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No. 53415-1-II
No. 53430-4-II
(CONSOLIDATED)

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

FREEDOM FOUNDATION,

Petitioner,

v.

BETHEL SCHOOL DISTRICT, and the WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION

Respondents.

PETITION FOR DISCRETIONARY REVIEW BY THE WASHINGTON STATE SUPREME COURT

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I. IDENTITY OF PETITIONER.

Petitioner, Freedom Foundation (the "Foundation"), was the Plaintiff in two (2) actions at the trial court level, which were consolidated for purposes of appeal, and asks this Court to review the Court of Appeals' published decision set forth in Part II, which essentially negates all "citizen's actions" lawsuits for those who disagree with the state's interpretation and implementation of the Fair Campaign Practices Act.

II. DECISION BELOW.

Division Two of the Court of Appeals published its opinion on August 4, 2020, *see* **Appendix A**,[1] Published Opinion in Consolidated Case Nos. 53415-1-II and 53430-4-II ("Op." or the "Opinion"), finding: (i) that the Foundation's citizen's action was barred as a result of the 2018 amendments to the Fair Campaign Practices Act, RCW ch. 42.17A (the "FCPA"), because Public Disclosure Commission staff summarily dismissed the Foundation's complaint that Respondents were violating the FCPA; (ii) that the Foundation did not have standing under the Administrative Procedure Act (the "APA") to seek judicial review of the dismissal of its administrative complaint by the Washington State Public Disclosure Commission (the "PDC"), because it was not a "party" to the PDC proceedings; and (iii) that the Foundation did not have APA standing arising from injury to its competitive interests as a result of the PDC's dismissal. The Foundation timely submits the instant petition for discretionary review.

[1] All subsequent references to the Appendix in support of the instant Petition, being filed contemporaneously herewith, shall be in the format "App. ___."

III. ISSUES PRESENTED FOR REVIEW.

The following issues merit Supreme Court review pursuant to RAP 13.4(b)(1) and (b)(2), as conflicting with the decisions of this Court and of the Court of Appeals, and RAP 13.4(b)(4), as presenting issues of substantial public interest:

1. Whether the Court of Appeals erred in ruling that under the 2018 amendments to the FCPA, a citizen's action lawsuit is available *only* if the PDC fails to take *any* action, which disqualifying action includes staff administrative dismissal of a complaint, within ninety (90) days of receiving an administrative complaint?

2. Whether the Court of Appeals erred in ruling that the Foundation lacked standing to seek APA review of the PDC's dismissal, because it was not a "party" as defined by the APA?

3. Whether the Court of Appeals erred in ruling that the Foundation lacked standing to seek APA review of the PDC's dismissal, because it did not suffer an "injury in fact" to its competitive interests?

IV. STATEMENT OF THE CASE.

This Petition is to preserve the citizen's action lawsuit, an integral part of campaign practices regulation since adoption by voters in the 1972 Initiative No. 134. In 2015, this Court held the purpose was to provide citizens with an avenue to challenge the state's interpretation of campaign practices law. The PDC now seeks to eviscerate the citizen's suit, based on 2018 amendments which never suggested such an intent.

The Freedom Foundation filed two (2) companion cases comprising the instant matter.[2] The factual basis underlying each case was that

[2] The Foundation initially attempted to bring both claims in a single lawsuit, but the Clerk refused to accept a single lawsuit including both claims. Pursuant to the FCPA, the

Respondent Bethel School District violated the FCPA, and the PDC staff simply was wrong when interpreting the substantive statute improperly to dismiss and/or dispose of the Freedom Foundation's administrative complaint. *See* CP, at 318-320.[3] One case was a citizen's action brought pursuant to RCW 42.17A.775 (**App. B**), in which the Foundation contended that the Defendant, Bethel, had been unlawfully using its taxpayer-funded facilities to collect money for political committees, by utilizing school district employees to set up and use district machines and equipment for payroll systems during work hours, and then knowingly sending the money to political committees – thereby directly and indirectly assisting political campaigns and ballot propositions. *See* Citizen's Action Complaint for Civil Penalties and Injunctive Relief for Past and Ongoing Violations of Chapter 42.17A RCW (the "Citizen's Action Complaint") (CP 001). There is no dispute Bethel did so and does so; the issue is whether in so supporting a political committee Bethel violates RCW 42.17A.555.[4]

The second case arises from a determination by the PDC that the Foundation's allegations (as set forth herein) did not constitute an FCPA violation, and the PDC's resulting dismissal of the Foundation's administrative complaint. The substance of the PDC's determination, as

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Citizen's Action Complaint (CP, at 001) below was filed on October 9, 2018, and given Case No. 18-2-05084-34. The same day, Freedom Foundation filed a second action under the Administrative Procedures Act, which was given Case No. 18-2-05092-34 (the "APA Petition") (CP, at 216).

[3] All references to the Clerk's Papers compiled for purposes of the appeal shall appear in the form "CP, at xxx," with the exception of those references to the Certified Appeal Board Record from the PDC, compiled as part of the Clerk's Papers, which shall appear in the form "WSPDC xxxx."

[4] "No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space…"(emphasis added).

reflected in its correspondence dated September 10, 2018, states: "Staff has determined that in this instance, no evidence supports a finding of a material violation warranting further investigation. The PDC has closed the matter, and will not be conducting a more formal investigation into your complaint or pursuing further enforcement action in this case." *See* CP, at 264 (emphasis added). From this disposition, it is clear only that the PDC declined to take any action against Bethel, which, as discussed *infra*, is the only relevant question for whether a citizen's action remains available. The Foundation sought review of this dismissal by way of an APA Petition.

The Thurston County clerk assigned the two (2) lawsuits to different judges, who considered the APA Petition first. The PDC moved to dismiss the APA Petition, arguing that the Foundation lacked standing to seek judicial review under the APA. CP, at 236-37. Bethel adopted the arguments set forth by the PDC in its motion to dismiss, in addition to asserting arguments that the District had not violated the FCPA and that the 2018 amendments did away with a citizen's action in these circumstances. CP, at 248, 257. Judge Price granted the motion to dismiss as to the PDC. CP, at 412. Judge Price later granted Bethel's motion for summary judgment, but only on the standing grounds initially asserted by the PDC. *See* CP, at 442-443. Bethel also asserted those separate grounds in support of summary judgment in the Citizen's Action Complaint, however. CP, at 036. Judge Murphy granted summary judgment in favor of Bethel, without specifying with particularity the grounds upon which the court relied. CP, at 200.

The Foundation filed timely appeals in both cases: on April 1, 2019, in the APA Petition, and on April 30, 2019, in the Citizen's Action Complaint. Following the parties' submission of their briefing, the Court of

Appeals reviewed the matter and determined that it would be set for consideration on July 1, 2020, without oral argument. The Court of Appeals then issued its Opinion that is the subject of this Petition on August 4, 2020.

V. ARGUMENT.

A. Introduction & Summary of Argument.

Petitioner respectfully requests this Court review Division Two's Opinion because it is in conflict with decisions of this Court, as well as of the Court of Appeals, and because this case involves issues of substantial public interest that should be determined by the highest court of this state. *See* RAP 13.4(b)(1), (b)(2), (b)(4).

It is immediately apparent that the Opinion is in conflict with this Court's decision in *Utter v. Building Industry Association of Washington,* 182 Wn.2d 398 (2015) ("*Utter*"), because the Opinion departs from the axiomatic understanding of the FCPA citizen's action as reflected in *Utter* – the entire point of the citizen's action was, and remains, to provide an avenue for questioning the decisions of the state government and bringing suit against FCPA violators when government officials "decline[] to sue." *See Utter*, 182 Wn.2d at 412. The Opinion conflicts with this salutary notion, which enjoys ongoing vitality notwithstanding amendments to the citizen's action provision.

The Court of Appeals, however, appears to believe that the 2018 FCPA amendments so fundamentally changed the principles on which the citizen's action provision was passed, that the mere action of informing the parties it will take no action is sufficient to prevent the citizen complainant from proceeding. *See* Opinion, at p. 9 (**App. A**) ("Now, the PDC must fail to take action, including dismissal, within 90 days of receiving a complaint before a citizen's action may be filed."). If this is to be the law, which is not

at all apparent from the statutory language, such a sea-change deserves a more comprehensive and conclusive supporting analysis than that in which the Court of Appeals engaged. *See id.* ("The plain language of the 2018 amendments to the FCPA are clear."). As such, if the Opinion does not warrant discretionary review as being in conflict with *Utter* (*see* RAP 13.4(b)(1)), it alternatively warrants review because such a significant departure from the previous framework of the FCPA is a question of momentous public importance, and one of first impression (*see* RAP 13.4(b)(4)).

The Court of Appeals' rulings as to standing also present grounds for discretionary review, under either of the foregoing prongs of RAP 13.4(b), as well as under RAP 13.4(b)(2). If staff dismissal is a sufficient action to preclude a citizen's suit, then whether that decision was based on a correct interpretation of campaign practices law should be subject to review under the Administrative Procedures Act.

First, whether an administrative complainant is to be considered a "party" under the APA, in the circumstances here, is a substantially important public question, because if the Court of Appeals is correct as to the meaning of the FCPA, the APA is left as the only avenue for the PDC's applications of the Statute to be subject to some meaningful check. It simply cannot be that the PDC has unilateral authority to ignore admitted FCPA violations, with no scrutiny via judicial review. Additionally, the effect of the Opinion is in conflict with the Court of Appeals' decisions in *Technical Employees Association v. Public Employment Relations Commission*, 105 Wn. App. 434, 439-40, 20 P.3d 472 (2001) and *Den Beste v. Pollution Control Hrgs. Bd.*, 81 Wn. App. 330, 339, 914 P.2d 144 (1996). Both of

those opinions employed a broader notion of "party" status under the APA.

Second, the aspects of the Opinion dealing with "competitive harm" (*see* Opinion, at pp. 13-14 (**App. A**)) are in conflict with the decisions of the Court of Appeals in *Snohomish County Public Transportation Benefit Area v. Public Employment Relations Commission*, 173 Wn. App. 504, 294 P.3d 803 (2013), as well as the decisions of the Supreme Court in *St. Joseph Hospital and Health Care Center v. Dept. of Health*, 125 Wn.2d 733, 887 P.2d 891 (1995) and *Seattle Bldg. & Const. Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 902 P.2d 581 (1996). Those opinions recognized that an injury-in-fact need not be immediate or economic in nature, and found standing in circumstances indistinguishable from those here.

As such, discretionary review is appropriate because both RAP 13.4(b)(1) and (b)(4) provide for review of the Court of Appeals' interpretation of the FCPA, and because RAP 13.4(b)(1), (b)(2) and (b)(4) all provide for discretionary review of its rulings on APA standing.

B. The Opinion is In Direct Conflict with the *Utter* Regime.

1. The Opinion All But Disregards Utter, Which Has Great Significance for Interpreting the Amended FCPA.

First, it is apparent that the Opinion is predicated on the notion that *Utter* is no longer good law, following the 2018 amendments to the FCPA citizen's action. *See* Opinion, at p. 9 (**App. A**) ("*Utter* was decided before the 2018 amendments and is not helpful in construing the new language."). While those amendments did effectuate significant revisions to other aspects of the citizen's action provision, they did not displace the time-honored principles of checks and balances that were reflected in *Utter*, nor did they change the significance of the word "action" as used in the statute.

The *Utter* case dealt with a citizen's action complaint filed by former justices of the Supreme Court against the Building Industry Association of Washington ("BIAW"), as well as an affiliated entity, BIAW-MSC. *Utter*, 182 Wn.2d at 405. The PDC conducted an investigation, which concluded BIAW was not a political committee and was not sued; this presented the Court with the question whether the PDC's investigation constituted an "action" so as to preclude the citizen-plaintiffs from maintaining their action. *See id.*, at 407 ("Thus, according to the Court of Appeals, where the AG refers for investigation or investigates a complaint, the notice-giving citizen may not sue even if the AG declines to sue."). This Court held that informal step by the government did not constitute a preclusive "action," which was interpreted to refer to a lawsuit. *See id.*, at 409. Further, the opinion was not predicated solely upon linguistic analysis, or the arrangement of words in the former statute.[5] To the contrary, the Court gave effect to underlying concerns that had animated passage of the citizen's action provision in the first place. In relevant part, it held

> Thus, if the Court of Appeals' interpretation were correct, the PDC – a government agency – would unilaterally bar all citizen suits for violation of Title 42 RCW just by investigating. The voters cannot possibly have intended to create a citizen's right to sue when the government will not but allow the government to bar every one of those suits with a procedural quirk.

Utter, 182 Wn.2d at 410 (emphasis added).

The irony is that, if the Court of Appeals' interpretation is correct here, the procedural "quirk" that precludes citizen suits will be the mere sending of a dismissal letter, whether or not following such an investigation,

[5] The current RCW 42.17A.775 (**App. B**) uses similar language, however, when it provides that a citizen's action "may be brought and prosecuted only if …[t]he commission has not taken action authorized under RCW 42.17A.755(1) within ninety days of the complaint being filed with the commission." (emphasis added)

indicating that no "action" will be taken. *See* Opinion, at p. 8 (**App. A**) ("Here, the PDC dismissed Freedom Foundation's complaint when it 'closed the matter' and did not conduct a formal investigation."). But the Supreme Court has already interpreted the intent of the voters in initially passing the initiative that resulted in the citizen's action provision, and found it inconsistent with such a result: "Moreover, BIAW's interpretation would defeat the purpose of providing for citizen suits in the first place, because the AG likely declines to sue in exactly those instances where the PDC investigation concludes that no violation occurred. The statute is obviously based on the notion that the government may be wrong, and then it is up to citizens to expose the violation." *See Utter*, at 411 (emphasis added). As such, to read the amendments to the FCPA as endorsing that very outcome presents an irreconcilable conflict with *Utter*.

2. *If the Opinion Is Correct That Utter Has Been Superseded, Interpretation of the Statute is a Question of Great Public Interest.*

It is plain to see that the Court of Appeals' Opinion is predicated upon its apparent belief that the 2018 FCPA amendments foreclose a citizen's action here. *See* Opinion, at p. 9 (**App. A**) ("Now, the PDC must fail to take action, including dismissal, within 90 days of receiving a complaint before a citizen's action may be filed."). It is rather curious, then, that the Court of Appeals declined to engage in any significant analysis of the statutory language, holding only that "…by the plain language of RCW 42.17A.775, Freedom Foundation does not meet the prerequisites for filing a citizen's action because the PDC acted timely on the complaint [and]…The plain language of the 2018 amendments to the FCPA are clear." *Id.*, at pp. 8-9.

As argued in the Court of Appeals, however, there is (at the very least) a reasonable reading of RCW 42.17A.755(1)(a) (**App. C**) that requires a dismissal to be treated the same as other resolutions of minor FCPA violations, instead of reading "otherwise" to mean "alternatively" – that is not the meaning with which it is used in the general language of subsection (1). *See Timberline Air Svc., Inc. v. Bell Helicopter-Textron, Inc.,* 125 Wn.2d 305, 313, 884 P.2d 920 (1994).[6] If the Court of Appeals' interpretation were the intended meaning, the statute could have simply left out this word entirely, in favor of the disjunctive word "or" that would accomplish that same purpose. *See Homestreet, Inc. v. Dept. of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009).[7] Instead, it appears the word "otherwise" was included specifically to denote that a dismissal was included among other ways the PDC could "…resolve the matter in accordance with subsection (2)." *See, e.g., Jin Zhu v. North Cent. Educ. Svc. Dist.-ESD 71*, 189 Wn.2d 607, 620, 404 P.3d 504 (2017); *see also Strain v. West Travel, Inc*., 117 Wn. App. 251, 254-57, 70 P.3d 158 (2003).

Taking the language of subsection (1)(a) in the context of the entire Section 755, it is clear that if the Legislature had intended dismissal to be a stand-alone option, it would have devoted a separate subsection to it. Instead, it grouped dismissals with other resolutions under subsection (2) – which allows the PDC to "delegate authority" for dismissals and other resolutions to its director if such authority is consistently applied.[8]

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[6] "When the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning."

[7] "Whenever possible, statutes are to be construed so no clause, sentence or word shall be superfluous, void, or insignificant." (citations and internal quotations omitted).

[8] The PDC has delegated such authority, including by way of WAC 390-37-060(1)(a), which addresses the circumstances in which dismissal is appropriate – *i.e.,* where the complaint is "obviously unfounded or frivolous, or outside of the PDC's jurisdiction." But

Furthermore, that organizational choice by the Legislature speaks to its intent in providing, under the new citizen's action provision, that the citizen's action may still be brought if "[t]he commission has not taken action authorized under RCW 42.17A.755(1)." *See* RCW 42.17A.775(2)(a) (**App. B**). First, as suggested above (*see supra*, at pp. 8-9), "action" should be taken to mean the same thing as it did at the time *Utter* was decided – that a dismissal was not an "action" – particularly since Section 775 still repeatedly uses it in the sense referring to enforcement proceedings, even after the 2018 amendments. *See Timberline Air Svc., Inc.,* 125 Wn.2d at 313. Second, it appears that the primary effect of the 2018 revisions, including to RCW 42.17A.755(1) (**App. C**), was to allow PDC discretion for its staff to take enforcement "action" only with respect to less significant violations ("technical corrections" and "remedial violations"), the same as the Commission itself does with more serious allegations. *See* RCW 42.17A.755(2) (**App. C**) ("For complaints of remediable violations or requests for technical corrections, the commission may, by rule, delegate authority to its executive director to resolve these matters in accordance with subsection (1)(a) of this section, provided the executive director consistently applies such authority."). That is not to say that *declining* to take such enforcement "action" should be accorded the same preclusive

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in requiring the PDC to first conduct a preliminary review before making that determination and ensuring that the choice between dismissal or further proceedings is "appropriate," the statute implies the necessity for some standards which will be used in making the determination. Those standards, which are promulgated in WAC 390-37-060, make clear that dismissals for "obviously unfounded" complaints are grouped conceptually with other summary dispositions of "technical corrections" or "remedial violations"; indeed, these dispositions are discussed in consecutive subsections of the same regulation. Considering the structure of Section 755 as a whole, one can plainly see that the Legislature did not intend to confer *carte blanche* discretion when the PDC "…dismiss[es] the complaint or otherwise resolve[s] the matter in accordance with subsection (2)." RCW 42.17A.755(1)(a).

effect – whether under *Utter*, as a result of the 2018 amendments, or as a matter of public policy.

Indeed, to the extent that the statutory amendments avoid a direct conflict with *Utter* (which the Foundation does not believe to be the case, as discussed *supra*), the need to properly and definitively interpret the statutory amendments nonetheless supports Supreme Court discretionary review.[9] It has been recognized by the Court that a purportedly sweeping statutory change to a previous regime warrants discretionary review; this is especially so where the statute can be read in a different, more incremental way. *See, e.g., In re Arnold*, 189 Wn.2d 1023, 408 P.3d 1091, 1092 (2017); *In re Adoption of T.A.W.*, 184 Wn.2d 1040, 387 P.3d 636, 637 (2016) ("But there may be questions about whether RCW 13.34.040(3) is so sweeping…When viewed in context…the 'plain meaning of this provision could be viewed in a different light.").

In any event, consideration of the 2018 amendments is a question of first impression, which invokes substantial importance to the public interest. *See, e.g., Rublee v. Carrier Corp.*, 192 Wn.2d 190, 194, 197, 428 P.3d 1207 (2018). Finally, the public interest supports discretionary review because the same question of interpretation is pending in at least one (1) other appellate matter that the Foundation is aware of. *See* Order Granting CR 12(b)(6) Motion to Dismiss (**App. D**) and Notice of Appeal (**App. E**) in *Freedom Foundation v. Service Employees International Union Political Education & Action Fund*, No. 20-2-010-56-34. A conclusive interpretation by the Supreme Court would save judicial resources, by determining an

[9] Although the FCPA was further amended in 2019, those amendments do not avoid the need for discretionary review, as they pertain to other language that was not at issue in the instant appeal. *See* Opinion, at pp. 6-7, nn. 2, 3 (**App. A**) ("The statute was also amended in 2019…However, these amendments are not material to this appeal.").

issue directly relevant to that matter, whether that determination is favorable to the Foundation or not. "In these circumstances, review by this court is warranted on the basis the motion raises an issue of substantial public interest under RAP 13.4(b)(4)." *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413, 414 (2016) (observing pendency of petitions raising common issues).

C. Whether Citizens Can Seek Judicial Review of PDC Decisions is Another Question of Great Public Interest.

The Court of Appeals held that "[t]he PDC action was not specifically directed toward Freedom Foundation, and it was not named or allowed to intervene as a party in any PDC proceeding." *See* Opinion, at p. 12 (**App. A**). In light of the abbreviated proceedings transpiring before the PDC, that understanding of what constitutes a "party" to an "agency proceeding" within the meaning of RCW 34.05.010(12)(a) (**App. F**) seems erroneously to conflate that concept with that of an "adjudicative proceeding," which is separately defined in Subsection (1) of the APA's definitions.[10] But the definition of "party" in Subsection (12) uses the notably broader phrasing of "agency proceeding," and therefore must be interpreted to import a different meaning than "adjudicative proceeding." *See Seeber v. Washington State Public Disclosure Commission*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981).[11]

1. The Order of Dismissal Was an "Agency Action" "Specifically Directed" to the Foundation.

The PDC unquestionably issued an order. *See* RCW 34.05.010(11)(a) (**App. F**) ("'Order,' without further qualification, means a written statement of particular applicability that finally determines the legal

[10] "'Adjudicative proceeding' means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency." RCW 34.05.010(1) (**App. F**).

[11] "It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent."

rights, duties, privileges, immunities, or other legal interests of a specific person or persons."). It is obvious that the PDC's dismissal here qualifies. That definition does not require a directive to the Foundation for it to do anything; it only requires that someone's legal rights or obligations be determined or impacted.

2. The Foundation Was Permitted to Participate "As a Party" in the Agency "Proceedings."

Separately and independently, it is clear that the Foundation participated "as a party" in the "agency proceedings" that resulted from the filing of its PDC complaint, as necessary to satisfy RCW 34.05.010(12)(b) (**App. F**). Decisional law going back over twenty (20) years has established that nothing more is required for "party" status than an entity being treated as a party would otherwise be treated in more formal "proceedings" – having its submissions accepted, considered by the agency and responded to by the other party, receiving notice of documents and of a decision, and being apprised of the basis of that decision – *i.e*., receiving the basic indicia of due process.[12] It appears that the looseness of these requirements was specifically to allow for the informal "proceedings" that transpired here, and to make sure that participants in such proceedings receive due process. *See Den Beste v. State, Pollution Cont. Hrgs. Bd.,* 81 Wn. App. 330, 339-40, 914 P.2d 144 (1996)[13]

[12] *See Technical Employees Ass'n. v. Publ. Empl. Rel. Comm'n*, 105 Wn. App. 434, 439-40, 20 P.3d 472 (2001); *see also infra*, at n.13.

[13] "Further, as stated by applicants, because the Department is prohibited…from conducting adjudicative proceedings on water rights applications, it is not possible for anyone, except perhaps an applicant, to become a 'party' to these proceedings in the traditional sense. Finally, as the PCHB noted, the APA defines a party to include persons allowed to 'participate as a party in the agency proceeding.'[…] We agree with the PCHB that, given its degree of participation, the Yakima Indian Nation was entitled to timely notice of the Department's decision." (emphasis added).

Accordingly, the Court should accept direct review in order to act on the Legislature's obvious intent to cast "party" status broadly, and prevent the PDC from staking out a position here that would allow it to entirely insulate from judicial review its future decisions of this sort. Not only does the Opinion implicate the important public questions of when APA review is available and by whom (for purposes of RAP 13.4(b)(4)), it conflicts with the Court of Appeals' decisions in *Den Beste* and *Technical Employees Association*, so discretionary review is independently warranted under RAP 13.4(b)(2).

D. The Opinion Conflicts with Numerous Published Decisions in Failing to Recognize the Foundation's Competitive Harm.

With respect to the "injury-in-fact" requirement, the Court of Appeals erroneously held that "…Freedom Foundation identifies no direct economic effect or material adverse injury from the PDC's denial of the complaint…The mere fact that an unfavorable result could become precedent to Freedom Foundation's potential future litigation is not a harm under RCW 34.05.530." *See* Opinion, at p. 14 (**App. A**).

First, it is black letter law that the prejudice sufficient for an "injury-in-fact" need not be economic in nature. *See Association of Data Processing Svc. Orgs. v. Camp*, 397 U.S. 150, 154 (1970); *U.S. v. Students Challenging Regulatory Agency Procedures* ("*SCRAP*"), 412 U.S. 669, 687 (1973). Financial competition, while sufficient, is not required; the Foundation and entities that violate the FCPA need only (and undoubtedly do) have that "…concrete adverseness which sharpens the presentation of issues." *See Baker v. Carr*, 369 U.S. 186, 204 (1962) *see also Seattle Bldg. & Const. Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 793, n.1, 920 P.2d 581 (1996) ("As our reliance on federal case law in [St.

Joseph Hospital] indicates, we will look to federal cases addressing standing."); *see also* RCW 34.05.001.

Second, while the Foundation's bargaining chip may be intangible, it is nonetheless real – the ability gained by FCPA violators to cite the PDC's decision under review here, to courts, the agency, or to the Foundation itself, in the context of future actions, and the Foundation's inability to cite a favorable decision arising from the same matter. The "perceptible harm" to the Foundation's efforts that result from losing decisions is too obvious to be denied, notwithstanding the Court of Appeals' unconvincing efforts (*see* Opinion, at pp. 13-14) (**App. A**) to distinguish its own opinion in *Snohomish Cty. Publ. Transp. Benefit Area v. Publ. Employment Relations Comm'n*, 173 Wn. App. 504 (2013). Indeed, despite its reluctance to acknowledge the effect that unfavorable precedents have for the Foundation and its competitive interests, the Court of Appeals had previously recognized such harm as sufficient to confer standing. *See* Opinion, at p. 14 ("The mere fact that an unfavorable result could become precedent to Freedom Foundation's potential future litigation is not a harm under RCW 34.05.530."); *Snohomish Cty.*, 173 Wn. App. at 514 ("This loss of leverage is a 'sufficient likelihood of economic injury.'").

Third, the Opinion is in direct conflict with the Court's decisions in *Seattle Bldg. & Const. Trades Council*, 129 Wn.2d 787, 920 P.2d 581 (1996) and *St. Joseph Hospital and Healthcare Center v. Department of Health*, 125 Wn.2d 733, 887 P.2d 891 (1995). Although the Opinion mentioned neither of those important Supreme Court decisions, they both recognized that competitive harm exists even where a competitive injury is not "direct." *See Seattle Bldg. & Const. Trades Council*, 129 Wn.2d at 795;

St. Joseph Hospital & Healthcare Center, 125 Wn.2d at 742. The Court of Appeals' rulings have great public importance, as they affect the scope of individuals and/or entities who may seek APA review of agency decisions, and the fact that the Court of Appeals held that the Foundation lacks standing does not impact the need for this Court's consideration of the weighty issues identified in this Petition. *See State v. Watson*, 155 Wn.2d 574, 577-78, 122 P.3d 903 (2005).

VI. CONCLUSION.

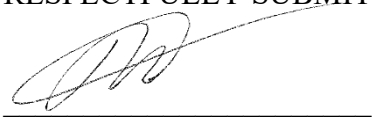
This Court should grant review of the Published Opinion of the Court of Appeals, in its analysis with respect to both Sections I and II of the Opinion (**App. A**). Discretionary review is warranted as to the Citizen's Action Complaint because the Court of Appeals' opinion is contrary to *Utter v. BIAW,* the substance of which was not altered by the 2018 FCPA amendments, or alternatively, because a statutory departure from the *Utter* citizen's action regime marks a question of first impression, deserving of a conclusive interpretation by the highest Court of this State. The Court of Appeals' Opinion erroneously handles issues of great (not merely substantial) public interest and importance, concerning the FCPA's fundamental policy goals and the overriding need for a check on the decision-making of government actors when they "may be wrong."

Review is similarly warranted as to judicial review under the Administrative Procedures Act because the Court of Appeals' erroneous analysis in that regard leaves no meaningful avenue for citizens of the State of Washington to subject the PDC's decisions to scrutiny, and in combination with the citizen's action analysis, insulates essentially all of the PDC's decisions from any independent check. Interpretation of the APA's definition of "party" is a substantially important public question,

upon which the Opinion conflicts with other decisions of the Court of Appeals, and the Opinion also unduly restricts the notion of "competitive harm," contrary to decisions of the Washington State Supreme Court and the Court of Appeals – indeed, as well as decisions of the United States Supreme Court, which establishes Washington law in this regard.

The Foundation respectfully submits that the Court should correct the errors below, by accepting discretionary review, vacating the Opinion of the Court of Appeals, remanding to the trial court for further proceedings pursuant to the Court's disposition, and award costs on appeal to the Foundation.

RESPECTFULLY SUBMITTED on September 3, 2020.



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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 3, 2020, I electronically filed with the Court the foregoing document and appendix and served the same by email upon the following:

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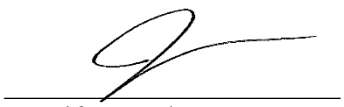

Jennifer Matheson

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

August 4, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FREEDOM FOUNDATION, a Washington nonprofit organization, in the name of the State of Washington, Appellant, v. BETHEL SCHOOL DISTRICT; WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, Respondents.	No. 53415-1-II Consolidated
FREEDOM FOUNDATION, a Washington nonprofit organization, in the name of the State of Washington, Appellant, v. BETHEL SCHOOL DISTRICT; WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, Respondents.	No. 53430-4-II PUBLISHED OPINION

WORSWICK, J. — This consolidated appeal arises from two superior court actions brought by Freedom Foundation regarding Bethel School District's processing of payroll deductions. First, Freedom Foundation filed a citizen's action against the District, alleging a violation of the Fair Campaign Practices Act (FCPA), RCW 42.17A.775. The superior court granted the District's motion for summary judgment dismissal. Second, Freedom Foundation filed a petition for judicial review of the Public Disclosure Commission's (PDC's) decision to dismiss Freedom

Foundation's complaint to the PDC regarding the District's conduct. Both the PDC and the District moved to dismiss, albeit under different rules. The superior court granted the PDC's CR 12(b)(6) motion to dismiss and the District's motion for summary judgment dismissal.

On appeal, Freedom Foundation argues that the superior court erred in dismissing its actions because the District violated the FCPA, discovery remained outstanding in the citizen's action, and the District failed to meet its burden at summary judgment regarding the citizen's action. The District and the PDC argue that Freedom Foundation lacks the authority to bring a citizen's action and lacks standing to seek judicial review of the PDC's dismissal.

We agree with the District and the PDC. We hold that Freedom Foundation does not have authority to bring a citizen's action and that it lacked standing to seek judicial review of the PDC's dismissal. As a result, we do not consider Freedom Foundation's remaining arguments. Accordingly, we affirm.

FACTS

RCW 42.17A.495(3) allows employees to make written requests for payroll deductions to political committees. RCW 28A.405.400 requires school districts to make these payroll deductions if at least 10 percent of the school district's employees make a written request specifying the same payee. Approximately 24 percent of the District's employees designated the Washington Education Association's Political Action Committee (WEA-PAC) as a payroll deduction payee, and 17 percent designated the National Education Association Fund for Children and Public Educations (NEA-FCPE). As a result, the District processes these payroll deductions monthly and has done so for several years.

In June 2018, Freedom Foundation filed a complaint with the PDC regarding the District's payroll deductions. Freedom Foundation alleged that the District improperly used public facilities in violation of RCW 42.17A.555 to process employee payroll contributions to WEA-PAC and NEA-FCPE.

In September, the PDC found that evidence did not support a violation of RCW 42.17A.555 by the District. As a result, the PDC "closed the matter" and did not conduct a formal investigation into Freedom Foundation's complaint. Clerk's Papers (CP) at 24. Following the PDC's closing of the matter, Freedom Foundation filed two separate actions in Thurston County Superior Court.

First, Freedom Foundation filed a citizen's action complaint against the District. The District moved for summary judgment dismissal. The superior court granted the District's motion for summary judgment and dismissed the citizen's action complaint.

Second, Freedom Foundation filed an action seeking judicial review under the Administrative Procedure Act[1] (APA) of the PDC's dismissal of Freedom Foundation's initial complaint. The superior court granted the PDC's CR 12(b)(6) motion to dismiss and the District's motion for summary judgment dismissal of the action seeking judicial review under the APA.

Freedom Foundation appeals three orders from the two actions: (1) the order granting the District's motion for summary judgment dismissal regarding the citizen's action, (2) the order granting the PDC's motion to dismiss regarding judicial review under the APA, and (3) the order

[1] Chapter 34.05 RCW.

granting the District's motion for summary judgment dismissal regarding judicial review under the APA. We consolidated these appeals.

ANALYSIS

I. CITIZEN'S ACTION COMPLAINT

The District and the PDC argue that Freedom Foundation lacks the statutory authority to bring a citizen's action following the PDC's timely dismissal of its complaint. We agree.

A. *Legal Principles*

We review motions for summary judgment de novo. *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 481, 166 P.3d 1174 (2007). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We view all evidence in a light most favorable to the nonmoving party. *Utter v. Bldg. Indus. Ass'n*, 182 Wn.2d 398, 406, 341 P.3d 953 (2015).

We also review issues of statutory interpretation de novo. *State v. Evergreen Freedom Found.*, 192 Wn.2d 782, 789, 432 P.3d 805 (2019) (plurality opinion). When engaging in statutory interpretation, we endeavor to determine and give effect to the legislature's intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). In determining the legislature's intent, we must first examine the statute's plain language and ordinary meaning. *Jametsky*, 179 Wn.2d at 762. Legislative definitions included in the statute are controlling, but in the absence of a statutory definition, we give the term its plain and ordinary meaning as defined in the dictionary. *State v. Econ. Development Bd.*, 9 Wn. App. 2d 1, 10, 441 P.3d 1269 (2019). In addition, we consider the specific text of the relevant provision, the context of the entire statute,

related provisions, and the statutory scheme as a whole when analyzing a statute's plain language. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012).

We liberally construe the FCPA

> to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.

RCW 42.17A.001(11).

B. *RCW 42.17A.755 and RCW 42.17A.775*

A person who believes the FCPA has been violated may bring an action in the name of the State against the alleged violator in certain circumstances. RCW 42.17A.775(1). This type of action, termed a citizen's action, has always been subject to prerequisites. RCW 42.17A.775; former RCW 42.17A.765 (2010); *Utter*, 182 Wn.2d at 407. And recently, the legislature amended the citizen's action process. *See* former RCW 42.17A.765; RCW 42.17A.775.

Before June 7, 2018, a person could file a citizen's action after giving notice to the attorney general if the attorney general failed to commence an action regarding the alleged FCPA violation within 45 days. Former RCW 42.17A.765(4); *Utter*, 182 Wn.2d at 407. Under the former statute, a citizen's action was precluded only if the attorney general or local prosecutor brought a suit. *Utter*, 182 Wn.2d at 412. The former statute did not preclude a citizen's action where the Attorney General declined to bring an action. *Utter*, 182 Wn.2d at 407; former RCW 42.17A.765(4).

In 2018, the legislature amended the citizen's action provisions. LAWS OF 2018, Reg. Sess., ch. 304, § 14.[2] The legislature removed the citizen's action provisions from former RCW 42.17A.765 and created RCW 42.17A.775, which set forth new requirements for a citizen's action. RCW 42.17A.775 states in relevant part:

> (2) A citizen's action may be brought and prosecuted only if the person first has filed a complaint with the commission and:
>
> (a) *The commission has not taken action authorized under RCW 42.17A.755(1) within ninety days of the complaint being filed with the commission*, and the person who initially filed the complaint with the commission provided written notice to the attorney general in accordance with RCW 42.17A.755(5) and the attorney general has not commenced an action, or published a decision whether to commence action pursuant to RCW 42.17A.765(1)(b), within forty-five days of receiving the notice;
>
> (b) For matters referred to the attorney general within ninety days of the commission receiving the complaint, the attorney general has not commenced an action, or published a decision whether to commence an action pursuant to RCW 42.17A.765(1)(b), within forty-five days of receiving referral from the commission;
>
> . . . .
>
> (3) To initiate the citizen's action, after meeting the requirements under subsection (2) (a) and (b) of this section, a person must notify the attorney general and the commission that the person will commence a citizen's action within ten days if the commission does not take action authorized under RCW 42.17A.755(1), or the attorney general does not commence an action or publish a decision whether to commence an action pursuant to RCW 42.17A.765(1)(b). The attorney general and the commission must notify the other of its decision whether to commence an action.

RCW 42.17A.775 (emphasis added).

[2] The statute was also amended in 2019. LAWS OF 2019, Reg. Sess., ch. 428, § 40. However, these amendments are not material to this appeal. Thus, we cite the current statute.

As referenced in RCW 42.17A.775(2)(a), the PDC may act on a complaint as authorized by RCW 42.17A.755(1).[3] This statute states:

> The commission may initiate or respond to a complaint, request a technical correction, or otherwise resolve matters of compliance with this chapter, in accordance with this section. If a complaint is filed with or initiated by the commission, the commission must:
>
> (a) *Dismiss the complaint* or otherwise resolve the matter in accordance with subsection (2) of this section, as appropriate under the circumstances after conducting a preliminary review;
>
> (b) Initiate an investigation to determine whether a violation has occurred, conduct hearings, and issue and enforce an appropriate order, in accordance with chapter 34.05 RCW and subsection (3) of this section; or
>
> (c) Refer the matter to the attorney general . . . .

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

C. *Freedom Foundation's Citizen's Action Complaint*

Freedom Foundation argues that this court should construe RCW 42.17A.755 and RCW 42.17A.775 to mean it has authority to file a citizen's action. Specifically, Freedom Foundation argues, "The only natural and logical way to read RCW 42.17A.755(1), and to read it harmoniously with the next subsection (2), is that for the PDC to 'dismiss the complaint' is identical, in legal effect, to actions it may take to 'otherwise resolve the matter . . . .'" Br. of Appellant at 11. We hold that, based on the plain language of RCW 42.17A.755 and RCW 42.17A.775, Freedom Foundation cannot bring a citizen's action following the PDC's timely dismissal of its complaint.

[3] The statute was also amended in 2019. LAWS OF 2019, Reg. Sess., ch. 428, § 38 . However, these amendments are not material to this appeal. Thus, we cite the current statute.

To meet RCW 42.17A.775's prerequisites for a citizen's action, the PDC must fail to take action within 90 days of receiving a complaint. Actions the PDC may take include dismissing the complaint. RCW 42.17A.755(1)(a). Here, the PDC dismissed Freedom Foundation's complaint when it "closed the matter" and did not conduct a formal investigation.[4] CP at 24. The PDC took this action within 90 days of Freedom Foundation filing the complaint. Thus, by the plain language of RCW 42.17A.775, Freedom Foundation does not meet the prerequisites for filing a citizen's action because the PDC acted timely on the complaint.

Freedom Foundation also makes a policy argument that it should be allowed to bring a citizen's action based on the FCPA's general purpose and *Utter v. Bldg. Indus. Ass'n*, 182 Wn.2d 398.[5] Freedom Foundation appears to argue that because the FCPA contains broad policy statements, the legislature cannot amend statutory provisions that Freedom Foundation believes go against those policies. Freedom Foundation is mistaken. *See Associated Press v. Wash. State Legislature*, 194 Wn.2d 915, 930-31, 454 P.3d 93 (2019) (plurality opinion).

[4] Freedom Foundation acknowledges that the PDC dismissed its complaint. Br. of Appellant at 38 ("[T]he Foundation has a clear injury-in-fact that results from the PDC dismissing its complaint.").

[5] Freedom Foundation also quotes *Washington v. Facebook, Inc.*, 2018 WL 5617145 at *1 (W.D. Wash. Oct. 30, 2018), a federal district court opinion which stated, "A citizen may bring an action to enforce the [FCPA] only after the Commission or the Attorney General declines to bring a suit." The issue in that case concerned the State of Washington's motion to remand the matter to state court. The sentence that Freedom Foundation quotes in its briefing is from the facts section and is purely dictum. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914 (2013) ("A statement is dicta when it is not necessary to the court's decision in a case.") Further, as discussed above, this dictum does not comport with the 2018 amendments on the citizen's action requirements.

Further, Freedom Foundation's reliance on *Utter* is misplaced. *Utter* analyzed former RCW 42.17A.765. 182 Wn.2d at 407. Under former RCW 42.17A.765(4), a person could file a citizen's action after giving notice to the attorney general if the attorney general failed to commence an action regarding the alleged FCPA within 45 days. *Utter*, 182 Wn.2d at 407. The former statute did not preclude a citizen's action where the attorney general declined to bring an action. *Utter*, 182 Wn.2d at 412; former RCW 42.17A.765(4).

The 2018 amendments removed the citizen's action provisions from former RCW 42.17A.765 and created RCW 42.17A.775. LAWS OF 2018, Reg. Sess., ch. 304, § 14. The new statute altered the prerequisites for a citizen's action. Now, the PDC must fail to take action, including dismissal, within 90 days of receiving a complaint before a citizen's action may be filed. RCW 42.17A.775; RCW 42.17A.755(1). *Utter* was decided before the 2018 amendments and is not helpful in construing the new language. The plain language of the 2018 amendments to the FCPA are clear. Accordingly, we hold that the trial court did not err when granting the District's motion for summary judgment dismissal of the citizen's action.

II. JUDICIAL REVIEW UNDER THE APA

The District and the PDC argue that Freedom Foundation lacks standing under the APA to challenge the PDC's dismissal of Freedom Foundation's PDC complaint. Freedom Foundation argues that it has standing because it was a party to the PDC complaint and because it suffered harm. We hold that Freedom Foundation lacks standing to challenge the dismissal of its PDC complaint because it was not a party to the PDC complaint, but rather a mere complainant, and because it did not suffer specific and perceptible harm.

We review a trial court's ruling to dismiss a claim under CR 12(b)(6) de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Dismissal is proper if, beyond a reasonable doubt, the plaintiff cannot prove any set of facts that would justify recovery. *Kinney*, 159 Wn.2d at 842.

We also review standing de novo. *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 861, 351 P.3d 875 (2015). A person has standing to obtain judicial review of an agency action if that person is aggrieved or adversely affected by the agency action. RCW 34.05.530. A person is aggrieved or adversely affected only when three conditions are present:

> (1) The agency action has prejudiced or is likely to prejudice that person;
>
> (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
>
> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.530. The first and third prongs are the "injury-in-fact" requirements, and the second prong is the "zone of interest" requirement. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 327, 997 P.2d 360 (2000). All three requirements must be established for a person to have standing. *Allan*, 140 Wn.2d at 326-27. The person or entity challenging the agency action has the burden to prove standing. *KS Tacoma Holdings, LLC v. Shoreline Hr'gs Bd.*, 166 Wn. App. 117, 127, 272 P.3d 876 (2012).

To meet the injury-in-fact test, "a person must allege facts demonstrating that he or she is 'specifically and perceptibly harmed' by the agency decision . . . . When a person alleges a threatened injury, as opposed to an existing injury, the person must demonstrate an 'immediate, concrete, and specific injury to him or herself.'" *Patterson v. Segale*, 171 Wn. App. 251, 259,

289 P.3d 657 (2012) (internal citation omitted) (quoting *Trepanier v. City of Everett*, 64 Wn. App. 380, 382-83, 824 P.2d 524 (1992)). Conjectural or hypothetical injuries are insufficient to confer standing. *Trepanier*, 64 Wn. App. at 383. For an injury-in-fact, Freedom Foundation must show an invasion of a legally protected interest. *Snohomish County Pub. Transp. Benefit Area v. Public Emp't Relations Comm'n*, 173 Wn. App. 504, 513, 294 P.3d 803 (2013).

We hold that Freedom Foundation cannot meet the injury-in-fact test because Freedom Foundation fails to show prejudice. Freedom Foundation argues that it suffered two injuries. The first is the denial of its PDC complaint because it was a party to the PDC proceeding. The second is a "competitive harm" to Freedom Foundation's interests. We address each test in turn.

A. *Freedom Foundation's Status as a Complainant Does Not Confer Standing*

Freedom Foundation argues that, by virtue of being a party to the PDC complaint, it was prejudiced when that complaint was ultimately dismissed. We hold that Freedom Foundation was not a party to the complaint and that Freedom Foundation's status as a complainant does not confer standing.

Under the APA, a party to an agency proceeding is "(a) A person to whom the agency action is specifically directed; or (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding." RCW 34.05.010(12). "Agency action" is "licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits." RCW 34.05.010(3).

The FCPA does not confer standing on a complainant, and a complainant does not have the ability to participate in any proceeding unless requested by the PDC. WAC 390-37-030(1).

However, the PDC is to notify the complainant of any commission hearings and the complainant or any other person may submit documentary evidence to the PDC. WAC 390-37-030.

Freedom Foundation was not a party to the PDC complaint. The PDC action was not specifically directed toward Freedom Foundation, and it was not named or allowed to intervene as a party in any PDC proceeding. Rather, Freedom Foundation retained the status of a complainant and submitted documentary evidence to the PDC during its preliminary investigation. Because Freedom Foundation was not a party to the complaint, it fails to show how its complainant status resulted in a specific and perceptible harm when the PDC denied its complaint.

Freedom Foundation relies on our unpublished decision in *AUTO v. Washington Public Disclosure Commission*.[6] But in *AUTO* we did not consider whether a complainant had standing to petition for review. Rather, we held that the complainant failed to timely file its petition for review, thus, the complainant was time-barred from filing the action. *AUTO* did not consider the question presented in this case.

Freedom Foundation also argues that it is in a better position to file PDC complaints because of its organizational mission. But Freedom Foundation's organizational mission cannot confer standing without a particularized harm or injury. *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972) (plurality opinion). Thus, we hold that Freedom

[6] No. 50652-1-II, slip op. (unpublished) (Wash. Ct. App. May, 14, 2019) http://www.courts.wa.gov/opinions/pdf/D2%2050652-1-II%20Unpublished%20Opinion.pdf.

Foundation was not a party to the PDC complaint and that Freedom Foundation fails to show standing based on its status as a mere complainant.

B. *Freedom Foundation Did Not Suffer Specific and Perceptible Harm*

Freedom Foundation also argues that it suffered harm. Specifically, Freedom Foundation argues it suffered a "competitive harm" because campaign contributions "frustrate the Foundation in achieving its goal to promote the policies embodied in the FCPA." Br. of Appellant at 41. "In other words, the PDC's action creates a precedent, which will undoubtedly be wielded against the Foundation when it later seeks to initiate administrative or judicial complaints based upon similar conduct." Reply Br. of Appellant at 24. We hold that Freedom Foundation fails to show that it suffered harm.

To have standing, Freedom Foundation must be specifically and perceptibly harmed by the PDC's decision. *Patterson*, 171 Wn. App. at 259. This harm cannot be conjectural or hypothetical. *Trepanier*, 64 Wn. App. at 383. Freedom Foundation must show an invasion of some legally protected interest. *Snohomish County Pub. Transp. Benefit Area*, 173 Wn. App. at 513.

To support its argument, Freedom Foundation cites *Snohomish County Pub. Transp. Benefit Area*, 173 Wn. App. at 504.[7] There, a public transportation agency sought judicial review of a decision from the Public Employment Relations Committee (PERC). *Snohomish*

[7] Freedom Foundation also cites *Reagles v. Simpson*, 72 Wn.2d 577, 434 P.2d 559 (1967). But *Reagles* was superseded by the three-pronged standing requirements of RCW 34.05.530, and is not relevant. *Allan*, 140 Wn.2d at 329 n.1 (stating that *Reagles* "cannot control today's interpretation of RCW 34.05.530").

County Pub. Transp. Benefit Area, 173 Wn. App. at 508-09. PERC's decision involved an unfair labor practice complaint which had the effect of taking away the benefit of a rule that affected the transportation agency's negotiation with the employee unions. *Snohomish County Pub. Transp. Benefit Area*, 173 Wn. App. at 514. This court held that the transportation agency had standing based on an economic injury because the decision adversely affected the transportation agency's ability to negotiate with the unions. *Snohomish County Pub. Transp. Benefit Area*, 173 Wn. App. at 513-14. This court recognized the direct economic effect of losing this bargaining leverage. *Snohomish County Pub. Transp. Benefit Area*, 173 Wn. App. at 514.

Here, Freedom Foundation cannot show an economic or competitive injury. Freedom Foundation identifies no direct economic effect or material adverse injury from the PDC's denial of the complaint. Further, Freedom Foundation fails to show any specific or perceptible harm. The mere fact that an unfavorable result could become precedent to Freedom Foundation's potential future litigation is not a harm under RCW 34.05.530. Freedom Foundation fails to show prejudice and as a result, cannot show it has standing to bring an action for judicial review. We hold that the trial court did not err when granting the District's and the PDC's motions and dismissed Freedom Foundation's complaint.[8]

[8] Freedom Foundation also argues that the trial court erred by granting summary judgment because discovery was incomplete and because issues of material fact remained regarding the District's conduct. However, Freedom Foundation failed to move for a continuance to conduct further discovery and as a result, is precluded from raising the issue on appeal. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 24-25, 851 P.2d 689 (1993). Further, issues of facts regarding the District's conduct are not material because Freedom Foundation's lack of authority to bring a citizen's action and lack of standing are dispositive. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004).

ATTORNEY FEES

Freedom Foundation requests an award of attorney fees. RCW 42.17A.775(5), provides for reimbursement from the State for reasonable attorney fees in successful citizen's actions. Here, Freedom Foundation did not prevail in a citizen's action. We deny Freedom Foundation's request for attorney fees.

We affirm.

Worswick, J.

Melnick, J.

Sutton, A.C.J.

APPENDIX B

RCW 42.17A.775

Citizen's action.

(1) A person who has reason to believe that a provision of this chapter is being or has been violated may bring a citizen's action in the name of the state, in accordance with the procedures of this section.

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

(a) The commission has not taken action authorized under RCW **42.17A.755**(1) within ninety days of the complaint being filed with the commission, and the person who initially filed the complaint with the commission provided written notice to the attorney general in accordance with RCW **42.17A.755**(5) and the attorney general has not commenced an action, or published a decision whether to commence action pursuant to RCW **42.17A.765**(1)(b), within forty-five days of receiving the notice;

(b) For matters referred to the attorney general within ninety days of the commission receiving the complaint, the attorney general has not commenced an action, or published a decision whether to commence an action pursuant to RCW **42.17A.765**(1)(b), within forty-five days of receiving referral from the commission; and

(c) The person who initially filed the complaint with the commission has provided notice of a citizen's action in accordance with subsection (3) of this section and the commission or the attorney general has not commenced action within the ten days provided under subsection (3) of this section.

(3) To initiate the citizen's action, after meeting the requirements under subsection (2) (a) and (b) of this section, a person must notify the attorney general and the commission that the person will commence a citizen's action within ten days if the commission does not take action authorized under RCW **42.17A.755**(1), or the attorney general does not commence an action or publish a decision whether to commence an action pursuant to RCW **42.17A.765**(1) (b). The attorney general and the commission must notify the other of its decision whether to commence an action.

(4) The citizen's action must be commenced within two years after the date when the alleged violation occurred and may not be commenced against a committee or incidental committee before the end of such period if the committee or incidental committee has received an acknowledgment of dissolution.

(5) If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but he or she shall be entitled to be reimbursed by the state for reasonable costs and reasonable attorneys' fees the person incurred. In the case of a citizen's action that is dismissed and that the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all trial costs and reasonable attorneys' fees incurred by the defendant.

[2019 c 428 § 40; 2018 c 304 § 16.]

NOTES:

Effective date—Finding—Intent—2019 c 428: See notes following RCW **42.17A.160**.

Finding—Intent—2018 c 304: See note following RCW **42.17A.235**.

APPENDIX C

RCW 42.17A.755

Violations—Determination by commission—Penalties—Procedure.

(1) The commission may initiate or respond to a complaint, request a technical correction, or otherwise resolve matters of compliance with this chapter, in accordance with this section. If a complaint is filed with or initiated by the commission, the commission must:

(a) Dismiss the complaint or otherwise resolve the matter in accordance with subsection (2) of this section, as appropriate under the circumstances after conducting a preliminary review;

(b) Initiate an investigation to determine whether a violation has occurred, conduct hearings, and issue and enforce an appropriate order, in accordance with chapter **34.05** RCW and subsection (3) of this section; or

(c) Refer the matter to the attorney general, in accordance with subsection (4) of this section.

(2)(a) For complaints of remediable violations or requests for technical corrections, the commission may, by rule, delegate authority to its executive director to resolve these matters in accordance with subsection (1)(a) of this section, provided the executive director consistently applies such authority.

(b) The commission shall, by rule, 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 as provided for in this section. Any stipulation must be referred to the commission for review. If approved or modified by the commission, agreed to by the parties, and the respondent complies with all requirements set forth in the stipulation, the matter is then considered resolved and no further action or review is allowed.

(3) If the commission initiates an investigation, an initial hearing must be held within ninety days of the complaint being filed. Following an investigation, in cases where it chooses to determine whether a violation has occurred, the commission shall hold a hearing pursuant to the administrative procedure act, chapter **34.05** RCW. Any order that the commission issues under this section shall be pursuant to such a hearing.

(a) The person against whom an order is directed under this section shall be designated as the respondent. The order may require the respondent to cease and desist from the activity that constitutes a violation and in addition, or alternatively, may impose one or more of the remedies provided in RCW **42.17A.750**(1) (b) through (h), or other requirements as the commission determines appropriate to effectuate the purposes of this chapter.

(b) The commission may assess a penalty in an amount not to exceed ten thousand dollars per violation, unless the parties stipulate otherwise. Any order that the commission issues under this section that imposes a financial penalty must be made pursuant to a hearing, held in accordance with the administrative procedure act, chapter **34.05** RCW.

(c) The commission has the authority to waive a penalty for a first-time violation. A second violation of the same requirement by the same person, regardless if the person or individual committed the violation for a different political committee or incidental committee, shall result in a penalty. Successive violations of the same requirement shall result in successively increased penalties. The commission may suspend any portion of an assessed penalty contingent on future compliance with this chapter. The commission must create a schedule to enhance penalties based on repeat violations by the person.

(d) Any order issued by the commission is subject to judicial review under the administrative procedure act, chapter **34.05** RCW. If the commission's order is not satisfied and no petition for review is filed within thirty days, the commission may petition a court of competent jurisdiction of any county in which a petition for review could be filed under that jurisdiction, for an order of enforcement. Proceedings in connection with the commission's petition shall be in accordance with RCW **42.17A.760**.

(4) In lieu of holding a hearing or issuing an order under this section, the commission may refer the matter to the attorney general consistent with this section, when the commission believes:

(a) Additional authority is needed to ensure full compliance with this chapter;

(b) An apparent violation potentially warrants a penalty greater than the commission's penalty authority; or

(c) The maximum penalty the commission is able to levy is not enough to address the severity of the violation.

(5) Prior to filing a citizen's action under RCW **42.17A.775**, a person who has filed a complaint pursuant to this section must provide written notice to the attorney general if the commission does not, within 90 [ninety] days of the complaint being filed with the commission, take action pursuant to subsection (1) of this section. A person must simultaneously provide a copy of the written notice to the commission.

[**2019 c 428 § 38; 2018 c 304 § 13; 2011 c 145 § 7; 2010 c 204 § 1002; 2006 c 315 § 3; 1989 c 175 § 91; 1985 c 367 § 12; 1982 c 147 § 16;** 1975-'76 2nd ex.s. c 112 § 12. Formerly RCW **42.17.395**.]

NOTES:

Effective date—Finding—Intent—2019 c 428: See notes following RCW **42.17A.160**.

Finding—Intent—2018 c 304: See note following RCW **42.17A.235**.

Findings—Intent—Effective date—2011 c 145: See notes following RCW **42.17A.005**.

Intent—Severability—2006 c 315: See notes following RCW **42.17A.750**.

Effective date—1989 c 175: See note following RCW **34.05.010**.

APPENDIX D

☐ EXPEDITE
☐ No Hearing Set
☒ Hearing is set
Date: July 31, 2020
Time: 9:00 a.m.
Judge/Calendar: Murphy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

FREEDOM FOUNDATION, a Washington nonprofit organization, in the name of the STATE OF WASHINGTON, Plaintiff, v. SERVICE EMPLOYEES INTERNATIONAL UNION POLITICAL EDUCATION & ACTION FUND, an IRS 527 political organization, Defendant.	No. 20-2-01056-34 **[PROPOSED] ORDER GRANTING CR 12(b)(6) MOTION TO DISMISS** *Clerk's Action Required*

This matter came before the Court on Defendant Service Employees International Union Political Education & Action Fund's (SEIU PEAF) Motion to Dismiss. The court heard the oral argument of counsel on July 17, 2020, and also considered the following when reaching its decision:

1. Defendant SEIU PEAF's Motion to Dismiss Complaint, dated April 30, 2020;
2. Plaintiff Freedom Foundation's Response in Opposition to the Motion to Dismiss, dated July 2, 2020;
3. SEIU PEAF's Reply in Support of the Motion to Dismiss, dated July 10, 2020.

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

Being fully advised on the matter, this Court hereby orders as follows:

1. Defendant SEIU PEAF's Motion to Dismiss is GRANTED;
2. This matter is DISMISSED WITH PREJUDICE, in its entirety, on the basis of the plain language of RCW 42.17A.755 and RCW 42.17A.775.

The hearing scheduled for July 31, 2020, is stricken

It is so ORDERED this 29th day of July, 2020.

Carol Murphy
The Honorable Carol Murphy
Thurston County Superior Court Judge

Presented by:

s/Ben Berger
Dmitri Iglitzin, WSBA No. 17673
Ben Berger, WSBA No. 52909
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s/Robert Bouvatte
Robert Bouvatte, WSBA No. 50220
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rbouvatte@freedomfoundation.com

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SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

APPENDIX E

☐ Expedite
☐ No hearing set
☐ Hearing is set
Date:
Time:
Judge/Calendar: Hon. Carol Murphy

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

FREEDOM FOUNDATION, a Washington nonprofit organization, in the name of the State of Washington,

Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION POLITICAL EDUCATION & ACTION FUND, an IRS 527 political committee,

Respondents.

No. 20-2-101056-34

NOTICE OF APPEAL BY PLAINTIFF FREEDOM FOUNDATION

NOTICE IS HEREBY GIVEN that Plaintiff, FREEDOM FOUNDATION, seeks review in the Washington State Court of Appeals, Division II, pursuant to RAP 4.1, of the attached: (1) Order Granting CR 12(b)(6) Motion to Dismiss, dated Wednesday, July 29, 2020 (a true and correct copy of which is attached hereto as **Exhibit 1**).

FREEDOM FOUNDATION
P.O. Box 552, Olympia, WA 98507
P: 360.956.3482 | F: 360.352.1874

Defendant, Service Employees International Union 775, is represented by:

Dmitri Iglitzin, WSBA No. 17673
Benjamin Berger, WSBA No. 52909
Barnard Iglitzin & Lavitt, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
Iglitzin@workerlaw.com
berger@workerlaw.com
woodward@workerlaw.com

RESPECTFULLY SUBMITTED this 19th day of August, 2020.

FREEDOM FOUNDATION

By: _____

Robert Bouvatte, WSBA #50220
PO Box 552, Olympia, WA 98507
PH: 360.956.3482 | F: 360.352.1874
RBouvatte@freedomfoundation.com

DECLARATION OF SERVICE

I, Jennifer Matheson, hereby declare under penalty of perjury under the laws of the State of Washington that on August 19, 2020, I caused the foregoing Notice of Appeal to be filed with the clerk, and caused a true and correct copy of the same to be sent via email and USPS, to the following:

Dmitri Iglitzin, WSBA No. 17673
Benjamin Berger, WSBA No. 52909
Danielle Franco-Malone, WSBA No. 40979
Barnard Iglitzin & Lavitt, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
Iglitzin@workerlaw.com
berger@workerlaw.com
franco@workerlaw.com
woodward@workerlaw.com

Dated: August 19, 2020.

By: _____
Jennifer Matheson

FREEDOM FOUNDATION
P.O. Box 552, Olympia, WA 98507
P: 360.956.3482 | F: 360.352.1874

EXHIBIT 1

☐ EXPEDITE
☐ No Hearing Set
☒ Hearing is set
Date: July 31, 2020
Time: 9:00 a.m.
Judge/Calendar: Murphy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

FREEDOM FOUNDATION, a Washington nonprofit organization, in the name of the STATE OF WASHINGTON,

Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION POLITICAL EDUCATION & ACTION FUND, an IRS 527 political organization,

Defendant.

No. 20-2-01056-34

[PROPOSED] ORDER GRANTING CR 12(b)(6) MOTION TO DISMISS

Clerk's Action Required

This matter came before the Court on Defendant Service Employees International Union Political Education & Action Fund's (SEIU PEAF) Motion to Dismiss. The court heard the oral argument of counsel on July 17, 2020, and also considered the following when reaching its decision:

1. Defendant SEIU PEAF's Motion to Dismiss Complaint, dated April 30, 2020;
2. Plaintiff Freedom Foundation's Response in Opposition to the Motion to Dismiss, dated July 2, 2020;
3. SEIU PEAF's Reply in Support of the Motion to Dismiss, dated July 10, 2020.

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SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP

Being fully advised on the matter, this Court hereby orders as follows:

1. Defendant SEIU PEAF's Motion to Dismiss is GRANTED;
2. This matter is DISMISSED WITH PREJUDICE, in its entirety, on the basis of the plain language of RCW 42.17A.755 and RCW 42.17A.775.

The hearing scheduled for July 31, 2020, is stricken

It is so ORDERED this 29th day of July, 2020.

Carol Murphy
The Honorable Carol Murphy
Thurston County Superior Court Judge

Presented by:

s/Ben Berger
Dmitri Iglitzin, WSBA No. 17673
Ben Berger, WSBA No. 52909
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APPENDIX F

RCW 34.05.010

Definitions. *(Effective until January 1, 2020.)*

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adjudicative proceeding" means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW **66.08.150**, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

(2) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter **42.41** RCW.

(3) "Agency action" means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.

Agency action does not include an agency decision regarding (a) contracting or procurement of goods, services, public works, and the purchase, lease, or acquisition by any other means, including eminent domain, of real estate, as well as all activities necessarily related to those functions, or (b) determinations as to the sufficiency of a showing of interest filed in support of a representation petition, or mediation or conciliation of labor disputes or arbitration of labor disputes under a collective bargaining law or similar statute, or (c) any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests, or (d) the granting of a license, franchise, or permission for the use of trademarks, symbols, and similar property owned or controlled by the agency.

(4) "Agency head" means the individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law. If the agency head is a body of individuals, a majority of those individuals constitutes the agency head.

(5) "Entry" of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective.

(6) "Filing" of a document that is required to be filed with an agency means delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

(7) "Institutions of higher education" are the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, The Evergreen State College, the various community colleges, and the governing boards of each of the above, and the various colleges, divisions, departments, or offices authorized by the governing board of the institution involved to act for the institution, all of which are sometimes referred to in this chapter as "institutions."

(8) "Interpretive statement" means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.

(9)(a) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law, but does not include (i) a license required

solely for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or similar status, under a collective bargaining law or similar statute, or (iii) a license, franchise, or permission for use of trademarks, symbols, and similar property owned or controlled by the agency.

(b) "Licensing" includes the agency process respecting the issuance, denial, revocation, suspension, or modification of a license.

(10) "Mail" or "send," for purposes of any notice relating to rule making or policy or interpretive statements, means regular mail or electronic distribution, as provided in RCW **34.05.260**. "Electronic distribution" or "electronically" means distribution by electronic mail or facsimile mail.

(11)(a) "Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.

(b) "Order of adoption" means the official written statement by which an agency adopts, amends, or repeals a rule.

(12) "Party to agency proceedings," or "party" in a context so indicating, means:

(a) A person to whom the agency action is specifically directed; or

(b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.

(13) "Party to judicial review or civil enforcement proceedings," or "party" in a context so indicating, means:

(a) A person who files a petition for a judicial review or civil enforcement proceeding; or

(b) A person named as a party in a judicial review or civil enforcement proceeding, or allowed to participate as a party in a judicial review or civil enforcement proceeding.

(14) "Person" means any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

(15) "Policy statement" means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

(16) "Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale. The term includes the amendment or repeal of a prior rule, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, (ii) declaratory rulings issued pursuant to RCW **34.05.240**, (iii) traffic restrictions for motor vehicles, bicyclists, and pedestrians established by the secretary of transportation or his or her designee where notice of such restrictions is given by official traffic control devices, (iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit,

graduation and the granting of degrees, employment relationships, or fiscal processes, or (v) the determination and publication of updated nexus thresholds by the department of revenue in accordance with RCW **82.04.067**.

(17) "Rules review committee" or "committee" means the joint administrative rules review committee created pursuant to RCW **34.05.610** for the purpose of selectively reviewing existing and proposed rules of state agencies.

(18) "Rule making" means the process for formulation and adoption of a rule.

(19) "Service," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal or electronic service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company.

[**2014 c 97 § 101; 2013 c 110 § 3; 2011 c 336 § 762; 1997 c 126 § 2; 1992 c 44 § 10; 1989 c 175 § 1; 1988 c 288 § 101; 1982 c 10 § 5.** Prior: **1981 c 324 § 2; 1981 c 183 § 1; 1967 c 237 § 1; 1959 c 234 § 1.** Formerly RCW **34.04.010**.]

NOTES:

Effective dates—1992 c 44: See RCW **42.41.901**.

Effective dates—1989 c 175: "Sections 1 through 35 and 37 through 185 of this act are necessary for the immediate preservation of the public peace, health, or safety, or the support of the state government and its existing public institutions, and shall take effect on July 1, 1989. Section 36 of this act shall take effect on July 1, 1990." [**1989 c 175 § 186.**]

Severability—1982 c 10: See note following RCW **6.13.080**.

Legislative affirmation—1981 c 324: "The legislature affirms that all rule-making authority of state agencies and institutions of higher education is a function delegated by the legislature, and as such, shall be exercised pursuant to the conditions and restrictions contained in this act." [**1981 c 324 § 1.**]

Severability—1981 c 324: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1981 c 324 § 18.**]

RCW 34.05.010

Definitions. *(Effective January 1, 2020.)*

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adjudicative proceeding" means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except

as limited by RCW **66.08.150**, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

(2) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter **42.41** RCW.

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(4) "Agency head" means the individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law. If the agency head is a body of individuals, a majority of those individuals constitutes the agency head.

(5) "Entry" of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective.

(6) "Filing" of a document that is required to be filed with an agency means delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

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(8) "Interpretive statement" means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.

(9)(a) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law, but does not include (i) a license required solely for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or similar status, under a collective bargaining law or similar statute, or (iii) a license, franchise, or permission for use of trademarks, symbols, and similar property owned or controlled by the agency.

(b) "Licensing" includes the agency process respecting the issuance, denial, revocation, suspension, or modification of a license.

(10) "Mail" or "send," for purposes of any notice relating to rule making or policy or interpretive statements, means regular mail or electronic distribution, as provided in RCW **34.05.260**. "Electronic distribution" or "electronically" means distribution by email or fax.

(11)(a) "Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.

(b) "Order of adoption" means the official written statement by which an agency adopts, amends, or repeals a rule.

(12) "Party to agency proceedings," or "party" in a context so indicating, means:

(a) A person to whom the agency action is specifically directed; or

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(13) "Party to judicial review or civil enforcement proceedings," or "party" in a context so indicating, means:

(a) A person who files a petition for a judicial review or civil enforcement proceeding; or

(b) A person named as a party in a judicial review or civil enforcement proceeding, or allowed to participate as a party in a judicial review or civil enforcement proceeding.

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(15) "Policy statement" means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

(16) "Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale. The term includes the amendment or repeal of a prior rule, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, (ii) declaratory rulings issued pursuant to RCW **34.05.240**, (iii) traffic restrictions for motor vehicles, bicyclists, and pedestrians established by the secretary of transportation or his or her designee where notice of such restrictions is given by official traffic control devices, or (iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit, graduation and the granting of degrees, employment relationships, or fiscal processes.

(17) "Rules review committee" or "committee" means the joint administrative rules review committee created pursuant to RCW **34.05.610** for the purpose of selectively reviewing existing and proposed rules of state agencies.

(18) "Rule making" means the process for formulation and adoption of a rule.

(19) "Service," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal or electronic service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company.

[**2019 c 8 § 701; 2014 c 97 § 101; 2013 c 110 § 3; 2011 c 336 § 762; 1997 c 126 § 2; 1992 c 44 § 10; 1989 c 175 § 1; 1988 c 288 § 101; 1982 c 10 § 5.** Prior: **1981 c 324 § 2; 1981 c 183 § 1; 1967 c 237 § 1; 1959 c 234 § 1.** Formerly RCW **34.04.010**.]

NOTES:

Effective date—2019 c 8 §§ 102,103, 107, and 701-703: See note following RCW **82.04.067**.

Existing rights and liability—Retroactive application—2019 c 8: See notes following RCW **82.02.250**.

Effective dates—1992 c 44: See RCW **42.41.901**.

Effective dates—1989 c 175: "Sections 1 through 35 and 37 through 185 of this act are necessary for the immediate preservation of the public peace, health, or safety, or the support of the state government and its existing public institutions, and shall take effect on July 1, 1989. Section 36 of this act shall take effect on July 1, 1990." [**1989 c 175 § 186.**]

Severability—1982 c 10: See note following RCW **6.13.080**.

Legislative affirmation—1981 c 324: "The legislature affirms that all rule-making authority of state agencies and institutions of higher education is a function delegated by the legislature, and as such, shall be exercised pursuant to the conditions and restrictions contained in this act." [**1981 c 324 § 1.**]

Severability—1981 c 324: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1981 c 324 § 18.**]

FREEDOM FOUNDATION

September 03, 2020 - 1:07 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53415-1
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