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

BRIEF OF THE BRONX HOUSEHOLD OF FAITH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Bronx Household of Faith is an evangelical Christian church formed in 1971 and located in University Heights, one of the lowest-income neighborhoods in the Bronx, New York City's lowest-income borough. The church conducts worship services each Sunday and performs significant community outreach throughout the week, including assisting University Heights residents with basic needs such as food, clothing, and rent, as well as counseling on how to escape poverty and leave behind crime and drug use.

In carrying out its mission of exalting the Lord Jesus Christ by demonstrating in community the power of the Gospel, BHOF has developed a keen understanding of the importance of the Constitution's free-speech protections. In litigation against the New York City Board of Education that spanned two cases and nearly 20 years, BHOF advanced free-speech and other constitutional arguments in support of its right to conduct Sunday services in a public-school auditorium on equal footing with the many secular groups that the Board allowed to meet in city schools during non-school hours for a wide variety of purposes. Although

[1] This *amicus* brief is filed with the parties' consent. Petitioners filed a blanket consent to the submission of *amicus* briefs on April 7, 2021. Counsel for all parties were notified of BHOF's intent to file this brief on April 9, 2021. Respondents supplied their consent to the submission of this brief on April 9, 2021. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

BHOF's position did not ultimately prevail, see *Bronx Household of Faith* v. *Board of Education*, 750 F.3d 184, 189–90 (2d Cir. 2014), cert. denied, 135 S. Ct. 1730 (2015), the group continues to advocate against government policies that close the door on speech.

Initiative 1501 is just such a law. It was drafted to protect entrenched public unions' continued access to Washington State caregivers' information while denying that information to groups who need it to inform caregivers regarding their legal rights vis-à-vis those unions and the fees they exact from Washington state caregivers. Such discriminatory speech suppression is patently unconstitutional. Accordingly, BHOF writes in support of petitioners' request for certiorari and reversal of the judgment below.

SUMMARY OF ARGUMENT

The First Amendment subjects to strict scrutiny any law that materially narrows the channels through which a putative speaker may engage with its intended audience. In *Meyer* v. *Grant*, 486 U.S. 414 (1988), and *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), the Court invalidated Colorado statutes that, respectively, prohibited the use of paid signature-collectors for state ballot initiatives and required such signature-collectors to be registered Colorado voters, because those laws meaningfully shrank the pool of potential collectors and,

consequently, curtailed dramatically the initiative proponents' ability to engage with their desired audience.

Likewise in *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552 (2011), the Court held that a Vermont statute that prohibited one group of speakers (pharmaceutical marketers) from speaking on a specific topic (the merits of specified prescription drug products) with one particular audience (prescribing physicians) violated the First Amendment because it prevented those speakers from being able to conduct that dialogue "in an effective and informative manner."

In just the same way, Initiative 1501 deprives petitioners of the means they require to engage in core political speech. Without contact information for current providers, petitioners will be able to contact and engage with only a fraction of the audience they could reach prior to Initiative 1501's adoption. Like the Vermont law at issue in *Sorrell*, Initiative 1501 burdens a particular dialogue with a specific intended audience, and it does so without any appreciable evidence that the means chosen by the State are the least-restrictive means of achieving the law's asserted goal of protecting care providers' clients from privacy invasions and identity theft.

Nor can Initiative 1501 be justified as a regulation based on petitioners' status as non-incumbents; that label is little more than a euphemism for "parties who wish to speak in opposition to the current union." Strict scrutiny cannot be evaded by such contrivances.

ARGUMENT

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964) (internal quotation marks omitted).

At issue in this case is a Washington statute that discloses political speech-enabling information to one putative speaker but denies it to all others—including those who wish to provide competing information and advocacy to the now-captive audience. As explained below, that selective muzzling of particular speakers violates bedrock First Amendment principles and numerous decisions of this Court. The petition for a writ of certiorari should be granted.

I. The Decision Below Conflicts with Decisions of This Court Condemning "Speech Diminution" Statutes Like Initiative 1501.

A. The First Amendment prohibits States from silencing disfavored speech by choking off the channels through which it is conducted.

Petitioners demonstrate that Initiative 1501, by restricting access to providers' contact information, represents a clear—and clearly forbidden—governmental choice to magnify the voice on one side of a debate and to muzzle all those who seek to disagree. Because the Ninth Circuit's blessing of that discrimination conflicts with foundational First Amendment

principles and numerous decisions of this Court, BHOF agrees with petitioners that review is warranted here.

BHOF writes separately to underscore that, even setting aside the viewpoint-discriminatory nature of Initiative 1501, the decision below would still conflict with the decisions of this Court that preclude States from using indirect methods—*e.g.*, choking off the channels through which core political speech is conducted—to stifle First Amendment activity that the State could not ban outright.

Four decisions of this Court are particularly salient. First, in *Meyer* v. *Grant*, 486 U.S. 414 (1988), the Court confronted the question whether Colorado's ban on paid signature-collectors for ballot initiatives violated the First Amendment. *Id.* at 415–16. The Court began by explaining that the collectors desired to engage in core political speech, because "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421; accord *id.* at 422 n.5 (holding that the protected nature of signature solicitation "follows from [the Court's] recognition . . . that the solicitation of charitable contributions often involves speech protected by the First Amendment" because such "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues" (citation omitted)).

The Court then held that the ban on paying signature solicitors "restrict[ed] political expression in two ways": (1) by "limit[ing] the number of voices who will convey appellees' message and the hours they can speak and, therefore, limit[ing] the size of the audience they can reach;" and, derivatively (2) "mak[ing] it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot." *Id.* at 422–23. Finding inadequate Colorado's justification for the statute's restrictions on political speech, the Court invalidated the law. *Id.* at 428.

Next came *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334 (1995), which presented the question whether "an Ohio statute that prohibits the distribution of anonymous campaign literature is a 'law . . . abridging the freedom of speech' within the meaning of the First Amendment." *Id.* at 336 (quoting U.S. Const., amend. I). Because the statute was a content-based regulation of speech—covering, as it did, "only those publications containing speech designed to influence the voters in an election need bear the required markings," *id.* at 345—the Court applied strict scrutiny.

In applying that standard, the Court assessed the State's asserted justifications for the law in question, but it did not do so in a vacuum. Instead, it asked whether Ohio possessed sufficient other tools to achieve its desired ends ("preventing fraud and libel") such that the ban on anonymous leafleting could not be sustained. *Id.* at 349–51. Concluding that "Ohio's prohibition of anonymous leaflets plainly [wa]s

not its principal weapon against fraud," the Court invalidated the ban. *Id.* at 350–51.

Four years later, the Court returned once again to Colorado and its regulation of initiative petitions, addressing in *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), whether Colorado had violated the First Amendment by requiring "that initiative-petition circulators be registered voters." *Id.* at 186. The Court held the requirement invalid, explaining that it "produces a speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*." *Id.* at 194. Just as in *Meyer*, the requirement that circulators be not only voter-eligible but registered voters "decrease[d] the pool of potential circulators" and thus "'limi[ted] the number of voices who will convey [the initiative proponents'] message' and, consequently, cut down 'the size of the audience [proponents] can reach.'" *Id.* at 194–95 (third and fourth alterations in original). Because Colorado failed to present sufficiently compelling reasons to justify its throttling of initiative-proponents' speech, the requirement could not stand. *Id.* at 195.[2]

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[2] Cf. *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 549 (2001) (federal law withholding legal-services grants from attorneys who sought to amend or invalidate existing welfare law held to be invalid viewpoint discrimination under the First Amendment); *id.* at 546–47 ("The restriction on speech is even more problematic because in cases where the attorney withdraws from a representation [due to the statutory prohibition], the client is unlikely to find other counsel. . . . Thus, with respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict.").

Finally, in *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552 (2011), the Court addressed a Vermont statute that made it illegal for data-mining companies to sell identifying information for prescribing physicians, if that information would be used to market products or services, unless the prescribing physician gave consent. *Id.* at 558–59.

The Court held that the law imposed content- and speaker-based restrictions and was therefore subject to heightened scrutiny. In assessing whether the Vermont statute "burden[ed] disfavored speech by disfavored speakers," *id.* at 564, the Court canvassed the legislative record and concluded that the only customers for the prescriber-identifying information at issue were pharmaceutical manufacturers, *id.* at 564–65. The net effect, the Court reasoned, was that the law targeted one group of speakers (pharmaceutical companies' marketers) who wished to speak to one particular audience (prescribing physicians) on a specific topic (the merits of their prescription drug products). *Ibid.* Because the law prevented those speakers from being able to conduct that dialogue "in an effective and informative manner," heightened scrutiny was warranted—a hurdle the statute could not clear. *Id.* at 565, 580.

In so holding, the Court distinguished *Los Angeles Police Department* v. *United Reporting Publishing Corp.*, 528 U.S. 32 (1999), which had held that a private publishing company could not prevail in a facial challenge to a California statute restricting the sale of recent arrestees' contact information, *id.* at 37.

The *Sorrell* Court explained that, whereas the plaintiff in *United Reporting* (a case about arrestees) was not asserting a violation of its own First Amendment rights, the plaintiffs in *Sorrell* were asserting that the Vermont statute infringed on their own ability to speak. *Sorrell*, 564 U.S. at 569–70 (discussing the separate opinions of Justices Scalia, Ginsburg, and Stevens in *United Reporting*). "All of those writings," the Court emphasized, "recognized that restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment." *Id.* at 569.

Finally, it bears noting that nothing in the framework adopted by these cases is in tension with this Court's earlier decision in *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978), in which four of the seven participating Justices concluded that there was no generalized First Amendment right to all information in government control. *Id.* at 9 (plurality opinion); *id.* at 16 (Stewart, J., concurring in the judgment).

The Ninth Circuit majority spent time on *Houchin*s, Pet. App. 14a–24a, but ultimately concluded it "does not control," Pet. App. 17a. To that extent, the court of appeals was correct; *Houchins* concerned the opposite situation, namely that of the press seeking access to a county jail to learn information to publish more widely, not of a speaker trying to speak to persons whose right to hear was at the same time being restrained by the government. See *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976).

In a more analogous context, this Court has held that there is a "delicate balance" between "the order and security of the internal prison environment and the legitimate demands of those on the 'outside' who seek to enter that environment, in person or through the written word." *Thornburgh* v. *Abbott*, 490 U.S. 401, 407 (1989). The regulation upheld there was measured under the penological-specific standard of *Turner* v. *Safley*, 482 U.S. 78, 89 (1987), and upheld the regulations because they set as a threshold test whether the publication was "detrimental to the security, good order, or discipline of the institution or . . . might facilitate criminal activity," but even then did not exclude such publications categorically. *Id.* at 416 (internal quotation marks omitted). In contrast, Initiative 1501 has no mechanism for allowing unobjectionable communications; instead, it prohibits all voices but one.

The uncontroversial conclusion that there is no generalized right to government information has no bearing here, where the issue is not a putative speaker's ability to access information in the government's exclusive possession, but rather Washington's decision to parcel it out to some speakers while denying it to others who cannot enter a dialogue with their desired audience unless and until they receive the information the State is withholding from them but has shared with competing advocates.[3]

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[3] Indeed, if anything, Justice Stewart's separate opinion in *Houchins* squarely supports petitioners, in that he soundly embraced the proposition that the Constitution mandates *equal* access to all putative speakers, and that the Ninth Circuit erred in

B. Initiative 1501 conflicts with this Court's precedents by throttling petitioners' efforts to speak to individual and family-care providers.

The Ninth Circuit panel majority considered none of this. If it had, it could not have upheld Initiative 1501 against petitioners' challenge.

1. Like Colorado in *Meyer* and *Buckley*, Washington has materially circumscribed the reach of petitioners' advocacy. Just as the limits on the petition circulators trenched on First Amendment freedoms by "limit[ing] the number of voices who will convey appellees' message . . . and, therefore, limit[ing] the size of the audience they can reach," *Meyer*, 486 U.S. at 422–23, so too has Initiative 1501 vastly "dimin[ished]" the reach of petitioners' speech by dramatically curtailing the size of the audience they can reach and making additional outreach impossibly burdensome. *Buckley*, 525 U.S. at 194. Because petitioners' intended speech touches on issues "of great public importance," *Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448, 2475 (2018)—namely, (1) informing individual and family-care providers in Washington of their right to cease paying union agency fees; and (2) advocating for the ouster of the providers' existing unions—Washington's throttling of

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approving an injunction that granted one set of persons (press representatives) broader access to the government's information than would be afforded to others. 438 U.S. at 18 (Stewart, J., concurring in the judgment).

that speech via Initiative 1501 is subject to strict scrutiny.

Sorrell compels the same conclusion. Just as the Vermont statute at issue there sought to stamp out a disfavored dialogue—marketing of specific products to individual prescribers—by denying the speakers the contact information they needed in order to identify and contact their audience, so too does Initiative 1501 seek to bar the sharing of information regarding public employees' rights vis-à-vis their unions by denying putative speakers the contact information they need in order to share that information with individual and family-care providers. 564 U.S. at 564–65.[4]

Had the Court of Appeals paid even cursory heed to these cases, it would have been compelled to apply strict scrutiny to Initiative 1501—a test the law would have certainly failed. Indeed, that conclusion is even clearer here than were the outcomes in *Meyer*, *Buckley*, *McIntyre*, and *Sorrell*. The first three of those cases were electoral cases, and—as this Court has said—

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[4] The underlying rights of those care providers are themselves of fundamental importance. As the Court ruled in *Janus*, compelling public employees to support monetarily the collective-bargaining activities of their unions violates the First Amendment. 138 S. Ct. at 2459–60. Public employees thus have the right to withhold both their financial support and personal imprimatur from the union's speech if they disagree with it. See *id.* at 2464 ("As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical'" (alteration in original) (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950))).

States are afforded "significant flexibility in implementing their own voting systems." *John Doe No. 1* v. *Reed*, 561 U.S. 186, 195 (2010). *Sorrell*, for its part, sounded (or at least echoed) in commercial speech, which States also have greater latitude to regulate. See *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). Here, of course, neither of these circumstances is present; Initiative 1501 regulates pure political speech, and hence the First Amendment's protections apply in their most potent form.

The actual analysis performed by the court of appeals bore little resemblance to strict scrutiny, which requires the State to show that its actions "are narrowly tailored to serve compelling state interests." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). For example, the court of appeals did not even ask whether there is a direct causal link between (a) restricting a rival union (or proponents of having no union at all) from communicating with public union members; and (b) the stated goal of protecting those union members' *clients* from identity theft—much less whether Initiative 1501's selective restriction is the most narrowly tailored way to advance that goal.

As Judge Bress clearly demonstrated in dissent below, it is not. Pet. App. 85 (Bress, J., dissenting) ("The State has not brought forward any evidence that previous public records requests of care providers' identities have led to identity theft."); *id.* at 85–86 ("Among other things, the State has not explained why, to avoid identity theft, it needs to prevent the disclosure of all identifying information of in-home care providers, as

opposed to merely some of it. The State also has not explained why it could not protect against identity theft by allowing some greater disclosure of care provider information while instituting some confidentiality restrictions surrounding its receipt."). The court of appeals' failure to step back and ask those determinative questions was an abdication of its responsibility to apply strict scrutiny.

2. Perhaps ironically, the public-access statute to which Initiative 1501 was added is in harmony with the First Amendment values discussed above. It is only the provisions of Initiative 1501 that have caused the present constitutional discord. Indeed, even a cursory examination of that broader statute would have shown that Washington, even more adamantly than most states, crafted its entire public access framework against a backdrop that individuals should decide for themselves what they want to know and how they want to respond.[5] For example, the Revised Code states:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not

[5] As noted, this is consonant with First Amendment first principles. See *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.").

> good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

RCW 42.56.030. Going even further, the state defined the right to privacy exceedingly narrowly, stating that it is violated only if "disclosure of information about the person: (1) [w]ould be highly offensive to a reasonable person; and (2) is not of legitimate concern to the public." RCW 42.56.050.

Especially given this statutory backdrop, there is no showing (or even reasonable inference) that allowing alternate viewpoints to be communicated to caregivers "could facilitate identity crimes against seniors, vulnerable individuals, and other vulnerable populations that these caregivers serve." RCW 42.56.640 (Intent). Indeed "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Bartnicki* v. *Vopper*, 532 U.S. 514, 529 (2001).

Nor is Initiative 1501 the most narrowly tailored way possible of advancing the State's interests in preventing identity crime. As Judge Bress observed in his dissenting opinion, there are numerous other ways to achieve equivalent—if not superior—results with fewer burdens on protected speech. Pet. App. 85–86 (Bress, J., dissenting) (discussing alternatives).

Because the State has failed to prove that Initiative 1501 "does not 'unnecessarily circumscrib[e] protected expression,'" *Republican Party of Minnesota* v. *White*, 536 U.S. 765, 775 (2002) (quoting *Brown* v. *Hartlage*, 456 U.S. 45, 54 (1982)), the law fails strict scrutiny.

3. The court of appeals similarly dismissed out of hand its obligation to undertake a "viewpoint" analysis, a feat it achieved by recharacterizing the existing unions' message as a "legal status," Pet. App. 28—a rhetorical sleight of hand that has created concern for the Court in other First Amendment contexts.[6] As Justice Gorsuch said in his concurrence in *Espinoza* v. *Montana Department of Revenue*, the law deems it important to protect "religious actions, not just religious status . . . the right to *be* religious without the right to *do* religious things would hardly amount to a right at all." 140 S. Ct. 2246, 2276, 2277 (2020) (Gorsuch, J., concurring). The converse is also true; protecting

[6] Almost as an afterthought, and reflective of the paucity of the analysis of the Court of Appeals, it dismissed as a mere "suggestion" that the statute was viewpoint discriminatory because it "disadvantage[d] Boardman's message." Pet. App. 33. After all, the Court of Appeals reasoned, disproportionate impact does not matter if the statute is facially neutral. *Ibid*. *Reed* belies the Ninth Circuit's analysis. See 576 U.S. at 164 ("Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys[.]' Those laws, like those that are content based on their face, must also satisfy strict scrutiny." (internal quotation marks omitted)).

whatever a speaker says because of its status as an "existing union" speaker while prohibiting whatever a "prospective union" speaker says, knowing in advance much of what the content from each will be, is not a viewpoint neutral decision, as a plurality of this Court recently reaffirmed in *Barr* v. *American Association of Political Consultants*, *Inc.*, 140 S. Ct. 2335, 2347 (2020) (plurality opinion) ("[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." (internal quotation marks omitted)).

For its contrary conclusion—that regulating status *is* enough to satisfy the First Amendment—the court of appeals relied on *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983). But the portion of *Perry* on which the Court of Appeals relied was the preliminary evaluation whether the place of speaking—there, the school's mailbox and delivery system—was a traditional public forum, a limited public forum, or a non-public forum. Concluding that the in-school mailbox and delivery system was non-public, the Court went on to assess whether the distinctions "were reasonable in light of the purpose which the forum at issue serves." *Id*. at 49.

Nothing in this Court's precedents—or, for that matter, in First Amendment first principles—supports the Ninth Circuit's implicit conclusion that Washington's *open-records* regime establishes a similar *non-public* forum. Accordingly, Washington is strictly prohibited from drawing distinctions based on

speaker status, and Initiative 1501 is invalid under the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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