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CONSOLIDATED CASE NO. 97109-9

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SUPREME COURT OF THE STATE OF WASHINGTON

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FREEDOM FOUNDATION,  
Petitioner,

v.

TEAMSTERS LOCAL 117 SEGREGATED FUND, et al.,  
Respondent/Cross-Appellant.

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FREEDOM FOUNDATION,  
Petitioner/Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION POLITICAL  
EDUCATION AND ACTION FUND,  
Respondent/Defendant.

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FREEDOM FOUNDATION,  
Petitioner/Plaintiff,

v.

JAY INSLEE, et al.,

Respondents/Defendants

SERVICE EMPLOYEES INTERNATIONAL UNION 775,  
Respondent/Necessary Party.

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**TEAMSTERS LOCAL UNION NO. 117'S  
REPLY BRIEF ON CROSS APPEAL**

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Teamsters Local Union No. 117 (Local 117 or Union) previously showed that private parties engage in state action when they litigate citizen's actions under the Fair Campaign Practice Act (FCPA). Those private prosecutions vindicate public—not private—rights in the name of and on behalf of the State, with significant State assistance in the form of mandatory reimbursement of the fees and costs of litigation as well as State-backed enforcement of privately obtained judgments that escheat to the State upon their issuance. Those unique features of FCPA citizen's actions make it fair to attribute citizen's action prosecutions to the State.

The Freedom Foundation's (Foundation) response first mistakenly contends that this Court's precedent already resolved the Union's claim by upholding the FCPA against a constitutional challenge. *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974), however, rejected facial challenges to the FCPA, not the selective-enforcement claim presented here.

It next fails to distinguish or undermine any of the unique features of the FCPA citizen's action provision critical to the statutory delegation of prosecutorial authority.

Finally, it argues that its litigation discretion, lack of authority to attach property or make arrests, and the very existence of a statutory delegation of authority to private parties all defeat state action here. None of these points has merit. Private delegates have repeatedly been held to

have engaged in state action even while exercising discretion within the scope of their delegated authority. The power to initiate and prosecute public-rights complaints, even without the power to attach property or arrest people, is sufficient to confer state action. And the Foundation cannot avoid the conclusion that a delegation of governmental authority to a private person confers state action by pointing to the delegation itself as evidence that the power at issue is not exclusively governmental. Such a self-referential argument would wipe from the judicial reporters the very notion of state action through the exercise of delegated state power.

Washington has delegated quintessentially governmental authority to the Foundation and other citizen-prosecutors by granting them the power to enforce the public rights of the FCPA in the name of the State and with significant assistance from the State. Local 117 alleges that the Foundation has abused that power by selectively enforcing that delegated authority to punish its ideological adversaries. The First Amendment condemns that abusive selective enforcement just as much when undertaken by private delegates of state authority as when undertaken by the State itself. This Court should reinstate Local 117's counterclaim.

## ARGUMENT

### **I. Local 117 adequately alleges state action by the Foundation in selectively enforcing citizen's actions to punish its ideological adversaries.**

#### **A. *Fritz* does not foreclose Local 117's selective-enforcement claim.**

The Foundation first argues that decisions of this Court and federal courts sustaining the FCPA against facial challenges categorically foreclose Local 117's selective-enforcement claim. FF Ans. Br. 7–9 (citing *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010)). That position conflates facial and selective-enforcement challenges.

Local 117's counterclaim does not challenge the facial validity of the FCPA. It accuses the Foundation of selectively enforcing the FCPA against entities perceived to support the Democratic Party. CP 470–71. Selective enforcement of facially constitutional laws based on ideology or political affiliation clearly violates the constitution. *See, e.g., Hoye v. City of Oakland*, 653 F.3d 835, 849–57 (9th Cir. 2011) (sustaining selective enforcement claim where city enforced facially valid bubble law against anti-abortion counselors but not pro-abortion ones); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 920–22, 924–25 (9th Cir. 2012) (en banc) (plaintiff adequately alleged selective enforcement claim by asserting that he was singled out for prosecution based on constitutionally protected activity

although other similarly situated persons were not prosecuted). *Accord State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003) (“a prosecutor is precluded from engaging in selective enforcement to avoid the substantive goals of the Fourteenth Amendment to the United States Constitution.”).

The U.S. Supreme Court has recognized the unconstitutionality of selective enforcement of facially valid laws as far back as *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). There, the Court held that selective enforcement of an otherwise facially valid municipal ordinance against Chinese operators was unlawful. *Id.* at 373–74. The discriminatory enforcement of the law, not the law itself, was unconstitutional. *Id.* Local 117’s claim is rooted in this principle.

The Foundation’s cited authorities do not bar Local 117’s claim. *Fritz* involved a facial challenge to the FCPA’s constitutionality. *Fritz*, 83 Wn.2d at 291–92, 303, 311. The plaintiffs alleged that the statute’s financial disclosure requirements infringed on privacy rights, was overbroad, and trampled on a candidate’s right to seek office and the electorate’s right to choose among candidates. *Id.* at 291–92. They also lodged various theories attacking the facial validity of the FCPA’s lobbying and citizen suit provisions. *Id.* at 303, 311. This Court upheld the facial validity of these provisions against those theories. *See id.* at 301. It did not license public officers and citizen plaintiffs to weaponize the

FCPA against their political opponents.<sup>1</sup> The same is true of *Brumsickle*, in which the Ninth Circuit rejected facial challenges to the FCPA but left the door open to as-applied challenges. 624 F.3d at 1002–22.

Local 117’s selective enforcement allegations clearly state deprivations of Local 117’s constitutional rights.<sup>2</sup>

**B. The private prosecution of the FCPA’s public rights—in the name of the State, at its expense, and aided by its enforcement—is fairly attributable to the State.**

As Local 117 previously explained, courts examine a two-part test to determine whether private parties have engaged in state action. They

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<sup>1</sup> *Fritz* did not hold that abusive citizen lawsuits “pose[] no problem of constitutional dimension,” but only that the citizen suit provision presented no facial due process problem. *Fritz*, 83 Wn.2d at 314. The Court retained discretion to “fashion a remedy” should “courts experience a significant number of palpably frivolous lawsuits.” *Id.*

<sup>2</sup> The Foundation also argues that Local 117’s factual allegations are insufficiently detailed to identify the comparator group needed to state a selective-enforcement claim. FF Ans. Br. 8–9 n.6. Local 117 specifically alleged that the Foundation has brought citizen’s actions only “against Democratic and Democratic-donating entities—particularly labor unions—but not against similarly-situated Republican-donating or right-leaning entities, in violation of Defendants’ First Amendment rights.” CP 471. That allegation is sufficiently specific to identify a comparator group, especially in light of this State’s notice pleading standards which deem a claim adequately stated so long as any set of facts consistent with the pleaded allegations would entitle the plaintiff to relief. *See Orwick v. City of Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984). Moreover, willful ignorance is no defense to selective enforcement. *Fair Housing Justice Ctr. v. Silver Beach Gardens Corp.*, No. 10 Civ. 912(RPP), 2010 WL 3341907, at \*4 (S.D.N.Y. Aug. 13, 2010); *United States v. Mumphrey*, 193 F. Supp.3d 1040 (N.D. Cal. 2016). To the extent the Court seeks greater factual specificity than ordinarily required, it may take judicial notice of decisions of Washington courts, which show the Foundation has in fact not brought citizen’s actions against other Republican-affiliated FCPA violators or suspected violators, such as the Grocery Manufacturer’s Association, the Building Industry Association of Washington, or the Foundation itself. *State v. Evergreen Freedom Foundation*, 192 Wn.2d 782, 432 P.3d 805 (2019); *State v. Grocery Mfr. Ass’n*, 5 Wn. App. 2d 169, 425 P.3d 927 (2018), rev. granted 193 Wn.2d 1001, 438 P.3d 130 (2019) (Table); *Utter v. Bldg. Indus. Ass’n of Washington*, 182 Wn.2d 398, 341 P.3d 953 (2015). In any event, Local 117 is entitled to discovery regarding the scope of the Foundation’s knowledge of FCPA violations by members of the comparator class.

ask, first, whether the constitutional injury resulted from the exercise by a private person of a right or privilege having a source in state authority and, second, whether the injurious private conduct is fairly attributable to the state. Local 117 Br. 36. The Foundation does not contest that its ability to bring a citizen's action is grounded in statutory authority provided by the State under RCW 42.17A.765(4)(a). *Cf.*, FF Ans. Br. 9–21. So only the fair attribution question is at issue on this appeal.

Four unusual features of FCPA citizen's actions makes their private prosecution fairly attributable to the State: (1) citizen's actions enforce public, not private, rights; (2) they do so in the name of the State; (3) the State pays for successful citizen's actions as a matter of mandatory obligation not discretion; and (4) judgments in citizen's actions escheat to the State, making enforcement of FCPA violations initiated by citizen action an inevitably joint activity. Local 117 Br. 39–43.

Together, these features amply support the “normative judgment” that citizen-action prosecution is fairly attributable to the State. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001). The Foundation vainly attempts to avoid this conclusion by minimizing or misconstruing these features.

**1. Citizen's actions are not private rights of action.**

The Foundation first tries to analogize citizen's actions to private

rights of action, whose use is not state action. FF Ans. Br. 13 (citing *Am. Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 53, 119 S. Ct. 977, 143 L. Ed.2d 130 (1999)). The analogy fails, however, because citizen’s actions are not private rights of action. As this Court has repeatedly instructed, a private right of action lies only where the plaintiff is “within the class for whose ‘especial’ benefit the statute was enacted.” *Bennett v. Hardy*, 113 Wn.2d 912, 920, 784 P.2d 1258 (1990). *Accord Keodalah v. Allstate Ins. Co.*, 194 Wn.2d 339, 346–347, 449 P.3d 1040 (2019); *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 727, 406 P.3d 1149 (2017); *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002); *Washington State Coal. for the Homeless v. Dep’t of Soc. & Health Servs.*, 133 Wn.2d 894, 912, 949 P.2d 1291 (1997). The Foundation has never alleged any particularized injury to itself, a private party, that would bring it within any class for whose “especial” benefit the FCPA was enacted. *Cf.*, CP 1–21. In fact, it claims no personal injury at all from the FCPA violations it alleges. *Id.* That omission was no mistake: an FCPA citizen’s action requires no harm to the citizen-prosecutor. *Cf.*, RCW 42.17A.765(4)(a). Instead, the citizen-prosecutor takes upon himself the mantle of prosecution of public rights, which does not require the prosecutor be personally harmed. Local 117 Br. 39–40.

In this regard, the FCPA citizen’s action is wholly unlike the

worker's compensation scheme in *Sullivan*. In that case, private insurers deferred payment of certain benefits pending review by organizations authorized by statute of the medical reasonableness of the treatment sought. *Sullivan*, 526 U.S. at 44–48. The employees charged the insurers with due process violations by deferring payment under those procedures without notice or a hearing. *Id.* at 48. Finding no state action by the insurers, the Court rejected the employees' contention that the state had "encouraged" or "authorized" the insurers to withhold payments by enacting the review procedures. *Id.* at 53. The Court held that the creation of a private remedy to resolve private disputes between employees and insurers, alone, does not "so significantly encourage[] the private activity as to make the State responsible for it" because "a private party's mere use of the State's dispute resolution machinery, without the overt, significant assistance of state officials, cannot" constitute state action. *Id.* at 53, 54. The Court contrasted that holding with private review organizations' decisions, which had been statutorily authorized to resolve medical-reasonableness questions of claimed workers' compensation benefits: "like that of any judicial official, [those private organizations' decisions] may properly be considered state action." *Id.* at 54.

The FCPA's citizen's action is not a mechanism for remedying a private harm or resolving private disputes. Instead, it is a delegation to

private actors of the authority to prosecute violations of public rights. When violations are found, civil penalties fill the State's coffers, not citizens' personal accounts. The State is both the guarantor of the right at issue and the beneficiary of its enforcement. *Sullivan's* holding finding no state action in insurers' private use of private rights of action is simply inapposite.<sup>3</sup> Its acknowledgment that delegation of governmental functions (there, adjudication) to private entities constitutes state action is far more relevant to the FCPA's delegation of prosecutorial authority.

**2. Prosecution in the name of the State is no mere formality but a substantive indicator of state power that aggravates the selective-enforcement injury.**

The Foundation curiously relies on *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002), to argue that it is a mere formality, with no substantive import, that citizen's actions must be brought in the name of the State. FF Ans. Br. 12. *Lee* held that a lessee of government property engaged in state action when it excluded street preachers from speaking on that property. *Id.* at 554–57. The lessee became a state actor, the court concluded, when the government delegated regulation of speech in a public forum to a private actor. *Id.* at 556.

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<sup>3</sup> The Foundation's reliance on *Roberts v. AT&T Mobility LLC*, 877 F.3d 833 (9th Cir. 2017), is likewise misplaced. That case held the Federal Arbitration Act merely gives private parties the choice to arbitrate disputes; it does not "encourage" arbitration to such an extent that the private choice to enter an arbitration agreement is attributable to the state. *Id.* at 842–44. Unlike the Federal Arbitration Act, an FCPA action does not merely enforce private agreements but vindicates public rights.

So holding, the court emphasized the “practical reality” of the lessee’s “administration of free speech rules in a public forum” over legal formalities regarding the lack of a public easement through the forum. *Id.* That focus on practical reality over legal formality—highlighted here by the Foundation (FF Ans. 12 n.10)—only aids Local 117’s position. Here, the practical reality and legal formality go hand in hand. When it litigates citizen’s actions, the Foundation prosecutes FCPA violations in the name of and on behalf of the State. In doing so, the Foundation, like any citizen-prosecutor, is “necessarily acting on behalf of the State, implicating rights that belong to the State” and “is not acting solely on [its] own behalf regarding [its] own legal rights and obligations.” *No On I-502 v. Washington NORML*, 193 Wn. App. 368, 373–75, 372 P.3d 160 (2016). The formality of stating in the caption that the action is brought in the name of the State thus reflects the substantive, practical reality that an FCPA citizen-prosecutor litigates not its own private rights but public rights that belong to the State. Like other delegations to private actors of the authority to prosecute public rights violations, *see* Local 117 Br. 40–41 (citing cases), the substantive, practical reality here is that citizen-prosecutors engage in state action.

When citizens selectively enforce the FCPA against their ideological adversaries, the injury of that selective enforcement is

aggravated because it is undertaken in the name of the State. It says, in effect, that Washington countenances the use of the FCPA to punish supporters of a particular political party. The First Amendment decries that injury.

**3. Prevailing citizen-prosecutors benefit from mandatory fee reimbursement from the State.**

Local 117 argued the mandatory award of fees is a form of governmental assistance that benefits citizen-prosecutors. Local 117 Br. 41–42. The Foundation does not dispute this point but attempts to undermine its significance by arguing that citizen-prosecutors may have to pay fees when they lose. FF Ans. Br. 10 n.8. This retort overlooks a fundamental distinction between prevailing and losing citizen-prosecutors. Prevailing citizen-prosecutors are entitled, as of right, to fee reimbursement from the State. RCW 42.17A.765(4)(b). By contrast, an award of fees against losing citizen-prosecutors is only discretionary (“the court may order”), and even then only upon a showing that the action was “brought without reasonable cause.” *Id.*

The asymmetry between the two provisions underscores the financial benefit conferred upon prevailing citizen-prosecutors. Those private actors have an unequivocal statutory right to fee recovery from the State upon prevailing, even if the State had good cause not to commence

an FCPA action against a defendant, such as when a violation was inadvertent, made in good faith, or of such minor importance as to not warrant—in the opinion of the enforcing officials—the expenditure of public resources to prosecute it. *Id.* Yet citizen-prosecutors are subject to an adverse fee award only at the court’s discretion upon a finding that they commenced an action without reasonable cause—a standard somewhat similar to an award of fees under CR 11 and RCW 4.84.185. In other words, citizen-prosecutors are liable to pay fee awards only in similar circumstances as every other litigant—when they bring a claim or action that is frivolous or lacking in reasonable cause. But they are entitled, upon prevailing, to a fee award in circumstances few other litigants ever see—as a matter of right and from the State rather than their litigation opponent. Such financial assistance is a significant benefit indeed.

**4. Prevailing citizen-prosecutors benefit from State enforcement of judgments they obtain.**

State enforcement of judgments obtained in citizen’s actions is another significant form of governmental assistance. The Foundation acknowledges that were it to prevail in this action, the State would enforce the judgment at no cost to the Foundation itself. FF Ans. Br. 11–12 n.9. That cost-free enforcement is a significant governmental benefit supporting state action.

The Foundation tries to minimize the value of that benefit by contending that its only interest is “seeing the law properly and evenhandedly enforced.” *Id.* That contention, if true, does not undermine the value to the Foundation of externalizing the costs of judgment-enforcement to the State. And it cannot be squared with the procedural posture of this case. This appeal arises from the CR 12(b)(6) dismissal of Local 117’s counterclaim, which alleged the Foundation selectively enforces the FCPA against its ideological adversaries for its private gain. Local 117 Br. 35. Those allegations must be accepted as true on this appeal. *Id.* It is thus a verity on appeal that the Foundation does not have an interest in seeing the proper, evenhanded enforcement of the law but, instead, in seeing the FCPA enforced in a selective, unevenhanded manner for the Foundation’s private gain. Because the judgment escheats to the State, were it to prevail in this case, the Foundation would be able to enlist the State at no cost to itself as the enforcer of its judgment. The Foundation would thus advance its improper, private ends at the State’s expense. Its statutory ability to externalize the costs of judgment-enforcement onto the State is another significant form of governmental assistance.

**C. The Foundation’s remaining arguments are unavailing.**

Unable to refute the four critical features of FCPA citizen’s actions

that fairly support attribution of such private prosecutions to the State, the Foundation makes three additional points. None are persuasive. First, it contends that the State does not control citizen-prosecutors' litigation decisions. That point, however, does not distinguish citizen's actions from other delegations of state authority to private actors that have properly been held to be state action. Second, it tries to distinguish Local 117's private-prosecution cases by arguing that the private prosecutors in those cases all had the authority to attach property or make arrests. That point misreads Local 117's key authorities on delegations of prosecutorial power. Third, the Foundation argues that Local 117's analysis is meaninglessly broad. In truth, Local 117's analysis follows the standard approach in delegation cases and the four features that together clothe FCPA citizen-action prosecution in state action are remarkably specific and not shared by other familiar statutory schemes.

**1. Private delegates of governmental authority inevitably exercise discretion while engaging in state action.**

The Foundation contends that it has wide discretion over how to pursue a citizen's action—whether to sue, when to sue, whom to sue, and how to litigate—and thus its actions cannot fairly be attributed to the State. FF Ans. Br. 10–11. This argument overstates its discretion but in any event is immaterial because a private party's discretion in the exercise

of a delegated governmental function does not defeat state action.

Like any other FCPA citizen-prosecutor, the Foundation cannot institute a citizen's action against anyone it wishes to sue. It can only institute such an action against a person whom it has twice notified to public authorities as the subject of alleged FCPA violations. RCW 42.17A.765(4)(A); PEAFF Br. 7–11. As the State has explained, this requirement that complainants give public officials two separate notices before commencing suit underscores the State's primary role in FCPA enforcement, which citizen-prosecutors supplement only to a limited extent. Inslee Br. 15–17.

Similarly, the timing of a citizen's action is not nearly as unconstrained as the Foundation suggests. As PEAFF and the State have explained in detail, a citizen-prosecutor's window for bringing a citizen's action is limited to a 10-day period following the public officials' failure to act on the citizen's second notice. PEAFF Br. 6–41; Inslee Br. 18–38.

The scope of the Foundation's discretion to enforce the FCPA is thus far more constrained than the Foundation implies. Still, the Foundation is correct that once a complainant satisfies all Section 765 prerequisites, the complainant has substantial—though perhaps not

unlimited—discretion to litigate that action as he or she sees fit.<sup>4</sup> (It is an open question whether RCW 42.17A.765(1) gives the State the authority to intervene in a properly filed citizen’s action and, if so, whether the citizen-prosecutor would have to yield to the litigation preferences of the State in the event the two parties identified as litigating “in the name of the state” disagreed on any particular decision.)

That discretion, whatever its precise scope, does not distinguish citizen-prosecutors from other private delegates of state power who have been held to engage in state action. *See, e.g., Sullivan*, 526 U.S. at 54–55 (reviewing organizations, whose medical-reasonableness determinations were state action, had wide discretion to make those determinations in which the state had no substantive role and simply “shuffl[ed] paper” by forwarding completed requests); *Lee*, 276 F.3d at 553, 556 (state-actor lessee had wide discretion to regulate speech in a public forum, “independent of the City of Portland or any other public entity”); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 626–28, 111 S.Ct. 2077, 114 L.Ed.2d 600 (1991) (private civil litigant has wide discretion to use peremptory challenges without state supervision of how to do so); *West v. Atkins*, 487 U.S. 42, 52, 108 S.Ct. 2250, 101 L.Ed.2d 40

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<sup>4</sup> The public nature of an FCPA action also restricts the citizen’s choice in selecting a representative to prosecute the action, limiting it to licensed attorneys. *No On I-502*, 193 Wn. App. at 372–75.

(1988) (physician contracted by the state to care for prisoners had “professional discretion and judgment” regarding how to provide that care). This rebuttal fails.

**2. Private prosecutors engage in state action without themselves having attachment or arrest authority.**

The Foundation next attempts to argue that delegation of prosecutorial authority cannot be state action unless the private party has the power to attach property or make arrests. FF. Ans. Br. 14.

Local 117’s cited authorities on delegated prosecutorial power rebut that view. In *Voytko v. Ramada Inn of Atlantic City*, the “narrow question” was “whether the action by a hotel and its agents *in filing and prosecuting a criminal complaint* under a defrauding of innkeepers statute where the hotel’s retained attorney acts as prosecutor, amount[ed] to ‘state action.’” 445 F. Supp. 315, 321 (D.N.J. 1978) (emphasis added). The court held it did. *Id.* The Foundation would distinguish this holding by emphasizing that attaching or selling property is necessary before a private prosecution can be considered state action. FF Ans. Br. 15 n.13. The *Voytko* court’s discussion of innkeepers’ sale of guests’ property was pure dicta. 445 F. Supp. at 321. The defendant hotel, its managers, and attorneys engaged in state action in that case not because they sold guests’ property but because they “filed criminal complaints” and then “actually

prosecuted the case for the state” pursuant to state statute. *Id.* at 319, 320. This private “power to invoke the aid of state criminal prosecution under statutes specifically limited to persons who fail to pay their hotel bill is a sanction against debtors extending far beyond the common law innkeeper’s lien.” *Id.* at 322. In other words, *Voytko* found state action by the hotel and its agents precisely because those private parties did not attach private property but used delegated state authority to instigate and prosecute criminal charges.

The Foundation also cannot distinguish *Voytko* based on the arrest power because the *Voytko* defendants did not themselves arrest the guests. The police did, prompted by warrants issued upon the defendants’ filing of criminal charges. *Id.* at 320. In this regard, the innkeeper statute is no different from the FCPA: once the citizen-prosecutor obtains a judgment, the FCPA automatically enlists the coercive power of the State to enforce that judgment by escheating the judgment to the State. *Supra* at 12–14.

Neither can the Foundation distinguish *Brown v. Transurban USA, Inc.*, 144 F. Supp.3d 809 (E.D. Va. 2015), as an attachment case. In *Brown*, Virginia had “expressly delegated th[e] power [to enforce toll collections] to Transurban through state law.” 144 F. Supp.3d at 835. Specifically, Virginia had empowered that private entity to photograph tolls, mail summons to people who allegedly failed to pay tolls, and

institute actions seeking civil penalties to prosecute toll violators. *Id.* These delegated investigative and prosecutorial powers qualified as state action. *Id.* at 835–36. The private toll collector in *Brown* did not, however, have the authority to attach property or impose liens; it had to initiate collection lawsuits to seek property-transferring judgments. *Id.* at 818–20.

While Local 117 cited other cases finding state action in private use of attachment procedures, those cases are not the heart of Local 117’s argument. Decisions, like *Voytko* and *Brown*, finding state action in delegations of prosecutorial authority to private actors, are decisive.<sup>5</sup> Those decisions effectuate the longstanding teaching that the “State cannot avoid its constitutional responsibilities by delegating a public function to private parties.” *Georgia v. McCollum*, 505 U.S. 42, 53, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).

The Foundation can neither refute that principle nor distinguish its application to delegations of prosecutorial authority to private parties.

**3. The unique features that clothe FCPA citizen-action prosecution in state action are fact specific, not meaninglessly broad.**

The Foundation finally contends that “FCPA enforcement in

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<sup>5</sup> *Brunette v. Humane Soc. of Ventura Cty.*, 294 F.3d 1205, 1208 (9th Cir. 2002), also buttresses Local 117’s position by deeming the Humane Society a state actor based on its delegated law enforcement authority. The Foundation would distinguish that case because the state created the society itself. FF Ans. Br. 15. Here, the State created the role of citizen-prosecutor through the FCPA. While it did not create the Foundation, it conferred upon it the classically governmental function of prosecuting matters of public right. As *Voytko* and *Brown* illustrate, that delegation compels a finding of state action.

Washington” cannot be state action because the citizen action provision came into law along with the FCPA’s original enactment in 1972. FF Ans. Br. 17–18. In its view, the proper unit of analysis of whether a function delegated by statute to a private entity is a traditional governmental function is the delegating statute itself. *Id.* at 17–21.

Courts examining the root of governmental power, however, do not begin their analysis with the delegating statute but with the broader governmental function the statutory delegation enacts. For that reason, the relevant unit of analysis in *Voytko* was not prosecutions under New Jersey’s innkeepers statute but the exercise of a “prosecutorial privilege at criminal law which derives from the sovereign.” 445 F. Supp. at 322. That power “to act as state prosecutor” was a traditionally “sovereign power” whose delegation “gives rise to state action ... .” *Id.* Similarly, the relevant unit of analysis in *Brown* was not prosecutions under Virginia’s private toll collection statute but the “operation of, and enforcement of laws on, roads and public highways ... .” 144 F. Supp.3d at 835–36. Likewise, the relevant unit of analysis in *Edmonson* was not statutory authorization of peremptory challenges by private litigants—which the Court observed “date[d] back as far back as the founding of the Republic” or earlier—but the more general function of “selecting an entity that is a quintessential government body.” *Edmonson*, 500 U.S. at 621, 624.

In each of these cases, the courts abstracted at least one level of generality from the delegating statute to determine whether the relevant function was traditionally governmental. The Foundation's contrary approach of defining the power at issue in terms of the statutory delegation itself would effectively eliminate delegated state action. Delegations of state authority typically occur through a statutory scheme; if the statute enacting the delegation itself were the unit that defined the contested governmental power, that power could never be deemed exclusive because, by definition, it has been delegated to a private party. Yet, delegations of governmental power do confer state action on private parties. *Georgia, Edmonson, supra*. The proper unit of analysis must necessarily be at least one level more general than the delegating statute itself.<sup>6</sup>

Local 117 urges precisely such an analysis here by focusing on the enforcement of public rights laws, such as election regulation laws. Local 117 Br. 38–41.<sup>7</sup> The Foundation criticizes this analytical method as

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<sup>6</sup> Even under Foundation's cramped conception of the appropriate unit of analysis, the FCPA's structure proves that the enforcement of campaign finance laws is an exclusively governmental *prerogative*. While the FCPA provided for citizen's actions from the start, the prerogative to enforce the law has always been vested exclusively with state officers who can always preclude citizen's actions by filing their own action in response to either of the two required notices. *See* RCW 42.17A.765(4)(a). Only when the government yields its prerogative does a citizen gain the right to pursue an action. *Id.*

<sup>7</sup> The Foundation's reliance on *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed. 418 (1982), is inapposite because the private schools at issue in that case did not operate pursuant to any statutory delegation of governmental authority. They were simply

meaninglessly broad. FF Ans. Br. 17. It is not. Private enforcement of statutory public rights in the name of the state, with fee reimbursement by the state and judgments enforced by the state, is exceedingly rare. *Voytko* and *Brown* may be the only cases closely in point. The Foundation certainly offers no case holding that the private enforcement of a public-rights scheme—criminal or regulatory—in the name of the state is somehow not state action. By homing in on precisely those features of FCPA’s citizen’s actions that make it fair to attribute state action to their prosecution, the position urged here is properly fact-bound and will not unduly expand the state action doctrine.

**II. Local 117 adopts PEAFF’s reply in support its cross appeal of the denial of fees under Section 765(4)(b).**

The Service Employees International Union Political Action and Education Fund (PEAFF) demonstrates in its separate brief that the trial court was required to—but failed to—determine whether the Foundation lacked reasonable cause to bring this action; the undisputed, admissible evidence of the Foundation’s harassing intent to bankrupt public sector unions through citizen’s action litigation is sufficient to support a fee

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private schools that were partially subsidized by public funding. *Id.* at 840–42. *Johnson v. Knowles*, 113 F.3d 1114, 1119 (9th Cir. 1997) is equally unavailing because that case rejected state action in an election to a private position within a party rather than an election for public office. The FCPA regulates campaign practices of elections to public office. *Johnson* accordingly says nothing about whether the enforcement of that regulatory scheme governing public-office elections is state action.

award; and fees may be awarded where even one claim lacks reasonable cause. *See* PEAFF Reply Br., Sections I, II, IV. Local 117 concurs on all points and writes separately here to explain why, even apart from the Foundation's harassing motive, its claims against Local 117 lacked merit.

First, the Foundation contends that Local 117 is a political committee. An organization is a political committee only if one of its primary purposes is to spend money on electoral candidates or initiatives, or it receives contributions for electoral candidates or initiatives. Local 117 Br. 25–28. The Foundation does not rebut Local 117's showing that the Union's stated purposes and actual expenditures—which even on the Foundation's calculations reveal less than 0.3% of annual spending on electoral political activities—did not support the Foundation's political-committee claim. *Compare* Local 117 Br. 24–28 *with* FF Ans. Br. 60–62. It admits that the Union's bylaws show at most that political engagement is a means to achieve the Union's non-electoral ends, not an end in itself. FF Ans. Br. 61. And it does not dispute that the Foundation's own allegations of the Union's expenditures amount to less than 0.3% of its annual spending—it only queries whether that spending level should be deemed “de minimus.” *Id.* Yet, it identifies no authority suggesting that such a low level of electoral spending qualifies an organization as a political committee. In a last-ditch effort, it invites consideration of

unspecified hypotheticals; but hypotheticals cannot overcome a plaintiff's pleaded allegations that defeat its own claims.

The Foundation likewise fails to rebut Local 117's showing that dues must be earmarked as political contributions before they can trigger a political-committee designation. *Compare* Local 117 Br. 25–26 n. 16 with FF Ans. Br. 63–64. The Foundation does not and cannot contend that it properly alleged that the Union's dues payments were earmarked as political contributions; instead, it alleged only that the funds were “segregated” upon transfer from general funds to the SSF. Complaint ¶ 154, CP 18. The Foundation provides no authority showing that this segregation-upon-transfer suffices to give an organization an expectation of receiving contributions.

Finally, the Foundation fails to rebut Local 117's showing that the SSF is not a separate person under state law. *Compare* Local 117 Br. 28–29 with FF Ans. Br. 62–63. Disregarding longstanding PDC and Attorney General interpretations, it contends the bare statutory definition of a person includes bank accounts, even though it does not explain how a bank account qualifies as an “organization.”

Each of these fanciful theories lacks merit.

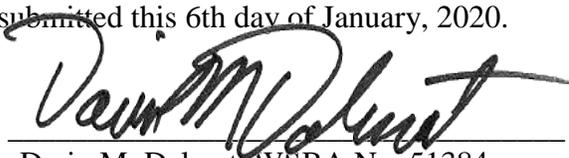
## CONCLUSION

This Court should reverse the dismissal of Local 117's counterclaim and the denial of its fee petition.

The FCPA delegates to private parties the governmental authority to prosecute violations of a public-rights statutory scheme regulating elections for public office. Private parties undertake those prosecutions in the name of the State and, upon prevailing, are automatically entitled to full reimbursement by the State for their efforts. They can also externalize the costs of enforcing privately obtained judgments by enlisting the State to do so. This unusual delegation of prosecutorial authority can fairly be deemed state action.

Undisputed evidence establishes that the Foundation brought meritless FCPA claims against Local 117 to drain its resources. A fee award is necessary to deter such abusive litigation.

Respectfully submitted this 6th day of January, 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 Washington State Supreme Court using the appellate efileing system, which will provide notice of such filing to all required parties.

Executed this 6th day of January, 2020, at Seattle, Washington.

  
Jennifer Woodward, Paralegal

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