No. 20-1334

In The
Supreme Court of the United States

BRADLEY BOARDMAN, ET AL.,

Petitioners,

v.

JAY INSLEE, GOVERNOR OF WASHINGTON, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Landmark has a unique perspective on this case because of its history of studying the political activity of public-sector unions. Landmark has compiled instances of apparently unreported political activity by a national teachers' union and its state affiliates in referrals to the Internal Revenue Service and other federal and state administrative agencies.

Landmark urges this Court to grant the petition for certiorari.

[1] The parties consented to the filing of this brief. Counsel for *Amicus Curiae* provided notices of its intent to file this brief to counsel for petitioners and respondent State on April 5, 2021 and to respondent Campaign on April 12, 2021. All parties consented by April 12, 2021. No counsel for a 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 *Amicus Curiae, its members, or its counsel* made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

How do you run for office if you don't know who the voters are? Public-sector unions supported a campaign to restrict access to certain government information for themselves. This effectively ensured their continued incumbency and kept their members in the dark about their constitutional rights. Their efforts have helped create a self-perpetuating system in Washington.

If a state provided citizens' voter registration data only to political parties with representation in the state legislature to prevent identity theft, it would be cold comfort to an independent third party if the state claimed it was based on the party's outsider status and not its viewpoint. Any alleged privacy interest threatened by wider dissemination of voter information would be outweighed by the specific harm to the third party's First Amendment rights to political expression and the general harm to the public's interest in robust political debate. Such a scheme would not directly restrict the independent party's ability to engage in political speech. Yet the practical effect would be severe. It would impose an extremely significant burden on its ability to reach registered voters, thereby forcing it to engage in more expensive, less targeted, and less effective communication.

Washington's Initiative 1501 similarly impinges petitioners' First Amendment rights. In-home care providers dissatisfied with their incumbent union are effectively thwarted from contacting other workers

because they are blocked from learning their names. These co-workers, similar to registered voters, are necessary to any attempt to trigger an election to replace an underperforming, corrupt or excessively partisan union. Initiative 1501 warrants constitutional scrutiny for harms to other important public interests, including dissenting workers' rights and union democracy.

The principle of exclusive representation by public-sector unions in collective bargaining is compulsory, as are the collective bargaining agreements themselves. They subject dissenting workers to representation and working conditions with which they may not agree, but are nearly powerless to change without union elections. As petitioner Freedom Foundation demonstrated, many workers are not even aware of their right to refrain from supporting their representative public-sector union. Such unions engage in inherently political speech during collective bargaining and are often powerful political entities in their own right. Workers may be funding fundamentally political entities expressing policies they don't support without informed consent, which *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) intended to prevent.

The Ninth Circuit Court of Appeals failed to protect the interests of the petitioners by focusing on status and not viewpoint. *Boardman v. Inslee*, 978 F.3d 1092 (9th Cir. 2020). It improperly applied the reasoning of *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) to Initiative 1501. *Boardman*, 978 F.3d at 1110–12. Indeed, the rationale underlying *Perry* is now questionable after *Janus*. Washington's attempt to restrict access to information it holds to an

incumbent union violates the First Amendment. This Court should grant the petition for certiorari.

ARGUMENT

I. The Ninth Circuit wrongly determined that Initiative 1501 discriminated on status and not viewpoint.

Under the First Amendment, government must not prohibit speech because of its viewpoint. *See* Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. 20 (2019). In the circuit court's opinion below, both majority and dissent agreed that the selective release of government information may violate the First Amendment if based on viewpoint. "[R]estrictions on the disclosure of government-held information" may "transgress the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569 (2011). The *Sorrell* Court gleaned this principle from the multiple concurring and dissenting opinions in *L.A. Police Dep't v. United Reporting Publ'g Corp. (United Reporting)*, 528 U.S. 32, 41–42 (1999) (Scalia, J., joined by Thomas, J., concurring); *id.* at 42–44 (Ginsburg, J., joined by O'Connor, Souter, and Breyer, JJ., concurring); *id.* at 44–48 (Stevens, J., joined by Kennedy, J., dissenting). Although the government may not have a duty to disclose information in its control, once it does so, it may not selectively release the information "based on an illegitimate criterion such as viewpoint." *United Reporting*, 528 U.S. at 43, (Ginsburg, J., concurring); *see also id.* at 45–47 (Stevens, J., dissenting).

The circuit court diverged, however, over whether Initiative 1501 discriminated against petitioners' viewpoint. The majority held that it did not. In their view, the selective release of information turned on *status* and not viewpoint. *Boardman*, 978 F.3d at 1110. Analyzing it mainly on the surface, they claimed that release was given to the collective bargaining representative, regardless of the representative's viewpoint or the viewpoint of anyone else requesting information.

The majority relied in part on *Perry Educ. Ass'n* for the distinction between status and viewpoint, a pre-*Janus* case that upheld a union's bargained-for exclusive use of teachers' in-school mailboxes for communication because of its status as collective bargaining representative. *Boardman*, 978 F.3d at 1110–12. According to the *Perry Educ. Ass'n* Court, the defeated rival union, however, had no "official responsibility in connection with the School District and need not be entitled to the same rights of access to school mailboxes." *Perry Educ. Ass'n*, 460 U.S. at 51. In addition, "the exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools." *Id.* at 51–52. This "labor peace" rationale stemmed from the holding in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), where it justified the impingement of First Amendment rights through the extraction of agency fees. In *Janus*, the Court wrote that such fears of labor chaos had been unfounded. *Janus*, 138 S. Ct. at 2465. Furthermore, the record in *Perry Educ. Ass'n* establishing the extent to which other groups had been granted or denied access to the mailboxes

was thin. *Perry Educ. Ass'n*, 460 U.S. at 47; Transcript of Oral Argument at 11–13, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (No. 81-896). This weakens it as an authority for the principle that denying access to a rival union is discrimination over status and not viewpoint.

In short, the majority's surface analysis of Initiative 1501's text was too narrowly focused.

II. Initiative 1501 was designed to discriminate against petitioners' First Amendment rights.

As argued persuasively by Judge Bress in dissent, the text and operation of Initiative 1501, along with the troubling evidentiary record of the union's attempt to suppress information, show unlawful viewpoint discrimination. Judge Bress wrote that I-1501 "plainly" shows viewpoint discrimination, citing Justice Scalia's *United Reporting* concurrence for the proposition that "den[ying] access to persons who wish to use the information for certain speech purposes[] is in reality a restriction upon speech" in contravention of the First Amendment. *Boardman*, 978 F.3d at 1127 (citing *United Reporting*, 528 U.S. at 42). To show why, he wrote that a "few analytical pieces" need to move into place. *Boardman*, 978 F.3d at 1127. First, the scheme gives the incumbent unions exclusive access to key information, "creating a distinction based on the speaker." *Id.* Although not a direct restriction on speech, it is a restriction on information that enables

speech on issues of public concern. *Id.* at 1128. And it gives preferential treatment for a public-sector union, an entity that, as *Janus* made clear, routinely takes positions on public issues. *Id.* Finally, Initiative 1501 has at least two unique features. It gives the in-home care providers' sensitive personal information to the unions but prevents anyone else from having it, unlike other states. These in-home care providers "are very difficult to identify or locate." *Id.* This makes the providers' information the *sine qua non* for union elections, which serve as a key check on incumbent union power. It is hard to win an election if you are denied access to the voters' names.

There are at least two other "analytical pieces" in addition to the dissent's that demonstrate the viewpoint discrimination at the heart of Initiative 1501: the important effects of *Harris v. Quinn*, 573 U.S. 616 (2014), the issues raised by *Janus*, and the unions' role in American politics. Turning first to the two cases, both had significant effects on public-sector unions and touch on many aspects of petitioners' interests. *Harris* explained at length how *Abood* rested on "questionable foundations." *Harris*, 573 U.S. at 645–46. Thus, the *Harris* Court declined to extend *Abood*'s reach to require agency fees from in-home personal care providers who were only quasi-public workers. *Id.* One can assume the loss of agency fees affected union coffers. Furthermore, much like petitioners, one of the original plaintiffs in *Harris* had used state public records requests to contact other caregivers to oppose an attempt to unionize them. She described it as crucial to

her efforts. Sean Higgins, *Seattle union spends $1.8M to change disclosure laws in its favor*, The Washington Examiner, Oct. 27, 2016. According to Pamela Harris:

> "We got the names and addresses of the personal support workers in the Illinois Home-Based Waiver program by submitting a request under the state Freedom of Information Act. We were told that this was how the unions obtained the list . . . Without that list, we would not have been able to reach the personal support workers and share the information about the mail-in ballot and the 'NO union' option. There is no doubt; we would not have prevailed."

Id. After *Harris*, public-sector unions were on notice about the importance of dissenting workers' access to their fellow in-home care providers' contact information to union organization and elections.

The second case, *Janus*, although issued after passage of Initiative 1501, raised subjects that affect petitioners' claims. It acknowledged the importance of consent before any fees or dues could be taken from workers, given the serious impingement of First Amendment rights involved when a worker is forced to subsidize a union's speech. *Janus*, 138 S. Ct. at 2486. The *Janus* Court also noted that public-sector unions acting as exclusive representatives speak on "matters of substantial public concern." *Id.* at 2460. And the opinion raised the impingement on associational freedoms created by exclusive representation, although it is "tolerated" in the context of collective

bargaining. *Id*. at 2478. *Janus* thus highlights the importance of informing workers of their rights before they consent to relinquishment of their First Amendment rights to an entity expressing political speech, as petitioners attempted to do. Finally, *Janus* did acknowledge the impingement of associational rights from exclusive representation, thus leaving the door open to future claims like petitioners'. The associational impact is exacerbated if it is impossible to remove an incumbent union in an election.

Public-sector unions' role in our political system is an important analytical piece to demonstrate viewpoint discrimination. Service Employees International Union (SEIU) is the parent union to the local unions representing Washington's in-home care providers. (SEIU 775 is the exclusive bargaining representative for individual providers, while SEIU 925 is the exclusive bargaining representative for family child care.) SEIU has a clear political viewpoint and wields great power in national politics. Its viewpoint is at odds with the petitioners'. According to the Center for Responsive Politics, the SEIU's political contributions during the 2020 election cycle totaled nearly $28 million, making it the seventeenth largest of 21,691 organizations making political contributions. *Service Employees International Union*, Center for Responsive Politics, https://www.opensecrets.org/orgs/service-employees-international-union/summary?id=d000000077 (last visited April 21, 2021). Federal election contributions went to 213 House Democrats and no House Republicans. *Id.* Thirty-three Senate Democrats received

contributions for a total of $223,226 while six Republicans received contributions amounting to $872. *Id.* Public-sector unions generally express their viewpoint at the state and local level as well as seen by their support of Initiative 1501.

III. Initiative 1501 warrants scrutiny for harm to the public interest in union democracy.

Finally, the public's interest in union democracy and workers' rights should be considered while analyzing Initiative 1501. As observed in a comparative study from 1966, labor unions are not completely autonomous organizations, but are linked to the state.

> "[Unions] act within a statutory framework designed to make them perform a definite aim of governmental policy, namely to secure industrial peace. Their purpose is to stabilize industrial relations through the machinery of collective bargaining. A trade union is able to fulfil its social function by becoming a bargaining agent for the unit of employees who are not all members of the union."

Jan K. Wanczycki, *Union Dues and Political Contributions Great Britain, United States, Canada—A Comparison*, Relations Industrielles/Industrial Relations, Vol. 21, No. 2 (Apr. 1966), at 200–201. Thus, they are "basically a creation of statute, endowed with statutory rights and obligations for the purpose of performing, as a sort of governmental agency, certain specific aims of governmental policy." *Id.* The public has an interest in the proper functioning of entities given responsibility

over public employment, especially the conduct of their elections.

This interest extends to the conditions for individual workers. Professor Clyde W. Summers, an early expert on union democracy, highlighted the importance of union elections because of the power they wielded over an individual worker. Clyde W. Summers, *The Public Interest in Union Democracy*, 53 NW. U. L. Rev. 610 (1958). "Collective bargaining is not only regulatory in character, it is compulsory, and this does not depend on the presence of a union security clause." *Id*. at 615. Under the principle of exclusive representation, "the majority union is the exclusive representative of all employees in the unit, and the minority is bound by majority action. The individual loses all freedom to make his own contract, for the majority union has exclusive and compulsory power to bargain for all terms and conditions of employment." *Id*. This power extends to the grievance process. *Id*. at 615–616. "The only point at which the worker has a choice is at the time of the representation election, and if there are competing unions this may enable him to exert pressures on union policies." *Id*. at 616.

Washington does not give workers unhappy with their union an unfettered right to trigger an election. Instead, while there is a valid collective bargaining agreement in place, "no question of representation may be raised except during the period not more than ninety nor less than sixty days prior to the expiration date of the agreement." *See* Wash. Rev. Code § 41.56.070. Initiating an election requires support from at least

30% of the workers. *Id.* Without access to the contact information of other workers, these structural hurdles to the removal of an incumbent union are steep.

In short, the public has an interest in union democracy. Public-sector unions are powerful political entities that influence policy, help elect candidates to public office, and may often dictate many of the working conditions of government workers. Any scheme that effectively removes workers' ability to counter an underperforming, corrupt, or overly partisan union through union elections should draw the Court's scrutiny.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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