No. 20-1334

In the Supreme Court of the United States

BRADLEY BOARDMAN, ET AL.,

PETITIONERS,

v.

JAY INSLEE, ET AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

State and federal public records laws often allow some entities access to government data based on their status while denying the same information to others. No court has ever held that such status-based access becomes unconstitutional if the entities able to receive government data have views different from those who cannot. Such a rule would upend countless laws that provide information to entities that tend to have certain political views, from health insurers to veterans' organizations to military contractors. These organizations typically receive special access to information because of some service they are contractually or statutorily obligated to provide. The same is true of public sector unions, which have statutory duties to all the workers they represent. Because of those duties, this Court has held that allowing an elected union certain access to employees they represent while denying such access to others is not viewpoint discrimination. The question presented is:

Did Washington voters violate the First Amendment by deciding that the personal contact information of certain caregivers should generally be exempt from disclosure under the State's public records statute but can be shared in limited ways, including with the union statutorily obligated to represent the caregivers?

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INTRODUCTION

The handiwork of Petitioners' able counsel cannot overcome the frailties of this case. Not one of Petitioners' key legal claims withstands examination: the law they challenge does not discriminate based on viewpoint, the decision below creates no conflict with decisions of this Court or lower courts, and this case is of little import. The Court should deny certiorari.

Petitioners' central claim—that Initiative 1501 discriminates based on viewpoint—is demonstrably wrong. When Washington voters enacted I-1501, they restricted access to State-held contact information of certain caregivers. The law contains several exemptions, however, including to ensure provision of fringe benefits to caregivers, to allow investigations of alleged caregiver misconduct, to further research into improving services for vulnerable residents, and to permit a union elected by the caregivers to represent them. Petitioners claim that this last exemption is viewpoint discrimination because they want to convey a message to the caregivers different from the union's message. But Petitioners could not access the data *regardless of their viewpoint*. Even if they copied a newsletter sent by the caregivers' union and asked the State for the caregivers' contact information to distribute only that message, I-1501 would require denying their request. And while Petitioners claim that the law restricts only anti-union messages, it requires the State to deny requests for caregiver data even if the would-be speaker wants to communicate a pro-union message.

Given how I-1501 operates, the lower courts properly applied this Court's precedent and held that the law distinguishes based on status, not viewpoint. In arguing to the contrary, Petitioners rely primarily on *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), and *Harris v. Quinn*, 573 U.S. 616 (2014), but neither remotely calls into question statutes like this one, which simply weren't at issue in those cases. This Court's more relevant decisions make clear that when government is facilitating speech, distinctions based on status rather than viewpoint are perfectly fine, and an elected union's statutory duty to represent employees creates just such a status-based distinction. The decision below is thus compelled by, rather than in conflict with, this Court's cases.

Petitioners' attempt to invent a lower court conflict is equally unavailing. Petitioners cite no case in which a federal or state appellate court invalidated on First Amendment grounds a public records statute that granted access to governmental records using status-based distinctions. Instead, they invoke a wholly unrelated line of cases about whether "unbridled discretion" by public officials in granting funding to student groups or allowing access to school property violates the First Amendment. These inapt cases create no conflict here, where I-1501 leaves public officials with no discretion about which information requests to grant or deny.

Petitioners' hyperbole about the case's importance also falls flat. I-1501 leaves Petitioners with many tools to reach caregivers, tools they have

used effectively in other States. And because of recent changes in Washington law, most caregivers will soon no longer collectively bargain with the State and their information will not be disclosed to anyone under the exemption challenged here. This Court's evaluation of that exemption would thus have little impact even in Washington, much less elsewhere.

In reality, it is Petitioners' proposed rule that would upend countless state and federal laws and longstanding practices. Public records laws often grant access to information only to certain entities, typically because of some statutory or contractual obligation of those entities, and such entities often have strong views on controversial topics. For example, governments at every level give employee contact information to health insurance companies to provide employee benefits, but such insurance companies typically oppose efforts to move to a single-payer healthcare system and support vaccination. Is it viewpoint discrimination to share employee information with these companies without also sharing it with "Medicare-for-All" advocates or anti-vaccination campaigners? Of course not, but Petitioners' argument would subject any such preferential access that coincides with certain viewpoints to constitutional challenge. The Court should not open that Pandora's Box.

In short, the decision below applies settled law, creates no split of authority, and is unimportant. The Court should deny review.

STATEMENT OF THE CASE

A. Washington's Public Records Act

Washington voters adopted the Public Records Act (PRA) by initiative in 1972. Initiative 276, Laws of 1973, ch. 1 (approved Nov. 7, 1972). "The PRA is a strongly worded mandate for broad disclosure of public records," *Associated Press v. Washington State Legislature*, 454 P.3d 93, 96 (Wash. 2019) (internal quotation marks omitted), directing disclosure of vastly more information than would be constitutionally required, *see, e.g.*, *McBurney v. Young*, 569 U.S. 221, 232 (2013) ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."). But the PRA includes numerous exemptions where the People or the Legislature determined that privacy rights or other interests outweighed the public interest in disclosure. *Resident Action Council v. Seattle Hous. Auth.*, 327 P.3d 600, 605 (Wash. 2013).

Exemptions from public disclosure include "certain law enforcement and crime data, public employees' personal information . . . , proprietary records . . . , library records . . . , commercial fishing catch and shellfish harvest data, and maps of archaeological sites," among many others. Pet. App. 8-9 (citing Wash. Rev. Code §§ 42.56.240, .250, .270, .310, .430(1), .430(8), .300(1)). Many provisions exempt personal information, including for children enrolled in various government programs and their families; personal financial information; information

provided to obtain an identity card or driver's license; and information submitted in connection with certain workers' compensation settlements. Wash. Rev. Code § 42.56.230.

These legislative judgments about protecting records from disclosure often involve nuanced policy decisions regarding the balance between privacy and disclosure. For example, the PRA exempts from disclosure information revealing the identity of witnesses to a crime only if disclosure would endanger a person's life or property, and exempts certain proprietary information obtained by an agency where the disclosure would produce private gain and public loss. Wash. Rev. Code §§ 42.56.240, .270(1).

Like many other public records statutes across the nation, the PRA sometimes resolves these policy issues by allowing disclosure to certain requesters but not others. As detailed below, the provision at issue here allows disclosure of the personal information of in-home care providers to their certified collective bargaining representatives as well as other entities. Pet. App. 135-36 (I-1501 § 11). Other provisions of the PRA or related Washington laws similarly allow disclosure only to certain categories of persons. *See, e.g.*, Wash. Rev. Code § 42.56.070(8) (allowing list of professional license applicants to be given to professional organizations), .240(4) (allowing concealed pistol license applications to be disclosed to law enforcement or corrections agencies), .240(14) (allowing disclosure of body worn camera recordings to persons involved in incident recorded, to certain state commissions, and, if relevant, to civil rights litigants), .430(2) (allowing release of sensitive fish and wildlife information to

colleges and universities, as well as to government agencies and public utilities); Wash. Rev. Code § 82.32.330 (allowing disclosure of confidential tax information in specified circumstances and to specified agencies or individuals).

Other states and the federal government have enacted similar laws and exemptions. *See, e.g.*, 5 U.S.C. § 552a(b) (specifying exceptions to federal Privacy Act); Cal. Gov't Code § 6254.3(a)(3) (exempting public employee contact information from public disclosure but allowing access to agents and employees of health benefits plans, among other exceptions); Ind. Code § 5-14-3-4(b)(1) (allowing disclosure of certain investigatory records to crime victim advocates, victim service providers, and public and private schools); S.C. Code § 30-4-40(a)(17) (allowing disclosure of public project structural plans for procurement or to contractors); Fla. Stat. § 119.071(3)(b) (same).

Other jurisdictions also similarly share non-publicly available information about workers with collective bargaining representatives. *See, e.g.*, *Serv. Emps. Int'l Union Local 1021 v. Sacramento City Unified Sch. Dist.*, 2018 WL 6499749 (Cal. Pub. Emp. Rels. Bd. Nov. 19, 2018); *Amalgamated Transit Union, Local 842 v. State of Del., Del. Transit Corp.*, 2012 WL 3878027, at *3 (Del. Pub. Emps. Rels. Bd. Aug. 15, 2012); *Dep't of Soc. & Rehab. Servs. v. Pub. Emps. Rels. Bd.*, 815 P.2d 66, 72 (Kan. 1991); *County of Morris v. Morris Council 6*, 852 A.2d 1126, 1130 (N.J. Super. 2004); *AFSCME Council 18 v. Bd. of Cnty. Comm'rs*, 2016 WL 8578769, at *4 (N.M. Pub. Emps. Rels. Bd. May 11, 2016); *see also Janus*, 138 S. Ct. at 2467 (noting that unions designated as

exclusive representatives are "often granted special privileges, such as obtaining information about employees" (citing 5 Ill. Comp. Stat. § 315/6(c))).

B. Washington Voters Overwhelmingly Passed I-1501 with Support from Across the Political Spectrum

In 2016, Washington voters considered an initiative addressing identity theft and privacy protections for vulnerable individuals and their caregivers. Among other things, I-1501 increased penalties for identity theft and consumer fraud targeting seniors and vulnerable individuals. It also amended the PRA to exempt from disclosure personal information of vulnerable individuals and their caregivers, with some exceptions. Personal information protected from disclosure included "names, addresses, GPS coordinates, telephone numbers, email addresses, social security numbers, driver's license numbers, or other personally identifying information." Pet. App. 134 (I-1501 § 8(2)(b)). As the initiative explained, "[t]he people find that additional measures are needed to protect seniors and vulnerable individuals from identity theft because such individuals often have less ability to protect themselves and such individuals can be targeted using information available through public sources . . . ." Pet. App. 131 (I-1501 § 4(2)). The initiative also explained that personal information of in-home caregivers is protected "because its release could facilitate identity crimes against seniors, vulnerable individuals, and the other vulnerable

populations that these caregivers serve." Pet. App. 134 (I-1501 § 7). As Petitioners admitted below, many in-home caregivers live in the same residence with the vulnerable individuals they serve. CA9.ER.35.

Identity theft and fraud using personal information are huge problems. The federal Bureau of Justice Statistics reports that 17.6 million Americans were victims of identity theft in 2014, and identity theft caused total losses of $17.5 billion in 2016.[1] In Washington, like in many states across the country, the Legislature has taken numerous steps to combat identity theft. *E.g.*, Wash. Rev. Code § 9.35.020 (making identity theft a crime, first enacted in 1999 and strengthened repeatedly); Wash. Rev. Code § 43.330.300 (establishing a financial fraud and identity theft crimes investigation and prosecution program); Wash. Rev. Code § 19.300.020 (making it a Class C felony to scan another person's identification device remotely to commit fraud or identity theft); Wash. Rev. Code § 28B.10.042 (prohibiting higher educational institutions from using student, staff, or faculty social security numbers except in certain instances to prevent potential identity theft); Wash. Rev. Code § 42.56.590 (requiring agencies to notify potentially affected persons of data breaches that compromise the security of personal information); Wash. Rev. Code § 19.182.130 (imposing civil penalty for obtaining information on consumer from consumer

[1] Dep't of Justice, Bureau of Justice Statistics, *Victims of Identity Theft, 2014* (Sept. 27, 2015), https://www.bjs.gov/content/pub/press/vit14pr.cfm; Dep't of Justice, Bureau of Justice Statistics, *Victims of Identity Theft, 2016* (Jan. 2019), https://www.bjs.gov/content/pub/pdf/vit16.pdf.

reporting agency under false pretenses); Wash. Rev. Code § 19.182.170 (allowing victims of identity theft to place a security freeze on their credit file to prevent further theft).

Like many other states and the federal government, Washington has also exempted from public disclosure certain personal information in its possession, such as employee personnel files and personal information used to apply for a driver's license. Wash. Rev. Code § 42.56.230; *see also* 5 U.S.C. § 552a(a)(4), (b) (Privacy Act prohibition on disclosure of personal information except in identified circumstances).

The campaign to convince voters to vote for or against I-1501 was a spirited one. In the Voter's Pamphlet, in-home care providers, the King County Sheriff, and a representative of Puget Sound Retirement Action argued that the initiative would help prevent fraudulent telemarketers and identity thieves from targeting seniors and the vulnerable. Pet. App. 11, CA9.ER.490-92. Those opposed to the initiative, including Petitioners here, argued in the Voter's Pamphlet and elsewhere that the initiative was instead designed to prevent in-home caregivers and child-care providers from learning about their right not to pay union dues. Pet. App. 11, CA9.ER.490-92 Newspaper articles similarly conveyed to the public the arguments for and against the initiative, including the views of Petitioners here. Pet. App. 61 (Bress, J., dissenting); CA9.ER.737-41.

Washington voters overwhelmingly supported the initiative, with nearly seventy-one percent voting

"yes." Pet. App. 12, CA9.ER.497. Although Petitioners characterize the measure as disfavoring certain political viewpoints, *see, e.g.*, Pet. 18, Washington voters of every political viewpoint resoundingly supported the measure. I-1501 passed in every county in Washington, encompassing views across the political spectrum.[2] For example, in Adams County over seventy percent of voters supported the initiative, with over sixty-six percent also voting for Donald Trump in the same election, while in King County over sixty-six percent of voters supported the initiative, with over seventy-one percent also voting for Hillary Clinton.[3]

C. I-1501 Generally Prohibits Disclosure of Personal Information of Vulnerable Individuals and Their Caregivers, with Some Necessary Exceptions

In describing I-1501, Petitioners repeatedly mischaracterize the law as prohibiting disclosure to virtually everyone except a certified collective

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[2] Washington Secretary of State, *Elections and Voting: November 8, 2016 General Election Results, Initiative Measure No. 1501 concerns seniors and vulnerable individuals. - County Results*, https://results.vote.wa.gov/results/20161108/state-measures-initiative-measure-no-1501-concerns-seniors-and-vulnerable-individuals_bycounty.html (last visited June 24, 2021).

[3] *Id.*; Washington Secretary of State, *Elections and Voting: November 8, 2016 General Election Results, President/Vice President - County Results*, https://results.vote.wa.gov/results/20161108/president-vice-president_bycounty.html (last visited June 24, 2021).

bargaining representative. *E.g.*, Pet. 2, 8, 15. In reality, I-1501 allows limited disclosure for specific purposes to further the Department of Social and Health Services' work or for the protection of vulnerable individuals generally. In this way, the law tracks other privacy laws that allow disclosure for certain purposes. *E.g.*, 5 U.S.C. § 552a(b) (exceptions allowing disclosure of personal information under the Privacy Act).

I-1501 includes the following exemptions allowing limited release of personal information:

- concerning caregivers who have been accused of or disciplined for abuse, neglect, or other acts of professional misconduct;
- for bona fide news organizations seeking to investigate a specific public employee's actions;
- to a governmental body, including agencies supporting vulnerable adults;
- as part of a judicial or quasi-judicial proceeding;
- as necessary for the provision of fringe benefits to public employees;
- as required by federal law;
- as required by contract between the state and a third party;
- to a person or entity under contract with the state to manage, administer, or provide services to vulnerable residents;

- to a person or entity under contract with the state to engage in research or analysis about state services for vulnerable residents; or
- to a certified collective bargaining representative recognized pursuant to state law.

Pet. App. 135-36 (I-1501 § 11). Consistent with the stated policy to protect vulnerable individuals, many of the exceptions—including the exception at issue here—prohibit anyone receiving personal information under one of these exemptions from further disclosure of the personal information. Pet. App. 135-36 (I-1501 § 11).

D. District Court Proceedings

Having failed to persuade voters in the political arena, after I-1501 passed Petitioners filed suit against Respondents in the federal district court for the Western District of Washington. BIO App. 1a-32a. Petitioners asserted multiple constitutional claims, most of which have now been abandoned, including claims that the statute was unconstitutionally overbroad, violated Petitioners' free association rights, and violated equal protection based on disparate treatment and animus. *Id.* The sole claim remaining asserts that I-1501 discriminates based on viewpoint in violation of the First Amendment.[4] BIO

[4] Petitioners also belatedly raised a claim regarding the right of in-home care providers to receive Petitioners' message. Pet. App. 109. The district court rejected the claim on its merits, noted that Petitioners had not asserted the claim in the complaint, and questioned the standing of Petitioners to assert the rights of in-home care providers. Pet. App. 109 & n.11. The Ninth Circuit later determined that Petitioners lacked standing to bring this claim. Pet. App. 42.

App. 24a-31a. The Complaint did not allege, however, that Washington voters discriminated or acted out of animus against Petitioners or their viewpoints. BIO App. 24a-31a.

In a careful and thorough opinion, the district court rejected all of Petitioners' claims on summary judgment. Pet. App. 90-126. It found that I-1501 did not burden Petitioners' speech in any way. Pet. App. 98. Applying settled precedent from this Court, the district court held that Petitioners had no right to government subsidization of their speech through disclosing government records. Pet. App. 102-07 (discussing *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999); *Press-Enter. Co. v. Riverside Cnty. Superior Ct., Cal.*, 478 U.S. 1 (1986); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)).

The district court also rejected Petitioners' viewpoint discrimination claim, again applying settled precedent from this Court, holding that providing employee information to a collective bargaining representative but not others constituted a distinction based on status, not viewpoint. Pet. App. 110-11 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)). As the district court explained, the exception allowing disclosure to collective bargaining representatives, like other exceptions in I-1501, "are all status distinctions, based on a contractual relationship or legal obligation to provide collective bargaining services . . . ." Pet. App. 110.

E. Ninth Circuit Opinion

The Ninth Circuit affirmed the dismissal of all of Petitioners' claims. The court first confirmed the general principle—conceded by Petitioners—that Petitioners have no First Amendment right to access government records, including employee contact information. Pet. App. 17. Applying this Court's rationale, the court determined that the First Amendment is implicated only when the government denies access to information "based on an illegitimate criterion such as viewpoint." Pet. App. 21 (quoting *United Reporting Publ'g Corp.*, 528 U.S. at 43 (Ginsburg, J., concurring)). Applying this standard, the court rejected Petitioners' two discernable viewpoint discrimination arguments.

First, the court rejected Petitioners' claim that I-1501 conditioned access to records on a requester's views, because the argument was premised on a false characterization of the legal operation of I-1501. "[T]he challenged provisions do not operate as Appellants suggest, for they are completely 'silent . . . concerning *any* speaker's point of view.'" Pet. App. 26 (emphasis added by Ninth Circuit) (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). As the court reasoned, "[u]nder the plain language of [I-1501], pro-collective bargaining voices and anti-collective-bargaining voices (and all voices, for that matter) are denied access to Provider Information unless the information is requested under one of several narrow circumstances." Pet. App. 26-27.

Second, the court rejected Petitioners' argument that providing the personal information to collective bargaining representatives but not to Petitioners constituted viewpoint discrimination. Relying on this Court's precedent, the court determined that a government engages in viewpoint discrimination when it makes distinctions "based on" or "because of" a speaker's message. Pet. App. 27 (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). It concluded that I-1501 "does not permit the Unions access to Provider Information based on the *views* they espouse on the subject of collective bargaining. Rather, the Unions' current access to Provider Information is based entirely on their *legal status* as certified exclusive bargaining representatives under Washington law." Pet. App. 28. The court noted that if a different union with very different views, such as the one some Petitioners wish to create, were elected by the caregivers as their representative, that new union would then get access to the caregivers' contact information and the present unions would lose access, confirming that the access is based on status, not viewpoint. Pet. App. 30-31.

The dissenting opinion agreed with the standard announced by the majority, but disagreed with its application. Pet. App. 62-64 (agreeing that there is no right to government information and the government may not discriminate based on viewpoint in determining access to information).

REASONS FOR DENYING THE PETITION

A. Petitioners Demonstrate No Conflict with this Court's Opinions

The decision below applies well-settled precedent, and it is Petitioners who seek to radically change this Court's jurisprudence. Indeed, despite arguing extensively that the decision below conflicts with *Perry*, Petitioners then argue that *Perry* should be overruled, implicitly conceding that no conflict exists. Pet. 26. The truth is that no court has ever accepted Petitioners' extraordinary argument—that the government may not disclose information necessary for a union to comply with its legal obligations without also making that information available to the general public. This Court should not grant review and become the first ever to suggest such a rule.

1. The Ninth Circuit Applied Settled Law in Determining that Petitioners Have No First Amendment Right of Access to Government Information and that I-1501 is Viewpoint Neutral

The opinion below applied bedrock free speech principles that Petitioners largely ignore. It is undisputed that Petitioners have no First Amendment right to the caregivers' personal information and that the government has no obligation to assist their speech. Pet. App. 16, 34 n.11 (citing *United Reporting Publ'g Corp.*, 528 U.S. at 40; *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 546 (1983)). Thus, Petitioners' hyperbole about the importance of their message and their alleged inability to target their message to caregivers

amounts only to a policy grievance, not a conflict with this Court's opinions.

Hewing closely to this Court's precedent, the court below analyzed the provision of government information as a kind of speech subsidy rather than a burden on speech. Pet. App. 19 (citing *United Reporting Publ'g Corp.*, 528 U.S. at 43 (Ginsburg, J., concurring)). Such subsidies are only impermissible if they are "based on an illegitimate criterion such as viewpoint." *United Reporting Publ'g Corp.*, 528 U.S. at 43 (Ginsburg, J., concurring).

In rejecting Petitioners' claims of viewpoint discrimination, the opinion below relied on and followed this Court's settled precedent that the government discriminates based on viewpoint when it regulates speech "*because of* the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163 (emphasis added). Contrary to Petitioners' claims, this principle applies equally when a statute distinguishes among speakers. *E.g.*, *Leathers v. Medlock*, 499 U.S. 439, 450 (1991) (speech subsidy "that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas").

I-1501 plainly does not discriminate among those seeking information based on the ideas they wish to express, and thus the decision below is perfectly consistent with this Court's precedent. I-1501 broadly prohibits disclosure of personal information of in-home caregivers, but includes exceptions not based on ideas, but on the practical need for such information for social service programs to function and for legal obligations to be satisfied. For

example, I-1501 allows disclosure if necessary for the provision of fringe benefits to public employees, to facilitate services to vulnerable residents, to allow investigation of suspected fraud and abuse, and to certified collective bargaining representatives to allow them to fulfill their statutory obligations. Pet. App. 135-36 (I-1501 § 11); *see also* Wash. Rev. Code § 41.56.080 (establishing obligation of certified representative to represent all employees within unit, including non-members of the union); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967) (recognizing obligation of employer to provide information needed by bargaining representative for performance of its duties). As addressed more fully below, such commonplace and commonsense exceptions to confidentiality laws are routine and necessary to avoid hamstringing government functions. *E.g.*, 5 U.S.C. § 552a(b)(3) (allowing disclosure of personal information for "routine use" as exception to Privacy Act).

The statute does not grant access to personal information *because of* the viewpoints of those who seek such information. Petitioners claim that they are denied access to caregivers' personal information because of the ideas they wish to convey, but that is obviously false. Even if Petitioners or other third parties wanted to convey a pro-union message, they still would be ineligible to access the caregivers' contact information. Petitioners' inability to obtain the information by changing their viewpoint underscores that they are not denied access due to viewpoint. By the same token, the caregivers' certified collective bargaining representative would not lose the ability to receive the information by changing its

views or message. Similarly, rival unions or those in favor of more aggressive, pro-union messaging cannot receive the information regardless of their viewpoints.

Although by no means the sole Supreme Court authority relied on by the lower court, the "decision in *Perry* . . . underscores this distinction" between status-based and viewpoint-based grants of access. Pet. App. 28. In *Perry*, the Court upheld a policy allowing the elected bargaining representative access to the interschool mail system and teacher mailboxes, but disallowing rival unions such access. *Perry*, 460 U.S. at 39. Like Petitioners here, the rival union claimed the policy discriminated based on viewpoint. *Id.* The Court rejected this argument, stating "it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views." *Id.* at 49. While *Perry* primarily analyzed whether a public school's mailbox system constituted a public forum, its conclusion that treating an incumbent union more favorably is based on status rather than viewpoint applies equally here. *See id.* at 45.

Unable to reconcile their position with *Perry*, Petitioners first offer a specious distinction. They claim that in *Perry* there were other easy ways to contact teachers besides the school mailbox system, while here there is no other easy way to reach individual providers. Pet. at 16, 25. But even if that claim were true, it would have absolutely no bearing on the Court's holding that granting the teachers' collective bargaining representative exclusive access to the mailbox system was a distinction based on status, not viewpoint. *Perry*, 460 U.S. at 49.

Petitioners next claim that *Perry* does not apply because I-1501's supporters allegedly intended to suppress Petitioners' speech, but the lower court properly rejected this claim based on this Court's precedent. As a general matter, when examining whether a law has discriminatory intent, this Court focuses on the intent of the law's enactors—in this case Washington's voters—and not statements of political supporters. *E.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973). In the First Amendment context, the Court has rejected the notion that a regulation "is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate[.]" *Hill v. Colorado*, 530 U.S. 703, 724 (2000). Thus, the Court has upheld speech restrictions even when "obviously enacted in response to the activities of antiabortion protesters[.]" *Id.* at 725 (citing *Frisby v. Schultz*, 487 U.S. 474, 482 (1988)). And here, Petitioners have not even alleged that Washington voters intended to favor any viewpoint when enacting I-1501. Such a claim would be tendentious given that I-1501 passed overwhelmingly in every Washington county, from the most conservative to the most liberal. *See* notes 2 & 3 *supra* p. 10.

Petitioners' final attempt to evade *Perry* is their suggestion that *Perry* should be overruled based on intervening case law. Pet. 27-28. But asking for precedent to be overturned is, of course, the opposite of showing a conflict justifying this Court's review. And Petitioners' claims of tension between *Perry* and subsequent cases are meritless in any event. Petitioners cite to a line of cases addressing speaker discrimination in other contexts, but none call *Perry*

into question. Pet. 27-28 (citing *Citizens United v. FEC*, 558 U.S. 310 (2010); *Reed*, 576 U.S. at 168; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011)). None of those cases discuss *Perry*, none address access to government-controlled information or means of communication, and none suggest that the government cannot make distinctions among speakers when granting subsidies. Petitioners cite no opinions of this Court criticizing *Perry*, and the State is aware of none. To the contrary, the Court continues to cite *Perry* with approval. *E.g.*, *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018).

In short, Petitioners fail to demonstrate that the decision below conflicts with prior precedent, instead advocating a departure from that precedent. There is no basis for this Court's review.

2. Petitioners' Claim that the Decision Below Conflicts With *Janus*, *Harris*, and *Sorrell* Is Meritless

In attempting to show a conflict, Petitioners rely heavily on this Court's opinions in *Janus*, 138 S. Ct. 2448, and *Harris*, 573 U.S. 616. The principles Petitioners derive from *Janus* and *Harris* boil down to: (1) public-sector unions have views and engage in political speech; and (2) non-union members must be able to opt out of paying union dues or other fees to the union. But neither of these premises is disputed here, and neither is inconsistent with or implicated by the opinion below.

First, that unions have views and engage in political speech does not mean that providing unions information not available to the general public is automatically viewpoint discrimination. *Any* speaker given access to information has views and may engage in political speech, but this Court has never invalidated regulations on that basis. Taken to its logical conclusion, Petitioners' radical approach would mean that any time government shares information with individuals or organizations with certain political views, it must share that information with everyone. Equating "status" with "viewpoint" so liberally would upend longstanding government practices and expectations, and few subsidies could survive. After all, the veterans' organization lobbying at issue in *Regan*, which the Court held could be exclusively subsidized, had pro-veteran "views" distinct from those not subsidized. *Regan*, 461 U.S. at 546. Yet under Petitioners' approach, because military contractors tend to have very different views than anti-war protestors, if the military provided contractors with maps of bases to fulfill their duties, the military would have to share the same maps with would-be protesters or anyone else who requested them. This Court has never suggested equating status and viewpoint in this way.

Second, Petitioners make much of this Court's conclusion in *Janus* and *Harris* that members of a public-sector bargaining unit must be able to opt out of paying union dues lest they be compelled to support speech with which they disagree. *E.g.*, Pet. 18. But nothing in the opinion below conflicts with this conclusion, and Washington immediately

complied with these holdings.[5] Neither *Janus* nor *Harris* suggests that the government must assist union opponents in persuading workers to decline union membership. Petitioners claim that Washington must facilitate their speech because opt-out rights are not "self-executing," *see* Pet. 18, but many vitally important rights are not "self-executing," and Petitioners cite no authority in any context requiring the government to facilitate private speech to educate the public about their rights.

In reality, the opinion below does not conflict with *Janus* and *Harris* because those cases simply do not address access to government information or viewpoint discrimination. To the extent that *Janus* addresses any issue relevant to this case, it supports the opinion below because it recognizes that, even after *Janus*, unions continue to enjoy "special privileges, such as obtaining information about employees . . . ." *Janus*, 138 S. Ct. at 2467. Petitioners' indignant complaint about the lower court's reliance on this statement ignores this Court's rationale in *Janus*. *E.g.*, Pet. 24-25.

Unable to point to anything in the holding of *Janus* or *Harris* that supports their request, Petitioners make the dangerous claim that the Court should grant review and invalidate I-1501 because it

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[5] *E.g.*, *Mentele v. Inslee*, 916 F.3d 783, 785 (9th Cir.), *cert denied sub nom. Miller v. Inslee*, 140 S. Ct. 114 (2019) (childcare providers); *Schumacher v. Inslee*, No. C18-5535 MFP, 2021 WL 1019823, at *1 (W.D. Wash. Mar. 17, 2021) (individual providers).

allegedly "seeks to suppress" the viewpoint *of the Court*. Pet. 23. But it is this Court's holdings that bind lower courts and create precedent, not speculation about what viewpoints might underlie the Court's decisions.

Finally, Petitioners cite this Court's opinion in *Sorrell*, 564 U.S. 552, as the basis of a conflict. But *Sorrell* is easily distinguished. In *Sorrell*, the Court applied strict scrutiny to a statute that restricted use of pharmacy records based explicitly on whether the records would be used for marketing or educational speech. *Id.* at 563-64. Unlike I-1501, the law at issue in *Sorrell* unquestionably burdened speech by restricting the use of information already in the possession of private parties. *Id.* Also unlike I-1501, the speech restrictions were explicitly tied to content, and anyone could obtain the information as long as they did not use it for the disfavored purpose of marketing. *Id.* at 564 ("The law on its face burdens disfavored speech by disfavored speakers."). The law in *Sorrell* therefore distinguished among speakers precisely because of the content of the speaker's message, and not for any other reason. *Id.*

This conclusion in *Sorrell* in no way conflicts with the opinion below, which itself recognized the same principle. Pet. App. 27 (quoting *Reed*, 576 U.S. at 168). The opinion below recognized that I-1501 "does not permit the Unions access to Provider Information based on the *views* they espouse . . . . [but] based entirely on their *legal status* as certified exclusive bargaining representatives under

Washington law." Pet. App. 28 (citing Wash. Rev. Code § 41.56.080).[6]

Petitioners fail to establish any tension, let alone conflict, with this Court's precedent. The Court should deny certiorari.

B. The Decision Below Comports with Other Court of Appeals Decisions

Petitioners fail to cite a single case in which a federal or state appellate court invalidated on First Amendment grounds a public records statute that granted access to governmental records using status-based distinctions. Pet. 30-32. Lacking a genuine conflict on this core legal issue, Petitioners attempt to contrive a reviewable conflict based on an inapt comparison with a wholly unrelated line of cases about whether "unbridled discretion" by public officials in granting funding to student groups or allowing access to school property violates the First Amendment. *See, e.g.*, *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002). These cases create no conflict here.

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[6] Petitioners also cite *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), and *Reed*, 576 U.S. at 170, to suggest that this Court views all speaker-based distinctions with skepticism. Pet. at 18-19. Both decisions, however, applied strict scrutiny to regulations that explicitly compelled or prohibited speech based on content. *Reed*, 576 U.S. at 164 (regulating outdoor signs based "entirely on the communicative content of the sign"); *Becerra*, 138 S. Ct. at 2377 (rejecting "government-scripted, speaker-based disclosure requirement" as compelled speech). There is no similar "speaker-based" regulation here because I-1501 does not restrict speech in the first instance and does not make any distinctions based on the content or viewpoint of any speaker.

In *Southworth*, college students challenged a university policy conferring "unbridled discretion" on public university administrators in distributing mandatory student fees as violating First Amendment viewpoint neutrality requirements. The Seventh Circuit agreed, holding that standardless discretion chills free expression by increasing the risk that applicants will self-censor to avoid adverse funding decisions, and allows public decision-makers to discriminate based on viewpoint. *Southworth*, 307 F.3d at 578-79; *see also Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376 (4th Cir. 2006) (invalidating public school policy granting school administrators "unbridled discretion" to charge community groups for use of school property).

But these cases and legal principles do not apply here and therefore do not represent a conflict. Most glaringly, I-1501 does not confer unbridled discretion on public officials in granting access to government-controlled information. Pet. App. 3-4. I-1501 expressly exempts personal information of in-home care providers from public disclosure, with all key terms clearly defined. Pet. App. 8-11. The only provision challenged by Petitioners, allowing access to certified collective bargaining representatives, is similarly unambiguous, and provides no discretion to public decision-makers in applying its terms. Wash. Rev. Code § 42.56.645(1)(d) (referencing Wash. Rev. Code § 41.56.080); Pet. App. 8-11. Unsurprisingly, Petitioners never even mentioned the "unbridled discretion" line of cases below because the cases have no application here.

Petitioners also mischaracterize the cases as equating status-based distinctions with viewpoint discrimination. Pet. 31. But the cases held no such thing. Indeed, the court in *Turning Point USA at Arkansas State University v. Rhodes*, 973 F.3d 868, 876 (8th Cir. 2020), explicitly rejected this view, holding that a university policy did not discriminate based on viewpoint even though by granting a status-based preference to officially recognized student groups it "favor[ed] the viewpoints of officially-recognized groups over unrecognized groups and individuals." The court recognized that status-based distinctions are "inherent and inescapable" in the limited public forum context and thus cannot be equated with viewpoint discrimination. *Id.* at 876.

The court in *Southworth* similarly recognized that status-based distinctions are not the same as viewpoint discrimination. There, the court held that university funding guidelines that considered the student group's prior funding history were not "unrelated to viewpoint" only because the standard perpetuated past viewpoint discrimination against religious and political student groups found to be unconstitutional in a prior lawsuit. *Southworth*, 307 F.3d at 594. The Seventh Circuit has since clarified that *Southworth* rejected viewpoint discrimination that "inhered in the policy classification itself" by institutionalizing prior viewpoint discrimination. *Wisc. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 649 (7th Cir. 2013). Absent such "inherent" viewpoint discrimination, the Seventh Circuit clarified that speaker-based distinctions or regulatory effects that fall more favorably or unfavorably on a particular viewpoint or speaker do not "transform a facially

neutral statute into a discriminatory one." *Walker*, 705 F.3d at 650 (a policy is not "vulnerable to constitutional assault . . . because it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the . . . mainstream" (citing *Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez,* 561 U.S. 661, 695 (2010))). The court in *Child Evangalism* rejected the status-based distinctions in that case for the same reasons. *Child Evangelism*, 457 F.3d at 1074 (rejecting status-based guideline by school because "viewpoint discrimination from past years has been institutionalized into the current system" (quoting *Southworth*, 307 F.3d at 594)).[7] These decisions do not conflict with the decision below.

Indeed, the Ninth Circuit has followed *Southworth* and *Child Evangelism* to hold that conferring unbridled discretion on public officials to modify or revoke public beach permits conflicts with viewpoint neutrality requirements. *Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012). In

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[7] Petitioners also cite in passing the Fourth Circuit's decision in *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019), but that decision likewise does not establish a reviewable conflict. In *Fusaro*, the Court permitted an as-applied challenge against a Maryland statute granting access to the names, addresses, and party affiliations of registered Maryland voters only to voters registered in Maryland and only for purposes related to the electoral process. The Court held that the *combination* of "content- and speaker-based restrictions" warranted departing from the general rule, espoused by the Court, that decisions about whether to release governmental records remain "fundamentally, a policy choice" entitled to "substantial deference." *Id.* at 256. *Fusaro* is not applicable here, where there is no content-based regulation.

Kaahumanu, the court held that conferring unbridled discretion on decision-makers risked chilling First Amendment expression by creating a risk that citizens will self-censor out of "fear of adverse government action" and because "standardless discretion also makes it difficult to detect, and protect the public from, unconstitutional viewpoint discrimination by the licensing official." *Kaahumanu*, 682 F.3d at 807.

The decision below does not conflict with this legal principle or its rationale. I-1501 creates no risk of self-censorship or opportunity for public officials to base access decisions on applicants' viewpoints because it does not confer any discretion on public officials in applying its terms. There is no legal conflict warranting review.

C. Accepting Petitioners' Argument Would Upend Countless State and Federal Laws

Accepting Petitioners' novel and sweeping interpretation of viewpoint discrimination would also jeopardize innumerable state and federal public records laws, as well as established law governing limited public forums and government subsidies. Every state and the federal government grants access to categories of government records using status-based distinctions. Petitioners' arguments have no coherent limiting principles and would transform facially nondiscriminatory grants of selective access into viewpoint discrimination virtually any time a law touches on a politically sensitive subject or the state grants selective access to an entity that advocates for one side of a public debate. It would also mire courts in endless second-guessing about the potentially

hidden motives behind routine public records laws and public records determinations.

Many states, for example, recognize the rights of unions to access personal information of public employees they represent, either by state statute or by recognition of federal disclosure requirements. *See, e.g.*, Cal. Gov't Code § 6254.3(a); Haw. Rev. Stat. § 89-16.5; 5 Ill. Comp. Stat. § 315/6(c); *Commc'n Workers of Am.*, No. 6765, 2006 WL 6036025 (Iowa Pub. Emp. Rels. Bd. Oct. 18, 2006). Because unions require such information to carry out their legal obligation of representing all bargaining unit members, Petitioners' arguments would essentially force states to disclose the personal information of public employees to everyone, taking this fundamental policy choice away from states.

Other examples abound. For instance, states routinely contract with certain health insurance companies to cover their employees, and routinely grant those companies access to employee information that others cannot obtain. *See, e.g.*, Cal. Gov't Code § 6254.3(a)(3) (exempting public employee contact information from public disclosure but allowing access to agents and employees of health benefits plans, among other exceptions). But health insurance companies regularly take positions on major policy issues, from enacting the Affordable Care Act to expanding Medicaid to encouraging vaccination. Do advocates for a "public option" or Medicare for All have a constitutional right to the same employee contact information? What about anti-vaccine activists who want to counteract the presumably "pro-vaccine" messages of insurance companies?

States also routinely balance competing interests in protecting privacy or security against the need for governmental information to deliver aid or further some other public interest. For example, some states prohibit disclosure of law enforcement investigatory records, but allow disclosure of such records to certain organizations like crime victim advocates or victim service providers, or to public and private schools. *See, e.g.*, Ind. Code § 5-14-3-4(b)(1). Other states prohibit disclosure of structural plans of public projects for obvious security reasons, but allow selective access to such records for project-based purposes such as procurement, or to contractors. *See, e.g.*, S.C. Code § 30-4-40(a)(17); Fla. Stat. § 119.071(3)(b). Some states prohibit disclosures that would invade personal privacy rights, such as the disclosure of library records, but permit disclosure of such information to "qualified researchers." *See, e.g.*, Ind. Code § 5-14-3-4(b)(16). In every case, it is easy to imagine controversial policy issues on which those granted access are likely to have very different views from some of those who are denied access, but that has never been considered a constitutional problem. Accepting Petitioners' arguments would cast doubt on the constitutionality of such routine policy decisions, unnecessarily burdening the government's ability to balance competing public interests between protecting privacy or security and addressing other public needs.

Longstanding federal public records laws would not be immune. The Federal Privacy Act, for example, generally exempts personal data from disclosure

without consent under the Freedom of Information Act, but provides exceptions that grant selective access based on the use of such information. For example, the "routine use" exemption permits "the use of [a] record for a purpose which is compatible with the purpose for which it was collected[.]" 5 U.S.C. § 552a(a)(7). The routine use exemption is regularly cited to provide otherwise confidential information to unions for purposes of fulfilling collective bargaining responsibilities. *See, e.g.*, *Dep't of Air Force v. Fed. Labor Rels. Auth.*, 104 F.3d 1396, 1402 (D.C. Cir. 1997) (applying "routine use" exemption to allow union access to otherwise confidential information "necessary to carry out its representational duties"). Law enforcement agencies also routinely invoke this exemption to obtain information for use in law enforcement investigations. *See, e.g.*, U.S. Dep't of Justice, *Overview of the Privacy Act: 2020 Edition*, https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition/disclosures-third-parties (last visited June 25, 2021) (collecting cases).[8] Under Petitioners' framing, even providing such information to law enforcement agencies, which are often on one side of heated public debates, could provide grounds for challenge as ostensibly favoring the viewpoint of such entities.

[8] *See, e.g.*, *Bansal v. Pavlock*, 352 F. App'x 611, 613-14 (3d Cir. 2009) (upholding disclosure of detainee's recorded telephone conversations by Marshals Service to government case agent).

Petitioners' argument could not coherently be limited to the public records context; it would also jeopardize selective grants of access to limited public forums. This Court has recognized that status-based distinctions are virtually inevitable in the limited public forum context because selectivity is the means by which limited public forums are preserved for their intended purposes. *Perry*, 460 U.S. at 48-49. States thus routinely apply status-based distinctions to grant or deny access to such forums. States, for example, limit their voters' pamphlet to include only statements by candidates running for public office. *See, e.g.*, *Cogswell v. City of Seattle*, 347 F.3d 809, 812 (9th Cir. 2003) (addressing ordinance governing local voters' pamphlet). The government imposes similar speaker-based or status-based limits in a host of other limited forum contexts, including public high school newspapers, airport terminals, televised debates between candidates for public office, and household mail boxes, following established precedent permitting speaker-based distinctions in such contexts. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."). Petitioners' proposed collapsing of speaker-based distinctions with viewpoint discrimination where the speaker's status tends to overlap with certain viewpoints would effectively eliminate the concept of a limited public forum.

Petitioners' framing would also undermine the constitutionality of government subsidies to

organizations or individuals holding viewpoints on virtually any important subject. Subsidies previously upheld by this Court, such as grant funding for particular artists or tax breaks for veterans organizations, would be subject to challenge by those with contrary viewpoints. *See, e.g.*, *Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 587-88 (1998) (noting legislatures "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech . . . at stake" and that such funding is not "discriminat[ion] on the basis of viewpoint [but] . . . merely . . . fund[ing] one activity to the exclusion of the other" (internal quotation marks omitted)); *Regan*, 461 U.S. at 546.

In short, Petitioners' argument dramatically departs from established laws and practices governing public records and viewpoint discrimination and would have far-reaching and unpredictable consequences. It would be a dangerous mistake for this Court to grant review here when lower courts have had no opportunity to grapple with Petitioners' theory or apply it to circumstances beyond the facts here.

D. The Decision Below Does Not Raise Important Issues Warranting the Court's Intervention

This case also does not raise important issues warranting this Court's attention because there is no risk here of chilling First Amendment speech, Petitioners have numerous other means to communicate with in-home caregivers without access to the confidential public records they seek, and much

of the relief Petitioners seek will soon become irrelevant because of changes in Washington law.

Contrary to Petitioners' claims, I-1501 does not restrict their speech in any way. Petitioners' characterization of I-1501 as "silencing critics of unions," "skewing public debate," and "chilling" opt-out rights under *Janus*—the cornerstone of their argument that I-1501 burdens First Amendment expression—rests entirely on the false premise that they have no other effective means to communicate with in-home caregivers. *See* Pet. QP, 2, 5, 6, 7, 15, 18. But as the district court correctly found, I-1501 "does not burden any methods of communication." Pet. App. 99. "Plaintiffs may canvass, hire paid canvassers, distribute pamphlets, make speeches, advertise and hold meetings, picket, or send mailers to distribute their speech." Pet. App. 99. Petitioner Freedom Foundation has successfully employed similar methods in the past when other states have denied their public records requests for personal contact information of in-home caregivers.[9] In California, for example, Petitioner Freedom Foundation launched a multi-media outreach campaign utilizing television ads, social media outreach, and op-ed campaigns after the state denied its public records requests for service providers' names and contact information.[10] Earlier outreach

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[9] Margot Roosevelt, *The Freedom Foundation wants to fight Democrats by busting a California homecare union*, Orange Cnty. Reg., Apr. 3, 2017, https://www.ocregister.com/2017/04/03/the-freedom-foundation-wants-to-fight-democrats-by-busting-a-california-homecare-union/ (last visited June 25, 2021).

[10] *Id.*

campaigns used cable television, hotlines, billboards, and Facebook ads.[11] The Foundation has repeatedly boasted about the effectiveness of these efforts, proclaiming, for example, that by using "billboards, radio, TV and even streaming services, the Freedom Foundation is spreading the word to millions of Ohioans," and that because of these tactics "*you just can't miss our message*."[12]

Social media advertising is a particularly effective means for communicating with in-home caregivers, who tend to be more engaged online and with social media than the average person.[13] Social media companies even offer tailored strategies for

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[11] Freedom Found., *Press Release: Freedom Foundation Launches Cable TV Ad Featuring Homecare Worker Who Opted Out of SEIU* (Mar. 23, 2015), https://www.freedomfoundation.com/press-release/freedom-foundation-launches-cable-tv-ad-featuring-homecare-worker-who-opted-out-of-seiu/; NPR, Anya Kamenetz, *Behind The Campaign To Get Teachers To Leave Their Unions* (July 19, 2018), https://www.npr.org/sections/ed/2018/07/19/628130197/behind-the-campaign-to-get-teachers-to-leave-their-unions (last visited Jun 25, 2021).

[12] Freedom Found., Lindsey Queen, *Freedom Foundation Blasting Its Message of Worker Freedom Across Ohio* (July 14, 2020) https://www.freedomfoundation.com/labor/freedom-foundation-blasting-its-message-of-worker-freedom-across-ohio/ (emphasis added); *see also, e.g.*, Freedom Found., Hunter Tower, *Freedom Foundation making its presence known to the Keystone State* (Sept. 1, 2020), https://www.freedomfoundation.com/labor/freedom-foundation-making-its-presence-known-to-the-keystone-state/ (stating that across Pennsylvania "[w]e've been on the radio, you've seen us in articles, and now we're on billboards").

[13] Transcend Strategy Group, Emily Zarecki, *Reaching Family Caregivers on Social Media* (Feb. 11, 2020), https://transcend-strategy.com/2020/02/11/reaching-family-caregivers-on-social-media.

engaging in-home caregivers, using detailed information about their demographics and online engagement patterns to micro-target them with social-media advertising.[14] Indeed, unions use similar strategies to organize employees of private companies whose names and addresses are not generally publicly available.[15] These same methods are available to Petitioners and undermine their efforts to inflate the stakes of this case and its impacts on expression by claiming that I-1501 eliminated the only effective mechanism for communicating with in-home service providers.

Further, I-1501's impact will soon be substantially limited by recent changes in Washington law and practice, severely undercutting the ongoing significance of this case. The bulk of in-home care providers who are the subject of this case will soon no longer collectively bargain with the state pursuant to a Washington law passed in 2018, Wash. Rev. Code § 74.39A.500. Under this law, individual providers will no longer contract directly with the State and thus will not be considered public employees under Washington's Public Employee Collective Bargaining Act. *See* Wash. Rev. Code § 41.56.026. Thus, individual providers' information will not be disclosed under the exception for "a representative certified or recognized under RCW 41.56.080." Wash. Rev. Code § 42.56.645(1)(d). The transition to this new

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[14] *Id.*

[15] Prudential, The Economist Intelligence Unit, *Unions and the Power of Social Media* (Jan. 2019), http://tafthartley.prudentialretirement.com/_assets/documents_pdfs/taft_article6_socialmedia.pdf.

model begins this summer and should be complete by spring 2022.[16] Petitioners' claim that this case presents issues of national significance thus borders on the absurd. The case will have limited impacts even on the actual parties going forward, much less anyone else.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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[16] Wash. Dep't of Soc. & Health Servs., *Questions and Answers About Consumer Directed Employer* (last updated Feb. 2021), https://www.dshs.wa.gov/sites/default/files/ALTSA/stakeholders/documents/CDE/CDE%20Questions%20and%20Answers.pdf (last visited Jun 25, 2021); *see also* Wash. Dep't of Soc. & Health Servs., *Consumer Directed Employer (CDE) Project: Talking Points #24 – Proposed implementation timelines* (last updated Mar. 2021), https://www.dshs.wa.gov/sites/default/files/ALTSA/stakeholders/documents/CDE/Talking%20Points%2024_Rev_3_2021.pdf (last visited June 25, 2021).

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRADLEY BOARDMAN, a Washington Individual Provider; DEBORAH THURBER, a Washington Family Childcare Provider; SHANNON BENN, a Washington Family Childcare Provider; and FREEDOM FOUNDATION, a Washington nonprofit organization; Plaintiffs, v. GOVERNOR JAY INSLEE, Governor of the State of Washington; PATRICIA LASHWAY, Director of the Washington Department of Social and Health Services ("DSHS"); and ROSS HUNTER, Director of the Washington Department of Early Learning ("DEL"); Defendants.	No. 3:17-cv-05255 **COMPLAINT**

I. INTRODUCTION

1. This case is about whether the State of Washington may allow private organizations to use Washington State's ballot initiative process as a

vehicle to silence ideological adversaries' constitutionally-protected speech and deny other groups equal protection under the law. Defendants Governor Jay Inslee, Patricia Lashway, and Ross Hunter (together, "Defendants") have facilitated and enforced Initiative 1501 ("I-1501"), which targets the constitutionally protected speech of Plaintiffs Bradly Boardman, Deborah Thurber, Shannon Benn, and the Freedom Foundation (collectively, "Plaintiffs").

2. I-1501 is the culmination of a prolonged battle between two ideologically-opposed groups, Plaintiff Freedom Foundation ("Foundation") and Service Employees International Union ("SEIU") 775 and SEIU 925 (together, "Unions"), and their speech to Washington's Homecare and Childcare Providers (collectively, "Providers"), who receive public subsidies for the care they provide. I-1501 prohibits the release of all Provider information to anyone, except the Unions.[1] Receiving updated Provider lists from the State pursuant to the Washington Public Records Act ("PRA"), RCW 42.56, is essential to engage in direct, one-on-one political speech with Providers.

3. For several years, Plaintiffs have requested and obtained Providers' contact information by submitting public records requests to the Washington Department of Social and Health Services ("DSHS") and the Washington Department of Early Learning ("DEL"). Every Plaintiff requested the records to engage in constitutionally protected speech with Providers. Yet the non-party Unions relentlessly

[1] Part III of I-1501, at issue in this case, is now codified in RCW 42.56.640, RCW 42.56.645, and RCW 43.17.410.

attempted to prevent Plaintiffs from obtaining updated Provider lists, by filing duplicative, frivolous lawsuits and lobbying the Legislature to amend the PRA and make all Provider information inaccessible to Plaintiffs. Failing to permanently halt Plaintiffs' speech, the Unions determined to change the law, themselves. They created and financed I-1501, which eliminated all access to updated Provider lists, thus making it impossible for Plaintiffs to continue communicating with Providers.

4. I-1501 violates the First Amendment and the Fourteenth Amendment of the U.S. Constitution in five ways. **First**, I-1501 violates the Equal Protection Clause because it significantly interferes with Plaintiffs' fundamental rights to freely speak and associate. **Second**, I-1501 violates the Equal Protection Clause because it treats two similarly situated groups differently and was created with animus toward Plaintiffs' speech. **Third**, I-1501 violates the First Amendment because it is viewpoint-discriminatory. **Fourth**, I-1501 violates the First Amendment because it is facially overbroad and acts to prohibit many different constitutionally protected expressive activities. **Fifth**, I-1501 violates the First Amendment because it violates Plaintiffs' freedom of association.

5. Plaintiffs bring this suit to enjoin and declare unconstitutional Part III of I-1501 under the First and Fourteenth Amendments of the U.S. Constitution.

II. JURISDICTION AND VENUE

6. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331, because it arises under the First and Fourteenth Amendments to the United

States Constitution, 28 U.S.C. § 1343, and because Plaintiffs seek relief under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and § 1988.

7. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, this Court has authority under 28 U.S.C. §§ 2201 and 2202 to grant declaratory relief and other relief for Plaintiffs, including preliminary and permanent injunctive relief.

8. Venue is proper in this Court because the Defendants do business and operate in this district. 28 U.S.C. § 1391(b). Intradistrict assignment to the Tacoma Division is proper because Defendants have offices in Thurston County, Washington. Local Civil Rule 3(d).

III. PARTIES

9. Plaintiff Bradley Boardman is a Homecare Provider who provides care to his sister-in-law, who is disabled. He resides in Everett, Washington.

10. Plaintiff Debbie Thurber is a Childcare Provider residing in Spokane, Washington. She operates a licensed childcare center, in which she has cared for state-subsidized children and intends to do continue doing so. She is also the founder of the Eastern Washington Family Childcare Association.

11. Plaintiff Shannon Benn is a Family Childcare Provider residing in Spokane, Washington. She and her husband operate a licensed childcare center, in which she cares for state-subsidized children. Since 2012, Benn has written an e-mail newsletter for Childcare Providers, updating them on events within the childcare profession.

12. Plaintiff Freedom Foundation is a 501(c)(3) charitable and educational non-profit organization. It is headquartered in Olympia, Washington.

13. Defendant Jay Inslee is Governor of Washington and is sued in his official capacity. As Governor, Defendant Inslee is Washington's chief executive officer. It is his responsibility to properly enforce the laws of Washington. The Governor's office is in Olympia, Washington.

14. Defendant Patricia Lashway is the Acting Secretary of DSHS, and is sued in her official capacity. DSHS is the state agency responsible for maintaining updated Homecare Provider lists. The Director's office is in Olympia, Washington.

15. Defendant Ross Hunter is the Director of DEL and is sued in his official capacity. DEL is the state agency responsible for maintaining updated Childcare Provider lists. The Director's office is in Olympia, Washington.

IV. FACTUAL ALLEGATIONS

A. Homecare and Childcare Providers.

16. Homecare Providers, otherwise known as Individual Providers, provide "personal care or respite care services," to persons who qualify for care assistance from DSHS. RCW 74.39A.240(3). Clients or consumers are elderly or disabled persons – often family members of the Providers – who have applied or are currently receiving services from DSHS. WAC 388-106-0010. Personal care services include "physical or verbal assistance with activities of daily living and instrumental activities of daily living due to . . . functional limitations." *Id.*

17. Homecare Providers are public employees solely for the purposes of collective bargaining. RCW 74.39A.270(1). The scope of collective bargaining for Homecare Providers is limited to their wages, hours, and working conditions. RCW 74.39A.270(5).

18. Family Child Care Providers provide "regularly scheduled care for a child or children in the Provider's home or the child's home for periods of less than twenty-four hours, or, if necessary, due to the nature of the parent's work, for periods equal to or greater than twenty-four hours; (b) receives child care subsidies; and (c) is either licensed by the statute under RCW 74.15.030 or is exempt from licensing under chapter 74.15 RCW." RCW 41.56.030(7).

19. Child Care Providers are public employees solely for the purposes of collective bargaining. RCW 41.56.028(1). The scope of collective bargaining for Child Care Providers must be limited solely to: (i) economic compensation, such as manner and rate of subsidy and reimbursement, including tiered reimbursements; (ii) health and welfare benefits; (iii) professional development and training; (iv) labor-management committees; (v) grievance procedures; and (vi) other economic matters. Retirement benefits are not subject to collective bargaining. RCW 41.56.028(c).

20. Providers work directly in their homes or the homes of their clients or in small day care facilities, which are scattered throughout Washington State. Homecare and Childcare Providers frequently enter and exit the Provider workforces; names on the Provider lists fluctuate substantially.

21. The Homecare Provider bargaining unit is the total number of all Washington Homecare Providers at any given time. SEIU 775 is the exclusive bargaining representative for the entire Homecare Provider bargaining unit, but not all Homecare Providers are Union members.

22. SEIU 775 unionized Homecare Providers by obtaining Provider lists from the State.

23. The Childcare Provider bargaining unit is the total number of all Washington Childcare Providers at any given time. SEIU 925 is the exclusive bargaining representative for the entire Childcare Provider bargaining unit, but not all Childcare Providers are Union members.

24. SEIU 925 unionized Childcare Providers by obtaining Provider lists from the State.

25. Because the Homecare and Childcare Provider bargaining units fluctuate regularly and substantially, anyone who wants to speak to Providers must request and obtain updated Provider lists from DSHS and DEL.

26. Providers have no means or ability to communicate with their fellow Providers scattered throughout Washington State absent receiving updated Provider lists pursuant to the PRA.

27. Plaintiffs and any speakers who wish to speak to Providers must obtain updated Provider lists pursuant to the PRA.

28. Defendants create and maintain updated Provider lists as part of their administration of the Provider programs. These lists are public records within the definition of RCW 42.56.010(3).

29. The Unions rely on updated Provider lists, obtained regularly and routinely from Defendants, to communicate with Providers—including those Providers who have explicitly declined to support the Unions, financially or otherwise. These communications include Union-related speech and non-Union, wholly political speech.

B. Plaintiff Freedom Foundation's Provider Outreach is facilitated by access to updated Provider lists.

30. The Foundation is a 501(c)(3) charitable and educational non-profit organization that seeks to advance individual liberty, free enterprise, and limited, accountable government.

31. Since 2013, the Foundation has fulfilled that mission through its Labor Reform Project. This project seeks to enhance workers' rights by informing them of their rights and how to exercise those rights, supporting common-sense labor reforms, and challenging practices and laws that permit public sector labor unions to deprive workers of their rights. To advance these goals, the Foundation produces policy research, litigates, and directly communicates with citizens.

32. In June 2014, the U.S. Supreme Court held that the First Amendment prohibits states from compelling quasi-public employees to pay agency fees to a Union as a condition of employment. *Harris*, 134 S.Ct. 2618. The Court held that the government violates the First Amendment by requiring partial-public healthcare workers to pay agency fees. *Id.*

33. In response to *Harris*, the Foundation developed a major outreach program to contact Washington quasi-public employees affected by *Harris*—particularly Homecare and Childcare Providers, who are public employees solely for the purposes of collective bargaining. Its outreach communications include e-mail, telephone, direct mail, and door-to-door canvasing.

34. The Provider outreach program is only possible and directly facilitated by the Foundation's access to updated Homecare and Childcare Provider lists obtainable from the State via the PRA, RCW 42.56. Before I-1501, no PRA exemption prevented the release of Homecare and Childcare Provider lists. *See SEIU 925 v. Freedom Found.*, 197 Wn. App. 203 (Wash. Ct. App. 2016); *SEIU 775NW v. DSHS*, 193 Wn. App. 377 (Wash. Ct. App. 2016), *review denied sub nom*.

35. The Foundation's outreach to Providers depends on identifying the proper audience for its speech: Homecare and Childcare Providers. Without access to information, the Foundation cannot effectively and efficiently communicate with Providers.

36. After I-1501, the Unions may continue to access and do, in fact, regularly receive current Homecare and Childcare Provider lists from Defendants, but other speakers may no longer receive Homecare and Childcare Provider lists.

C. The Unions rely upon Provider lists they receive from Defendants to engage in political communications with Homecare and Childcare Providers.

37. The Unions use the state-provided lists to engage in political speech with Homecare and Childcare Providers. These communications include encouragements to Providers to exercise their constitutional rights to vote, and explicit endorsements for candidates and ballot measures. Many of these communications do not relate to the Unions' roles as Providers' exclusive bargaining representatives. SEIU 775 and SEIU 925 can send these political communications to Homecare and Childcare Providers because they possess regularly-updated Provider lists from the Defendants.

38. SEIU 775 and SEIU 925 have used and continue to use the regularly-updated Provider lists to engage in door-to-door canvassing and communications with Homecare and Childcare Providers about political matters.

D. Childcare Providers left SEIU 925 in large numbers when the Foundation informed them of their constitutional rights.

39. DEL provided the Foundation Childcare Provider lists in July and August of 2014.

40. For over two years, the Foundation has relied upon the lists from July and August 2014 to conduct outreach to Childcare Providers regarding their constitutional rights to resign membership in and cease paying dues to SEIU 925.

41. Since the Foundation started contacting Childcare Providers in September 2014, SEIU 925's dues-paying membership has sharply declined. When the Foundation began its outreach, 100% of Childcare Providers paid union dues. As of January 2017, 63.2% of Childcare Providrs have resigned their membership in and ceased paying dues to SEIU 925.

E. SEIU 775 sued the Foundation to prevent it from obtaining the information it needed to communicate with Homecare Providers about their constitutional rights.

42. On July 2, 2014—two days after the Supreme Court's decision in *Harris*—the Foundation submitted a public records request to DSHS for a Homecare Provider list. DSHS determined that the public record was disclosable, but SEIU 775 sued in an attempt to enjoin the release of the list.

43. On October 3, 2014, the Thurston County Superior Court entered a Temporary Restraining Order ("TRO") enjoining disclosure of the Homecare Provider list, solely to preserve the fruits of SEIU 775's litigation. On October 16, 2014, the same court denied SEIU 775's request for preliminary and permanent injunctive relief, rejecting every substantive argument raised by the union. But in the same Order, the court extended the TRO for twenty days to allow SEIU 775 to appeal and seek from the Washington Court of Appeals a Stay Pending Appeal. On November 3, 2014, the Commissioner of the Washington Court of Appeals entered a Stay, solely to preserve the fruits of SEIU 775's appeal.

44. On April 12, 2016, the Court of Appeals issued a published opinion rejecting all of SEIU 775's arguments, and affirming that the Foundation was entitled to the Homecare Provider list it requested. *SEIU 775*, 193 Wn. App. 377.

45. SEIU 775 subsequently petitioned the Washington Supreme Court for discretionary review, which was unanimously denied.

46. Finally, on September 28, 2016, 819 days after the Foundation's initial public records request, DSHS provided the Foundation with a Homecare Provider list – that was current as of July 2, 2014, the date of the Foundation's request. After two-plus years of litigation, the Foundation received a two-year old list. Because turnover within the Homecare Provider bargaining unit is substantial, that two-year-old list of Homecare Providers likely differed from the most current list by 40%.

47. Because the Homecare Provider list the Foundation received on September 28, 2016 was so outdated, the Foundation requested an updated list of Homecare Providers from DSHS on September 29, 2016—the day after it received its first list.

48. Boardman also demanded that DSHS fulfill his July 2015 PRA request for a Homecare Provider list.

49. On October 24, 2016, SEIU 775 once again filed suit against the Foundation and Boardman to enjoin the disclosure of updated Homecare Provider lists. *See SEIU 775 v. Freedom Foundation, et al.*, Thurston Co. Sup. Ct. No. 16-2-04312-34.

50. On December 16, 2016, the Thurston County Superior Court once again rejected each of SEIU 775's arguments, and determined that the Foundation and Boardman were entitled to current Homecare Provider lists. *Id*. But, that court once again stayed the Homecare Provider lists' release to allow SEIU 775 to seek an appellate stay to preserve the fruits of (yet-another) SEIU 775 appeal, which the Court of Appeals Commissioner granted. *Puget Sound Advocates for Retirement Action v. Dep't of Social & Health Serv.*, Wash. Ct. App. Div. II No. 49977-1-II (Jan. 24, 2017).

51. Rather than wait another two years to prevail on appeal only to receive another outdated list, the Foundation dropped its public records request and SEIU 775 dismissed its appeal.

52. Because of the Foundation's relative difficulty in obtaining updated and accurate Homecare provider lists, the Foundation's outreach to Homecare Providers has been quite limited, and SEIU 775's dues-paying membership has only dropped by approximately 11%.

F. SEIU 925 sued the Foundation to prevent it from obtaining the information it needed to communicate with Childcare Providers about their constitutional rights.

53. The Foundation requested an updated Childcare Provider list from DEL on November 2, 2016.

54. On November 16, 2016, SEIU 925 sued the Foundation to enjoin the disclosure of an updated

Childcare Provider list. *See SEIU 925 v. Freedom Foundation, et al.*, Thurston Co. Sup. Ct. No. 16-2-04580-34. The Thurston County Superior Court denied SEIU 925's request for an injunction, rejecting every substantive argument the Union raised. But, that Court stayed the Childcare Provider list's release so SEIU 925 could seek an appellate stay to preserve the fruits of (yet-another) appeal, which the Court of Appeals Commissioner granted. *Serv. Employee Int'l Union 925 v. Dep't of Early Learning*, Wash. Ct. App. Div. II No. 49726-3-II (Jan. 25, 2017). As of now, the Foundation is still litigating this case.

G. SEIU 775 attempted to stymie the Foundation's Provider outreach in the Legislature.

55. During the 2015 legislative session, SEIU 775 lobbied for and vocally supported Senate Bill ("SB") 5678 and House Bill ("HB") 1349, which would have rendered all Provider information non-disclosable under the PRA. Neither bill became law.

56. In 2016, SEIU 775 supported SB 6542, another bill that would have rendered all Provider information non-disclosable under the PRA. To rally support for SB 6542, SEIU 775 emailed Homecare Providers on February 11, 2016, alleging that the "**Public Records Act has a loophole that lets anyone obtain our personal contact information.** And as it's happened, Caregivers across the state have been targeted by the Freedom Foundation[.] . . . **The Legislature needs to close this dangerous loophole so that caregivers and other public service workers like us can do our**

jobs without fear of harassment." (emphasis in original). SB 6542 did not become law.

H. The Unions drafted I-1501 to target and stop the Foundation's Provider outreach.

57. I-1501 was misleadingly titled "an act relating to the protection of seniors and vulnerable individuals from financial crimes and victimization."

58. I-1501 was approved by the voters in November 2016; it became law on December 8, 2016.

59. Part III, Section 8 of I-1501 dramatically amends the PRA by creating a new exemption for all Homecare and Childcare Provider-related information. Now codified as RCW 42.56.640, the new law exempts Homecare and Childcare Providers' "names, addresses, GPS [global positioning system] coordinates, telephone numbers, email addresses, social security numbers, driver's license numbers, or other personally identifying information."

60. Notably, the PRA already contained several provisions to protect Providers' privacy. *See, e.g.*, RCW 42.56.250(3) (exempting public employees' personal contact information and information about their dependents from disclosure); RCW 42.56.230(3) (exempting records related to public employees if disclosure would violate those employees' right to privacy).

61. Part III, Section 10 of I-1501 was codified as RCW 43.17.410, and this new law prohibits "the state or any of its agencies" from "releas[ing]" the information exempted by RCW 42.56.640.

62. The Unions are explicitly exempted from I-1501. "Nothing . . . shall prevent the release of public

[Homecare and Childcare Provider] information" if "[t]he information is being provided to a representative certified or recognized under RCW 41.56.080, or as necessary for the provision of fringe benefits to public employees, and the recipient agrees to protect the confidentiality of the information;" *see* RCW 42.56.645(1)(d); or if "[t]he disclosure is required by a contract between the state and a third party, and the recipient agrees to protect the confidentiality of the information;" *see id.* at § 645(1)(f).[2] Both these exceptions enable the Union to continue receiving, from Defendants, updated Provider lists. Moreover, I-1501 contains no limitations on the communications the Unions may engage in with Providers, communications that are directly facilitated by the Unions' uninterrupted access to Provider lists.

I. SEIU 775 and SEIU 925 were the sole financial supporters of I-1501.

63. Federal records indicate that SEIU 775 paid the law firm that drafted I-1501 $21,532 in November 2015.[3]

64. SEIU 775's Secretary-Treasurer Adam Glickman chaired the "Campaign to Prevent Fraud and Protect Seniors"—the official political action

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[2] These exceptions appear in Part III, Section 11 of I-1501.

[3] According to the Washington Secretary of State, Eric Lowney, of Smith & Lowney PLLC, was I-1501's "primary sponsor." Available at https://www.sos.wa.gov/elections/initiatives/initiatives.aspx?y=2016&t=p (last visited Apr. 5, 2017).

committee supporting I-1501.[4] As of December 7, 2016, the Pro-1501 PAC received $1,883,888.15 in total cash and in-kind contributions (non-monetary support) during the 2016 election cycle.[5]

65. Only three contributors funded the Pro-1501 PAC: SEIU 775, SEIU 925, and the 5th District Democrats.[6] The 5th District Democrats contributed $50 in cash. The remaining $1,883,888.15 in cash and in-kind contributions to the Pro-1501 PAC came solely from SEIU 775 and SEIU 925.

66. SEIU 925 contributed $250,000 in cash to the Pro-1501 PAC.

67. SEIU 775 contributed at least $1,575,000 in cash and at least $58,526.78 in in-kind contributions[7] to the Pro-1501 PAC. These in-kind contributions

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[4] The Political Committee Registration Form ("Form C1PC") for the "Campaign to Prevent Fraud and Protect Seniors" that was submitted to the Public Disclosure Commission on March 30, 2016 is available at https://web.pdc.wa.gov/rptimg/default.aspx?docid=4558230 (last visited Apr. 5, 2017).

[5] The Full Report of Receipts and Expenditures (Form C4) for the Pro-1501 PAC that was submitted to the Public Disclosure Commission on December 7, 2016 is available at https://web.pdc.wa.gov/rptimg/default.aspx?batchnumber=100736889 (last visited March 26, 2017).

[6] Available at http://web.pdc.wa.gov/MvcQuerySystem/CommitteeData/contributions?param=Q0FNUFBGIDExMQ%3D%3D%3D%3D&year=2016&type=initiative (last visited March 26, 2017).

[7] Available at http://web.pdc.wa.gov/MvcQuerySystem/CommitteeData/inkind?param=Q0FNUFBGIDExMQ%3D%3D%3D%3D&year=2016&type=initiative (last visited March 26, 2017).

included SEIU 775's signature gathering efforts, phone banking, postage services and costs, and general staff services.

J. The Unions' motive in creating, funding, and supporting I-1501 was to silence Plaintiffs' speech.

68. In a radio interview on NPR from July 2016, SEIU 775 Secretary-Treasurer Adam Glickman acknowledged that SEIU 775 created I-1501 to stop the Foundation from obtaining Provider lists and communicating with them.[8]

69. Sometime after September 28, 2016, SEIU 775 sent a letter to all Homecare Providers that stated: "There's one more way you can fight to stop the Freedom Foundation: When you get your ballot in the mail, vote YES on l-1501[.]"

70. On October 11, 2016, SEIU 775 posted a social media image on Facebook, revealing its true motives regarding I-1501:

> **Groups like the Freedom Foundation are threatening our union.** They tell us to stop paying dues—but that would weaken our union and rollback what we've won . . . I-1501 will keep the Freedom Foundation and others from getting personal information for us and our clients. **A vote for I-1501 is a vote to protect our union, ourselves and our clients.**"[sic] (Emphasis in original.)

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[8] Available at http://knkx.org/post/how-fight-between-seiu-775-and-conservative-think-tank-led-initiative-identity-theft (last visited March 27, 2017).

71. SEIU 775 also posted this image on Twitter.

72. On December 6, 2016, after I-1501 passed, SEIU 925 sent a letter to all Childcare Providers stating: "Another big win was the passage of Initiative 1501 . . . Just because we receive funding from the state to care for subsidized children doesn't mean extremist groups like the anti-union Freedom Foundation should be able to get our personal information and target us for their own political agenda."

73. Nearly every Washington newspaper opposed I-1501 as a deceptive attempt by a special interest to abuse the initiative process for its own benefit. Those newspapers recognized that I-1501 was not a good-faith attempt to protect seniors or vulnerable individuals.

74. *The Seattle Times* described I-1501 as "a Trojan horse." It told readers that I-1501 was "being run by a deep-pocketed special-interest group that wants to weaken the state [PRA]" and "Don't be fooled by I-1501's pitch to close scary loopholes and block the release of records that enable identity theft. There are no such loopholes. The state's [PRA] already gives sensitive records explicit protections."[9]

75. *The Columbian* suggested that "the true purpose behind [I-1501] is to protect [SEIU 775],

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[9] Available at http://www.seattletimes.com/opinion/editorials/reject-i-1501-and-urge-lawmakers-to-address-identity-theft/ (last visited March 26, 2017). *See also* THE TACOMA NEWS TRIBUNE, available at http://www.thenewstribune.com/opinion/article107896087.html (last visited March 26, 2017).

which represents a large percentage of in-home caregivers. Union officials would prefer that members not be informed that they no longer can be forced to pay dues to [SEIU 775]."[10]

76. *The Spokesman-Review* asserted that "[The Foundation] wants to contact home-health care workers to let them know they have the right to leave their union and stop paying dues . . . [SEIU 775] doesn't like this, so it wants an exemption to the [PRA] that would keep workers' information under wraps."[11]

77. Many other Washington and national publications editorialized against I-1501.[12]

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[10] Available at, http://www.columbian.com/news/2016/oct/05/in-our-view-no-on-i-1501/ (last visited March 26, 2017).

[11] Available at, http://www.spokesman.com/stories/2016/oct/18/i-491-yes-i-1501-no/ (last visited March 26, 2017).

[12] THE OLYMPIAN, available at http://www.theolympian.com/opinion/editorials/article112076757.html (last visited March 26, 2017); WALLA WALLA UNION BULLETIN, available at http://www.union-bulletin.com/opinion/editorials/i--won-t-help-seniors-or-the-vulnerable/article_1c015786-6bb6-11e6-8d3c-239468c3682d.html (last visited March 26, 2017); TRI-CITY HERALD, available at http://www.tri-cityherald.com/opinion/editorials/article104739261.html (last visited March 26, 2017); SPOKANE JOURNAL, available at http://www.spokanejournal.com/local-news/initiative-1501-focus-deterring-scams-targeting-the-elderly/ (last visited March 26, 2017); Q13 FOX, available at http://q13fox.com/2016/10/06/voter-guide-initiative-1501-increase-penalties-for-crimes-against-vulnerable-people/ (last visited March 26, 2017); KOMO NEWS, available at http://komonews.com/news/consumer/statewide-initiative-to-protect-seniors-from-fraud-is-more-involved-than-it-appears (last visited March 26, 2017); THE LEWIS COUNTY CHRONICLE, available at http://www.chronline.com/opinion/

K. I-1501 has stymied Plaintiffs' efforts to speak to Homecare and Childcare Providers.

78. I-1501 makes it impossible for the Foundation to acquire updated lists of Homecare and Childcare Providers. Without such lists, the

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other-views-reject-i--and-urge-lawmakers-to- address/article_50b2597a-8bf1-11e6-8cd2-7b8330b5daed.html (last visited March 26, 2017); *The Seattle Weekly,* available at http://www.seattleweekly.com/news/the-endorsements/ (last visited March 26, 2017); THE KITSAP SUN, available at http://www.kitsapsun.com/opinion/letters-sink-every-state-initiative-3f2805bf-2a67-2c82-e053-0100007f9dfe-397501551.html (last visited March 26, 2017); HERALD NET, available at http://www.heraldnet.com/opinion/letter-initiative-1501-is-only-about-helping-union/ (last visited March 26, 2017); THE WENATCHEE WORLD, available at http://www.wenatcheeworld.com/news/2016/oct/09/editorial-board-secrecy-for-dues/ (last visited March 26, 2017); THE NATIONAL REVIEW, available at http://www.nationalreview.com/article/441379/service-employees-international-union-ballot-initiative-1501-freedom-foundation-public-records-act (last visited March 26, 2017); THE WASHINGTON FREE BEACON, available at http://freebeacon.com/issues/seiu-id-theft-initiative-smokescreen-forced-dues/ (last visited March 26, 2017); THE WASHINGTON EXAMINER, available at http://www.washingtonexaminer.com/seattle-union-spends-1.8m-to-change-disclosure-laws-in-its-favor/article/2605805 (last visited March 26, 2017); FORBES, available at http://www.forbes.com/forbes/welcome/?toURL=http://www.forbes.com/sites/georgeleef/2016/11/05/unions-resort-to-election-trickery-in-grubby-efforts-at-maximizing-their-legal-plunder/&refURL=&referrer=#3cad0b933706 (last visited March 26, 2017); BLOOMBERG BNA, available at https://www.bna.com/caregiver-info-disclosure-n57982082391/ (last visited March 26, 2017); THE WALL STREET JOURNAL, available at http://www.wsj.com/articles/the-seius-ballot-fraud-1477435711 (last visited March 26, 2017).

Foundation will no longer be able to effectively and efficiently inform Homecare and Childcare Providers of their constitutional rights.

79. I-1501 also makes it impossible for Boardman to acquire an updated list of Homecare Providers so he will be unable to communicate effectively and efficiently with his fellow Providers. On March 15, 2017, DSHS denied Boardman's request because of I-1501.

80. I-1501 also makes it impossible for Thurber and Benn to acquire updated lists of Childcare Providers so they will be unable to communicate effectively and efficiently with their fellow Providers. I-1501 eliminates Thurber's longstanding speech and associational activities related to the Eastern Washington Child Care Association. On January 30, 2017, DEL denied Thurber's request for an updated Childcare Provider list because of I-1501.

81. Likewise, I-1501 eliminates Benn's longstanding speech to her fellow Providers in the form of her e-mail newsletters discussing issues of shared concern. On February 3, 2017, DEL denied Benn's request for an updated Childcare Provider list because of I-1501.

L. I-1501 eliminates Thurber's and Benn's right to de-certify and replace the existing Childcare Provider Union.

82. Thurber and Benn want to de-certify SEIU 925 and replace it with the PNW Child Care Association. To call a de-certification election, they must garner interest from 30% of the entire Childcare Provider bargaining unit. After the election is called,

they must convince a majority of voting Childcare Providers to certify the PNW Child Care Association as their new bargaining representative.

83. Currently, Thurber and Benn are working from years-old Childcare Provider lists they previously obtained from Defendants. But because those lists are so outdated and many of their fellow Providers change addresses frequently, they have had several hundred mailings returned to them. Clearly, if Thurber and Benn had updated lists, their prospects for success would be considerably higher. Of the Childcare Providers they have reached so far, 50% agree to call for a de-certification election.

84. Both Thurber and Benn submitted requests to DEL for updated Childcare Provider lists solely to facilitate their de-certification efforts. But DEL denied both their requests, citing I-1501.

85. Without these lists, it will be impossible for Thurber and Benn (or any other Childcare Provider) to follow the prescribed statutory processes they must to exercise their fundamental and constitutionally-protected associational rights.

V. CLAIMS FOR RELIEF

86. Regarding the below-referenced claims, Defendant Inslee enforces the implementation of I-1501.

87. Regarding the below-referenced claims, Defendant Lashway implements I-1501 as applied to Homecare Provider lists and Childcare Provider lists.

88. Regarding the below-referenced claims, Defendant Hunter implements I-1501 as applied to Childcare Provider lists.

CLAIM 1

Equal Protection Clause of the Fourteenth Amendment, through 42 U.S.C. § 1983
Part III of I-1501 significantly interferes with Plaintiffs' fundamental rights

89. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

90. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits Defendants from significantly interfering with Plaintiffs' fundamental rights of free speech and association and treating similarly situated groups differently based on the protected expressive activities in which they are engaged. Defendants are liable under 42 U.S.C. § 1983 if a state law significantly interferes with citizens' fundamental rights and the law does not pass strict scrutiny.

91. Plaintiffs and the Unions are similarly situated because both are ideologically-motivated groups and individuals that engage in constitutionally-protected speech with Providers.

92. The fundamental rights of free speech and freedom of association are guaranteed by the First Amendment of the U.S. Constitution.

93. Part III of I-1501 prevents Plaintiffs from accessing updated Provider lists, which directly facilitate Plaintiffs' political speech to Providers.

94. I-1501 allows the Unions to continue accessing current lists of Providers' names and contact information, which directly facilitates the Unions' political speech to Providers.

95. I-1501 silences Plaintiffs' political speech to Providers by preventing Plaintiffs from utilizing an essential tool to engage in direct, one-on-one speech with Providers.

96. I-1501's classifications significantly interfere with the exercise of Plaintiffs' fundamental rights of free speech and association by preventing the disclosure of updated Provider lists to Plaintiffs, but not the Unions; lists which are essential for both Plaintiffs and the Unions to engage in political speech with Providers.

97. I-1501's significant interference with Plaintiffs' but not the Unions' fundamental rights of free speech and association is not narrowly tailored to achieve a compelling government interest.

98. By and through Part III of I-1501, Defendants have significantly interfered with, and will continue to significantly interfere with, Plaintiffs' fundamental rights to free speech and association, in violation of the Equal Protection Clause of the Fourteenth Amendment. Part III of I-1501 is unconstitutional facially and as applied to Plaintiffs.

CLAIM 2

Equal Protection Clause of the Fourteenth Amendment, through 42 U.S.C. § 1983
Part III of I-1501 treats similar, non-suspect classes differently and is motivated by animus

99. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

100. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits Defendants from treating similarly-

situated, non-suspect class groups differently when that classification is motivated by, and a manifestation of, animus toward a targeted group. Defendants are liable under 42 U.S.C. § 1983 if a state law treats similarly [sic] groups differently, the groups are not a suspect class, and the laws were intended with, and manifestation of, animus to harm a targeted group that is disadvantaged under the law in question.

101. Plaintiffs and the Unions are similarly situated because both are groups and individuals that engage in constitutionally protected speech with Providers.

102. I-1501 prevents Plaintiffs from accessing updated Provider lists which directly facilitate Plaintiffs' political speech to Providers.

103. I-1501 allows the Unions to continue accessing updated Provider lists which directly facilitate the Unions' political speech to Providers.

104. Thus, I-1501 treats Plaintiffs and the Unions differently by preventing Plaintiffs from engaging in political speech with Providers but allowing the Unions to continue engaging in such speech with Providers.

105. I-1501 was motivated by animus because it was intended to silence Plaintiffs' political speech to Providers that the Unions disagreed with.

106. Specifically, I-1501 was drafted with the intention to silence the Foundation's political speech and thus harm the Foundation.

107. The Unions created, funded, and supported I-1501 to silence the Foundation's speech, and were motivated solely by their animus toward the Foundation, its outreach efforts, and its political speech.

108. Because I-1501 was motivated by animus to silence the speech of a group whose political views the Unions disagreed with, it cannot be reasonably related to a legitimate government interest. I-1501 does not satisfy rational basis review.

109. By and through Part III of I-1501, Defendants treat similarly-situated, non-suspect class groups differently based on a law motivated by, and manifesting, animus, in violation of the Equal Protection Clause of the Fourteenth Amendment. Part III of I-1501 is unconstitutional facially and as applied to Plaintiffs.

CLAIM 3

First Amendment, through 42 U.S.C. § 1983
Part III of I-1501 is a viewpoint-discriminatory speech regulation

110. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

111. The First Amendment to the U.S. Constitution, incorporated against the State of Washington by the Fourteenth Amendment, protects organizations' and individuals' right to engage in political speech. Further, the First Amendment forbids the Defendants from favoring one viewpoint over other viewpoints. Defendants are liable under 42 U.S.C. § 1983 if it infringes on the Plaintiffs' First Amendment rights.

112. The Foundation's outreach program to Providers is constitutionally protected speech. Plaintiffs' other expressive activities which are directed at Providers are constitutionally protected speech.

113. Accessing updated Provider lists obtained through the PRA is the only way Plaintiffs' can practicably and effectively engage in their constitutionally protected speech with Providers.

114. I-1501 does not escape constitutional scrutiny because it is facially neutral—instead, I- 1501 was drafted, sponsored, and supported with the purpose of silencing the Foundation's Provider outreach.

115. The First Amendment prohibits Defendants from intentionally erecting barriers to prevent the Foundation from exercising its constitutionally protected speech rights.

116. Further, Part III of I-1501 favors the Union's political and ideological viewpoints because the initiative exempts unions from its coverage, allowing the Unions to continue comunicating their viewpoint to Provides. Because the Initiative only burdens the speech of individuals and entities with views divergent from those of the Unions, it is viewpoint-discriminatory.

117. The Unions' control over I-1501's creation, funding, and passage demonstrates that I-1501 exists to favor pro-union speech over non-union speech.

118. I-1501 is not narrowly tailored to serve a compelling government interest.

119. By and through Part III of I-1501, Defendants favor the Unions' viewpoint while silencing Plaintiffs' viewpoints, in violation of the First Amendment, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983. Part III of I-1501 is unconstitutional facially and as applied to Plaintiffs.

CLAIM 4

First Amendment, through 42 U.S.C. § 1983
Part III of 1501 [sic] is facially overbroad

120. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

121. The First Amendment to the U.S. Constitution, incorporated against the State of Washington by the Fourteenth Amendment, prohibits the State from enforcing laws that are so overbroad that they impermissibly regulate protected expressive activities, in relation to the law's plainly legitimate sweep.

122. Part III of I-1501 ostensibly seeks to protect the identity of vulnerable individuals by preventing the release of Providers' names and contact information, but its real, and sole, purpose is to silence the Plaintiffs' viewpoints.

123. The goal of I-1501 is not unrelated to suppression of Plaintiffs' expression, so it is presumptively unconstitutional. I-1501's restrictions on access to Provider lists bears a close and obvious nexus to Plaintiffs' speech.

124. Thus, while the State may legitimately "protect seniors and vulnerable individuals from identity theft and other financial crimes," it may not

do so by prohibiting constitutionally protected speech completely unrelated to that objective.

125. Part III of I-1501 is facially overbroad, in violation of the First Amendment, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983.

CLAIM 5

First Amendment, through 42 U.S.C. § 1983
Part III of I-1501 violates Plaintiffs' Freedom of Association

126. Plaintiffs re-allege and incorporate by reference the paragraphs set forth above.

127. The First Amendment to the U.S. Constitution, incorporated against Defendants by the Fourteenth Amendment, forbids Defendants from abridging individuals' freedom of association. Defendants are liable under 42 U.S.C. § 1983 if it violates Plaintiffs' First Amendment rights.

128. Thurber and Benn are trying to decertify SEIU 925, and certify PNW Child Care Association as their new union, following the requisite statutory processes. Without updated Childcare Provider lists, they will be unable to contact the required number of Childcare Providers and trigger a de-certification election.

129. Thurber and Benn have both requested and been denied by DEL updated Childcare Providers lists. DEL refused their requests because of I-1501. At the same time, SEIU 925 continues to receive updated Childcare Provider lists.

130. Without the list of Childcare Providers, Thurber and Benn cannot exercise their fundamental associational rights, and are permanently subjected to an association with SEIU 925 they cannot escape and do not desire.

131. I-1501 is not narrowly tailored to serve a compelling government interest.

132. Thus, Part III of I-1501 violates Plaintiffs' freedom of association, in violation of the First Amendment, as secured against state infringement by the Fourteenth Amendment and 42 U.S.C. § 1983.

VI. PRAYER FOR RELIEF

Wherefore, Plaintiff requests that this Court:

1. Enter a declaratory judgment that Part III of I-1501 violates the First and Fourteenth Amendments to the U.S. Constitution facially and as applied to the Plaintiffs.

2. Issue a temporary restraining order and/or preliminary injunction immediately enjoining the State of Washington, by and through Defendants, from enforcing I-1501.

3. Issue a permanent injunction enjoining the State of Washington, by and through Defendants, from enforcing I-1501.

4. Award the Plaintiffs their reasonable attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988.

5. Award any other relief this Court deems just and proper.

RESPECTFULLY SUBMITTED on April 5, 2017, [sic]

By: s/ David M.S. Dewhirst

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