AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Southern California

July 07, 2023

Via Email

Elizabeth Lake
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Len Garfinkel
California Department of Education
1430 N Street
Sacramento, CA 95814-5901

RE: Provisions in CDE Data Protection Agreement Violate Contractors' First Amendment Rights and so are an Unconstitutional Condition

Dear Ms. Lake and Mr. Garfinkel:

The ACLU of Southern California has significant concerns about a condition included in California Department of Education's (CDE) contract with the Learning Policy Institute (LPI), and possibly other research organizations. The conditions of contract that prohibit LPI's employees, executives, and other representatives" from "testify[ing] for, consult[ing] with, or advis[ing] a party" known to be "adverse to the CDE, the State Superintendent of Public Instruction or the State Board of Education" in "any mediation, arbitration, litigation, or other similar proceeding" restricts contractors' First Amendment rights based on viewpoint and is an unconstitutional condition that may not be enforced.

I. Introduction

LPI is a nonprofit research organization that "conducts and communicates independent, high-quality research to improve education policy and practice." LEARNING POLICY INSTITUTE, https://learningpolicyinstitute.org/about (last visited July 5, 2023). According to its website, LPI is "nonprofit and nonpartisan" and "seeks to advance evidence-based policies at the local, state, and federal levels that support empowering and equitable learning for each and every child." It "conducts, marshals, and disseminates research across a variety of topics to support evidenced-based policy solutions," and its experts "bring high-quality evidence into policy deliberations at the federal, state, and local levels." *Id.*

LPI signed a contract with CDE under which CDE agreed to share state education data with LPI. However, one provision of that contract specifies that "LPI's employees, executives, and other representatives shall not voluntarily testify for, consult with, or advise a party in conjunction with any mediation, arbitration, litigation, or other similar proceeding where the employees, executives, or other representatives of LPI knows that the party is adverse to the CDE, the State Superintendent of Public Instruction or the State Board of Education." In the event that this happens, "all rights to access and use of the Data provided under the terms of this Agreement are immediately terminated and the Data must be immediately returned to the CDE or destroyed, in addition to all other remedies available to the CDE for breach of this agreement." Additionally, an acknowledgement form that individuals are required to sign before accessing the personally identifiable information provided by CDE to LPI repeats the restriction on testifying for, advising, or consulting with parties adverse to CDE and other entities, and includes an additional provision specifying that, if "found to use the Data in ways other than those permitted under the agreement," the signatory "agree[s] to pay liquidated damages in the amount of $50,000."

The contract's terms would retract a benefit if an LPI-associated individual chose to exercise their First Amendment rights and would impose an additional significant financial punishment. It thus constitutes an unconstitutional condition that violates the First Amendment. CDE should therefore notify LPI and LPI-associated individuals who signed the acknowledgement that it will immediately cease enforcing this provision of the contract, strike these sections in any other existing contracts, and avoid including these sections in similar contracts going forward.

II. Legal Analysis

A. The contract condition limiting the ability of LPI employees and representatives to testify, consult with, or advise parties adverse to CDE is an unconstitutional viewpoint-based restriction on speech.

The requirement in LPI's contract with CDE that LPI employees, executives, and other representatives not testify for, consult with, or even advise a party adverse to CDE is an unconstitutional condition that violates the First Amendment.

The Supreme Court has clearly stated, on multiple occasions and in a variety of contexts, that even though the government may deny someone a benefit for "any number of reasons," those reasons may *not* include "a basis that infringes [] constitutionally protected interests—especially, [an] interest in freedom of speech." *Perry v. Sinderman*, 408 U.S. 593 (1972). The government may not deny even a "gratuitous governmental benefit," *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 608 (2013), to "produce a result which it could not command directly." *Perry*, 408 U.S. at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (cleaned up). That principle holds true even if the party could have declined the benefit or had no right to the benefit. *See Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 214 (2013) (holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected…freedom of speech even if he has no entitlement to that benefit" (quoting *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 59 (2006)); *Perry*, 408 U.S. at 596 (Lack of contractual right to re-employment did not defeat claim that "nonrenewal of [] contract violated the First and Fourteenth Amendments."). "For if the government could deny a benefit to a person because of his

constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry*, 408 U.S. at 597.

Unconstitutional conditions can take many forms. *See, e.g.*, *Perry*, 408 U.S. 593 (holding that a public college violated professor's freedom of speech by declining to renew his employment contract because he was an outspoken critic of the college administration); *Koontz*, 570 U.S. 595 (holding that a water district could not condition a land use permit on an agreement to fund public lands projects because the requirement amounted to an illegal taking); *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019) (holding that a city may not demand a waiver of First Amendment rights as a condition of a police brutality settlement, even though it appeared in an otherwise valid contract). But regardless of the specific structure, the well-established principle remains the same: the government may not condition a benefit—here, access to government education data—on giving up a right, including and *especially* the right to speak freely without being subject to a viewpoint discriminatory scheme. *See Lane v. Franks*, 573 U.S. 228, 238, 242 (2014) (holding that "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen," and is protected by the First Amendment).

1. The CDE's contract condition discriminates based on viewpoint.

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

For example, a content-based restriction would prohibit demonstrations about abortion regardless of whether those demonstrations are for or against; a viewpoint-based restriction would "say that pro-choice demonstrations are allowed in the park but anti-abortion demonstrations are not allowed . . . Such viewpoint regulation is not allowed." Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 203 (1994). Viewpoint regulations would allow the government to "advance its own interests by stopping speech that expresses criticism of government policy, while allowing praise." *Id.* Viewpoint-based speech restrictions are "poison to a free society." *Iancu v. Brunetti*, 139 S.Ct. at 2302 (Alito, J., concurring). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995). As such, viewpoint-based speech restrictions are *per se* unconstitutional. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). Indeed, viewpoint-based discrimination is so disfavored that it is generally unconstitutional even within categories of unprotected speech, such as fighting words or obscenity. *R.A.V.*, 505 U.S. at 383–84. For example, the government "may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384; *see also New York v. Ferber*, 458 U.S. 747, 763 (1982).

The contract condition at issue is viewpoint discriminatory. LPI's contract with CDE specifies that, for the duration of the agreement, "LPI's employees, executives, and other representatives shall not voluntarily testify for, consult with, or advise a party in conjunction with any mediation, arbitration, litigation, or other similar proceeding" where the LPI-associated individual "knows that the party is adverse to CDE, the State Superintendent of Public Instruction or the State Board of Education." There is no similar restriction on an LPI-associated individual's ability to testify, advise, or consult in a proceeding on *behalf of* CDE. Indeed, the contract clearly permits testifying as an expert for the CDE or other state agencies. CDE may only terminate the contract and impose penalties if a contractor testifies for or advises parties who hold interests adverse to it or other listed state educational entities.

Therefore, the provisions keep out of court, mediation, arbitration, or other similar proceedings viewpoints and opinions that might harm CDE's and other state government entities' interests in litigation, while allowing viewpoints and opinions that would *serve* the government's interests and positions. Moreover, by preventing individuals associated with LPI from even advising or consulting with a party adverse to the government in the listed circumstances, these provisions hamper the ability of the adverse party to assess information, data, or research on its own. Therefore, the provisions do what the Court in *R.A.V.* expressly prohibited by "proscribing only [speech] critical of the government." *R.A.V.*, *supra*, 505 U.S. at 384.[1]

If the government were to try to institute this restriction on its own, outside of the context of a contract, it would be clear unconstitutional viewpoint discrimination. It may not achieve the same result by conditioning a benefit on a provision that has the effect of preventing experts from testifying against the state. *See Perry*, 408 U.S. at 597.

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

Courts have repeatedly rejected viewpoint-based restrictions on speech as unconstitutional conditions, even when those restrictions have been consented to. For example, in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Supreme Court found a condition on funding that prohibited recipient legal services organizations from providing representation that involved an effort to amend or otherwise challenge existing welfare laws to be impermissible viewpoint-based discrimination. The Court held that a restriction that "operates to insulate . . . [government conduct] from constitutional scrutiny . . . and other legal challenges . . . implicat[es] central First Amendment concerns," and so was an unconstitutional condition on speech. *Id.* at 547. And in *Overbey*, the court invalidated a non-disparagement clause that was a condition in a police-misconduct claimant's civil rights suit settlement agreement, even though it appeared in "an

[1] Furthermore, the provisions place a viewpoint-based restriction on speech concerning "public issues." The contract's restrictions limit the ability of experts to contribute their knowledge and understanding to cases against the CDE and other government entities. Such cases could have significant impacts on the state education system, or on operations of a significant government entity. Therefore, the restricted speech concerns "public issues," and so "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).

otherwise valid contract with the government." *Overbey*, 930 F.3d at 223. Under the clause, the claimant had promised not to speak to the media about "their underlying allegations or the settlement process itself." *Id.* at 219; *see also Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396, 1399 (9th Cir. 1991) (invalidating settlement provision that barred individual from seeking or holding elective office because it violated "his constitutional right to run for elective office and the constitutional right of the voters to elect him."); *U.S. v. Richards*, 385 F. App'x 691, 693–94 (9th Cir. 2010) (invalidating a plea agreement term that forbade defendant from commenting publicly about county commissioner).

The distorting effects of these types of restrictions pose significant risks to the First Amendment and its underlying principles. In *Velazquez*, the Court held that the government may not condition benefits on speech restrictions that place a "fundamental restriction on advocacy of attorneys and the functioning of the judiciary." *Velazquez*, 531 U.S. at 544. The Court determined that "[r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of attorneys." *Id.* The Court similarly found restrictions that distort mediums of speech illegal in *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984). In that case, the Court held that forbidding noncommercial educational television and radio stations who received grants under the Public Broadcasting Act of 1967 from "editorializing" abridged "important journalistic freedoms which the First Amendment jealously protects." *Id.* at 402. Taken together, the "First Amendment forb[ids] the Government from using [a] forum in an unconventional way to suppress speech inherent in the nature of the medium." *Velazquez*, 531 U.S. at 543 (citing *League of Women Voters*, 468 U.S. at 396–97).

By preventing LPI employees and representatives from providing testimony for a party adverse to CDE and other government entities, the CDE contract provisions restrict the ability of LPI's researchers and education experts from sharing their studies, research, and general expertise and opinions in a way that the government may disapprove of, while placing no similar restriction on the ability of LPI-associated individuals to testify on *behalf* of, or to consult with or advise, these government entities. Therefore, these individuals are unable to provide expert testimony on behalf of plaintiffs about significant education issues without violating LPI's contract with CDE. Nor can they consult with or advise any party adverse to the CDE, to help them better understand data or studies received through discovery in possible litigation, or evidence obtained from a third party. However, the contract conditions place no similar limitation on the ability of these government entities to wield the expertise of LPI employees and representatives in its favor.

This imbalance is striking, and the distorting effects of the restriction are two-fold. First, this restriction distorts the functioning of the court system. Independent education researchers serve an important role as expert witnesses because they are able to provide informed opinions and explain complex issues that help courts fully consider the cases before them. Many LPI-associated individuals are experts in their field and have robust underlying knowledge and understanding of the outcomes at issue in cases involving the educational system. Only allowing LPI-affiliated experts, who have conducted independent, robust, and important education research with the goal of contributing to education policy solutions and improving outcomes for students, to testify for, consult with, or advise the government in such matters, while disallowing any similar assistance for a party adverse to the government, would significantly distort the information being heard by a court, and so would impinge courts' "truth-seeking function." *See,*

e.g., *Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990) (discussing the truth-seeking function of courts); *see also Gardner v. Florida*, 430 U.S. 349, 360 (1977) (discussing the "truth-seeking function of trials"). Courts are central to parties' abilities to vindicate their rights. Disruption to the truth-seeking function of courts, whose precedents will have impacts not just in one case, but in subsequent cases and in public discussion of education issues, therefore, as in *Velazquez*, "threatens severe impairment of the judicial function." *Velazquez*, 531 U.S. at 546. "A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech." *Id.*

The contract restrictions also distort academic research and policy discussions. By preventing LPI employees and representatives from speaking on behalf of a party adverse to CDE and other government entities, the government restricts the ability of researchers and education experts to share their studies and provide opinions on the data that they have access to in a way that might paint the government in a negative light. They may, however, share their studies and provide opinions favored by the government, through expert testimony on behalf of the government. Or they may bolster the government's positions and viewpoints by advising or consulting with the government in a proceeding. Additionally, the provisions may also skew the research that is carried out, because a researcher who would benefit from accessing state data may nevertheless eschew that benefit because they know that accepting the data on the government's terms would muzzle their ability to act as an expert in litigation for any party adverse to the government. All of the above distorts the nature and purpose of independent, academic research, and the discussions that take place in the education policy and implementation fields.

These overlapping distortions appear still more egregious when considering what including these provisions could lead to, if CDE shared its data with *all* prominent education research organizations and included this same provision in all of its data sharing contracts. Any party who sought to vindicate education injuries imposed by the government would be significantly impaired in the courtroom, and the conversation arising from the facts, research, and expert opinions presented in these cases would be significantly artificially lopsided, as would the public's ability to consider and discuss the issues examined by these cases.

This provision is also breathtakingly overbroad with respect to any legitimate interest the government might assert. Even if the Court were to assume that CDE has a legitimate interest in preventing data that it makes specially accessible to LPI from being used against it in litigation, the restriction is not properly tailored to further that interest.[2] The provision apparently applies not just to speech adverse to CDE that directly relates to the data shared with LPI, but to *any* speech on behalf of a party adverse to CDE in litigation, mediation, or arbitration. It does not specify that that testimony must be about the data shared by CDE, or even that the matter must concern education. Based on this language, no LPI employee, executive, or representative could testify against CDE in *any* matter. Nor are the provisions narrowly tailored to protecting personally identifiable information included in the contract. It is unclear why a broad viewpoint-based limitation of this nature protects this information. And if the government was concerned

[2] For the reasons explained above, CDE does not have even a legitimate interest in conditioning researchers' 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.

about this information being shared, much narrower limitations, such as a stipulation that personally identifiable information may not be revealed, could just as easily achieve this end.

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

Additionally, the conditions of the contract with LPI provide that a representative or employee of LPI could not testify for, advise, or consult with a party adverse to CDE in litigation. Thus, CDE could terminate the contract and impose other penalties if one of its experts were to consult with Plaintiffs' counsel in an education-related matter against CDE about the significance of, or how best to interpret, data Plaintiffs obtained through discovery or some other independent method, such as a public records act request. In other words, the provisions go far beyond any asserted government interest in ensuring that data it provides through its contract with LPI is not used in litigation against it. That is another reason it violates the First Amendment. *See, e.g., U.S. v. Williams*, 553 U.S. 285, 292 (2008) (A speech restriction is "facially invalid if it prohibits a substantial amount of protected speech.")

B. Contractors do not waive objections to the unconstitutional conditions by signing CDE's contract.

CDE may not defend the unconstitutional provisions in its contracts by claiming that its contractors waived their right to challenge those conditions by signing the contract and accepting access to CDE data. Indeed, in cases in which the Supreme Court has invalidated conditions as unconstitutional, it has never even suggested that the government could assert a defense by showing that the plaintiff had waived its legal rights by accepting the condition. *See, e.g. Velazquez*, 531 U.S. 533 (which did not go through waiver analysis to decide that a condition of a benefit that violated First Amendment rights was unconstitutional). And in *League of Women Voters*, the Court made clear that appellee Pacifica Radio operated a station that *had accepted* grants from the Corporation for Public Broadcasting, which were conditioned on non-editorializing – the very condition the Court held was unconstitutional. 468 U.S. at 370 (Pacifica's "licensees have received and are presently receiving grants from the Corporation [for Public Broadcasting] and are therefore prohibited from editorializing.").

But even if a court did conclude that a waiver analysis was necessary, the CDE contract provisions at issue do not provide a valid waiver. A contractual waiver is valid if, first, it is knowing, voluntary, and intelligent; second, even if a waiver of rights was knowingly and voluntarily made, the provision at issue must still be in accord with public policy. *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991) (assessing whether plaintiff had waived his First Amendment right to run for office by signing a prior settlement agreement with the government); *see also Overbey*, 930 F.3d at 223. In undertaking public policy balancing, courts look at the significance of the right (the waiver of a constitutional right, compared to a statutory one, is significant, because constitutional rights "are generally more

fundamental than statutory rights") and the effects of allowing the government to contract around it, and they look at whether the government has a legitimate reason for including the waiver in its agreement. *Davies*, 930 F.2d at 1397. "A legitimate reason will almost always include a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived." *Id.* at 1399.

The provisions at issue here—viewpoint discriminatory restrictions on contractors' or their associates' ability to testify as an expert for, consult with, or advise any party adverse to CDE and related government bodies in any litigation, mediation, or arbitration—is a matter of significant public interest. As in *Davies*, the First Amendment right to testify in court, or to advise or consult with a party in litigation is strong: it is a fundamental constitutional right and is central to democracy and the legitimacy of the court system. *See Id.* at 1397–98; *see also Overbey*, 930 F.3d at 224–25 ("[E]nforcement of the non-disparagement clause at issue here was contrary the citizenry's First Amendment interest in limiting the government's ability to target and remove speech critical of the government from the public discourse."); *supra* Section II.A.2. (discussing the important truth-seeking function of courts, and how this provision implicates and undermines that function).

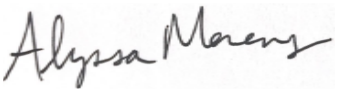
The balance of interests also weighs in favor of invalidating the provision, because the provision is extremely overbroad and is not related to the protection of CDE data. As set forth above, the provisions sweep far more broadly than necessary to protect any interest the government may have in protecting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

III. Conclusion

The limit that LPI's contract with CDE places on the speech of individuals associated with LPI violates the First Amendment. It subjects individuals' speech to a viewpoint discriminatory scheme, and it is unconstitutionally overbroad. Such a restraint, if instituted by the government by force, outside of the form of a contract, would be unconstitutional. Therefore, CDE has placed an unconstitutional condition on speech and CDE should immediately notify LPI and the associates who signed the contract that these provisions will not be enforced. CDE should also strike these provisions in any other existing contracts and should avoid including these sections in similar contracts going forward.

Please inform me (amorones@aclusocal.org) within 10 days whether CDE will cease enforcing this contract provision and will agree not to include it or any similar provision in any future contracts it enters into.

Sincerely,



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