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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment requires the State of Washington to disclose in-home caregivers' names and personal contact information to the general public because the State shares that information with the caregivers' exclusive collective bargaining representative.

CORPORATE DISCLOSURE STATEMENT

Respondent Campaign to Prevent Fraud and Protect Seniors has no parent corporation, and no company owns any stock in Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

In this case, a Ninth Circuit panel (per Judge N. Randy Smith) applied settled law to uphold Washington Initiative 1501, which limits public access to government information about in-home caregivers who carry out state programs. Like access-to-information laws in many other jurisdictions, Initiative 1501 contains limited exceptions, including one that allows public agencies to share information with the unions that serve as exclusive bargaining representatives for the caregiver bargaining units. This commonplace exception allows such unions to obtain information necessary for them to carry out their statutory obligation to represent the bargaining units. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2467 (2018) (recognizing that the exclusive representative commonly has the right to "obtain[] information about employees").

Petitioners ask this Court to review the rejection of their claim that Initiative 1501 discriminates on the basis of viewpoint. But they satisfy none of this Court's criteria for review. *First*, there is no circuit split. The cases Petitioners cite now—which were never mentioned in their briefs below or by the panel majority or dissent, and which do not involve unions or access to government information—are either inapposite or affirmatively support the Ninth Circuit's decision. *Second*, the petition raises issues that soon will be moot in most applications, lacks a sufficient record as to key issues, suffers from procedural defects, and ignores the Court's preference for percolation when faced with new and untested claims that risk widespread legal disruption. *Finally*, the

Ninth Circuit's decision is correct under this Court's precedents.

For these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. Background

1. Governments throughout the United States hold information and records of many kinds. As a general matter, there is no constitutional "right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978). However, many jurisdictions provide by statute or regulation for some public access. In the State of Washington, that access is provided by the Public Records Act, which allows public access to government records subject to hundreds of enumerated exceptions and limitations. *See* RCW Chapter 42.56; App. 92-93.

In November 2016, Washington voters adopted Initiative 1501, which received more than 70 percent of the vote and carried every county during an otherwise divisive election.[1] One part of Initiative 1501 added an exception to the Public Records Act for records containing "names, addresses, GPS coordinates, telephone numbers, email addresses, social security numbers, driver's license numbers, or other personally identifying information" of "vulnerable individuals" and "in-home care givers for vulnerable populations." App. 134; RCW 42.56.640. The Initiative defines "in-home care givers for vulnerable

[1] https://bit.ly/3qAVD0i.

populations" to mean "individual providers," "home care aides," and "family child care providers" who carry out certain state programs. App. 134; RCW 42.56.640(2)(a). The Initiative provides that "neither the state nor any of its agencies shall release" covered information. App. 135; RCW 43.17.410.

2. As is often true in public access laws, there are exceptions to the exception. For example, Initiative 1501 does not preclude government agencies from sharing covered information in legal proceedings, or with parties to contracts with the state where the contract requires disclosure, or with entities under contract with the state to provide services to (or to conduct research about) vulnerable residents. *See* App. 135-36; RCW 42.56.645(c), (f)-(g). Nor does the Initiative preclude sharing covered information with an employee fringe benefits provider. App. 135-36; RCW 42.56.645(d).

An additional exception in Initiative 1501 allows public agencies to share covered information with exclusive bargaining representatives certified under Washington's Public Employee Collective Bargaining Act, RCW Chapter 41.56, subject to a confidentiality requirement. App. 135-36; RCW 42.56.645(d). Under the Public Employee Collective Bargaining Act, if workers in a defined bargaining unit democratically choose to have a labor organization serve as the unit's "exclusive bargaining representative," the public employer and exclusive representative have a mutual legal duty to bargain with each other to reach a contract governing unit-wide terms of employment. RCW 41.56.080, .100(1), .140(4), .150(4). The labor organization that serves as exclusive representative is "required to represent … all the public employees in

the unit," regardless of whether they are union members, in negotiating a contract, communicating and enforcing the terms of the collective bargaining agreement, and handling grievances. RCW 41.56.080. The bargaining representative can be held liable for damages for breaching its legal duty to represent unit workers. *Allen v. Seattle Police Officers' Guild*, 100 Wash. 2d 361, 371-74 (1983).

Consistent with this statutory framework established by the Public Employee Collective Bargaining Act, Initiative 1501 allows public agencies to share government information about "individual providers" and "family child care providers" with their bargaining units' certified representatives, even though the information is not available to the public at large. *See* App. 4 (recognizing that these caregivers are "public employees" who have chosen exclusive representatives for purposes of collective bargaining).

3. The information access rules established by Initiative 1501 are commonplace: most collective bargaining laws grant exclusive bargaining representatives access to information about unit employees that is necessary for the representatives to carry out their legal duties.

Under the National Labor Relations Act (NLRA), which provides the model for state public employee collective bargaining laws, the employer's duty to bargain in good faith with its workers' bargaining representative has long been understood to include an "obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *United*

Graphics, 281 NLRB 463, 465 (1986). Thus, "an employer is required to comply with a union's request for a list of the names and addresses of all the employees in the bargaining unit of which the union is the exclusive bargaining representative." *United Aircraft Corp.*, 181 NLRB 892, 902 (1970) (collecting cases), *enforced*, 434 F.2d 1198 (2d Cir. 1970), *cert. denied*, 401 U.S. 993 (1971). The rationale is straightforward: exclusive representatives have specific legal duties—e.g., to bargain unit-wide contracts, to monitor compliance with those contracts, and to handle worker grievances—all of which require that the representatives communicate with represented workers.

Similar considerations have long shaped Washington law. Before voters approved Initiative 1501, Washington's Public Employment Relations Commission followed NLRA precedent by holding that public employers, as part of their statutory duty to bargain, must provide exclusive representatives with relevant information about bargaining unit workers, including their names and addresses, regardless of any Public Records Act exemptions. *See, e.g., Teamsters Union, Local 763 v. King County*, 1988 WL 524516 (Wash. Pub. Emp. Rel. Com. 1988).

In reaching this conclusion, the Commission recognized that an exclusive bargaining representative cannot perform its statutory duties without "a direct, confidential communication link with the entire bargaining unit." *Id.* at *7. The Commission also reasoned that public employers' "duty to provide information to an exclusive bargaining representative," "well established in labor law precedent which pre-dates the adoption of [Washington's] public records statute," supersedes disclosure exemptions in the Public Records

Act. *Id.* at *6; *see also International Association of Fire Fighters, Local 182 v. City of Pullman*, 2000 WL 1448869, at *14 (Wash. Pub. Emp. Rel. Com. 2000). The Commission considered—and rejected—the argument that an exclusive bargaining representative requesting information "relevant to its duty to bargain" is similarly situated to an "ordinary citizen" making a public records request. *Washington State Patrol Troopers Association v. State of Washington*, 1994 WL 900104, at *5 (Wash. Pub. Emp. Rel. Com. 1994). When the representative "requests a document that is relevant to its duty to bargain for members of the bargaining unit it represents, [the representative] has a separate right that an ordinary citizen cannot claim." *Id.*

Thus, exclusive bargaining representatives in Washington have long had access to certain non-public government information relevant to their statutory responsibilities. *See Teamsters Union, Local 763*, 1988 WL 524516, at *5 (access to residential addresses and telephone numbers of employees of a public agency). Consistent with that rule, Initiative 1501 preserves the longstanding rights of exclusive bargaining representatives to access information necessary to carry out their duties. Many other jurisdictions that provide for public employee collective bargaining make the same distinction between certified bargaining representatives and the general public when providing for access to government information about bargaining unit workers. *See infra* at 22 n.7.

B. Proceedings below

1. Petitioners are three in-home caregivers and a non-profit organization that seek to obtain caregivers'

names and personal contact information. App. 3, 5-6.[2] Petitioners allege that such information would assist them in their efforts to convince caregivers not to join the labor organizations that serve as their units' exclusive representatives, and to decertify and replace the family childcare providers' exclusive representative with a different labor organization. App. 5-6.

After unsuccessfully campaigning against Initiative 1501, Petitioners filed suit against state officials in the district court, alleging that the Initiative violates their free speech and free association rights under the First Amendment and their rights under the Equal Protection Clause. App. 95. The Initiative's proponent, Respondent Campaign to Prevent Fraud and Protect Seniors, was granted leave to intervene as an additional defendant. App. 13.

2. The district court (Judge Benjamin H. Settle) granted summary judgment for Respondents. App. 90-126. With respect to Petitioners' First Amendment claim, the district court held that, under *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (plurality), and its progeny, the government is not obligated to disclose

[2] Petitioner Freedom Foundation seeks information about in-home caregivers via unlawful means as well as lawful ones: the Foundation recently was found liable in two separate state court proceedings for "stealing the private information" of caregivers, including by conspiring with a former client "convicted of Conspiracy to Commit Trafficking in Stolen Property in the Second Degree for selling stolen information to the Foundation." *See Schumacher v. Inslee*, __ F. Supp. 3d __, 2021 WL 1019823, at *4 (W.D. Wash. Mar. 17, 2021) (summarizing the state court proceedings and holding that, in light of its wrongful conduct, the Foundation could not serve as class counsel for caregivers in a putative class action).

information. App. 101, 107. The district court further held that, even if Initiative 1501 were subject to review for viewpoint discrimination because it permits disclosure to the exclusive representative, the Initiative creates only a "status distinction[], based on … a legal obligation to provide collective bargaining services," not a viewpoint distinction. App. 110.

The district court also rejected Petitioners' claim under this Court's "methods of communication" precedents (a claim that Petitioners do not raise in this Court). The district court reasoned that the First Amendment does not "compel[] the government to disclose information to help speakers identify their target audience," and non-disclosure "does not burden any methods of communication [Petitioners] may use to speak to caregivers once [Petitioners] have identified them." App. 99. Indeed, Petitioners "fail[ed] to show that their ability to 'communicate' with their intended audience is seriously impinged by [Initiative 1501]," given that Petitioners "may canvass, hire paid canvassers, distribute pamphlets, make speeches, advertise and hold meetings, picket, or send mailers to distribute their speech." App. 100-01.

Finally, the district court rejected Petitioners' equal protection challenge, holding that Washington voters rationally could conclude that "protecting caregiver identities removes an avenue that could be abused to identify homes with vulnerable residents," because many caregivers provide services in the caregivers' own homes. App. 122-24. The district court added that Petitioners "failed to submit any evidence" that voters were motivated by "impermissible animus" in adopting Initiative 1501. App. 125.

3. The Ninth Circuit affirmed in an opinion by Judge N. Randy Smith, joined by Judge Milan D. Smith, Jr. The Ninth Circuit first held that Petitioners had no freestanding right of access to the public records they sought. Rather, "the disclosure of government-controlled information is a 'task which the Constitution has left to the political processes' and … 'a legislative body might appropriately resolve one way or the other' whether to provide public access to information within its control." App. 15-16 (quoting *Houchins*, 438 U.S. at 12 (plurality opinion)).

The Ninth Circuit next held—in agreement with Petitioners—that the government's selective disclosure of information can violate the First Amendment when it is based on viewpoint. App. 24-25. The Ninth Circuit reasoned that the provision of information is "'a kind of subsidy to people who wish to speak to or about'" an issue or group. App. 18 (quoting *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 43 (1999) (*United Reporting*) (Ginsburg, J., concurring)). Adhering to the separate writings in *United Reporting*—and to decisions from the Fourth and Tenth Circuits—the Ninth Circuit reasoned that, "[a]s in other areas where the legislature enjoys broad discretion in deciding whether and how to confer a benefit or subsidy, the government is not insulated from First Amendment scrutiny when it discriminates invidiously in the provision of government-controlled information." App. 21. Thus, while Washington "'is free to support some speech without supporting other speech'" through the provision of information, it may not do so on the basis of "'an illegitimate criterion such as viewpoint.'" App. 18-19 (quoting *United Reporting*, 528 U.S. at 43-44 (Ginsburg, J., concurring) (citing

Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983)).

Applying that rule, the Ninth Circuit found that Initiative 1501 does not discriminate on the basis of viewpoint. *See* App. 25 (explaining that Petitioners' argument "finds no home in the text or operation of the statute"). Rather, under the Initiative, the disclosure of covered information is based "entirely on … *legal status* as certified exclusive bargaining representative[] under Washington law." App. 28-29. The Ninth Circuit added that its conclusion was "underscore[d]" by *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), which recognized that a law may treat a collective bargaining representative differently because of its legal status without discriminating on the basis of viewpoint. App. 28-29 (citing *Perry*).

Finally, the Ninth Circuit rejected Petitioners' equal protection claim. The Ninth Circuit reasoned that Washington voters rationally could have decided that Initiative 1501's protection of covered information would prevent "identity theft and other financial crimes" against vulnerable individuals because in-home care providers often live with their clients. App. 45; *see also* 9th Cir. ER 35. Moreover, Washington voters rationally could have decided "that providing the exclusive bargaining representatives of in-home care providers with access to [covered] information would further the legitimate state interest in the special responsibilities of an exclusive bargaining representative." App. 45 (cleaned up). The Ninth Circuit rejected Petitioners' claim that Initiative 1501 was motivated by animus, emphasizing that "there is no evidence in the record … indicating that the *more*

than 2.2 million Washington voters who voted in favor of Initiative 1501 were motivated by an irrational prejudice or a bare desire to harm" petitioners or their message. App. 47 (cleaned up).

Judge Daniel A. Bress dissented.

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied for several reasons: there is no division of authority in the lower courts necessitating this Court's review; the petition is beset with procedural issues, is not supported by an adequate record, and presents an untested legal theory with the potential for widespread disruption; and the decision below is correct.

I. There is no circuit split.

1. Petitioners do not identify, and we are not aware of, any appellate decision invalidating on viewpoint-discrimination grounds a law addressing access to government information. Further, the decision below is the only appellate case even to have addressed the constitutionality of a law like Initiative 1501, which limits government disclosure of public employees' personal information with an exception for the employees' exclusive bargaining representative. There is thus no division of opinion in the lower courts on the constitutionality of such laws, and neither the majority nor the dissent below suggested the existence of any split.

Nonetheless, Petitioners insist that the decision below departs from opinions "recognizing that discrimination based on 'status' and discrimination

based on 'viewpoint' are often two sides of the same coin." Pet. 30. But the Ninth Circuit did not hold that a purported status-based distinction can never be disguised viewpoint discrimination. The Ninth Circuit held only that the commonplace and long-standing distinction at issue in this case, which allows information about bargaining unit workers to be shared with the union responsible for representing them, is a legitimate distinction based on legal status and is not viewpoint discriminatory. App. 27-35.

To support their claim of a conflict, Petitioners cite three cases. None of those cases was cited in their briefs below or by the Ninth Circuit majority or dissent; nor did any of those cases involve labor unions or access to information. That is reason enough to doubt any split. Yet there is more: although Petitioners rely mainly on a case from the Seventh Circuit, *see Southworth v. Board of Regents of University of Wisconsin System*, 307 F.3d 566 (7th Cir. 2002), the Seventh Circuit itself has since construed that very case in an opinion that supports (and was affirmatively cited by) the Ninth Circuit opinion here, *see Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) (*WEAC*); *see also* App. 29 n.8, 32 & 33 n.10 (panel majority citing *WEAC*).

2. *WEAC* is a helpful starting point for two reasons: *WEAC* confirms that the Ninth Circuit's decision is consistent with well-established law (including in the Seventh Circuit); and *WEAC* distinguishes *Southworth*, the principal case that Petitioners invoke in their attempt to manufacture a split. *See* Pet. 31.

In *WEAC*, the Seventh Circuit considered a First Amendment challenge by public employee unions to Wisconsin Act 10, which barred most public sector unions from using governmental payroll deduction systems. Under Act 10, only employers of "public safety employees" (most of whom had supported then-Governor Scott Walker) could continue to deduct voluntary union dues from their employees' paychecks; in contrast, employers of "general employees" could not do so. 705 F.3d at 642-43. Like Petitioners here, the plaintiffs in *WEAC* cited *Citizens United v. FEC*, 558 U.S. 310 (2010)—as well as *Sorrell v. IMS Health*, 564 U.S. 552 (2012)—to assert that discrimination based on legal status (there, the status of being a "general employee" union) was necessarily the same as discrimination based on viewpoint, because "general employee" unions would predictably hold different viewpoints than "public safety" unions on political issues, as had been true in the past. *See* 705 F.3d at 645-648; *see also* Pet. 31 ("[W]hen the speaker's status is inextricably intertwined with one side of a contentious debate … discrimination on the basis of status and viewpoint are one and the same.").

Like the decision below, which held that the benefit at issue here (access to government information) is a government subsidy, *WEAC* held that the benefit at issue there (use of the state's payroll systems to collect dues) was a government subsidy. *See id.* at 645; *accord* App. 16-17. Like the decision below, *WEAC* held that in providing subsidies the government may not discriminate on the basis of viewpoint. *See* 705 F.3d at 646; *accord* App. 24-25. And like the decision below, *WEAC* held that the law at issue did not discriminate on the basis of viewpoint merely because it limited

access to the subsidy to entities with a particular legal status (there, the legal status of being a "public safety" union). *See* 705 F.3d at 648-652; *accord* App. 29-32.

To support the last conclusion, *WEAC* cited a long line of cases upholding subsidies that draw lines based on status. *See* 705 F.3d at 646-47 (discussing *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Leathers v. Medlock*, 499 U.S. 439 (1991), and *Regan*, 461 U.S. 540). As *WEAC* emphasized, it was clear in many of those cases that "the advantaged group … undoubtedly held different viewpoints than those excluded from the subsidy; yet, the Court upheld the statute." 705 F.3d at 648-649. Therefore, and in reasoning that applies here, *WEAC* warned that "the Unions' argument proves too much: if different speakers necessarily espouse different viewpoints, then any selective legislative funding decision would violate the First Amendment as viewpoint discriminatory. Such an interpretation of the First Amendment would leave legislatures with the unpalatable choice of funding all expressive activity or none at all." *Id.* at 649.

WEAC distinguished *Citizens United* and *Sorrell* (cited by the plaintiffs there and Petitioners here) because each "involved a law that *actively created barriers* to speech rather than mere subsidies." 705 F.3d at 648 (emphasis added). In the subsidy context, the Seventh Circuit reasoned, "*Regan* controls" and "speaker-based distinctions are permissible." *Id.* "That the benefits of [a] subsidy may fall more heavily on groups with one particular viewpoint does not transform a facially neutral statute into a discriminatory one." *Id.* at 650. Finally, *WEAC* rejected arguments that Wisconsin Act 10 should be deemed

viewpoint discriminatory because of statements made by partisans supporting its enactment. *Id.* at 652.

As the Ninth Circuit recognized in repeatedly citing *WEAC*, the decision below is consistent with—and supported by—the law of the Seventh Circuit. *See, e.g.*, App. 32 n.10 (warning that "by the dissent's logic, every selective speech subsidy could be struck down for viewpoint discrimination" (*citing WEAC*, 705 F.3d at 648-649)); App. 33 (rejecting Petitioners' claim that "challenged provisions are viewpoint discriminatory simply because they disadvantage [Petitioners'] message" (citing *WEAC*, 705 F.3d at 650)). Yet Petitioners do not even mention *WEAC*. Instead, in asserting that the decision below represents a split from the Seventh Circuit, they invoke *Southworth*, a much older case distinguishable for reasons given by the Seventh Circuit itself in *WEAC*.

3. In *Southworth*, the Seventh Circuit considered a school funding policy that advantaged student groups that had received funds in the prior two years. *See* 307 F.3d at 593. Applying nonpublic forum analysis, the Court found that this policy "had the effect of viewpoint discrimination," *WEAC*, 705 F.3d at 649, because it disadvantaged political and religious groups, which had previously been forbidden from obtaining school funding, *Southworth*, 307 F.3d at 594. As a result of the new policy, impermissible "viewpoint discrimination from past years ha[d] been institutionalized into the current system." *Id.*

Petitioners read *Southworth* for the proposition that "discrimination on the basis of status and viewpoint are one and the same." Pet. 31. But that is not

what the case says, and it is not how it has been construed by the Seventh Circuit. As *WEAC* clarified, *Southworth* addressed only a discriminatory effect that was *expressly tied* to a prior, explicitly viewpoint-discriminatory policy and thus had "a causal connection" to pre-existing viewpoint discrimination. *WEAC*, 705 F.3d at 649. Indeed, *WEAC* distinguished *Southworth* on this basis: although *WEAC* recognized that "general employee" and "public safety employee" unions may "espouse different viewpoints," *id.* at 648, the Court emphasized that Wisconsin's statutory distinction between these two groups "has no inherent connection to a particular viewpoint," in contrast to the policy in *Southworth*, which was causally connected to a prior, explicitly viewpoint-discriminatory rule, *id.* at 649.[3]

The same distinctions hold true here. Unlike in *Southworth*, there is no claim here that Initiative 1501 is viewpoint discriminatory by virtue of any causal connection to a constitutionally flawed prior policy. *Contra Southworth*, 307 F.3d at 594. And while unions in Washington may have viewpoints on many issues, Initiative 1501 does not condition access to information on the exclusive collecting bargaining representatives' viewpoints.

4. Petitioners cite two additional cases in their unsuccessful attempt to demonstrate a split.

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[3] Most of the *Southworth* decision concerned whether the funding policy impermissibly granted "unbridled discretion" to the student government. 307 F.3d at 573-92. There is no claim here that Initiative 1501 grants any discretion to public agencies.

Petitioners first cite *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*, 470 F.3d 1062 (4th Cir. 2006), which adopted *Southworth*'s analysis. But *Child Evangelism* is inapposite for the reasons just given. *Contra* Pet. 31-32.

Petitioners also cite *Turning Point USA v. Rhodes*, 973 F.3d 868 (8th Cir. 2020), which rejected a challenge to a school policy governing where student groups could set up tables on campus. There, the Eighth Circuit noted that schools cannot prohibit tabling "due to an organization's views." *Id.* at 876; Pet. 32. But the Eighth Circuit then rejected the same effort to collapse status and viewpoint that Petitioners urge here: "True, the Tabling Policy favors the viewpoints of officially-recognized groups over unrecognized groups and individuals. But the Supreme Court has described such favoritism as status-based discrimination, rather than viewpoint-based discrimination." *Id.* (citation omitted).

Turning Point thus supports the decision below. Much as *WEAC* recognized that status-based distinctions are not inherently (or presumptively) viewpoint discriminatory in the context of government subsidies, so did *Turning Point* state the same rule in the context of designated public forum analysis.

5. As noted above, Petitioners assert the existence of a split on whether "discrimination based on 'status' and discrimination based on 'viewpoint' are often two sides of the same coin." Pet. 30. In framing the professed split so nebulously, and in relying on cases that have nothing to do with information disclosure or unions, Petitioners give away the game: there is no

disagreement necessitating this Court's intervention. When courts evaluate information access laws, which constitute subsidies, they do not "often" hold that drawing lines based on status is inherently viewpoint discrimination. Petitioners do not cite a single case supporting that contention—which, if accepted, would call into doubt untold laws, regulations, and policies governing access to state subsidies and benefits. For this reason alone, the Court should deny review.

II. Additional considerations militate against review.

The petition should also be denied because it raises issues that will be moot in most applications by next year, lacks an adequate record as to several of Petitioners' contentions, suffers from procedural problems, and advocates an untested, disruptive legal theory with implications far beyond this case.

1. As an initial matter, the question presented will soon be moot as to the "individual providers" who constitute the great majority of union-represented caregivers covered by Initiative 1501.

In 2018, the Washington Legislature passed a bill that requires the Department of Social and Health Services to contract with a private "consumer directed employer" to employ the individual provider workforce. 2018 Wash. Legis. Serv. Ch. 278 (S.S.B. 6199). The Department was required to "initiate the transition of individual providers to the consumer directed employer no later than July 1, 2021." *Id*. § 30. The

transition has commenced and is expected to be completed by Spring 2022.[4]

Under this new model, individual providers are not "public employees" for purposes of the Public Employee Collective Bargaining Act, so they will not have "a representative certified or recognized under RCW 41.56.080." App. 135-36; RCW 42.56.645(1)(d). Petitioners' claims will therefore soon be moot with respect to most caregivers covered by Initiative 1501.

2. With respect to the remaining, smaller group of family childcare providers, the Court's consideration of the question presented would be constrained by Petitioners' failure to create a record and waiver below.

Petitioners assert that, because of how the public employee collective bargaining law operates, it is too difficult for them to decertify the existing exclusive representative of the family childcare providers unless Petitioners are provided with access to government information. Pet. 5-6. But even if this were a relevant consideration—and it is not, because Petitioners lack any freestanding right of access to public records that might assist their decertification efforts—Petitioners failed to support that claim below. The district court found that "to the extent [Petitioners] believe it is too difficult to decertify caregiver unions, and public access to caregiver identities would significantly improve union elections, those arguments would be appropriate in a challenge involving

[4] Wash. Dept. of Social and Health Svcs., Questions and Answers, https://bit.ly/3x5roRG & https://bit.ly/3y72WiI.

the complete context of the state's collective bargaining laws," and "[t]hat is not the case here." App. 107.

Petitioners' claim as to family childcare providers is also undermined by a waiver made below. The Ninth Circuit concluded (in the context of Petitioners' Equal Protection Clause challenge) that Petitioners had waived their argument that application of Initiative 1501 to this class of public employees lacks a rational basis. *See* App. 45 n.16. Given Petitioners' failure to support their contention that there is no rational basis for Initiative 1501 as applied to family childcare providers, they should not be heard to insist that it was the product of animus or viewpoint discrimination on the part of 2.2 million Washington voters.

3. Another reason for denying review is that Petitioners' question presented rests on a mistaken premise about what kind of personal identifying information is actually at issue.

In this Court, Petitioners repeatedly insist that they require both the identities of caregivers *and* "their contact information" to mount what they consider to be an effective campaign. Pet. i; *see also id.* at 1 ("[A]nyone who wants to reach this audience … must obtain their identities *and contact information* from the state" (emphasis added)); *see also id.* at 5 ("[T]he necessary first step … is getting access to the list of providers and their contact information"); *id.* at 6 ("Absent contact information … providers cannot … make the case").

But, setting aside the lack of evidentiary support for these assertions,[5] Petitioners litigated this case below on the premise that caregiver "contact information" is shielded from disclosure by provisions of Washington law that pre-date Initiative 1501 and that Petitioners have never challenged, such that only caregiver names—not contact information—are truly at issue here.

Petitioners argued to the district court that, because of pre-existing Public Records Act exemptions, the caregivers' "private contact information was already exempted from disclosure" and that "[t]he only true effect of I-1501's PRA provisions was to preclude anyone other than approved groups from being able to learn the *identity*" of caregivers. D.Ct. Dkt. 50 at 1, 7 (emphasis supplied) (citing RCW 42.56.230(3) and RCW 42.56.250(4)).[6] These assertions led the district court to find that "the only additional information the Initiative withholds is [caregivers'] names." App. 93-

[5] The district court found that Petitioners "fail[ed] to show that their ability to 'communicate' with their intended audience is seriously impinged by [Initiative 1501]." App. 100-01. Indeed, Petitioner Freedom Foundation uses a well-funded internet and social media strategy to express its message. *See* https://www.optouttoday.com/.

[6] The pre-existing statutory provisions that Petitioners cited to the district court clearly protect from disclosure the contact information of "individual provider" homecare workers, and those workers are the vast majority of union-represented caregivers covered by Initiative 1501. Whether pre-existing statutory provisions also shield contact information of "family childcare providers" is less clear, but the district court never had reason to consider that issue because Petitioners maintained that those statutory provisions prevent disclosure of contact information for *all* relevant caregivers. *See* D.Ct. Dkt. 50 at 1, 7; Dkt. 63 at 16; Dkt. 72 at 3.

94. And Petitioners repeated the point in argument to the Ninth Circuit. *See* 9th Cir. Oral Arg. Recording at 12:59-13:11 (Petitioners' counsel asserting that "all that my client ever asked for [was] the names[,]" "[n]ot all the other identifying information").

Because Petitioners did not challenge the Public Records Act exclusions that pre-date Initiative 1501, and conceded below that those exclusions would preclude them from obtaining contact information, their question presented (and the rest of their petition) rests on a mistaken premise about what is fairly at issue, contradicts Petitioners' own assertions about what information they believe they need and hope to obtain, and seeks a remedy as to "contact information" that this Court cannot provide without invalidating state statutory provisions concededly outside the scope of Petitioners' lawsuit.

4. Finally, the petition should be denied because Petitioners ask this Court to skip past any percolation and issue a ruling with sweeping, disruptive implications across myriad areas of federal and state law.

As an initial matter, Washington's information access rule is no outlier: many jurisdictions deny the general public access to information about public employees with an exception for those employees' exclusive bargaining representative under state labor law.[7] Indeed, Washington State itself made that

[7] *See, e.g.*, *Cty. of Morris v. Morris Council No. 6*, 371 N.J. Super. 246, 253 (N.J. App. Div. 2004) (requiring disclosure of public employee home addresses, which are exempt under the state public records law, because "[a]t issue is not disclosure to the public at large, but rather disclosure to a bargaining

distinction prior to adoption of Initiative 1501. *See supra* at 5-6. As this Court recognized in *Janus*, the provision of such information is commonplace. 138 S. Ct. at 2467.

Nor would Petitioners' proposed rule stop at information disclosure laws. As the Ninth Circuit recognized, and as the Seventh Circuit similarly observed in *WEAC*, the provision of information is merely one of many government subsidies. *See, e.g.*, App. 21. Through direct funding, tax breaks, and a host of other methods, governments offer all manner of subsidies and benefits that are limited to groups defined by their legal status. If accepted, Petitioners' theory would "render numerous [other] Government programs constitutionally suspect." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *see infra* at 33-36.

Given the pittance of precedent that Petitioners identify (none of which even concerns an information access law), and given that Petitioners say almost nothing about the many other settings in which their rule would apply, the Court should decline their invitation to consider the question presented before it has been considered by other lower courts.

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representative that needs the addresses to accomplish the unions' statutory mandate to represent its members"); *AFSCME Council 18 v. Bd. of Cnty. Commissioners*, 2016 WL 8578769, at *4 (N.M. Pub. Emp. Rel. Bd. 2016); *State, Dept. of Soc. and Rehab. Servs. v. Pub. Emp. Rel. Bd. of Kansas Dept. of Hum. Res.*, 249 Kan. 163, 170 (Kan. 1991); *Servs. Emps. Int'l Union Local 1021 v. Sacramento City Unified Sch. Dist.*, 2018 WL 6499749 (Cal. Pub. Emp. Rel. Bd. 2018).

III. The decision below is correct.

Petitioners do not identify a single case from any state or federal court that invalidates on viewpoint discrimination grounds a law addressing public access to government information. That is not because such laws are rare. Nor is it because persons or groups afforded access under such laws lack strong viewpoints. Instead, the absence of authority to support Petitioners' novel claim reflects settled principles affording the government a measure of latitude in drawing status-based lines when providing subsidies. Although Petitioners try to frame their position narrowly, the rule they seek would radically disrupt those settled principles. For good reason, the decision below rejected this position and adhered to precedent.

A. Status-based distinctions are permitted in the context of government subsidies.

Petitioners rest most of their case on a single claim: discrimination based on status is discrimination based on viewpoint. *See* Pet. 18-21. But that claim is wrong when it comes to government subsidies. In this context, the government may permissibly draw status-based distinctions so long as it does not engage in the separate evil of viewpoint discrimination. The decision below correctly articulated this rule, which follows from longstanding Supreme Court precedent, including but not limited to *Perry*.

In assessing Initiative 1501, the Ninth Circuit first held that the provision of government-controlled information is in the nature of a government "benefit or

subsidy." App. 21 (discussing *United Reporting*, 528 U.S. 32). Petitioners do not dispute that proposition. The Ninth Circuit further held that the government may not engage in viewpoint discrimination in selectively disclosing information. App. 22-25 (discussing *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019), and *Lanphere & Urbaniak v. State of Colo.*, 21 F.3d 1508 (10th Cir. 1994)). Petitioners agree with that holding also.

According to Petitioners, the Ninth Circuit went awry in its application of these rules. They insist that virtually every status-based distinction is viewpoint discriminatory. Pet. 19-20 (citing *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), *Sorrell*, 564 U.S. 552, and *Citizens United*, 558 U.S. 310). But the cases Petitioners cite all involved laws that affirmatively burdened speech through bans or mandatory disclosures. *See NIFLA*, 138 S. Ct. at 2378 (law requiring non-licensed pregnancy centers to display certain notices); *Sorrell*, 564 U.S. at 564 (ban on sale of prescriber-identifying information and pharmaceutical marketers' use of such information); *Citizens United*, 558 U.S. at 318 (prohibition on independent corporate expenditures for electioneering communications). Because such laws can be "instruments to censor"—and because "speech restrictions based on the identity of the speaker are all too often simply a means to control content"—this Court approaches them skeptically. *See id.* at 340.

Initiative 1501, by contrast, does not affirmatively burden speech. It does not prohibit any speech or expenditure for speech. Nor does it compel or condition speech through disclosure requirements. Petitioners

are free to express whatever message they choose in whatever manner they choose. App. 99. Indeed, their claim is that they wish to engage in less speech by targeting only the subset of listeners they could identify if given access to employees' personal information, rather than by expressing their message through mass mailings, advertising, social media, or public events.

As a law concerning access to government information, Initiative 1501 involves a speech "subsidy." App. 18 (quoting *United Reporting*, 528 U.S. at 43 (Ginsburg, J., concurring)). And so long as the government does not engage in the separate sin of viewpoint discrimination, status-based distinctions are "permissible when the state subsidizes speech." *WEAC*, 705 F.3d at 646; *see also id.* ("Nothing in the Constitution requires the government to subsidize all speech equally."). This Court has articulated and applied that principle in many settings. *See, e.g.*, *Finley*, 524 U.S. at 587-588 ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake … [because the Government] has merely chosen to fund one activity to the exclusion of the other."); *Leathers*, 499 U.S. at 444 (emphasizing that a subsidy "that discriminates among speakers is constitutionally suspect only in certain circumstances"); *Rust*, 500 U.S. at 194 (holding that "there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."); *Regan*, 461 U.S. at 549 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not

infringe the right, and thus is not subject to strict scrutiny."); *see also WEAC*, 705 F.3d at 646-648.

Petitioners' position depends on collapsing the subsidy/restriction distinction that anchors this line of authority. Their view is thus foreclosed by the cases just cited. Indeed, if status-based limits were presumptively treated as viewpoint discriminatory in the context of government subsidies, as Petitioners urge, many laws would be endangered and this Court's own precedent would be undermined. *See WEAC*, 705 F.3d at 647 ("[T]he speech subsidy upheld in *Regan* discriminated on the basis of speaker—veterans' groups who engaged in lobbying could claim section 501(c)(3) status but other lobbying groups could not.").

The decision below thus correctly apprehended the line that this Court has drawn between status-based distinctions and viewpoint-based discrimination in the field of subsidy rules like Initiative 1501. Simply put, distinctions drawn by reference to legal status are generally permissible with respect to subsidies, and this Court has never suggested that such distinctions should be approached skeptically; if anything, it has warned against undue judicial intrusion on decisions by the political branches about how to allocate subsidies and other government benefits. *See, e.g.*, *Finley*, 524 U.S. at 588; *Rust*, 500 U.S. at 194, *Regan*, 461 U.S. at 549.

For these propositions, and to further confirm its conclusion, the decision below relied partly on *Perry*. *See* App. 30-32. *Perry* upheld a school's choice to allow only the teachers' collective bargaining representative (and not a rival union) to access an interschool mail

system. *See* 460 U.S. at 45-50. *Perry* rejected arguments that this rule discriminated on the basis of viewpoint, explaining that it is "more accurate to characterize the access policy as based on the status of the respective unions rather than their views." *Id.* at 49. Although *Perry* concerned physical access to a forum, rather than access to information, it exemplifies the principle that "the State has the right to pick and choose which speech is subsidized so long as it does not discriminate on the basis of viewpoint." App. 29 n.8 (citing *Leathers*, 499 U.S. at 450). *Perry* thus stands among many cases holding that status-based distinctions are permitted in the context of government subsidies and are not presumptively invalid.[8]

B. The Initiative draws lines only by reference to status, not viewpoint.

In addition to their general attack on status-based classifications, Petitioners assert that Initiative 1501 draws lines based on viewpoint rather than status. Their theory, which they attribute to *Janus* and *Harris v. Quinn,* 573 U.S. 616 (2014), is that "this is not a context in which status and viewpoint can be separated," because any "incumbent union" will have views "about the value of union membership." Pet. 15.

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[8] Petitioners expend substantial energy criticizing and seeking to distinguish *Perry*, which they treat as the sole authority supporting the decision below. *See* Pet. 25-29. But the decision below is supported by substantial precedent. Further, this Court has cited *Perry* many times, confirming that it is no outlier. *E.g.*, *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (citing *Perry*); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (same).

The decision below rightly rejected this argument, which is flawed for many reasons.

1. Under this Court's precedents, viewpoint discrimination can occur if the law "'on its face' draws distinctions based on the message a speaker conveys," or, "though facially content neutral … cannot be 'justified without reference to the content of the regulated speech,' … or [was] adopted … 'because of disagreement with the message the speech conveys.'" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163-64 (2015). None of these bases is present here.

Initiative 1501 does not "on its face" draw any distinction based upon viewpoint. The Initiative is "completely 'silent … concerning *any* speaker's point of view." App. 26 (citation omitted). The facial neutrality of Initiative 1501 cuts strongly against any claim that it discriminates based on viewpoint. *Compare Reed*, 576 U.S. at 168 (defining viewpoint discrimination as "the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'"), *with* App. 31 n.9 ("There is no underlying ideological test that must be met in order to receive the speech subsidy at issue in this case … the recipient's adherence to a given viewpoint plays no role in determining who receives it.").

Nor is Initiative 1501 justifiable only by reference to speech content. Petitioners could adopt *any* position on the issue of collective bargaining—or the wisdom of *Harris* and *Janus*—and it would make no difference with respect to their ability to obtain information. App. 26-27. The "sole factor" governing access to information is whether the requesting party has "the *legal*

status of an exclusive bargaining representative under section 41.56.080." App. 31.

The conclusion that Initiative 1501 does not reflect impermissible viewpoint discrimination is reinforced by the fact that the Initiative accommodates a commonplace, pre-existing, widespread rule for access to public employee information. Many other jurisdictions mirror Washington in providing exclusive bargaining representatives with access to information about bargaining unit workers that is not available to the general public. *See supra* at 22 n.7. They do so, moreover, for a viewpoint-neutral reason: exclusive bargaining representatives have a special need for such information in order to comply with their responsibilities under state collective bargaining laws.[9]

Nor is Initiative 1501 grounded in any improper motive. Although Petitioners criticize some proponents of Initiative 1501, the decision below properly refused to find that a law "is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate." App. 29 n.8 (citing *Hill v. Colorado*, 530 U.S. 703, 724 (2000)). It would be a stark departure from this Court's precedent to impute viewpoint discriminatory motives to the entire voting population of a state just because advocates publicly or privately expressed views critical of *Harris* or *Janus* (or any other subject). Rather, as the Ninth Circuit held, "there is no evidence in the

[9] For example, the collective bargaining agreements for caregivers contain typical grievance/arbitration procedures that the exclusive representative must administer on behalf of all caregivers in the bargaining unit. *See* https://bit.ly/35YXoec & https://bit.ly/3x646e9.

record (and [Petitioners] certainly cite to none) indicating that the more than 2.2 million Washington voters … were motivated by … 'a bare desire to harm' [Petitioners] or their message against the Unions." *See* App. 47; *see also Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 545 (1982) (rejecting inference that voters had discriminatory purpose where a law was "approved by an overwhelming majority of the electorate" and its purposes—as "stated in its text"—were "legitimate, nondiscriminatory objectives").

At bottom, Petitioners' complaint is that it is now harder for them to identify bargaining unit members. *See* Pet. 22. But Petitioners are free to use all the normal means of expressing their message to potential audiences, and this Court's precedent does "not support the proposition that the First Amendment compels the government to disclose information to help speakers identify their target audience." App. 101. In fact, this Court relied on the principle that the government need not subsidize speech activities in an analogous case holding that unions lacked any right to government assistance in collecting funds through payroll deduction. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) (recognizing that unions may "face substantial difficulties" collecting money to support their speech activities, but emphasizing that they remain "free to engage in such speech as they see fit" and "simply are barred from enlisting the State in support of that endeavor"). Just as the grant or denial of union payroll deductions is not impermissible viewpoint discrimination, the government is free to decide what information to disclose. Petitioners would

understandably prefer governmental aid in spreading their message, but they are not entitled to it.

2. Petitioners also appear to suggest that *Harris* and *Janus* directly require the invalidation of any law that impedes "informing this particular audience of their opt-out rights." Pet 16. Petitioners do not even allege the existence of a split on that proposition, which in all events is mistaken. *Harris* and *Janus* addressed only the rights of individual employees. These precedents did not impose any affirmative constitutional mandate that the government subsidize organizations opposing public sector unions—and neither opinion supports treating the absence of a public subsidy as equivalent to a ban on speech.[10]

To be sure, *Janus* recognized that unions, like many other private actors, engage in speech on matters "of substantial public concern." 138 S. Ct. at 2460. *Janus* further held that the government lacks a sufficient interest in compelling public employees to fund such speech involuntarily. *See id.* at 2466-2469; *Harris*, 573 U.S. at 653-654. Neither *Janus* nor *Harris*, however, held that the government is forbidden from using exclusive representative collective bargaining systems. And in any such system, the representative receives "many benefits," *Janus* 138 S. Ct. at 2467, along with the many burdens of representing an

[10] This lawsuit was filed prior to *Janus*, App. 94, and the petition's references to an "opt-out" system are outdated, *see* Pet. i, 1-3, 7, 15-16, 18, 22-24, 30, 34. After *Janus*, no public employee in Washington State or elsewhere becomes a union member or assumes an obligation to pay union membership dues unless that employee affirmatively and voluntarily opts *in* by choosing to sign a union membership card. *See* 138 S. Ct. at 2486.

entire unit. *Janus* specifically identified "obtaining information about employees" among the "privileges" customarily available to unions serving as exclusive bargaining representatives. *Id.*

In truth, Petitioners' claim is at loggerheads with *Janus* and *Harris*. Those cases did not hold that unions were unique; if anything, their overriding thrust is that unions are *not* unique as compared to other private actors for purposes of compelled speech. *See Janus*, 138 S. Ct. at 2466-2478. There is thus no basis in either opinion for Petitioners' assertion that status-based distinctions involving a union are different in kind than any other status-based distinction.

C. Petitioners' proposed rule would upend this Court's subsidy precedents.

As the Ninth Circuit recognized, this Court has *never* held that laws providing subsidies to groups defined by their legal status are discriminatory just because the subsidy recipients have views. *See* App. 32 n.10 ("[I]t does not matter … whether a speech subsidy happens to affect one particular viewpoint more than another."); *see also WEAC*, 705 F.3d at 648-49. The reason is simple: *everyone* has views. And people who are given special access to government information almost definitionally have views about the relevant subject. If the government cannot draw status-based lines without showing that subsidy recipients lack a viewpoint, many disclosure laws will become subject to constitutional challenge.

Examples are legion. Consider, for instance, the Internal Revenue Code, which generally exempts tax

return information from disclosure but has exceptions for (inter alia) "persons having material interest"—including shareholders of a corporate filer. 26 U.S.C. § 6103(a), (e)(D)(iii). Like Initiative 1501, this distinction can fairly be framed as based upon status—that of the shareholder in relation to the corporate filer. But under Petitioners' rule, it may be struck down as viewpoint discrimination: with rare exceptions, shareholders want their company to do well, whereas competitors and the general public (who cannot access the company's returns) may hold different views.

Or consider another provision of Washington's Public Records Act, which prohibits disclosing the records of public assistance recipients but creates an exception for "duly designated representatives of approved private welfare agencies." RCW 74.04.060(d)(3). On Petitioners' view, this law is likely invalid, since "duly designated representatives" are likely pro-welfare and pro-incumbent welfare agency, and thus have strong views that separate them from anti-welfare or welfare reform groups. Other examples of this issue abound in varied contexts.[11]

And that is just the tip of the iceberg. This Court's First Amendment rules about subsidies apply to direct

[11] *See, e.g.*, Ga. Code Ann. § 50-18-72(a)(5) (motor vehicle accident reports disclosable to those with "need," including media and researchers); Mass. Gen. Laws c. 66 § 10B (government employee contact information disclosable to nonprofit organizations for retired public employees); Minn. Rev. Stat. 13.32(3)(j) (private student data disclosable to volunteer with "legitimate educational interest"). Several states also have freedom of information laws that restrict access to their own citizens. *See, e.g.*, Ala. Code § 36-12-40; N.H. Rev. Stat. Ann. § 91-A:4; Tenn. Code Ann. § 10-7-503.

funding and tax breaks just as forcefully as to information access laws. App. 21. In *Regan*, the Court upheld a law that "subsidized" the lobbying activities of tax-exempt veterans' organizations by exempting them from Section 501(c)(3)'s prohibition on engaging in substantial lobbying. 461 U.S. at 548. The Court reasoned that this did not violate the First Amendment because the exemption applied "regardless of the content of any speech [the veterans' organizations] may use," and it was not "aimed at the suppression of dangerous ideas." *Id.* at 548-49.

If Petitioners' view prevails, *Regan* cannot stand. Veterans' organizations as speakers "undoubtedly held different viewpoints than those excluded from the subsidy." *WEAC*, 705 F.3d at 648. Moreover, those views, like those of unions, undoubtedly concern the allocation of limited tax dollars to serve their members' interests. *See, e.g.*, *Harris*, 573 U.S. at 653-54 (discussing unions' speech on matters of "public concern" that impact the public fisc). Indeed, subsidizing any groups solely on the basis of their legal status under Section 501(c)(3) may be broadly impermissible under Petitioners' theory of viewpoint discrimination, given that groups that enjoy this legal status likely hold different viewpoints than society at large on any number of sensitive issues.

The same goes for many other instances where the Court has recognized the government's prerogative to subsidize (or provide tax breaks) to defined speakers as part of an effort to achieve public policy objectives. *See supra* at 26. If Petitioners' theory can invalidate the subsidy here, it will "render numerous [other] Government programs constitutionally suspect."

Rust, 500 U.S. at 194. It may also lead to a more general retreat from subsidies and selective information access laws. *See United Reporting*, 528 U.S. at 44 (Ginsburg, J., concurring) (cautioning against "imposing an all-or-nothing regime under which 'nothing' could be a State's easiest response"); *see also* App. 32 n.10 (warning that under the dissent's view—advocated by Petitioners—"every selective speech subsidy could be struck down for viewpoint discrimination").

Petitioners' only response to these concerns is an assertion that *Janus* and *Harris* support a unique rule for subsidies involving unions. But that supposed limitation has no basis in the text of either opinion or in any other precedent. And tellingly, Petitioners base their arguments about a split entirely on cases that involve subsidies in non-union contexts. If this Court were to hold that subsidies are viewpoint discriminatory whenever provided to speakers or groups with "inherent" or "intrinsic" or "necessary" views on a subject, that disruption of precedent would sow havoc throughout the legal system. The decision below was therefore right to reject Petitioners' position.

CONCLUSION

The petition for certiorari should be denied.

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