NO. 100072-3

SUPREME COURT OF THE STATE OF WASHINGTON

Seattle 420, LLC,

Petitioner,

v.

Washington State Liquor and Cannabis Board,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

On three separate occasions over the course of 22 months, Seattle 420, LLC (Seattle 420)[1] sold cannabis to a minor during a compliance check conducted by the Washington State Liquor and Cannabis Board (WSLCB). Throughout Seattle 420's entire time as a licensed cannabis retailer, the law and applicable regulations were unequivocal: the consequence of a third sale-to-minor violation in a three-year period was license cancelation.

Seattle 420 seeks application of the current penalty rules promulgated in response to Engrossed Substitute Senate Bill (ESSB) 5318, 66th Leg., Reg. Sess. (Wash. 2019). However, ESSB 5318 had not passed either legislative chamber when Seattle 420's license was canceled. Moreover, the post-ESSB 5318 rules were not effective until February 22, 2020, 11 months after WSLCB issued its Final Order and two months after that order was affirmed by the superior court.

[1] Seattle 420, LLC, was licensed under the trade name Bellevue Marijuana, sometimes referring to itself as "BelMar" in prior pleadings.

In petitioning this Court, Seattle 420 has abandoned all issues raised before WSLCB at the administrative level. Instead, Seattle 420 argues that ESSB 5318, codified in part in RCW 69.50.562(2), and rules adopted in WAC 314-55-509 and -520 – -525, should be given retroactive effect concerning a violation that occurred in 2018. ESSB 5318 does not contain a retroactivity clause, its provisions do not clarify preexisting law, and the changes made in the bill were not limited to remedial process and procedure. Further, ESSB 5318 does not otherwise clearly imply legislative intent in favor of retroactivity. In summary, the Legislature did not intend ESSB 5318 to be retroactively applied.

The Court of Appeals appropriately addressed Seattle 420's arguments and, consistent with precedent, dismissed them. Seattle 420's attempt to craft an exception for their conduct after the fact does not present a question of substantial public interest. Because Seattle 420's Petition for

Review does not meet any of the criteria in RAP 13.4(b), this Court should deny discretionary review.

II. COUNTERSTATEMENT OF THE ISSUES FOR REVIEW

1. Whether the Appellant can overcome the presumption against retroactivity for ESSB 5318 despite the statute's (a) unambiguous prospective text, (b) absence of any explicit provision of retroactivity, and (c) non-remedial nature, given the inclusion of both substantive changes to penalties as well as procedural changes to enforcement practice?
2. Whether Appellant may challenge WSLCB's statutory authority for a rule that was adopted after Seattle 420's license cancelation and which has not been applied to this case?

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III. COUNTERSTATEMENT OF THE CASE

Through Initiative Measure No. 502, the people of Washington legalized the licensed retail sale of cannabis "to adults aged twenty-one and over." Laws of 2013, ch. 3, §§ 10, 13; RCW 69.50.354. The sale of cannabis to a minor is a serious public safety violation that has always carried severe consequences WAC 314-55-521; Former WAC 314-55-520 (2015); *See also* Wash. St. Reg. 13-21-104, 15-11-107, 16-11-110, 20-03-177. Even under ESSB 5318, cases involving the "[f]urnishing of marijuana product to minors" can be treated as violations without first issuing a notice of correction;[2] can be punished by license cancelation for a single violation;[3] and can affect penalty assessments for more than two years after the commission of the violation.[4]

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[2] ESSB 5318 §§ 3(1)(c)(ii), 6(2)(b)(ii)
[3] ESSB 5318 § 6(2)(b)(ii)
[4] ESSB 5318 §§ 6(2)(b)(ii), 6(3)(b)

A. Seattle 420's History of Repeated Sale-to-Minor Violations and Resulting License Cancelation

Seattle 420 initially received a cannabis retailer license in January 2015. AR[5] 120. On September 20, 2016, Seattle 420 sold cannabis to a 19 year-old investigative aide during a routine compliance check. AR 120. WSLCB reached a compromise agreement with Seattle 420 in late December 2016 to reduce the penalty to $1,500 for a first violation. AR 121. On February 24, 2017, Seattle 420 again sold cannabis to another 19 year-old investigative aide, agreeing to a $2,500 penalty and 15-day license suspension for a second sale-to-minor violation. AR 124-25. Seattle 420 failed a compliance check for a third and final time on July 24, 2018, selling cannabis to a 20 year-old investigative aide. AR 103, 106, 113-16.

Regarding the third violation, an enforcement officer issued an Administrative Violation Notice (AVN) for selling

[5] Administrative Record will be referred to as AR and Clerks Papers will be referred to as CP.

cannabis to a minor and allowing a minor to frequent a restricted area in violation of WAC 314-55-079 and RCW 69.50.357, respectively. AR 67. The AVN cited the standard penalty of license cancelation for a third violation within a three-year period under former WAC 314-55-520 (2015).[6] AR 120, 124, 151.

Both parties filed cross-motions for summary judgment during administrative review, and the Administrative Law Judge granted WSLCB's motion in an initial order. AR 90, 129. Seattle 420 unsuccessfully argued that the compliance check had been illegal, and arbitrary and capricious, because WSLCB had failed to comply with what Seattle 420 alleged was a rulemaking requirement in RCW 69.50.560(2). AR 133-35. The initial order affirmed the AVN and its recommended penalties. AR 194. Seattle 420 filed a petition for review to WSLCB, which affirmed the initial order, waived the monetary penalty associated with the

[6] The monetary penalty for the minor frequenting violation is not at issue here, as the WSLCB's Final Order affirmed the violation but waived the penalty.

minor-frequenting violation, and ordered that Seattle 420's cannabis retail license be canceled on April 11, 2019. AR 207, 231-34.

B. Judicial Review of WSLCB's Final Order Canceling Seattle 420's License

Seattle 420 filed a petition for judicial review in King County Superior Court and moved to stay the license cancelation pending review. CP 1. The superior court denied the motion for a stay, and Seattle 420 sought an emergency stay and discretionary review from the Court of Appeals. The Court of Appeals denied the motion for an emergency stay, and WSLCB's Final Order canceling Seattle 420's license became effective on April 11, 2019. AR 231. On May 9, 2019, Seattle 420 stipulated to withdrawal of the request for discretionary review. Gov. Inslee signed ESSB 5318 into law four days later, with an effective date of July 28, 2019.[7]

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[7] ESSB 5318, Laws of 2019, ch. 394.

In briefing to the superior court, Seattle 420 argued for the first time that ESSB 5318, codified in pertinent part in RCW 69.50.562(2), should be applied retroactively to eliminate license cancelation as the penalty for its third sale-to-minor violation. CP 35. The superior court rejected both the retroactivity argument as well as the arguments that Seattle 420 had raised before WSLCB. CP 147-49. In rendering its decision on retroactivity, the court noted that ESSB 5318 had directed WSLCB to create some new penalties but observed that because that process was not yet complete, the superior court had "no authority to retroactively apply 'new rules' that have not yet been adopted." CP 149, ln. 21.

Seattle 420 appealed to Division 1 of the Court of Appeals. *Seattle 420, LLC v. Liquor & Cannabis Bd.*, No. 80904-1-I, 2021 WL 2911772 (Wash. Ct. App. July 12, 2021) (unpublished) (hereinafter Opinion). Seattle 420 repeated its prior arguments on retroactivity and the alleged rulemaking requirement and

added, for the first time on appeal, a conditional rule challenge to WAC 314-55-509(4).

The Court of Appeals affirmed the WSLCB's Final Order. Opinion at 2, 13. In discussing Seattle 420's retroactivity argument, the Court of Appeals thoroughly addressed the contention that ESSB 5318 was remedial in nature and intended to apply retroactively. Opinion at 10-12. The Court of Appeals concluded that:

> [The] language in the statute defeats any claim that the legislature intended to disallow the penalty imposed on Seattle 420. . . . The mere fact that the WSLCB ultimately developed a penalty schedule that was less severe than the one in effect at the time of Seattle 420's third violation does not render the bill remedial in nature. Given the presumption that laws are prospective and because the statute itself represents a substantive change in the law, we reject the contention that the law is retroactive.

Opinion at 12.

IV. REASONS FOR DENYING REVIEW

Seattle 420 fails to establish a basis for review. This case does not present an issue of substantial public importance, and the Court of Appeals' decision is not in conflict with case law.

Because the Petition fails to satisfy any of the four factors in RAP 13.4(b), review should be denied.

A. The Retroactivity of ESSB 5318 is Not a Question of Substantial Public Interest

This case involves none of the far reaching impact on other proceedings or public import that typically marks a matter of substantial public interest. Enforcement actions for violations that occurred under the prior rules are necessarily finite and decreasing. Rather, the unpublished decision of the Court of Appeals here affects only Seattle 420's individual interest and a dwindling number of enforcement actions initiated prior to the enactment of ESSB 5318 and its subsequent rulemaking.

Seattle 420 argues that this case is of substantial public interest because of its counsel's purported awareness of "numerous appeals" and other "pending enforcement actions that could be negatively influenced" by the opinion below. Petition at 6-7. Seattle 420 provides no further details to support this claim, and its counsel's conjecture about the potential impact of an unpublished opinion is not persuasive.

WSLCB enforcement actions for regulatory violations involve the application of the rules in effect on the date a violation occurred. WAC 314-55-509(4).[8] A *new* violation of a *current* regulation is assessed under the *current* penalty structure. Seattle 420's case is a *2018* violation of the *prior* regulations, assessed under the *prior* penalty structure. Therefore, the issue of ESSB 5318's retroactivity impacts only Seattle 420 or some other similarly situated party whose action in violation of the statute predate the new rules.

The judicial presumption to disfavor retroactivity is rooted in common sense principles of fairness. Seattle 420 seeks to avoid being held to the same basic standard of not selling cannabis to a minor three times in three years that nearly every one of their competitors was able to meet. Instead, Seattle 420 wants the rules of February 2020 to apply to their conduct from

[8] This citation is in reference to the application of WAC 314-55-509(4) to new enforcement actions. Seattle 420 also contests the legislative authority for this rule, despite its inapplicability to this case. Discussed in § IV.C, *infra*.

July 2018. Seattle 420's wish for a unique exception for their reckless conduct is not a question of substantial public interest.

B. The Court of Appeals Decision on ESSB 5318 is Consistent with Precedent on Retroactive Legislative Intent

Seattle 420 asserts that the Court of Appeals did not adequately discuss their argument on legislative intent, and that their holding was inconsistent with case law on remedially retroactive legislation. However, the plain language of the statute is prospective and gives no indication that the Legislature intended, or even contemplated, that ESSB 5318 would apply to an already-executed final order of the WSLCB.

The Court of Appeals focused on Seattle 420's argument characterizing the statute as remedial. In straining to reach that characterization, however, Seattle 420 fundamentally misunderstands the distinction between rights and remedies. The Opinion accurately describes modification of penalties under ESSB 5318 as "a substantive change in the law" affecting

the rights of cannabis licensees, which is categorically not remedial. Opinion at 11.

1. ESSB 5318's legislative preamble does not imply retroactive intent in a statute with otherwise unambiguously prospective language

Seattle 420 argues that ESSB 5318 should be retroactively applied based on a legislative intent expressed in findings contained in the preamble to the bill's operative provisions. Petition at 8-9. Seattle 420's analysis gives particular focus to the preamble's fifth sentence, which states:

> The risk taking entrepreneurs who are trying to comply with board regulations should not face punitive consequences for mistakes made during this initial phase of the industry that did not pose a direct threat to public health and safety.

Laws of 2019, ch. 394, § 1(5).

Seattle 420's focus on the Legislature's prefatory statements on the future of the cannabis industry is misplaced. First, the sale of cannabis to a minor is an immediate and direct

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threat to public safety. *See* WAC 314-55-521, former WAC 314-55-520. As such, the Legislature's statements are not applicable to the sales to minors.

Moreover, while legislative findings may aid interpretation, they cannot contravene the unambiguous language of a statute. *See State v. Alvarez*, 74 Wn. App. 250, 258, 872 P.2d 1123 (1994) (statement of legislative intent to make unlawful "the repeated invasions" of a person's privacy did not override unambiguous statute criminalizing a single act of harassment), *aff'd*, 128 Wn.2d 1, 904 P.2d 754 (1995).

Here, ESSB 5318's language is unambiguously prospective. Statutory language that is "expressed in the present and future tenses rather than the past tense . . . manifests an intent that the act should apply prospectively only." *Johnston v. Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d 637, 641-42, 538 P.2d 510 (1975).

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All[9] of ESSB 5318's relevant operative language is forward-looking. ESSB 5318 section two describes when WSLCB "*may issue* a notice of correction"; section three describes how WSLCB "*may issue*" a violation without first issuing a notice of correction if the WSLCB "*can prove*" certain violations have occurred; and section five discusses how WSLCB "*must make* recommendations" to licensees during a requested on-site consultation visit, instead of issuing a citation. Laws of 2019, ch. 394, §§ 2(1), 3(1)(c), 5(2) (emphasis added).

Similarly, section six of ESSB 5318 requires WSLCB to develop new procedures for issuing written warnings, waiving fines, and responding to requests for "compliance assistance," and section eight deals with WSLCB's handling of proposed settlement agreements. These provisions all concern actions

[9]Arguably, in ESSB 5318 § 3(1)(a) the language may be considered past tense, but that language describes where a licensee that "has previously been subject to an enforcement action for the same or similar type of violation" can receive an AVN without first receiving a notice of correction. It does not indicate a legislative intent for retroactivity.

WSLCB may take in future cases. The legislative text gives no indication that these directives were to have immediate effect on pending cases; much less have any application to past cases decided prior to the bill's adoption.

Seattle 420's reliance on the "unique situation" in *Snow's Mobile Homes* is also misplaced. *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216 (1972). In *Snow's*, the Legislature enacted an explicit tax exemption for mobile home dealerships and included an emergency clause to give it *immediate effect* in May 1969. *Id*. at 285. However, tax assessments had already started in January of that year, so the emergency clause's immediate effect language raised an ambiguity. *Id*. at 288. The Court reasoned that "[i]f the emergency clause was intended to have any effect, it must have been the intent that it affect the listing and assessing of property in 1969." *Id*. at 288. Otherwise, the emergency clause would be superfluous in an amendment to the next year's tax code.

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An ambiguity in an express effectiveness provision was resolved "in the light of the legislative and administrative history of the subject matter." *Id.* at 292. ESSB 5318 does not contain a similar express provision, the legislative history contains no clear indication of retroactive intent, and its plain language is unambiguously prospective.

2. ESSB 5318's statutory directives to engage in rulemaking do not indicate legislative intent for subsequently adopted rules to apply retroactively

ESSB 5318 directed WSLCB to develop rules that would change certain cannabis rules and regulations, but did not include a retroactivity provision. ESSB 5318 § 6 (codified as RCW 69.50.562). Instead, the bill directed WSLCB to engage in rulemaking to implement the prescribed changes, indicating that the Legislature understood that its directives would not take effect immediately, much less retroactively.

Throughout the bill, the Legislature directed WSLCB to adopt rules "to implement and enforce" its directives. *See, e.g.,* ESSB 5318 §§ 3(2), 4(1), 4(2), 4(3), and 6(2).

These directives are forward-looking and, therefore, necessarily prospective. In other words, until the revised rules could be written and adopted, there were no new rules that could be applied to Seattle 420's past violations or its already-imposed cancelation penalty. Thus, without a provision for retroactivity, the anticipated rules did not alter the outcome of previously completed cases such as this one.

Seattle 420 erroneously argues that retroactivity should be presumed because the rulemaking process resulted in an overall more lenient penalty schedule. Petition at 12. In support of this argument, Seattle 420 overstates the applicability of *State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). In *Heath*, this Court retroactively applied a statute permitting a judicial stay of the automatic 5-year revocation of a habitual traffic offender's motor vehicle license if the offender is undergoing treatment for alcoholism. *Id*. at 197 & n.1.

The *Heath* Court acknowledged the presumption that statutes apply prospectively but noted that where a statute is

remedial and would be furthered by retroactive application, the presumption may be reversed. *Id.* at 198. In the present situation, however, even if the statute is deemed to be remedial in part, there is no argument that the purpose of the statute would be furthered by retroactive application. To the contrary, the Legislature specifically provided that as to **sales to minors**, revocation is an appropriate sanction after even one violation. RCW 69.50.562(2)(b)(ii) (emphasis added). This situation differs greatly from *Heath*, where the purpose of the statutory change was to encourage and support those seeking treatment for their medical condition of alcoholism.

Separately, exclusively remedial statutory amendments carry a presumption toward retroactive application; however, ESSB 5318 is not exclusively remedial as discussed *infra*.

3. ESSB 5318 is not remedial in nature because it affects the substantive rights of licensees

Seattle 420 argues for retroactive application on the basis that ESSB 5318 is "remedial in nature." Petition at 14-18. The Court of Appeals correctly rejected this argument. Opinion at 12.

Remedial statutes "relate[] to practice, procedure, or remedies and do[] not affect a substantive or vested right." *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984) (citing *Johnston v. Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975)). As this Court reiterated in *State v. Jefferson:*

> [Washington Courts] have defined a "right" as a "legal consequence deriving from certain facts," while a "remedy" is a "procedure prescribed by law to enforce a right."

192 Wn.2d 225, 248, 429 P.3d 467 (2018) (quoting *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997) (quoting *Dep't of Ret. Sys. v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994)) (internal quotation marks omitted).

ESSB 5318 does affect substantive rights. It directs WSLCB to adjust the potential penalties some licensees will face for violations; indeed, this is the very reason that Seattle 420 urges its application. Far from not affecting a substantive right,

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Seattle 420 wants the statute to apply in this situation "*because* it provides [it] with a new substantive right." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 224, 173 P.3d 885 (2007) (emphasis in original).

As the Court of Appeals correctly observed:

> [ESSB 5318] is not remedial simply because the purpose is to consider improvements to prior practices. The punishments which were ultimately adopted via WAC 314-55-521, though less harsh, substantively changed the law which is an indicator that the law is not remedial. See Magula v. Benton Franklin Title Co., 131 Wn.2d 171, 182, 930 P.2d 307 (1997) ("[A]n amendment may apply retroactively if it is curative or remedial and intended to clarify rather than change the law."). Since this is a substantive change in the law, modifying the resulting penalty for sale to a minor, the bill is not remedial.

Opinion at 11.

In taking issue with this accurate statement of the law (Petition at 15), Seattle 420 first overstates the utility of the Opinion's citation to *Magula.* The *Magula* quote states the principle that a change in the law that affects substantive rights is categorically different from either a curative or remedial

amendment that seeks to clarify the law. *See Magula*, 131 Wn.2d at 181-82. This proposition is supported by precedent, which makes clear that a statute is remedial where it does not affect a substantive right. Opinion at 10-11 (citing *Johnston v. Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975) ("A statute is remedial and has a retroactive application when it relates to practice, procedure or remedies and does not affect a substantive or vested right.") (citation omitted).

Second, Seattle 420's cited examples of "prior opinions [] where substantive changes in the law were deemed remedial" are the exact opposite. Petition at 15-17. As examples, Seattle 420 lists *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283; *State v. Heath*, 85 Wn.2d 196; and *Macumber v. Shafer*, 96 Wn.2d 568, 637 P.2d 645 (1981). None of these cases involve retroactive judicial application of a substantive change to a legal right because the amendment was remedial in nature. Petition at 15-17.

As discussed in § IV.B.1 *supra*, *Snow's* analyzed the legislative intent of "immediate effect" language in an express statutory provision on the effectiveness and applicability of that statute. The statute was not remedial, because it affected rights related to taxation. Rather than any remedial nature of the statute, the Court's analysis in *Snow's* was instead centered on the express immediate effect language; finding that there was clear legislative intent to retroactively modify certain rights. Specifically, "whether the legislature intended to abolish the right to assess and levy ad valorem taxes in the year 1969." *Snow's Mobile Homes*, 80 Wn.2d at 288.

As also discussed in § IV.B.2 *supra*, *State v. Heath*, 85 Wn.2d 196, concerned a statute that allowed for a judicial stay of a habitual traffic offender's driving suspension. *Id.* at 197. The statute affected procedure rather than substance: specifically, it introduced a procedural exception to a license suspension order under specified conditions. *Id.* at 198. The legal consequences of the driver's status as a habitual traffic offender

was not affected, only the process. *Id*. Therefore, this Court found the statute was "patently remedial" because it "allows alcoholics to receive treatment for their illness," without affecting the substantive habitual traffic offender finding. *Id*.

In *Macumber v. Shafer*, this Court considered whether a statute increasing the homestead exemption amount was retroactively applicable to a loan that predated the increase. 96 Wn.2d 568, 569, 637 P.2d 645 (1981). The Court held that the statute was remedial because it "merely increased the dollar amount of the homestead exemption." *Id*. at 570. Further, the retroactive application of a statute increasing the homestead exemption was "merely a modification of the remedy" and did not violate the contract clause of the federal constitution because "the remedy could be modified as long as it does not totally deny or seriously impair the value of the right" of the creditor. *Macumber v. Shafer*, 96 Wn.2d 568, 571, 637 P.2d 645 (1981) (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481 (1934)). In other

words, the increase was a cost-of-living adjustment that did not make a substantive change in the homestead exemption law and it did not affect the creditor's vested right to repayment.

Finally, Seattle 420 suggests a distinction between laws that *impose* penalties and those that *modify* them. Petition at 17-18; *But see Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 947, 117 S. Ct. 1871, 138 L. Ed. 2d 135 (1997) (The impairment of a vested right or creation of a new liability "constitute[s] a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity."). As the Court of Appeals correctly noted:

> [ESSB 5318 § 6] expressly allowed for the WSLCB to establish penalties which could be harsher than the scheme which existed at the time of Seattle 420's third violation, particularly with regard to sales of marijuana to a minor. The language of this statute indicates that the WSLCB could have penalties resulting in the loss of a license 1) after one violation of furnishing marijuana to a minor, or 2) after two sales to a minor in a two year period. The mere fact that the WSLCB ultimately developed a penalty schedule that was less severe than the one in effect at the time of Seattle 420's

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> third violation does not render the bill remedial in nature.

Opinion at 12.

The correct measure of remedial retroactivity is to determine if a change in the law substantively affects a legal right, or merely affects the procedures prescribed by law to enforce that right. Using this measure, the Court of Appeals' analysis was straightforward; because ESSB 5318 made a substantive change in the law "modifying the resulting penalty for sale to a minor, the bill is not remedial." Opinion at 11.

C. Seattle 420 has failed to properly present its challenge to WAC 314-55-509 and is no longer in the rule's zone of interest

Seattle 420 additionally asks this Court to declare WAC 314-55-509(4) invalid as lacking statutory authority. Petition at 12-14. This rule was enacted during the rulemaking directed by ESSB 5318, and it became effective on February 22, 2020, long after the agency action in this case. In relevant part, WAC 314-55-509(4) states:

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> For violations that occurred before the effective date of these rules, enforcement action will be based on the rules that were in effect on the date the violation occurred.

Seattle 420's rule challenge was offered conditionally. App. Reply Brief at 17. The Opinion does not address the rule challenge because it was able to resolve all issues in this case without doing so.

The same timing analysis that applies to ESSB 5318 also applies to this procedural challenge to WAC 314-55-509(4). Both WAC 314-55-509 and ESSB 5318 became effective long after all of the reviewable events in this case, and neither provides a basis for the requested relief. As explained *supra*, ESSB 5318 directed WSLCB to change the cannabis penalties without including any provision that would make the new rules retroactive. In its rulemaking, WSLCB determined that enforcement actions for past conduct would be based on the penalties that were in effect at the time the conduct was committed, and it enacted WAC 314-55-509(4) to make that rule

clear. Nothing in ESSB 5318 conflicts with WSLCB's determination.

As the agency designated by the Legislature to regulate the State's cannabis industry, WSLCB's interpretation of ESSB 5318 and the relevant statutes and regulations "is entitled to great weight" and should be given deference. *See Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 593, 90 P.3d 659 (2004) (courts give "great weight" to regulatory agency's interpretation of ambiguous statutes that fall within its special expertise provided the interpretation does not conflict with statute). Thus, WSLCB's interpretation of ESSB 5318 and its decision to implement WAC 314-55-509(4) as a bright-line rule for determining which penalty structure applies to a particular violation were both well within its regulatory authority. Seattle 420 has not shown that WSLCB's actions failed to consider facts and circumstances or were willful or unreasoning. *See Stewart v. Dep't of Soc. & Health Servs.*, 162 Wn. App. 266, 273, 252 P.3d 920 (2011).

Moreover, Seattle 420 is not in the zone of interest of the rule because WAC 314-55-509(4) applies prospectively to enforcement actions initiated after the rule's effective date. Seattle 420's cannabis retailer license was canceled on April 11, 2019; WAC 314-55-509 became effective on February 22, 2020. Enforcement actions can only be initiated against a license holder or a "true party of interest in a marijuana license." WAC 314-55-010(19). Without holding a cannabis license, Seattle 420 has no standing to challenge a rule it was never subject to because it is not aggrieved, adversely impacted, prejudiced, or otherwise affected by the rule. *See generally City of Burlington v. Liquor Control Bd.*, 187 Wn. App. 853, 869, 351 P.3d 875 (2015), as amended (June 17, 2015) (citing *Trepanier v. City of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992) ("Conjectural or hypothetical injuries are not sufficient for standing.").

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Seattle 420 has failed to provide this Court with a valid legal reason for declaring WAC 314-55-509(4) to be invalid. Seattle 420's rule challenge does not merit this Court's review.

V. CONCLUSION

Seattle 420's Petition for Review fails to satisfy any of the criteria for accepting review in RAP 13.4(b). The Court of Appeals, consistent with the precedent of this Court, found that ESSB 5318 should not be retroactively applied because it affects the substantive rights of cannabis licensees and its plain language manifests an intent that changes apply prospectively. Likewise, the Court of Appeals was correct to not consider Seattle 420's rule challenge where Seattle 420 lacks standing to raise such a challenge, and where the rule does not conflict with

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ESSB 5318. Therefore, Seattle 420's Petition for Review should be denied.

This document contains 4,892 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 8th day of October 2021.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on October 8, 2021, I served a true and correct copy of the *Answer to Petition for Review* by e-mail through the Court's e-filing system:

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DATED this 8th day of October 2021 at Olympia, Washington.

KELLI LEWIS
Legal Assistant

AGO/GCE

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