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

BRIEF OF *AMICI CURIAE* STATES OF UTAH, ALASKA, ARIZONA, ARKANSAS, GEORGIA, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA SUPPORTING PETITIONERS

SEAN D. REYES
Utah Attorney General
MELISSA HOLYOAK*
Utah Solicitor General
UTAH OFFICE OF THE
ATTORNEY GENERAL
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
melissaholyoak@agutah.gov
* *Counsel of Record*
Counsel for Amici Curiae

[ADDITIONAL COUNSEL WITH SIGNATURE BLOCK]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

This Court held in *Janus v. AFSCME, Council 31* that public employees have a First Amendment right not to be compelled to subsidize union speech and must clearly waive that right before unions can collect dues from them. Washington's Initiative 1501 gives existing public-sector unions exclusive access to the contact information of quasi-public employees (in-home-care providers), effectively denying it to parties who want to communicate other viewpoints on unions. Is this viewpoint discrimination bearing on *Janus* waiver consistent with the First Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICI CURIAE

Amici states have a vital interest in protecting the First Amendment rights of their citizens.[1] The Ninth Circuit here held that a Washington statute codifying a ballot initiative (Initiative 1501) granting unions exclusive access to quasi-public employees' contact information is not viewpoint-discriminatory because it merely discriminates on the basis of the incumbent unions' "*legal status* as certified exclusive bargaining representatives." App. 28. But the "legal status" label by itself cannot provide a complete picture of the conflicting viewpoints at play.

The decision below conflicts with those of this Court and other circuits recognizing that viewpoint-discrimination analysis must look beyond the label and instead closely scrutinize the effects to ferret out any favoritism. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811, 812 (1985); *see also Turning Point USA at Arkansas State University v. Rhodes*, 973 F.3d 868 (8th Cir. 2020); *Southworth v. Board of Regents of University of Wisconsin System,* 307 F.3d 566 (7th Cir. 2002); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1074 (4th Cir. 2006). Because the Ninth Circuit's decision conflicts with other circuits, *Amici* states have a strong interest in the Court settling the tension created by the decision below.

---

[1] Counsel of record for all parties received notice of *Amici*'s intent to file at least ten days prior to this brief's due date.

Indeed, the Ninth Circuit's superficial "status" inquiry merely exacerbates viewpoint discrimination by tolerating laws that hide behind some identifying description of the favored speaker. *Amici* states have a strong interest in correcting this errant Circuit rule ensuring that other courts do not follow suit.

Amici states also have a strong interest in the viewpoint discrimination at issue here because it shuts down the parties' underlying debate *about* the exercise of First Amendment rights. The Court recognized in *Harris v. Quinn*, 573 U.S. 616, 656 (2014) and *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018) that the First Amendment protects quasi-public employees from being forced to pay union dues. *Amici* states have an interest in ensuring that the marketplace of ideas remains open, particularly when those ideas involve the very exercise of speech.

SUMMARY OF ARGUMENT

The First Amendment is not simply "free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). Banal ideas rarely need the First Amendment; it is the unpopular idea, the unempowered idea, the politically charged idea, that evokes censorship and thus depends on constitutional protection to survive.

Over the last century, "freedom for the thought that we hate" has become a cornerstone of modern First Amendment jurisprudence. The First Amendment protects all manner of unpopular speech: anti-

gay protests near a dead soldier's funeral; "crush" videos depicting the tortured deaths of small animals for sexual pleasure; the exclusion of gay organizations from a St. Patrick's Day parade; gory and racist video games; vulgar and scandalous trademarks; lewd satire; flag burning; and parades designed to intimidate Jewish survivors of the Holocaust. *See, respectively, Snyder v. Phelps*, 562 U.S. 443 (2011); *United States v. Stevens*, 559 U.S. 460 (2010); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Texas v. Johnson*, 491 U.S. 397 (1989); *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977). It is therefore unremarkable that the First Amendment protects the right to engage in speech adverse to unions, generally, or an incumbent union, specifically.

However much the sponsors of Initiative 1501 hate the anti-union message of Petitioners, the First Amendment protects that message. The Ninth Circuit recognized that "the First Amendment forbids a state from discriminating invidiously among viewpoints in the provision of information within its control." App. 2. And while Initiative 1501—by design and in practice—favors pro-union viewpoints by silencing anti-union messages, the Ninth Circuit looked past that, focusing instead on the existing unions' "legal status." App. 28. This elevated form over substance to an unconstitutional degree, failing to adequately scrutinize the viewpoint discrimination

that "facilitate[s] speech on only one side of the [union] debate." *McCullen v. Coakley*, 573 U.S. 464, 485 (2014).

Glossing over viewpoint discrimination is particularly egregious here because the relevant debate—the value of union membership—relates directly to the providers' First Amendment rights under *Janus*. *Janus* held that state employees have a First Amendment right not to be compelled to subsidize union speech. 138 S. Ct. at 2486. Unions cannot collect any dues from employees without "clear and compelling" evidence that the state employee waived her First Amendment rights. *Id.* But Initiative 1501 cuts off the conversation that informs the employees' decision to waive those First Amendment rights by severing employees' rights to receive information relevant to that decision.

Finally, such viewpoint discrimination is unnecessary. Public sector unions flourish nationwide without similar viewpoint-discriminatory laws that violate the First Amendment rights of the employees.

ARGUMENT

I. Initiative 1501's viewpoint discrimination is particularly egregious because it silences any debate of the employees' First Amendment rights regarding subsidized union speech.

Viewpoint discrimination is a cardinal sin against the First Amendment. *See e.g., Iancu*, 139 S. Ct. at 2299 (where rule "is viewpoint-based, it is unconstitutional"); *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018) ("restrictions … based on viewpoint are prohibited"); *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("viewpoint discrimination is forbidden") (cleaned up). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414.

Yet the Ninth Circuit affirmed government viewpoint discrimination of Initiative 1501. The Initiative gives exclusive access to government-controlled information—contact information for the quasi-public in-home-care providers—to *existing* unions. App. 12, 28. Communicating with in-home care providers is essentially impossible without this information because those providers have a high turnover rate and never gather in a centralized location. App. 52-53 (Bress, J., dissenting). And by prohibiting others from accessing this contact information—which was available before Initiative 1501, App. 5-6—the government "powerfully favors *those views inherent to incumbent unions*

while creating significant obstacles to speech for anyone with opposing views," App. 68 (Bress, J., dissenting).

The Ninth Circuit held that Initiative 1501 was not viewpoint-discriminatory because limiting access to existing unions "is based entirely on their *legal status* as certified exclusive bargaining representatives." App. 28. The court reasoned that "a law affecting entities holding a particular viewpoint is not viewpoint discriminatory unless it targets those entities *because of* their viewpoint." App. 34 (quoting *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 900 (9th Cir. 2018)). But there was no question that Initiative 1501 was intended to hinder anti-union advocacy. App. 60 (Bress, J., dissenting). It was funded almost exclusively by incumbent unions after providers began opting out in droves due to the Freedom Foundation's educational communications to those providers. App. 56 (Bress, J., dissenting). Thus, while Initiative 1501 was intended to silence the anti-union message, the court found no viewpoint discrimination because the statute did not *expressly denounce* that viewpoint.

The Ninth Circuit elevated form over substance to ignore what reality and the record manifest. That the law distinguishes based on legal status "is only to ask the viewpoint discrimination question, not to answer it." App. 73 (Bress, J., dissenting). An ostensibly neutral status cannot save "a regulation that is in reality a facade for viewpoint-based discrimination" and "may conceal a bias against the viewpoint advanced by the excluded speakers." *Cornelius v. NAACP Legal*

Def. & Educ. Fund, Inc., 473 U.S. 788, 811-12 (1985); *see Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2391 (2018) (Breyer, J., dissenting) (law's exclusion of some speakers may reveal "governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people") (cleaned up) (quoting *McCullen*, 134 S. Ct. at 2533). With sole access to the in-home-care providers, the incumbent unions have an absolute advantage in the union debate. That is of course why they bankrolled Initiative 1501.

The government's favoring one side of the union debate is particularly egregious here because the debate implicates First Amendment rights. State employees have a First Amendment right not to be compelled to subsidize union speech. *Janus*, 138 S. Ct. at 2486. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id.* at 2463. Indeed, because such unwelcome compulsion would be "demeaning," unions cannot collect dues without "clear and compelling" evidence that the state employee waived her First Amendment rights. *Id.* at 2464, 2486.

While *Janus* requires clear waiver of an employee's First Amendment rights, waiver by the care providers here would be based on the one-sided presentation of the pro-union argument. The Ninth Circuit's conclusion that Initiative 1501's viewpoint discrimination is excused because incumbent unions'

"*legal status* as certified exclusive bargaining representatives," App. 28, merely doubles down on the First Amendment injury. In a context laden with free speech implications—union participation by public and quasi-public employees—this new rule basically eliminates any attempt to fire or replace an incumbent bargaining representative. It places the government's imprimatur on the incumbent union, limiting and violating providers' ability to explore, much less pursue, other representative options. In this way, the Ninth Circuit rule appears to jettison the "fixed star in our constitutional constellation … that no official, high or petty, can prescribe what shall be orthodox in politics … or other matters of opinion[.]" *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Allowing providers and public employees to receive both sides of the union debate is critically important to fully inform their decisions on waiving their First Amendment rights regarding compelled union speech.

II. Viewpoint discrimination in favor of pro-union speech is unnecessary because unions can operate without violating the First Amendment.

This Court recognized that as a result of *Janus*, "the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members." *Janus*, 138 S. Ct. at 2485-86. But to retain members,

unions cannot exchange one First Amendment violation (compelled speech) for another (viewpoint discrimination). And it's not necessary to spread the union message anyway.

The in-home-care providers in this case are represented by Service Employees International Union Healthcare 775NW ("SEIU 775") and Service Employees International Union Local 925 ("SEIU 925"). App. 4. SEIU is the largest healthcare union in North America with more than 1.1 million members. *See* https://www.seiu.org/cards/these-fast-facts-will-tell-you-how-were-organized/. SEIU has more than 150 local union affiliates, with 15 state councils that represent all SEIU locals in a particular state. *See* https://www.seiu.org/cards/these-fast-facts-will-tell-you-how-were-organized/how-are-we-structured/p2.

These local unions represent home-care workers nationwide including in states that do not have similar viewpoint-discriminatory laws favoring existing unions. Granting access to the contact information of quasi-public employees exclusively to existing unions is unnecessary for the operation of unions.

To the extent these unions wish to contact providers and make their case for membership, Petitioners do not oppose their right to access providers' information and contact them. But through Initiative 1501, the unions' captured a monopoly over this information and the ability to communicate effectively with dispersed and otherwise-unreachable

individuals. That leaves providers with half the story, to the detriment of their First Amendment rights.

CONCLUSION

Amici states respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
MELISSA HOLYOAK*
Utah Solicitor General
UTAH OFFICE OF THE
ATTORNEY GENERAL
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
melissaholyoak@agutah.gov

Attorneys for *Amici Curiae*
State of Utah

**Counsel of Record*

Dated: April 23, 2021

Additional Counsel:

Treg Taylor
ALASKA ATTORNEY GENERAL

Mark Brnovich
ARIZONA ATTORNEY GENERAL

Leslie Rutledge
ARKANSAS ATTORNEY GENERAL

Christopher M. Carr
GEORGIA ATTORNEY GENERAL

Jeff Landry
LOUISIANA ATTORNEY GENERAL

Lynn Fitch
MISSISSIPPI ATTORNEY GENERAL

Austin Knudsen
MONTANA ATTORNEY GENERAL

Douglas J. Peterson
NEBRASKA ATTORNEY GENERAL

Mike Hunter
OKLAHOMA ATTORNEY GENERAL

Alan Wilson
SOUTH CAROLINA ATTORNEY GENERAL

Ken Paxton
TEXAS ATTORNEY GENERAL

Patrick Morrisey
WEST VIRGINA ATTORNEY GENERAL