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NO. 53415-1-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

FREEDOM FOUNDATION,

Appellant,

v.

BETHEL SCHOOL DISTRICT,
and
WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION

Respondents,

and
WASHINGTON STATE EDUCATION ASSOCIATION,
Possibly interested party

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION'S
RESPONSE BRIEF

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I. INTRODUCTION

Freedom Foundation filed two legal actions that are not permitted under state law. The Washington State Public Disclosure Commission (Commission) timely considered a complaint filed by Appellant Freedom Foundation alleging that Bethel School District violated the Fair Campaign Practices Act (RCW 42.17A) by withholding from wages, upon written request of its employees, contributions to political committees. The Commission dismissed the complaint, exercising the discretion granted to it by RCW 42.17A. Dissatisfied with the Commission's dismissal, Freedom Foundation filed a citizen action in the name of the state against Bethel School District, and simultaneously sought judicial review of the Commission's dismissal. Both actions were properly dismissed by the superior court.

There is no legal basis supporting either a citizen action under RCW 42.17A or judicial review under the Administrative Procedure Act (APA), RCW 34.05. First, the Legislature has precluded Freedom Foundation's citizen action pursuant to the plain language of RCW 42.17A, which prohibits such actions where the Commission has timely dismissed the citizen's underlying complaint. Second, Freedom Foundation lacks standing to seek judicial review under the APA, as it has failed to meet its burden of showing any particularized injury.

Finally, Freedom Foundation's underlying complaint lacks merit, as Bethel School District committed no violation of RCW 42.17A. This Court should affirm the dismissal of both superior court actions.

II. RESTATEMENT OF THE ISSUES FOR REVIEW

1. Does the plain language of RCW 42.17A preclude a citizen action in the name of the state where the Commission dismisses a complaint?

2. Did the superior court properly dismiss Freedom Foundation's petition for judicial review where Freedom Foundation lacks standing under the APA, having suffered no injury-in-fact?

III. RESTATEMENT OF THE CASE

A. The Commission's Authority To Investigate Complaints

In 1972, Washington voters adopted Initiative 276, designed, in part, to give the public complete access to information about who funds election campaigns. I-276 § 1. The Commission was established to enforce portions of I-276, which now are codified in RCW 42.17A. *See* RCW 42.17A.105. RCW 42.17A encompasses laws that "seek to ferret out those whose purpose is to influence the political process and subject them to the reporting and disclosure requirements of the act in the interest of public

information.” *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508, 546 P.2d 75 (1976). RCW 42.17A is “liberally construed” to “promote complete disclosure of all information respecting the financing of political campaigns.” RCW 42.17A.001. The “requirements do not restrict political speech – they merely ensure that the public receives accurate information about who is doing the speaking.” *Voters Educ. Comm. v. Pub. Disclosure Comm’n*, 161 Wn.2d 470, 498, 166 P.3d 1174 (2007).

B. Factual Statement

The Commission received a complaint from Freedom Foundation concerning the Bethel School District in June 2018, along with supporting documentation concerning the complaint. AR 0001-0199.¹ The complaint alleged that the District’s use of public facilities to process employee contributions to the Washington Education Association’s Political Action Committee (WEA-PAC) and the National Education Association Fund for Children and Public Education (NEA-FCPE) violated RCW 42.17A.555. *Id.* The Commission received the District’s response on August 30, 2018. AR 0200-0201. A few days later, Freedom Foundation provided the Commission with supplemental information regarding its complaint.

¹ “AR” refers to the Certified Administrative Record. “CP” refers to the Thurston County Superior Court’s Clerk’s Papers.

AR 0202-0210. The Commission reviewed the documents submitted, assessed the factual and legal arguments, and determined that Freedom Foundation's complaint was without merit because the District's withholding of wages is explicitly authorized in statute. On September 10, 2018, the Commission dismissed the complaint. AR 0211-0213.

C. Procedural History

Following the Commission's dismissal of Freedom Foundation's complaint, Freedom Foundation filed a citizen's action in the name of the state against Bethel School District in Thurston County Superior Court. CP 1-8. The court granted the District's summary judgment motion and dismissed the action. CP 204-211. Freedom Foundation simultaneously filed a second action in Thurston County Superior Court, seeking judicial review under the APA, RCW 34.05. CP 216-229. The court dismissed the action upon granting the Commission's motion to dismiss and the District's summary judgment motion. CP 435-444. Freedom Foundation appealed the dismissal of both superior court matters, and this Court ordered the appeals consolidated.

IV. STANDARD OF REVIEW

A. The Citizen Action Matter

Whether Freedom Foundation may pursue a citizen action in the name of the state is a question of law requiring the interpretation of RCW 42.17A.775. This Court reviews issues of statutory construction *de novo*. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). In construing a statute, the court's fundamental objective is to ascertain and carry out the people's or the Legislature's intent. *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). This Court looks to the entire "context of the statute in which the provision is found, [as well as] related provisions, amendments to the provision, and the statutory scheme as a whole." *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015) (internal quotation marks omitted) (quoting *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015)).

B. The Commission's Dismissal

Judicial review of agency actions, such as the Commission's dismissal of Freedom Foundation's complaint, is governed by the APA. RCW 34.05.570. The party asserting the invalidity of the agency's action has the burden of demonstrating invalidity on the grounds listed in RCW 34.05.570(3). RCW 34.05.570(1)(a)-(b), (3). When reviewing an

agency's decision, an appellate court sits in the same position as the superior court and applies the standards of review directly to the agency record. *Tapper v. State Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Questions of law are reviewed *de novo*. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982).

Courts grant substantial weight to an agency's interpretation of the statutes it administers when that agency possesses expertise in the subject matter. *Pub. Utility No. 1 of Pend Oreille County v. State Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). Here, the Commission is charged with, and has expertise in, administering RCW 42.17A, and the court should accord substantial weight to the Commission's application of that law. *See* RCW 42.17A.105-.110.

V. ARGUMENT

The two matters on appeal before this Court are separate actions, but the underpinning of both matters is the complaint filed by Freedom Foundation with the Commission. For different reasons, both matters were properly dismissed below. Freedom Foundation's citizen action is precluded by the plain language of the statute, as the Commission timely considered and properly dismissed its complaint. As a party suffering no injury based on that dismissal, Freedom Foundation lacks standing to seek review under the APA. Even if Freedom Foundation could establish

standing, its complaint lacks merit as Bethel School District's actions were explicitly authorized by law.

A. Freedom Foundation's Citizen Action Is Precluded Under the Plain Language of the Statute

Freedom Foundation errs in seeking to apply the statute as it existed prior to June 7, 2018. Pursuant to the plain language of RCW 42.17A's revised statutory scheme, the filing of a complaint with the Commission is prerequisite to a citizen action under RCW 42.17A. RCW 42.17A.755(2). The Commission timely considered and dismissed Freedom Foundation's complaint against Bethel School District within 90 days of its receipt, finding no basis to conclude the district had violated RCW 42.17A. The Commission's dismissal precludes a citizen action. RCW 42.17A.775(2)(a). This Court should reject Freedom Foundation's attempt to disregard the new statutory scheme.

1. The Legislature limited the ability of citizens to pursue actions in the name of the state under RCW 42.17A

In 2018, the Legislature adopted ESHB 2938, making numerous amendments to RCW 42.17A, including substantial changes to the citizen action process. *See* Laws of 2018, Reg. Sess., ch. 304 (effective June 7, 2018).² Prior to those changes, the Washington Supreme Court had

² The Legislature also amended RCW 42.17A.755 and RCW 42.17A.775 in 2019, pursuant to SHB 1195. Laws of 2019, Reg. Sess., ch. 428. Those amendments have no bearing on this matter.

held that RCW 42.17A precluded a citizen suit only where the attorney general or local prosecutor brings a suit, and did not preclude such a citizen suit where the attorney general declines to sue. *Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 405, 341 P.3d 953 (2015). In enacting ESHB 2938, the Legislature did not eliminate the ability of citizens to file actions in the name of the state, but it did make such actions dependent upon the citizen first filing a complaint with the Commission. RCW 42.17A.775(2). Further, the Legislature chose to preclude citizen actions where the Commission has timely considered and taken action on the complaint. RCW 42.17A.775(2)(a). Freedom Foundation's complaint was filed on June 20, 2018, after the changes to RCW 42.17A took effect.

2. The Commission timely dismissed Freedom Foundation's complaint pursuant to RCW 42.17A.755(1)

The Commission has the authority to investigate apparent violations of RCW 42.17A upon receipt of a complaint. RCW 42.17A.105; RCW 42.17A.755(1). If a complaint is filed with the Commission, the Commission has the following options:

- (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 an actual 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.

RCW 42.17A.755(1) (emphasis added). In other words, the Commission must do one of four things: 1) dismiss a complaint; 2) resolve a complaint pursuant to RCW 42.17A.755(2); 3) initiate an investigation on the complaint, which may lead to an enforcement action; or 4) refer the matter to the attorney general. *Id.* Here, the Commission chose to dismiss the complaint, as authorized by RCW 42.17A.755(1)(a).

3. RCW 42.17A.755(2) is not applicable to Freedom Foundation's complaint

Freedom Foundation conflates RCW 42.17A.755(1) with RCW 42.17A.755(2), arguing that action taken by the Commission under *either* provision does not preclude citizen action. First, these statutory provisions should not be conflated, as the respective provisions are different methods of addressing complaints filed with the Commission. Second, as long as the Commission takes timely action under either provision, a citizen action *is* precluded.

RCW 42.17A.755(2) states, in pertinent part:

(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 (emphasis added).

Thus, RCW 42.17A.755(2)(a) addresses a particular type of complaint—a complaint considered to allege a “remedial violation” or a “technical correction.” Both terms are specifically defined in the statute and addressed in the Commission’s rules, and refer to potential errors in campaign finance reports filed with the Commission. *See* RCW 42.17A.005(45); RCW 42.17A.005(51); *see also* WAC 390-37. The conduct identified in Freedom Foundation’s complaint—employee withholdings by Bethel School District—does not relate to such reporting deficiencies.

Further, even assuming, *arguendo*, that RCW 42.17A.755(1) and (2) should be conflated as Freedom Foundation suggests, its argument lacks merit. RCW 42.17A.755(1)(a) states that the Commission has acted by either “dismissing the complaint” pursuant to RCW 42.17A.755(1), or “otherwise resolving the matter in accordance with” RCW 42.17A.755(2). In turn, RCW 42.17A.775(2)(a) states that a citizen action is precluded if action has been taken pursuant to RCW 42.17A.755(1). Thus, action taken by the Commission to either dismiss a complaint (as was done here), or, to

resolve the complaint as a remedial violation or technical correction, precludes citizen action.

4. The Commission's timely action on the complaint within 90 days of receipt precludes a citizen action in the name of the state

Pursuant to RCW 42.17A.775, a citizen may not sue in the name of the state if the Commission has taken action on a complaint within 90 days of receipt of that complaint. RCW 42.17A.775(2) states, in pertinent part:

(2) A citizen's action may be brought and prosecuted only **if the person first has filed a complaint** with the commission **and:**

(a) **The commission has not taken action authorized under RCW 42.17A.755(1) within ninety days of the complaint being filed** with the commission;

(b) For matters referred to the attorney general within ninety days of the commission receiving the complaint, the attorney general has not commenced an action within forty-five days of receiving referral from the commission. (Emphasis added).

Here, the Commission took action on the complaint within 90 days, pursuant to RCW 42.17A.755(1). Thus, under the plain language of the statute, Freedom Foundation is precluded from pursuing a citizen action in the name of the state.

5. Utter is not applicable to this matter

Freedom Foundation improperly relies upon *Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.*, a decision interpreting RCW 42.17A before its

amendment in 2018. In *Utter*, the Court was interpreting *former* RCW 42.17A.765(4), which stated:

(4) A person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself or herself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter.

(a) This citizen action may be brought only if:

(i) **The attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after the notice;**

(ii) The person has thereafter further notified the attorney general and prosecuting attorney that the person will commence a citizen's action within ten days upon their failure to do so;

(iii) **The attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice;** and

(iv) The citizen's action is filed within two years after the date when the alleged violation occurred. (Emphasis added.)

The entirety of subsection (4) was stricken by the Legislature in 2018, and replaced with the procedures set forth in RCW 42.17A.775. *See* Laws of 2018, Reg. Sess., ch. 304, § 14. As a result, *Utter's* discussion of when a citizen action may be pursued is no longer applicable to citizens who seek to sue under RCW 42.17A in the name of the state.

6. The legislative history of ESHB 2938 supports an intent to revise the citizen action process

The legislative history of the 2018 amendments to RCW 42.17A demonstrates that one clear purpose of the bill was to change the citizen

action procedures. The Final House Bill report includes a discussion of the changes to the procedure that a citizen must follow to file suit in the name of the state. The Supreme Court has looked to such sources to ascertain the legislative intent behind the passage of statutory amendments. *See State v. Medina*, 180 Wn.2d 282, 291, 324 P.3d 682 (2014) (quoting from a 2009 bill report to show the Legislature's intent behind the 2009 amendment to the law); *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 727, 153 P.3d 846 (2007) ("Useful legislative history materials may include bill reports."); *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 185, 829 P.2d 1061 (1992) (quoting from a Final Legislative Report to ascertain legislative intent).

The Final House Bill Report states:

Citizen's Action. The citizen's action procedures are changed. In order to file a citizen's action, a person first must file a complaint with the PDC. **If the PDC takes certain action within 90 days of receiving the complaint, then the person may not go forward in the process. Such action includes dismissing or otherwise resolving the complaint after a preliminary review**, initiating an investigation and holding any appropriate hearings, or referring the matter to the AG. If the PDC refers the matter to the AG within 90 days, a citizen's action may only proceed if the AG does not commence an action within 45 days of receiving the referral.

Final Bill Report of ESHB 2938, at 5-6, 65th Leg., Reg. Sess. (Wash. 2018) (emphasis added). This legislative history further solidifies what the plain language of the statute already makes clear: ESHB 2938 fundamentally

changed the citizen action process. While the ability of citizens to sue in the name of the state was preserved, such suits were precluded where the Commission had timely considered and acted upon the citizen's original complaint.

As it did with *Utter*, Freedom Foundation also mistakenly relies on *State of Washington v. Facebook, Inc.*, C18-1031JLR, 2018 WL 5617145 (W.D. Wash. Oct. 30, 2018). The issue before that court was whether the state's lawsuit was improperly removed by Facebook to federal court; the court agreed it was. The *Facebook* lawsuit was filed on June 4, 2018, prior to the amendments to RCW 42.17A. *Facebook*, 2018 WL 5617145, at *2. Without further discussion, the court merely acknowledged that the 2018 legislative changes relate to the "pre-filing requirements," precisely what is at issue here. *Facebook*, 2018 WL 5617145, at *5, fn.3. In any event, the court's statement regarding citizen actions was dictum, unrelated to the propriety of removal, and is not binding on this court.³

B. Freedom Foundation Lacks Standing to Seek Judicial Review Under the APA

In addition to being precluded from pursuing a citizen action, Freedom Foundation lacks standing to seek judicial review. A person must

³ In analyzing diversity jurisdiction and finding that Facebook had improperly removed the action to federal court, the Court recognized that the possibility of the citizen complainants bringing a citizen action in the name of the state did not transform them into the real parties in interest. *Facebook*, 2018 WL 5617145, at *6.

have standing to obtain judicial review of agency action under the APA. RCW 34.05.530. A purpose of the law of standing is to determine *who* may bring a case before the court to contest agency action. See William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 823-26 (1989). To have standing, a “person”⁴ must be “aggrieved or adversely affected by the agency action.” RCW 34.05.530. A person is aggrieved or adversely affected within the meaning of this section only when the following 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 34.05.530 (emphasis added). All three of these tests must be met to establish standing. *Id.*; *Allan v. University of Wash.*, 140 Wn.2d 323, 326, 997 P.2d 360 (2000). The first and third prongs are generally called “injury-in-fact” requirements, while the second is called the “zone of interest” prong.” *Id.* at 327.

⁴ The APA defines “person” to include natural persons, businesses, and other groups. RCW 34.05.010(14).

The person challenging the action has the burden to prove standing. *Snohomish Ct. Pub. Trans. Benefit Area v. State*, 173 Wn. App. 504, 512, 294 P.3d 803 (2013); *Patterson v. Segale*, 171 Wn. App. 251, 259, 289 P.3d 657 (2012); *KS Tacoma Holdings LLC v. Shoreline Hearings Bd.*, 166 Wn. App. 117, 127, 272 P.3d 876 (2012). As discussed below, Freedom Foundation has failed to meet its burden of establishing standing to challenge the Commission’s dismissal of the complaint.

1. Freedom Foundation was not prejudiced by Commission action

Freedom Foundation has shown no prejudice that separates it from the interested public at large. In order to satisfy the prejudice requirement of RCW 34.05.530(1), “a person must allege facts demonstrating that he or she is ‘specifically and perceptibly harmed’ by the agency decision.” *See Patterson*, 171 Wn. App. at, 259 (quoting *Trepanier v. City of Everett*, 64 Wn. App. 380, 382–83, 824 P.2d 524 (1992)). “When a person alleges a threatened injury, as opposed to an existing injury, the person must demonstrate an ‘immediate, concrete, and specific injury to him or herself.’” *Id.* If the agency action does not specifically harm or injure the petitioner, the petitioner cannot establish the “prejudice” requirement of standing. *See Allan*, 140 Wn.2d at 331–32 (wife of university professor lacked standing to challenge the validity of the university’s rules of

procedure used in disciplinary proceeding because, among other things, she did not share her husband's interest in university employment); *State v. McKenzie*, 114 Wn. App. 687, 700–01, 60 P.3d 607 (2002) (“One who is not adversely affected by a rule or statute does not have standing to contest its validity”); *Pac. Wire Works v. Dep’t of Labor & Indus.*, 49 Wn. App. 229, 236–37, 742 P.2d 168 (1987) (employer who challenged a rule that did not actually affect its employees was denied standing to challenge the rule); *see also KS Tacoma Holdings*, 166 Wn. App. at 128-138 (no injury to landowner from environmental regulation); *Newman v. Veterinary Bd. Of Governors*, 156 Wn. App. 132, 143-44, 231 P.3d 840 (2010) (no injury resulting from agency decision not to bring licensing action against a veterinarian).

Freedom Foundation was never a party in any proceeding relating to the complaint it filed. Nevertheless, it argues it has standing by virtue of being a “party” to the complaint it filed with the Commission, citing the APA’s definition of “party.” Freedom Foundation is not a party under that definition. RCW 34.05.010(12) defines “party” to include:

- (a) A person to whom the agency action is specifically directed; or
- (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.

No “agency action”⁵ was ever directed at Freedom Foundation, and it was never named by the Commission as a party to any proceeding. Further, as discussed below, it had no right to participate in the complaint review process.

Neither RCW 42.17A nor the Commission’s rules confer special status upon a complainant based upon the simple act of filing a complaint. In fact, a complainant has no ability to participate in any proceeding, unless requested by the Commission. WAC 390-37-030(1). When a person files a complaint with the Commission, Commission staff give notice to the complainant of any open commission hearings on the matter, and the complainant “may” be called as a witness in any enforcement hearing or investigative proceeding. *Id.* Neither the complainant nor any other person, however, “shall have special **standing** to participate or intervene in any investigation or consideration of the complaint by the commission or its staff.” *Id.* (emphasis added). In summary, neither the Legislature nor the Commission has authorized complainants to formally challenge a Commission’s disposition of a complaint.

Freedom Foundation suffered no injury here sufficient to establish standing. There is no allegation that the conduct in question directly affected

⁵ RCW 34.05.010(5) defines “agency action” to mean “licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.”

Freedom Foundation. Rather, Freedom Foundation simply seeks an investigation of Bethel School District based on a purported violation of RCW 42.17A. Such an interest is no different from any other citizen who may have an interest in ensuring the statute is enforced.

The United States Supreme Court has recognized “that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Heckler v. Chaney*, 470 U.S. 821, 831, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). The Court reasoned that, “. . . when an agency refuses to act it generally does not exercise its *coercive* power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.” *Heckler*, 470 U.S. at 832 (emphasis in original).⁶ Here, the Commission, after its review, properly exercised its discretion not to initiate an investigation. It exercised no coercive power over Freedom Foundation.

Freedom Foundation argues it was prejudiced in this matter solely by virtue of having filed a complaint that the Commission considered and dismissed. It is incorrect. To satisfy the prejudice requirement,

⁶ *Heckler* interpreted the federal Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2), which bars judicial review of agency action “committed to agency discretion by law.” Here, RCW 42.17A grants to the Commission discretion with regard to the dismissal of complaints. RCW 42.17A.755(1)(a).

RCW 34.05.530(1), “a person must allege facts demonstrating that he or she is ‘specifically and perceptibly harmed’ by the agency decision.” *Patterson*, 171 Wn. App. at 251 (quoting *Trepanier*, 64 Wn. App. at 382-83). Freedom Foundation is unable to separate its interests from the interested public at large.

Freedom Foundation argues that while all citizens may file complaints with the Commission, it is in a better position to do so, based on “its mission to advance liberty, free enterprise, and limited, accountable government.” Freedom Foundation’s Opening Brief at 46. An organization’s mission is not sufficient to establish standing, absent a showing of particularized injury or harm to that organization.

In *Sierra Club v. Morton*, the United States Supreme Court discussed the standing of the Sierra Club to challenge the construction of a proposed ski resort and recreation area in a national game refuge. *Sierra Club v. Morton*, 405 U.S. 727, 734-36, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). In finding the Sierra Club lacked standing, the Court opined as follows:

But a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural

heritage from man's depredations. **But if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived.** And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

Sierra Club, 405 U.S. at 739 (emphasis added).⁷ “[T]he ‘injury in fact’ test requires *more* than an injury to a cognizable interest. It requires that the party seeking review be . . . among the injured.” *Allan*, 140 Wn.2d at 328 (quoting *Sierra Club*, 405 U.S. at 734–35). Whatever interest Freedom Foundation has in the outcome here, it suffered no injury.

As the Court in *Sierra Club* recognized, to confer standing under these circumstances is to open the door to any group with a bona fide special interest in a particular subject matter to challenge any agency action it deems improper or unfavorable to its interests. To do so would render the standing requirement meaningless. This Court should reject

⁷ The Court in *Sierra Club* was interpreting the federal APA, 5 U.S.C. § 702, which provided:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

This federal standard is *broader* than the standard under our state’s current APA. In fact, the federal standard is similar to language that was included in an earlier version of our state’s APA, and which was removed by the Legislature in favor of a more limited standing requirement. *See Andersen*, 64 Wash. L. Rev. at 823.

Freedom Foundation's attempt to significantly expand—or bypass—the requirements for standing.

2. Freedom Foundation was not competitively harmed by the Commission's action

Freedom Foundation also argues that it was competitively harmed by the Commission's decision, and such harm is a sufficient injury-in-fact to establish standing. First, and foremost, this argument is a strained expansion of the common understanding of competitive harm or injury. Freedom Foundation has not identified a cognizable "competitive" advantage that was harmed by the Commission's decision to dismiss its complaint. There is no competitive advantage gained or withheld by virtue of the Commission's decision to dismiss a complaint. Rather, the Bethel School District was simply found not to have engaged in illegal conduct. While Freedom Foundation contends a violation did occur, it cannot show how the dismissal for lack of a violation disadvantages Freedom Foundation's viability as an ongoing nonprofit organization.

Freedom Foundation cites two cases as supporting an argument that it has shown prejudice by virtue of being "competitively harmed" by the Commission's decision, *Snohomish Cty.*, 173 Wn. App. at 504, and *Reagles v. Simpson*, 72 Wn.2d 577, 434 P.2d 559 (1967). Neither case is

helpful here. As illustrated below, no court has interpreted harm as applying to a situation such as the one before this Court.

In *Snohomish County*, a public transportation agency, Community Transit, sought judicial review of a decision by the Public Employment Relations Commission (PERC). Community Transit had standing because the decision by PERC affected them as an employer, as it lost the benefit of a rule that affected its negotiating leverage with unions. *Snohomish Cty. Pub. Trans. Benefit Area*, 173 Wn. App. at 513-14. Thus, Community Transit was able to demonstrate that it was directly affected by a PERC decision in the form of an “economic injury.” *Id.* In contrast, Freedom Foundation has not come forward with facts showing any direct economic effect from the Commission’s decision.

Reagles is of minimal value to this Court’s analysis because it was decided before the APA’s current standing requirements were adopted. *See Allan*, 140 Wn.2d 323 at 329 (footnote 1). In *Reagles*, the Washington Supreme Court was applying a broader standing requirement that looked to whether a party was “beneficially interested” in the subject matter of the action. Even under such a broad standard, however, Freedom Foundation’s argument fails. In *Reagles*, the Washington Osteopathic Medical Association (Association) sought review of actions taken by the Washington State Board of Medical Examiners to accredit the

Washington College of Physicians & Surgeons, and to issue licenses to three osteopathic physicians and surgeons. In finding that the Association had standing, the court relied on the following facts:

[The Association] also contend[s] that the osteopathic profession will suffer, particularly osteopathic specialists and osteopathic hospitals, because the Board's action 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.

Reagles, 72 Wn. 2d at 564. Thus, the Association was able to causally connect the decisions by the agency in question to the members served by their organization. No such causal connection has been made here.

Freedom Foundation also cites an unpublished decision, *AUTO v. Wash. Pub. Discl. Comm.*, 8 Wn. App. 2d 1068, 2019 WL 2121528 (2019), arguing that it dealt with the same statutory scheme at issue here. Opening Brief at 39. In fact, *AUTO* involved the Commission's review of a complaint in 2016, prior to the significant legislative changes to RCW 42.17A discussed herein. *See* Laws of 2018, Reg. Sess., ch. 304. Furthermore, although standing was tangentially addressed in *AUTO*, the main issue was whether the petition for judicial review was untimely filed. The Court of Appeals affirmed the dismissal of the petition on that basis. *AUTO*, 2019 WL 2121528, at *5.

Here, Freedom Foundation alleges that it was competitively harmed based solely upon “its goal to promote the policies embodied in the FCPA.” Opening Brief at 41. Allowing standing under such a rationale disregards the plain language of RCW 34.05.530, by effectively abolishing any meaningful requirement for judicial review of agency decisions. An organization would need to simply assert it had an interest in seeing a statute properly enforced. Despite showing no particularized harm, a court would need to confer standing upon that organization to challenge any decision by the agency responsible for administering a statute. This is entirely inconsistent with the plain language of the statute, which requires a specific showing that agency’s action has “prejudiced, or likely to prejudice” the person seeking judicial review. RCW 34.05.530(1). This Court should decline Freedom Foundation’s request to substantially diminish the APA’s standing requirement.

3. The Commission was not required to consider Freedom Foundation’s interests in determining whether to dismiss the complaint

The second requirement for standing is whether the petitioner’s “asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged.” RCW 34.05.530(2). This is called the “zone of interest” requirement. The test is not “especially

demanding.” *KS Tacoma Holdings*, 166 Wn. App. 117 at 128. While this test is generally not difficult to meet, it was not met here.

The issue before the Commission was whether Bethel School District had violated RCW 42.17A. The Commission was tasked with reviewing potential violations of RCW 42.17A by the school district irrespective of the particular viewpoint of the complainant. RCW 42.17A does not authorize any person or group of persons to influence the Commission’s ultimate decision regarding what action, if any, it will take on a complaint.

In *Newman*, the Court of Appeals examined whether dog owners Kenneth and Nonna Newman had standing⁸ to challenge a decision by the Veterinary Board of Governors to decline to pursue charges against veterinarians that had treated their dog. The Court found that the applicable statute, the Uniform Disciplinary Act (RCW 18.130), did not provide the Newmans with a right to compel action against the veterinarians’ licenses by virtue of having filed a complaint, as that authority and discretion were vested with the Veterinary Board. *Newman*, 156 Wn. App. at 144. Similarly here, Freedom Foundation has no right under RCW 42.17A to compel any investigation or action by the Commission against the Bethel School

⁸ The court in *Newman* was analyzing standing under the Newmans’ constitutional writ of certiorari, as the Newmans had failed to perfect any potential APA claim. *See Newman*, 156 Wn. App. at 142, 146-50.

District. The authority and discretion to do so rest with the Commission.
RCW 42.17A.755.⁹

Allowing complainants such as Freedom Foundation to challenge dismissals would void the Commission's discretionary authority to enforce RCW 42.17A. The Commission is certainly cognizant that its actions may be subject to judicial review by those who can establish standing. Those subject to enforcement action by the Commission have a right to seek judicial review following the issuance of a final order by the Commission. *See* RCW 34.05.542(2). But to allow complainants such as Freedom Foundation to seek judicial review renders any decision made by the Commission that runs contrary to a complainant's position subject to later court scrutiny. There is no statutory basis in either the APA or RCW 42.17A to so diminish the standing requirement in such a manner as to effectively eliminate it. *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.").

Freedom Foundation also relies on *St. Joseph Hospital & Health Care Center v. Dept. of Health*, 125 Wn.2d 733, 739-42, 887 P.2d 891 (1995). St. Joseph challenged the granting of a certificate of need to a

⁹ The Attorney General may also take action upon referral by the Commission. RCW 42.17A.755.

competing health care provider. The Court found St. Joseph had standing, reasoning that because the Legislature intended to regulate competition as well as control health care costs, competing service providers were within the statutory zone of interest. *Id.* at 741. Freedom Foundation fails to point to any similar competitive harm at stake.

In sum, the general policy interests of complainants are not within the “zone of interests” that agencies such as the Commission must take into account when making decisions. Agencies such as the Commission must make such decisions based on the facts and the law, even if contrary to a particular viewpoint of an individual or interest group. Freedom Foundation cannot establish standing under the second prong of RCW 34.05.530.

4. A judgment in favor of Freedom Foundation would provide no remedy absent a showing of prejudice

The third APA standing requirement is that a judgment in favor of the petitioner “would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.” RCW 34.05.530(3). In other words, standing is denied if the harm alleged would not be remedied by a favorable judgment. Together with the requirement that the agency action prejudice the petitioner, this requirement constitutes the “injury-in-fact” element of standing. *Seattle Bldg. & Constr.*

Trades Council v. Apprenticeship & Training Council,
129 Wn.2d 787, 793–94, 920 P.2d 581 (1996).

As discussed above, Freedom Foundation fails to demonstrate prejudice simply because the complaint was dismissed. Freedom Foundation is undoubtedly dissatisfied by the Commission's action, but such "dissatisfaction is not sufficient to establish injury-in-fact." *Newman*, 156 Wn. App. at 144. The third prong of the standing requirement can not be satisfied here.

C. Even if This Court Were to Find That Freedom Foundation Has Standing, There Is No Basis to Find Bethel School District Violated RCW 42.17A

Even if this Court finds Freedom Foundation has standing to seek judicial review under the APA, Bethel School District did not violate RCW 42.17A.

1. Bethel School District properly withheld a portion of employees' wages pursuant to RCW 42.17A.495(3)

RCW 42.17A.495(3) states that:

No **employer or other person** or entity responsible for the disbursement of funds in payment of wages or salaries may withhold or divert a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee. (Emphasis added).

Thus, pursuant to RCW 42.17A.495(3), *any* employer or other person can withhold wages for the purpose of contributing to a political committee, as

long as the employees have provided the employer with a written request to do so.

While “employer” is not defined in RCW 42.17A, there is no basis to construe RCW 42.17A.495(3) as excluding public employers such as the Bethel School District. Further, “person” is defined in RCW 42.17A to include:

[A]n individual, partnership, joint venture, public or private corporation, association, federal, state, or **local governmental entity or agency however constituted**, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized.

RCW 42.17A.005(38) (emphasis added). Bethel School District is a “local governmental entity” and therefore an “other person” under RCW 42.17A.005(38). The district is therefore explicitly authorized to withhold or divert a portion of an employee’s wages or salaries for contributions to political committees, pursuant to RCW 42.17A.495(3).¹⁰

The Commission’s rule details the written authorization required to withhold wages for contributions to political committees.

¹⁰ No employer may discriminate against any employee, either for supporting or opposing any political committee. RCW 42.17A.495(2). See *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 531, 936 P.2d 1123 (1997) (Fair Campaign Practices Act prohibits employers from discriminating against employees because of employees’ refusal to abstain from political involvement.). A finding that a public entity may not withhold funds at the request of an employee, would allow public employees to be treated differently than their private counterparts. Despite the prohibition against discrimination set forth in RCW 42.17A.495(2), public entities could simply disregard any employee request to withhold funds. There is no authority in RCW 42.17A authorizing such disparate treatment.

WAC 390-17-100. In *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 140 Wn.2d. 615, 634-36, 999 P.2d 602 (2000), the Court held WAC 390-37-100 properly required an employer to obtain annual written authorization from employees only when payment from the deductions is made to a political committee. The court found that the burden of showing this rule was in conflict with the intent and purpose of the statute had not been met. Here, it was not disputed that Bethel School District had obtained the necessary permissions from its employees to withhold funds for the political committees in question. CP 276-79.

Freedom Foundation argues that Bethel School District's form did state that the authorization may be revoked, as required in WAC 390-17-100. Freedom Foundation's Opening Brief at 32-33. The District's form, however, states in pertinent part, "[t]his authorization . . . remains in effect until revoked in writing by the employee . . .". CP 276-79. That statement is consistent with the suggested form provided in WAC 390-17-100 ("This authorization form remains in effect until revoked in writing by the employee."). Regardless, Freedom Foundation did not raise this issue in its complaint. AR 0001-0199. That issue was therefore not before the Commission, and this Court should therefore disregard Freedom Foundation's argument.

2. **Bethel School District did not withhold wages for the “purpose” of assisting a campaign or promoting/opposing a ballot proposition, rendering RCW 42.17A.555 inapplicable**

RCW 42.17A.555 does not apply to Bethel School District’s conduct, eliminating the need to analyze the exception found in RCW 42.17A.555(3) for “normal and regular conduct.” RCW 42.17A.555 states in pertinent part:

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** (emphasis added).

Bethel School District withheld funds at the request of its employees, not to assist any particular campaign, or promote or oppose any particular ballot proposition. No evidence was submitted that Bethel School District’s “purpose” in withholding the wages was to provide such assistance. Rather, it was performing a lawful task as requested by its employees and authorized by statute.

In *City of Seattle v. State*, 100 Wn.2d 232, 668 P.2d 1266 (1983), the Court reviewed certain city ordinances providing campaign funding for candidates in city elections. It found the ordinances valid pursuant to RCW 42.17.130 (recodified later as RCW 42.17A.555), stating as follows:

When RCW 42.17.130 refers to ‘assisting a campaign for election of any person to any office’ it means assisting a specific campaign at the expense of other campaigns. (Italics ours.) An even-handed program of assistance available to *all* candidates based on objective minimum qualification criteria simply does not involve the abuses of public trust which inspired RCW 42.17.130.

City of Seattle, 100 Wn.2d at 247-48. Similarly, here, Bethel School District provided no specific campaign assistance by withholding money at the request of its employees. Rather, such withholdings went to the political committee designated by the employee, regardless of affiliation.¹¹

3. Even if RCW 42.17A.555 applies, Bethel School District engaged in normal and regular conduct

A public office or agency may use public facilities for the purpose of assisting a campaign, or in support or opposition to a ballot proposition, if that activity is part of its “normal and regular conduct.” RCW 42.17A.555(3). Even assuming, *arguendo*, that RCW 42.17A.555 applies to the conduct of Bethel School District because the district somehow was providing a form of campaign assistance, that conduct falls within this exception.

¹¹ RCW 42.17A.555 must also be read in harmony with the specific authorization for withholdings found in RCW 42.17A.495(3). “Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme which maintains the integrity of the respective statutes.” *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008). Even if a conflict does exist between the two provisions, the more specific authorization found in RCW 42.17A.495 should be applied. “A specific statute will supersede a general one when both apply.” *Kustura v. Dep’t of Labor & Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010).

“Normal and regular conduct” is defined in WAC 390-05-273, and includes conduct that 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 manner.

WAC 390-05-273 (emphasis added).¹² Bethel School District’s conduct was lawful, as it was expressly authorized by statute. In addition to the authorization found in RCW 42.17A.495, RCW 28A.405.400 requires school districts to make payroll deductions when authorized by ten percent of its employees. There was likewise nothing extraordinary about what Bethel School District was doing, as it had processed similar payroll deductions for years. CP 276-79 (Declaration of Todd Mitchell in Support of the Bethel School District’s Motion for Summary Judgment). In summary, even if it had been shown that Bethel School District’s conduct

¹² Freedom Foundation characterizes WAC 390-05-273 as an improper expansion of what can be considered “normal” activities. Opening Brief at 20. This rule, however, has been applied by at least two Courts of Appeal in this state. See *Herbert v. Public Disclosure Comm’n*, 136 Wn. App 249, 148 P.3d 1102 (2006); *State v. Economic Development Board for Tacoma-Pierce County*, 9 Wn. App. 2d 1, 441 P.3d 1269 (2019); see also *King County Council v. Public Disclosure Commission*, 93 Wn.2d 559, 611 P.2d 1227 (1980) (in a case decided prior to the adoption of WAC 390-05-273, the court construed the statutory terms “normal and regular” to mean “lawful” and “usual or customary”). The rule survived scrutiny in each case.

had the effect of supporting a particular campaign, its conduct was authorized as normal and regular.¹³

D. Should the Court Find the Commission Committed Error, This Matter Should Be Remanded to the Commission

The Commission is statutorily assigned discretion to determine whether violations of RCW 42.17A have occurred. RCW 42.17A.755. Therefore, should this Court reach the merits and find any error with the Commission's dismissal of Freedom Foundation's complaint, the Commission should be given another opportunity to review the matter. Under RCW 34.05.574(1), a reviewing court may remand to the agency for further proceedings, but in reviewing matters within agency discretion, the court "shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency."¹⁴ Should the Court find the Commission erred, a remand would be appropriate so as to allow the Commission the opportunity to apply the court's guidance.

¹³ Freedom Foundation also supports its argument by referencing the Commission's longstanding guidelines, specific to school districts, regarding the limitations on using public resources for political activity. Opening Brief at 18. These guidelines make no reference to any potential application of RCW 42.17A.555 to a school district or other public employer withholding wages at the request of an employee. *See* PDC Interpretation No. 01-03, available at: <https://www.pdc.wa.gov/learn/guidelines-school-districts> (last viewed October 1, 2019).

¹⁴ The other relief available in RCW 42.17A.574(1) does not apply here, as there was no agency action taken against Bethel School District to set aside, enjoin, stay or modify.

E. Attorneys' Fees Should Not Be Awarded to Freedom Foundation

There is no basis to award attorneys' fees in this matter. Attorneys' fees are only available should the citizen prevail. RCW 42.17A.775(5). Assuming without conceding that Freedom Foundation's citizen suit may proceed, Freedom Foundation would not prevail in its citizen suit unless and until a court determines Bethel School District violated RCW 42.17A. Any consideration of attorneys' fees is untimely.

VI. CONCLUSION

The Commission respectfully requests that the Court affirm the dismissal of each superior court matter. Freedom Foundation is precluded from pursuing a citizen action and lacks standing to challenge the Commission's dismissal under the APA.

RESPECTFULLY SUBMITTED this 3rd day of October 2019.

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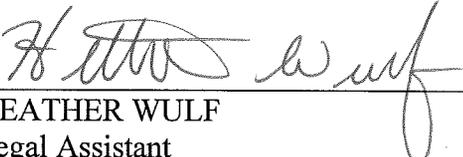
I certify, under penalty of perjury under the laws of the state of Washington, that I served, via regular United States Postal Service mail and electronic mail, a true and correct copy of the Washington State Public Disclosure Commission's Response Brief, upon the following:

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Washington State Public Disclosure Commission's Response Brief

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