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No. 97109-9
No. 97111-1
No. 97394-6

IN THE WASHINGTON STATE SUPREME COURT

FREEDOM FOUNDATION,
Petitioner/Plaintiff,

v.

TEAMSTERS LOCAL 117 SEGREGATED FUND, *et al.*,
Respondents/Defendants.

FREEDOM FOUNDATION,
Petitioner/Plaintiff,

v.

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

FREEDOM FOUNDATION,
Petitioner/Plaintiff,

v.

JAY INSLEE and STATE OF WASHINGTON DEPARTMENT OF
SOCIAL AND HEALTH SERVICES, *et al.*,
Respondents/Defendants.

PETITIONER/PLAINTIFF, FREEDOM FOUNDATION'S,
INITIAL BRIEF IN CONSOLIDATED APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES v

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED 2

A. Assignments of Error 2

B. Issues Pertaining to Assignments of Error. 3

III. STATEMENT OF THE CONSOLIDATED CASES 4

IV. ARGUMENT 12

A. The Imposition of a 10-Day Statute of Limitations Misinterprets the Citizen’s Action Provision of the FCPA. 12

1. RCW 42.17A.765 is unambiguous and did not bar this action..... 13

2. Legislative History..... 34

3. The Last Antecedent Rule Compels Petitioner’s Reading..... 44

B. The Trial Court Should Not Have Stayed All Discovery, In the Weeks Prior to Granting Judgment on the Pleadings..... 47

1. The Foundation Had a Right of Access to the Courts, and to Conduct Discovery..... 47

2. Teamsters 117 Identified No Reason the Discovery Below was Unduly Burdensome or Excessive..... 51

C. The Trial Court Improperly Granted Judgment on the Pleadings, With Numerous Discovery Items Outstanding. 54

D. The Complaint Against Teamsters 117 Alleged Sufficient Facts to Find That the Union Was a Political Committee, Under the “Receiver of Contributions” Prong 56

1. The Union Was Properly Alleged to Be a Receiver of Contributions..... 57

2. The Teamsters 117 Segregated Fund Was a Receiver of Contributions..... 59

E. The Foundation is Entitled to Be Reimbursed for Its Attorney’s Fees and Costs. 64

V. CONCLUSION..... 64

TABLE OF AUTHORITIES

CASES.....	PAGES
<i>1000 Virginia Ltd. Partnership v. Vertecs Corp.</i> , 158 Wn.2d 566, 146 P.3d 423 (2006).....	37
<i>Abbenante v. Giampietro</i> , 75 R.I. 349, 66 A.2d 501 (R.I. 1949).....	31
<i>Asotin County v. Eggleston</i> , 7 Wn. App. 21d 151 (2019).....	51
<i>Barnum v. State</i> , 72 Wn.2d 928, 435 P.2d 678 (1967)	56, 57, 61, 62
<i>Becker v. Community Health Systems, Inc.</i> , 182 Wn. App. 935, 332 P.3d 1085 (2014).....	55, 56
<i>Blenheim v. Dawson & Hall, Ltd.</i> , 35 Wn. App. 435, 667 P.2d 125 (1983)	57
<i>Campaign Integrity Watchdog, LLC v. Alliance for a Safe & Independent Woodmen Hills</i> , 2017 WL 710493, (not reported) (Co. Ct. App. 2017)	35
<i>Cipollone v. Liggett Group, Inc.</i> , 785 F.2d 1108, 1121 (3rd Cir. 1986)...	59
<i>Citizens United v. Federal Election Commission</i> , 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed. 2d 753 (2010).....	68
<i>Clark County Public Util. Dist. No. 1 v. State, Dept. of Revenue</i> , 153 Wn. App. 737, 222 P.3d 1232 (2010).....	50
<i>Department of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	24
<i>Dyson v. King County</i> , 61 Wn. App. 243, 809 P.2d 769 (1991).....	62
<i>Entrepreneur, Ltd. v. Yasuna</i> , 498 A.2d 1151 (D.C. 1985).....	31
<i>Evergreen Freedom Foundation v. National Education Association</i> (“NEA”), 119 Wn. App. 445, 81 P. 3d 911 (2003)	passim
<i>Eyman v. Wyman</i> , 191 Wn.2d 581, 424 P.3d 1183 (2018).....	20, 49
<i>Fritz v. Gorton</i> , 83 Wn.2d 275, 517 P.2d 911 (1974).....	40
<i>Geschwind v. Flanagan</i> , 121 Wn.2d 833, 854 P.2d 1061 (1993).....	34
<i>Hodgson v. Bicknell</i> , 49 Wn.2d 130, 298 P.2d 844 (1956).....	56
<i>Human Life of Washington Inc. v. Brumsickle</i> , 624 F.3d 990, 1011–12 (9th Cir. 2010)	64, 71
<i>John Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991).....	53
<i>Keep Watson Cutoff Rural v. Kittitas County</i> , 145 Wn. App. 31, 184 P.3d 1278 (2008).....	33
<i>Kelso Educational Association v. Kelso Sch. Dist. No. 453</i> , 48 Wn. App. 743, 740 P.2d 889 (1987).....	32
<i>Key Bank of Puget Sound v. City of Everett</i> , 67 Wn. App. 914, 841 P.2d 800 (1992).....	31
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002)	14, 28, 35

<i>King v. Snohomish County</i> , 146 Wn.2d 420, 47 P.3d 563 (2002)	63
<i>Knedlik v. Snohomish County</i> , 186 Wn. App. 1022 (2015) (unpublished op.)	23
<i>LaGuardia Assoc. v. Holiday Hospitality Franchising, Inc.</i> , 92 F.Supp.2d 119 (E.D.N.Y. 2000).....	31
<i>Lowe v. Rowe</i> , 173 Wn. App. 253, 294 P.3d 6 (2012).....	13, 64
<i>McLeod, Alexander, Powel & Apffel, P.C. v. Quarles</i> , 894 F.2d 1482, 1485 (5th Cir. 1990).....	60
<i>Medina v. Public Utils. Dist. No. 1 of Benton County</i> , 147 Wn.2d 303, 53 P.3d 993 (2002).....	17, 21
<i>Mercer v. State</i> , 48 Wn. App. 496, 739 P.2d 703 (1987)	62
<i>Millay v. Cam</i> , 135 Wn. 2d 193, 203 (1998)	34
<i>Morpho Detection, Inc. v. State, Dept. of Revenue</i> , 194 Wn. App. 17, 371 P.3d 101 (2016).....	52
<i>O.S.T. v. Blueshield</i> , 181 Wn.2d 691, 335 P.3d 416 (2014)	13
<i>Oleson v. K-Mart Corp.</i> , 175 F.R.D. 560, 565 (D. Kan. 1997)	59
<i>Panag v. Farmers Ins. Co. of Washington</i> , 166 Wn.2d 27, 204 P.3d 885 (2009).....	48
<i>Putman v. Wenatchee Valley Medical Ctr., P.S.</i> , 166 Wn.2d 974, 216 P.3d 374 (2009).....	53
<i>Reynolds & Associates v. Harmon</i> , 193 Wn.2d 143, 437 P.3d 677 (2019)	30
<i>Richardson v. GEICO</i> , 200 Wn. App. 705, 403 P.3d 115 (2017).....	53
<i>State ex rel. Evergreen Freedom Foundation v. Washington Education Ass’n</i> , 111 Wn. App. 586, 49 P.3d 894 (2002)	passim
<i>State v. Allen</i> , 150 Wn. App. 300, 207 P.3d 483 (2009).....	48
<i>State v. Contreras</i> , 124 Wn.2d 741, 880 P.2d 1000 (1994).....	29
<i>State v. Wofford</i> , 148 Wn. App. 870, 201 P.3d 389 (2009)	52
<i>Tesoro Refining & Marketing Co. v. State Dep’t of Revenue</i> , 164 Wn.2d 310, 190 P.3d 28 (2008).....	39
<i>Umpqua Bank v. Shasta Apartments, LLC</i> , 194 Wn. App. 685, 378 P.3d 585 (2016).....	14, 15, 39
<i>Utter v. Building Industry Ass’n of Washington</i> , 182 Wn.2d 398, 341 P.3d 953 (2015).....	38, 51, 65
<i>Voters Educ. Comm. v. WSPDC</i> , 161 Wn.2d 470, 166 P.3d 1174 (2007).....	69
<i>Wash. State Coalition for the Homeless v. Wash. Dep’t of Social and Health Services</i> , 133 Wn.2d 894, 949 P.2d 1291 (1997).....	16
<i>Wells Fargo Bank, N.A. v. Dept. of Revenue</i> , 166 Wn. App. 342, 271 P.3d 268 (2012).....	33

<i>West v. Washington State Association of District and Municipal Court Judges</i> , 190 Wn. App. 931, 361 P.3d 210 (2015).....	23
<i>Wingert v. Yellow Freight Sys., Inc.</i> , 146 Wn.2d 841, 50 P.3d 256 (2002)	34, 46
<i>Winter v. Toyota of Vancouver USA, Inc.</i> , 132 Wn. App. 1029 (2006) (unpublished op.)	55, 62

STATUTES

RCW 42.17A.001.....	27, 43
RCW 42.17A.005.....	60
RCW 42.17A.140.....	37
RCW 42.17A.495.....	6
RCW 42.17A.765.....	passim
RCW 42.17A.775.....	38, 64
RCW 42.52.460	32
RCW 74.39A.240.....	5

RULES

RAP 18.1.....	64
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I. INTRODUCTION

Respondents' 10-day "statute of limitations" relies upon a statutory interpretation that does violence to the text of former RCW 42.17A.765(4)(a)(ii) (which imposes no time limitation on the filing of citizen's actions), and treats other provisions of the statute as mere surplusage. Simply stated, the reason this argument is lacking is because Respondents' counsel has created a 10-day "promise" from whole cloth. Nonetheless, the trial courts accepted this 'creative' interpretation.

The Legislature plainly intended only to require that the citizen give a second notice prior to initiating suit, and thereafter be precluded from acting for ten (10) days while the Attorney General and/or prosecuting attorneys consider bringing an FCPA enforcement action. This conclusion is compelled not only by the plain language of subsection (ii), but also by the legislative history concerning the entire citizen's action provision in former Section 765.¹ Moreover, this intent remains in the FCPA, as revised today, which continues to utilize only one ten-day period. Hence, whether the Court travels under a "plain language" analysis, or undertakes to consider legislative history, the result is the same.

¹ All references to RCW 42.17A.765 shall be to the former statute, as it existed prior to amendments in 2018.

The Court should hold that RCW 42.17A.765 contains only a 2-year statute of limitations, and accordingly reverse the judgments below and remand for further proceedings.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. Assignments of Error.

1. The trial courts, Hon. Erik D. Price and Hon. Carol Murphy, erred as a matter of law in granting judgment on the pleadings to the Respondents in the Teamsters 117 Matter and the DSHS COPE Matter, and dismissal of the complaint in the SEIU PEAFF Matter, upon their findings that the FCPA, in its former version of RCW 42.17A.765(4)(a)(ii), required that a citizen who had given both the first, 45-day notice to the attorney general and prosecuting attorney under RCW 42.17A.765(4)(a)(i), and the second, 10-day notice under RCW 42.17A.765(4)(a)(ii), must also file the citizen's action within ten (10) days of that second notice.

2. The trial court, Hon. Erik D. Price, also erred as a matter of law in granting judgment on the pleadings in the Teamsters 117 Matter to Respondent, Teamsters 117, upon its finding that (a) the purported limitations period upon which Teamsters 117 relied was properly raised by way of its motion, even though the limitations period is an affirmative defense that was not raised in the pleadings, and that (b) the Petitioner had sufficient notice of that defense, for purposes of affording due process.

3. The trial court, Hon. Erik D. Price, abused its discretion by granting a total stay of discovery in the Teamsters 117 Matter, in the weeks leading up to the hearing on the Respondents' motion for judgment on the pleadings.

4. The trial court, Hon. Christine Schaller, erred as a matter of law in granting Teamsters 117's motion to dismiss in the Teamsters 117 Matter, in part, pursuant to the "contributions" prong of the political committee test set forth in Washington decisional law.

B. Issues Pertaining to Assignments of Error.

1. Whether the trial court erred in finding that the FCPA, in its former version of RCW 42.17A.765(4)(a)(ii), unambiguously required that a citizen who had given both the first, 45-day notice to the attorney general and prosecuting attorney under RCW 42.17A.765(4)(a)(i), and the second, 10-day notice under RCW 42.17A.765(4)(a)(ii), must also file the citizen's action within ten (10) days of that second notice?

2. Whether the trial court erred in determining that (a) the purported limitations period upon which Teamsters 117 relied in the Teamsters 117 Matter was not an affirmative defense that should have been raised in the pleadings, in order to satisfy due process, and that (b) the issue was jurisdictional, allowing it to be raised at any time?

3. Whether the trial court erred in finding that the circumstances of the Teamsters 117 Matter warranted a total stay of discovery, in the weeks leading up to the hearing on the Respondents' motion for judgment on the pleadings?

4. Whether the trial court erred in ruling in the Teamsters 117 Matter that Petitioner had not alleged sufficient facts to support a finding that Teamsters 117 was a political committee, pursuant to the "contributions" prong of the political committee test set forth in Washington decisional law?

5. Whether the trial court erred in ruling in the Teamsters 117 Matter that Teamsters 117's separate, segregated fund, its PAC, was not a separate entity required to file its own reports disclosing its political activity?

III. STATEMENT OF THE CONSOLIDATED CASES

The actions below are all in the nature of citizen's actions under the Fair Campaign Practices Act, RCW ch. 42.17A ("FCPA"), which, in relevant part, sets forth a detailed, pre-suit notice scheme, before the citizen may file a judicial action should the government not act to enforce the FCPA. *See* RCW ch. 42.17A.765.

The crux of the Teamsters 117 Matter (No. 97109-9) is that the Respondent/Defendant, Teamsters Local Union No. 117 has established a

political action committee (“PAC”) under the IRS rules (the Teamsters Local 117 Segregated Fund) for nonprofit organizations, and spends tens of thousands of dollars each year on political expenditures without reporting any of this political activity to the Washington Public Disclosure Commission or to the IRS (although Teamsters tells the IRS it *is* filing reports in Washington State). *See* 97109 CP, at 1-2.²

In the SEIU PEAFF Matter (No. 97111-1), the Freedom Foundation (the “Foundation”) contends that the Respondent/Defendant, Service Employees International Union Political Education and Action Fund (“PEAF”), spends millions of dollars on political activity within Washington State and does not qualify for the lesser reporting permitted for out-of-state political committees, yet ignores the requirements that *do* apply. *See* 971111 CP, at 1-2.

In the DSHS COPE Matter (No. 97394-6), the Foundation alleged that the Respondent/Defendant, State of Washington Department of Social and Health Services (“DSHS”), had been withholding and/or diverting money from the wage payments it made to the State’s Individual Provider home care aides (“IP’s”), as defined by RCW 74.39A.240(3), *knowing* that

² Because the instant consolidated appeal contains three (3) separate cases, in each of which Clerk’s Papers were designated and filed with the Court, references to the record in the proceedings below shall be preceded by the case number corresponding with the cited set of Clerk’s papers (*e.g.*, 971099 CP, at ___; 971111 CP, at ___; 973946 CP, at ____).

the money was going to a political committee, the SEIU Committee on Political Education (“COPE”), for use as political contributions for state activity. *See* 973946 CP, at 2. The Foundation further alleged that DSHS had been making the aforementioned payroll deductions without IPs’ written authorizations, in clear violation of RCW 42.17A.495(4). *Id.*

In each of the foregoing cases, the Foundation delivered to the requisite authorities its first (45-day) and second (10-day) notices of FCPA violations by Teamsters 117, SEIU PEAFF, and DSHS, but the authorities failed to take any action, as contemplated under RCW 42.17A.765. The Foundation subsequently brought separate citizen’s actions for the violations, although not within ten (10) days of sending its second notices. These matters involve a fundamentally important question of statutory interpretation, concerning former provisions of the FCPA that require the citizen to provide successive notices to the prosecuting attorney and attorney general, prior to filing suit against a putative defendant for alleged violations of the FCPA – in part, because the critical language remained in the statute, following its amendment in 2018. The Petitioner respectfully seeks review of the rulings of the trial court, Hon. Erik Price (in the SEIU PEAFF Matter and Teamsters 117 Matter) and Hon. Carol Murphy (in the DSHS COPE Matter), that the language of RCW 42.17A.765(4)(a)(ii) requires the citizen complainant to file his or her judicial action within ten

(10) days of the officials' receiving the second notice required by subsection (ii).

In the SEIU PEAFF Matter, the Defendant's motion to dismiss was heard on February 8, 2019. PEAFF argued that the plain language of former RCW 42.17A.765(4)(a)(ii) meant that a citizen who had sent the first and second notices to the Attorney General and prosecuting attorney was then required to actually proceed to "commence a citizen's action" within 10 days of the second notice, and that this result was mandated by the "last antecedent rule" of statutory interpretation. Although no express statutory text placed an affirmative obligation on the citizen to file suit within ten (10) days, PEAFF argued and the trial court agreed that it would be an "absurd" result for the statute to require the notice to contain certain language, but not to require the citizen to act in accordance therewith. Respondents argued that the officials' receipt of the second notice triggered a 10-day investigatory period, and the expiration of that period would then trigger a second, "symmetrical" 10-day period for the citizen to file suit.

The Foundation countered that the entirety of RCW 42.17A.765(4)(a)(ii) relates to notice by the citizen to state officials, and so the trial court could not infer any affirmative obligation on the citizen to file suit within ten (10) days of the second notice. Subsection (ii) contains, at most, requirements for the notice itself, but does not effectively impose a

10-day statute of limitations on the claim because the FCPA, in RCW 42.17A.765(4)(a)(iv) had already set a 2-year statute of limitations (from the date a violation occurred). Further, courts had previously interpreted RCW 42.17A.765 to create only one (1) period of ten days, following receipt of the second notice, during which the state could investigate, and the citizen was required to wait before filing suit. **Therefore, to require the citizen to file suit “within 10 days” of the second notice, under the language of subsection (ii), would require that the citizen file the complaint during the same time that he or she is precluded from acting, in order to allow the Attorney General and prosecuting attorneys to complete their investigation.** *See State, ex rel. Evergreen Freedom Foundation v. National Education Association (“NEA”),* 119 Wn. App. 445, 453, 81 P. 3d 911 (2003).³ The Foundation argued that this unworkable result could not be what the Legislature intended in passing RCW 42.17A.765, as it was facially inconsistent with the text and ignored important words therein.

The Court granted PEAFF’s motion to dismiss, finding that the plain language of RCW 42.17A.765 required suit to be filed “within 10 days” of the second notice. *See* 971111 CP, at 320-21. Hon. Erik D. Price did not

³ “In *WEA*, we intended to simply restate the statute’s clear intent, that the AG or county prosecutor’s ‘commencement of an action’ within the prescribed time period precludes a citizen’s action (indeed, such commencement obviates the need for a citizen’s action).”

believe that a resolution of the parties' competing statutory interpretations was necessary to resolve the issue before it, and therefore did not decide whether the Statute created one (1) ten-day period or two (2).⁴ But the question of whether the statute creates one ten-day period or two bears directly on the reasonableness of the parties' respective statutory interpretations, and so the trial court's refusal to grapple with this question left its decision in a logical 'purgatory.' Judge Price dismissed the citizen's action, and Petitioner noted this timely appeal. 971111 CP, at 418.

In the Teamsters 117 and DSHS COPE Matters, the parties' respective arguments concerning the 10-day language of the statute essentially mirrored those advanced in the SEIU PEA Matter, resulting in identical holdings. In the Teamsters 117 Matter, the Defendants' motion for judgment on the pleadings was heard on April 12, 2019. In accord with its prior ruling in the SEIU PEA Matter, the Court granted Teamsters 117's motion for judgment on the pleadings, finding that the plain language of RCW 42.17A.765 required suit to be filed "within 10 days" of the second notice.⁵ *See* 971099 CP, at 1247-48. The trial court did so over the

⁴ The trial court held that it need not decide whether the statute created only one (1) 10-day period or two (2) consecutive 10-day periods, because the Foundation had sent the second notice more than twenty (20) days after sending the first. *See* Transcript of Hearing before Judge Price, February 8, 2109, at pp. 74-75 (973946 CP, at 47-48).

⁵ Again, the Court held that it need not decide whether the statute created only one (1) 10-day period or two (2) consecutive 10-day periods. *See* 971099 CP, at 1248.

procedural objections of the Foundation, who noted that Teamsters 117 had not raised as an affirmative defense the Foundation's failure to satisfy statutory conditions precedent to suit, and that due process therefore precluded the court from considering that belated argument in the context of a motion for judgment on the pleadings. Judge Price nonetheless granted judgment on the pleadings, and the Foundation subsequently noted this timely appeal. 971099 CP, at 1243.

The Foundation also respectfully seeks review of the trial court's rulings leading up to the foregoing disposition of the Teamsters 117 Matter, including its Order staying all discovery until the Defendant's motion for judgment on the pleadings could be heard, and its previous Order holding that the Foundation *could not*, as a matter of law, demonstrate that (1) Teamsters 117 was a political committee under the FCPA, pursuant to the "contributions" prong, nor (2) that the separate segregated fund ("SSF") was a separate entity for purposes of making the required showing of "political committee" status.

Teamsters 117 initially filed a Motion to Dismiss under CR 12(b)(6), arguing that the Plaintiff had not alleged sufficient facts to make the Defendant a "political committee," within the meaning of the FCPA, and that its SSF set up under federal tax law was not a separate legal entity required to register as a political committee under the FCPA and disclose

its contributions and expenditures. 971099 CP, at 23. The trial judge initially assigned ruled that although the Foundation could not demonstrate Teamsters 117's political committee status through the "contributions" prong, it had sufficiently alleged political committee status as a result of Respondents' expenditures. *See id.*, at 1253-54. The court held that the Union and its SSF were not to be considered separate legal entities for purposes of determining political committee status, which may depend upon whether a group has the receipt of contributions or expenditure of funds during an electoral, political contest as one of its primary purposes. As such, the trial court considered the activities of the SSF along with the activities of the Union itself in making this determination. While it held that the Petitioner could not satisfy the requisite showing under the "contributions" prong, the trial court also held that Petitioner's allegations concerning the "expenditures" prong *were* legally sufficient, if supported in fact, to make Teamsters 117 a political committee under Washington law. *See id.*

In the DSHS COPE Matter, SEIU 775's motion for judgment on the pleadings was heard on June 28, 2019. Agreeing with Judge Price's rulings, the trial court (Judge Murphy) granted SEIU 775's Motion for Judgment on the Pleadings, finding that RCW 42.17A.765 required suit to be filed "within 10 days" of the second notice. 973946 CP, at 545-47. The Hon. Carol Murphy held that the plain language of subsection (ii), considered

alongside the other requirements of former Section 765, required that the citizen’s action be filed within ten (10) days after sending the second notice – notwithstanding that the Court agreed with the other commentators who have described the relevant language as “clunky.” Judge Murphy granted judgment on the pleadings, and the Foundation subsequently noted this timely appeal. *Id.*, at 541-47.

This Court consolidated each of these cases and on August 7, 2019, decided to address all of them on direct review. This opening brief is therefore filed in accordance with the briefing schedule established for these consolidated matters, by the Court’s letter notice dated September 16, 2019.

IV. ARGUMENT

A. The Imposition of a 10-Day Statute of Limitations Misinterprets the Citizen’s Action Provision of the FCPA.

The standard of review upon questions of statutory interpretation, as well as upon an order granting judgment on the pleadings, is *de novo*. *O.S.T. v. Blueshield*, 181 Wn.2d 691, 696, 335 P.3d 416 (2014); *Lowe v. Rowe*, 173 Wn. App. 253, 258, 294 P.3d 6 (2012); RCW 42.17A.765(4)(a)(ii) establishes nothing more than the requirements of a notification, as the entirety of that subsection is concerned only with the notice provided to State officials, and does not restrict when a citizen’s action may be filed. The plain language of the text requires this conclusion, and accordingly no

appellate court has applied this provision to restrict the filing of a citizen action, nor has any articulated a ten-day limitation on such actions – the statute clearly does not impose a stand-alone ten-day limitation on filing. Existing case law supports this interpretation. Finally, to the extent that consideration of legislative history is necessary, the legislative history only reinforces that the provision is a notice requirement, rather than a durational restriction.

1. RCW 42.17A.765 is unambiguous and did not bar this action.

The trial court erred in determining that the FCPA contains any ten-day limitations period on filing citizen’s actions. The meaning of a statute clear on its face must be “derived from the language of the statute alone.” *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). An unambiguous statute is “not subject to judicial construction...”. *Id.* Courts cannot “add language to an unambiguous statute...”. *Id.* Courts must also “construe statutes assuming that the legislature meant exactly what it said.” *Umpqua Bank v. Shasta Apartments, LLC*, 194 Wn. App. 685, 694, 378 P.3d 585 (2016). “To determine legislative intent, we first look to the plain meaning of the statute and consider the meaning of the provision at issue, the context of the statute, and related statutes ... If a statute is unambiguous, we apply the statute’s plain meaning without considering other sources of legislative

intent.” *Umpqua Bank*, 194 Wn. App. at 693. RCW 42.17A.765(4)(a)(ii) provides in part that, in addition to a prior notice required by § 765(4)(a)(i), a person seeking to file a citizen action must “notif[y] the Attorney General and prosecuting attorney that the person will commence a citizen’s action within ten days upon their failure to do so...”.

Section 765 lists the conditions precedent to bringing a citizen’s action under the FCPA. The Legislature specifically listed each individual requirement separately, by reference to the activities or “failures” required by each subsection, as is clear upon consideration of the entire scheme. A person who has notified the attorney general and appropriate prosecuting attorney, in writing, that there is reason to believe a violation of the FCPA has occurred may bring a citizen’s action only if the following conditions precedent are satisfied:

- (i) The attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after the notice;
- (ii) The person has thereafter further notified the attorney general and prosecuting attorney that the person will commence a citizen’s action within ten days upon their failure to do so;
- (iii) The attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice; and
- (iv) The citizen’s action is filed within two years after the date when the alleged violation occurred.

See RCW 42.17A.765(4)(a) (emphasis added).

“Notify” is not defined in the statute, but a word “which has a well-accepted, ordinary meaning, is not ambiguous.” *Wash. State Coalition for the Homeless v. Wash. Dep’t of Social and Health Services*, 133 Wn.2d 894, 906, 949 P.2d 1291 (1997). The online Merriam-Webster Dictionary defines “notify” as “to give notice of or report on the occurrence of.”⁶ The only natural way to read subsection (ii) is that all of its embedded requirements are concerned with the second pre-suit notice that the citizen must provide. Section 765(4)(a)(ii) therefore imposes *only* a notification requirement, along with a very general requirement on the contents of the notification.

These notice requirements serve several significant purposes. For instance, the notice alerts the Attorney General and prosecuting attorneys of their legal rights, always desirable in a legal notice, and perhaps quite significant to counties less accustomed to considering FCPA enforcement. *See, e.g., Hollis v. Snohomish County Medical Examiner’s Office*, 8 Wn. App. 2d 1071, at *6 (May 20, 2019) (unpublished op.) (“The purpose of claim filing statutes is to ‘allow government entities time to investigate, evaluate, and settle claims.’”) (citing *Medina v. Public Utils. Dist. No. 1 of Benton County*, 147 Wn.2d 303, 310, 53 P.3d 993 (2002)). It also directly

⁶ *See* 973946 CP, at 246-55.

alerts the prosecuting attorney and AG that the citizen intends to sue upon the facts stated in the 45-day notice, and that they have only ten (10) more days to file an action if they want to control prosecution of the FCPA violation. *NEA*, 119 Wn. App. at 453 (stating “the statute's clear intent [is] that the AG or county prosecutor’s “commencement of an action” within the proscribed time period precludes a citizen’s action.”); *see also* Commissioner Bears’s Ruling Denying Review (973946 CP, at 244) (“But looking at section 4(a) in its entirety, RCW 42.17A.765(4)(a)(ii) is reasonably interpreted as a notice formality, which in conjunction with RCW 42.17A.765(4)(a)(iii), reminds the prosecuting attorney and attorney general to act within 10 days after receiving the second notice to retain their right to sue.”). The text does not place any limitation upon when the citizen’s action must be *filed*, because the entirety of subsection (ii) is concerned only with notice.

State ex rel. Evergreen Freedom Foundation v. Washington Education Ass’n (“*EFF*”) supports this plain language interpretation. *See* 111 Wn. App. 586, 604, 49 P.3d 894 (2002). There, the Division Two Court of Appeals stated that a citizen’s action may be brought “...if **three** conditions are met.” *Id.* (emphasis added). The court noted the statutory language (1) requires a person to “give notice to the [AG] and the [PA] that there is reason to believe” a violation has occurred; (2) if, after 45 days, the

AG and PA have not commenced an action, the person “must file a second notice with the AG and [PA] notifying them that the person will commence a citizen’s action within 10 days of the second notice if neither the [PA] nor the AG acts”; and, (3) the AG and [PA] must fail to bring an action within 10 days of receiving the second notice.” *Id.* The court in *EFF* did not impose any fourth requirement of a second ten-day limit on the filing of a citizen action; nor did the court describe such a window when summarizing the requirements. Nor has any appellate court ever done so.⁷ This is because, as the Court in *NEA* later acknowledged, the obvious and overriding purpose of RCW 42.17A.765 is to give the AG a timeframe during which it can prevent a citizen’s complaint by filing its own – specifically, the AG has forty-five (45) days from receipt of the citizen’s written allegations and an additional ten (10) days from the citizens second notice. *NEA*, 119 Wn. App. at 453.

Subsection (ii) is perfectly unambiguous in setting requirements concerning only the second notice, and not on any citizen’s action that may be filed subsequent thereto. Rather, any *possible* ambiguity is in whether: (1) the “ten days” mentioned in Section 765(4)(a)(ii) (relating to the second

⁷ Respondents cited below no case in which an appellate court construed the statute as it does, and noticeably absent from their moving papers was any substantive discussion of the legislative history on this matter. *See* 971099 CP, at 486-532; 971111 CP, at 14-209; 973946 CP, at 16-69.

notice) is the same “ten days” mentioned in Section 765(4)(a)(iii) concerning the time span within which a complainant must give the AG the exclusive prerogative of filing an action, or (2) whether it places a limitation on when the citizen must provide the second notice *itself*, after officials have failed to act in response to the citizen’s first, 45-day notice that is referenced in Section 765(4). SEIU 775 argued to the trial court that this alternative reading was “implausible,” but offered nothing sufficient to explain why. *See* 973946 CP, at 22-23.

First, for the reasons discussed in greater detail *infra* (*see* pp. 44-47), the “last antecedent rule” cited by the trial court is not an inexorable command, and should not be applied where the text indicates a contrary intent. Instead, the rule holds that the proper “last antecedent” is the last one to which the modifying term can be applied **without impairing the meaning of the sentence**. *See Eyman v. Wyman*, 191 Wn.2d 581, 599, 424 P.3d 1183 (2018) (“The last antecedent is the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence.”).

In this case, that antecedent is “notified,” as discussed in greater detail *infra* in **Section IV.A.3** – it is not required that the modifying term apply to every word in-between, and the “last antecedent rule” itself seems to suggest this will often *not* be the case. Use of the word “thereafter” also

does not undermine this reading, because it is properly read to suggest only that expiration of the first, 45-day period is a condition precedent to the second notice – the rest of the temporal aspects are addressed later in the sentence. *See* 973946 CP, at 23. Reading subsection (ii) in this way does not leave a “gaping void” concerning the contents of the notice, nor would it be “useless” to the official (*see id.*) – it would advise that the citizen intends to exercise his or her rights under the citizen’s action of the FCPA, which the Legislature has deemed a necessary prerequisite in order to undertake what would otherwise be the role of the state official. *See Medina*, 147 Wn.2d at 310. Nowhere except in subsection (ii) does Section 765 require the citizen to threaten filing suit himself or herself, a step which it *permits* only after the officials have done nothing with the information provided in the first notice, for a period of forty-five (45) days.⁸ This critical

⁸ The argument that such a notice would be “useless” if it does “not explain how the citizen’s plan to file suit depends on the official’s inaction in the course of the ensuing ten days” (*see* 973946 CP, at 23) is circular, in that it depends upon reading the statute SEIU 775’s way to begin with. And to address this argument aside from the “ensuing ten days” portion, SEIU 775 did not explain how it is “unacceptable” that the officials should be charged with understanding the legal significance of the second notice, in the context of the statutory scheme that they are otherwise charged with enforcing. The Legislature and the courts have already collectively established the limits of the officials’ enforcement discretion by way of subsection (iii) (requiring as an additional condition precedent that the officials not file suit for ten (10) days after the second notice), and the priority of action doctrine – the citizen’s advice is not needed in that regard. *See NEA*, 119 Wn. App. at 449, n.5. Lastly, this alternative interpretation resolves the inconsistency in SEIU 775’s position created by the word “within” – short of creating another ten-day period that is not mentioned anywhere in the statute. In other words, this interpretation avoids the “race to the courthouse” that results from SEIU 775’s reading, while also avoiding SEIU 775’s objection to the Foundation’s reading as “precatory,” *i.e.*, that it permits the citizen to make a “false promise.” *See* 973946 CP, at 23.

step can hardly be called superfluous or an “empty gesture,” as the trial court opined.

In any event, it is clear that subsection (ii) concerns nothing more than the second notice that must be provided, and the foregoing conclusion is mandated by the text of Section 765. Indeed, the Division Two Court of Appeals has already resolved any ambiguity (such as that Section 765 placed “symmetrical” 10-day obligations on the citizen and the state officials) in Plaintiff’s favor in *EFF*. **There the Court of Appeals interpreted the “ten days” in subsection (4)(a)(ii) to be the same “ten days” in subsection (4)(a)(iii).** In *EFF*, the court stated that “the person must file a second notice with the AG and [PA] notifying them that the person will commence a citizen’s action within 10 days of the second notice if neither the [PA] nor the AG acts...”, and that “the AG and the [PA] must in fact fail to bring such an action within 10 days of receiving the second notice” before the complainant can file a citizen action. 111 Wn. App. at 604 (emphasis added). Multiple courts cite this standard verbatim, therefore implicitly recognizing that neither subsection (ii) nor subsection (iii) places a time limitation on the *complainant’s* filing of a citizen’s action.

The basis for the Foundation’s reading, that the citizen is precluded from acting during the 10-day period while the state officials weigh their options, is amply supported by case law interpreting the relevant provision

and is even recognized by the Union. *See, e.g., West v. Washington State Association of District and Municipal Court Judges*, 190 Wn. App. 931, 940-41, 361 P.3d 210 (2015);⁹ *NEA*, 119 Wn. App. at 453 (“In *WEA*, we intended to simply restate the statute’s clear intent, that the AG or county prosecutor’s “commencement of an action” within the prescribed time period precludes a citizen’s action (indeed, such commencement obviates the need for a citizen’s action.)”); *Knedlik v. Snohomish County*, 186 Wn. App. 1022, at *3 (2015) (unpublished op.);¹⁰ *see also* 973946 CP, at 21 (“Bringing such suit is made contingent on “their failure to do so.””). The Unions’ reading of the Statute is inconsistent with its concession in this regard, under *EFF*.

Indeed, if one accepts the Unions’ position that subsections (ii) and (iii) collectively impose obligations on both the citizen and on the State, then the language of subsection (ii) would require an entirely unworkable result, *i.e.*, that both the citizen and the State have the *same* 10-day window within which to file suit, in other words, a “race-to-the-courthouse”

⁹ “A citizen action to address violations of chapter 42.17A RCW in the name of the State is permitted only if the attorney general and the local prosecutor fail to bring an enforcement action after being given written notice of the alleged violations ... Under the act’s comprehensive enforcement scheme, the attorney general and local prosecutor must be given the opportunity to commence an action before a court will entertain a citizen’s request to declare an entity in violation of the act.”

¹⁰ “RCW 42.17A.765 requires that the attorney general and local prosecutor first receive the opportunity to bring an action.” (emphasis added).

situation as seemingly contemplated by the court in *EFF*.¹¹ Respondents attempted to avoid this absurd conclusion, but it is required by the language that “...the person will commence a citizen’s action within ten days.” See RCW 42.17A.765(4)(a)(ii) (emphasis added); see also *EFF*, 111 Wn. App. at 604 (“Second, if 45 days after this first notice the prosecuting attorney and AG have not commenced an action, the person must file a second notice with the AG and prosecuting attorney notifying them that the person will commence a citizen’s action within 10 days of this second notice if neither the prosecutor nor the AG acts.”) (emphasis added).¹²

¹¹ SEIU 775 admitted below that “[t]his has been the approach taken by the Court of Appeals in the past,” but simultaneously suggested that this “alternative[.]” reading embraced by the courts of this State is somehow entitled to no more dignity than the one it now advances unilaterally – *i.e.*, that there are “symmetrical,” consecutive, 10-day periods. See 973946 CP, at 21, n.6). The Union cannot have it both ways, but of course the reason that it declined to choose between these “alternatives” is because the *EFF* reading yields an absurd result (if subsection (ii) is a notice provision as SEIU 775 insisted), and because there is simply no textual basis in the citizen’s action statute (neither former nor current) to find any “symmetrical” 10-day periods. In other words, if *EFF* and *NEA* were right, then SEIU 775 was wrong. The Union only tried to distract from this irreconcilable difficulty with its position by arguing that “[u]nder either interpretation, the instant lawsuit was untimely filed,” a position which the trial court appears to have accepted. *Id.* What this position ignores is that the existence of only one ten-day period in the language of the statute means that the Unions’ interpretation is exceedingly unlikely to be the actual intent of the Legislature. See *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (“The court’s fundamental objective is to ascertain and carry out the Legislature’s intent...”).

¹² As discussed in greater detail below, the Unions’ attempt to rely on the “upon their failure to do so” language as establishing the trigger for commencement of the citizen’s 10-day window cannot change this result, because “their failure to do so” must be understood to refer to the state officials’ failure to file an enforcement action under subsection (i), not to the filing of a citizen’s action under (ii) – state officials cannot, by definition, file a *citizen’s* action. See 973946 CP, at 21 (“Subsection (ii) first refers to the citizen’s ‘commence[ment]’ of an ‘action’... Bringing such suit is made contingent on ‘their failure to do so.’”); see also *infra*, at pp. 45-46.

Thus, if the trial court is correct that the language refers to (2) different ten-day periods (the first of which applies to the AG and prosecutor and the second of which applies to complainants), *EFF* (and all courts) would thus be equating the *beginning point* at which a complainant could first file a citizen action with the complainant's *deadline* for filing a citizen action, thereby rendering citizen's actions impossible. This was the most absurd reading available, because it renders the entire provision hopelessly self-refuting. **To deepen the error, this absurd reading conflicts with the only clear statement of law on this point, to date, which forecloses the possibility of two (2) simultaneous, ten-day periods.** See *State, ex rel. Evergreen Freedom Foundation v. National Education Association ("NEA")*, 119 Wn. App. 445, 453, 81 P.3d 911 (2003).¹³ Indeed, under the trial court's interpretation, the statutory provision would prohibit the very citizen's action it was attempting to create. There can be no more "absurd" result than that. This could not be what the Legislature intended in passing RCW 42.17A.765. In the end, though the Legislature may have worded the provision inartfully, the Foundation's preferred interpretation, unlike the Union's, at least saves the provision from oblivion.

¹³ "In *WEA*, we intended to simply restate the statute's clear intent, that the AG or county prosecutor's 'commencement of an action' within the prescribed time period precludes a citizen's action (indeed, such commencement obviates the need for a citizen's action)."

The Unions attempted to cut this Gordian knot by arguing that *EFF* “announced unequivocally that the time to file a citizen suit is temporally limited by the date of the second notice,” but *EFF* made no such announcement, even in the portion quoted verbatim in the Unions’ briefs. *See* 973946 CP, at 27; 97109 CP, at 495. On its face, *EFF* states nothing more than that court’s understanding of the requirements for the second notice – it did not understand them to impose an affirmative obligation to follow through upon any “promise” made in the notice, if it could even be considered that. First, if the Unions are correct, *EFF* would have listed four (4) conditions precedent, not just three (3). *See supra*, at pp. 16-17. Second, Plaintiff agrees with the Unions’ concession that the portion of *EFF* on which they relied is mere *dictum*, since the *EFF* court was simply not presented with any question requiring interpretation of subsection (ii). *See* 973946 CP, at 27; 971099 CP, at 495; *EFF*, 111 Wn. App. at 606.¹⁴ The *dictum* quoted by the Unions was soon pared back, along with any concerning “tolling” of the 10-day period, because the Supreme Court had “intended to simply restate the statute’s clear intent, that the AG or county prosecutor’s ‘commencement of an action’ within the prescribed time period precludes a citizen’s action.” *NEA*, 119 Wn. App. at 453.

¹⁴ “Because the AG acted before the end of the 10–day period [pursuant to subsection (iii)], *EFF* could not bring a citizen’s lawsuit under RCW 42.17.400(4) and the trial court properly denied *EFF*’s motion to amend its pleadings.”

Lastly, the notice is more properly understood as a *threat* than a promise, which the State has no particular interest in ensuring that the citizen carry out, within ten (10) days or at any other time (because the citizen is obviously *not* acting on behalf of the State). Where in the text Respondents found a 20-day period, or two (2) “symmetrical” 10-day periods for that matter, is left a mystery.¹⁵ But whether or not *EFF I’s* reading is the *best* one available, it is clear courts have chosen to interpret RCW 42.17A.765(4)’s actual language (“ten days”) in a way which avoids inventing new, obligatory language clearly absent from the provision (as courts cannot do), and which avoids imposing on the citizen a duplicative deadline, where no textual indication supports that application. *See Atkinson*, 147 Wn.2d at 20. This Court should reject the trial court’s attempts to invent new language and hold that subsection 765(4)(a)(ii) is unambiguous and does not place a second statute of limitations on complainants.

This interpretation is the only logical interpretation that honors the

¹⁵ Perhaps the simplest way to view the statute is to note that subsections (a)(ii) and (a)(iii) both mention ten-day periods. The language is clear that both references are to the *same* ten-day period. Subsection (a)(iii) references the previous section by stating that the authorities “in fact” fail to act within ten days. Contrary to the Unions’ claim, the 2018 amendments in no way altered the language regarding the ten-day window. In fact, the legislature *removed* one of the references to ten (10) days. Laws of 2018, ch.304, § 16. **That amendment left only a single reference to ten (10) days.** If it were correct that previously there were two (2) different ten-day periods, then one would expect that the 2018 amendments would substantially change the timing to bring a citizen’s action, but it is clear that no such change was intended.

plain language, by considering the meaning of every word – including the seemingly-unimportant words “**to do so.**” *See infra*, at pp. 45-47. It is the only one that can reconcile two inconsistent limitations periods, and avoid the need for inventing two (2) ten-day periods that would conflict in practice, if read to place an obligation on both the citizen’s and the State’s filing of an “action.” *See, e.g., State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).¹⁶ On the other hand, the glaring inconsistency remaining in the Union’s position – *i.e., that it would require the “to do so” language to refer to the State’s filing of a “citizen’s action”* – pervades and is fatal to its argument. *See* 973946 CP, at 20-21, 24; 971099 CP, at 490-91, 493.¹⁷

Petitioner’s interpretation – which incurs no inconsistencies of this sort – is the only one that takes account of the entire scheme of Section 765, and its mutually exclusive enforcement prerogatives, to determine that the

¹⁶ “It is the duty of this court to construe statutes so as to avoid rendering meaningless any word or provision ... Likewise, we must avoid constructions that yield unlikely, strange or absurd consequences.” (emphasis added).

¹⁷ “Two things are clear on the face of subsection (ii): (1) that the complainant must inform officials that he will bring an action “within ten days,” not at any time thereafter in his discretion; and (2) that the ten-day period starts upon the public official’s “failure to do so,” i.e., to commence an FCPA action within the officials’ 10-day window commenced by receipt of the second notice ... Instead, the mandatory notice language contains two ... commitments: (1) the citizen “will commence” [a citizen’s] action if the officials failed timely to do so, and (2) the citizen’s commencement of that action would occur “within ten days upon their failure to do so.” (emphasis added).

10-day limitation in subsection (ii) is only a limitation on the citizen’s ability to file suit during that notice period. This notice is the entire concern of subsection (ii), which is unmistakable upon considering it in the framework of the rest of subsection (4) and Section 765. *See Campbell & Gwinn, LLC*, 146 Wn.2d at 11-12;¹⁸ *see also Reynolds & Associates v. Harmon*, 193 Wn.2d 143, 159, 437 P.3d 677 (2019).¹⁹

The Foundation’s is also the only interpretation that gives proper deference to the unequivocally-expressed policy aims of the FCPA – to maximize public information by creating a mechanism whereby citizens may seek to enforce its provisions. *See Umpqua Bank*, 194 Wn. App. at 695 (“When the statute at issue or a related statute includes an applicable statement of purpose, we must read the statute in a manner consistent with its stated purpose.”).²⁰ To constrain this mechanism by replacing the 2-year limit with a period so short it will more often than not be missed (if

¹⁸ There, the court concluded that under the better understanding of plain language rule, “...the plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Upon reflection, we conclude that this formulation ... is more likely to carry out legislative intent. Of course, if, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history.”

¹⁹ “As the statutory scheme above illustrates, [the provision at issue] is not a stand-alone provision. To be properly understood, it must be read with the preceding statutes.” (emphasis added).

²⁰ Here, the statute does include such a statement of purpose, which is unequivocal in its mandate that the FCPA “...shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying.” RCW 42.17A.001(11).

understood at all), would run roughshod over the legislative will. “The interpretation which is adopted should be the one which best advances the legislative purpose.” *Key Bank of Puget Sound v. City of Everett*, 67 Wn. App. 914, 918, 841 P.2d 800 (1992).

The trial courts’ interpretation is simply not how the law generally operates, and the Respondents cited below no examples to the contrary. *See* 971099 CP, at 493-94; 971111 CP, at 308; 97394 CP, at 25-26. In the out-of-state cases they relied upon, such as where landlords waived the rights invoked by their notices to the tenants, the waiver required an affirmative act, *i.e.*, the acceptance of additional rent. *See Entrepreneur, Ltd. v. Yasuna*, 498 A.2d 1151, 1166 (D.C. 1985); *Abbenante v. Giampietro*, 75 R.I. 349, 352, 66 A.2d 501 (R.I. 1949); *LaGuardia Assoc. v. Holiday Hospitality Franchising, Inc.*, 92 F.Supp.2d 119, 130 (E.D.N.Y. 2000). Further, the common law doctrine of waiver says nothing of importance concerning the interpretation of a statute, and any interpretation of the statutes in those cases (which was clearly not the basis for the holdings) was based upon wholly different statutory schemes. Common law waiver/abandonment and laches cannot be held to apply here, for their part, where a claim was brought within the applicable statute of limitations. *See Kelso Educational Association v. Kelso Sch. Dist. No. 453*, 48 Wn. App. 743, 749, 740 P.2d 889 (1987) (“Absent highly unusual circumstances, a court is generally

prohibited from imposing a shorter period under the doctrine of laches than under the relevant statute of limitations.”) (*citing Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 375, 680 P.2d 453 (1984)); *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 610, 94 P.3d 961 (2004).²¹

Perhaps the clearest indication that SEIU 775’s position is incorrect is that the Legislature *did* otherwise impose a statute of limitations when it required the “citizen’s action [to be] filed within two years after the date when the alleged violation occurred.” RCW 42.17A.765(4)(a)(iv). Clearly absent from subsection (ii), by contrast, is a provision requiring a complainant to file an action within ten (10) days of the expiration of the second ten-day notice provided to the Attorney General and prosecuting attorney. Hence, the Unions’ necessary reliance on common law principles – which, of course, are derogated by the relevant statutory provisions, because the common law would require no notice at all as a condition precedent to suit. *See Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437, 824 P.2d 541 (1992) (“Statutes in derogation of the common law are strictly construed and no intent to change that law will be found unless it appears

²¹ Further, the Washington cases that the Unions cited are totally irrelevant to the true, interpretational question, because there was no issue in those cases as to whether the statutes imposed a deadline that the plaintiffs had not complied with. *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 38, 184 P.3d 1278 (2008); *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 943 P.2d 341 (1997); *Wells Fargo Bank, N.A. v. Dept. of Revenue*, 166 Wn. App. 342, 362-63, 271 P.3d 268 (2012). *NEA* is the only holding to date that addresses the question before this Court. *See* 119 Wn. App. at 453.

with clarity.”) (emphasis added); *see also McNeal v. Allen*, 95 Wn.2d 265, 269-70, 621 P.2d 1285 (1980) (“Nowhere in the section is there expressed an intent to create a cause of action . . . nor is there any language from which such an intent can be implied.”).

At bottom, the Legislature could have easily included a 10-day limitation if it so intended, and the only actual, 2-year time requirement that is apparent in subsection (iv)’s statute of limitations (a newer development) should govern over any requirement that Defendant seeks to *infer* from subsection (ii). *See Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993) (*citing Morris v. Blaker*, 118 Wn.2d 133, 147, 821 P.2d 482 (1992)); *see also* 973946 CP, at 27, n.10; 971099 CP, at 495, n.7; 971111 CP, at 19, n.4. The Legislature “understands how to enact” limits on legal actions. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 860, 50 P.3d 256 (2002) (Sanders, J., dissenting) (*citing Millay v. Cam*, 135 Wn. 2d 193, 203 (1998) (“Courts do not amend statutes by judicial construction . . . nor rewrite statutes ‘to avoid difficulties in construing and applying them.’”)). Had the Legislature intended to do so, it “would have included” the necessary language. *Id.*

Unlike what the Legislature has included here, Respondent’s examples of timing restrictions on actions (in markedly different other contexts, *see* 973946 CP, at 28-29; 971099 CP, at 495-96) *are* clearly

articulated in statute. *See* 42 U.S.C. § 2000e-5(f)(1);²² 29 U.S.C. § 626(e).²³ Subsection (ii) does not contain anything establishing a limitation so clearly – only subsection (iv) does that, and it should not be read as almost entirely superfluous. *See Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). As such, not only does the Foundation’s reading resolve all of the language of Section 765, it properly balances the citizen’s and the State’s prerogatives, in light of the policies served by Washington’s FCPA.²⁴ The trial court’s interpretation, on the other hand, renders superfluous not only subsection (iv), but also significant portions of subsection (iii), and ignores the plain meaning of words (*e.g.*, “notify” and “to do so”) in subsection (ii).

This Court need not look beyond this State’s borders, as urged by

²² “...within ninety days after the giving of such notice a civil action may be brought against the respondent...by any person whom the charge alleges was aggrieved...”.

²³ “A civil action may be brought under this section by a person...against the respondent named in the charge within 90 days after the date of the receipt of such notice.”

²⁴ The Unions relied upon the law of Colorado to persuade the trial courts that their interpretation of Washington law was correct. *See* 973946 CP, at 28; 971099 CP, at 496 (*citing Campaign Integrity Watchdog, LLC v. Alliance for a Safe & Independent Woodmen Hills*, 2017 WL 710493, at *3 (not reported) (Co. Ct. App. 2017)). But in doing so, they only reinforced that the Foundation correctly understood the citizen’s action provision, because the Colorado scheme is identical in its relevant particulars. *See* 973946 CP (“In other words, the Colorado Constitution creates a thirty-day waiting period for the citizen to act, notwithstanding the running of an independent limitations period tied to the date of the underlying alleged violations.”) (emphasis added). All the *Campaign Integrity Watchdog* court made clear is that it is not an “empty gesture” to require the citizen to send a notice kicking off this waiting period, as Washington does – just as here, the initial administrative complaint does not thereafter bind the citizen to file suit or take any further action, and the only purpose of the 30-day waiting period is to create a time for the authorities to act. *See* 2017 WL 710493, at *4; *see also* Co. Const., Art. 28, s.9(2)(a).

the Unions below, because there is a direct corollary to the FCPA’s citizen’s action provision much closer to home.²⁵ The Legislature provided for citizen’s actions relating to ethical violations which the relevant ethics board declines to pursue, using virtually identical text and operating in the same manner as does Section 765. *See* RCW 42.52.460. The Legislature intended this language to restrict the ethics boards, not the citizen. Just as this Court should understand the FCPA, the language of the ethics board statute has never been interpreted to obviate the statute of limitations that immediately follows the “within ten days upon their failure” language.

Furthermore, it has been the practice of the Attorney General to request – and for the Foundation to grant – extensions of time for the officials to complete their investigation, notwithstanding this supposed 10-day statute of limitations on the citizen. *See* 971111 CP, at 333-35. This clearly indicates that the 10-day period is not a statute of limitations – for the AG cannot agree to extend the citizen’s statute of limitations to file a claim against an unrelated third party. In addition, the citizen will not know in advance what must be included in its citizen’s action – any of the government officials may take none, some, or all of the allegations. The

²⁵ Notably, the only ruling on appeal to address this issue in *Washington’s* campaign finance context has also expressly recognized that the Foundation’s position is reasonable in interpreting RCW 42.17A.765(4)(a)(ii) as a notice formality. *See supra*, at p. 16.

citizen therefore will have an *extremely* short time to actually prepare the action.²⁶

As structured by the Legislature, even assuming there were two (2) symmetrical ten-day periods, subsection (ii) cannot be a statute of limitations by which the citizen must bring an action within twenty (20) days of receipt by the first government official. There is no plausible way to make such a statute work. Because interpreting the FCPA to impose a 10-day statute of limitations will lead to “grave injustice,” in myriad foreseeable instances (such as those referenced in footnote 27), the Court should not so interpret the statute. The Union’s interpretation would “...defeat the purpose of providing for citizen suits in the first place,” because it would effectively neuter the citizen’s action provision, in the vast majority of potential actions. *See Utter v. Building Industry Ass’n of*

²⁶ Aside from lacking any clear limitations language like that contained in subsection (iv), subsection (ii) additionally does not include a basic characteristic of a statute of limitations for filing a claim – that the person to be limited knows when the period begins, so as to determine the date by which he or she must act. Here, the Foundation knew what date it *mailed* the notice. However, there is no practical way for the citizen to know what date the government is in *receipt* of the notice. *See infra*, n.32. Further complications could arise if the different government officials receive the notice on different dates – is the citizen then required to mail the notice again to the first official who received it, in order to preserve his or her ten-day period? Given that no amount of diligence will allow a citizen to determine when his or her cause of action thereafter accrues – and given that at least a few days must always be allotted for mailing – basic notions of fairness dictate that the statute should not be interpreted to impose such a fleeting statute of limitations. *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 586, 146 P.3d 423 (2006). In addition, there may be *multiple* dates when the action would accrue, because the statute requires notice both to the AG and to any of the prosecuting attorneys of the county in which the alleged violation may have occurred.

Washington, 182 Wn.2d 398, 411, 341 P.3d 953 (2015). The Legislature could not have intended for the courts to subvert the intent of the FCPA by such machinations, which the ordinary citizen will have difficulty understanding, to say nothing of complying with. Instead, the Court should read the 10-day language harmoniously with the 2-year statute of limitations that appears in the very same subsection. *Key Bank*, 67 Wn. App. at 917.

2. *Legislative History.*

The Foundation’s interpretation is, *in the least*, a reasonable one which must be considered in light of the arguments above. Thus, if this Court also considers the trial court’s interpretation to be reasonable, which it should not, the statute must at least be considered ambiguous because a statutory provision is ambiguous if it is susceptible “to more than one reasonable interpretation.” At that point (and only at that point) the Court can consider legislative history to resolve the ambiguity. *Tesoro Refining & Marketing Co. v. State Dep’t of Revenue*, 164 Wn.2d 310, 317-18, 190 P.3d 28 (2008).²⁷ It is also important to note that the prevailing rules of statutory interpretation in this State permit the Court to consider *all* that the

²⁷ However, merely because a second interpretation is conceivable does not render the statute ambiguous – the Unions’ strained and nonsensical reading does not give rise to an ambiguity in the statute, because it is only “reasonable” interpretations that operate to create such an issue. *Id.*, at 317-18. Nonetheless, Petitioner addresses the legislative intent behind Section 765, in an abundance of caution, despite the Respondents’ contentions below that the statute is unambiguous. *See* 97394 CP, at 24; 971099 CP, at 490-92; 971111 CP, at 18.

Legislature has said in ascertaining the legislative intent, even in a plain meaning analysis – including the subsections of RCW 42.17A.765(4)(a) that operate in tandem with subsection (ii), the other subsections of Section 765, and all else that has been uttered in the FCPA and related or similar statutes. *See Umpqua Bank*, 194 Wn. App. at 694; *Campbell & Gwinn, LLC*, 146 Wn.2d at 11-12.

If the Court should determine to consider legislative history, the language in the original 1972 ballot measure and the subsequent legislative history of its amendments support the Foundation’s interpretation – the same interpretation courts have given to the “ten-day” language in former § 765(4)(a)(ii)-(iii). The original 1972 provision included language which clearly applied *only* to the AG:

Any person who has notified the attorney general in writing that there is reason to believe that some provision of this act is being or has been violated may himself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this act if the attorney general has failed to commence an action hereunder within forty days after such notice and if the attorney general has failed to commence an action within ten days after a notice in writing delivered to the attorney general advising him that a citizen's action will be brought if the attorney general does not bring an action.

See Voter Pamphlet, Sec. 40, p. 65 (emphasis added) (973946 CP, at 321).

The Supreme Court confirmed this interpretation of the “ten day” language in *Fritz v. Gorton*, 83 Wn.2d 275, 314, 517 P.2d 911 (1974)

(“...the plaintiff in such cases is required to give the [AG] a 40-day notice of an alleged violation. The litigant may then proceed [o]nly after the service of a second 10-day notice results in no action on the part of the [AG].”). Under the original 1972 language, a six-year statute of limitations was the only timing restriction on the filing of citizens’ actions. *See Voter Pamphlet*, Sec. 41, p. 65 (973946 CP, at 321). In 1975, the Legislature amended the original citizen action process with HB 827, changing the forty (40) day notice requirement to forty-five (45) days and requiring notice to the prosecuting attorneys, but maintaining the “ten-day” language:

...such person has [after forty-five days] further notified the attorney general and prosecuting attorney that said person will commence a citizen's action *within ten days* upon their failure so to do, and the attorney general and the prosecuting attorney have *in fact* failed to bring such action *within ten days* of receipt of said second notice.

Laws of 1975, Chapter 294, Sec. 27 (p. 1320) (emphasis added) (973946 CP, at 394).²⁸

Though the provision *adding* the language in subsection (a)(ii) occurred in 1975, nothing indicates any legislative intent for this revision to effectuate any change in the calculation of when the citizen must file his or

²⁸ In the discussion over the next few pages concerning legislative history, the Foundation will, for ease of reference, only cite to the historical materials set forth as part of the record in the DSHS COPE Matter. The same materials concerning legislative history had been presented to the trial courts in the Teamsters 117 Matter and in the SEIU PEA Matter, however. *See* 971099 CP, at 845-892; 971111 CP, at 236-275.

her action. Laws of 1975, 1st Ex. Sess. ch. 294, § 27(4).²⁹ The 2007 amendments (titled to enact a statute of limitations) added the actual statute of limitations, two (2) years, as subsection (a)(iv) of the newly numbered subparagraphs. Laws of 2007, ch. 455, §1(4). The statute as enacted by initiative clearly applied the ten-day period to when the authorities had to act.³⁰ **Throughout these minor changes to the language in subsection (a)(ii) there has been a reference to only a single ten-day period, and as existing after the 2018 amendments there was only the single reference**

²⁹ Significant debate was had over the “bounty hunter” provision. See “Sectional analysis of Engrossed Second Substitute House Bill No. 827 as amended by the House,” May 8, 1975, p. 7 (973946 CP, at 403) (“Section 26 - Repealed the authorization of a citizen to bring suit alleging a violation of this chapter.”); “Summary of All Major and Some Minor Amendments to Second Substitute House Bill 827,” Washington State House of Representatives, May 8, 1975 (973946 CP, at 403) (“25. Deletes so called ‘bounty hunter’ clause which allowed citizens to file suit if the Attorney General did not act on request.”); WA State Senate Research Center, “Analysis of the Proposed Amendments to Int. #276, May 30, 1975 (973946 CP, at 409-14).

³⁰ Moreover, it is evident that in deeming the second notice received as of the date of mailing, the original 1972 provisions give no indication that the date of the receipt is somehow tied to the citizen’s Statute of Limitations, which appears in the previous subsection. See Motion, at p. 5, n.5; Voter Pamphlet, Sec. 42, p. 65 (973946 CP, at 321). Instead, the Statute of Limitations operates with reference to an ascertainable date (see *supra*, at n.27), *i.e.*, when the violation occurred. This is the same under the current version of RCW 42.17A.140(1), which operates to apply a definition of “receipt” only to the ending date upon which something must be submitted, *i.e.*, if a submission to the PDC, for example, is post-marked on the deadline for that submission to be made, it is considered “received” by the PDC as of the deadline. Nothing in that Section suggests that the authorities’ “receipt” of a second ten-day notice somehow gives rise to an obligation on the part of the *citizen* who has sent the notice – the obvious purpose of which is to start the AG’s 10-day period, not to end it.

to a ten-day period, during which the authorities – not the citizen – must act.³¹

Additionally, other legislative history materials also support this interpretation. *See* “Summary of the changes made by the Senate in Engrossed Second Substitute House Bill 827,” “Change #39” (973946 CP, at 445) (describing *three* requirements which do not include a ten day limitations period on complainants); “Summary of Changes in ESSEB 827 Adopted by the Free Conference Committee,” Washington State Legislature, June 8, 1975, “Change #33” (*id.*, at 449) (describing same three requirements without a ten day limitations period); “Summary of the differences between the 3rd draft of the proposed conference committee report on Engrossed Second Substitute House Bill 827 and Engrossed Second Substitute House Bill 827 as amended and passed by the House,” Washington State Legislature (*id.*, at 453) (“Change #26 - On page 35, after line 23 deletes the section which would have repealed the citizen's right to bring suit in cases where prosecutors fail to act. (*See* page 36, lines 12-30 of ESSHB 827.)”). Importantly, it is also supported by legislative

³¹ *See current* RCW 42.17A.775. As is apparent from the 2018 amendments to the FCPA (973946 CP, at 437-39), the enforcement provisions were stricken from Section 42.17A.765 and re-inserted into Section 775. In the course of these revisions, a provision analogous to former subsection (iii) of Section 765 was not included in the new Section 775, strongly suggesting that the 10-day period referenced in former subsection (ii) was always intended only to place a limit on the officials’ window to act, not to place any limit on the citizen’s time to file a citizen’s action.

comments on the final House Bill as enacted and enrolled. “Sectional analysis of Engrossed Second Substitute House Bill No. 827...”, July 2, 1975, “Section 27” (973946 CP, at 461) (describing three (3) requirements without a ten-day period).

Nothing in the 1975 Amendments’ history suggests, or even hints, the Legislature intended to drastically limit the time in which a complainant could file a citizen’s action from up to approximately six (6) years after the required notices, to a meager ten (10) days. *See* press release from WACOG, May 7, 1975 (973946 CP, at 463-65) and letter to WA State Senators from Michael Hildt, Chairman, Washington Coalition for Open Government, May 19, 1975 (*id.*, at 467-68). In fact, the legislative history shows the amended language (which the Unions admit survives today) only imposed three (3) requirements on complainants, none of which included a ten-day restriction on filing a citizen’s action. *See supra*, at pp. 16, 24.

Petitioner notes that the Unions’ counsel argued in some of the matters below that the citizen makes a “promise” to comply with the purported limitations period in subsection (a)(ii). In other matters below, they attempted to rely upon a newly-minted, hybrid statutory/common law principle that “the issuer [of a notice] has a duty to act in accordance with the notice’s terms or else waives any rights that would follow,” lest the government lose credibility in the eyes of the citizenry. *See* 971099 CP, at

494, n.6; 973946 CP, at 25-26, n.9.³² But were it the Legislature’s intent to limit citizens actions to a ten-day filing period, this would have represented a serious departure from the law then in effect. The fact that nothing in the legislative history suggests the Legislature meant to make such a change, that the Legislature saw the amended 1975 language as imposing the same basic requirements on complainants as the original 1972 language, cited *supra*, and the fact that the contemporary understanding of the legislation was that a citizen’s action could be filed if the authorities failed to file an action within ten (10) days of receiving the second notice, all confirms the invalidity of the Unions’ reading.

This is confirmed in the statute’s 2007 Amendments, when the Legislature for the first time included language which explicitly limited the time period in which complainants could file a citizen action (previously less than approximately six years). In 2007, the Legislature specifically added a separate requirement imposed on complainants in a new subsection: “This citizen action may be brought only if the citizen’s action is filed within two years after the date when the alleged violation occurred.” RCW

³² Puffery aside, it is clear that the State need not actually follow through with every prosecution of every criminal that it threatens with charges, whether in a timely manner or not. Further, the analogy does not hold, because here, the citizen is issuing a notice (and *arguendo*, making a “promise”/threat) to the State *itself* – “pursue this lawbreaker, or I will” – *not* to the lawbreaker. The Union’s conflation of the relevant actors in a putative FCPA enforcement action echoes its apparent belief that the AG, after receiving such a threat, can usurp the authority of a third-party respondent to extend the citizen’s statute of limitations to file suit against that third-party entity. *See supra*, at pp. 32-33.

42.17A.765(4)(a)(iv); *see also*, Laws of 2007, Chapter 455, Sec. 1 (p. 3) (HB 1832) (973946 CP, at 473). This language clearly indicates the Legislature intended to impose a restriction on when complainants could file citizen actions – language missing from subsection (4)(a)(ii). Again, if in the 1975 Amendments the Legislature intended to drastically alter the time period in which complainants could file a citizen action, it would have included similar language – but it declined to do so. See *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 860, 50 P.3d 256 (2002) (the Legislature “understands how to enact” limits on legal actions.)

Unlike the 1975 legislative history, the legislative history of HB 1832 in 2007 indicates that the altered language does, indeed, impose a restriction on how long complainants have to file a citizen action. For example, in remarks before the Senate Government Operations and Elections Committee (March 26, 2007), Rep. Sam Hunt, prime sponsor of HB 1832, stated:

In essence, it [HB 1832] shortens citizen complaint periods for complaints against campaigns for violations to two years. And, those of us who have been around campaigns know that after two years — if you have an issue campaign, if you have a losing campaign, even a winning campaign — the volunteer staff and folks disperse to various places. This would provide a two-year window for anybody who has a legal complaint against a campaign to present that complaint. It would not impact agencies like the Public

Disclosure Commission, which has a five-year period; that would remain.³³

Similarly, Rep. Hunt also stated before the House State Government and Tribal Affairs Committee (February 21, 2007) that

What we are trying to do is – we talked with Public Disclosure Commission on this and it appears that what we’re trying to do is draft it to the wrong part of the RCW. We are not looking to interfere or to shorten the time that the PDC and – would have to address complaints and issues. We’re more looking at the time for other complaints. And part of the problem is, with a two or four-year election cycle – once you get beyond that period it’s hard to – especially if you’re a losing campaign – to find your records, you know, who was your treasurer? Where is your treasurer? That sort of thing.³⁴

Additionally, the HB 1832 Bill Analysis prepared by non-partisan legislative staff summarized the bill as follows: “Decreases to two years the statute of limitations for actions brought for violations under chapter 42.17 RCW.”³⁵ The Final Bill Report maintains: “Any citizen’s action brought under the state law governing campaign financing and related reporting must be commenced within two years of the violation.”³⁶ *See also* HB

³³*Senate Government Operation & Elections Cmte.*, TVW, <https://www.tvw.org/watch/?clientID=9375922947&eventID=2007031127&startStreamAt=1563&stopStreamAt=1630&autoStartStream=true> (last visited 9/18/2019).

³⁴*House State Government & Tribal Affairs Cmte.*, TVW, <https://www.tvw.org/watch/?clientID=9375922947&eventID=2007021147&startStreamAt=1806&stopStreamAt=2223&autoStartStream=true> (last visited 9/18/2019).

³⁵ 973946 CP, at 475-76.

³⁶ *See id.*, at 478.

Report (“Any citizen’s action brought under chapter 42.17 RCW must be commenced within two years...” (973946 CP, at 481). Lastly, in 2018 the Legislature amended this language, so that it then had only a single reference to a 10-day period. **As existing after the 2018 amendments, the FCPA either had a 10-day period for the AG to act to control the enforcement of the allegation, or it initiated a “race to the courthouse.”**

On a fundamentally important level, interpreting RCW 42.17A.765(4)(a)(ii) to prohibit a citizen’s action unless it is brought within a very narrow window does not promote enforcement of disclosure provisions. The stated purpose of the FCPA has been made clear by the Legislature in RCW 42.17A.001; to wit, encouraging disclosure and avoiding secrecy. The union’s position is certainly not “liberally” construing the FCPA, which aims to promote complete disclosure of all information respecting the financing of political campaigns. *See, e.g., Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 40, 204 P.3d 885 (2009). Accordingly, the Court here should not require the FCPA to contain duplicative statutes of limitation, one of which will often expire before the citizen has any notice of the accrual of his or her claim, thereby rendering the 2-year limitations period meaningless. *See State v. Allen*, 150 Wn. App. 300, 311, 207 P.3d 483 (2009). Again, to do so would render the entire

citizen's action provision of the FCPA an "empty gesture" (*see supra*, at pp. 19-20) and could not have been the intent of the Legislature.

3. *The Last Antecedent Rule Compels Petitioner's Reading.*

Lastly, the Union claims Plaintiff must "shuffle the ['citizen's action'] phrase from its current position to the end of the sentence" to support its interpretation, in order for "citizen's action" to be divorced from the "within ten days" language. 973946 CP, at 22; 971099 CP, at 491; 971111 CP, at 305. But nothing could be further from the truth. No language in former § 765 (or current § 775) expressly imposes a ten-day restriction on a person filing a citizen action. On the contrary, it is the Unions' position which must distort the meaning of language ("to do so") in order to conclude it imposes a limitations period.

Indeed, the "last antecedent rule" (upon which SEIU 775 places its near-exclusive reliance) is merely a rule of grammar that has proven useful in interpreting statutes, because it is often useful in interpreting language; it must yield where, as here, "...a contrary intent appears in the statute." 973946 CP, at 22-23; 971099 CP, at 491; 971111 CP, at 18) (*citing Eyman v. Wyman*, 191 Wn.2d 581, 559, 424 P.3d 1183 (2018)); *see also State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010) ("We do not apply the rule if other factors, such as context and language in related statutes, indicate contrary legislative intent or if applying the rule would result in an

absurd or nonsensical interpretation.”); *Clark County Public Util. Dist. No. 1 v. State, Dept. of Revenue*, 153 Wn. App. 737, 754-56, 222 P.3d 1232 (2010).

Here, that contrary intent is readily apparent in Section 765, and within subsection (ii) itself, because subsection (ii) uses the critically important words “**upon their failure to do so.**” RCW 42.17A.765(4)(a)(ii). The Section uses the word “fail” in two other instances, which provide the key to the Legislature’s intent: (1) in subsection (i), when referring to the officials’ failure to commence an enforcement action following forty-five (45) days after the first notice is received, and (2) in subsection (iii), when referring to the officials’ continuing failure to bring the enforcement action following ten (10) days after the second notice. But in using the words “**to do so.**” subsection (ii) cannot be understood to refer to the continuing “failure” referenced above (which has not yet happened at the time the citizen provides the second notice), and of course it cannot refer to the officials’ failure to file a *citizen’s* action, because that would be nonsensical and lead to absurd results – the state officials cannot “fail” to file a citizen’s action, as they never have the right or ability to do so in the first place. *See, e.g., Utter v. BIAW*, 182 Wn.2d 398, 410, 341 P.3d 953 (2015) (disapproving interpretation of “action” in citizen’s action provision of FCPA that would place the citizen in the position of conducting

investigations, as “citizen’s actions,” because statute dedicated such investigations to state officials)³⁷; *Asotin County v. Eggleston*, 7 Wn. App. 21d 143, 151 (2019) (“There is a textual basis for a different construction, however, and one that is more consonant with the remaining provisions of ... the purpose of the PRA.”).

But the linguistic nonsense inherent in the Unions’ position is exactly what a wooden application of the “last antecedent” rule would require here. *See State v. Wofford*, 148 Wn. App. 870, 882, 201 P.3d 389 (2009);³⁸ *Morpho Detection, Inc. v. State, Dept. of Revenue*, 194 Wn. App. 17, 24, n.1, 371 P.3d 101 (2016). Under Plaintiff’s interpretation, the attorney general and the prosecuting attorney would have forty-five (45) days, after receiving the first notice, within which to preclude a citizen’s action by “commenc[ing] an action hereunder.” RCW 42.17A.765(4)(a)(i). If they “fail[ed] to do so,” then the citizen could then “further notif[y] the attorney general and prosecuting attorney that the person will commence a citizen’s action,” *i.e.*, reiterate the factual substance of its first notice, and provide notice to the state officials that he or she intends to sue – but that

³⁷ “Thus, under the Court of Appeals’ interpretation, if the AG fails to act, a citizen could investigate on his or her own in the name of the State, personally issue orders with the same authority as a subpoena; require the appearance of other citizens to answer questions, and take all other steps authorized by subsections (2) and (3) above for the AG. That is not a reasonable interpretation of the statute.”

³⁸ “[W]e are unwilling to mechanically apply the last antecedent rule if, considering other principles for determining legislative intent, the result is plainly at odds with such legislative intent.”

the State has one brief opportunity to preclude a citizen's action. RCW 42.17A.765(4)(a)(i). If the state officials have still "...failed to bring such [an enforcement] action within ten days of receipt of said second notice" (RCW 42.17A.765(4)(a)(iii)), then the citizen is unhampered and may file the citizen's action at any time – subject to the 2-year statute of limitations in subsection (iv). This result is inexorable whether traveling under a plain meaning or legislative history analysis.

B. The Trial Court Should Not Have Stayed All Discovery, In the Weeks Prior to Granting Judgment on the Pleadings.

1. The Foundation Had a Right of Access to the Courts, and to Conduct Discovery.

A trial court's discovery orders are reviewed for an abuse of discretion. *Richardson v. GEICO*, 200 Wn. App. 705, 711, 403 P.3d 115 (2017). It is undoubtedly true that trial courts possess a certain amount of discretion in managing their dockets, including the conduct of discovery proceedings. CR 26(b)(1)(C). However, Judge Price should have considered Teamsters 117's motion to stay discovery against the background of Washington law, which jealously protects a plaintiff's right of access to the courts, and the right to conduct lawful discovery in connection therewith. *See Putman v. Wenatchee Valley Medical Ctr., P.S.*,

166 Wn.2d 974, 979, 216 P.3d 374 (2009) (quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)).³⁹

The Supreme Court in *Puget Sound Blood Center* aptly emphasized the critical importance of discovery in exercising this right of access:

The court rules recognize and implement the right of access. The discovery rules, specifically CR 26 and companion rules, CR 27-37, grant a broad right of discovery which is subject to the relatively narrow restrictions of CR 26(c) ... It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense. Thus, the right of access as previously discussed is a general principle, implicated whenever a party seeks discovery. It justifies the limited nature of the exceptions to broad discovery found in CR 26(c) ... Thus, plaintiff's right of access to the courts and his concomitant right of discovery must be accorded a high priority in weighing the respective interests of the parties in litigation.

117 Wn.2d at 782-83 (emphasis added).

In that light, the trial court's stay was a clear abuse of discretion. While the period of time between the hearing on Teamsters 117's motion to stay discovery and the hearing on its motion for judgment on the pleadings was limited, it represented a substantial portion of the time that the parties had remaining within which to conduct discovery, and a critical time for the Foundation to conduct discovery in attempting to raise an issue of fact in

³⁹ "The people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations ... This right of access to courts 'includes the right of discovery authorized by the civil rules.'"

response to Teamsters 117's request for judgment. The information that the Foundation sought below was not only relevant and material to a determination of the issues and claims here, including those bound up with Teamsters 117's request for judgment on the pleadings, but indispensable to the broad scope of inquiry required by applicable campaign finance law in the State of Washington.

These important, fundamental observations were not diminished simply because one party filed a dispositive motion below. In order to satisfy CR 8(a)(1), a pleader need only file a complaint containing a short and plain statement showing that the pleader is entitled relief. *Becker v. Community Health Systems, Inc.*, 182 Wn. App. 935, 941, 332 P.3d 1085 (2014). The standard applicable to Teamsters 117's request for judgment on the pleadings was identical to that which is utilized on a motion to dismiss. *See Winter v. Toyota of Vancouver USA, Inc.*, 132 Wn. App. 1029, at *2 (2006) (unpublished op.) ("In either case, dismissal is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery, considering even hypothetical facts outside the record."). As has long been the law of this State, "[d]ismissal of a claim under Rule 12(b)(6) is appropriate only if it can be said that there is no state of facts which the plaintiff could prove in support of entitling him to relief under his claim." *Barnum v. State*, 72 Wn.2d 928, 929, 435 P.2d 678 (1967). On a motion for

judgment on the pleadings, the rule is that the party who moves for judgment on the pleadings admits, for purposes of the motion, the truth of every fact well pleaded by his opponent and the untruth of his own allegations which have been denied. *Hodgson v. Bicknell*, 49 Wn.2d 130, 136, 298 P.2d 844 (1956). Under this lenient standard, the trial court should have considered even hypothetical circumstances, in order to determine whether there were any conceivable facts the Foundation could have alleged in support of relief. *Becker*, 182 Wn. App. at 941.

At the very least, the Foundation was owed the opportunity to conduct discovery in support of its claims, and to raise both legal and factual arguments against judgment on the pleadings and/or summary judgment. *See Barnum*, 72 Wn.2d at 930 (1967);⁴⁰ *see also Blenheim v. Dawson & Hall, Ltd.*, 35 Wn. App. 435, 438, 667 P.2d 125 (1983) (“A motion to dismiss under CR 12(c) can be considered a motion for summary judgment even if not denominated as such either by the moving party or by the court.”). The trial court’s stay order (971099 CP, at 801-02) foreclosed these opportunities, wholesale, and then the court compounded its error by

⁴⁰ “These matters should have been disclosed by discovery proceedings for the allegations in the complaint could then have been considered in the light of the facts so disclosed, in a motion for summary judgment hearing. Plaintiff may or may not be able to establish facts which will entitle him to recover.”

finding that there was no due process issue in permitting Teamsters 117 to prevail on an affirmative defense which had not been raised,⁴¹ and thus, to which no appreciable discovery had been directed. This constitutes reversible error.

2. Teamsters 117 Identified No Reason the Discovery Below was Unduly Burdensome or Excessive.

Teamsters 117 suggested to the trial court that discovery should be stayed because “...further discovery would be unduly burdensome and expensive,” but its only stated basis for that position was that the Foundation’s claims are “meritless.” *See* 971099 CP, at 541-43. Teamsters 117 made much of this supposed lack of factual merit, but never satisfied its burden to explain how the discovery itself imposes any “undue burden or expense.” CR 26(c) undoubtedly required such a showing, however, and the absence of one rendered the trial court’s stay of discovery an abuse of discretion.

Indeed, Teamsters 117 could hardly maintain any proper “unduly burdensome” objection, because the discovery below was tailored to a determination of the facts and issues in this case, and was perfectly

⁴¹ As noted *infra* (*see* pp. 55-56, n.51), the Foundation contends that the trial court’s consideration of Teamsters 117’s affirmative defense of failure of conditions precedent independently represents error.

permissible under the broad scope of discovery afforded by CR 26(b)(1).⁴² As Teamsters 117 itself recited in seeking the stay, in order to determine whether an organization has political activity as its “primary or one of the primary purposes” requires a broad consideration of not just its stated purposes, but whether the whole of its activities comports with the “stated goals and mission,” which specifically includes activities “other than political activity.” See 971099 CP, at 541-42 (citing *EFF*, 111 Wn. App. at 599).⁴³ The needs of the case below therefore warranted a “wide-ranging” inquiry, and the Foundation was entitled to more information for opposing judgment on the pleadings and/or summary judgment than merely the general purposes stated in Teamsters 117’s collective bargaining agreement, and the bare statistics offered by counsel’s self-serving declarations and Teamsters 117’s publicly-filed IRS forms.⁴⁴

⁴² “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party ... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” (emphasis added).

⁴³ “[These factors] are intended to reach all relevant evidence, but they are not exclusive. For example, by examining the totality of the circumstances, a fact finder may look at all of the organization’s actions, including those in addition to its stated goals.”

⁴⁴ It was the factual bases for these very representations that the Foundation sought to inquire into, by way of the vast majority of its written discovery requests. See 971099 CP, at 669-748.

Teamsters 117 protested that this discovery was “costly, intrusive, and irrelevant” (971099 CP, at 534), but did not attempt to articulate in greater detail why it was any of those things, and the Declaration of Ms. Ewan (*id.*, at 546) offered no details to carry its burden in that regard.⁴⁵ It is clear that motion was filed as an afterthought only after a number of other legal arguments failed to dispose of this action, and after Teamsters 117 had an opportunity to learn of the type of information that the Foundation would be seeking in this matter. *See, e.g., Winter*, 132 Wn. App. 1029, at *2, n.3.⁴⁶

Acting on that information, Teamsters 117 succeeded in being wholly absolved from its discovery obligations until its dispositive motion could be determined. But even the cases that Teamsters 117 relied upon below required some type of a special or inordinate burden imposed by the discovery (such as proceeding with litigation in the face of a qualified immunity defense), in conjunction with the presence of a dispositive motion

⁴⁵ By way of contrast, what was required to carry Teamsters 117’s burden, as the party seeking protection, was to “...show specifically how each discovery request is burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.” *Oleson v. K-Mart Corp.*, 175 F.R.D. 560, 565 (D. Kan. 1997); *see also Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3rd Cir. 1986); *McLeod, Alexander, Powel & Appfel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (stating that the “party resisting discovery must show specifically how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive”).

⁴⁶ “Toyota’s argument is particularly inappropriate given that it sought early dismissal in order to head off Winter’s discovery requests, thus denying Winter the opportunity to develop the factual record.”

filed by the defendant. *See Nissen v. Pierce County*, 183 Wn. App. 581, 590, 333 P.3d 577 (2014);⁴⁷ *Long v. Snoqualmie Gaming Commission*, 7 Wn. App. 2d 672, 690, n.52, 435 P.3d 339 (2019) (citing *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996)). The special considerations in the foregoing cases were simply not present below, and Teamsters 117 identified no other unusual or undue burden. Accordingly, its effort to halt the discovery process (with the hearing on its motion for judgment on the pleadings looming large) should have been squarely rejected, but was not. The trial court in the Teamsters 117 Matter erred by staying discovery.

C. The Trial Court Improperly Granted Judgment on the Pleadings, With Numerous Discovery Items Outstanding.

Relatedly, it was not proper for the trial courts in the Teamsters 117 Matter or in the DSHS COPE Matter to grant judgment on the pleadings before both parties had a full opportunity to develop the record below through discovery, because the rules of practice “...are to be liberally construed in order that full discovery proceedings will be afforded,” in order to protect litigants’ right of access to the courts. *See Barnum*, 72 Wn.2d at

⁴⁷ “We balance this free and open government principle against the countervailing principle that individuals, including government employees, should be free from unreasonable searches and intrusions into their private affairs.”

930 (1967);⁴⁸ *Putman*, 166 Wn.2d at 979 (2009) (citing *Puget Sound Blood Ctr.*, 117 Wn.2d at 782 (1991)).

It appears that the Unions' belated Motions for judgment on the pleadings were nothing more than an attempt to avoid the lawful discovery process – an attempt which the trial courts indulged, regrettably. *See, e.g., Winter*, 132 Wn. App. 1029, at *2, n.3 (citing *Barnum*, 72 Wn.2d at 931). Had the discovery process gone forward, the Foundation would have been in a better position to bring in relevant matters outside of the pleadings, and to argue that the motions for judgment on the pleadings should have been converted to motions for summary judgment, and denied for outstanding factual disputes. Yet none of these options were available to the Foundation, for the foregoing reasons (and in the Teamsters 117 Matter, because the trial court permitted the Defendant to prevail on an affirmative defense that had not been raised).⁴⁹ The judgments below should be reversed, because

⁴⁸ “These matters should have been disclosed by discovery proceedings for the allegations in the complaint could then have been considered in the light of the facts so disclosed, in a motion for summary judgment hearing.”

⁴⁹ The Foundation objected that judgment on the pleadings cannot be granted on an affirmative defense not raised in the pleadings. Failure to satisfy a statutory condition precedent such as the second notice requirement of RCW 42.17A.765(4)(a)(ii) is an affirmative defense that must be raised by way of an answer or is considered waived. *See Washington-Reed v. King County, Dept. of Metropolitan Services*, 90 Wn. App. 1031, at *2, n.10 (Apr. 20, 1998) (unpublished op.) (“Further, a defendant has not waived an affirmative defense relating to a mandatory claim filing condition precedent to commencement of an action *as long as the defendant asserts the defense in its answer to the complaint.*”) (citing *Mercer v. State*, 48 Wn. App. 496, 501-02, 739 P.2d 703 (1987))

Petitioner/Plaintiff was not "...given a reasonable opportunity to present all material made pertinent to such a motion by rule 56." *See* CR 12(c).

D. The Complaint Against Teamsters 117 Alleged Sufficient Facts to Find That the Union Was a Political Committee, Under the "Receiver of Contributions" Prong.

A "political committee" is any person "having the expectation of

(emphasis added); *see also Tucker v. Kittitas County*, 89 Wn. App. 1069, at *4 (Mar. 27, 1998) (unpublished op.) ("Here, the allegation that the Tuckers' failed to comply with KCC 2.72 does not merely controvert an element of the plaintiffs' prima facie case. Rather, it is a matter of avoidance that the County was required to affirmatively plead.") (*citing* CR 8(c)); *see also Dyson v. King County*, 61 Wn. App. 243, 245, 809 P.2d 769 (1991) ("CR 9(c) addresses pleading requirements for conditions precedent. It states that '[a] denial of performance or occurrence shall be made specifically and with particularity.'). The trial court should also have found that Teamsters 117 waived the affirmative defense by failure to raise it by way of its previous CR 12(b)(6) motion to dismiss (or its previous motion for judgment on the pleadings), instead raising it only in a CR 12(c) motion, **over a year into the litigation, and after the 2-year Statute of Limitations had already run.** *See King v. Snohomish County*, 146 Wn.2d 420, 424-26, 47 P.3d 563 (2002) ("We have held that a defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense ... Here, both the County and the Kings engaged in extensive, costly, and prolonged discovery and litigation preparation only to have the case decided on procedural grounds completely unrelated to the discovery in which they were engaged.") (emphasis added). Teamsters 117's dilatory gamesmanship cut the Plaintiff off from having an opportunity to conduct discovery into the relevant issues and the ability to mount a factual defense, as well as any ability to dismiss and refile the action upon an indisputably proper notice. *See Dyson*, 61 Wn. App. at 245-46 ("By answering without raising the defense and proceeding to defend the case for an appreciable period of time while awaiting the running of the statute of limitations, the City did take the type of misleading affirmative action which was lacking in Mercer..."). In proceeding over the Plaintiff's objection, it appears that Judge Price believed that the issue was "jurisdictional," and could therefore be raised at any time. Yet, there is persuasive authority suggesting that even if the requirement was "jurisdictional," in the lesser sense of that word (*i.e.*, not strictly concerning the court's subject matter jurisdiction), that the Teamsters' conduct here would result in a waiver of the defense. *See Holmstrom v. Port of Bellingham*, 94 Wn. App. 1008, at *2 (Feb. 16, 1999) (unpublished op.) ("Taking into account all of these circumstances, we conclude that the Port ... through its delay, waived its jurisdictional objection to the suit."). The Foundation does not intend to waive these arguments on appeal, but believes they are most appropriately considered as an aside to the substantive arguments set forth in this Section.

receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.” RCW 42.17A.005. An entity may become a political committee under two alternative prongs: by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures. *EFF*, 111 Wn. App. at 598; *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1011–12 (9th Cir. 2010). Here, while the trial court correctly denied dismissal, finding that Teamsters 117 and/or its segregated fund could be a political committee under the “expenditures prong,” it nonetheless ruled as a matter of law, at the motion to dismiss stage no less, that the Plaintiff could not demonstrate political committee status under the “contributions prong.”⁵⁰ See 971099 CP, at 1253-54. Upon the granting of a motion to dismiss, this Court’s standard of review is *de novo*. *Lowe*, 173 Wn. App. at 258 (2012).

1. *The Union Was Properly Alleged to Be a Receiver of Contributions.*

An entity becomes a political committee under the contribution

⁵⁰ Compounding the error on this point, it was not proper for the trial court in the Teamsters 117 Matter to “dismiss” only one prong of the test for “political committee” status. The trial court should have held that because the Foundation’s allegations satisfied the “expenditures” prong, the “political committee” test was satisfied, and denied the motion to dismiss. *EFF*, 111 Wn. App. at 598. The CR 12(b)(6) motion was simply not the proper context to foreclose one method of proving “political committee” status; and the trial court should have left this determination for a motion *in limine*, after the Foundation had a fair opportunity to conduct discovery.

prong if “expects” to receive contributions. *Utter*, 182 Wn.2d at 416. A pledge to provide money is sufficient. That the pledged money ultimately is transferred to a reporting political committee does not alter the fact that the entity to which the pledge was made becomes a political committee. *See id.*, at 416-17. Hence, any pledge from anyone to Teamsters Local 117 is sufficient, even if the money was transferred to its separate segregated fund. Of course, a pledge to the separate segregated fund is also sufficient for it to become a committee. It is consistent with the complaint that among the extensive political activities Teamsters 117 planned for and engaged in, there was a pledge to support those activities. *See* 971099 CP, at 3-14. The trial court should have credited these allegations, considered such “hypothetical facts,” and declined to dismiss any portion of the Complaint.

EFF’s detailed analysis is helpful here, insofar as it stated “[u]nder the ‘receiver of contributions’ prong, ...[w]hen an organization is funded primarily by membership dues, it is a ‘receiver of contributions’ if the members are called upon to make payments that are segregated for political purposes and the members know, or reasonably should know, of this political use.” *EFF*, 111 Wn. App. at 602. Stated differently, “[d]ues are political ‘contributions’ if the organization’s members intend or expect their dues to be used for electoral political activity.” *Id.* In *EFF*, where dues were not considered to be contributions, it was critical that dues were “not

segregated in any manner for political expenditures.” *Id.* at 603.

But here, for Teamsters Local 117 to have properly obtained dismissal, it would have had to show that under no conceivable facts has it segregated dues in any manner for political purposes, and that reasonably aware members were not aware their dues would be used for political purposes. Given the large expenditures, the significant role political activity played in the union, and the public pronouncements by union leaders, even the facts specifically alleged in the Complaint show members should know of the political use of their dues. It is easy to conceive of additional facts showing actual awareness. Similarly, it is easy to conceive of facts surrounding the creation of the SSF which would show that Teamsters 117 has “segregated” dues into the fund.

2. *The Teamsters 117 Segregated Fund Was a Receiver of Contributions.*

The separate segregated fund has stated on an Internal Revenue Fund form that it is a “qualified State and local political organization.”⁵¹ 971099 CP, at 17, ¶142. To be one, the organization must be “subject to State law that requires the organization to report (and it so reports)” certain information. *Id.*, at 16, ¶141; *see also* 26 U.S.C. §527(e)(5)(A)(ii). Yet

⁵¹ Information provided on an IRS form can create an issue of fact. *Utter*, 182 Wn.2d at 420, n.8.

Teamsters 117's SSF does not.

Because Teamsters 117 claims the separate segregated fund is a "political organization," it is a "person," and meets the definition of a "political committee." A "person" includes an "individual, partnership, joint venture, public or private corporation, association, federal, state or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized." RCW 42.17A.005(35) (emphasis added). The Segregated Fund is easily such a "person" under this broad definition.

The separate segregated fund should have been considered a "person," for several reasons. First, Teamsters 117 conceded to the Federal Government that its SSF is a "political organization" required to report its political activity to state authorities. Given that it (the SSF) has elected to receive favorable federal income tax treatment, that federal statute gives the SSF status as a "separate organization," 26 U.S.C. §527(f)(3), within the definition of "person." This separate status on the federal level in turn brings the SSF within Washington's regulation as a federal governmental entity "however constituted." The U.S. Supreme Court considers these funds to

have a separate identity. “A PAC is a separate association⁵² from the corporation.” *Citizens United v. Federal Election Commission*, 558 U.S. 310, 337, 130 S.Ct. 876, 175 L.Ed. 2d 753 (2010) (allowing PAC to speak still does not allow corporation itself to speak). “Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a “separate segregated fund” (known as a political action committee, or PAC) for these purposes.” 558 U.S. at 321.

Further, this is hardly the first instance of an entity disingenuously trying to avoid Washington’s disclosure laws. For instance, the Voters Education Committee argued it was not a political committee, even though it was a § 527 separate segregated fund. The Washington Supreme Court took a dim view of that too-clever position, finding that

However, VEC fails to justify how it qualifies as a “political organization” but not a “political committee.” Thus, the fact that VEC registered as a “political organization” under section 527 organization is a persuasive fact that indicates that VEC was seeking the tax benefits of section 527 while disingenuously seeking to avoid the disclosure requirements of the FCPA.

Voters Educ. Comm. v. WSPDC, 161 Wn.2d 470, 491, n.14, 166 P.3d 1174 (2007).

Teamsters 117’s argument that the SSF was nothing more than a

⁵² Notably, an “association” itself is a “person” under the FCPA.

“bank account,” was contradictory to the allegations of the Complaint, and the only “evidence” to support that proposition was the federal form on which the fund states that it is a “qualified state or local political organization,” *cf.* 26 U.S.C. 527(e)(5), filing reports in Washington State – which it is not. *See* 971099 CP, at 1224-30. Nothing on the form indicates it is only a “bank account.” The Foundation’s allegations below properly disputed that the SSF is so illusory.⁵³ Given that very few bank accounts write checks without human input, there may be a committee which oversees the management of the separate segregated fund, which would fall within the definition of a “person.” There may be officers or trustees. Even if only one individual oversees the separate segregated fund, the definition of “person” includes an individual. Nor is there a requirement for a human being in the definition, because private corporations are “persons.” Lastly, the catchall provision including “any other organization or group of persons, however organized” is broad enough that conceivable facts make it impossible to argue that the SSF simply *cannot* be a person subject to disclosure requirements. The trial court should have considered all of these

⁵³ At bottom, money in the form of dues comes into Teamsters 117, and then goes out in the form of political contributions, from the Separate Segregated Fund. As a result, either these Defendants were to be considered one (1) entity, in which case the entity was a receiver of contributions, or they were to be considered two (2) entities, in which case the Union itself was not making expenditures, but the SSF was both receiving contributions and making expenditures. Under either scenario, the SSF should have been considered a receiver of contributions.

hypothetical factual circumstances against dismissal, but apparently did not.

In addition, a holding not requiring the SSF to disclose its political activity would create perverse incentives. The Ninth Circuit observed that Washington's Fair Campaign Practices Act

addresses the “hard lesson of circumvention” that has historically plagued the campaign finance context ... If the [FCPA] exempted groups with only “a” primary purpose of political advocacy, a group like Human Life's affiliated political action committee, HLPAC (which unmistakably qualifies as a political committee under the [FCPA]), could evade political committee status simply by merging with its affiliated organization, and thus diluting the newly created organization's relative share of advocacy activity. *See* Leake, 525 F.3d at 332 (Michael, J., dissenting) (warning that such a standard “effectively encourages advocacy groups to circumvent the law by *not* creating political action committees and instead to hide their electoral advocacy from view by pulling it into the fold of their larger organizational structure”).

Brumsickle, 624 F.3d at 1011–12 (9th Cir. 2010).

No Washington appellate court has considered whether an SSF must disclose its political activity, and so Teamsters 117 has attempted to take advantage of this doctrinal ‘gap’ by doing precisely that over which the *Brumsickle* court expressed concern.⁵⁴ Without delving too far into the conceivable facts, this Court should require the record to be developed so

⁵⁴ Any number of organizations which seek to participate in political activity create a separate entity to do so, and provide the disclosure so important to participatory democracy through that separate entity. Teamsters Local 117 has created that separate entity, yet for some reason believes it is exempt from disclosing under federal and state laws the tens of thousands of dollars, or more, it has spent, and related direct political activity.

that a principled decision can be made based on how such a fund operates, what such a fund does, and whether that structure should be permitted to evade the purpose of the FCPA to fully disclose such political activity.

Washington citizens and voters long ago declared the public policy to fully disclose political contributions and expenditures, and that the public's right to know this information “far outweighs” any right that these matters remain secret and private. This Court should enforce that public decision, and reverse the trial court’s dismissal of the “contributions” prong.

E. The Foundation is Entitled to Be Reimbursed for Its Attorney’s Fees and Costs.

Lastly, the Foundation requests an award of the reasonable attorney’s fees and costs it has incurred in pursuing the matters below, as well as this instant appeal. *See generally* RAP 18.1. The FCPA provides for a reimbursement of these expenses in successful citizen’s actions. RCW 42.17A.775. Here, all of the instant consolidated appeals are citizen’s actions pursuant to RCW 42.17A.775, so the Foundation should be awarded all of its reasonable attorney’s fees and costs in these matters.

V. CONCLUSION

For all of the reasons set forth above, the Foundation respectfully requests that the Court (a) vacate the trial court’s Order Granting Defendant SEIU PEAFF’s Motion to Dismiss Claims Against it Pursuant to CR

12(b)(6), and its Order Denying Motion for Reconsideration, in the SEIU PEA Matter; (b) vacate the trial court's Order Granting SEIU 775's Motion for Judgment on the Pleadings in the DSHS COPE Matter; (c) vacate the trial court's Order Granting Defendant's Motion for Judgment on the Pleadings in the Teamsters 117 Matter; (d) vacate the trial court's Order Granting Defendant's Motion to Stay Further Discovery Until Resolution of the Pending Dispositive Motion, in the Teamsters 117 Matter; (e) vacate that portion of the trial court's Order Granting Defendant's Motion to Dismiss in Part, and its Order Denying Motion for Reconsideration, finding that there were not sufficient allegations to support the "contributions" prong in the Teamsters 117 Matter; (d) award reasonable attorney's fees and costs to the Foundation, in the trial court and on appeal in each of these consolidated appeals; and (e) remand to the trial court for further proceedings consistent with the foregoing.

RESPECTFULLY SUBMITTED this 7th day of October, 2019.



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