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County of Alameda

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14
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF ALAMEDA
17

18 CAYLA J., KAI J., AND ELLORI J., through their
guardian ad litem ANGELA J., MEGAN O., AND
19 MATILDA O., through their guardian ad litem
MARIA O., ALEX R., AND BELLA R., through their
20 guardian ad litem KELLY R., ISAAC I., AND
21 JOSHUA I., through their guardian ad litem SUSAN I.,

22 Plaintiffs,

23 v.

24 STATE OF CALIFORNIA, STATE BOARD OF
25 EDUCATION, STATE DEPARTMENT OF
EDUCATION, TONY THURMOND, in his official
26 capacity as State Superintendent of Public Instruction,
and DOES 1-100,

27 Defendants.
28

Case No. RG20084386

**Ex Parte Application of AMERICAN
CIVIL LIBERTIES UNION OF
SOUTHERN CALIFORNIA, INC.
and AMERICAN CIVIL LIBERTIES
UNION OF NORTHERN
CALIFORNIA, INC. to File an
Amicus Brief in support of Plaintiffs'
Request for an Informal Discovery
Conference and Protective Order**

Dept: 23
Judge: Hon. Brad Seligman

Complaint Filed: Nov. 30, 2020
Trial Date: Sep. 5, 2023

1 The AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA (“ACLU
2 SOCAL”) and the AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA
3 (“ACLU NORCAL”) request permission to file a brief as amici curiae in support of Plaintiffs CAYLA
4 J., KAI J., AND ELLORI J., et al.’s Request for an Informal Discovery Conference and Protective
5 Order pursuant to Local Rule 3.31. A copy of the proposed brief is being lodged with the Court
6 together with this Application. We recognize that an amicus on a Request for an Informal Discovery
7 Conference or Request for Protective Order is unusual; however, the question underlying Plaintiffs’
8 request constitutes a very important constitutional question, and the effect of denying Plaintiffs’ witness
9 a protective order to enable him to testify at this late stage will be hard to undo later in the case.

10 On July 25, 2023, counsel for ACLU SoCal and ACLU NorCal contacted counsel for Plaintiffs
11 to inform them that we intended to file an amici curiae brief, supporting Plaintiffs’ motion for an
12 informal discovery conference and request for a protective order, and to inquire whether they would
13 oppose our application. Plaintiffs’ counsel responded that they support our application. That same day,
14 we also contacted Defendants’ counsel to notify them of our intent to file an amici curiae brief
15 supporting Plaintiffs’ motion for an informal discovery conference and request for a protective order
16 and asked them to inform us of whether they intended to oppose. As of 4:50 p.m. on July 26, 2023,
17 Defendants’ counsel had not yet informed us whether they intended to oppose.

18 19 **INTEREST OF ACLU SOCAL AND NORCAL**

20 The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan
21 membership organization with approximately 2 million members, dedicated to the defense and
22 promotion of the guarantees of individual rights and liberties embodied in the state and federal
23 constitutions. ACLU SoCal and ACLU NorCal are regional affiliates of the ACLU and have extensive
24 expertise in bringing public interest litigation to vindicate these rights.

25 ACLU SoCal and ACLU NorCal both have a long history in defending First Amendment
26 freedoms. The organizations are dedicated to ensuring that all people are free to express themselves
27 without government interference, and work to protect the free speech rights of Californians through
28

1 litigation and other advocacy. For example, in *Rosebrock v. Beiter*, No. CV1001878SJOSSX, 2015 WL
2 13709619 (C.D. Cal. Aug. 13, 2015), ACLU SoCal litigated the issue of whether the Veterans
3 Administration Greater Los Angeles Healthcare System engaged in viewpoint discrimination in
4 violation of the First Amendment when it allowed veterans to display an American flag union up but
5 prohibited them from displaying the flag union down on VA property; in *Int'l Soc'y for Krishna*
6 *Consciousness of California, Inc. v. City of Los Angeles*, 48 Cal. 4th 446 (2010), ACLU NorCal and
7 ACLU SoCal litigated the question of whether a Los Angeles City ordinance that prohibited persons
8 from soliciting funds at Los Angeles International Airport violated the First Amendment and the Liberty
9 of Speech Clause of the California Constitution.

10 ACLU SoCal and ACLU NorCal recognize that the educational system in the U.S. was built on
11 a foundation of white supremacy, attempted cultural genocide, and racial capitalism. The organizations
12 seek to reimagine, redesign, and reinvest in a substantially different education system where Black,
13 Indigenous, and other students of color are authentically supported; their experiences, culture and
14 history are reflected; and their needs are prioritized. Accordingly, ACLU NorCal and ACLU SoCal have
15 spent decades advocating for education equity, including ensuring the equal treatment of students in
16 California's education system based on protected characteristics, such as race, wealth, sexual
17 orientation, gender identity, immigration status, and others. For example, ACLU SoCal and ACLU
18 NorCal litigated *Smith v. LAUSD*, CV 93-7044 LEW (C.D. Cal. 1996), which challenged Los Angeles
19 Unified School District's ("LAUSD") failure to provide adequate special education services for students
20 with disabilities; *Daniel v. California*, BC214156 (L.A. Super. Ct. 1999), which challenged students'
21 lack of access to Advancement Placement courses in Inglewood and Kern Unified School Districts;
22 *Williams v. California*, 312236 (S.F. Super. Ct. 2000), which challenged substandard learning
23 conditions, including insufficient textbooks, lack of sufficiently trained teachers, and inadequate
24 facilities; *Gensaw v. Del Norte Unified Sch. Dist.*, 3:07-cv-03009 (N.D. Cal. 2008), which challenged
25 racial discrimination in the form of disparate discipline of Native American students and closure of the
26 only school in the district where a majority of the students were Native American; *Reed v. California*,
27 BC432420 (L.A. Super. Ct. 2010), which challenged LAUSD's practice of disproportionately laying off
28

1 teachers at the district's highest-need schools; *Casey A. v. Gundry*, CV 10-00192 GHK (C.D. Cal. 2010),
2 which challenged deficient education and conditions in Los Angeles County's largest juvenile probation
3 facility; *Palmer v. W. Contra Costa*, N12-1013 (Contra Costa Super. Ct. 2012), which sought to improve
4 conditions at a community day school program; *DJ v. California* BSI42775 (L.A. Super. Ct. 2013),
5 which challenged the state's failure to ensure that English learners received sufficient English language
6 instructional services; *Jessica K. v. Eureka City Schs.*, 3:13-cv-05854-JSC (N.D. Cal. 2013), which
7 challenged a racially hostile educational environment for Black and Native American students, including
8 disparate discipline and culturally denigrating curricula; *Cnty. Coal. v. LAUSD*, BSI56259 (L.A. Super.
9 Ct. 2015), which challenged LAUSD's failure to provide sufficient targeted services for low-income
10 students, English learners, and foster youth as required by the Local Control Funding Formula; and
11 *Sigma Beta Xi v. Riverside*, 5:18-cv-01399 (E.D. Cal. 2018), which challenged a so-called voluntary
12 probation program that criminalized students, particularly students of color, for normal childhood
13 behavior.

14
15
16 Dated: July 27, 2023

Respectfully submitted,

17
18 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
19 OF SOUTHERN CALIFORNIA

20 /s/ Alyssa Morones

Alyssa Morones (SBN 343358)

Peter Eliasberg (SBN 189110)

21 Jonathan Markovitz (SBN 301767)

22
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24 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
25 OF NORTHERN CALIFORNIA

26 /s/ Angelica Salceda

27 Angelica Salceda (SBN 296152)

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Exhibit A

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23 STATE OF CALIFORNIA, STATE BOARD OF
EDUCATION, STATE DEPARTMENT OF
24 EDUCATION, TONY THURMOND, in his official
25 capacity as State Superintendent of Public Instruction,
and DOES 1-100,

26 Defendants.
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Case No. RG20084386

**[PROPOSED] Amicus Brief on
Behalf of AMERICAN CIVIL
LIBERTIES UNION OF
SOUTHERN CALIFORNIA, INC.
and AMERICAN CIVIL
LIBERTIES UNION OF
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1 **I. INTRODUCTION**

2 Dr. Thomas Dee is a professor at Stanford University’s Graduate School of Education, a
3 Research Associate at the National Bureau of Economic Research, a Senior Fellow at the Stanford
4 Institute for Economic Policy Research and the Faculty Director of the John W. Gardner Center for
5 Youth and Their Communities.¹ He also serves on the editorial boards of the American Educational
6 Research Journal, the Journal of Policy Analysis and Management, and Education Finance and Policy.²
7 Dr. Dee prepared an expert report for Plaintiffs about the effects of the COVID-19 pandemic on
8 enrollment, chronic absenteeism, and student engagement in California. Plaintiffs also wish to obtain
9 testimony from Dr. Dee, based on Dr. Dee’s expert knowledge of these issues. However, Defendants are
10 relying on an agreement between the California Department of Education (“CDE”) and the John W.
11 Gardner Center at the Stanford Graduate School of Education (“JGC”)—about education data not at
12 issue in Dr. Dee’s expert report or testimony—to stop Dr. Dee from testifying. ³

13 CDE entered an agreement with JGC, under which CDE agreed to share state education data
14 with JGC. However, a provision in that contract specifies that “employees, executives, and other
15 representatives” of the Stanford Graduate School of Education shall not “testify for, consult with, or
16 advise a party in conjunction with any mediation, arbitration, litigation, or other similar legal proceeding
17 where JGC knows that party is adverse to CDE, the State Superintendent of Public Instruction or the
18 State Board of Education with respect to that mediation, arbitration, litigation or other similar legal
19 proceeding.” Jacobs Decl., Ex. 2 at p. 10. If this happens, “all rights to access and use of the Data
20 provided under the terms of this Agreement are immediately terminated and the Data must be
21 immediately returned to the CDE or destroyed, in addition to all other remedies available to CDE for
22 breach of the Agreement.” *Id.* Additionally, an acknowledgement form signed by Dr. Dee and others,
23 which individuals are required to sign before accessing the personally identifiable information provided
24 by CDE to JGC, repeats the restriction on testifying for, advising, or consulting with parties adverse to

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¹ Stanford Graduate School of Education, Faculty, <https://ed.stanford.edu/faculty/tdee> (last visited July 26, 2023).

26 ² *Id.*

27 ³JGC is situated in the Graduate School of Education at Stanford University. It “conducts research, in partnership
28 with others” with the goal of “promoting positive and equitable youth and community outcomes.” Stanford
University, John W. Gardner Center for Youth and Their Communities, <https://gardnercenter.stanford.edu/> (last
visited July 25, 2023).

1 CDE and other entities, and includes an additional provision specifying that, if “found to use the Data in
2 ways other than those permitted under the agreement,” the signatory “agree[s] to pay liquidated damages
3 in the amount of \$50,000.” Jacobs Decl., Ex. 2, Attachment D at p. 3.

4 On July 24, 2023, CDE sent Dr. Dee a “Notice of Breach and Demand to Mitigate Damages”
5 that cited the above provisions of JGC’s contract with CDE, and the acknowledgement agreement.
6 Jacobs Decl., Ex. 1.

7 The letter demanded that Dr. Dee withdraw as an expert from this case and threatened to seek
8 \$50,000 in damages and to suspend contractual agreements with Stanford University if Dr. Dee declined
9 to withdraw. *Id.* at 2. Neither Dr. Dee’s expert report nor his planned testimony involved the data shared
10 under the agreement between CDE and JGC; Dr. Dee used and intends to use only publicly available
11 data to inform his analysis for this case. Declaration of Michael A. Jacobs In Support of Request For
12 Informal Discovery Conference (“Jacobs Decl.”) ¶¶ 4–5.

13 The contract and acknowledgement form provisions are unconstitutional conditions that violate
14 the First Amendment. CDE cannot constitutionally block Dr. Dee’s participation in this case. This Court
15 should therefore grant the protective order Plaintiffs have requested, allowing Dr. Dee to continue
16 participating in this case as an expert.

17 **II. ARGUMENT**

18 **A. The contract condition prohibiting JGC employees and representatives from** 19 **testifying, consulting with, or advising parties adverse to CDE is an unconstitutional** 20 **viewpoint-based restriction on speech.**

21 The requirement in JGC’s contract with CDE, and the acknowledgement form signed by Dr. Dee
22 and others, that JGC employees, executives, and other representatives not testify for, consult with, or
23 advise a party adverse to CDE (“Testimony Provision”) is an unconstitutional condition that violates the
24 First Amendment of the United States Constitution.⁴

25 The United States Supreme Court has clearly stated on multiple occasions and in a variety of
26 contexts that even though the government may deny someone a benefit for “any number of reasons,”

27 ⁴ It also violates the Liberty of Speech Clause of the California Constitution, Cal. Const. Art I, Sec. 2, which the
28 courts have interpreted to be more speech protective than its federal counterpart. *See, e.g., San Diego Unified Port
Dist. v. U.S. Citizens Patrol*, 63 Cal.App.4th 964, 970 (1998).

1 those reasons may *not* include “a basis that infringes [] constitutionally protected interests—especially,
2 [an] interest in freedom of speech.” *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). The government may
3 not deny even a “gratuitous governmental benefit,” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570
4 U.S. 595, 608 (2013), to “produce a result which it could not command directly.” *Perry*, 408 U.S. at 597
5 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (cleaned up). That principle holds true even if
6 the party could have declined the benefit or had no right to the benefit. *See Agency for Int’l Dev. v.*
7 *Alliance for Open Society Int’l, Inc.*, 570 U.S. 205, 214 (2013) (holding that the government “may not
8 deny a benefit to a person on a basis that infringes his constitutionally protected...freedom of speech
9 even if he has no entitlement to that benefit” (quoting *Rumsfeld v. Forum for Academic and Institutional*
10 *Rights*, 547 U.S. 47, 59 (2006)); *Perry*, 408 U.S. at 596 (Lack of contractual right to re-employment did
11 not defeat claim that “nonrenewal of [] contract violated the First and Fourteenth Amendments.”). “For
12 if the government could deny a benefit to a person because of his constitutionally protected speech or
13 associations, his exercise of those freedoms would in effect be penalized and inhibited.” *Perry*, 408 U.S.
14 at 597. California courts similarly follow this precedent. *See California Building Industry Assn. v. City*
15 *of San Jose*, 61 Cal.4th 435, 457 (2015) (“As a general matter, the unconstitutional conditions doctrine
16 imposes special restrictions upon the government’s otherwise broad authority to condition the grant of a
17 privilege or benefit when a proposed condition requires the individual to give up or refrain from
18 exercising a constitutional right.” (citing *Perry*, 408 U.S. at 597–98; *Pickering v. Board of Ed.*, 391 U.S.
19 563, 568 (1968))).

20 Unconstitutional conditions can take many forms. *See, e.g., Perry*, 408 U.S. 593 (holding that a
21 public college violated professor’s freedom of speech by declining to renew his employment contract
22 because he was an outspoken critic of the college administration); *Koontz*, 570 U.S. 595 (holding that a
23 water district could not condition a land use permit on an agreement to fund public lands projects
24 because the requirement amounted to an illegal taking); *Overbey v. Mayor of Baltimore*, 930 F.3d 215
25 (4th Cir. 2019) (holding that a city may not demand a waiver of First Amendment rights as a condition
26 of a police brutality settlement, even though it appeared in an otherwise valid contract). But regardless
27 of the specific structure, the well-established principle remains the same: the government may not
28 condition a benefit—here, access to government education data—on giving up a right, including and

1 especially the right to speak freely without being subject to a viewpoint discriminatory scheme. See
2 *Lane v. Franks*, 573 U.S. 228, 238, 242 (2014) (holding that “[s]worn testimony in judicial proceedings
3 is a quintessential example of speech as a citizen,” and is protected by the First Amendment).

4 **1. The CDE’s Testimony Provision discriminates based on viewpoint.**

5 The First Amendment guarantees that the government “has no power to restrict expression
6 because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of City of Chicago v.*
7 *Mosley*, 408 U.S. 92, 95 (1972). Accordingly, content-based speech restrictions are “presumptively
8 invalid,” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992), and must satisfy strict scrutiny. See
9 *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163–64 (2015). Government discrimination among
10 viewpoints is an even “more blatant and more egregious form of content discrimination.” *Id.* at 168
11 (internal quotations omitted); see also *Iancu v. Brunetti*, 139 S.Ct. 2294, 2299 (2019) (holding that
12 government entities may not discriminate against speech based on the ideas or opinions that speech
13 conveys).

14 For example, a content-based restriction would prohibit demonstrations about abortion regardless
15 of whether those demonstrations are for or against; a viewpoint-based restriction would “say that pro-
16 choice demonstrations are allowed in the park but anti-abortion demonstrations are not allowed . . . Such
17 viewpoint regulation is not allowed.” Erwin Chemerinsky, *The First Amendment: When the Government*
18 *Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 203 (1994). Viewpoint regulations would
19 allow the government to “advance its own interests by stopping speech that expresses criticism of
20 government policy, while allowing praise.” *Id.* Viewpoint-based speech restrictions are “poison to a free
21 society.” *Brunetti*, 139 S.Ct. at 2302 (Alito, J., concurring). “The government must abstain from
22 regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is
23 the rationale for the restriction.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829
24 (1995). As such, viewpoint-based speech restrictions are *per se* unconstitutional. See *Matal v. Tam*, 137
25 S. Ct. 1744, 1763 (2017).

26 Indeed, viewpoint-based discrimination is so disfavored that it is generally unconstitutional even
27 within categories of unprotected speech, such as fighting words or obscenity. *R.A.V.*, 505 U.S. at 383–
28 84. For example, the government “may proscribe libel; but it may not make the further content

1 discrimination of proscribing *only* libel critical of the government.” *Id.* at 384; *see also New York v.*
2 *Ferber*, 458 U.S. 747, 763 (1982).

3 The Testimony Provision is viewpoint discriminatory. JGC’s contract with CDE specifies that,
4 for the duration of the agreement, “JGC’s employees, executives, and other representatives shall not
5 voluntarily testify for, consult with, or advise a party in conjunction with any mediation, arbitration,
6 litigation, or other similar proceeding” where the JGC-associated individual “knows that the party is
7 adverse to CDE, the State Superintendent of Public Instruction or the State Board of Education.” Jacobs
8 Decl., Ex. 2 at p. 10. There is no similar restriction on a JGC-associated individual’s ability to testify,
9 advise, or consult in a proceeding on *behalf of* CDE. Indeed, the contract clearly permits testifying as an
10 expert for the CDE or other state agencies. *See id.* at 10. CDE may only terminate the contract and
11 impose penalties if a contractor testifies for or advises parties who hold interests adverse to it or other
12 listed state educational entities.

13 Therefore, the Testimony Provision prevents viewpoints and opinions that might harm CDE’s
14 and other state government entities’ interests in litigation from coming into court, mediation, arbitration,
15 or other similar proceedings, while allowing viewpoints and opinions that would *serve* the government’s
16 interests and litigation positions. Moreover, by preventing individuals associated with JGC from even
17 advising or consulting with a party adverse to the government in the listed circumstances, the Testimony
18 Provision hampers the ability of the adverse party to assess information, data, or research on its own.
19 Therefore, the provision does what the Court in *R.A.V.* expressly prohibited by “proscribing only
20 [speech] critical of the government.” *R.A.V.*, *supra*, 505 U.S. at 384.⁵

21 If the government were to try to institute this restriction on its own, outside of the context of a
22 contract, it would be clear unconstitutional viewpoint discrimination. It may not achieve the same result
23
24

25 ⁵ Furthermore, the Testimony Provision places a viewpoint-based restriction on speech about “public issues.”
26 The contract’s restrictions limit the ability of experts to contribute their knowledge and understanding to cases
27 against the CDE and other government entities. Such cases could have significant impacts on the state education
28 system, or on operations of a significant government entity. Therefore, the restricted speech concerns “public
issues,” which “occupies the highest rung of the hierarchy of First Amendment values and is entitled to special
protection.” *Connick v. Meyers*, 461 U.S. 138, 145 (1983) (internal quotations omitted).

1 by conditioning a benefit on provisions that have the effect of preventing experts from testifying against
2 the state. *See Perry*, 408 U.S. at 597.

3
4 **2. Viewpoint-based restrictions on speech are unconstitutional conditions on First Amendment rights, even when those restrictions have been consented to.**

5 Courts have repeatedly rejected viewpoint-based restrictions on speech as unconstitutional
6 conditions, even when those restrictions have been consented to. For example, in *Legal Services Corp. v.*
7 *Velazquez*, 531 U.S. 533 (2001), the Supreme Court found a condition on funding that prohibited
8 recipient legal services organizations from providing representation that involved an effort to amend or
9 otherwise challenge existing welfare laws to be impermissible viewpoint-based discrimination. The
10 Court held that a restriction that “operates to insulate . . . [government conduct] from constitutional
11 scrutiny . . . and other legal challenges . . . implicat[es] central First Amendment concerns,” and so was
12 an unconstitutional condition on speech. *Id.* at 547. And in *Overbey*, the court invalidated a non-
13 disparagement clause that was a condition in a police-misconduct claimant’s civil rights suit settlement
14 agreement, even though it appeared in “an otherwise valid contract with the government.” *Overbey*, 930
15 F.3d at 223. Under the clause, the claimant had promised not to speak to the media about “their
16 underlying allegations or the settlement process itself.” *Id.* at 219; *see also Davies v. Grossmont Union*
17 *High Sch. Dist.*, 930 F.2d 1390, 1396, 1399 (9th Cir. 1991) (invalidating settlement provision that barred
18 individual from seeking or holding elective office because it violated “his constitutional right to run for
19 elective office and the constitutional right of the voters to elect him.”); *U.S. v. Richards*, 385 F. App’x
20 691, 693–94 (9th Cir. 2010) (invalidating a plea agreement term that forbade defendant from
21 commenting publicly about the county commissioner).

22 The distorting effects of these types of restrictions pose significant risks to the First Amendment
23 and its underlying principles. In *Velazquez*, the Court held that the government may not condition
24 benefits on speech restrictions that place a “fundamental restriction on advocacy of attorneys and the
25 functioning of the judiciary.” *Velazquez*, 531 U.S. at 544. The Court determined that “[r]estricting LSC
26 [Legal Services Corporation] attorneys in advising their clients and in presenting arguments and
27 analyses to the courts distorts the legal system by altering the traditional role of attorneys.” *Id.* The
28 Court similarly held restrictions that distort mediums of speech illegal in *F.C.C. v. League of Women*

1 *Voters of Cal.*, 468 U.S. 364 (1984). In that case, the Court held that forbidding noncommercial
2 educational television and radio stations who received grants under the Public Broadcasting Act of 1967
3 from “editorializing”, abridged “important journalistic freedoms which the First Amendment jealously
4 protects.” *Id.* at 402. Taken together, the “First Amendment forb[ids] the Government from using [a]
5 forum in an unconventional way to suppress speech inherent in the nature of the medium.” *Velazquez*,
6 531 U.S. at 543 (citing *League of Women Voters*, 468 U.S. at 396–97).

7 By preventing JGC employees and representatives from providing testimony or expert reports for
8 a party adverse to CDE and other government entities, the Testimony Provision restricts the ability of
9 JGC’s researchers and education experts from sharing their studies, research, and general expertise and
10 opinions in a way that the government may disapprove of, while placing no similar restriction on the
11 ability of JGC-associated individuals, including Dr. Dee, to testify on *behalf* of, or to consult with or
12 advise, these government entities. Therefore, Dr. Dee is unable to provide expert testimony on behalf of
13 Plaintiffs about the significant education issues central to this case without violating JGC’s contract with
14 CDE (causing JGC to lose access to the education data shared by CDE and risking an individual fine of
15 \$50,000). Nor can he, or any other JGC-associated individuals, consult with or advise this or any party
16 adverse to CDE, to help them better understand data or studies available publicly or received through
17 discovery in possible litigation, or evidence obtained from a third party. However, the contract
18 conditions place no similar limitation on the ability of these government entities to wield the expertise of
19 Dr. Dee or any JGC employees and representatives in its favor.

20 This imbalance is striking, and the distorting effects of the restriction are two-fold. First, this
21 restriction distorts the functioning of the court system. Independent education researchers serve an
22 important role as expert witnesses because they can provide informed opinions and explain complex
23 issues that help courts fully consider the cases before them. Many JGC-associated individuals, including
24 Dr. Dee, are experts in their field and have robust underlying knowledge and understanding of the
25 outcomes at issue in cases involving the educational system. Only allowing JGC-affiliated experts, who
26 have conducted independent, robust, and important education research with the goal of advancing
27
28

1 “positive and equitable youth and community outcomes”⁶, to testify for, consult with, or advise the
2 government in such matters, while disallowing any similar assistance for a party adverse to the
3 government, would significantly distort the information being heard by a court, and so would impinge
4 courts’ “truth-seeking function.” *See, e.g., Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th
5 Cir. 1990) (discussing the truth-seeking function of courts); *see also Gardner v. Florida*, 430 U.S. 349,
6 360 (1977) (discussing the “truth-seeking function of trials”). Courts are central to parties’ abilities to
7 vindicate their rights. The Testimony Provision threatens Plaintiffs’ ability to vindicate their rights in
8 this particular case, because, if successful, CDE’s efforts to enforce the provision will deprive the Court
9 of the opportunity to consider Dr. Dee’s testimony, and to evaluate his expert report. But the threat
10 posed by the Testimony Provision extends beyond this one case: it threatens to more broadly disrupt the
11 truth-seeking function of courts, as the precedent here may impact subsequent cases and public
12 discussion of education issues. Therefore, as in *Velazquez*, the Testimony Provision “threatens severe
13 impairment of the judicial function.” *Velazquez*, 531 U.S. at 546. The Court should refuse to allow CDE
14 to enforce the Testimony Provision because “[a] scheme so inconsistent with accepted separation-of-
15 powers principles is an insufficient basis to sustain or uphold the restriction on speech.” *Id.*

16 The contract restrictions also distort academic research and policy discussions. By preventing
17 JGC employees and representatives from speaking on behalf of a party adverse to CDE and other
18 government entities, the government restricts the ability of researchers and education experts to share
19 their studies and provide opinions on the data that they have access to in a way that might paint the
20 government in a negative light. They may, however, share their studies and provide opinions favored by
21 the government, through expert testimony on behalf of the government. Or they may bolster the
22 government’s positions and viewpoints by advising or consulting with the government in a proceeding.
23 Additionally, the provisions may also skew the research that is carried out, because a researcher who
24 would benefit from accessing state data may nevertheless eschew that benefit because they know that
25 accepting the data on the government’s terms would muzzle their ability to act as an expert in litigation
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27
28 ⁶ Stanford University, John W. Gardner Center for Youth and Their Communities,
<https://gardnercenter.stanford.edu/> (last visited July 25, 2023).

1 for any party adverse to the government. All of the above distorts the nature and purpose of independent,
2 academic research, and the discussions that take place in the education policy and implementation fields.

3 These overlapping distortions appear still more egregious when considering what including the
4 Testimony Provision could lead to if CDE shared its data with *all* prominent education research
5 organizations and included this same provision in all of its data sharing contracts. Any party who sought
6 to vindicate education injuries imposed by the government would be significantly impaired in the
7 courtroom, and the conversation arising from the facts, research, and expert opinions presented in these
8 cases would be significantly artificially lopsided, as would the public's ability to consider and discuss
9 the issues examined by these cases. Indeed, there is already evidence of this problem: CDE also
10 effectively blocked the testimony of education expert Dr. Sean Reardon, based on a similar contract.
11 Jacobs Decl. ¶ 9.

12 The Testimony Provision is also breathtakingly overbroad with respect to any legitimate interest
13 the government might assert. Even if the Court were to assume that CDE has a legitimate interest in
14 preventing data that it makes specially accessible to JGC from being used against it in litigation, the
15 restriction is not properly tailored to further that interest.⁷ The Testimony Provision applies not just to
16 speech adverse to CDE that directly relates to the data shared with JGC, but also to *any* speech on behalf
17 of a party adverse to CDE in litigation, mediation, or arbitration. It does not specify that that testimony
18 must be about the data shared by CDE, or even that the matter must concern education. Based on this
19 language, no JGC employee, executive, or representative could testify against CDE in *any* matter. The
20 CDE's attempt to enforce these provisions in this case, where Dr. Dee has not and does not intend to use
21 data shared under the contract in his expert report or testimony, demonstrates this. Jacobs Decl. ¶¶ 4–5.

22 Nor is the Testimony Provision narrowly tailored to protecting privacy by restricting
23 dissemination of personally identifiable information. It is unclear how a broad viewpoint-based
24 limitation of this nature protects this information at all. But if the government was concerned about this
25 information being shared, much narrower limitations, such as a stipulation that personally identifiable
26

27 ⁷ For the reasons explained above, CDE does not have even a legitimate interest in conditioning researchers'
28 access to its data on accepting this viewpoint discriminatory contract provision. We are simply pointing out that
even if this interest were legitimate, the contract is not appropriately tailored to further this interest.

1 information may not be revealed, would much more effectively achieve this end and without muzzling
2 researchers from testifying or advising anyone adverse to the State.

3 Two simple examples illustrate the clear overbreadth of the provision. First, under these
4 provisions CDE may cancel the contract with JGC and impose additional penalties if one of its experts
5 were to testify as a fact witness in a sexual harassment case brought by a CDE employee in which a JGC
6 expert witnessed behavior that they believed violated the law. Thus, the provisions go far beyond
7 protecting CDE from having its data used against it or protecting personal information. They help
8 “insulate” CDE from legal scrutiny in all areas, not just those related to education law or policy, and are
9 thus “a condition[s] [that] implicat[e] central First Amendment concerns.” *Velazquez*, 531 U.S. at 547.

10 Additionally, the conditions of the contract with JGC provide that a representative or employee
11 of JGC could not testify for, advise, or consult with a party adverse to CDE in litigation. Thus, CDE
12 could terminate the contract and impose other penalties if one of JGC’s experts consults with Plaintiffs’
13 counsel in an education-related matter against CDE about the significance of, or how best to interpret,
14 data Plaintiffs obtained through discovery or some other independent method, such as a public records
15 request. This is evidenced by CDE’s letter threatening to enforce these provisions if Dr. Dee moved
16 forward with his testimony, even though his expert report and planned testimony did not involve data
17 obtained under JGC’s contract with CDE. Jacobs Decl. ¶ 5. In other words, the Testimony Provision
18 goes far beyond any asserted government interest in ensuring that data it provides through its contract
19 with JGC is not used in litigation against it. That is another reason it violates the First Amendment. *See,*
20 *e.g., U.S. v. Williams*, 553 U.S. 285, 292 (2008) (a speech restriction is “facially invalid if it prohibits a
21 substantial amount of protected speech.”).

22
23 **B. Contractors do not waive objections to the unconstitutional conditions by signing
CDE’s contract.**

24 CDE may not defend the unconstitutional provisions in its contracts by claiming that Dr. Dee or
25 its contractors generally waived their right to challenge those conditions by signing the contract and
26 accepting access to CDE data. Indeed, in cases in which the Supreme Court has invalidated conditions as
27 unconstitutional, it has never suggested that the government could assert a defense by showing that the
28 plaintiff had waived its legal rights by accepting the condition. *See, e.g. Velazquez*, 531 U.S. 533 (which

1 did not go through a waiver analysis to decide that a condition of a benefit that violated First
2 Amendment rights was unconstitutional). And in *League of Women Voters*, the Court made clear that
3 appellee Pacifica Radio operated a station that *had accepted* grants from the Corporation for Public
4 Broadcasting, which were conditioned on non-editorializing – the very condition the Court held was
5 unconstitutional, 468 U.S. at 370 (Pacifica’s “licensees have received and are presently receiving grants
6 from the Corporation [for Public Broadcasting] and are therefore prohibited from editorializing[.]”). But
7 the Court never suggested that licensees thereby waived their rights to challenge the condition.

8 But even if a court did conclude that a waiver analysis was necessary, the CDE contract
9 provisions at issue do not provide a valid waiver. A contractual waiver is valid only if it satisfies two
10 conditions. First, it must be knowing, voluntary, and intelligent. *Davies v. Grossmont Union High Sch.*
11 *Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991) (assessing whether plaintiff had waived his First Amendment
12 right to run for office by signing a prior settlement agreement with the government); *see also Overbey*,
13 930 F.3d at 223. Second, even if a waiver of rights was knowingly and voluntarily made, the provision
14 at issue must still be in accord with public policy. *Davies*, 930 F.2d at 1396; *Overbey*, 930 F.3d at 223.
15 In undertaking public policy balancing, courts look at the significance of the right (the waiver of a
16 constitutional right, compared to a statutory one, is significant, because constitutional rights “are
17 generally more fundamental than statutory rights”) and the effects of allowing the government to
18 contract around it, and they look at whether the government has a legitimate reason for including the
19 waiver in its agreement. *Davies*, 930 F.2d at 1397. “A legitimate reason will almost always include a
20 close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute
21 underlying the litigation involved and the specific right waived.” *Id.* at 1399.

22 The provisions at issue here—viewpoint discriminatory restrictions on contractors’ or their
23 associates’ ability to testify as an expert for, consult with, or advise any party adverse to CDE and
24 related government bodies in any litigation, mediation, or arbitration—are a matter of significant public
25 interest. As in *Davies*, the First Amendment right to testify in court, or to advise or consult with a party
26 in litigation is strong: it is a fundamental constitutional right and is central to democracy and the
27 legitimacy of the court system. *See Id.* at 1397–98; *see also Overbey*, 930 F.3d at 224–25
28 (“[E]nforcement of the non-disparagement clause at issue here was contrary the citizenry’s First

1 Amendment interest in limiting the government’s ability to target and remove speech critical of the
2 government from the public discourse.”); *supra* Section II.A.2. (discussing the important truth-seeking
3 function of courts, and how this provision implicates and undermines that function).

4 The balance of interests also weighs in favor of preventing CDE from enforcing the Testimony
5 Provision in this case because the provision is extremely overbroad and is not related to the protection of
6 CDE data. As set forth above, the Testimony Provision sweeps far more broadly than necessary to
7 protect any interest the government may have in protecting its data. First, it is not aimed at protecting the
8 personally identifiable information contained in the data. Second, it restricts speech unrelated to data
9 shared by the government by preventing individuals from testifying for, consulting with, or advising
10 parties adverse to CDE in *any* matter, not just those where the shared data is implicated or even,
11 presumably, where education research is part of the case. Therefore, it lacks a close nexus to CDE’s
12 interests. *Davies*, 930 F.2d at 1399. Furthermore, the viewpoint discriminatory nature of the Testimony
13 Provision serves to protect CDE from legal risk, and to unfairly elevate its position in court, arbitration,
14 or mediation proceedings. A general reduction in legal risk “is not the kind of “specific interest” that has
15 been found to satisfy the close nexus test.” *Lil’ Man in the Boat, Inc. v. City of Cnty. of San Francisco*,
16 No. 17-cv-00904-JST, 2017 WL 3129913 at *10 (N.D. Cal. 2017). As the provision in *Davies*
17 “corrupted” the political process, this Testimony Provision corrupts the justice system. *Id.* at 1398;
18 *supra* Section II.A.2. (discussing distorting effects of these provisions).

19 **III. CONCLUSION**

20 The limit that JGC’s contract with CDE places on the speech of individuals associated with JGC
21 violates the First Amendment. It subjects individuals’ speech to a viewpoint discriminatory scheme, and
22 it is unconstitutionally overbroad. Such a restraint, if instituted by the government by force, outside of a
23 contract, would be unconstitutional. Therefore, CDE has placed an unconstitutional condition on speech
24 and CDE may not use its contract to block Dr. Dee’s testimony in this case. This court should approve
25 Plaintiffs’ requested protective order barring Defendants from interfering with Plaintiffs’ presentation of
26 expert testimony to the Court.

1 Dated: July 27, 2023

Respectfully submitted,

2
3 AMERICAN CIVIL LIBERTIES UNION
4 FOUNDATION OF SOUTHERN CALIFORNIA

5 /s/ Alyssa Morones

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7
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