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Division II
State of Washington
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No. 53889-0-II

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

FREEDOM FOUNDATION,

Appellant/Plaintiff,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, and
SERVICE EMPLOYEES INTERNATIONAL UNION POLITICAL
EDUCATION & ACTION FUND,

Appellees/Defendants.

**APPELLANT/PLAINTIFF, FREEDOM
FOUNDATION'S, INITIAL BRIEF**

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I. INTRODUCTION.

Prior to commencing the review proceedings below, the Freedom Foundation (the “Foundation”) requested that the Washington State Public Disclosure Commission (the “PDC”) take enforcement action against the Service Employees International Union’s Political Education and Action Fund (“SEIU PEAFF”), for its ongoing and systematic violations of the Fair Campaign Practices Act (“FCPA”), including its failure to disclose or timely disclose millions of dollars in contributions. The PDC declined to take enforcement action on the basis that these violations (many of which SEIU PEAFF conceded to the PDC) did not warrant the deployment of its finite resources – even though it had recently issued a warning to SEIU PEAFF in January, 2019, for similar conduct in response to a Freedom Foundation complaint that had been filed in late 2018.

The PDC’s disposition of the Foundation’s more recent administrative complaint, regarding SEIU PEAFF’s extensive failures to disclose required information and its unlawful in-state campaign contributions, is a bid to centralize an unprecedented amount of enforcement discretion within that agency. Administrative discretion must yield to the Legislature’s mandates, however, notwithstanding the PDC’s claim of “broad authority” to enforce the mandates of the FCPA. Indeed, judicial review of an agency’s operations and decisions is a fundamental

component of due process in the United States, to such an extent that the courts enjoy an inherent power of judicial review. See *State v. Ford*, 110 Wn.2d 827, 829, 755 P.2d 806 (1988) (citing *Pierce Cty. Sheriff v. Civil Serv. Comm'n of Pierce Cty.*, 98 Wn.2d 690, 658 P.2d 648 (1983)). In declining to exercise review over a purported lack of standing under Washington's Administrative Procedures Act (the "APA"), the court below cast off this integral and fundamental role and permitted the PDC to ignore its own statutory duties concerning admitted FCPA violations.

That decision was in error because the FCPA supplied the Foundation's standing by conferring upon the Foundation the right to file a PDC complaint, which the Foundation did file and which the PDC addressed. The PDC's determination to ignore FCPA violations committed by SEIU PEAFF worked an "injury-in-fact" to the Foundation's interests, which of course was redressable below. SEIU PEAFF's failure to disclose the source of millions of dollars in political contributions affects everyone in Washington State and, together with the PDC's "slap on the wrist" (i.e., its second warning letter to SEIU PEAFF in as many years), clearly and tangibly prejudices the Foundation and its supporters – both as a matter of statute and as a matter of the "competitive harm" that results when the Foundation's opponents can violate the FCPA with impunity.

The Foundation and its supporters are well within the “zone of interests” contemplated by the FCPA and sought to remedy a PDC decision that is clearly contrary to the FCPA’s directives. This state of affairs does not comport with the law, but remedying it does comport with the Foundation’s mission.

As a result, the Foundation had standing for its APA Petition below, and the dismissal of that Petition should be reversed. Moreover, upon finding standing, the Court should proceed to interpret the former version of the FCPA and find that it did not permit the PDC to dispose of admitted “actual violations” with a mere warning and dismissal.

II. ASSIGNMENT OF ERROR & ISSUES PRESENTED.

A. Assignment of Error.

The trial court, Hon. John C. Skinder, erred in dismissing the Foundation’s petition for judicial review under the APA, upon its finding that the Foundation lacked standing.

B. Issues Pertaining to Assignment of Error.

1. Whether the trial court erred in dismissing the Foundation’s petition for judicial review under the APA, upon its finding that the Foundation did not have standing arising from the dismissal of its administrative complaint that had been filed with the PDC?

2. Whether the trial court erred in dismissing the Foundation’s petition for judicial review under the APA, upon its finding that the Foundation did not have associational standing to seek judicial review of the PDC’s dismissal of its administrative complaint?

3. If the Court determines that the trial court erred with respect to the first or second assignments of error identified above, it should go on to consider: Whether the then-operative version of the FCPA permitted the PDC to categorize certain violations as “minor violations” and to resolve them with a mere warning letter, even though this method of resolution was not then recognized by statute or listed as one of the actions the PDC “must” take after receiving an administrative complaint?

III. STATEMENT OF THE CASE.

The Freedom Foundation commenced its Petition for Review Pursuant to the APA, RCW 34.05.510, *et seq.* (the “Petition”) on June 5, 2019. The factual basis underlying its request for review is that SEIU PEAFF violated the FCPA and that the PDC acted unlawfully and was simply wrong when in thinking it could dismiss the Freedom Foundation’s administrative complaint exposing those violations. *See generally* CP, at 001-013.¹ In its administrative complaint to the PDC, which was submitted

¹ All references to the Clerk’s Papers compiled for purposes of this appeal, including those contained in the Certified Agency Record (which have been made part of the Clerk’s Papers), shall appear in the form “CP, at xxx.”

February 18, 2019, the Foundation contended that SEIU PEAFF had unlawfully contributed funds to political committees in Washington State without first receiving the requisite contributions from voters in Washington. *See* CP, at 025. The Foundation further alleged that SEIU PEAFF repeatedly violated the FCPA's disclosure requirements by failing to state its purpose on required forms C5, filing forms late, and failing to report receipt of contributions from persons residing outside Washington State. *See id.*, at 026-027.

After affording SEIU PEAFF an opportunity to respond as one party and receiving supplemental materials from the Foundation as the other, the PDC determined the allegations merited only a "formal written warning" to SEIU PEAFF, which was issued on May 7, 2019. CP, at 015-017. The substance of the PDC's determination, as reflected in its correspondence of that date, states: "...PDC staff has determined that the facts in this instance do not amount to a finding of an actual violation warranting further investigation. However, pursuant to WAC 390-37-060(1)(b), PDC staff will be formally warning SEIU PEAFF concerning the importance of timely and accurately filing C-5 reports disclosing contribution and expenditure activities undertaken by an out-of-state political committee as required by PDC laws and rules." *See* CP, at 017 (emphasis added).

Curiously, SEIU PEAFF had admitted before the PDC many of the substantive allegations. For instance, it admitted that “[o]n four occasions, contributions received by SEIU PEAFF from SEIU’s general fund account... should have been reported by SEIU PEAFF on its C-5 filings.”² *See* CP, at 071. SEIU PEAFF chalked its failures up to “an inadvertent error on our compliance end.” *Id.* SEIU PEAFF characterized other admitted failures on its part as “trivial” and asked the PDC to dismiss the Foundation’s complaint as not warranting the imposition of any monetary penalty. *See* CP, at 072. The PDC did precisely that, notwithstanding having previously issued a warning letter to SEIU PEAFF for similar violations. *See* CP, at 015-017, 074.

The Foundation wrote to the PDC, pointing out several factual³ and legal flaws in its resolution of the complaint and requesting that it reconsider its decision in that regard, but the PDC denied the Foundation’s request on May 20, 2019. CP, at 019-021. The PDC’s email declining reconsideration “clarified” that “[t]he matter was dismissed with a warning pursuant to WAC 390-37-060(1)(d). Our correspondence resolving the case inadvertently cited WAC 390-37-060(1)(b), which had contained the

² SEIU PEAFF went on to note that it had filed corrected forms C-5, but this activity was undertaken only *after* the Foundation’s complaint had been submitted to the PDC, on the date of SEIU PEAFF’s response. *See id.*; *see also* CP, at 005, 074-075.

³ The PDC’s complaint return letter stated SEIU PEAFF failed to disclose \$1,534,947 in contributions. In reality, it had admitted to failing to disclose \$2,770,463.

warning provision of that rule prior to the latest revisions, effective 12/31/2018.” CP, at 019.

The Foundation then sought judicial review and the PDC moved to dismiss the APA Petition, arguing the Foundation lacked standing to seek review under the APA. CP, at 090-096. SEIU PEAFF agreed with the arguments set forth by the PDC in its motion to dismiss, but did not separately assert any grounds for dismissal. Judge Skinder granted the motion to dismiss as to both the Defendants below. CP, at 141.

The Foundation timely filed an appeal on October 1, 2019. CP, at 136-38. The PDC sought a stay of this appeal, pending the conclusion of an appeal in a factually unrelated matter, but the Court denied the PDC’s Motion to Stay by way of a letter notice on November 13, 2019. The Foundation subsequently moved for an extension of time to submit this Initial Brief through and including January 8, 2020, which no party opposed. The motion for extension was granted on December 2, 2019, and this Initial Brief is filed in accordance with that Order.

IV. ARGUMENT.

A. Standards Applicable to Motion to Dismiss.

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 & Constr. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001) (emphasis added).⁴

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: “(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 Bldg. and Constr. Trades Council v. The Apprenticeship and Training Council*, 129 Wn.2d 787, 793, 920 P.2d 581 (1996).

⁴ 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. This generous standard even includes facts alleged for the first time upon appellate review, although the trial court is similarly required to consider such hypothetical scenarios. *See id.*

“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 Bd.*, 166 Wn. App. 117, 126-27, 272 P.3d 876 (2012). In this case, the PDC’s dismissal of the Foundation’s administrative complaint resulted in more than one “injury-in-fact,” and it is clear that the Foundation is within the FCPA’s “zone of interest.”

The Foundation’s APA Petition alleged specific and perceptible harm to its interests, arising from the facts that even after being caught and warned the first time, and

[n]otwithstanding [several later] instances of being advised that its actions violated the law, SEIU PEAFF did not go back and amend its forms, did not correct its reporting errors and therefore continued to violate the FCPA, until after the administrative complaint forming the basis of [the Foundation’s APA] appeal was submitted to the PDC ... SEIU PEAFF’s failure to timely file its 2018 PDC reports occurred over the course of a major election year, and as a result, the public was deprived of timely and accurate information concerning the financing of state elections ... The amended Form C5 reports, which the SEIU PEAFF filed on March 12, 2019 (the day

prior to its response to the PDC), disclosed a total of \$2,770,463 in additional political contributions that the SEIU PEAFF received from the national SEIU in Washington, D.C., which were not initially disclosed ... Of the contributions received by the SEIU PEAFF, a total of \$747,983 was expended in Washington State through contributions to other SEIU political committees within the State of Washington.”

See CP, at 005-006, ¶¶34-37.

Separately, the Foundation alleged sufficient facts to find that it enjoyed “associational standing” as a result of the prejudice dealt to its supporters and/or constituents by the PDC’s decision. *See* CP, at 010, ¶59(f). Pursuing allegations of FCPA violations is germane to the Foundation’s mission, and the Foundation was able to properly represent the interests of its supporters in seeking judicial review.

Because these allegations were sufficient for the Foundation to enjoy standing for judicial review of the PDC’s determination, the trial court’s dismissal of the Foundation’s APA Petition should be reversed.

B. Freedom Foundation Had Statutory & Associational Standing to Seek Judicial Review of the PDC’s Decision.

i. Appellant Suffered An “Injury-In-Fact” As a Result of the PDC’s Decision, Which is Redressable by a Court.

Looking to the U.S. Supreme Court’s decisions, the courts of this state have defined an “injury-in-fact” as the “...invasion of a legally

protected interest.” *Snohomish Cty. Pub. Transp. Benefit Area v. State, Pub. Emp’t Relations Comm’n*, 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 needed only to allege facts that, if taken as true, establish that it would be “specifically and perceptibly harmed” by the PDC’s decision. *See KS Tacoma Holdings, LLC*, 166 Wn. App. at 129. As to redressability, the Foundation’s allegations were required to indicate that “...it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Envtl Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

In satisfying the foregoing pleading requirements for standing, the APA Petition alleged that the Foundation suffered an “injury-in-fact” as a result of “...the PDC decision, which prejudices the Foundation in that it permits the national SEIU and its political committee, the SEIU PEAFF, to conceal its political activities and to unduly influence the election of friendly officials throughout the State of Washington,” and because “...the Foundation was a party to the PDC proceeding below.” CP, at 010, ¶¶59.e-59.f. 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 ¶59.f) – in addition

to the direct invasion of the Foundation’s legally protected interest in having its complaint fairly considered and correctly determined under a proper interpretation of the law by the PDC.

The PDC argued below that there had been no prejudice to the Foundation’s interests simply because “[i]t exercised no coercive power over Freedom Foundation.” *See* CP, at 093. This 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.”⁵ *Washington Indep. Tel. Ass’n v. Washington Util. and Transp. Comm’n*, 110 Wn. App. 498, 512, 41 P.3d 1212 (2002) (*citing Seattle Bldg. and Constr. Trades Council*, 129 Wn.2d at 793). 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

⁵ No “coercive power” is required, or any number of outside entities challenging an agency decision would not have standing to do so. Moreover, the PDC argued that an agency’s decision not to prosecute is generally left to the agency’s discretion (*see id.*), citing for that proposition *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). That case dealt with a totally inapposite statutory scheme, however, namely the federal Food, Drug & Cosmetic Act (the “FDCA”). *See* 470 U.S. at 823. Much more relevant was the Federal Election Campaigns Act (the “FECA”), which notably, does *not* commit the disposition of administrative complaints entirely to the agency – instead, it permits parties “aggrieved by an order of the Commission dismissing a complaint” to file a petition seeking judicial review in the U.S. District Court for the District of Columbia. *See* 52 U.S.C., § 30109(a)(8)(A). Why the trial court believed that PDC has greater discretion than the FEC, particularly in light of the mandatory language of RCW 42.17A.755, remains a mystery.

denial of the relief it requested from the PDC when the PDC dismissed its administrative complaint and issued a mere warning letter to SEIU PEAFF; and (2) the “competitive harm” to the Foundation’s interests when violations of the FCPA are ignored. Either of these is sufficient, in and of itself, to support standing.

a. Dismissal of the Administrative Complaint.

First, of course, the Foundation has a clear injury-in-fact resulting from the PDC dismissing its complaint, out of hand. The Foundation was a party to the administrative complaint and the disposition thereof (*see* RCW 34.05.010(12) (defining “party” to include “[a] person to whom the agency action is specifically directed”), and it is therefore immaterial that “...a complainant has no ability to participate in any proceeding, unless requested by the Commission.”⁶ *See* CP, at 092. The Foundation brought its

⁶ The mere fact that the Foundation was a party to the administrative proceedings here distinguishes all of the otherwise factually apposite cases cited by Defendants below. First, in *Allan*, 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 Allan v. University of Washington*, 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*, the court’s decision was similarly predicated upon the fact that the plaintiffs were not parties to the administrative proceedings. *See Newman v. Veterinary Bd. of Governors*, 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. The Newmans do not cite any authority for the proposition that they had become a party to the agency proceeding by filing a report. Nor does the definition of a ‘party’ under the Administrative Procedure Act support their position.”). An additional and related reason why the *Newman* decision is unhelpful is that the statute at issue there provided no right for the Newmans to initiate a complaint, unlike the FCPA’s creation of just such a procedural right in its

administrative complaint pursuant to a specific statutory provision (*see* RCW 42.17A.755); the agency received a response from the PDC’s counsel as well as supplemental information from the Foundation (treating it as a party) in support of its complaint, before making a determination. *See* CP, at 015; *see also* CP, at 022; and CP, at 070.

The PDC argued below that the Foundation was not a “party” to the administrative disposition of its complaint, because “no ‘agency action’ was ever directed at Freedom Foundation, and it was never named by the Commission as a party to any proceeding.” CP, at 126. That argument ignores that the PDC’s dismissal of the administrative complaint (CP, at 015) was itself an “agency action,” which of course was “specifically directed” to the Foundation. Under the APA, a “party” can either be “a person to whom the agency action was specifically directed, or “[a] person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.” RCW 34.05.010(12). Per the same statute, “agency action” is broadly defined to mean “...licensing, the implementation or enforcement of a statute, the adoption of an agency

enforcement provision. *See Newman*, 156 Wn. App. at 144 (“The Uniform Disciplinary Act does not provide the Newmans with the right to compel action against the veterinarians’ licenses by filing a complaint ... the legal interests at stake in a professional disciplinary hearing are those of the license holder.”); RCW 42.17A.755 (“If a complaint is filed with or initiated by the commission, the commission must...”) (emphasis added).

rule or order, the imposition of sanctions, or the granting or withholding of benefits.” RCW 34.05.010(3) (emphasis added).

The Foundation satisfied these criteria in multiple ways. While the dismissal did not “order” the Foundation to do anything, as the PDC’s “coercive power” position would seem to require, it nonetheless was an “order” dismissing the complaint (much as a judicial order of dismissal would be), and it indisputably “implement[ed]” the FCPA, specifically, the “enforcement” provisions of RCW 42.17A.755. *See* RCW 34.05.010(5); *see also* CP, at 098.⁷ Moreover, whether the brief proceedings that transpired before the PDC resulted in any enforcement action taken against SEIU PEAFF, and whether the Foundation had a legally enforceable right to make submissions therein, they were quite clearly “proceedings” in which the Foundation was quite clearly permitted to participate. *See* RCW 34.05.010(12). That these proceedings were not more extensive, resulting in greater involvement from both parties, does not change the fact that the PDC was happy to treat the Foundation as a party when conducting its preliminary review of the complaint and deciding to take no enforcement action thereon.⁸

⁷ “Rather, the Commission has been granted the discretion to enforce RCW 42.17A and did so here.”

⁸ The very fact that the PDC’s cited regulation clarifies that PDC complainants do not have “special” standing to participate in PDC proceedings supports the notion that they have ‘general’ or ‘normal’ standing to seek judicial review of the PDC’s dispositions, which the

The PDC's treatment of the Foundation as a party in these brief proceedings gave it standing to challenge the PDC's determination arising from such proceedings, as a clear matter of statute. *See, e.g., Auto. United Trades Org. (AUTO) v. Washington Pub. Disclosure Comm'n*, 8 Wn. App. 2d 1068, 2019 WL 2121528, at *4-5 (Ct. App. Div. II, 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.")⁹ Further, and as Division II has previously found highly significant, the PDC copied the adverse party (SEIU PEAFF's attorney,

regulation does not purport to alter. *See* WAC 390-37-030 (1). First, by referring to standing for participation in the administrative proceedings as "special" standing, the PDC's regulations distinguish this from the notion of standing to seek judicial review of the PDC's decisions after the fact. The reference to "special standing," then, seems only intended to limit the degree to which complainants have a right to make arguments or submissions to the PDC concerning the complaint. Further, the Legislature obviously intended for parties even to abbreviated proceedings to be considered "parties" under the APA, because it uses the alternative phrase "intervene or participate," which would encompass not only "intervention" in formal proceedings but also "participation" in a summary preliminary review that does not result in further investigation or adjudication (as was the case here). *See* RCW 34.05.010 (12)(b). Mirroring this language, the PDC's rules reference the lack of "special standing" to "participate or intervene in any investigation or consideration of the complaint," thereby similarly encompassing the abbreviated proceedings that transpired before the PDC here. In short, the Legislature's and PDC's providing that the agency can conduct its own review and determination without involvement from the complainant says nothing concerning a right of judicial review *thereafter*, and neither the FCPA nor the PDC's regulations should be construed to eliminate this important right.

⁹ 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 by the PDC.

Dmitri Iglitzin) on the letter declining to take action on the Foundation’s administrative complaint. *See* CP, at 017; *see also* *AUTO*, 2019 WL 2121528, at *1, 5.

The PDC attempts to avoid the undeniable significance of the *AUTO* decision on the basis that it is “unpublished” and only “tangentially addressed” the issue of standing. CP, at 127. The Foundation recognizes that the decision is not binding on this Court – but *AUTO* is on all fours and the PDC identifies no reason why it should not guide this Court’s analysis. While it is correct that the “main issue” in that case was whether a petition for judicial review was timely filed, absolutely necessary to and intertwined with that decision was the proposition that, upon receiving the PDC’s letter declining to take action, the complainant suffered “specific and perceptible harm” as a result of the letter, and that this “prejudice” should have been “immediately apparent” to the complainant. *See* *AUTO*, 2019 WL 2121528, at *5.

In effect, the PDC has recognized this type of harm when the upshot was to *preclude* the citizen from taking further action under the statute of limitations, but now denies it constitutes any harm for purposes of *allowing* the citizen to seek further review. This Court should not permit the PDC to sidestep the *AUTO* decision simply because the PDC had different interests in that case than it does now. Moreover, the fact that *AUTO* was decided

before the relevant 2018 amendments to the FCPA is simply of no moment. *AUTO* did not involve any question of interpretation under any provision of the FCPA; to the contrary, it addressed (for present purposes) the question of when a “party” suffers prejudice sufficient for standing under RCW 34.05.530 and RCW 34.050.010 – statutes which remain in effect, unchanged, today. If *AUTO* is considered at all, it is dispositive.

After the PDC’s dismissal letter resulted in a specific and perceptible harm to its interests, the Foundation sought to determine whether the agency’s handling of its complaint adhered to the agency’s duties as set forth in the FCPA’s enforcement provision – and the APA required review of this question. *See Seattle Bldg. and 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.”). Further, the injury of which the Foundation complains had already been accomplished by the time the APA Petition was filed, and therefore could not be considered merely speculative. *See CP*, at 014-021. As such, many of the cases cited by the PDC below are 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) (“In essence, Patterson and Engdahl assert only that they may be harmed by a future permitting decision in which the City utilizes the King County SMP

as its own SMP. Such a nonspecific and conjectural injury is insufficient to impart standing as an aggrieved party.”); *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) (“Trepanier has failed to present any evidentiary facts to show that he or his property would be injured by Everett’s SEPA action His argument is based on the unsupported assumption that reducing densities in some areas will necessarily result in reduced development potential within Everett to such an extent that development will be forced into unincorporated Snohomish County.”).

b. Competitive Injury to the Foundation.

Second, the Foundation concretely alleged a “competitive harm” resulting from SEIU PEAFF’s FCPA violations that its administrative complaint sought to remedy and to prevent in the future. The continuation of SEIU PEAFF’s illegal practices works an additional, ascertainable injury-in-fact to the Freedom Foundation itself, because it frustrates the Foundation in achieving its goal to assure enforcement of the policies embodied in the FCPA. *See Snohomish Cty. Public Transp. Benefit Area*, 173 Wn. App. at 514 (“By analogy, if the farmers’ cooperative suffered an injury-in-fact when it lost a ‘bargaining chip’ that helped it purchase certain

assets, an employer suffers an injury-in-fact when it loses the benefit of a rule that affects its negotiating leverage with unions.”); *Reagles v. Simpson*, 72 Wn.2d 577, 585-86, 434 P.2d 559 (1967).¹⁰ Moreover, upon a CR 12(b)(6) motion to dismiss, the Court should have considered as true, and as against dismissal, any conceivable facts consistent with those alleged in the APA Petition – 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 according it the procedure which an alleged “actual violation” required. *See* CP, at 002, 006-007, ¶¶3, 45-47; *see also Bravo*, 125 Wn.2d at 750; *Janicki Logging*, 109 Wn. App. at 659.

As such, the trial court erred in ordering dismissal upon the Appellee’s argument that “[t]here is no allegation that the conduct in question directly affected Freedom Foundation. Rather, Freedom Foundation simply believes that the action taken by the Commission was

¹⁰ “These 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.” (emphasis added).

not severe enough, and wants this Court to order the Commission to penalize SEIU PEAFF.” *See* CP, at 092.¹¹

Even setting aside the Foundation’s clear standing as a matter of statute, the competitive harm that results from the PDC’s decision is a recognized basis for finding prejudice. *See Seattle Bldg. and Const. Trades Council*, 129 Wn.2d at 795 (“Thus, contrary to Apprenticeship Council’s position, the fact that any economic injury to Appellants may not be immediate, or the fact that the decision of the agency would be no different under formal adjudicatory proceedings is not dispositive of the standing question if Appellants have a concrete interest protectable by the requirement of formal adjudicatory proceedings. Appellants have asserted

¹¹ The PDC offered the trial court a number of immaterial, and therefore unconvincing, justifications to ignore the precedents cited by Appellant. First, it argued that the *Snohomish County* case cited by the Foundation requires a “direct economic effect” in order to show prejudice. CP, at 128. But the injury there had nothing to do with the complainant’s interests “as an employer” vis-à-vis its employees; it was concerned with Community Transit’s leverage in negotiating with the union. *See Snohomish Cty. Pub. Transp. Benefit Area*, 173 Wn. App. at 51. There is a direct analogy between that case and the loss of position that the Foundation suffers from the agency’s determination here. Similarly, it is no meaningful basis for distinction that in the *St. Joseph Hospital* case, “...the Legislature intended to protect the interests of competing health care providers when they enacted the certificate of need statute.” *See* CP, at 131. The FCPA is clear that “interest groups” such as the Foundation are within its zone of interests. *See* RCW 42.17A.400. It is equally clear that the FCPA seeks to accomplish its goal of transparency in politics, in part, by having individuals and interest groups with opposing interests police each other – the statute provides not only a citizen’s action (*see* RCW 42.17A.765) but also a mechanism for opponents to bring complaints before the PDC (*see* RCW 42.17A.755). Much like in *St. Joseph*, there is only one class of persons who will challenge decisions that decline enforcement proceedings against a particular group; it is, of course, those persons who oppose said group. *See St. Joseph Hosp. & Health Care Ctr v. Dept. of Health*, 125 Wn.2d 733, 742, 887 P.2d 891 (1995). And when the Foundation next pursues similar allegations administratively or judicially, it will have to overcome the “bargaining chip” that the PDC has handed unions – unless this Court redresses the error below.

such an interest.”). This prejudice would clearly have been redressed by a decision of the lower courts finding in favor of the Foundation on the merits, so the Foundation adequately satisfied both sub-prongs of the “injury-in-fact” test. To the extent that the dismissal was predicated on a purported lack of prejudice to the Foundation’s interests, the trial court clearly erred.

ii. The Foundation is Within the Broad “Zone of Interests” Under the FCPA.

The “zone of interest” test is a further requirement applied by courts to separate plaintiffs with standing from the general public, “...because so many persons are potentially ‘aggrieved’ by agency action.” *St. Joseph’s*, 125 Wn.2d at 739. “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. Sec. Indus. Ass’n*, 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” those interests) when taking the actions at issue. *Id*; see also RCW 34.05.530(2).

That test was easily satisfied by the APA Petition. 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.” See 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.” *See* RCW 42.17A.001. “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. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 507-08, 546 P.2d 75 (1976) (recognizing that part of the purpose of I-276 was 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 maximizing public information).

Chapter 42.17A RCW manifests its intent to have campaign finance broadly policed by such individuals, interest groups and other “ferrets” in a variety of ways – not the least of which is the citizen’s action procedure embodied in RCW 42.17A.775. For present purposes, however, the Legislature’s intent is also displayed in its provision of an administrative complaint process for any interested parties, which the Foundation availed itself of here (as discussed above). *See* 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(1)(a) – even though the violations alleged by the Plaintiff rose well above the level of the “remedial violations” or “technical corrections” that the FCPA allows to be handled in this manner. *See* RCW 42.17A.755(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). Moreover, and as discussed in greater detail *infra* (see pp. 30, 37-44), the FCPA does not permit the PDC to resolve the issues raised by the Foundation’s administrative complaint with a mere “warning letter,” regardless of how the PDC may choose to allocate its “finite resources” when statutorily-permitted to make such discretionary decisions in other cases.

The PDC argued that, merely because the Foundation could not force the PDC’s hand and require it to commence a full investigative and/or adjudicatory process, its decision was therefore immune from judicial review. In other words, it interpreted the “required to consider” language of the APA in a far more technical sense than any appellate court of this State

has ever understood it before. *See* CP, at 094 (“Similarly here, Freedom Foundation has no right under RCW 42.17A to compel any particular action by the Commission. Such decisions rest exclusively with the Commission.”). That argument is a bridge too far, because it could equally apply to *any* complainant whose complaint is dismissed without further inquiry, and because it ignores the fact that the PDC lacked statutory authority for the action it *did* take. The discretion of the PDC is not so unfettered as that of the federal Food & Drug Administration.¹² If there is presented something more than a mere “remedial violation” or “technical correction” (as was the case here), then the PDC can no longer resolve the matter at its discretion; it “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 (emphasis added). There was simply no statutory provision authorizing resolution of such administrative complaints by issuing a “warning letter” – much less two (2) warning letters – even though the PDC purports to have arrogated that authority to *itself* by virtue of WAC 390-07-060.¹³ *See* CP, at 097-099.

¹² 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 matter is one “committed to an agency’s absolute discretion,” are totally inapposite in the context of the FCPA. *See Heckler*, 470 U.S. at 828-35 (1985).

¹³ Statutory law and the then-operative regulations, however, obligated the PDC to take into consideration the fact that it had very recently warned SEIU PEAFF about engaging in very similar conduct. *See* RCW 42.17A.750(d)(i), (xii); WAC 390-37-061(4).

The validity of and authority for the PDC's instant determinations are beyond the scope of this Section's arguments over standing, but it should go 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 Bd.*, 187 Wn. App. 853, 863, 351 P.2d 875 (2015) ("The licensing statute explicitly protects the City's interest by providing them a statutory right to object to a proposed license and request a hearing."). 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 required by law. *See Pierce Cty. Sheriff*, 98 Wn.2d at 694 ("The right to be free from such action is itself a fundamental right and hence any arbitrary and capricious action is subject to review ... Under this standard, the courts always have inherent power to review agency action to the extent of assuring that it is not arbitrary and capricious."). 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 City of Burlington*, 187 Wn. App. at 863, n.8. And as the court observed in that recent opinion, this glaring fact distinguished the case relied heavily upon

by the Defendants below, *Allan v. University of Washington*, 140 Wn.2d 323, 997 P.2d 360 (2000) – in addition to the other distinguishing points noted in **Section IV.B.i.a**, *supra*, at pp. 13-14, n.6.

Considering, in particular, the time and resource constraints faced by individual citizens in ensuring that their elections are fair and uncorrupted, the Foundation must be determined to have standing to seek review of the PDC’s decision. While all citizens may have a *right* to file an administrative complaint, the Foundation is in a better position and has a greater motivation to do so, in support of its mission to advance individual liberty, free enterprise, and limited, accountable government. As such, this case is much like that before the Washington Supreme Court in *St. Joseph Hosp.*, 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 for review. *Id.* The court found St. Joseph had 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). *Id.*, at 896 (“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 (“In both cases, competitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller’s rulings.”).

Here, similarly, the aims of the FCPA can only practically be achieved if individuals and entities such as the Foundation – who *do* take the trouble to ensure that its provisions are enforced – can seek judicial review to ensure that the PDC interprets the FCPA properly and does not exceed its statutory authority. Most assuredly, the SEIU PEAFF and other beneficiaries of PDC decisions to forego investigations or issue extra-statutory ‘second chances’ in the form of warning letters will not appeal such determinations.

Further, recent legislative amendments to the FCPA render hollow the PDC’s concern that “...to allow citizens to challenge every complaint disposition would open the judicial floodgates to those who simply wish to second guess decisions made by the Commission.” *See CP*, at 094. The Legislature has already fashioned what it deems to be an appropriate remedy to any problem of widespread, vexatious FCPA suits by allowing the PDC

to dispose of “technical corrections” or “remedial violations” without resorting to the fuller adjudicative procedures that indisputably trigger judicial review, “...**provided the executive director consistently applies such authority.**” See RCW 42.17A.755 (emphasis added). Hence, the trouble here is twofold: (i) the violations alleged were not such “remedial violations” or “technical corrections,” or even purported to be, and (ii) the PDC asserted the *further* authority to exercise limitless discretion to decline enforcement even where an “actual violation” is presented. The Foundation’s contrary interpretation of the FCPA, requiring judicial review, can hardly be called “absurd” if it prevents the PDC from exercising a power that the Legislature deliberately withheld. The legislative intent to preserve judicial review, even for decisions of categorization, could not be clearer.

At an even more basic level, the “zone of interest” test itself has already accounted for the Defendants’ “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, 399.¹⁴ APA review also plainly does not

¹⁴ “It was thought, however, that Congress, in enacting [Section 702 of the APA] had not intended to allow suit by every person suffering injury in fact. What was needed was a gloss on the meaning of [Section 702]. The Court supplied this gloss by adding to the requirement that the complainant be ‘adversely affected or aggrieved,’ i.e., injured in fact, the additional requirement that ‘the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’”

require any indication of a specific “...right ... to compel any particular action by the Commission,” as the PDC’s arguments suggested.¹⁵ *See Clarke*, 479 U.S. at 400; *see also* CP, at 094. But the Foundation *did* have a right to have the PDC properly interpret the statute, and a salient, statutory interest in ensuring that the PDC did not exceed its discretionary authority by ignoring violations of the law by favored entities. It is clear beyond question that the Foundation was within the broad “zone of interests” established by the FCPA, and the trial court erred to the extent it held otherwise.

iii. The Foundation Has Associational Standing to Seek Review of the PDC’s Handling of FCPA Violations.

Aside from its own obvious stake in the matter, arising from the PDC’s disposition, the Foundation possessed standing to challenge the PDC’s determination on behalf of all its supporters throughout the State of Washington, each of whom was harmed by the PDC allowing SEIU PEAFF’s illegal activities to go unchecked. It is settled law in this state that “...a non-profit corporation or association which shows that one or more of its [supporters] are specifically injured by a government action may represent

¹⁵ Furthermore, although the Foundation responds in greater detail to the Appellee’s “injury-in-fact” arguments above, *City of Burlington* evidences that the “injury-in-fact” prong is not “especially demanding,” either. Indeed, if it were, and if an “injury-in-fact” required such a 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.

those [supporters] in proceedings for judicial review.” See *Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401 (1978) (citing *Loveless v. Yantis*, 82 Wn.2d 754, 758, 513 P.2d 1023 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972)). This recognized interest, known as organizational or associational standing, requires that (1) the individual constituents of the organization would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor relief requested requires the participation of the individuals themselves. *International Association of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002).¹⁶

For the reasons stated *supra*, in **Section IV.B.ii**, it is indisputable that the interests of public disclosure and government transparency that the Foundation sought to ensure by way of the APA Petition are explicitly enshrined in the FCPA’s “zone of interests.” These interests are directly germane to the Foundation’s purpose of working toward “...limited,

¹⁶ The PDC attempted below to distinguish the Foundation’s cases on associational standing, on the basis that “[t]he courts in *SAVE* and *International Association of Firefighters* were not reviewing the APA’s standing requirement, rendering neither decision applicable in this context.” CP, at 132. It is true that the Foundation’s cases did not interpret RCW 34.05.530, but that does not preclude application of the judicial doctrine of associational standing in this factual context (and the PDC cites no authority to the effect that it would or should). Indeed, RCW 34.05.530 uses the word “person” in each of its standing requirements, which undoubtedly includes legal “persons” like non-profit corporations. Whether such a “person” is similarly prejudiced as its constituents are, is a question adequately addressed by the associational standing doctrine.

accountable government” (emphasis added), a mission that dovetails with the policy goals of the FCPA. *See* RCW 42.17A.001.¹⁷ Furthermore, the Foundation enjoys the support of individuals across the State of Washington who were directly harmed by the SEIU PEAFF’s numerous, unrepentant failures to comply with the FCPA and the state government’s purporting to exercise its “discretion” to do nothing about that situation. *See* CP, at 010, ¶59.f (alleging that PDC decision “...prejudices the Foundation in that it permits the national SEIU and its political committee, SEIU PEAFF, to conceal its political activities and to unduly influence the election of friendly officials throughout the State of Washington.”); *see also Loveless*, 82 Wn.2d at 758 (“With the [supporters] of the association here all residents of the area affected, the association has a direct enough interest to challenge the administrative action.”).

As set forth in great detail in the Petition, the SEIU PEAFF admitted to committing “actual violations” of the Statute a second time, as to which

¹⁷ “It is hereby declared by the sovereign people to be the public policy of the state of Washington: (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided. (2) That the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty, and fairness in their dealings. (3) That the people shall be assured that the private financial dealings of their public officials, and of candidates for those offices, present no conflict of interest between the public trust and private interest. ... (11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.”

the PDC took no action except to summarily dismiss the Foundation's allegations. See CP, at 003-006, ¶¶13-40; see also *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892 (2011) ("Where the injury complained of is procedural in nature, standing requirements are relaxed."). As the FCPA forcefully acknowledges (*see supra*, at n.17), the citizens of this state have the right to expect that their elected officials take violations of the FCPA seriously, and that those officials themselves comply with the unambiguous statutory mandates to which they are subject. It cannot be denied that these interests are directly affected by the PDC's claim of limitless discretion – in enforcing a statute aimed at combating government corruption, no less. See *Washington State Housing Finance Comm'n v. National Homebuyers Fund, Inc.*, 193 Wn.2d 704, 716-17, 445 P.3d 533 (2019) (citing *Washington Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 653, 278 P.3d 632 (2012) ("Although WASAVP has not suffered economic loss as a result of I-1183, its goals of preventing substance abuse could reasonably be impacted by I-1183's restructuring of Washington's regulation of liquor.")).

The claims asserted below did not require the individual participation of the Foundation's supporters and could properly be pursued by the organization. The Foundation did not assert claims for money damages on behalf of particular supporters, which might have required

individual proofs, but instead sought a judicial declaration to impact all such constituents, and for the punitive remedies provided under the FCPA as against SEIU PEAFF. *See* CP, at 011-012; *see also International Association of Firefighters*, 146 Wn.2d at 214 (“Monetary damages are distinguishable from injunctive relief, in that injunctive relief generally benefits every member of an employee association equally whereas the amount of monetary damages an employee suffers may vary from employee to employee.”). If the Foundation is ultimately successful, the fines paid by SEIU PEAFF will go not to the Foundation, but to the State’s coffers. Thus, the harm arising from SEIU PEAFF’s activities was felt by each of the Foundation’s supporters in the state of Washington but could have been categorically redressed by the general relief sought by the Foundation in the trial court. *See* RCW 42.17A.750(1).

Lastly, this Court should find that the Foundation has standing to seek judicial review on behalf of its supporters in order to ensure that a question of such substantial public importance does not go unanswered. The extent of the PDC’s discretion under the FCPA is just such a question (momentous, let alone substantial), because it immediately and extensively affects numerous segments of the population. Essentially, it affects everyone who participates in representative democracy in the State of Washington, and all of the various industries that are affected by the results

of such electoral contests (which is to say, all of them). *See Washington Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 459 P.2d 633 (1969) (“Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry, or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer.”). Issues concerning the interpretation of the FCPA (even in its former provisions) are unsettled, novel, and of great magnitude – which the Supreme Court has recognized in taking direct review of several consolidated appeals from citizens’ actions filed by the Foundation. *See Freedom Foundation v. Teamsters Local 117, et al.*, Supreme Court No. 97109-9.¹⁸ For similar reasons, the Court should hold that the Foundation here has a sufficient stake to challenge the PDC’s assertion of limitless enforcement discretion, which has wide-ranging impacts on the State of Washington’s operations, potentially in every industrial sector.

C. The PDC’s “Warning Letter” Rule Lacks Statutory Authority.

¹⁸ As such, it is not only the Foundation that “deems important” questions concerning the proper interpretation of the FCPA. *See* CP, at 132. To allow trial courts to fulfill their function of statutory interpretation, with respect to such a critical and wide-ranging statute, does not “...render the standing requirement meaningless.” *Id.*

Lastly, the PDC attempted to justify its own regulatory fiat by arguing that “WAC 390-37-060 was amended by the Commission following the passage of the 2018 amendments, effective December 31, 2018.” *See* CP, at 097. But to reiterate the PDC’s argument is to reject it, because of course an administrative agency cannot immunize its rules against attack simply by amending them following the passage of a statute that invalidates them. “An administrative rule has force of law only if the agency promulgated it with delegated authority.” *Pierce Cty. v. State*, 144 Wn. App. 783, 836, 185 P.3d 594 (2008). While an agency may “fill in the gaps” of a general statutory scheme where its rules fall within the general grant of authority, courts should not and do not hesitate to invalidate an agency regulation if it exceeds or conflicts with an agency’s statutory authority. *Id.* (citing *Jenkins v. Dept. of Social & Health Services*, 160 Wn.2d 287, 295, 157 P.3d 388 (2007)); *see also* RCW 34.05.570(2)(c). Moreover, the deference that the PDC relied upon below applies only if a statute is ambiguous: “when the statutory language is plain, the statute is not open to construction or interpretation.” *Green River Community College, Dist. No. 10 v. Higher Ed. Personnel Bd.*, 95 Wn.2d 108, 113, 622 P.2d 826 (1980).

The parties agreed below that the Rule at issue, WAC 390-37-060, existed in substantially identical form prior to the 2018 amendments to the

FCPA, and the PDC contended that Rule allowed it to resolve “minor violations” with a mere warning letter. But then, the 2018 amendments to the FCPA set forth a detailed protocol that further limited the PDC’s discretion in handling complaints alleging violations of the statute’s provisions. *See generally former RCW 42.17A.755 (2018).*¹⁹ Under that protocol, if the PDC determined that an alleged violation was neither a “technical correction” nor a “remedial violation,” it had to treat it as an “actual violation” – there was no category for “minor violations,” or even any mention of such, in the 2018 statute. *See generally RCW 42.17A.755.* In turn, if an “actual violation” was found – and the Union here agreed before the PDC that it had committed “actual violations,” and admission the PDC seems to have ignored²⁰ – then the PDC’s discretion was limited to either initiating an investigation and conducting further proceedings, or referring the matter to the AG. *See RCW 42.17A.755(1)(b), (1)(c).*

¹⁹ The Legislature subsequently further amended the FCPA in 2019, including the provisions set forth in RCW 42.17A.005 and RCW 42.17A.755. These amendments were not made effective, however, until May 21, 2019. As such, at the time of SEIU PEAFF’s violations in 2018, and the Foundation’s filing of an administrative complaint as well as the resolution thereof in early 2019, the law in effect was the FCPA as it existed in 2018. As such, references in this Section to the FCPA should be construed as referring to the law in effect at that time.

²⁰ *See CP*, at 071 (“Second, the Freedom Foundation notes monetary discrepancies between certain Form 8872’s that PEAFF filed with Internal Revenue Service and the C-5 Reports filed by SEIU PEAFF with the PDC, and asserts that that means that the C-5 reports were erroneous. Regrettably, there is some truth to this.”).

Stated differently, Section 755 reflected a legislative judgment that “actual violations” of the Act “*must*” be pursued in one of the foregoing ways. The PDC could not simply ignore them, or effectively permit them to continue by classifying them as “minor violations” worthy of no further agency attention. Where violations did not rise to the level of actual violations (a question which was itself not committed to agency discretion; *see* RCW 42.17A.005 for definitions of “actual violation,” “technical correction,” and “remedial violation”), the FCPA already reflected a reasoned decision that they could be dealt with in the PDC’s even-handed discretion.

But the law did *not* permit the PDC such “broad” enforcement discretion where “actual violations” are concerned. This only makes sense, for the FCPA’s central concern is the favoritism and arbitrary power that state officials can wield where their activities are subject to no check. *See* RCW 42.17A.001 (“It is hereby declared by the sovereign people to be the public policy of the state of Washington: ... (2) That the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty, and fairness in their dealings. (3) That the people shall be assured that the private financial dealings of their public officials, and of candidates for those offices, present no conflict of interest between the public trust and private interest ... (5) That public confidence

in government at all levels is essential and must be promoted by all possible means.”). To judicially permit government officials wholesale discretion to “dispose of complaints [like the Foundation’s] as appropriate” – complaints that seek to ensure the integrity of those same government officials – would be ironic and repugnant to the FCPA’s unmistakable intent. *See Utter v. Bldg. Indust. Assoc. of Wash.*, 182 Wn.2d 398, 411, 341 P.3d 953 (2015) (recognizing that government officials often “may be wrong” in exercising the authorities provided under the FCPA); *see also* RCW 42.17A.400 (“(1) The people of the state of Washington find and declare that: ... (b) Rapidly increasing political campaign costs have led many candidates to raise larger percentages of money from special interests with a specific financial stake in matters before state government. This has caused the public perception that decisions of elected officials are being improperly influenced by monetary contributions.”) (emphasis added).

The fact that the PDC promulgated its Rule recognizing “minor violations” and permitting them to be resolved by a warning letter, at such a time as the Legislature had foreclosed that procedure altogether, did not support its position below. *See* CP, at 097. Accordingly, the PDC also argued that its amended rule was “consistent with” the PDC’s legislatively recognized authority to enforce the FCPA. *See id.* But this PDC rule is not an instance of an agency merely “filling in the gaps” of legislation; the PDC

claims the discretion *not* to carry out its unambiguous statutory mandates as set forth in Section 755. *See H&H Partnership v. State*, 115 Wn. App. 164, 170, n.14, 62 P.3d 510 (2003) (“[The agency’s] argument is unpersuasive because [the statutes] are not ambiguous ... Absent ambiguity, there is no need for Ecology’s expertise in construing the statutes ... Similarly, this court will not defer to an agency determination that conflicts with a statute.”). The lack of ambiguity in the enforcement scheme of RCW 42.17A.755 – and the fact that its import clearly contradicts the actions undertaken by the PDC – renders administrative deference wholly inappropriate, and distinguishes the principal authorities cited by this administrative agency in the trial court. *See ARCO Prods. Co v. Washington Utils. & Transp. Comm’n*, 125 Wn.2d 805, 811, 888 P.2d 728 (1995) (“The statute unambiguously gives the WUTC the authority and discretion to determine whether and how to allocate the refund.”) (*citing Jensen v. Dept. of Ecology*, 102 Wn.2d 109, 685 P.2d 1068 (1984) (“The DOE’s decision is an exercise of discretion.”))).

This case is much more like one cited in the PDC’s reply below (CP, at 133), wherein the plain language of the statute precluded the creation of an exemption (much like a “minor violation”) that was not established by the Legislature. *See Edelman v. State, Pub. Disclosure Comm’n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004) (“If the legislature intended to create an

exemption for situations in which the parent organization does not participate, it would have done so in the language of the statute. It didn't.”). The PDC's creation of a “minor violation” is an even bolder claim of discretion than in *Edelman*. And it is no answer that “RCW 42.17A.755 simply gives the Commission several options with regard to how to address complaints, including dismissal” (*see* CP, at 134), because dismissal was not one of the dispositions available for “actual violations,” and because “minor violations” was simply not a category recognized anywhere in the statute. *See* RCW 42.17A.755. Similar to the unauthorized regulatory creation of an “exemption,” the PDC's interpretation (which confers upon itself discretion to abdicate its statutory duties) is fundamentally at odds with the FCPA's policy goals, and therefore should not have been sustained. *See Edelman*, 152 Wn.2d at 591 (“Rule 311 limits the effect of RCW 42.17.660, by creating a broad exemption to the single contribution limit where no such exemption exists in the statute.”).

That this rule pre-dated the 2018 FPCA amendments does nothing to remedy the underlying conflict with the statutory scheme as it existed following the 2018 amendments. *See, e.g., State v. Brown*, 142 Wn.2d 57, 62, 11 P.3d 818 (2000) (“The mere fact that the DOC had a preexisting list of internal prison rules labeled ‘serious infractions’ is not enough to fulfill the statutory mandate in RCW 9.94.070. The DOC erred by simply applying

its list of ‘serious infractions’ already promulgated pursuant to RCW 9.94.070(2) in a different context to give substance to a class C felony.”). Nor does it suffice that subsequent legislative enactments went on to recognize a category for “minor violations,” or to emphasize the need for discretion in the deployment of finite resources. CP, at 134 (“Further, the Legislature’s recent amendments to RCW 42.17A support the view that the Commission must focus its resources on significant violations of the law.”) The then-operative statute did not permit the PDC to apply the label “minor violations” to allegations of “actual violations” and thereby “enforce” the statute by declining to enforce it.²¹

Should the Court find that the Foundation had standing to seek judicial review by way of its APA Petition, it should go on to address the merits of whether the 2018 amendments to the FCPA permitted the PDC to act in this fashion, and it should rule that they did not.

V. CONCLUSION.

Collectively considered, the PDC’s current arguments in support of its purportedly vast discretion are quite remarkable. Not only does the PDC claim (i) the unilateral authority to ignore the FCPA’s statutory commands, but it also claims (ii) that its enforcement decisions are effectively immune from judicial review for lack of standing. For it is not just the Foundation

²¹ See CP, at 098.

that would lack standing under the PDC's theory. If the PDC's arguments concerning standing are correct, then no individual or entity throughout the State of Washington will be capable of challenging a decision by the PDC to "look the other way" after being notified of an undisputed FCPA violation. Only agency actions that affirmatively take enforcement action will ever be reviewable, thereby abandoning the Washington State Supreme Court's admonition that government officials often "may be wrong" – particularly where they decide not to prosecute constituents who have helped them to get elected. *See Utter*, 182 Wn.2d at 411 ("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). The FCPA amendments reflect no intent to depart so markedly from how the statute has been understood and applied throughout its history.

The Foundation respectfully submits that the Court should reject the PDC's limitless view of its own authority, reverse the trial court's dismissal of the APA Petition pursuant to CR 12 (b)(6), and remand to the trial court for further proceedings consistent therewith.

RESPECTFULLY SUBMITTED on January 8, 2020.



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