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CONSOLIDATED CASE NO. 97109-9

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION,
Petitioner,

v.

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

FREEDOM FOUNDATION,
Petitioner/Plaintiff,

v.

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

FREEDOM FOUNDATION,
Petitioner/Plaintiff,

v.

JAY INSLEE, et al.,
Respondents/Defendants

SERVICE EMPLOYEES INTERNATIONAL UNION 775,
Respondent/Necessary Party.

**SERVICE EMPLOYEES INTERNATIONAL UNION POLITICAL
EDUCATION AND ACTION FUND'S ANSWERING BRIEF AND
OPENING BRIEF ON CROSS APPEAL**

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INTRODUCTION

Section 765 of the Fair Campaign Practices Act (FCPA) requires complainants to send public officials two notices before bringing a citizen's action to enforce the statute. The second notice must state that the complainants will file suit within 10 days of the officials' failure to file their own FCPA enforcement action. Under the statute, this failure occurs 10 days after the officials receive the second notice. Together, these provisions give complainants 20 days from the second notice to file a citizen's action. In both this and the other cases consolidated for appeal, the Freedom Foundation (Foundation) filed suit after that deadline. It thus failed to satisfy the statutory prerequisites to bringing a citizen's action.

The Foundation resists this conclusion on the ground that, although Section 765 requires complainants to tell state officials that they will bring suit within 10 days if the State fails to act, complainants are under no obligation actually to file as promised within the 10-day timeline. In other words, the Foundation's position is that in enacting Section 765, the Legislature intended to allow complainants to make hollow promises or even lie to public officials without consequence. Not surprisingly, this reading of Section 765 is contrary to settled principles of statutory construction, as well as basic principles of waiver and forfeiture. Because the Legislature cannot rationally be deemed to have required complainants

to perform the empty gesture of making a promise to sue that is at best meaningless, and at worst knowingly false, in order to gain the privilege of enforcing election laws in the name of the State, the Court should reject the Foundation's reading and affirm the dismissal below.

ASSIGNMENTS OF ERROR

As explained below, PEAFF contends that the trial court did not err in dismissing the Foundation's citizen action for its failure to comply with the procedural prerequisites of Section 765. PEAFF does, however, assign error to the trial court's denial of its post-dismissal request for attorneys' fees under RCW 42.17A.765(4)(b) (2012) without determining whether the Foundation brought its suit without reasonable cause.¹

STATEMENT OF THE CASE

I. The parties

Service Employees International Union Political Education and Action Fund (PEAFF) is one of SEIU's separate segregated funds, within the meaning of 26 U.S.C. § 527(f)(3). CP 514.² The Foundation is a registered nonprofit organization. CP 2.

¹ Unless otherwise noted, all references to the FCPA are to the version in effect as of 2012—the version relevant to each of the consolidated appeals.

² PEAFF is sometimes referred to as "IPEA." CP 514–19. This brief refers to the entity as PEAFF.

II. The Foundation notified the public officials of its FCPA claims against PEAFF, the public officials declined to pursue them, and the Foundation then initiated an untimely citizen suit.

On January 22, 2018, the Foundation wrote to the Washington Attorney General and two county prosecutors (collectively, public officials), alleging that PEAFF had violated Washington's FCPA in several respects. CP 1, 498–509. The Attorney General's Office (AGO) then solicited a position statement from PEAFF regarding the charges. CP 511–12. On February 14, 2018, PEAFF submitted a position statement to the AGO explaining why the Foundation's charges lacked merit. CP 514–19. The public officials did not institute an enforcement proceeding against PEAFF within 45 days of the Foundation's January 22 notice (i.e., by March 8, 2018). CP 1.

On March 9, 2018, the Foundation mailed the public officials a second notice of its FCPA complaints. CP 1, 319.³ That letter triggered a 10-day period—i.e., until March 19, 2018—for the officials to commence an action if they wanted to foreclose the Foundation from doing so. RCW 42.17A.765(4)(a)(iii). If the officials failed to do so within that period, the Foundation then had 10 days from that failure—i.e., until March 29,

³ That notice informed the officials that the Foundation intended to bring suit but contrary to Section 765(4)(a)(ii) did not say that it would do so within 10 days of their failure to act on its second notice. *Id.*

2018—to commence a citizen’s action under Section 765. RCW 42.17A.765(4)(a)(ii).

The Foundation commenced this action on April 3, 2018, after the March 29 deadline for doing so had passed. CP 1–13.

III. The trial court dismissed the Foundation’s citizen suit.

PEAF moved to dismiss the Foundation’s complaint. CP 14–209. In addition to merits and other procedural arguments not at issue in this appeal, PEAF argued that the Foundation’s citizen’s action was procedurally barred because it did not comply with Section 765’s prerequisites to suit. CP 16–21. The trial court heard the motion and dismissed the case. CP 320–21.

The trial court ruled that Section 765(4)(a)(ii) by its plain terms requires that the notice “include an assertion that the citizen’s action will be commenced within ten days upon [the officials’] failure.” RP 72:18–23 (2/8/19).⁴ The court then held that, by requiring a citizen to make that specific assertion as a prerequisite to suit, the Legislature intended the citizen to act in accordance with its assertion: “it is unreasonable to assume that the Legislature would require such a specific notice if it did not also mean what it says, which is the suit must be actually commenced

⁴ The operative statutory language is: “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.” RCW 42.17A.765(4)(a)(ii).

within the ten days.” *Id.* at 73:23–74:2. The court explained that it “would be odd and utterly unsupportable at the end of the day ... to have the Legislature have this specific notice be an empty gesture and not mean what it says.” *Id.* at 74:3–6.

The Foundation moved for reconsideration, which the trial court denied. CP 322–54, 417. The Foundation then sought direct review of the dismissal and reconsideration orders. CP 418–25.

On August 7, 2019, this Court granted direct review and consolidated the Foundation’s appeal with Case No. 97109-9. On September 4, 2019, the Court consolidated these cases with Case No. 97394-6, which also turned on the interpretation of Section 765.

IV. The trial court denied PEAFF’s fee petition.

On April 4, 2019, PEAFF moved for an award of reasonable attorneys’ fees pursuant to RCW 42.17A.765(4)(b). CP 430–519. The motion argued that an award of fees was appropriate on two independent grounds: (1) that the Foundation’s action was brought with the intent to harass an entity affiliated with SEIU, which the Foundation has expressly stated it intends to bankrupt by forcing it to expend resources to defend itself; and (2) that the Foundation’s claims were meritless and raised no issues of public interest. CP 436–41, 530–36. After hearing the motion, the trial court denied the petition. CP 539–41; RP 30:6–32:14 (4/12/19).

Although the court noted it was “very concerned” with the possibility that the Foundation may have “abuse[d] ... the legal system for political gain,” it did not render a finding on whether the Foundation’s claims were reasonably brought. RP 31:5–7 (4/12/19). The court denied the motion based solely on the “procedural posture of this case.” *Id.* at 31:9–10. In the court’s view, because it dismissed the action on procedural grounds, it was not able to weigh the merits of the suit, even though it recognized that under “some circumstances,” a citizen’s harassing intent could constitute a sufficient basis for awarding fees. *Id.* at 31:17–24, 32:8–12. PEAf timely cross-appealed this denial of fees.

ARGUMENT

I. The trial court correctly dismissed this action because the Foundation failed to file suit within the window period required by Section 765.

A. As a prerequisite to suit, complainants must specifically inform public officials that they will file suit within 10 days of the officials’ failure to do so.

As this Court recently explained, the “fundamental objective” in statutory interpretation is “to ascertain and carry out the legislature’s intent.” *Randy Reynolds & Associates, Inc. v. Harmon*, 193 Wn.2d 143, 155, 437 P.3d 677 (2019). Courts begin by examining a statute’s “plain meaning,” which is discerned from the “ordinary meaning of the language at issue, the context of the statute in which [the] provision is found, related

provisions, and the statutory scheme as a whole.” *Id.* (internal quotations omitted). In determining language’s “ordinary meaning,” the Court faithfully deploys “basic rules of grammar” *Douglass v. Shamrock Paving, Inc.*, 189 Wn.2d 733, 739, 406 P.3d 1155 (2017).

Applying those principles, the first interpretive task is to determine what Section 765 actually says. The relevant text is:

- (4) A person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself or herself bring in the name of the state any of the actions (hereinafter referred to as a citizen’s action) authorized under this chapter.
 - (a) This citizen action may be brought only if:
 - (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.

RCW 42.17A.765(4).

This text establishes the following process for filing a citizen’s action. To begin, a “person” notifies relevant public officials in writing of

claimed FCPA violations. Section 765(4). This first notice starts a 45-day period in which public officials may file their own action. If the officials fail “to commence an action under the FCPA within forty-five days after the [first] notice,” the complainant must then give a second notice.

Section 765(4)(a)(ii) specifies the earliest the complainant may issue that second notice—after the 45-day period commenced by the initial notice, if the public officials fail to file an FCPA action within that period. Subsection 4(a)(ii). The same subsection also specifies the content of the complainant’s second notice: the notice must inform the public officials that the “*person* will commence a citizen’s action *within ten days* upon their failure to do so.” *Id.* (emphasis added). The “within ten days” limitation plainly applies to the complainant, not the public officials. “[W]ithin ten days” is an adverbial phrase modifying the verb “commence,” and the singular “person” (i.e., complainant) is the subject of that verb. *Id.* (emphasis added).⁵

Conversely, “their failure to do so” refers to the officials’ failure to file an action on the complainant’s allegations. *Id.*; *see also Utter*, 182 Wn.2d at 409 (the officials’ commencement of an action “refers back to the same type of action as the citizen’s action”—i.e., an action to enforce the FCPA violations alleged in the complainant’s notices). Grammatically,

⁵ As Judge Price explained, the term “within ten days” “cannot modify anything else in a reasonable way.” RP 72:24-25 (02/08/19).

it cannot refer to “the person[’s]” (i.e., complainant’s) failure, because “their” is a plural pronoun and “the person” is a singular noun. The plural noun immediately preceding “their failure” is the “attorney general and prosecuting attorney.” Thus, the only textually defensible antecedent of “their failure” is the officials’ failure.⁶ See *State v. Ose*, 156 Wn.2d 140, 146–49, 124 P.3d 635 (2005) (construing a statute to make a singular indefinite article agree with a “singular” noun); *Eyman v. Wyman*, 191 Wn.2d 581, 599, 424 P.3d 1183 (2018) (applying the last antecedent rule, under which “courts construe the final qualifying words and phrases in a [clause] to refer to the last antecedent unless a contrary intent appears in the statute.”).⁷

Next, Subsection 4(a)(iii) provides that the complainant may sue only if the public officials have “in fact failed to bring such action within ten days of receipt of said second notice.” Subsection 4(a)(iii). “Such action” clearly refers to the filing of an action on the complainant’s FCPA allegations. *Id.*; *Utter*, 182 Wn.2d at 409; Section 765(1), (2), (4). By statutory definition, the date of “receipt” of an FCPA notice is “the date

⁶ Moreover, as a matter of common sense, “their failure to do so” cannot refer to the complainant. Were that the case, the condition precedent for the complainant to file a citizen action would be his own failure to file a citizen action, a logical impossibility.

⁷ The Foundation resists this reading because, it contends, officials cannot file a “citizen’s action.” FF Op. Br. 26, 45. This Court rejected the Foundation’s rejoinder in *Utter*, where it treated citizen and official FCPA enforcement actions interchangeably within Section 765. *Utter*, 182 Wn.2d at 409. See also *No On I-502 v. Washington NORML*, 193 Wn. App. 368, 373, 372 P.3d 160 (2016) (citizen’s action is filed in the name of the state and “the underlying claim always belongs to the State”).

shown by the post office cancellation mark on the envelope of the submitted material.” RCW 42.17A.140(1). So the dates of receipt and of mailing are deemed identical by operation of statute. The officials’ “failure” to bring an FCPA action thus occurs 10 days from the mailing of the second notice.

Reading Subsections 4(a)(ii) and (iii) together yields but one semantic result: the complainant’s second notice must inform the public officials that the complainant will bring an action within 10 days of their “failure” to file an enforcement action. Pursuant to Subsection 4(a)(iii), the officials then have 10 days from their receipt of the second notice (deemed identical to the complainant’s mailing date) to bring an action if they wish to preclude the complainant from doing so. Once those 10 days have expired, the officials have “failed” to act within the meaning of Subsection 4(a)(iii). Under Subsection (4)(a)(ii), the complainant must then bring a citizen suit “within ten days” of that failure. In other words, adding the two 10-day periods together, the statutory language mandated by Subsection 4(a)(ii) effectively notifies officials that the complainants will bring suit within 20 days of the date they mail the second notice.

The final subsection, (4)(a)(iv), sets an outer limit on when a complainant may file suit, requiring that any action be filed within two years of the alleged underlying violations. This outer limit makes sense

because while Section 765 sets deadlines for certain steps in the process, including the 20-day requirement just discussed, it does not set a deadline for every step. For example, Section 765 does not provide a deadline for the complainant to issue the first or second notice. Instead, it permits complainants to issue the first notice at any time and the second notice any time after the initial 45-day period closes, as long as the overall two-year limit set forth in subsection 4(a)(iv) is met. Without that two-year outer limit, these periods could extend indefinitely, leading to the filing of stale claims.

The record in this case illustrates these interlocking requirements:

- **January 22, 2018:** The Foundation sent its initial FCPA notice. Subsection 4.⁸
- **March 8, 2018:** The 45-day initial period ended for officials to sue on the Foundation's first notice if they wished to preclude the Foundation from filing a citizen's action. Subsection 4(a)(i).
- **March 9, 2018:** The period began for the Foundation to serve its second notice. Subsection 4(a)(ii).
- **March 9, 2018:** The Foundation actually served its second notice. *Supra* at 3.
- **March 19, 2018:** Ten days from the mailing and deemed receipt of the second notice elapsed without the officials filing an FCPA action on

⁸ The Foundation's complaint alleges that PEAFF was required to register as a political committee in both 2016 and 2018. Taking the latest date alleged as the operative accrual date—for the sake of argument only—the Foundation's 2016 allegations accrued on October 17, 2016 (CP 6) and the Foundation's 2018 allegations accrued on March 7, 2018 (CP 7), giving the Foundation until October 17, 2018, to sue on its 2016 allegations and until March 7, 2020, to sue on its 2018 allegations.

the Foundation's complaint. The officials have now been deemed to have failed to act timely on the second notice. Subsection 4(a)(iii).

- **March 29, 2018:** Ten days elapsed from the officials' failure to act on the Foundation's second notice. This is thus the date by which Subsection 4(a)(ii) required the Foundation to represent it would bring suit.
- **April 3, 2018:** The Foundation actually brought this suit. *Supra* at 4.
- **September 27, 2018:** This is 20 days before the running of two years from the last date alleged in connection to the 2016 allegations. It is thus the last date on which the Foundation could have served its second notice while still complying with the two-year limitations period on its 2016 allegations. Subsection 4(a)(ii)–(iv).
- **October 17, 2018:** This is the date the two-year limitations period ran on the Foundation's 2016 allegations. Subsection 4(a)(iv).

The Foundation's decision to serve its second notice on March 9, 2018, required it to represent that it would file suit within 10 days of the public officials' failure to do so, which would in practice mean by March 29, 2018. The Foundation could have served its second notice as much as six months later, on September 27, 2018, without missing the October 17, 2018, limitations period on its 2016 allegations. For its own reasons, the Foundation sent its second notice on the earliest date it could. Based on that decision, Section 765(4)(a)(ii) required it to represent, in effect, that it would file suit by no later than March 29, 2018. It did not do so.

There can be no serious question that, in each of the cases consolidated for review, the Foundation did not file suit by the time the

FCPA required it to represent to the officials it would do so.⁹ The only serious question is whether the Foundation can fairly be held to the terms of the representation Section 765(4)(a)(ii) required it to make. As explained next, it can and should be held to that representation.

B. Basic principles of statutory interpretation, waiver, and forfeiture require complainants to act in accordance with the specific terms of their statutorily mandated representations.

Three doctrines combine to require complainants to do as the statute requires them to say: the interpretive doctrines against surplusage and absurdity, the doctrine of implied waiver, and the equitable doctrine of forfeiture.

First, this Court construes statutes to avoid empty surplusage. *E.g.*, *Olympic Peninsula Narcotics Enf't Team v. Real Property*, 191 Wn.2d 654, 665, 424 P.3d 1226 (2018); *Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 237–38, 422 P.3d 891 (2018). Here, the language Subsection 4(a)(ii) requires complainants to include in

⁹ The Foundation's second notice in this case did not make the representations required by Section 765(4)(a)(ii). *Supra* at 3 n.3. Consistent with its own misreading of the statute, the Foundation simply informed the public officials that it would file its own action "if your office[s] fail to do so within the next 10 days." CP 319. But it failed to indicate that it would file suit *within ten days* of the public officials' failure to act. *Id.* The Foundation's suit against PEAFF thus fails to comply with two of Section 765's prerequisites: its second notice failed to make the required representations and it then filed this action after the time required by those required representations. The dismissal in this case can thus be affirmed on this independent ground.

The records in the related Local 117 and SEIU 775 cases do not contain the actual language the Foundation used in its second notice. Because both cases were dismissed on the pleadings, the Foundation is entitled to the reasonable inference in those cases that its second notice contained the required language.

their second notice—that they “will commence a citizen’s action within ten days upon [the officials’] failure to do so”—becomes superfluous if complainants do not, in fact, have to file suit within 10 days of the officials’ failure in order to gain the privilege and awesome power of enforcing election laws in the name of the State.

If, as the Foundation contends, Subsection 4(a)(ii) merely requires complainants to notify the officials that they intend to bring suit at some indefinite time before the expiration of the limitations period, the phrase “within ten days” does no linguistic work. The Foundation’s reading erroneously wipes that phrase from the statute. *See Olympic Peninsula, Central Puget Sound, supra.*¹⁰ It also leads to the absurd result that the Legislature requires complainants to make assertions to government officials without regard to their truth or falsity. *See State v. Mannering*, 150 Wn.2d 277, 282, 75 P.3d 961 (2003) (“statutes must be read to avoid absurd and strained interpretations.”); *Whitehead v. Dept. of Soc. & Health Servs.*, 92 Wn.2d 265, 595 P.2d 926 (1979) (statutory interpretation should avoid “absurd consequences”). This Court has long presumed, absent contrary evidence, that public officials act in good faith. *Rosso v. State*

¹⁰ Moreover, the statutory text of the required second notice language uses “will,” not “may,” in discussing the complainant’s filing of a citizen’s action within ten days. That choice shows the complainant’s time to file is mandatory, not discretionary. *Cf.*, *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 694, 381 P.3d 1, 21 (2016) (“may” indicates discretion).

Personnel Bd., 68 Wn.2d 16, 20, 411 P.2d 138 (1966). The Foundation’s reading, however, would permit complainants acting in bad faith to step into the shoes of public officials charged with enforcing the FCPA. That absurdity should not be countenanced.¹¹

Second, the Foundation has waived its right to bring a citizen’s action by acting inconsistently with the terms of its second notice. Both constitutional and statutory rights can be waived through “knowing, voluntary, and intelligent act[s].” *Matter of Det. of Black*, 187 Wn.2d 148, 153, 385 P.3d 765 (2016) (waiver of constitutional rights). *See also Wynn v. Earin*, 163 Wn.2d 361, 381, 385, 181 P.3d 806 (2008) (waiver of statutory rights). Inaction can also trigger implied waiver, where the failure to timely exercise a time-limited right evinces a knowing, voluntary, and intelligent decision to forego the right. *State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015) (“If a trial has begun in the defendant’s presence, a subsequent voluntary absence of the defendant operates as an implied waiver of the right to be present.”); *Wynn*, 163 Wn.2d at 381 (waiver occurred where litigant failed to object to testimony as violation of statutory rights).

¹¹ It also vitiates the statute’s evident purpose of motivating officials to act on meritorious allegations. Concrete deadlines have a way of focusing the mind and motivating action. The trial court’s reading of Section 765, which gives the officials a concrete deadline to act on the second notice before the citizen will file suit, does far more to advance the likelihood that the officials will actually do so than does the Foundation’s open-ended reading that gives the officials additional notice with no deadline. *See infra* at 24–26.

Courts have specifically applied this waiver principle to statutory mandates requiring a party, as a pre-filing requirement, to issue a notice detailing its future conduct. *See, e.g., Abbenante v. Giampietro*, 75 R.I. 349, 352, 66 A.2d 501 (R.I. 1949) (affirming dismissal action where landlord had statutory duty to notify tenant to quit and accept no further rent thereafter as a prerequisite to an ejectment action); *Beverly Health & Rehab. Servs., Inc. v. N.L.R.B.*, 317 F.3d 316, 321 (D.C. Cir. 2003) (strikers lost statutory protections when union began strike after the date identified in its notice as the strike commencement date); *Entrepreneur, Ltd. v. Yasuna*, 498 A.2d 1151, 1166 (D.C. 1985) (landlord waived right to extinguish tenant's purchase option by accepting rent inconsistent with landlord's notice of breach).¹²

Here, Subsection 4(a)(ii) required the Foundation to indicate that it would file an FCPA citizen action within 10 days of the officials' failure to do so. But the Foundation did not file a citizen action within that period. The Foundation, a thoroughly counseled organization, cannot fairly claim

¹² The Foundation unpersuasively tries to distinguish these cases on the ground that the waiving party engaged in an affirmative act. FF. Op. Br. 28. This distinction is immaterial because in Washington a party can waive rights by inaction as much as by affirmative action. *See Thurlby, Winn, supra*. Moreover, the relevant action in each of these cases was the party's distribution of a notice representing it would undertake a future action; in each case the party later failed, through inaction, to perform the promised action and was deemed to have waived the right at issue. Finally, the Foundation simply ignores *Beverly Health*, which involved a union's promise to perform certain conduct (there, a strike), followed by its passive failure to do so by the date indicated in the notice.

to have acted unknowingly, involuntarily, or unintelligently in waiting more than 10 days from the officials' failure to file an FCPA action before filing its own action.

Third, parties may involuntarily forfeit their rights. Unlike waiver, forfeiture does not require knowing action; it is instead “grounded in equity—the notion that people cannot complain of the natural and generally intended consequences of their actions.” *State v. Mason*, 160 Wn.2d 910, 926, 162 P.3d 396 (2007). Statutory rights are subject to forfeiture. *State v. George*, 160 Wn.2d 727, 739, 158 P.3d 1169 (2007) (failure to appear—even inadvertently—forfeits right to timely trial).

Inaction or delay in filing suit can forfeit a person's right to pursue the action, even where it can still be pursued by government officials. *Duskin v. Carlson*, 136 Wn.2d 550, 557–60, 965 P.2d 611 (1998) (failure to timely pursue personal injury action forfeited worker's right to do so and assigned the right to sue to government agency); *accord id.* at 562 (Johnson, J., dissenting) (characterizing this holding as forfeiture).

Section 765 required the Foundation to represent that it would file suit within 10 days of the officials' failure as a prerequisite to the privilege of bringing such suit. It would be inequitable to permit the Foundation to pursue its citizen's action after making the required representation but

failing to abide by it.¹³ The Foundation’s failure to timely bring its citizen’s action forfeited its right to do so.

C. The Foundation vacillates between two readings of Subsection 4(a)(ii), neither of which is tenable.

The Foundation avoids offering an affirmative reading of the disputed statutory language, preferring to make unmerited criticisms of the trial courts’ and Respondents’ construction. Indeed, the Foundation largely skirts the issue by simply characterizing Subsection 4(a)(ii) as “impos[ing] *only* a notice requirement” whose content is “very general.” FF Op. Br. 15 (original emphasis).¹⁴ Although it has no coherent account of Section 765 as a whole, the Foundation does gesture at two different interpretations of Subsection 4(a)(ii). Both fail to grapple with the actual statutory text.

1. The “leap forward” theory

The Foundation’s principal theory is that Subsection 4(a)(ii)’s reference to “within ten days” applies to the timeframe for the public officials, not the complainant, to bring an enforcement action. FF Op. Br. 15–16, 25 n.15.

The obvious difficulty with this interpretation is that the phrase “within ten days” appears immediately after the phrase “the person will commence a citizen’s action.” Subsection (4)(a)(ii). It does not modify any

¹³ Nor could the Foundation avoid dismissal by arguing that it never made the required representation in the first place. *Supra* at 13 n.9.

¹⁴ This brief cites the Foundation’s Initial Brief in Consolidated Appeals as “FF Op. Br.”

action by the public officials. The only way that “within ten days” in Subsection 4(a)(ii) can attach to the public officials is by rearranging the sentence so that the phrase *leaps forward* to modify the later phrase, “upon their failure to do so.” The Foundation would thus effectively rewrite the statute to say: “[t]he person has thereafter further notified the [public officials] that the person will commence a citizen’s action upon their failure to do so *within ten days*.”

There is an obvious difference between the expressions “within ten days upon their failure to do so” and “upon their failure to do so within ten days.” To replace one with the other would do violence to the plain text and usurp the role of the Legislature. Settled law prohibits such judicial statutory editing. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002); *see also State ex rel. Palagi v. Regan*, 113 Mont. 343, 126 P.2d 818, 822–23 (Mont. 1942) (rejecting interpretive theory that would require the court to “reverse the relations of the words” and read a provision stating “shall not, during the period ... be elected or appointed to fill any office” as “shall not be elected or appointed to fill any office during the period”).

Instead, the last antecedent rule applies. Under that rule, “unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent.” *Spokane v. Cty. of Spokane*, 158 Wn.2d 661,

673, 146 P.3d 893 (2006) (internal citation omitted). *See also Flowers v. Carville*, 310 F.3d 1118, 1124 (9th Cir. 2002) (last antecedent rule forecloses interpretations that result in “words leaping across stretches of text, defying the laws of both gravity and grammar”). “The last antecedent is the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence.” *Eyman*, 191 Wn.2d at 599 (internal quotation omitted).¹⁵

Here, “commence a citizen’s action” is the last antecedent before the phrase “within ten days.” The latter thus modifies the former, resulting in a standalone 10-day deadline for the “person”—i.e., the complainant—to “commence a citizen’s action.” *Supra* at 7. Nothing about this natural reading impairs the meaning of the sentence.

The Foundation admits it flouts the default application of the last antecedent rule by connecting “within ten days” to a later term. FF Op. Br. 44 (contending that the rule “must yield ... here”). It justifies its reading by contending a “contrary intent” appears in the statute sufficient to avoid its application here. FF Op. Br. 44–45. The Foundation is mistaken. First, the “contrary intent” exception does not countenance the Foundation’s

¹⁵ Courts have specifically applied this doctrine to determine the correct antecedents to prepositional phrases. *See, e.g., Ward v. State*, 936 So.2d 1143, 1146–47 (Fla. 3d DCA 2006); *Oak Grove Resources, LLC v. Direcotr, OWCP*, 920 F.3d 1283, 1290–91 (11th Cir. 2019); *Jackson on behalf of Sorenson v. Options Residential, Inc.*, 896 N.W.2d 549, 555 (Minn. 2017).

attempted linguistic contortion. That exception sometimes permits a term to modify a word or phrase that occurs earlier than the immediately preceding antecedent, but it never permits modification of a subsequent word or phrase. *See In re Wyly*, 552 B.R. 338, 562 (Bankr. N.D. Tex. 2016) (rejecting, as “run[ning] counter to the Last Antecedent Rule,” interpretation that would read qualifying word “as modifying a *postcedent* that appears later on in the statutory text”) (original emphasis).

Second, even if the Foundation’s approach had a grammatical basis, Section 765 does not show the “contrary intent” claimed by the Foundation. The Foundation points to what it calls “the critically important words ‘upon their failure to do so.’” FF Op. Br. 45. But it does not explain what contrary intent that phrase signifies or how it helps to identify the correct antecedent.¹⁶ It merely notes that the word “fail” (or its variants) appears in two other places in Subsection 4(a). *Id.* That is true. But the mere appearance of the word “fail” in multiple places does nothing to clarify why the Legislature chose to position the phrase “within ten days” where it did—i.e., *immediately after* the “person[’s]” “commence[ment of] a citizen action” and *before* the phrase “upon their

¹⁶ Similarly, in connection with its “leap back” theory (*infra* at 24–26), the Foundation offers another exception to the last antecedent rule, so that “within ten days” jumps back in the sentence and modifies “notified.” FF Op. Br. 18. But it never identifies any support for the notion that Subsection 4(a)(ii) was meant to set a 10-day deadline for a citizen to issue a second notice immediately after the expiration of the officials’ 45-day period.

failure to do so.” In truth, the phrase “upon their failure to do so” is indeed important, but that is because it specifies the condition precedent for the citizen’s 10 days to act—the expiration of the officials’ own 10-day period “to do so,” i.e., file an enforcement action. *Supra* at 9.¹⁷

Failing to harmonize the last antecedent rule with its reading, the Foundation waves it away, disparaging it as “merely a rule of grammar.” FF Op. Br. 44. But grammar is the lifeblood of language and establishes the rules through which words strung together acquire meaning. *See State v. Simon*, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), *aff’d in part, rev’d in part on other grounds*, 120 Wn.2d 196, 840 P.2d 172 (1992) (“The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words.”). Moreover, the last antecedent rule is the “default rule of interpretation” and cannot be ignored because a litigant finds it inconvenient. *In re Sanders*, 551 F.3d 397, 400 (6th Cir. 2008).

Leaving the rule aside, the Foundation’s attempted textual inversion cannot be reconciled with other basic grammatical dictates. The terms “within ten days” and “upon their failure to do so” are both prepositional phrases and together constitute a compound prepositional

¹⁷ Indeed, the Foundation conceded at oral argument below in another of the consolidated cases (No. 97394-6) that Subsection 4(a)(ii)’s “failure to do so” referred “to the government not acting within 10 days of receipt of this notice.” RP 20:19-24 (06/28/19).

phrase. A prepositional phrase “must modify a verb, noun, or adjective.” *Hardt v. Watertown*, 95 Conn. App. 52, 59 895 A.2d 846 (Conn. 2006). “[P]repositional phrases generally modify the immediately preceding term,” *Slaven v. BP Am., Inc.*, 973 F.2d 1468, 1472 (9th Cir. 1992), which is the verb, noun, or adjective to which it attaches. Here, the compound prepositional phrase, “within ten days upon their failure to do so,” modifies the immediately preceding term by describing when the complainant “shall commence” the citizen action. It thus acts as an adverbial phrase modifying the verb “commence.” *See Parkhurst v. Everett*, 51 Wn.2d 292, 294–95, 318 P.2d 327 (1957) (where prepositional phrase “modifies the mood of the verb,” it is “used adverbially”).

Within the compound phrase, each successive prepositional phrase modifies either the one that immediately preceded it or the ultimate antecedent that the phrase modifies. *See Asotin Cty. v. Eggleston*, 7 Wn. App. 2d 143, 151, 432 P.3d 1235 (2019). It is therefore grammatically appropriate for the phrase “upon their failure to do so” to modify the immediately preceding phrase “within ten days.” Conversely, PEAFF is unaware of any authority holding that a phrase within a compound prepositional phrase may modify a *subsequent* constituent of that compound phrase, so that the two essentially switch places. That would be

contrary to how prepositional phrases work together when placed consecutively. *Id.*

2. The “leap back” theory

The Foundation’s second theory requires the reader to move the phrase “within ten days” so that it leaps backward in the sentence to modify an earlier word—“notified”—rather than the immediately preceding phrase “commence a citizen’s action.” FF Op. Br. 18. This theory effectively rewrites Subsection 4(a)(ii) as, “The person has thereafter further notified the [public officials] within ten days upon their failure to do so that the person will commence a citizen’s action.”

That reordering is simply not what Subsection 4(a)(ii) says. It also makes no sense. “Notified” provides no information about what “failure” the second prepositional phrase (“upon their failure to do so”) contemplates. As a result, “upon their failure to do so” is left dangling in the middle of the sentence performing no function.

In an effort to solve this problem, the Foundation asks this Court to rewrite Subsection 4(a)(ii) a second time, so that its phrase “their failure to do so” refers to the officials’ failure to file an enforcement action under Subsection 4(a)(i). FF Op. Br. 22 n.12. Although the rules of grammar require Subsection 4(a)(ii)’s “their failure to do so” to refer to the immediately preceding phrase, “commence a citizen’s action,” the

Foundation would have the reference skip that phrase along with the rest of Subsection 4(a)(ii) to refer all the way back to the officials failure, described in Subsection 4(a)(i), to file suit in response to the first notice. This Court has rejected such acrobatic textual interpretations. *See Eyman*, 191 Wn.2d at 599 (rejecting interpretation that required a referent to skip over an intervening phrase).¹⁸

The Foundation’s “solution” also cannot be squared with the structure of Section 765 as a whole. A complainant becomes entitled to issue a second notice under Subsection 4(a)(ii) only if the officials have already failed to act on the complainant’s first notice. *Supra* at 7, 9. The officials’ failure to act on the first notice occurs 45 days after that notice. Subsection 4(a)(ii). Subsections 4(a)(ii) and (iii), in turn, address the content of and official response to the complainant’s second notice, respectively. There would be no purpose for a complainant to warn the officials in a second notice that the complainant will file suit in response to their earlier failure to act—that was the purpose of the first notice. The purpose of the second notice, instead, must be to motivate the officials to act on the second notice, which is why Subsection 4(a)(iii) gives the officials 10 days to file suit before deeming them to have failed to have

¹⁸ The Foundation resists the grammatical reading here on the grounds that officials cannot file “citizen’s actions.” But, as the *Utter* Court held, they can and do file FCPA enforcement actions on citizens’ complaints. 182 Wn.2d at 409. The Court has thus rejected the Foundation’s objection to this reading.

acted on that second notice. It simply makes no structural sense to read the second notice's reference to the officials' failure to act as a failure to act on the first, rather than second, notice.¹⁹

3. The Foundation's leaping theories both deny a stable meaning to the phrase, "within ten days."

The "leap forward" and "leap back" theories share a common flaw. Subsections 4(a)(i) and (iii) each employ phrases—"within [45 or 10] days"—to establish a time limit for certain pre-filing requirements. The Foundation concedes that when these phrases appear in Subsections 4(a)(i) and (iii), they modify the verbs immediately preceding them.

It is only when it comes to the construction of "within ten days" in Subsection 4(a)(ii) that the Foundation casts about for exotic antecedents or postcedents. That enterprise violates the well-established principle that "[w]hen the same word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning." *Medcalf v. State, Dep't of Licensing*, 133 Wn.2d 290, 300–01, 944 P.2d 1014 (1997); accord *State v. Walker*, 101 Wn. App. 1, 7, 999 P.2d 1296 (2000); *State v. Wagner*, 97 Wn. App. 344, 347–48, 984

¹⁹ The Foundation's own acceptance of a 10-day period for the complainant to perform an act (issue the second notice) also undermines its position that Section 765 cannot be read to require the filing of a complaint in a 10-day period. *See infra* at 24–26. Because a complainant must know the grounds of his FCPA claims in order to draft the initial notice, it should be no more burdensome for the complainant to finalize a complaint within a 10-day period (PEAF's reading) than for the complainant to draft a second notice within a 10-day period (the Foundation's reading).

P.2d 425 (1999). Because the phrase “within [x] days” undisputedly modifies the immediately preceding verb in the other subprovisions of Subsection 4(a), it must do so in Subsection 4(a)(ii) as well.²⁰

D. The Foundation mischaracterizes FCPA case law to support its erroneous interpretation.

Unable to articulate a coherent reading of Subsection 4(a)(ii) on its own terms, the Foundation misreads FCPA case law to buttress its various misinterpretations. For instance, the Foundation repeatedly cites *State ex rel. Evergreen Freedom Found. v. Nat’l Educ. Ass’n (“NEA”)*, 119 Wn. App. 445, 81 P.3d 911 (2003). FF Op. Br. 8 n.3, 21, 23, 24. That decision says nothing about the present issue. Instead, it merely held that the Attorney General’s referral of a complaint to the PDC does not preclude a citizen suit. *NEA*, 119 Wn. App. at 452–53. In so doing, *NEA* withdrew prior *dicta* regarding the existence of a tolling period for the *public officials’* 10-day window following their receipt of the second notice. *Id.* It did not address whether a *complainant* has 10 days from the expiration of the public officials’ time to act to itself bring a citizen action, much less whether the complainant’s time to act could be tolled.

²⁰ The two theories also contradict one another. It cannot be the case, as the Foundation contends, that (a) the second notice *must* tell the officers that they have 10 days to act (FF Op. Br. 16) and (b) that the second notice performs its full function without needing to inform the officials of anything at all (FF Op. Br. 19 n.8).

The Foundation next mistakenly contends that *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n* (“WEA”), 111 Wn. App. 586, 49 P.3d 894 (2002), supports its position. As the Foundation apparently agrees, FF Op. Br. 24, WEA’s reference to Subsection 4(a)(ii) is *dictum* because the Court of Appeals was merely paraphrasing the preconditions to bringing a citizen suit in the course of engaging in an analysis not relevant to the issue on appeal here. And to the extent WEA’s dictum is considered here at all, it actually supports PEAFF’s position, not the Foundation’s. WEA stated that a complainant must notify the public officials that he “will commence a citizen action within 10 days of the second notice if neither ... acts.” WEA, 111 Wn. App. at 604 (emphasis added). The Foundation overlooks this straightforward application of the last antecedent rule to tie a 10-day period to the filing of a citizen action.²¹

The Foundation contends that WEA supports its position because the opinion does not explicitly say that the complainant must follow through on his promise to file suit within 10 days. FF Op. Br. 24. But the Court of Appeals never had the opportunity to address that question because there the Attorney General forwarded the plaintiff’s allegations to

²¹ In characterizing *NEA*, the Foundation claims that the follow-up case also “pared back” WEA’s description of Subsection 4(a)(ii). FF Op. Br. 24. *NEA* did nothing of the sort. The opinion’s exclusive focus was to disavow the notion that by forwarding a complainant’s allegations to the PDC, the Attorney General tolled his 10-day period to act on the allegations. *NEA*, 119 Wn. App. at 452–53.

the PDC, which in turn initiated an investigation—conduct the Court found precluded a citizen’s action. *WEA*, 111 Wn. App. at 606–09. The *WEA* plaintiff’s 10-day period never accrued in the first place.

The Foundation also seizes on one aspect of *WEA*’s *dicta* that suggests a *more rigorous* approach than the one urged here—namely, that a complainant must file suit within 10 days of *issuing* the notice, rather than within 10 days of the end of the officials’ own 10-day period to act on the second notice. *Id.* The Foundation claims PEAFF must either relinquish its position that the statute creates two successive 10-day windows or avert its eyes to *WEA*’s command to complainants to promise to sue “within ten days” of a condition precedent. FF Op. Br. 22 n.11. The text does not support that claim. *Supra* at 7–9. Even if this false dilemma applied, it is no Sophie’s choice because if there were only a single 10-day filing period, the Foundation’s action would simply be 10 days *more untimely* than PEAFF contends.

Finally, the Foundation mischaracterizes *Utter*. FF Op. Br. 33–34, 45–46 & n.37. As explained above, *Utter* supports PEAFF’s reading. It held that “action” refers to a “lawsuit,” not an investigation. *Utter*, 182 Wn.2d at 409–10. The Foundation relies on the passage where the Court observed that construing “action” as an “investigation” would impermissibly expand “citizen’s actions” to include investigations by citizens. *Id.* at 410. The

point is undisputed. Critically, though, the Court also recognized that public officials' commencement of an action in Subsection 4(a)(i) "refers back to the same type of action as the 'citizen[']s' action' in subsection (4)(a)." *Id.* The Court thus expressly held that "action" and "citizen's action" could be interchanged when context requires. As explained above, context so requires in Subsection 4(a)(ii). *Supra* at 7–11, 9 n.7.

E. Subsection 4(a)(ii) is a pre-filing window period that harmoniously coexists with Subsection 4(a)(iv)'s statute of limitations.

The Foundation contends that the 10-day filing window cannot coexist with Subsection 4(a)(iv)'s two-year limitations period, FF Op. Br. 29–31, 40–43, but it offers no authority for the point and concedes that comparable statutory schemes contain both. *Id.* at 30–31.

There is nothing unfamiliar about this sort of statutory scheme. Several statutes impose a window period by requiring potential plaintiffs to file suit within a certain number of days following an administrative investigation, notwithstanding the existence of an independent statutory limitations period that runs from the alleged violation. *See, e.g.*, RCW 4.92.110 (waiting period and limitations period co-exist in nonclaim

statute). *See also Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1520–24 (9th Cir. 1987) (same for Clean Water Act).²²

That result is unsurprising, as the two periods serve different functions. Pre-suit exhaustion windows incentivize public officials to advance plodding investigations by giving complainants a discrete, limited period in which to file suit, absent state action. *Hallstrom v. Tillamook County*, 493 U.S. 20, 29, 110 S. Ct. 304, 310 (1989) (“notice allows Government agencies to take responsibility for enforcing [] regulations, thus obviating the need for citizen suits.”). Limitations periods, by contrast, ensure that members of the public need not fear litigation beyond a specified period following an event. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 14, 134 S. Ct. 1224, 188 L.Ed.2d 200 (2014) (statutes of limitations “characteristically embody a ‘policy of repose, designed to protect defendants’”). The two mechanisms work together.²³ So the Foundation’s observation that Subsection 4(a)(iv) establishes a limitations period does not undercut the trial court’s reading of Subsection 4(a)(ii)’s pre-suit filing window.

²² The Foundation circularly argues that these examples are distinguishable because they are “clearly articulated in the statute.” FF Op. Br. 30–31. But this merely assumes that an FCPA complainant’s obligation to file suit within 10 days of the public officials’ failure to do so is not clear here—a point the parties dispute.

²³ At the trial court noted, “It is not unreasonable ... that the opportunity to pursue this type of case on behalf of the state would have a timing mechanism through which you must commence it that is separate from more of a statute of limitations idea for the staleness of the actual underlying issues.” RP 74:7–18 (02/08/19).

F. If anything, the legislative history supports PEAFF's and the lower court's reading of Section 765.

Unable to offer a clear account of Section 765's text, the Foundation turns to unsupportable inferences from legislative history. FF Op. Br. 34–44.

The Foundation's reliance on legislative history does not aid its cause because the 1975 amendments support PEAFF's reading, not the Foundation's. *See* FF Op. Br. 35–46. The 1972 statute pertinently said that a complainant could bring a citizen action only if “the attorney general has failed to commence an action within ten days after a notice in writing” *Id.* at 35. *See also Fritz v. Gorton*, 83 Wn.2d 275, 311, 517 P.2d 911 (1974) (quoting 1972 predecessor to Section 765). That version of the FCPA did not require the complainant to tell the officials when he would bring suit; it only required 10 days to elapse from the complainant's second notice before the complainant could file his citizen's action. Were that version of the statute in effect when the Foundation brought this action, the Foundation would be correct and PEAFF would be wrong.

But the Legislature amended the FCPA in 1975 and added a second timing requirement. Since 1975, the complainant's second notice must inform the public officials that he will file suit within 10 days of their failure to commence an enforcement action. FF Op. Br. 36 (quoting Laws

of 1975, Chapter 294, Sec. 27 (p. 1320)). When interpreting the amendment, it is the judicial branch's responsibility to discern the significance of the change, not undo it. *See State ex rel. Munroe v. Poulsbo*, 109 Wn. App. 672, 678, 37 P.3d 319 (2002); *Marchioro v. Chaney*, 90 Wn.2d 298, 307–08, 582 P.2d 487 (1978). The only way to give effect to that amendment is to read the additional timing restriction as having an independent meaning. The trial court's interpretation honors the amendment's significance.

The Foundation nonetheless resists that significance because it has unearthed no explanation from any legislator detailing why the Legislature added the second timing restriction. FF Op. Br. 34–44. The Foundation would thus deny the enacted language of the 1975 amendments their plain meaning based on its failure to find such an expression of subjective legislative intent. That effort must be rejected because “[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.” *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592, 100 S. Ct. 1889, 1897, 64 L. Ed. 2d 525 (1980). The surest indicator of legislative intent is the words the Legislature adopted and the Governor signed into law. The Foundation's

failure to find a record of any legislator confirming that those words mean what they say cannot deny them their meaning.²⁴

G. The Foundation’s additional scattershot arguments have no merit.

1. The FCPA’s policy aims and rule of liberal construction do not justify the Foundation’s erroneous reading.

The Foundation stresses the FCPA’s rule of liberal construction. FF Op. Br. 27 n.20, 43. But where a liberally construed statutory regime provides a “limited cause[s] of action,” a plaintiff must still “strict[ly]” comply with the statute’s “time requirements.” *See Inland Empire Dry Wall Supply Co. v. W. Surety Co. (Bond No. 58717161)*, 189 Wn.2d 840, 844, 408 P.3d 6901 (2018). The FCPA provides a limited cause of action to complainants who satisfy very specific time requirements. As in *Inland Empire*, while the FCPA’s substantive requirements are liberally construed, its procedural prerequisites must be strictly enforced. *See West v. Wash. State Ass’n of Dist. & Mun. Court Judges*, 190 Wn. App. 931, 941, 361 P.3d 210 (2015) (affirming dismissal due to failure to “timely give the prerequisite notices before commencing” citizen action).

²⁴ To the extent there is evidence of subjective legislative intent, it, too, supports PEAFF’s reading because the additional restrictions on the citizen’s action are consistent with a compromise between the two legislative houses. *See* CP 254 (the 1975 amendments were a compromise between the House’s proposal to repeal the citizen’s suit entirely and the Senate’s proposal to preserve it).

Moreover, “[r]ules of liberal construction cannot be used to change the meaning of a statute which in its ordinary sense is unambiguous.” *Miller v. Shope Concrete Prod. Co.*, 198 Wn. App. 235, 239, 392 P.3d 1170 (2017) (citation omitted). Even liberally construed, there is no reasonable way to read the disputed portion of Subsection 4(a)(ii) as anything other than requiring the complainant to represent that he will file a citizen’s action within ten days of the public officials’ failure to file their own enforcement action. The only remaining question is whether the rule of liberal construction allows the complainant to flout the terms of this notice and render it meaningless. The rule does not operate that way. *See Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 102 (D.D.C. 2003) (“Even a liberal construction” of the federal RICO statute could not “stretch” a disputed phrase to come “perilously close to rendering [it] surplusage”); *Rutherford v. Trim-Tex, Inc.*, 803 F. Supp. 158, 162 (N.D. Ill. 1992) (“the court has a duty not to liberally construe statutory language so as to create superfluous provisions”).

The Foundation also seeks support for its reading from the FCPA’s general policy of promoting complete disclosure. FF Op. Br. 27, 43. This argument assumes the Unions did not comply with all applicable FCPA requirements, a proposition the Respondents vigorously dispute. The Foundation cannot overcome its procedural deficiencies by relying on its

unproven claims. Also, if the policy favoring disclosure trumped all other considerations, the Legislature would not have established procedural prerequisites to citizen actions but would have allowed them at will. The Legislature's choice to enact prerequisites shows that the FCPA primarily entrusts public officials with enforcing the law's disclosure requirements. *West*, 190 Wn. App. at 941 (prerequisites are part of FCPA's "comprehensive enforcement scheme" and failure to comply deprives complainant of "authority to sue for a judgment").

Moreover, the FCPA expressly identifies competing policy goals that are equally, if not more, relevant to determining how the Court should interpret the citizen suit prerequisites. Specifically, the FCPA "shall be enforced so as to ensure that the information disclosed will not be misused for arbitrary and capricious purposes and to ensure that all persons reporting under this chapter will be protected from harassment and unfounded allegations based on information they have freely disclosed." RCW 42.17A.001. The 10-day pre-suit filing window ensures that complainants cannot harass those they accuse by lodging allegations with government officials and then sitting on them for up to two years even after the officials refuse or fail to act on them. That outcome would allow a complainant to chill the accused's First Amendment speech and associational rights by insisting it will file a citizen suit but then leave the

accused waiting for months to learn whether it will face litigation on the allegations.

No legislation “pursues its purposes at all costs.” *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234, 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417 (2013) (internal quotations omitted). In this case, the FCPA evinces at least two purposes, one of which favors complete disclosure and the other favors restrained enforcement to protect against arbitrary, capricious, harassing, and unfounded litigation. The highly reticulated enforcement provisions of Section 765 strike a balance between those two goals. This Court should honor that balance.

2. The existence of identical language in RCW 42.52.460, confirms, rather than refutes, the trial court’s reading.

The Foundation observes that language nearly identical to Subsection 4(a)(ii) appears in a Washington statute permitting citizen actions for public service ethics violations. FF Op. Br. 32 (citing RCW 42.52.460). But it points to no authority interpreting that language. Thus, the Foundation simply begs the question how the relevant terms in the other statute should be construed.

In fact, to the extent the ethics statute reveals anything about the FCPA, it tends to confirm the trial court’s interpretation. First, the Legislature’s re-use of the same language from the FCPA shows that the

placement of the phrase “within ten days” was not unintentional but deliberate and deemed worthy of imitation in other statutory schemes. Second, the only relevant change that RCW 42.52.460 enacted in comparison to RCW 42.17A.765(4)(a) was to replace “failure to do so” with “failure to commence an enforcement action,” a stylistic clarification which confirms that the phrase “failure to do so,” as used in Subsection 4(a)(ii), indeed refers to the officials’ “failure” to file an enforcement action within the timeframe set forth in 4(a)(iii) (contrary to the Foundation’s “leap back” theory).

3. Whether the public officials’ 10-day window may be tolled is immaterial to the existence of the complainant’s 10-day window.

The Foundation also erroneously argues that the complainant’s 10-day window to file suit must have no force because the Attorney General and Foundation have occasionally agreed to extend Section 765’s time limits. FF Op. Br. 32.

The record shows only that the officials have occasionally agreed to toll their own period for acting on the second notice. It contains no evidence of any agreements to toll *complainants’* subsequent 10-day period to act, much less whether that period exists in the first place. Neither does the Foundation identify any evidence that it requested or

received from any Respondent an extension of time to file its citizen actions.

4. The trial court’s reading does not afford a complainant an unfairly short amount of time to bring a citizen action.

The Foundation further attacks the existence of the 10-day filing window by arguing it provides complainants with “an *extremely* short time to actually prepare the [citizen’s] action.” FF Op. Br. 32–33 (emphasis in original). This criticism lacks merit.

The Foundation appears to assume that a complainant must mail his second notice immediately upon the expiration of the officials’ 45-day window and rush to draft a complaint during the following 10-day interval. But that interpretation ignores the terms of Subsection (4)(a)(ii), which grant the complainant discretion in determining when, after the 45-day period, to send the second notice. *Supra* at 10–12. As a result, the FCPA grants a complainant more than enough time to draft and file a complaint.²⁵

Making a mountain out of a molehill, the Foundation further complains that it would be difficult to convert administrative allegations

²⁵ Even if a complainant had to issue the second notice immediately upon the conclusion of the 45-day period, that would work no injustice. A complainant is already obligated to flesh out his theories of FCPA violations in his first notice to public officials. *See Knedlik v. Snohomish Cty.*, 186 Wn. App. 1022, 2015 WL 1034286 at *2–3 (2015) (unpublished) (affirming dismissal of citizen action that failed to adequately allege how person violated FCPA) (cited pursuant to GR 14.1 for persuasive value). The core of the complaint should be complete before a complainant submits it to the officials.

into a judicial complaint within 10 days because the public officials or PDC may act on all, some, or none of them. FF Op. Br. 32. All this means in practice is that a complainant might have to delete a few lines from a draft complaint, an act that can be accomplished with a key stroke.

5. Complainants can determine when filing windows begin.

In a footnote, the Foundation briefly argues that there is no way for complainants to determine when public officials receive the second notice and thus no way to determine when the officials' 10-day response period ends or the citizen's 10-day period to sue begins. FF Op. Br. 33, n.26. The Foundation is mistaken.

The FCPA establishes by operation of statute the date by which public officials are presumed to have received a citizen's notice:

...the *date of receipt* of any properly addressed application, report, statement, *notice*, or payment required to be made under the provisions of this chapter is the date shown by the post office cancellation mark on the envelope of the submitted material.

RCW 42.17A.140(1) (emphasis added). The cancellation mark date determines the date on which the public officials "receive" a complainant's second notice. Because the cancellation mark is typically affixed to a letter on the date of its mailing, CP 357-58, this provision

provides an easy guideline for complainants: the date of mailing is presumed to be the date of receipt.

II. The trial court erred by denying PEAFF's fee petition based solely on the procedural nature of the dismissal of the case.

PEAFF agrees with Local 117's construction of Section 765(4)(b). In particular, PEAFF agrees that Subsection 4(b) requires a trial court, upon a timely motion following the dismissal of a citizen action, to determine whether an action was reasonably brought, even if it has discretion to then deny a fee award. PEAFF further agrees that a citizen suit is not reasonably brought when the complainant brings it for the purpose of harassing the defendant and draining it of financial resources.

PEAFF presented the same evidence of the Foundation's underlying motives and efforts to bankrupt public sector unions as presented in Local 117's case. CP 444–96. Although the precise claims the Foundation lodged against PEAFF differ from those against Local 117, the claims against PEAFF were also unmeritorious, and in some instances, frivolous. CP 439–41, 514–19, 535–36. In light of the Foundation's vexatious motives and its meritless claims, PEAFF was entitled, upon the trial court's dismissal of the action, to an award of reasonable attorneys' fees and costs. The trial court's refusal to even evaluate whether the Foundation's

claims were reasonably brought, based solely on the procedural nature of the dismissal, was reversible error.

CONCLUSION

For the reasons explained above and in the accompanying Local 117 brief, PEAFF respectfully asks the Court to (1) affirm the order granting PEAFF's motion to dismiss the Foundation's citizen's action for failure to comply with Section 765's prerequisites; (2) affirm the order denying the Foundation's motion to reconsider the dismissal; and (3) reverse the order denying PEAFF fees and remand for an award of reasonable attorneys' fees and costs PEAFF incurred in defending this action.

Respectfully submitted this 6th day of November, 2019.



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DECLARATION OF SERVICE

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

Executed this 6th day of November, 2019, at Seattle, Washington.


Jennifer Woodward, Paralegal

BARNARD IGLITZIN & LAVITT

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