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No. 53415-1-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

FREEDOM FOUNDATION,
Appellant/Plaintiff,

v.

BETHEL SCHOOL DISTRICT, and the WASHINGTON STATE
PUBLIC DISCLOSURE COMMISSION,
Appellees/Defendants,

WASHINGTON STATE EDUCATION ASSOCIATION,
Possibly interested party.

APPELLANT/PLAINTIFF, FREEDOM FOUNDATION'S,
OPENING BRIEF IN CONSOLIDATED APPEAL

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I. INTRODUCTION.

The Bethel School District (“Bethel” or the “District”) admits that it knowingly uses its facilities to withhold money for political contributions from employees’ wages, and forwards them directly to political funds such as the Washington Education Association Political Action Committee (“WEA-PAC”) and National Education Association Fund for Children and Public Education (“NEA-FCPE”), for hundreds of contributors. Plaintiff, Freedom Foundation (“Appellant,” “Plaintiff,” or the “Foundation”) alleged below that this violates the Fair Campaign Practices Act (the “FCPA”), specifically RCW 42.17A.555, which prohibits public agencies from using taxpayer facilities, directly or indirectly, to assist political activities. Bethel argued its practice falls under the exemption for “normal and regular conduct,” and that citizens can no longer challenge government decisions not to pursue FCPA violations, as a result of amendments to the FCPA.

The District’s activities cannot be called “normal,” at least not as that word is ordinarily and properly understood. The District’s activities violate both the letter and the spirit of the FCPA, and it is *this Court* that has the ultimate prerogative of legislative interpretation, not the PDC, which has improperly expanded the scope of what it considers “normal” conduct for a public entity such as Bethel.

Separately, Bethel’s activities are not “regular” because they are not “specifically authorized” by any statute or other authority. Further, it cannot be gleaned from the record below that the Defendant’s activities are “lawful” so as to be “regular” within the meaning of the statute, simply because the record is largely devoid of evidence and did not support summary determination. The trial court erroneously allowed Bethel to short-circuit the lawful discovery process by its Motion, and to avoid further inquiry into the purported lawfulness of its activities, even though the record before the trial court had already revealed clear violations.

Moreover, the courts below eviscerated the citizen’s action process, part of the FCPA ever since its enactment by initiative in 1972. The point of this mechanism has always been to permit a citizen to challenge the government’s determinations for the very reason that the government “may be wrong.” *Utter v. Building Indust. Ass’n. of Washington*, 182 Wn. 2d 398, 411, 341 P.3d 953 (2015). Although the Legislature made substantial changes to the FCPA in 2018, nothing suggested an intent to gut the citizen’s action process. Nonetheless, the District argued that citizens “lack standing” under the new statute, even where the PDC declines to investigate (referred to as “dismissing” an administrative complaint under the FCPA). The issue was not truly one of standing, but rather of the existence of a remedy, and the 2018 amendments preserved the citizen’s action here.

At bottom, either the Foundation’s APA Petition or its Citizen’s Action Complaint (*see infra*, at pp. 6-7, for definitions of these terms) should be viable – indeed, there is no reason why *both* cannot remain available – but the Appellees/Defendants in this matter have collectively taken the position that not only (1) is there no avenue for judicial review of an administrative decision “dismissing” a complaint under RCW 42.17A.755, but also that (2) there is no longer a citizen’s action to challenge the same administrative decision. Effectively, this “heads-we-win, tails-you-lose” strategy would mean that a great deal of the PDC’s decisions are categorically immune from challenge, even where the agency has acted arbitrarily, capriciously or, worse, discriminatorily. This cannot be (and is not) the law in the State of Washington, and the Foundation should not have to accept these inconsistent rulings. Either the PDC did not make a decision when it “declined to sue,” in which case the citizen’s action should be available, or it did make a decision, in which case the FCPA complainant should be able to seek review under the APA.

Notwithstanding the PDC’s “discretionary authority” to enforce the mandates of the FCPA, judicial review of an agency’s operations and decisions is a fundamental component of due process in the United States. *See State v. Ford*, 110 Wn. 2d 827, 829, 755 P.2d 808 (1988) (*citing Pierce County Sheriff v. Civil Service Commission of Pierce County*, 98 Wn. 2d

690, 658 P.2d 648 (1983)). The result below – leaving the Foundation with no cognizable remedy for the District’s violations – should not stand.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED.

A. Assignments of Error.

1. The trial court, Hon. Erik D. Price, erred in granting the Appellee/Defendant Washington State Public Disclosure Commission’s Motion to Dismiss, upon its finding that the Freedom Foundation did not have standing to seek judicial review of the PDC’s action in dismissing its administrative complaint under the APA.

2. The trial court, Hon. Erik D. Price, erred in granting Appellee/Defendant Bethel School District’s Motion for Summary Judgment Dismissal, upon its finding that the Freedom Foundation did not have standing to seek judicial review of the PDC’s action in dismissing its administrative complaint under the APA.

3. The trial court, Hon. Carol Murphy, erred in granting Appellee/Defendant Bethel School District’s Motion for Summary Judgment Dismissal of All Claims, upon its finding that the 2018 amendments to the Fair Campaign Practices Act, ch. 42.17A RCW, prohibit citizen’s actions where PDC staff decides not to pursue allegations of FCPA violations.

B. Issues Pertaining to Assignments of Error.

1. Whether the trial court erred in ruling that the dismissal by the PDC of the Foundation’s administrative complaint is one of the “actions” under RCW 42.17A.755 that prevents a complainant from later filing a citizen’s action, under the 2018 amendments to the FCPA (RCW 42.17A.775)?

2. Whether the trial court erred to the extent it ruled that the FCPA (RCW 42.17A.555) permits a school district to process employee contributions to political action committees via payroll deductions , as part of the “normal” and “regular” conduct of the school district?

3. Whether the trial court erred to the extent it ruled that employee contributions to WEA-PAC and NEA-FCPE knowingly and systematically processed via payroll deduction by Bethel School District were part of the “normal” and “regular” conduct of the District, where the District’s own policies prevent the use of work hours and/or public resources to promote or oppose candidates and/or ballot measures?

4. Whether the trial court erred in entering summary judgment in favor of Bethel School District, where discovery in the matter was incomplete and the existing record revealed facts which in the light most favorable to the Foundation support a determination that the District violated the FCPA?

5. Whether the trial court erred in dismissing the Foundation’s petition for judicial review under the APA, and in granting summary judgment dismissal of the Foundation’s APA Petition against Bethel School District, upon its finding that the Foundation did not suffer an injury-in-fact and did not have standing arising from the dismissal of its administrative complaint that had been filed with the PDC?

III. STATEMENT OF THE CASE.

The Freedom Foundation filed two (2) companion cases comprising the instant matter.¹ The factual basis underlying each case is that Bethel has violated the FCPA, and the PDC simply was wrong when it improperly dismissed and/or disposed of the Freedom Foundation’s administrative complaint. *See* CP, at 318-320. One was a citizen’s action brought pursuant to RCW 42.17A.775, in which the Foundation contended that the Defendant, Bethel, had been unlawfully using its taxpayer-funded facilities to collect money for political committees, by utilizing school district employees to set up and use district machines and equipment for payroll systems during work hours, and then knowingly sending the money to

¹ The Foundation initially attempted to bring both claims in a single lawsuit, but the Clerk refused to accept a single lawsuit including both claims. Pursuant to the FCPA, the Citizen’s Action Complaint (CP, at 001) below was filed on October 9, 2018, and given Case No. 18-2-05084-34. The same day, Freedom Foundation filed a second action under the Administrative Procedures Act, which was given Case No. 18-2-05092-34 (the “APA Petition”) (CP, at 216).

political committees – thereby directly and indirectly assisting political campaigns and ballot propositions. *See* Citizen’s Action Complaint for Civil Penalties and Injunctive Relief for Past and Ongoing Violations of Chapter 42.17A RCW (the “Citizen’s Action Complaint”) (CP 001).

The second case arises from a determination by the PDC that the Foundation’s allegations (as set forth herein) did not constitute an FCPA violation, and the PDC’s resulting dismissal of the Foundation’s administrative complaint. The substance of the PDC’s determination, as reflected in its correspondence dated September 10, 2018, states: “Staff has determined that in this instance, no evidence supports a finding of a material violation warranting further investigation. The PDC has closed the matter, and will not be conducting a more formal investigation into your complaint or pursuing further enforcement action in this case.” *See* CP, at 264 (emphasis added).² From this disposition, it is clear only that the PDC declined to take any action against Bethel, which is the only relevant question in determining whether a citizen’s action remains available.

In its Answer, Bethel admitted many of the substantive allegations. Bethel admitted it uses its facilities to withhold from employee wages

² All references to the Clerk’s Papers compiled for purposes of this appeal shall appear in the form “CP, at xxx,” with the exception of those references to the Certified Appeal Board Record from the PDC, compiled as part of the Clerk’s Papers, which shall appear in the form “WSPDC xxxx.”

contributions to WEA-PAC and NEA-FCPE.³ Bethel admitted it “uses its facilities to directly give the political contributions to the political committees.”⁴ Bethel admitted it currently makes contributions to political committees for approximately six hundred (600) employees.⁵ Bethel admitted its employees, during work hours, set up and use district machines and equipment to administer this payroll system.⁶ Notwithstanding Bethel’s own policies, these entities are political committees formed by unions for the express purpose of engaging in political activity. CP, at 323-324.

The PDC moved to dismiss the APA Petition, arguing that the Foundation lacked standing to seek judicial review under the APA. CP, at 236-37. Bethel adopted the arguments set forth by the PDC in its motion to dismiss, in addition to asserting arguments that the District had not violated the FCPA and that the 2018 amendments did away with a citizen’s action in these circumstances. CP, at 248, 257. Judge Price granted the motion to dismiss as to the PDC. CP, at 412. Judge Price later granted Bethel’s motion for summary judgment, but only on the standing grounds initially asserted by the PDC. *See* CP, at 442-443 (“The Court did not consider the substantive argument the District lawfully could send money directly to

³ Answer, ¶23 (CP, at 011), Complaint, ¶23 (CP, at 004).

⁴ Answer, ¶24 (CP, at 011), Complaint, ¶24 (CP, at 004).

⁵ Answer, ¶25 (CP, at 011), Complaint, ¶25 (CP, at 004).

⁶ Answer, ¶26 (CP, at 011), Complaint, ¶26 (CP, at 004).

political committees ... Similarly, the Court did not consider the substantive argument the FCPA prohibits citizen's actions under the circumstances present, and does not reach that issue.""). Bethel also asserted those separate grounds in support of summary judgment in the Citizen's Action Complaint, however. CP, at 036. Judge Murphy granted summary judgment in favor of Bethel, without specifying with particularity the grounds upon which the court relied. CP, at 200.

The Foundation filed timely appeals in both cases; on April 1, 2019, in the APA Petition, and on April 30, 2019, in the Citizen's Action Complaint. Pursuant to the Court's suggestion that the matters appeared related, the Foundation moved for consolidation of the instant appeals, as arising from the same set of facts (which no party opposed). On June 7, 2019, the Court issued its Amended Perfection Notice, deeming the appeals consolidated under Case No. 53415-1-II. The instant brief is filed in accordance with the schedule set forth in that Amended Perfection Notice.

IV. ARGUMENT.

A. The 2018 Amendments to the FCPA Preserve a Citizen's Action.

As mentioned *supra*, at p. 7, it is not entirely clear from the PDC's correspondence whether its disposition of the Foundation's administrative complaint was a "dismissal" of same, but the PDC certainly did not request

technical corrections, identify remedial violations or otherwise resolve the matter pursuant to RCW 42.17A.755(1).

The current text of the FCPA, Section 775, states in pertinent part,

A citizen's action may be brought and prosecuted only if the person first has filed a complaint with the commission and: ... The Commission has not yet taken action authorized under RCW 42.17A.755(1) within ninety days of the complaint being filed with the commission...

RCW 42.17A.775(2)(a) (emphasis added).

For its part, Section 755 states, in relevant portion, that

(1) The commission may initiate or respond to a complaint, request a technical correction, or **otherwise** resolve matters of compliance with this chapter in accordance with the section. If a complaint is filed with or initiated by the commission, the commissioner must: (a) Dismiss the complaint or otherwise resolve the matter in accordance with subsection (2) of this section, as appropriate under the circumstances after conducting a preliminary review; (b) Initiate an investigation to determine whether a violation has occurred, conduct hearings, and issue and enforce an appropriate order, in accordance with chapter 34.05 RCW and subsection (3) of this section; or (c) Refer the matter to the attorney general, in accordance with subsection (4) of this section. (2)(a) For complaints of remedial violations or requests for technical corrections, the commission may, by rule, delegate authority to its executive director to resolve these matters in accordance with subsection 1(a) of this section, provided the

executive director consistently applies such authority.

RCW 42.17A.755(1) (emphasis added).

The only natural and logical way to read RCW 42.17A.755(1), and to read it harmoniously with the next subsection (2), is that for the PDC to “dismiss the complaint” is identical, in legal effect, to actions it may take to “otherwise resolve the matter in accordance with subsection (2) of this section.” This is clearly the reason that Bethel’s argument below emphasized the language concerning the PDC’s ability to “Dismiss the complaint ... after conducting a preliminary review,” while ignoring the language of “...otherwise resolve the matter ... after conducting [the same] preliminary review.” CP, at 041, 256. Bethel’s position – which the trial court accepted – either reads the singularly important word “otherwise” out of the statute entirely or distorts its meaning beyond recognition, in suggesting that to “dismiss the complaint” is somehow not included within the broader avenues to “...otherwise resolve the matter in accordance with subsection (2) of this section.” RCW 42.17A.755(1)(a) (emphasis added). Both must be handled the same (the first is merely a species of the second), and both represent resolutions outside of the auspices of subsection (1).

Indeed, subsection (1) previously uses the word “otherwise” with the exact same, broad meaning, when it states that “[t]he commission may

initiate or respond to a complaint, request a technical correction, or otherwise resolve matters of compliance with this chapter, in accordance with this section.” RCW 42.17A.755(1). The legislative intent in again using the word “otherwise” is clear that *however* the matter may be resolved “in accordance with subsection (2) of this section,” such is not a resolution pursuant to subsection (1) that will preclude a citizen’s action. *See Garrison v. Washington State Nursing Board*, 87 Wn. 2d 195, 197, 550 P.2d 7 (1976) (*citing Champion v. Shoreline Sch. Dist. 412*, 81 Wn. 2d 672, 676-77, 504 P.2d 304 (1972)) (“Whenever a legislature had used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there is something in the context or the nature of things to indicate that it intended a different meaning thereby.”)). Here, of course, there is no textual indication that the Legislature intended the ‘catch-all’ meaning when first using the word “otherwise” in RCW 42.17A.755(1), but meant something different when using the same word later in the very same subsection. But the trial court’s ruling depends upon ascribing different meanings in each instance. Each refers to general classes of action that the PDC could take, and in the latter instance, “otherwise” refers to actions (aside from dismissal) the PDC could take *under subsection (2)*.

In support of its selective and self-serving reading, Bethel attempted

below to rely upon what it characterizes as evidence of the Legislature’s intent in enacting the recent FCPA amendments. CP, at 041, 256-257. First, it is fundamental that a court may not rely upon purported evidence of legislative intent to “clarify” the meaning of an unambiguous statutory mandate, which is what the Court is faced with here. *Geschwind v. Flanagan*, 121 Wn. 2d 833, 840-841, 854 P.2d 1061 (1993) (“Without a showing of ambiguity, we derive the statute’s meaning from its language alone ... In interpreting a statute, the court should assume that the Legislature meant exactly what it said.”); *Washington Public Ports Assoc. v. State, Dept. of Revenue*, 148 Wn. 2d 637, 648-49, 62 P.3d 462 (2003).

Second, even considering the Final Bill Report for ESHB 2938 on its own terms, the Report unequivocally states, on its face, that this legislative staff “analysis is not a part of the legislation **nor does it constitute a statement of legislative intent.**” CP, at 030, 270. It is clear that this Report does not evidence anything, much less the notion that the recent amendments to the FCPA intended to preclude a citizen’s suit where the PDC declines to take any action against the respondent. *See Kilian v. Atkinson*, 147 Wn. 2d 16, 21, 50 P.3d 638 (2002) (“The court must also avoid constructions that yield unlikely, absurd or strained consequences.”). Courts should avoid endorsing such results, particularly where, as here, they contravene the stated purposes of the statute. *State v. Cornwell*, 190 Wn. 2d

296, 303, 412 P.3d 1265 (2018); *Ward v. LaMonico*, 47 Wn. App. 373, 377, 735 P.3d 92 (1987) (“The court’s ‘paramount concern’ is to ensure the underlying policy of the statute is carried out.”); *see also Matter of Brown*, 198 Wn. App. 1041, at *6 (not reported) (Apr. 17, 2017). And the removal of a citizen’s action (or, stated differently, the abolishment of a citizen’s right to seek redress for FCPA violations) in such a wide range of cases (*i.e.*, anytime that the PDC dismisses a complaint) would most certainly contravene the FCPA’s purpose of maintaining a check on government officials, not to mention its mandate that it be “...liberally construed to effectuate [its] policies and purposes...” RCW 42.17A.001; *Seeber v. Washington State Public Disclosure Commission*, 96 Wn. 2d 135, 140, 634 P.2d 303 (1981) (*citing former* Section 42.17.920); *Utter v. Building Indust. Ass’n. of Washington*, 182 Wn. 2d 398, 411, 341 P.3d 953 (2015) (“The statute is obviously based on the notion that the government may be wrong, and then it is up to citizens to expose the violation.”) (emphasis added).

Nothing in the legislative history, nor discussion on the floor, nor in any amendments, indicates the Legislature intended to do away with the citizen’s action, or to confine it to those cases where the PDC ignores an administrative complaint altogether. In this instance, the Court should not approve a reading of the FCPA amendments that not only obviates the word “otherwise,” but also the collective effect of Sections 42.17A.775 and

42.17A.755(1) and (2) (which are all closely-related in their effect)⁷ – and that results in a significant change to the way the highest court of this state has previously understood the statute to operate. *See Utter*, 182 Wn. 2d at 412 (“We hold that RCW 42.17A.765 precludes a citizen’s suit only where the AG or local prosecuting authorities bring a suit themselves, and it does not preclude a citizen suit where the AG declines to sue.”); *see also No on I-502 v. Washington NORML*, 193 Wn. App. 368, 371-72, 372 P.3d 160 (2016) (“The ‘citizen’s action’ is permitted when the attorney general and the prosecuting attorney of a certain county either fail to commence or opt not to commence an action under the FCPA...” (emphasis added)); *West v. Washington State Association of District and Municipal Court Judges*, 190 Wn. App. 931, 940-41, 361 P.3d 210 (2015).

As such, even if the disposition is considered a “dismissal,” it must be treated by this Court the same as any other determination that “...otherwise resolve[s] the matter in accordance with subsection (2) of this section, as appropriate, after conducting a preliminary review.” *See* RCW 42.17A.755(1) (emphasis added). Under subsection (2), the PDC may internally handle complaints of “remedial violations” or needed “technical corrections” without conducting any investigation or holding any more

⁷ *Kilian*, 147 Wn. 2d at 21 (“In construing a statute, courts should read it in its entirety, instead of reading only a single sentence or a single phrase.”).

formal proceedings, as is referenced in subsection (1)(a). *See* RCW 42.17A.755. To be clear, the Foundation contends that the PDC did not have the authority to handle allegations of substantive, ongoing, serious violations of the FCPA in this manner. But either way, this limited discretion to handle *de minimis* issues extends equally to situations where the PDC decides to either “dismiss” or to “otherwise resolve” the issues by some other disposition, such as requiring the respondent to remedy the violation, and neither of these “actions” will foreclose a citizen’s action.⁸

Here, whether characterized as a “dismissal” or something else, the PDC “declined to sue” the Bethel School District. As such, faithful application of the FCPA (taking into account its historical background,

⁸ This is because the citizen’s action provision, as revised, still allows a citizen’s action in circumstances in which “[t]he commission has not taken action authorized under RCW 42.17A.755(1)” within ninety (90) days of the citizen filing a complaint with the PDC. *See* RCW 42.17A.775(2)(a) (emphasis added). In so defining the scope of PDC actions that can prevent the citizen from pursuing his or her action, the Legislature quite plainly intended to treat dismissals the same as any other “action” the PDC could take under RCW 42.17A.755(1)(a), or it could easily have drawn a distinction between such “actions.” Further, if the Legislature had intended by its use of the word “action” to draw some distinction, it surely could have used the term “agency action,” which has a well-understood meaning under the APA. *See* RCW 34.05.010(3). In choosing a different phrasing, and explicitly referring to “...action authorized under RCW 42.17A.755(1),” the Legislature clearly delineated to what type of “action” it intended to refer, and distinguished it from the notion of “agency action,” generally. *See Seeber v. Washington State Public Disclosure Commission*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981) (“It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent.”). Where the District’s argument fails, accordingly, is that “action” authorized under RCW 42.17A.755(1) is only that action which results in further proceedings pursuant to that same section. Although dismissals or dispositions that “otherwise resolve the matter” are *discussed* in subsection (1)(a), RCW 42.17A.755(2)(a) ensures that these actions are not “*authorized*” under subsection (1), within the meaning of RCW 42.17A.775 and the general structure of that Statute.

general structure and plain language), requires that a citizen’s action remain available in these circumstances. Since the recent FCPA amendments were enacted, the only court that has considered this aspect of the revised citizen’s action provision (a federal court in the Western District of Washington), has not understood it to work the sweeping change which the District advances. *State of Washington v. Facebook, Inc.*, 2018 WL 5617145, at *1 (W.D. Wash. Oct. 30, 2018) (slip op.) (“A citizen may bring an action to enforce the Act only after the Commission or the Attorney General declines to bring a suit.”). In holding otherwise, the trial court erred.

B. Political Activities Are Neither “Normal” Nor “Regular” Conduct of a School District.

Public officials and employees should not use taxpayer-funded facilities to engage in political activity. This is a rule that, as detailed below, has been recognized in Washington case law for decades. Bethel School District was thus wrong that its actions fall within permitted “normal and regular” conduct. To the extent that the trial court in the Citizen’s Action Complaint ruled on this basis, it was in error.

1. Public Facilities Generally Should Not Be Used for Political Activity.

The FCPA is perfectly unambiguous in stating that

No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may

use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space...

RCW 42.17A.555 (emphasis added).

Implementing this mandate, longstanding PDC guidelines specific to school districts state (which Bethel admits) that employees shall not use work hours or public resources for political activity, such as fundraising. Answer ¶27 (CP, at 011), Complaint ¶27 (CP, at 004). Furthermore, Bethel’s own policies state its facilities are not to be used to assist political campaigns and that collecting campaign funds is prohibited on its property. *See infra*, at pp. 23-24. Nevertheless, Bethel argued below that collecting political contributions and sending them directly to political committees are part of its “normal and regular conduct,” and are thus not prohibited by RCW 42.17A.555.

2. *Bethel’s Activities Are Not “Normal” or “Regular.”*

“Because FCPA policy mandates that we must liberally construe its provisions, we construe the FCPA’s exceptions narrowly.” *State v.*

Economic Development Board for Tacoma-Pierce County, 441 P.3d 1269, 1278 (2019). Because Bethel claims an exemption under RCW 42.17A.555, it bears the burden of proving the exemption applies. *Id.* at 1279. As Bethel recognized below, the FCPA does not define the words “normal” or “regular,” so they should be given their plain and ordinary meaning. *See* CP, at 042, 252 (citing *King County Council v. Public Disclosure Commission*, 93 Wn.2d 559, 561, 611 P.2d 1227 (1980) (“‘Normal’ means usual or customary ... ‘Regular’ means lawful or conducted in conformity with established rules.”)). It is clear from RCW 42.17A.555 that it must be shown a practice is both “normal” and “regular,” because the statute is drawn in the conjunctive. *King County Council*, 93 Wn.2d at 1229.

Here, however, Bethel again seems to have a blind spot for words in the statute unfavorable to its position, because the entirety of its evidentiary presentation below only attempted to establish that Bethel’s conduct was “regular” (*i.e.*, lawful), not that it was “normal.” Both showings must be made, but Bethel did not and cannot make either. As a result, Bethel instead frequently referred collectively to the “normal and regular conduct of the district,” attempting to elide the distinction between the two and its burden to demonstrate satisfaction of both. *See, e.g.* CP, at 39, 44-45, 249, 254-255.

3. *It Strains The Ordinary Meaning of “Normal” to Apply it to Political Activities by a School District.*

First, it is appropriate to consider the dictionary definitions of a word to determine its ordinary meaning. *King County Council*, 93 Wn.2d at 563; *Washington Public Ports Assoc.*, 148 Wn.2d at 647. Merriam-Webster’s Online Dictionary defines the word “normal” as follows:

- 1a: conforming to a type, standard, or regular pattern;
- b: according with, constituting, or not deviating from a norm, rule, or principle;
- 2: occurring naturally.

See <https://www.merriam-webster.com/dictionary/normal> (CP, at 155).⁹

“When the statutory language is plain, the statute is not open to construction or interpretation.” *Green River Community College District No. 10 v. Higher Education Personnel Board*, 95 Wn.2d 108, 113, 622 P.2d 826 (1980). The PDC, however, has promulgated a rule that appears to misinterpret and improperly expand the scope of what can be considered “normal” activities for a school district or other public agency. See WAC 390-05-273 (“Normal and regular conduct of a public office or agency Means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment; and (2) usual, i.e., not effected or authorized in or by some extraordinary means or

⁹ Perhaps even more pointedly, the Oxford Online Dictionary defines “normal” (in the first definition) to mean: “Conforming to a standard; usual, typical, or expected.” (emphasis added). See <https://en.oxforddictionaries.com/definition/normal> (CP, at 157).

manner.”) (emphasis added).

It is this Rule upon which the District’s position rests, notwithstanding that the case it cites, *State ex rel. Evergreen Freedom Foundation v. WEA*, 140 Wn.2d 615, 632-40, 999 P.2d 602 (2000), dealt with a different administrative rule entirely, namely WAC 390-17-100 (prescribing the content of deduction forms, which Bethel has also violated, as discussed in greater detail *infra*, at pp. 32-33). That case does not “stand[] for the proposition that school districts may divert part of an employee’s wages to a political committee,” however one may parse its language. CP, at 43-44, 253-254 (emphasis added). The court there was not presented with the propriety of deducted wages being directly funneled to political committees; it was called upon to decide whether the statute applied to the WEA, as a union rather than a public agency, and whether an employee’s specific annual authorization was necessary before the deduction could be made *State ex rel. Evergreen Freedom Foundation*, 140 Wn. 2d at 629-37. Further, the court only considered the circumstances under which *union dues and agency fees* could be deducted (with the employer arguably blind as to the ultimate recipient), not additional deductions *specifically* for political committees, *see id.*, at 610. Because the relevant rule here, WAC 390-05-273, was not even at issue in the *Evergreen Freedom Foundation* case, the Court did not purport to determine whether such deductions that

go *directly* to political candidates or committees are part of the “normal” operations of a school district, or indeed, even whether they are “lawful” within the meaning of WAC 390-05-273. Nor did the court consider a circumstance where knowledge of the political nature of the contributions simply cannot be denied. In this case, however, the entities to whom these political contributions were made appear at the top of the withholding form, making ignorance impossible. CP, at 018, 279.

The Foundation does not dispute that “normal” means essentially the same thing as “usual.” But neither of these words is so broad as to encompass all conduct that is “not effected or authorized in or by some extraordinary manner” – which would seem sufficient only to satisfy the “regular” prong. *See* WAC 390-05-273. Indeed, it can hardly be said that it is part of the normal or usual operations of a school district to engage in political activities, particularly in light of the unambiguous public policy of this State and the intent of the FCPA to prohibit such activity by government entities. *See Herbert v. Washington State Public Disclosure Commission*, 136 Wn. App. 249, 264, 148 P.3d 1102 (2006) (“The statute was enacted to ensure that public resources are not used to provide advantages to a particular candidate or ballot measure, and the restriction on the use of school systems furthers that purpose.”); *Washington Education Association v. Smith*, 96 Wn.2d 601, 607, 638 P.2d 77 (1981) (“Second, we can find

nothing in the legislative history indicating that the legislature intended to permit deductions for political purposes. In other legislation, the legislature has expressed its disapproval of using state property in connection with the solicitation or making of political contributions.”) (emphasis added).

In fact, such activities are so *abnormal* for a school district to engage in that the PDC’s rule expressly excludes them from the scope of “normal and regular conduct of a public office or agency” – unless they are “specifically authorized” by a separate constitutional, charter or statutory provision. *See* WAC 390-05-273.¹⁰ For this reason, *King County Council*, while useful for its exposition of the law, is distinguishable on its facts. There, the court only endorsed the unremarkable propositions that it is normal conduct of a legislative body to pass a council resolution endorsing a ballot measure, and that it was “lawful” for the legislative body to do so where authorized by other statutes. *See* 93 Wn.2d at 562-63. These activities, of course, fall well within the normal conduct of a legislative body, while school districts are not traditionally, normally, or even lawfully thought of as assisting political campaigns. The Legislature, the PDC, and

¹⁰ This is a point discussed in greater detail *infra* at pp. 26-29, but for present purposes, the Foundation need only say that the PDC’s exclusion as such seems to acknowledge that political activities are not “normal,” in the ordinary sense of the word, even if they could otherwise be “normal,” under its definition. In effect, the PDC’s definition states that such activities are not “normal,” unless they are “regular” (in which case they are *necessarily* “normal”) – thereby allowing the “regular” prong to entirely overtake the analysis.

apparently even the Bethel School District, do not feel that political activities using public facilities are part of a school district’s “normal” operations, or their policies would not so sharply condemn political activities by employees. *See* CP, at 121, 323 (“The district, as part of its mission to educate and instill civic virtue, will assure that public facilities are not to be used to assist in any candidate’s campaign or to support or oppose any ballot measure...”); *see also State v. Economic Development Board for Tacoma-Pierce County*, 441 P.3d 1269, 1280 (2019) (“Further, because these actions were prohibited by the school district’s policies, and because the school was not customarily engaged in distributing political materials, Division One held that the teacher’s actions were not normal and regular conduct.”) (*discussing Herbert*, 136 Wn. App. at 256-57).¹¹

A definition so loose as the PDC’s drains virtually all meaning out of the word “normal,” and in the context of public schools, allowed Bethel to argue below that political contributions may be knowingly facilitated, and that “...school districts may divert part of an employee’s wages to a political committee, if it is done properly and in accordance with RCW 42.17A.495.” *See* CP, at 43-44, 253-254. Although Bethel would like to rely on the PDC’s interpretation, which could *sometimes* be entitled to deference

¹¹ Unfortunately, Judge Murphy did not have the benefit of this Court’s binding, directly applicable opinion in *State v. Economic Development Board for Tacoma-Pierce County*, at the time that summary judgment was granted to Bethel School District on April 19, 2019.

by a court in other circumstances, it cannot do so when that interpretation is fundamentally contrary to the legislative intent. *Weyerhauser v. State Dept. of Ecology*, 86 Wn.2d 310, 317; 545 P.2d 5 (1976).

It is a principle of first importance to our governmental structure that an agency only has those powers either expressly granted or necessarily implied from statutory grants of authority. *Green River Comm. Coll. Dist.*, 95 Wn.2d at 112. While an agency may “fill in the gaps” of legislation that it is charged with enforcing, it “...does not have the power to promulgate rules that amend or change legislative enactments.” *Id.* The interpretation of “normal” ascribed by WAC 390-05-273 does precisely that, however, because no person of ordinary intelligence, upon reading the word “normal” in the statute, would understand it to have that strained definition. *See Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 797, 947 P.2d 727 (1997). In advancing an interpretation of RCW 42.17A.555 that would allow school districts to engage in political contributions from employees’ wages – whether with written authorization or not – the PDC purports to “amend or nullify a statute under the guise of interpretation,” and yields an absurd result that it out of sync with the purposes of the FCPA. *See State v. Dodd*, 56 Wn. App. 257, 260, 783 P.2d 106 (1989). Accordingly, the PDC’s interpretation is not entitled to the “great weight” that Bethel placed upon

it.¹² *See Dodd*, 56 Wn. App. at 261 (“It has always been for the courts, not administrative agencies, to declare the law and interpret statutes.”). This case exemplifies the sound policy judgment that “...what should be required of a person covered under the public disclosure act should be determined not by the person who must report nor by the notions of those who administer the act but by the language of the statute.” *Seeber*, 96 Wn.2d at 141. The Court should hold that the PDC’s definition of “normal” is not entitled to deference here, that Bethel’s political activities cannot be considered “normal,” in the ordinary meaning of that word, and that the summary judgment must be vacated.

4. Bethel Can Cite No “Specific Authorization” For Processing Political Contributions.

In lieu of any discussion on the foregoing points, Bethel’s discussion below focused on whether its political activities can be considered “regular.” However, Bethel did not and could not satisfy this prong either, even with the benefit of the PDC’s definition. As recognized in the Motion below, that term is defined to mean “lawful, i.e., specifically authorized, either expressly or by necessary implication in an appropriate enactment.”

¹² Indeed, the interpretation embodied in Rule 390-05-273 was not promulgated contemporaneously with the initial passage of the FCPA in 1972, and did not come into existence until 1979. The timing of the PDC’s interpretation therefore cuts against the weight that Bethel believes it to have. *See Green River Community College*, 95 Wn. 2d at 118 (observing that contemporaneous interpretations are entitled to greater weight).

WAC 390-05-273 (emphasis added); CP, at 42-43, 252-253¹³; *King County Council*, 93 Wn.2d at 561.

But having no textual authority on point, the Defendant argued below that its “specific authorization” came by way of RCW 28A.405.400. *See* CP, at 44-45, 254-255. It is certainly true that the cited statute is phrased with a mandatory “shall,” but this is a mere distraction – what is missing from RCW 28A.405.400 is any specific reference to political contributions, whatsoever.¹⁴ While perhaps that Section “generally authorizes” Bethel to make deductions from employees’ wages, without any reference to contributions “for the purpose of assisting a candidate’s campaign or promoting or assisting a ballot proposition,” or any other political activity, it cannot “specifically authorize” the use of public facilities for those activities. *See, e.g., Economic Dev. Bd. for Tacoma-Pierce Cty.*, 441 P.3d at 1280 (“In *Herbert*, the court did not consider whether teachers generally e-mailed each other, but instead considered whether school e-mail was regularly used in the distribution of political materials.”). Given that there

¹³ It is worth noting that, while there is perhaps some dissonance between this definition of “regular” and the ordinary meaning of same, there is not such a conflict as results from the PDC’s improper definition of “normal.” *See* <https://www.merriam-webster.com/dictionary/regular>; <https://en.oxforddictionaries.com/definition/regular>. *See* CP, at 159-161.

¹⁴ Bethel also cites to RCW 42.17A.495 (*see* CP, at 43-44, 253-254), but that statute cannot provide specific authorization for anything, given that it is *proscriptive* of the deductions at issue, unless there is a written request from the employee for the deduction. Moreover, that statute applies broadly to all employers, not just public employers, and similarly cannot be read to specifically authorize any political conduct by Bethel, a public school district.

is no express authorization in any other statute, either, Bethel (and the trial court) apparently found such authorization in a *decisional* authority, the *Evergreen Freedom Foundation* case that is cited in its Motion (CP, at 43-44, 253-254). 140 Wn.2d 615, 999 P.2d 602 (2000). But as noted *supra* at pp. 21-22, that case is readily distinguishable in numerous respects, most obviously because it did not even deal with the same PDC Rule at issue here. Thus, even if the requisite authority *could* be found in a case, instead of in a textual provision (which it cannot), Bethel has cited no such case.

As the Foundation pointed out to the PDC and to the trial court, when the Legislature intends to carve out such specific authorizations for political activity, it knows how to do so. *See, e.g.,* RCW 35.58.268 (authorizing political contributions via payroll deduction for public transportation employees). It likely did not do so here because of the different, and long-established public policy of Washington, which vocally disapproves of the use of public school resources for political purposes.¹⁵ *See Washington Education Association v. Smith*, 96 Wn.2d 601, 606-07, 638 P.2d 77 (1981). In the absence of any “specific authorization” in a

¹⁵ There is simply no specific authorization in RCW 28A.405.400 – but even to the extent that one could be extrapolated therefrom, the newer statute, RCW 42.17A.555 (along with its express prohibition) must be held to govern here. *Geschwind v. Flanagan*, 121 Wn. 2d 833, 841, 854 P.2d 1061 (1993) (*citing Morris v. Blaker*, 118 Wn. 2d 133, 147; 821 P.2d 482 (1992) (“A conflict between two statutory provisions can be resolved by giving effect to the more specific and more recently enacted statute.”)).

textual authority to use payroll deductions for political purposes, Bethel’s political activities are no more “regular” than they are “normal.” *See, e.g., Economic Dev. Bd. for Tacoma-Pierce Cty.*, 441 P.3d at 1281 (“The Port is authorized by statute to manage the port, its lands, and its employees, and to engage in economic endeavors ... However, the Port does not point to any statute separately authorizing it to oppose ballot propositions as required by WAC 390-05-273.”) (emphasis added). Just as in that recent case involving the Economic Development Board, where the Attorney General overrode the PDC’s recommendation to take no action (*see* 441 P.3d at 1274), the PDC’s contrary determination in this case only exemplifies *Utter*’s well-founded concern that government actors simply “may be wrong.” 182 Wn. 2d at 411.

C. The Trial Court Should Not Have Granted Summary Judgment, With Discovery Incomplete and the Record Presenting Factual Issues.

At summary judgment, Bethel attempted to make a showing that the payroll deductions at issue here were “normal and regular,” within the meaning of the statute, simply because the form that is utilized purportedly complies with that prescribed by the FCPA, and these payroll deductions are processed monthly, for a large number of employees. *See* CP, at 44-45,

254-255; CP, at 16, 277.¹⁶ Under CR 56, summary judgment is proper only where no material issue of fact exists in the record, and where the moving party is entitled to judgment as a matter of law. *See White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) (citing CR 56(c)). “The moving party bears the initial burden of showing the absence of an issue of material fact,” and as suggested by the language of Rule 56, this burden must typically be met by reference to evidence in the record, *e.g.*, responses to interrogatories, deposition transcripts, supporting affidavits and the like. *See Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).¹⁷ Accordingly, such motions should be granted only if, from consideration of all the evidence, reasonable persons could reach but one conclusion: that the movant is entitled to judgment, as a matter of law. *See Olson v. Siverling*, 52 Wn. App. 221, 224, 758 P.2d 991 (1988).

In this case, however, it seems that the trial court forgot the respective burdens of the parties on a summary judgment motion. In making

¹⁶ Notably, it appears Bethel did not even proffer such a factual showing in support of the “usual” aspect of the “normal” prong, which would require reference to the ordinary operations of a school district and how exactly its indisputable assistance in employees’ making political contributions is included therein. *See supra*, at pp. 17-24.

¹⁷ A “material” fact is any that has the potential to affect the outcome of the matter, in whole or in part. *Hash by Hash v. Children’s Orthopedic Hospital & Medical Center*, 110 Wn. 2d 912, 915, 757 P.2d 507 (1988). It is axiomatic that when considering a motion for summary judgment, the court must construe *all* facts, evidence and reasonable inferences therefrom in support of the non-moving party. *Stevenson v. State*, 100 Wn. App. 1021, at *5 (Apr. 10, 2000) (not reported).

a *prima facie* case that it is entitled to judgment as a matter of law, the movant must offer specific facts rather than mere conclusory statements, to demonstrate the absence of any material issue of fact. *LaMon v. Butler*, 112 Wn. 2d 193, 197, 770 P.2d 1027 (1989).¹⁸ “If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion.” *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980). Because Defendant never shifted the burden to raise an issue of fact, the Motion should have been denied.

Setting aside the fact that the PDC has promulgated a definition of the word “regular” that Bethel cannot satisfy (*see supra*), the Foundation demonstrated below that the District’s payroll deductions were not “lawful” in the empirical sense of compliance with applicable law (assuming *arguendo* that the law “specifically authorize[d]” the deductions as addressed in the foregoing Section). This is because even RCW 28A.405.400, the statute upon which Defendant relies for a “specific authorization” for political contributions, states that “[t]he employer may

¹⁸ Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact.” *Hash by Hash*, 110 Wn. 2d at 915. Freedom Foundation, as the non-movant, had no obligation to marshal a shred of evidence demonstrating a disputed issue of material fact, unless and until Bethel carried its burden to show a *prima facie* case for summary judgment.

not derive any financial benefit from such deductions.” (emphasis added). The Appellant alleged below, however, that Bethel *had* received such a benefit (and thereby exceeded the scope of any authority under RCW 28A.405.400), by virtue of certain directors of the Bethel School District having received political contributions from the WEA. *See* Citizen’s Action Complaint, at ¶30 (CP, at 005). Support for these allegations was presented in the required disclosures of the WEA-PAC, which clearly evidence contributions to entities supporting the election of Amy Pivetta-Hoffman and Brenda Rogers. *See* CP, at 127, 131, 136, 328, 332, 341. Such conflicts of interest appear to implicate the central purposes of the FCPA, give rise to an appearance (if not the actual fact) of corruption, and required the denial of summary judgment on this record.

As an additional violation that should have precluded summary judgment, the “Authorization for Political Contributions” form utilized by the Bethel School District is not, in fact, wholly compliant with WAC 39-17-100. *See* CP, at 18, 279. That rule requires, *inter alia*, that the form contain “(e) A statement specifying that the authorization may be revoked at any time and such revocation shall be in writing.” (emphasis added). While the Appellee’s form is sure to advise the employee that “[t]his authorization for withholdings and contributions remains in effect until revoked in writing by the employee and received by WEA-PAC,” and that

he or she “agree[s] that this authorization shall automatically be renewed each year thereafter unless written notice of revocation is given by me to WEA,” the form does not, anywhere, “specify that the authorization may be revoked at any time,” as the administrative rule unambiguously requires. WAC 39.17.100 (emphasis added). The Appellant proffered no evidence below to rebut or explain this violation.

It cannot be overstated, however, that the Foundation’s evidence below was only that which it had been able to gather through its own devices, without the benefit of *any* discovery being conducted. Given that state of the record, it is clear that Bethel failed in its burden to demonstrate the absence of any material, disputed issue of fact. *See, e.g., Olson*, 52 Wn. App. at 224. Indeed, the District did nothing more than to submit the bare-bones, conclusory affidavit of its HR Director, Mr. Mitchell, ostensibly in support of the “normal and regular” inquiry required by the FCPA. From the few facts related therein, it made the grand leap of logic that “[t]he District’s compliance with RCW 28A.405.400 provides further proof that the processing of the deductions is part of the normal and regular conduct of the District.”). CP, at 45, 255.

While that factual showing was woefully insufficient to demonstrate that Bethel had truly been compliant (as was Bethel’s burden), it is also likely that discovery would have revealed significant additional information

– potentially including other violations of the FCPA and/or other applicable law in processing employees’ payroll deductions. *See, e.g., Stevenson*, 100 Wn. App. 1021, at *9 (“In the absence of discovery on these issues, it cannot be determined what immunity, if any, exists for the County under RCW 71.05.120.”). The moving party did not sustain its burden, so summary judgment should not have been granted. *Graves*, 94 Wn.2d at 302. In so doing, notwithstanding the clear presence of factual issues and the lack of discovery, the trial court erred.

D. The Freedom Foundation Had Statutory Standing to Seek Judicial Review of the PDC’s Dismissal of Its Complaint.

Under well-established Washington law, “CR 12(b)(6) motions should be granted only sparingly and with care.” *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (internal quotations and citation omitted). Not only must all facts alleged in the complaint be accepted as true, but the Court must deny dismissal if “any set of facts, consistent with the complaint, would entitle the plaintiff to relief.” *Janicki Logging & Construction Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001).¹⁹

¹⁹ As such, dismissal is only proper if “...it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery.” *Burton v. Lehman*, 153 Wn. 2d 416, 422, 103 P.3d 1230 (2005). It has been recognized that a court may therefore consider, in addition to the facts alleged, hypothetical facts or situations asserted by the complaining party, whether or not part of the formal record. *Bravo*, 125 Wn. 2d at 750.

As a matter of statute, a person's standing to challenge administrative decision-making requires that such person be "aggrieved or adversely affected" by the agency's decision. RCW 34.05.530. The statute sets forth three (3) requirements to make this determination, derived from federal case law, which are that: "(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." *Id.*; see also *Seattle Building and Construction Trades Council v. The Apprenticeship and Training Council*, 129 Wn.2d 787, 793, 920 P.2d 581 (1996).

"The first and third conditions are often called the 'injury-in-fact' requirement, and the second condition is known as the 'zone of interest' test." *Seattle Bldg. & Constr. Trades Council*, 129 Wn. 2d at 793-94. Because they are derived from federal case law, both the "injury-in-fact" and the "zone-of-interest" statutory requirements are interpreted and applied consistently with federal law on the subject. *KS Tacoma Holdings, LLC v. Shorelines Hearings Board*, 166 Wn. App. 117, 126-27, 272 P.3d 876 (2012). In this case, the PDC's dismissal of the Foundation's

administrative complaint results in more than one “injury-in-fact,” and it is clear that the Foundation is within the FCPA’s “zone of interest.”

The APA Petition alleged specific and perceptible harm to its interests, arising from the facts that “Bethel uses its facilities to pay employee wages and to withhold WEA-PAC and NEA-FCPE contributions from employee wages ... Bethel uses its facilities to directly give the political contributions to the political committees by forwarding the money from the employee’s wages to the political committees ... Bethel currently makes contributions to political committees for approximately 600 employees ... Bethel employees set up and use district machines and equipment for payroll systems during work hours, directly and indirectly assisting all campaigns and ballot propositions supported by WEA-PAC and NEA-FCPE.” *See* APA Petition, at ¶¶19-22 (CP, at 219). Bethel admits these acts. CP, at 232, ¶¶19-22.

1. Appellant Suffers An “Injury-In-Fact” As a Result of the PDC’s Decision, Which Would Be Redressed By a Favorable Determination Here.

Looking to the U.S. Supreme Court’s decisions, the courts of appeal in this state have defined an “injury-in-fact” as the “...invasion of a legally protected interest.” *Snohomish County Public Transportation Benefit Area v. State Public Employment Relations Commission*, 173 Wn. App. 504, 513, 294 P.3d 803 (2013) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555,

560 (1992)). At the motion to dismiss stage, the Foundation was only required to allege facts that, if taken as true, establish that it would be “specifically and perceptibly harmed” by the PDC’s decision. *KS Tacoma Holdings, LLC*, 166 Wn. App. at 129. As to redressability, the Foundation’s allegations were required to support that “...it is likely, as opposed to merely speculative, that the injury [would] be redressed by a favorable decision.” *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

In satisfying the foregoing pleading requirements for standing, the APA Petition alleged that it suffers an “injury-in-fact” as a result of “...the PDC decision, which prejudices the Foundation in that it denied the Complaint,” and because “...the Foundation was a party to the PDC proceeding below.” APA Petition, at ¶¶38-39 (CP, at 222). As to redressability, the APA Petition alleged the obvious fact that “...the Court’s ruling that PDC’s decision is in error would eliminate and redress the prejudice caused by PDC’s decision,” (*id.*, at ¶39), in addition to the direct invasion of its legally protected interest in having its complaint correctly determined under a proper interpretation of the law (*id.*, at ¶¶39-40). Below, however, the PDC argued flatly that there was no prejudice to the Foundation’s interests simply because “[i]t exercised no coercive power over Freedom Foundation.” CP, at 242. But in fact, the PDC did. The

Foundation was sufficiently interested to file a lengthy, detailed administrative Complaint. The PDC refused to act on its allegations, and the PDC would prefer its decision end the matter.

But the PDC’s narrow view of the injury-in-fact test is not the law. Instead, “[t]he Supreme Court of Washington has stated its intent to follow the United States Supreme Court, which ‘routinely recognizes probable *economic* injury resulting from agency actions that alter competitive conditions as sufficient to satisfy’ the injury-in-fact requirement.” *Washington Independent Telephone Association v. Washington Utilities and Transportation Commission*, 110 Wn. App. 498, 512, 41 P.3d 1212 (2002) (citing *Seattle Bldg. and Constr. Trades Council*, 129 Wn. 2d at 795). As such, the Foundation’s allegations supported two (2) different “concrete and specific” injuries-in-fact, neither of which is hypothetical or conjectural: (1) the denial of the relief it requested from the PDC when the PDC dismissed its administrative complaint; and (2) the “competitive” harm to the Foundation’s interests when violations of the FCPA go unchecked and unredressed. Either of these is sufficient to support standing.

First, of course, the Foundation has a clear injury-in-fact that results from the PDC dismissing its complaint, out of hand. *See, e.g., Automotive United Trades Organization v. Washington Public Disclosure Commission*, 2019 WL 2121528, at *4-5 (May 14, 2019) (not reported) (“The agency

action at issue here is the PDC’s June 17 letter ... wherein the PDC declined to take action on AUTO’s citizen’s action notice ... AUTO reasonably should have known that the June 17 letter detailing why its citizen’s action was meritless would cause it specific and perceptible harm.”).²⁰ The Foundation was a party to the administrative complaint and the denial thereof (*see* RCW 34.05.010(12) (defining “party” to include “[a] person to whom the agency action is specifically directed”)), and it was therefore immaterial that “...a complainant has no ability to participate in any proceeding, unless requested by the Commission.”²¹ CP, at 241. The Plaintiff brought its administrative complaint pursuant to a specific statutory provision (RCW 42.17A.755) – and the agency saw fit to hear a response from the PDC’s counsel in that regard and requested supplemental information from the Foundation (as a party) in support of its complaint,

²⁰ Although it is an unpublished opinion, *AUTO v. WSPDC* should be considered as highly persuasive precedent, as it dealt with an injury-in-fact arising out of the context of the exact statutory scheme at issue here, and indeed, out of the very same conduct on the part of the PDC. Judge Price did not have the benefit of this appellate decision at the time the trial court granted the PDC’s motion to dismiss.

²¹ The mere fact that the Foundation was a party to the administrative proceedings here distinguishes all of the otherwise factually relevant cases cited by the Defendant below. First, in *Allan v. University of Washington*, the basis for the court’s holding was that the plaintiff herself was not the subject of disciplinary proceedings concerning her husband, a professor at the university. *See* 140 Wn.2d 323, 332-33, 997 P.2d 360 (2000) (“Absent a concrete interest, injury-in-fact standing under the APA is not conferred upon the spouse of an administrative agency’s employee merely on the basis of an asserted failure on the part of the agency to follow procedural requirements.”). In *Newman v. Veterinary Board of Governors*, the court’s decision was similarly predicated upon the fact that the plaintiffs were not parties to the administrative proceedings. *See* 156 Wn. App. 132, 147, 231 P.3d 840 (2010) (“The Newmans’ position rests on the erroneous conclusion that they are parties to the Board’s decision not to file a statement of charges.”).

before making a determination. Attachment A to APA Petition (CP, at 226); WSPDC 0001, WSPDC 0200, WSPDC 0202. Further, and as this Court has before found highly significant, the PDC here too copied the adverse party (Bethel’s attorney) on the letter declining to take action on the Foundation’s Complaint. WSPDC 0211-0213; *AUTO*, 2019 WL 2121528, at *5.

The Foundation raised below a question of whether the agency’s handling of its complaint adhered to the agency’s duties as set forth in the same provision – and the APA required review of that question. *See Seattle Bldg. & Const. Trades Council*, 129 Wn. 2d at 798 (“RCW 34.05.570(4)(b) authorizes judicial review when a person’s rights are violated by an agency’s failure to perform a duty required by law to be performed.”). The injury of which the Foundation complained had already been accomplished, and therefore cannot be considered merely speculative. As such, many of the cases cited by the PDC were easily distinguishable – particularly in the context of a motion to dismiss. *See Patterson v. Segale*, 171 Wn. App. 251, 259-60, 289 P.3d 657 (2012) (nonspecific and conjectural injury is insufficient to impart standing); *KS Tacoma Holdings, LLC*, 166 Wn. App. at 132 (“Because KS Tacoma’s alleged land use injury is speculative and lacks factual support, it fails the prejudice prong of the injury-in-fact test.”); *Trepanier v. City of Everett*, 64 Wn. App. 380, 383-84, 824 P.2d 524 (1992).

Second, the Foundation adequately alleged a “competitive harm” resulting from the campaign contributions that its administrative complaint sought to prevent. Such illegal contributions work an additional ascertainable injury-in-fact to the Freedom Foundation itself, because they frustrate the Foundation in achieving its goal to promote the policies embodied in the FCPA. *See Snohomish Cty. Public Transp. Benefit Area*, 173 Wn. App. at 514; *Reagles v. Simpson*, 72 Wn. 2d 577, 585-86, 434 P.2d 559 (1967).²² Moreover, upon a motion to dismiss, the trial court should have considered any conceivable facts consistent with those alleged in the APA Petition (*Bravo*, 125 Wn. 2d at 750; *Janicki Logging*, 109 Wn. App. at 659) – including that the PDC arbitrarily and capriciously dismissed the Foundation’s administrative complaint with no basis in law or fact, for purely political reasons, without even according it the procedure which an alleged “actual violation” required. *See* APA Petition, at ¶¶3, 40 (CP, at 217, 222). Even ignoring the Foundation’s clear standing as a matter of statute, the competitive harm that results from the PDC’s decision was a firm,

²² “The plaintiffs predicate their right to sue on the vital interest they have in all matters affecting the osteopathic profession, and also on their interest, founded on their professional responsibility to the public, in the standards of medical education and practice in this state. They also contend that the osteopathic profession will suffer, particularly osteopathic specialists and osteopathic hospitals, because the Board’s actions will encourage some osteopathic general practitioners to desert their profession for the medical profession. This would reduce referrals to osteopathic specialists and the use of osteopathic hospitals ... We are satisfied that these plaintiffs are interested in, and affected by, the Board’s action to an extent sufficient to give them standing to sue in this case.”

recognized basis for finding prejudice. This unfavorable decision provides a strategic advantage to its future adversaries, by purportedly allowing them to use government resources to facilitate collecting funds with which to oppose the Foundation's efforts to inform members of their constitutional rights. *See Telecommunications Ratepayers Association for Cost-Based and Equitable Rates and Public Counsel v. Washington Utilities and Transportation Commission*, 112 Wn. App. 1045, at *4, n.29 (unreported op.) (July 22, 2002) ("The injury-in-fact requirement is satisfied by evidence of 'probable economic injury resulting from agency actions that alter competitive conditions.'"); *Seattle Bldg. and Const. Trades Council*, 129 Wn. 2d at 795. That prejudice would clearly have been redressed by a decision below in favor of the Foundation on the merits, so the Plaintiff had satisfied both sub-prongs of the "injury-in-fact" test.

2. *Appellant Is Within the Broad "Zone of Interests" Contemplated by the Fair Campaign Practices Act.*

The "zone of interest" test is a further requirement applied by courts to separate plaintiffs having standing from the general public, "...because so many persons are potentially 'aggrieved' by agency action." *St. Joseph Hospital & Health Care Center v. Dept. of Health*, 125 Wn. 2d 733, 739, 887 P.2d 891 (1995). "However, although the zone of interest test serves as an additional filter limiting the group which can obtain judicial review of

an agency decision, the ‘test is not meant to be especially demanding.’” *Seattle Bldg. & Constr. Trades Council*, 129 Wn. 2d at 797 (citing *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987)). The test focuses on whether the Legislature intended for the agency to protect the complainant’s interests (*i.e.*, “required [it] to consider” the complainant’s interests) when taking the actions at issue. *Id*; see also RCW 34.05.530(2).

That test was easily met below. Indeed, the FCPA’s intent is plainly stated, to “[e]nsure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes.” RCW 42.17A.400 (emphasis added). As such, “[t]he provisions of [Chapter 42.17A] shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying ... so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.” RCW 42.17A.010. “Initiative 276 was designed to inform the public and its elected representatives of expenditures made by persons whose purpose it is to influence or affect the decision-making processes of government.” *State v. Dan J. Evans Campaign Committee*, 86 Wn. 2d 503, 507-08, 546 P.2d 75 (1976).

For present purposes, the Legislature’s intent is displayed in its provision for an administrative complaint by any interested parties, which

the Plaintiff availed itself of here (as discussed above). RCW 42.17A.755 (“Violations”) (“The commission may initiate or respond to a complaint, request a technical correction, or otherwise resolve matters of compliance with this chapter, in accordance with this section.”) (emphasis added). It appears that the PDC “dismissed” the Foundation’s administrative complaint pursuant to RCW 42.17A.755 – even though the violations alleged by the Appellant rose well above the level of the “remedial violations” or “technical corrections” that the FCPA allows to be handled in this manner. *See* 42.17A.755(2)(a).

The PDC argued below that merely because the Foundation could not force its hand and require it to commence a full investigative and/or adjudicatory process, that the PDC’s decision is therefore immune from judicial review – in other words, it interpreted the “required to consider” language of the statute in a far more stringent and technical sense than any court of this State has ever understood it before. CP, at 243 (“Similarly here, Freedom Foundation has no right under RCW 42.17A to compel any investigation or action by the Commission against the Bethel School District. Such decisions rest exclusively with the Commission.”). But the discretion of the PDC is not so unfettered.²³ If there is presented something

²³ As such, the principles discussed in *Heckler*, concerning a preclusion of judicial review where the enabling statute so provides, or where there is such a lack of standards that the

more than a mere “remedial violation” or “technical correction”, then the PDC “must ... (b) [i]nitiate an investigation, conduct hearings, and issue and enforce an appropriate order ... [or] (c) [r]efer the matter to the attorney general.” RCW 42.17A.755.

It should have gone without saying that a person or entity whose complaint is dismissed, after being brought pursuant to the FCPA’s statutory procedure, is within the “zone of interest” that the statute contemplates. *See, e.g., City of Burlington v. Washington State Liquor Control Board*, 187 Wn. App. 853, 863, 351 P.3d 875 (2015). A right of review is necessary if only to determine that the PDC has not acted arbitrarily in determining that additional investigation and adjudication with respect to the Foundation’s allegations was not itself required by law. *See Pierce County Sheriff v. Civil Service Commission of Pierce County*, 98 Wn. 2d 690, 693-694, 658 P.2d 648 (1983) (“The right to be free from such action is itself a fundamental right and hence any arbitrary and capricious action is subject to review.”). As in *City of Burlington*, the Foundation’s statutory standing is an important fact that distinguished it from the general public, most of whom have not filed similar complaints with the PDC and been summarily rebuffed in their efforts. *See* 187 Wn. App. at 863, n.8. And

matters is one “committed to an agency’s absolute discretion,” were totally inapposite to the trial court’s analysis. *Heckler v. Chaney*, 470 U.S. 821, 828-35 (1985).

as Division One observed in that recent opinion, this glaring fact distinguished the case relied heavily upon by the Defendant, *Allan v. University of Washington*, 140 Wn. 2d 323, 997 P.2d 360 (2000))– in addition to the other distinguishing points noted *supra*, at p. 39, n.21.²⁴ While all of the citizenry have a *right* to file an administrative complaint, the Foundation is in a better position to do so, in support of its mission to advance individual liberty, free enterprise, and limited, accountable government. And having filed the case, its interests are necessarily greater than those of the general public.

As such, this case is much like that before the Washington Supreme Court in *St. Joseph Hospital*, 125 Wn. 2d at 739-42. There, the state Department of Health granted a certificate of need (CN) to Medical Ambulatory Care, Inc., a health care provider that competed for business with the plaintiff in that case, St. Joseph Hospital. *Id.* at 735. St. Joseph had challenged the grant at the administrative level and was initially successful, but the applicant was ultimately given a CN and St. Joseph filed a petition

²⁴ The PDC also extensively cited the *Newman* case, dealt with above as it concerns “injury-in-fact,” in connection with the “zone of interest” prong of the standing test. *See* Motion, at pp. 7-8 (CP, at 242-243). It is unclear why – except perhaps to improperly conflate those issues – since that opinion was expressly predicated on the “injury-in-fact” analysis. *See Newman v. Veterinary Board of Governors*, 156 Wn. App. 132, 143-44 (2010). In any event, it *is* clear (whether the PDC had some degree of discretion with respect to the disposition of the Foundation’s administrative complaint), that the Foundation’s interests are nonetheless among those the PDC is broadly charged with enforcing, and is thus “required to consider” whenever it engages in decision-making.

for review. *Id.* The court found St. Joseph to have standing, even though its interests were not directly and immediately injured by the conferral of a benefit on its competitor (which, it is worth noting, is *not* the case here, *see supra*). *Id.*, at 741-742.²⁵ Here, similarly, the aims of the FCPA can only practically be achieved if individuals and entities such as the Foundation can seek judicial review to ensure that the PDC interprets the FCPA properly. Most assuredly, the School District and similar parties will not appeal decisions declining to investigate them.

Further, recent legislative amendments to the FCPA render hollow the Defendant's concern that "...to allow any complainant to challenge a complaint dismissal opens the judicial floodgates to those who simply wish to second guess every decision made by the Commission." CP, at 243. The Legislature has already fashioned what it deems to be an appropriate remedy to the problem of widespread, vexatious FCPA suits by allowing the PDC to dispose of "technical corrections" or "remedial violations" without resort to the fuller adjudicative procedures that indisputably trigger judicial review, "...**provided the executive director consistently applies such authority.**" RCW 42.17A.755 (emphasis added). The trouble is twofold: (i)

²⁵ "While an applicant who is denied a CN has both a motive and a statutory right to seek review of the Department's determination, no comparable motivation or statutory authority to seek review exists when the Department grants a CN. Practically, this review can only be achieved if competitors have standing." (emphasis added); *see also Clarke*, 479 U.S. at 403.

the violations alleged here are not such “remedial violations” or “technical corrections,” and (ii) the PDC asserts the *further* authority to insulate from review its decisions as to which category a violation falls into – *i.e.*, it disregards the language requiring it consistently to apply such authority, because someone else must necessarily make *that* determination. The Foundation’s contrary interpretation of the FCPA can hardly be called “absurd” if it yields a result that is expressly called for by the statute, enacted in response to the problem that the PDC predicts. *See CP*, at 243.

At an even more basic level, the “zone of interest” test itself has already accounted for the “floodgates” concern and balanced it with the salutary purposes of APA review; the line it has drawn is not an “especially demanding” one. *See City of Burlington*, 187 Wn. App. at 863; *Clarke*, 479 U.S. at 395-96, 399. APA review also plainly does not require any indication of a specific “...congressional purpose to benefit the would-be plaintiff,” as the PDC’s arguments below suggested.²⁶ *See Clarke*, 479 U.S. at 400; *see also CP*, at 242-243. But the Foundation *does* have a right to have the PDC properly interpret the statute in any investigation the

²⁶ Furthermore, although the Foundation responds in greater detail to the PDC’s “injury-in-fact” arguments *supra*, at pp. 36-42, the analysis from *City of Burlington* evidences that the “injury-in-fact” prong is not “especially demanding,” either. *See* 187 Wn. App. at 862 (“The zone of interest test limits judicial review of an agency action to litigants with a viable interest at stake, rather than individuals with only an attenuated interest in the agency action.”). Indeed, if an “injury-in-fact” required such a demanding showing as the PDC seems to believe, the courts would never have felt that the “zone of interest” was necessary to stem the tide of possible complainants for judicial review.

Foundation precipitates, and is within the broad “zone of interests” established by the FCPA. As such, the trial court erred.

E. The Foundation Is Entitled to Be Reimbursed For Its Attorney’s Fees and Costs.

Lastly, the Foundation requests an award of the reasonable attorney’s fees and costs it has incurred in pursuing the matters below, as well as this instant appeal. The FCPA provides for a reimbursement of these expenses in successful citizen’s actions. RCW 42.17A.775. Here, the matters set forth in the APA Petition are inextricably intertwined with those set forth in the Citizen’s Action Complaint, so the Foundation should be awarded all of its reasonable attorney’s fees and costs in these matters.

V. CONCLUSION.

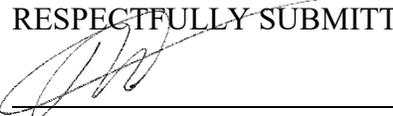
Bethel School District is using its taxpayer funded facilities to send political contributions directly to political committees, for contribution to favored candidates, including two Bethel School District board members. This is contrary to the Fair Campaign Practices Act, Washington public policy, and longstanding PDC guidelines. No statute authorizes the use of public school facilities to process contributions to political committees, nor is it “normal” or “regular” under Bethel’s own policies, either.

The Citizen’s Action Complaint was brought below because the PDC declined to take enforcement action. Ever since its inception in I-276,

the Fair Campaign Practices Act has included a citizen’s suit provision, the purpose of which is to challenge a government decision, such as that of the PDC, which “may be wrong.” *Utter*, 182 Wn. 2d at 411. The 2018 FCPA amendments did not attempt silently to change this fundamental feature, which is retained by its plain language. Thus it remains in place where the PDC declines to initiate enforcement proceedings, continuing to permit citizens to prosecute significant violations of the Act.

For all of the reasons set forth above, the Foundation respectfully requests that the Court (a) vacate the trial court’s Order Granting Defendant Bethel School District’s Motion for Summary Judgment Dismissal of all Claims; (b) vacate the trial court’s Order Granting Defendant, Washington State Public Disclosure Commission’s, Motion to Dismiss; (c) vacate the trial court’s Order Granting Bethel School District’s Motion for Summary Judgment; (d) award reasonable attorney’s fees and costs to the Foundation, in the trial court and on appeal; and (e) remand to the trial court for entry of judgment finding that Bethel School District has violated the FCPA.

RESPECTFULLY SUBMITTED this 1st day of August, 2019.



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DECLARATION OF SERVICE

I, Jennifer Matheson, hereby declare under penalty of perjury under the laws of the State of Washington that on August 1, 2019, I filed the foregoing document and caused it to be delivered via USPS and e-mail to the following:

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FREEDOM FOUNDATION

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