No. _____

In the
Supreme Court of the United States

BRADLEY BOARDMAN, a Washington Individual Provider, et al.,

Petitioners,

v.

JAY R. INSLEE, Governor of the State of Washington, 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

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QUESTION PRESENTED

Petitioners are individual in-home care providers in Washington state who are situated identically to the quasi-public employees in *Harris v. Quinn*, 573 U.S. 616 (2014), and a non-profit organization dedicated to ensuring that workers understand their constitutional right not to subsidize union speech. After *Harris*, petitioners communicated with other providers to spread that message and to encourage them to oust one of their incumbent unions. Those efforts were initially quite successful, with large numbers of providers exercising their opt-out rights. But those efforts depended on access to state lists of providers and their contact information. Because providers are widely dispersed and have high turnover rates, only the state, which facilitates their payment, has that information. Even the incumbent unions depend on the state for that critical speech-enabling information. Frustrated by petitioners' success, the incumbent unions worked to convert the state's monopoly over that information into a duopoly. They drafted and bankrolled a ballot initiative amending Washington's public-records laws to deny virtually *everyone but the incumbent unions* access to that information. Voters approved that initiative, and, over a 40-page dissent, the Ninth Circuit upheld it.

The question presented is:

Whether a law that skews the debate over the value of public-sector unions and undermines public-sector employees' opt-out rights by giving incumbent unions exclusive access to information necessary to communicate with public-sector employees is consistent with the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners are Bradley Boardman, a Washington individual provider; Deborah Thurber, a Washington family-child-care provider; Shannon Benn, a Washington family-child-care provider; and the Freedom Foundation, a Washington non-profit organization.

Respondents are Jay Inslee, governor of Washington; Robert Hines, director of the Washington Department of Social and Health Services; Ross Hunter, secretary of the Washington Department of Children, Youth, and Families; and the Campaign to Prevent Fraud and Protect Seniors.

CORPORATE DISCLOSURE STATEMENT

The Freedom Foundation has no parent corporation, and no publicly held company owns 10 percent or more of its stock. The other petitioners are individuals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the U.S. District Court for the Western District of Washington and the U.S. Court of Appeals for the Ninth Circuit:

Boardman v. Inslee, No. C17-5255 BHS (W.D. Wash.) (Jan. 10, 2019)

Boardman v. Inslee, No. 19-35113 (9th Cir.) (Oct. 22, 2020)

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PETITION FOR WRIT OF CERTIORARI

The law at issue here poses a dual threat to the First Amendment. It combines blatant viewpoint discrimination with a barely disguised effort to frustrate the opt-out rights that this Court identified as critical to the constitutionality of state-mandated public-sector-union regimes in *Harris v. Quinn*, 573 U.S. 616 (2014) and *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018). The Ninth Circuit's decision upholding this effort to skew debate and nullify those critical First Amendment rights cannot stand.

In the wake of *Harris*, petitioners began contacting their fellow in-home care providers in Washington state to make sure that they were aware of their First Amendment right to refrain from subsidizing their unions' speech through union dues. That message found a receptive audience—large numbers of providers began resigning their union membership and revoking authorization for the deduction of union dues from their state payments. But that audience is notoriously difficult to reach and constantly changing. Unlike workers who congregate in traditional workplaces, in-home care providers work in isolation in widely dispersed locations throughout the state, and turnover among them is exceptionally high. As a result, anyone who wants to reach this audience—even the providers' incumbent unions—must obtain their identities and contact information from the state, which collects that data in the reimbursement process. Having fared poorly in a wide-open and robust debate with petitioners, the incumbent unions decided to reserve this audience for themselves. There was nothing subtle about that

effort: A union-backed group drafted, financed, and promoted an initiative that prohibits the state from sharing the providers' contact information *with anyone but their incumbent unions*. In one fell swoop, that law silenced the unions' critics and neutered the employees' opt-out rights.

The First Amendment precludes this law two times over. The law reflects naked viewpoint discrimination, the most deadly of First Amendment sins. While the law stops short of saying that only an incumbent union may address public-sector employees, it is little different in practical effect because the information that it denies is necessary for communicating with the widely dispersed and constantly changing universe of providers. That would be bad enough in any context. But given the law's chilling effect on the opt-out rights that this Court found necessary to square state-sanctioned public-sector unions with the First Amendment in *Harris* and *Janus*, this law is especially pernicious. It reserves the opportunity to identify and communicate with employees for the one speaker with the least incentive to inform them of their constitutional right to opt out of the union.

The decision below is of outsized importance given the nationwide debate that *Janus* triggered. In *Janus*' wake, public-sector unions redoubled their efforts to make the case for robust public-sector unions, while opponents made the case for better unions and opting out. That type of robust open debate is what the First Amendment favors. But some unions have leveraged their years of incumbency to secure laws that skew that debate in their favor. All those laws share the

same aim, but none pursues the twin goals of eliminating dissent and minimizing opt-outs as unabashedly as the law at issue here. If the decision below stands, such laws will spread, to the detriment of core First Amendment values. This Court should grant review and reaffirm that the First Amendment does not permit one side of an important public debate "to fight freestyle, while requiring the other to follow Marquis of Queensbury rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 978 F.3d 1092 and reproduced at App.1-89. The district court's opinion is reported at 354 F.Supp.3d 1232 and reproduced at App.90-126.

JURISDICTION

The Ninth Circuit issued its opinion on October 22, 2020. On March 19, 2020, this Court extended the deadline to file any petition for writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the U.S. Constitution and Washington's Initiative 1501 are reproduced at App.127-137.

STATEMENT OF THE CASE

A. Legal Background

"Millions of Americans, due to age, illness, or injury, are unable to live in their own homes without assistance and are unable to afford the expense of in-

home care." *Harris*, 573 U.S. at 620. Other Americans are unable to work or attend school without receiving financial assistance for childcare. *See* Karen E. Lynch, Cong. Res. Serv., RL30785, *The Childcare and Development Block Grant: Background and Funding* 1 (Sept. 17, 2014); Karen E. Lynch, Cong. Res. Serv., *Child Care Entitlement to States* 1 (July 18, 2019). To help address these problems, the federal government makes funding available to state-run programs that provide in-home care services for certain individuals and families. *See* 42 U.S.C. §§618, 1396n(c), 9858 *et. seq*. All states, including Washington, have such programs. *See, e.g.*, MaryBeth Musumeci et al., Kaiser Family Found., *Key State Policy Choices About Medicaid Home and Community-Based Services*, app. tbl. 1 (Feb. 2020); Kelly Dwyer et al., *Key Cross-State Variations in CCDF Policies as of October 1, 2019*: *The CCDF Policies Database Book of Tables* tbl. I.A (Dec. 2020). Because states administer these programs and are responsible for providing reimbursement for the widely dispersed providers, the state, and the state alone, collects comprehensive data about the universe of providers and their contact information.

Consistent with this framework, Washington law identifies two types of state-paid in-home care providers: (1) "individual providers," who care for disabled adults, and (2) "family child care providers," who care for children in low-income families. *See* Wash. Rev. Code §§74.39A.240(3), 41.56.030(7), (9). There are more than 40,000 in-home care providers dispersed throughout Washington, App.5, and, like the employees in *Harris*, they are all considered quasi-public employees—*i.e.*, public employees solely for the purpose of collective bargaining, in which they are

required to participate, *see* Wash. Rev. Code §§74.39A.270(1), 41.56.028(1); *cf. Harris*, 573 U.S. at 638-39. One exclusive bargaining representative has authority to negotiate with the state on behalf of all *individual* providers. Wash. Rev. Code §§74.39A.270(2)(a), (5). That has long been Service Employees International Union Local 775 (SEIU 775). App.4. A different exclusive bargaining representative has authority to negotiate on behalf of all *family-child-care* providers. Wash. Rev. Code §§41.56.028(2)(a), (c). That has long been SEIU 925. App.4. The unions regularly communicate with providers about employment-related issues and numerous other matters, such as political elections, corporate taxes, and gun control. App.54 (Bress, J., dissenting).

Communicating with in-home care providers is no "simple task." App.5. Unlike the typical workforce, in-home care providers "do not share workplaces, supervisors, or clients, and they have a notably high turnover rate"—as much as 40% each year. App.5; CA9.ER.691. Thus, the necessary first step for anyone who wishes to communicate with providers is getting access to the list of providers and their contact information. By virtue of its role in reimbursing and regulating providers, the state is in exclusive possession of that information. Without access to that information, "effectively communicating with care providers is essentially impossible." App.52 (Bress, J., dissenting). And without access to that information, displacing an incumbent union is equally impossible, for to trigger an election, a challenger must obtain "written proof" of support from a substantial percentage of the bargaining unit—"at least" 30% of

all family-child-care providers and "at least" 10% of all individual providers, respectively—during a 30-day window. *See* Wash. Rev. Code §41.56.070; Wash. Admin. Code §391-25-051(2). Absent contact information for their fellow providers, providers dissatisfied with the incumbent unions cannot even make the case that it is time for a change, let alone garner the requisite documentary support. Indeed, absent contact information, no one can ensure that providers understand that, under this Court's precedents in *Harris* and *Janus*, they are not obligated to subsidize the union through agency fees.

B. Factual Background

Petitioners Bradley Boardman, Deborah Thurber, and Shannon Benn are in-home care providers in Washington. App.3. Boardman is an individual provider, and Thurber and Benn are family-child-care providers. App.3. Petitioners' views differ fundamentally from the views of the incumbent unions on many issues. Boardman, for example, objects to SEIU 775's "heavy involvement in partisan politics," and Thurber and Benn view SEIU 925 as failing to "adequately represent[] the interests" of family-child-care providers. App.55 (Bress, J., dissenting). Thus, after this Court held in *Harris* that the First Amendment prohibits a state from compelling quasi-public employees to pay agency fees to a union, 573 U.S. at 627-57—a right that the Court later extended to all public employees in *Janus*, 138 S.Ct. at 2459-60—petitioners ceased paying such fees to their respective unions, App.4.

With support from petitioner Freedom Foundation, a Washington non-profit organization,

Boardman, Thurber, and Benn also sought to share their views with other in-home care providers. Boardman sought "to inform other individual providers of their right to opt out of paying agency fees to SEIU 775," and Thurber and Benn sought to replace SEIU 925 with a "rival union." App.5. To accomplish these objectives, petitioners sought and obtained provider information through requests under Washington's Public Records Act, which can be used to obtain such information for most public employees. App.5-6; *see also* Wash. Rev. Code §42.56.001 *et seq*. After the state provided that information, petitioners contacted numerous providers. Many providers welcomed their views; indeed, by 2017, nearly two-thirds of family-child-care providers had opted out of supporting SEIU 925. CA9.ER.460; App.56 (Bress, J., dissenting). As that remarkable opt-out rate demonstrates, the ability to avoid compelled dues is particularly attractive to widely dispersed providers, many of whom work part-time for relatively low wages and cannot take advantage of the benefits that a union might be able secure for employees in a more traditional workplace.

"Naturally," the incumbent unions took umbrage at petitioners' campaign to "voic[e] their opposition to the Unions." App.6. Rather than try to compete vigorously in the marketplace of ideas, however, the unions took a different tack: They tried to silence the opposition altogether by monopolizing the information necessary to communicate with providers. They began by challenging petitioners' public-records requests in court. App.6. When those obstructionist tactics failed, the unions tried lobbying Washington's legislature to amend the Public Records Act to cut off their

opponents' access to that critical information. Again, their efforts bore no fruit. CA9.ER.691; App.56 (Bress, J., dissenting).

Undeterred, the unions turned to Washington's ballot-initiative process. An officer of SEIU 775 established a political committee misleadingly dubbed the "Campaign to Prevent Fraud and Protect Seniors" (Campaign), which the unions principally financed. App.11-12. The Campaign proceeded to draft a proposal, Initiative 1501, to amend Washington's Public Records Act to prohibit the release of the "[s]ensitive personal information"—*i.e.*, the names and contact information—"of vulnerable individuals and their in-home care providers," with one notable exception: The state could still release information about in-home care providers "'to a representative certified or recognized under [§41.56.080],' … which is an exclusive bargaining representative of a collective bargaining unit"—in other words, the union-drafted initiative included a special exception for SEIU 775 and SEIU 925 (and virtually no one else).[1] *See* App.9-11, 11 n.3; Wash. Rev. Code §§42.56.640(1), 42.56.640(2)(b), 43.17.410. Although the measure was couched as an effort to protect seniors and other vulnerable individuals from identity theft, App.7, the Campaign later confessed that it had zero evidence that public-records requests pose any risk of identity

[1] Initiative 1501 contains a handful of other exceptions—*e.g.*, the state may disclose provider contact information to a "governmental body" or as "required by federal law." *See* App.135-36. But respondents have never claimed "that these various provisions solve the constitutional problem" petitioners allege. App.57 n.1 (Bress, J., dissenting).

theft.[2] That is hardly surprising. As AARP Washington, which is devoted to protecting senior citizens in the state, observed in explaining why it refused to endorse the ballot measure, identity thieves "do not fill out public records requests to get their victims." App.85 (Bress, J., dissenting).

The union-backed Campaign served as the "chief proponent" of Initiative 1501. App.11. Indeed, nearly "all the funding for the ballot initiative (more than $2 million) came from the Unions." App.56 (Bress, J., dissenting). And while the measure was presented as protecting seniors from identity theft, the Campaign did not conceal entirely its real objective of protecting the incumbent unions. Its campaign literature complained that "[g]roups like the Freedom Foundation are threatening unions" and urged voters to "[v]ote yes on I-1501 to keep our unions strong." App.12. And its chair explained that Initiative 1501 would prevent provider information from being "made available to the Freedom Foundation or any other advocacy/political/religious group with an agenda." App.59 (Bress, J., dissenting).

The incumbent unions echoed that theme. SEIU 775 wrote to its members: "There's one more way you can fight to stop the Freedom Foundation: When you get your ballot in the mail, vote YES on I-1501." App.12. Another message from SEIU 775 stated: "By

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[2] When asked at oral argument on appeal whether there was any evidence "that the public records requests were creating identity thefts," the state's counsel responded that he was "not aware of any … reported case of somebody using a public records request to obtain information" for that purpose. CA9 Oral Arg. 35:42-36:01 (Feb. 4, 2020), https://bit.ly/3pzfYle.

voting Yes" on Initiative 1501, "we protect caregivers in our union from anti-union bullying of the Freedom Foundation." App.59 (Bress, J., dissenting). And an advocacy organization the unions supported ominously warned that the "right-wing" Freedom Foundation had "been working to acquire the names and contact information of home health care workers and child care providers as part of a deceptive campaign to destroy the unions," and explained that Initiative 1501 would stymie that effort by preventing the Freedom Foundation from acquiring that speech-enabling information. App.60 (Bress, J., dissenting).

Relatively objective viewers were able to identify the real purpose behind Initiative 1501. In urging voters to reject it (while simultaneously "urg[ing] lawmakers to address identify theft" in different legislation), the Editorial Board of the *Seattle Times* wrote: "Don't be fooled by I-1501's pitch to close scary loopholes and block the release of records that enable identity theft. … I-1501 is the result of a spat between the powerful Service Employees International Union and the conservative Freedom Foundation. They are fighting over whether the foundation can contact state-employed care providers to inform them that they no longer are required to pay union dues or fees to SEIU, following a U.S. Supreme Court ruling in 2014." App.61 (Bress, J., dissenting); CA9.ER.737-41; *see also* CA9.ER.742-46 (similar messages in other publications). Opponents of Initiative 1501 likewise did their best to underscore its threat to First Amendment values and effective implementation of this Court's decisions. The "Argument Against" section in the "Voter's Guide" explained that Initiative 1501 would "prevent in-home caregivers and childcare

providers from learning they no longer can be forced to pay dues to the union." App.11. It added that, "[i]f Initiative 1501 passes," "caregivers will not even be able to contact each other to discuss issues of common concern." App.11.

Washington voters nonetheless approved Initiative 1501 in November 2016, and it took effect the following month. App.12. After the vote, "SEIU 775 sent a congratulatory email to its members stating that the new law would 'protect[] caregivers from the Freedom Foundation or other groups getting access to their personal information," and "SEIU 925 similarly sent an email to its members touting I-1501's approval, decrying 'extremist groups like the anti-union Freedom Foundation.'" App.61 (Bress, J., dissenting).

C. District Court Proceedings

While petitioners' pre-Initiative 1501 public-records requests met with some success, the information they obtained "soon became outdated" "due to … high turnover." App.6. Accordingly, after having additional public-records requests predictably denied once the new law took effect, petitioners filed this lawsuit challenging Initiative 1501. App.12; CA9.ER.758, 781, 788, 797. Petitioners argued that, by giving the incumbent unions exclusive access to provider information, Initiative 1501 discriminates on the basis of viewpoint, in violation of the First Amendment. CA9.ER.817.[3] The Campaign that

[3] Petitioners asserted other First Amendment claims, as well as claims under the Equal Protection Clause.

spearheaded the initiative intervened "to assist in defending [its] constitutionality." App.13.

On cross-motions for summary judgment, the district court entered judgment for respondents. The court first posited that there is "substantial support for [respondents'] argument that laws restricting public access to records" to certain parties "do not implicate the First Amendment at all." App.104. But the court declined to rely on that view and instead held that Initiative 1501 "does not discriminate based on viewpoint." App.110. Invoking *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the court concluded that "it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views." App.110. Because petitioners lack the status of "certified representative," the court found their viewpoint-discrimination claim "unfounded." App.110-11. The court also made the unlikely suggestion that *Janus* provided support for that view by observing that "exclusive representative designation comes with 'special privileges' for the union like 'obtaining information about employees.'" App.111.

D. Ninth Circuit Proceedings

A divided Ninth Circuit panel affirmed. The majority rejected respondents' principal defense "that laws restricting public access to records do not implicate the First Amendment" at all, and that "invidious viewpoint discrimination in the provision of government-controlled information is beyond constitutional scrutiny." App.14, 25-26. But it

nevertheless held that Initiative 1501 does not discriminate "based on … *views*." App.28.

Relying on *Perry*, the majority concluded that Initiative 1501 is not viewpoint-discriminatory because the line it draws is "based entirely on … *legal status* as certified exclusive bargaining representatives under Washington law." App.28. In the majority's view, the fact that a rival union could obtain the same information if it (somehow) succeeded in displacing the incumbent sufficed to "demonstrate the propriety of applying *Perry*." App.30-32. That Initiative 1501 effectively precludes such an effort and insulates the incumbent unions from meaningful challenge made no difference to the majority; in its view, "the existence of reasonable alternatives [to communicate with providers] plays no role in the present analysis." App.30 n.8. The majority found it relevant that the law discriminates against everyone but the incumbent unions, thus depriving both "anti-collective-bargaining voices" and other "pro-collective-bargaining voices" of the means to effectively communicate with providers. App.26-27. And like the district court, the majority suggested that *Janus* sanctioned discriminatory access laws because it "acknowledged that a union's ability to 'obtain[] information about employees' was one of the many 'benefits' and 'special privileges' of being the exclusive bargaining representative of a collective bargaining unit." App.28 n.7.

Judge Bress issued a lengthy dissent. He explained that Initiative 1501 "gives critical State-controlled information to powerful actors on only *one* side of [an] important public debate, while denying

everyone on the other side the same information." App.68. That, he concluded, is "transparent viewpoint discrimination." App.48, 69. Moreover, "[b]y denying rival unions critical State-held information," Judge Bress lamented, those "rival unions must compete in a Kafkaesque election process where they cannot easily identify who the voters even are or how they can be contacted." App.80. In his view, "the First Amendment [n]either allows [n]or requires us to ignore the obvious political realities of I-1501's basic design." App.81.

As for *Perry*, while Judge Bress observed that it "sits uncomfortably with the Supreme Court's modern jurisprudence concerning public-sector unions," he found it readily distinguishable on numerous grounds, including that "*Perry* repeatedly made clear that no evidence of viewpoint discrimination was to be found." App.75-77. Here, by contrast, "the viewpoint discrimination … was not just poorly hidden," but "touted as a principal selling point of the law." App.82. Judge Bress rejected the majority's reliance on the incidental denial of speech-enabling information to pro-union speakers beyond the favored unions themselves because "I-1501 promotes only one side of an overall debate." App.68. And he found it "remarkable" for the majority "to claim that *Janus* somehow provides support for I-1501 when I-1501 reflects an obvious effort to make an end-run around *Janus* by preventing in-home care providers from knowing they have a *Harris*/*Janus* right not to pay union agency fees." App.88 n.4. Judge Bress thus determined that Initiative 1501 must undergo strict scrutiny, which it could not survive. App.89.

REASONS FOR GRANTING THE PETITION

The decision below upholds a law that limits access to speech-enabling information to a single speaker and was drafted for the avowed purpose of frustrating the exercise of the First Amendment rights this Court vindicated in *Harris* and *Janus*. The law acknowledges the critical importance of data concerning the universe of providers and their contact information by giving the incumbent unions—and virtually no one else—access to that critical speech-enabling information. In the context of the ongoing debate about the merits of union membership and the representation provided by the incumbent unions, that discrimination in favor of the incumbent unions constitutes rank viewpoint discrimination. And because the incumbent unions are poorly positioned—to say the least—to inform employees of their opt-out rights under *Harris* and *Janus*, Initiative 1501 threatens to rob those vital First Amendment decisions of much of their practical effect.

The Ninth Circuit decision upholding this open threat to First Amendment values conflicts with this Court's precedents. The Court has repeatedly made clear that laws discriminating on the basis of speaker are inherently suspect, and hence warrant careful scrutiny to assess whether viewpoint- and/or content-based discrimination is afoot. And *Harris* and *Janus* make clear beyond cavil that this is not a context in which status and viewpoint can be separated; discrimination in favor of incumbent unions is discrimination in favor of a particular viewpoint about the value of union membership and the merits of *Harris* and *Janus*. Indeed, a central premise of those

decisions was that unions take distinct positions on controversial issues, and that advancing views on those issues is so central to the mission of a union that subsidizing a union through agency fees necessarily means subsidizing its speech. Thus, in this context, discriminating in favor of the incumbent union is discriminating against the contrary viewpoint.

The Ninth Circuit concluded otherwise only by giving this Court's 5-4 decision in *Perry* a sweeping reading that converts it into a cover for blatant viewpoint discrimination and leaves it irreconcilable with a host of more recent decisions, including *Harris* and *Janus*. In reality, *Perry* is readily distinguishable. The law there gave a union preferential access to one communication channel among many for reaching workers in a traditional workplace. Initiative 1501, by contrast, gives the incumbent unions exclusive access to information that is absolutely vital to communicating with the widely dispersed, isolated, and constantly changing universe of providers. In other words, Initiative 1501 effectively makes the providers a captive audience. That would be bad enough in any context, but *Harris* and *Janus* make clear that informing this particular audience of their opt-out rights is a necessary precondition for squaring public-sector-union regimes with the First Amendment. Thus, a law reserving this audience for the one speaker with the least incentive to inform them of their constitutional right to refrain from supporting the union is plainly incompatible with the First Amendment and this Court's precedents.

The decision below also conflicts with decisions of other circuits that faithfully apply this Court's

precedents. And the issue here is enormously consequential to the faithful implementation of *Harris* and *Janus*, as well as to the broader public debate about public-sector unions. This case involves the most brazen and aggressive effort to resist this Court's decisions in *Harris* and *Janus*, but Initiative 1501 by no means stands alone in its effort to blunt the force of this Court's decisions. Public-sector unions throughout the country have not given up their long-enjoyed state-conferred monopoly without a fight. They have been actively trying to enlist courts, legislatures, and others to prevent this Court's decisions from achieving their promises of protecting free speech and liberty. Now that this most aggressive of resistance efforts has been endorsed by the Ninth Circuit, it will be replicated elsewhere absent this Court's review. The Court should grant certiorari and ensure that this viewpoint discrimination does not prevent the promise of *Janus* and *Harris* from becoming a reality.

I. The Decision Below Conflicts With This Court's Decisions Condemning Viewpoint Discrimination And Is Profoundly Wrong.

When a union serves as an exclusive bargaining representative, it engages in "inherently political speech" and "express[es] views on a wide range of subjects." *Janus*, 138 S.Ct. at 2475, 2480. That is precisely why this Court held that public employees cannot be compelled to pay union dues and must have the right to freely authorize and revoke the payment of dues. *Id.* at 2459-60. And when it comes to the widely dispersed providers that make up the presumptive memberships of SEIU 775 and SEIU 925,

a meaningful opt-out right depends on access to data concerning the universe of providers and their contact information. Indeed, even the incumbent unions themselves are critically dependent on that data. Nonetheless, at the instigation of those unions, Washington has decided to provide *only* incumbent unions with that critical speech-enabling data. There is a word for that, two words in fact—viewpoint discrimination—and the First Amendment forbids it.

Initiative 1501 is one of the most blatant examples of viewpoint discrimination this Court will confront. And its aim is not just to shield providers from opposing viewpoints, but to frustrate this Court's decisions in *Janus* and *Harris*. The opt-out rights recognized in those cases are critical to squaring public-sector-union regimes with the First Amendment, but they are not self-executing. They depend on the ability of union members to hear speech informing them of their rights and of viewpoints critical of the incumbent unions. Initiative 1501 cuts off that information at the source and reserves it for one side in an intense and important debate on which the very constitutionality of public-sector-union regimes depends. That law conflicts with this Court's decisions condemning viewpoint discrimination and with *Harris* and *Janus*. It cannot stand.

A. Initiative 1501 Is a Case Study In Forbidden Viewpoint Discrimination.

1. It is bedrock law that the government may not restrict speech "based on hostility—or favoritism—towards the underlying message expressed." *R.A.V.*, 505 U.S. at 386. Even when it comes to otherwise unprotected speech, discrimination on the basis of

viewpoint is verboten. *Id.* Content-based discrimination is problematic enough and triggers strict scrutiny, *see*, *e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 169-70 (2015), but viewpoint discrimination is worse. A law that targets "particular views taken by speakers on a subject" is an even "more blatant" and "egregious" violation of the First Amendment. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Simply put, even when it comes to fighting words, government funding, and access to speech-enabling information, the government "may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011).

In keeping with those principles, this Court has been "deeply skeptical" of laws that "'distinguis[h] among different speakers, allowing speech by some but not others.'" *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2378 (2018) (*NIFLA*). A "speaker" and his "viewpoints" are so frequently "interrelated" that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2009). Moreover, "[s]peaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own.'" *NIFLA*, 138 S.Ct. at 2378 (quoting *Sorrell*, 564 U.S. at 580). Accordingly, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 576 U.S. at 170.

These principles apply with full force when the government discriminates in how it affords access to

speech-enabling information. "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell*, 564 at 570. And some critical speech-enabling information is in the exclusive control of the government. While citizens may not have a First Amendment right to obtain every kind of information within the government's control, *see McBurney v. Young*, 569 U.S. 221, 232 (2013), "it is an entirely different question whether a restriction … that *allows* access to [certain persons], but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information," *L.A. Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 42 (1999) (Scalia, J., concurring); *see also id.* at 43 (Ginsburg, J. concurring) (government "could not" release information "only to those whose political views were in line with the party in power").

Sorrell is instructive. There, the Court considered a law that "restrict[ed] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors." *Sorrell*, 564 U.S. at 557. The law contained numerous exemptions but stated that "pharmaceutical manufacturers" could not use that information for "marketing" purposes. *See id.* In other words, "[t]he law on its face burden[ed] disfavored speech by disfavored speakers." *Id.* at 564. By preventing *only* pharmaceutical manufacturers "from communicating with physicians in an effective and informative manner," the law went "even beyond mere content discrimination, to actual viewpoint discrimination." *Id.* at 564-65. Because Vermont had

"not shown that its law ha[d] a neutral justification," the Court held it unconstitutional even though it impacted commercial, rather than political, speech. *Id.* at 579-80. The state "burdened a form of protected expression that it found too persuasive" while leaving "unburdened those speakers whose messages are in accord with its own views"—and "[t]his the State cannot do." *Id.* at 580.

2. Applying these settled principles, this should have been a straightforward case. On its face, Initiative 1501 discriminates on the basis of speaker. It limits access to critical speech-enabling information on an important matter of public concern to a single interested party in the debate: the incumbent unions. There can be no gainsaying the importance of this information for meaningful communication with providers. That is why the unions who wrote Initiative 1501 carved themselves out, ensuring that only they can obtain the names and contact information of in-home care providers. *See* Wash. Rev. Code §§43.17.410, 42.56.645(1)(d), 41.56.080. Without that information about the widely dispersed and constantly changing universe of providers, no one, including the incumbent unions, can meaningfully communicate with providers. And incumbent unions are not given access to that information for some narrow or limited purpose, like providing updates about union bargaining with the state. They are given unfettered access to providers to share with them any message they choose, be it the unions' views on the benefits of unionism, the benefits of that union in particular, or the political or social issues of the day (such as celebrating the defeat of anti-union forces when Initiative 1501 was approved). Meanwhile,

those who wish to share with providers a different perspective on any or all of those issues, or simply inform them of their opt-outs rights under *Harris* and *Janus*, are severely hamstrung in their efforts. They have no means of identifying the widely dispersed and constantly changing universe of providers, as the state has created a monopoly—or, thanks to Initiative 1501, a duopoly—on that information.

That broad preference for the incumbent unions and their speech is no accident. Initiative 1501 was drafted and promoted by the incumbent unions themselves, for the unabashed purpose of suppressing the speech of those who disagree with them. As the union-backed Campaign that served as its "[c]hief proponent" explained, the whole point of Initiative 1501 was to ensure that providers' contact information would not be "made available to the Freedom Foundation or any other advocacy/political/religious group with an agenda" with which the incumbent unions disagree. App.59 (Bress, J., dissenting). That mission has been accomplished. By preventing anyone but the unions from "communicating with [providers] in an effective and informative manner," *Sorrell*, 564 U.S. at 565, the law fundamentally skews debate on all manner of issues of importance to the incumbent unions in favor of those incumbent unions. That is blatant viewpoint discrimination.

That alone should have been enough to invalidate Initiative 1501. After all, this is not a context in which speaker and viewpoint can be divorced; the central premise of *Janus* and *Harris* is that a union and its "viewpoints" are so "interrelated," *Citizens United*, 558 U.S. at 340, that requiring public employees to

pay union dues would unconstitutionally require them "to subsidize private speech on matters of substantial public concern," *Janus*, 138 S.Ct. at 2460; *see also Harris*, 573 U.S. at 654. Initiative 1501 thus plainly triggers strict scrutiny, and it just as plainly cannot survive "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Not only is there zero evidence to support respondents' patently pretextual claim that the law targets identity theft, *see* n.2, *supra*, but Initiative 1501 is patently not "narrowly drawn to serve [any] interest" the state may claim, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011)—as evidenced by the fact that no other state in the country has an access law "nearly as extreme as Washington's," App.86 (Bress, J. dissenting).

But Initiative 1501 is all the more remarkable because the viewpoint it seeks to suppress is *the viewpoint of this Court*. One of the core messages petitioners seek to convey to providers is simply the teaching/holding of *Harris* and *Janus* that providers need not subsidize union speech through union fees; instead, the constitutionality of compelled public-sector unions depends on the ability of providers to opt out. It is precisely because petitioners seek to share this (to use the unions' words) "anti-union" message, App.58-59 (Bress, J., dissenting), and because the message was finding a highly receptive audience, that the unions sought to silence them. Initiative 1501 thus not only stifles speech on the basis of viewpoint, but does so for the avowed purpose of frustrating the opt-out process that this Court held was essential to the constitutionality of public-sector unions in *Harris* and *Janus*. Making matters worse, Initiative 1501 not

only frustrates opt-out rights, but also frustrates associational rights by insulating incumbent unions from challenge by other unions, as it leaves rival unions forced to "compete in a Kafkaesque election process where they cannot easily identify who the voters even are or how they can be contacted." App.80 (Bress, J., dissenting). Thus, the law locks providers as a group into their incumbent unions in perpetuity, while frustrating their ability as individuals to opt out. It is hard to imagine a law more profoundly at odds with the First Amendment.

B. The Ninth Circuit's Contrary Conclusion Cannot Be Reconciled With This Court's Precedent.

Remarkably, a divided Ninth Circuit panel upheld Initiative 1501. But it did so only by employing reasoning that conflicts with several of this Court's decisions. According to the majority, Initiative 1501 is not viewpoint-discriminatory because it discriminates on the basis of the incumbent unions' "*legal status* as certified exclusive bargaining representatives," and denies access to all others regardless of whether they are "pro-collective-bargaining" or "anti-collective-bargaining voices." App.26-28. In the Ninth Circuit's view, this Court's decision in *Perry* compels that conclusion, and, even more remarkably, *Janus* supports it. That is doubly wrong. *Perry* is readily distinguishable and does not sanction the kind of rank viewpoint discrimination displayed by Initiative 1501. And the fact that the Ninth Circuit could construe *Janus* as lending support to an initiative designed to convert the opt-out right required by *Harris* and

Janus into a merely theoretical possibility underscores the need for this Court's review.

1. *Perry* involved a challenge to a collective-bargaining agreement that granted the incumbent union exclusive access to an "interschool mail system and teacher mailboxes." 460 U.S. at 38-40. The rival union brought a viewpoint-discrimination challenge, and a bare majority of the Court upheld that policy, finding it "more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views," because there was "no indication that the School Board intended to discourage one viewpoint and advance another." *Id.* at 49. *Perry* did not involve access to speech enabling-information, but rather dealt with access to a single channel for communicating with teachers in a traditional public workplace. There was no suggestion that denying access to the school's internal communication system rendered identification of and communication with teachers impossible, as opposed to marginally less convenient. *Perry* thus by no means embraced a categorical rule that distinctions based on an incumbent union's "status" as such are necessarily not viewpoint-discriminatory. The Court simply concluded, based on the particular facts of that case, that the policy before it did not discriminate on the basis of viewpoint. Whatever may be said of that conclusion on the facts of *Perry*, it has no bearing here, for it cannot seriously be contended that there is "no indication" that Initiative 1501 was "intended to discourage one viewpoint and advance another." *Id.*

That alone should have sufficed to distinguish *Perry*. But *Perry* is particularly inapt because it relied

on the fact that the policy arose in the public-school context, leading the Court to conclude that the "exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools." *Id.* at 52. That reasoning is already on shaky footing given that *Janus* expressly rejected the "labor peace" rationale as a sufficient justification for forcing public-sector employees to pay union dues. 138 S.Ct. at 2460, 2465-66. And whatever force that concern may retain in the school context, *Harris* expressly declined to extend the "labor peace" rationale to the context of widely dispersed in-home care providers because such employees "do not work together in a common state facility but instead spend all their time in private homes." 573 U.S. at 649-50.

That same dynamic makes Initiative 1501 far more burdensome than the access restriction in *Perry*. *Perry* repeatedly emphasized that the rival union was "not prevented from using other school facilities to communicate with teachers," including by "post[ing] notices on school bulletin boards," "hold[ing] meetings on school property after school hours," and "mak[ing] announcements on the public address system." 460 U.S. at 41. Here, by contrast, not only are there no alternative (let alone state-provided) channels through which petitioners can communicate with providers; there is no other way for petitioners to even identify the universe of providers, let alone communicate with them. Nothing in *Perry* comes close to countenancing such a blatant effort to silence all opposition to an incumbent union.

2. Not only is there no good reason to extend *Perry* to this inapt context; there are multiple excellent

reasons not to do so. As Judge Bress observed, *Perry* "sits uncomfortably with th[is] Court's modern jurisprudence concerning public-sector unions." App.75. The whole reason this Court held that public and quasi-public employees cannot be forced to pay even a portion of union dues is because unions have and often espouse particular viewpoints. *Janus*, 138 S.Ct. at 2467 & n.5, 2475. Efforts to separate out "germane" speech are fruitless because everything the union does embodies a distinct perspective that public-sector employees should not be compelled to support. Thus, whatever can be said about distinguishing between speakers and viewpoints in other contexts, this is a classic context in which the "speaker" and its "viewpoints" are so "interrelated" that discrimination in favor the speaker is necessarily "a means to control content." *Citizens United*, 558 U.S. at 340.

And it is not just *Janus* and *Harris* with which *Perry* sits uncomfortably. *Perry* is in considerable tension with a string of recent cases rejecting attempts to characterize discrimination based on the identity of the speaker as viewpoint-neutral. Indeed, it was just a few Terms ago that the Court admonished that "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." *Reed*, 576 U.S. at 170. It was just a few Terms before *Reed* that the Court struck down as viewpoint-discriminatory Vermont's effort to distinguish on the basis of a speaker's "status" as a pharmaceutical manufacturer. *See Sorrell*, 564 U.S. at 564. And it was only a few Terms before *Sorrell* that the Court reminded, in striking down a law that discriminated on the basis of corporate status, that "[s]peech

restrictions based on the identity of the speaker" are inherently suspect. *Citizens United*, 558 U.S. at 340.

In short, the notion that there is some category of speakers as to which discrimination is categorically permissible is exceedingly difficult to reconcile with this Court's First Amendment jurisprudence. Several commentators have questioned the vitality of *Perry* for precisely that reason.[4] But whatever its continuing vitality more generally, *Perry* cannot save a law that prevents anyone but the incumbent union from even identifying the relevant audience. Reserving an audience—as opposed to a single means of reaching that audience—to a single, highly interested speaker cannot be understood as anything other than viewpoint discrimination. If *Perry* tolerates that kind of viewpoint discrimination, then *Perry* must give way.

3. The majority's conversion of *Perry* into a cover for blatant viewpoint discrimination was problematic enough. But its other justifications for its holding are even more problematic. For instance, the majority

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[4] *See, e.g.*, Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 Fla. St. U. L. Rev. 765, 781 (2015) (explaining how *Citizens United* held that "discrimination based on speaker identity is a free speech problem sufficient to trigger heightened scrutiny," but "*Perry* … said the opposite"); Nicole B. Cásarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 Alb. L. Rev. 501, 536-37 (2000) ("[T]he *Perry* Court erred in treating 'speaker identity' as distinguishable from 'speaker perspective' in these circumstances. If the state can freely tailor speech restrictions on the basis of speaker status, then the state can eliminate unwanted points of view in nonpublic forums at will."); Steven G. Gey, *Reopening the Public Forum-From Sidewalks to Cyberspace*, 58 Ohio St. L.J. 1535, 1579 (1998) (describing *Perry*'s reasoning as "very formalistic" and "unconvincing").

suggested that Initiative 1501 is not viewpoint-discriminatory because other pro-union speakers beyond the incumbent unions cannot receive the information from the state either. *See* App.26-27. The majority seemed to think that, by reserving the audience to a single, highly interested speaker and crowding out any other voice, Initiative 1501 somehow avoids viewpoint discrimination. But the notion "that debate is not skewed so long as multiple voices are silenced is simply wrong." *Rosenberger*, 515 U.S. at 831-32. Moreover, to the extent the incumbent unions want to share the views of fellow travelers with the providers, they are free to do so. And to the extent there is daylight between the views of the incumbent unions and the views of those who generally support them, or those who support unionism more generally but not necessarily those unions, then denying access to those pro-collective bargaining voices makes Initiative 1501 "more viewpoint based, not less so." *Matal v. Tam*, 137 S.Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

As the *pièce de résistance*, the majority suggested that *Janus* actually *supports* giving incumbent unions exclusive access to would-be members because *Janus* observed that one of the "'benefits' and 'special privileges' of being the exclusive bargaining representative of a collective bargaining unit" is the "ability to 'obtain[] information about employees.'" App.28 n.7. That misses both the central lesson and the holding of *Janus*. The benefits conferred on a public-sector union are part and parcel of why members cannot be forced to support the union financially. And while the union will certainly have information about the members who do not opt out,

nothing in *Janus* supports the notion that the incumbent union should—or even could—have exclusive access to information about the universe of *potential* union members. To the contrary, broader access to that information is critical to make the opt-out right meaningful, and the absence of a meaningful opt-out right would not just violate the First Amendment rights of public and quasi-public employees but call into question the very constitutionality of state-mandated public-sector unions. In short, to state the obvious, *Janus* furnishes no support for a deceptive ballot measure designed to make "*Janus* rights" a nullity.

In sum, the decision below reached a result that is impossible to reconcile with this Court's precedent, and did so by construing one of those precedents (*Perry*) to effectively render all the others a dead letter. There is no reason to read *Perry* to countenance that untenable result. But to the extent that it does, it should be overruled. Either way, the Court should grant certiorari and invalidate Initiative 1501 as the blatant viewpoint discrimination it is.

II. The Decision Below Conflicts With Decisions From Other Courts Of Appeals.

The decision below conflicts not only with this Court's precedent, but with decisions from several other circuits recognizing that discrimination based on "status" and discrimination based on "viewpoint" are often two sides of the same coin. As those courts have correctly recognized, "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." *Reed*, 576 U.S. at 170. And when the speaker's status is inextricably

intertwined with one side of a contentious debate, these circuits have recognized that discrimination on the basis of status and viewpoint are one and the same.

In *Southworth v. Board of Regents of University of Wisconsin System*, 307 F.3d 566 (7th Cir. 2002), for example, the Seventh Circuit examined the criteria a university used for disbursing certain funds to student organizations. Those criteria provided, among other things, that a student organization could not qualify for funds unless the university had provided funds to that organization for at least two prior years. *See id.* at 593. Although those criteria merely purported to favor organizations that had achieved incumbent status, the court nevertheless rejected them as "[i]mpermissibl[y] [v]iewpoint-[b]ased." *Id.* at 592. As the court explained, "until recently, the University prohibited funding of activities which were politically partisan or religious in nature," and "there were no procedures designed to assure the distribution of funds in a viewpoint-neutral manner." *Id.* at 594 (quotation marks and alterations omitted). Further, "historically popular viewpoints are at an advantage compared with newer viewpoints." *Id.* The court thus concluded that incumbent status could not "be said to be unrelated to viewpoint." *Id.* at 593-94.

The Fourth Circuit expressly followed the Seventh Circuit's lead in rejecting as viewpoint-discriminatory a similar school policy favoring "incumbent" student groups. *See Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1074 (4th Cir. 2006) ("Our analysis parallels that of the Seventh Circuit in

Southworth[.]"). And, more recently, the Fourth Circuit reiterated that "status"-based distinctions necessitate careful scrutiny for viewpoint discrimination. *See Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019).

The Eighth Circuit has likewise recognized the need to closely scrutinize status-based favoritism for viewpoint discrimination. In *Turning Point USA at Arkansas State University v. Rhodes*, 973 F.3d 868 (8th Cir. 2020), the court examined a university policy that allowed students to set up tables for advocacy purposes only if they had first registered as a student organization—a status that required them to have five members, a faculty or staff advisor, and a constitution. *See id.* at 873-74. The court warned that such "status-based discrimination" would constitute "viewpoint-based discrimination" if the requirements to obtain registered-student-organization status "could not be met due to an organization's views." *Id.* at 875-76.

The status-cum-viewpoint discrimination is far more blatant here, as only one incumbent can qualify for favored access to speech-enabling data, and that incumbent has a distinct viewpoint; indeed, no incumbent public-sector union is going to have an anti-union or pro-*Janus* viewpoint. These decisions scrutinizing and often condemning far less blatant discrimination are exceedingly difficult to square with the Ninth Circuit's seeming views that status and viewpoint are distinct and that discrimination based on the former is unproblematic. The Ninth Circuit's decision thus conflicts not only with this Court's precedents, but with the decisions of other circuits more faithfully applying those precedents.

III. This Case Is Exceptionally Important.

This case is profoundly important, not just to the vindication of core First Amendment prohibition on viewpoint discrimination, but also to ensuring that the promise of *Harris* and *Janus* is not frustrated. "[V]iewpoint discrimination" is always "a matter of serious constitutional concern," *NIFLA*, 138 S.Ct. at 2378 (Kennedy, J., concurring), for it is a "poison to a free society," *Iancu v. Brunetti*, 139 S.Ct. 2294, 2302 (2019) (Alito, J., concurring). Viewpoint discrimination is particularly pernicious, moreover, when it arises in the context of speech on matters "of great public importance." *Janus*, 138 S.Ct. at 2475. But what makes *this* viewpoint discrimination truly extraordinary is that Initiative 1501 "reflects an obvious effort to make an end-run around *Janus* by preventing in-home care providers from knowing they have a *Harris*/*Janus* right not to pay union agency fees." App.88 n.4 (Bress, J. dissenting). In other words, Initiative 1501 violates the First Amendment in open and avowed service of suppressing the exercise of rights that this Court has held are protected by the First Amendment and are central to ensuring that public-sector-union regimes are consistent with the Constitution.

That dual threat to the core First-Amendment prohibition on viewpoint discrimination and the efficacy of this Court's public-sector-union precedents suffices to warrant review. But while Washington's Initiative 1501 may be the least subtle effort to neutralize *Janus* and *Harris*, it is far from the only such effort. As one might suspect, this Court's decisions in *Harris* and *Janus* were not met with

warm applause by public-sector unions and the government officials that they had long supported. To the contrary, *Janus* triggered a vigorous contest between public-sector unions and their critics to inform public-sector employees of their *Janus* rights and the pros and cons of continued union membership. Since the whole point of *Janus* was to convert public-sector-union membership from a matter of state compulsion into one of free choice, that vigorous debate was expected. And as long as each side of that debate confronted speech with more speech, the First Amendment was vindicated. But the early rounds of that debate did not go well for public-sector unions. The situation in Washington that precipitated Initiative 1501 is a case in point. By 2017, just three years after *Harris* gave quasi-public workers there an opt-out right, nearly two-thirds of family-child-care providers had opted out of supporting SEIU 925. CA9.ER.460; App.56 (Bress, J., dissenting). Given their lack of success in convincing providers about the value of union membership on the merits, it is unsurprising—but still unconstitutional—that unions turned their attention to Initiative 1501 and un-leveling the playing field.

With the post-*Harris* experience as a guide, public-sector unions wasted no time in securing similar (though generally less blatant) government help in the wake of *Janus*. In New York, for example, Governor Cuomo issued an executive order *on the day Janus was decided* to restrict access to information about public-sector-union members. N.Y. Exec. Order 183 (June 27, 2018), https://on.ny.gov/3cHU5ef; *In Response to Janus Decision, Governor Cuomo Signs Executive Order to Protect Union Members From*

Harassment and Intimidation, Office of the Governor (June 27, 2018), https://on.ny.gov/3cqWuKv. New York, New Jersey, California, Maryland, and Massachusetts have all passed laws that require public-sector employers to give unions preferential access to newly hired employees. *See* N.Y. Civ. Serv. Law §208; N.J. Stat. Ann. §34:13A-5.13; Cal. Gov't Code §3556; Md. Code Ann., State Pers. & Pens. §3-307; Mass. Gen. Laws Ann. ch. 150E, §5A. And other jurisdictions have taken similar steps. As one observer summarized, many of these efforts to blunt the effect of *Janus* have met with success, producing "[n]ew laws, court rulings, and gubernatorial orders block[ing] public employers from sharing public employees' contact information, which ma[kes] identifying and contacting workers much more difficult." Daniel DiSalvo, *The Future of Public-Employee Unions*, Nat'l Affairs (2020), https://bit.ly/3b8zaSg. "The result is a largely one-sided messaging environment, wherein government workers are unlikely to hear clear statements of their rights under law or perspectives other than the unions' regarding the costs and benefits of public-union membership." *Id.*

It is no surprise, of course, that the post-*Janus* debate in many of these jurisdictions has been one-sided—that is the whole point of viewpoint discrimination. And while many jurisdictions have sought to resist *Janus*, Initiative 1501 is the *ne plus ultra* of those efforts. If the decision below upholding even that blatant effort is left standing, it will serve as a model for other jurisdictions to end open and robust debate in the name of combatting identity theft, and

to engage in viewpoint discrimination in the guise of status discrimination.

Finally, it is not just the rights vindicated by *Janus* and *Harris* that the decision below threatens. The decision provides a road map to circumvent the prohibition against viewpoint discrimination in a wide variety of contexts. After all, many viewpoints are closely tied to a speaker's "status," be it status as a corporation, or as a pharmaceutical manufacturer, or as a pregnancy center. That is precisely why this Court has admonished that "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." *Reed*, 576 U.S. at 170. By failing to heed that instruction, the decision below reached a result at odds with this Court's viewpoint-discrimination cases, at odds with this Court's public-sector-union cases, and at odds with core First Amendment values. The Court should grant certiorari and reverse.

CONCLUSION

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

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