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 MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

PATRICK J. WRIGHT
Counsel of Record
MACKINAC CENTER FOR PUBLIC POLICY
140 West Main Street
Midland, MI 48640
(989) 631-0900
wright@mackinac.org

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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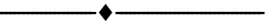
INTEREST OF AMICUS CURIAE[1]

The Mackinac Center for Public Policy ("Mackinac Center") is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

Michigan passed both private-sector and public-sector right-to-work legislation in December 2012. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws, and its research regarding the impact of right-to-work laws on union membership was cited in this Court's *Janus v. AFSCME*, ___ U.S. ___, 138 S.Ct. 2448 (2018) decision. *Id*. at 2466, n.3.



SUMMARY OF ARGUMENT

In both *Harris v. Quinn*, 573 U.S. 616 (2014) and *Janus*, this Court held that certain public-sector employees could not be compelled to provide financial support to a union. This Court recognized that over decades, public-sector unions had received billions of dollars of unconstitutional exactions.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the submission of this brief.

But, these decisions, like state right-to-work laws are not self-executing. Obviously, public-sector unions have a strong incentive to keep as many members (and dues payers) as possible. Many groups, like Petitioner Freedom Foundation and Amicus Mackinac Center have developed means of informing public-sector employees of their rights. The means are all dependent on knowing who these employees are and how they can be reached. Here, two public-sector unions sought to monopolize that information through a ballot initiative so that they could keep more members. For *Harris* and more particularly now *Janus* (given that it applies to significantly more public-sector workers), this union monopoly on the identification of workers cannot be permitted.

ARGUMENT

I. Employee lists are absolutely essential to inform public-sector workers of their rights as set forth by this Court.

In *Janus v. AFSCME*, ___ U.S. ___, 138 S.Ct. 2448 (2018), this Court held that it is a violation of First Amendment speech rights where "public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities." *Id*. at 2459-2460. *Janus* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), wherein "a similar law" had been upheld. *Janus*, 138 S.Ct. at 2460.

This Court recognized that the anticipated financial impact of the change caused by *Janus* belonged on the public-sector unions, and indicated that public-sector unions would be forced to adjust in order to "attract and retain members":

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

Id. at 2485-2486.

This case arose out of the unions' attempt to avert the financial impact of an earlier agency-fee ban. In *Harris v. Quinn*, 573 U.S. 616 (2014), this Court held that personal care providers were not "full-fledged public employees" and that under the First Amendment they could not be forced to pay agency fees. *Id*. at 645-646, 656.

After *Harris*, two branches of a public-sector union, SEIU 775 and SEIU 925, put forth a ballot initiative, Initiative 1501, that would make it easier for those unions to retain contact with individuals within

their bargaining unit, while largely preventing any other entity from reaching those same individuals. This was accomplished by hiding their true aim within an initiative that was putatively to protect seniors from identity theft. The real goal was to maintain membership and dues payments by preventing Petitioner Freedom Foundation from obtaining lists of those within the bargaining units. This would mean the Freedom Foundation could no longer inform those employees within those bargaining units about *Harris*.

The main purpose of this amicus brief is to affirm the importance of employee lists for communicating both with personal care providers at issue here and with other public employees subject to mandatory unionism so as to inform them of their rights under *Harris* and *Janus*. A synopsis of the history of personal-care unionization will provide some context related to how we arrived at this point and why these lists are central.

Organized labor has been on a decades-long membership decline, particularly in the private sector. According to the January 21, 2021 Bureau of Labor Statistics "Union Member Summary" only 6.3% of private-sector employees are unionized.[2] This works out to 7.1 million private-sector employees who are union

[2] https://www.bls.gov/news.release/union2.nr0.htm.

members.[3] In 1954, the private-sector unionization rate was 34.7%.[4]

The public-sector-unionization rate has been more stable. Currently, it is at 34.8% with 7.2 million employees who are union members.[5] That rate has been somewhere between 37.4% and 33.6% for the last twenty years.[6] So, overall union numbers have been dropping due mostly to declines in the private sector.

As one of the strategies for reversing the trend, organized labor launched a national initiative to increase its membership by redefining employer-employee relations when state or local governments subsidize a service. Labor organizations began organizing personal care providers, who aid the elderly and disabled in their own homes, by performing tasks such as bathing, meal preparation, shopping, and administrating medications. Linda Delp & Katie Quan, *Homecare Worker Organizing in California: An Analysis of a Successful Strategy*, 27 Lab. Stud. J. 1, 3 (2002).

There were problems with this organizational plan because these workers were not in a traditional employer-employee relationship with an entity that could be organized against. As generally explained in

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[3] *Id.*

[4] https://savvyroo.com/chart-1737519203472-union-membership-rates-began-falling-in-the-mid-1950s.

[5] https://www.bls.gov/news.release/union2.nr0.htm.

[6] https://www.forbes.com/sites/zengernews/2021/01/30/national-labor-relations-board-becomes-battleground-for-big-business-and-big-labor/?sh=577b3c337ebe.

Harris, there is an employer-employee relationship between the person receiving the care – the customer – and the person giving the care – the provider. *Harris*, 573 U.S. at 621. The customer is responsible for finding, hiring, directing, evaluating, supervising the work, setting the bounds of the services to be rendered, and for firing the provider. *Id*. at 622. But the state, subsidized by Medicaid, pays the providers' salaries. *Id*.

Organizing under the National Labor Relations Act ("NLRA") was not an option. The NLRA "employee" definition excludes both those "in the domestic service of any family or person in his home" and any "independent contractor." 29 U.S.C. § 152(3). Further, the NLRA's "employer" definition excludes those working for a state or any of its political subdivisions. 29 U.S.C. § 152(2).

Thus, any organizing would have to be on a state-by-state basis. The first successful organizing effort took place in California, where the SEIU sought to organize all the personal care providers in Los Angeles County. California labor organizers formulated a three-part strategy to "engage in the structuring of a new sector of the workforce," which included grassroots organizing, policy changes, and coalition building. *Homecare Worker Organizing in California*, 27 Lab. Stud. J. 5-6. This strategy proved difficult as the "workforce was very fragmented," working "in different homes with no occasion to come together as group" and a turnover rate of 40%. *Id*. at 4. Organization could not be successfully accomplished without identification of these workers:

> Worker organizing began in Los Angeles and was particularly intense because of the sheer number – 74,000 workers. *The initial challenge confronting the union was to find the workers.* Los Angeles homecare worker Verdia Daniels (2000), President of SEIU Local 434B and one of the original activists, described the outreach process, "We went to senior citizens' centers, doctor's offices, markets, churches; *we even dug in trash cans to find lists of workers.*"

Id. at 6 (emphasis added).

Despite these outreach efforts, the California Court of Appeals held that home-help workers were not employees under the controlling statute. *SEIU, Local 434 v. Los Angeles Cnty.*, 275 Cal. 508 (Cal. Ct. App. 1991). In response, a model was created that was copied in other states and largely continues to this day.

What became necessary, from the union's perspective, was an entity that could be bargained against. In California, for example, a statute was passed that allowed counties to establish "a public authority to provide for the delivery of in-home supportive services." Cal. Welf. & Inst. Code § 12301.6(a)(2). By and large, these public authorities' main function was to act as an employer for collective bargaining purposes. See generally *Harris*, 573 U.S. at 639 ("The Illinois Legislature has taken pains to specify that personal assistants are public employees for one purpose only: collective bargaining.").

Being a collective bargaining agent of this type can be quite lucrative. Take Michigan, where a branch of the SEIU became the collective-bargaining agent for that state's home-help providers. SEIU "negotiated" a dues payment of 2.75% of any compensation a provider received.[7] Michigan's approximately 45,000 home-help providers paid around $6 million a year in dues.[8]

Michigan is where the pushback against this type of unionization originated. In 2009, Amicus Mackinac Center challenged the unionization of home-based day-care providers, which followed the same model as the personal-care-provider unionizations, in state court. This suit drew substantial national attention and led to federal suits, which culminated in this Court's opinion in *Harris* in 2014. In the interim, Michigan became a right-to-work state both for private and public sectors, which means that under state law agency-fees were (and still are) banned.

Michigan's public-sector right-to-work law passed on December 12, 2012. 2012 Mich. Pub. Act 349. It took effect on March 28, 2013. See generally Mich. Const. art. IV, § 27; Mich. Comp. Laws § 423.210(5). Hoping that news of right-to-work's passage would be sufficient in and of itself to lead many employees to weigh their options under right to work in particular with

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[7] https://www.mackinac.org/archives/2012/CollectiveBargainingAgrmt.MQCCC.SEIU.2012.pdf (p. 6 of collective-bargaining agreement).

[8] https://www.michigancapitolconfidential.com/16124. The total eventually topped out at $34 million. https://www.mackinac.org/18363.

regard to Michigan's largest public-sector union – the Michigan Education Association – Amicus Mackinac Center largely was passive during the 2013 "August Window."[9] Not many MEA members left the union that year.[10] It was only after Amicus Mackinac Center started up an information campaign around the 2014 August Window involving tens of thousands of post cards and emails that many employees exercised their rights. A significant bump in those resigning from the MEA occurred in 2015, a year in which this campaign continued. These efforts required, however, that the Mackinac Center communicate with over 100,000 union members that needed to be communicated with. Without knowing who the employees were and how to contact them, it is likely that many more employees would not have known about their ability to choose to leave the union and end financial support to it.

Returning to Michigan personal care providers, their situation was a touch different than that of providers in many other states because their union disbanded after a bruising political and policy battle. Highlights include two laws being passed exempting personal care providers from Michigan's public-sector

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[9] This was the one-month period when all MEA members could revoke their dues authorizations thereby both resigning from the union and also ending any financial support to it.

[10] An additional factor likely slowed the exodus. Michigan's right-to-work law grandfathered in any contract that had an agency-fee clause in it. Thus, while the law took effect on March 28, 2013, each individual contract entered into before that date could have an agency-fee provision and would have to expire of its own terms. Mich. Comp. Laws. § 423.210(5).

collective bargaining law, a federal injunction, and a legislative attempt to defund the putative employer.[11] After the last collective bargaining agreement, the new laws were allowed to take effect.[12]

These laws are what make Michigan different than this case, but demonstrate why this case is of national importance. In order for there to be an agency fee, there must first be mandatory collective bargaining. In Michigan, the public bargaining statute now specifically indicates that home-help workers are not public employees. Mich. Comp. Laws § 423.201(e)(1). Thus, there is no mandatory collective bargaining.[13]

But *Harris* did not reach the issue of whether mandatory bargaining for home-help providers was unconstitutional. Rather, it held that requiring those individuals to pay agency fees violated the First Amendment. Thus, it is still possible to have mandatory collective bargaining agents for personal care

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[11] https://www.mackinac.org/HAYNES-MERC.

[12] These new laws had to survive a proposed constitutional amendment, State Proposal 12-4, backed by the SEIU that sought to reimpose the system that allowed the dues collection. That proposal was defeated 56% to 44% in November 2012. https://mielections.us/election/results/12GEN/.

[13] For whatever reason – possibly internal union infighting – the personal care provider portion of the union in Michigan disbanded. While not a mandatory collective bargaining agent, it could have stayed in existence and sought voluntary dues from members so that it could lobby the legislature in much the same way it did as a mandatory collective bargaining agent.

providers. Thus, if a union can prevent members from leaving, it could keep receiving dues.

This was the situation in Washington after *Harris*. As noted by the Ninth Circuit, Petitioner Freedom Foundation obtained an employee list, and its contact with those employees led to 65.5% drop in union membership:

> In 2014, the Freedom Foundation submitted a records request to [Washington Department of Early Learning] and obtained identifying information for care providers that the Foundation then used to contact them. The Foundation asserts that its efforts to educate in-home care providers about the Supreme Court's decision in *Harris* led to a dramatic drop in union membership. As of January 2017, 63.2% of family child care providers are reported to have left SEIU 925 post-*Harris*. As of April 2018, that number reportedly had climbed to 65.5%.

Pet. App. 56. It was this success that triggered Initiative 1501.

But, public-sector unions are not limited to trying to retain just personal care providers. With other public-sector employees, informing them of this Court's holdings remains important too. Recently a test case took place in California's adjoining Riverside and San Diego Counties.[14] In San Diego County, SEIU hospital

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[14] https://www.nationalreview.com/2021/03/how-a-government-union-court-case-could-drain-the-democrats-coffers/.

employees were contacted and informed of their rights and 24% of them subsequently left the union. In Riverside County, no such educational effort was made and the number of union members increased slightly. This suggests that when workers are informed of their rights, they will act upon them more often. Access to their identity is critical in order to provide them this information.

RELIEF REQUESTED

For the reasons stated above, this Court should grant certiorari in this matter.

Respectfully submitted,

PATRICK J. WRIGHT
Counsel of Record
MACKINAC CENTER FOR PUBLIC POLICY
140 West Main Street
Midland, MI 48640
(989) 631-0900
wright@mackinac.org

Counsel for Amicus Curiae