No. 20-1334

In the Supreme Court of the United States

BRADLEY BOARDMAN, A WASHINGTON INDIVIDUAL PROVIDER, ET AL., PETITIONERS

v.

JAY INSLEE, GOVERNOR OF WASHINGTON, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PROTECT THE 1ST AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a law that skews the debate over which, if any, union should represent quasi-public employees, and over the various rights of such employees, by giving incumbent unions exclusive access to information necessary to communicate with such employees, is consistent with the First Amendment.

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

Amicus Protect the 1st, Inc. (PT1) is a nonprofit, nonpartisan 501(c)(4) organization that advocates for protecting First Amendment rights in all relevant settings. PT1 thus defends the speech and association rights of people from across the ideological spectrum, including people who may not even agree with the organization's views.

This case is of particular concern to PT1 because it involves a constitutional challenge to a Washington law that hinders the exercise of multiple First Amendment rights, including the right to freely speak and the right to voluntary association or dissociation. The law, Initiative 1501, does so by design—its stated purpose was to insulate incumbent unions from criticism and competition and to undermine attempts to provide union-represented home care providers with information and alternative viewpoints, including whether to pick a new union as their representative.

The law has succeeded by providing the incumbent union nearly exclusive access to those who would vote for or against its representation, who might choose a competing representative, or who might elect to exercise their right not to fund the union at all.

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[1] All parties consented to the filing of this brief and were notified of it more than 10 days before the brief was due. No counsel for a party authored the brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to fund its preparation or submission. *Amicus* is not publicly traded and has no parent corporations. No publicly traded corporation owns 10% or more of *amicus*.

Whatever one's views on unions, however, the State should not be allowed to restrict communication to and among workers in a bargaining unit in a way that favors the incumbent, excludes rivals, and denies workers information to the exercise of their rights vis-à-vis the union.

Amicus thus agrees with Petitioners that this case is important both because Initiative 1501 violates the "core First Amendment prohibition on viewpoint discrimination" and because it frustrates the "promise" of *Harris* v. *Quinn*, 573 U.S. 616 (2014), and *Janus* v. *AFSCME, Council 31*, 138 S.Ct. 2448 (2018). Pet.33. It further agrees that the Ninth Circuit's application of *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), is incoherent because, here, there is only one way to contact the "widely dispersed, isolated, and constantly changing universe of providers"—through access to their contact information. Pet.16.

Amicus writes separately to emphasize two additional reasons for granting review. *First*, this case is important because it will affect hundreds of thousands of individual home care providers throughout the country that, like several of the Petitioners, are treated as public employees solely for purposes of collective bargaining. If the law in this case is allowed to stand, it will serve as a model for protecting incumbent unions in comparable circumstances throughout the country.

Second, laws like the one here undermine the foundational premise of unionization—consent to collective action—by insulating the incumbent union from any meaningful challenge and effectively

destroying the likelihood that there will ever be another election to replace or simply oust that union's exclusive representation of workers who may no longer support it. The problem is especially pernicious in the context of home-based providers, who generally do not work in the same location as their fellow union members and do not even work for the same companies. They thus lack the ability to communicate with each other or to organize face-to-face, opportunities that are generally available in more concentrated work environments. Pet.5; Pet.App.53 (Bress, J., dissenting). The statute and decision below thus convert a putatively "democratic" choice for collective representation into a permanent oligarchy.

REASONS TO GRANT THE PETITION

I. The Question Presented Is Important Because It Could Impact The First Amendment Rights Of Hundreds Of Thousands Of Quasi-Public Employees Nationwide.

The Petition and the dissenting opinion clearly describe the doctrinal importance of this case. See Pet.17-24; Pet.App.48-50 (Bress, J., dissenting). But this Court's review is warranted for an additional, practical reason: The legal question presented will impact hundreds of thousands of quasi-public employees nationwide.

In the United States, there are nearly 4.6 million direct care workers.[2] That number has grown by more

[2] Stephen Campbell *et al.*, *Caring for the Future: The Power and Potential of America's Direct Care Workforce* 18 (2021).

than 50% since 2009.[3] Of those workers, more than 2.25 million work directly in the home.[4] While the precise number of such workers funded by Medicaid, and hence sometimes deemed quasi-public employees, is difficult to determine,[5] the number is certainly very high given the many state laws directed at such workers.

For example, like Washington, many States treat home healthcare workers as public employees for collective bargaining purposes.[6] And the available data show that the number of quasi-public employees in these states is enormous: In California alone, 375,000 home healthcare employees are public

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[3] *Ibid.*

[4] *Ibid.*

[5] See *id.* at 38.

[6] See Mo. Ann. Stat. §208.862(3) ("[P]ersonal care attendants shall be employees of the council solely for purposes" of collective bargaining); 5 Ill. Comp. Stat. §315/3(n) (same); 20 Ill. Comp. Stat. Ann. §2405/3(f) (same); Conn. Gen. Stat. §17b-706b(b) (same); Cal. Welf. & Inst. Code §12301.6(c)(1) (same); Mass. Gen. Laws ch 118E, §73(b) (same); Or. Rev. Stat. §410.612(2) (same); Md. Code Ann., Health-Gen. §15-901 (same); Vt. Stat. Ann. tit. 21, §1640(c) (same). Many States likewise treat home childcare providers and daycare workers as public employees for collective bargaining purposes. See Conn. Gen. Stat. §17b-705a(b); 5 Ill. Comp. Stat. §315/3(n); Mass. Gen. Laws ch. 15D, §17(b); N.M. Stat. Ann. §50-4-33(A); N.Y. Lab. Law §§695-a *et seq.*; Or. Rev. Stat. §329A.430; R.I. Gen. Laws §§40-6.6-1 *et seq.*; N.J. Exec. Order No. 23 (Aug. 2, 2006) (recognizing the Childcare Workers Union "as the recognized exclusive majority representative of all registered and approved [New Jersey] family child care providers").

employees for unionization purposes.[7] And 125,000 home healthcare workers are exclusively represented by 1199SEIU United Healthcare Workers East in several States, including Maryland and Massachusetts, which, as mentioned above, treat home-care workers as public employees solely for collective-bargaining purposes.[8] Another union, SEIU 1199 New England, serves as the exclusive bargaining representative for thousands of personal care attendants in Connecticut.[9] Vermont's more than 7,500 "independent direct support providers" are represented by the American Federation of State, County and Municipal Employees Council 93, Local 4802/Vermont Homecare United.[10] And, in Oregon, SEIU Local 503 represents upwards of 26,000 home care and child-care workers.[11]

In sum, hundreds of thousands of workers nationwide are similarly situated to the Washington workers here. Their constitutional rights would be

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[7] Maxford Nelson, *Getting Organized At Home: Why Allowing States to Siphon Medicaid Funds to Unions Harms Caregivers and Compromises Program Integrity* 12 (2018), https://www.freedomfoundation.com/wp-content/uploads/2018/07/Getting-Organized-at-Home.pdf.

[8] 1199SEIU, *Homecare*, https://www.1199seiu.org/homecare.

[9] Nelson, *supra* n.7, at 75-77.

[10] *Id.* at 82.

[11] Jeff Mapes, *Two Oregon unions stop collecting dues for some 'fair share' workers following high court's decision*, The Oregonian (Jan. 10, 2019), https://www.oregonlive.com/mapes/2014/07/two_oregon_unions_stop_collect.html.

determined by this Court's resolving the Question Presented.

If the decision below is allowed to stand, moreover, it will serve as a roadmap for incumbent unions and their political allies in these other States to ensure the continuation of their privileged positions. They will have a free hand to suppress effective competition and oppose speech targeted to the audience that matters most: workers currently and exclusively represented by such incumbents. And such suppression of communication and competition is necessarily viewpoint-based: Incumbent unions will not criticize themselves or extoll their rivals, and will not disseminate views or information regarding workers' rights under *Janus*. Pet.32.

This case thus presents an important question worthy of this Court's review: The decision below adopts a restrictive view of the First Amendment that potentially affects hundreds of thousands of quasi-public workers and allows "one side of a debatable public question to have a monopoly in expressing its views." *City of Madison, Joint Sch. Dist.* v. *Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976).

II. The Decision Below Undermines the Foundational Premise of Unionization—Consent to Collective Action.

Beyond threatening the rights of hundreds of thousands of employees, the decision below also undermines the very premise of unionization—workers voluntarily combining to "protect their common interests and improve their working conditions."[12] A statutory scheme like Initiative 1501, which barricades an incumbent union from serious challenge, denies employees the information and free choice among alternatives that are crucial to their ability to give informed consent. And, given the high turnover rate of home care workers, Pet.App.5-6, many of them may *never* have been given a genuine choice whether to accept the incumbent or any union as their representative.

A. Like any representative enterprise, unionization requires the informed consent of those represented.

If any principle animates representative enterprises, it is that no one can represent another without that person's informed consent. Clients consent to be represented by lawyers, principals by agents, and beneficiaries by trustees. It is woven into the very fabric of representative government: Governments "deriv[e] their just powers from the consent of the governed[.]" The Declaration of Independence para. 2 (1776). Indeed, the "streams of *** power" flow, if at all, from that "pure original

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[12] Workplace Fairness, *All About Unions*, https://www.workplacefairness.org/labor-unions#1.

fountain of all legitimate authority," the "consent of the people." The Federalist No. 22, at 112 (Alexander Hamilton) (Gideon ed., 2001).

Free choice and consent are no less important in the union context. Indeed, principles of choice and consent pervade labor laws and govern the relationship between unions and workers. Unions exist to preserve the rights of workers to "bargain collectively through representatives *of their own choosing*." *Allied Chem. & Alkali Workers of Am., Loc. Union No. 1* v. *Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 172 (1971) (cleaned up; emphasis added). And only after workers have chosen their union can unions legitimately "serve the collective interests of workers," *H. A. Artists & Assocs., Inc.* v. *Actors' Equity Ass'n*, 451 U.S. 704, 713 (1981), by exercising their "power to act on behalf of the employees in good faith," *Chauffeurs, Teamsters & Helpers, Loc. No. 391* v. *Terry*, 494 U.S. 558, 567 (1990). Without that consent, unions act not on behalf of the workers, but on their own behalf, supplanting the common interests of the workers with their own parochial interests.

As with democratic government, moreover, consent to union representation has traditionally been based on elections. Federally, the "statutory policy" is "that a union should not purport to act as the collective-bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in the unit." *NLRB* v. *Loc. Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 344 (1978). And in Washington, both "[i]ndividual providers and

family childcare providers [are] represented by an exclusive bargaining representative elected by a majority of providers within the unit." Pet.App.4 (citations omitted).

And, as with ordinary elections, proper consent of those who would be governed means *informed* consent. Thus, in the election context, this Court has taught that "the ability of the citizenry to make *informed choices* *** is essential," *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 (1976) (emphasis added), and that the "right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United* v. *FEC*, 558 U.S. 310, 339 (2010). For elections in general, it is the First Amendment's guarantee of unimpeded debate and free association with competing candidates that provides the information and choice which legitimize any subsequent consent through voting.

The same constitutional guarantees should apply with full force to any governmental efforts to force association and collective action through the union representation of quasi-public workers.[13] The Ninth

[13] Private models of informed consent likewise reflect what is required for genuine consent to union representation. The Model Rules of Professional Conduct, for example, require attorneys to give clients "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rules of Pro. Conduct r. 1(e) (Am. Bar Ass'n, 2017). And doctors must provide patients with the "information [they] need[] to meaningfully consent to medical procedures," including information about "alternative treatment options *** and the risks and likely results of each option." *Stuart* v. *Camnitz*, 774 F.3d 238, 251 (4th Cir. 2014).

Circuit's failure to apply this principle is a powerful reason to grant review.

B. Denying workers information and choice among alternatives delegitimizes any consent upon which the incumbent union's representation is based.

The statute as issue in this case is especially destructive of valid worker consent to union representation. *First*, Washington in-home care providers are difficult to identify because they are scattered throughout the State and share no defining characteristics beyond their positions and their status as public employees for purposes of collective bargaining. As the Ninth Circuit recognized, they have unique workplaces, unique supervisors, and unique clients. Pet.App.5. In fact, most "do not work in *** typical workplaces" at all, but are often "one family member caring for another in the privacy of their homes." *Id.* at 53 (Bress, J., dissenting). Because of this, there is "little reason to know they were quasi-public employees." *Ibid.* Indeed, the providers are so different that they never "gather" or share any "contacts with one another." *Ibid.*

Second, even if these workers can be identified, any information will quickly become "outdated" because in-home care providers have a "notably high turnover rate." *Id.* at 5-6 (majority opinion). Those rates vary year to year but have reached as high as 40%. *Id.* at 53 (Bress, J., dissenting). This high turnover rate "adds to the communication problem." *Id.* at 78. And, given such high turnover, it is entirely possible that the current unions, which have served for years, Pet.5,

are serving without ever having secured the informed consent of a majority of the current workers.

Third, unions have already been chosen for both individual providers and family-child-care providers and Washington law sets a high threshold for challenging those unions. Pet.App.4 (majority opinion); Pet.6. Indeed, to even trigger an election, a rival union needs the written support of 30% of the family child-care workers and 10% of the in-home individual providers statewide. Pet.5-6 (citations omitted); Pet.App.5. That high threshold, coupled with the difficulty of contacting the workers, has proven impossible to meet. Pet.App.5.

Fourth, Initiative 1501 amplifies each of these informational difficulties by making it impossible for anyone other than the government or the incumbent union to obtain the worker's contact information. As the Ninth Circuit acknowledged, the Petitioners had previously relied on information obtained through Washington's public records law to contact other employees and inform them of their representation options. That itself was burdensome. But it provided at least one way for rival unions and other in-home care providers to learn how to contact bargaining unit members, and Petitioners were able to use it successfully. Pet.App.5-6. Initiative 1501 now prohibits that. Pet.App.6-8.

Because of the extreme difficulty—and near impossibility—of obtaining the employees' contact information in any other way, the "State's information about the identities and contact information for in-home care providers is thus the golden ticket to communicating with them[.]" Pet.App.67 (Bress, J.,

dissenting). Without that key information, no rival union will ever be able to secure the support necessary even to *trigger* an election. As a result, the ever-changing body of in-person care providers will be forever represented by unions that they did not vote for initially and that they will never be allowed to vote on in the future.

Even were a retention election occasionally sought, that would not provide legitimate consent without free access by rivals and speakers to the "electorate." In the current system of incumbent-only access, the workers are most unlikely even to learn that there are other representation options available. The effects of Initiative 1501 thus are similar to a state's election ballot listing only one candidate despite several other candidates running. In both situations, the result is a pre-determined winner by default, with the outcome decided before the tallying of any votes. Initiative 1501 thus does real violence to the primary premise of unionization, informed consent to collective action.

To remedy these wrongs, and to preserve the workers' First Amendment rights, the Court should grant the Petition.

CONCLUSION

Granting review and deciding the important questions presented here would not only protect the First Amendment rights of potentially hundreds of thousands of similarly situated workers nationwide but would also ensure that States are not permitted to undercut the fundamental premises of choice and consent that underly union representation in the first place. The Petition should be granted.

Respectfully submitted,

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