No. 20-1334

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

BRIEF OF *AMICUS CURIAE* CENTER OF THE AMERICAN EXPERIMENT IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

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April 23, 2021

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Center of the American Experiment (the "Center") is a non-partisan educational organization dedicated to the principles of individual sovereignty, private property and the rule of law. It advocates for creative policies that limit government involvement in individual affairs and promotes competition and consumer choice in a free market environment. The Center is a nonprofit, tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code.

This case concerns the Center because the Center has worked with home-based providers (also known in Minnesota as "PCAs") to prevent harm caused by a Minnesota law that declared them "state employees," but only for the purpose of collectively bargaining. Further, the Center has sought to educate these embattled home-based providers about their First Amendment rights and right to obtain decertification of the underperforming SEIU. The Center has also helped them in their attempt to decertify the SEIU as their exclusive representative—certification which was supported by

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief. 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.

only 13% of home-based care workers.[2] However, in the process of that effort, the State of Minnesota's Bureau of Mediation Services ("BMS") made it impossible to obtain the signatures required to initiate a decertification contest because they withheld the current list of home-based providers who could be contacted to determine their interest in decertification. At the same time, the state BMS provides that list to the SEIU on demand.

Individual home-based providers brought a lawsuit against BMS in Minnesota in 2016 to challenge this unfair practice, but the Minnesota Supreme Court held that the BMS was not required to provide a current list to those seeking to decertify the SEIU as the exclusive representative for the home-based providers. In other words, the Minnesota Supreme Court entrenched viewpoint discrimination into Minnesota's freedom of information law. Thus, the Center believes this case is of great importance, because the law of other states, including Minnesota's law, also unfairly favors public sector unions and violates the First Amendment rights of those who seek to inform home-

[2] Examples of the Center's educational efforts and coverage of the Minnesota decertification effort include Fall 2019 and Summer 2019 articles in the Center's *Thinking Minnesota* magazine, which has a circulation of more than 100,000, as well as frequent online posts, including the following as brief examples: https://www.americanexperiment.org/attorney-generals-office-argues-dfl-legislature-purposely-made-it-harder-for-pcas-to-decertify-the-seiu/; https://www.americanexperiment.org/victory-pca-access-to-union-list-upheld-by-court/.

based care workers of their rights, criticize public-sector unions, or seek to decertify them.

SUMMARY OF THE ARGUMENT

Under Rule 10(c) of the Rules of the Supreme Court of the United States, the Court considers whether "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court" in deciding whether to grant a petition for a writ of certiorari.

The Center believes that the Ninth Circuit's decision below was wrong, and if left undisturbed will have negative impacts throughout the Ninth Circuit and in Minnesota by application of its principles. Consequently, the Center urges the Court to grant Petitioners' petition for a writ of certiorari and reverse the decision below.

It is very easy for public sector unions to obtain the contact information for public employees they need to contact to be certified as exclusive bargaining representatives, and very hard for public sector union employees to get that same information to attempt to communicate with those employees or decertify those public sector unions. The Center and other grassroots organizations in Minnesota who coordinate with individual employees to educate them about their rights in

relation to public sector unions, along with the individual employees themselves, have been treated differently than the unions in having access to employee lists that allow for effective organization. Minnesota home-based care employees should not be forced to use outdated lists and spend weeks and months on end seeking information possessed by and readily available to the State. Yet, that is what the Minnesota Supreme Court held they must do when it enshrined this viewpoint discrimination into Minnesota law in 2020.

Similarly, Washington's law and the Ninth Circuit decision approving it entrenches into law favoritism that benefits public sector unions and harms public sector employees who may seek to communicate with other home-based care workers for myriad reasons, including poor "representation" and union political speech with which they disagree. The Center therefore requests that the Court grant the Petition and rectify this fundamental unfairness.

ARGUMENT FOR GRANTING THE PETITION

Petitioners present an important question of federal law that should be settled by the Court because the Petitioners' experience is, unfortunately, not limited to their case. In *Greene v. Minnesota Bureau of Mediation Services*, 948 N.W.2d 675 (Minn. 2020), several plaintiffs in Minnesota who sought to decertify the Service Employees International Union ("SEIU") as the exclusive representative for Minnesota home-based

care workers faced Minnesota laws similar to the Washington law at issue here.

The Center covered the *Greene* plaintiffs' experience closely and helped with the efforts to obtain signatures for initiating a decertification election under Minnesota law.[3] That effort was met with staunch opposition from the State of Minnesota and the SEIU, who repeatedly denied the *Greene* plaintiffs' efforts to get information the SEIU and the State possessed—a current list of home-based care workers. In fact, the Minnesota Attorney General argued at the time that the intent of the Minnesota counterpart to Washington's law is to make it prohibitively difficult for anyone other than an entrenched union to access home-based care workers' contact information.[4]

Because of the State and the union's refusal to play fair and provide a readily available current list of employees, the *Greene* plaintiffs were forced to bring a lawsuit. The Minnesota Supreme Court held similarly to the Ninth Circuit here and entrenched viewpoint discrimination into the Minnesota laws enabling the home-based care worker program and the Minnesota Government Data Practices Act. These Minnesota plaintiffs' experience shows the Court that the Petition

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[3] *See supra* n.2.

[4] *E.g.*, Kim Crockett, *Center of the American Experiment*, "Attorney General's Office Argues DFL Legislature Purposely Made It Harder for PCAs to Decertify the SEIU," *available at* https://www.americanexperiment.org/attorney-generals-office-argues-dfl-legislature-purposely-made-it-harder-for-pcas-to-decertify-the-seiu/.

raises an issue of nationwide importance that is not limited to Washington State.

I. Minnesota and Washington Have Similar Laws Related to Public Access to Home-Care Employee Contact Information.

Minnesota's employee relations laws and public data laws at issue in the *Greene* case are similar to Washington's in the most relevant respects.

A. Minnesota's Laws at Issue in the *Greene* Case.

The Minnesota laws (the "Act") that authorize the state program to subsidize home-based care workers require that the Minnesota Department of Human Services ("DHS") compile and maintain a current list of all home-care workers in the bargaining unit along with their names and addresses. Minn. Stat. § 256B.0711, subd. 4(f). The Act states, in relevant part:

> The commissioner [of human services] shall, no later than September 1, 2013, and then monthly thereafter, compile and maintain a list of names and addresses of all individual providers who have been paid for providing direct support services to participants within the previous six months.

The Act additionally requires that the BMS provide the list maintained by DHS to potential exclusive representatives that can demonstrate the support of at least 500 PCAs, or to an existing exclusive

representative upon a request. Minn. Stat. § 179A.54, subd. 9. The Act also states: "When the list is available to an employee organization under this subdivision, the list must be made publicly available." *Id.*

Despite what appears to be a provision for public access, the Minnesota Supreme Court held this past year that this provision actually means:

> When the BMS Commissioner makes the list available to an employee organization upon request, then the Commissioner must make this list available to a member of the public upon request. Accordingly, a list is available to the public if (1) an employee organization requests the list after demonstrating sufficient support, or (2) if the exclusive representative requests the list.

Greene v. Minnesota Bureau of Mediation Services, 948 N.W.2d 675, 681 (Minn. 2020).

To be sure that the *Greene* plaintiffs would have no way around the Act, the Minnesota Supreme Court also held that they could not obtain the information they sought under the Minnesota Government Data Practices Act. *Id.* at 682-85.

The Minnesota Supreme Court made it very clear that the intent of the law, as it saw it, was to *not* give equal access to employee contact information—in other words, to discriminate based on viewpoint:

> Nothing about the PELRA provision suggests that the Legislature intended to give individual PCAs and their exclusive representative

> equal access to the list—let alone an intention so clear that it overrides the plain meaning of the provision. Indeed, the Legislature would not have created different disclosure rules for employee organizations, exclusive representatives, and the general public if it intended each group to have equal access under all circumstances.

Greene, 948 N.W.2d at 675.

Thus, in Minnesota, the only time a person or organization other than an exclusive representative can access the contact information of all 27,000 home-based care workers is when the exclusive representative requests the list. This is never the case because the agreement between the SEIU and the State of Minnesota requires the home-based care workers' "agencies" to provide the sought-after contact information to the SEIU, under force of law. Home Care Workers Contract, July 1, 2019 through June 30, 2021, pp. 27-28, *available at* http://www.seiuhealthcaremn.org/files/2019/06/190531_Home-Care-3rd-Contract-Booklet.pdf.

While the *Greene* plaintiffs argued that this holding would make decertification a practical impossibility, the Minnesota Supreme Court simply stated that "respondents falsely equate difficulty with impossibility." *Greene*, 948 N.W.2d at 681. To the great detriment of Minnesota's home-based care workers, the Minnesota Supreme Court's theoretical understanding was wrong, which the *Greene* plaintiffs' real-world experience shows, as discussed *infra*.

B. The Washington Laws at Issue Here.

The Petition explains the Washington legal scheme well. Before Initiative 1501 became Washington law, the Petitioners could obtain access to personnel data that would allow them to contact home-based care workers and tell them about their First Amendment rights and right not to be represented by the SEIU upon decertification. Pet. 6-7. Now, Washington law prohibits the release of the names, addresses, telephone numbers, and email addresses to virtually all data requestors. Wash. Rev. Code § 42.56.640. However, the SEIU, as the "representative certified or recognized under RCW 41.56.080," is exempt from that prohibition. Wash. Rev. Code § 42.56.645(1)(d). As the Petitioners point out, because of Initiative 1501, their task in expressing their messages to Washington home-based care workers is now nigh impossible. The *Greene* plaintiffs' experience confirms this.

II. The *Greene* Plaintiffs' Experience Shows That Without Court Intervention Here, Public Sector Unions Will Maintain a Stranglehold Over What Political Information Home-Based Care Workers Receive.

While their lawsuit seeking the list of home-based care workers was ongoing, the *Greene* plaintiffs still sought, in 2016, to decertify the SEIU as the exclusive representative of Minnesota's home-based care workers. *Matter of Decertification of an Exclusive Representative for Certain Emps. of State*, No. A17-0798,

2018 WL 414363, at *1 (Minn. Ct. App. Jan. 16, 2018). This is a gargantuan task without accurate contact information. Decertification requires that 30% of those in the collective bargaining unit submit a petition and signature cards showing their desire to not be represented by the union. Minn. Stat. § 179A.12, subd. 3. The *Greene* plaintiffs' great efforts failed because of the impossibility of effective communication with home-based care workers without current contact information for these workers spread across the state.

The reason the *Greene* plaintiffs sought decertification is simple: the SEIU is bad for Minnesota home-based care workers, as it skims 3% of their Medicaid benefits for no real value. Kim Crockett, *Center of the American Experiment*, "10,000 Cards Delivered to Gov. Dayton Demanding New PCA Election," Sept. 28, 2017, *available at* https://www.americanexperiment.org/10000-cards-delivered-to-gov-dayton-demanding-new-pca-election-2/. In addition, the SEIU is well-known to be a significant donor to left-wing causes with which many home-based care workers disagree. *E.g.*, *MinnPost*, "Meet the Minnesota political groups spending big on the 2020 election," Sept. 28, 2020, *available at* https://www.minnpost.com/state-government/2020/09/meet-the-minnesota-political-groups-spending-big-on-the-2020-election/ (last accessed April 19, 2021).

Another irksome reality is that the SEIU was certified as the exclusive representative for all home-based care workers in Minnesota in 2014 based on an approval by approximately 3,500—or 13%—of the 27,000 or so home-based care workers in Minnesota.

See Matter of Decertification at *1-2 ("A majority of the 5,849 voting PCAs chose to be represented by the Service Employees International Union Healthcare Minnesota (SEIU). . . . SEIU asserted that relators had understated the number of PCAs in the bargaining unit and that the actual number was 27,361. . . ."). This is fewer than half of the votes the *Greene* plaintiffs apparently needed for decertification, as discussed *infra*. This kind of "majority" is no basis for representation at all, especially given the insurmountable barriers erected by the State and the Minnesota Supreme Court to even hold a decertification election.

Yet, that is what the *Greene* plaintiffs tried to do. To attempt decertification, the *Greene* plaintiffs sought a then-current list of home-based care workers. They were rejected by Minnesota and the SEIU, and they had to go to the Minnesota Supreme Court to get them years after the window for decertification had elapsed. As discussed above, the Minnesota Supreme Court rejected their pleas.

The operative facts related to the effort to obtain home-based care workers' contact information to tell them about their right to seek decertification are well summarized by the Minnesota Court of Appeals in the *Greene* case:

> In May 2016, to gather support for their decertification petition, respondents submitted requests to DHS and BMS, seeking the most-recent list of all PCAs compiled under Minn. Stat. § 256B.0711, subd. 4(f), which directs the commissioner to maintain a list of the

names and addresses of all PCAs who have been paid for providing direct support services to participants within the previous six months.[3] Respondents' first request to DHS identified the Minnesota Government Data Practices Act (MGDPA) and Minn. Stat. § 179A.54, subd. 9 (2018), as authorizing the requested disclosure. DHS responded by informing respondents that they must direct their request to BMS because the BMS commissioner "is the official responsible for providing access to the list." Respondents did so. In May 2016, BMS provided respondents with a 2014 list of PCAs compiled pursuant to section 256B.0711, subd. 4(f).

In August 2016, respondents began gathering signatures for their decertification effort, but encountered difficulties. The 2014 list was no longer accurate. Respondents claim that 30% to 40% of the information on the list was inaccurate, which frustrated their efforts to obtain the number of signatures required for a decertification petition. Respondents explained that some addresses included on the list did not exist, that some listed individuals had not been PCAs for some time, that some addresses were incomplete, and that some listed PCAs no longer resided at listed addresses.

Respondents made additional requests under the MGDPA for an updated list. DHS informed respondents that the information could not be released because it was private data under provisions of the MGDPA and instructed that respondents' request for

> information be directed to BMS under Minn. Stat. § 179A.54, subd. 9.
>
> Respondents submitted another request to BMS and DHS in October 2016, again asking BMS to provide, or to direct DHS to provide, an updated list of names and contact information of PCAs represented by SEIU. BMS replied, again providing the 2014 list and informing respondents that they were not entitled to a more-recent list because section 179A.54, subdivision 9, "does not apply to decertification petitions" and respondents were not an employee organization currently representing PCAs or seeking to represent PCAs. Respondents also contacted SEIU directly, but SEIU denied respondents' request and a separate request from respondent Greene.

Greene v. Minnesota Bureau of Mediation Servs., No. A18-1981, 2019 WL 3776949, at *1–2 (Minn. Ct. App. Aug. 12, 2019), *review granted* (Oct. 29, 2019), *aff'd in part, rev'd in part and remanded*, 948 N.W.2d 675 (Minn. 2020).

At the same time that they were seeking care workers' contact information, the *Greene* plaintiffs still attempted to mount a decertification challenge to the SEIU with outdated and inaccurate information, and they experienced exactly what they told the Minnesota Supreme Court they would experience. The Minnesota Court of Appeals eventually affirmed the dismissal of their decertification petition because they were unable to obtain more signatures with the poor-quality information they had—even though state agencies were

able to provide each other with a then-current list with an exact number of employees within the specific bargaining unit at issue. *Matter of Decertification*, 2018 WL 414363, at *3 ("DHS did so on February 8, 2017, by submitting a seventh and final list that includes 28,144 PCAs.").

The Minnesota Court of Appeals' decision in the decertification case shows the impossibility of mounting a decertification election for home-based care workers spread across the state:

> Relators filed a decertification petition with BMS. . . . With their petition, relators submitted 2,596 authorization cards signed by PCAs who indicated that they favored decertification. In their petition, relators alleged that the bargaining unit consisted of approximately 8,000 PCAs. If there were 8,000 PCAs in the bargaining unit, the 2,596 PCAs who signed authorization cards would constitute 32.5 percent of the unit, thereby satisfying the 30–percent threshold.
>
> On December 6, 2016, BMS issued an order stating that relators' petition was timely and that they had made a sufficient showing of interest to warrant a decertification election. The following day, SEIU asked BMS to reconsider the matter. SEIU asserted that relators had understated the number of PCAs in the bargaining unit and that the actual number was 27,361, which is the number of PCAs included in DHS's sixth list. If there were 27,361 PCAs in the bargaining unit, the 2,596 PCAs

who signed authorization cards would constitute only 9.5 percent of the unit, thereby falling below the 30–percent threshold.

On December 9, 2016, relators responded to SEIU's motion for reconsideration. Relators submitted five affidavits executed by persons who attempted to contact persons included in the first list of PCAs, which had been complied in 2014 and was provided to relators in May 2016. Those five affidavits identify certain addresses that could not be found, certain addresses that did not contain residences, and certain addresses for residences that were not occupied. Relators also submitted an affidavit executed by an attorney that summarizes efforts to contact persons included in the sixth list of PCAs, which was provided to relators in November 2016. That affidavit states, among other things, that 9,579 telephone calls had been made after relators received DHS's sixth list and that callers had connected with 480 of the persons called. The attorney's affidavit also states that 17.08 percent of the persons reached stated that they were not a PCA and that 11.46 percent of the persons reached stated that they performed home-based healthcare services that excluded them from the bargaining unit. The attorney's affidavit further states that only 1,955 names were on both the first list from May 2016 and the sixth list from November 2016, and that 10,958 names were on both the second list from September 2016 and the sixth list from November 2016. The attorney's affidavit concludes by stating the affiant's conclusion that the bargaining unit

> consists of approximately 8,000 to 8,500 persons.
>
> On December 13, 2016, BMS's commissioner issued a six-page order granting SEIU's request for reconsideration. The order states, "For the purpose of determining a showing of interest in this matter, the relevant list shall be the November 29, 2016 list provided by DHS." The order required DHS to submit, within six days, "a summary explaining how [DHS] determined who is included in the bargaining unit" and required relators to submit, within 14 days, "substantial evidence demonstrating that its estimate of approximately 8,000 eligible bargaining employees is accurate."
>
> . . . .
>
> On February 7, 2017, BMS ordered DHS to submit a list of PCAs as of November 30, 2016. DHS did so on February 8, 2017, by submitting a seventh and final list that includes 28,144 PCAs. On February 10, 2017, BMS's commissioner issued a three-page order, which states that, based on the seventh list, relators "failed to submit the requisite 30 percent showing of interest" and that the decertification petition is dismissed.

Id. at *2–3.

The Court of Appeals affirmed the BMS' decision to dismiss the decertification petition because, even with the inaccuracies noted in the plaintiffs' practical experience, the Court of Appeals believed it could not

statistically reach a conclusion where the plaintiffs had submitted enough signatures showing interest in decertification.[5] *Id.* at *5.

Thus, the *Greene* plaintiffs' efforts were frustrated by, in their view, wrong decisions from Minnesota's state courts. If they had simply had access to a current list of contact information for home-based care workers—which the State and SEIU have—at the time they sought decertification, at least the SEIU would have been in for a fair fight over whether they are, in fact, good for Minnesota's home-based care workers. However, the State and the SEIU are not interested in a fair fight. Minnesota's statutory scheme, like Washington's Initiative 1501, entrenches that unfairness in law, and the *Greene* plaintiffs' experience is a case study in that unfairness.

CONCLUSION

Petitioners here face an insurmountable barrier to effective communications with home-based care workers because of the discrimination baked into Initiative 1501. Moreover, the *Greene* plaintiffs' experience in Minnesota demonstrates that this type of discrimination is not limited to Washington State and also makes decertification of poor-performing exclusive bargaining

[5] Notable as well, by the time the Minnesota Court of Appeals had made its decision in January 2018 for a decertification petition filed in November 2016, the "open window" period for seeking decertification had long passed.

representatives impossible. The Center respectfully submits that the Court should grant the petition for certiorari and redress the discrimination imposed by the Washington law on Petitioners.

Dated: April 23, 2021

Respectfully submitted,

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