No. 20-1334

In The
Supreme Court of the United States

BRADLEY BOARDMAN, et al.,

Petitioners,

v.

JAY 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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE PELICAN INSTITUTE FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a law which facilitates speech by unions but does not similarly facilitate speech by other speakers on the same topics discriminate between viewpoints in violation of the First Amendment?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] Among other things, PLF litigates in defense of the right of workers not to be compelled to make payments to support political or expressive activities with which they disagree. *See, e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995). PLF also has participated as amicus curiae in virtually all of this Court's cases involving labor unions compelling workers to support political speech from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Janus v. American Fed'n of State, Cty., and Mun. Emp's., Council 31*, 138 S. Ct. 2448 (2018).

The Pelican Institute for Public Policy is a nonpartisan research and educational organization—a think tank—and the leading voice for free markets in Louisiana. Its mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

Amici both oppose restrictions on the availability of public records when those restrictions operate

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[1] Pursuant to this Court's Rule 37.2(a), all parties received notice of Pacific Legal Foundation's intent to file this brief more than 10 days in advance and consented to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

explicitly or implicitly to permit only favored communicators to obtain otherwise nonconfidential records. Favoring such communicators—in this case, public employee unions who would restrict the ability of state workers to be informed of their First Amendment rights as described in *Janus*—entails viewpoint discrimination that cannot be justified by any of the state's asserted interests.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2016, Washington voters approved a ballot initiative, I-1501, that amended the state's public records act to prevent the state from disclosing contact information for publicly employed in-home care providers, except to the current certified bargaining representative for the in-home care providers. The initiative denied any other union, private person, or organization access to that contact information. The in-home care providers are represented by a chapter of the Service Employees' International Union under the state's exclusive representation law. Wash. Rev. Code § 41.56.028(2)(a). However, under *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), and *Harris v. Quinn*, 573 U.S. 616 (2014), the workers have a First Amendment right to choose whether to join and fund the union and that choice can be exercised only by knowing, voluntary, affirmative consent.

Petitioners are in-home care providers and the advocacy group, the Freedom Foundation, who are attempting to communicate with workers about their First Amendment rights announced in *Janus* and to explain how to exercise those rights. Because in-home care providers are dispersed throughout the State

with no common work location, supervisors, or community, the only way to discover their contact information was to ask the State for employee rosters and work contact information using Washington's Public Records Act, Wash. Rev. Code § 42.56. I-1501 prohibits the state from releasing this information to Petitioners, while explicitly granting unions continued access to the same information. Despite the differential treatment, the Ninth Circuit upheld I-1501 under rational basis review because the law did not facially condition access to contact information based on the requester's viewpoint, but rather based on their "legal status" as a certified representational union. Pet. App. 28, 44.

Public workers have a First Amendment right to refrain from joining or funding a public employee union. Workers can only make an affirmative, knowing, and voluntary waiver of First Amendment rights if they have sufficient information to do so. The amendment to the Public Records Act was intended to—and does—deprive workers of that information. The Ninth Circuit's holding that the law's preference for unions is based on "status" denies the reality that it is "a façade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 811 (1985). Speech regulation based on speakers' status is still a distinction between speakers based on a characteristic that affects the content and perspective of the speech. In the absence of a controlling test established by this Court, lower courts inconsistently apply varying frameworks for analyzing cases where a right of access intersects First Amendment speech rights. Moreover, as a practical matter, granting public employee unions exclusive access to information

necessary to advise workers about their First Amendment rights related to union membership effectively ensures that those workers remain uninformed and therefore unable to exercise a knowing, voluntary waiver of those rights. To resolve the conflict among lower courts, and settle an issue of nationwide importance, the petition for writ of certiorari should be granted.

ARGUMENT

I

CIRCUIT COURTS CONFLICT AS TO THE ANALYSIS APPROPRIATE TO ACCESS RESTRICTIONS THAT INFRINGE FIRST AMENDMENT RIGHTS

This Court has not provided guidance on the intersection between the government's statutory ability to withhold certain information in its possession and the government's concurrent obligation to uphold viewpoint neutrality in its engagement with public discourse. This balance is muddied by the plurality opinion in *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978), which held that the First Amendment does not guarantee a right of access to sources of information within government control but did not address the countervailing obligation of neutrality. This Court has not yet harmonized that holding with other cases that establish a First Amendment right to access to real property in a viewpoint neutral manner. *See, e.g.*, *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106–07 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993); *Christian Legal*

Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 678–79 (2010).

The continued vitality of *Houchins* is in doubt, although it has not been overruled. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569 (2011) (reviewing multiple opinions in *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), to conclude that eight of this Court's Justices agreed in that case that "restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment"). The awkward and unresolved overlap in these cases has created confusion and irreconcilable decisions in the Circuit Courts.

In *Cap. Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1166 (3d Cir. 1986) (en banc), a newspaper challenged a state agency's refusal to provide access to documents pertaining to water contamination. The en banc Third Circuit court generated one concurring and one dissenting opinion on the First Amendment access issue. The majority opinion acknowledges only one limitation on a state's right to deny access to records: whether the records have been historically available. *Id.* at 1174.[2] It thus framed the question this way:

> a party relying on the First Amendment as a source of a right of access to government-held information would normally have to allege and prove that access has traditionally been afforded to the public and that access "plays a

[2] The court later described this as the "experience and logic" test. *PG Pub. Co. v. Aichele*, 705 F.3d 91, 104–05 (3d Cir. 2013).

> significant positive role in the functioning of the particular process in question."

Id. (citing *Press-Enterprise Co. v. Superior Court of Cal. for Riverside Cty.*, 478 U.S. 1, 8 (1986)). Judge Adams' concurring opinion agreed that historical tradition was a factor to be considered, but also envisioned "a special case, perhaps, where access to governmental proceedings might be deemed so significant to a democratic government that the First Amendment would mandate access even without a showing of a tradition of openness." *Id.* at 1177 (Adams, J., concurring). Judge Gibbons, writing for four dissenters, considered the lack of access to be a form of prior restraint because "[t]he people cannot discuss governmental activities of which they are kept in ignorance." *Id.* at 1186 (Gibbons, J., dissenting).[3] The dissenting judges identified this as the proper test: "a governmental restriction on access to information about governmental matters presents a first amendment question, and that such a restriction, like any other prior restraint, can be sustained only if it demonstrably advances significant governmental interests and is narrowly tailored to serve those interests." *Id.* at 1189 (Gibbons, J., dissenting).

Taking a contrary view, the District of Columbia Circuit chose to apply the balancing test set forth in *Pell v. Procunier*, 417 U.S. 817, 833 (1974) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 690–91 (1972)), rather than the historical tradition approach favored

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[3] The dissenters viewed this as particularly "pernicious" because it allows "the selective release of information in the unbridled discretion of those holding the reigns of governmental power," virtually ensuring that "public debate about governmental affairs . . . will be distorted by governmental interference." *Id.*

by the Third Circuit in *Capital Cities. JB Pictures, Inc. v. Dep't of Defense*, 86 F.3d 236, 239 (D.C. Cir. 1996). The court thus weighed the public interest in adopting the restriction against the burden on gathering information. *Id.* Like the court below, the D.C. Circuit disavowed that refusing press access effected viewpoint discrimination and rejected the plaintiffs' claim that "visual images of caskets of deceased soldiers convey a certain message." *Id.* at 239–40.

The First Circuit, in *D'Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538 (D.R.I. 1986), *aff'd without opinion*, 815 F.2d 692 (1st Cir. 1987), considered whether a state-owned rock concert venue's acquiescence to some performers' "no camera" rule violated the First Amendment rights of a photographer who wished to attend and take photographs. Viewing this as an "access" case, the court framed the rule in this way: "[I]f the first amendment is to retain a reasonable degree of vitality, the limitations upon access must serve a legitimate governmental purpose, must be rationally related to the accomplishment of that purpose, and must outweigh the systemic benefits inherent in unrestricted (or lesser-restricted) access." *Id.* at 1543.

The Sixth Circuit favorably cited this approach in *S.H.A.R.K. v. Metro Parks Serving Summit Cty.*, 499 F.3d 553, 560 (6th Cir. 2007), a case in which an animal rights group surreptitiously attached cameras to trees in a public park to capture the government's deer culling activities (*i.e.*, shooting 200 deer). However, the Sixth Circuit recast the *D'Amario* approach as a three-part inquiry. First, the court identified the specific rule that prohibits access to information and "whether that rule selectively

delimits the audience." *Id.* (cleaned up). Second, the court "inquired into the government's stated interest for invoking the rule." *Id.* at 561. And third, the court would apply rational basis review if the rule does not selectively delimit the audience, and a "stricter level of scrutiny" if the rule does selectively delimit the audience. *Id.*

In the case perhaps most closely akin to this one, the Fourth Circuit considered whether a Virginia resident stated a First Amendment claim when he was denied access to Maryland's list of voters, which state law permitted to be accessed only by Maryland residents. *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019). While acknowledging that the case superficially appeared controlled by *Houchins*, the court nonetheless held that the Virginian's interests were protected by the First Amendment because the voter list was closely tied to political speech and because the law imposed content- and speaker-based conditions on access to the list. *Id.* at 250. Even so, the court determined that the restriction did not impose a "severe burden on the First Amendment right to free speech" because it was a "'step removed' from the communication of political speech" and there were multiple alternative means of communicating with Maryland voters. *Id.* at 259–60. Yet the court acknowledged that the result would be different if there were an element of viewpoint discrimination. *Id.* at 261 (viewpoint discrimination "separates presumptively valid distinctions from presumptively unconstitutional restrictions in securing access to voter information").

Only this Court can resolve these conflicts.

II

WHETHER VIEWPOINT DISCRIMINATION MAY BE NEGATED BY THE STATUS OF AFFECTED SPEAKERS IS AN UNSETTLED QUESTION OF NATIONAL IMPORTANCE

Viewpoint discrimination occurs when the government burdens "speech by particular speakers, thereby suppressing a particular view about a subject." *Moss v. U.S. Secret Service*, 572 F.3d 962, 970 (9th Cir. 2009) (quotations omitted). *See also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 59 (1983) (Brennan, J., dissenting) (describing viewpoint discrimination as "government restrictions on speech by particular speakers"). Discrimination against certain speakers or their viewpoints is an "egregious form of content discrimination," *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995), and "presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory.").

The Ninth Circuit upheld I-1501 after applying rational basis review to the disparate treatment it imposed between the unions who are granted exclusive authority to access the contact information and Petitioners, who are denied access. Pet. App. 45. The court below determined rational basis review was appropriate because the law did not facially condition access to in-home provider information on the requester's viewpoint, but rather based on their "legal status" as a certified bargaining representative. *Id.* at 28. But this distinction should not save a facially-

neutral regulation that is, in reality, a façade for viewpoint-based discrimination. *See Cornelius*, 473 at 811–12.

The Ninth Circuit essentially held that as long as the viewpoint discrimination is accomplished through two laws, rather than one, it evades scrutiny. Washington law, unlike most viewpoint discriminatory statutes, accomplishes viewpoint discrimination through the interaction of two laws. First, a state statute creates the status of "certified bargaining representative," which authorizes unions to speak on behalf of all workers in a bargaining unit, regardless of whether they join the union. Wash. Rev. Code § 41.56. Second, I-1501 grants preferential access to government information based on the status conferred in the first statute. Pet. App. 135–36. In this context, the status and the union's viewpoint are indivisible. To separate out the status of the union, as though its viewpoint plays no role, establishes only a pretext for preferring some speakers' communication over others. This Court should have little patience for constitutional violations occurring under the veneer or pretext of legitimate government action. *See, e.g.*, *Christian Legal Soc. Ch. of the Univ. of Cal., Hastings College of the L. v. Martinez*, 561 U.S. 661, 736 (2010) (Alito, J., writing for four dissenters) ("The adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 286–88 (1988) (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting) (characterizing the subject-matter action of protecting students from sensitive topics as a mere pretext for viewpoint discrimination).

Some Circuit courts look beyond apparent facial neutrality to discern whether the government is engaging in *sub rosa* viewpoint discrimination. For example, in *Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny County*, the Third Circuit held that a port authority unconstitutionally employed viewpoint discrimination by rejecting a public interest group's bus advertisement encouraging ex-prisoners to vote after accepting other noncommercial advertisements. 653 F.3d 290, 297 (3d Cir. 2011). The Eighth Circuit held that a state could not discriminate against the Ku Klux Klan's application to participate in a roadside cleanup sponsorship program when all of its proffered reasons were pretext to cover the real reason for denying the application: the state's "disagree[ment] with the Klan's beliefs and advocacy." *Cuffley v. Mickes*, 208 F.3d 702, 711 (8th Cir. 2000). And in *Mesa v. White*, the Tenth Circuit held that a city council's restriction on the public's ability to address a meeting was pretextual because, although facially neutral, the council's speech restriction was of "recent vintage," enacted in response to a particular speaker's expression. 197 F.3d 1041, 1048 (10th Cir. 1999).

Speaker limitations are viewpoint limitations for the purpose of First Amendment analysis. Most cases of viewpoint discrimination are not overt but involve regulations that prohibit a particular subject matter or speaker. Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. 3, 33 (2019). A law's proponents will often argue that the absence of any attempt to ban a particular viewpoint in the course of a specific debate indicates that there has been no viewpoint discrimination. However, this Court has repeatedly blurred the line

between speaker discrimination and viewpoint discrimination. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 645 (1994) ("even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys"); *Cornelius*, 473 U.S. at 811 (government's stated neutral purpose "will not save a regulation that is in reality a facade for viewpoint-based discrimination); *see also Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004) (The "mere recitation of viewpoint-neutral rationales" will "not immunize [government's] decisions from scrutiny," as they may be a "mere pretext for an invidious motive . . . . In practical terms, the government rarely flatly admits it is engaging in viewpoint discrimination."). The Ninth Circuit improperly allowed covert viewpoint discrimination rather than probe the scope and effect of a law under a more exacting standard of review. As the Fourth Circuit noted in *Fusaro*, 930 F.3d at 253–54, neither *Houchins*, nor *United Reporting*, nor any other decision of this Court has addressed "a situation where the government provided information only to a discrete group for limited purposes, let alone in *an overtly political context*." (Emphasis added.)

Here, the overtly political context is Washington's legal framework that effectively prevents any speaker other than a public employee union from advising public workers about the existence of their constitutional rights and the means to exercise those rights. As with any other politically-active association, the extent to which a public employee union maintains and increases its political power depends on the number of members who contribute dues to the organization. *See, e.g.*, Benjamin I. Sacks,

The Unbundled Union: Politics Without Collective Bargaining, 123 Yale L.J. 148, 169 (2013) ("Historically, unions have mobilized their memberships for various forms of political action."). These *inherently* political unions, *see Janus*, 138 S. Ct. at 2473, therefore, have every incentive to acquire new members to block other advocates' efforts to thwart that goal.

In this case, the Ninth Circuit essentially held that a state may enable communication by certain speakers with one message, but not others with a different message, as long as it does so through a multipart legal framework, rather than one law. This is viewpoint discrimination, whether the state uses one law or two to accomplish its goal. If the decision below stands, anti-information laws may well proliferate, especially in the context of protecting public employee unions from the consequences of ensuring that all public workers have sufficient information to knowingly and voluntarily exercise their First Amendment rights.

III

IF ONLY UNIONS CAN PROVIDE INFORMATION ABOUT *JANUS* RIGHTS, MOST WORKERS WILL REMAIN IN THE DARK

Public employee unions have every financial incentive to withhold information about constitutional waivers. When their representatives present applications for membership to employees, those applications make no mention of the First

Amendment or *Janus*.[4] Instead, the union membership application is presented as part of the general onboarding paperwork with no indication that workers waive constitutional rights by signing. I-1501 was intended to prevent Petitioners from contacting in-home care providers to advise them of their First Amendment rights to refrain from joining and subsidizing public employee unions. Pet. App. 125.

This is the reality acknowledged by Judge Bress below: Unions promote an identifiable "pro-union" viewpoint that "the incumbent Unions should stay in power." Pet. App. 70 (Persons who oppose public-sector unions cannot get the information, nor can persons who wish to replace the incumbent unions with a rival union.). *See also N.L.R.B. v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974) ("[I]t is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative."). This Court need not—and should not—turn a blind eye to this reality. *See McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (government action is properly viewed by one "familiar with the history of the government's actions and competent to learn what

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[4] *See, e.g.*, ASEA/AFSCME Local 52 (Alaska), Union Membership & Dues Deduction Authorization Form, https://www.afscmelocal52.org/member (visited Mar. 17, 2021); SEIU Local 1000 (California), Membership Application Form, https://www.seiu1000.org/sites/main/files/file-attachments/membershipform.pdf (visited Mar. 17, 2021); Teamsters Local Union 8 (Pennsylvania), Membership and Dues Deduction Authorization Card, https://www.ibtlocal8.org/docs/Membership%20and%20Dues%20Deduction%20Authorization%20Card%202018_103118.pdf (visited Mar. 17, 2021).

history has to show" such that a court will not "turn a blind eye to the context" in which a policy is enacted).

By effectively leaving it entirely to the unions to decide whether and how to advise workers of their rights, the State ensures that most of the in-home care workers will remain uninformed.[5] This is not mere speculation. In California, for example, state law prohibits public employers from communicating with workers about their First Amendment rights. Cal. Gov't Code §§ 3550, 3553. When the University of California sent a letter to employees accurately describing the holdings of the *Janus* decision, the union filed an unfair labor practice claim with the Public Employee Relations Board, which ruled in favor of the union. California Public Employment Relations Board Unfair Practice Case Nos. SF-CE-1188, SF-CE-1189-H, and SF-CE-1192-H, *PERB Decision* at 1, 6-9 (Mar. 1, 2021).[6] Attorneys serving public agencies in the state advise them to make no mention of *Janus* or First Amendment rights whatsoever.[7]

In Washington, aside from the skewed access to public records at issue in this case, the Ninth Circuit also recently upheld a state agency's permission to

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[5] *See generally* Deborah J. La Fetra, *Miranda for Janus: The Government's Obligation to Ensure Informed Waiver of Constitutional Rights*, 55 Loyola L.A. L. Rev. __ (forthcoming Spring, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825917.

[6] https://perb.ca.gov/wp-content/uploads/decision-2755h.pdf.

[7] *See, e.g.*, Ellie R. Austin and Sarah Hirschfeld-Sussman, School & College Legal Services of California, Legal Update, at 3, 5 (June 28, 2018), https://sclscal.org/wp-content/uploads/2018/06/06-2018CC-Janus-v.-American-Federation-of-State-County-and-Municipal-Employees-ERASHS.pdf.

union representatives to be present in the agency's lobby to advocate in favor of the union's position while preventing a person from the Freedom Foundation from accessing the lobby to hand out leaflets explaining the *Janus* decision. *Freedom Found. v. Washington Dep't of Ecology*, 840 F. App'x 903, 904 (9th Cir. 2020); *see also id.* at 906 (Callahan, J., dissenting) (considering this as likely unconstitutional viewpoint discrimination).

Janus adopted the constitutional waiver requirements of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (Waiver is "an intentional relinquishment or abandonment of a *known* right or privilege.") (emphasis added), *cited in Janus*, 138 S. Ct. at 2486. In short, states must provide an opportunity for employees to make *informed* decisions. In this circumstance, the government must "open the channels of communication rather than [] close them." *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). I-1501 engages in viewpoint discrimination precisely to close channels of communication that present alternatives to public employee union speech, violating both the First Amendment right to the Petitioners seeking access and diminishing the rights of public workers to exercise their own First Amendment rights as articulated in *Janus*.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: April 2021.

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