No. 102144-5

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION I
84640-0-I

FREEDOM FOUNDATION,

Appellant,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, et al.

Respondents.

PETITION FOR REVIEW BY THE WASHINGTON STATE SUPREME COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

I. IDENTITY OF PETITIONER

Petitioner is Plaintiff-Appellant Freedom Foundation, a Washington non-profit organization.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of *Freedom Foundation v. Washington State Public Disclosure Commission, et al*., No. 84640-0-I (April 3, 2023) (unpublished), and Order Denying Motion for Reconsideration, No. 84640-0-I (May 31, 2023).[1]

III. ISSUES PRESENTED FOR REVIEW

The Administrative Procedure Act ("APA"), RCW 34.05, does not grant agencies absolute unreviewable discretion to selectively enforce the law in a partisan manner by withholding the law's application from favored organizations. Yet, due to the Fair Campaign Practices Act's ("FCPA") unique aims and enforcement regime, the Court of Appeals ("COA") error effectively grants such power to the Public Disclosure Commission ("PDC") by making it virtually impossible for an

[1] The Appendix is cited as "A."

aggrieved party to prove an "injury in fact" caused by the agency's decision to *decline* enforcement of the FCPA, RCW 42.17A. Preventing such discretion is an issue of substantial public interest that this Court should decide to prevent partisan application of the FCPA. This case presents an excellent opportunity to do so because the "diversion of resources" standing doctrine, interpreted properly, is well-suited to advance the FCPA's unique aims and enforcement regime.

The issues presented for review are of substantial public interest and are issues of first impression to this Court:

1. Under the "diversion of resources" standing doctrine, does an organization's injuries caused by the PDC's pattern of failing to enforce the FCPA constitute "injury in fact" sufficient to confer standing under the APA, RCW 34.05.530?

2. Did the Superior Court err when it held that the Foundation's interests are not among those the PDC was required to consider when the PDC considered the Foundation's complaint?

IV. STATEMENT OF THE CASE

A. The Parties

Washington law created the PDC and tasked it with enforcing the FCPA, RCW 42.17A.100 – the unique goal of which is to protect "public trust" and "confidence" in Washington's democratic processes by ensuring that political campaigning and funding are fully disclosed to the public. RCW 42.17A.001 (1)-(6), (9). The Freedom Foundation (the "Foundation") shares these goals and exists to serve public employees of all political persuasions by educating them on the operations, spending, and structure of the unions representing them, including the manner and extent to which unions engage in electoral political activity ("political activity"). CP 9 (¶11). The Foundation is the only entity in Washington with this mission.

Headquartered in Olympia, Washington, the Washington Federation of State Employees ("WFSE") is Washington's largest union representing state employees. WFSE represents

about 46,000 employees and spends significant sums on political activity in Washington. Reports filed with the PDC by *recipients* of *some* of WFSE's contributions indicate that the union has contributed *at least* $2.7 million since 2016 to Washington candidates and political committees. AR 00004 & 00125. WFSE possesses an immense "financial stake in matters before state government" and, consequently, is one of Washington's biggest and most powerful political spenders. RCW 42.17A.400(1)(b). Yet, WFSE does not report *any* political contributions it receives or expenditures it makes, even though it should do so under the FCPA's definition of political committee. RCW 42.17A.005(41).

B. The PDC's Inaction and the Foundation's Diversion of Economic Resources

The FCPA obligates the PDC to "[c]ompile and maintain a current list of all filed reports and statements" cataloging the political activity which political committees must report under the FCPA. RCW 42.17A.105(3). The PDC also "*shall* investigate and report apparent violations of the" FCPA when parties fail to

submit the proper reports. RCW 42.17A.105(4) (emphasis added). The Foundation uses relatively simple research methods to investigate the PDC's database containing reports of political activity. The Foundation then uses this information to accomplish its mission to "inform[] public employees, and the public in general, about political activity of large labor organizations…" CP 66 (¶ 8).

When the PDC fails to perform its obligations under the FCPA – in this case, by continually refusing to enforce the FCPA against WFSE – the PDC prevents the Foundation from accomplishing its mission to educate public employees on the political activity of the unions representing them. This leaves the Foundation with a choice between two injuries: either be unable to perform its mission of educating public employees, or expend additional resources to counteract the PDC's inaction by (1) engaging in additional costly, cumbersome, and time-consuming research to discover union political activity, and (2) preparing and filing complaints with the PDC to get the PDC to fulfill its

obligation under the FCPA to fairly "investigate and report apparent violations of the" FCPA "upon complaint." *See* CP 62-68; *see also* RCW 42.17A.105(5).

Whereas WFSE's political activity could be readily ascertained from the PDC's website in as little as a few minutes, attempting to document the political activity of a nonreporting political committee like WFSE takes considerably more resources. CP 67 (¶¶ 11-12). No alternative source of information, e.g., compilations of reports by the federal Department of Labor, offers insights into WFSE's political activity that is as timely, comprehensive, accurate, or easily accessible as the disclosure required of organizations by the FCPA. *Id.* at 63-66 (¶ 6). Thus, the absence of any reports filed by WFSE as a result of PDC inaction prevents the Foundation from accomplishing its mission of educating public employees, thus requiring the engagement of the cumbersome, expensive, and time-consuming methods of researching the federal compilations described at CP 63-66 (¶ 6). These *additional*

resources that the Foundation diverted toward this costly form of research was necessary to avoid the worse injury of being unable to fulfill its mission to public employees. Additionally, preparing and filing administrative complaints with the PDC to alert the PDC of WFSE's FCPA violations also requires the *additional* expenditure of funds.

These diverted resources would have otherwise been devoted to advancing the Foundation's mission by informing public employees about political activity, representing employees whose rights have been violated, or advancing the Foundation's mission in other ways. *See* CP 66-67 (¶¶ 7-10).

C. The Foundation's Nonmonetary Injuries

The Foundation also suffers nonmonetary injuries in two ways. First, since federal law does not require unions like WFSE to report as much of its political activity as the FCPA, the Foundation's additional, costly research methods cannot discover much of WFSE's political activity *at all*. CP 65-66 (¶¶ 6(d)(iii)-(iv). Since the PDC does not enforce the FCPA against

WFSE, no amount of research by the Foundation will discover this activity. Thus, even though this injury cannot be monetized, it prevents the Foundation from accomplishing much of its mission to educate public employees.

Second, also essential to the Foundation's mission is educating public employees on the political activity of large labor organizations in time to alert those employees of that activity *when it matters most to those employees*, i.e., *before* the elections the activity was intended to influence. Facilitating disclosure of time-sensitive electoral activity is an especially important purpose of the FCPA. *See* RCW 42.17A.750(1)(d)(ii) (when assessing penalties for FCPA violations, courts should consider the "impact on the public, including whether the noncompliance deprived the public of timely or accurate information during a time-sensitive period or otherwise had a significant or material impact on the public…"). The Foundation's mission is impaired by the fact that no alternative source of information about a union's political activity is as

timely as the reports filed by the PDC about political committees. This renders the Foundation unable to accomplish a large aspect of its organizational mission. CP 65-66, 6n7 (¶¶ 6(d), 11).

D. The Foundation's Administrative Complaint

To counteract the PDC's inaction – its refusal to apply the FCPA to WFSE – the Foundation filed this complaint with the PDC alleging that WFSE violated the FCPA so the PDC would perform its duties under RCW 42.17A.105(3)-(5) and require WFSE to report its political activity, allowing the Foundation to continue educating public employees on union political activity. Instead, the PDC took the affirmative step of declining any action. The PDC's decision to dismiss the Foundation's complaint is egregiously and demonstrably bad. It contains obvious legal errors, lacks any supporting evidence at all, and is arbitrary and capricious. There are few explanations for the PDC's dismissal other than partisanship, laziness, or incompetence.

E. The Proceedings Below

1. The Superior Court's Decision

The Foundation filed a Petition for Review in Thurston County Superior Court. The Office of the Attorney General ("AGO") filed a CR (12)(b)(6) Motion to Dismiss arguing that the Foundation lacked standing to bring suit under RCW 34.05.530. The lower court granted the AGO's Motion to Dismiss, generically concluding that the Foundation failed to prove injury in fact and, therefore, lacked standing to seek review of the PDC's decision. VRP at pp. 22-23. The court also held that the Foundation's interests "did not fall within the zone of interests required to be considered by the PDC." *Id*. at 23.

2. The Court of Appeals' Decision

The Court of Appeals affirmed. The appellate court implicitly agreed with the Foundation that the "diversion of resources" doctrine found in extensive federal case law applies when agency action *or inaction* "perceptively impair[s] [an] organizational plaintiff's ability to provide the services it was

formed to provide." A.006 (internal citations and quotations omitted). The court observed that when this occurs, "there can be no question that the organization suffered injury in fact." *Id.*; *see also* A.005-006, 008, 011, 012-013. However, the court concluded that the Foundation did not have standing under the diversion of resources doctrine because the Foundation supposedly never "changed its behavior" since it "endeavors into the same types of research both before and after the PDC's decision." A.012. The court did not address the zone of interest test, or the Foundation's argument that its nonmonetary injuries constituted injury in fact. A.013.

V. ARGUMENT

This case involves an issue of substantial public interest because the COA's misapplication of the diversion of resources standing doctrine makes it virtually impossible for an aggrieved party to prove an injury in fact caused by a PDC decision to decline enforcement of the FCPA. This empowers the PDC to weaponize the FCPA against disfavored individuals and

organizations by granting to the PDC absolute and unreviewable discretion to apply the FCPA in a partisan manner. The Foundation respectfully requests that this Court grant review on this important matter of first impression pursuant to RAP 13.4(b)(4), reverse the COA's decision, and provide Washington courts with uniform authoritative guidance on the application of an important standing doctrine that particularly suits the FCPA's unique enforcement regime and prevents the PDC from possessing an unreviewable discretion that undermines the FCPA.

A. The Diversion of Resources Standing Doctrine is Particularly Suited to Effectuate the FCPA's Unique Enforcement Regime, and its Nullification by the Court of Appeals Under the FCPA is a Matter of Substantial Public Interest Because it Empowers the PDC With Unreviewable Discretion to Apply the FCPA in a Partisan Manner

A person has standing to obtain judicial review of agency inaction only if that person is "aggrieved or adversely affected" by that inaction. RCW 34.05.530. The answer to this question is relatively simple to determine under most statutory regimes. *See*,

e.g., *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039-41 (9th Cir. 2015) (an agency's failure to enforce a law requiring it to assist people with voter registration injures an organization which expends resources registering people to vote); *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 745-46, 748 (9th Cir. 1991) (an agency's failure to provide translators at deportation hearings injures an organization that expends resources to assist immigrants in, inter alia, legal proceedings); *California v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* ("BATFE"), Case No. 20-cv-06761, 2023 WL 1873087, at *13-15 (N.D. Cal. Feb. 9, 2023) (an agency's failure to regulate a particularly dangerous kind of firearm injures an organization which expends resources to promote gun safety and prevent gun violence).

The question of who is "aggrieved" by agency inaction *under the FCPA*, however, is a more difficult question because the FCPA's purpose is to protect "public trust" and "confidence" in Washington's democratic processes through the *disclosure of*

information. *See* RCW 42.17A.001(5), (flush paragraph); RCW 42.17A.400(1)(b); *see also* RCW 42.17A.750(1)(a) (the FCPA is intended to "protect the right of the electorate to an "informed and knowledgeable vote."). Indeed, the FCPA's unique enforcement regime works by compelling the disclosure of information and fining those who violate the FCPA. Thus, the result when the PDC fails to act is an *absence of information* that empowers organizations to engage in *secret* political activity. Unearthing something unknown to exist can be extremely difficult, if not impossible, and proving that one was actually harmed by a lack of knowledge of unknown secret conduct is even more futile. Thus, the question of who is aggrieved by the *absence* of information and *hidden* political activity is a nebulous one.

Despite this, the FCPA's clear purpose is to protect the public from this exact kind of nebulous harm *and*, importantly, for its unique enforcement regime to be used to *remedy* such harm when it occurs. *See* RCW 42.17A.001, RCW 42.17A.750.

One is hard-pressed, however, to find – or even abstractly think up – any scenario in which such harm could be proven at all, let alone at the standing stage of litigation. The difficulty of proving harm caused by absent information is demonstrated by the fact that *none* of the factors courts can consider when assessing remedies under the FCPA relate at all to the *actual* harm caused by the violation of the FCPA, i.e., the harm caused by the absence of information and secret political activity.[2] *See* RCW 42.17A.750. Yet, *actual* harm caused by *absent* information and *secret* (when it occurs) political activity is exactly what a litigant is expected to prove to establish standing under the FCPA. *See, e.g.*, *Washington State Hous. Fin. Comm'n v. Nat'l Homebuyers Fund, Inc.*, 193 Wn.2d 704, 716, 445 P.3d 533 (2019) ("The

[2] The factor that comes closest to relating to *actual* harm is whether a violation of the FCPA "probably" affected the outcome of an election. RCW 42.17A. 750(1)(a). It is doubtful, however, whether evidence showing that the absence of information and the secret political activity "probably" influenced an election would suffice at the standing stage. Regardless, the public's trust and confidence in elections could be significantly harmed even without an election's outcome being objectively affected.

injury in fact part of the standing test precludes those whose injury is speculative or abstract, rather than actual, from bringing an action."). This conundrum belies the APA's "generous review provisions" which "serve a broadly remedial purpose." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156 (1970); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) ("The APA was intended to confer generous review of agency action…").

It is no surprise, then, that alternative standing doctrines have been insufficient under the FCPA. *See*, *e.g.*, *Freedom Found. v. Bethel Sch. Dist.*, 14 Wn. App. 2d 75, 87-90, 469 P.3d 364 (2020) (organization did not possess standing because it was not a "party" to its own FCPA complaint, did not possess complainant standing, and did not suffer "competitive injuries"); *Freedom Found. v. Washington State Pub. Disclosure Comm'n*, 16 Wn. App. 2d 1037, 2021 WL 463364, *5 (2021) (unpublished), *review denied sub nom. Freedom Found. v. Pub.*

Disclosure Comm'n, 197 Wn.2d 1018, (2021) (organization did not possess associational standing).

Moreover, despite the fact that the FCPA is designed to prevent harm to "public trust" and "confidence," *see* RCW 42.17A.001 ("public" is mentioned twelve times), *and* be used to remedy such harm, RCW 42.17A.750, as a general APA rule standing on behalf of the public, a member of the public, or a portion of the public is impossible because "[a]n interest sufficient to support standing to sue…must be more than simply the abstract interest of the general public in having others comply with the law." *Chelan Cnty. v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002). Yet, "having others comply with the [disclosure] law" is exactly how the FCPA's enforcement regime accomplishes the FCPA's purposes.

Thus, the FCPA's enforcement structure presumes that parties will police each other under the FCPA by filing complaints with the PDC, and that the PDC will fairly apply the FCPA against the subjects of those complaints when warranted.

RCW 42.17A.105(5) ("The commission *shall [u]pon complaint* or upon its own motion, *investigate and report apparent violations* of this chapter to the appropriate law enforcement authorities…" (emphasis added)); *see also* RCW 42.17A.400(2)(a) (the FCPA's intent is to "[e]nsure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes."). Logic dictates, and the FCPA presumes, that there is likely only one class of persons that would challenge the PDC when it declines to enforce the FCPA against an individual or organization; specifically, those persons who oppose said group. *Cf. St. Joseph Hosp. & Health Care Ctr. v. Dept. of Health*, 125 Wn.2d 733, 742, 887 P.2d. 891 (1995) (if opponents of the beneficiaries of agency action or inaction have "no standing to challenge the agency's actions as arbitrary, as a practical matter no one will."). Obviously, the organizations the PDC empowers to engage in secret political activity will not challenge the PDC's failure to enforce the law against them. Thus, under the FCPA, this makes

opponents of the beneficiary of PDC inaction "peculiarly suitable challengers of administrative neglect…" even if actual harm is difficult to prove since the agency inaction did not directly impact them as would a positive agency action. *Id.*

This enforcement regime makes sense given the PDC's unique aims, the APA's "generous review provisions," and the simple logic that PDC commissioners and investigators are not immune to the very political pressures and corruption the FCPA is designed to expose and prevent (especially when their jobs depend on politicians who accept campaign donations from the organizations accused of campaign finance violations before the PDC).[3] Partisan enforcement of the FCPA thus undermines the FCPA's entire purpose.

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[3] This enforcement regime is especially important given the Legislature's recent amendments which virtually rescind the FCPA's citizen action provision, originally passed by *the people*. *See* Laws of 2019, ch. 428 (S.H.B. 1195). (It is no surprise that the politicians regulated by the FCPA would like to keep enforcement of the FCPA "in house" and away from the people.)

Therefore, this Court should craft reasonable standing rules under the FCPA that take into consideration the FCPA's unique purposes and enforcement regime, but without jettisoning the APA's requirement that a party be "aggrieved or adversely affected" by an FCPA violation. Proper application of the diversion of resources standing doctrine in this case presents this Court with an excellent opportunity to do so.

The diversion of resources doctrine allows an organization to establish an "injury in fact" by showing it changed its behavior by diverting resources from its mission to counteract an agency's inaction. *See infra* at 25-26. This doctrine is well-suited to serve the FCPA's purpose because it serves the FCPA's unique enforcement regime by giving a party seeking to compel the *disclosure of information* under the FCPA a reasonable opportunity to show standing, while also honoring the limiting principle that a party must be "aggrieved or adversely affected" to have standing. For example, an organization would not need to accomplish the near-impossible task of proving that either (1)

the public trust or confidence was harmed, or (2) the organization (or anyone, for that matter) was harmed by the effect that the absence of information/secret political activity had on Washington's elections and campaigns (the FCPA's dual purposes). At the same time, however, simply expending resources to counteract agency inaction (e.g., on costly research or preparing and filing complaints) would not confer standing so long as those resources were not diverted from a mission the complainant was already pursuing independent of the counteracting behavior funded by the additional expenditures. *See supra* at 4-9; *infra* at 25-30. Thus, the diversion of resources doctrine is well-suited to effectuate the FCPA's unique aims and enforcement regime without granting a "free pass" to any party trying to establish standing, especially considering parties must still satisfy the zone of interest and redressability requirements in RCW 34.05.530.

The COA's misapplication of the diversion of resources doctrine, however, eliminates the doctrine from being applied

under the FCPA entirely. Since the FCPA is a transparency law, the PDC's failure to enforce the FCPA results in an absence of information – harm from which is exceedingly difficult, usually impossible, to prove. Under the COA's reasoning, however, a party's attempt to discover that secret political activity can never cause a legally cognizable injury because the act of unearthing that secret activity itself cannot be considered the requisite "change in behavior" since, by definition, the expenditures necessary to counteract the injury caused by that secrecy will (1) be of the same category of behavior before and after the inaction ("research"), *see* "categorical error" *infra* at 26-28, and/or (2) preexist the PDC's formal decision dismissing a complaint that is based on the expenditures which led to unearthing the secret activity. *See* "fulcrum error" *infra* at 29-30.

Without proper application of the diversion of resources doctrine under the FCPA, no party will be able to prove actual harm caused by the absence of information caused by a PDC decision to *not* apply the FCPA; this even though the APA at

RCW 34.05.570(3)-(4) contemplates review of agency inaction for a plethora of reasons, including, presumably, a PDC "exercise of discretion" that permits secret political activity. RCW 34.05.570(4)(c). The COA's decision below nullifies these "generous" review provisions entirely in the context of the FCPA – leaving the PDC with unreviewable discretion to apply the FCPA in a partisan manner. This is clearly not the intent of the APA or the FCPA.

This empowers the PDC to sidestep its duty to fairly enforce the FCPA by simply refusing to investigate parties it favors and then dismissing private party complaints in decisions that will always go unreviewed since a litigant can never establish an injury in fact. It should go without saying that such "discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives, and for that reason the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion." *Heckler v. Chaney*, 470 U.S. 821, 848 (1985), (*Marshall, J. concurring)*; *see also Adams*

v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (unreviewable discretion can lead to an agency's "general policy which is in effect an abdication of its statutory duty" to enforce the law.).

In conclusion, the effect of the rulings below is to prevent judicial review of a wide swath of rulings where the PDC exercises "discretion" to decline enforcement of the FCPA, even if it exercises its discretion in a partisan manner. This effectively nullifies the FCPA's immensely important purposes. Secret political activity is the death knell to the "sound governance of a free society," RCW 42.17A.001(11), especially when only certain factions are permitted to engage in such secret activity. Preventing the PDC from possessing unreviewable discretion to weaponize the FCPA is of substantial public interest and this Court should grant review to provide authoritative guidance to lower courts on a standing doctrine that is well-suited to prevent such discretion.

B. The Court of Appeals Erroneously Applied the Diversion of Resources Standing Doctrine When it Misinterpreted How an Organization Must "Change its Behavior" to Counteract Agency Inaction.

Under the diversion of resources doctrine, "[a]n organization's injury confers standing if it constitutes "a drain on its resources resulting from counteracting the effects of the defendant's actions." *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 904 (9th Cir. 2002); *see also El Rescate Legal Servs.*, 959 F.2d at 748 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *Glob. Neighborhood v. Respect Washington*, 7 Wn. App. 2d 354, 387, 434 P.3d 1024, (2019), *review denied*, 193 Wn.2d 1019, (2019), and *cert. denied*, 140 S. Ct. 638, 205 L. Ed. 2d 389 (2019) ("An organization… 'has standing in its own right with concrete and demonstrable injury to its activities caused by a drain on the organization's resources.'"). An organization must "change its behavior related to its mission in a specific way because of a government action or inaction." *La Raza*, 800 F.3d

at 1040). It is only necessary for a party to "broadly allege[]" such injury at the pleading stage. *Id.*

The COA misapplied the doctrine's "change in behavior" requirement in two ways.

First, the COA incorrectly applied a categorical approach to the question of what constitutes a "change in behavior", rather than a resource-based approach (the "categorical error"). This led the COA to erroneously conclude that the Foundation did not "change its behavior" since it supposedly "endeavors into the same *types* of research both before and after the PDC's decision." A.012 (emphasis added). However, the "behavior" that an organization must change relates to its *financial expenditures*, not the category or "type" of behavior those expenditures fund.

For example, the lower court in *La Raza* similarly erred in its application of the diversion of resources doctrine because it failed to acknowledge that an organization suffers legally cognizable injury even when its additional expenditures are dedicated to the same *type* of activities it engaged in before an

agency's inaction. 800 F.3d at 1039-40. In *La Raza*, the agency had failed to assist individuals with voter registration in its public assistance offices, a duty imposed on it by Nevada law. *Id.* at 1036-37. The plaintiff organizations had standing because they had to *expend additional resources* on efforts to assist individuals with voter registration who, had the agency enforced the law, should have been offered voter registration assistance by the agency. *Id.* at 1040. It was irrelevant that the organizations made expenditures on voter registration both before and after the agency's inaction. *Id.* at 1039-41. The relevant factor was the additional financial resources the organizations *spent* on registering voters they would *not have otherwise had to spend* but for the agency's inaction. *Id.*; *see also BATFE*, 2023 WL 1873087, *14 ("The fact that a plaintiff has previously engaged in a particular kind of activity does not mean that the plaintiff is going about its 'business as usual' if it engages in the same kind of activity in response to the defendant's conduct, so long as the

uptick in that activity causes a diversion of resources away from the organization's affairs…").

Similarly, the Foundation showed it made additional *expenditures* in two ways: (1) engaging in costly, cumbersome, and time-consuming research methods to discover WFSE's political activity, and (2) preparing and filing a PDC complaint. *See supra* at 4-7; CP 62-68. The Foundation would not make these additional expenditures *but for* the PDC's inaction of failing to enforce the FCPA against WFSE – which is similar to the Nevada agency refusing to enforce Nevada law. *La Raza*, 800 F.3d at 1039-40; *see also id.* at 1040 (organization must "expend[] additional resources that [it] would not otherwise have expended, and in ways that [it]would not have expended them."). Thus, the Foundation's additional expenditures constitute the necessary "change in behavior" required to show injury in fact, regardless of the fact that the Foundation may or may not have researched political activity and/or filed PDC complaints in the past.

Second, the COA erred because it viewed the relevant agency inaction exclusively as a particular PDC decision dismissing a complaint, rather than a pattern of ongoing inaction which *includes* an agency decision. This led the COA to incorrectly hold that the Foundation engaged in "the same types of research both before and after the PDC's *decision*." A.012 (emphasis added).

The relevant PDC inaction that causes the Foundation to expend additional resources is more than just the decision in this case. Rather, the inaction is the PDC's refusal to apply the FCPA's reporting requirements to WFSE, *of which this particular decision is only one example*. To be sure, the PDC's dismissal of the Foundation's complaint injures the Foundation. However, the relevant PDC inaction – not enforcing the FCPA against WFSE – began *before* the Foundation engaged in the costly research and the preparing and filing of its PDC complaint. Indeed, the PDC's inaction *caused* the need to expend these additional resources to avoid injury to its mission. *See supra* at 4-7. The PDC's dismissal

may be the locus of an appeal, but the PDC's inaction is an *ongoing* inaction. *Cf. La Raza*, 800 F.3d at 1036-37 (an agency's ongoing failure to assist groups with voter registration); *El Rescate Legal Servs.*, 959 F.2d at 745-46, 748 (an agency's ongoing failure to provide translators to assist refugees during court proceedings).[4]

Finally, in the least, this Court should remand this case to the COA for the COA to consider for the first time on appeal the Foundation's argument that its *non*monetary injuries constitute injury in fact. *See supra* at 7-9.

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[4] Preparing and filing PDC complaints does not constitute a "manufactured" litigation injury that fails to confer standing, because the litigation challenging the PDC's dismissal began *after* the PDC's dismissal of the Foundation's complaint. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013).

C. The Superior Court Erred When it Held That the Foundation's Interests Were Not Among Those That the PDC is Required to Consider When it Applies the FCPA

If the Court grants this Petition, it should either reverse the Superior Court's erroneous holding on this matter, or remand the matter to the COA to review for the first time. *See supra* at 11.

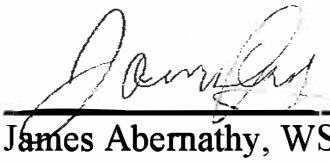
VI. CONCLUSION

The Foundation respectfully requests that the Court grant this Petition pursuant to RAP 13.4(b)(4) because it is of substantial public interest whether the PDC will be empowered to apply the FCPA in a partisan manner, and the Court should determine the matter to provide authoritative guidance to lower courts in applying a standing doctrine well-suited to effectuate the FCPA's unique aims and enforcement regime.

CERTIFICATION OF COUNSEL

This document contains 4,996 words, excluding the parts of the document exempt from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED, on June 29, 2023.



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DECLARATION OF SERVICE

I, Kirstie Elder, hereby declare under penalty of perjury under the laws of the State of Washington that on June 29, 2023, I caused the foregoing document to be filed with the clerk, and caused a true and correct copy of the same to be delivered via via email per e-service agreement to the following:

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Dated: June 29, 2023

By: Kirstie Elder
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No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION I
84640-0-I

FREEDOM FOUNDATION,

Appellant,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, et al.

Respondents.

APPENDIX TO PETITION FOR REVIEW BY THE SUPREME COURT

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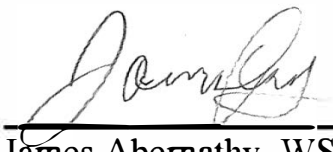
APPENDIX PAGE NUMBERS	DESCRIPTION
App. A 001-013	Published Opinion by Division I Court of Appeals in *Freedom Foundation et al. v. Washington State Public Disclosure Commission, et al.*, No. 84640-0-I, (April 3, 2023)
App. A. 014	Order Denying Motion for Reconsideration

RESPECTFULLY SUBMITTED, June 29, 2023.



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4/3/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION, a Washington nonprofit organization, Appellant, v. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, a State of Washington Government Agency, and WASHINGTON FEDERATION OF STATE EMPLOYEES, a Washington labor union, Respondents.	No. 84640-0-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — Freedom Foundation filed an administrative complaint with the Washington State Public Disclosure Commission (PDC) alleging that the Washington Federation of State Employees (WFSE) was a political committee that violated the Fair Campaign Practices Act (FCPA). After a preliminary investigation, the PDC dismissed the complaint, finding no further investigation was warranted. Freedom Foundation sought judicial review under the Administrative Procedure Act (APA). The superior court dismissed the case with prejudice because the Freedom Foundation did not have standing to petition for judicial review under the APA. We affirm.

FACTS

The Freedom Foundation is a nonprofit organization that seeks to "educate

public employees about their rights regarding union representation, membership, and dues payment." The Foundation states that its primary focus is "to inform public employees who disagree with their union that they have a constitutional right not to associate with, nor financially to support, their union." One way Freedom Foundation accomplishes this goal is by providing public employees with information about the "extent to which unions engage in electoral political activity." To obtain this information, the Foundation "expends significant resources" conducting research to ensure that unions comply with the reporting requirements of the FCPA, codified at chapter 42.17A, RCW.

On April 14, 2021, Freedom Foundation filed a complaint with the Public Disclosure Commission, alleging that WFSE, a union representing employees of Washington state, had failed to register as a political committee and failed to file the contribution and expenditure reports required by the FCPA. The Foundation specifically alleged that WFSE's receipt of $200,000 from the American Federation of State, County, and Municipal Employees (AFSCME)[1] and the expenditure of $15,000 to the Retired Public Employees Council of Washington (RPEC) made the group a political committee under the FCPA. The Foundation asserted that these financial transactions created a status that subjected WFSE to certain reporting requirements under the FCPA that they had failed to follow. In its complaint, the Foundation requested that the PDC investigate the alleged lack of compliance and appropriately enforce the FCPA. If the PDC found WFSE to be a political committee under the FCPA, WFSE would be required to report certain financial transactions to the PDC, which would then be

[1] WFSE is a statewide labor organization affiliated with the national AFSCME labor union.

accessible through a public database maintained by the PDC.

The PDC is permitted to investigate violations of the FCPA on its own or in response to a complaint. RCW 42.17A.105(5). When it receives a complaint, the PDC is permitted to conduct an investigation and enforce the FCPA where appropriate, refer the matter to the attorney general, or dismiss a complaint after conducting a preliminary review when appropriate. RCW 41.17A.755(1)(a)-(c).

In July 2021, the PDC sent a letter to Freedom Foundation informing it that the commission had completed a preliminary investigation of the complaint and concluded that there was "no evidence warranting" a further investigation. The PDC noted that the WFSE's receipt of $200,000 from AFSCME did not make the WFSE a political committee because the "grant received from AFSCME and deposited into WFSE's general treasury did not make WFSE or WFSE's general treasury account a political committee as a receiver of contributions." It also noted that WFSE's $15,000 expenditure to RPEC was not intended to be deposited by RPEC into a political committee account and the fact that RPEC inadvertently did so did not make WFSE a political committee. PDC dismissed the matter in accordance with RCW 41.17A.755(1).

Freedom Foundation then petitioned the Thurston County Superior Court under the Administrative Procedure Act (APA), chapter 34.05 RCW, for judicial review of the PDC's decision to dismiss its complaint. The PDC moved to dismiss the case under CR 12(b)(6) contending that the Freedom Foundation lacked standing to petition for judicial review under the APA. Freedom Foundation claimed organizational standing. To support its argument, the Foundation submitted the declaration of Maxford Nelson, the Foundation's Labor Policy Director. In his declaration, Nelson stated there was no other

source of information that was as easy to access or had the same timely reporting requirements as the PDC's database. Nelson claimed that because the PDC dismissed its complaint, the Foundation "had to expend additional resources engaging in more cumbersome research" that required staff and resources that would otherwise be "used by the Foundation to advance its mission in other ways."

The trial court granted PDC's motion and dismissed the case with prejudice.[2] Freedom Foundation appeals.[3]

DISCUSSION

Standard of Review

We review a trial court's ruling to dismiss a claim under CR 12(b)(6) de novo. Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Dismissal is proper if, beyond a reasonable doubt, the plaintiff cannot prove any set of facts that would justify recovery. Id. A trial court's decision on standing is reviewed de novo. City of

[2] This case is the fourth attempt by Freedom Foundation to appeal the dismissal of a complaint to the PDC after previously having its request for judicial review dismissed for lack of standing under the APA. See Freedom Found. v. Bethel Sch. Dist., 14 Wn. App. 2d 75, 469 P.3d 364 (2020) (holding that Freedom Foundation had no standing and rejecting its claims that it was a party to the complaint and that it was injured because the PDC decision created a precedent that could be held against the Freedom Foundation in future complaints); Freedom Found. v. Serv. Emps. Int'l Union Pol. Educ. & Action Fund, No. 53889-0-II, slip op. (Wash. Ct. App. Feb. 9, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2053889-0-II%20Unpublished%20Opinion.pdf (holding that the Freedom Foundation had no standing and rejecting its claims that it was a party to the complaint, suffered competitive harm where opponents will be able to cite to PDC decisions, and had associational standing because its members were harmed by the decision); Freedom Found. v. Amalg. Transit Union Legis. Council, No. 55642-1-II, slip op. (Wash. Ct. App. Feb. 15, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2055642-1-II%20Unpublished%20Opinion.pdf (holding that Freedom Foundation had no standing and rejecting its claims to be a party to the complaint, suffered competitive injury, and had associational standing on behalf of its supporters). The Freedom Foundation does not repeat its previous standings argument in the instant case.

[3] Freedom Foundation asserted additional claims on appeal. However, because the issue of standing is dispositive and we affirm the superior court, we do not address the other claims.

Burlington v. State Liquor Control Bd., 187 Wn. App. 853, 861, 351 P.3d 875 (2015).

Injury-In-Fact

The APA generally provides the exclusive means of judicial review of an agency action. RCW 34.05.510. Under the APA, a party has standing for judicial review where they are "aggrieved or adversely affected by the agency action." RCW 34.05.530. A person is aggrieved or adversely affected when three conditions are present:

(1) The agency action has prejudiced or is likely to prejudice that person;

(2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 43.05.530. The first and third prongs make up the "injury-in-fact" requirement, while the second prong provides the "zone of interest" requirement. Allan v. Univ. of Wash., 140 Wn.2d 323, 327, 997 P.2d 360 (2000). The party challenging an agency action has the burden to prove all three requirements to prove standing. Id.; KS Tacoma Holdings, LLC v. Shorelines Hr'gs Bd., 166 Wn. App. 117, 127, 272 P.3d 876 (2012).

Washington courts interpret the injury-in-fact prongs consistently with federal case law. Snohomish County Pub. Transp. Benefit Area v. Public Emp't Rel. Comm'n, 173 Wn. App. 504, 513, 294 P.3d 803 (2013) (citing KS Tacoma Holdings, 166 Wn. App. at 126-27)). An injury-in-fact is an invasion of a legally protected interest. Id. (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). This invasion must be "concrete and particularized" and not "conjectural" or "hypothetical." Lujan, 504 U.S. at 560 (citing Sierra Club v. Morton, 405 U.S. 727, 740-41 n.16, 92 S. Ct. 1361, 31 L. Ed. 636 (1972)). There must be a "causal connection

between the injury and the conduct complained of," meaning the injury has to be "fairly . . . trace[able] to the challenged action of the defendant." Id. (alteration in original) (quoting Simon v. Eastern Ky. Welfare Rts. Org., 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)). To meet the injury-in-fact test, "'a person must allege facts demonstrating that he or she is specifically and perceptibly harmed by the agency decision.'" Freedom Found. v. Bethel Sch. Dist., 14 Wn. App. 2d 75, 86, 469 P.3d 364 (2020) (internal quotation marks omitted) (quoting Patterson v. Segale, 171 Wn. App. 251, 259, 289 P.3d 657 (2012)).

Where an organization seeks standing to sue, it must "demonstrate organizational standing by showing that the challenged 'practices have perceptibly impaired [its] ability to provide the services [it was] formed to provide.'" East Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 765 (9th Cir. 2018) (quoting El Rescate Legal Servs., Inc. v. Exec. Office of Immigr. Rev., 959 F.2d 742, 748 (9th Cir. 1991)). One way an organization can show organizational standing is to show that "independent of the litigation" the challenged decision or policy "'frustrates the organization's goals and requires the organization to expend resources in representing clients they otherwise would spend in other ways.'" Id. (internal quotation marks omitted) (quoting Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 943 (9th Cir. 2011) (en banc)). Where a defendant's practices have "perceptibly impaired [the organizational plaintiff's] ability to provide [the services it was formed to provide] . . . there can be no question that the organization suffered injury in fact." El Rescate, 959 F.2d at 748 (alterations in original) (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982)).

Freedom Foundation asserts organizational standing. It argues that its purpose is to "counsel and educate public workers as to the electoral political activity of the unions representing them," ultimately "reduc[ing] the influence of large organizational contributors in Washington's elections." The Foundation posits that by dismissing its complaint, PDC "forecloses entirely the Foundation's ability to counsel and educate public workers on significant electoral political activity in Washington in a timely manner." The Foundation claims that because the PDC dismissed its complaint, it was "forc[ed] . . . to expend and divert additional economic resources to investigate information that should be easily and immediately available in the PDC database." The Foundation argues that because the PDC dismissed its complaint and did not include the WFSE expenditure in its public database, the Foundation was forced to use "alternative methods for investigating WFSE's political activity" which are "more cumbersome, disparate, and time-consuming than the relatively easy method of simply accessing the PDC database." The Foundation explains that "it is much easier to review a political committee's report of their expenditures, than search through every other reporting entity to see if they report receiving a contribution."

First, Freedom Foundation asserts that the "extra sums" it expended "to counteract" the PDC's decision confers standing. However, an organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all. It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1018 (9th Cir. 2013) (citing La Asociacion de Trabajadores de Lake Forest v. Lake Forest, 624 F.3d

1083, 1088 (9th Cir. 2010)). To confer organizational standing, economic harm must be "independent of the litigation." East Bay, 932 F.3d at 765; Walker v. City of Lakewood, 272 F.3d 1114, 1124 n. 3 (9th Cir. 2001) (standing must be established independent of the lawsuit itself). To the extent, the Freedom Foundation suggests that it is economically harmed by having to expend resources on legal efforts such as this litigation to counteract the PDC's decision, such expenditure does not amount to an economic harm sufficient to confer organizational standing.

Next, Freedom Foundation argues that it is economically harmed because it had to divert economic resources from its original mission due to the PDC's inaction against WFSE. While the Foundation cites several cases for this proposition, the facts of those cases distinguish them from the facts before this court. We address each in turn.

In El Rescate, an organization providing legal aid in immigration courts challenged the Board of Immigration Appeals' provision of language interpretation services during immigration court hearings as inadequate. 959 F.2d at 745. The court there held that plaintiffs had established injury in fact sufficient for organizational standing because they had shown that the Board's decisions not to provide adequate interpretation services had required them to spend additional resources in representing largely Central American refugee clients who did not speak or understand English that would have otherwise been spent on other aspects of representation. Id. at 748.

In Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, the advocacy group was found to have organizational standing where the city of Redondo Beach enacted an ordinance effectively prohibiting the solicitation and hiring of day laborers at traffic intersections. 657 F.3d 936, 940 (9th Cir. 2011). Comite submitted

declarations explaining that, rather than focusing its resources on its original mission to "strengthen and expand the work of local day laborer organizing groups," enactment of the ordinance required it to divert its resources toward meeting with individual laborers to explain the ordinance and assisting arrested day laborers with their criminal cases stemming from the ordinance. Id. at 943. Comite employees testified that the time and resources it undertook in those efforts would have been used toward its "core organizing activities." Id. The court held that Comite had established both an injury in fact and a causal connection between the ordinance and the injury, giving it organizational standing to challenge the ordinance. Id.

In Valle del Sol Inc., an organization challenged a collection of Arizona statutes enacted to criminalize the harboring and transportation of unauthorized aliens[4] within the state. Valle del Sol Inc., 732 F.3d at 1012. The plaintiffs were a collection of organizations who ran programs offering transportation and shelter to unauthorized aliens in Arizona largely through the efforts of volunteers. Id. at 1018. The plaintiffs showed evidence that the new statutes had created a reasonable fear of prosecution among volunteers and that the organizations had to use their resources to educate volunteers and counteract the fears created by the statutes, frustrating their collective purpose to arrange and provide transportation and shelter to unauthorized aliens within Arizona. Id. As a result, the court held that plaintiffs had organizational standing to

[4] We recognize the criticism of the use of the term "alien," but defer to the Ninth Circuit's use of the term "unauthorized aliens" in this context given the term "alien" was expressly used in the relevant Arizona statute and the fact Congress has provided legal definitions for such terms in federal immigration law. See Valle del Sol Inc., 732 F.3d at 1012 n.1 (citing Lozano v. City of Hazleton, 724 F.3d 297, 300 n. 1 (3d Cir.2013)); 8 U.S.C.A. § 1101(a)(3) (defining the term "alien" as any person not a citizen or national of the United States.).

challenge the statute because they had shown they were required to divert resources to counteract the frustration of their missions.

In another case, the Fair Housing Council of San Fernando Valley brought suit against Roommate.com, a service used to pair potential roommates, alleging that it provided a discriminatory list of criteria to its users in violation of the Fair Housing Act. Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1218 (9th Cir. 2012). The Fair Housing Council argued that it had organizational standing because it had used resources to investigate the alleged violations and undertook new education and outreach campaigns targeting discriminatory roommate advertising that would have otherwise been used toward its central mission. Id. at 1219. The court held that the council did have organizational standing based on that diversion of resources. Id.

In another case in which an organization argued organizational standing to challenge the non-action of a state agency, a collection of civil rights groups challenged the dismissal of a complaint. The National Voter Registration Act requires states to distribute voter registration materials and assist with registration in public assistance offices. National Council of La Raza v. Cegavske, 800 F.3d 1032, 1034-35 (9th Cir. 2015). The plaintiff organizations sued the Nevada Secretary of State and Director of Nevada's Department of Health and Human Services claiming that the two had failed to provide voter registration information and assistance in their offices providing public assistance in violation of the National Voter Registration Act. Id. at 1036-37. The court found that the groups had organizational standing based on the evidence they provided showing that they made additional expenditures holding voter registration drives in

areas where constituents should have had access to that information at public assistance offices. Id. at 1039. The court noted that the organizations had "clearly" alleged that they changed their behavior as a result of the violations and would have put those resources toward "some other aspect of their organizational purpose–such as registering voters the [act's] provisions do not reach, increasing their voter education efforts, or any other activity that advances their goals." Id. at 1040.

In each of these cases where the organizations established standing, each organization alleged that it had to change its behavior related to its mission in a specific way because of a government action or inaction. Here, Freedom Foundation made no such allegation. It submitted one declaration stating only that if the WFSE were required to register with the PDC as a committee and comply with those reporting requirements, "Foundation staff would have had to spend less time researching the nature, structure, and extent of its electoral political activity." The Foundation claims it "will be forced to expend more resources and staff time to attempt to ascertain the nature, structure, and extent of unions' electoral political activity from inferior alternative sources in order to continue communicating this information to its supporters, the general public, and to union-represented employees."

Certainly, whenever the PDC requires political committees to report its expenditures, it makes it easier for the public to access such information. But the Foundation has failed to allege that it is specifically and perceptibly harmed by PDC exercising its discretion to not investigate further. The PDC correctly argues that the Freedom Foundation is in the exact same position it was in before its decision to

dismiss the complaint, and, thus, it cannot establish that PDC's decision sufficiently caused injury to establish standing.

The Foundation states that alternative sources do not provide the information sought in a manner that is "as timely or comprehensive" as that required "by the Fair Campaign Practices Act." The procedural history of this case suggests that the time, effort and expense of having to rely on alternative sources for information is exactly what the Freedom Foundation did to initiate its complaint with the PDC. By its own description and actions, its mission includes acting as a watchdog to ensure public unions such as the WFSE comply with the FCPA. The Foundation states it "expends significant resources" conducting research to ensure that unions comply with the reporting requirements of the FCPA. The Foundation's ability to investigate an entity may be easier when the PDC declares that entity to be a political committee, thus requiring it to file reports in compliance with the FCPA. However, that does not mean the Foundation is injured by a non-action by the PDC when it endeavors into the same types of research both before and after the PDC's decision.

Unlike El Rescate Legal Services, Comite de Jornaleros de Redondo Beach, Valle del Sol Inc., Fair Housing Council of San Fernando Valley, and National Council of La Raza, Freedom Foundation has not alleged that the challenged action or inaction has impaired its ability to provide the services it was formed to provide. Freedom Foundation focuses in particular on the actions in El Rescate and states that the harm it alleges here is comparable. However, in El Rescate, organizations providing legal services to immigrants were forced to find their own interpretive services rather than rely on the inferior interpretation services of the courts. El Rescate, 959 F.2d at 745. This is

something that, but for the court's inaction in obtaining adequate interpretation, they would not be required to do as part of their provision of legal services. Freedom Foundation here is not taking on an additional task as the result of the PDC's non-action. The Foundation states only that inclusion in the PDC database would provide an easier avenue to obtain the information they seek in addition to the more resource intensive methods it currently employs.

We conclude that the Freedom Foundation has not established an injury-in-fact to confer organizational standing. Because the Foundation fails to meet the injury-in-fact test, we need not determine whether its interests satisfy the zone of interest test. Patterson, 171 Wn. App. at 258 n. 5.

We affirm.

Coburn, J.

WE CONCUR:

Díaz, J.

Smith, A.C.J.

FILED
5/31/2023
Court of Appeals
Division I
State of Washington

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

FREEDOM FOUNDATION, a Washington nonprofit organization, Appellant, v. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, a State of Washington Government Agency, and WASHINGTON FEDERATION OF STATE EMPLOYEES, a Washington labor union, Respondents.	No. 84640-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Freedom Foundation, having filed a motion for reconsideration of the opinion dated April 3, 2023, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Colum, J.

FREEDOM FOUNDATION

June 29, 2023 - 3:57 PM

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FREEDOM FOUNDATION

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