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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF 1
I. The Decision Below Is Profoundly Wrong 2
II. The Decision Below Conflicts With Decisions From Other Courts 8
III. This An Excellent Vehicle To Resolve The Important Question Presented 11
CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Autor v. Pritzker,
740 F.3d 176 (D.C. Cir. 2014) 5

Barr v. Am. Ass'n of Pol. Consultants, Inc,
140 S.Ct. 2335 (2020) 5

Brown v. Ent. Merchs. Ass'n,
564 U.S. 786 (2011) 8

Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five,
470 F.3d 1062 (4th Cir. 2006) 10

Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez,
561 U.S. 661 (2010) 8

Citizens United v. FEC,
558 U.S. 310 (2010) 3

City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp. Rels. Comm'n,
429 U.S. 167 (1976) 4

Fortgang v. Woodland Park Zoo,
387 P.3d 690 (Wash. 2017) 12

Fusaro v. Cogan,
930 F.3d 241 (4th Cir. 2019) 10

Harris v. Quinn,
573 U.S. 616 (2014) 1, 5

Iancu v. Brunetti,
139 S.Ct. 2294 (2019) 5

In re Brunetti,
877 F.3d 1330 (Fed. Cir. 2017) 5

Janus v. AFSCME, Council 31,
138 S.Ct. 2448 (2018)..... 1

Matal v. Tam,
137 S.Ct. 1744 (2017)..... 5, 11

McCullen v. Coakley,
573 U.S. 464 (2014)..... 6

Nat'l Inst. of Fam. & Life Advocs. v. Becerra,
138 S.Ct. 2361 (2018)..... 3, 7

Perry Educ. Ass'n
v. Perry Loc. Educators' Ass'n,
460 U.S. 37 (1983)..... 4

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992)..... 6

Reed v. Town of Gilbert,
576 U.S. 155 (2015)..... 9

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011)..... 2

Southworth
v. Bd. of Regents of Univ. of Wis. Sys.,
307 F.3d 566 (7th Cir. 2002)..... 9

Turning Point USA at Ark. State Univ.
v. Rhodes,
973 F.3d 868 (8th Cir. 2020)..... 10

Wis. Educ. Ass'n Council v. Walker,
705 F.3d 640 (7th Cir. 2013)..... 9

Statutes

Ga. Code Ann. §50-18-72..... 12

S.C. Code §30-4-40..... 12

Other Authority

Wash. Dep't of Soc. & Health Servs., *Full CDE Q&A* (last updated June 2021), https://bit.ly/3i11xEf 12

REPLY BRIEF

Initiative 1501 poses a dual threat to the First Amendment. It not only sanctions blatant viewpoint discrimination, skewing debate on enormously consequential issues, but also eviscerates the important First Amendment protections for quasi-public and public employees that this Court vindicated in *Harris v. Quinn*, 573 U.S. 616 (2014), and *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018). In defending this extreme law and the divided Ninth Circuit decision that upheld it, respondents invite this Court to suspend disbelief and accept their claim that Initiative 1501 reflects innocuous status-based discrimination, rather than pernicious viewpoint discrimination. Far from requiring that level of naïveté, this Court's cases demand deep skepticism of status-based distinctions, which can often cloak impermissible viewpoint discrimination. That skepticism is fully warranted here, where two incumbent unions drafted, bankrolled, and promoted an initiative designed to grant them a monopoly over quasi-public employees' contact information and to blunt the effect of *Harris* and *Janus*.

Respondents' other efforts to resist review fare no better. The decision below breaks with decisions of other circuits that faithfully follow this Court's precedents. And the importance of this case is underscored by the outpouring of amicus support. Respondents' suggestion that invalidating Initiative 1501 would call into question longstanding and uncontroversial state laws is belied by both common sense and the amicus support of the very states whose laws respondents invoke. In reality, it is leaving the

profoundly misguided decision below standing that would have devastating effects on in-home care providers in Washington, on the security of the opt-out rights *Harris* and *Janus* vindicated, and on bedrock First Amendment values.

I. The Decision Below Is Profoundly Wrong.

Initiative 150l's dual threat to First Amendment values is not subtle. The law neuters the opt-out rights *Harris* and *Janus* vindicated by engaging in what Judge Bress aptly described as "transparent viewpoint discrimination." Pet.App.48. The majority's decision white-washing that viewpoint discrimination and green-lighting the gutting of *Harris* and *Janus* cannot stand. *See* Pet.17-30.

Respondents now abandon their principal defense below of Initiative 1501—namely, the extraordinary claim that a state's disclosure of speech-enabling information to the state's preferred speakers is categorically "beyond First Amendment scrutiny." Pet.App.14. But respondents' earlier resistance, while remarkable, was understandable: If Initiative 1501 is subject to meaningful First Amendment scrutiny, it plainly flunks the test.

Respondents concede, as they must, that Initiative 1501 contains "speaker-based" distinctions "[o]n its face," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64 (2011), as the law generally prohibits anyone from accessing the contact information for Washington's in-home care providers but "exempt[s]" the incumbent unions, State.BIO.1; *see*

Campaign.BIO.1.[1] While respondents view such speaker-based discrimination as if it were a First Amendment feature that avoids viewpoint discrimination, this Court takes a dimmer view and is "deeply skeptical" of speaker-based discrimination. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2378 (2018) (*NIFLA*). Because a speaker and his "viewpoints" are often "interrelated," "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

That is nowhere more obvious than with Initiative 1501. Respondents' effort to dismiss the "content control" and viewpoint discrimination that Initiative 1501 works requires them to ignore both this Court's precedents and the on-the-ground reality of this industry. Respondents never dispute that *Harris* and *Janus* are premised on the understanding that a union and its viewpoints are inseparable. Nor do they seriously contest that, without access to the information the state has reserved for the incumbent unions, it is "essentially impossible" for *anyone* to "effectively communicat[e]" with Washington's in-home care providers. Pet.App.52 (Bress, J., dissenting). In fact, even respondents characterize that information as "necessary" for their own

[1] Respondents note that Initiative 1501 contains other narrow exemptions, *see* State.BIO.11-12; Campaign.BIO.3, but they do not "suggest[] that [they] solve the constitutional problem," Pet.App.57 n.1. The Campaign, but not the state, quibbles about whether the "contact information" at issue extends beyond names, Campaign.BIO.20-22, but both opinions below employed that phrase, *see, e.g.*, Pet.App.5; Pet.App.67 (Bress, J. dissenting), and no contact information is more vital than someone's name.

communication with providers. State.BIO.16; *see* Campaign.BIO.1, 30. By giving only the incumbent unions that "necessary" information, Initiative 1501 gives them "a monopoly in expressing [their] views" to providers on "debatable public question[s]," which is "the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp. Rels. Comm'n*, 429 U.S. 167, 175-76 (1976). None of that is an accident; as respondents never deny, that opt-out-denying monopoly has been the incumbent unions' objective all along. State.BIO.20; Campaign.BIO.30.

Like the majority below (and in contrast to this Court's teachings), respondents insist that "distinctions based on status" are "perfectly fine." State.BIO.2; *see* Campaign.BIO.24. But while the majority relied "almost exclusively" on *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), for that proposition, Pet.App.75 (Bress, J., dissenting), respondents desperately downplay *Perry*, *see* Campaign.BIO.27-28 (the majority relied "partly on *Perry*"); State.BIO.19 (the majority "by no means" relied only on *Perry*). That belated effort to rewrite the decision below is understandable, as *Perry* is both plainly distinguishable and inconsistent with later, better-reasoned precedent. Among other things, *Perry* concerned an incumbent union's preferential access to only *one* direct channel of communication with readily identifiable workers in a traditional worksite, and that worksite was a public school, which implicated unique concerns about "labor peace." 460 U.S. at 38-41, 52. Initiative 1501, by contrast, eliminates for everyone save the incumbent unions the *only* direct channel of communication—indeed, the only means of

even *identifying* workers—in a context where this Court has already squarely rejected the "labor peace" rationale. *See Harris*, 573 U.S. at 649-50.[2]

Finding no refuge in *Perry*, respondents seek it in this Court's "subsidy" cases, *see* State.BIO.17, 22, 33-34; Campaign.BIO.24-27, 31, 33-36, which the Ninth Circuit mentioned only in footnotes. But those cases are inapposite, as they "all involved cash subsidies or their equivalent"—*i.e.*, "tax benefits." *Matal v. Tam*, 137 S.Ct. 1744, 1761 (2017) (Alito, J.). The fact that this "Court has never extended the subsidy doctrine to situations not involving financial benefits," *In re Brunetti*, 877 F.3d 1330, 1345 (Fed. Cir. 2017) (quoting *Autor v. Pritzker*, 740 F.3d 176, 183 (D.C. Cir. 2014), *aff'd sub nom. Iancu v. Brunetti*, 139 S.Ct. 2294 (2019), reflects the reality that governments could recast "just about every government service" as a subsidy, *Matal*, 137 S.Ct. at 1761 (Alito, J.). And while cash is fungible, the contact information of in-home care providers is not; all agree that it is "necessary" for the incumbent unions, and it is no less necessary for petitioners. In all events, respondents concede that states cannot award subsidies on a viewpoint-discriminatory basis anyway, *see* State.BIO.17; Campaign.BIO.24, so their subsidy argument is

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[2] The state faults petitioners for failing to show a "conflict" with *Perry*. State.BIO.16. That claim is puzzling, as petitioners' point is that the Ninth Circuit erred in relying on *Perry* because it is distinguishable. But if *Perry* truly does compel the result that the Ninth Circuit reached, then the Court should overrule its viewpoint-discrimination holding, which conflicts with intervening and better-reasoned precedent. *See*, *e.g.*, *Barr v. Am. Ass'n of Pol. Consultants, Inc*, 140 S.Ct. 2335 (2020).

"ultimately irrelevant," Pet.App.72 (Bress, J., dissenting).

Respondents' additional arguments are equally meritless. Respondents contend that, supposedly unlike the speaker-based laws that this Court has condemned, Initiative 1501 "does not affirmatively burden speech," and leaves petitioners "free" to communicate "through mass mailings, advertising, social media, or public events." Campaign.BIO.25-26; *see* State.BIO.24, 35-37. If "social media" is really so "effective" that it obviates the need to contact providers directly, *but see* CA9.ER.50, 462, 470-72 (rejecting this theory), it is hard to see why the incumbent unions "require" that information or deem it "necessary" for their own communication with providers. State.BIO.16, 30. And respondents never explain how the opt-out rights vindicated in *Harris* and *Janus* can be effectuated or how petitioners Thurber and Benn can engage in their petition campaign to decertify their incumbent union when Initiative 1501 prevents them from learning who those providers are. *See McCullen v. Coakley*, 573 U.S. 464, 488-89 (2014) ("When the government makes it more difficult to engage in" "'one-on-one communication'" "[i]n the context of petition campaigns," "it imposes an especially significant First Amendment burden."). Finally, whether the contact information is "necessary" or just highly useful, this Court has squarely rejected the notion that a state may "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

In an effort to convert chutzpah into a First Amendment defense, respondents suggest that Initiative 1501's speaker-based discrimination is not viewpoint discrimination because the law is "silent" about viewpoint. Campaign.BIO.29; *see* State.BIO.14, 18. But the ability of speaker-based distinctions to silently cloak viewpoint discrimination is precisely why this Court is "deeply skeptical" of them. *NIFLA*, 138 S.Ct. at 2378. And if there ever were a context where only a fantasist would imagine unions offering anti-union messages and dissenters promoting union membership, it is in the public-sector union context, as this Court's cases underscore. Whatever is true in other contexts, in a context where a meaningful right to opt-out of agency shops and forced dues is essential to squaring unions with the First Amendment, laws that reserve the very identities of potential union members to the incumbent union are plainly incompatible with the First Amendment.

Finally, respondents double down on their credulity-straining suggestion that *Janus* supports Initiative 1501 because it noted that incumbent unions enjoy certain "privileges, such as obtaining information about employees." State.BIO.23; *see* Campaign.BIO.1, 32-33. But respondents identify nothing in *Janus* hinting that an incumbent union's "privileges" include exclusive, perpetual access to that information. And little wonder: Giving that information solely to the one speaker least likely to inform workers of their right to opt out of an incumbent union effectively renders *Janus* nugatory, and precluding workers from ever changing their bargaining representative infringes associational rights to boot. *Cf. Christian Legal Soc. Chapter of the*

Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 680 (2010) ("[S]peech and expressive-association rights are closely linked.").

In short, the conclusion that Initiative 1501 is viewpoint-discriminatory is "inescapable." Pet.App.68 (Bress, J., dissenting). And as all agree, viewpoint-discriminatory laws are subject to the strictest of scrutiny, which Initiative 1501 plainly cannot satisfy. Even assuming that the state has a compelling interest in combatting an identify-theft-via-public-records-requests problem that never materialized, Initiative 1501 is not remotely "narrowly drawn" to serve it. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Indeed, while respondents observe that other states give incumbent unions access to worker contact information, State.BIO.30; Campaign.BIO.22 n.7, no other law is "nearly as extreme as Washington's," App.86 (Bress, J. dissenting), which likely explains why respondents never even try to argue that the law could satisfy strict scrutiny.

II. The Decision Below Conflicts With Decisions From Other Courts.

The incompatibility of Initiative 1501 and the Ninth Circuit's decision with *Harris*, *Janus*, and bedrock First Amendment principles is reason enough to grant review. But the decision below also conflicts with decisions from other courts. *See* Pet.30-32.

Respondents protest that other courts have not "addressed the constitutionality of a law like Initiative 1501." Campaign.BIO.11; *see* State.BIO.25. Indeed. Initiative 1501 is such an "outlier" that it is impossible to have that kind of conflict. Pet.App.88 (Bress, J., dissenting). But extremism in violation of liberty is a

vice, not a virtue. At any rate, there is a circuit conflict nonetheless because, even in evaluating less extreme affronts to the First Amendment, other circuits have correctly recognized, in line with this Court's precedents, that "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015).

The Seventh Circuit, for example, has held that a policy that favored speakers based on incumbent status—*i.e.*, student groups in existence for at least two years, with bonus points for longevity—could not survive because the status-based distinction merely "institutionalized" viewpoint discrimination. *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 593-94 (7th Cir. 2002). Unable to refute the conflict between *Southworth* and the decision below, respondents change the subject to a *different* Seventh Circuit decision—*Wisconsin Education Association Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) (*WEAC*)). *See* State.BIO.27-28; Campaign.BIO.12-16. But *WEAC* explicitly reaffirmed *Southworth*'s conclusion that speaker-based laws that "inherently" favor or disfavor speakers who espouse particular viewpoints are viewpoint-discriminatory,[3] *see* 705 F.3d at 649, which perfectly describes Initiative 1501.

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[3] The payroll-deduction program addressed in *WEAC* distinguished between "public safety employees" and "general employees," and the plaintiffs argued that it favored the former because they supported Wisconsin's governor. 705 F.3d at 644. But that group "include[d] employee organizations that opposed or failed to endorse the governor." *Id.* at 643.

The conflict runs deeper. The Campaign concedes that, in *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*, 470 F.3d 1062, 1074 (4th Cir. 2006), the Fourth Circuit expressly aligned itself with *Southworth*.[4] *See* Campaign.BIO.17. And the Fourth Circuit emphasized in *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019), that a law granting status-based access to speech-enabling information warrants careful scrutiny for viewpoint discrimination. The Campaign does not address *Fusaro*, while the state tries to limit it to laws codifying *separate* status-based and content-based distinctions. *See* State.BIO.28 n.7. In reality, *Fusaro* recognized that status and content/viewpoint often overlap. *See* 930 F.3d at 252 ("[A] speaker preference" can "reflect[] a content preference[.]").

Nor do respondents meaningfully engage with the Eighth Circuit's decision in *Turning Point USA at Arkansas State University v. Rhodes*, 973 F.3d 868, 876 (8th Cir. 2020). They assert that *Turning Point* "supports the decision below," Campaign.BIO.17; *see* State.BIO.27, but the Eighth Circuit specifically concluded that, when a court confronts status-based discrimination, it is *not* enough to invoke *Perry* and call it quits, for status and viewpoint can easily coincide. *See* 973 F.3d at 876 & n.5. The Ninth Circuit's decision is thus just as incompatible with the weight of circuit authority as it is with this Court's precedents.

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[4] The state—apparently confused by a similarly named case, *see* State.BIO.26—never addresses *Child Evangelism*.

III. This An Excellent Vehicle To Resolve The Important Question Presented.

The importance of the issues here is underscored by the outpouring of amicus support. The reason for that outpouring is self-evident. Initiative 1501 is egregiously viewpoint-discriminatory and eviscerates the rights that this Court recognized in *Harris* and *Janus*. Those decisions forced public-sector unions to compete for members in the marketplace of ideas. After years of being shielded from such competition, it is no surprise that unions have asked friendly legislatures to insulate them from competition. If Washington's law—the *non plus ultra* of such efforts—is allowed to stand, other states that have already enacted junior-varsity versions can be expected to follow suit, and *Harris* and *Janus* will soon be a dead letter. *See* Pet.33-36.

Respondents insist that it is *petitioners*' position that would "upend" First Amendment jurisprudence and "jeopardize innumerable" laws. State.BIO.29; Campaign.BIO.33. But that is just a merits argument—and a mistaken one at that, as respondents' concerns about longstanding laws that are not transparent efforts to skew a critical public debate are misplaced.

For instance, respondents repeatedly argue that the subsidy cases "cannot stand" under petitioners' theory. Campaign.BIO.35; *see* State.BIO.33-34. But as explained, those cases are "nothing like" this one. *Matal*, 137 S.Ct. at 1761 (Alito, J.). And their examples of other purportedly at-risk laws do not pass the straight-face test. There is no reason to suspect that South Carolina is facilitating one side of a public

debate by giving "structural plans of public projects" to "contractors." State.BIO.31 (citing S.C. Code §30-4-40(a)(17)). The same goes for Georgia's choice to disclose "motor vehicle accident reports" to the "media," whose *raison d'être* is to disclose information to the public. Campaign.BIO.34 n.11 (citing Ga. Code Ann. §50-18-72(a)(5)). The considerable distance between those anodyne laws and Initiative 1501 likely explains why South Carolina, Georgia, and numerous other states have filed a brief *supporting* petitioners. *See* States.Amicus.Br.

Respondents' efforts to conjure up vehicle problems fare no better. Respondents make the remarkable claim that a *different* law designed to protect one of the incumbent unions—under which individual providers "will no longer contract directly with the State," but rather with a state-selected contractor—will minimize Initiative 1501's effect on "individual providers' information" after Spring 2022. State.BIO.37; *see* Campaign.BIO.18-19. But even on the dubious assumptions that Washington's second effort to deny individual providers the benefits of *Harris* and *Janus* is valid[5] and that the state-selected contractor will be exempt from Washington's Public Records Act, *but see Fortgang v. Woodland Park Zoo*, 387 P.3d 690, 695-97 (Wash. 2017), that still leaves Initiative 1501's unconstitutional effects on family-

[5] The consumer-direct-employer model barely changes the status quo for individual providers: They will receive the same government funds after caring for the same people, and the same union will continue to speak on matters of public concern while representing them. *See* Wash. Dep't of Soc. & Health Servs., *Full CDE Q&A* 19 (last updated June 2021), https://bit.ly/3i11xEf.

child-care providers undiminished. And only *one* of the four petitioners is an individual provider, which is perhaps why the state buries this point in the back of its brief.

For its part, the Campaign accuses petitioners of having "fail[ed] to create a record" and "waive[d]" issues, Campaign.BIO.19, but neither charge impeded the Ninth Circuit's resolution of petitioners' viewpoint-discrimination claim or troubled the dissent. Moreover, the notion that express status-based discrimination in favor of incumbent unions, bought and paid for by those unions, works viewpoint discrimination in favor of the unions requires only common sense, not an extensive record. In short, there is no obstacle to granting certiorari and invalidating a dual threat to First Amendment values.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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