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No. 52673-5-II

IN THE WASHINGTON COURT OF APPEALS
DIVISION II

(Thurston County Superior Court No. 18-2-00464-34)

PACIFIC NORTHWEST CHILD CARE ASSOCIATION,
Petitioner,

v.

ATTORNEY GENERAL'S OFFICE,
Defendant,

and

JAY INSLEE,
Defendant,

and

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING,
Respondent.

PETITIONER'S OPENING BRIEF IN THE COURT OF APPEALS

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I. INTRODUCTION

The Public Employees' Collective Bargaining Act ("PECBA") ensures that government employees enjoy the right to organize and designate representatives of their own choosing for purposes of collective bargaining, free from interference, coercion, or restraint – direct or otherwise. This is consistent with State and Federal free speech and association guarantees, because union speech and association are protected by the Federal and State constitutions.

These PECBA and constitutional rights extend to family child care providers ("FCCP"), who provide child care services in people's homes and are spread throughout the state in the communities in which they work. Aside from Public Records Act ("PRA") records requests, there is no viable way for FCCPS to identify one another to enjoy their PECBA and constitutional right to organize and speak on organizing activity.

The Petitioner, Pacific Northwest Child Care Association ("PNWCCA" or "Petitioner"), is an association of FCCPs seeking to decertify and replace the incumbent collective bargaining representative, Service Employees International Union 925 ("SEIU 925"). To do so, the PNWCCA must contact fellow providers around the state to advocate for such an election.

In 2016, however, the State passed Initiative 1501. I-1501 bars FCCPs (and indeed all citizens) from making public record requests for the names and contact information of FCCPs, statewide. Since the State passed I-1501, it has refused to identify fellow FCCPs to the PNWCCA, and it is logistically impossible for the PNWCCA to contact fellow FCCPs and change their exclusive bargaining representative. As such, the State forces FCCPs to continue to associate with the incumbent union, in violation of both the PECBA and the federal and State constitutions.

The PNWCCA brought an unfair labor practice complaint with the Public Employment Relations Commission ("PERC") based upon the foregoing, but PERC dismissed the complaint for failure to state a claim. It concluded in one sentence that the PNWCCA failed to state a claim because the State was following another law. The PNWCCA appealed to the Superior Court, which affirmed PERC. The PNWCCA appeals.

II. FACTS[1]

A. Background

Family child care providers (FCCPs) are licensed and licensed

[1] Petitioner's claim was dismissed for failure to state a claim, with no factual findings below. Accordingly, the petitioner may assert any hypothetical factual scenario consistent with the complaint that gives rise to a valid claim, even if the facts are alleged informally, for the first time, on appeal. *See Fondren v. Klickitat Cty.*, 79 Wn. App. 850, 854, 905 P.2d 928, 930 (1995) (internal citation omitted).

exempt "family, friends and neighbor" providers under RCW 41.56.030(7), providing care in homes and communities throughout the State. They are invisibly spread throughout the State in the homes and communities in which they provide services, with no common spaces, supervisors, or working community. Administrative Record ("AR") at 44 (PNWCCA's Amended Complaint ("Complaint")).

In March, 2006, the State passed the Quality Family Child Care Act, which makes FCCPs public employees for the sole purpose of being subject to exclusive bargaining representation on a limited number of bargaining subjects. RCW 41.56.028(2)(c), (3). FCCPs are subject to a single bargaining representative. RCW 41.56.028(2)(a) ("A statewide unit of all family child care providers is the only unit appropriate for purposes of collective bargaining….").

Three months after the Act passed, Service Employees International Union 925 (SEIU 925) became FCCPs' exclusive bargaining representative. *State - Social and Health Services*, Decision 9362 (PECB, 2006).[2] SEIU 925 remains the incumbent.

The Pacific Northwest Child Care Association (PNWCCA or Petitioner) is a voluntary Association of FCCPs. Its providers would like to

[2] https://decisions.perc.wa.gov/waperc/decisions/en/item/175970/index.do?q=925

decertify and replace SEIU 925. Their reasons for doing so range from dissatisfaction with SEIU 925's representation of their interests, to the high price of representation, to SEIU 925's speech on political and sensitive topics.

To replace SEIU 925, the PNWCCA must submit a representation petition to PERC under RCW 41.56.070. The petition must be supported by a showing of interest, consisting of individual cards signed by FCCPs stating that they support the purpose of the representation petition. Thirty percent (30%) or more of the employees in the bargaining unit must show their support, in order to trigger an election to replace SEIU 925.

B. <u>Petitioner's attempts to trigger a certification election</u>

Ms. Deborah Thurber is a FCCP, and one of the directors of the PNWCCA. AR at 40. She has organized trainings, meetings, and events for family child care providers since 1989, when she became a licensed FCCP. She is also the current president of the 1981-founded Eastern Washington Family Child Care Association.[3] In these roles and for many years past, Ms. Thurber requested and received the names and contact information of FCCPs through Public Records Act (PRA) requests. She used this information to contact fellow FCCPs to arrange conferences, send

[3]http://www.ewfcca.org/

newsletters, and set up trainings.

Ms. Thurber regularly made and received responses to updated PRA requests without interference, since updated lists are essential to remain relevant to the FCCP community. Updated lists are essential because providers are spread invisibly throughout the State, and turnover is high—particularly among "Family, Friends and Neighbors" providers, which make up seventy percent (70%) of the bargaining unit. AR at 41, 44; *see State – Family Child Care Providers*, Decision 12746 (PECB, 2017)[4] ("[T]he list of eligible family child care providers fluctuates from month to month.")

In January of 2017, as an officer of the PNWCCA, Ms. Thurber made a public records request to the State Department of Early Learning for a list of FCCPs and their contact information. She wanted to contact FCCPs to conduct outreach and promote an election petition.[5] The State denied her request, however, citing RCW 42.56.640. AR at 67 (Response to January 24, 2017 PRA Request).

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[4] https://decisions.perc.wa.gov/waperc/decisions/en/item/232835/index.do?q=thurber

[5] The request read, in relevant part: "I submit the following request: The names, mailing address, telephone number and email address provided for state contact of all family child care providers…. This would include both licensed and license exempt (Family, Friend & Neighbor (FFN)) providers. The sole and express purpose of this request is so that I can communicate with my fellow child care providers about their constitutional and statutory rights to decertify our current exclusive bargaining representative and replace it with another exclusive bargaining representative of our choosing." AR at 64, January 24, 2017 Public Records Request.

RCW 42.56.640, enacted into law under Initiative 1501, was passed in November 2016. I-1501, relating to the protection of senior citizens and other vulnerable individuals from financial crimes, Laws of 2017, ch. 4, was funded and backed almost exclusively by incumbent SEIU 925 and sister union SEIU 775.[6] Among other things, I-1501 created a new exemption under the PRA, barring release of FCCP's contact information. It states, in relevant part, that "[s]ensitive personal information of in-home caregivers for vulnerable populations is exempt from inspection and copying under [the PRA]," RCW 42.56.640, to include FCCPs.

I-1501 includes exceptions under RCW 42.56.645. Under RCW 42.56.645, the State will release FCCPs' information under a number of circumstances, to include if the requestor is the incumbent union, if the release is part of a quasi-judicial proceeding, or if release is to a person under contract with the State to provide services to vulnerable residents.[7] The State did not apply any these exceptions to Ms. Thurber on behalf of the PNWCCA.

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[6] "[U]nions SIEU 775 and SEIU 925… sponsored I-1501 through the 2016 general election ballot initiative process. Ultimately, I-1501 was passed by the state electorate and, through the initiative process, the unions' efforts successfully resulted in a PRA exemption that prevents the disclosure of contact information for members of the unions' bargaining units." *Boardman v. Inslee*, No. C17-5255 BHS, 2017 WL 1957131, at 1 (W.D. Wash. May 11, 2017).

[7] Indeed, the State does release FCCPs' information to SEIU 925 for its outreach and other purposes. AR at 43; AR at 118 (2017-2019 Collective Bargaining Agreement between SEIU 925 and State, Art. 4.5).

The PNWCCA was forced to attempt to reach out to FCCPs and trigger a representation election without an updated list of providers. Washington's total population is over 7 million people, however, and with approximately 7,000 FCCPs, the PNWCCA was tasked with identifying and contacting roughly .001% of the entire State population. AR at 44. Attempting to gather signatures through public education campaigns employing traditional advertising methods was prohibitively expensive for the PNWCCA, and at any rate would likely have failed to reach many providers. *Id.* The only feasible method for the PNWCCA to contact FCCPs for an election is through the PRA.

The PNWCCA could not access new lists because the State would no longer release them to it, but the PNWCCA did possess old lists of FCCPs from before I-1501 was passed. It used these in an attempt to contact enough FCCPs to trigger an election. But, given the high turnover rate for Family, Friends and Neighbor FCCPs, which comprise roughly 70% of the bargaining unit, AR at 41, this effort failed. Despite screening for bad addresses and removing them from the mailing list, hundreds of letters were returned undeliverable. AR at 44. The PNWCCA also learned that hundreds of providers no longer lived at listed addresses, and many more providers with good addresses were no longer members of the bargaining unit,

because they had either ceased working as a child care providers or ceased accepting state-subsidized clients. *Id.*

Despite the the inadequacy of the old lists, however, the PNWCCA was *still* able to garner about a thirteen percent (13%) showing of interest – 892 providers – from the relatively few FCCPs it was able to contact. The PNWCCA filed a change of representation petition with the PERC based on this thirteen percent (13%), and requested that just cause be found to process the election petition under the circumstances. PERC ultimately denied the PNWCCA's request, however, and dismissed the petition. AR at 52-57 (*State – Family Child Care Providers*, Decision 12746 (PECB, 2017).[8]

Without an accurate list of providers and their contact information, it is logistically impossible for FCCPs and the PNWCCA to communicate with each other, and to gather enough signatures to meet the thirty percent (30%) threshold necessary to trigger a representation election. AR at 43-44 (Complaint).

III. PROCEDURAL HISTORY

After filing a second public records request for FCCPs' contact information and being denied again, AR at 88, the PNWCCA filed an Unfair

[8] https://decisions.perc.wa.gov/waperc/decisions/en/item/232835/index.do?q=thurber

Labor Practice (ULP) complaint with the Public Employment Relations Commission (PERC) on August 14, 2017 for interference with PECBA rights under RCW 41.56.140(1) – namely, that the State had interfered with the PNWCCA's and FCCPs' "free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining" free from interference, coercion, or restraint. RCW 41.56.140, .040; AR at 39-46 (Complaint).

The PNWCCA explained to PERC how the State's application of I-1501 violated the PECBA, the FCCPs' First Amendment rights to free speech and association, and their Equal Protection rights. It asked that PERC direct the State to provide the PNWCCA with a complete and up-to-date list of family child care providers and to extend the timeframe for the PNWCCA to submit its representation petition, together with all other just remedial action.

PERC denied the PNWCCA's request and dismissed the PNWCCA's complaint, however, for failure to state a claim upon which relief could be granted. AR at 1-4, *State – Family Child Care Providers*, Decision 12781-A (PECB, 2017).[9] The Commission dismissed the complaint because, according to the Commission, the State had complied

[9] https://decisions.perc.wa.gov/waperc/decisions/en/item/304127/index.do?q=12781-A+

with another law: I-1501's PRA exemption. The Commission declined to apply an exception (under RCW 42.56.645) to the exemption under the PRA. PERC did not address the constitutionality of the State's action.[10]

The PNWCCA timely appealed to the Thurston County Superior Court under the Administrative Procedures Act (APA), for an unconstitutional order as applied, *see* RCW 34.05.570(3)(a), and because PERC erroneously applied or interpreted the law. RCW 34.05.570(3)(d). Clerk's Papers (CP) at 5, 55. The Superior Court affirmed PERC's decision, and declined to address the Constitutional issues. CP at 161 (Superior Court Order). Petitioner PNWCCA timely filed this appeal.

IV. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

A. The employer, State, refuses to give public employees information to identify one another, which is necessary for them to organize, citing RCW 42.56.645. PERC erred when it concluded that this does not interfere with employees' rights under the PECBA, and erred when it failed to order the State to release the information under one of the exceptions to RCW 42.56.640, RCW 42.56.645.

B. FCCPs have a right to associate or not associate with a labor organization under the Free Speech and Free Association guarantees

[10] Constitutional issues are outside PERC's competency and jurisdiction. *See State — Corrections,* Decision 12749 (PSRA 2017) ("The Commission only has the authority to enforce Washington State's collective bargaining laws.")

of the First Amendment and Article I § 5 of the Washington State Constitution. The State forces FCCPs to be represented by a single bargaining representative, while simultaneously refusing to identify FCCPs to one another for purposes of changing who that representative is. The Superior Court erred by not addressing this issue, and not finding that such action violates Petitioner's First Amendment rights.

C. I-1501 burdens one class of FCCP employees in their attempt to associate for collective bargaining purposes, but does not so burden another class of those supporting the existing regime. The Superior Court erred by not addressing this issue, and not finding that such action violates Petitioner's right to Equal Protection of the laws.

V. STANDARD OF REVIEW

The standard of review is *de novo*, with all Petitioner's facts taken as true and provable.

Petitioner appeals PERC's decision under RCW Sections 34.05.570(3)(a) and (d) because PERC's order, or the statute it is based on, is in violation of constitutional provisions as applied, and PERC erroneously interpreted and applied the law. In a petition for review of an agency decision under the APA, the Court of appeals reviews the decision of the agency below directly. *Willman v. Washington Utilities & Transp.*

Comm'n, 122 Wn. App. 194, 203, 93 P.3d 909, 913 (2004), *aff'd*, 154 Wn.2d 801, 117 P.3d 343 (2005) ("An appellate court reviewing agency action sits in the same position as the superior court, applying the standards of the [Washington Administrative Procedure Act] directly to the record before the agency.") (internal citations and quotations omitted).

The Court reviews a PERC dismissal for failure to state a claim under the error of law standard. *City of Pasco v. PERC*, 119 Wn.2d 504, 507, 833 P.2d 381, 382 (1992). Under that standard, the Court may substitute its own judgment for that of the agency, and overturn or remand the agency's decision. *Karanjah v. Dep't of Soc. & Health Servs.*, 199 Wn. App. 903, 914, 401 P.3d 381, 388 (2017) (internal citations omitted). Similar to the CR 12(b)(6) standard, all facts alleged in the complaint "are assumed to be true and provable." *City of Spokane*, Decision 12947 (PECB, 2018),[11] 2018 WL 6440985 at *1, fn. 1; AR at 2. Where, as here, a matter is dismissed with no factual findings, the petitioner may assert any hypothetical factual scenario consistent with the complaint that gives rise to a valid claim, even if the facts are alleged informally, for the first time, on appeal. *See Fondren v. Klickitat Cty.*, 79 Wn. App. 850, 854, 905 P.2d 928, 930 (1995) (internal citations omitted).

[11] https://decisions.perc.wa.gov/waperc/decisions/en/item/351060/index.do?q=12947+

Here, PERC ruled, purely as a matter of law, that the Association failed to state a claim upon which relief could be granted. AR at 4. Petitioner appeals PERC's decision for an erroneous interpretation of the law, and for an order and ruling based on a statute that is unconstitutional as applied. RCW 34.05.570(3)(d), (a). CP at 5. The error of law standard applies, and all factual allegations are taken as true and provable.

V. ARGUMENT

Family child care providers enjoy the right to "organize and designate representatives of their own choosing for purposes of collective bargaining," free from interference and discrimination under the PECBA. RCW 41.56. The First Amendment and Article 1 Section 5 of the federal and State constitutions also protect FCCPs' right to discuss, advocate, and associate for purposes of collective bargaining. *Thomas v. Collins*, 323 U.S. 516, 532, 65 S. Ct. 315, 324, 89 L. Ed. 430 (1945); *Foss v. Dep't of Corr.*, 82 Wn. App. 355, 365, 918 P.2d 521, 526 (1996). Indeed, the First Amendment affords collective bargaining related speech and association the highest constitutional protection, since it is inherently political speech. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2474-77 (2018).

Petitioner PNWCCA seeks to challenge the exclusive representation of an existing union. To do so, it needs to identify fellow FCCPs for union

organizing purposes. The State violated Petitioner's PECBA and constitutional rights when it barred access to the identities of fellow providers, while facilitating access to the incumbent union.

PERC failed to appreciate that the State, as employer, can interfere with PECBA rights by "complying with another law," AR at 4, since it is the State itself that passed, and then enforced, the law. Even more than violating petitioner's PECBA rights, however, the State violated petitioner's First Amendment and Equal Protection rights, since the real world, practical effect of the State's action precludes FCCPs from disassociating from SEIU 925 and/or associating with another union.

Petitioner requests that this Court find that the State's application of I-1501 violated its First Amendment and Equal Protection rights, or, in the alternative, remand this matter to PERC and order it to find a cause of action for employer interference with collective bargaining rights.

This Court should so find and remand for three reasons. First, A) PERC erred when it did not find a cause of action for employer interference under the PECBA. Second, B) the State violates First Amendment free speech and association rights when forces employees to be represented by a single bargaining representative while simultaneously denying them the possibility of changing who that representative is. Finally, C) the State violated Petitioner's Equal Protection rights by selectively applying I-1501.

A. PERC ERRED BY NOT FINDING A CAUSE OF ACTION FOR EMPLOYER INTERFERENCE WITH PETITIONER'S PECBA RIGHTS.

PERC erred when it failed to find a cause of action for employer interference under the law and facts presented here. This Court should remand to PERC for such cause of action. The complaint establishes interference in fact, and PERC erred by concluding that the State did not interfere as a matter of law. It did so based on the untenable premise that the State cannot commit a ULP by interpreting and applying one of its own statutes. Lastly, PERC erred by refusing to exercise discretion and order the State to identify FCCPs to Petitioner under one of I-1501's exceptions.

1. Petitioner's complaint establishes that the State interfered with FCCPs' right to organize as a matter of fact.

Under the PECBA, FCCPs have the right to organize and designate representatives of their own choosing free from interference, restraint, or discrimination – direct or indirect. RCW 41.56.010; RCW 41.56.040. The State commits an unfair labor practice when it interferes with, restrains, or coerces public employees in the exercise of these rights. RCW 41.56.140(1).

The State, as employer, interferes with public employees' right to organize and designate representatives where its acts "'reasonably tend[] to

interfere with the free exercise by employees of their rights…'". *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wash. App. 541, 565, 222 P.3d 1217, 1230 (2009) (citations omitted). Evil intent or bad faith is not an element of the violation, and a "finding of 'intent' is not necessary…". *Id.* at 565. A complainant is not required to demonstrate that the employer intended or was motivated to interfere with an employee's protected collective bargaining rights. *City of Tacoma*, Decision 6793-A (PECB, 2000).[12] When a change of representation election is taking place or is otherwise imminent, an employer interferes with employees' rights when it denies a rival union's members' access to employees, or even expresses a preference for a competing union. *Teamsters Local 117*, *Complainant v. King County Security Guild*, *Respondent Teamsters Local 117*, *Complainant v. King County*, *Respondent*, Decision 11223 (PECB, 2011), 2011 WL 5831812. ("Prior to July 2011, Local 117 representatives had the ability to visit employees at work facilities … On July 7, 2011, the employer informed Local 117 that it did not have access to employees without first seeking permission from management … The employer changed its existing practice of allowing access to the workplace and bargaining unit employees by Local 117 representatives during a pending representation petition …

[12] https://decisions.perc.wa.gov/waperc/decisions/en/item/172710/index.do

Therefore, the Examiner concludes the employer committed an interference violation…"). Indeed, even "the appearance of favoritism towards one union…" may be enough to establish a violation. *Public School Employees of Washington v. Renton School District No. 403*, Decision 1501-A (PECB, 1982), 1982 WL 591722 at *3 (emphasis in original).

The State cannot seriously contend that its refusal to identify fellow FCCPs to Petitioner does not interfere with Petitioner's ability to organize *in fact*, and the State does not seem to seriously contest this. Prior to the passage and application of I-1501, Petitioner was able to contact fellow FCCPs for any and all purposes—organizing related or otherwise. Now, it is logistically impossible for Petitioner to conduct this outreach for organizational, or any, purpose. *See* AR at 43-44 (Complaint). As stated in its complaint, a public education campaign employing traditional advertising methods is prohibitively expensive for Petitioner. To garner a thirty percent (30%) showing of support for an election, Petitioner would have to make meaningful contact with 7000+ individuals scattered throughout the State, in a State made up of more than 7 million people. In other words, to be effective, even the most well-funded and well-designed State-wide advertising campaign would fail because it would be searching for the proverbial needle in the haystack: IPs make up only .001% of the entire State population, and at least thirty percent would need to be reached.

Meanwhile, while refusing to release FCCPs' identities to Petitioner, the State releases that same information to the incumbent union under RCW 42.56.645(1)(d). This action is categorically an interference with one representative's ability to organize, and an expression of preference for the incumbent union.

The Petitioner's factual allegations, assumed true for purposes of this appeal, conclusively establish that the State in fact interfered with FCCPs' and Petitioner's right to organize.

2. PERC erred when it concluded that the State did not interfere with FCCPs' PECBA rights as a matter of law

Despite the State's interference with Petitioner's PECBA rights, PERC concluded that the State did not interfere with Petitioner's rights as a matter of law because "the employer was complying with another law." AR at 4. PERC gives no explanation for this single-sentence conclusion, and it is erroneous for two reasons. First, the conclusion that the State was in fact following another law accepts the State's proffered interpretation and discretionary application of the 'other law' in question, without meaningful scrutiny and a hearing. Second, the idea that an employer cannot violate rights because it is purporting to follow another statute does not extend to the PECBA context, because the PECBA envisions the State as the employer in the first place, and governs the State as employer.

a. The State had discretion to release the information in question, and PERC failed to acknowledge it.

The first reason that PERC's conclusion is in error is that PERC accepted, wholesale and without examination or hearing, the employer State's proffered rationale for refusing to identify FCCPs to Petitioner.

In response to Petitioner's ULP before PERC, the State argued that the statute barred it from releasing the information in question, and that it had "no discretion" "to choose [to release the information] unless the requestor falls within the exceptions of RCW 42.56.645." AR at 12 (State's Response to Petitioner's PERC Appeal Brief). But by not recognizing an RCW 42.56.645 exception in the PNWCCA's case, the State *did* exercise discretion. At least two exceptions apply: subsections (1)(c) (release as part of a quasi-judicial proceeding, such as, in this case, a PERC election petition) and (1)(g)[13] (release to a person or entity under contract with the State to administer services to vulnerable residents, such as, in this case FCCPs).[14] Even if it were true that following another law absolves the State of any PECBA liability, PERC erred in so far it accepted the State's version

[13] Petitioner identifies this exception for illustrative purposes, to show how PERC failed to scrutinize the State's decision not to release the information in question.

[14]Petitioner does not adopt the conclusion that FCCPs serve vulnerable individuals for purposes of the statute, but the State apparently adopts that conclusion for constitutional scrutiny purposes. *See*, *infra*, sec. B.3, below. If the State believes that FCCPs serve vulnerable individuals for purposes of constitutional scrutiny, then the State should believe that FCCPs serve vulnerable residents for purposes of RCW 42.56.645(1)(g).

of events surrounding the application of that law wholesale—that it had no discretion but to apply the law in the way it did.[15]

The State interfered with Petitioner's PECBA rights, and PERC lent its hand, without scrutiny, to the State's justification for that interference. As such, the PERC's decision was in error.

b. PERC erred by concluding that it is impossible for the State to interfere with PECBA rights by passing and enforcing legislation

Second, PERC's decision rests on the untenable premise that the State *cannot* enact and enforce legislation that violates the PECBA. AR at 4 ("The PNWCCA asks the Commission to issue a cause of action for employer interference when the employer complied with RCW 42.56.640…. A cause of action cannot be found for employer interference because the employer was complying with another law."). This conclusion, based on a sweeping premise utterly inconsistent with the PECBA, is wrong for three (3) reasons.

First, the premise that the State cannot violate the PECBA by passing legislation otherwise violating PECBA rights is contrary to the PECBA as written: RCW 41.56.905 states that "if any provision of this

[15]As PERC itself has pointed out, CP at 146, the National Labor Relations Board, which is persuasive authority, acknowledges that an employer has an obligation to release identities of bargaining unit employees to a union where no reasonable alternative means of communication exists. Petitioner's facts, taken as true, establish that no reasonable alternative means of communication exist. PERC should have found a cause of action.

chapter conflicts with any other *statute*, ordinance, rule or regulation of *any public employer*, the provisions of this chapter shall control." (emphasis added). Here, the State passed a law that unquestionably conflicts with the PECBA in that it permits (or mandates, according to the State) the State to prohibit FCCPs from identifying one another, which is a necessary predicate for organization.

Second, PERC's unexplained premise is contrary to both the Courts' and PERCs' guidance and decisional law. *See Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula*, 130 Wn.2d 401, 408, 924 P.2d 13, 16 (1996) ("[RCW 41.56.905] acknowledges that the PECBA may be inconsistent with other statutes, and provides that conflicts are to be resolved in favor of the dominance of the PECBA."); *Rose v. Erickson*, 106 Wn.2d 420, 424, 721 P.2d 969, 971 (1986) ("[T]he Legislature… enacted the provisions stating that a liberal construction should be given to all of RCW 41.56 and conflicts resolved in favor of the dominance of that chapter. … [I]n the event of conflict between RCW 41.14 and RCW 41.56, RCW 41.56 must prevail."); *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 140 Wn.2d 615, 648, 999 P.2d 602, 620 (2000), *as amended* (June 8, 2000) (J. Madsen, concurring/dissenting) ("RCW 41.56.905 mandates that the provisions of RCW 41.56 prevail in the case of conflict with any other statute. Where [the majority's

interpretation of the statute] conflicts with RCW 41.56.110, RCW 41.56.110 must prevail."); *see also Lincoln County (Teamsters Local 690)*, Decision 12844-A (PECB, 2018)[16] (County's passage and enforcement of an ordinance opening collective bargaining meetings to the public may be an unfair labor practice under certain conditions.[17]); *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 413–14, 842 P.2d 938, 949 (1992) ("The Legislature has commanded that the Public Employees' Collective Bargaining Act be 'liberally construed', RCW 41.56.905, and this court has similarly found that exceptions to such employees' rights to collectively bargain are to be 'narrowly confined'.)

Finally, the premise that the State cannot pass legislation that violates the PECBA is inimical to the PECBA's spirit and purpose, and public policy: a State employer cannot use its power to pass self-serving legislation as a shield to commit unfair labor practices with impunity and without scrutiny. A hypothetical City could not, for example, unilaterally pass an ordinance imposing a one percent (1%) ceiling on all wage increases for all bargaining units under its jurisdiction, without, at the very least, PERC finding *a cause of action* for a ULP. Surely, in such a hypothetical

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[16] https://decisions.perc.wa.gov/waperc/decisions/en/item/343613/index.do?q=128814
[17]This decision is pending APA appeal. Counsel for the Petitioner here also represents the County in that matter.

ULP, PERC would not be satisfied with the City's answer in defense that it was merely 'complying with another law.'

PERC erred in so far as it concluded, without analysis or explanation, that the State could not interfere FCCPs' PECBA rights because it was complying with its own interpretation of a law that it itself had passed.

3. PERC failed to reconcile RCW 42.56.640 with the PECBA in order to avoid violation of FCCPs' PECBA rights

In its ULP complaint, Petitioner asked PERC to "direct the state to provide the PNWCCA with a complete and up-to-date list of family child care providers and extend the timeframe for PNWCCA to submit a showing of interest by at least four months." AR at 46 (PNWCCA's ULP Complaint). Having concluded that the State could not have committed a ULP out of hand, however, PERC refused to craft an appropriate remedial order. PERC could, and should have, under its remedial powers and the exception to I-1501's barring provisions, contained in RCW 42.56.645.

This was error. PERC has a duty to reconcile apparent conflicts between the PECBA and other employer statutes. If such conflict cannot be reconciled, it has broad powers to correct unfair labor practices under RCW 41.56.160 generally. PERC erred by (a) not reconciling RCW 42.56.640 and the PECBA by ordering the State to identify FCCPs to Petitioner under

RCW 42.56.645, and, if the two could not be reconciled, (b) erred by not ordering the State to release the information requested under PERC's general powers, since the PECBA controls over I-1501's bar against release under the are PRA.

a. PERC erred when it refused to craft a remedy per one of the RCW 42.56.645 exceptions and reconcile the PECBA with I-1501

PERC is empowered and directed to "…prevent any unfair labor practice and to issue appropriate remedial orders," and to "…take such affirmative action as will effectuate the purposes and policy" of the PECBA. RCW 41.56.160(1), (2). PERC may petition the Superior Court for the effectuation of its orders. RCW 41.56.150(3). In fact, administrative agencies such as PERC have "considerable latitude" to shape remedies, and PERC has explicit authority. *Munic. of Metro. Seattle v. Pub. Employment Relations Comm'n*, 118 Wash. 2d 621, 634, 826 P.2d 158, 164 (1992) (internal citations and quotations omitted); RCW 41.56.160. Indeed, PERC can even impose "extraordinary remedies." *Washington Public Employees Association*, *UFCW Local 365 v. Community College District 13*, Decision 8117-B (PSRA, 2005), 2005 WL 1046286 at *7 (internal citations omitted).

Furthermore, "while the PECBA prevails over inconsistent statutes, if apparent conflicts in the statutes can be reconciled and effect given to

each without distortion of the language used, the statute will be harmonized." *Peninsula Sch. Dist.*, 130 Wn.2d at 408. Not only this, but PECBA rights are liberally construed, and "exceptions to… employees' rights to collectively bargain are to be 'narrowly confined'. *Shoreline Cmty. Coll. Dist. No. 7*, 120 Wn.2d at 413.

There is no question that PERC has the power to order the State, as employer, to release FCCPs' information to Petitioner. Not only is such an order within PERC's broad remedial powers, but RCW 42.56.645(1)(c) specifically permits release of the information requested as part of a quasi-judicial proceeding. Under RCW 42.56.645(1)(c), FCCPs' information may be released "…as part of a judicial or quasi-judicial proceeding and subject to a court's order protecting the confidentiality of the information…". PERC is indisputably a quasi-judicial body, and can unquestionably fashion an order to allow release of the information needed to prevent an ULP. PERC itself does not dispute that it has this power. AR at 143 (PERC Response to Petitioner's Opening Brief in Superior Court) ("PNWCCA argues that PECBA preempts the PRA and that RCW 42.56.645(1)(c) would permit PERC to order release of employee lists in a remedial order under RCW 41.56.160. PERC does not dispute this.")

PERC refused to order release pursuant to RCW 4256.645 because "no action was pending before [the Commission] when the PNWCCA

requested the information from the employer." AR at 4. But this reasoning is non-responsive to Petitioner's argument. Whether or not an action was pending at the time it made its PRA request is irrelevant once it is established that the State interfered with Petitioner's PECBA rights, which it unequivocally did. PERC can release the information requested as part of its powers to remedy unfair labor practices, and should have done so here.

b. PERC erred when it refused to craft a remedy under its general powers because the PECBA controls where there is conflict

The PECBA controls over I-1501 to the extent that they conflict. This is true as a general legal proposition, *see Peninsula Sch. Dist.*, 130 Wn.2d at 408, *Rose*, 106 Wn.2d at 424, and especially true here, because I-1501's RCW 42.56.640 is a narrowly construed, fringe exemption to the PRA, contrary to the PRA's entire purpose, while RCW 41.56.140 is the PECBA's very mainstay and linchpin. As such, to the extent there is conflict, the PECBA controls, and PERC erred when it failed to craft a remedial order enforcing the PECBA.

The PECBA is liberally construed and controls over conflicting employer statutes to accomplish its purpose: if "any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control." RCW

41.56.905. RCW 41.56.140(1), enumerating unfair labor practices, is arguably the core of the PECBA, guaranteeing the right of public employees to be free from employer interference and discrimination. RCW 41.56.140 and its application control over conflicting statutes of "any public employer," and is liberally construed.

On the other hand, the PRA also has a conflict provision, alongside its "strongly worded mandate for broad disclosure of public records," *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600, 605 (2013) (internal citations omitted), and its oft-cited purpose of "nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people…". *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn. 2d 243, 251, 884 P.2d 592, 597 (1994).[18] However, the PRA's liberal and controlling nature extends only to those provisions that accomplish its purpose. PRA exemptions, in contrast, are narrowly construed. *See* RCW 42.56.030. Exemptions to the PRA are not controlling since they are inconsistent with its purpose. Indeed, as a general matter, PRA exemptions "are inapplicable to the extent that information, the

[18] RCW 43.17.410, the other portion of I-1501 restricting release of FCCPs' information, does not have a conflict provision.

disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought." RCW 42.56.210.

Here, to the extent that I-1501 allows (or requires, per the State) the State to bar FCCPs from organizing in violation of the PECBA's core provision RCW 41.56.140, the PECBA controls. PERC has the power to enforce RCW 41.56.140 by remedial order, even if it contravenes RCW 42.56.640, because the PECBA controls over "any other statute, ordinance, rule or regulation of *any public employer*." RCW 41.56.905 (emphasis added).

It is difficult to imagine a more unsupported and aberrational feature in the body of PRA law than RCW 42.56.640, which bars the release of *public employees' names*.[19] RCW 41.56.040 of the PECBA, on the other hand, is central to its being. Where there is conflict, the PECBA controls.[20]

Moreover, a list of names of providers and their work contact information implicates neither privacy nor vital governmental interests – especially given the fact that this information was recently available to all, and still is available to the union. The information being sought – names,

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[19]It is difficult to imagine a PRA exemption more fundamentally inimical to the PRA's overall purpose than one baring the release of government employees' names. The foundation for accountable government, and the exercise of all political rights in connection therewith, is the knowledge of who one's public servants *are*.

[20] While not codified, Section 12 of Initiative 1501 does state that it shall be "liberally construed" to promote the safety of vulnerable individuals. However, it has no independent provision governing conflicts with other laws.

addresses, email, and phone numbers – is providers' *work contact information*, on file with the State for work-related purposes. It does not implicate personal privacy or any vital government function.

PERC, again, does not contest the forgoing analysis. AR at 143 ("PNWCCA argues that PECBA preempts the PRA…. PERC does not dispute this.")

The State cannot rely on RCW 42.56.640 to commit what is a patently unfair labor practice, if not so in name. PERC erred when it failed to recognize that the State had committed an unfair labor practice and failed to correct the violation under its remedial powers.

B. SUBJECTING FCCPS TO EXCLUSIVE STATEWIDE REPRESENTATION WHILE PREVENTING THEM FROM CHANGING THEIR REPRESENTATIVE VIOLATES FCCPS' RIGHTS OF FREE SPEECH AND ASSOCIATION UNDER THE FIRST AMENDMENT.

The State subjects FCCPs to statewide, exclusive representation by a *single* bargaining representative. RCW 41.56.028(2)(a) ("A statewide unit of all family child care providers is the only unit appropriate for purposes of collective bargaining…"). This bargaining representative engages in protected speech on FCCPs' behalf. Compelling FCCPs to accept representation by a single representative, **while simultaneously removing the only feasible means for FCCPS to change who that representative is**, violates FCCPs' First Amendment association and speech rights.

Under the First Amendment of the State and Federal constitutions, FCCPs have a right to not associate with an exclusive bargaining representative, and to discuss forming an alternative representative with one another. State action that burdens this right is subject to strict scrutiny. Here, the State chokes FCCPs' associational and free speech rights to the point of a near total bar to speech and association. This is because the State forces FCCPs to be represented by a single representative under circumstances where they cannot feasibly change that representative. The State's action fails strict scrutiny, and even rational basis review, as applied.

1. State action is subject to strict scrutiny when it burdens the FCCPs' rights to not associate with a particular representative, and to designate an alternative representative.

FCCPs have the constitutional right to relay ideas, advocate, and associate for the purposes of collective bargaining. *Foss v. Dep't of Corr.*, 82 Wn. App. 355, 365, 918 P.2d 521, 526 (1996) ("Full freedom of association of workers is protected by statute, case law, and [the] state and federal constitutions."); *Thomas v. Collins*, 323 U.S. 516, 532, 65 S. Ct. 315, 324, 89 L. Ed. 430 (1945) (The "right … to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them

is protected not only as part of free speech, but as part of free assembly.”). This is because collective bargaining speech, and the speech that collective bargaining representatives engage in, is political speech, afforded the full spectrum of First Amendment protections. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2474-77 (2018).

Included in the rights of free speech and association is the right *not* to speak or associate: “Freedom of association… plainly presupposes a freedom not to associate.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citations omitted). *See Otto v. Pennsylvania State Educ. Ass'n-NEA*, 330 F.3d 125, 128 (3d Cir. 2003) (“The First Amendment affords public-sector employees the freedom not to associate with a labor organization.”).

State action that burdens political speech and association is subject to strict scrutiny. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 S. Ct. 876, 898, 175 L. Ed. 2d 753 (2010). It is unnecessary that the violating government action be direct: imposing an indirect, or merely likely burden, violates the First Amendment if the burden is not sufficiently justified. *See*, *e.g.*, *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462, 78 S. Ct. 1163 (1958); *see also Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960). Indeed, even action that has “the practical effect ‘of discouraging’ the exercise of constitutionally protected political rights” is subject to such scrutiny. *Patterson*, 357 U.S. at 461.

To survive such scrutiny, the State action must further a compelling state interest and be narrowly tailored to achieve it. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464, 127 S. Ct. 2652, 2664, 168 L. Ed. 2d 329 (2007); s*ee also Marchioro v. Chaney*, 90 Wash. 2d 298, 309, 582 P.2d 487, 493 (1978), *aff'd*, 442 U.S. 191, 99 S. Ct. 2243, 60 L. Ed. 2d 816 (1979); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986); *Clingman v. Beaver*, 544 U.S. 581, 591 (2005) (describing the Court's application of strict scrutiny in *Tashjian*).

As will be shown below, the State's refusal to honor FCCPs' PRA requests severely burdens their free speech and association rights by amounting to near total bar on protected speech and association, and is neither justified by a compelling interest, nor narrowly tailored.

2. The State's conduct severely burdens FCCPs' associational and free speech rights because it allows for indefinite forced association with a single bargaining representative.

In 2006, the State legislature enacted the Quality Family Child Care Act, Laws of 2006, Ch. 54, subjecting FCCPs to representation by a single bargaining representative statewide. RCW 41.56.028(2)(a) ("A statewide unit of all family child care providers is the only unit appropriate for purposes of collective bargaining under RCW 41.56.060."). FCCPs are

quasi-public employees, so they receive no benefits of public employment aside from exclusive representation. RCW 41.56.028(3) ("Family child care providers who are public employees solely for the purposes of collective bargaining under [this section] … are not, for that reason, employees of the state for any purpose. This section applies only to the governance of the collective bargaining relationship between the employer and family child care providers….")

The Act became effective March 15, 2006. SEIU 925 was certified as FCCPs' exclusive representative soon thereafter, on June 23, 2006. *State - Social and Health Services*, Decision 9362 (PECB, 2006).[21] It remains the incumbent despite decreasing popularity.[22]

As established above, it is uncontestable that the State, by applying RCW 42.56.640 and .645 to refuse to identify FCCPs to Petitioner, severely

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[21] https://decisions.perc.wa.gov/waperc/decisions/en/item/175970/index.do?q=925.

[22] SEIU 925 was instrumental in the passage of I-1501 which now essentially enshrines it as the collective bargaining representative for FCCPs. *See Boardman v. Inslee*, No. C17-5255 BHS, 2017 WL 1957131, at 1 (W.D. Wash. May 11, 2017) ("[U]nions SIEU 775 and SEIU 925… sponsored I-1501 through the 2016 general election ballot initiative process. Ultimately, I-1501 was passed by the state electorate and, through the initiative process, the unions' efforts successfully resulted in a PRA exemption that prevents the disclosure of contact information for members of the unions' bargaining units.") It has also resorted to lawsuits against individual FCCPs for challenging its incumbent status. AR at 41 (Complaint) (Petitioner's PERC Statement of Facts and Requested Relief) ("SEIU 925 twice sued family child care provider Shannon Benn, now an officer of PNWCCA, when she… requested lists of providers from the state.")

burdens FCCPs' right to associate for organizational purposes and communication regarding the same. Beyond having "the practical effect 'of discouraging' the exercise of constitutionally protected political rights," *see Patterson*, 357 U.S. at 461, the State's application of I-1501 in the RCW 41.56 context so severely restricts providers' speech and association rights as to put a stranglehold on speech and an effective complete bar on political disassociation.

Family child care providers do not share offices, supervisors, clients, or work spaces. Instead, they are scattered throughout the State, unknown to one another and to the rest of society. Yet, they are forced to be represented by a single collective bargaining representative, that purports to speak on their behalf on the highly contentious political topics inherent in collective bargaining. To coordinate with one another for the purpose of ensuring that that representative in fact represents their interests on these important topics – at least to some extent – these providers must *first* be able to identify one another. Prior to the passage of I-501, FCCPs could identify one another and communicate with one another via the PRA. Thus, even the most modest provider had the means to identify her fellow bargaining unit members and discussing the possibility of forming an alternative representative. The State has foreclosed that possibility.

Applying I-1501 to deny providers the ability to identify one another – in other words, to apply the barring provision but not the exception – burdens providers' free speech and associational rights. [23] This is a severe burden, far beyond even a "likely" burden that meets the criteria for triggering strict scrutiny, because FCCPs are simultaneously forced to associate without being given a reasonable alternative to the organization with which they are associating.[24] Providers are forced to accept continued representation by the incumbent union on *political speech*, occupying "the highest rung of the hierarch of First Amendment values," on highly sensitive, value and policy driven topics, to include such issues as wages, pensions, and benefits, as well as other, "sensitive political topics" that are of "profound value and concern to the public." *Janus*, 138 S. Ct. at 2475-76. This forced political speech and violation of the right of non-association

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[23] DEL does provide limited information for licensed providers, online, at https://www.findchildcarewa.org. This service provides only information only for licensed providers, however, not family, friends and neighbor providers which, as discussed above, make up 70% of the bargaining unit and have high turnover.

[24] It is this forced association, under RCW 41.56.028, that distinguishes this case from the "right of access" line of cases. The State cannot argue that it owes FCCPs no right of access to government records here because, as described above, forcing providers to accept representation by a single representative, on political issues, *without any means of replacing that representative*, unequivocally violates providers' right *not* to associate. Even if this case were considered on right of access principles, however, a qualified right to access the information in question exists here, because access plays a significant and positive role in the functioning of the process in question (union representation elections), and history and experience militate towards the same (union election by ballot is the traditional procedure for certifying a union). *See Press-Enterprise. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 8 (1986) (*Press-Enterprise II*); *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992).

is the direct result of the statutory scheme codified in RCW 41.56.028(2)(a), coupled with I-1501. The State's application of I-1501 leaves providers with no avenue of replacing SEIU 925; in other words, it leaves providers no way to *not* associate with SEIU 925 – regardless of whether and to what extent they disagree with SEIU 925's representational speech.

It is important to acknowledge what issue is *not* before this Court on appeal now. Petitioner is not arguing that the principle of exclusive representation itself is unconstitutional. Instead, the question before the Court is whether, where the State *does* force employees to be represented by an exclusive representative on political issues, can it deny those employees a meaningful opportunity to change that representative? The answer is unequivocally "no." Employing a statutory scheme that forces employees to be represented by an organization with which they disagree on political topics may (perhaps) pass constitutional muster, but going further to deprive them of any mechanism for democratically replacing that representative is a bridge too far.

The State's application of I-1501, in the context of exclusive representation for FCCPs scattered throughout the State, severely burdens FCCPs' First Amendment rights of speech and of non-association; its action triggers strict scrutiny.

3. The State's action is non-responsive to I-1501's goal of protecting *seniors* and *vulnerable individuals*, and therefore fails at any level of review

Having established that strict scrutiny applies to the State's action in this case, the Court will consider whether barring release of FCCPs' information to fellow FCCPs serves a compelling government interest, and is narrowly tailored to achieve that interest. The State's action satisfies neither. Its interest in passing RCW 42.56.640 is not compelling, and its application of RCW 42.56.640 and .645 is overbroad.[25] In fact, it even fails rational basis review.

a. The State's purpose in passing I-1501 was to protect senior citizens and vulnerable adults from identity theft, not children, low income parents, or child care providers.

The State's purpose in passing I-1501 is to protect seniors and vulnerable individuals from identity theft:

> It is the intent of this initiative to protect the safety and security of seniors and vulnerable individuals by
> (1) increasing criminal penalties for identity theft targeting seniors and vulnerable individuals;
> (2) increasing penalties for consumer fraud targeting seniors and vulnerable individuals; and
> (3) prohibiting the release of certain public records that could facilitate identity theft and other financial crimes against seniors and vulnerable individuals.

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[25] It is not relevant that voters rather than a legislative body enact a particular statute, since voters may no more violate the Constitution than a legislative body. *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 295, 102 S. Ct. 434, 437, 70 L. Ed. 2d 492 (1981).

LAWS OF 2017, ch. 4, sec. 2.

The specific purpose of section 8 (codified in RCW 42.56.640) is as follows:

> It is the intent of part three of this act to protect *seniors and vulnerable individuals* from identity theft and other financial crimes by preventing the release of public records that could be used to victimize them. Sensitive personal information about *in-home caregivers for vulnerable populations is* protected because its release could facilitate identity crimes against *seniors, vulnerable individuals, and other vulnerable populations* that these caregivers serve."

LAWS OF 2017, ch. 4, sec. 7 (emphasis added).

Section 3 of I-1501 (codified in RCW 9.35.007(7)) defines a "vulnerable individual" as a person:

> (i) [(a)] Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself;
> (ii) [(b)] Found incapacitated under chapter 11.88 RCW;
> (iii) [(c)] Who has a developmental disability as defined under RCW 71A.10.020;
> (iv) [(d)] Admitted to any facility;
> (v) [(e)] Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW;
> (vi) [(f)] Receiving services from an individual provider as defined in RCW 74.39A.240; or
> (vii) [(g)] Who self-directs his or her own care and receives services from a personal aide under chapter 74.39 RCW.

Laws of 2017, ch. 4, sec. 3, Initiative Measure No. 1501; RCW 9.35.005(7).

b. Though legitimate, the State's interest in passing I-1501 could not have been compelling, since identify theft was already a crime and FCCPs' information is still released to the incumbent union

First, the State fails to show that a compelling interest supports its barring PRA release of family child care providers' work contact information to fellow FCCPs and Petitioner. While the State may have a compelling interest in protecting seniors and vulnerable adults generally, that interest is not evident in its passing RCW 42.56.640. Under State law prior to the passage of I-1501, identity theft was already a crime, punishable under RCW 9.35.020. RCW 42.56.640, then, is duplicative.

Moreover, that an existing union *is* entitled to this information lessens the strength of any claim that preventing disclosure is a compelling justification, since, after all, the existing union may easily fail to keep the provider's information confidential. Disclosure of the requested list to the PNWCCA presents absolutely no more risk of any identity theft or other harm to seniors or vulnerable individuals than does release to an incumbent collective bargaining organization.

c. The State's means are wildly overbroad and fail even rational basis review, since it engages in "linkage" analysis, and bars release of child care providers' information, not vulnerable individuals.'

More importantly, the State's means to accomplish its interests are fatally overbroad and disjointed. As it relates to FCCPs, RCW 42.56.640 is only at best tangentially related to its purpose of protecting senior citizens and vulnerable individuals. RCW 42.56.640 bars release of the information of vulnerable individuals' *providers.* It is one thing to bar release of vulnerable individuals' information to the public; it is quite another – and *not* narrowly tailored – to exempt all information relating to those individuals' *providers.*

In fact, this Court has declared this sort of "linkage" analysis invalid – both generally, and specifically as applied to recipients of welfare aide and their providers. *SEIU Healthcare 775NW v. State, DSHS*, 193 Wn. App. 377, 377 P.3d 214 (2016), *review denied sub nom*. *SEIU Healthcare 775 N.W. v. State of WA DSHS*, 186 Wn.2d 1016, 380 P.3d 502 (2016).

In *SEIU 775NW*, SEIU 775[26] sought to enjoin PRA release of individual providers' information to a requesting party. It argued that because RCW 42.56.230(1) exempted welfare recipients' information from PRA requests, so too, by extension, it exempted welfare recipients' *providers'* information from release. *Id.* at 409. This Court rejected that argument, citing *King Cty. v. Sheehan*, 114 Wn. App. 325, 346 (2002): "It

[26]SEIU 775, like SEIU 925, funded I-1501, thereby accomplishing its goal of baring release of IPs' information, albeit by way of initiative.

is a fact of modern life in this age of technology that names can be used to obtain other personal information from various sources, but we conclude that this is not sufficient to prevent disclosure…." *Id.* at 410–11."

The legislature and voters are not *per se* prohibited from engaging in "linkage" analysis as a constitutional matter. However, it is the poorest stuff from which to craft a "narrowly tailored" piece of legislation. At the very least, logical reasons must support the linkage, in order for the law to survive review. But RCW 42.56.640 fails the strict scrutiny requirement that statutes and their application be narrowly tailored to achieving a compelling state interest.

However, RCW 42.56.640 fails even rational basis review. To survive rational basis review, the State's action must only be rationally related to a legitimate government interest, but *children* and *their parents* or children's care *providers* are not "vulnerable individuals" – either in a colloquial sense or, more importantly, as that term is defined in I-1501.

I-1501 was passed to "protect seniors and vulnerable individuals from identity theft and other financial crimes," but does not classify children or their parents as either. LAWS OF 2017, ch. 4, sec. 7; RCW 42.56.640. Nor could it, since children are not seniors, nor are they "vulnerable individuals." RCW 42.56.640; RCW 9.35.005(7). Nor are parents receiving childcare subsidies to pay for family child care providers seniors or

"vulnerable individuals." Thus, even if it could be said that a rational relationship exists between vulnerable individuals' information and their individual home care providers, no conceivable rational relationship exists between vulnerable individuals and *child care* providers. Family child care providers do not serve vulnerable individuals. They serve low-income parents.

In sum, RCW 42.56.640 bars release of family child care providers' information where its ostensible purpose is to protect seniors and vulnerable individuals, in a manner completely divorced from the spirit and context of the rest of the statute. Even if the rest of the statute is rational, I-1501's RCW 42.56.640 is not.[27]

Beyond having "the practical effect 'of discouraging' the exercise of constitutionally protected political rights," *Patterson*, 357 U.S. at 461, RCW 42.56.640 severely burdens family child care providers' Free Speech and Free Association rights, does not advance a compelling government interest, and is wildly overbroad as applied to FCCPs. It even fails rational basis review. The State's action here is unconstitutional.

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[27]Section 10, codified as RCW 43.17.410, does make passing reference to "vulnerable individuals and their children." However, low income parents, whom FCCPs serve, are not vulnerable individuals as defined by statute or colloquially. Being low income does not make one vulnerable for purposes of the statute, and there is no indication that the Statute intended this meaning.

C. THE STATE'S APPLICATION OF I-1501 VIOLATES PROVIDERS' EQUAL PROTECTION RIGHTS.

The State's application of I-1501 also implicates state and federal rights of Equal Protection. U.S. Const. Amend. 14; Wash. Const. Art. I, § 12; *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014). "The equal protection clauses of the Fourteenth Amendment to the United States Constitution and article 1, section 12 of the Washington State Constitution guarantee similarly situated persons 'like treatment' under the law." *In re Salinas*, 130 Wash. App. 772, 777, 124 P.3d 665, 668 (2005) (citations omitted). I-1501 fails both under strict scrutiny and under rational basis review.

"If a classification impacts a fundamental right or a suspect class, [the Court applies] the strict scrutiny standard to determine if the equal protection clause has been violated." *Harris v. Charles,* 171 Wash.2d 455, 462, 256 P.3d 328 (2011).

Here, I-1501 affects the PNWCCA's members' fundamental rights of free speech and association for political purposes. I-1501 creates a class of persons – one whose members are already hard-pressed to identify one another for collective bargaining organizing – and severely burdens their ability to identify and contact one another. By privileging one class of employees to conduct political outreach but not another class, the State has burdened one class of persons' speech, but not another's. As discussed,

above, I-1501 is not narrowly tailored to serve a compelling government interest and is unconstitutional as applied.

Neither does the State's passage of I-1501 pass rational basis review. A state action, challenged under equal protection, will pass rational basis review if it: (1) applies alike to all members of the class, (2) there are reasonable grounds to distinguish between those within and without the class, and (3) the classification has a rational relationship to the State's purpose. *Schatz v. State, Dep't of Soc. & Health Servs.*, 178 Wash. App. 16, 23 (2013) (citations omitted).

The first two requirements are not at issue. First, I-1501 creates a class of people – all persons not affiliated with the incumbent union – who are barred from knowing who their publicly-employed family child care providers are. Second, the grounds for distinguishing between these classes, presumably, is that incumbent union affiliates have an administrative need to contact child care providers.

Where I-1501 founders is on the last requirement: prohibiting citizens from learning who State family *child care* providers are has no rational relationship to I-1501's purpose of protecting seniors and vulnerable individuals. As discussed above, the State passed I-1501 to protect *seniors* and *vulnerable individuals* from identity theft. LAWS OF 2017, ch. 4, sec. 7; RCW 42.56.640. Children, low income parents who

qualify for Medicaid, and family child care providers are not senior citizens or vulnerable individuals. RCW 42.56.640; RCW 9.35.005(7). In fact, no conceivable rational relationship exists between vulnerable individuals and *child care* providers. Family child care providers do not serve vulnerable individuals. They serve low-income parents. RCW 42.56.640's total bar to release of FCCPs' information is not rationally related to I-1501's purpose, let alone narrowly tailored.

VI. CONCLUSION

Where the State forces FCCPs to be represented by a single bargaining representative, but refuses to allow FCCPs to identify amongst one another, the State violates FCCPs' PECBA, free speech, free association, and Equal Protection rights.

This Court should find that the State's application of RCW 42.56.640 is unconstitutional as applied; or, in the alternative, this Court should find that PERC erred when it failed to find a cause of action for employer interference with PECBA rights, and remand to PERC with orders to find a cause of action for the same.

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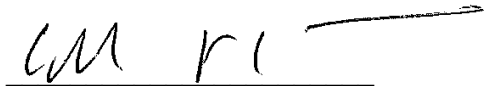
RESPECTFULLY SUBMITTED on April 4, 2019.



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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on April 4, 2019, I electronically filed with the Court of Appeals Division II the foregoing document, Petitioner's Opening Brief, and caused a true and correct copy of the same to be delivered via e-mail pursuant to an e-service agreement to the following:

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FREEDOM FOUNDATION

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