No. ____

In The
Supreme Court of the United States

FREEDOM FOUNDATION,

Petitioner,

v.

WASHINGTON DEPARTMENT OF ECOLOGY, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

DEBORAH J. LA FETRA
Counsel of Record
ETHAN W. BLEVINS
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
DLaFetra@pacificlegal.org

Counsel for Petitioner

QUESTION PRESENTED

The Washington Department of Ecology invites union representatives and other visitors to the agency's main lobby to communicate with employees on matters generally related to the agency's mission and employee interests, including union membership. In response to Freedom Foundation's efforts to educate state workers about their constitutional rights to decline union membership, the agency revised its visitor policy to bar the Freedom Foundation from communicating to workers in the agency's main lobby while continuing to allow representatives of the Washington Federation of State Employees to use the lobby to encourage employees to join the union. A split panel of the Ninth Circuit Court of Appeals upheld the policy.

Does state action that supports speech by public employee unions to public employees advocating union membership and disfavors speech by right-to-work advocates to the same public employees on the same topic constitute viewpoint discrimination in violation of the First Amendment?

PARTIES TO THE PROCEEDINGS AND RULE 29.6

Petitioner Freedom Foundation was the plaintiff-appellant in all proceedings below.

Respondents Washington Department of Ecology, a Washington state agency, and Sandi Stewart, in her official capacity as Director of Human Resources for the Washington Department of Ecology, were the defendants-appellees in all proceedings below.

CORPORATE DISCLOSURE STATEMENT

Freedom Foundation is a nonprofit corporation organized under the laws of Washington. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

RULE 14.1(b)(iii) STATEMENT OF ALL RELATED CASES

The proceedings in the trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Freedom Foundation v. Washington Department of Ecology, No. C18-5548RBL (W.D. Wash. Dec. 3, 2019).

Freedom Foundation v. Washington Department of Ecology, No. 20-35007 (9th Cir. Dec. 21, 2020).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Freedom Foundation respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS

The panel opinion of the Ninth Circuit Court of Appeals is unpublished and available at 840 F. App'x 903 (9th Cir. 2020) and included as Appendix 1a. The decision of the district court is published at 426 F. Supp. 3d 793 (W.D. Wash. 2019) and included at Appendix 10a.

JURISDICTION

The district court had jurisdiction over this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The district court granted the defendants' motion for summary judgment on December 3, 2019, and entered final judgment on December 6, 2019. Freedom Foundation filed a timely appeal to the Ninth Circuit Court of Appeals. On December 21, 2020, a split panel of the Ninth Circuit affirmed the district court opinion. Over a dissent, Freedom Foundation's petition for rehearing en banc was denied on May 28, 2021. The Ninth Circuit issued its mandate on June 7, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. amend. I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Washington Department of Ecology Policy 14-10(2) provides: "**Visitors may not use Ecology facilities to promote or conduct commercial enterprise.** Visitors also may not use Ecology facilities to promote or solicit for an outside organization or group. The only exceptions are public hearings or meetings held according to this policy, or activities approved as a charitable activity according to Policy 15-01." (Emphasis original).

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

This case involves Washington State's continued opposition to protecting its workers' First Amendment right to work free of union membership and dues.[1] After this Court overruled *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and held that public employees must give informed consent prior to the state deducting union dues in *Janus v. Am. Fed. of State, Cty., and Mun. Emps. (AFSCME), Council 31*, 138 S. Ct. 2448 (2018), right-to-work advocates such as Petitioner Freedom Foundation heralded *Janus* as a game-changing landmark case upholding public employees' First Amendment rights. *Janus* opponents, however, were well-prepared to enact and implement evasive measures to ensure that public employee unions, and only public employee unions, would be in a position to inform workers about their rights (or not) and to decide what qualifies as consent.

In this case, a state agency revised its public access policy to hinder right-to-work advocate

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[1] *See* Amicus Brief filed by 20 States, including Washington, in support of Respondents in *Janus v. Am. Fed. of State, Cty., and Mun. Emps., Council 31*, docket no. 16-1466 (filed Jan. 19, 2018).

Freedom Foundation's efforts to educate the agency's workforce about their First Amendment rights, while permitting a public employee union to present its viewpoint on *Janus* to workers in the same space. Prior to 2017, Washington Department of Ecology Policy 14-10 forbade visitors from using the agency's public areas only if they were there "to promote or conduct commercial enterprise." *Freedom Foundation v. Washington Dep't of Ecology*, case no. 20-35007, dkt. 12-1, Excerpts of Record (ER) 139. The public areas include the vendor-operated cafeteria that serves all tenant agencies,[2] ER 228, *Freedom Foundation v. Washington Dep't of Ecology*, case no. 20-35007, dkt. 17, Appellees' Supplemental Excerpts of Record (SER) 180, 184, and the 11,000-square-foot lobby, which features a high-ceilinged atrium with floor-to-ceiling windows on the north and south sides, seating areas that serve as "places for conversation," partitioned areas designated for meetings, and large open areas for foot traffic. ER 230, 258–67. It is a "high traffic area." ER 230.

Under Ecology's original policy, Freedom Foundation staff were welcomed into the agency lobby to communicate with the workers. Due to a misunderstanding, an Ecology employee also permitted a Freedom Foundation speaker to enter a nonpublic area of the building for a short time before he was escorted back to the lobby. Subsequently, the Department revised its policy with the expressed intent to exclude Freedom Foundation speakers

[2] In addition to the Department of Ecology, the building houses staff employed by the Washington Conservation Commission, the Pollution Liability Insurance Agency, and the U.S. Department of Environmental Protection Agency. SER 184.

entirely, ER 148, adding one new sentence: "Visitors also may not use Ecology facilities to promote or solicit for an outside organization or group." ER 139. Although Freedom Foundation's communication with employees neither promoted nor solicited for any outside organization or group, Ecology relied on this new provision to exclude Freedom Foundation from the otherwise public areas of the building.

Ecology interprets the policy to permit other private speakers to express themselves in the building's public lobby and cafeteria. Notably, Ecology permits the public employees' union to speak in the lobby on the very same topic that Freedom Foundation desires to speak about, but from a different and politically favored perspective. ER 74–77. The agency also interprets the policy to allow other private speakers to use its lobby for expressive activities, ranging from a bike repair demonstration conducted by a local retailer to a plant sale promoting local nonprofits, so long as the speakers assert some connection to departmental interests. ER 78–88.

Washington's efforts to restrict the information provided to public workers are not unique.[3] Other

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[3] Washington state employs a multi-pronged counterattack to *Janus*. Among other things, the state revised its Public Records Act to permit public employee unions—and no one else—to obtain worker identity information. *See Boardman v. Inslee*, 978 F.3d 1092, 1098 (9th Cir. 2020) (upholding the law), *cert. denied*, docket no. 20-1334, 2021 WL 4733644 (Oct. 12, 2021) (Justices Thomas, Alito, and Gorsuch indicating they would have granted certiorari); *id.* at 1120 (Bress, J., dissenting) ("The State is effectively using an information embargo to promote the inherently "pro-union" views of the incumbent unions, while making it vastly more difficult for those with opposing views—

states similarly responded to *Janus* by enacting laws designed to enhance unions' power to communicate with workers while dampening or extinguishing the ability of other speakers—including the states themselves—to communicate with workers about their First Amendment rights and union membership. For example, in California and Illinois, laws grant unions exclusive access to new employees and prohibit state agencies from discussing *Janus* with employees without the unions' approval. *See* Cal. Gov't Code §§ 3550, 3553; 5 ILCS 315/6 (c), (f).

Janus's declaration of public workers' First Amendment rights has been the law for three years, but lower courts have narrowed its application. Meanwhile, workers have challenged new state laws that effectively discourage public employees from exercising their rights. Many of those cases are mooted by the unions' strategy of refunding the plaintiffs' dues with interest and accepting their resignations, thus preventing courts from addressing the merits. In short, *Janus* is vulnerable and under attack. If *Janus* is to provide meaningful First Amendment protection for public employees, courts must be diligent in protecting it from states' evasion tactics.

The petition for writ of certiorari should be granted.

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and particularly those with views opposite unions—to reach their intended audience.").

STATEMENT OF THE CASE

1. Freedom Foundation's Santa Project

Freedom Foundation is a 501(c)(3) nonprofit organization operating in Washington, Oregon, and California and devoted to advancing the public's interest in individual liberty, free enterprise, and limited, accountable government. Its work includes public advocacy, research, canvassing, and litigation. Freedom Foundation works to inform public-sector workers about union expenditures and the constitutional right to opt into union membership and dues as recognized by *Janus*. Having found that public-sector unions often keep state employees in the dark about their constitutional rights, the Foundation canvasses to notify government employees of those rights. This mission is critical for the many public-sector workers who are less than fully informed of their rights with respect to union membership.

During the Christmas holiday season, Freedom Foundation canvassers in Santa Claus costumes visit state government buildings to hold signs and hand out holiday-themed materials addressing the right to opt out. ER 41–73.[4] The Foundation trains canvassers to "avoid non-public areas," ER 96–97, "hand out flyers to people who are interested, talk to people who are willing to talk . . ., smile, always be polite, and stay out of the way." ER 60; ER 95.[5] Before visiting state

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[4] The canvassers informed workers about the law then-applicable, which required workers to "opt-out" rather than requiring the state to obtain affirmative consent (opt-in) as now required under *Janus*. *See Janus*, 138 S. Ct. at 2486.

[5] "Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First

buildings, the Foundation's outreach director contacts building administrators or security to notify the state of an upcoming visit and ask where canvassers are allowed on the property. ER 50; ER 95. Santa canvassers can interact with more employees and distribute their message more effectively in building lobbies, *id.*, than would be possible outside (Ecology's proposed "cooperative solution," SER 195), particularly given Washington's dreary and often wet winter weather. Freedom Foundation has been allowed to pass out such information in the public spaces of various Washington state government buildings. ER 58–59.

a. Holiday Canvassing in 2015

In December 2015, Freedom Foundation sent canvassers to the Thurston County, Washington, lobbies of the Washington Department of Natural Resources, the Washington Department of Enterprise Services, and Ecology. ER 58–59. The canvassers dressed in Santa Claus costumes and carried holiday-themed materials because a festive approach attracts attention and creates a friendly atmosphere. ER 51. At each location, one or two canvassers carried a poster, a sign, and handouts. ER 67, 69, 56. Freedom

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Amendment." *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997); *Mills v. Ala.*, 384 U.S. 214, 219 (1966) (protection for "humble" leaflets). Likewise, this Court has extolled "one-on-one communication" as perhaps "the most effective" and "[most] fundamental" speech. *Meyer v. Grant*, 486 U.S. 414, 424 (1988); *see also McCullen v. Coakley*, 573 U.S. 464, 488–89 (2014) ("When the government makes it more difficult to engage in" "'one-on-one communication'" "[i]n the context of petition campaigns," "it imposes an especially significant First Amendment burden.").

Foundation's name did not appear on any of the written materials, nor did the materials promote the Foundation. The red, white, and green poster, decorated with snowflakes, bore the legend, "Give Yourself a Raise." It continued: "You work hard for your money—keep more of it," and then explained how to opt out of union dues and fees. ER 68. The sign depicted an unfurled scroll denominated "Santa's List" on a red background and listed "Naughty Union Facts," describing union finances, including the fact that $6.6 million of the $23 million collected in dues and fees subsidized AFSCME's political agenda. ER 70. The handouts were opt-out forms packaged in envelopes marked with the phrase, "Give Yourself a Raise." ER 56, 70.

At the buildings housing the departments of Enterprise Services and Natural Resources, law enforcement personnel confirmed that Freedom Foundation could communicate with workers and hand out forms in the public lobby. ER 58–59. The story ended differently at the Department of Ecology.

b. Public Speech at Ecology HQ

Ecology's headquarters is a three-story, 323,000-square-foot building, open from 8:00 a.m. to 5:00 p.m., Monday through Friday. ER 256. The building houses about 900 Ecology employees, plus staff for several tenant agencies. *Id.* The public entrance opens into the approximately 11,000-square-foot lobby, a high-ceilinged atrium with floor-to-ceiling windows on the north and south sides. Seating areas in the lobby serve as "places for conversation," artwork, partitioned areas designated as meeting spaces, and large open areas for foot traffic. *See* ER 230, 258–67. Reception and security desks are adjacent to the lobby entrance

and a placard in front of the entrance directs visitors to sign in and receive a badge. ER 258–67. The cafeteria, which serves Ecology employees as well as other tenant agency employees, also is a public area. ER 228, SER 180, 184.

As the district court found, employees enter through a side door adjacent to the employee parking structure and then "must pass through the lobby to access the workspaces." ER 4. Employees must also pass through the lobby to move from their workspaces to the cafeteria and meeting rooms on the other side of the building. *Id*. *See also* SER 214 (detailed map of the building). The parking area closest to the outdoor plaza by the main public entrance is designated for visitors. *Id.* Consequently, employees would not encounter speakers who were restricted to the outdoor plaza.

Washington Federation of State Employees (WFSE), an affiliate of AFSCME and the exclusive representative of Ecology employees, frequently uses the Ecology lobby for expressive activity, including membership drives. *See, e.g.*, SER 031 (WFSE used lobby for "promoting union membership"). It holds "tabling" events in the lobby as often as twice a month, *see* SER 075, where union representatives set out a table and speak with Ecology employees about union membership, including the union's views about this Court's *Janus* decision. ER 75; ER 77; SER 065.[6]

[6] All the union's communications, whether to promote union membership or otherwise related to union representation, are acknowledged to be inherently political. *Janus*, 138 S. Ct. at 2473. Therefore, the specific content of the union's communications has no legal consequence.

Ecology also regularly hosts activities in the lobby that include expression by other outside organizations. For example, every year Ecology holds a farmers' market in the lobby, which lasts most of the day. ER 269; ER 238–39. Local nonprofits have shared information about themselves at the farmers' market in the past. ER 269. Ecology also holds an annual plant sale in the lobby for charitable fundraising, during which Thurston County Food Bank and Master Gardeners Foundation of Thurston County has shared information about their organizations. ER 271–78; ER 235–36. In 2016, the plant sale was so loud that it disrupted employees. ER 280. Nonetheless, Ecology has continued to hold the sale in the lobby. ER 280. Ecology also allows outside organizations to share commuter information in the lobby, such as a "transit fair" lasting several hours. ER 283–84; ER 163–67; ER 240–44, and a bike repair demonstration. ER 285–88. Other events include pet photo contests, travel photo contests, art receptions, Peace Corps week, and employee art shows. ER 237, 250–52; ER 286; ER 289–92; ER 293–95. Various organizations engage in leafletting in the lobby. ER 124.

c. Ecology Welcomes, Then Ejects, Santa

In December 2015, Freedom Foundation outreach director, Matthew Hayward, and canvasser Elmer Callahan (dressed as Santa) arrived at Ecology headquarters in Lacey, Washington. They checked in at the front desk, informed the receptionist why they were there, and gave her a Freedom Foundation business card. ER 52, 54. Unknown to Hayward and Callahan, the security guard on duty, Ken Nasworthy, was under the mistaken impression that the Freedom Foundation visitors were from the WFSE union. He

informed them that they could have access to the whole building if they signed in. ER 51–54. Upon this invitation, Mr. Callahan signed in and "went down the hallway"[7] while Mr. Hayward remained in the lobby. ER 52. Ten minutes later, a union shop steward and another employee led Mr. Callahan back to the security desk. ER 52, 115–16; SER 010.

Mr. Nasworthy realized his error. ER 52, 55; ER 109; ER 126–27. He told the Freedom Foundation visitors that Ecology had a good relationship with the employees' union and that the union did not want Freedom Foundation on the premises. *Id*. He then physically removed them from the building. ER 52. Mr. Hayward contacted Freedom Foundation's legal counsel, David Dewhirst, who soon arrived to speak with Mr. Nasworthy. *Id*. During the conversation, Mr. Nasworthy agreed that Freedom Foundation canvassers could pass out information in the public areas of the building including the cafeteria and lobby. ER 117, 123. He acknowledged that various groups handed out information in those spaces "all the time." ER 123–24. Respondent Sandi Stewart agreed that canvassers could enter public spaces such as the lobby and the cafeteria during open hours. ER 131–35; SER 180.

d. Ecology's New Speech Policy

Directly in response to Freedom Foundation's visit, ER 148 (confirmed by Ecology designated representative Administrative Services Director Jason Norberg), Ecology added new language to Administrative Policy 14-10, entitled "Reserving and

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[7] At the time, there were no physical barriers between the lobby and the office areas. SER 010.

Using Ecology Facilities." ER 139. Effective as of April 2017, Policy 14-10 retained its original language, "Visitors may not use Ecology facilities to promote or conduct commercial enterprise," then added, "Visitors also may not use Ecology facilities to promote or solicit for an outside organization or group." *Id.*

Ecology's interpretation extends beyond the text of the policy. Speaking on behalf of the agency, Jason Norberg explained that whether a communication ran afoul of the policy "would be dependent upon the content of that communication," ER 155, and is a decision made "at the discretion of Ecology officials." ER 160. Ecology also interprets the prohibition to include any speech "*connected* to an outside organization" regardless of whether the organization is identified. ER 151 (emphasis added). If this weren't broad enough, Ecology also asserts the discretion to ban speech if it merely "encourage[s] conversation in the lobby." ER 158. Ecology reserves the authority to ban speech "depend[ing] on the circumstances surrounding the conversation and the conversation itself." ER 153. *See also* ER 152, 155, 167–68.

Yet Ecology recognizes one broad exception to the speech restriction: speech that the agency deems, within its discretion, to be related to Ecology business. ER 153, 167–68. Speech related to Ecology business includes such topics as employee wellness, employee commuting options, and labor relations. ER 165, 180, 184. The exception for labor relations, if applied neutrally, unquestionably would include the Freedom Foundation's message about employees' constitutional rights related to union membership. It is not applied neutrally: Ms. Stewart, the designated 30(b)(6) witness, confirmed that the union is "the only

organization that can speak to union-related issues on Ecology premises." ER 181.

e. Holiday Canvassing in 2017[8]

A few months after Ecology enacted its new policy, Freedom Foundation again sent holiday canvassers to state buildings to inform workers about their constitutional rights. ER 63; ER 193. As before, canvassers dressed as Santa in the lobbies of several state buildings, including the Department of Natural Resources and the Department of Fish and Wildlife, shared their message that public employees enjoy a constitutionally protected right to work. ER 193.

The canvassers carried a poster and handouts, none of which contained Freedom Foundation's name or promoted the Foundation. The poster was green and red, with an image of a lump of coal in the middle, and the words "WFSE [Washington Federation of State Employees] has been naughty." ER 202–04. The poster directed readers to a website, OptOutToday.com, explaining workers' constitutional rights with respect to union membership. ER 204. Canvassers carried opt-out forms and pamphlets focused on union finances and explaining employees' right to opt out. ER 205–06. They also carried a "Santa's List" leaflet with "Naughty union facts" and referred readers to OptOutToday.com. ER 201.

Before visiting Ecology, Freedom Foundation Outreach Director Matthew Hayward advised Respondent Stewart about the organization's upcoming canvassing plans. ER 57. Ms. Stewart informed Mr. Hayward that Freedom Foundation

[8] In 2016, Freedom Foundation Santa canvassers visited state agencies in Oregon only.

staff would not be allowed to leaflet in the lobby in light of the newly amended Policy 14-10. ER 61–65; ER 210. Because Freedom Foundation's speech was not promoting itself or soliciting for any organization, ER 211, Mr. Hayward determined that the amended policy, as written, did not apply to its visit. ER 213. Thus, Santa-clad Freedom Foundation canvasser Sandy Belzer arrived at Ecology headquarters, carrying the poster and handouts. Because the Foundation anticipated that the Department might try to restrict Freedom Foundation's speech, an attorney accompanied Ms. Belzer. ER 194–95; ER 202–04. They entered the lobby, and Ms. Belzer began handing out leaflets. ER 196.

Within minutes, Respondent Stewart, accompanied by security guards, arrived to inform them that they could not distribute information inside the building. *Id*. When the Freedom Foundation attorney asked why they could not communicate information to workers in the lobby even though the union used the same lobby to communicate with the same workers, Ms. Stewart asserted that the union could use the lobby because "they're not an outside organization," SER 197; *see also* ER 220, SER 194, App. 4a n.2, App. 23a, and therefore had the right to do so pursuant to the collective bargaining agreement between Ecology and the union. ER 219–20. At Ms. Stewart's insistence, Foundation staff left the premises. ER 219.

2. Freedom Foundation's Challenge to Ecology's Viewpoint-Discriminatory Ban and Decisions Below

In July 2018, Freedom Foundation filed a 42 U.S.C. § 1983 claim in the Western District of

Washington. ER 296–304. The complaint alleged that Ecology's policy and practice of forbidding Freedom Foundation's nondisruptive communication about workers' constitutional rights in Ecology's public lobby violated the First Amendment to the United States Constitution and sought declaratory and injunctive relief. ER 296–303. Following discovery, both parties moved for summary judgment.

The district court held that the lobby was a nonpublic forum and that restricting access to groups specifically tied to the agency's function is content-neutral and states a sensible basis for distinguishing what is permitted and what is not. The court limited its analysis to the threshold question of whether Ecology's lobby is a public or nonpublic forum. App. 19a–26a. Although the court acknowledged that, even in a nonpublic forum, speech restrictions must still be reasonable and viewpoint-neutral, App. 19a, it declined to consider facts and arguments bearing on those factors. Rather, the court simply declared without analysis that Ecology satisfied these constitutional requirements "as a matter of law." App. 20a, 24a, 26a.

In an unpublished memorandum opinion, a divided Ninth Circuit panel affirmed, holding that the lobby was a nonpublic forum and that the policy was neither unreasonable nor viewpoint discriminatory. App. 2a, 4a.[9] The panel majority rejected Freedom Foundation's proof of viewpoint discrimination, holding that Ecology's policy reserving the lobby for

[9] Freedom Foundation argued below that the lobby was a designated public forum but does not seek review of the Ninth Circuit's contrary holding on that point because viewpoint neutrality is required in any type of forum.

agency business was reasonable and that Freedom Foundation had adequate alternatives available to canvass outside the building. App. 3a. The majority acknowledged that Freedom Foundation was barred while union representatives were permitted to address employees in the lobby:

> Ecology is subject to the collective bargaining agreement (the "CBA") between the State of Washington and the WFSE. In accordance with the CBA, Ecology allows the WFSE to use the lobby for representational activities subject to advance approval. This differential access for the WFSE versus Freedom Foundation to speak about labor relations is lawful under *Perry* [*Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50–52 (1983),] because the WFSE is the exclusive bargaining representative of unionized employees at Ecology.

App. 4a n.2.

Judge Callahan dissented because, although the policy was facially viewpoint-neutral, circumstantial evidence strongly suggested that the policy was intended to muzzle Freedom Foundation's speech and, therefore, factual questions should have precluded summary judgment for the government. App. 6a ("Governments rarely target a speaker's viewpoint outright."). Judge Callahan expressed concern that Ecology's revised policy was "a façade for viewpoint-based discrimination," given Ecology's "red-flag" admission that it adopted the policy "in direct response to Freedom Foundation's 2015 visit" combined with the union's unrestricted use of the same space to discuss "the very topic on which

Freedom Foundation sought to leaflet." App. 7a–8a. She noted that while the union is an exclusive representative, "not all of its activities clearly qualify as representational," such as membership drives. App. 8a. Over Judge Callahan's dissent, the Ninth Circuit denied the Foundation's petition for rehearing en banc. App. 27a–28a.

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW CONFLICTS WITH THIS AND OTHER COURTS' REQUIREMENT FOR FACTUAL INVESTIGATION OF VIEWPOINT DISCRIMINATION

A. The First Amendment Prohibits *Sub Rosa* Viewpoint Discrimination in Any Forum

Viewpoint-based regulations are "an egregious form of content discrimination" that are impermissible in any forum. *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); *Center for Investigative Reporting v. Se. Penn. Transp. Auth.*, 975 F.3d 300, 313 (3d Cir. 2020). *See also Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., joined by Thomas & Kavanaugh, JJ., dissenting from denial of application for injunctive relief) ("[F]avoring one viewpoint over others is anathema to the First Amendment."). All courts, including this Court, Circuit courts, and the court below, agree that

speech restrictions in nonpublic forums must be viewpoint neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985); *Porter v. City of Philadelphia*, 975 F.3d 374, 387 (3d Cir. 2020); *Zukerman v. United States Postal Serv.*, 961 F.3d 431, 444 (D.C. Cir. 2020) ("viewpoint discrimination is prohibited in all forums"); App. 3a.[10]

The government can engage in unconstitutional viewpoint discrimination in two ways. First, it may enact a speech restriction for a discriminatory purpose—i.e., "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). Or, as here, it may apply a facially viewpoint-neutral rule in a viewpoint-discriminatory way. *See Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 631 (2d Cir. 2005); *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 978 F.3d 481 (6th Cir. 2020) (nonpublic forum) (transit authority's ban on advertisements that could hold group of people up to "scorn or ridicule" on the sides of city buses discriminated on the basis of viewpoint, and thus violated First Amendment).

Most cases of viewpoint discrimination are not overt but involve regulations that prohibit a particular subject matter or speaker. Lackland H.

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[10] The D.C. Circuit, however, engages in forum analysis *before* considering whether a restriction discriminates on viewpoint. By sufficiently narrowing the scope of the forum, the court may conclude that a restriction is content-based—prohibiting an entire subject matter—rather than viewpoint based. *Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 327 (D.C. Cir. 2018).

Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. 3, 33 (2019). A law's proponents will often argue that the absence of any attempt to ban a particular viewpoint in the course of a specific debate indicates that there has been no viewpoint discrimination. However, this Court recognizes that there often is no clear line between speaker discrimination and viewpoint discrimination. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 645 (1994) ("[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys."). "The existence of reasonable grounds" for a regulation of speech "will not save a regulation that is in reality a façade for viewpoint-based discrimination." *Cornelius*, 473 U.S. at 811; *see also Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004) (The "mere recitation of viewpoint-neutral rationales" will "not immunize [government's] decisions from scrutiny," as they may be a "mere pretext for an invidious motive. . . . In practical terms, the government rarely flatly admits it is engaging in viewpoint discrimination.").

B. Circuit Courts Conflict as to the Judiciary's Role in Determining When Viewpoint Discrimination Occurs

This Court and others have little patience for constitutional violations occurring under the veneer or pretext of legitimate government action. *See, e.g.*, *Cornelius*, 473 U.S. at 811; *Christian Legal Soc. Ch. of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 736 (2010) (Alito, J., writing for four dissenters) ("The adoption of a facially neutral policy for the purpose of suppressing the expression of a

particular viewpoint is viewpoint discrimination."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 286–88 (1988) (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting) (characterizing the subject-matter action of protecting students from sensitive topics as a mere pretext for viewpoint discrimination); *Collins v. Putt*, 979 F.3d 128, 145 (2d Cir. 2020) (Menashi, J., concurring in the judgment) ("The Supreme Court has made clear that actions motivated by impermissible viewpoint considerations do not become lawful simply because those actions might be justified on some other viewpoint-neutral ground."); *Gerlich v. Leath*, 861 F.3d 697, 705 (8th Cir. 2017) (court found evidence of a viewpoint-discriminatory motive when government's "actions and statements show "unique scrutiny" of specific speaker's speech).

To determine whether a regulation is a façade or pretext for viewpoint discrimination, courts must consider the circumstances of the speech restriction's enactment and implementation. For example, in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969), the school board enacted a facially neutral ban on all types of armbands, ostensibly to minimize disruption. But this Court did not hesitate to consider the cause-and-effect context that motivated the school board to act, noting that other comparably distracting items of apparel were left unregulated. *Id.* at 510–11. Because the school board's regulation, in context, was intended to suppress expressed opposition to the Vietnam War, it was unconstitutional. *Id.* at 514; Frank D. LoMonte, *Everybody Out of the Pool: Recognizing a First Amendment Claim for the Retaliatory Closure of (Real or Virtual) Public Forums*, 30 U. Fla. J.L. & Pub. Pol'y

1, 33 (2019) ("Inquiry into motive is indispensable in First Amendment cases, because ill-motivated government actors can readily dress up a targeted act of punishment in the guise of a facially neutral enactment."); *cf. Waters v. Churchill*, 511 U.S. 661, 692 (1994) (at-will public employee may state a First Amendment claim if she is fired for expressing views on a matter of public concern).

The Ninth Circuit below, however, refused to grapple with evidence that Ecology changed its policy and applied it in a particularly restrictive way against Freedom Foundation. It simply affirmed the district court's holding that Freedom Foundation's viewpoint discrimination argument simply failed "as a matter of law." App. 20a, 24a, 26a.[11]

In contrast to the Ninth Circuit's refusal to review the evidence in ruling on Freedom Foundation's viewpoint-discrimination claim, several Circuit courts look beyond apparent facial neutrality to discern whether the government is engaging in *sub rosa* viewpoint discrimination. Most closely analogous is *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, in which the Third Circuit reviewed a port authority bus regulation that prohibited "noncommercial" advertisements. 653 F.3d 290, 292 (3d Cir. 2011). In Pennsylvania, felons regain their right to vote upon their release from prison, but

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[11] Courts in the Ninth Circuit continue to reject claims of viewpoint discrimination even while acknowledging state policies that benefit public employee unions. *See, e.g.*, *Freedom Foundation v. Sacks*, No. 3:19-cv-05937-BJR, 2021 WL 1250526, at *9 (W.D. Wash. Apr. 5, 2021) (citing *Boardman v. Inslee*, 978 F.3d 1092), *appeal pending*, Ninth Cir. docket no. 21-35342 (filed May 3, 2021).

many ex-prisoners are unaware of this fact. To inform them of their legal rights, a nonprofit group asked the port authority to accept an ad encouraging ex-prisoners to vote. The port authority rejected the ad based on the "noncommercial" policy. *Id.* at 293. The district court conducted a five-day bench trial and received evidence about "comparator" ads that the port authority accepted, including ads from other nonprofit organizations seeking to educate the public about their rights and opportunities. *Id.* at 294.[12] The district court rejected the port authority's claim that it refused the ad as "noncommercial," holding that it was a pretext for viewpoint discrimination. *Id.* The Third Circuit affirmed because the port authority's viewpoint neutral explanation for its action was not credible in light of evidence that "the coalition's ad and

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[12] Speech restrictions in a nonpublic forum remain subject to limitation even under a "reasonableness" standard of review: the government may not offer justifications unsupported by the record. *Pomicter v. Luzerne Cty. Convention Ctr. Auth.*, 939 F.3d 534, 543 (3d Cir. 2019) (citing *NAACP v. City of Philadelphia*, 834 F.3d 435, 443 (3d Cir. 2016)). In *NAACP*, the court struck down an airport's restriction on noncommercial advertisements on the reasonableness review appropriate for nonpublic forums (regardless of viewpoint discrimination) because the city failed to provide record evidence or commonsense inferences demonstrating a legitimate explanation for the ban on noncommercial content. 834 F.3d at 445. Courts must review evidence to "grasp the purpose" of the forum and, "critically, understand how the speech activity at issue may disrupt that purpose." *Id.*; *see also New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir. 2002) (describing reasonableness review as a "fact-intensive" inquiry considering "the uses to which the forum typically is put," the "risks associated with the speech activity," and the "proffered rationale"); *Hawkins v. City & Cty. of Denver*, 170 F.3d 1281, 1290 (10th Cir. 1999) (same).

the comparator ads were all designed to educate readers about their legal rights." *Id.* at 298.[13] In this context, a reasonable inference is that the port authority's rejection of the ad directed toward ex-prisoners was "motivated by hostility towards the ad's message." *Id.* at 299.

Just as *Pittsburgh League* found unconstitutional viewpoint discrimination when some nonprofits sought to advertise legal rights relevant to certain segments of the public, but one was rejected, so too in this case the Department of Ecology permits one private organization—the public employee union—to use the lobby to communicate with workers about union membership but forbids the same space to be used by another organization to speak on the same topic from a different perspective.

Other Circuit courts similarly review the record and reject pretextual reasons for applying facially viewpoint-neutral speech restrictions in a way that effectively silences only certain, disfavored speakers. For example, the Eighth Circuit held that a state could not discriminate against the Ku Klux Klan's application to participate in a roadside cleanup sponsorship program when all of its proffered reasons were pretext to cover the real reason for denying the application: the state's "disagree[ment] with the Klan's beliefs and advocacy." *Cuffley v. Mickes*, 208

[13] A nonprofit organization devoted to the elimination of poverty sought to inform low earners about their entitlement to the federal earned income tax credit. Another nonprofit organization committed to fighting housing discrimination advertised contact information for people who experienced illegal discrimination. Finally, a nonprofit organization dedicated to advancing women's rights advertised free legal information. *Id.* at 294.

F.3d 702, 711 (8th Cir. 2000), *cert. denied sub nom. Yarnell v. Cuffley*, 532 U.S. 903 (2001). The court reviewed the evidence and determined first that the state "treated the Klan differently from the vast majority of applicants." *Id.* at 706. The court relied in part on deposition testimony from a state employee who stated that the department could deny an applicant based on their beliefs despite the state's later filing of a "curative affidavit" from the employee disclaiming her earlier testimony. *Id.* at 707. In contrast, the Ninth Circuit in this case blithely accepted Ecology's litigation-driven explanations at odds with deposition testimony provided by fact witnesses. *See supra* at 9–14. In *Cuffley*, the state also claimed that the Klan was ineligible to adopt a highway because it violated a regulation "conveniently adopted after the Klan applied," *id.* at 711, prohibiting "[a]pplicants with a history of unlawfully violent or criminal behavior." *Id.* at 709. State witnesses were unsure how it would be applied generally (drunk driving? antitrust?) and the state had only ever applied it to the Klan. Reviewing all the evidence, the court concluded that the "regulation was intended to target only the Klan and its views." *Id.* at 710.

The First Circuit, in *Ridley*, 390 F.3d 65, also evaluated evidence that a transit authority rejected certain bus advertisements that favored marijuana legalization because it disagreed with the message. The evidence consisted of agency statements expressing distaste for the message, *id.* at 88–89, combined with evidence that the transit authority's rejection of the ads did not reasonably serve its purported justification of protecting children. *Id.* (ads either targeted adults or stated "smoking pot is not

cool"). The court further considered evidence that the transit authority permitted ads promoting alcoholic beverages (also illegal for juveniles), an inconsistent approach that "deepen[s]" the "suspicion of viewpoint discrimination." *Id.* at 88.

And in *Mesa v. White*, the Tenth Circuit held that evidence of the circumstances surrounding a city council's refusal to permit the plaintiff to speak about a controversial personnel decision, when the city knew from experience that Mesa's speech would likely be critical of the council's action, supported an inference of viewpoint discrimination that should have been sufficient to withstand summary judgment. 197 F.3d 1041, 1047 (10th Cir. 1999). The court further held that the city council's restriction on a speaker's ability to address a meeting was pretextual because, although facially neutral, the council's speech restriction was of "recent vintage," enacted in response to the particular speaker's expression. *Id.* at 1048. Given the factual record, the district court erred in granting summary judgment to the city. *See also Summum v. City of Ogden*, 297 F.3d 995, 1006 (10th Cir. 2002) (city's "historical relevance" criterion for approving monuments "devolve[d] into a mere post hoc facade for viewpoint discrimination" and rejection of proposed monument on that basis violated First Amendment).

In contrast to the Ninth Circuit below, the First, Third, Eighth, and Tenth Circuits hold that plausible allegations of viewpoint discrimination—especially in light of regulations enacted in response to a particular speaker as in this case—demand a court's attention to the factual record.

C. Ecology Engaged in Viewpoint Discrimination Against Freedom Foundation

"The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as a part of free speech, but as part of free assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1945). The First Amendment prohibits the state from punishing a pro-union speaker who "ask[s] a worker to join a union." *Id.* at 526. Similarly, a speech restriction discriminates on the basis of viewpoint "if it provide[s] that public officials could be praised but not condemned." *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017). Here, the record established that Ecology's policy effectively provides that the department's workers will hear the union praised but not condemned.[14] Yet the First Amendment protects speech urging workers not to join a union. *Thomas*, 323 U.S. at 537–38. Given this Court's protection of speakers saying "Join!" or "Don't join!," surely "You have a constitutionally-based *choice* to join!" must share the same First Amendment protection. *See Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 365 (D.C. Cir. 2018) ("For the Government to change the nature of a forum in order to deny access to a particular speaker or point of view surely would violate the First Amendment.").

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[14] The majority opinion dismissed the security guard's comments regarding Ecology's favoritism ("We have a good relationship with our union, and they don't want you here."), because he did not speak officially on behalf of the agency. App. 5a. Yet, where a regulation is a façade intended to cloak official viewpoint discrimination, such evidence is entitled to serious consideration.

Evading the clear equivalence between the union's speech regarding union membership and Freedom Foundation's speech regarding union membership, the Ninth Circuit instead based its decision on Ecology's refusal to grant lobby access to two other organizations, holding that these refusals sufficed to show that the policy change did not specifically target Freedom Foundation. App. 6a ("[N]ot 'everyone' is allowed access to the lobby and, in fact, at least two organizations (the Sierra Club and Olympia Coffee Roasting Company) aside from Freedom Foundation have been denied such access."). Yet the "denial" to Olympia Coffee, an agency coffee vendor, was only a relocation within the building: its request to hold a coffee tasting in the lobby was instead held in the cafeteria. App. 24a. The second denial was to Sierra Club's planned demonstration with a large group of approximately 100 protestors; the organization agreed to conduct its protest just outside the building. App. 24a; SER 5–6. These are easily distinguished from the one or two individuals from Freedom Foundation seeking access to the lobby to discuss the same topic for which the union is granted access.

Dissenting from the majority opinion below, Judge Callahan properly demonstrated judicial skepticism: "the timing of the policy, combined with the circumstances surrounding the 2015 leafletting attempt, circumstantially supports the notion that Ecology simply had no desire to entertain Freedom Foundation's opinions." App. 8a. Judge Callahan questioned how the policy was needed to minimize disruption when "'everybody' previously [could] leaflet there 'all the time'" and Ecology previously allowed Freedom Foundation to do so. App. 8a. She further

questioned why the policy banned individuals using the lobby on behalf of organizations while granting access to individuals using the lobby on their own behalf. App. 9a; *see also Turning Point USA at Arkansas State Univ. v. Rhodes*, 973 F.3d 868, 877, 879 (8th Cir. 2020) (campus restriction that allowed registered groups to speak on the student union patio could not constitutionally exclude individuals from speaking in that space). Finally, Judge Callahan found "notable" that "Ecology allows the employees' union to use agency facilities for its events, including for discussing *Janus* . . .—the very topic on which Freedom Foundation sought to leaflet," and a membership drive that may have occurred in the lobby prior to Freedom Foundation's 2015 visit. App. 8a. Certainly, as Judge Callahan concluded, the evidence presented "sufficient smoke to survive summary judgment" and should have proceeded to trial. App. 9a.

II

THIS CASE IS IMPORTANT TO PUBLIC EMPLOYEES NATIONWIDE AND CAN BE RESOLVED ONLY BY THIS COURT

Washington's Department of Ecology revised its policy specifically to exclude Freedom Foundation from communicating with state employees prior to this Court's *Janus* decision. At the time, before *Janus*, it was certainly beneficial for workers to receive information as to constitutional limitations on public employee unions so they understood their right to opt-out. In the post-*Janus* world, where the state must have clear evidence that each individual worker affirmatively consents to join the union and have dues deducted from his or her paycheck, such

communication is not merely beneficial; it is essential. *Janus* adopted the constitutional waiver requirements of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (Waiver is "an intentional relinquishment or abandonment of a known right or privilege."). 138 S. Ct. at 2486. In short, states must provide an opportunity for employees to make informed decisions. In this circumstance, the government must "open the channels of communication rather than [] close them." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). By effectively leaving it entirely to the unions to decide whether and how to advise workers of their rights, the State ensures that many workers will remain uninformed and unable to execute an effective constitutional waiver.

States have "no obligation to aid [public employee] unions in their political activities." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009). And, since *Janus*, it is well understood that *all* of a public employee union's activities are inherently political. *Janus*, 138 S. Ct. at 2473. The extent to which a public employee union maintains and increases its political power depends on the number of members who contribute dues to the organization. *See, e.g.*, Benjamin I. Sacks, *The Unbundled Union: Politics Without Collective Bargaining*, 123 Yale L.J. 148, 169 (2013) ("Historically, unions have mobilized their memberships for various forms of political action."). These inherently political unions, therefore, have every incentive to acquire new members—and to block other advocates' efforts to thwart that goal.

Most obviously, public employee unions have every financial incentive to withhold information about constitutional waivers so that workers, unaware of their choices, join the union under the misimpression that they are required to do so or that they obtain no benefit from declining to join. Unions promote an identifiable "pro-union" viewpoint that "the incumbent Unions should stay in power." *Boardman v. Inslee*, 978 F.3d at 1130 (Bress, J., dissenting) (Persons who oppose public-sector unions cannot get the information, nor can persons who wish to replace the incumbent unions with a rival union.), *cert. denied*, docket no. 20-1334, 2021 WL 4733644 (Oct. 12, 2021). *See also N.L.R.B. v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974) ("[I]t is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative."). When union representatives present applications for membership to employees, those applications make no mention of the First Amendment or *Janus*.[15] Instead, the union membership form is presented as part of the general onboarding paperwork with no indication that workers waive constitutional rights by signing. This Court need not—and should not—turn a blind eye to the reality that the state and union are acting jointly to suppress information that enables workers to exercise their constitutional rights. *See McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (government action is properly viewed by one "familiar with the history of the government's actions and competent to learn what history has to show" such that a court will not "turn a blind eye to the context" in which a policy is enacted); *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)

(Friendly, J.) ("Judges are not required to exhibit a naivete from which ordinary citizens are free.").

Ecology's amended policy, intended and implemented to exclude Freedom Foundation's right-to-work message, presents, as Judge Callahan wrote, "red flags of viewpoint discrimination." App. 7a. This is representative of a larger problem of nationwide scope: State agencies and public employee unions are thwarting the ability of workers to obtain necessary information to exercise a constitutional waiver, in compliance with this Court's First Amendment jurisprudence. They plainly seek to undermine and erode the constitutional protection offered by *Janus*. "At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302–03 (2019) (Alito, J., concurring).

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[15] *See, e.g.*, ASEA/AFSCME Local 52 (Alaska), Union Membership & Dues Deduction Authorization Form, https://www.afscmelocal52.org/member (visited Sept. 10, 2021); SEIU Local 1000 (California), Membership Application Form, https://www.seiu1000.org/sites/main/files/file-attachments/membershipform.pdf (visited Sept. 10, 2021); Teamsters Local Union 8 (Pennsylvania), Membership and Dues Deduction Authorization Card, https://www.ibtlocal8.org/docs/Membership%20and%20Dues%20Deduction%20Authorization%20Card%202018_103118.pdf (visited Sept. 10, 2021).

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
ETHAN W. BLEVINS
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
DLaFetra@pacificlegal.org

Counsel for Petitioner