No. 25-156

IN THE Supreme Court of the United States

FREEDOM FOUNDATION,

Petitioner,

v.

RITA GAIL TURNER, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS UTLA AND SEIU LOCAL 99

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QUESTION PRESENTED

A California statute provides that public agencies may disclose the time, date, and location of public employee orientations only to orientation participants—"the employees, the exclusive [collective bargaining] representative, [and] a vendor that is contracted to provide a service for purposes of the orientation." Cal. Gov't Code § 3556(a). The question presented is:

Does the California statute violate the First Amendment's prohibition on viewpoint discrimination even though the statute does not make a viewpoint-based distinction and was not adopted for a viewpoint-discriminatory reason?

CORPORATE DISCLOSURE STATEMENT

Respondents United Teachers Los Angeles and Service Employees International Union Local 99 have no parent corporations, and no corporation or other entity owns any stock in Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions, Statutes, and Rules

Other Authorities

INTRODUCTION

In California, as in many other states, the union that represents a bargaining unit of public employees has the right to attend new-employee orientations to speak with and answer questions from workers in the bargaining unit. Section 3556 of the California Government Code (Section 3556) provides that public agencies may disclose the date, time, and location of these orientations only to orientation attendees, *i.e.*, "the employees, the exclusive representative, [and] a vendor that is contracted to provide a service for purposes of the orientation." Cal. Gov't Code § 3556(a). The legislative history of the statute shows that the California Legislature chose to limit access to information about orientations because of concerns about employee safety and privacy arising from the disclosure of when and where large gatherings of new public employees will occur.

Petitioner Freedom Foundation (Foundation) asks the Court to grant review of the unpublished court of appeals decision below to decide whether California's limitation on the disclosure of such government-held information "is unlawful viewpoint discrimination under the First Amendment." Pet. i. This question is not worthy of the Court's review. As the lower courts correctly recognized, the challenged portion of Section 3556 does not draw any distinction based on viewpoint, and the legislative history does not reflect any viewpoint-discriminatory motivation. The decision below therefore does not conflict with this Court's precedents or with the decision of any other court of appeals. Moreover, Section 3556 does not restrain the Foundation from contacting California public employees through other means, or from engaging in any

speech. All that being so, this Court should deny the petition.

STATEMENT OF THE CASE

I. Background

A. Statutory background

In California, labor relations between public employers and their employees are governed by various statutes administered by the California Public Employment Relations Board (PERB). *See, e.g., Boling v. Pub. Emp. Rels. Bd.*, 5 Cal. 5th 898, 911 (2018). Labor relations between public schools and their employees are governed by the Educational Employment Relations Act (EERA). *See* Cal. Gov't Code §§ 3540–3549.3. Like the other laws that PERB administers—and like the public-employment relations laws in other states—the EERA "recogniz[es] the right of public … employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public … employers, [and] to select one employee organization as the exclusive representative of the employees in an appropriate unit." *Id.*, § 3540. The EERA further recognizes the duty of the exclusive representative to represent all members of the bargaining unit fairly, regardless of whether they choose to join the union or not. *See id.* § 3544.9.

The California Legislature has found that "the ability of an exclusive representative to communicate with the public employees it represents is necessary to ensure the effectiveness of state labor relations statutes, and the exclusive representative cannot properly discharge its legal obligations unless it is able to meaningfully communicate through cost-

effective and efficient means with the public employees on whose behalf it acts." *Id.* § 3555. In 2017, the Legislature adopted the original version of Section 3556, which required most public employers to "provide the exclusive representative mandatory access to its new employee orientations." 2017 Cal. Stat. ch. 21, § 2 (A.B. 119). The California Legislature specified that, absent extenuating circumstances, "[t]he exclusive representative shall receive not less than 10 days' notice in advance of an orientation." *Id.*[1]

The following year, in 2018, the California Legislature amended Section 3556 to restrict disclosure of "[t]he date, time, and place of the orientation" to "the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation." 2018 Cal. Stat. ch. 53, § 16 (S.B. 866).

As reflected in the official reports of the legislative committees that considered this amendment, this restriction arose from concerns that widely sharing the date, time, and location of concentrated gatherings of public employees may threaten the privacy and safety of those employees or invite potential disruption of the orientations. *See, e.g.*, Assemb. Floor Analysis: 3d Reading, A.B. 2970, 2017–2018 Leg., Reg. Sess., at 2 (Cal. 2018) (describing Legislature's "privacy and safety concerns"); S. Comm. on Pub. Emp't & Ret.,

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[1] Many states have similar statutes that provide exclusive bargaining representatives the right to attend orientations for the new bargaining-unit workers they must represent. *See, e.g.,* Conn. Gen. Stat. § 31-40bb; Haw. Rev. Stat. § 78-64; 5 Ill. Comp. Stat. § 315/6; Me. Stat. tit. 26, §§ 975, 979-T, 1295, 1037; Md. Code, Educ. §§ 6-405, 6-506; Mass. Gen. Laws ch. 150E, § 5A; Minn. Stat. § 179A.07, subd. 9; N.J. Stat. § 34:13A-5.13; N.Y. Civ. Serv. Law § 208(4)(c); Or. Rev. Stats. § 243.804(1)(b)(B); Vt. Stat. tit. 21, § 1738; Wash. Rev. Code. §§ 41.56.037(1)(a), 41.80.083.

Analysis of A.B. 2970, 2017–2018 Leg., Reg. Sess., at 2 (Cal. 2018) (describing Legislature's concerns about "disrupt[ion]" and "privacy and safety"); *id.* at 4 (pointing out that orientations are held for "every form of law enforcement, such as police, sheriffs, firefighters, EMTs, dispatchers, probation, and corrections"); *see also* App. 38a, 51a.

B. Factual background

The Foundation is an organization that seeks to discourage public employees from joining labor unions. *See, e.g.*, App. 4a. One of several methods by which the Foundation engages with public employees is by approaching them outside of their workplaces. *Id.*; *see also, e.g.*, *Boardman v. Inslee*, 978 F.3d 1092, 1100 (9th Cir. 2020) (discussing how the Foundation contacts public employees "through the mail and by door-to-door canvassing").

On January 19, 2023, the Foundation submitted a request to the Los Angeles Unified School District (District), pursuant to the California Public Records Act, for the "date, time, and place of all orientations for new District employees scheduled from February 1, 2023, to August 30, 2023." App. 23a, 43a. On January 30, 2023, the District denied the Foundation's request because Section 3556 precludes disclosure of that information. App. 23a–24a, 43a.

II. Proceedings below

A. District court proceedings

On May 1, 2023, the Foundation filed the instant action challenging the constitutionality of Section 3556's restriction on the government's disclosure of information. App. 43a. The Foundation sued three District officials. *Id.* PERB moved to intervene to

defend Section 3556. App. 44a. United Teachers Los Angeles (UTLA) and Service Employees International Union, Local 99 (SEIU Local 99; collectively, Unions)—two labor organizations that serve as the exclusive representatives of certain District employees—also moved to intervene to defend Section 3556. *Id.* The district court granted both intervention motions and further granted the parties' stipulation that the District defendants would not participate in the litigation. *Id.* The district court subsequently granted a motion by the California Attorney General to intervene to defend Section 3556. *Id.*

On October 24, 2023, the Foundation filed the operative first amended complaint (FAC). App. 1a, 44a–45a. The FAC alleged four causes of action, all supposedly arising under the First Amendment: (1) "Discrimination in Provision of Information Based on Viewpoint of the Speaker," App. 26a; (2) "Unconstitutional Content-Based Speech Regulation Based on Function or Purpose of Speech," App. 28a; (3) "Speech Chilled through Prior Restraint," App. 31a, and (4) "Denial of Access to Government-Held Information," App. 32a. As a remedy, the Foundation sought an order declaring "the challenged portion of Cal. Gov't Code § 3556 restricting access to the dates, times, and places of new employee orientations" unconstitutional under the First Amendment and permanently enjoining the District defendants "from enforcing the challenged portion of Section 3556." App. 34a–35a.

PERB and the Unions filed motions to dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted the motions on January 16, 2024. App. 41a.

In its dismissal order, the district court began by addressing the Foundation's "two related claims for content-based discrimination and viewpoint discrimination." App. 46a. The district court concluded that "Section 3556 is not facially content-based because it does not draw distinctions based on the message the speaker conveys." App. 47a. The district court reasoned that "Section 3556 … 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." *Id.*; *see also* App. 48a–49a. (footnote omitted) ("Section 3556 merely provides carveouts for those who must attend the orientation: new public employees; the exclusive bargaining representative, who has a duty to communicate with new public employees regardless of whether they eventually join the union; and vendors contracted to provide services to orientation attendees.").

The district court further concluded that Section 3556 could not be invalidated because of a content- or viewpoint-based purpose or justification. App. 51a.

The district court looked to the statute's legislative history and observed that "[t]he confidentiality provision … arose out of 'incidents of workers being targeted at public gatherings' that caused 'privacy and safety concerns' for public employees," which is a "content-neutral" justification. *Id.* Although the Foundation had proffered evidence purportedly showing that "section 3556 was motivated by legislators' pro-union bias," the district court found that "[n]one of th[at] 'evidence' establishes a plausible connection between legislators' perceived pro-union bias and the passage of SB 866," and otherwise declined to ascribe an improper motive to the California Legislature.

App. 52a–53a (citing, *e.g.*, *United States v. O'Brien*, 391 U.S. 367, 383 (1968)).

Turning next to the Foundation's contention that Section 3556 is a prior restraint on speech, the district court determined that such a claim was "similarly implausible." App. 54a. The district court explained that "a prior restraint is an order 'forbidding certain communications when issued in advance of the time that such communications are to occur,'" and "[t]he confidentiality provision of section 3556 simply does not forbid any communications by the Freedom Foundation." *Id.* (internal quotations omitted). "At most," the district court observed, "the provision merely impedes the Foundation's ability to efficiently locate and speak to new public employees *en masse* at orientation events," which still "does not … keep the Foundation from reaching new employees." *Id.*

Finally, the district court rejected the Foundation's claim that it was unlawfully denied access to government-held information. *Id.* Noting that such a claim may lie only where "the government denies access to information based on an illegitimate criterion such as viewpoint," the district court again emphasized that Section 3556 draws a distinction based only on "who must be present at the orientation." App. 55a (internal quotations omitted).

The district court observed that the Foundation had not requested leave to amend its FAC, reasoned that any amendment would be futile, and dismissed the FAC without leave to amend. *Id.*

B. Court of appeals proceedings

The Foundation appealed, and the Ninth Circuit unanimously affirmed the district court's judgment in

an unpublished memorandum opinion. The court first concluded that Section 3556 is not content or viewpoint discriminatory on its face, because the statute does not draw any distinctions based on the "content of [the information receiver's] speech or the viewpoint they convey." App. 38a. Rather, Section 3556 solely "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." *Id.*

Second, the court determined that the Foundation had failed to plead sufficient plausible allegations to establish that Section 3556's "purpose and justification" was content or viewpoint discriminatory. App. 38a–39a. The court concluded that "none of [the Foundation's] alleged evidence establishes a plausible connection between legislators' perceived … bias and Section 3556." *Id.*

Third, the court rejected the Foundation's argument that "Section 3556 amounts to a prior restraint," because "the law does not forbid any speech." App. 39a. The court reasoned that the Foundation could not state a cognizable prior-restraint claim "by simply alleging that Section 3556 burdens [its] ability to efficiently locate and speak to new employees at orientations," especially given the Foundation's "acknowledge[ment] that Section 3556 does not bar it from reaching public employees to convey its message." *Id.* (noting that the Foundation "can locate the names of new employees under the California Public Records Act").

In light of its conclusion that Section 3556 therefore "does not implicate First Amendment rights," the court determined that the statute was subject only to

rational basis review, and that Section 3556 was easily justified by the Legislature's stated "concern for employee privacy." App. 39a–40a (observing that the Foundation "does not contest that Section 3556 has a rational basis").

The Foundation did not seek panel rehearing or rehearing en banc.

REASONS FOR DENYING THE PETITION

The petition is not worthy of the Court's review. The Foundation asks the Court to grant review to decide whether Section 3556's limitation on the government's disclosure of orientation information "is unlawful viewpoint discrimination under the First Amendment." Pet. i. According to the Foundation, the court of appeals' decision "conflicts with this Court's First Amendment precedents." Pet. 13. As a threshold matter, an alleged legal error in a non-precedential decision is not a sufficient reason for granting review. In any event, there is no conflict with any decision of this Court. Nor is there a "conflict[] … with decisions from several other circuits." Pet. 26. The petition should be denied.

I. The decision below does not conflict with this Court's precedents.

A. The Foundation first argues that the court of appeals failed to recognize that Section 3556's limitation on the government's disclosure of orientation information is "viewpoint discrimination on its face." Pet. 14. But the Foundation's argument fails at the outset. Under this Court's precedents, the government engages in viewpoint discrimination when it "regulat[es] … speech based on 'the specific motivating ideology or the opinion or perspective of the speaker.'"

Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 168 (2015) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). The challenged sentence of Section 3556 does not "on its face" draw any distinction based on the information requester's ideology, opinion, or perspective.[2]

By its terms, Section 3556 limits the disclosure of the date, time, and location of new-employee orientations to the orientation participants, *i.e.* "the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation." The throughline between these entities is their status as participants in the orientation, not any shared viewpoint.

Moreover, in its operation, Section 3556 does not condition access to information based on viewpoint. The orientation participants would not lose access to the information if they held different views. Rather, the participants would lose access only if their status as orientation participants changed—even if they continued to hold the same views. Nor would the Foundation or other members of the general public who are not orientation participants become entitled to the orientation information by adopting the same views as an orientation participant. As such, Section

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[2] This Court has suggested that because the disclosure of government information is "a kind of subsidy to people who wish to speak to or about" an issue or group, the government could transgress the First Amendment if it withheld information based on "an illegitimate criterion such as viewpoint." *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 43 (1999) (Ginsburg, J., concurring). The court of appeals proceeded on that assumption. *See* App. 37a–38a.

3556 does not involve "viewpoint discrimination on its face." Pet. 14.

B. According to the Foundation, the court of appeals failed to recognize that "'speech restrictions based on the identity of the speaker' are inherently suspect." Pet. 22–23 (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). Section 3556, however, does not impose any speech restriction. App. 39a ("[T]he law does not forbid any speech."); App. 49a ("[S]ection 3556 does nothing to prevent the … Foundation from sharing its anti-union message …."). Nor is there anything "suspicious" about a statute that limits information about new-employee orientations to the attendees of the orientations themselves. *See, e.g.*, App. 49a ("A pro-union message is not the common denominator.").

There is also no support in this Court's caselaw for the Foundation's contention that a viewpoint-neutral subsidy constitutes viewpoint discrimination merely because some recipients of the subsidy may, at some high level of generality, be presumed to share a certain viewpoint. *See* Pet. 12 (asserting that "discrimination in favor of incumbent unions is discrimination in favor of a particular viewpoint"). In *Regan v. Taxation with Representation of Washington,* 461 U.S. 540 (1983), for example, the Court upheld a speech subsidy for veterans' groups even though such groups may have generally had pro-veteran and pro-military views.

The Foundation's attempt to pigeonhole the viewpoints of "incumbent unions" otherwise fails. The challenged portion of Section 3556 applies to a wide variety of unions representing a wide variety of public employees, from unions representing police officers,

firefighters, and prison guards, to unions (like UTLA and SEIU Local 99) representing teachers and other school employees. The Foundation cannot plausibly ascribe a single viewpoint to all such unions.

C. The Foundation also apparently contends that the court of appeals should have recognized that Section 3556 is viewpoint discriminatory on its face because it provides for the participation of a bargaining unit's exclusive representative in employee orientations, while not providing the same access to "everyone who wishes to promote an opposing perspective." Pet. 14. But as the court of appeals correctly recognized, "ensuring that an exclusive bargaining representative has access to carry out the duty of communicating with public employees at an orientation" is "viewpoint neutral." App. 38a; *see supra* at 3 & n.4 (describing commonplace nature of such access rules); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 49 (1983) (holding that a policy giving the exclusive representative, but not a rival union, access to a school district's intraschool mail system to communicate with bargaining-unit employees was lawful because it was based on "the status of the respective unions rather than their views" (emphasis omitted)).[3]

[3] The Foundation asserts that *Perry* is "readily distinguishable" because the policy in *Perry* restricted speech in a nonpublic forum. Pet. 21. But the Foundation offers no coherent reason why the test for viewpoint discrimination would be different when the government is disclosing government-held information rather than restricting speech. The Foundation also urges that "commentators have questioned the vitality of *Perry*." Pet. 23. But the decision is no outlier. *See, e.g., Minn. Voters All. v. Mansky*, 585 U.S. 1, 11–12 (2018) (citing *Perry*); *Rosenberger*, 515 U.S. at 830 (same). Moreover, *Perry* was a harder case than this one. In

Moreover, the Foundation did not challenge the portion of Section 3556 that provides for the exclusive representative to participate in orientations. Nor did the Foundation seek to participate in District orientations. *See* Pet. 8 ("[T]he Foundation has never sought to attend the new employee orientations."). As such, this case would not be a vehicle for addressing a challenge to differential access to the orientations themselves.

D. The Foundation further contends that the court of appeals should have recognized that Section 3556 was amended because legislators allegedly favored pro-union speech. *See* Pet. 25. However, "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383. Although the Court recognized in *Reed* that a law may be content-based if it was adopted "because of disagreement with the message [the speech] conveys," 576 U.S. at 163–64 (alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)), nothing in *Reed* or the cases *Reed* relies upon permits the open-ended inquiry into legislators' potential motivations that the Foundation asserts the lower courts should have undertaken here.

In any event, the lower courts fully considered the Foundation's argument that Section 3556 was amended for a viewpoint-discriminatory purpose, and they concluded that the argument lacked any support.

Perry, the school district denied access to a rival union but not to other, non-labor organizations (like the Girl Scouts) for the purpose of protecting "labor-peace." 460 U.S. at 47–48, 52. In this case, the Foundation is treated the same as the rest of the general public, not singled out for any special disadvantage.

The district court reviewed "[t]he legislative history of [S]ection 3556" and concluded that "[t]he confidentiality provision of [S]ection 3556 arose out of 'incidents of workers being targeted at public gatherings' that caused 'privacy and safety concerns' for public employees" and that "[t]he purpose of the confidentiality provision is … content-neutral." App. 51a–52a (quoting legislative reports). Likewise, the court of appeals concluded that the "legislative history reflects a content and viewpoint neutral purpose" and that "none of [the Foundation's] evidence establishes a plausible connection between legislators' perceived pro-union bias and Section 3556." App. 38a–39a.[4]

Contrary to the Foundation's assertion, Pet. 25–26, this case does not present "stronger" evidence of legislative "animus" than *Boardman v. Inslee*, 978 F.3d 1092 (9th Cir. 2020). In *Boardman*, there was "extensive record evidence" to show that the initiative sponsor was motivated by animus, and the challenged provision was "a unique law" that left anti-union groups with no way to contact "quasi-public-sector employees who are very difficult to identify." *Id.* at 1124, 1128–29 (Bress, J., dissenting). In the instant case, the California Legislature added the confidentiality provision of Section 3556 for viewpoint-neutral reasons, and the Foundation has other means to contact

[4] The Foundation's discussion of the history of Section 3556's confidentiality provision is misleading. The provision at issue was considered by the Legislature as Assembly Bill 2970 and heard by several legislative committees. The provision's language was subsequently dropped into Senate Bill 866, an omnibus budget trailer bill with 51 sections, *see* 2018 Cal. Stat. ch. 53, § 16, shortly before Senate Bill 866 was adopted. There is no basis for assuming that comments about Senate Bill 866 had anything to do with the specific provision at issue here.

public employees. *See infra* at 17. Thus, there is no merit to the Foundation's contention that this case is a "better vehicle" for review than *Boardman*. Pet. 25.

E. The decisions relied upon by the Foundation do not otherwise reflect any conflict between this Court's precedents and the court of appeals' decision.

The Foundation places particular emphasis on *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), and suggests that the law at issue in *Sorrell* is similar to Section 3556. *See* Pet. 16–17. But in *Sorrell*—and unlike here—the challenged statute drew a content-based distinction on its face: The law expressly prohibited the disclosure of prescriber-identifying information for use in marketing prescription drugs, and "thus disfavor[ed] marketing, that is, speech with a particular content." *Sorrell*, 564 U.S. at 564. By its terms, Section 3556 draws no similar content-based distinction.

The law in *Sorrell* also singled out a specific group of speakers—pharmaceutical manufacturers—and disfavored their speech *because of* the content of their speech, *i.e.*, their marketing of prescription drugs. *Id.* Section 3556 does not expressly single out or disfavor any speakers, much less single out or disfavor the Foundation or any other speaker because of any speech content.

The Foundation's reliance on *Reed* and *Rosenberger* fails for similar reasons. In *Reed*, 576 U.S. at 159, a sign ordinance drew a content-based distinction by "identif[ying] various categories of signs based on the type of information they convey, then subject[ing] each category to different restrictions." In *Rosenberger*, 515 U.S. at 822–23, a university policy discriminated based on viewpoint because it denied

funding to "petitioners for the sole reason that their student paper 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'"

Finally, the Foundation argues that Section 3556's confidentiality provision "guts the protections against compelled speech set out in *Janus* [*v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. 878 (2018)] and is thus in further conflict with [that] decision." Pet. 18. To the contrary, this Court recognized in *Janus* that "a union designated as exclusive representative is often granted special privileges," and held only that public employers cannot require non-members of a union to pay agency fees to support union activities. 585 U.S. at 899, 901. California Education Code section 45060 requires that union deductions for District employees be made only with an employee's affirmative, written authorization. California law therefore does not conflict with *Janus*.

And insofar as the Foundation wishes to inform District employees of their rights under *Janus*, it remains free to do so. The Foundation conceded below that Section 3556 does not prevent the Foundation from reaching out to public employees. *See, e.g.*, App. 39a ("[The Foundation] acknowledged that Section 3556 does not bar it from reaching public employees to convey its message. [The Foundation] can locate the names of new employees under the California Public Records Act."); *see also* App. 54a (Section 3556 "does not … 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." (internal quotation marks omitted)).

The Foundation's attempt to manufacture a conflict with this Court's precedents thus fails.

II. There is no circuit split to resolve.

The Foundation further argues that review should be granted because the court of appeals' decision conflicts with the decisions of other courts of appeals "recognizing" that a distinction based on "incumbent status" can be viewpoint discriminatory. App. 26, 27. There is no such conflict. The Foundation mischaracterizes those cases—none of which involves public employee unions or the government's disclosure of information—and misstates their relevance.

The Foundation relies principally on *Southworth v. Board of Regents of University of Wisconsin System*, 307 F.3d 566 (7th Cir. 2002), which addressed (among other questions) the constitutionality of a public university's consideration of "the length of time [a student] organization has been in existence and the amount of funding an organization has received in the past" for purposes of distributing student-activity funds. *Id.* at 594. In concluding that such criteria were not "unrelated to viewpoint," the Seventh Circuit explained that the criteria actually "depend[ed] in part on viewpoint-based decisions of the past," because "until recently," the university had prohibited the funding of certain viewpoints. *Id.*

Southworth thus involved "viewpoint discrimination from past years" that was "*institutionalized* into the current system." *Id.* (emphasis added). Against that backdrop, the Seventh Circuit further concluded that "historically popular viewpoints are at an advantage compared with newer viewpoints." *Id.* & n.12 ("Were the University to start from scratch and thus

even the playing field, we would be faced with a different, and closer question….").

Section 3556 does not similarly "depend" on or "institutionalize" previous viewpoint discrimination. Indeed, Section 3556 is not backward-looking at all. Rather, Section 3556's sole criterion for information disclosure is whether the information requester is entitled to attend *future* new-employee orientations. *Southworth* is therefore immaterial here.

Child Evangelism Fellowship of South Carolina v. Anderson School District Five, 470 F.3d 1062 (4th Cir. 2006), is likewise inapposite. In that case, the Fourth Circuit relied on *Southworth* to conclude that a policy of waiving fees for use of public-school facilities based upon prior use of the facilities also "institutionalized" past viewpoint discrimination, insofar as use of the facilities was previously governed by a viewpoint-discriminatory policy. *Id.* at 1073–74 ("Since the old policy made it far easier for beneficiaries of impermissibly discretionary fee decisions to become longstanding users than for others to do so, the new policy errs by making free access contingent upon longstanding use."). Section 3556 does not similarly condition the disclosure of information on whether the information requester received the information in the past. Nor does the process by which bargaining-unit employees can choose union representation involve government consideration of the union's viewpoint.

The Foundation's remaining cases simply state general First Amendment principles with which the court of appeals' decision is fully consistent. In *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019), the Fourth Circuit observed that a "regulation that plausibly burdens First Amendment rights on the basis of

viewpoint, political affiliation, or class should be subject to strict scrutiny." *Id.* at 261. Section 3556 imposes no such burdens.

Finally, in *Turning Point USA at Arkansas State University v. Rhodes*, 973 F.3d 868, 876 (8th Cir. 2020), the Eighth Circuit recognized that university rules restricting "tabling" at a certain location to registered student organizations "*might* constitute viewpoint discrimination *if* the requirements [for registering a student organization] could not be met due to an organization's views." *Id.* at 876 (emphases added). Again, the disclosure of information under Section 3556 does not turn in any way on the information requester's views. Even another labor organization that espouses the *exact same* views as the exclusive representative would be denied new-employee orientation information for the *exact same* reason as the Foundation: Neither entity has a right to attend the orientation. By the same token, the exclusive representative would continue to be entitled to the orientation information even if its members were to elect new leadership that espouses starkly different views. Thus, Section 3556 does not impose any requirements based on viewpoint.

In sum, there is no circuit conflict to resolve.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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