FILED
6/30/2017 4:32 PM
Court of Appeals
Division II
State of Washington

No. 96578-1

No. 49726-3-II

IN THE WASHINGTON COURT OF APPEALS
DIVISION II

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925,
Appellant,

v.

EVERGREEN FREEDOM FOUNDATION, d/b/a FREEDOM FOUNDATION,
Respondent,

and

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING,
Respondent.

APPELLEE FREEDOM FOUNDATION'S
RESPONSE BRIEF

Counsel for Respondent Freedom Foundation

Greg Overstreet, WSBA #26682
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
GOverstreet@freedomfoundation.com

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I. INTRODUCTION

This is at least the sixth suit filed by Respondent Service Employees International Union, Local 925 ("SEIU 925" or "Union") against the Freedom Foundation ("Foundation") to prevent family childcare providers from learning about their constitutional right to leave the union. The purpose of these suits, including this one, is simple: delay the release of records until they are useless. SEIU 925 has accomplished this goal procedurally with stays of disclosure but cannot win substantively. The following section summarizes why.

SEIU 925's first argument is that RCW 74.04.060(4) prohibits the disclosure of childcare provider lists. These childcare providers are represented by SEIU 925 and are the people the Foundation wants to inform of their constitutional right to leave SEIU 925. These childcare providers provide services to recipients of public assistance; they are essentially vendors. Childcare providers are not recipients of public assistance themselves; they are providers of services to recipients of public assistance. The trial court (correctly) held that the first statute SEIU 925 invoked as an exemption from disclosure, RCW 74.04.060(4), only allows the withholding of lists or names of public assistance *recipients*, not providers. Though assessing other statutes, this Court has reasoned similarly in 2016

published decisions against SEIU 925 and its sister union, SEIU 775.

SEIU 925's next argument is that RCW 74.04.060(4) prohibits the use of the lists or names of childcare providers for a "political" purpose. However, the Public Records Act, Ch. 42.56 RCW, is all about the use of public records for "political" purposes. Moreover, interpreting RCW 74.04.060(4) to prohibit political speech would make the statute unconstitutional. Courts will avoid interpreting statues to be unconstitutional, especially when a perfectly good interpretation exists—and it does here: that RCW 74.04.060(4) allows the withholding of lists or names of public assistance *recipients* but not vendors to them such as the childcare providers at issue here. Even if this Court somehow concluded that "political" speech was prohibited by RCW 74.04.060(4), it could still avoid an unconstitutional outcome by defining the prohibited speech to be "electioneering," which the Foundation is not conducting. But the best interpretation is still that RCW 74.04.060(4) applies to recipients, not providers, thereby avoiding constitutional rulings altogether.

SEIU 925's second argument is that the 2016 Initiative 1501 ("I-1501") is retroactive.[1] SEIU 925 cannot point to any language in I-1501

[1] Two of SEIU 925's assignments of error relate to I-1501. Assignment of Error B relates to RCW 43.17.410(1). *See* Appellant's Opening Brief at 3. Assignment of Error C relates to Assignment of Error C. *Id*. I-1501 incorporates both statutes. *See* Laws of 2017, c. 4 § 10 (codified at RCW 43.17.410) and c. 4 § 8 (codified at RCW 42.56.640). Accordingly, the Foundation will present its arguments on why I-1501 is not retroactive by looking at

stating the law must be applied retroactively. Instead, SEIU 925 merely points to I-1501's general policy statement. But nearly every initiative has a similar policy statement that does not address retroactivity. Accepting SEIU 925's argument violates the traditional rule that initiatives apply prospectively instead of retroactively. Another flaw in SEIU 925's retroactivity argument is that it attempts to have part of I-1501 (the exemption from public disclosure) apply retroactively, but not the rest of the initiative (*e.g.*, increased criminal penalties). The text of I-1501 does not provide that part of the law is retroactive while the rest is not, and the voters could not possibly have inferred this unstated and intricate constitutional nuance.

Stepping back from all the legal details, one might ask, "What is the case really about?" It is yet another desperate attempt by SEIU 925 to stop the Foundation from nonexempt accessing public records and thereby telling SEIU 925 members of their constitutional rights. The trial court got it right and should be affirmed.

II. RESPONDENT'S ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO SAME

The Foundation requests that this Court affirm the trial court.

I-1501 as a whole instead of looking at RCW 43.17.410(1) and RCW 42.56.640(1) separately. By doing so, the Foundation is simultaneously addressing Assignments of Error B and C.

III. STATEMENT OF FACTS

The Foundation informs childcare workers and others of their First Amendment right to leave unions such as SEIU 925. CP 455-56, 462-62. This right was expressly recognized in *Harris v. Quinn*, 134 S.Ct. 2618 (2014). When childcare workers leave the union, as they do in droves when informed of their constitutional right to do so, SEIU 925 loses dues money. CP 12.

SEIU 925 does not like this. The Union has filed at least six lawsuits to prevent the Foundation from obtaining lists of childcare providers.[2] It has never won a case preventing an agency from turning over these lists to the Foundation. SEIU 925 does succeed, however, in obtaining procedural stays of disclosure until the records are outdated and much less effective. However, this case, at this stage, is about the substantive law. SEIU 925 always loses on the law.

Just six months ago, this Court rejected all of SEIU 925's arguments in a case about identical records. *See Serv. Employees Int'l Union Local 925*

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[2] In addition to this case, SEIU also filed:
(1) *SEIU 925 v. Dep't Social & Health Servs. and Freedom Found.*, Wa. Ct. App. No. 48522-2-II;
(2) *SEIU 925 v. Dep't Early Learning & Freedom Found.*, Thurston Co. No. 14-2-02082;
(3) *SEIU 925 v. Dep't of Early Learning, Shannon Benn, and Danielle Rosellison,* Thurston Co. No. 15-2-00283-7;
(4) *SEIU 925 v. Dep't of Early Learning and James Abernathy,* Thurston Co. No. 15-2-01940-3;
(5) *SEIU 925 v. Dep't of Early Learning and Shannon Benn,* Thurston Co. No. 16-2-01416-34.

v. Freedom Found., 197 Wn. App. 203, 389 P.3d 641 (2016) (rejecting arguments on different exemptions from disclosure than those claimed in the instant case). This Court also rejected similar arguments from SEIU 775 about the Foundation's efforts to obtain a list of health care providers. *See SEIU Healthcare 775NW v. Dep't of Social & Health Servs.*, 193 Wn. App. 377, 409-11, 377 P.3d 214, *rev. denied*, 186 Wn.2d 1016 (2016) (rejecting argument that RCW 42.56.230(1) exemption from the disclosure of public assistance "recipients" allows the withholding of lists or names of care providers). Furthermore, SEIU 925 has acknowledged to its members that no legal basis exists to withhold these records from the Foundation. *See* Declaration of Maxford Nelsen[3] ("Nelsen Dec."), **Exhibit A** at 3 "This loophole [in "the state's disclosure law"] leaves provider home information exposed."). It also acknowledged that its determination "to continue to fight this situation" (apparently by repeatedly filing duplicative lawsuits) is motivated purely by SEIU 925's distaste for the content of the Foundation's communications with providers. *Id*. at 1-2.[4]

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[3] This Declaration was submitted to this Court in support of Respondent Foundation's "Response in Opposition to Appellant's Emergency Motion for Injunctive Relief Pending Appeal" on January 11, 2017. Thus, it is in the appellate record. For the Court's convenience, a courtesy copy is attached hereto as **Exhibit A**.

[4] "Freedom Foundation… is now using this information to find us and send us information about stopping our union membership… Freedom Foundation is an anti-union organization… Don't be misled by information from the anti-union Freedom Foundation… we urge to <u>not</u> sign any letters from the Freedom Foundation." (Emphasis in original.)

The Foundation received the same information it requests now from the Department of Early Learning ("DEL") in the Summer of 2014. Now the Foundation seeks an updated list of childcare providers to continue its outreach to them about their constitutional right to leave SEIU 925. CP 454-57. Freedom Foundation's purpose for these records has always been the same: to inform childcare providers of their legal rights regarding union membership and dues payment. CP 461-62. After two years of communications with these providers, SEIU 925 cannot identify a single instance in which the Foundation has communicated any other message to providers. CP 461-63. The Foundation's outreach to childcare providers is vital because the State and SEIU 925 have refused to inform employees about their constitutional rights. CP 455-56. If the Foundation does not tell childcare providers about their rights, no one will.

Using stays to prevent workers from learning of their First-Amendment rights is only part of SEIU 925's strategy; it also passed an initiative to attempt to stop the Foundation from informing workers of their constitutional rights. CP 460-61. SEIU 925 and SEIU 775 created and sponsored (to the tune of $1.8 million) Initiative 1501—a measure that purported to protect seniors and vulnerable individuals, but in truth squarely targeted the Foundation's *Harris*-related outreach efforts by amending the PRA to prevent the disclosure of providers' names so the

Foundation could not contact them. *Id.; Boardman v. Inslee*, No. C17-5255-BHS, 2017 WL 1957131, at *3 (W.D. Wash. May 11, 2017) ("There is no dispute that the Campaign is a product of SEIU unions' efforts to pass I-1501.").[5] SEIU 925 and SEIU 775 contributed all but $50 of the $1.8 million spent to fund I-1501. CP 460-61; CP 585-632.

Every newspaper that editorialized on I-1501 recognized it as a cynical abuse of the initiative process by a special interest group.[6] *Id*. at

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[5] A true and accurate copy of this Order is attached as **Exhibit B** to this brief.

[6] *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; *Tri-City Herald,* Available at http://www.tri-cityherald.com/opinion/editorials/article104739261.html; *Spokane Journal,* Available at http://www.spokanejournal.com/local-news/initiative-1501-focus-deterring-scams-targeting-the-elderly/; *Seattle Times,* Available at www.seattletimes.com/opinion/reject-i-1501-and-urge-lawmakers-to-address-identity-theft/; *The Columbian,* Available at http://www.columbian.com/news/2016/oct/05/in-our-view-no-on-i-1501/; *Q13Fox,* Available at http://q13fox.com/2016/10/06/voter-guide-initiative-1501-increase-penalties-for-crimes-against-vulnerable-people/; *Komo News,* Available at http://komonews.com/news/consumer/statewide-initiative-to-protect-seniors-from-fraud-is-more-involved-than-it-appears; *The Chronicle,* Available at http://www.chronline.com/opinion/other-views-reject-i--and-urge-lawmakers-to-address/article_50b2597a-8bf1-11e6-8cd2-7b8330b5daed.html; *The News Tribune,* Available at http://www.thenewstribune.com/opinion/article107896087.html; *The Spokesman Review,* Available at http://www.spokesman.com/stories/2016/oct/18/i-491-yes-i-1501-no/; *The Stranger,* Available at http://www.thestranger.com/news/2016/10/18/24627137/the-strangers-endorsements-for-the-november-2016-general-election; *The Seattle Weekly,* Available at http://www.seattleweekly.com/news/the-endorsements/; *The Kitsap Sun,* Available at http://www.kitsapsun.com/opinion/letters-sink-every-state-initiative-3f2805bf-2a67-2c82-e053-0100007f9dfe-397501551.html; *The Olympian,* Available at http://www.theolympian.com/opinion/editorials/article112076757.html; *Herald Net,* Available at http://www.heraldnet.com/opinion/letter-initiative-1501-is-only-about-helping-union/; *The Wenatchee World,* Available at http://www.wenatcheeworld.com/news/2016/oct/09/editorial-board-secrecy-for-dues/; *The National Review,* Available at http://www.nationalreview.com/article/441379/service-employees-international-union-ballot-initiative-1501-freedom-foundation-public-records-act; *The Washington Free Beacon,* Available at http://freebeacon.com/issues/seiu-id-theft-initiative-smokescreen-forced-dues/; *The Washington Examiner,* Available at

223-377. For instance, the *Seattle Times* said:

> I-1501 is a Trojan horse. It's being run by a deep-pocketed special-interest group… It manipulates voters, using fears and sympathy to make a records-act change rejected by courts and lawmakers… I-1501 would set a bad precedent. It would establish that clever special-interest groups could carve holes in the Public Records Act to their benefit, if they've got $1.6 million to spend.

See supra n. 4. *The Olympian* agreed and added, "[I-1501] walks and talks like a special-protection measure for the Service Employees International Union... Voters should reject it and leave the state's public records laws intact." *Id*. *The Columbian* stated, "the true purpose behind the measure is to protect the Service Employees International Union…" *Id*. *Forbes* called I-1501 a scam "aimed at maximizing union money haul by stopping the dues leakage caused by *Harris v. Quinn.*" *Id*. *The Tri-City Herald* called I-1501 "deceitful and wrong." *Id*. However, with its deceptive ballot title, I-1501 passed.

Below, the trial court rejected every argument raised by SEIU 925. On December 9, 2016, the court denied SEIU's Motion for Preliminary Injunction, concluding that it was unable to show *even a likelihood* of

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http://www.washingtonexaminer.com/seattle-union-spends-1.8m-to-change-disclosure-laws-in-its-favor/article/2605805; *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; *Bloomberg BNA,* Available at https://www.bna.com/caregiver-info-disclosure-n57982082391/; (last visited December 6, 2016).

success on the merits. The trial court then ordered DEL to produce the records to the Foundation by December 19, 2016, "and not before" – thus ensuring that SEIU 925 would be able to seek and obtain an appellate stay with this court while obviously struggling to find any basis for granting a stay, itself. CP 967-68. Verbatim Report of Proceedings ("VRP") 12/9/16 at 46-56. On January 25, 2017, SEIU 925 obtained a stay of disclosure from a commissioner of this Court.[7]

IV. ARGUMENT

A. The Proper Standard of Review

SEIU 925 admits it bears the burden of proof. *See* Appellant's Opening Brief at 11.

However, SEIU 925 goes on to incorrectly claim that the standard of review is *de novo*. This is incorrect because SEIU 925 is appealing the grant of a *preliminary* injunction, as it conceded to the trial court below. VRP 12/9/16 at 56-57 ("THE COURT: 'I think a denial of a preliminary injunction ends that unless somebody tells me something differently.' MR. LAVITT: 'We agree, Your Honor. I don't see any further involvement given your ruling today.'"). This Court must review a denial of a motion for a preliminary injunction under the abuse of discretion standard. *Huff v.*

[7] For the Court's convenience, this Ruling is attached hereto as **Exhibit C**.

Wyman, 184 Wn.2d 643, 648, 361 P.3d 727 (2015) ("We review a trial court's decision on a preliminary injunction for an abuse of discretion."); *Speelman v. Bellingham/Whatcom Cnty. Hous. Auth.*, 167 Wn. App. 624, 630, 273 P.3d 1035 (2012) ("We review a trial court order granting or denying a preliminary injunction for an abuse of discretion.").

Two of the three cases that SEIU 925 cites suggesting that the standard of review is de novo are inapposite because they concern denials of *permanent* injunctions, not the preliminary injunction at issue in the instant case. *SEIU 775 v. State Dep't of Soc. & Health Servs.*, 198 Wn. App. 745, ___ P.3d ___ (2017) ("*SEIU 775 II*"); *SEIU 775*, 193 Wn. App. at 385. The other case is inapposite because the trial court order there under review both denied a preliminary injunction a*nd affirmatively ordered disclosure of the disputed public records*. *Nw. Gas Ass'n v. Wash. Utils. & Transp. Comm'n*, 141 Wn. App. 98, 102, 168 P.3d 443 (2007). At first glance, the trial court order in this case appeared to do the same thing, to wit:

> [T]he Court DENIES Plaintiff's Motion for a Preliminary Injunction and orders DEL to produce records on Monday, 12/19/16, ***and not before***.

CP 968. However, the words, "and not before" constitute an injunction, barring release of the records before December 19, 2016. As the transcript from the preliminary injunction hearing bears out, the intent of this carefully crafted language was to do subtly what the trial court knew it could not do

explicitly: temporarily stay disclosure and allow SEIU 925 several days to seek an appellate stay from the commissioner of this Court. VRP 12/9/16 at 46-56. Because of this "not before" language, this case is quite different from *Nw. Gas Ass'n*. A preliminary injunction is not a final judgment, and the lower court is entitled to more deference at this early stage of litigation.

It's no surprise that SEIU 925 appealed the preliminary injunction instead of waiting for the case to go to a permanent injunction hearing. If SEIU 925 followed the later path, the records at issue here would have been disclosed, which would have allowed the Foundation to tell childcare providers of their constitutional right to leave the Union. But because it chose this path of appealing a preliminary injunction, SEIU 925 now must live with that decision and litigate this case under the abuse of discretion standard. *Huff*, 184 Wn.2d at 648.

Abuse of discretion is a difficult standard to meet. "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009). This occurs when a trial court relies on unsupported facts or applies the wrong legal standard, the decision is manifestly unreasonable, or adopts a view that "no reasonable person would take." *Id.*

at 582-83 (internal quotations omitted).[8]

Not only does SEIU 925 need to show the trial court abused its discretion in denying its motion for a preliminary injunction, it also must show the three elements for an injunction. Because this case is a PRA case, that means SEIU 925 must show "(1) that the record in question specifically pertains to that party; (2) that an exemption applies; and (3) that disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function." *Ameriquest Mortg. Co. v. Office of the Attorney General of Wash.*, 177 Wn.2d 467, 487, 300 P.3d 799 (2013). As explained below, SEIU 925 cannot show that it is entitled to a preliminary injunction.

The Foundation does not, in this case, contest the first element (that the records pertain to a specific party). The Foundation most certainly contests the second element (that an exemption from disclosure applies). Analysis of this element occupies most of this brief.

A short mention of the third PRA injunction element, that disclosure "would not be in the public interest and would substantially and irreparably harm that party or a vital government function," is warranted here. Simply put, informing people of their constitutional rights is in the public interest.

[8] However, even if this case is reviewed de novo, the trial court should be affirmed.

Period.

Furthermore, informing people of their constitutional rights, which thereby causes a financial loss for an entity that makes money when people don't know of those rights, is not the "harm" contemplated under the PRA injunction statute, RCW 42.56.540, as a reason to prevent the disclosure of public records. SEIU 925 has a business model based on keeping people in the Union even when they have the right to leave; losing money when people exercise their rights is SEIU 925's problem, not a reason to prevent people from learning of their rights.

B. RCW 74.04.060(4) is Not an "Other Statute" that Prohibits the Disclosure of the Foundation's Records Request

1. RCW 74.04.060 Applies to Records About Public Assistance *Recipients*, Not Providers of Services to Those Recipients

a. Reading RCW 74.04.060 As a Whole Leads to the Conclusion That RCW 74.04.060(4) Applies Only to Lists or Names of Recipients

The trial court correctly concluded that the "lists or names" referred to in RCW 74.04.060(4) was limited to the lists or names of public assistance "recipients" referred to in RCW 74.04.060(1)(a).[9] *See* VRP at 6. Under either the (proper) abuse of discretion standard or SEIU 925's

[9] RCW 74.04.060(1)(a) refers to "applicants and recipients." Throughout this brief, the Foundation will refer to both simply as "recipients."

suggested *de novo* standard, the trial court did not err.

To better understand the arguments on whether RCW 74.04.060(4) is an exemption from disclosure for the requested records, some background on the requested records is required. The Foundation requested a list of childcare providers. CP 467. These are the childcare providers represented by SEIU 925. They are *providers* of services who happen to be paid by public funds; these providers are not welfare recipients.[10] These childcare providers are no different than a person hired by a public assistance recipient to fix the recipient's roof. Just because the funds used to pay the roofer are from public assistance does not turn the roofer into a "recipient" of public assistance. The roofer is a provider of a service, not a public assistance recipient.

Some background on RCW 74.04.060 will assist the Court in deciding whether it applies to lists or names of recipients or providers. The statute was written in the 1940s and slightly amended several times since then. In those days, it was widely believed that receiving public assistance stigmatized the recipient. *See generally* Joel F. Handler & Ellen Jane Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1 (1969) (describing the stigmatization of welfare

[10] Some childcare providers might coincidentally be welfare recipients; however, as a group, childcare providers are not welfare recipients. SEIU presented no evidence to the trial court, and none exists in the record, that childcare providers are welfare recipients.

recipients in the 1940s through 1960s). To reduce the stigma of welfare recipients, many states enacted laws preventing the disclosure of identities of welfare recipients. RCW 74.04.060 is one such law.

There has never been a stigma to providing services to public assistance recipients. Take, for example, the roofer. There is no stigma to fixing the roof of a public assistance recipient. The same lack of stigma applies to a childcare provider. (If anything, childcare providers should be lauded, not stigmatized. They provide valuable services.)

Now that the background of the records request and the statute have been provided, it is time to look at the statute itself. Statutes are read in their entirety. *Traveler's Casualty & Surety Co. v. Wash. Trust Bank*, 186 Wn.2d 921, 930, 383 P.3d 512 (2016). This means that the references to "recipients" in RCW 74.04.060 as a whole inform the meaning of "lists or names" in RCW 74.04.060(4), which is the fragment of the statute upon which SEIU 925 relies. When read in its entirety, the relevant portions of RCW 74.04.060 reveal rather quickly that the "lists or names" that cannot be provided are lists of recipients, not lists of providers. The entire text of the contested portions of RCW 74.04.060 are hereby presented to the Court (emphasis added):

> (1)(a) For the protection of [public assistance] applicants and *recipients*, [public assistance agencies] … are prohibited, except as hereinafter provided, from disclosing the contents

> of any records, files, papers and communications, except for purposes directly connected with the administration of the programs of this title. In any judicial proceeding, except such proceeding as is directly concerned with the administration of these programs, such records, files, papers and communications, and their contents, shall be deemed privileged communications and except for the right of any individual to inquire of the office whether a named individual is a *recipient* of welfare assistance and such person shall be entitled to an affirmative or negative answer.
>
> …
>
> (c) [DSHS] shall review methods to improve the protection and confidentiality of information for *recipients* of welfare assistance who have disclosed to the department that they are past or current victims of domestic violence or stalking.
> (2) The county offices [administering public assistance] shall maintain monthly at their offices a report showing the names and addresses of all *recipients* in the county receiving public assistance under this title, together with the amount paid to each during the preceding month.
>
> …
>
> (4) It shall be unlawful, except as provided in this section, for any person, body, association, firm, corporation or other agency to solicit, publish, disclose, receive, make use of, or to authorize, knowingly permit, participate in or acquiesce in the use of any *lists or names* for commercial or political purposes of any nature. The violation of this section shall be a gross misdemeanor.

SEIU 925 argues that the reference in RCW 74.04.060(4) to "lists or names" means lists or names of childcare *providers*. This is incorrect. Reading the statute as a whole, as this Court must, *see Traveler's*, 186 Wn.2d at 930, it is obvious that RCW 74.04.060 is referring to lists or names

of public assistance *recipients*.

A final blow to SEIU 925's argument is that this Court has held that a similar welfare-related exemption from disclosure covers recipients, not providers. In *SEIU Healthcare 775NW v. Dep't of Social and Health Serv's*, 193 Wn. App. 377, 409-11, 377 P.3d 214, *rev. denied*, 186 Wn.2d 1016 (2016), this Court rejected SEIU 775's argument that the exemption in RCW 42.56.230(1) for records about "welfare recipients" allowed the withholding of records about providers. In another case, this one concerning RCW 42.56.230(2)(a)(ii), which is an exemption for information about "children" enrolled in school and other activities, this Court ruled against SEIU 925's argument that this exemption also extended to childcare providers. *SEIU Local 925 v. Freedom Found.*, 197 Wn. App. 203, 220-1, 389 P.3d 641 (2016). In these cases, this Court (properly) did not extend exemptions about recipients and children to providers of services to recipients. This Court narrowly construes PRA exemptions, as RCW 42.56.030 requires, and it did so in the recent *SEIU 775* and *SEIU 925* cases. It should continue to do so here.

b. RCW 74.04.060(4) Is Limited to Public Assistance Recipients, Not Childcare Providers, Because PRA Exemptions Are Narrowly Construed in Favor of Disclosure

The plain reading of RCW 74.04.060 provided in the preceding paragraphs should be more than sufficient to conclude that the "lists or

names" described in RCW 74.04.060(4) refers to a list of names of public assistance recipients. However, if this plain reading were thought to be a close call, PRA exemptions must be read narrowly and in favor of disclosure. *See* RCW 42.56.030 (exemptions must be "narrowly construed"). The Foundation will not waste the Court's time citing the dozens of published Washington appellate decisions stating that exemptions must be narrowly construed in favor of disclosure. The trial court followed this well-established authority and interpreted RCW 74.04.060(4) narrowly. *See* VRP at 6-7 (interpreting the exemption to apply to lists or names of "recipients" instead of "providers" and noting: "I think that's the more likely interpretation of [RCW 74.04.060(4)], especially in light of the fact that it would be viewed as an exemption or prohibition from disclosure which are to be read narrowly, and that is the narrow reading.").

2. SEIU 925's Argument That RCW 74.04.060(4) Can Be Used to Withhold Public Records If They Will Be Used for a "Political" Purpose Would Render That Statute Unconstitutional

a. The "Political" Use of the Requested Records

SEIU 925 seizes on the following fragment of the statute to argue that public records cannot be disclosed if they will be used for a "political" purposes: "It shall be unlawful … [to use] any lists or names for commercial or *political* purposes of any nature. The violation of this section shall be a

gross misdemeanor."[11] RCW 74.04.060(4) (emphasis added). Thus, SEIU 925 argues, using the requested lists or names for a political purpose is unlawful.[12]

SEIU 925 asserts that the Foundation is using the records for a "political" purpose and cites a footnote in a case on whether the Foundation was using other records for a commercial purpose. That case, in the context of whether the use was commercial or not, noted the following:

> [T]he Foundation's stated purpose in requesting the lists is to correspond with the individual providers and notify them of their constitutional right to refrain from union membership and fee payments. Notifying individuals of their constitutional rights does not directly involve the generation of revenue or financial benefit. As the trial court noted, this purpose appears to be political rather than commercial.

SEIU 775, 193 Wn. App. at 406.

This Court knows exactly how the Foundation plans on using the records (and has used the records in the past, from the uncontested records request to DEL in 2014). The Court is free to characterize the Foundation's

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[11] RCW 74.04.060(4) makes it a gross misdemeanor to use the lists or names for a political purpose. The ramifications of this are analyzed *supra*.

[12] In the trial court proceedings below, SEIU 925 argued that the Foundation was using the lists for "commercial" purposes, too. SEIU 925 argued this even though it has been established that the Foundation is not using the lists for "commercial" purposes. *See SEIU 775*, 193 Wn. App. at 408. After filing this action, this Court ruled against SEIU 925 on whether the Foundation was using the records for a commercial purpose. *See SEIU 925*, 197 Wn. App. at 217. After this loss, SEIU 925 chose not to appeal the trial court ruling against them on commercial purposes. This appeal only relates to the political purpose portion of RCW 74.04.060(4). However, the Foundation never has and never will use these requested records for commercial purposes.

use of the records as it sees fit because, as will be seen, the Foundation's use of the records is constitutionally protected.

b. The PRA Exists to Allow "Political" Speech

SEIU 925's interpretation of RCW 74.04.060(4)—that disclosure of records to the Foundation is prohibited because it will use the records for political purposes—is completely unfounded. That is because the PRA is inherently political. As the Washington Supreme Court has explained, the PRA "is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability of the people of public officials and institutions." *PAWS II*, 125 Wn.2d at 251. The PRA supports allowing citizens to access public records precisely to encourage political activities, like discovering how government operates. *See id.* ("Without tools such as the [PRA], government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests."). Thus, attempting to prevent the disclosure of public records because the requestor of public records could evoke a "political" response is incompatible with the PRA. (As described below, the generically "political" nature of the records request does not mean the use of the term "political" in RCW 74.04.060(4) precludes disclosure here because that term must be interpreted to be constitutional.)

Political speech is legal in America. Remember that the Foundation seeks these public records to communicate with workers about their constitutional rights—ironically, their First Amendment constitutional rights. First Amendment speech about First Amendment rights: this is what SEIU 925 wants to stop. The public records at issue are the only effective way to communicate with these workers. And SEIU 925 knows it, which is why they keep suing the Foundation to stop the speech.

Speaking of the fact that political speech is legal in America, it is worth noting that accepting SEIU 925's argument could theoretically lead to the attempted criminal prosecution of the Foundation for its political speech. RCW 74.04.060(4) makes it a gross misdemeanor to use the lists or names for a political purpose. If SEIU 925 is correct that RCW 74.04.060(4) prevents political speech such as the Foundation's outreach to childcare providers (again, individuals not even covered by the statute), then the fact that such political speech is a gross misdemeanor seems to mean that SEIU 925 would urge the criminal prosecution of the Foundation for our political speech. (In fairness to the SEIU 925, they have not *yet* suggested this.) However, given that the Foundation contacted childcare workers in 2014 from a list provided by DEL, then presumably SEIU 925 thinks the Foundation committed a crime by exercising its right to political speech. The Court should be aware that accepting SEIU 925's argument could lead

to a claim that the Foundation's political speech is a crime. This is yet another reason to not accept SEIU 925's argument that RCW 74.04.060(4) prohibits—and perhaps criminalizes—political speech.

c. Political Speech, Especially Speech About Constitutional Rights, Is Protected and Interpreting RCW 74.04.060(4) to Prevent That Speech Would Be Unconstitutional

The Foundation has candidly acknowledged that it uses the list of childcare providers to inform them of their constitutional rights. The records at issue are the only effective way to reach the workers who need to hear about their constitutional rights. CP 455, 463. This outreach—informing childcare providers about their right to choose whether to join a labor union—is undoubtedly protected by the First Amendment. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right thus 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."). Simply, SEIU 925's reading of RCW 74.04.060(4) runs counter to the First Amendment (incorporated against Washington by the Fourteenth Amendment) and the Equal Protection Clause of the Fourteenth Amendment. Courts will make every attempt to interpret a statute so it is constitutional.

Washington courts construe statutes to avoid constitutional issues. *Wash. State Republican Party v. Wash State Pub. Disclosure Comm'n*, 141

Wn.2d 245, 280, 4 P.3d 808 (2000). Therefore, this Court must interpret RCW 74.04.060(4) to be constitutional if at all possible—and it is very possible to do so. That interpretation would be that RCW 74.04.060(4) does not prevent the type of non-electioneering political speech the Foundation plans to employ. Another constitutional interpretation would be that RCW 74.04.060(4) only applies to recipients, not providers.

Consider *Lanphere & Urbaniak v. Colo.*, 21 F.3d 1058 (10th Cir. 1994) and *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994). In *Lanphere*, a law firm used Colorado's public records law to access criminal records and solicit clients. 21 F.3d at 1510. In response, the Colorado Legislature amended its public records law to prohibit the disclosure of criminal records unless the requestor affirmed that the records would not be used for soliciting business. *Id.* at 1510-11. The law firm sued Colorado, alleging that the new law violated the First Amendment. *Id*. at 1511. Colorado argued that the First Amendment was not implicated because the law merely regulated "access to records." *Id.* The Tenth Circuit disagreed. It held that the Colorado legislature created its law to regulate "the speech use of such records." *Id.* at 1513. And because the law was meant to restrict constitutionally protected speech, it was a content-based regulation which implicated the First Amendment. *Id.* Similarly, the Eleventh Circuit held in *Speer* that an attorney was likely to prevail on his claim that banning the

disclosure of public records for truthful commercial speech violated the First Amendment.[13] 15 F.3d at 1010.

SEIU 925's interpretation of RCW 74.04.060(4) suffers from the same infirmities as the speech restrictions in *Lanphere* and *Speer*. The union's interpretation of RCW 74.04.060(4) turns the statute into a content-based restriction because it prohibits the disclosure of records for the reasons they are used. *See Lanphere*, 21 F.3d at 1513 (holding that because the Colorado Legislature "has drawn a regulatory line based on the speech use of such records" that First Amendment analysis is triggered). Because RCW 74.04.060(4) would be a content-based restriction, it would need to survive strict scrutiny, i.e. that the law is narrowly tailored to achieve a compelling government interest. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015). SEIU 925 has not provided evidence to survive strict scrutiny.

SEIU 925's interpretation would also conflict with the Equal Protection Clause. An interpretation of the statute violates the Equal Protection Clause if it discriminates between parties' speech. *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Police Dept. of City of Chicago v.*

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[13] Because the records at issue are allegedly regulated to limit political speech, the State must show a greater justification for restricting their access than in the cases discussed above. *See Lanphere*, 21 F.3d at 1513 ("Because the statute disadvantages commercial speech, our review is conducted subject to the lesser First Amendment protection afforded such speech under the four-part test of [*Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980)].").

Mosley, 408 U.S. 92, 94-95 (1972). Specifically, the government may not treat union and non-union speech differently. *See Mosley*, 447 U.S. at 96. SEIU 925 engages in explicit political communications with the providers whose information it obtains regularly from the State. CP 463, 874-89. But under SEIU 925's interpretation of RCW 74.04.060(4), the Foundation will be unable to engage in similar political communication. If a statute is interpreted to treat constitutionally protected speech differently, the distinction will be upheld only if it passes strict scrutiny. *Carey*, 447 U.S. at 101-02. SEIU cannot.[14]

d. The Trial Court's Interpretation Properly Avoids Constitutional Issues

Considering the host of constitutional issues that SEIU 925's reading of RCW 74.04.060(4) raises, the trial court correctly concluded that the statute applies only the release of records about public assistance recipients, not childcare providers, *see* VRP 12/9/16 at 6, and thereby allows the Foundation to conduct its political speech.

Federal law bolsters the conclusion that the trial court correctly

[14] It is irrelevant that SEIU 925 has signed a collective bargaining agreement with the state, as CBAs must be consistent with state statutes and the Constitution. SEIU 925 would only be entitled to special treatment if it is carrying out duties related to collective bargaining. *Cf. Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 50-54 (1983) (discussing special privileges for collective bargaining representatives in terms of public and non-public forums). SEIU 925 cannot make any plausible argument that communicating political messages is related to its limited role as collective bargaining representative.

decided this case. This Court may look to similar federal law and its use of similar terms when interpreting RCW 74.04.060(4). *See Inland Empire Distrib. Sys., Inc. v. Utils. & Transp. Comm'n*, 112 Wn.2d 278, 283, 770 P.2d 624 (1989) (remarking that federal statutes are persuasive when like state statutes); *Clawson v. Grays Harbor College Dist. No. 2*, 109 Wn. App. 379, 386, 35 P.3d 1176 (2001) ("Because the [state] MWA is based upon the [federal] FLSA, federal authority is persuasive in the absence of adequate state authority.").

Here, all related federal law suggests that RCW 74.04.060(4) only applies to recipients, not providers. For instance, the federal enabling statute allowing Washington to have the childcare program at issue requires state plans to "provide safeguards which restrict the use or disclosure of information concerning applicants and *recipients* to purposes directly connected with the administration of the plan." 42 U.S.C. § 1396a(a)(7)(A)(i) (emphasis added). The corresponding federal regulations also flesh out these confidentiality requirements. *See* 42 C.F.R. §§ 431.300-307. For instance, 42 C.F.R. § 431.306(a) (emphasis added) requires participating states to "have criteria specifying the conditions for release and use of information about *applicants and beneficiaries*." Federal law clearly does not require states to safeguard information about childcare *providers*; it only requires protecting the information of applicants and

beneficiaries of public assistance. The Foundation only requested records about providers. Just like its federal corollary, RCW 74.04.060(4) applies to the disclosure of information about recipients, not providers. Therefore, it is not an exemption from disclosure of public records about providers.

e. Limiting "Political" to Electioneering Advocacy Would Also Avoid the Numerous Constitutional Issues SEIU 925's Definition Poses

If this Court rejects the trial court's definition, it should limit the definition of "political" to electioneering activity. This definition would at least limit the grave constitutional concerns that SEIU 925's definition raises.

Because Ch. 74.04 RCW does not define "political," this Court should look to other related statutes that do define it. The most well-settled Washington statutory enunciation of political activity can be found in the campaign-finance reporting provisions of the Public Disclosure Act, Ch. 42.17A RCW, which voters approved with the PRA in the 1970s. (Indeed, until recently, the two statutes were codified in the same statutory chapter (Ch. 42.17 RCW).)

RCW 42.17A.005(36) (emphasis added) defines "political advertising" as:

> any advertising … or other means of mass communication, used *for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election*

campaign. (Emphasis added.)

Likewise, RCW 42.17A.005(37) (emphasis added) defines "political committee" as any person "having the expectation of receiving contributions or making expenditures *in support of, or opposition to, any candidate or any ballot proposition*." Other Washington statutes define "political purpose" similarly. RCW 29A.08.720(3) defines "political purposes" as a "purpose concerned with the support of or opposition to any candidate for any partisan or nonpartisan office or concerned with the support of or opposition to any ballot proposition or issue." The same is true for the Public Employment Code (RCW 41.06.250), and other statutes. *See, e.g.* RCW 19.09.020. Indeed, Washington's statutes follow other states' laws that define "political purpose" to mean partisan advocacy and ballot initiative campaigning.[15]

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[15] *See, e.g.*, A.R.S. § 23-361.02 ("'Political purpose' means any activity undertaken in support of or in opposition to a statewide initiated or referred measure, a constitutional amendment or measure, a political subdivision ballot measure, or the election or nomination of a candidate to public office and includes using 'vote for', 'oppose', or any similar support or opposition language in any advertisement whether the activity is undertaken by a candidate, a political committee, a political party, or any person."); Cal. Gov't Code § 84251 ("A payment made for 'political purposes,' . . . includes a payment made for the purpose of influencing or attempting to influence the actions of voters or a local agency formation commission for or against the qualification, adoption, or passage of a LAFCO proposal."); N.D.C.C. § 16.1-10-02(2)(a) ("'Political purpose' means any activity undertaken in support of or in opposition to a statewide initiated or referred measure, a constitutional amendment or measure, a political subdivision ballot measure, or the election or nomination of a candidate to public office and includes using 'vote for', 'oppose', or any similar support or opposition language in any advertisement whether the activity is undertaken by a candidate, a political committee, a political party, or any person."); N.M. Stat. § 1-19-26(M) ("'political purpose' means influencing or attempting to influence an election or pre-primary convention, including a constitutional amendment

The Foundation does not seek the instant records to engage in electioneering. Instead, as the Court knows, the Foundation seeks the records to inform union members of their constitutional rights. SEIU 925 has not even attempted to claim the Foundation is seeking the records for electioneering. If the Court rejects the trial court's interpretation of RCW 74.04.060(4), it should adopt the common definition of "political," which is electioneering. This reading accords with the PRA's interpretive mandate that favors disclosing records.

The "electioneering" definition of "political" is constitutionally sound. It is well-established that states have more leeway to regulate electioneering activities. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 208-10 (1992) (upholding Tennessee law banning electioneering within 100 feet of a polling place); *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (upholding campaign finance regulations to limit quid pro quo arrangements and the appearance of corruption in elections). But courts frown on states regulating political speech in the way that SEIU 925 defines it. *See, e.g.*, *Meyer v. Grant*, 486 U.S. 414, 421-24 (1988) (striking down Colorado's restriction on petition circulators because it imposed a substantial burden on core

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or other question submitted to the voters."); Utah Code § 20A-12-301(8) ("'Political purposes' means an act done with the intent or in a way to influence or tend to influence, directly or indirectly, any person to refrain from voting or to vote for or against any judge standing for retention at any election.").

political speech).

3. SEIU 925 Engages in an Impermissible Linkage Analysis

Once again, SEIU 925 uses a linkage argument to prevent the Foundation from obtaining public records. *See* Appellant Opening Br. 17-19. And once again, *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006); *SEIU 775*, 193 Wn. App. 377; and *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002) control. All these cases (and more) categorically reject engaging in a linkage analysis.

In *SEIU 775*¸ a case involving the same law firm now representing SEIU 925 here, SEIU 775 argued that RCW 42.56.230(1) prohibits releasing the names of home healthcare providers because revealing that information "could effectively reveal the identities of [Medicaid] beneficiaries." 193 Wn. App. at 409. This Court rejected SEIU 775's argument that *Koenig* and *Sheehan* "did not rule that a linkage analysis was intrinsically illegitimate." *Id.* at 411.

Here, SEIU 925 once again relies on the linkage argument. It argues that "[t]his statement of purpose does not limit 'the contents of any records, files, papers and communications' to only those that directly refer to an applicant or recipient." *See* Appellant's Opening Br. 18. This is a classic example of a linkage argument. SEIU 925 cites no intervening authority in the past fourteen months that makes linkage acceptable. Linkage is still not

allowed under the PRA. Nothing has changed.

Another reason SEIU 925 is mistaken about RCW 74.04.060(4) is that if this Court accepted SEIU 925's argument, DEL would largely be read out of the PRA. This is because many of the records DEL has would be exempt under RCW 74.04.060(4) since they can theoretically be linked to a recipient. Under this standard, DEL could simply claim that a document *could* link to an applicant or recipient, and then refuse to disclose any and all records. This turns the strong mandate of the PRA on its head. *PAWS II*, 125 Wn.2d at 251.

If SEIU 925 wants use the linkage argument, it may ask the Legislature to change the law. Or it could get the people to approve the linkage analysis through the ballot initiative. Indeed, SEIU 925 has plenty of experience utilizing these tactics. *Boardman*, No. C17-5255 BHS, 2017 WL 1957131, at *3.

C. I-1501 Does Not Prohibit Disclosure of these Records Because It Does Not Apply Retroactively

On its face, I-1501 precisely addresses the very records at issue in this case. That is because SEIU 925 and SEIU 775 created I-1501 solely to eliminate the Foundation's access to childcare and individual providers' information. Unfortunately for SEIU 925, I-1501 was not the law until December 8, 2016, long after the Foundation submitted this request. *See*

Const. art. II, § 1(d) ("Such measure shall be in operation on and after the thirtieth day after the election at which it is approved."). Predictably, SEIU 925 argues that I-1501 should apply retroactively to prevent the Foundation from obtaining records it requested before election day. SEIU 925's retroactivity argument fails.

"Statutory amendments are [] presumed to be prospective unless there is a legislative intent to the contrary or the amendment is clearly curative." *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990). SEIU 925 contends that *State v. Rose*, 191 Wn. App. 858, 867-70, 365 P.3d 756 (2015) controls, and that I-1501's effect must be determined by assessing the intent of the average voter. But *Rose* is inapposite here. *Rose* assessed the "saving" statute, RCW 10.01.040, which preserved "pending prosecutions, penalties, or forfeitures for earlier committed crimes." *Id.* at 860. In other words, *Rose* dealt with an initiative's interaction with an existing criminal non-retroactivity statute. No such statute interacts with § 8 of I-1501. Thus, the effect of I-1501 on the case at bar is subject to the general presumption articulated in *Howell*.

No discernable legislative intent rebuts the presumption that I-1501 applies prospectively. To determine legislative intent, courts first look for "express language indicating retroactive application." *City of Ferndale v. Friberg*, 107 Wn.2d 602, 605, 732 P.2d 143 (1987). In *Niemann v. Vaughn*

Community Church, the Court of Appeals determined a statute enacted in 1969 applied retroactively to a discriminatory restraint on alienation in a 1956 deed in part because "by its terms, it specifically applies to preexisting written instruments." 118 Wn. App. 824, 832, 77 P.3d 1208 (2003), *aff'd*, 154 Wn.2d 365, 113 P.3d 463 (2005). In addition, RCW 49.60.227 gave courts jurisdiction to strike terms in real property contracts voided by the statute in question in *Niemann*. In other words, the statute at issue in *Niemann* could apply retroactively because there were additional statutes specifically permitting retroactive application.

I-1501 contains no express language indicating retroactive application and no other statutes outside I-1501 allow a retroactive application. Nor does I-1501's relevant statement of policy in § 2(3) reference any specific harms the pre-existing statutory scheme facilitates; it merely states:

> It is the intent of this initiative to protect the safety and security of seniors and vulnerable individuals by … prohibiting the release of certain public records that *could* facilitate identity theft and other financial crimes against seniors and vulnerable individuals. (Emphasis added.)

This is a general statement of prospective policy, not a strong policy statement indicating retroactive application.

Furthermore, retroactive application in this case would do nothing to advance I-1501's policy. *See Howell*, 114 Wn.2d at 47 (searching for

some "statement of strong public policy that would be served by retroactive application"). The Foundation has candidly acknowledged its sole intended purpose for requesting the lists and its confidential maintenance of the lists. CP 455. The record reflects that this request is nothing more than a request for an updated version of the same records DEL gave the Foundation in 2014. CP 455. The Foundation has contacted care providers to inform them of their constitutional rights for years. After years contacting care providers, SEIU 925 still cannot provide any evidence of the harms I-1501 purports to protect have been perpetrated against anyone. Ever.

Additionally, I-1501 is neither remedial nor curative. If SEIU 925's theory of retroactivity is correct, the Foundation and the public possess a clear, statutory right to obtain public records relating to childcare providers on December 7, but no longer on December 8. Given the paramount importance the PRA and courts place on public access to public records, this abrupt change in that access—access that is guaranteed by law—impinges a substantive, vested right. *Miebach v. Colasurdo*, 102 Wn.2d 170, 181 (1984) ("A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right."). Access to nonexempt public records is a substantive right. I-1501, purports to "affect" that right. *See* RCW 42.56.030. Therefore, I-1501's PRA reforms are not "clearly curative and remedial." *Johnson v. Cont'l W., Inc.*,

99 Wn.2d 555, 561, 663 P.2d 482 (1983). I-1501 lacks any textual or implicit indicators that it should be applied retroactively. This Court should decline SEIU 925's invitation to do so here.

Another problem with SEIU 925's retroactivity argument is that the union wants part—not all—of the initiative to be applied retroactively. SEIU 925 obviously wants the public records portion to be applied retroactively. However, I-1501 contains other provisions, and provisions which cannot be applied retroactively. For example, I-1501 enhances criminal penalties for identity theft. The ex post facto protections of the state and federal constitutions would prohibit a retroactive application of the parts of I-1501 enhancing criminal penalties. (SEIU 925 does not argue for that in this case.) However, given that two-thirds of I-1501 (the enhancements to criminal and civil penalties) could not be retroactively applied, SEIU 925 is asking this Court to retroactively apply part of an initiative. SEIU 925 provides no authority that parts of a law can be retroactively applied while other parts remain prospectively applied.

A final problem with SEIU 925's attempt to only apply part of I-1501 retroactively is that the average voter could not possibly have read an initiative (which did not address retroactivity) and conclude that part would be applied retroactively while the rest would not.

V. CONCLUSION

The trial court was correct to interpret RCW 74.04.060(4) to apply to recipients, not providers. The PRA requires narrow readings of exemptions and the trial court did exactly what was required. Doing so avoided the constitutional issues from prohibiting—or even criminalizing—political speech. There is no indication that I-1501 was meant to apply retroactively. There is nothing in the text of the initiative stating so and the average voter would not have understood it to apply retroactively. Finally, no authority is offered for the claim that part of an initiative is retroactive, while the rest is not. For all the reasons presented herein, the trial court should be affirmed.

RESPECTFULLY SUBMITTED on June 30, 2017.

Greg Overstreet, WSBA #26682
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
GOverstreet@freedomfoundation.com

Counsel for Respondent Foundation

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on June 30, 2017, I electronically filed with the Court the foregoing document, Respondent Freedom Foundation's Response Brief, and this declaration of service and served the same by email upon the following:

Robert H. Lavitt
Michael Robinson
Schwerin Campbell Barnard
Iglitzin & Lavitt LLP
18 West Mercer Street, Suite
400 Seattle, WA 98119
lavitt@workerlaw.com
robinson@workerlaw.com
owens@workerlaw.com

Attorneys for Appellant
SEIU 925

Gina Comeau
Morgan Damerow
Office of Attorney General
7141 Cleanwater Drive SW
Olympia, WA 98504
Ginad@atg.wa.gov
Morgand@atg.wa.gov
Carlyg@atg.wa.gov
Staceym@atg.wa.gov
LPDarbitration@atg.wa.gov

Attorneys for Respondent DEL

Dated: June 30, 2017, at Olympia, Washington.

Kirsten Nelsen

No. 49726-3-II

IN THE WASHINGTON COURT OF APPEALS
DIVISION II

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925,
Appellant,

v.

EVERGREEN FREEDOM FOUNDATION, d/b/a FREEDOM FOUNDATION,
Respondent,

and

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING,
Respondent.

DECLARATION OF MAXFORD NELSEN IN SUPPORT OF RESPONDENT FREEDOM FOUNDATION'S RESPONSE IN OPPOSITION TO APPELLANT'S EMERGENCY MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

Counsel for Respondent Freedom Foundation

David M.S. Dewhirst, WSBA #48229
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
ddewhirst@freedomfoundation.com

Exhibit A

I, Maxford Nelsen, hereby declare as follows:

1. I am Labor Policy Director for Respondent Freedom Foundation.

2. It is my informed belief that the Family Childcare Provider bargaining unit may experience 20% or more turnover annually. This means that Family Childcare Provider lists the Freedom Foundation obtained in mid-2014 are now considerably out-of-date. It is for this reason that the Foundation submitted the public records request in this case, and will continue to make recurring public records requests to the State of Washington for up-to-date lists of Family Childcare Providers. Major and frequent fluctuations in the Family Childcare Provider bargaining unit result from (a) existing providers leaving the bargaining unit and new providers joining; and (b) existing providers intermittently providing care for "state-subsidized" children, children whose families qualify for public assistance subsidies.

3. If the Freedom Foundation does not possess up-to-date lists of providers, the Freedom Foundation's ability to effectively and efficiently conduct its outreach program to providers is severely diminished. Thus, forcing the Foundation to wait multiple months and years to obtain lists of providers renders the records progressively less useful and the Foundation's efforts to obtain them largely futile.

4. Attached as **Exhibit A** is a true and accurate copy of an email SEIU

Exhibit A

925 sent to childcare providers on November 17, 2014.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed in Olympia, WA on January 11, 2017.

Maxford Nelsen

Exhibit A

Declaration of Maxford Nelsen

EXHIBIT A

From:
Sent: Monday, November 17, 2014 8:51 PM
To:
Subject: FW: Privacy Breach update: Family Child Care under attack

Follow Up Flag: FollowUp
Flag Status: Completed

Wanted to let you know how SEIU is responding to your communications

SEIU Local 925
United for Quality Education and Public Services

Haga clic aquí para leer en español

Dear fellow provider,

A few weeks ago you received a letter from us about DEL releasing our private information as part of a public information request. Our information was sent to the Freedom Foundation, which is now using this information to find us and send us information about stopping our union membership.

Freedom Foundation is attacking family child care

Make no mistake. The Freedom Foundation is an anti-union organization. It does not advocate for family child care or children. It does not advocate for increased subsidy rates for providers or for more funding for families to afford child care. It does not advocate for quality child care in Olympia, like we have.

Don't be misled by information from the anti-union Freedom Foundation. They do not care about family child care or devastating cuts to child care funding for families.

Exhibit A

We are angry, frustrated, and in complete disbelief that this outside agency is attempting to sink all the gains that we've fought for and won. If we lose our power, we will lose family child care in Washington.

As fellow child care providers, we urge you to not sign any letters from the Freedom Foundation. Please call our Member Resource Center at (877) 734-8673 if you have any questions about this attack on us.

We've come too far to go backward

Since we organized as a union in 2006 we have increased our subsidy rates by over 20%. We have gained our non-standard hours bonus, added to our absent days, won access to health insurance, won an increase of 6 months in infant pay, and continued to fight for our families and children. Prior to organizing our union, we suffered financial losses every time the state was hit hard by tough economic times.

Imagine where we might be if we had not built our union. Every year at the bargaining table we are under attack and have to fight to keep the things that help our profession and to make improvements, even going to arbitration for a raise in subsidy rates. We have no doubt that without our power we would lose all the gains we have made. That is our union difference.

Fight back the attack

As a union, we have the power to advocate for families, providers and our communities. We need to keep our membership strong so we can continue this great work we have started. Our power and unity are what have preserved family child care. Without family child care, children will suffer in our state.

If you are contacted by the Freedom Foundation or have questions about the privacy breach, call our Member Resource Center immediately at (877) 734-8673.

In Solidarity,

Marie Keller
Family Child Care Provider
SEIU Local 925 Family Child Care Chapter President

Exhibit A

Martha Moreno
Family Child Care Provider
SEIU Local 925 Family Child Care Chapter Vice-President

Holly Lindsay
Family Child Care Provider
SEIU Local 925 Family Child Care Chapter Secretary

P.S. Our fight to protect our children and family privacy continues.

Our union has attempted to restrict the State from sending our private home information to the public. The Superior Court judge said he is persuaded there is a risk to children. However, because of the wording of the state's disclosure law the court was unwilling to order DEL to protect providers' information in the future. This loophole leaves provider home information exposed. We will continue to fight this situation.

Estimado Proveedor,

Hace unas cuantas semanas Usted recibio una carta de parte de nosotros tocante de que DEL dejo saber nuestra información privada como parte de un pedido público. Nuestra información fue mandada a Freedom Foundation, cual ahora esta usando esta información para localizarnos y enviarnos información de terminar nuestra miembresia de la Unión.

Freedom Foundation esta atacando Cuidado Infantil

No se equivoque. El Freedom Foundation es una organización anti-unión. No lucha para Cuidado Infantil o niños. No lucha para aumento de subsidios para los proveedores o para mas fondos para familias para que puedan pagar el cuidado de niños. No lucha por Cuidado Infantil de calidad en Olympia, cómo hemos hecho nosotros.

No se equivoque con la información de parte de anti-unión Freedom Foundation. Ellos no les importa del cuidado de niños o de los cortes de fondos para el cuidado de niños de familias.

Exhibit A

Estamos enojadas, frustradas y no lo podemos creer que esta agencia esta tratando de undir todo lo que hemos logrado, por lo que hemos luchado y ganamos. Si perdemos nuestro poder, vamos a perder el Cuidado Infantil en Washington.

Cómo proveedores de Cuidado Infantil, les pidemos que no firmen ninguna de las cartas de Freedom Foundation. Por favor hable al Centro de Recursos de Miembrios al (877) 734-8673 si usted tiene preguntas sobre este ataque.

Hemos llegado muy lejos para irnos para atrás

Desde que nosotros nos organizamos cómo Unión en 2006 hemos aumentado nuestros tariffas de subsidios por mas de 20%. Hemos ganado el bono de horas irregulares, sumamos mas a nuestros dias ausentes, ganamos acesso a seguro médico, ganamos aumento de 6 meses en pago de bebés y continuamos a luchar para nuestras familias y niños. Antes de organizer nuestra unión, sufrimos perdidas financieros cada vez que le pegaban al estado duro en los tiempos economicos.

Imaginese donde estuvieramos si no vieramos construyido nuestra unión. Cada año en la mesa de negociaciones estamos bajo de ataque y tenemos que luchar para mantener las cosas que ayuda a nuestra profesión y para hacer mejoras, como ir a arbitraje para un aumento en las tariffas de subsidos. No tenemos ninguna duda que sin nuestro poder, podemos perder todo lo que hemos logrado. Esto es nuestra unión diferencia.

Pelear el ataque

Cómo una unión, tenemos el poder de luchar por familias, proveedores y nuestra comunidades. Necesitamos mantener nuestra miembresia fuerte para contiuar este gran trabajo cual hemos empezado. Nuestro poder y unidad es lo que ha conservado Cuidado Infantil. Sin el Cuidado Infantil, niños en nuestro estado van a sufrir.

Si se ha comunicado Freedom Foundation con usted o tiene preguntas sobre la privacidad, favor de hablar al Centro de Recursos de Miembiros imediatemente al (877) 734-8673.

En Solidaridad,

Exhibit A

Marie Keller
Proveedora de Cuidado Infantil
SEIU Local 925 Cuidado Infantil Presidente del Capitulo

Martha Moreno
Proveedora Cuidado InfantilFamily Child Care Provider
SEIU Local 925 Cuidado Infantil Vice-Presidente del Capitulo

Holly Lindsay
Proveedora de Cuidado Infantil
SEIU Local 925 Cuidado Infantil Secretaria del Capitulo

P.S. Nuestra pelea para protejer la privacidad de nuestros niños y familias continua.

Nuestra unión ha intentado de restringir el Estado de enviar nuestra información de casa privada al público. El Juez del Juicio Superior dijo que el esta convincido que hay un riesgo a los niños. Sin embargo, porque el lenguaje del revelación del estado, la corte no estaba de acuerdo de ordenar a DEL de protejer la información de los proveedores en el futuro. Este requicio déjà la información de casa del proveedor exponido. Vamos a continuar a pelar esta situación.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925
All rights reserved.
1914 N 34th Street, Suite 100, Seattle WA 98103

Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRADLEY BOARDMAN, et al., Plaintiffs, v. JAY R. INSLEE, Governor of the State of Washington, et al., Defendants.	CASE NO. C17-5255 BHS ORDER GRANTING MOTION TO INTERVENE

This matter comes before the Court on the motion to intervene of the Campaign to Prevent Fraud and Protect Seniors ("Campaign"). Dkt. 17. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On April 5, 2017, Plaintiffs filed their complaint against the State of Washington (the "State") and moved for an emergency temporary restraining order ("TRO"). Dkts. 1, 2. On April 10, 2017, the State responded. Dkt. 15. Later that day, the Court held a hearing and denied the motion for TRO. Dkt. 21.

Exhibit B

Also on April 10, 2017, the Campaign moved for permissive intervention. Dkt. 17. On April 21, 2017, Plaintiffs responded in opposition to the motion. Dkt. 25. On April 28, 2017, the Campaign replied.

II. FACTUAL BACKGROUND

This case deals with Plaintiffs' constitutional challenge to Washington State Initiative I501 ("I-1501"). Washington voters adopted I-1501 in the 2016 general election. I-1501 made several changes to laws regarding "vulnerable adults" and their homecare providers. It increased penalties for criminal identity theft and civil consumer fraud targeting seniors or vulnerable adults. I-1501 also created an exemption to Washington's Public Records Act ("PRA"). The PRA generally makes publicly available all records prepared, owned, used, or retained by government entities. *See* RCW 42.56.010(3); .070. Unless exempted by the PRA or other statute, public records must be provided upon request, or the public entity will face harsh monetary penalties. RCW 42.56.070(1); RCW 46.56.550(4). *See e.g.*, *Zink v. City of Mesa*, 162 Wn. App. 688, 701 (2011). Specifically, I-1501 exempted from public disclosure personal information of vulnerable individuals, as well as the information of their homecare providers, including names, addresses, GPS coordinates, telephone numbers, email addresses, social security numbers, driver's license numbers, or other personally identifying information. RCW 42.56.640.

Plaintiffs, in particular Plaintiff Freedom Foundation, have been attempting for years to obtain up-to-date public records of contact information for state-funded homecare providers (identified by statute as "Individual Providers"). Plaintiffs use the

Exhibit B

information in the records to contact homecare providers to inform them of their constitutional right as partial-state employees to opt out of union membership and dues, as announced in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). However, due to efforts by SEIU unions (who represent the applicable bargaining units as majority unions), a lengthy litigation process prevented Plaintiffs from obtaining up-to-date records, despite state court rulings that Plaintiffs were entitled to receive the records. *See* Dkt. 2 at 7–8; Dkt. 6; Dkt. 26. When the records were finally released in September of 2016, they were out-of-date and therefore useless to Plaintiffs' outreach efforts.

While the state courts grappled with Plaintiffs' rights to receive the records under the then-applicable provisions of the PRA, the Washington State legislature was dealing with proposals by certain unions to create a new exemption under the PRA that would prevent disclosure of the records. These efforts in the legislature failed. However, unions SIEU 775 and SEIU 925 also 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. As a result of I-1501, the State has denied Plaintiffs' recent PRA requests seeking up-to-date contact information for homecare providers, thereby hindering Plaintiffs' ability to efficiently identify and contact homecare providers to inform them of their First Amendment right to opt out of union dues and membership. Plaintiffs challenge the constitutionality of I-1501 on the basis that it abridges their First Amendment rights and violates the Equal Protection Clause of the Fourteenth Amendment.

Exhibit B

III. DISCUSSION

The Campaign moves to intervene in order to defend the constitutionality of I-1501. Dkt. 17. Plaintiffs object to the addition of the Campaign to this action under the permissive intervention rule, Fed. R. Civ. P. 24(b), arguing that intervention by the Campaign will poses a significant risk of delay and prejudice. Dkt. 25 at 12–13.

Permissive intervention is available to any party at the Court's discretion. In relevant part, Fed. R. Civ. P. 24(b) provides:

> (1) . . . On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> * * *
>
> (3) . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b). For the Court to allow permissive intervention, the moving party must show "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009). If these threshold requirements are satisfied, the Court may then consider other discretionary factors to determine whether intervention serves the interests of justice, including "whether the intervenor's interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying

Exhibit B

factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena Cty. Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

Plaintiffs do not dispute that the threshold requirements for permissive intervention are satisfied. Dkt. 25 at 7. The motion to intervene is timely, as it was filed within five days of the complaint. Dkts. 1, 17. The Court has jurisdiction, as the Campaign seeks only to raise defenses to Plaintiffs' constitutional claims. *See* Dkt. 17 at 6. Finally, the Campaign's purpose for intervening is to raise a defense that shares common questions of both law and fact with the underlying claims: namely, the constitutionality of I-1501. *See* Dkt. 1; Dkt. 17 at 4; Dkt. 25 at 7. Therefore, the only question before the Court is whether it should deny the motion to intervene on other equitable grounds.

Plaintiff argues that the Court should deny the motion to intervene on the basis that (1) the Campaign's interests are adequately represented by the State; (2) intervention will not contribute to the full factual and legal development of the case; and (3) the Campaign's participation will likely result in undue delay and hardship. Dkt. 25 at 8–13.

At this early stage, the State has adequately defended I-I501 in response to a motion for a TRO. Dkts. 15, 21. However, due to the expedited nature of the TRO hearing, the State's position has not been fully developed, and the Court finds that it is unclear what the State's position will be going forward. For instance, when questioned at the TRO hearing regarding applicability of RCW 42.56.645(1)(g) to certain plaintiffs in this case, neither the State nor Plaintiffs could offer a position on whether, under the Washington Public Records Act ("PRA"), records would properly be released to certain

Exhibit B

Plaintiffs based on their contracts with the State to provide services to vulnerable residents. Based on the substantial penalties implicated by wrongful withholding under the PRA, the State may have incentive to settle the matter and stay its enforcement of the new initiative until Government officials can gain a better grasp of the numerous, broadly-worded exceptions permitting disclosure found in RCW 42.56.645. Additionally, the State has thus far failed to raise the issue of *Pullman* abstention on the basis that a state court's construction of 42.56.645(1)(g) may likely render moot certain Plaintiffs' claims. Accordingly, the Court concludes that it does not appear that the interests of the State in defending the constitutionality of I-1501 are so aligned with the interests of the Campaign as to constitute a basis for denying intervention.

Additionally, the Court finds that intervention will allow for a more fully developed record. By intervening, the Campaign is present to participate in discovery. Plaintiff has already argued at great length that I-1501 was the product of animus towards their political speech. Allowing the Campaign's participation in this lawsuit will substantially improve the efficiency of potential discovery that is focused on the alleged animus behind the Campaign-sponsored initiative.

The last issue is whether the addition of the Campaign will cause undue delay or prejudice to the parties. The Court is concerned that it may. There is no dispute that the Campaign is a product of SEIU unions' efforts to pass I-1501. Plaintiffs have presented evidence to show that, in the recent past, the SEIU unions have used litigation tactics to prolong the release of the public records that are the underlying subject of this lawsuit, so that the records became outdated and useless by the date of their disclosure. *See* Dkt. 2 at

Exhibit B

7–8; Dkt. 26. The Campaign has presented nothing to rebut this evidence. However, as both the Plaintiffs and the Campaign have acknowledged, the Court may limit the participation of permissive intervenors as necessary to prevent undue delay or prejudice. Dkt. 25 at 13; Dkt. 30 at 7. The Court and the parties have numerous tools to prevent or sanction conduct that results in unnecessary delay, and the Court will not tolerate abusive litigation tactics. *See Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) ("Federal courts possess certain 'inherent powers' . . . to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That authority includes the ability to fashion an appropriate sanction for conduct which abuses the judicial process.") (quotations omitted). Therefore, as the Campaign's intervention does not appear to threaten to inject any extraneous issues into the case, the Court finds that intervention is not likely to result in undue delay or prejudice to the parties.

Accordingly, the Court finds that permissive intervention is appropriate in this case and grants the motion to intervene.

IV. ORDER

Therefore, it is hereby **ORDERED** that the Campaign's motion to intervene (Dkt. 17) is **GRANTED**.

Dated this 11th day of May, 2017.

BENJAMIN H. SETTLE
United States District Judge

Exhibit B

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

January 25, 2017

Morgan B Damerow
Atty General Ofc/L&P Division
PO Box 40145
Olympia, WA 98504-0145
morgand@atg.wa.gov

David Morgan Steven Dewhirst
Attorney at Law
PO Box 552
Olympia, WA 98507-0552
ddewhirst@freedomfoundation.com

Robert H Lavitt
Schwerin Campbell Barnard Iglitzin & Lav
18 W Mercer St Ste 400
Seattle, WA 98119-3971
lavitt@workerlaw.com

Gina L Comeau
Attorney General's Office
PO Box 40145
Olympia, WA 98504-0124
gina.comeau@atg.wa.gov

Michael S. Robinson
Attorney at Law
18 W Mercer St Ste 400
Seattle, WA 98119-3971
robinson@workerlaw.com

CASE #: 49726-3-II/SEIU Local 925 v. Dept. of Early Learning, et al

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The emergency motion for stay is granted. Failure to enjoin the fulfillment of the PRA requests would totally destroy the fruits of the appeal. And where the fruits of an appeal would be totally destroyed in the absence of a stay, this court should grant a stay unless the appeal is totally devoid of merit. Boeing Co. v. Sierracin Corp., 43 Wn. App. 288, 291-92, 716 P.2d 956 (1986). The questions of whether RCW 74.04.060 is an "other statute" prohibiting disclosure of the information sought in the PRA requests, and of whether Initiative 1501 applies to PRA requests that were submitted before its effective date, are debatable and not totally devoid of merit. Further, the harm to appellants in the absence of a stay is greater than the harm to Freedom Foundation that will be caused by a stay.

Exhibit C

Accordingly, the trial court's order denying an injunction against fulfilling the PRA requests is stayed and the fulfillment of the PRA requests is enjoined. The stay and injunction shall remain in effect until a mandate issues in this appeal.

Very truly yours,

Derek M. Byrne
Court Clerk

DMB:saf

Exhibit C

FREEDOM FOUNDATION

June 30, 2017 - 4:32 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49726-3
Appellate Court Case Title:	Service Employees International Union Local 925, App. v. Dept. of Early Learning, et al, Respondents
Superior Court Case Number:	16-2-04580-1

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