-JPR

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FREEDOM FOUNDATION,
a not-for-profit organization,

*Plaintiff,*

v.

RITA GAIL TURNER, in her official capacity as Litigation Research Coordinator in the Public Records Act Unit of the Office of General Counsel for the Los Angeles Unified School District, et al.,

*Defendants,*

and

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD, et al.,

*Intervenor-Defendants.*

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ORDER RE INTERVENOR-DEFENDANTS' MOTIONS TO DISMISS [52] AND [54]

Intervenor-Defendant California Public Employment Relations Board ("PERB") brings a Motion to Dismiss Plaintiff's First Amended Complaint ("FAC") (PERB Mot. to Dismiss, Docket No. 52); Intervenor-Defendants United Teachers Los Angeles and SEIU Local 99 (collectively, the "Unions") also bring a separate Motion to Dismiss Plaintiff's FAC. (Unions Mot. to Dismiss, Docket No. 54 (collectively with the

PERB Mot. to Dismiss, the "Motions")). On January 12, 2024, the Court held a hearing and heard oral argument from PERB, the Unions, and Plaintiff. For the reasons below, the Motions are **GRANTED**.

## I. BACKGROUND

### A. Factual Background

Plaintiff Freedom Foundation ("Freedom Foundation" or the "Foundation") "is a national § 501(c)(3) non-profit that educates public employees about their First Amendment rights to refrain from union membership and the payment of union dues." (FAC, Docket No. 46 ¶ 5). Central to the Foundation's message is the Supreme Court's holding in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.* at 2486. The Foundation frequently spreads this message "through direct face-to-face contact, either at public fora near [public employees'] places of work, or upon invitation, inside their homes." (FAC ¶ 5).

After the Supreme Court decided *Janus*, the California Legislature passed Senate Bill 866 ("SB 866"). (*Id.* ¶ 54). SB 866 amended, *inter alia*, California Government Code section 3556 ("section 3556"), a 2017 law that required public employers to provide exclusive bargaining representatives mandatory access to new employee orientations. (*Id.* ¶ 52, 55–57, Ex. G). Since SB 866's passage in 2018, section 3556 has also provided that "[t]he date, time, and place of" orientations for new public employees "shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor

that is contracted to provide a service for purposes of the orientation." (*Id.* ¶ 53).

On January 19, 2023, Freedom Foundation submitted a request for public records to the Office of the General Counsel for the Los Angeles Unified School District ("LAUSD") under the California Public Records Act, California Government Code §§ 2650, *et seq*. (*Id.* ¶ 122, Ex. P). The request sought the "date, time, and place of all orientations for new District employees scheduled from February 1, 2023, to August 30, 2023." (*Id.* ¶ 123). According to Freedom Foundation, "the purpose of this request was to enable the Foundation to communicate with new public employees about their First Amendment rights in protected public fora outside the location of the orientations, either by face-to-face conversations or providing them with written information." (*Id.* ¶ 124). On January 30, 2023, Defendant Rita Gail Turner, a Litigation Research Coordinator in the Public Records Act Unit of the Office of the General Counsel for LAUSD, denied the Foundation's request for the date, time, and location of new employee orientations in compliance with section 3556. (*Id.* ¶¶ 126–127).

On May 1, 2023, Freedom Foundation filed suit challenging the constitutionality of the provision of section 3556 that prohibits the disclosure of information regarding orientations for public employees. (*See generally* Compl., Docket No. 1). The Foundation names as Defendants three LAUSD employees in their official capacities: Turner; Devora Navera Reed, General Counsel for LAUSD; and Alberto M. Carvalho, Superintendent of LAUSD (collectively, the "LAUSD Defendants"). (*Id.* ¶¶ 6–8). The Foundation alleges four counts under 42 U.S.C. § 1983 for

violations of the First Amendment: Count I for viewpoint discrimination (FAC ¶¶ 143–61), Count II for unlawful content-based regulation of speech (*id.* ¶¶ 162–79), Count III for an unlawful prior restraint (*id.* ¶¶ 180–91), and Count IV for unlawful denial of access to government-held information (*id.* ¶¶ 192–200). Freedom Foundation seeks a declaratory judgment that the challenged provision of section 3556 violates the First Amendment, a permanent injunction preventing LAUSD Defendants from enforcing section 3556, and "$1.00 in nominal damages from each of the Defendants for the deprivation of the Foundation's First Amendment rights," as well as costs and attorney's fees. (*Id.* at 35–37).

B. Procedural Background

On June 16, 2023, PERB—the California government agency that enforces section 3556—filed a motion to intervene in this matter. (PERB Mot. to Intervene, Docket No. 25); Cal. Gov't Code § 3555.5. On July 14, 2023, the Unions also filed a Motion to Intervene as Defendants. (Unions Mot. to Intervene, Docket No. 27). On July 21, 2023, Plaintiff and LAUSD Defendants filed a joint stipulation regarding LAUSD Defendants' limited participation in the case. (Stipulation, Docket No. 29). On September 19, 2023, the Court granted the parties' stipulation to limit the participation of the LAUSD Defendants, (Order, Docket No. 41), and granted the motions to intervene by PERB and the Unions, (Order, Docket No. 40). California Attorney General Rob Bonta filed a motion to intervene on November 3, 2023, (CA AG Mot. to Intervene, Docket No. 51), which the Court granted (Order, Docket No 56).

Meanwhile, on October 24, 2023, the Foundation filed the FAC, amended to add new allegations

regarding the California Legislature's motives for passing SB 866. (*See* FAC ¶¶ 17–75). On December 1, 2023, PERB and the Unions each filed motions to dismiss the FAC, which the Court now considers.

## II. DISCUSSION

To survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The court must construe the complaint in the light most favorable to the plaintiff and take its non-conclusory allegations as true. *Boquist v. Courtney*, 32 F.4th 764, 773 (9th Cir. 2022). The court is not required, however, to accept as true legal conclusions couched as factual allegations. *Twombly*, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions. . .").

Pursuant to Fed. R. Civ. P. 15(a)(2), when a motion to dismiss is granted, courts should "freely give leave [to amend] when justice so requires." In determining whether leave to amend is warranted, courts consider "bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously amended his pleadings." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Id.*

A. First and Second Causes of Action

The Foundation brings two related claims for content-based discrimination and viewpoint discrimination. "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 168–69 (2015) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)); *see also Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1124 (9th Cir. 2023) (Vandyke, C.J., concurring) ("Viewpoint discrimination is a type of content discrimination, but a 'more blatant' type."). "[A] speech regulation targeted at specific subject matter is content based," however, "even if it does not discriminate among viewpoints within that subject matter." *Id.*

Because viewpoint discrimination is a subtype of content-based discrimination, the Court will broadly consider whether section 3556 is a content-based regulation, and, if so, whether it discriminates on viewpoint specifically. To do so, the Court must evaluate both "whether [the] law is content based on its face and whether the purpose and justification for the law are content based." *Reed*, 576 U.S. at 156. If at least one of those criteria is met, the law is subject to strict scrutiny. *Id.* at 163–64.

1. Facial Discrimination

Freedom Foundation first argues that section 3556 is discriminatory on its face. (Opp'n to Mots. to Dismiss ("Opp'n"), Docket No. 58 at 6–9). A regulation of speech is facially content-based "if it 'target[s] speech based on its communicative content'— that is,

if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'"[1] *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022) (quoting *Reed*, 576 U.S. at 163). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Reed*, 576 U.S. at 163–64. Both types of facial distinction are "drawn based on the message a speaker conveys." *Id.*

Section 3556 is not facially content-based because it does not draw distinctions based on the message the speaker conveys. The regulation at issue in this case is very similar to the one at issue in *Boardman*, 978 F.3d 1092. There, the Ninth Circuit considered a Washington ballot initiative that "prohibit[ed] public access to certain government-controlled information, including the personal information of in-home care providers," but required that the same personal information be provided to the in-home care providers' exclusive bargaining representative. *Id.* at 1098. In other words, like section 3556, the regulation at issue in *Boardman* gave collective bargaining representatives exclusive access to

[1] It is worth mentioning that Freedom Foundation brings a cognizable First Amendment claim, even though the issue here is whether the Foundation has a right to access information regarding employee orientations for the purpose of engaging in speech at those orientations—not whether the Foundation has a right to engage in the speech itself. *See Boardman v. Inslee*, 978 F.3d 1092, 1105 (9th Cir. 2020) (finding that "the government may transgress the First Amendment by imposing viewpoint-based conditions on access to government-controlled information or by otherwise discriminating among viewpoints in the provision of information within its control").

information regarding the public employees they represented. *Id.*

The appellants in *Boardman*—including the Foundation—argued that the law discriminated based on viewpoint, but the Ninth Circuit rejected that argument. The court found that the law was not facially discriminatory because it "den[ied] access to [p]rovider [i]nformation irrespective of a requester's views, ideology, or message on any particular subject." *Id.* at 1109. To be entitled to the protected information, the requester needed to be an exclusive bargaining representative certified under Washington law. *Id.* at 1110. Thus, the Ninth Circuit reasoned, the law at issue "[did] not permit the [u]nions access to [p]rovider [i]nformation based on the *views* they espouse on the subject of collective bargaining," but instead was "based entirely on their *legal status* as certified exclusive bargaining representatives under Washington law." *Id.* (citing Wash. Rev. Code. § 41.56.080). Were appellants to replace the certified exclusive bargaining representative—as they apparently sought to do—the plain terms of the law dictated that they, and not the unions, would be entitled to providers' personal information, completely irrespective of their views. *Id.* at 1111–12.

Section 3556 similarly discriminates based only on the requester's legal status and not on the requesters' message—regardless of whether they are anti-union, pro-union, ambivalent, or apathetic. Like Washington law, California law provides for formal recognition of exclusive bargaining representatives by the state. *See* Cal. Gov't Code § 3520.5. Section 3556 merely provides carveouts for those who must attend the orientation: new public employees; the exclusive bargaining representative, who has a duty to com-

municate with new public employees regardless of whether they eventually join the union[2]; and vendors contracted to provide services to orientation attendees. A pro-union message is not the common denominator.

Moreover, section 3556 does nothing to prevent the Freedom Foundation from sharing its anti-union message with new public employees. Nevertheless, Freedom Foundation argues that "[w]hile it is true that the Foundation could be present every single day outside possible orientation locations in the off chance that a new employee orientation might be occurring, this would present a constitutionally intolerable burden on the Foundation's speech." (Opp'n at 8). For support, the Foundation cites two Supreme Court cases, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) and *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991), for the proposition that "[l]aws banning speech outright and laws burdening speech are 'but a matter of degree' and government's 'content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.'" (Opp'n at 8 (quoting *Playboy*, 529 U.S. at 812)).

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[2] Indeed, a "union's duty extends to all employees in the bargaining unit, regardless of union membership . . . ." *Cnty. of Los Angeles v. Los Angeles Cnty. Emp. Rels. Com.*, 56 Cal. 4th 905, 931 (2013). Therefore, "the union must have the means of communicating with all employees." *Id.*; *see also* Cal. Gov't Code § 3544.9 ("The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.").

Both cases are distinguishable. In *Playboy*, the Supreme Court considered a statute that "require[d] cable operators either to scramble a sexually explicit channel in full or to limit the channel's programming to the hours between 10 p.m. and 6 a.m." 529 U.S. at 808. And in *Simon & Schuster*, the Supreme Court considered New York's "Son of Sam" law, which "require[d] that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account" for the benefit of his victims. 502 U.S. at 108. Both cases considered statutes that placed considerable burdens on specific types of expressive content: sexually explicit programming in *Playboy* and autobiographical accounts of crime in *Simon & Schuster*. On both occasions the Supreme Court found that the statutes, while not amounting to outright bans on the material they were directed at, placed restrictions on the material *because* of the content. Therefore, the statutes were subject to higher levels of scrutiny. *See Playboy*, 529 U.S. at 812; *Simon & Schuster*, 502 U.S. at 118.

In contrast, Section 3556 neither bans Freedom Foundation's speech outright nor burdens the Foundation's speech because of its message. The law is not content-based on its face.

2. Content-Based Purpose

Because section 3556 does not facially discriminate based on content, the Court moves on to the second question presented in *Reed*: "whether the purpose and justification for the law are content based." *Reed*, 576 U.S. at 156. Here, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S.

781, 791 (1989). But "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others . . . so long as it is '*justified* without reference to the content of the regulated speech.'" *Id.* (emphasis in original) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

The legislative history of section 3556 shows that it is "justified without reference" to any content or viewpoint. The confidentiality provision of section 3556 arose out of "incidents of workers being targeted at public gatherings" that caused "privacy and safety concerns" for public employees.[3] (*See* PERB Request for Judicial Notice, Docket No. 53, Ex. A). The purpose of the confidentiality provision is thus content-neutral. That it may have "an incidental effect" on the Freedom Foundation's wish to speak outside of new employee orientations does not render the law content-based.

The Foundation alleges that section 3556 was motivated by legislators' pro-union bias, (FAC ¶¶ 17–75), and argues that, at this phase, the Court must accept those allegations as true, (Opp'n at 23–25). As discussed above, however, at the motion to dismiss phase, claims must have "facial plausibility"—that is,

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[3] "'[A] court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment,' as long as the facts noticed are not 'subject to reasonable dispute.'" *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)). Legislative history is not subject to reasonable dispute and "is properly a subject of judicial notice." *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012).

the plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Freedom Foundation's allegations do not allow for such an inference.

As support for its claims that the confidentiality provision was impermissibly motivated by anti-union bias, the Foundation provides three categories of evidence: (1) Democratic lawmakers' statements disapproving of the *Janus* decision, (FAC ¶¶ 17–25; Exs. A–C); (2) evidence of donations from unions to the campaigns of Democratic lawmakers, (*id.* ¶¶ 26–42; Exs. D–F); and (3) statements from unions, agencies, and others—none of whom are legislators—stating that SB 866 would bolster union power, (*id.* ¶¶ 61–75; Exs. G–M). None of these categories of "evidence" establishes a plausible connection between legislators' perceived pro-union bias and the passage of SB 866. Disapproval of the outcome of *Janus* does not equate to a scheme to discriminate against anti-union advocacy, and "the contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support." *Hill v. Colorado*, 530 U.S. 703, 724 (2000).

Moreover, the unions' reasons for supporting SB 866 are not indicative of the legislatures' reasons. Freedom Foundation has drawn no meaningful difference between this case and *Boardman*, in which the appellants likewise "present[ed] *the [u]nions'* motivations in supporting the ballot measure," and the Ninth Circuit "refuse[d] to impute upon Washington voters the allegedly invidious motivations of the [u]nions." 978 F.3d at 1119 (emphasis in original). It is well-established that a court "will not

strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *see also Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) ("In assessing whether a restraint on speech is content neutral, we do not make a searching inquiry of hidden motive . . . ."); *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1278 (9th Cir. 2017) (on motion for summary judgment, upholding regulation and quoting *Menotti*, 409 F.3d at 1130 n.29, for proposition that "even if [plaintiff] could establish that the City had an illicit motive in adopting [the ordinance], that would not be dispositive because the Supreme Court has held unequivocally that it will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive") (cleaned up); *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 793–94 (9th Cir. 2006) (on motion for summary judgment, upholding city ordinance aimed at solicitation even though there was a "possibility that solicitation was targeted because . . . it generally concerns requests for money by the homeless or vagrants and requests for patronage of sex-based businesses" since "the uncontroverted evidence support[ed] that the ordinance was enacted with the purpose of controlling the secondary effects of solicitation, rather than the content of the soliciting requests themselves").

Finally, while the Foundation is correct that *Boardman*—like many of the above cases—was decided at the summary judgment phase, Freedom Foundation must show plausible entitlement to relief to survive *this* phase, which it has not done. (Opp'n at 23). Nor has the Foundation explained what it hopes to find during the discovery process to show that the

facially neutral regulation at issue is in fact a content-based regulation motivated by an illicit purpose. Therefore, Counts I and II of the FAC for content- and viewpoint-based discrimination are **DISMISSED**.

B. Third Cause of Action

Freedom Foundation's third cause of action for unlawful prior restraint is similarly implausible. "In First Amendment law, a prior restraint is an order 'forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Twitter, Inc. v. Garland*, 61 F.4th 686, 702–03 (9th Cir. 2023), *cert. denied sub nom. X Corp. v. Garland*, No. 23-342, 2024 WL 71958 (U.S. Jan. 8, 2024) (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)). The confidentiality provision of section 3556 simply does not forbid any communications by the Freedom Foundation. At most, the provision merely impedes the Foundation's ability to efficiently locate and speak to new public employees *en masse* at orientation events. It does not even keep the Foundation from reaching new employees; as the Foundation itself points out, "the names of new employees are available under the California Public Records Act." (Opp'n at 13). Count III for unlawful prior restraint is **DISMISSED**.

C. Fourth Cause of Action

Finally, the Foundation also fails to state a claim for unlawful denial of access to government-held information. "Although the decision whether to disclose government-controlled information 'at all' is well within the prerogatives of the political branches . . . , when the government selectively discloses information within its control, a First Amendment

claim will lie if the government denies access to information 'based on an illegitimate criterion such as viewpoint.'" *Boardman*, 978 F.3d at 1107 (quoting *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 43 (1999) (Ginsburg, J., concurring)). Again, the confidentiality provision of section 3556 denies access to the entire public, with narrow exceptions for those who must be present at the orientation—including the exclusive bargaining representative and vendors contracted to service the orientation. This disclosure, albeit "selective," is not based on illegitimate criterion like viewpoint. Count IV is therefore also **DISMISSED**.

D. Leave to Amend

As discussed above, "[f]utility of amendment can, by itself, justify the denial of . . . leave to amend." *Bonin*, 59 F.3d at 845 (9th Cir. 1995). "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988), *overruled on other grounds by Iqbal*, 556 U.S. 662.

Freedom Foundation has not requested leave to amend, and it appears to the Court that there is no set of facts the Foundation could allege in an amended complaint to state a plausible claim under *Twombly* and *Iqbal*. The Court therefore denies leave to amend.

III. CONCLUSION

The Motions to Dismiss are **GRANTED** without leave to amend for the reasons set forth above.

**IT IS SO ORDERED.**

Dated: January 16, 2024

/s/ Wesley L. Hsu
HON. WESLEY L. HSU
UNITED STATES DISTRICT JUDGE

## APPENDIX D

### United States Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

## APPENDIX E

### Cal. Gov't Code § 3556(a)

**(as amended on June 27, 2018)**
**Additions indicated by text**

(a) Each public employer described in subdivision (a) of Section 3555.5 shall provide the exclusive representative mandatory access to its new employee orientations. The exclusive representative shall receive not less than 10 days' notice in advance of an orientation, except that a shorter notice may be provided in a specific instance where there is an urgent need critical to the employer's operations that was not reasonably foreseeable. The structure, time, and manner of exclusive representative access shall be determined through mutual agreement between the employer and the exclusive representative, subject to the requirements of Section 3557, and the agreement may expressly waive or modify requirements set forth in this section. The date, time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation.