No. 25-156

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

As part of the attempt to undermine this Court's decision in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878 (2018), the California legislature passed California Government Code § 3556 ("Section 3556") to prevent anyone but the incumbent union from knowing when and where new employee orientations occur.

Nothing in the record, or even in the legislative history, shows that new employees faced "privacy and security" concerns at orientations. In fact, new employees face circumstances no different from current employees that walk *en masse* into government buildings every day. State.BIO.1. (Government buildings are, by nature, "group settings."). The legislature's mealy-mouthed "privacy and security" justification is a pretext to exclude the message that this Court in *Janus* so eloquently declared: no public employee is required to pay money to a union absent the employee's agreement to pay. Union membership, including the payment of dues, is *opt-in* rather than *opt-out*.

The Foundation seeks to inform public employees that they have a choice: they do not have to agree to be union members or to pay any money to the union. California and public sector unions work hand-in-hand to prevent this message from reaching public employees.

The collusion between the California legislature and the unions is self-evident, not just on the record (Pet.App.9a-16a) but for two other reasons.

First, California passed Section 3556 as part of Senate Bill 866 ("SB 866"), which was a "react[ion] to the Supreme Court's blow against unions." *See* Pet. 4-5. SB 866's purpose was to make it *more difficult* for

public employees to exercise their newfound right not to pay money to a union absent consent. For example, California Government Code § 3550, also part of SB 866, prohibits public employers from informing public employees of their rights under *Janus*.[1] California Government Code § 1157.12 and § 1153, similarly part of SB 866, prohibit employees who want to opt out of union membership from contacting their employers to opt out.

Second, nothing in Section 3556 changes the access unions have to new employee orientations. Before Section 3556, the state permitted unions to be part of new employee orientations. What changed was the prohibition on *anyone else* even knowing when and where new public employees would be inducted into the workforce. That unions fought so hard to first intervene in this case (the Foundation did not sue the union respondents), and then to participate actively in it, reveals their true motive: new employee orientations are a recruitment tool for public sector unions to pressure new employees to join the union while deliberately obscuring their *Janus* rights to decline to pay money to the union.

The state and union collusion to undo the rights this Court vindicated in *Janus* makes this case an excellent vehicle to decide the issue presented: whether this

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[1] California Government Code § 3550 states as follows:

A public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization...

The Public Employment Relations Board has held that informing public employees of the *Janus* decision constitutes "discouragement" in violation of this statute. *UTLA v. Alliance Schools*, PERB Decision No. 2795 (Nov. 3, 2021).

Court should permit a viewpoint-based restriction dressed up as a "status-based distinction" to undercut public employees' *Janus* rights.

I. This Is an Excellent Vehicle to Resolve the Important Question Presented.

Section 3556 is egregiously viewpoint-discriminatory and subverts the rights this Court recognized in *Janus*. *Janus* forced public-sector unions to compete for members in the marketplace of ideas. After years of being shielded from such competition, it is no surprise that unions have sought laws from friendly legislatures insulating them from competition.

The respondents cannot muster a real argument as to why this case is not only better than *Boardman*, but is actually an ideal vehicle to resolve the question presented. As discussed in the Foundation's Petition for Writ of Certiorari, *see* Pet. 11-12, this case was decided on a Rule 12(b)(6) motion, not a summary judgment, as in *Boardman*. The Foundation presented ample evidence in its pleadings that the California legislature passed Section 3556 to discriminate against the viewpoint that union membership and dues are voluntary. In *Boardman*, the district court had to weed through competing evidence on a summary judgment. *Boardman v. Inslee*, 354 F.Supp.3d 1232, 1246-47 (W.D. Wash. 2019), *aff'd*, 978 F.3d 1092 (9th Cir. 2020).

Additionally, it was the legislature here, and not the voters as in *Boardman*, that passed Section 3556. So while it is difficult to attribute animus to the voters of Washington State, it is easy to attribute pro-union favoritism to the California legislature.

Lastly, the *Boardman* decision affected a small group of public employees in a state with a public

employee population one-sixth that of California. This case affects the rights of 2.8 million people. To say it is a "narrower" vehicle blinks reality. State.BIO.16.

At least three justices on this Court viewed *Boardman v. Inslee* as cert-worthy. *Boardman v. Inslee*, 978 F.3d 1092 (9th Cir. 2020), *cert denied*, 142 S.Ct. 387 (2021) ("Justice Thomas, Justice Alito, and Justice Gorsuch would grant the petition for writ of certiorari."). This case presents an even starker attempt to limit free speech that California and the unions would prefer to obfuscate, in an effort to evade *Janus*.

II. The Decision Below Is Profoundly Wrong Because It Undermines the Rights *Janus* Secured.

Section 3556's dual threat to First Amendment values is not subtle. The law neuters *Janus'* holding that employees never have to opt in to union membership in the first place. And because of its viewpoint discrimination, Section 3556 also conflicts with this Court's other precedent. *See* Pet.14-15.

1. Contrary to the respondents' arguments, Section 3556 contains "speaker-based" distinctions "[o]n its face," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011), as the law prohibits anyone from accessing the location, date, and time for new employee orientations "other than incumbent unions." *See* Pet. 13-15; Union.BIO.9-10; State.BIO.4,11. While respondents view such speaker-based discrimination as if it were a First Amendment feature that avoids viewpoint discrimination, this Court takes a dimmer view and is "deeply skeptical" of speaker-based discrimination. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 777-78 (2018). Because a speaker and his "viewpoints" are all too often "interrelated," "[s]peech

restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

That is nowhere more obvious than with Section 3556. Respondents' effort to dismiss the "content control" and viewpoint discrimination that Section 3556 authorizes requires them to ignore both this Court's precedents and the on-the-ground reality of union tactics. Respondents never dispute that *Janus* is premised on the understanding that a union and its viewpoints are inseparable. *Janus*, 585 U.S. at 920 ("collective bargaining with a government employer, unlike collective bargaining in the private sector, involves inherently 'political' speech.").

By preventing anyone but unions from having access to the locations and times of new employee orientations, Section 3556 gives "a monopoly in expressing [their] views" to providers on "debatable public question[s]," which is "the antithesis of constitutional guarantees," *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp. Rels. Comm'n*, 429 U.S. 167, 175-76 (1976). What is objectionable on its face is not the unions' access to new employee orientations – which unions had before Section 3556 – but the fact that all other speakers are excluded from even getting the information necessary to speak to the new employees on the public sidewalk before they walk into their orientation.

2. The respondents argue that Section 3556 does not conflict with this Court's precedent in *Reed* and *Rosenberger*[2] because those cases regulate "speech based on 'the specific motivating ideology or the

[2] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

opinion or perspective of the speaker,'" Union.BIO.9-10; State.BIO.4-5, but here "the orientation participants would not lose access to the information if they held different views." Union.BIO.10; State.BIO.6, 9. But this argument asks this Court to suspend reality: the legislature passed this law in order to prevent new employees from hearing that union membership and dues are *optional*, not a requirement. *See* Pet. 4-6; Pet.App.12a-16a. It is naïve, at best, to think unions would adequately inform public employees that they do not need to be union members.

The respondents also argue that there is no conflict with *Reed* and *Rosenberger* because the viewpoint discrimination was evident on its face without the need to do an "open ended inquiry into legislators' potential motivations…" Union.BIO.13. As explained above, the discrimination against anti-union membership viewpoints is apparent once pretextual masks of "security and privacy" fall off.

3. The state respondents fault petitioners for failing to show a "conflict" with *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37 (2018). State.BIO.6. That claim is puzzling, as petitioners' point is that the Ninth Circuit erred in relying on *Perry* because it is distinguishable. *See* Pet. 13, 21-24. But if *Perry* truly does compel the result the Ninth Circuit reached, then the Court should overrule its viewpoint-discrimination holding, which conflicts with intervening and better-reasoned precedent. *See*, *e.g.*, *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610 (2020) (holding that the exception allowing for government debt-collection phone calls but not other debt-collection phone calls under the TCPA was unconstitutional because it was content-based discrimination).

4. Finding no refuge in *Perry*, respondents seek it in this Court's "subsidy" cases. *See* Union.BIO.10-11; State.BIO.9,13. But *Regan v. Tax'n with Representation of Washington*, 461 U.S. 540 (1983) and subsidy cases like it are inapposite, as they "all involved cash subsidies or their equivalent"—*i.e.*, "tax benefits." *Matal v. Tam*, 582 U.S. 218, 240-41 (2017) (Alito, J.), and this "Court has never extended the subsidy doctrine to situations not involving financial benefits." *In re Brunetti*, 877 F.3d 1330, 1345 (Fed. Cir. 2017) (quoting *Autor v. Pritzker*, 740 F.3d 176, 182-83 (D.C. Cir. 2014), *aff'd sub nom. Iancu v. Brunetti*, 139 S.Ct. 2294 (2019). While cash is fungible, the information regarding dates and times of new employee orientations is not. In all events, respondents cannot point to a single case where subsidies are awarded on a viewpoint-discriminatory basis.

5. Respondents contend that, supposedly unlike the speaker-based laws this Court has condemned, Section 3556 does not bar the Foundation's speech because if the "Foundation wishes to inform District employees of their rights under *Janus*, it remains free to do so" under the California Public Records Act. Union.BIO.16; *see* State.BIO.7.

Once again, the stark reality contradicts the respondents' imaginary world view. The purpose of new employee orientations is to recruit uninformed new public employees into the ranks of union membership. This is done slyly, in ways that not only do not inform employees of their *Janus* rights but intentionally *obscure them*. But that isn't the only crime. Once those employees have unwittingly signed up for union membership, those membership agreements require them to *remain* union members for at

least a year, with an "opt-out" period that is short and often undiscoverable to the employee.

The Foundation is inundated daily with calls from employees that want to opt out of union membership and who never knew they had a choice in the matter. To them the Foundation can only reply "sorry, while it is a violation of your First Amendment rights for the union to take your money without your consent, you must continue paying dues for another eleven months, and even then, there is no guarantee the union will release you." *Janus*, 585 U.S. at 882 ("neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee…unless the employee affirmatively consents to pay.").

Connecting with employees *before* they become members is the difference between the Foundation's speech having any effect and it being largely inconsequential. *N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984), *citing to Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968) ("A delay 'of even a day or two' may be intolerable when applied to 'political' speech in which the element of timeliness may be important.").

6. Lastly, respondents double down on their credulity-straining suggestion that *Janus* supports Section 3556 because it noted that unions enjoy certain "privileges, such as obtaining information about employees." Union.BIO.16; *see* State.BIO.13. But respondents identify nothing in *Janus* hinting that a union's "privileges" include exclusive, perpetual access to that information. And little wonder: giving that information solely to the one speaker least likely to inform workers of their right to opt out of a union effectively renders *Janus* nugatory, and precluding workers from ever changing their bargaining repres-

entative infringes associational rights to boot. *Cf. Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 680 (2010) ("[S]peech and expressive-association rights are closely linked.").

In short, the conclusion that Section 3556 is viewpoint-discriminatory is inescapable. *See* Pet.14-15. And as all agree, viewpoint-discriminatory laws are subject to the strictest of scrutiny, which Section 3556 plainly cannot satisfy. Even assuming that combatting a phantom "privacy and security" problem is a compelling state interest, Section 3556 is not remotely "narrowly drawn" to serve it. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). For example, California can pass a law that prohibits anyone but incumbent unions from *participating* in new employee orientations. This would still permit non-incumbent unions and the Foundation to set up tables on sidewalks outside of government buildings, which the respondents have never argued is a "privacy or security" concern, nor can they. *See, e.g., McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (holding that public streets and sidewalks occupy a "special position" in terms of First Amendment protection because of their historic role as sites for discussion and debate).

III. The Decision Below Conflicts With Decisions From Other Courts.

The incompatibility of Section 3556 and the Ninth Circuit's decision with *Sorrell, Reed*, and *Janus*, and bedrock First Amendment principles is reason enough to grant review. But the decision below also conflicts with decisions from other courts. *See* Pet.26-28.

Respondents fail to see the irony of their attempt to remove the conflict between the Ninth Circuit's

memorandum opinion and *Southworth v. Bd. of Regents of Univ. of Wisconsin Sys.*, 307 F.3d 566 (7th Cir. 2002). *Southworth* does not apply here, the respondents argue, because Section 3556 does not "depend" on or "institutionalize" previous viewpoint discrimination. Union.BIO.17-18; *see* State.BIO.8. It certainly does! Incumbent unions in California have already received years of informational (and other) benefits not available to groups with opposing views and that discrimination is baked into the exclusive representation cake. Section 3556 continues in that tradition by granting information to unions that have already been in power for years, and to no one else.

The conflict runs deeper. The union respondents concede that in *Child Evangelism Fellowship of South Carolina v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1074 (4th Cir. 2006), the Fourth Circuit expressly aligned itself with *Southworth*. *See* Union.BIO.18. And the Fourth Circuit emphasized in *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019) that a law granting status-based access to speech-enabling information warrants careful scrutiny for viewpoint discrimination. The union respondents do not address that aspect of *Fusaro*, trying to limit that holding to merely a rule statement about First Amendment rights. *See* Union.BIO.18-19. In reality, *Fusaro* recognized that status and content/viewpoint often overlap. *See* 930 F.3d at 251 ("[A] speaker preference" can "reflect[] a content preference[.]"). Here, of course, it does.

Nor do respondents meaningfully distinguish the Eighth Circuit's decision in *Turning Point USA at Arkansas State Univ. v. Rhodes*, 973 F.3d 868, 876 (8th Cir. 2020). Respondents assert that *Turning Point* does not conflict with the Ninth Circuit's memorandum opinion here because the tabling restrictions in

Turning Point were viewpoint neutral, just as Section 3556 is viewpoint neutral as to who the requester of information is. Union.BIO.19; State BIO.6-7. But this misstates the Eighth Circuit's warning that a status-based distinction "might constitute viewpoint discrimination" if the requirements to obtain a permit to table "could not be met due to an organization's views." *Turning Point*, 973 F.3d at 876. In other words, the Eighth Circuit cautioned that merely spraying a distinction with "status-based" perfume does not diffuse the stink of its viewpoint discriminatory intent.

In sum, the respondents fail to remove the conflict between the Ninth Circuit and the Fourth, Seventh, and Eighth Circuits, which do not condone simple "status-based" distinctions as excuses for viewpoint-based discrimination.

CONCLUSION

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

Respectfully submitted,

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