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 *AMICUS CURIAE* CITIZEN ACTION DEFENSE FUND IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Citizen Action Defense Fund (CADF)[1] is a Washington nonprofit corporation and public-interest law firm devoted to advancing free markets, restraining government overreach and defending constitutional rights. CADF is a "watchdog" for all Washingtonians, helping to ensure that the State and local governments play by the rules and that the public's constitutional rights are protected.

This case raises questions of deep importance to CADF. As an organization that strives to defend constitutional rights, CADF is concerned that the ballot Initiative at the center of this case functionally impinges on the First Amendment rights of two groups—the right of petitioners to share their opinions about union and bargaining matters, and the right of bargaining unit members to not financially support their representative union. Additionally, CADF strongly opposes the unlevel playing field that the Initiative creates between public-sector unions (which can freely obtain lists of bargaining unit members) and public employees (who can no longer obtain lists of their bargaining unit colleagues).

SUMMARY OF ARGUMENT

Petitioners argue persuasively that certiorari is warranted because the "naked viewpoint discrimination" of Washington's Initiative 1501, a

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[1] All parties received notice of *amicus curiae*'s intent to file this brief more than 10 days in advance and have consented to the filing of 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 person other than amicus or its counsel made a monetary contribution to its preparation or submission

ballot measure passed by Washington State voters in 2016, as well as the law's "chilling effect on the [union] opt-out rights" that this Court recently articulated in *Harris v. Quinn*, 573 U.S. 616 (2014), and *Janus v. AFSCME, Council 31*, 585 U.S. ___, 138 S. Ct. 2448 (2018), are inconsistent with First Amendment principles. Pet. Br. at 2.

This brief of *amicus curiae* provides the Court with additional context regarding the history and operation of Initiative 1501. First, the Initiative should be understood as the culmination of a years-long effort by public-sector unions in Washington—led chiefly by Service Employees International Union Healthcare 775NW ("SEIU 775"), which represents individual providers,[2] including one of the petitioners—to stymie petitioners' ability to disseminate their views. SEIU 775 litigated in court, lobbied the legislature and ultimately led an election campaign as they attempt to block petitioners' speech from being heard by the one relevant audience. This history demonstrates the "manifest purpose" of Initiative 1501 "is to regulate speech because of the message it conveys." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994).

Second, despite the anti-fraud and anti-identity theft gloss of Initiative 1501, the measure's sole practical impact is to shield individual providers and

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[2] "Individual providers" contract with the Washington Department of Social and Health Services to "provide[] personal care or respite care services to persons who are functionally disabled or otherwise eligible" for services through Medicaid or other state-funded programs. WASH. REV. CODE § 74.39A.240(3).

family child-care providers[3] from virtually all union-related speech except their unions' own speech. Thus, the Initiative's text itself serves as further indication that it "is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 811 (1985).

Such historical and contextual detail constitutes additional evidence of the "naked viewpoint discrimination" and "chilling effect on [union] opt-out rights" of Initiative 1501 that petitioners articulated and that merit certiorari. Pet. Br. at 2.

ARGUMENT

I. The History Of Initiative 1501 Shows Its "Manifest Purpose Is To Regulate Speech Because Of The Message It Conveys"

Following this Court's landmark decision in *Harris v. Quinn*, 573 U.S. 616 (2014), "petitioners began contacting their fellow in-home care providers in Washington state to make sure they were aware of their First Amendment right to refrain from subsidizing their unions' speech through union dues." Pet. Br. at 1. These efforts by petitioners to "voic[e] their opposition to the Unions" precipitated a series of responses by those unions that culminated in the passage of Initiative 1501. *Boardman v. Inslee*, 978 F.3d 1092, 1100 (9th Cir. 2020).

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[3] The other two individual petitioners are family child-care providers, represented by Service Employees International Union Local 925 ("SEIU 925"). "Family child-care providers" are licensed (unless exempt from licensure) and paid by the Washington Department of Early Learning to "provide[] regularly scheduled care for a child or children in the home." WASH. REV. CODE § 41.56.030(7).

Although a divided Ninth Circuit panel held that Initiative 1501's restrictions were based on status rather than viewpoint, the history and context of the Initiative belie this conclusion. *See id.* at 1110-11. Viewed together, the chain of events that led up to Initiative 1501 clearly reveal its purpose to be the suppression of one particular viewpoint. And because "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys," the Initiative's purpose is exceptionally relevant to any First Amendment analysis of it. *Turner Broad. Sys.*, 512 U.S. at 645.

A. Unions Petitioned The Courts In Order To Block Petitioners' Speech

The Ninth Circuit acknowledged that petitioners' efforts to contact the other 40,000 providers in their bargaining units was "not . . . a simple task" because they "work in homes dispersed through Washington[, t]hey do not share workplaces, supervisors, or clients, and they have a notably high turnover rate." *Boardman*, 978 F.3d at 1100. To overcome this hurdle, petitioners "obtained lists of in-home care providers' personal information [from] the state agencies that administer home-care programs" through Washington's Public Records Act ("PRA"). *Id.* Indeed, "effectively communicating with care providers is essentially impossible without [this] information." *Id.* at 1122 (Bress, J., dissenting). Moreover, "due to in-home care providers' high turnover, these lists soon became outdated." *Id.* at 1100 (majority opinion).

SEIU 775 first attempted to block petitioners from accessing lists of individual providers by challenging the petitioners' PRA requests in court. *Id.*

Under the PRA, certain specific information is exempt from public disclosure entirely, such as records containing personal financial information, records revealing an individual's religious beliefs, and records that would impair physical or information security, among others. *E.g.*, WASH. REV. CODE §§ 42.56.230(5), .235, .420. More generally, the release "of any specific public record may be enjoined [by] a person who is named in the record or to whom the record specifically pertains" if it can be shown that the record's release "would clearly not be in the public interest and would substantially and irreparably damage any person." WASH. REV. CODE § 42.56.540.

Following one of petitioners' PRA requests, SEIU 775 sought "a preliminary and permanent injunction" to prohibit "release[e of] the lists of individual providers," claiming the information was exempt from disclosure under various provisions of the PRA. *SEIU Healthcare 775NW v. State*, 377 P.3d 214, 217 (Wash. Ct. App. 2016), *petition denied*, 380 P.3d 502 (Wash. 2016). Nevertheless, "the trial court denied SEIU's motions for a preliminary and permanent injunction," ruling that the PRA "did not prohibit disclosure of the lists of individual providers even assuming the accuracy of the allegations by the SEIU." *Id.* at 219-20. A Washington state appeals court "affirm[ed] the trial court's denial of SEIU's request for preliminary and permanent injunctive relief," *id.* at 230, and the Washington Supreme Court declined further review, *SEIU Healthcare 775NW*, 380 P.3d at 502.

While these litigation efforts ultimately failed, the attempt to block petitioners' ability to *speak* to other providers by using the PRA to block petitioners'

ability to *identify* their fellow providers eventually became the foundation on which Initiative 1501 now rests.

B. After Losing In Court, Unions Lobbied The Legislature To Change The Law

Once the trial court rejected SEIU 775's attempt to block disclosure of provider lists under the existing PRA, unions began lobbying the Washington State Legislature to amend the PRA to provide a more explicit basis on which disclosure of provider lists could be denied.

During the Washington Legislature's 2015 session, public-sector unions (including SEIU 775[4]) solicited support for Washington House Bill 1349 ("HB 1349") and Washington Senate Bill 5678. *See, e.g.*, H.R. BILL REP. NO. 1349, 64th Leg., 2015 Reg. Sess. (Wash. 2015) (listing representatives of the Washington State Council of Firefighters and the union representing Department of Corrections officers as testifying "in support" of the bill). These bills, as originally introduced, would have prohibited the names of public employees obtained through the PRA from being used to obtain addresses or telephone

[4] *See, e.g.*, email from Adam Glickman, Secretary-Treasurer of SEIU 775, to Aisling Kerins, then-Executive Director of External Relations, Office of the Governor (Feb. 6, 2015, 02:50:26 PM PST), https://www.freedomfoundation.com/wp-content/uploads/2016/05/Adam-Glickman-SB-5678-email.pdf (forwarding an email from SEIU 775's general counsel that contained a legal memorandum suggesting revised language to the bills and requesting the Governor's budget office "write a letter to the chair" of the committees supporting such revisions).

numbers of those employees—the very process that petitioners had been following all along.[5]

HB 1349 was subsequently amended on the floor of the State House of Representatives to instead forbid lists of public employees and in-home care providers obtained through the PRA from being used to "[i]nduc[e] any person to cease or refrain from economically supporting any entity"—still the very activity that petitioners had been engaging in, not to mention a primary reason why they were seeking lists of other in-home care providers at all. H.R. JOURNAL, 64th Leg., 2015 Reg. Sess., 558-60 (Wash. 2015).

Though neither bill passed the Washington Legislature during its 2015 session, SEIU 775 renewed their efforts in 2016. The amended version of HB 1349 was reintroduced as Washington Senate Bill 6542 ("SB 6542"). *See* S. 6542, 64th Leg., 2016 Reg. Sess. (Wash. 2016). Despite SEIU 775 exerting even greater public pressure on legislators,[6] SB 6542 failed to advance as well. *See* S. JOURNAL, 64th Leg., 2016 Reg. Sess. (Wash. 2016).

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[5] As described on p. 5, *supra*, the PRA exempts certain records from public disclosure. One exemption is for "[r]esidential addresses . . . telephone numbers [and] email addresses" of "employees or volunteers of any public agency." WASH. REV. CODE 42.56.250(4). *Not* exempt (at least prior to the passage of Initiative 1501) were names and dates of birth. Petitioners could have thus been able to obtain contact information for their fellow providers by comparing a list of names and birth dates against other publicly-available data sets, like the voter registration file.

[6] See, e.g., email from an SEIU caregiver, Feb. 11, 2016, 08:36 AM PST), https://www.freedomfoundation.com/wp-content/uploads/2016/05/SEIU-775-privacy-email-Feb-2016.pdf (encouraging recipients to send their legislators a message to pass a bill like SB 6542).

C. After Being Rebuffed By The Courts And The Legislature, Unions Turned To The Ballot Box

Mere hours after SB 6542 "died" for the remainder of the 2016 session, public-sector unions tried their hand at a third audience—the voters.[7] Thanks to a progressive-era state constitutional amendment declaring that "the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature," Washington is home to an unusually and consistently large number of voter-generated ballot measures. WASH. CONST. art. II, § 1; *see also* Kenneth P. Miller, *Courts as Watchdogs of the Washington State Initiative Process*, 24 SEATTLE U. L. REV. 1053, 1055-56, 1058 (2001).

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[7] At the beginning of each regular legislative session, the Washington State House and Senate adopt a concurrent resolution to "establish cutoff dates for the consideration of legislation" during that session. *E.g.*, S. Con. Res. 8401, 67th Leg., 2021 Reg. Sess. (Wash. 2021). For the 2016 legislative session, Senate Concurrent Resolution 8406 designated February 5 as the final day to report a bill out of the legislative committee to which it was referred. *Id.* § 1. SB 6542 was introduced on January 25 and referred to the Senate Commerce & Labor Committee. S. JOURNAL, 64th Leg., 2016 Reg. Sess., 82 (Wash. 2016). At 1:27 PM on February 4, the Senate Commerce and Labor Committee cancelled its meeting scheduled for the following day, thereby ensuring that SB 6542 could not be reported out of committee before the requisite cutoff date. Senate Commerce & Labor Committee, *2/5/2016 Agenda*, https://app.leg.wa.gov/committeeschedules/ - /Senate/17544/02-05-2016/02-05-2016/Schedule///Bill/. Starting at 4:39 PM on February 4, the sponsor of Initiative 1501, filed the first of eleven draft initiatives. Washington Secretary of State, *Proposed Initiatives to the People - 2016*, http://www.sos.wa.gov/elections/initiatives/initiatives.aspx?y=2016.

Perhaps not surprisingly in light of Washington's initiative tradition, a few hours after the unions' legislative "fix" to the PRA died for the 2016 session, the first of several strikingly similar ballot initiative drafts was filed with the Washington Secretary of State. Washington Secretary of State, *Proposed Initiatives to the People - 2016*, http://www.sos.wa.gov/elections/initiatives/initiatives.aspx?y=2016. Eleven versions were ultimately filed by the same sponsor, one of which became Initiative 1501. *Id.*

The Union's connection to, and support of, the Initiative was clear. The "Campaign to Prevent Fraud and Protect Seniors" ("Campaign"), the registered campaign committee in support of the Initiative and one of the respondents in this case, "received substantial contributions from the Unions.[8] It was also chaired by SEIU 775's secretary-treasurer." *Boardman*, 978 F.3d at 1102-03 (footnote added).

Additionally, although the Initiative "was ostensibly based on protecting in-home care providers and the persons for whom they care from identity theft and fraud," the unions frequently, unabashedly and publicly argued that the Initiative should be supported *because* it would impair petitioners' ability to deliver their views about unions. *Id.* at 1124 (Bress, J., dissenting). For example, an internal SEIU letter to its members "criticized [petitioner] Freedom

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[8] Even characterizing SEIU 775's financial support of the Campaign as "substantial" is an understatement. Of the $2.2 million raised by the campaign, nearly $2 million came from SEIU 775 and $250,000 came from SEIU 925. Only $1,413.10 came from other sources. Washington Public Disclosure Commission, *Campaign to Prevent Fraud and Protect Seniors*, https://www.pdc.wa.gov/browse/campaign-explorer/committee?filer_id=CAMPPF%20111&election_year=2016.

Foundation's 'anti-union agenda'" and urged voting "YES on I-1501" in order to "to stop the Freedom Foundation." *Id.* at 1125. SEIU 775's secretary-treasurer (and Campaign chair) "argued in favor of I-1501" to a Seattle newspaper "because it would prevent care providers' information from being 'made available to the Freedom Foundation or any other advocacy/political/religious group with an agenda'" *Id.*

Even the district court's order in this case acknowledged that one "could rationally infer that the predominate motivating factor for the Initiative and the Campaign's support for the Initiative was animus toward the Freedom Foundation and outside entities with prerogatives similar to the Foundation." *Boardman v. Inslee*, 354 F. Supp. 3d 1232, 1252 (W.D. Wash. 2019).

Thus, despite purporting to only address identity theft, consumer fraud and the PRA, while avoiding any *direct* mention of topics like collective bargaining, union membership or political speech, the historical development of Initiative 1501 evinces a clear intent by SEIU 775 and other public-sector unions to enact a viewpoint-discriminatory law. The Campaign and SEIU 775 openly admitted that a primary goal of Initiative 1501 was to prevent petitioners from being able to disseminate an anti-union message, these unions only pivoted to a strategy of amending the law through a voter initiative after failing to successfully lobby the State Legislature two sessions in a row, and the legislative effort was only mounted after it became clear that state courts would not interpret the PRA in the way SEIU 775 hoped.

Because the "manifest purpose" of Initiative 1501 "is to regulate speech" based on "the message it

conveys," this Court should grant the petition for certiorari and strictly scrutinize the obvious viewpoint-discriminatory intent of the Initiative. *Turner Broad. Sys.*, 512 U.S. at 645

II. Initiative 1501 "Is In Reality A Facade For Viewpoint-Based Discrimination"

A textual analysis of Initiative 1501 suggests a viewpoint-discriminatory intent as well. The Initiative consists of 13 sections, many of which are procedural or otherwise non-substantive.[9] The only provisions that amend substantive state law address one of three topics—identity theft, consumer fraud and the PRA. However, the Initiative's identity theft and consumer fraud provisions are functionally meaningless. The only practical impact of Initiative 1501 relates to its amendment to the PRA, rendering the rest of the measure "a facade for viewpoint-based discrimination." *Cornelius*, 473 U.S. at 811.

A. The Initiative's Identity Theft Penalties Are Exceptionally Narrow And Not A Deterrent

Under Washington law, it is a crime to "knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." WASH. REV. CODE § 9.35.020(1). Such criminal action constitutes "identity theft in the first degree," a "class B felony," if the perpetrator "obtains credit, money, goods,

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[9] Section 1 names the act. 2017 Wash. Sess. Laws ch. 4. Sections 2, 4 6(1) and 7 declare "legislative" intent. *Id.* Section 9 requires a report. *Id.* Section 12 is a construction clause. *Id.* Section 13 is a severability clause. *Id.*

services, or anything else" over $1500 in value. WASH. REV. CODE § 9.35.020(2). In general, all other acts of identity theft are "in the second degree," a "class C felony." WASH. REV. CODE § 9.35.020(3).

The one exception involves Initiative 1501's sole change to Washington's criminal identity theft statutes—upgrading identity theft that "knowingly targets a senior or vulnerable individual" to a class B felony, regardless of the amount of money or value of other items obtained through the identity theft. 2017 Wash. Sess. Laws ch. 4, § 5(2) (codified at WASH. REV. CODE § 9.35.020(2)).

But this small change—which *at most* only affects instances of identity theft that knowingly target seniors *and* involves theft of less than $1500—is even narrower than it appears. That's because, under federal law, the penalties for identity theft far exceed the corresponding state law penalties.

Pursuant to Washington law, a class B felony is punishable by up to 10 years in prison and a $20,000 fine (or both), while a class C felony is punishable by up to 5 years in prison and a $10,000 fine (or both). WASH. REV. CODE § 9A.20.021. By comparison, federal criminal penalties for identity theft include up to 15 years in prison, Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (1998) (codified at 18 U.S.C. § 1028), and a mandatory *minimum* sentence of at least 2 years if the identity theft is committed in conjunction with certain other crimes, Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004) (codified at 18 U.S.C. § 1028A). Moreover, unlike most crimes, federal courts have jurisdiction over identity theft even if the perpetrator and victim are in the same

state. Identity Theft Enforcement and Restitution Act of 2008, Pub. L. No. 110-326, 122 Stat. 3560 (2008) (codified at 18 U.S.C § 3663(b)).

Thus, the Initiative's update to Washington's criminal identity theft statute is not only limited to an extremely narrow set of facts, but appears to provide little deterrence effect given that maximum federal penalties remain higher than any potential state penalty.

B. The Initiative's Consumer Fraud Provisions Are Ambiguous And Irrelevant

Initiative 1501 also purports to subject "consumer fraud that targets a senior or vulnerable individual . . . to civil penalties." 2017 Wash. Sess. Laws ch. 4, § 6. Yet this addition to state law is even more illusory than the Initiative's adjustment to Washington's criminal identity theft statute.

Although Initiative 1501 defines several of its other terms, such as "Senior" and "Vulnerable individual," it does not define "consumer fraud." *Cf.* 2017 Wash. Sess. Laws ch. 4, § 3. Nor is "consumer fraud" defined in any other state statute. *See, e.g.*, WASH. REV. CODE ch. 9.35 (governing identity crimes and where section 6 of the Initiative is codified), ch. ch. 9A.60 (the "fraud" provisions of the Washington Criminal Code), and ch. 19.68 (establishing Washington's Consumer Protection Act), none of which define "consumer fraud." Confounding matters further, the Initiative "creates no new cause of action" to bring a consumer fraud claim.

The Ninth Circuit inadvertently underscored the paradoxical nature of this provision by describing it as

"a treble-damages provision applicable in any *civil* cause of action." *Boardman*, 978 F.3d at 1101 (emphasis added). Yet it was codified within Washington's *criminal* code, specifically at title 9 ("Crimes and Punishments"), chapter 35 ("Identity Crimes") of the Revised Code of Washington. The statute is so ambiguous that even the State's own statutory compilations appear unsure whether it is civil or criminal in nature.

As might be expected for an undefined malfeasance with an undefined enforcement mechanism, *amicus* can find no examples of any criminal or civil case where penalties were sought under this statute, further demonstrating the irrelevance of this component of Initiative 1501.

C. The Initiative's PRA Revisions Don't Combat Identity Theft Or Consumer Fraud

A divided Ninth Circuit panel concluded that "the State has a legitimate interest in protecting seniors and other vulnerable individuals . . . from identity theft and other financial crimes." Yet as explained in Part II.A and II.B *supra*, Initiative 1501 makes only trivial adjustments to state law on these topics. The only provision of the Initiative that carries any practical import is found in section 10, which amends the PRA to forbid the release of any "personal information of in-home caregivers for vulnerable populations." 2017 Wash. Sess. Laws ch. 4 § 10. (To be sure, section 11, which carves out exemptions for collective bargaining representatives and a few other limited situations, and section 8, which defines key terms contained in sections 10 and 11, are important

complements to section 10. *See* 2017 Wash. Sess. Laws ch. 4, §§ 8, 11.)

And despite the State's legitimate interest in protecting vulnerable populations from identity theft and consumer fraud, "there is scant evidence as to how restricting access to the names of in-home care providers will protect either them or the vulnerable persons for whom they care from identity theft." *Boardman*, 978 F.3d at 1137 (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.*, nor does "[t]he Initiative . . . explicitly articulate how withholding caregiver identities will protect vulnerable individuals," *Boardman*, 354 F. Supp. 3d at 1250.

In the end, Initiative 1501 does nothing to further the State's interest in protecting vulnerable populations from identity theft and consumer fraud because each of its provisions either lacks any meaningful effect or lacks any evidence of actually reducing identity theft and consumer fraud.

Instead, the series of superfluous and superficial changes contained in Initiative 1501 serve to obscure its one true impact—prohibiting the "release [of] personal information of in-home caregivers" to nearly everyone *except* the caregivers' incumbent union. 2017 Wash. Sess. Laws ch. 4, §§ 10-11. Thus, like this Court held in *Cornelius*, "[t]he existence of reasonable grounds" for a law should not save a law "that is in reality a facade for viewpoint-based discrimination."

CONCLUSION

For the reasons above, *amicus* requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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