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

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FREEDOM FOUNDATION, a Washington nonprofit organization,

Appellant,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, a  
State of Washington government agency, and SERVICE EMPLOYEES  
INTERNATIONAL UNION POLITICAL EDUCATION & ACTION  
FUND, an IRS 527 political committee,

Respondents.

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**BRIEF OF RESPONDENT SERVICE EMPLOYEES  
INTERNATIONAL UNION POLITICAL EDUCATION AND  
ACTION FUND**

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## I. INTRODUCTION

The central question this Court is tasked with answering is whether an entity with no material interest in the outcome of an administrative proceeding can seek judicial review of the relevant agency's action under the Administrative Procedures Act (APA), RCW 34.05., *et. seq.*, simply because it lodged the underlying allegations, is ideologically hostile to the respondent, and would prefer that the respondent face the most draconian penalty possible. The answer is a definitive "no."

This question arises out of an administrative complaint that Appellant Freedom Foundation (the Foundation) filed with Respondent Washington Public Disclosure Commission (PDC). The complaint alleged that Co-Respondent Service Employees International Union Political Education & Action Fund (SEIU PEAFF) violated the Fair Campaign Practices Act (FCPA), RCW 42.17A, *et. seq.*, in several respects. The PDC ultimately identified one allegation as a "minor violation" (which SEIU PEAFF had already admitted), issued a warning letter, and dismissed the complaint. Dissatisfied with the remedy the PDC elected, the Foundation brought the instant APA petition on the theory that it has a statutory right to re-litigate the PDC's enforcement choices in state court.

However, Washington precedent is clear that persons in the Foundation's position do not have standing to obtain a judicial audience to

second-guess an agency's enforcement decisions. There is no dispute that the Foundation, as an organization, suffered no harm distinct from the general public as a consequence of SEIU PEAFF's minor violations. The only thing that distinguishes the Foundation from the public at large is its unique antipathy to SEIU PEAFF. But this ideological opposition does not grant the Foundation standing. And Washington courts are adamant that a person does not obtain APA standing merely by instigating the agency proceedings. There are thus no judicially recognized grounds for allowing the Foundation to pursue its ideological vendetta against SEIU PEAFF in state court. Moreover, even if such grounds existed, the Foundation cannot show that the PDC exceeded its authority in any respect. The Court should affirm the trial court's dismissal of the Foundation's APA petition.

## **II. ASSIGNMENTS OF ERROR**

SEIU PEAFF does not assign any error to the trial court's ruling.

## **III. STATEMENT OF THE CASE**

The facts of this case are straightforward and not in dispute. SEIU PEAFF is a Section 527 political fund connected to the Service Employees International Union. CP 2, 32-34. It is registered as an out-of-state political committee with the PDC and submits C-5 reports. CP 35-44, 84. The Foundation is a non-profit organization that purports to champion individual liberty, free enterprise, and limited, accountable government.

CP 2; FF Op. Br., 27. It acknowledges that it seeks to police SEIU PEAFF's compliance with the FCPA because it considers SEIU PEAFF an "opponent" which holds "opposing interests." FF Op. Br., 21, n.11.

On February 18, 2019, the Foundation submitted an administrative complaint to the PDC alleging that SEIU PEAFF had violated the FCPA in a number of respects. CP 24-30.<sup>1</sup> Pursuant to RCW 42.17A.755, the PDC conducted a preliminary review of the Foundation's allegations. It solicited a position statement from SEIU PEAFF, which in response contested several allegations but acknowledged that, through an inadvertent error, it had failed to report four specific expenditures made in out-of-state political campaigns. CP 72-74. On March 12, 2019, SEIU PEAFF also amended its C-5 reports to accurately reflect the initially unreported expenditures. CP 73, 84. The PDC permitted the Foundation to respond with supplemental materials. CP 75-81. The record does not reflect that the Foundation was ever joined as a party to the proceedings.

On May 7, 2019, the PDC issued two letters setting forth its findings and ordering a remedy. CP 82-85. Consistent with SEIU PEAFF's admission, the PDC found that SEIU PEAFF failed to disclose the above-

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<sup>1</sup> In 2018, the Foundation lodged separate FCPA allegations against SEIU PEAFF, which it eventually converted into a citizen action. CP 5. The trial court dismissed the Foundation's complaint and the Foundation then sought and received discretionary review by the Supreme Court as part of consolidated Case No. 97109-9, captioned *Freedom Foundation v. Teamsters Local 117 Segregated Fund, et al.*, which is currently pending.

referenced expenditures in five of its C-5 report. CP 83-85. The PDC did not classify this failure as an “actual violation” because (1) the unreported out-of-state expenditures did not concern Washington races; (2) all Washington expenditures had been reported; (3) the amended reports showed no additional 2018 expenditures; and (4) SEIU PEAFF spent only 9.2% of its 2018 expenditures in Washington. CP 85. Accordingly, the PDC declared that it was formally warning SEIU PEAFF to comply with its disclosure requirements going forward but was dismissing the Foundation’s complaint pursuant to RCW 42.17A.755(1). CP 82, 85.

Dissatisfied with the PDC’s conclusions, the Foundation requested that the PDC reconsider its remedy. CP 19. Aside from clarifying that the allegations had been dismissed as “minor violations” under WAC 390-37-060(1)(d), the PDC declined to do so. CP 7, 19. On June 5, 2019, the Foundation filed an APA petition in Thurston County Superior Court, alleging that the PDC had exceeded its authority under the FCPA when it issued SEIU PEAFF a formal warning rather than bringing an enforcement action against SEIU PEAFF and seeking extensive monetary penalties. CP 1-21. The PDC moved to dismiss the Foundation’s petition on standing grounds and on September 27, 2019, the trial court granted the motion. CP 140-42. The Foundation appealed the trial court’s decision on October 1, 2019. CP 136-38.

## IV. ARGUMENT

### **A. The Foundation lacks standing under the APA to appeal the PDC's dismissal of its administrative complaint and issuance of a warning letter to SEIU PEAFF.**

The trial court correctly found that the Foundation lacks standing to challenge the PDC's decision to dismiss the Foundation's complaint and issue a warning letter. Controlling precedent shows that the Foundation satisfied none of the APA's standing requirements. Unable to meet those requirements, the Foundation instead tries to massage them by reinventing its role in the administrative proceedings below, misrepresenting its own interests, and distorting case law.

These tactics cannot obscure the Foundation's true position, which it at points admits: it is simply an anti-union interest group that, by lodging FCPA complaints, seeks to inflict as much financial damage as possible on union entities, such as SEIU PEAFF. The Foundation has no particularized connection to SEIU PEAFF or its political activities and has no stake in the outcome of the PDC proceeding, other than to advance its ideological goals. Washington courts do not recognized the pursuit of political goals as a source of APA standing. The trial court's ruling should be affirmed.

#### **1. The APA's standing requirements**

The APA's standing requirements are set forth in RCW 34.05.530. That statute limits the right to "obtain judicial review of agency action" to

persons who are “aggrieved or adversely affected by the agency action.” RCW 35.05.530. A person is “aggrieved or adversely affected” under the APA “only when” three conditions are present: “(1) [t]he agency action has prejudiced or is likely to prejudice that person; (2) [t]hat 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.*<sup>2</sup> The Foundation rightly notes that the first and third prongs are paired together as an “injury-in-fact” test, while the second constitutes a separate “zone of interest” test. *Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 862, 351 P.3d 875 (2015). Where it errs is in these tests’ application.

## **2. The Foundation has not suffered an injury-in-fact.**

An agency action works an injury-in-fact when it results in “an invasion of a legally protected interest.” *Snohomish Cty. Pub. Transp. Benefit Area v. State Pub. Empl’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, 112 S. Ct. 2139 (1992)). To confer standing, that invasion must be “concrete and particularized.” *Allan v. Univ. of Wash.*, 92 Wn. App. 31,

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<sup>2</sup> Because “[t]hese three conditions are derived from federal case law,” Washington courts “look to federal cases addressing standing.” *Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 793 & n.1, 920 P.2d 581 (1996).

37, 959 P.2d 1184 (1998) (citing *Lujan*, 505 U.S. at 560), *aff'd*, 140 Wn.2d 323, 997 P.2d 360 (2000). The U.S. Supreme Court has clarified that an injury is “particularized” when it “affect[s] the plaintiff in a personal and individual way.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016); *see also Mestrovac v. Dep’t of Labor & Indus. of State*, 142 Wn. App. 693, 704, 176 P.3d 536 (2008) (in analogous RAP 3.1 context, delimiting standing to appeal by defining “aggrieved” as “a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation”). An injury is “concrete” when it “actually exist[s],” even if it is intangible. *Spokeo*, 136 S. Ct. at 1548-49.

The Foundation alleges that it has suffered “two [] different ‘concrete and specific’ injuries-in-fact’ ...: (1) the 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 interest when violations of the FCPA are ignored.” FF Op. Br., 13. Neither of these alleged injuries invades a concrete and particularized legal interest.

**a. Dismissal of the administrative complaint**

The Foundation’s theory that it has suffered an injury-in-fact merely because the PDC chose to dismiss its complaint and issue a warning letter, rather than commence an enforcement action and seek

more punitive penalties against SEIU PEAFF, is entirely unprecedented. Indeed, courts consistently reject the notion that a person holds a concrete and particularized stake in an agency proceeding solely by virtue of apprising the agency of allegations the agency is empowered to investigate. Neither have courts found a person's mere participation in administrative proceedings sufficient to show injury-in-fact, when the outcome of the proceeding has no particularized impact on it.

The PDC's enforcement decision hardly affects the Foundation in a particularized way. This follows inexorably from the nature of the law the Foundation purports to enforce. When someone commits a campaign finance violation, it harms the public at large, not any person in particular. *See Crisman v. Pierce Cty. Fire Protection Dist. No. 21*, 115 Wn. App. 16, 23, 60 P.3d 652 (2002) (the FCPA's goal is to "protect[] the public rather than any individual candidate"). And when a person is assessed a penalty for such a violation, the proceeds escheat to the state, not private parties. *See RCW 42.17A.750, 755, & 775(1)*. Moreover, the FCPA largely delegates power to the PDC and Attorney General to enforce its provisions. *See RCW 42.17A.755* (outlining PDC's enforcement powers); *RCW 42.17A.765* (same with respect to Attorney General).

Meanwhile, the FCPA does not permit private causes of action because there are no private rights to enforce. *Crisman*, 115 Wn. App. at

22-24 (affirming summary judgment in defendant’s favor because FCPA did not create implied private right of action). The FCPA grants private parties a limited, auxiliary role in the statute’s enforcement by permitting members of the public to file complaints with the PDC alleging FCPA violations, which the PDC must then process. *See* RCW 42.17A.105(5) (requiring PDC to “investigate and report apparent violations” following “complaint”); RCW 42.17A.755(1) (setting forth actions PDC must take “[i]f a complaint is filed”). Members of the public may even initiate citizen actions in the name of the state against alleged violators, if neither the PDC nor the Attorney General takes action on a complaint and certain other prerequisites are satisfied. *See generally* RCW 42.17A.775.

But regardless of the form it takes and the identity of its prosecutor, all enforcement activities under the FCPA are pursued exclusively in the public interest. *See Crisman*, 115 Wn. App. At 23; *No On I-502 v. Wash. NORML*, 193 Wn. App. 368, 373-74, 372 P.3d 160 (2016) (even a citizen suitor “is necessarily acting on behalf of the State, implicating rights that belong to the State”); *State v. Evergreen Freedom Found.*, 1 Wn. App. 2d 288, 309, 404 P.3d 618 (2017) (FCPA’s disclosure requirements were adopted to “improve public confidence in the fairness of elections and government processes and to protect the public interest”), *aff’d*, 192 Wn.2d 782, 432 P.3d 805 (2019), *cert. denied*, 139 S. Ct. 2647

(2019). That means complainants who choose to participate in the FCPA’s enforcement process inherently lack any personal stake in the proceedings.

Here, the Foundation has acted in the role of a citizen complainant. Thus, regardless of the Foundation’s own motives for lodging its complaint, the moment the PDC took up its allegations, the proper resolution thereof became solely a matter of public concern. There are no “legal interests” at stake in this case other than, on the one hand, the State’s interest in seeing its campaign finance laws properly enforced and, on the other, SEIU PEAFF’s pecuniary interests in limiting its exposure to a financial penalty and its associational and speech rights that may be implicated as a result of disclosing its political expenditures. In contrast, because it was the instigator, not the subject of the PDC’s investigation, there is no dispute that the PDC’s resolution of the Foundation’s complaint did not result in a monetary judgment or penalty against the Foundation. Nor did the PDC’s decision affect any other concrete legal or equitable right the Foundation may possess. *See Mestrovac*, 142 Wn. App. at 704.<sup>3</sup> Likewise, the PDC’s determination did not impose an affirmative burden or obligation on the Foundation to do anything. *See id.*

That posture is fatal to the Foundation’s theory of standing. As

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<sup>3</sup> In asserting it has met the zone-of-interests test, the Foundation argues that it has “a right to have the PDC properly interpret the statute....” FF Op. Br., 30. But as explained below, a generalized interest in the law’s proper enforcement is neither concrete nor particularized because all members of the public share in it equally. *See infra*, 11.

courts in this and other jurisdictions have repeatedly held, a litigant's generalized interest in seeing that a law be properly enforced does not establish a particularized legal interest that an agency action can invade. *Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002) ("An interest sufficient to support standing to sue...must be more than simply the abstract interest of the general public in having others comply with the law."); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S. Ct. 1055 (1997) ("An interest shared generally with the public at large in the proper application of the Constitution and laws will not do."); *KERM, Inc. v. F.C.C.*, 353 F.3d 57, 58 (D.C. Cir. 2004) (a "generalized interest in the faithful enforcement of the law" is insufficient to confer standing).

The fact that the Foundation originally apprised the PDC of the alleged FCPA violations and is now dissatisfied with the result of the review process does not create a cognizable injury either. The FCPA does not vest a complainant with a right to expect any particular outcome. Without such a right, there is no legal interest for the PDC to invade.

The Court of Appeals addressed this "expectancy" argument in *Newman v. Veterinary Board of Governors*, 156 Wn. App. 132, 231 P.3d 840 (2010). There, two dog owners submitted a complaint to the veterinarian professional licensing board, alleging that the veterinarian who treated their dog had acted unprofessionally. *Id.* at 138. The board

investigated but ultimately found that no unprofessional conduct occurred. *Id.* at 139. When the board refused to reconsider its decision, the owners sought a constitutional writ of review, *id.*, and later requested that the writ petition be converted into an APA action for judicial review. *Id.* at 146.

The owners argued that they had APA standing because the board did not appropriately discipline the respondent veterinarian and “they had an interest in having the veterinarians held accountable and in seeing justice served.” *Id.* at 144. The Court of Appeals rejected this argument because “dissatisfaction is not sufficient to establish an injury-in-fact.” *Id.* Moreover, the only concrete legal interests at stake “in a professional disciplinary proceeding are those of the license holder.” *Id.*; *see also Choi v. Wash. State Dep’t of Health*, 6 Wn. App. 2d 1019 at \*2 (Nov. 19, 2018) (unpublished) (complainant seeking APA review of department’s failure to revoke license of East Asian medicine practitioner did not suffer injury-in-fact because assertion that he was “member of the Public which [the Department] has an obligation to protect” did not allege “immediate, concrete, and specific injury in fact”).

Similarly, the Foundation suffers no harm from the alleged fact that the PDC exceeded its authority in issuing its order of dismissal. This amounts only to an allegation of a “procedural injury,” which is insufficient to establish an injury-in-fact. *See Allan v. University of*

*Washington*, 140 Wn.2d 323, 997 P.2d 360 (2000).

In *Allan*, a student accused a university professor of sexual harassment, resulting in his initial discharge, and later a faculty committee adjudication to decide whether to reinstate him. *Id.* at 325. The professor’s wife participated in that proceeding under subpoena. *Id.* After the student sued and settled with university, the Faculty Senate deliberated whether, as a result, to change the Faculty Code’s “procedures governing faculty members’ appeals of discipline arising out of student complaints.” *Id.* During those deliberations, the professor’s wife “advised the chair of the Faculty Senate that it was her belief that the UW must comply with the APA in adopting any proposed rule changes—including providing opportunity for public comment—or the changes would be invalid.” *Id.* When the proposed changes were enacted without public comment, the wife brought an APA petition challenging their validity. *Id.* at 326.

The Supreme Court held that the professor’s wife lacked standing because she had not suffered an injury-in-fact. *Id.* at 329-32. To begin with, her past participation in the original faculty adjudication did not show that she was subject to any present or future harm. *Id.* at 363-64. The substantive right at issue was only her husband’s continued employment, which, as a non-university employee, she did not share. *Id.* at 332. Thus, all the petitioner was left with was an alleged “procedural injury,” *id.* at

329, stemming from the Faculty Senate’s “improperly promulgated change to the Faculty Code.” *Id.* at 331. However, the Court explained that “essential to the assertion of ‘such procedural rights’ [is] a ‘concrete interest...protectable by a requirement of formal adjudicatory proceedings.’” *Id.* at 330 (quoting *Seattle Bldg. & Const. Trades Council*, 129 Wn.2d at 795).<sup>4</sup> Since the concrete interest belonged to the petitioner’s husband, her untethered assertion of an improperly promulgated rule availed her nothing. *Id.* at 331, 332-33 (“Absent a concrete interest, injury-in-fact standing under the APA is not conferred...merely on the basis of an asserted failure on the part of the agency to follow procedural requirements.”).

*Allan, Newman, and Choi* are on point. Just as the complainants in those cases suffered no injury from the agency’s allegedly deficient procedure or disappointing enforcement decision, the Foundation was not concretely harmed by what it deems to be an insufficiently severe penalty or by any procedural error the PDC committed in processing its complaint.

The Foundation’s rationale for why the PDC’s actions or inactions nevertheless harmed it is unpersuasive. The Foundation argues that it was a “party” to the PDC’s “disposition” of its administrative complaint, and thus, of necessity, the PDC’s resolution of the complaint worked an

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<sup>4</sup> The Foundation’s citation to *Seattle Building & Construction Trades Council*, FF Op. Br., 18, 21, is misleading because it ignores this important qualification.

injury-in-fact to its interests. FF. Op. Br. 13, 16 & n.6. This argument is defective on two scores. First, whether a person is technically a “party” to an agency proceeding is irrelevant to the question of whether it has suffered an invasion of a concrete and particularized legal interest. Second, even if this inquiry was relevant to the injury-in-fact test, the Foundation fails to show that it was a “party” to the PDC’s preliminary review of the allegations against SEIU PEAFF.

In *Allan*, the Court accepted as “true” the petitioner’s assertion that she ‘participated as a party in the very adjudication and litigation which resulted in these changes.” *Allan*, 140 Wn.2d at 329. But it held that her participation in the faculty committee’s “adjudicative process involving her husband” did not establish a statutory injury because it was not probative of whether she would suffer a “present” or “future harm.” *Id.* The Foundation is thus wrong that its putative “party” status distinguishes its position from the petitioner’s in *Allan*. See FF. Op. Br., 13 at n.6.

The situation was similar in *Newman*. While the Court of Appeals found that the dog owners were not actually “parties” to the veterinarian board’s decision not to file a statement of charges, it also determined that “[e]ven if [they] were parties,” they could not show that the decision adjudicated a “final order” appealable under the APA. *Newman*, 156 Wn. App. at 148. That was because parties may only seek review of orders that

determine a party’s “legal rights, duties, privileges, immunities, or other legal interests....” *Id.* (quoting RCW 34.05.010(3)). But a decision not to file charges against the respondent veterinarian “did not finally determine the legal rights or interests of the [dog owners].” *Id.* It only resolved the licensing interest of the veterinarian. *See id.* Thus, with respect to *Newman* as well, the Foundation is wrong in asserting that that the petitioner’s non-party status meaningfully distinguishes that case from the instant facts.<sup>5</sup>

In the face of these authorities, the Foundation relies only on *dicta* from an unpublished decision. FF. Op. Br., 16 (citing *Auto. United Trades Org. v. Wash. Pub. Disclosure Comm’n* (“*AUTO*”), 8 Wn. App. 2d 1068, 2019 WL 2121528, at \*4-5 (May 14, 2019) (unpublished)). *AUTO* does not assist the Foundation. First, regardless of its content, *AUTO* is not binding on this court. *Allan*, on the other hand, is. Second, *AUTO*’s holding was entirely unrelated to the question of APA standing. *AUTO*

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<sup>5</sup> The Foundation also attempts to distinguish *Newman* on the ground that, whereas the petitioners in that case had “no right to initiate a complaint,” the FCPA affords the Foundation such a “procedural right.” FF. Op. Br., 13-14, n.6. This argument confuses the right to file an administrative complaint (which kicks off a review process) with the right to compel the investigating agency to bring an enforcement action after it conducts a review. Nothing in *Newman* suggests that the veterinarian board had discretion to ignore the dog owners’ complaint. Indeed, the board conducted a “nine month review” before informing the owners that no disciplinary action was warranted. *Newman*, 156 Wn. App. at 138. Similarly, the PDC did not bar the Foundation from filing a complaint and it did not ignore the complaint’s contents. It conducted a preliminary review and sought position statements from SEIU PEAFF and the Foundation before it dismissed the charges. CP 72-85. At the same time, neither the Uniform Disciplinary Act at issue in *Newman* nor the FCPA here “compel” the corresponding agency to bring *an enforcement action* against the target of the complaint once the review has concluded. *Newman*, 156 Wn. App. at 144; RCW 42.17A.755(1)(a) (permitting the PDC to dismiss complaints).

alluded to the petitioner's standing only incidentally while identifying when the petitioner first had notice of an appealable decision and, as a consequence, why its petition was untimely. *AUTO*, *supra* at \*5. Although the Court apparently assumed that the PDC's decision not to take action "prejudiced" the petitioner, *id.*, no party disputed that issue and the court did not provide any reasoning for so stating. Therefore, the Court's incidental reference to the petitioner's "harm" was classic *dicta* and would not bind this court even if the decision had been published. *See ETCO, Inc. v. Dep't of Labor & Indus.*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992) ("Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis...."). In sum, *AUTO*'s *dicta* cannot overcome the controlling force of *Allan and Newman*.

At any rate, the Foundation was in fact not a "party" to the PDC's investigation of its complaint. The APA defines a "party to an agency proceeding" as either "[a] person to whom the agency action is 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)(a)-(b). The Foundation asserts it qualifies under both prongs. FF Op. Br., 15.

As to subparagraph (a), the Foundation notes that the PDC's dismissal of its complaint was an "agency action" within the meaning of the APA because it was an "order" which "implemented" the FCPA. FF Op. Br., 14-15 (quoting RCW 34.05.010(3)). That is undoubtedly true. But the Foundation only baldly asserts, without citing any authority, that the PDC's order of dismissal was "specifically directed" to it. *Id.* at 14. The claim that the PDC's order of dismissal was "specifically directed" to the Foundation is foreclosed by *Newman*, which held that the complainants were not "parties" to the veterinarian board's decision not to file a statement of charges because "if specifically directed at anyone, [the decision] was directed at the licensees," not the dog owners. *Newman*, 156 Wn. App. at 147. In other words, an agency order is "specifically directed" to a person only if it affects their material legal interests. Here, the only entity whose legal interests were affected by the PDC's order of dismissal was SEIU PEAFF. Thus, the PDC's order of dismissal was "specifically directed to" SEIU PEAFF, not the Foundation.

The Foundation devotes most of its attack to showing party status under the second prong. It contends that it was "clearly permitted to participate" in the PDC's investigation. FF Op. Br., 14-15.<sup>6</sup> Yet again, the Foundation simply ignores the inconvenient part of the statutory language.

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<sup>6</sup> The Foundation does not allege, nor could it, that it was "named as a party" or "intervened" in the PDC's investigation. *See* RCW 34.05.010(12)(b).

While it is debatable whether the Foundation even “participated” in the investigation in a meaningful sense, it surely did not participate “*as a party*” in the proceedings. RCW 34.05.010(12)(b) (emphasis added). This is a critical distinction. If the legislature intended to define all participants or intervenors in a proceeding to qualify as “parties” under the APA, it could have accomplished that without appending the phrase “as a party” to subparagraph (b). That term must be accorded significance, since it is a basic rule of statutory construction that each word of a statute must be given independent meaning and none be treated as superfluous. *Am. Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 91 P.3d 864 (2004) (“Words have meaning, and words in a statute are not superfluous.”).

This meaning becomes clear when the phrase is construed in light of the “surrounding” text. *Oostr v. Holstine*, 86 Wn. App. 536, 544, 937 P.2d 195 (1997). Subparagraph (b) is divided into two parts by the word “or.” The first part discusses persons “named as a party” to the proceeding, while the second discusses persons “allowed to intervene or participate as a party.” The term “as a party” at the end of the sentence recalls its usage in connection with named parties at the beginning. Read in conjunction with the first half of the sentence, the second part operates as a catchall to capture entities that participate *as if* they had been named as parties. This ensures that a person with a material stake in the outcome

of the agency action obtains the rights that inhere in named parties, even if the agency failed to formally join it to the proceeding. However, the “participation” clause was not meant as a loophole to confer party status on any entity that participates in an agency proceeding in any way.

This limited reading is confirmed by one of few cases to have analyzed the “participate as a party” language. *See Technical Employees Ass’n v. Pub. Empl. Relations Comm’n*, 105 Wn. App. 434, 20 P.3d 472 (2001). In *Technical Employees*, the Court of Appeals held that a labor union participated “as a party” to a representational proceeding before the Public Employees Relations Commission (PERC) even though it had not been formally joined. *Id.* at 439. That was not only because the union had been served with relevant documents throughout the process, but also because it was the incumbent representative for some of the employees who were the subject of the rival union’s representational petition and it claimed it could represent others with uncertain status. *Id.* at 439-40; *compare with Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 618, 902 P.2d 1247 (1995) (agency action not “specifically directed” at attorneys of record even though they participated in administrative proceeding). The union was therefore not a disinterested complainant or witness, but an entity with a material interest in the outcome of PERC’s representational decision. In contrast, the

Foundation points only to the fact that it filed a complaint with the PDC and provided supplemental information in support of its allegations. FF Op. Br., 13-14. Neither activity, however, shows that it participated as if it was an interested party. And for the reasons discussed above, the Foundation's role as an FCPA complainant precluded any personalized interest in the outcome of the investigation. *Supra*, 8-11.

Were there any lingering doubt that the Foundation, as a complainant, did not participate "as a party" to the PDC's investigation, the PDC's own regulations make that explicit. WAC 390-37-030 plainly states that "[w]hen a complaint is filed with the PDC other than by PDC staff....neither the complainant nor any other person shall have special standing to participate or intervene in any investigation or consideration of the complaint by the commission or its staff," even though complainants may receive notice of hearings, may be called as witnesses, and may, at the presiding officer's discretion, provide comment. WAC 390-37-030(1). In a footnote to its brief, the Foundation attempts to wriggle out from under this regulation by seizing on the word "special" as a modifier to "standing." FF Op. Br., 15-16, n.8. The Foundation argues that WAC 390-37-030's reference to a complainant's lack of "special standing" implies the existence of "normal" or "general standing," which complainant's do possess. *Id.* To the contrary, the regulation's list of specific actions

complainants may take shows that their standing is not “general” but limited. Thus, “special standing” here connotes the “general” standing attached to respondents, who fully participate in investigations as interested parties. Conversely, WAC 390-37-030 casts complainants as holders of limited, non-party standing with circumscribed participation rights. Again, such persons may “participate” in investigations, but they clearly do not participate “as parties.” *See* RCW 34.05.010(12)(b).

Because the PDC’s order was not “specifically directed” to it and it did not “participate as a party” in the investigation, the Foundation is not a “party” within the meaning of the APA. To the extent a petitioner’s status as a “party” to the agency action has any bearing on the injury-in-fact inquiry, the Foundation’s role as a non-party complainant only further confirms that it has not suffered a concrete and particularized injury.

#### **b. Competitive injury to the Foundation**

The Foundation’s second injury-in-fact theory is that the PDC’s alleged failure to sufficiently punish SEIU PEAFF hurt its own competitive standing. FF Op. Br., 19-22. In particular, the Foundation positions itself as SEIU PEAFF’s “competitor” inasmuch it has “opposing” ideological interests. FF Op. Br., 21, n.11. Thus, in the Foundation’s view, any enforcement decision which does not damages its ideologically competitor undermines its own mission. *Id.* Unsurprisingly, no court has recognized

the Foundation's novel theory of "competition." And the theory fails on its own terms because nothing about the PDC's decision detracts from the Foundation's ability to continue opposing SEIU PEAFF's political interests.

To begin with, it is difficult to understand how the Foundation and SEIU PEAFF compete with one another. SEIU PEAFF is Section 527 political fund operated by Service Employees International Union, a labor organization that represents workers. CP 2, 32-34. The Foundation is, by its own telling, a non-profit organization focused on "advance[ing] individual liberty, free enterprise, and limited, accountable government." FF Op. Br., 27. The Foundation is not a labor union or an affiliate of one, and it does not seek to replace SEIU as a collective bargaining agent for any unit of employees. Nor does the Foundation allege that it is itself a political committee which competes with SEIU PEAFF for donations.

The Foundation does very little to clarify the nature of the parties' competitive relationship. It does, however, hint towards a theory, which it buries in a footnote. FF. Op. Br., 21, n.11. The Foundation asserts 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...." *Id.* (citing RCW 42.17A.755, 765) (emphasis added).<sup>7</sup> The

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<sup>7</sup> The Foundation's citation to two FCPA provisions does not support the proposition that the FCPA intended for persons with "opposing interests" to "police" each other's FCPA compliance. Although the FCPA's enforcement provisions permit members of the public

Foundation apparently suggests that it holds “opposing interests” to SEIU PEAFF and therefore competes with it on an ideological level. But none of the decisions that have identified injuries-in-fact based on competitive harm have recognized ideological competition as a battle that can disadvantage a legally protected interest.

For instance, in *Seattle Building and Construction Trades Council*, the Supreme Court found that a union trade council adequately alleged a competitive injury in opposing the approval of another apprenticeship program because “[e]xisting programs have an interest in contesting what they believe to be inadequate standards in order to prevent entry of new, substandard programs into the market which will deplete the work opportunities of apprentices of existing programs including their own.”

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to lodge complaints with the PDC and, in some cases, bring citizen actions, *see* RCW 42.17A.755, 775, nothing therein encourages complainants and citizen suitors to specifically target people to whom they are ideologically hostile. Indeed, such a purpose would be repugnant to the U.S. Constitution, which forbids the selective use of state laws to target particular political groups. *See Nichols v. Pelham Manor*, 974 F. Supp. 243, 255-56 (S.D.N.Y. 1997) (denying motion to dismiss Section 1983 claim that town selectively enforced political solicitation laws against minor political party). In attributing this purpose to the statute, the Foundation simply superimposes on the law its own misguided view of the ends to which the FCPA can be put. There is no doubt that the Foundation has implemented this view by filing abusive citizen actions exclusively against labor unions and their affiliates. *See, e.g., Freedom Found. v. Inslee, et al.*, Case No. 17-2-00417-34 (Thurston Cty., filed Feb. 8, 2017) (Skinder, J.); *Freedom Found. v. Service Emp. Int’l Union Political Education & Action Fund*, No. 18-2-01731-34 (Thurston Cty., filed April 3, 2018) (Price, J.); *Freedom Found. v. SEIU 775*, Case No. 18-2-00454-34 (Thurston Cty., filed Jan. 19, 2018) (Dixon, J.); *Freedom Found. v. Inslee*, Case No. 18-2-02904-34 (Thurston Cty., filed Jun. 6, 2018) (Murphy, J.). The Foundation’s misuse of the FCPA’s citizen action provisions is the subject of a Section 1983 counterclaim currently pending before the Washington Supreme Court in *Freedom Foundation v. Teamsters 117, et al.*, Case No. 97109-9. *See supra*, 3, n.1. The Foundation’s position here is simply a judicial admission of statements its officers have made in extra-judicial settings. *See* Opening and Reply Briefs of Teamsters 117, Case No. 97109-9.

*Seattle Building & Constr. Trades Council*, 129 Wn.2d at 796. “They also have an interest in attracting qualified apprentices, and additional programs will mean more competition for those apprentices.” *Id.* Additionally, approving another apprenticeship program disadvantaged members of affiliated unions by allowing “employers of apprentices in [the new] programs [to] submit bids reflecting lower wages to registered apprentices.” *Id.* at 797. Thus, the Court identified a competitive harm based on likely pecuniary losses to the existing apprenticeship program, its union affiliates, and individual apprentices and union members.

The same was true in *St. Joseph Hospital and Health Care Center v. Department of Health*, 125 Wn.2d 733, 739-42, 887 P.2d 891 (1995). The Court found that a hospital had APA standing to challenge the state Department of Health’s issuance of a conditional certificate of need (CN) license to a different healthcare provider to open a kidney dialysis center in the same market in which the hospital operated. *Id.* at 735-38. *St. Joseph* reasoned that because the certification process was based on a legislative judgment that excessive competition drove up healthcare costs, “competing service providers” had a cognizable interest in the certification of CN applicants. *Id.* at 740-42. Again, the Court rooted its analysis in the financial competition between the hospital and CN applicant in providing medical services. *Id.* The Foundation vainly attempts to analogize its

position to the hospital in *St. Joseph*, alleging that they are both “interest groups” likely to challenge advantages that accrue to competitors in agency proceedings. FF Op. Br., 21, n.11. But regardless of whether the Foundation is an “interest group,” it is not a *competitor* with SEIU PEA. The Foundation simply assumes in circular fashion that it does compete with SEIU PEA in a relevant sense, which is what it must prove.

The primacy of economic competition also featured in *Snohomish County*, where the Court of Appeals held that a public employer lost “negotiating leverage” when PERC ruled in an administrative adjudication that contractual grievance procedures survived a labor agreement’s expiration as a matter of law. *Snohomish Cty.*, 173 Wn. App. at 513. The employer’s loss of leverage stemmed from the fact that the survival of grievance procedures had previously been a subject of bargaining, and the employer would consent to that term only in exchange for concessions. *Id.* By removing that item from the bargaining table, PERC reduced the employer’s ability to extract those concessions. *Id.* As before, the basis for finding a competitive disadvantage was a party’s loss of financial benefits, not an ideological war between politically opposed organizations.<sup>8</sup>

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<sup>8</sup> The Foundation attempts to broaden the holding of *Snohomish County*, arguing that the case stands for the proposition that a petitioner need not show a “direct economic effect” to suffer a competitive injury. FF Op. Br., 21, n.11. As it reads the case, the Court’s competitive injury finding “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

Under the forgoing authorities, the Foundation cannot show that it is an interested competitor unless it has alleged that it economically competes with SEIU PEAFF in the provision of services or bargains with SEIU PEAFF as part of a contractual relationship. It alleges neither. In fact, the Foundation's true competitors are not the labor unions it attacks on ideological grounds, but other anti-union non-profits that vie with the Foundation to obtain donor grants to fund efforts to undermine unions.

Even if it competed with SEIU PEAFF in a meaningful sense, the Foundation does not adequately explain how it has been disadvantaged by the agency action at issue. The Foundation claims that "[t]he continuation of SEIU PEAFF's illegal practices" hurts it because "it frustrates the Foundation in achieving its goal to assure enforcement of the policies embodied in the FCPA." FF Op. Br., 19. But by the Foundation's own admission, SEIU PEAFF has since reported the out-of-state expenditures that were the subject of its PDC complaint. FF Op. Br., 6, n.2. So it brazenly mischaracterizes the record to suggest that SEIU PEAFF's so-called "illegal practices" are "continuing." Elsewhere, the Foundation

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in negotiating with the union." *Id.* It is true that the Court focused on the relationship between the union and the employer, but, as the Court recognized, that relationship was based on the give-and-take of concrete economic benefits in the context of collective bargaining negotiations. *See Snohomish Cty.*, 173 Wn. App. at 513 ("Community Transit can no longer *obtain concessions* in exchange for an agreement to continue the arbitration of grievances past the collective bargaining agreement's expiration.") (emphasis added). Whether the loss of these concessions harmed the employer in a direct or indirect fashion, it still ultimately affected its pocket book. The Foundation cannot explain how the PDC's decision not to bring an enforcement action against SEIU PEAFF did the same to it.

vaguely asserts that the PDC's enforcement decision awarded SEIU PEAFF a "bargaining chip" which it "will have to overcome" the next time it brings an administrative or judicial claim against SEIU PEAFF. FF Op. Br., 21, n.11. The Foundation does not explain what kind of "bargaining chip" SEIU PEAFF has gained. The PDC has never suggested its enforcement choices in future cases are controlled by past ones, so any claim that SEIU PEAFF has immunized itself from future FCPA liability is incorrect as a matter of law. And even if that was somehow the case, the Foundation cannot articulate how those circumstances would affect its ideological crusade against SEIU PEAFF – the only "competition" it even remotely alleges. Nothing about PDC's enforcement decisions prevents the Foundation from continuing to disseminate anti-union propaganda.

In addition to the absence of support from the relevant case law, the Foundation's theory of competition lacks any limiting principle. If all it takes to show an injury-in-fact is an agency's conferral of an advantage (or, as is the case here, the agency's refusal to impose a disadvantage) on an entity the petitioner subjectively deems to have "opposing interests," anyone can claim to be a "competitor" of the entity that is the real subject of agency action. But the entire purpose of the standing inquiry is to weed out those persons whose interests are affected in a concrete way from those whose are affected only abstractly. *See Spokeo*, 136 S. Ct. at 1548-

49 (“concreteness” component of injury-in-fact test differentiates “*de facto*” interest that “actually exist” from those that are merely “abstract”). To hold opposing political views to the respondent in an administrative proceeding is to have an exclusively “abstract” grievance against it, and thus to lack a genuine injury-in-fact. By posing as SEIU PEAFF’s competitor, the Foundation simply seeks a workaround to its central obstacle in acquiring standing: the utter absence of a specific, protectable legal interest it holds in the outcome of this case.

Moreover, administering an “ideological competitor” test would be impossible in practice. How would a court determine when two persons’ interests are sufficiently “opposed”? How would it assess damage to a political “interest”? To pose these questions is to expose the theory as unfeasible, in addition to undermining the standing requirement’s purpose.

**3. The Foundation is not within the zone of interests that the FCPA protects.**

For many of the same reasons it fails to allege an injury-in-fact, the Foundation does not adequately allege it is within the zone of interests that the FCPA protects. Simply stated, the FCPA is not concerned with complainants’ feelings about the enforcement choices the PDC makes.

The zone of interest test reflects “concerns that not every person ‘potentially affected by agency action in a complex interdependent

society’ should be permitted to have judicial review” and therefore “serves as a filter to limit review to those for whom it is most appropriate.” *Seattle Bldg. & Trades Council*, 129 Wn.2d at 797 (citation omitted). The test asks the court to “determine whether the Legislature intended that [the petitioner’s] interest be protected by the agency” when it engaged in the disputed action. *Id.*; accord *KS Tacoma Holdings, LLC v. Shoreline Hearings Bd.*, 166 Wn. App. 117, 127, 272 P.3d 876 (2012).

The Foundation does not directly articulate which of its “interests” the PDC should have considered. But it appears to assert that the PDC should have consulted its preference on the appropriate penalty to levy against SEIU PEAFF before dismissing the complaint and issuing SEIU PEAFF a warning letter. The FCPA required no such consultation. As explained above, the FCPA is a public policy statute designed to “protect[] the public rather than any individual candidate.” *Crisman*, 115 Wn. App. at 23; accord *No On I-502*, 193 Wn. App. at 373-74; *Evergreen Freedom Found.*, 1 Wn. App. 2d 288 at 309. If the statute does not protect the interests of individual candidates, who may actually be affected by unlawful political expenditures and contributions, it surely does not protect the interests of administrative complainants, who have no personal stake in the outcome of administrative proceedings. *See supra*, 8-11. And even if a complainant could plausibly assert an interest which the PDC

should consider in some contexts, it would not extend to the relevant context here: determining the appropriate penalty to levy against a respondent. Instead, the FCPA enumerates a number of factors bearing on “the nature of the violation and any relevant circumstances” which should be considered in assessing a penalty. *See* RCW 42.17A.750(1)(d); *see also* WAC 390-37-182(3) (incorporating same factors into PDC’s internal regulations). None of these factors involve the preferences of the citizen complainant. *Id.* The only interests the PDC must consider when making enforcement decisions are the public’s and the individual respondent’s.

The Foundation advances several spurious arguments to support the claim that it falls within the FCPA’s zone of interests. First, the Foundation selectively cites a statement of intent introducing the FCPA’s contribution limits and disclosure requirements, which references the rights of “interest groups” to “influence elective and governmental processes.” FF Op. Br., 22 (quoting RCW 42.17A.400). The Foundation’s partial quote ignores the surrounding text, which states in full that “[b]y *limiting campaign contributions*, the people intend to: (a) [e]nsure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes.” RCW 42.17A.400(2)(a) (emphasis added). Quite obviously, this provision did not articulate a desire to let interest groups dictate enforcement outcomes to the PDC.

Indeed, it did not address the enforcement process at all. It simply noted that enacting contribution limitations has the salutary effect of leveling the playing field among participants in the political process.

Second, the Foundation invokes the FCPA's general policy aim to inform the public about expenditures made to influence the political process. FF Op. Br., 23 (citing *State v. Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 507-08, 546 P.2d 75 (1976); RCW 42.17.001). While the Foundation accurately recapitulates the FCPA's overarching goal, it does not explain why that goal requires the PDC to consider a complainant's preferences when it decides how best to enforce the act. The FCPA accomplishes its goals through the statute's detailed enforcement scheme, so the PDC must take into account complainants' preferences only insofar as the statute's enforcement provisions require it to do so. No such requirement exists. *See* RCW 42.17A.750(1)(d); WAC 390-37-182(3).

This leads directly into the Foundation's third argument, which is that the FCPA's provision of an auxiliary enforcement role for members of the public – allowing them to file administrative complaints – places those who avail themselves of this right in a unique position, which the PDC must consider when making enforcement decisions. FF Op. Br., 23-27. But the fact that a person follows a statutory procedure to submit an administrative complaint does not mean it acquires any special interests

once those same procedures vest the actual investigative and decision-making responsibilities with the recipient agency.

The Foundation conclusorily asserts that “it should go without saying” that the act of bringing a complaint “pursuant to the FCPA’s statutory procedure” places the complainant in the zone of interest. FF Op. Br., 26. Since the Foundation bears the burden to prove its standing, an explanation is very much necessary, and entirely lacking. The Foundation cites *Burlington*, 187 Wn. App. 853. But that case does not support the associated proposition. In *Burlington*, the Court of Appeals held that a city had standing to challenge the liquor board’s approval of a store owner’s relocation of liquor store within the city’s jurisdiction. *Id.* at 876-77. In so holding, the Court found that the city met the zone of interest test because municipalities have an “interest in regulating alcohol sales within their borders.” *Id.* at 865. The Court noted that the “[t]he licensing statute explicitly protects the City’s interest by providing a statutory right to object to a proposed license and request a hearing.” *Id.* at 863.

Seizing on this last quote, the Foundation analogizes its right to bring administrative complaints to the city’s right to object to a license and request a hearing. FF Op. Br., 26. But the petitioner in *Burlington* did not obtain an interest the liquor board was required to consider by virtue of holding a procedural right; it gained the procedural right because state law

declared that municipalities had a public health interest in restricting liquor sales and expressly required the liquor board “to give ‘substantial weight’ to the City’s objections regarding chronic illegal activity.” *Id.* at 864-65. In other words, the city’s procedural right merely effectuated its substantive interest, which the board had to consider. In contrast, as explained above, FCPA complainants have no substantive interest in the outcome of enforcement proceedings. Their procedural right to bring complaints and citizen actions is thus not a reflection of a substantive interest the PDC must consider, but merely a means to assist public officers in the execution of their duties. That alone cannot confer standing. *See KERM*, 353 F.3d at 61 (agency’s reliance “on public participation to assist in its enforcement of the Act... does not obviate the need for a petitioner to establish Article III standing....”). Accordingly, the Foundation cannot bootstrap a zone of interest showing onto a procedural right divorced from any substantive interest the PDC must consider.<sup>9</sup>

A fourth argument the Foundation makes on the zone of interest front is that it is better positioned and motivated than average citizens to file administrative complaints, given its organizational mission. FF Op.

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<sup>9</sup> The Foundation further claims that like the city in *Burlington*, it too had statutory standing during the administrative process. FF Op. Br., 26 (citing *Burlington*, 187 Wn. App. at 863, n.8). Not so. The city had statutory standing because RCW 66.24.010(8) grants municipalities rights in liquor board proceedings that effectively allow them to participate “as parties.” *See* RCW 34.05.010(12)(b). The Foundation’s participation rights in the PDC investigation were strictly limited. *See supra*, 21-22.

Br., 27-28. Even accepting the self-serving recitation of its mission, the fact that the Foundation is especially motivated to lodge complaints with the PDC does not translate into a requirement that the PDC consider its preferences when assessing penalties against investigation respondents. Indeed, the U.S. Supreme Court has specifically refuted this theory, explaining that “standing is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486, 102 S. Ct. 752 (1982) (finding non-profit organization lacked standing to challenge transfer of government property to religious college where its members “fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees”) (emphasis in original); *see also Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 121 (3d Cir. 1997) (petitioner’s purported knowledge of and anger about defendant’s violation did not confer standing because “others may feel just as strongly” as petitioner’s members); *Siegel v. U.S. Dep’t of Treasury*, 304 F. Supp.3d 45, 51 (D.D.C. 2018) (“The knowledge and familiarity alleged by Plaintiffs is the sort of merely ‘psychological consequence produced by observ[ing] conduct with which one disagrees’

that cannot suffice for standing.”) (citation and alterations omitted).<sup>10</sup>

Fifth, the Foundation bemoans the fact that if the PDC need not take into account its interests in making enforcement decisions, the same would be true of all FCPA complainants. FF Op. Br., 25. That is true, but it follows inescapably from the fact that such complainants inherently lack concrete and particularized interests in the outcome of enforcement proceedings. *Supra*, 8-11. Further, the fact that “if [complainants] have no standing to sue, no one would have standing, is not a reason to find standing.” *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 420, 133 S. Ct. 1138 (2013) (citation omitted). It could simply be the case that the legislature did not intend for certain aspects of administrative discretion to be second-guessed by outside parties.

That is precisely the case with the FCPA. In 2018, the state legislature significantly revised the FCPA’s enforcement scheme. Previously, a complainant was entitled to commence a citizen action on any allegations that the Attorney General or county prosecutor declined to pursue. *See* Former RCW 42.17A.765(4) (2018). The 2018 amendments

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<sup>10</sup> The Foundation invokes *St. Joseph Hospital* to support this “motivational” theory of standing. FF Op. Br., 27. But that case did not hold that the adjudicating agency was required to consider the petitioning hospital’s interests merely because the latter was motivated to challenge the issuance of CN to another healthcare provider. The hospital met the zone of interest test because “the Legislature intended to regulate competition as well as control costs” when it introduced the CN application requirement, and the hospital was a “competing service provider[]” that would be economically affected by the presence of another dialysis center in its market. *St. Joseph*, 125 Wn.2d at 741.

not only require complainants to notify the PDC of allegations, but foreclose citizen suits whenever the PDC takes one of three statutorily enumerated steps, including dismissing the complaint, within ninety days. *See* RCW 42.17A.775(2)(a) (citizen action allowed only if “[t]he commission has not taken action authorized under RCW 42.17A.755(1) within ninety days of the complaint being filed”). Significantly, when these amendments were proposed, the legislature was aware that it would have the effect of drastically reducing the number of citizen actions by mediating complainant allegations through the PDC’s enforcement discretion. *See* House Bill Report ESB 2938 at \*8 (Staff Summary of Public Testimony) (2018).<sup>11</sup> Nevertheless, the bill passed overwhelmingly.

Thus, the Foundation’s real grievance is not with the PDC, but with the state legislature, which decided to diminish citizens’ role in FCPA enforcement due to the “weaponization” of the statute through an explosion of citizen suits. *Supra*, 37, n. 11. The Foundation cannot skirt this legislative judgment by filing an APA petition (which it treats as a citizen suit by other means) without standing, and then complain that the

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<sup>11</sup>*Available at* <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bill%20Reports/House/2938-S.E%20HBR%20PL%2018.pdf?q=20200307023323>. Proponents of the bill observed that by granting complainants unrestrained license to file citizen suits, “[t]he law currently encourages more litigation and increases costs for the public, which frustrates the work of the PDC to provide more transparency.” *Id.* Opponents acknowledged that the bill would “prohibit[] a citizen’s action each time the PDC simply begins an investigation” and asserted that this would “restrict[] a citizen’s ability to bring enforcement actions on important issues.” *Id.* Opponents admitted, however, that the FCPA had recently become “weaponized for political purposes.” *Id.*

result precludes external challenges to PDC enforcement decisions. That was exactly what the legislature intended with the 2018 amendments.

**4. The Foundation does not have associational standing under the APA to seek review of the PDC's enforcement decision.**

In a Hail Mary gambit, the Foundation separately argues that it has associational standing to seek APA review of the PDC's dismissal and warning letter on behalf of its "supporters." FF Op. Br., 30-35. This claim fails on its face because none of the Foundation's individual supporters would themselves have APA standing. The Foundation cannot erect its own standing atop that crumbling foundation. Additionally, the Foundation elides the relevant inquiry by conflating members and supporters. Associational standing is permitted only when an organization has the former. Finally, even if the Foundation could attain associational standing through its supporters, the record does not disclose who these are. So the Foundation cannot satisfy its burden to show that this case can be resolved without examining the need for individual participation.

In Washington, there is a tripartite test to establish associational standing: "(1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither claim asserted nor relief requested requires the participation of the organization's

individual members.” *IAFF, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002).

The Foundation stumbles at the first step because its supporters would not otherwise have standing to sue in their own right. For the same reasons the Foundation cannot show that it suffered an injury-in-fact or is situated within the zone of interests merely by acting as an administrative complainant, any supporter who made the same argument would err as a matter of law. *See supra*, 8-11. The Foundation does not attempt to show that the PDC has invaded a protected legal interest of one its unnamed individual supporters that is any more concrete or particularized than its own. To the contrary, the Foundation merely reiterates bromides about citizens’ “right to expect that their elected officials take violations of the FCPA seriously” and “comply with the unambiguous statutory mandates to which they are subject.” FF Op. Br., 33. These are quintessentially generalized interests shared by the public at large. *See Nykreim*, 146 Wn.2d at 935; *Arizonans for Official English*, 520 U.S. at 64; *KERM*, 353 F.3d at 58. When an organization cannot establish the individualized standing of its members, it necessarily cannot establish its own associational standing. *See KS Tacoma Holdings*, 166 Wn. App. at 138-39 (no associational standing where petitioner “cannot demonstrate that any of its claimed members have standing in his or her own right”).

The Foundation's associational standing theory is also defective because it invokes "supporters throughout the State of Washington," but not any members. FF Op. Br., 30. Not a single Washington decision which has addressed the doctrine of associational standing has found it to exist based on the amorphous concept of "supporters." Indeed, to extend the doctrine to this class of persons, the Foundation liberally replaces the word "member" with "supporter" in its citation to a relevant decision. *Id.* at 30-31 (quoting *Save a Valuable Environment v. Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401 (1978)). Courts to have considered the question hold that the two classes are not interchangeable. *See Am. Legal Found. v. F.C.C.*, 808 F.2d 84, 90 (D.C. Cir. 1987) (no associational standing where organization's "relationship to its 'supporters' bears none of the indicia of a traditional membership organization" insofar as it "serves no discrete, stable group of persons with a definable set of common interests" and it did not appear that "'supporters' play any role in selecting [organization's] leadership, guiding [its] activities, or financing those activities"); *Fund Democracy, LLC v. S.E.C.*, 278 F.3d 21, 25-27 (D.D.C. 2002) (organization lacked association standing when it claimed to represent "informal consortium" of investors but lacked actual members).

Assuming *arguendo* that the Foundation can establish associational standing through its "supporters," it has failed to allege any specific facts

about their identities. The Foundation merely gestures vaguely to “the support of individuals across the State of Washington.” FF Op. Br., 32. It is therefore impossible for the Court to determine on the record whether these supporters have met the criteria for individual standing and whether this case can proceed without their individual participation.<sup>12</sup>

For these reasons, the Foundation’s claim of associational standing is meritless. The trial court’s order dismissing the petition on standing grounds should be affirmed.

**B. The PDC acted within its statutorily-delegated authority when it dismissed the Foundation’s complaint and issued SEIU PEAFF a warning letter.**

Because the Foundation lacks standing under the APA, the trial court correctly held that it did not have jurisdiction to reach the merits of its petition. However, even if the Foundation had standing, its petition would have required dismissal because its theory of agency overreach is rooted in a misreading of the FCPA.

The propriety of the PDC’s enforcement decision revolves around the 2018 amendments to RCW 42.17A.755, the FCPA provision detailing how the PDC must process complaints and conduct investigations of alleged violations. The relevant portion of Section 755 states that “[i]f a

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<sup>12</sup> The Foundation asserts that individualized proof is unnecessary because it only seeks a judicial declaration and punitive damages, the proceeds of which would escheat to the State. FF Op. Br., 34. That the remedy sought is not tailored to the Foundation’s supporters only confirms the non-concrete or particularized nature of the alleged injury.

complaint is filed with or initiated by the commission, the commission must” do one of three things:

- (a) Dismiss the complaint or otherwise resolve the matter in accordance with subsection (2) of this section, as appropriate under the circumstances after conducting a preliminary review;
- (b) Initiate an investigation to determine whether a violation has occurred, conduct hearings, and issue and enforce an appropriate order, in accordance with chapter 34.05 RCW and subsection (3) of this section; or
- (c) Refer the matter to the attorney general, in accordance with subsection (4) of this section.

RCW 42.17A.755(1)(a)-(c) (2018). Subsection (2), which is referenced in Subsection (1)(a), itself contains two prongs. The first permits the PDC to “delegate authority to its executive director to resolve [complaints of remedial violations or requests for technical corrections] in accordance with subsection (1)(a) of this section.” RCW 42.17A.755(2)(a) (2018). The second instructs the PDC to “develop additional processes by which a respondent may agree by stipulation to any allegations and pay a penalty subject to a schedule of violations and penalties, unless waived by the commission....” RCW 42.17A.755(2)(b) (2018).

The PDC’s letter of dismissal stated that it was dismissing the Foundation’s complaint pursuant to RCW 42.17A.755(1). CP 82, 85. So the relevant question is what that sub-provision requires and whether the PDC followed those requirements.

Curiously, the Foundation’s brief does not actually address how

Subsection (1)(a) should be construed. It simply avers that the 2018 amendments “set forth a detailed protocol that further limited the PDC’s discretion in handling complaints,” pursuant to which an alleged violation deemed neither a “technical correction” nor “remedial violation” must be treated as an “actual violation.” FF Op. Br., 37. In the Foundation’s view, the investigation or referral procedures of Subsections (1)(b) and (c) are the only available paths for resolving “actual violations.” *Id.* at 37-38. Since the PDC did not do either, but rather dismissed the complaint based on SEIU PEAFF’s “minor violation,” it follows, in the Foundation’s view, that the PDC failed to adhere to the mandates of Section 755. *Id.*

Of course, Section 755’s express language does not actually say any of this, so the Foundation’s reading is based on a series of unstated assumptions. Although not entirely clear, it appears the Foundation first assumes that any action taken under Subsection (1)(a) must be mediated through the process described in Subsection (2). That is why it immediately homes in on two terms introduced in Subsection (2)(a): “remedial violations” and “technical corrections.” Based on the link it draws between Subsections (1)(a) and (2)(a), the Foundation infers that “dismissals” are limited to these two circumstances. Finally, the Foundation assumes that if dismissals are reserved for remedial violations and technical corrections, all other violations are “actual” ones, which

must be addressed through 1(b) or (c). These assumptions are unwarranted and contrary to established principles of statutory construction.

Most glaringly, Subsection (1)(a) does not require the PDC to follow Subsection (2)'s procedures when dismissing complaints. Instead, it gives the PDC the option of dismissing a complaint *or* further processing it under Subsection (2). The plain language of Subsection (1)(a) distinguishes “dismiss[ing]” a complaint and “otherwise resolv[ing]” it through the placement of the disjunctive word “or.” Undisputedly, those two options are discrete. What is ambiguous is whether the subsequent phrase “in accordance with subsection (2) of this section” applies to both options or just one. A straightforward application of the last antecedent rule, and an examination of other structural and linguistic clues, compels the conclusion that the cross-reference to Subsection (2) attaches only to “other resolutions” of complaints.

“The last antecedent rule provides that, unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent.” *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 781, 903 P.2d 443 (1995). The expression “in accordance with subsection (2) of this section” is a prepositional phrase that immediately follows “otherwise resolve the matter.” RCW 42.17A.755(1)(a). The latter is the immediate antecedent of the former. A default application of the last antecedent rule

limits the application of this prepositional phrase, and in turn the cross-reference to Subsection (2), to “otherwise resolv[ing] the matter.”<sup>13</sup>

Structural considerations align with this conclusion. It cannot be that dismissals must follow the procedures outlined in Subsection (2) because those procedures, and in particular those associated with (2)(b), assume the respondent has committed a violation or error of some sort, which requires remedial action.<sup>14</sup> But it goes without saying that no remedy is needed to dismiss unmeritorious complaints. The PDC should be able to dismiss those immediately after completing a preliminary review. Yet applying the cross-reference to Subsection (2) to dismissals would produce the absurd result that baseless allegations would require the respondent to execute a stipulation and pay a penalty. This cannot be. *See Strain v. W. Travel, Inc.*, 117 Wn. App. 251, 254, 70 P.3d 158 (2003) (“Statutes must be construed to avoid strained or absurd results.”).

Another problem with tying the Subsection (2) cross-reference to dismissals is that it would make it impossible to determine how to resolve complaints for remedial violations and requests for technical corrections.

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<sup>13</sup> There is no reason to believe the statute expresses a contrary intent to the default rule. In fact, in light of the other textual considerations, see *infra*, 45-47, the statute’s objective intent supports the application of the last antecedent rule.

<sup>14</sup> Subsection (2)(a) clearly addresses violations and errors because its terms are limited to “remedial violations” and “technical corrections.” RCW 42.17A.755(2)(a). Subsection 2(b) must also deal with violations of some kind because resolution through this prong requires the respondent to execute a stipulation and pay a penalty. RCW 42.17A.755(2)(b). Neither would be necessary if the complaint lacked merit.

Subsection (2)(a) requires the executive director to act “in accordance with subsection (1)(a)” when resolving either of these issues. RCW 42.17A.755(2)(a). But if it is the case that that both of Subsection (1)(a)’s actions must be accomplished “in accordance with subsection (2),” then acting “in accordance with subsection (1)(a)” would require *referring back* to Subsection (2). This would leave the executive director with two implausible options. If he then turns to (2)(b), he must negotiate a stipulation and penalty for a mere remedial violation or technical correction, which would be draconian in the extreme. But if he looks to (2)(a), he returns to the starting point, producing an infinite loop ping-ponging the reader between cross-references to Subsections (1)(a) and (2)(a), with neither provision containing any substantive directive. Applying the last antecedent rule avoids this absurd result. By severing the link between the phrases “dismiss the complaint” and “in accordance with subsection (2),” the expression “acting in accordance with subsection (1)(a)” can reasonably be understood as allowing the executive director to choose (1)(a)’s first option – simply dismissing the complaint concerning remedial violations or the request for technical correction.

A final textual clue supporting the independence of the dismissal option is the inclusion of phrase “as appropriate under the circumstances” at the end of Subsection (1)(a). This expression emphasizes the

discretionary nature of the PDC's authority to act. It suggests a choice between dismissing the complaint, on the one hand, or taking additional actions, on the other, depending on the facts. Emphasizing this discretion would be meaningless if all efforts to dispose of a case following a preliminary review required further processing under Subsection (2).

Because the option of dismissing a complaint under RCW 42.17A.755(1)(a) is not subject to the requirements and limitations of Subsection (2), it is possible for the PDC to dismiss complaints alleging non-remedial violations after conducting a preliminary review. That is what the Foundation alleges occurred here. The Foundation's exegesis on the difference between gradations of violations is thus a red herring.

It is worth noting that even if Subsection (2) controlled how the PDC issues orders of dismissal, it does not follow that "actual violations" could not be dismissed through this process. While Subsection (2) mentions "remedial violations" and "technical corrections" specifically, that does not mean the absence of a reference to "actual violations" was meant to have a preclusive effect. Nothing in Subsection (1) states that actual violations *must* be investigated through a hearing or referred to the Attorney General. Certainly, Subsection (1)(b) allows the PDC to initiate an investigation "to determine whether an actual violation has occurred." RCW 42.17A.755(1)(b). But where, as here, the respondent forthrightly

admits the violation at the outset, there is nothing left for the PDC to investigate. In such cases, a dismissal with a warning or a stipulation under Subsection (2) may be more appropriate.<sup>15</sup>

Moreover, the Foundation assumes without support that the types of violations referenced in Section 755 are exclusive of any other type. But it does not explain why this is so. RCW 42.17A.755(1) is focused on articulating the PDC's options for processing complaints, in the course of which it happens to mention certain kinds of violations. But it does not purport to be a taxonomy of violations, much less an exhaustive one.

Because the Foundation misreads the underlying statute at issue, the rest of its critiques of the PDC's action fall away. The Foundation trains most of its fire on WAC 390-37-060, the regulation pursuant to which the PDC classified SEIU PEAFF's failure to report expenditures as a "minor violation" and issued the latter a formal warning.<sup>16</sup> Relying on its erroneous belief that Section 755 requires all non-remedial violations to be formally investigated or referred to the Attorney General, the Foundation

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<sup>15</sup> Even if the PDC was required to formally investigate the already admitted violation, that does not mean the remedy the PDC ultimately ordered – dismissal with a warning – was unlawful. Subsection (1)(b) merely requires the PDC to "issue and enforce an appropriate order, in accordance with chapter 34.05 RCW and subsection (3) of this section." RCW 42.17A.755(1)(b). Subsection (3) then clarifies that this order could direct the respondent to cease and desist its conduct, impose certain enumerated remedies, or set "other requirements as the commission determines appropriate to effectuate the purposes of this chapter." RCW 42.17A.755(3)(a). The PDC's order is consistent with this broad delegation. Any procedural error in reaching this result was harmless.

<sup>16</sup> Subsection (1)(d) thereof allows "[t]he executive director [to] resolve any complaint that alleges minor violations of chapter 42.17A by issuing a formal written warning."

claims that the regulation exceeds the PDC's powers by allowing certain violations to instead be classified as "minor violations" and resolved through a warning. FF Op. Br., 37-41. Since Section 755 does not actually define the class of violations which can be dismissed after preliminary investigation, the PDC had discretion to employ its administrative expertise to make this determination. *See Tri-City Railroad Co., LLC v. State*, 194 Wn. App. 642, 377 P.3d 282 (2016) ("it is an appropriate function for administrative agencies to 'fill in the gaps' where necessary to the effectuation of a general statutory scheme, including through statutory construction") (citation and quotation marks omitted). The PDC acted well within its statutorily-delegated power when it isolated certain kinds of violations as "minor" and punishable by a warning letter only.

Lastly, although the Foundation at various points exaggerates their character and scope, the reality is that SEIU PEAFF's disclosure violations were exactly the sort of "minor violations" that should be redressed without the punitive fines the Foundation wished the PDC imposed. As detailed in the PDC's dismissal letter, the only substantiated allegation from the Foundation's administrative complaint was SEIU PEAFF's inadvertent failure to disclose four expenditures it had made in *non-Washington* campaigns. CP 82-85. This failure, while regrettable, was minor because a failure to timely report out-of-state expenditures does not

deprive the public of critical information about the funding of Washington political campaigns, CP 85; WAC 390-37-061(2)(a) (defining “minor violations”), which is the FCPA’s touchstone interest. A violation is also “minor” when, as here, it was committed in the course of a good faith attempt at compliance. WAC 390-37-061(2)(b). There is no dispute that SEIU PEAFF has regularly submitted C-5 reports as an out-of-state political committee. Although its compliance efforts have not always been perfect, its good faith error does not warrant levying monetary penalties. The PDC appropriately exercised its discretion in so finding.

#### V. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court’s dismissal of Appellant Freedom Foundation’s APA petition.

Respectfully submitted this 9th day of March, 2020.



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I, Jennifer Woodward, declare under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding document with the Court of Appeals, Division II, using the appellate e-filing system, which will provide notice of such filing to all required parties.

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