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

BRIEF OF GOLDWATER INSTITUTE AND ILLINOIS POLICY INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONERS

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases, and it files *amicus* briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the constitutional principles of free speech and freedom of association. Specifically relevant here, Institute litigators represent attorneys challenging a mandatory association in several cases, including *Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021) (reversing dismissal of First Amendment challenge to mandatory bar association membership); *Boudreaux v. Louisiana State Bar Association*, No. 20-30086 (5th Cir. filed Feb. 11, 2020) (pending); and *Schell v. Oklahoma Supreme Court Justices*, No. 20-6044 (10th Cir. filed Apr. 2, 2020) (pending). The Institute has appeared frequently as *amicus curiae* in this Court and other courts in free-speech cases. *See, e.g.*, *Janus v. AFSCME*, 138

[1] The parties have consented to the filing of this brief. *Amici curiae* gave counsel of record for all parties notice of their intention to file this brief at least 10 days before the brief's due date. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amici*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

S.Ct. 2448 (2018); *Minn. Voters Alliance v. Mansky*, 138 S.Ct. 1876 (2018).

The Illinois Policy Institute is a nonpartisan, nonprofit public-policy research and education organization that promotes personal and economic freedom in Illinois. The Institute's policy work includes budget and tax policy, good government, jobs and economic growth, and labor policy. During the past several years, the Institute has assisted thousands of public-sector employees in exercising their freedom to opt out of union membership. The Institute seeks to provide state and local government employees with accurate information about their First Amendment rights, but provisions of Illinois law similar to those Petitioners challenge, discussed *infra*, constrain its ability to identify and communicate with those individuals.

INTRODUCTION AND SUMMARY OF ARGUMENT

If it stands, the lower court's decision won't just harm the First Amendment rights of people and organizations like Petitioners, who want to speak to Washington in-home care providers about their right *not* to join or pay a union under *Harris v. Quinn*, 573 U.S. 616 (2014). It will also prevent many of those providers from exercising the First Amendment rights of which Petitioners wish to inform them. It also stands to harm public-sector workers, if courts apply its reasoning to uphold similar laws that attempt to shield government

employees from people who would advise them of their right to avoid paying a union under *Janus v. AFSCME*, 138 S.Ct. 2448 (2018).

In *Janus*, the Court held that a state may not collect union fees from an individual unless it has clear and compelling evidence that the individual affirmatively consented to waive his or her First Amendment right *not* to pay a union. And, to be effective, an individual's waiver of First Amendment rights must be knowing and voluntary—which means that the individual must be *informed* of his or her rights before he or she can validly waive them.

For workers to know of their right not to support a union, someone must *inform* them of it. Petitioners wish to give that information to Washington's in-home care providers, and there is only one practical way for them to do so: by obtaining their names and contact information and directly communicating with them. But the law Petitioners challenge prevents that, while allowing unions to communicate with providers without limitation.

If Petitioners cannot inform providers of their First Amendment rights, it is doubtful that the state, the union, or anyone else will. In fact, the law Petitioners challenge is just one of several ways that states with politically powerful public-sector unions have actively sought to *prevent* providers and public-sector employees from learning about their rights under *Harris* and *Janus*.

Therefore, to ensure that workers can make informed decisions about whether to waive their right not to pay a union—that is, to ensure that providers and employees actually enjoy the protection for their rights that *Harris* and *Janus* promise—it is essential that people and organizations outside of government, such as Petitioners, be allowed to receive workers' names and contact information, so that they may inform workers of their rights and present an alternative to the government-backed union perspective. The Court therefore should grant certiorari and reverse the lower court's decision.

ARGUMENT

To ensure that providers and public-sector employees can know of and exercise their First Amendment rights under *Harris* and *Janus*, individuals and groups like Petitioners must be able to obtain their names and contact information.

Reversal of the lower court's decision is essential, not only to protect the First Amendment rights of Petitioners and others like them, but also to ensure that the in-home care providers with whom Petitioners wish to communicate—as well as public-sector employees generally—can receive the information they need to enjoy the First Amendment rights this Court upheld in *Harris* and *Janus*.

In *Janus*, the Court held that the government may not deduct any payment to a union from someone's paycheck unless the person "affirmatively consents to pay." 138 S.Ct. at 2486. An agreement to pay a union is a waiver of the individual's First Amendment right *not* to pay, and "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.*

An individual's waiver of First Amendment rights is only valid if the individual *knows* of the right and freely, intentionally chooses to abandon it. *See Patterson v. Illinois*, 487 U.S. 285, 292 (1988). That means the individual must be *informed* of his or her rights before he or she can validly waive them. *Cf. id.* at 292–93 (validity of waiver turned on whether individual was "made sufficiently aware" of constitutional right). Thus, for workers to validly waive their right not to support a union, someone must inform them of that right.

Petitioners wish to inform Washington's in-home care providers of their right not to join or pay a union. That task is difficult because the providers are scattered in homes throughout the state; they do not work together, or even regularly meet, in the same physical location. *See* Decl. of Matt Hayward in Supp. of Pls.' Mot. for Summ. J. ¶ 5, Dkt. 52, July 18, 2018, *Boardman v. Inslee*, No. 3:17-cv-05255-BHS (W.D. Wash. 2019) ("Hayward Decl."). As one pro-union legal scholar has observed, someone wishing to communicate with in-home care providers cannot "stand at the factory gate and both identify and recruit workers as they enter[] or depart[]," as one might with industrial

workers, because providers are "hidden in individual homes [and] fragmented throughout neighborhoods, towns, and cities." Peggie Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1399 (2008).

Petitioners have found—and the record evidence shows—that there is only one means by which someone can effectively communicate with providers about their constitutional rights: "direct individual outreach, such as door-to-door canvassing, direct mail or email." Hayward Decl., *supra*, ¶ 7. "[D]oor-to-door canvassing is the best mode of communication because [someone wishing to communicate with providers] can have a conversation with [providers] about their rights and can answer questions and provide information." *Id.* at ¶ 9. Advertising through broadcast media, social media, and the internet has proven "overwhelmingly ineffective" because of the high cost of airing enough advertising to reach the right people, and because those modes of communication "work best on soundbites repeated multiple times, which is not a good method for discussing constitutional rights and the pros and cons of continuing membership in a public sector union." *Id.* at ¶ 6; Decl. of Brian Minnich in Supp. of Pls.' Mot. for Summ. J. ¶ 8, Dkt. 53, July 18, 2018, *Boardman v. Inslee*, *supra* (explaining that reaching providers through television would require "extreme lengths, such as having an ad playing at every available interval on every local news channel across the state," which still would be unlikely to "reach more than a handful" of providers).

To communicate with providers directly, Petitioners and others like them must, at a minimum, *know who the providers are*. Hayward Decl., *supra*, ¶ 8. But the law Petitioners challenge prevents that—deliberately—while allowing unions to obtain providers' complete contact information and to communicate with providers without limitation. *See* Pet. 9, 21. Restricting access to that information is an effective curtailment of the Petitioners' speech rights. *Cf. Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564–66 (2011) (allowing some parties access to medical information while denying it to others was a content-based speech restriction).

If Petitioners cannot inform providers of their First Amendment rights, it is doubtful that providers will learn of their rights from anyone else. Many unionized providers and public-sector employees are not aware of their First Amendment rights under *Harris* and *Janus*. The record in this case shows that Petitioner Freedom Foundation found, when it was able to communicate with providers in Washington, that "the vast majority . . . have no idea that they have the right to leave the union" and that even "those who did know about their right had been misled to believe that they would lose their healthcare if the[y] chose to opt out." Hayward Decl., *supra*, ¶ 7. And a YouGov poll of teachers taken one year after *Janus* found that 77 percent of respondents had not heard of *Janus*; 52 percent were not aware that the Court had held that public employees could not be required to pay union fees; and 82 percent thought no one had contacted them about *Janus*. TeacherFreedom.Org, *One Year After* Janus: *Teacher*

Attitudes on Union & Membership at 3–4, 8, June 2019.[2]

Worse, state governments under the influence of powerful public-sector unions have taken affirmative steps to *prevent* providers or public-sector employees from learning about their rights under *Harris* and *Janus*. The statute that Petitioners challenge is just one example.

Just as Washington gives unions exclusive access to providers' names and contact information, numerous states have enacted laws that provide unions with providers' or employees' complete contact information—typically including their home addresses and personal phone numbers and email addresses, and sometimes including even their social security numbers—while prohibiting all others from obtaining their contact information (sometimes, as here, including their names).[3] Many union-friendly state governments

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[2] https://teacherfreedom.org/wp-content/uploads/2019/06/One-Year_After-Janus_Poll_Teacher_Freedom.pdf.

[3] *See, e.g.*, Cal. Gov't Code §§ 3558, 6254.3; Haw. Rev. Stat. § 89-16.6(a), (d); 5 Ill. Comp. Stat. 140/7.5(oo), (pp), 315/6(c), (c-5); 26 Me. Rev. Stat. Ann. § 975(2); Md. Code, State Pers. & Pens. §§ 3-208, 3-2A-08; Md. Code, Educ. § 6-407; Md. Code, General Provisions §§ 4-311(b)(3), 4-331; N.J. Stat. Ann. 34:13A-5.13(c), (d); N.Y. E.O. 183 (June 27, 2018); N.Y. Civ. Serv. Law §§ 208(4)(a), 209-a(1)(h); 3 Vt. Stat. Ann. §§ 909(c), 910, 1022(c), 1023; 16 Vt. Stat. Ann. §§ 1984(c), 1985; 21 Vt. Stat. Ann. §§ 1646, 1738(c), 1739; 33 Vt. Stat. Ann. § 3619; *see also* Or. Rev. Stat. §§ 192.355(3), 192.363, 192.365, 243.804(4)(a) (giving unions access to employees' contact information but allowing others to obtain it only if they "show by clear and convincing evidence that the public interest requires disclosure").

not only give unions employees' contact information but also give unions the right to meet with new employees shortly after they are hired, either at new employee orientation sessions or in group or individual meetings.[4]

The purpose of those meetings with the union is not, of course, to inform employees of their right to choose whether to join, or not join, a union. The meetings' purpose is to allow the union to persuade new employees to sign union membership agreements. Indeed, unions and supporters openly admit this. *See, e.g.*, Adam Ashton, *'Everything Is at Stake': California Unions Brace for a Supreme Court Loss*, Sacramento Bee,

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[4] *See, e.g.*, Cal. Gov't Code § 3556 (giving union "mandatory access to . . . new employee orientations"); 5 Ill. Comp. Stat. 315/6(c-10)(1)(C) (giving union opportunity to meet with new employees for an hour) (enacted December 2019); 26 Me. Rev. Stat. Ann. § 975(1)(c) (giving union right to meet with new employees for at least 30 minutes); Md. Code Ann., State Pers. & Pens. § 3-307(b)(3), (5) (giving union 20 minutes to "collectively address all new employees . . . during a new employee program" and authorizing state to "encourage," but not mandate, attendance); Md. Code, Educ. §§ 6-407.1, 6-509.1(a)(1) (giving unions access to "new employee processing" in schools); Mass. Gen. Laws Ann. ch. 150E, § 5A(b)(iii) (giving union right to meet with new employees for at least 30 minutes); N.J. Stat. Ann. 34:13A-5.13(b)(3) (giving union "right to meet with newly hired employees . . . for a minimum of 30 and a maximum of 120 minutes"); N.Y. Civ. Serv. Law § 208(4)(b), (c) (giving union rights to meet with new employees and "mandatory access" to new employee orientations); Or. Rev. Stat. § 243.804(1)(b)(B) (giving union right to meet with new employees for 30 to 120 minutes); Wash. Rev. Code § 41.56.037 (giving union right to meet with new employees for at least 30 minutes, with employee attendance not mandatory).

Oct. 24, 2017[5] ("Union leaders say the law that gives them access to new employee orientation is particularly significant [as a means of mitigating *Janus*'s anticipated effect on membership]."); Catherine L. Fisk & Martin H. Malin, *After* Janus, 107 Cal. L. Rev. 1821, 1873–74 (2019); Michael Wasser, Jobs with Justice Education Fund, *Making the Case for Union Membership: The Strategic Value of New Hire Orientations*, Sept. 2016.[6]

And unions seek to have the meetings last as long as possible—the New Jersey and Oregon statutes cited above expressly allow them to last as long as two hours—because "[r]esearch finds that in-person orientations lasting at least one hour are most effective at increasing member commitment." Kara Walter, *State and Local Policies to Support Government Workers and Their Unions*, Center for American Progress Action Fund, June 27, 2018.[7] The record here shows that Washington providers who attended such meetings reported being "heavily pressured by the union representatives at these meetings to join the union." Hayward Decl., *supra*, ¶ 11. They also reported that they "did not understand that they could decline to join." *Id.*

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[5] https://www.sacbee.com/news/politics-government/the-state-worker/article180426706.html.

[6] https://www.jwj.org/wp-content/uploads/2016/09/JWJEDU_BestPractice_Report_2016_FINAL.pdf.

[7] https://www.americanprogressaction.org/issues/economy/reports/2018/06/27/170587/state-local-policies-support-government-workers-unions/.

Making the meetings' purpose even clearer—and further evincing the state's intent to *prevent* individuals from becoming informed of their First Amendment rights—California enacted legislation prohibiting disclosure of the dates, times, and places of new employee orientations to anyone except employees, the union, and vendors providing services at the meetings. This ensures that no one can be outside the meetings to advise attendees of their rights before they enter. Cal. Gov't Code § 3556 (amended on the day *Janus* was decided, June 27, 2018); *see also* Aaron Tang, *Life After* Janus, 119 Colum. L. Rev. 677, 701 (2019) (pro-union scholar noting that "[s]uch efforts seem likely to help stem the tide of membership losses").

Even where the law does not expressly prohibit disclosure of such meetings' times and locations, it could be practically impossible for people who wish to inform workers of their rights to obtain that information through public records requests before the meeting occurs. The record in this case shows that, due to government delay and union obstruction, Petitioners' public records requests for schedules of provider "onboarding" meetings proved useless. Hayward Decl., *supra*, ¶ 12.

In addition, some States have responded to *Janus* by enacting statutes that strongly discourage or actually prohibit public employers from advising workers of their right not to join or pay a union. For example, Illinois officials responded to the state's loss in *Janus* by enacting a law that—among other things designed to inhibit employees' exercise of First Amendment

rights—prohibits public-sector employers from advising employees of their rights, mandating that they "refer all inquiries about union membership to exclusive bargaining representative [i.e., the union]." 115 Ill. Comp. Stat. 5/14(c-5), 315/10(d) (amended to include these provisions Dec. 19, 2019); *see also* Joe Tabor, *Illinois House Passes Bill to Make It Harder for Public Employees to Leave Unions, Recover Fees*, Illinois Policy, Oct. 29, 2019[8] (describing this and other features of the legislation). Other states, anticipating or responding to *Janus*, have enacted laws prohibiting public employers from either discouraging union membership or encouraging union resignation. This was done with the obvious intention that employers would therefore say *nothing* about union membership to avoid violating the law. *See* Cal. Gov't Code §§ 3550, 3553 (amended to include this rule on the day *Janus* was decided, June 27, 2018); N.J. Stat. Ann. 34:13A-5.14 (effective May 18, 2018).

New Jersey even enacted a financial penalty for violations, requiring a public employer to reimburse a union for "any losses suffered . . . as a result of the public employer's unlawful conduct." N.J. Stat. Ann. 34:13A-5.14(c). To further discourage public employers from advising employees of their rights, California enacted a statute—also signed into law the day *Janus* was decided—that requires an employer to meet and confer with the union before sending employees any notice about their right under *Janus*, and, if the union

[8] https://www.illinoispolicy.org/illinois-house-passes-bill-to-make-it-harder-for-public-employees-to-leave-unions-recover-fees/.

does not approve the message's content, to distribute a message from the union together with the employer's notice. Cal. Gov't Code § 3553; *see also* Ben Bradford, *California Unions Have Prepared for* Janus, CapRadio, June 27, 2018[9] (describing urgency to pass bill in anticipation of *Janus*).

Even where the law does not expressly prohibit or discourage it, public-sector employers generally have little incentive to inform employees of their rights.[10] An official might fear that a union would charge the employer with an unfair labor practice if it were to provide employees with information on how to avoid joining, or how to resign from, the union. And, even putting that threat aside, it might be easier for an employer to avoid potential conflicts with a union by saying nothing on the issue; the manger typically has

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[9] https://capradio.org/articles/2018/06/27/california-unions-have-prepared-for-janus/.

[10] There are exceptions. Michigan recently adopted a rule requiring the state personnel director to remind workers annually of their right not to pay union dues or fees and requiring workers to agree annually to union paycheck deductions. Mich. Civ. Serv. Comm'n R. 6-7 (2020), https://tinyurl.com/7p974z4d. Also, several state attorneys general have found dues deductions based on a union's reporting alone to be unconstitutional under *Janus* and have therefore recommended that their respective states collect union dues only after advising employees of their First Amendment rights and obtaining their consent directly. *See* Letter from Alaska Attorney General Kevin G. Clarkson to Gov. Michael J. Dunleavy (Aug. 27, 2019), https://tinyurl.com/y4t6yjpz; Op. Att'y Gen. Ind. 2020-5 (2020), https://tinyurl.com/39j4cvkx; Op. Att'y Gen. Tex. KP-0310 (2020), https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2020/kp-0310.pdf.

nothing to gain, and something to lose, by acting against the union's interests.

Also, some managers might themselves be union members or supporters who prefer that employees not exercise their right not to join the union. *Cf.* R. Theodore Clark, Jr., *Politics & Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. Cin. L. Rev. 680, 684 (1975) (noting that the government employees who bargain with unions often are themselves union members). And, of course, managers might not inform providers or employees of their rights because they, too, do not understand *Janus*, or simply out of inertia. *See* Daniel DiSalvo, *The Future of Public-Employee Unions*, Nat'l Affairs, Spring 2020[11] ("Human-resource departments often just hand out union cards to new hires to be signed with other benefits materials."). *Cf. Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F.Supp.2d 498, 506 (E.D. Va. 2000) ("what is really at stake here is whether the union can collect more money [from employees] as a benefit of the decisionmaker's inertia. In other words, it is the [union's] hope that objecting nonmembers will either forget or overlook the annual objection requirement, or will reconsider their objection on the merits, thereby enabling the [union] to collect greater funds from nonmembers."). Many public-sector employers not only fail to advise employees of their rights; they also fail to directly obtain workers' consent before deducting union dues from their paychecks. Instead, public sector

[11] https://nationalaffairs.com/publications/detail/the-future-of-public-employee-unions.

unions often allow unions to solicit and retain membership agreements from employees—implicitly entrusting the unions to ensure that the agreements constitute knowing and voluntary—and then simply accept the union's say-so about which employees are and are not members. Several union-friendly state governments codified this practice in response to *Janus*.[12]

Once a union has claimed an individual as a member in this way, the employee can be legally locked into paying union dues for years. Some union-allied state governments have enacted legislation to make it difficult for (supposed) union members to stop paying dues. Hawaii, for example, has enacted a statute that provides that employees may only ask the union (not the state) to cease dues deductions during the 30-day period before the anniversary of the employee's initial dues authorization. Haw. Rev. Stat. § 89-4(c). In New Jersey, an employee who has signed a union membership agreement has just *10 days* each year during which he or she may request an end to dues deduction. N.J. Stat. Ann. 52:14-15.9e. Illinois has authorized (retroactively) union membership agreements that include irrevocable dues authorizations lasting longer than one year with a 10-day opt-out window. 5 Ill. Comp. Stat. 315/6(f). And even where statutes do not

[12] *See* 5 Ill. Comp. Stat. 315/6(f-20), (f-25) (dues authorization to be made to union, which is then to communicate it to employer); N.J. Stat. Ann. 52:14-15.9e (employer and union authorized to agree that employees may only request dues deductions from union; employee's electronic signature suffices); N.Y. Civ. Serv. Law § 208(1) (union entitled to dues deduction "upon presentation [to the employer] of dues deduction authorization cards").

mandate or specifically authorize it, many collective bargaining or union membership agreements include similar automatic renewals and short opt-out windows.[13]

What if an individual paying dues seeks to stop because his or her apparent "consent" was not informed or freely given? These states have disclaimed any responsibility, asserting that it is a private dispute between the individual and the union—even as those states continue to take dues from the individuals' paychecks on the unions' behalf pursuant to state law. And the Ninth Circuit has endorsed that view, finding that such unauthorized dues deductions do not constitute "state action" that can support a constitutional claim (a ruling another pending petition for certiorari seeks to overturn). *See Belgau v. Inslee*, 975 F.3d 940, 946–49 (9th Cir. 2020), *petition for cert. filed*, No. 20-1120 (U.S. Feb. 11, 2021); *see also*, *e.g.*, *Jarrett v. Marion County*, No. 6:20-cv-01049-MK, 2021 WL 65493, *3 (D. Or. Jan. 6, 2021) (one of numerous district court decisions applying *Belgau* to find no state action where state deducted dues based on forged signatures on union membership agreements), *appeal docketed*, No. 21-35133 (9th Cir. Feb. 19, 2021).

Thus, individuals have no constitutional remedy for union dues deductions made without their

[13] Since *Janus*, numerous lawsuits have challenged these agreements (so far unsuccessfully), particularly those entered before *Janus*, for impermissibly burdening workers' exercise of their First Amendment rights. *See, e.g.*, *Bennett v. Council 31, AFSCME*, 991 F.3d 724, 729–33 (7th Cir. 2021).

informed consent—which means that, to enjoy the right not to pay dues without a valid First Amendment waiver, a person must be informed of his or her rights *before* he or she signs a union membership agreement.

Officials have taken these measures to inhibit workers' ability to exercise their First Amendment rights to benefit the public-sector unions that fund their campaigns for office. It is in the interest of politicians who rely on funding from public-sector unions to sustain and increase the flow of membership dues to the unions so that the unions' contributions will likewise continue or increase. Indeed, the unionization of in-home care providers (like those whose rights are at stake in this case) illustrates how union-backed politicians use laws to increase union membership and revenue and thus sustain the flow of union funds to their campaigns. *See* Jacob Huebert, Harris v. Quinn*: A Win for Freedom of Association*, 2014 Cato S. Ct. Rev. 195, 208–09 (2014)[14] (describing Illinois' cycle of unions contributing to the campaigns of officials who, in turn, unionize more groups, including non-employee childcare business owners like Petitioner). Such officials have no incentive to inform workers of their right not to pay a union, and they have acted on their strong incentive to *prevent* workers' exercise of that right.

Therefore, in Washington and other states with politically powerful public-sector unions, if providers or employees are going to receive the information they

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[14] https://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2014/9/huebert.pdf.

need to exercise their First Amendment rights under *Harris* and *Janus*, individuals and organizations outside of government must be allowed to present it to them. And, again, outside individuals and groups can only effectively communicate that information if the state gives them the same access to workers' names and contact information that it gives to unions. That will only happen if the Court grants certiorari and reverses the lower court's decision.

CONCLUSION

The petition for certiorari should be *granted*.

Respectfully submitted,

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