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BY 

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

ALICIA GREEN, on behalf of herself and all others similarly situated,

Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL
AND HEALTH SERVICES,

Appellant.

REPLY BRIEF OF DEPARTMENT

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I. ARGUMENT

A. **The Department Properly Interpreted And Applied Its Rule Consistent With Its Limited Statutory Authority To Spend Public Money**

Despite lengthy attempts to justify her proposed interpretation of the Department's food assistance regulations, Ms. Green offers no sound reason for ignoring the fundamental issue: the Department has limited *statutory* authority to operate a food assistance program and her interpretation of its regulation is contrary to that statutory power.

Notably, Ms. Green does not dispute that the source of the Department's authority to spend public dollars—in this case, *federal* dollars—on a food assistance program arises under RCW 74.04.500 and .510, which require the Department to operate its food assistance program consistent with the Federal Food Stamp Act. Nor does she refute that, at all times relevant to this lawsuit, the Department's calculation of food benefits complied with the Federal Food Stamp Act and RCW 74.04.500 and .510. Nor does she deny that her proposed interpretation conflicts with Federal Food Stamp Act requirements, which results in a conflict with RCW 74.04.500 and .510. In light of these statutory mandates and the Department's reasoned explanation for interpreting the rule, the Court should reject Ms. Green's argument that the Department is simply bound by "plain language" of its regulations.

1. The Record Shows That The Department Never Intended To Apply The Earned Income Deduction Of WAC 388-450-0175 To Food Assistance

WAC 388-450-0162(1)(b) was a compressed regulation that calculated “countable income” for both cash and food assistance programs by allowing deductions under a set of rules in “WAC 388-450-0170 to 0200.” In 2006, the Department amended one of those rules, WAC 388-450-0175, eliminating language that had clearly precluded application of the deductions contained therein to food assistance. By July 1, 2008, however, the Department had amended WAC 388-450-0175 once again to clarify that the deduction applied only to General Assistance cash grants.¹

Furthermore, the record shows that the Department gave notice of its continuing intent to comply with the Federal Food Stamp Act and RCW 74.04.500 and .510 when amending WAC 388-450-0175 in May 2006. CAR at 000499, 000505–510, 000547–561, 000564, 000583. This included a statement that 7 CFR § 273.9 (under the Federal Food Stamp Act) required the Department to change its regulations related to

¹ Ms. Green’s brief at 13-14 shows the 2006 amendment in “bill drafting” format. The 2006 amendment changed the heading from an unambiguous phrase showing that it applied only to General Assistance into a more ambiguous statement (from “GA-U earned income incentive and deduction” to “Does the department offer an income deduction as an incentive to GA-U clients to work?”) Thus, after the 2006 amendments, the heading of the rule still focused on GA-U clients, but the 2006 amendment also deleted a phrase where the regulation stated “This section applies to the GA-U cash assistance program.” As explained by John Camp, the phrase was deleted because it was viewed as unnecessary, not to expand the deduction to Food Assistance. Finding 14, AR 0000003; Finding 16, AR 0000004.

countable income and that “RCW 74.04.510 requires the department to adopt rules consistent with Federal requirements for administration of the Food Stamp Program.” CAR 000004, 000499, 000509.

Notably, nothing in the rule-making file indicated that the Department intended to expand application of the income deductions in WAC 388-450-0175 to food assistance benefits. Thus, the reading urged by Ms. Green was not discussed anywhere during the 2006 amendment.

2. Ms. Green’s Interpretation Results In Significant Public Expenditures Contrary To Statute

This case should be resolved on the basis that the Department cannot act outside the boundaries of its statutory mandate to operate Basic Food consistent with the requirements of the Federal Food Stamp Act. Thus, while Ms. Green’s interpretation of the text of WAC 388-450-0162(1)(b) and -0175 is plausible, it conflicts with federal Food Stamp Act requirements and violates the Department’s statutory authority.

Ms. Green summarily dismisses RCW 74.04.500 and .510, saying that, “at most, . . . this statutory mandate suggests that the [Department’s] March 2006 amendment of WAC 388-450-0175 removing the limiting language was inadvertent rather than intentional.” *Brief of Resp.* at 24. Ms. Green’s theory is fundamentally flawed; it would have an administrative agency overcome a statutory directive by simply adopting a

rule. It is established law in Washington that “[a]dministrative rules may not amend or change enactments of the legislature.” *Juanita Bay Valley Cmty. Ass’n v. City of Kirkland*, 9 Wn. App. 59, 79, 510 P.2d 1140 (1973) (citing *State ex rel West v. Seattle*, 50 Wn.2d 94, 309 P.2d 751 (1957)). “Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication.” *State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979). As a consequence,

[i]n exercising the rule-making power, . . . administrative officers . . . must act within the limits of the power granted to them. . . . The basis for that proposition is, of course, that rules and regulations which have the effect of extending, or which conflict in any manner with, the authority-granting statute do not represent a valid exercise of authorized power, but, on the contrary, constitute an attempt by the administrative body to legislate.

State v. Miles, 5 Wn.2d 322, 325-326, 105 P.2d 51 (1940) (citations omitted); *see also State v. Munson*, 23 Wn. App. at 525. Legislative rules must be “*within the agency's delegated authority . . .*” *Ass'n of Wash. Bus. v. Dep't of Rev.*, 155 Wn.2d 430, 446-47, 120 P.3d 46 (2005) (citing *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 314-15, 545 P.2d 5 (1976)) (emphasis added).

The statutory limits on the Department’s food assistance program preclude inclusion of the deduction in former WAC 388-450-0175, even

assuming that the language of that rule could be misread to apply to food assistance. This is necessarily so because statutory limits are superior to Ms. Green's mechanical reliance on "plain language." Indeed, Ms. Green's rejection of the statutory limits would have serious consequences, because it would allow an agency to adopt a regulation (intentionally or inadvertently) to spend public money contrary to its statutory authority. For example, if the Washington legislature mandated by statute that public assistance recipients receive no more than \$100 per month, the Department could, under Ms. Green's argument, circumvent such a limitation by adopting a rule. To have the force of law, a rule must not contradict statutorily delegated authority; a rule adopted beyond such authority is invalid and void. *See Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004); RCW 34.05.570(2)(c).²

² This approach is also consistent with Washington's long established ultra vires doctrine. In *Finch v. Mathews*, 74 Wn.2d 161, 443 P.2d 833 (1968), the Court explained how "ultra vires and void" applied to matters "wholly without legal authorization or in direct violation of existing statutes".

This court has long recognized that in determining what acts of a governing body are ultra vires and void, and thus immune from the application of the doctrine of equitable estoppel, *it must distinguish those acts which are done wholly without legal authorization or in direct violation of existing statutes*, from those acts which are within the scope of the broad governmental powers conferred, granted or delegated, but which powers have been exercised in an irregular manner *or through unauthorized procedural means*.

Id. at 172 (emphasis added).

3. Case Law Recognizes That An Agency May Interpret A Rule To Avoid Violating Express Limits On Statutory Authority

Courts have long held that rules must be interpreted and applied consistent with the agency's enabling statute where possible; in the event of conflict, statutory provisions must prevail. *See Colgate-Palmolive-Peet Co., v. NLRB*, 338 U.S. 355, 362-64, 70 S. Ct. 166, 94 L. Ed. 161 (1949); *see also Cobra Roofing Service, Inc. v. Dep't of Lab. & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004). The authority cited by Ms. Green does not suggest otherwise.

For instance, in *Cubanski v. Heckler*, 781 F.2d 1421, (9th Cir. 1986), the 9th Circuit did *not* hold that "legislative rules which have been promulgated through required rule-making procedures carry the force of law." *Brief of Resp.* at 27. Rather, the 9th Circuit confirmed that rules must be "issued by an agency *pursuant to statutory authority*" to have the force of law. *Cubanski*, 781 F.2d at 1426 (emphasis added).

Ms. Green's other authorities similarly fail to demonstrate that an agency would be bound to an interpretation of a regulation that would conflict with statute. For instance, in *U.S. v. Nixon*, 418 U.S. 683, 694-95, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) the Supreme Court held that the Attorney General was bound by the plain language of an unambiguous regulation delegating authority to a special prosecutor; the Court

specifically noted, however, that the regulation had been adopted pursuant to statutory authority. *Nixon*, 418 U.S. at 694-695. In *Panhandle Eastern Pipe Line Company v. Federal Energy Regulatory Commission*, 613 F.2d 1120, (D.C. Cir. 1979), the D.C. Circuit held that the Federal Energy Regulatory Commission (FERC) could not willfully ignore an unambiguous regulation related to gas rates. *Panhandle*, 613 F.2d at 1135. In that case, the court specifically noted that any issue as to the FERC's regulations "alter[ing] the statutory scheme" was *not* presented for appeal. *Panhandle*, 613 F.2d at 1134, fn.69. Likewise, in *Exportal LDTA v. U.S.*, 902 F.2d 45, 49 (D.C. Cir. 1990), the court noted that the scope of the agency's authority was not at issue. *Exportal*, 902 F.2d at 49.

Moreover, contrary to Ms. Green's brief, the D.C. Circuit recognizes an exception to the general rule that a federal agency is bound by its own regulations where the regulations are inconsistent with a statute. *See Tunik v. Merit Systems Protection Board*, 407 F.3d 1326, 1345-46 (D.C. Cir. 2005); *see also Am. Tel. & Tel. Co. v. Fed. Comm'n Comm'n*, 978 F.2d 727, 733 (D.C. Cir. 1992) ("We have never held . . . that an agency is obliged to apply a rule in an adjudicatory context if intervening events indicate that the rule is unlawful."); *see also Am. Fed. of Gov't Employees, AFL-CIO, Local 3090 v. Fed Labor Relations Auth.*, 777 F.2d 751, 760 (D.C. Cir. 1985)(Scalia, J., concurring). ("Perhaps there

are situations in which we would be justified in looking beyond the defect of inconsistency, to affirm an adjudication on the ground that its result was mandated by statute and that the conflicting rule was simply unlawful.”).

More importantly, Washington law does not support Ms. Green’s assertion that the Department must interpret a rule contrary to statutory authority based on mechanical application of the plain language rule. As a threshold matter, none of the Washington cases Ms. Green cites involved consideration of whether the plain language of a rule conflicted with a statute. The court in *Kabbae v. Dep’t of Soc. & Health Servs.*, 144 Wn. App 432, 444, 192 P.3d 903 (2008) expressly noted that “[I]n *Costanich*, . . . we did not address whether WAC 388-02-0600(2)(e) conflicts with RCW 34.05.464(4).” *Kabbae*, 144 Wn. App at 444, citing *Costanich v. Dep’t of Soc. & Health Servs.*, 138 Wn. App 547, 554, 156 P.3d 232 (2007).

Washington law also emphasizes that “[c]onstrutions that would yield ‘unlikely’ or ‘absurd’ results should be avoided.” *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007). Under Washington rules of construction,³ if a literal interpretation is absurd, the legislation or rule is ambiguous and the court should move on to examine legislative history and use judicial canons of statutory interpretation. *See In re Det. of*

³ Washington courts interpret administrative rules by applying rules of statutory construction. *See Mader v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003).

Martin, 163 Wn.2d 501, 509-13, 182 P.3d 951 (2008); *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242-43, 88 P.3d 375 (2004); *State v. Taylor*, 97 Wn.2d 724, 729-30, 649 P.2d 633 (1982). A statute is absurd if its plain meaning is in direct conflict with another statute so as to render either statute meaningless. *Martin*, 163 Wn.2d at 509-13. Applying *Martin* in this context, a rule is absurd, and thereby ambiguous and subject to construction, if the alleged plain meaning is in direct conflict with a statute so as to render its provisions meaningless.

Here, the Department's food assistance regulations are ambiguous for that very reason. If the language of WAC 388-450-0162, -0175, and -0185 is read as Ms. Green contends, it conflicts with the mandate in RCW 74.04.500 and .510 to operate Basic Food consistent with Federal Food Stamp Act requirements. Again, Ms. Green does not deny that her "plain language" interpretation of WAC 388-450-0162 and -0175 conflicts with Federal Food Stamp Act requirements; she simply asserts that the agency should be bound regardless of the statute.

Furthermore, read in context, the 2006 amendment is not unambiguous; instead, it reflects the Department's interpretation. For example, Ms. Green wrongly suggests that all the "deduction regulations" referenced by WAC 388-450-0162(1)(b) contain language that makes them program specific, except for WAC 388-450-0175, justifying

applying that to the Food Assistance program. *Brief of Resp.* at 23. She ignores the title to section 0175, which remained specific to the General Assistance program, because it stated: “Does the department offer an income deduction as an incentive to *GA-U clients* to work?”

Moreover, the context for the deduction in section 0175 includes the general rule on food assistance, WAC 388-450-0040. This “overview rule” of Basic Food mentions only the deductions in WAC 388-450-0185, not section 0175. Thus, the Department’s interpretation is consistent with the context of the rule and its rulemaking intent, such that a reviewing court may give appropriate deference to the Department’s interpretation. e.g. *ZDI Gaming Inc. v. State ex rel. Wash. State Gambling Comm’n.*, 151 Wn. App. 788, 806, 214 P.3d 938 (2009).

Finally, Ms. Green’s own analysis explains why a reviewing court may affirm the Department’s legal conclusion that it inadvertently omitted language limiting the application of the earned income deductions of WAC 388-450-0175 to general assistance benefits. As cited by Green:

[where] the omission makes the “statute entirely meaningless” . . . [t]his court will compensate . . . if “it is ‘imperatively required to make it a rational statute.’ ”

Martin, 163 Wn.2d at 512–513 (citations omitted). In short, the Department’s food assistance program cannot both comply with and

violate the Federal Food Stamp Act. Accordingly, it is appropriate to construe the language in WAC 388-450-0175 as limited to GA-U clients.

4. The Department Properly Explained Why Compliance With Statutory Authority Was Necessary, Even In The Face Of An Alleged Inconsistency With The Language Of The Rule

The Legislature expressly contemplates that an agency may have a compelling reason to address inconsistency with a rule during an adjudication. Specifically, the judicial review provisions of the Administrative Procedures Act (APA) direct a court to reverse an agency order that is inconsistent with a rule, but subject to an explicit exception: “unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for the inconsistency.” RCW 34.05.570(3)(h). Here, the order properly concluded that the earned income deductions of WAC 388-450-0175 were not applicable when calculating Ms. Green’s Food Assistance benefits and the Department explained that the alleged inconsistency between the order rejecting Ms. Green’s argument and the rule itself reflected the statutory limits on Food Assistance benefits. AR 000004–9. The Department specifically addressed why Ms. Green’s mechanistic approach to the rule would render these statutory limitations meaningless, a result that would be inconsistent

with the Legislature's plainly stated intent under RCW 34.05.570(3) and nowhere intended by the context or intent of the rule.

Accordingly, the superior court judgment reversing the Department's order on Ms. Green's Food Assistance should be reversed, and the Department's order should be affirmed. Even if the 2006 amendment implies that Ms. Green could claim the General Assistance deduction for earned income, the limits on the Department's statutory authority were clear, as is the context of the rule, and there was never any intent to extend that deduction to Ms. Green's situation.

B. The Court Erred By Certifying A Class Where Ms. Green's Claim Was Not Typical Of Class Members' Claims And Where Class Members Did Not Meet Statutory Requirements For Judicial Review

Again, if this Court concludes that the Department's interpretation of the regulation was correct, then the class certification issues described below are mooted because the class members' legal arguments will correspondingly fail. However, the Court may, in the alternative, reverse the superior court's judgment as to the class because class members did not maintain viable claims under RCW 34.05.570(3)(d) and therefore it was an abuse of discretion to certify the class.

Despite Ms. Green's vigorous defense of the trial court's certification of the class, the record does not show how the trial court

concluded that Ms. Green’s claim—judicial review of her order on benefits—was typical of class members’ claims under CR 23. It was the trial court’s duty to articulate how, at the time Ms. Green filed her lawsuit, each class member could independently maintain a viable cause of action that included the same legal theory as that asserted by Ms. Green. *See Washington Educ. Ass’n v. Shelton Sch. Dist. No. 309*, 93 Wn.2d 783, 793, 513 P.2d 769 (1980); *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007); *Oda v. State*, 111 Wn. App. 79, 92-94, 44 P.3d 8 (2002); *rev. den.* 147 Wn.2d 1018, 45 P.3d 992 (2002). Given that Ms. Green’s precise claim is that she and class members sought review *only* under RCW 34.05.570(3)(d),⁴ the trial court had to articulate how, on March 25, 2009, all class members were similarly maintained and had a viable cause of action for judicial review under RCW 34.05.570(3)(d). CP 118. As explained below, Ms. Green’s attempt to justify a class action in these circumstances should be rejected.

1. Class Certification Was Untenable Because Judicial Review Under RCW 34.05.570(3)(d) Requires That A Party Receive An Agency Order

It is illogical to certify a class for judicial review of an agency adjudicative *order* when class members did not obtain any adjudicative

⁴ After the trial court certified the class, Ms. Green abandoned claims under RCW 34.05.570(3)(h) and (i) that the order was inconsistent with a rule and arbitrary and capricious; she relied, instead, on the sole claim that the Department had erroneously interpreted or applied the law, a standard of review unique to .570(3)(d). CP 118.

orders for the court to review. To counter this, Ms. Green relies on the court's ruling waiving the requirement that class members exhaust available administrative remedies, suggesting that the trial court thus allowed class members to obtain review under RCW 34.05.570(3) without obtaining an agency order. *See Brief of Resp.* at 32–34. Ms. Green's reliance on the court's "waiver of exhaustion" flies in the face of established legal authority, which holds that the jurisdiction of the superior court to review agency action may be invoked only through strict compliance with the APA's statutory filing and service requirements.

"The superior court and the parties are bound by the statutory mandate of the APA, and it is the statutory procedural requirements which must be met to invoke subject matter jurisdiction." *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 217, 103 P.3d. 193 (2004) (citations omitted). Non-compliance with these requirements fails to invoke the jurisdiction of the superior court's jurisdiction; the result is dismissal. *Skagit Surveyors & Eng'rs, LLC. v. Friends of Skagit Cy.*, 135 Wn.2d 542, 555-557, 958 P.2d 962 (1998).

Oda v. State, does not support Ms. Green's proposition that the requirements of RCW 34.05.542(2) may be waived. *Oda* simply held that the Legislature's broad waiver of sovereign immunity under RCW

4.92.090⁵ encompassed class actions *in tort* and that, once a tort action is properly commenced against the State, class members need not provide separate notice under RCW 4.92.110. *Oda*, 111 Wn. App. at 86, 88.

This case is more like *Lacey Nursing Ctr. v. Dep't of Rev.*, 128 Wn.2d 40, 905 P.2d 338 (1995), discussed in *Oda*. In *Lacey Nursing*, the superior court erred by certifying a class of persons seeking tax refunds based on a common legal issue. The court noted that there are “specific conditions upon taxpayers seeking excise tax refunds” and that to maintain a statutory cause of action for monetary relief, the entire class must show that it fulfilled the requirements set out in statute. *Id.* at 50.⁶

RCW 82.32.180 imposes specific requirements applicable to excise tax refund suits which were not met by Respondents. Under this circumstance, the trial court's certification of this case as a class action was manifestly unreasonable and based upon untenable grounds. *The Respondents did not satisfy the statutory requirements* of RCW 82.32.180. [Footnote omitted.] And, logically, unnamed and unidentified plaintiffs in a class action could not satisfy those requirements. We therefore reverse the decision of the trial court that an excise tax refund lawsuit could be maintained as a class action under RCW 82.32.180.

Id. at 51-52 (emphasis added).

⁵ RCW 4.92.090 provides that “The state of Washington . . . shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.”

⁶ “Under the statute taxpayers must (1) identify themselves, (2) state the correct amount of tax each concedes to be the true amount, (3) state reasons why the tax should be reduced or abated, and then (4) prove that the tax paid by the taxpayer is incorrect. The taxpayer must satisfy those specific conditions to initiate an excise tax refund appeal.” *Lacey Nursing*, 128 Wn. 2d at 50.

The APA similarly imposes requirements limiting the availability of judicial review, the remedies, and the scope. Thus, while the state’s waiver of sovereign immunity for tort liability is broad, allowing for the forgiveness of noncompliance with tort claim notice in *Oda*, the APA’s limited waiver of immunity make this case just like *Lacey Nursing*. This is reflected in the APA, which states that court rules regarding “class actions” are applicable only “*to the extent not inconsistent with this chapter . . .*” RCW 34.05.510(2).

Furthermore, the requirements Ms. Green seeks to bypass are very different from the tort claim notice addressed in *Oda*. Ms. Green seeks to waive the requirement that a party participate in an adjudication and obtain an order for the court to review under RCW 34.05.570(3).⁷ This APA requirement is fundamental to ensuring exhaustion of remedies and ensuring that an agency may correct errors without resort to courts. *See* RCW 34.05.534. Second, as discussed in the next subsection, Ms. Green seeks to bypass the jurisdictional requirement that a party seek judicial review of such an order within 30 days. The jurisdictional time limit, together with the adjudication requirement, ensures finality for unappealed agency decisions and agency adjudications. *See* RCW 34.05.542(2).

⁷ Notably, the APA already allows a party to seek direct review under RCW 34.05.570(4) without participating in an adjudication and obtaining an order.

Finally, Ms. Green's reliance on the superior court's waiver of exhaustion to excuse the lack of adjudicative orders for class members is contrary to the record, which shows that it arose in a different context. The Department argued that Ms. Green's class-based claims had no common adjudication or record and therefore class members' claims could only fall within the category of "other agency action" under RCW 34.05.570(4) as a means to review the Department's grant of food benefits. Based on that premise, the Department showed that the class needed to demonstrate a basis for waiver of exhaustion under RCW 34.05.534, because the class members had undoubtedly failed to use available administrative remedies. CP 90–94. When the trial court excused exhaustion, it responded to this specific argument. *See* June 18, 2009 VRP at 6–7. The court gave no indication, however, that it was also waiving the time and filing requirements of RCW 34.05.542.⁸

The class members did not have the independent ability to seek review of an agency order under RCW 34.05.570(3) because they did not have agency orders to review. As a consequence, they did not maintain a viable cause of action that included the same legal theory as that asserted

⁸ Ms. Green and the class members disclaimed review under "other agency action." June 9, 2009 VRP at 28–29, 38–39. "Other agency action", however, would not have provided the remedy sought by the class because RCW 34.05.542(3) requires such a petition to be filed within 30 days of the "action." This would have limited review to actions on benefits within the 30 days prior to the 2009 complaint.

by Ms. Green under RCW 34.05.570(3)(d). As in *Lacey Nursing*, it was an abuse of discretion to certify a class for claims under RCW 34.05.570(3), and the certification should be reversed.

2. RCW 34.05.542 Governs Time Limits For APA Claims

Ms. Green does not defend the trial court's conclusion that class members' claims were timely under RCW 34.05.542. CP 110; *Brief of Resp.* at 38. Nor does she deny that, to the extent that their claims arose under RCW 34.05.570(3), class members did not comply with the 30-day time-for-filing limit of RCW 34.05.542(2).

Instead, Ms. Green raises a new argument: that RCW 34.05.542 does not bar class members' claims under the APA, and that the applicable statute of limitations arose under WAC 388-410-0040(3) and Federal Food Stamp Act regulations. Ms. Green's argument errs in claiming that these regulations supersede the APA's requirements.

First, RCW 34.05.542 unambiguously governs time limits for petitions for judicial review under RCW 34.05.570. As described above, the court is bound by the APA's statutory mandate and noncompliance affects jurisdiction and requires dismissal. e.g. *Diehl*, 153 Wn.2d at 217. Thus, WAC 388-410-0040(3) cannot alter the applicable APA time limitations under RCW 34.05.542; nor does it function as a stand-alone statute of limitation for an APA claim.

Rather, WAC 388-410-0040(3) provides recipients with an opportunity to “reopen the book” with the Department on the prior twelve months of food assistance. Under this rule, a recipient may ask the Department to restore assistance that he believes was underpaid during the prior twelve months. If the Department denies such a request, a party may request a hearing within 90 days under RCW 74.08.080. WAC 388-410-0040(4) (“The client may request a fair hearing if they disagree with the amount of benefits the department determines were underpaid.”). WAC 388-410-0040(3) does *not* alter the strict requirements of RCW 34.05.542; it simply allows a person to seek remedy directly from the Department for underpayment.

The federal provisions cited by Ms. Green also fail to justify allowing the class to seek judicial review in an untimely petition. Ms. Green does not allege that the Department has underpaid her (or any class member) Food Stamp benefits required by federal law. Nor does she refute that, at all times relevant to this lawsuit, the Department’s calculation of Ms. Green’s and class members’ food benefits complied with the Federal Food Stamp Act.⁹

⁹ As laid forth in its opening brief, the Department’s food stamp calculations included a standard deduction, 20 percent earned income deduction, and deductions for allowable dependent care, medical costs, child support and shelter, as required by federal law. *See* 7 U.S.C. § 2014(d), (e)(1)-(6), § 2017; *Opening Brief* at 4–7.

Despite this, Ms. Green alleges that the Federal Food Stamp Act compels the Department to provide additional benefits. But her interpretation would violate the Federal Food Stamp Act by augmenting its mandatory benefit calculation with two additional income deductions (namely, \$85 plus 50 percent of the remainder of a client's earned income, plus an additional 20 percent of the client's earned income). The Court should reject any argument that the Federal Food Stamp Act compels the Department to violate the Federal Food Stamp Act.

In sum, class members could not assert a timely cause of action under RCW 34.05.570(3)(d) when Ms. Green filed her lawsuit on March 25, 2009. A lawsuit under RCW 34.05.570(3) must be filed within 30 days of service of a final order. RCW 34.05.542(2). No class member received an order during the 30 days prior to filing and they had no claims akin to Ms. Green's claim under RCW 34.05.570(3).

3. Equitable Tolling Does Not Resurrect Class Claims

Ms. Green does not dispute that the 30-day time limit under RCW 34.05.542(2) is jurisdictional and may not be equitably tolled. Instead, Ms. Green contends that WAC 388-410-0040(3) and the federal Food Stamp Act provide the only applicable time limits for class members' claims under RCW 34.05.570(3). As shown above, neither WAC 388-410-0040 nor the federal Food Stamp Act provisions bypass the

jurisdictional requirements of the APA for judicial review of an agency order. Ms. Green's argument in support of the trial court's decision to equitably toll class members' claims therefore fails.

The federal authority cited by Ms. Green does not alter the equation. Both *Bowen v. City of New York*, 476 U.S. 467, 106 S. Ct. 2022, 90 L. Ed. 2d 462, (1986), and *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. CA 1984) involved federal statutes unrelated to the APA that included time limits specifically held to be non-jurisdictional. Notably, those cases also involved constitutional claims and egregious behavior not remotely similar to the alleged misapplication of a rule regarding calculation of income, as alleged here.¹⁰

Even if time limits for judicial review were subject to tolling, Ms. Green's argument for tolling relies on false factual allegations, matters that were not presented to or considered by the trial court, and matters that, even if accepted as true, have no bearing. More specifically, she now alleges that the Department actively misleads food assistance recipients regarding their rights under the Federal Food Stamp Act. To the

¹⁰ *Bowen* involved the Social Security Administration's application of a "fixed clandestine policy against those with mental illness." *Bowen*, 476 U.S. at 474 (citation omitted). *Lopez* involved "the executive branch defying the courts and undermining what are perhaps the fundamental precepts of our constitutional system – the separation of powers and respect for the law." *Lopez*, 725 F.2d at 1497 (citations omitted).

contrary, the Department's regulations and actions are consistent with federal requirements, which state:

A household shall be allowed to request a hearing on any action by the State agency or loss of benefits which occurred in the prior 90 days. Action by the State agency shall include a denial of a request for restoration of any benefits lost more than 90 days but less than a year prior to the request.

7 C.F.R. § 273.15(g). As described above, the Department's rule allows food assistance recipients to both request restoration of any benefits allegedly underpaid during the previous year and 90 days to contest a denial. WAC 388-410-0040(3), (4); *see also* RCW 74.08.080.¹¹

C. If A Remedy Exists For The Class, WAC 388-410-0040(3) Only Requires That Underpaid Benefits Be Paid Back To March 25, 2008.

Ms. Green abandons her plain language approach to regulatory interpretation for the purpose of defending the trial court's decision to order the Department to provide benefits to class members back to March 26, 2007. Contrary to Ms. Green's claims, the plain language of WAC 388-410-0040(3)¹² is unambiguously client-specific. At best,

¹¹ Ms. Green's reliance on the provisions of 7 C.F.R. § 273.15(g) to justify tolling or a different time limit for judicial review is also without merit because neither Ms. Green nor members of the class she represents are aggrieved under the Federal Food Stamp Act.

¹² WAC 388-410-0040(3) provides: "A client is eligible for restoration of underpaid benefits for any of the twelve months prior to: (a) The month the client requests restoration; (b) The month the department discovers an underpayment; (c) The date the household makes a fair hearing request when a request for restoration of benefits was not received; or (d) The date court action was started when the client has taken no other action to obtain restoration of benefits."

treating the complaint as a request by clients, it would only result in benefits for twelve months prior to March 25, 2009.¹³ Of course, the Department had amended the rule by July 1, 2008, to eliminate the basis for the class members' claim.

Prior to the lawsuit, no individual class member sought restoration of benefits, the Department did not discover any particular underpayment, and no client's household made a fair hearing request. Assuming there can be any judicial review remedy, WAC 388-410-0040(3) at best provides that Ms. Green's lawsuit triggers the twelve-month "look-back" for restoration for each class member. Again, Columbia Legal Services' (CLS) March 26, 2008, letter is *not* applicable because it was not sent on behalf of any particular class member; it identified no client,¹⁴ and by her counsel's own admission, Alicia Green did not obtain CLS as counsel until April 21, 2008, four weeks after the letter. CAR 000184. Moreover, James Davis received the maximum allotment. CAR 000185–187.

Ms. Green's allegation that the Department prevented her from filing an earlier lawsuit is untrue. In the first instance, the trial court dismissed Ms. Green's prior lawsuit because it was untimely and time-

¹³ Again, the federal provisions cited by Ms. Green do not apply because neither Ms. Green nor the members of the class she represents are aggrieved under federal law.

¹⁴ Had the letter identified a particular client, the Department could have provided a response specific to that client, as provided under WAC 388-410-0040(3). Assuming the Department denied such a request, it could have been separately appealed under RCW 74.08.080, as described under WAC 388-410-0040(4).

barred under the APA.¹⁵ CAR 000194. Thus, contrary to Ms. Green's contention, exhaustion was largely irrelevant in that case.

In addition, the Department actively encouraged Ms. Green to request an administrative hearing regarding her March 2008 food assistance. In answer to her prior lawsuit, it stated, "To the extent that there is still time to do so, Alicia Green should request an administrative hearing as soon as possible if she disagrees with the calculation of her benefits." CAR 000158. Of her own accord, Ms. Green rejected the Department's suggestion. Instead, after the trial court dismissed her lawsuit, she requested a hearing regarding subsequent food benefits.

D. Attorney's Fees

Attorney's fees should be denied because neither Ms. Green nor the class should prevail. If Ms. Green prevails individually and the court reverses class certification, then her fees fall under RCW 74.08.080(3).

If the class were to prevail, RCW 74.08.080(3) has no application because that statute is limited to persons who seek timely review of an agency adjudicative order. Here, Ms. Green stands in a representative capacity for a class of persons who did *not* seek timely review of agency adjudicative orders and therefore this statute does not apply. A statute awarding attorneys' fees against the state must be strictly construed

¹⁵ The facts and legal theories alleged by Ms. Green in that lawsuit were different from the facts and legal theories alleged here.

because it constitutes a waiver of sovereign immunity and an abrogation of the American rule. *Rettkowski v. Dep't of Ecology*, 76 Wn. App. 384, 389, 885 P.2d 852 (1994), *aff'd in part, rev'd on other grounds in part*, 128 Wn.2d 508, 910 P.2d 462 (1996). Accordingly, any award of attorney's fees under RCW 74.08.080 should be limited to fees in connection with Ms. Green's individual claim and not class issues.

Finally, Ms. Green is not entitled to an award of attorney's fees related to her efforts opposing discretionary review if the court reverses class certification because she would not prevail in the position advanced. Alternatively, she is not entitled to attorney fees for separate review before the Washington State Court of Appeals. For a prevailing party to recover attorneys' fees for efforts made before the Court of Appeals, strict compliance with RAP 18.1 is required. *See, e.g., Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 321 n. 21, 103 P.3d 753 (2004).

RESPECTFULLY SUBMITTED this 2nd day of July, 2010.

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NO. 40159-2

STATE OF WASHINGTON

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

BY _____
DEPUTY

ALICIA L. GREEN, on behalf of herself
and all others similarly situated,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Appellant.

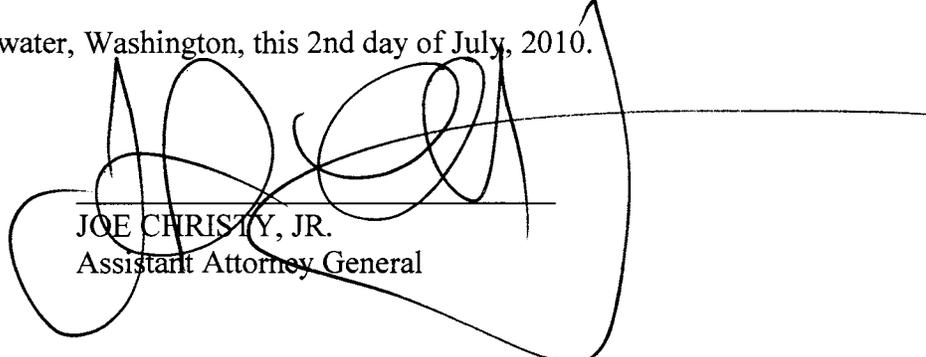
DECLARATION OF
SERVICE

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I certify that on July 2, 2010, I personally delivered a copy of the Appellant's **Reply Brief of Department** upon the person(s) listed below as follows:

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DATED at Tumwater, Washington, this 2nd day of July, 2010.



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