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 FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a law that skews the debate over the value of public-sector unions and undermines public-sector employees' opt-out rights by giving incumbent unions exclusive access to information necessary to communicate with public-sector employees is consistent with the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

RULES & STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS[1]

The National Right to Work Legal Defense Foundation, Inc. has been the Nation's leading litigation advocate for employee free choice since 1968. To advance this mission, Foundation staff attorneys have represented individual workers before this Court in several cases involving their First Amendment freedoms.[2] Foundation attorneys have also represented independent Medicaid and childcare providers in cases challenging the constitutionality of government imposed exclusive representatives on individuals who are not government employees.[3]

The Foundation has an interest in the question presented here because it likewise concerns providers' ability to exercise their First Amendment rights. When state laws like Washington's Initiative 1501 (I-1501) give incumbent labor unions special privileges and discriminate based on viewpoint, it abridges

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[1] Both parties provided consent to the filing of this amicus brief under Supreme Court Rule 37.3(a). Under Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus made a monetary contribution to its preparation or submission.

[2] *E.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Loc. 1000*, 567 U.S. 298 (2012); *Commc'ns Workers v. Beck*, 487 U.S. 735 (1988); *Chi. Tchrs. Union, Loc. No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984).

[3] *E.g.*, *Mentele v. Inslee*, 916 F.3d 783, 789 (9th Cir. 2019); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018); *Hill v. SEIU*, 850 F.3d 861, 864 (7th Cir. 2017); *D'Agostino v. Baker*, 812 F.3d 240, 242–43 (1st Cir. 2016); *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016) (unpublished per curiam order).

workers' ability to exercise their rights not to engage in expressive association with labor unions.

The Foundation also has an interest in this case because it concerns a tactic to which several states have turned to resist and undermine the constitutional rights recognized by this Court in *Harris* and *Janus*. Those cases held that providers and public-sector employees have a First Amendment right not to subsidize unions and their speech. But since this Court handed down those decisions, states have enacted laws to stifle these workers' ability to exercise their First Amendment freedoms. Washington's I-1501 is one of the most egregious examples of those laws. If the decision below stands, it will allow states and labor unions to erode the constitutional protections workers fought so hard to gain in *Harris* and *Janus*.

The Court should grant the Petition and clarify that workers' First Amendment rights trump labor-union-sponsored legislation designed to resist this Court's precedents.

SUMMARY OF ARGUMENT

For four decades, unions were allowed to unconstitutionally exact money for their expressive activities from public employees' wages. It is "hard to estimate how many billions of dollars"[4] unions were allowed to unconstitutionally seize and keep before this Court ended that unconstitutional practice—first for

[4] *Janus*, 138 S. Ct. at 2486.

homecare providers in *Harris v. Quinn*[5] and then for public-sector employees in *Janus v. AFSCME*.[6]

Not satisfied with that windfall, unions have since colluded with states to resist this Court's holdings in those cases. And the lower courts have been all too willing to uphold those unconstitutional laws. I-1501 is a prime example. Special interest groups designed that law to keep workers in the dark about their constitutional rights under *Harris* and *Janus*, and promote only incumbent labor unions' views on exclusive representation. It is therefore vital that the Court grant the Petition and further vindicate workers' First Amendment rights against this state-sponsored resistance.

A. The effect that exclusive—i.e., monopoly—representation has on workers' First Amendment rights is readily apparent. As of 2020, over 7.9 million public employees were required, as a condition of their employment, to accept a union as their representative for speaking to the government.[7] Many of these employees are not union members. And as this Court recognized in *Janus*: "designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights,"[8] and inflicts a "significant impingement on associational freedoms."[9]

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[5] 573 U.S. 616 (2014).

[6] 138 S. Ct. 2448 (2018).

[7] U.S. Dep't of Lab., *Economic News Release Table 3*, *Union Affiliation*, Bureau of Lab. Stat. (Jan. 22, 2021), https://tinyurl.com/r5he3s3n.

[8] 138 S. Ct. at 2469.

[9] *Id.* at 2478.

Monopoly representation gives an incumbent union the exclusive power to speak, as workers' bargaining agent, on topics of public concern. Indeed, "[i]n addition to affecting how public money is spent, union speech in collective bargaining addresses many . . . important matters," such as "education, child welfare, healthcare, and minority rights, to name a few," that are "of great public importance."[10]

And states are imposing monopoly representatives on workers who are not public employees. States like Washington are now dictating which advocacy group represents certain professions in their relations with the state. Since the early 2000s, several states have extended exclusive representation beyond public employees to:

- Independent Medicaid providers, many of whom are parents who care for their children in their own homes;
- Individuals who operate home-based childcare businesses; and
- Individuals who operate adult foster homes for persons with disabilities.

In *Harris*, the Court recognized that these individuals have a First Amendment right not to subsidize union speech.[11] But this right means little if states and unions can purposefully keep workers in the dark

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[10] *Id.* at 2475; *see also* Pet. App. 54 (Bress, J., dissenting) (describing the Unions' speech here on topics such as "minimum wage," "vot[ing] for Governor Jay Inslee," "gun control," and "tax breaks").

[11] *Harris*, 573 U.S. at 647.

so that they do not *know* of their rights under *Harris*. That is what is happening here. Unions designed Washington I-1501 to prevent homecare providers from learning about, and thus from exercising, their First Amendment rights. It does so by granting only incumbent union representatives the ability to obtain the information necessary to effectively communicate with this widely dispersed workforce.

What's more, in Washington around 45,000 homecare providers are subject to I-1501. That large number means the statute effectively destroys any effort by these providers to decertify a union—i.e., escape from monopoly union representation—if they cannot garner the information required to reach other bargaining unit members. Decertification requires that 30% of providers sign cards or petitions that support removing the union representative. I-1501 makes such a signature campaign a virtual impossibility because no one—other than the entrenched, incumbent union representative—can obtain providers' contact information. I-1501 thus creates a "Hotel California" scheme in which these workers can "check in" to association with a union, but they "can never leave" through an election.

B. This case also exemplifies a broader resistance to this Court's holdings in *Harris* and *Janus*. States and unions have enacted various other schemes to insulate themselves from workers' free choice. For example, many state and local governments are placing barriers to employees opting out of subsidizing a un-

ion by refusing to comply with *Janus'* waiver requirement.[12] Several states have enacted regulations and legislation that prohibit workers from stopping the seizure of union dues from their wages for most of the year, or that preclude state and local governments from evaluating whether workers affirmatively consented to union dues deductions. Some lower courts, unfortunately, have upheld these state and union tactics—tactics that undermine *Harris* and *Janus*.

This case allows the Court to disabuse states and unions of the notion that they can enact unconstitutional barriers to workers' free choice to not subsidize unions' speech or to opt out of associating with a union. The Court should therefore grant the Petition.

ARGUMENT

This case raises an exceptionally important question concerning workers' First Amendment freedoms.

A. I-1501's viewpoint discrimination places an unconstitutional burden on workers' ability to exercise their First Amendment rights.

Petitioners' brief and Judge Bress' dissent below leave no doubt that this case presents an important question under the First Amendment.[13] But Amicus writes to explain more fully what Washington's viewpoint discrimination means for workers' ability to exercise their free choice.

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[12] *Janus*, 138 S. Ct. at 2486 (Unions and employers cannot deduct union fees or payments from an employee's pay, or through another method, "unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.") (citations omitted).

[13] Pet. Br. 33–36; Pet. App. 48–50.

1. The Court recognized in *Janus* that "designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights,"[14] and inflicts a "significant impingement on associational freedoms."[15] Indeed, the designation of a union as workers' monopoly bargaining representative creates a mandatory agency relationship between the union and the represented individuals.[16] Through this mandatory agency relationship, the union gains the "exclusive right to speak for all the employees in collective bargaining,"[17] and the right to contract for them.[18] This includes individuals, like some Petitioners here, who oppose the union's advocacy and bargaining agreements.[19]

An exclusive representative's rights are also "exclusive" in the sense "that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer."[20] Exclusive representation thus "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."[21]

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[14] 138 S. Ct. at 2469.

[15] *Id.* at 2478.

[16] *See ALPA v. O'Neill*, 499 U.S. 65, 74–75 (1991).

[17] *Janus*, 138 S. Ct. at 2467.

[18] *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

[19] *Id.*; *see also* Pet. Br. 6.

[20] *Janus*, 138 S. Ct. at 2460; *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975).

[21] *Allis-Chalmers*, 388 U.S. at 180.

In this way, "an individual employee lacks direct control over a union's actions,"[22] and exclusive representatives can engage in advocacy that represented individuals oppose.[23] These representatives also can enter into binding contracts that harm their principals' interests.[24] For example, an exclusive representative can waive nonconsenting individuals' rights to bring discrimination claims in court.[25] A represented individual likewise "may disagree with many of the union decisions but is bound by them."[26]

Given an exclusive representative's authority to speak and contract for nonconsenting individuals, the Court has long acknowledged that this mandatory association restricts individual liberties.[27] The Eleventh Circuit reached the same conclusion as *Janus* in *Mulhall v. Unite Here Loc. 355*, holding that an employee had "a cognizable associational interest under the First Amendment" in whether he is subjected to a union's exclusive representation.[28] *Mulhall* recognized

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[22] *Teamsters, Loc. 391 v. Terry*, 494 U.S. 558, 567 (1990).

[23] *See Knox*, 567 U.S. at 310.

[24] *See Ford Motor Co. v. Huffman,* 345 U.S. 330, 338–40 (1953).

[25] *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 271 (2009).

[26] *Allis-Chalmers*, 388 U.S. at 180.

[27] *See 14 Penn Plaza,* 556 U.S. at 271 (exclusive representatives can waive individuals' legal rights because "[i]t was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands"); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (exclusive representation causes a "corresponding reduction in the individual rights of the employees so represented"); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (under exclusive representation, "individual employees are required by law to sacrifice rights which, in some cases, are valuable to them").

[28] 618 F.3d 1279, 1286–87 (11th Cir. 2010).

that the union's "status as his exclusive representative plainly affects his associational rights," because the employee would be "thrust unwillingly into an agency relationship" with a union that may pursue policies with which he disagrees.[29]

2. In recent years, several states have extended exclusive representation beyond the public workforce to individuals who merely receive government payments for their services to citizens. This includes independent Medicaid providers whom persons with disabilities or their guardians employ to assist with daily living activities.[30] But states do not employ these homecare providers. In fact, many are the beneficiary's parent, sibling, or other family members.[31] In California's In-Home Supportive Services Program, for example, 47% of personal care providers are family members and 25% are friends or neighbors.[32]

Even though those caregivers are not public employees—they merely receive Medicaid payments for their services—fifteen states have imposed exclusive

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[29] *Id.* at 1287.

[30] *See, e.g.*, *Harris*, 134 S. Ct. at 2623–25 (discussing Illinois' program); *see also generally* Robert Wood Johnson Found., *Developing and Implementing Self-Direction Programs and Policies* 1–5 to 1–10 (2010), rb.gy/41j5ks; U.S. Dept. of Health & Hum. Servs., *Understanding Medicaid Home & Cmty.* Servs. 177–80 (2010), rb.gy/zcllac.

[31] *Harris*, 134 S. Ct. at 2624–25; *see also* Pet. App. 53 (Bress, J, dissenting) ("Most of [the homecare providers] do not work in what we would regard as typical workplaces, as they are often one family member caring for another in the privacy of their homes.").

[32] Pamela Doty et al., U.S. Dep't of Health & Hum. Servs., *In-Home Supportive Servs. for the Elderly & Disabled*, 48 (1999), http://aspe.hhs.gov/daltcp/reports/1999/ihss.pdf.

representatives on them.[33] Three states, New Jersey, Oregon, and, as most relevant here, Washington, have also compelled proprietors of adult foster homes—which provide care to the disabled and elderly in residential settings[34]—to accept exclusive representatives to bargain with those states over Medicaid reimbursement rates for their services.[35]

Several states have also enacted schemes that impose monopoly representatives on home-based childcare providers. Most states operate programs that subsidize the childcare expenses of low-income families under the federal Child Care and Development Fund Act, 42 U.S.C. § 9857 et seq.[36] Families enrolled in these programs can generally use their subsidy to

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[33] *See* Maxford Nelsen, *Getting Organized at Home*, Freedom Found. (July 18, 2018), https://www.freedomfoundation.com/labor/getting-organized-at-home; *see also* Cal. Welf. & Inst. Code § 12301.6(c)(1) (West, 2018); Conn. Gen. Stat. § 17b-706b (2014); 5 Ill. Comp. Stat. 315/3 (2018); Md. Code Ann., Health-Gen. § 15-901 (West 2017); Mass. Gen. Laws ch. 118E, § 73 (2015); Minn. Stat. § 179A.54 (2013); Mo. Rev. Stat. § 208.862(3) (2018); Or. Rev. Stat. § 410.612 (2020); Vt. Stat. Ann. tit. 21, § 1640(c) (2013); Wash. Rev. Code § 74.39A.270 (2018); Ohio H.B. 1, § 741.01-06 (July 17, 2009) (expired); Exec. Budget Act, 2009 Wis. Act 28, § 2241 (repealed 2011); Pa. Exec. Order No. 2015-05 (Feb. 27, 2015); Interlocal Agreement between Mich. Dep't of Cmty. Servs. & Tri-Cty. Aging Consortium (June 10, 2004) (expired).

[34] *See* Janet O'Keeffe et al., U.S. Dep't of Health & Hum. Servs., *Using Medicaid to Cover Services for Elderly Persons in Residential Care Settings* (2003), https://aspe.hhs.gov/report/using-medicaid-cover-services-elderly-persons-residential-care-settings-state-policy-maker-and-stakeholder-views-six-states.

[35] *See* Or. Rev. Stat. § 443.733 (2020); Wash. Rev. Code § 41.56.029 (2007); N.J. Exec. Order No. 97 (Mar. 5, 2008).

[36] *See* U.S. Gov't Accountability Off., *Child Care: State Efforts to Enforce Safety & Health Requirements* 4–6 (2004).

pay the childcare provider of their choice, including: (1) home-based "family child care" businesses; and (2) "relative care providers" who, as the name implies, are family members who care for related children in their own homes.[37] In 2005, states began imposing exclusive representatives on these childcare providers for petitioning the states over their childcare regulations and their subsidy rates for indigent children. To date, nineteen states—including Washington—have authorized mandatory representation for home-based childcare providers, though some states rescinded or allowed these laws and executive orders to expire.[38]

These providers are not government employees. In fact, family childcare providers are not employees at all but are proprietors of small daycare businesses who sometimes employ their own employees.[39] A family childcare provider's only real connection to the

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[37] *See* 45 C.F.R. § 98.2 (2016) (defining "eligible child care provider" and "family child care provider").

[38] Cal. Educ. Code § 8430 et seq. (West 2021); Conn. Gen. Stat. § 17b-705 (2012); 5 Ill. Comp. Stat. 315/3 (2018); Mass. Gen. Laws ch. 15D, § 17 (2013); Me. Rev. Stat. Ann. tit. 22, § 8308(2)(C) (repealed 2012); Md. Code Ann., Educ. § 9.5-705 (West 2016); Minn. Stat. § 179A.52 (expired); N.M. Stat. Ann. § 50-4-33 (2009); N.Y. Lab. Law § 695-a et seq. (2010); Or. Rev. Stat. § 329A.430 (2020); R.I. Gen. Laws § 40-6.6-1 et seq. (2013); Wash. Rev. Code § 41.56.028 (2007); Ohio H.B. 1, § 741.01-.06 (July 17, 2009) (expired); Exec. Budget Act, 2009 Wis. Act 28, § 2216j (repealed 2011); Iowa Exec. Order No. 45 (Jan. 16, 2006) (rescinded); Kan. Exec. Order No. 07-21 (July 18, 2007) (rescinded); N.J. Exec. Order No. 23 (Aug. 2, 2006); Pa. Exec. Order No. 2007-06 (June 14, 2007) (rescinded); Interlocal Agreement Between Mich. Dep't of Human Servs. & Mott Cmty. Coll. (July 27, 2006) (rescinded).

[39] *See, e.g.*, *Parrish v. Dayton*, 761 F.3d 873, 875 (8th Cir. 2014).

state is that one or more of their customers may partially pay for their daycare services with public-aid money.

These schemes targeting these providers affect hundreds of thousands of individuals. One study estimated that 358,037 homecare providers were subject to union dues exactions in 2017.[40] In Washington alone, around 45,000 homecare providers are subject to I-1501.[41]

3. Because exclusive representation has wide-ranging effects on the associational rights of hundreds of thousands of workers, it is vital that this Court take this case and make clear that states cannot discriminate in favor of unions' viewpoint in communicating with these vast, independent workforces. If I-1501 stands, it will give the states and unions a powerful weapon against employee free choice—free choice this Court recognized is required by the First Amendment in *Harris* and *Janus*.

As Judge Bress noted below, I-1501's text prevents organizations like Petitioner Freedom Foundation and this Amicus, and all others, from informing providers about their First Amendment right not subsidize union speech—while giving incumbent unions the ability to contact those providers and promote their views on exclusive representation.[42] This information disparity has substantial consequences for employees' knowledge about their rights. As the Freedom Foundation asserted below, "efforts to educate in-home care providers about the Supreme Court's

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[40] *See* Nelsen, *supra*, at 5.

[41] Pet. App. 52–53 (Bress, J, dissenting).

[42] *Id.* at 56–57.

[2014] decision in *Harris* led to a dramatic drop in union membership. As of January 2017, 63.2% of family childcare providers are reported to have left SEIU 925 post-*Harris*."[43] That proportion of providers exercising their First Amendment rights grew to 65.5% by April 2018.[44]

But if providers do not have knowledge to make an informed choice about their First Amendment rights—and the state only allows them to hear the self-interested union officials' views—it distorts the "marketplace of ideas" providing unions with "extreme favoritism as to who may receive critical and otherwise unavailable speech-enabling information."[45] Indeed, I-1501's speaker-based distinction "powerfully favors those views inherent to incumbent unions while creating significant obstacles to speech for anyone with opposing views" that might inform employees of their ability to exercise their First Amendment rights.[46]

4. Because exclusive representation impinges on association freedoms, it is vital that workers have a way to rid themselves of an unwanted union if they so choose.[47] Yet I-1501 makes this nearly impossible for homecare providers because it denies them the means to engage in the legal process required to do so.

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[43] *Id.* at 56.

[44] *Id.*

[45] *Id.* at 50, 67–68.

[46] *Id.* at 68 (emphasis deleted).

[47] *See generally Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937); *Russell v. Nat'l Mediation Bd.*, 714 F.2d 1332 (5th Cir. 1983).

In Washington, to trigger a decertification election, a provider must collect 30% of his or her fellow providers' signatures, which could number in the thousands.[48] And those thousands of homecare workers—unlike in a traditional workplace in which employees are typically located in one or a few facilities—are scattered throughout the State. Because of this geographical disbursement, these individuals are "difficult to identify or locate" and "[t]he State's information about the identities and contact information for in-home care providers is thus the golden ticket to communicating with them."[49] And in turn, without this provider information, it becomes a practical impossibility for providers to gain the signatures required if they do not know from whom to collect signatures.

I-1501 thus creates a "roach motel" system: A labor union has the information to gather enough signatures to become the homecare workers' exclusive bargaining representative—but those workers can never access the necessary information to decertify the union. The Court should take this case and make clear the First Amendment does not allow a state to insulate special interest groups from individuals' ability to not associate with a union.

B. Washington's law is just one example of state resistance to workers' First Amendment rights recognized by *Harris* and *Janus*.

As Judge Bress' dissent below makes clear: I-1501 "reflects an obvious effort to make an end-run around

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[48] Pet. App. 55 (citing Wash. Rev. Code § 41.56.070 (Supp. 2020); Wash Admin. Code § 391-25-110(1) (2009)).

[49] Pet. App. 67.

Janus by preventing in-home care providers from knowing they have a *Harris/Janus* right not to pay union agency fees."[50] But I-1501 is only the tip of the iceberg when it comes to state laws seeking to insulate unions from workers' free choice after *Harris* and *Janus*. Indeed, union rent-seeking not only includes obtaining monopolies on public employees' and providers' information, but also extends to state laws and regulations that abridge workers' ability to exercise their First Amendment rights by restricting when they can exercise those rights.

1. Shortly after the Court's ruling in *Janus*, several state attorneys general (and one state agency) issued guidance about how to comply with *Janus.* This includes Illinois' Attorney General (who represented Illinois in *Janus*) and the attorneys general of California, Connecticut, Maryland, Massachusetts, New Mexico, Oregon, Pennsylvania, Vermont, and Washington (who filed an amicus brief supporting the losing respondents in *Janus*).[51] Each of those attorneys general summarily declared *Janus* inapplicable to government deductions of union membership dues.[52]

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[50] *Id.* at 88 n.4; *see also id.* at 89 ("[I-1501]'s [w]hole regime is designed to promote pro-union views and stem the tide of workers leaving the unions in the wake of *Harris* and *Janus*.").

[51] *See* Brief for the State of New York et al., as Amici Curiae Supporting Respondents, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466); Brief for the State of Cal. as Amicus Curiae Supporting Respondents, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466).

[52] *See* Affirming Lab. Rts. and Obligations in Pub. Workplaces, Cal. Att'y Gen. Op. (undated), rb.gy/wwetc5; Guidance Regarding Rts. and Duties of Pub. Emps. after *Janus*, Ill. Att'y Gen. Op. (July 19, 2018), rb.gy/cphkyj; Guidance Regarding the Rts. and

The advisory opinion issued by the Attorney General of Massachusetts is typical. It declares that:

> The *Janus* decision does not impact any agreements between a union and its members to pay union dues, and existing membership cards or other agreements by union members to pay dues should continue to be honored. The opinion only impacts the payment of an agency service fee by individuals who decline union membership.[53]

The state attorneys general thus effectively declared that the government does *not* need proof of a constitutional waiver, as *Janus* requires, to deduct payments for union speech from workers' wages. This is true even if the worker joined the union without knowledge of his or her *Janus* rights. That knowledge,

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Duties of Pub. Emps. After *Janus*, Conn. Att'y Gen. Op. (undated), rb.gy/qaw4ud; Guidance on the Rts. and Duties of Pub. Emps. After *Janus*, Md. Att'y Gen. Op. (undated), rb.gy/v71fyp; Affirming Labor Rts. and Obligations in Pub. Workplaces, Mass. Att'y Gen. Op. (undated), rb.gy/guzdxw; Pub. Sector Emps. After *Janus*, N.M. Att'y Gen. Op. (undated), rb.gy/vzqh1u; Affirming Lab. Rts. and Obligations in Pub. Workplaces, Or. Att'y Gen. Op. (undated), rb.gy/ovweir; Guidance on the Rts. and Responsibilities of Pub. Emps. Following *Janus*, Pa. Att'y. Gen. Op. (undated), rb.gy/mb5ade; Pub. Lab. Rts. and Obligations Following *Janus*, Vt. Att'y Gen. Op. (undated), rb.gy/umfmzo; Affirming Lab. Rts. and Obligations in Pub. Workplaces, Wash. Att'y Gen. Op. (July 17, 2018), rb.gy/saakuh; *see also* Guidance for Pub. Emps., N.Y. Dep't of Lab. (undated), https://www.nyspffa.org/main/wp-content/uploads/2018/07/nys_dol_janus_guidance.pdf.

[53] Affirming Lab. Rts. and Obligations in Pub. Workplaces, Mass. Att'y Gen. Op. (undated), rb.gy/guzdxw.

of course, would have been impossible before this Court decided *Janus*. This narrow and misguided interpretation of *Janus* renders the Court's waiver requirement effectively meaningless, because unions can ignore the requirement by simply including a union membership authorization on the same form that authorizes government dues deductions. That is the normal state of affairs: Unions almost always couple membership and dues deductions authorizations on one document.

The notion that *Janus* has no application to government deductions of union membership dues is untenable. The First Amendment protects all public employees and providers treated as public employees—union members and nonmembers alike—from having money for union speech taken from them without their affirmative consent. Under *Janus*, affirmative consent requires clear and compelling evidence that the workers knowingly waived their First Amendment rights.[54] The waiver standard applies to all of these workers.

Alaska's attorney general recognized as much in a formal opinion.[55] He correctly concluded that, under *Janus*, the state could not lawfully deduct union dues from its employees' wages without proof the employees knowingly waived their First Amendment rights.[56] But his position is in the minority among states that collect payments for unions from their employees.

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[54] 138 S. Ct. at 2486.

[55] *See* First Amendment Rts., Alaska Att'y Gen. Op. 2019 WL 4134284 (Aug. 27, 2019).

[56] *Id.*

2. Besides flouting *Janus*' waiver requirement, several states also responded to the decision (in some cases preemptively) by passing laws that severely restrict when workers can stop subsidizing union speech. Delaware permits workers to stop the deduction of union dues from their wages only during a 15-day annual escape period or the period set in the authorization.[57] Hawaii allows only a 30-day annual escape period.[58] New Jersey permits stopping government dues deductions during only 10 days per year.[59] An Illinois' law authorizes a limited 10-day escape period.[60] These states effectively prohibit workers from exercising their First Amendment rights under *Janus* for 335 to 355 days of the year.

3. Equally pernicious are state laws that seek to undermine *Janus* by granting unions control over government deductions of union dues from workers. A California law, for example, requires public employers to blindly rely on union claims that workers consented to dues deductions and prohibits demanding proof that the worker did so.[61] That law also requires that public employers direct to unions all worker requests to stop dues deductions and prohibits stopping deductions except upon a union's order.[62] Rather than comply with *Janus* by ensuring that workers consented to union dues deductions, California has done the opposite by mandating that public employers turn a blind

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[57] Del. Code Ann. tit. 19, § 1304 (2018).

[58] Haw. Rev. Stat.§ 89-4(c) (2018).

[59] N.J. Stat. Ann. §52:14-15.9e (West 2018).

[60] 5 Ill. Comp. Stat. 315/6 (2019).

[61] Cal. Gov't Code § 1157.12 (West 2018).

[62] *Id.*

eye to whether a dues deduction violates workers' First Amendment rights.[63]

4. These laws and the lower courts' opinions upholding them are—like I-1501—part of a broader trend by states, unions, and lower courts undermining *Harris* and *Janus*. This case allows the Court to establish that states cannot put unconstitutional burdens on workers' ability to exercise their rights recognized by those cases and reaffirm that this Court meant what it said in *Janus*: "The right to eschew association for expressive purposes is . . . protected" by the First Amendment.[64]

CONCLUSION

This Court has consistently reaffirmed that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[65] I-1501's viewpoint discrimination undermines this principle and thus this case warrants the Court's review.

For the reasons stated in this brief, and those stated by the Petitioner, the Court should grant the Petition.

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[63] *See Hudson*, 475 U.S. at 307 n.20 ("[T]he government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights.").

[64] 138 S. Ct. at 2463.

[65] *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Respectfully submitted,

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