No. 94563-2

(Court of Appeals Case No. 48881-7-II)

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

SERVICE EMPLOYEES INTERNATIONAL UNION 775NW,
Appellant/Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and THE EVERGREEN FREEDOM FOUNDATION d/b/a FREEDOM FOUNDATION,
Respondent/Defendants.

RESPONDENT FREEDOM FOUNDATION'S ANSWER TO SEIU 775NW'S PETITION FOR DISCRETIONARY REVIEW BY THE SUPREME COURT

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I. IDENTITY OF THE RESPONDING PARTY

Respondent Freedom Foundation ("the Foundation") is the Defendant/Appellee below.

II. STATEMENT OF RELIEF SOUGHT

The Freedom Foundation (the "Foundation") respectfully requests that this Court deny Petitioner/Appellant SEIU 775 ("SEIU")'s Petition for Discretionary Review. SEIU materially misrepresents the holdings of the cases it claims to "conflict" with the decision below. SEIU also ignores ample, well-established case law related to "public interest" and the Public Employees Collective Bargaining Act ("PECBA") violations that, when accounted for, destroy its merits argument. Its Petition is solely and purely intended to delay the eventual disclosure of non-exempt and time-sensitive public records long enough to render them useless to the requestor. A federal court recently made the factual finding that SEIU routinely engages in this abusive behavior toward the Freedom Foundation. SEIU engaged in this identical practice in 2016 to prolong – for an additional six months – the disclosure to the Foundation of non-exempt public records. This abuse of the judicial process must stop. SEIU's disingenuous Petition should be denied.

III. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant discretionary review when the decision below does not conflict with any Washington case law and the public interest clearly weighs in favor of disclosure?

2. Should the Foundation be awarded reasonable attorney's fees, costs, and sanctions when SEIU materially represented the holdings of its cited cases, ignores relevant law, and has conceded that PECBA does not expressly mention records or confidentiality anywhere within the statute?[1]

IV. STATEMENT OF THE CASE

The Foundation is an independent, non-profit organization that seeks to advance individual liberty, free enterprise, and limited, accountable government. CP 246-47. As part of its mission, the Foundation informs homecare aides, including individual providers ("IPs"), of their constitutional right to choose whether to pay union dues. CP 247. This right was recently acknowledged in *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

The Foundation's outreach efforts are particularly important because SEIU lies to or misinforms countless IPs about their rights regarding union dues payments. CP 233-45; 249-51.[2] Specifically, SEIU informs IPs that

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[1] The Foundation is reserving this issue until this Court rules on the instant Petition.

[2] The Foundation has also received and published video footage in which a SEIU affiliate lies to workers about their constitutional rights regarding union membership and dues payment during mandatory training appointments workers must attend with SEIU's representatives. CP 221.

union dues are mandatory, CP 233-34, CP 249-251, spreads foreboding, misleading, and outright false information about the Foundation, CP 236-38, and barrages IPs with repeated phone calls and home-visits pleading for IPs to sign membership cards, CP 236-38. Many IPs have expressed gratitude for the Foundation's educational efforts; without it they would have never known about their constitutional rights regarding dues payments. CP 233-45; 249-51.

In accordance with its outreach program, the Foundation submitted a public records request to DSHS on January 12, 2016 for IP's contracting and orientation schedules ("schedules"). CP 255-56. SEIU sued to enjoin the schedules' disclosure. CP 8-18. It argued that PECBA exempted the schedules as an "other statute" under the PRA, under the assumption that disclosure would amount to an unfair labor practice ("ULP") in violation of PECBA. CP 16.

However, as an independent, non-profit organization, the Foundation is neither controlled by the State nor acts on behalf of the State. CP 247. Specifically, the Foundation is unable to levy any threats of reprisal or promises of benefits regarding union membership, which is necessary for a ULP claim. CP 247. The Foundation possesses absolutely no authority over IPs, nor has the Foundation claimed otherwise. CP 247. Indeed, the Governor of Washington recently made disparaging remarks about the

Foundation. CP 220 ("We know the Freedom Foundation is spending hundreds of thousands of dollars to try to strip people of their rights....I intend to be vigorous in fighting with you against those who want to diminish working people's rights in the state of Washington."). Notably, numerous large unions, including SEIU, are listed among the top contributors to the Governor's campaign. CP 220. The evidence clearly shows the Foundation is not a proxy for the State, which is also necessary for a ULP claim.

Further, multiple courts have recognized that the Foundation's communications with providers qualifies as political speech. *See Boardman v. Inslee et al.*, No. C17-5255 BHS, 2017 WL 1957131 (W.D. Wash. May 11, 2017) ("Plaintiffs, in particular Plaintiff Freedom Foundation, have been attempting for years to obtain up-to-date public records of contact information for...[IPs]. Plaintiffs use the information...to contact homecare providers to inform them of their constitutional right...to opt out of union membership and dues, as announced in *Harris v. Quinn*[.]."); *SEIU Healthcare 775 NW v. State, Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 406, 967 P.2d 1284 (2016), *rev denied*, 186 Wn.2d 1016; *Serv. Emps. Int'l Union Local 925 v. Freedom Foundation*, 197 Wn. App. 203, n. 4, 389 P.3d 641 (2016); *SEIU 775 v. Elbandagji et al.*, No. 16-2-13095-0 (King Cty. Sup. Ct. June 16, 2017) ("I do not find that SEIU has demonstrated that

the Freedom Foundation has wrongfully communicated with SEIU members or used SEIU's confidential information to harass SEIU members or employees. The Freedom Foundation is entitled to contact SEIU members, and prior restraint of its efforts to do so is impermissible.").

Thus, this lawsuit is yet another attempt by SEIU and its affiliates to prevent its own bargaining members from learning of their constitutional rights. SEIU and its affiliates fought against the disclosure of nearly every one of the Foundation's public records requests pertaining to home healthcare workers to prevent the Foundation from informing them of their right to opt out of union membership and to stop subsidizing the union.[3] In a lawsuit challenging the constitutionally of a PRA exemption ushered through Washington's initiative process by SEIU, U.S. District Court Judge Benjamin Settle recognized SEIU's abusive delay tactics:

> 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. 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.

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[3] CP 220, listing numerous lawsuits filed by SEIU and its affiliates, including *SEIU Healthcare 775 v. DSHS and Freedom Foundation*, Case No. 14-2-26633-2; *Service Employees International Union Local 925 DSHS and Freedom Foundation*, Case No. 14-2-02359-3; *Service Employees International Union Local 925 v. DEL and Freedom Foundation*, Case No. 14-2-02082-9; *SEIU Healthcare NW Training Partnership v. DSHS and Freedom Foundation*, Case No. 15-2-29484-9.

> 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***.

Boardman v. Inslee et al., No. C17-5255, 2017 WL 1957131 at * 3 (W.D. Wash. May 11, 2017) (internal citations removed) (emphasis added).

SEIU's "other statute" argument is just as meritless as the ones before it. After oral argument, the trial court below ruled that PECBA did not qualify as an "other statute" under the PRA. RP 40-41. Specifically, it held:

> I don't find that there is an exemption here that applies. I am persuaded that the vast majority of the case law interpreting the Public Records Act and the other statute's provision contemplate that there be a clear exemption or protection of information or exemption of a record, even if it is in another statute. And here I'm finding the argument of an unfair labor practice by the Foundation as a proxy for the State to be not captured by 41.56. In addition, 41.56 simply does not come close enough to the cases that I looked at, such as the PAW[S] case, that do talk about the presence of a protection.

RP 41. The Court of Appeals unanimously agreed. Yet SEIU persists with a meritless Petition for Review, in order to keep the clock running so that the Foundation ultimately receives outdated schedules.

IV. ARGUMENT

1. The decision below does not conflict with published Washington Court of Appeals decisions.

SEIU 775 materially misrepresents the holding of *White v. Clark* to justify its first "confliction" argument. *See White v. Clark*, 188 Wn. App. 622, 630-31, 354 P.3d 38 (2015), *rev. denied*, 185 Wn.2d 1009, 366 P.3d

1245 (2016). RAP 13.4(b)(2). The question in *White* was not whether courts could cobble together implied exemptions from various legal authorities to create an "other statute exemption," as SEIU implies. Pet. for Discretionary Review at 12. Rather, *White*'s central question was whether ***regulations***—that expressly prohibited the disclosure of pre-tabulated ballots—could operate as "other statute" exemption under the PRA. *White*, 188 Wn. App 635. The court looked to Washington's Constitution and related statutes to justify why ***regulations*** qualified as an "other ***statute***" exemption under the PRA. *Id.* at 633-34.

In *White*, Mr. Timothy White requested copies of the pre-tabulated ballots cast in a county election. *Id.* at 628. In deciding whether the pre-tabulated ballots were exempt from disclosure, the court affirmed that "[a]n 'other statute' exemption applies only if that statute explicitly identifies an exemption; the PRA does not allow a court to imply such an exemption." *Id.* at 631. The Court acknowledged Article VI, section 6 of the Washington Constitution and RCW 29A.40.110(2) and RCW 29A.60.110 did not expressly prohibit the disclosure of processed, pre-tabulated ballots—but two secretary of state regulations explicitly did. Therefore, the central "question…is whether these secretary of state regulations can provide the basis for a PRA exemption." *Id.* at 635. The court reasoned that because Article VI, section 6 ***expressly*** provided the Legislature the right to secure

the secrecy of votes, and because the Legislature ***expressly*** delegated to the Secretary of State the authority to effectuate any provision of Title 29A RCW, and ***because the regulations expressly required the secrecy of pre-tabulated ballots***, then the regulations "create an 'other statute' exemption to the PRA under RCW 42.56.070(1) for pre-tabulated ballot images." *Id.* at 635-36. SEIU warps *Wright*'s central holding by arguing that "Just as in this case, no single statute or regulation contained an express prohibition or exemption of a specific record." Pet. for Discretionary Review at 12. The quote SEIU misleadingly cites refers to ***statutory*** provisions discussed in *White*, not the explicitly prohibitory regulations. *White*, 188 Wn. App. at 631, 634-35.

Here, the decision below squarely complies with *White*. Just as in *White*, Judge Maxa—who also authored *White*—began by affirming the long-established principle that courts "will find an 'other statute' exemption only when the legislature has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production in response to a public records request." *SEIU 775 v. State Dep't of Soc. & Health Servs., et al.*, ___ P.3d __, 198 Wn. App. 745 (2017) (quoting *John Doe A. v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016)). Then, unlike the Constitutional, statutory and regulatory provisions in *White*, Judge Maxa correctly acknowledged that "PECBA does not explicitly

exempt or prohibit the release of records or information that would constitute an unfair labor practice. ***In fact, the PECBA does not even mention any records or information***." *SEIU 775*, 2017 WL 1469319 at *4 (emphasis added). SEIU fails to point to any PECBA provision throughout the entirety of its Petition to refute this dispositive argument. That is largely because SEIU's counsel has already conceded that PECBA omits any express references to records or the confidentiality of any information during oral arguments below:

> YOUR HONOR 2: So, can…I follow up with Judge Maxa's question? So, the Supreme Court in the recent case of Washington State Patrol said to qualify as an other statute exemption under the .070(1) that statute must specifically exempt or prohibit from production a specific record. So, what you're arguing to us here is even though the statute here doesn't specifically say that, by disclosing it would violate some other provision.
> Ms. Robbins: That's correct, Your Honor…
> JUDGE MAXA: So, you're saying we should expand that even though the—the statute you're dealing with, the PECBA, doesn't talk about confidentiality, doesn't talk about records, we—we should expand those cases that do talk about confidentiality and records to cover this situation,
> Ms. Robbins: That's right.

See Appendix A (Ct. of App. Tr. 9:20-10:3, 11:1-6, Feb. 28, 2017).

Upon a complete reading of *White*, it is obvious that the holding below squarely comports with *White*. Both affirm the well-established rule that a statute (or regulation expressly deriving its authority from legislation) must expressly prohibit the release of records. If, like PECBA, it does not, then

that statute is categorically precluded from qualifying as an "other statute" exemption under the PRA.

2. The decision below does not conflict with this Court's prior decisions.

Next, SEIU contorts the holdings of *PAWS II*,[4] *Washington State Patrol*[5] and *Hangartner*[6] to argue that the decision below conflicts with each. Yet its argument merely presents a less-supported repetition of the *Washington State Patrol* dissenting opinion, which a majority of this Court soundly (and quite recently) rejected. Further, unlike any of the statutes in *PAWS II*, *Washington State Patrol*, and *Hangartner*, PECBA fails to contain any reference to any records or confidentiality, or any indication of legislative intent even hinting against the disclosure of public records. *See* Appendix A (Ct. of App. Tr. 9:20-10:3, 11:1-6, Feb. 28, 2017).

SEIU begins by misstating the holding of *PAWS II*, writing that this Court "found that the Uniform Trade Secrets Act ("UTSA") operated as an independent limit on disclosure where disclosure would interfere with the UTSA's purpose of protecting trade secrets, even though no provision of the Act expressly dealt with confidentiality or records disclosure." Pet. at 14. That statement is patently false. The *PAWS II* Court directly addressed

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[4] *Progressive Animal Welfare Soc'y v. University of Washington ("PAWS II")*, 125 Wn.2d 243, 884 P.2d 592 (1994).
[5] *Doe ex rel v. Washington State Patrol*, 185 Wn.2d 363, 374 Wn.2d 363 (2016).
[6] *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004).

the UTSA's express protection of trade secrets, including permitting injunctive relief to prevent the disclosure of trade secrets. *PAWS II*, 125 Wn.2d at 262-63. The anti-harassment statute at issue in *PAWS II* also expressly provided for injunctive relief against acts that would definitively violate the statute. *Id.* at 263-64.

SEIU also twists the holding of *Hangartner*, stating that this Court held that an attorney-client privilege statute operated as an 'other statute' "even though nothing in that statute expressly dealt with disclosure or confidentiality of records." Pet. for Discretionary Review at 16. Again, not true; the statute at issue in *Hangartner* expressly addressed the confidentiality of records. As this Court noted,

> RCW 5.60.060(2)(a) provides that "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment."

Hangartner, 151 Wn.2d at 451. The Court reasoned that "[t]he language the legislature used in RCW 42.17.260(1) is clear and plainly establishes that documents that fall within the attorney-client privilege are exempt from disclosure under the PDA." *Hangartner*, 151 Wn.2d at 453. This Court reaffirmed its position of those cases most recently in *Washington State Patrol*:

> The dissent claims that under our holding, both *Hangartner* and *PAWS II* would have a different result. Not so. In *Hangartner*, the attorney-client privilege statute used broad prohibitive language to prevent the disclosure of privileged documents in particular situations. In *PAWS II*, we held that both the Uniform Trade Secrets Act (UTSA), chapter 19.108 RCW, and the anti-harassment statute were "other statutes." The UTSA authorized an injunction to protect trade secrets where a showing was made that such protection was necessary. Additionally, *PAWS II* cited to legislative history in which the legislature declared "it *a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.*" The same is true of the antiharassment statute.

Washington State Patrol, 185 Wn.2d at 404, n. 5 (internal citations omitted) (emphasis in original). This Court has already acknowledged SEIU's arguments, which the dissent argued in *Washington State Patrol*, and explicitly rejected them. *Id.* Yet, even more frustrating, the facts in this case are materially different than *PAWS II* and *Hangartner* because PECBA undisputedly contains no reference to records, or information, or confidentiality whatsoever. SEIU's second "confliction" argument is meritless.

3. The decision below does not warrant review on public interest grounds.

Finally, SEIU ignores the plain language of the PRA regarding "public interest," and attempts to use a 'public interest' argument to introduce a new argument that has never been adjudicated by any court. It does so in tacit acknowledgment of the failure of its primary PECBA argument. In

summary, SEIU argues that DSHS's compliance with the PRA, and the subsequent communications between the Foundation and homecare providers—that numerous Washington courts have called political speech—would qualify as an unfair labor practice ("ULP") in violation of PECBA.

SEIU's argument lacks merit for at least three reasons. **First,** the people of Washington have already decided that the 'public interest' *always* favors disclosure in disputes regarding public records. RCW 42.56.030.[7] SEIU's attenuated and wholly unsupported public interest argument cannot overcome clear statutory language reinforced by decades of case law. **Second**, SEIU's 'public interest' argument requires this Court to recognize that disclosure of public records would actually qualify as a ULP as a matter of law, which no court has ever held. This Court does not have original jurisdiction to do so here. WASH. CONST. Art. IV. § 4. It is also beyond the scope of a public records case, as public records may only be enjoined by an explicitly enumerated exemption in the PRA, the Washington Constitution, or in another statute. *White v. Clark*, 188 Wn. App. 622, 630-31, 354 P.3d 38 (2015). The inapplicability of each automatically equates to the disclosure of public records, bar none. **Third**, even if this Court

[7] *See also Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 413, 327 P.3d 600 (2013); *PAWS II*, 125 Wn.2d at 251.

considered at this late stage the merits of SEIU's previously un-adjudicated argument, it completely lacks merit.

a. The public interest always favors disclosure of non-exempt public records.

SEIU's public interest argument omits any citation to supportive authority and ignores the PRA's unquestioned public interest in the disclosure of non-exempt public records. RCW 42.56.030. This Court has long recognized that, to preserve the sovereignty of Washington citizens and the accountability of public officials, courts must consider the PRA's policy that free and open examination of public records is in the public interest. *PAWS II*, 125 Wn.2d at 251. In cases involving public records, the 'public interest' always favors disclosure. *Id.* SEIU's 'public interest' argument relies solely on its unproven and meritless assumption that disclosure constitutes a ULP, which was neither adjudicated nor raised below. Instead, the Foundation's outreach efforts, which SEIU characterizes as a ULP, is political speech, which multiple courts have recognized.[8] The public interest in this case clearly favors disclosure.

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[8] *See Boardman v. Inslee et al.*, No. C17-5255 BHS, 2017 WL 1957131 (W.D. Wash. May 11, 2017) ("Plaintiffs, in particular Plaintiff Freedom Foundation, have been attempting for years to obtain up-to-date public records of contact information for…[IPs]. Plaintiffs use the information…to contact homecare providers to inform them of their constitutional right…to opt out of union membership and dues, as announced in *Harris v. Quinn*[.]."); *SEIU Healthcare 775 NW v. State, Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 406, 967 P.2d 1284 (2016), *rev denied*, 186 Wn.2d 1016; *Serv. Emps. Int'l Union Local 925 v. Freedom Foundation*, 197 Wn. App. 203, n. 4, 389 P.3d 641 (2016); *SEIU 775 v. Elbandagji et al.*, No. 16-2-13095-0 (King Cty. Sup. Ct. June 16, 2017) ("I do not find that

b. *Whether disclosure qualifies as a ULP is a separate question of law that this Court does not have original jurisdiction to decide.*

SEIU ignores the law that discusses the 'public interest' under RCW 42.56.030 and instead argues that its entirely illusory ULP argument would satisfy the "public interest" prong. Yet in order to determine that the disclosure of public records gives rise to an 'untenable conflict,' this Court must first determine that disclosure actually qualifies as a ULP. Whether the disclosure of public records qualifies as ULP is a separate question of law that no court has ever held in the affirmative. The courts below specifically declined to consider it. *SEIU 775 v. State Dep't of Soc. & Health Servs.*, 2017 WL 1469319 at *n.1; CP 382-384. This court cannot consider the merits of the ULP argument for the first time here because it does not have original jurisdiction on this issue. WA CONST. ART. 4, § 4. Further, it is well-established that issues not clearly stated in a petition for review are waived and should be stricken. *See* RAP 13.4(c)(5); RAP 13.7(b); *State v. Gossage*, 165 Wn.2d 1, 6, 195 P.3d 525 (2008), *cert. denied*, 557 U.S. 926 (2009); *State v. Buchanan*, 138 Wn.2d 186, 196, 978 P.2d 1070 (1999), *cert. denied*, 528 U.S. 1154 (2000). An issue may be

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SEIU has demonstrated that the Freedom Foundation has wrongfully communicated with SEIU members or used SEIU's confidential information to harass SEIU members or employees. The Freedom Foundation is entitled to contact SEIU members, and prior restraint of its efforts to do so is impermissible.").

waived even if it is argued, if it is not separately identified as an issue for review. *See State v. Korum*, 157 Wn.2d 614, 623-24, 141 P.3d 13 (2006) (declining to consider an ancillary argument because it was not clearly raised in the concise statement of issues). Here, just like in *Korum*, SEIU never raised the ULP argument in its statement of issues, and this Court should decline to consider it for the first time here.

c. *Even if this Court considered whether disclosure of public records qualifies as a ULP for the first time here, the argument is wholly meritless.*

SEIU conclusorily claims that "disclosure would undisputedly constitute an unfair labor practice." This is, of course, not true, as the Foundation has extensively briefed below. It then cursorily glazes over RCW 41.56.040, .140. and .040, without further discussion into the well-established related rules and applications. Arguendo, even if this Court now considered the ULP argument, there is absolutely no way that the disclosure of public records of contracting schedules could possibly be a ULP.

RCW 41.56.040 prohibits the interference of public employees' rights to organize. RCW 41.56.040. As the complaining party, SEIU carries the burden of proving unlawful interference by a preponderance of the evidence. *Pasco Housing Authority*, Decision 5927-A 1997, 1997 WL 810882 (PECB, 1997), *aff'd*, 98 Wn. App. 809, 991 P.2d 1177 (2000). "An interference violation will be found when employees could reasonably

perceive the employers' actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees." *Pasco Housing Authority*, Decision 5927-A 1997 (PECB, 1997), *aff'd*, 98 Wn. App. 809, 991 P.2d 1177 (2000) (emphasis in original).[9] "If the setting, the conditions, the methods, or other probative context can be appraised, in reasonable probability, as having the effect of restraining or coercing the employees in the exercise of such rights, then his activity on the part of the employer is violative of [Section 8(a)(1)] of the Act." *Taylor Rose Mfg. Corp.*, 205 NLRB 262, 265 (1973), *enforcement granted, NLRB v. Taylor-Rose Mfg. Corp.*, 493 F.2d 1398 (2d Cir. 1974).

Here, SEIU claims that a typical IP attending a contracting appointment could reasonably perceive the Foundation's attendance at the meetings as DSHS itself discouraging union activity. Pet. for Discretionary Review at 18. Its arguments fail for at least three reasons.

First, SEIU fails to provide any evidence that DSHS has invited the Foundation to attend the contracting appointments or any other meetings. Indeed, in unrelated litigation, the Foundation has requested access to these meetings, which DSHS flatly denied. Disclosure of schedules merely allows

[9] Federal labor law is also persuasive. "The phrase "... no threat or reprisal or force or promise of benefit" found in RCW 41.59.140(3) must be interpreted in the same context as the identical language of Section 8(c) of the National Labor Relations Act." *Lake Washington School District*, Decision 2483 (PECB, 1986).

the Foundation to access public sidewalks in order to inform IPs of their constitutional rights—which is both a quintessential public forum for free speech, to engage in the most highly protected form of free speech. *U.S. v. Kokinda*, 497 U.S. 720, 727, 110 S.Ct. 3115 (1990). In no universe can the mere disclosure of public records of state-sponsored meeting times and locations, and nothing more, cause a reasonable IP to believe that the State is unlawfully interfering with union activity. *See Pasco Housing Authority*, Decision 5927-A 1997, 1997 WL 810882 (PECB, 1997), *aff'd*, 98 Wn. App. 809, 991 P.2d 1177 (2000). SEIU failed in proving a ULP claim by ignoring the key fact that DSHS never actually invited the Freedom Foundation to anything.

Second, the State is in no way communicating with or acting in a manner directed towards IPs by merely disclosing schedules. Without any action by the State directed to IPs, the factors analyzing an employer's communications for unlawful interference are rendered irrelevant. *See Pasco Housing Authority*. It is impossible to evaluate the tone of the communication if communication did not occur. *Id.* For the similar reasons, all of SEIU's cited cases about an employer's unlawful interference are inapposite because they deal with an employer's communications to employees. *See supra*. Without any evidence of State action directed towards

IPs, the State is categorically precluded from engaging in unlawful interference.

Third, IPs cannot reasonably perceive the State's actions as a threat of reprisal or force or promise of benefit associated with the union activity when the disclosure of public meeting times and locations is required by law absent an explicitly stated exemption. The State cannot even inquire into a requester's purpose absent very limited, and inapplicable, circumstances. *PAWS II*, 125 Wn.2d at 252. The PRA is clear that "when there is a possibility of conflict between the PRA and other acts, the PRA governs." *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010); *see also Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 578, 983 P.2d 676 (1999) (if another statute conflicts with the PRA, "it is resolved by the application of RCW 42.17.920 that provides the Act is to be liberally construed with conflicts between the Act and other statutes resolved in favor of the Act."). This is because the PRA is one of the strongest laws in Washington that heavily protects the revered and cherished principles for Washington citizens—that of open and transparent government. *See* RCW 42.56.030. Agencies are tasked with the responsibility of ensuring open and transparent governments to Washington's citizens, and face heavy penalties for failing to do so. RCW 42.56.550. It defies logic and common sense that a reasonable IP would

perceive an agency's compliance with one of the strongest laws in Washington, *that protects the sovereignty of Washington citizens over its government*, as a threat of reprisal or force or promise of benefit associated with the union activity. In disclosing meeting times and locations, the State is simply following the strong mandate of the Washington legislature by disclosing public records—no more, no less.

V. CONCLUSION

For the foregoing reasons, the Foundation respectfully requests that this Court deny SEIU's Petition for Discretionary Review.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on June 23, 2017, I served a copy of the foregoing by email pursuant to an e-service agreement:

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Dated this 23rd day of June 2017, at Olympia, Washington.

Stephanie Olson

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 755,	)	Cause No. 48881-7-II
Respondent,	)	ORAL ARGUMENT
v.	)	
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Appellants.	)	

VERBATIM REPORT OF

DIGITALLY-RECORDED PROCEEDINGS

February 28, 2017

HEARD BEFORE THE HONORABLE BRADLEY MAXA
HEARD BEFORE THE HONORABLE LISA WORSWICK
HEARD BEFORE THE HONORABLE LISA SUTTON

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T A B L E O F C O N T E N T S

YOUR HONOR 1: You need to raise that way up—

MS. ROBBINS: Oh.

THE COURT 1: —so that the microphone is much closer to your face so that we can—

JUDGE MAXA: Go as far as you—

YOUR HONOR 1: —hear you.

JUDGE MAXA: —want it.

YOUR HONOR 1: Yeah. So that we can hear you and that the recording picks up, please. Thank you.

MS. ROBBINS: Is that better?

YOUR HONOR 1: Yes.

MS. ROBBINS: May it please the Court, my name is Jennifer Robbins and I represent the Appellant, SEIU 775.

JUDGE MAXA: Are you reserving time for rebuttal?

MS. ROBBINS: Yes, six minutes, Your Honor.

JUDGE MAXA: Very good.

MS. ROBBINS: This case raises two primary legal issues. First, does the state public employment collective bargaining statute, RCW 41.56, prohibit the State of Washington Department of Social and Health Services, DSHS, from facilitating the Freedom Foundation's systematic denigration of SEIU 775 to individual providers as those individual providers, or IPs, go to and from employment-related meetings where a reasonable employee could perceive

that conduct as being sanctioned or adopted by DSHS? The second issue is, if so, is RCW 41.56 an other statute within the meaning of the Public Records Act, RCW 42.56.070 Sub 1, such that the Court should enjoin release by DSHS of the dates and locations and times of those employment-related meetings? SEIU 775 submits that the answer to each of these questions is yes.

Now, because whether conduct constitutes an unfair labor practice is context-specific, it's important to understand both the nature of the contracting appointments and the nature of the communications that DSHS's disclosure of the times and locations information would facilitate. As to the appointments themselves, as part of their employment bargaining unit members, IPs, must attend special contracting appointment meetings and training and orientation meetings with the State. These appointments are not open—they're not events open to the public. They're internal matters between the State and IPs that are part of the operation of the home care system in Washington. There's no evidence the State releases the times and locations of such employment-related meetings to the public for these or any other kinds of similar meetings between the State and its employees. SEIU 775 is the collective bargaining representative of the IPs, and it has been granted access to these meetings pursuant to the negotiated

collective bargaining agreement.

What's at issue in this case is a request by the Freedom Foundation to be told the times and locations of these meetings. Now, it's undisputed that if the Foundation learns that information, it intends to show up at the meetings, or outside of them, and attempt to dissuade the bargaining unit members from being members of the union as it did, for example, when it stationed a Freedom Foundation Santa Claus outside the Washington Department of National Resources—Natural Resources last December telling public employees, quote, "why they should sever ties with their unions," end quote, and gave them opt-out forms to help them do so.

YOUR HONOR 1: So, would this be the first case where the courts are considering the motives of the requestor?

MS. ROBBINS: No, it wouldn't. There are other contexts where the Court can look at the motives of the requestor. In the commercial purposes context, for example, RCW 42.56.080 says that when you're looking to see whether an other statute applies or bars disclosure, it's appropriate for the court to—or the agency to look into the purpose of the request. So, here—

YOUR HONOR 1: So, can you give me some cases that say that? I mean, I'm—I'm—I guess I'm familiar with the commercial purpose, but I think that—that's an issue that

maybe has even been raised between these parties before. But absent—absent that?

MS. ROBBINS: Yes, I think the—the *PAWS* case is the best example—the *PAWS II* case which we discussed in quite a bit of detail in the briefing. There—there are two separate holdings in that case that relate to RCW 42.56.070(1), the other statute provision. The first had to do with the state trade secret statute. The second had to do with the state anti-harassment statute.

Now, nothing in the state anti-harassment statute expressly prohibited the disclosure of records. It didn't have a non-disclosure or a confidentiality provision. Rather, it was a protection for animal researchers, essentially, to be free from harassment based on their work. And the—the Supreme Court—State Supreme Court and PAWS held that anti-harassment statute to be an other statute because disclosure of the unfunded grant proposal documents would lead to—or could lead to harassment of the researchers. So, there the court looked at what is going to happen with the information once it is disclosed and will that violate an other statute such that that other statute should be incorporated into the Public Records Act and bar disclosure.

It's important to note that that holding is separate and independent from the holding relating to the trade secret

statute. And importantly in that case the court looked to whether the statute operated to bar disclosure. So, in *PAWS*, in *Hangartner*, in *White versus Clark*, the court—the Supreme Court and the Court of Appeals has looked to other statutes and say, does that other statute operate to prohibit disclosure or bar disclosure even where that other statute itself isn't about protecting the confidentiality of a specific kind of record or document. In *Hangartner* it was an attorney-client privilege statute, and the statute itself didn't limit agency action or bar the disclosure of records. It talked about whether a—an attorney can be questioned about its private—his or her private communications with—

JUDGE MAXA: But it specifically—

MS. ROBBINS: —the client.

JUDGE MAXA: —relates to confidentiality, right?

MS. ROBBINS: It does but it doesn't have to do with the disclosure of documents. Like, the language of the statute itself didn't expressly prohibit the disclosure of documents. It—it related to the questioning of counsel, but the court said that operates to prohibit the disclosure of attorney-client privilege documents at well—as well. The purpose of the statute is to protect the confidentiality of attorney-client communications so we're going to incorporate that as an other statute and say attorney-

client privilege documents cannot be disclosed in response to a Public Records—

JUDGE MAXA: Is there anything—

MS. ROBBINS: —Act request.

JUDGE MAXA: —in the PECBA that says we have to keep meeting times confidential or we have to keep certain things confidential? Is there anything about confidentiality in the PECBA?

MS. ROBBINS: No, Your Honor, and that's why the *PAWS* case is the most analogous because they're—like in this case, the statute itself isn't about the confidentiality of documents; it's protecting different interests. In this case the right of employees—public employees to be free from interference and coercion in regards to their rights under the collective bargaining statute. And here it would be unlawful for the State to disclose the times and locations because it would facilitate conduct by a third party that would be unlawful for the State to do itself. And that—

YOUR HONOR 2: So, can—can you—can I follow up with Judge Maxa's question? So, the Supreme Court in the recent case of *Washington State Patrol* said to qualify as an other statute exemption under the .070(1) that statute must specifically exempt or prohibit from production a specific record. So, what you're arguing to us here is even though

the statute here doesn't specifically say that, by disclosing it it would violate some other provision.

MS. ROBBINS: That's correct, Your Honor. And in that portion of the *State Patrol* case the Supreme Court favorably discusses *Hangartner* and *PAWS*. And, in fact, the language about not implying exemptions and requiring other exemptions to be expressed in the other statute, that's that language that was stated in the *PAWS* case as well. Yet, in *PAWS* and *Hangartner,* and in *White* to some extent, the other statute did not expressly contain a nondisclosure provision. Yet the court held that it did prohibit disclosure of a certain kind of information in part to protect the interests at stake in the statute, whether it be confidentiality of attorney-client privilege, anti—you know, protecting harassment of researchers or, in this case, protecting workers from interference.

JUDGE MAXA: Although again you mention—

MS. ROBBINS: Had—

JUDGE MAXA: —*White*. Wasn't the whole point of *White* is the statute's required confidentiality of the voting records?

MS. ROBBINS: Correct, but in that case it was a—sort of a compilation of constitutional provision in the statute and a regulation which together the court said, as a whole, this is protecting the confidentiality of ballots. And—

JUDGE MAXA: So, you're saying we should expand that even though the—the statute you're dealing with, the PECBA, doesn't talk about confidentiality, doesn't talk about records, we—we should expand those cases that do talk about confidentiality and records to cover this situation,

MS. ROBBINS: That's right. And—and the court has already done that. And I think if doing so was prohibited by the Public Records Act, then the Court in *State Patrol* couldn't have favorably discussed *PAWS* and *Hangartner*. It would have had to distinguish those or—or disapprove of them. Yet the court expressly approved of them and—and discussed them favorably in the context of here's the history of the other statute provision and how our courts have applied that. And, yes, it's true that in many cases the other statute is about the nondisclosure of a certain kind of document, but in some cases it's not, and—and *PAWS* and *Hangartner* are examples of that. And if the Court were to reverse the trial court and order an injunction to be established in this case, it would be consistent with *PAWS*—the anti-harassment statute part of *PAWS* to do that.

And I think in looking at the—

JUDGE MAXA: You are running into your rebuttal—

MS. ROBBINS: Oh.

JUDGE MAXA: —just so you're—you're aware.

MS. ROBBINS: I'll save the rest of my comments for

rebuttal.

JUDGE MAXA: Okay.

MS. ROBBINS: Thank you.

JUDGE MAXA: Thank you, Ms. Robbins. How much time does Ms. Robbins have left for rebuttal?

THE CLERK: Four minutes.

JUDGE MAXA: Okay.

MS. ROBBINS: Thank you.

JUDGE MAXA: Are you folks going to be splitting time or is one person going to be arguing or—

MS. McLEAN: So, we have agreed in advance that we would split the time. The State—Margaret McLean on behalf of the Department of Social and Health Services. State will be taking the first five minutes of argument, and the remainder will be for the Freedom Foundation.

JUDGE MAXA: Okay. So, set her time for five minutes and we'll go from there.

MS. McLEAN: Thank you.

JUDGE MAXA: Thank you.

MS. McLEAN: Again, good morning, Your Honors. My name is Margaret McLean, and I am from the Attorney General's Office representing the Department of Social and Health Services in this matter.

In this case the Department received a public records request from the Freedom Foundation and assessed it as it

would in any other situation by looking to the four corners of the document and without regard to who was requesting the information. This wasn't one of those instances, like the commercial purposes situation, where the state agency believed it had any authority to look beyond that in assessing this request as it came through the door.

The Department, based on that, determined that the information was disclosable and it was unable to identify any exemptions that would authorize it to withhold this information, and that's why it notified SEIU. SEIU's position in this case is arguing, as—as I think it indicated in—in oral argument today, sort of a novel theory that would expand the provisions of the Public Records Act a bit in the sense that it would require state agencies to look at who was requesting this type of information and what its intended purpose might be. And the Department is unable to determine that that's an appropriate exemption based on the current state of the law.

Now, we do—recently the parties were before this Court and—and we talked in the—in the initial opening argument about the SEIU case around commercial purposes. And I think that really is a very important case in terms of today's analysis. That case found that when a—when there's a statutory provision that—that requires or authorizes a state agency to look beyond the four corners of the

document and to inquire into the motivations of the requestor, that the state agencies are permitted to do so in those circumstances. But from the State's perspective at this point there is nothing that ties the Public Employees Collective Bargaining Act with the Public Records Act in a way that allows the State to see that that is a permissible way to—to withhold records in this case. The—

JUDGE MAXA: So, what—what if this is a—a violation—an unfair labor practice? What—how—

MS. McLEAN: Well—

JUDGE MAXA: How does the State protect itself? Are they basically required to commit an unfair labor practice under the PRA?

MS. McLEAN: I think that's an excellent question and sort of leads to the complexities of this issue in that only the Public Employees Relations Commission, PERC, itself can determine whether an unfair labor practice has been committed or not. And PERC has made it very clear that it's the only—it gets to determine that; the parties can't decide that for themselves.

It may well be that if the State were to take this information and to interfere with that relationship between the Union and its bargaining unit members, that that would constitute an unfair labor practice on behalf of the State. But here what's being asked is that that be then brought

into the public records realm such that the State wouldn't ever be—I think potentially that the State would not ever be allowed to release this type of information. And it's not clear that there's enough of a nexus between what the Collective Bargaining Act is trying to address, which is the behavior between the State and the unions and union members, and the—just the prohibition on disclosure of—of records.

The cases that—that SEI relies on to indicate that a third party could be committing what would essentially be an unfair labor practice if it came in, those are all cases that are mostly cases out of the private sector where there's not that overlap of the Public Disclosure Act. The presumption—from the State's perspective in—in reviewing this, the presumption is that records are disclosable. And it's—we're to read that portion of the statute very broadly, and we're also to apply exemptions very narrowly.

It's unclear how that would play out in this situation in terms of reading the exemption narrowly. Would that mean that the State were never allowed to disclosed union information to anybody because it could be used for a nefarious purpose? Or it's just—it's a difficult issue for the State to resolve unless the Court does extend, in some respect, the law in this area.

So, at this point the Department is—stands ready to

release the records if that is what this Court determines and is also quite willing to do whatever this Court directs in that regard.

JUDGE MAXA: Thank you—

YOUR HONOR 1: Thank you.

JUDGE MAXA: —Ms. McLean.

MS. OLSON: May it please the Court, my name is Stephanie Olson, and I'm representing the Freedom Foundation in this matter.

There is one essential question in this case and that is whether the Public Employees Collective Bargaining Act, or PECBA, explicitly prohibits the disclosure of specific information or records or otherwise operates as an exemption to the PRA. And the answer is clearly no. And SEIU even concedes this on Page 32 of its corrected brief when it acknowledges that PECBA is not—not an information or nondisclosure statute. And according to over 25 years of case law that concession ends this case right here. There is no exemption to the PRA and the records must be disclosed.

But SEIU tries to get around the clear exemptions of the other statute requirement by pointing to the alleged underlying conduct, of which there is no support of, to then say that that would allegedly violate PECBA by constituting an unfair labor practice, or ULP. And then,

therefore, that would operate as an applied exemption to the release of these—or an implied prohibition to the release of these records. But not only does that clearly contradict well established other statute case law by forcing this Court to imply a prohibition where none exists, but it also relies on several causal gaps that SEIU provides no evidence of and which it is its burden to do under labor law. And so, for these reasons the records must be disclosed.

So, for the first I'll go over why PECBA does not operate as an other statute exemption under the PRA. But second I'll show that even if this Court were to determine that PECBA somehow did qualify as an other statute exemption, the disclosure of contracting records themselves does not give rise to a ULP. And, third, I'll show that even if this Court were to look beyond the four corners of the contracting schedules, the anticipated but yet unsupported alleged underlying conduct still would not give rise to a ULP.

So, first, PECBA categorically cannot qualify as an other statute under the PRA. SEIU's analysis actually flips the other statute analysis on its head. Courts don't begin by evaluating the underlying conduct or facts to then determine if that would violate a statute to then determine if that statute operates as an exemption to the PRA. That

would be a fact-dependent analysis. The courts have repeatedly held that the other statute analysis is a question of law and that courts must first look to the plain language of the statute in question to see if that plain language explicitly prohibits the disclosure of specific information or records. And it's important that these three key elements must be there within the plain language. It must be explicit, it must be specific, and it must pertain to information or records, not conduct as SEUI alleges.

Now, if that's—if those three requirements aren't there, then the courts are required to find that no exemption exists. Courts cannot imply prohibitions where none exist, but that's exactly what SEIU is asking this Court to do. They acknowledge that there's no explicit prohibition of information or records within PECBA anywhere. They point to .010—Section .010 in PECBA, .026, .040, and .140 that deal with interference and ULPs. But nowhere in those provisions or anywhere in PECBA does it mention records or information or explicitly prohibit that information. And so, by this concession PECBA fails to meet any of the requirements for the other statute exemption. This failure is undisputed among all the parties and so PECBA—

JUDGE MAXA: So, Ms. Robbins talks about *PAWS II*—

MS. OLSON: Uh-huh.

JUDGE MAXA: —and the fact that part of that focused on an anti-harassment statute which doesn't necessarily specifically relate to information or documents. How do you respond to the *PAWS II* argument?

MS. OLSON: *PAWS II* actually holds with—within that anti-harassment statute it allowed for an injunction to specifically prevent information that would lead to anti-harassment, and the court in *Washington State Patrol* specifically noted that. In fact, it favorably discussed the cases discussing the other statute exemption by starting out on Page—on Page 375, "Our review of Washington case law shows that courts consistently find to be an other statute when the plain language of the statute makes it clear that a record or portions thereof is exempt from production." And then, again, it specifically references *PAWS II* when it says, "We offer no opinion about Zink's purpose, but if the legislature wanted to protect Level 1 sex offenders from harassment as it protected animal researchers from harassment in *PAWS II* and abortion service providers from harassment in *Planned Parenthood*, it would have done so expressly either through explicit language or making the statute at question there the exclusive means for obtaining such records."

And the trial court below in this case actually addressed the *PAWS II* argument. And the trial court said

specifically that must be read within the broader context of the case in which the court was discussing, the Supreme Court in *PAWS II*. And the Supreme Court specifically discussed how other statutes must be explicit, that courts cannot imply prohibitions where none exist. And so, PECBA categorically cannot operate as an exemption.

But even if this Court—even if PECBA—

JUDGE MAXA: Excuse me, what—what about *Hangartner*, then, which is the attorney-client privilege which [inaudible] specifically relate to—to documents necessarily or the production of documents?

MS. OLSON: That specifically related to the information that should not be disclosed and that was communications between attorneys and clients, which was privileged. And *Washington State Patrol* specifically addresses that too and treats—treats that as an explicit prohibition because it pertained to specific information.

So, even if PECBA qualified as an other statute, the disclosure of contracting schedules itself if not a ULP in violation of PECBA.

Now, State has noted potential—in its briefings, "potential PRA exemptions must be evaluated within the four corners at issue." And this actually comports with 42.56 Subsection 80, which SEIU has actually referenced, which prohibits agencies from distinguishing among requestors or

from requiring information about the purpose of the request. Now, Subsection 80 actually contains an exemption for other statutes. But within Subsection 80 it—it lists the same requirements that Subsection 70 does about other statutes in that the other statute must specifically pertain to information or records first and prohibit that information of records to certain persons. So, we have the same type of requirements that are mirrored substantially in Subsection 80 as in Subsection 70. Mirroring the intent of the strong mandate of the PRA to very narrowly construe exemptions and have very specific requirements for the other statute exemption.

But even if this Court were to look beyond the four corners of the contracting schedules and the safety and orientation schedules at issue, which—which are the records at issue—and let me go back to that point very quickly. The dates and times on contracting schedules and orientation schedules itself is substantially factual and it cannot lead to an unfair labor practice. Under *City of Seattle* PERC has held that substantially factual information does not give rise to any sort of unlawful interference or coercive nature of communications. But even if this Court were to look beyond the four corners of the contracting schedules at issue, the anticipated conduct cannot give rise to a ULP.

Now, what SEIU is doing is alleging two types of unlawful—ULPs. The first is unlawful surveillance, and the second is unlawful interference. Now, unlawful surveillance, a third party can only be liable of unlawful surveillance if it's an agent of the State or somehow is acting on behalf—an agent of the employer or somehow acting on behalf of the employer. And there's absolutely no evidence that the Foundation is in any way an agent of the State. And under well-established labor law all the PERC cases that SEIU cites, *Pasco Housing Authority*, *Taylor/Rose Management Services*, the burden is on the party alleging the ULP to show by a preponderance of evidence that the actual interference is occurring. And there's no such evidence in the record in this case. So, there's—there's no evidence that the Foundation is operating as an agent of the State.

Now, for interference violations the third party must possess a certain—a sufficient degree of control over the employees. And, likewise, there's simply just no evidence that the Foundation possesses any control and SEIU doesn't even address this in its reply. But it tries to get around the—the relationship that's required by saying that a reason—an IP could reasonably perceive the State's disclosure of contracting schedules to then put back liability on the State by—by creating unlawful interference

or surveillance. But this, like I mentioned earlier, relies on several causal gaps, all of which must be construed in favor of disclosure and all of which the burden is on SEIU, under labor law, to prove by a preponderance of the evidence that this interference will actually occur.

The first causal gap is that the disclosure of contracting schedules will actually equate to the Foundation being invited to attend these meetings inside and—and make presentations to employees. There's absolutely no evidence of that. And, in fact, the Foundation in other cases has actually requested and been denied. Now, that's not in the record but it is SEIU's burden by the preponderance of the evidence to show that the disclosure of mere dates and times equates to the actual presence and presentation within these meetings themselves and there's no evidence of that.

The second causal gap is that an IP would make the mistake and there would be a reasonable perception that the Foundation was there on the behalf of the State and its communications were going back towards the State. Again, there's absolutely no evidence of this. And it would seem actually quite reasonable that there would be very strong distinctions between the State and the Foundation by way of introductions, by way of presentation. And all of these are mere speculations because there are simply no facts. But—

but there's absolutely no facts that a reasonable IP would attribute any sort of presentation that would hypothetically happen back to the State.

And the third causal gap—

JUDGE MAXA: You're out of time.

MS. OLSON: All right, thank you.

JUDGE MAXA: Thank you, Ms. Olson. Ms. Robbins, you have four minutes for rebuttal.

MS. ROBBINS: Thank you, Your Honor. Absent some act by DSHS to dissociate itself from the Freedom Foundation's message or conduct, a reasonable employee could presume that the Freedom Foundation is attending employment-related meetings by invitation to provide anti-union message and encourage IPs to opt out of membership or financial support.

I would like to talk about what the undisputed facts are in the record below. To find a—an interference unfair labor practice the PERC or the state courts, which have concurrent jurisdiction with PERC over ULPs, look at a seven-factor test to see if communications are coercive or if they interfere. One of those factors is do the communications disparage, discredit, or undermine the Union? So, I'd like to point to specific parts of the record that the Freedom Foundation did not dispute below that show that the communications that the Foundation would

make would disparage, discredit, or undermine SEUI 775.

At CP 113 and 115 the Foundation describes public sector labor unions as, quote, "a rampant disease that is destroying our state." At CP 122, 138, and 325, the Foundation says that 775—SEUI 775, quote, "manipulates or tricks or misleads its members." On CP 134 it insinuates that SEUI physically threatens its members. At CP 136 the Foundation calls the union employees, quote, "well-paid thugs" who get paid for, quote, "breaking the law." At CP 114 and 120 it says that SEIU 775's informing of IPs of the benefits of the union and their right to opt out of membership is, quote, "an attempt to deceive."

All of this is—is disparagement or discrediting of the Union. If the DSHS manager was standing outside of those contracting appointment meetings and saying those sorts of statements to IPs as they were coming to or from the meeting, clearly that would be communications that would be perceived to undermine or discredit the Union. The—DSHS cannot accomplish through the Foundation what would be unlawful for it to do itself.

Another factor in communications are an unfair labor practice is are they materially misleading? You can look at the record to see examples of the opt-out forms that the Foundation provides to members and that—it's undisputed that they would provide similar forms or such forms to IPs

as they were going to or fro the contracting appointments. Those opt-out forms say, at CP 174, 75, and 325, that employees, quote, "lose nothing," end quote, even though—lose nothing by withdrawing their membership from the Union even though an employee who withdraws from the membership of the Union loses their right to participate in internal union affairs, to vote in union elections, to vote on whether—a collective bargaining agreement, which establishes the employee's wages and benefits, whether that should be approved or not. There are other materially misleading facts in the materials that the Freedom Foundation would communicate. Freedom Foundation did not deny any of these facts. So, in absence of anything that insures the individual providers that the Freedom Foundation's anti-union message doesn't speak for the State, and there is no evidence that there would be a dissociation or a separation between DSHS and the Foundation's message, it would be reasonable for an IP to assume that it does.

In conclusion, SEIU 775 requests that this Court reverse the trial court's denial of a preliminary and permanent injunction on the merits and remand the case for entry of a final order enjoining DSHS from disclosing the times or the locations to the Foundation. Thank you.

JUDGE MAXA: Thank you, Ms. Robbins.

[End of excerpt.]

LEGEND OF SYMBOLS USED

— Indicates an incomplete sentence or broken thought.

... Indicates there appears to be something missing from original sound track or a break in the testimony when switching either from Side A to Side B or switching between tapes.

[inaudible]
1. Something was said but could not be heard.
2. Speaker may have dropped their voice or walked away from microphone.
3. Coughing in background, shuffling of papers, et cetera, which may have drowned out speaker's voice.

[sic]
1. The correct spelling of that word could not be found, but is spelled phonetically, or —
2. This is what it sounded like was said.

[No response.] There is a pause in proceedings, but no response was heard.

[No audible response.] Possible that something was said, but word or words could not be heard.

[Off-the-record discussion.]
1. Discussion not pertaining to case.
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) ss.
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Appellate Court Case Number:	94563-2
Appellate Court Case Title:	SEIU 775 v. State of Washington, et al.
Superior Court Case Number:	16-2-01007-2

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