

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**

**AMICUS CURIAE BRIEF OF
THE FAIRNESS CENTER
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Petitioners are individual in-home care providers in Washington state who are situated identically to the quasi-public employees in *Harris v. Quinn*, 573 U.S. 616 (2014), and a non-profit organization dedicated to ensuring that workers understand their constitutional right not to subsidize union speech. After *Harris*, petitioners communicated with other providers to spread that message and to encourage them to oust one of their incumbent unions. Those efforts were initially quite successful, with large numbers of providers exercising their opt-out rights. But those efforts depended on access to state lists of providers and their contact information. Because providers are widely dispersed and have high turnover rates, only the state, which facilitates their payment, has that information. Even the incumbent unions depend on the state for that critical speech-enabling information. Frustrated by petitioners' success, the incumbent unions worked to convert the state's monopoly over that information into a duopoly. They drafted and bankrolled a ballot initiative amending Washington's public-records laws to deny virtually *everyone but the incumbent unions* access to that information. Voters approved that initiative, and, over a 40-page dissent, the Ninth Circuit upheld it.

The question presented is:

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

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INTEREST OF THE *AMICUS CURIAE*¹

The Fairness Center is a nonprofit, public interest law firm that provides free legal services to those hurt by public-sector union officials. The Fairness Center has represented clients, including homecare workers, who have been injured and whose rights have been violated due to exclusive representation, and it desires to serve and further those clients' interests by supporting the Petition for Writ of Certiorari. The Fairness Center represented a Pennsylvania homecare worker and his employer, whose muscular dystrophy rendered him quadriplegic. They jointly challenged an executive order issued by the Pennsylvania Governor allowing for imposition of a representative on over 20,000 homecare workers in Pennsylvania. In connection with that representation, the Fairness Center also submitted open records requests under Pennsylvania law, seeking information related to the representation of homecare workers in Pennsylvania. But the requests resulted in years-long litigation, compounding the existing hurdles homecare workers face to learning basic information about how they are represented. This *amicus* brief thus seeks to offer some context from the Commonwealth of Pennsylvania for the benefit of this Court.

¹ Pursuant to this Court's Rule 37.2(a), Petitioners and Respondents have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the date of filing of the *Amicus Curiae's* intention to file this brief.

No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *Amicus Curiae* made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

When it comes to First Amendment rights, homecare workers as a group are unique and vulnerable: to attempts to unionize them, to difficulties in identifying and organizing with fellow workers, to challenges in obtaining the information needed to protect their constitutional rights.

In recent years, homecare workers have found themselves frequent targets of attempts by public-sector unions to become their exclusive representative. Homecare workers in at least ten states have seen the imposition of a representative interfere with their care of the disabled and elderly and with their First Amendment rights.

And once such attempts have been successful, homecare workers are at a particular disadvantage in gathering information to protect their rights. The unique setting in which homecare workers operate makes it difficult for them to be informed of even basic information about the quality of the representation they receive from their union, or to organize and share information with fellow homecare workers.

In sum, this Court should address governmental action and laws targeting or limiting access to information based on viewpoint in this context. The access to information at issue here may provide one of the few safeguards for the constitutional rights of homecare workers.

REASONS FOR GRANTING THE PETITION

I. This Court Should Reject Attempts To Stifle Access to Rights-Enabling Information

In Pennsylvania, workers who are not even employed by the state have been forced, by executive fiat, to accept a union as their representative. And once that representation is imposed, homecare workers are particularly disadvantaged in learning basic information about the quality of their representation and in communicating with other workers—the first steps to protecting and to exercising constitutional rights in this context. Roadblocks to accessing that information threaten the exercise of workers’ constitutional rights.

A. Homecare Workers Have Been Targeted for Unionization, Despite their Status as Non-Public Employees

Homecare workers have long been vulnerable to attempts to force representation upon them. In Pennsylvania, representation was imposed via executive order, subject to change with the occupant of the gubernatorial office. The most recent attempt in Pennsylvania ultimately prevailed in subjecting over 20,000 homecare workers to representation.

1. Homecare Programs in Pennsylvania

Over the last 30 years, the trend in long-term caregiving has shifted from institutional care to more at-home care, which now makes up nearly 43 percent of Medicaid spending on long-term care. Janet O’Keeffe et al., U.S. Dep’t of Health & Human Servs., *Understanding Medicaid Home & Community Services: A Primer* 22 (2010), <https://aspe.hhs.gov/system/>

files/pdf/76201/primer10.pdf. Medicaid waiver programs allow states to fund home- and community-based services for some Medicaid-eligible individuals. Legislative Budget & Fin. Comm., *Family Caregivers in Pennsylvania's Home and Community-Based Waiver Programs S-1* (June 2015), <http://lbfc.legis.state.pa.us/Resources/Documents/Reports/527.pdf>.

In Pennsylvania, as in many other states, this homecare is commonly delivered by private-sector employees, either through agencies, which employ homecare workers, or directly to recipients (sometimes referred to as “participants” or “consumers”), who employ their own homecare workers, known as direct care workers.²

2. Representation Imposed on Pennsylvania Homecare Workers

Attempts to impose a representative on homecare workers in Pennsylvania have a long history. Beginning in 2010, a Pennsylvania governor attempted

² As one state court explained in summarizing Pennsylvania’s participant model,

Under the Participant Model, [homecare workers] are recruited, hired, and managed by a participant who employs the [worker]. . . . As employers, participants have federal employer identification numbers, are subject to workers’ compensation and unemployment requirements, and pay relevant employer taxes. Under Act 150, participants have the “right to make decisions about, direct the provision of and control . . . [home] care services.” Section 2(3) of Act 150, 62 P.S. § 3052(3). Thus, participants’ control over their care is unfettered other than compliance with home care service regulations.

Markham v. Wolf, 147 A.3d 1259, 1263 (Pa. Commw. Ct. 2016), *vacated*, 190 A.3d 1175 (Pa. 2018) (footnotes omitted).

to unionize homecare workers via executive order. Pa. Exec. Order No. 2010-04, *reprinted in* 40 Pa. Bull. 6071 (Oct. 23, 2010), 4 Pa. Code §§ 7a.21–.30 (2010). But after affected participants and providers challenged the order in court, *Markham*, 147 A.3d at 1276, the governor rescinded it. *See* Pa. Exec. Order No. 2010-10, *reprinted in* 40 Pa. Bull. 7333 (Dec. 25, 2010), 4 Pa. Code § 7a.31 (2010). Pennsylvania’s next governor rejected this approach in favor of a long-term commission that did not involve an exclusive representative. Pa. Exec. Order No. 2014-01, *reprinted in* 44 Pa. Bull. 1120 (Mar. 1, 2014).

But in February 2015, the newly elected governor of Pennsylvania issued an executive order again effectively unionizing homecare workers. *See* Pa. Exec. Order No. 2015-05 (Feb. 27, 2015), *reprinted as amended in* 45 Pa. Bull. 1937 (Apr. 18, 2015), 4 Pa. Code §§ 7a.111-117 (2015). The order affected homecare workers and recipients of services provided under the participant model. 4 Pa. Code § 7a.111. According to statistics from Pennsylvania’s Department of Human Services, 26,885 homecare workers were providing services under those programs as of March 2015. O’Keeffe 24.

The order establishes a process for election of a “representative” for homecare workers and a requirement that, once elected, the representative “meet and confer” with administration officials. 4 Pa. Code § 7a.113. The order requires Pennsylvania officials to meet with the representative at least monthly to discuss topics affecting the terms and conditions of employment for homecare workers, including “[s]tandards for compensating Direct Care Workers,” “Commonwealth payment procedures,” “[t]raining and professional development opportunities,” and “[v]olun-

tary payroll deductions.” 4 Pa. Code § 7a.113. The representative’s speech on these topics—previously discussed and resolved between homecare workers and the disabled or elderly individuals for whom they care—is presumed to represent the interests of homecare workers and takes place on a platform before high-ranking government officials.

This arrangement effectively replaces the previous setup where the homecare worker was free to negotiate his own conditions of employment directly with his employer. And despite the imposition of such a representative, the order stipulates that “[n]othing in this Executive Order shall be interpreted to grant Direct Care Workers the status of Commonwealth employees.” *Id.* § 7a.115. Indeed, both in fact and in law, the individual receiving care remains the employer. Yet the employer is not included in any negotiations between the representative and the government.

Shortly after the Executive Order issued, several homecare workers and the participants who employ them brought two different lawsuits challenging the order. *See Markham*, 190 A.3d at 1179–80. Undersigned *amicus* represented two clients who opposed this imposition of a state-mandated representative into their long-running homecare setup. One client has provided homecare services to his employer, a quadriplegic adult with muscular dystrophy, for over 25 years. Until the Executive Order, the two had successfully and amicably negotiated the terms and conditions of the homecare worker’s employment without the aid of a union, and the homecare worker opposed his representation by a labor organization. The two thus challenged the Executive Order in state court, arguing that it

exceeded the Governor's power under the state constitution.

Although the challengers initially prevailed, *Markham*, 147 A.3d at 1279; *Smith v. Wolf*, No. 177 M.D. 2015, 2016 WL 6069483, at *3 (Pa. Commw. Ct. Oct. 14, 2016), *vacated sub nom. Markham v. Wolf*, 190 A.3d 1175 (Pa. 2018), the Pennsylvania Supreme Court upheld the Executive Order. *See Markham*, 190 A.3d at 1185–89.

So, under the system now in place in Pennsylvania, a representative is elected by a majority of votes cast, with an election held if an employee organization has the support of only ten percent of workers. The homecare representative can win an election with a bare majority of those voting in the election, even if it is a small percentage of the entire bargaining unit. Upon winning the election, the representative then becomes the speaker for over 20,000 homecare workers on employment topics with the Commonwealth. *See Markham*, 147 A.3d at 1267–68. In fact, in 2015, the union currently representing homecare workers in Pennsylvania³ became the representative for all covered homecare workers based on 2,663 votes, out of the roughly 20,000 eligible voters. *See Markham*, 147 A.3d at 1268.

The threat to First Amendment rights is patent here, where the representation takes place outside of the employment context. In Pennsylvania, the Executive Order forces on homecare workers a representative—the equivalent of a union—and requires the government to recognize and engage with the

³ The United Home Care Workers of Pennsylvania is a joint project of the Service Employees International Union and the American Federation of State, County and Municipal Employees.

representative. And it mandates that this discussion happen with no involvement from homecare workers' actual employers, the recipients. Nor does the Order provide for any guarantees for homecare workers to be informed about how they are represented or what topics are discussed between the representative and the Commonwealth.

And homecare workers in Pennsylvania are not alone in facing this threat to their First Amendment rights. Similar executive orders unionizing homecare workers have been issued in at least four other states,⁴ while other homecare workers have been unionized by statute or other means.⁵

⁴ See, e.g., Conn. Exec. Order No. 10 (Sept. 21, 2011), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Others/Governor-Dannel-P-Malloy--Executive-Order-No-10.pdf>; Ill. Exec. Order No. 2003-8 (Mar. 4, 2003), <https://www2.illinois.gov/Documents/ExecOrders/2003/execorder2003-8.pdf>; Md. Exec. Order No. 01.01.2007.15 (Aug. 6, 2007), <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/013000/013206/unrestricted/20110024e.pdf>; Ohio Exec. Order No. 2007-23S (July 17, 2007), *rescinded by* Ohio Exec. Order No. 2015-05K (May 22, 2015).

⁵ See, e.g., Cal. Welf. & Inst. Code § 12301.6(c)(1) (West 2019); Conn. Gen. Stat. § 17b-706b (2019); 5 Ill. Comp. Stat. 315/3(n) (2016); Md. Code Ann., Health-Gen. § 15-901 (West 2019); Mass. Gen. Laws ch. 118E, § 73 (2019); Mo. Rev. Stat. § 208.862(3) (2019); Or. Rev. Stat. § 410.612 (2018); Vt. Stat. Ann. tit. 21, § 1640(c) (West 2019); Wash. Rev. Code § 74.39A.270 (2020); see also 4 Pa. Code §§ 7a.111–.117; Interlocal Agreement between Mich. Dep't of Cmty. Servs. & Tri-Cty. Aging Consortium (June 10, 2004).

B. Once Unionized, Homecare Workers Are at a Unique Disadvantage in Accessing Information about their Representation and in Communicating with Others

The foregoing history in Pennsylvania underscores the particular vulnerability of homecare workers to forced unionization attempts by states. And once that representation is compelled, homecare workers may find information about their rights and the quality of their representation difficult to come by, due to the nature and structure of their employment situation. Yet in the context of homecare workers, speech and information regarding their representation is vital to their ability to be informed of, to exercise, and to protect their basic constitutional rights.

1. Homecare Workers' Unique Employment Context Makes Information-Gathering and Communication Difficult

Significant barriers already limit homecare workers' access to information, whether about the quality of the representation they receive, the rights they have, or the identities of fellow homecare workers with whom they might organize.

Although over 20,000 homecare workers are now represented by one representative in Pennsylvania, they do not have a central employer. Rather, in the participant model, each homecare worker has a different employer, the client for whom they provide in-home services. This means that for homecare workers, there is no centralized, common access to information, either about the quality of the representation they receive or about the others who

are represented with them. The representative itself, and the Commonwealth, may be the only source for relevant information.

Of course, the representative may have little incentive to share objective information with those it represents about the quality of the representation it is providing. Nor would the representative be eager to turn over the contact information necessary for one represented homecare worker to communicate and organize with fellow workers. And homecare workers lack many sources to locate that information themselves. There is no one employer from whom information can be learned. The employers of the homecare workers in Pennsylvania are shut out of the mandated speech between the representative and the Commonwealth, so they, too, are left in the dark. Homecare workers have no water cooler around which to identify others who are similarly situated or share information, no bulletin board to which they may post or from which to gather updates, no staff meetings at which to connect.

Open records requests, such as those impacted by the law challenged in this Petition, thus represent one, and perhaps the only, viable option that may remain for homecare workers to be informed, whether about the representation being provided or to identify and locate fellow workers. In Pennsylvania, this option takes the form of requests under Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101–67.3104 (2021). But there is no guarantee that even this access will be automatic, simple, or without significant cost for homecare workers to navigate.

As noted, the Executive Order mandates no provision of information to homecare workers about the representation conducted purportedly on their behalf.

In connection with the representation of the clients discussed above, who had few other options to stay informed, undersigned *amicus* sought information from Pennsylvania's Governor regarding the representation of homecare workers. Sent in February 2019, the requests sought public records related to the implementation of the Governor's Executive Order, including records of meetings between the representative and state officials. *Off. of the Governor v. Wanner*, No. 1453 C.D. 2019, 2020 WL 3495623, at *1 & n.1 (Pa. Commw. Ct. June 29, 2020).

The Governor granted the requests in part, making some disclosures in April 2019, and denied them in part, withholding some documents under claims of attorney work product or attorney-client privilege. *Id.* On appeal of the partial denial, the Office of Open Records in May 2019 ordered the Governor to produce the withheld documents for *in camera* inspection, and it determined in September 2019 that the Governor improperly withheld documents. *Id.* at *2. The Governor then filed a petition for review with the Commonwealth Court, which ultimately affirmed the determination of the Office of Open Records in June 2020. *Id.* at *7. Next, the Governor sought review in Pennsylvania's Supreme Court, which eventually denied review in February 2021. Order, *Off. of the Governor v. Wanner*, No. 513 MAL 2020, 2021 WL 671372 (Pa. Feb. 22, 2021). The Governor made a final disclosure in the matter to undersigned *amicus* in April 2021, more than two years after the initial requests had been made.

2. Access to Information Is a Fundamental Tool for Workers To Protect their Rights

For homecare workers who have had a representative imposed into their working relationship with their employer, there is no question fundamental constitutional rights are implicated. And the realities of employment for homecare workers make it difficult for them to obtain even basic information about the quality of the representation they receive, or to identify or organize with fellow workers. Yet this information is vital to their ability to protect and assert their constitutional rights.

Under this Court's decisions in *Harris* and *Janus*, homecare workers like Petitioners, and the 20,000 Pennsylvania workers who have a representative through executive order, have a constitutional right to choose whether to join or otherwise support their representative. But securing the information needed to inform workers about these rights is difficult, as Petitioners highlight, Pet. 5–6. The entities who hold the cards when it comes to information necessary to communicate with workers have little incentive to share.

Additional First Amendment rights are at stake here as well. If cutting off access to information based on the requester's viewpoint is tolerated, access to information necessary to protect homecare workers' associational rights is also at risk. These associational rights are nearly impossible to assert in an informational vacuum.

As this Court recognized, “[d]esignating a union as the employees’ exclusive representative substantially restricts the rights of individual employees.” *Janus v.*

AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018). Homecare workers, in Pennsylvania and other states, now have a representative who has rights of speech with and access to the state. Under the Pennsylvania scheme for representing homecare workers, discussed above, the representative of those workers was elected on a bare majority of 2,663 votes, out of over 20,000 eligible to vote. But that representative now has mandated access to and speech with the state as to critical matters related to homecare workers—guarantees that the individual workers do not similarly have under the Executive Order.

Homecare workers' unique employment setting means they have few ways to gather the information they need to know how they are being represented. And their representative certainly has little incentive to provide that information, especially if it is unfavorable. Open records laws, therefore, may provide one of the few options homecare workers have to learn about how they are being represented. Such information may also be homecare workers' only way to assess the quality of that representation, the type or tone of the representation they are associated with, or the speech being made purportedly on their behalf. *Cf. Janus*, 138 S. Ct. at 2469 (observing that the duty of fair representation "is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit"). But if this information can be cut off if the state disapproves of the requester's viewpoint, even this limited option may disappear.

And, if homecare workers were to discover their representation to be inadequate, the kind of contact information at issue here, Pet. 5–7, becomes critical to them. The ability to communicate and organize

with others similarly situated is a necessary step for homecare workers to hold their representative accountable, and to pursue association with another representative if necessary. For instance, now that Pennsylvania direct care workers have a representative, the only recourse for those who oppose it is to seek its removal under terms set by the Executive Order, which requires reinitiating the election process for another representative. 4 Pa. Code § 7a.113. To initiate that process, ten percent of the represented homecare workers must sign cards choosing to be represented by another organization. *Id.* Homecare workers who are employed by a participant would need to first identify others, and given their dispersed and decentralized employment context, which makes it difficult for homecare workers to even know of one another, public records requests may provide the only avenue for doing so. And even when workers have joined together, the Order gives a right to the state's list of those eligible to vote only to an established employee organization with the support of at least 50 direct care workers. 4 Pa. Code § 7a.114. So any other entity or individual has no right to the list of workers, and would still need to rely on public records. For homecare workers to choose whether to take these steps to exercise their implicated constitutional rights, they must be able to gain information concerning the representation they are receiving from the current representative and have the ability to identify and organize with similar individuals. Only in that way are these individuals able to safeguard and exercise their associational and speech rights.

CONCLUSION

For all these reasons, homecare workers' access to information often available only through public records requests is necessary to protect constitutional rights on multiple levels. Attempts to stifle access to that rights-enabling information because of the viewpoint of the requester should not prevail.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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