No. 20-1334

In The
Supreme Court of the United States

BRADLEY BOARDMAN, et al.,

Petitioners,

v.

JAY R. INSLEE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS IN SUPPORT OF PETITION FOR CERTIORARI

JAMES E. LOBSENZ
Counsel of Record
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
(206) 622-8020
lobsenz@carneylaw.com

Counsel for Amicus Curiae

April 21, 2021

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. The First Amendment protects the right to receive information and ideas as well as the right to send or transmit them	5
II. Workers have the right *to receive* both pro- and anti-union views. While anti-union views are often expressed by employers, workers also have the right to express anti-union views, and *to receive* anti-union views from other workers in their own industry who seek to persuade them not to join unions	9
III. Fears that anti-union speech might be effective in persuading workers not to join unions cannot justify making it impossible for workers to receive such views. Summary judgment is inappropriate where the evidentiary record fails to rule out the possibility that access to information has been intentionally denied in order to prevent recipients from being exposed to disfavored ideas	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES:

Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982) 5, 6, 12, 13, 14

Chamber of Commerce v. Brown, 554 U.S. 60, 128 S.Ct. 2408, 171 L.Ed.2d 264 (2008) 10, 11

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) 5

Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965) 6, 8, 9

Letter Carriers v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974) 4

Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) 6, 7, 8

Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) 11

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) 5

TABLE OF AUTHORITIES – Continued

Page

Thornhill v. Alabama,
310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093
(1940) 9

Thomas v. Collins,
323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430
(1945) 10

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,
425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346
(1976) 5, 11

Winters v. New York,
333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840
(1948) 5

STATUTES:

RCW 42.56.640(2)(b) 2

RCW 43.17.410 2

OTHER AUTHORITY:

J. Madison, 9 *Writings of James Madison* 103 (G. Hunt ed. 1910) 4

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Allied Daily Newspapers is a trade association representing 25 daily newspapers across the state of Washington. It advocates for public access to government records so that newspapers can effectively fulfill their role as public watchdogs. Allied has previously appeared before this Court as *amicus curiae*.[2] This case raises questions of fundamental importance to Allied Daily Newspapers and to the people of Washington State because it calls into question the scope of the right to freedom of speech and the right of certain citizens to receive information.

STATEMENT OF THE CASE

Over 40,000 in-home care providers provide care for disabled adults and for children in low-income families throughout Washington State. Under Washington law they are considered to be quasi-public employees for the purpose of collective bargaining. One union has the exclusive authority to negotiate collective bargaining agreements on behalf of those who care for disabled

[1] Timely notice was given and all parties have consented to the filing of this brief. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

[2] See *Milner v. United States Department of the Navy*, No. 09-1163.

adults. Another union has exclusive authority to negotiate on behalf of the family child-care providers.

In November of 2016, Washington voters approved Initiative 1501, which amended Washington's Public Records Act by exempting records which contain the addresses, emails and phone numbers of in-home care providers from the Act. Since in-home care providers work in thousands of private homes and are dispersed throughout the State, in order to communicate with them, one must first obtain their contact information. Prior to November 2016, this information could be obtained by making a Public Records Act request for disclosure of records containing their addresses and phone numbers. Claiming that this contact information could be used to commit identity theft and to defraud vulnerable seniors and disabled people receiving in-home care, the proponents of Initiative 1501 succeeded in enacting a new law which prohibited all state agencies from releasing such contact information and exempted this information from the scope of the Public Records Act. RCW 43.17.410[3] and RCW 42.56.640.[4]

---

[3] RCW 43.17.410 provides: "(1) To protect vulnerable individuals and their children from identity crimes and other forms of victimization, neither the state nor any of its agencies shall release sensitive information of vulnerable individuals or *sensitive personal information of in-home caregivers* for vulnerable populations as those terms are defined in RCW 42.56.640." (Italics added).

[4] RCW 42.56.640(2)(b) provides: "'Sensitive personal information' means names, addresses, GPS [global positioning system] coordinates, telephone numbers, email addresses, social security numbers, driver's license numbers, or other personally identifying information."

Thus, it is no longer possible for anyone wishing to communicate with the in-home care providers to obtain the contact information necessary to call or write to them. In fact, they cannot even learn their names.

Petitioners are in-home care providers who wish to inform other in-home care providers that they cannot be compelled to pay dues to the unions that currently represent them. They brought suit to challenge these provisions of Initiative 1501. Petitioners contend that Initiative 1501 violates *their* First Amendment right to speak by effectively prohibiting them from communicating with their fellow in-home care providers. The district court disagreed with their contention that the Initiative amounted to unconstitutional viewpoint discrimination because it effectively prevented anti-incumbent union speech from reaching the in-home care providers while leaving the incumbent union free to communicate with them. A divided panel of the Ninth Circuit affirmed, holding that the differential access to the in-home care providers was justified because it was based on the "status" of the union and not on the viewpoint (pro or anti-union) being expressed.

SUMMARY OF THE ARGUMENT

Petitioners succinctly present the argument concerning the suppression of *their* right to speak to the in-home care providers. They do *not*, however, explicitly argue that the challenged law also violates the

First Amendment right of their fellow in-home care providers *to receive information*. This Court has consistently recognized that the First Amendment protects the rights of recipients as well as the rights of speakers.

In the union context, depriving workers of any meaningful ability to receive information challenging the views and efficacy of their unions is antithetical to the principle that "favor[s] uninhibited, robust, and wide open debate in labor disputes." *Letter Carriers v. Austin*, 418 U.S. 264, 273, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

Under state and federal law, workers have the right to decide whether they want a union to represent them, and whether they want to join the union that does represent them. But when those holding anti-union views cannot communicate with the workers, but an incumbent union can, there is no debate at all, and union elections are rendered meaningless. As Madison wrote: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both." 9 *Writings of James Madison* 103 (G. Hunt ed. 1910). The law challenged in this case *is* a perfect example of both.

ARGUMENT

I. The First Amendment protects the right to receive information and ideas as well as the right to send or transmit them.

In a variety of different contexts, this Court has held that the First Amendment "protects the right to receive information and ideas." *Board of Education, Island Trees Union Free Sch. District v. Pico*, 457 U.S. 853, 867, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982), quoting *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969). The right of freedom of speech and press incudes not only the right to speak and to publish, but also "the right to receive," and "the right to read." *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (right to receive information about contraception from one's doctor). It includes, for example, the right to receive advertising information about the price of drugs. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) "If there is a right to advertise, there is a reciprocal right to receive the advertising"). Finally, government is not allowed to screen out truthful information that it fears may be misused if received by others. "The right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Stanley*, 394 U.S. at 564, citing *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948).

The right to receive "is an inherent corollary of the rights of free speech and press that are explicitly

guaranteed by the Constitution, in two senses." *Island Trees*, 457 U.S. at 867. "First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them: 'The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it.' " *Island Trees*, 457 U.S. at 867. The right to disseminate ideas would be rendered meaningless "if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring). Second, the right to receive information and ideas "is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Island Trees*, 457 U.S. at 888.

Throughout our history various state interests have been advanced as justifications for preventing the receipt of messages. For example, in *Martin v. City of Struthers*, 319 U.S. 141, 144, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), a City ordinance prohibited the door-to-door distribution of handbills by Jehovah's Witnesses espousing a religious cause. The city asserted that the ordinance was justified by the need to protect the residents from the annoyance of having to answer their door in order to be offered literature they had no desire to read, and by the need to prevent burglaries from being committed by criminals who were merely pretending to be legitimate canvassers. *Id.* This Court rejected both justifications.

First, the Court noted that while some recipients might be annoyed by the message conveyed by the Jehovah's Witnesses, not all would. Some would want to receive their pamphlets and the City of Struthers had no business making a decision that prevented them from receiving their information and literature:

> [T]his ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder. It submits the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it.

Martin, 319 U.S. at 143-44.

Second, the Court also acknowledged that burglars frequently posed as canvassers in order to discern whether a house is empty and thus an easy target for burglary. But neither justification was found sufficient to outweigh the constitutional right to receive which precluded the City from simply depriving a willing recipient of the Jehovah's Witnesses' literature. Noting that the problems of annoyance and potential misuse by criminals could "easily be controlled by traditional legal methods," and that the freedom to receive information was "vital to the preservation of a free society," this Court held that a stringent prohibition on the distribution of information to all

householders was forbidden by the First Amendment. *Id.* at 147.

The challenged ordinance in this case has exactly the same effect. No matter how much in-home providers might *want* to receive information from other in-home providers like Boardman, they cannot because state law prohibits the release of the addresses where they work, their phone numbers and their email addresses. Boardman cannot go "door-to-door" to disseminate his views to in-home providers because he does not know which doors to knock on, and because they are employed in thousands of different homes cross the State. Without contact information such as street or email addresses, Boardman cannot send them anything either. Thus, they are deprived of the ability to receive information about their First Amendment right not to join the unions that represent them.

In *Martin*, the Court noted that those homeowners who feared that the persons coming onto their property were actually burglars who were merely pretending to be Jehovah's Witnesses, they could simply warn all persons approaching their homes not to come onto their property. If they did not heed that warning they could be prosecuted for trespass. Similarly, in this case, if persons posing as in-home providers obtained contact information in order to facilitate the crime of identity theft, they too could be prosecuted.

In *Lamont*, a regulation promulgated by the Secretary of the Treasury did not absolutely forbid people from receiving mail determined by government to

contain communist propaganda. Instead, it required the addressee to inform the Post Office that he wanted to receive the detained mail. Despite the fact that it was still *possible* to receive the mail, the Court struck down the regulation as a violation of the addressee's right to receive it because it had an obvious deterrent effect. 381 U.S. at 307. The Government argued that since an addressee wishing to receive the detained piece of mail need only return a card stating that fact, this was merely an "inconvenience and not an abridgment" of the First Amendment. This Court disagreed: "[W]e cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one." *Id.* at 309 (Brennan, J., concurring). "In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose." *Id*.

II. Workers have the right *to receive* both pro- and anti-union views. While anti-union views are often expressed by employers, workers also have the right to express anti-union views, and *to receive* anti-union views from other workers in their own industry who seek to persuade them not to join unions.

This Court has recognized that freedom of discussion concerning working conditions in an industry and the causes of labor disputes is indispensable to the operation of effective government. *Thornhill v. Alabama*, 310 U.S. 88, 103, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

"The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as a part of free speech, but as part of free assembly." *Thomas v. Collins*, 323 U.S. 516, 532, 65 S.Ct. 315, 89 L.Ed. 430 (1945). Penalizing a pro-union speaker simply for "asking a worker to join a union" is protected speech which cannot be restrained. *Id.* at 526. At the same time, urging workers *not* to join a union is also protected by the First Amendment. *Id.* at 537-38.

Usually, the party urging workers *not* to join a union is the employer. When States have passed laws seeking to preclude or hinder employers from engaging in anti-union speech, this court has held such laws are preempted by national labor laws. *Chamber of Commerce v. Brown*, 554 U.S. 60, 128 S.Ct. 2408, 171 L.Ed.2d 264 (2008). In the present case, the speakers wishing to persuade workers not to join unions *are other workers*. But the State has made it virtually impossible for them to convey their anti-union message by denying them access to their fellow workers' names and addresses.

In *Brown*, the State of California enacted a statute which prohibited several classes of employers that received state funds from using the funds to assist, promote, or deter union organizing. *Id.* at 62. This Court held that the law was preempted by the National Labor Relations Act which protects both the right of employers and employees to engage in speech about their unionization. While *Brown* was decided on statutory preemption grounds, this Court noted that "the right

of employees to refuse to join unions . . . implies an underlying right *to receive information* opposing unionization." *Brown*, at 68 (italics added). Thus, in the specific context of labor relations, this Court had recognized both the right of speakers to express their views about the advantages and disadvantages of joining a union, and their right *to receive* information and the views of others on this subject.

III. Fears that anti-union speech might be effective in persuading workers not to join unions cannot justify making it impossible for workers to receive such views. Summary judgment is inappropriate where the evidentiary record fails to rule out the possibility that access to information has been intentionally denied in order to prevent recipients from being exposed to disfavored ideas.

A State may not suppress the dissemination of truthful information about lawful activity because it fears the information will affect the behavior of its recipients. *Virginia State Bd.*, 425 U.S. at 773. *Accord Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (Fear that allowing advertisers to inform beer drinkers of the alcohol content of their beer will lead some to choose to drink more potent beers does not justify prohibiting brewers from conveying that information).

Naturally, those who favor unions and wish to encourage workers to join them, are concerned that

allowing information about the perceived disadvantages of unions and union membership will have the effect of persuading workers not to join or support unions. In this case, Petitioners have presented substantial evidence that the proponents of Initiative 1501 were not truly concerned with the risk that persons posing as in-home providers would obtain personal identification information that they could use to commit crimes such as identity theft. Instead, the proponents' literature stressed the point that passage of the initiative "will keep our unions strong." *App-12, Petition for Writ of Certiorari.* The clear message was: Pass this initiative so the in-home providers won't find out that they have the right *not* to join any union and *not* to pay any union dues. Notwithstanding the evidence in the record that Initiative 1501 was motivated by viewpoint discrimination and a desire to prevent in-home providers from receiving anti-union views, the court below affirmed the grant of summary judgment to the Governor and rejected the claim of unconstitutional viewpoint discrimination.

In *Island Trees*, this Court considered a summary judgment in favor of the defendant governmental entity, and reversed because the record before it contained similar evidence of viewpoint discrimination which led the school district to prevent the potential recipients – students, the readers of library books – from receiving information and ideas that the school board did not like. Illustrating a clearly impermissible form of viewpoint discrimination, this Court said this:

> If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. . . .

Island Trees, 457 U.S. at 870-71.

This Court held that if the school board's removal of certain books from the school library was *intended* "to deny [the students] access to ideas with which [the school board] disagreed," then the school board violated the First Amendment. *Id.* at 871. Finding that the evidence presented by high school students raised a genuine issue of material fact as to whether that was the school board's intent, this Court reversed the summary judgment. *Id.* at 875 ("[t]he evidence plainly does not foreclose the possibility that [the school board's] decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books").

In *Island Trees*, the evidence strongly indicated that the reason the students were denied access to the books in question was that the books were "anti-American." *Id.* at 872-73. Here, the evidence strongly suggests that access to the information required to communicate with the 40,000 in-home providers in Washington State was denied because the initiative

proponents did not want them to receive views that were "anti-union." Here, as in *Island Trees*, the record suggests that Initiative 1501 was enacted for the purpose of achieving viewpoint discrimination, and that the effect of the Initiative is to violate the First Amendment rights of both the anti-union in-home providers who wish to express their views, and the First Amendment right of their fellow in-home providers to receive them.

CONCLUSION

For the reasons stated above, Allied Daily Newspapers urges this Court to grant certiorari to review the decision entered below by the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JAMES E. LOBSENZ
Counsel of Record
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
(206) 622-8020
lobsenz@carneylaw.com

Dated: April 21, 2021