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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,
REPLY BRIEF & ANSWER BRIEF IN CROSS-APPEALS**

Robert A. Bouvatte, Jr.
WSBA #50220
FREEDOM FOUNDATION
P.O. Box 552
Olympia, WA 98507
Phone: 360.956.3482
rbouvatte@freedomfoundation.com

Eric R. Stahlfeld
WSBA #22002
FREEDOM FOUNDATION
P.O. Box 552
Olympia, WA 98507
Phone: 360.956.3482
estahlfeld@freedomfoundation.com

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I. INTRODUCTION.

As enacted by citizen's initiative in 1972, Washington's Fair Campaign Practices Act (the "FCPA") originally required notice only to the Attorney General, and a forty-five (45) day waiting period, before a citizen could bring his or her own action for FCPA violations. The Legislature amended the statute in 1975, requiring notice also be provided to the county prosecuting attorney and requiring a second notice be provided to the authorities before the filing of a citizen action, granting them an additional ten (10) days to bring an enforcement action if they wanted to control enforcement of the alleged FCPA violations. Nothing required the authorities to act within forty-five (45) days of the initial notice of the alleged FCPA violations, and nothing required a citizen to file suit within ten (10) days of his or her second notice. Consideration of the present language of the statute after amendments in 2018 confirms that legislative intent has always been to permit citizen actions after the authorities have failed to act after receipt of proper notice of violations.

Once a citizen has provided proper notice to the authorities to no avail, the only restriction on the citizen's ability to file an action is the statute of limitations. In 2007, the Legislature shortened the limitations period from six (6) to two (2) years from the date of the violation.

On its face, the plain language requires only that the citizen notify the authorities, and consideration of the general structure of the citizen's action provision makes even clearer that the act of providing notice is the entire concern of RCW 42.17A.765(4)(a)(ii). The Respondents' arguments, by contrast, focus on subsection (ii) in a vacuum, to the detriment of its surrounding provisions.

The FCPA is unambiguous, but consideration of the legislative history only bolsters the Foundation's position. There is only a single ten (10) day period in the citizen action process – the ten (10) days which the authorities have to act after receiving the second notice should they wish to control enforcement of the alleged FCPA violations. This is how all interested parties have interpreted the provision for several decades – including the Attorney General, the courts, the Foundation, and the Washington State Public Disclosure Commission (“PDC”) – until the trial courts below endorsed an imaginative reading that renders the citizen's action provision entirely unworkable. The plain language of the statute and legislative history, in addition to mere common sense and settled legal principles, all point to the same result. Subsection (ii) places no deadline on the filing of a citizen's action, and the trial court's error should be reversed.

II. COUNTER-STATEMENT OF CASE.

The Foundation largely agrees with Teamsters Local 117's ("Teamsters 117") summary of the procedure that transpired below (*see* Teamsters Local Union No 117's Answering Brief and Opening Brief on Cross Appeal ("Teamsters' Answer Br."), at pp. 11-17), except insofar as it includes clearly argumentative statements, in violation of RAP 10.3(5). Teamsters' Ans. Br., at p. 12, 14. Such arguments, along with the entirety of pages 5-10 of the Teamsters' Answer Brief, do not belong in the Statement of Facts,¹ and constitute little more than an effort to smear the Foundation and its mission. The Foundation will address the relevant facts in the appropriate Argument sections below but would also request that the Court either strike the aforementioned portions or simply decline to consider them.

Similarly, the Foundation does not dispute the bulk of the Respondents', Jay Inslee and the State of Washington Department of Social and Health Services (collectively, the "State Respondents") Statement of the Case, which is essentially a discussion of the legislative history of the FCPA's relevant provisions, but would note that such legislative history is only relevant insofar as the Court finds that there have been competing,

¹ *See* RAP 10.3(a)(5) ("A fair statement of the facts and procedure relevant to the issues presented for review, without argument.") (emphasis added).

reasonable interpretations offered by the parties here. *See* Brief of Respondents Jay Inslee and State of Washington Department of Social and Health Services Regarding No. 97394-6 (the “State’s Ans. Br.”), at pp. 2-11. Because the Respondents have offered no reasonable interpretation of the citizen’s action provision, however, the Court has no occasion to consider legislative history.² *See Tesoro Refining & Marketing Co. v. State Dept. of Revenue*, 164 Wn.2d 310, 317-18, 190 P.3d 28 (2008).

Furthermore, because “[t]he citizen’s action provision as last amended in 2010 is the version at issue in this case” (*see* State’s Ans. Br., at p. 7), the Foundation objects to the State Respondents’ discussion of the 2018 amendments to the FCPA and their characterization of the legal effect of the same, because they simply “do not govern this appeal.” *See* State’s Ans. Br., at pp. 7-11. The Foundation specifically objects to and disputes the State Respondents’ argumentative statements that the “...2018

² The State Respondents make much of the 1975 amendments to the FCPA, arguing that “[i]f the new language added in 1975 was not intended to specify what the second notice must contain, but rather merely referred to the issuance of a second notice following the failure of the attorney general or prosecuting attorney to take action after the first notice, it would have been a meaningless addition.” *See* State’s Ans. Br., at p. 27. But the argument that a statutory requirement for the content of a notice separately imposes a requirement to take the action threatened in the notice is one that enjoys no authority, nor the support of any historical evidence of a “compromise” in the Legislature, and must rely upon self-serving “common law principles” derived from the decisional authorities of other states. Also, this argument, like much of the argument asserted by the State and by the union entities, Teamsters 117, Service Employees International Union Political Education Fund (“SEIU PEAFF”) and Service Employees International Union 775 (“SEIU 775”) (collectively, the “Unions”), is directed at only one of the Foundation’s alternative interpretations of the citizen’s action provision. *See infra*, at p. 31, n.28.

amendments do evidence a continuing legislative intent to broaden the Commission's authority to resolve campaign finance and disclosure violations while narrowing the circumstances in which citizen's actions are permissible" (*id.*, at p. 8), and that "[i]f the Commission takes any action authorized by RCW 42.17A.755(1) other than referral, the person wishing to file a citizen's action may not do so" (*id.*, at p. 9). These matters are contested in another pending litigation and are beyond the scope of the present appeal.

III. COUNTER-STATEMENT OF ISSUES PRESENTED.³

1. The Unions' first Assignment of Error mischaracterizes the substance of the trial court's ruling on Teamsters 117's post-dismissal request for attorney's fees under RCW 42.17A.765(4)(b). *See* Teamsters' Answer Br., at p. 4. The trial court did not "fail[] to exercise discretion," and did not avoid a determination of whether the Foundation's suit was brought without reasonable cause. *See also* SEIU PEAFF's Ans. Br., at p. 2. Properly framed, the issue on this cross-appeal is: Did the trial court err in finding the Unions had not met their burden to show that the suit was brought without reasonable cause?

³ The instant brief constitutes both a reply in support of the Foundation's Initial Brief, as well as an Answer Brief in the Respondents' cross-appeals. Accordingly, the Foundation will first set forth its Answer Brief in response to the Respondents' assignments of error, in **Sections IV.A. and IV.B.**, with its Reply Brief to follow in **Sections IV.C-IV.F.**

2. The Foundation disagrees with Teamsters 117's characterization of the conduct at issue in its Second Assignment of Error, but would note that Teamsters 117 accurately identifies the issue on appeal as the trial court's dismissal of its counterclaim under 42 U.S.C. Section 1983, for lack of any state action that would render the Foundation subject to constitutional regulation.

3. The Foundation objects to the State's characterization of the issue concerning interpretation of the FCPA (*see* State's Ans. Br., at p. 14), which conflates enforcement actions and citizen's actions under the FCPA, as explained more fully below. *See infra*, at pp. 29-34. The Foundation's Initial Brief in Consolidated Appeals (the "Initial Br.") correctly characterizes the substance of the issue on appeal concerning interpretation of former RCW 42.17A.765(4)(a). *See* Initial Br., at p. 2.

IV. ARGUMENT.

A. **The Counterclaim Was Properly Dismissed for Lack of Any State Action.**

To state a claim for relief under 42 U.S.C. § 1983, parties must "establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed

under color of state law.”⁴ *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). Like the state action requirement of the Fourteenth Amendment, “the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful.” *Id.*, at 50.

It has long been black letter law that

[S]tate action requires *both* an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, *and* that the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Id. (emphasis in original).

To prove state action: (1) a claimant must allege a constitutional deprivation, *id.*; (2) the defendant’s actions must be “properly attributable to the State,” *Roberts v. AT&T Mobility, LLC*, 877 F.3d 833, 838 (9th Cir. 2017)); **and** (3) the claimant must show that the “public function” of campaign finance law enforcement in Washington is exclusively a prerogative of the State. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

Additionally, in alleging state action, a plaintiff must identify “the specific conduct” which violates its constitutional rights. *Sullivan*, 526 U.S.

⁴ "In cases under § 1983, ‘under color’ of law has consistently been treated as the same thing as the ‘state action’ required under the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 794 fn. 7 (1966).

at 50-51. Teamsters 117 alleged below that the Foundation violated unions' constitutional rights under the First and Fourteenth Amendments by filing citizen actions against them for violating the FCPA. 971099 CP 471, at ¶8.10. However, enforcing the FCPA's disclosure requirements does not violate *any* constitutional rights, as the Foundation argued. *See Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974)⁵; *Human Life of Washington, Inc. v. Brumsickle*, C08-0590-JCC, 2009 WL 62144, at *21-22 (W.D. Wa. Jan. 8, 2009), *aff'd*, 624 F.3d 990 (9th Cir. 2010). At the outset, the conduct attributed to the Foundation below failed to amount to a constitutional violation, and Teamsters 117 utterly failed to allege any constitutional violation.⁶ *See, e.g. Johnson v. Kulongoski*, 2004 WL 1737732, *7 (D. Or.

⁵ The Washington Supreme Court has already held that the threat of abusive lawsuits under the FCPA citizen action provision "poses no problem of constitutional dimension." *Fritz v. Gorton*, 83 Wn.2d at 314. Also citing U.S. Supreme Court precedent, the Washington Supreme Court in *Fritz* held that *qui tam* actions similar to the FCPA citizen action provision did not deprive the defendant of any constitutional rights. *Id.* at 313.

⁶ The trial court may have "...reach[ed] the issue of whether Local 117 had adequately alleged a constitutional deprivation," contrary to Teamsters 117's argument. *See Teamsters' Ans. Br.*, at p. 35, n.18. Even assuming *arguendo* that defect was not any part of the trial court's analysis however, it would nonetheless represent another basis for affirming dismissal of the counterclaim. *See LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989) ("Second, an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it."). Teamsters 117 may have "no doubt" that it adequately alleged a selective enforcement discrimination claim, but the case law tells a different story. Indeed, even those cases cited by the Union recognize that "[t]he standard for proving discriminatory effect 'is a demanding one.'" *Lacey v. Maricopa County*, 693 F.3d 896, 920 (9th Cir. 2012). Satisfaction of that standard, even at the pleading stage, would require some facts from which to surmise that individuals or entities similarly situated to Teamsters 117 had committed violations that could have been prosecuted, but were not. *Id.* In the context of an FCPA citizen's action, it would require the Union to allege facts showing that the Foundation was actually aware of actual, and similar, violations by some *identified* conservative-leaning groups, but did not act to bring citizen's actions against them. *See,*

2004) (plaintiff failed to identify any conduct that violated his constitutional rights and that “each of the acts alleged by plaintiff appears to have been based on practices or procedures that have previously been approved or sanctioned by the courts”). The trial court’s dismissal of the Counterclaim should be affirmed on that ground alone.

1. Reliance on State Statutes Does Not Transform the Foundation into a State Actor.

Even if Teamsters 117 had alleged a constitutional deprivation, which it did not, it would still have to show that the Foundation’s conduct was “properly attributable to the State ... Otherwise, private parties could face constitutional litigation whenever they seek to rely on some statute governing their interactions with the community surrounding them.” *Roberts*, 877 F.3d at 838.

Washington’s FCPA includes a citizen action provision allowing private actors to bring actions against parties they suspect have violated the FCPA, so long as the party bringing the action satisfies certain notice prerequisites and the proper authorities have declined to take action. *See* RCW 42.17A.775 (former 42.17A.765). As Judge Price correctly

e.g., *Nichols v. Village of Pelham Manor*, 974 F.Supp. 243, 255 (S.D.N.Y. 1997); *Hoye v. City of Oakland*, 653 F.3d 835, 855 (9th Cir. 2011) (“Under both the First Circuit approach and the selective enforcement approach, plaintiffs are generally required to show the existence of an unconstitutional policy by extrapolating from a series of enforcement actions.”). As can be seen, the broadly and vaguely framed allegations of the Counterclaim came nowhere close to meeting this high bar. *See* 971099 CP 470-471, at ¶¶8.5-8.9.

ascertained, the decision to bring a citizen action is entirely within the private actor's judgment, and no state actor plays any role in the private actor's prosecution of the action – the citizen can only act once state action ends. See Teamsters' Ans. Br., at p. 37. *Whether* a private actor brings an action, *when* a private actor brings an action, *who* a private actor brings the action against, and *how* a private actor strategizes and litigates the action is entirely within the independent discretion of the private actor.⁷ Further, the State offers no assistance to private actors utilizing the citizen action provision – financial, legal, or otherwise.⁸ Under the FCPA's citizen action provision, these matters “turn[] on judgments made by private parties without standards established by the State.” *Sullivan*, 526 U.S. at 52 (*citing Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982)) (internal quotations omitted).

⁷ The Foundation is a private, non-profit entity that is not engaged in any legal or business relationship with the State of Washington. This important fact distinguishes *West v. Atkins*, 487 U.S. 42 (1988), cited by the Union. See *West*, 487 U.S. at 55-56 (“It is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can be fairly attributed to the State. Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner.”) (emphasis added).

⁸ The Union argues that “[t]he Foundation's citizen's suits also rely heavily on government assistance and benefits” (*see* Teamsters' Ans. Br., at p. 41), but the only such benefit that it goes on to identify is the availability of attorney's fees and costs recovery in successful citizen's actions. See RCW 42.17A.765(4)(b). It should not be forgotten that the FCPA also provides for an unsuccessful claimant to *pay* attorney's fees and costs, where the citizen's action is brought “without reasonable cause.” See *id.* As the Foundation argued below, the availability of attorney's fees in such circumstances cuts against the policy concerns raised by the Union in allowing citizens to avail themselves of the FCPA without risking liability under 42 U.S.C. Section 1983. See Teamsters' Ans. Br., at pp. 40-41 (citing potential “serious abuse of the prosecutorial function”). Respectfully, the trial court adequately addressed these questions in denying the Unions' motions for attorney's fees below, in holdings that are unburdened by any error, as explained *infra*, at pp. 21-29.

Importantly, the filing of a citizen action is only permitted after the State *declines* to take action. *See* RCW 42.17A.775(2)(a)-(b). A “decision not to intervene” by state actors “can just as easily be seen as state inaction.” *Sullivan*, 526 U.S. at 53.

Indeed, while both the citizen and the State have their respective spheres under the FCPA, ***they are conspicuously required to be mutually exclusive of each other*** – if the State engages in state action by bringing an enforcement action, the citizen may not act. *See* RCW 42.17A.755(2). To suggest that the FCPA imposes a procedural scheme under which the “Foundation’s citizen’s suits also rely heavily on government assistance and benefits” (*see* Teamsters’ Ans. Br., at p. 41) is simply incorrect, as the State neither encourages nor controls the citizen action process, including whether and when it is commenced, how the case is litigated, and whether it is settled, *etc.* *See, e.g., Rendell-Baker*, 457 U.S. at 841 (“Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation.”). That level of state involvement is not what the FCPA contemplates, and its creation of a private right of action cannot be the basis for state action.⁹ *See Roberts*, 877 F.3d at 842-43 (invocation of Federal Arbitration Act not state action) (*citing Sullivan*, 526 U.S. at 52).

⁹ This conclusion is unaltered by the fact that any financial recovery from the citizen’s action will escheat to the State. *See* Teamsters’ Ans. Br., at p. 41 (“Complainants who step into the shoes of the State to enforce these public rights need allege no particularized harm

In that regard, it matters not that in bringing such an action, the Foundation is formalistically required to state in the caption that its action is brought in the name of the State. *See* Teamsters' Ans. Br., at p. 42; *see also* *Lee v. Katz*, 276 F.3d 550, 556 (9th Cir. 2002).¹⁰ Comparing this absence of any substantive state involvement to the level of involvement that the Supreme Court found sufficient in *Brentwood Academy*, another case cited by Teamsters 117, leaves no doubt that the trial court was correct in its analysis. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298, 300 (2001).¹¹

to themselves and, even if they prevail in the action, receive no private bounty.”). Under the citizen’s action provision of the FCPA, once a judgment is obtained, the citizen is entirely removed from the collections and other enforcement proceedings, as the Union itself recognizes. *See id.*, at p. 42 (“As a result, state officials, not private citizens, are positioned to collect and enforce those judgments.”). Thus, it cannot be said that the citizen utilizes state-created attachment procedures for his or her own benefit – the citizen never utilizes such procedures, and separately, obtains no tangible benefit by way of a citizen’s action. The Union attempts to disguise this fatal deficiency as a *positive* indication of joint action, by arguing that “citizen litigants like the Foundation gain the benefit of governmental enforcement of judgments obtained by private litigants without cost to the litigants themselves,” but this clever maneuver is unavailing. *See id.*, at p. 42, n.19. Under the carefully partitioned FCPA scheme, the State and the citizen are never in the position of acting cooperatively, and the benefit that the Foundation gains from a judgment being enforced against the union is not the financial interest that the State enjoys, but instead, is the same non-tangible interest that led it to bring a citizen’s action in the first place – an interest in seeing the law properly and evenhandedly enforced. The citizen acts to discharge his interests, while the State acts to protect its own, but never are the two “jointly” working toward any common goal.

¹⁰ “It is the function of the OAC’s administration of the Commons that guides and informs our inquiry, not the precise legal arrangement under which the OAC leases the area.”

¹¹ “The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it ... There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exist and functions in practical terms.”

The Union attempted to avoid the myriad unfavorable details of the FCPA's enforcement scheme below by alleging that private parties who bring FCPA citizen actions are state actors because regulating campaign finance issues is *exclusively* a government function and that, by creating the citizen action provision, the State "clothe[s] [private actors] with the authority of state law." See 971099 CP 470, at ¶¶8.2-8.3. But "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Sullivan*, 526 U.S. at 52 (declining to hold a private actor's conduct to be state action in the worker's compensation context). Further, "private use of state-sanctioned private remedies or procedures does not rise to the level of state action." *Id.* at 53. Nor does the fact that the State created the citizen action provision and set the standards for filing citizen actions turn private actors utilizing the process into state actors. *Id.* at 54 ("Nor does the State's role in creating, supervising, and setting standards for the [] process differ in any meaningful sense from the creation and administration of any forum for resolving disputes"). And the fact that enforcing campaign finance regulations may be a "public function," see 971099 CP 470, at ¶8.2, does not transform the Foundation into a state actor because the "mere availability of a remedy for wrongful conduct, even when the private use of the remedy serves important public interests, [does not] so significantly

encourage[] the private activity so as to make the State responsible for it.”
Sullivan, 526 U.S. at 53 (emphasis added).

The Union relies on a line of cases where state action was found upon a private actor’s utilization of state statutes for “attachment” procedures and exercising other remedies available to the private actor. *See* Teamsters’ Ans. Br., at p. 38 (“Just as the attachment procedures for seizing property in *Lugar* were made possible only by authority provided by state statute ... here, the Foundation’s selective pursuit of FCPA citizen’s action was made possible only by authority provided by the FCPA.”); *see also* pp. 40-41. In each of those cases, though, the basis for the holding was not merely that the private entity acted in an enforcement capacity – it was the private actor’s power to execute upon judgments, impound animals, place liens on property, **and otherwise to utilize the state’s monopoly on the use of force** (such as its exclusive power of attachment) that resulted in findings of state action. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982);¹² *Brown v. Transurban USA, Inc.*, 144 F.Supp.3d 809, 835 (E.D. Va. 2015) (“And Virginia state courts have found that Transurban acts in the place of the Commonwealth when it seeks to collect unpaid tolls and

¹² “While private misuse of a state statute does not describe conduct that can be attributed to the State ... we have consistently held that a private party’s joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a ‘state actor’ for purposes of the Fourteenth Amendment.” (emphasis added).

administrative fees.”); *Voytko v. Ramada Inn of Atlantic City*, 445 F.Supp. 315, 321 (D.N.J. 1978).¹³ Further, the State itself must be involved with this exercise of power in some significant capacity. See *Smith, et al. v. Teamsters Local 2010*, Case No. 5:19-cv-00771-PA-FFM (Dec. 3, 2019) (slip op.) (“Thus, the State’s role in collecting dues deductions does not amount to ‘significant assistance’ that warrants a finding of joint action.”) (citing *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013)). In *Brunette*, for instance, the state actually **created** the private entity itself, with the express intent that the humane society operate as a “quasi-public” agency, collecting fines, impounding (*i.e.*, collecting) property and bringing criminal charges. See *Brunette v. Humane Soc’y of Ventura Cty.*, 294 F.3d 1205, 1208 (9th Cir. 2002); see also *Storey v. City of Seattle*, 124 Wn. 598, 602, 215 P. 514 (1923) (“Under the provisions of section 3158 thereof, [the humane society has] the powers of peace officers in matters relating to the cruelty to animals. They are also empowered to make arrests without warrants in certain cases ... and by section 3198 it is provided that all fines collected in any county for the violation of the state laws relating to cruelty to animals shall be paid to such society.”).

¹³ The analysis in *Voytko* emphasizes just how indispensable the actual act of *collection* is to the holdings in this line of cases, because to attach or sell property is a traditional government function – unlike the litigation and adjudication that may lead thereto, or in that case, the retention of property already in one’s possession. See 445 F.Supp. at 321.

Indeed, in first permitting a finding of state action in limited circumstances surrounding execution proceedings, the Supreme Court was careful to note the specific and fact-based nature of its holding. *See Lugar*, 457 U.S. at 942 (“Whatever may be true in other contexts, this is sufficient where the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute.”) (emphasis added). While that holding has been applied to a variety of different factual circumstances, it has never been expanded beyond the context of actually exercising the State’s execution power.¹⁴

Clearly then, it is insufficient that the Foundation is merely performing a “public function” with “the authority of state law,” as alleged

¹⁴ In other cases cited by the Union, it was not the nature of the conduct that was the basis for the state action, but rather, the deprivation of due process rights, many in the context of criminal trials. These cases are so factually inapposite as to be irrelevant to the instant question. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 624-25 (1991) (“The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court’s jurisdiction ... If a government confers on a private body the power to choose the government’s employees or officials, the private body will be bound by the constitutional mandate of race neutrality.”); *Georgia v. McCollum*, 505 U.S. 42, 52 (1992) (“In regard to the second principle, the Court in *Edmonson* found that peremptory challenges perform a traditional function of the government ... These same conclusions apply with even greater force in the criminal context because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function.”); *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980) (“This Court’s decisions establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment ... When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty.”) (emphasis added). But assuming *arguendo* that they have any significance here, all are distinguishable insofar as they involved quintessentially public functions geared toward the state’s conduct of trials in its courts, while no such “exclusive public function” is present in this case.

below (*see* 971099 CP 470, at ¶8.3), or that its citizen’s actions “...result[] from the exercise of a right or privilege whose source is state authority,” as Teamsters 117 formulates the question on appeal. Teamsters’ Ans. Br., at p. 37. The Foundation’s act of filing a citizen action must also be “fairly attributable to the State.” But its conduct here – that of filing a *citizen’s* action – clearly is not attributable to the State. Absent such attribution, this Court must honor “the essential dichotomy between public and private acts that [courts] have consistently recognized.” *Roberts*, 877 F.3d at 842 (*citing Sullivan*). The Foundation’s conduct cannot be state action, as a matter of law, and the trial court should therefore be affirmed.

2. *Teamsters 117 Argues an “Exclusive Public Function” That is so Broad as to Be Meaningless.*

Additionally, under the “public function” test, Teamsters 117 was required to show that the enforcement of campaign finance law is “traditionally the *exclusive* prerogative of the State.” *Rendell-Baker*, 457 U.S. at 842 (emphasis in original). As the Supreme Court recently re-stated, “very few” functions fall into this category. *Manhattan Community Access Corp. v. Halleck*, 139 S.Ct. 1921, 1929 (2019). “[T]he relevant question is not simply whether a private group is serving a public function,” contrary to Teamsters 117’s reliance on “public rights.” *Rendell-Baker*, 457 U.S. at 842; *see also Teamsters Ans. Br.*, at pp. 39-41. Notwithstanding these bare

legal conclusions, *see* 971099 CP 470, at ¶¶8.2-8.3,¹⁵ FCPA enforcement in Washington has *never* been the exclusive prerogative of the State.

Instead, since the FCPA was first enacted, private individuals and entities have had a statutorily recognized role to play in enforcing the FCPA. The very existence of the FCPA’s citizen action provision clearly demonstrates that the enforcement of campaign finance laws has not been the “*exclusive prerogative of the State.*” *Rendell-Baker*, 457 U.S. at 842 (emphasis in original). The FCPA originally became law as a ballot measure (I-276) in 1972. *See* Voter Pamphlet, p. 55.¹⁶ Section 40 of the original FCPA granted enforcement powers to the Attorney General, county prosecuting attorneys, and *private citizens*. *Id.* at p. 65. This citizen action provision survives today and continues to empower private actors when the State refuses to act.

In *Rendell-Baker*, the Legislature provided state funds for students, but the delegation of educational funding to the State did not render educational funding the *exclusive* province of the State. *Rendell-Baker*, 457 U.S. at 842. “That a private entity performs a function which serves the public does not make its action state action.” *Id.* Similarly, here, the “legislative policy choice,” *id.*, in the FCPA to grant enforcement power to

¹⁵ *See also* Teamsters’ Ans. Br., at p. 39.

¹⁶ Available at <http://washingtoncog.org/wp-content/uploads/2017/04/I-276-VotersPamphlet1972.pdf> (last visited November 15, 2019).

the AG and local prosecuting attorneys does not render enforcement of FCPA the exclusive province of the State. Indeed, the “legislative policy choice” in the FCPA was to ensure that enforcement of campaign finance laws was not the exclusive province of the State. “The [citizen action] statute is obviously based on the notion that the government *may be wrong*, and then it is up to citizens to expose the violation.” *Utter v. Bldg Indus. Ass’n of Washington*, 182 Wn.2d 398, 411 (2015) (emphasis in original). The legislative policy choice of Washington’s campaign finance law is that the enforcement of the very regulations meant to hold candidates accountable cannot be performed exclusively by those same candidates if they are successfully elected. From the very inception of the FCPA, incorporation of the citizen’s action provision demonstrates the State has specifically delegated a significant aspect of enforcement to the independent prerogative of private actors. While such adversity between the citizen and State is not alone dispositive, it undercuts both any suggestion of exclusivity and also of “joint action.”¹⁷

¹⁷ The Union mischaracterizes the trial court’s holding, in stating that it was based upon its understanding that “...the adversity between citizen litigants and the Attorney General precluded any finding of state action by citizen litigants.” *See Teamsters’ Ans. Br.*, at p. 43. Such was never the basis for the trial court’s holding. Instead, the trial court observed that the “unique” allocation of authorities established by the FCPA meant that the citizen’s action complainant could not be performing an “exclusive government function.” *See Verbatim Report of Proceedings (the “VRP”), 2/15/2019*, at p. 27, ll. 10-12. (“The State is disinterested in pursuing the claim, and only if the State or government is disinterested in the claim does the citizen have the right.”). The trial court certainly did not avoid the necessary analysis, as the Union suggests, but properly considered the adversity between

In any event, what matters is not whether the Foundation’s conduct fits under a broad category of actions generally reserved to the State, but whether the Foundation’s *specific actions* can be considered state action. *See Sullivan*, 526 U.S. at 51 (“Our approach to this latter question begins by identifying ‘the specific conduct of which the plaintiff complains.’”). The Union commits a classic fallacy of division when it ascribes state action to the Foundation’s filing of a citizen’s action by placing it under the broad category of election oversight, a function generally reserved to the State. While “overseeing elections” (*see* 971099 CP 470, at ¶8.2) generally may be the province of the State, it does not follow that every specific activity that fits under such a broad heading constitutes state action. The Foundation does not oversee elections, in any sense of the phrase. Consequently, the specific conduct of filing FCPA citizen’s actions where the state declines to take enforcement action should be evaluated on its own. Notably, authority from the Ninth Circuit Court of Appeals strongly supports dismissal of the Counterclaim for lack of state action, because the Union has similarly focused its lens so broadly as to include activity only remotely related to an election. *See Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir. 1997) (“Because the Defendants’ conduct interfered with an election, the Plaintiffs

state and citizen as but one relevant factor. As with any strawman argument, knocking it down with the *Georgia v. McCollum* case fails to aid the Court’s analysis.

argue that the Defendants exercised a public function. As [that] court concluded, the Plaintiffs' argument stretches the public function test too far.”¹⁸ As in *Johnson*, Teamsters 117's sleight of hand is unavailing. The state action doctrine represents just the sort of “insuperable bar to relief” that makes a disposition under CR 12(b)(6) appropriate, and the trial court's dismissal of the Counterclaim should therefore be affirmed for lack of any state action. *See, e.g., Tenore v. AT&T Wireless Svcs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

B. The Trial Court Correctly Denied the Fee Petitions Because It Could Not Say the Actions Below Lacked “Reasonable Cause.”

Both Teamsters 117 and SEIU PEAFF claim that the denials of their requests for attorney's fees and costs were erroneous, because the trial court somehow “abdicat[ed]” its discretion and declined to determine whether the actions had been brought without reasonable cause. *See* Teamsters' Ans. Br., at p. 30; Service Employees International Union Political Education and Action Fund's Answering Brief and Opening Brief on Cross Appeal (“SEIU PEAFF's Ans. Br.”), at p. 41. These arguments extrapolate, based on

¹⁸ *See also Halleck*, 139 S.Ct. at 1929-30 (operation of public access channels on cable system not a traditional and exclusive public function); *Wilcher v. City of Akron*, 498 F.3d 516, 519 (6th Cir. 2007) (operation of public broadcast station not an exclusive function of the state); *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (providing mental health services not an exclusive state function).

no authority other than the statute, limitations on the trial court's discretion that were advanced nowhere below.

The FCPA provides, in relevant part, that

In the case of a citizen's action that is dismissed and that the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorney's fees incurred by the defendant.

RCW 42.17A.765(4)(b) (emphasis added).

At this stage, the Unions request this Court to make the factual finding that was unavailable to the trial court, which would be entirely improper.¹⁹ Teamsters' Ans. Br., at p. 32. For the reasons explained more fully below, the Respondents have identified no abuse of discretion in the trial court's denial of the attorney's fees and costs petitions, which should be affirmed.

¹⁹ The Respondents cite RAP 2.5(a) for this request, but it appears that they misunderstand the nature of that Rule, because while they are assigning error to the denial of attorney's fees, rather than seeking an affirmance of same, neither Teamsters 117 nor SEIU PEAFF argued to Judge Price that "[b]y its terms, this provision identifies dismissal – not post-trial judgment – as the event that triggers the reasonable cause determination." Teamsters' Ans. Br., at p. 30; RAP 2.5(a) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.") (emphasis added).

1. *The Court Did Not Avoid the Question of “Reasonable Cause.”*

Teamsters 117 attempts to distort the trial court’s ruling, suggesting that because it did not rule the way the Unions would like, it must have avoided a ruling on the question of “reasonable cause” altogether. *See* Teamsters’ Ans. Br., at p. 16; SEIU PEAFF’s Ans. Br., at p. 41. This argument seizes upon a modicum of imprecision in the trial court’s oral ruling, but the intended import of the trial court’s words could not be clearer: Judge Price held that the “record before [the court]” did not allow it to find that reasonable cause was lacking, so he denied the motion for failure to satisfy its burden. *See id.* But the FCPA does not require that in every case, the trial court make an affirmative determination that the action was “brought with reasonable cause,” or “brought without reasonable cause.” Because a lack of reasonable cause is a statutory prerequisite to an award of fees, if the trial court cannot affirmatively say the latter, denial of an attorney’s fees motion is entirely proper. *See* RCW 42.17A.765(4)(b) (“In the case of a citizen’s action that is dismissed and that the court also finds was brought without reasonable cause...”).

It is also important to consider the context in which Judge Price held he could not say that the statute’s criteria were satisfied. It is correct, of course, that the Attorney General may not have believed there to be legal merit to the Foundation’s allegations, or it (presumably) would have acted

upon them, resources permitting. *See* Teamsters Ans. Br., at p. 32. But every single instance where a citizen disagrees with the AG does not subject the citizen bringing the action to a punitive attorney’s fees award, because the whole point of the citizens action is that the AG and other government authorities “may be wrong.” *Utter*, 182 Wn.2d at 411.

The Union correctly anticipates the problem with this argument: “While citizens may certainly disagree with official determinations where they have viable legal theories, the Foundation has never offered such a theory here.” *Id.*, at p. 33. To the contrary, the Foundation did just that, and its claim that Teamsters 117 either was or operated a “political committee” survived a CR 12(b)(6) motion to dismiss. *See* 971099 CP 333-334. As such, the trial court necessarily disagreed with the AGO’s analysis, and found that the Foundation had indeed asserted a “viable legal theory.”²⁰

Against that background, of course, the only other avenue to a finding of frivolity would be that the Foundation’s claims lacked *factual* merit. Teamsters 117’s Answer does not contest that its IRS Form 8871 states under penalty of perjury that it “files” reports disclosing its political

²⁰ The Unions’ suggestion that an attorney’s fees award would not have been appropriate after trial – and therefore must have been awarded following the “dismissal” (at a time when all that could be said was that the action was not legally frivolous) (*see* Teamsters’ Ans. Br., at p. 30), is contradicted by *State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass’n*, 111 Wn. App. 586, 596, 49 P.3d 894 (2002) (attorney’s fees award entered after bench trial).

activity in the State of Washinton (the document speaks for itself). *See* 971099 CP 10, at ¶89; 971099 CP 463, at ¶89. Nor does Teamsters 117 seriously deny that neither it nor its PAC (Separate Segregated Fund) reports as a political committee. *See* 971099 CP 11, at ¶104; 971099 CP 464, at ¶104. Instead, it admits significant political activity.

Judge Price's stated that he could not make that determination after a dismissal of the complaint on procedural grounds. The action simply did not proceed far enough to determine whether or not it lacked factual merit, as these comments suggest. The need to re-assemble the trial court's comments into a purported belief that the determination of "reasonable cause" must await trial simply highlights the weakness of the Union's position. *See* Teamsters' Ans. Br., at 31.

Indeed, the posture of the actions below left the Unions in the position of arguing that the Foundation's purportedly ill motives could alone support an award of attorney's fees – regardless of whether the action itself was frivolous. The Unions cited no authority for that proposition below, and do not do so here. Instead, they argue, in effect, that the Foundation's litigation lacked reasonable cause merely because it was brought by the Foundation and because the Foundation conducted discovery, and cite to a number of inapposite cases for the apparent proposition that the trial court need not have made a separate finding of

frivolity. See Teamsters' Ans. Br., at p. 34. But in *Matter of Pearsall-Stipek*, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998), the question of frivolity was a given, and the court only considered whether it was also necessary that the action be for purposes of harassment. More relevant for present purposes is that court's holding that, like an FCPA complainant, "...a recall petitioner's motives plays no part of the sufficiency determination." *Id.*, at 267. Similarly here, a complainants' motivations say nothing about "reasonable cause."

The other cases cited by Teamsters 117 are marital dissolution cases that have no relevance here, because the attorney's fees standard for those actions only requires a finding of "need" – it does not require a finding of frivolity, as does the FCPA in requiring that an action be brought "without reasonable cause." See *Wixom v. Wixom*, 190 Wn. App. 719, 725, 360 P.3d 960 (2015) ("Attorney fees in dissolution proceedings may be awarded 'after considering the financial resources of both parties.'"); *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002) ("Finally, Tina seeks attorney fees based on her need and/or Randy's intransigence. We find both."). While costly intransigence is an *additional* basis that may support a fee award in such cases, these authorities cannot dispense with the need in FCPA cases to find that the Foundation's citizen's action suits "lacked reasonable cause." Nor do they stand for the proposition that

conducting discovery can somehow demonstrate the frivolity of an action. See Teamsters's Ans. Br., at pp. 33-34. The trial court correctly found that Respondents' burden went unsatisfied, and so denied their petitions.

2. *The Applicable Attorney's Fees Standard Requires the Entire "Action" to be Meritless.*

At long last, Teamsters 117 comes to an argument that it advanced in the trial court, when it argues (as a mere afterthought) that "...a fee award would still be appropriate because the FCPA authorizes fee awards whenever even a 'single claim' is frivolous or harassing." See Teamsters' Ans. Br., at pp. 34-35. The statute at issue uses the phrase "citizen's action," so a plain language analysis does not appear to clearly answer whether it intends to provide for fees awards where a complainant is unsuccessful only as to one part of an "action." See RCW 42.17A.765(4)(b). The case cited by the Union does not address the situation that was before this trial court, however, because on the facts of that case, the court was applying a definition of "action" that included all of the claims the FCPA complainant had against a single party. See *WEA*, 111 Wn. App. at 615 ("The trial court did not find that the entire lawsuit was brought without reasonable cause; rather it found only that the claims against Hanselman were brought without reasonable cause.").

In determining the meaning of the word "action," as used in the FCPA, this Court should consider a related statute, *i.e.*, the general

provision for fee awards in the context of non-FCPA, frivolous actions. *See* RCW 4.84.185 (“In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause...”) (emphasis added). In that statute, the word “action” is used in the sense as in a “cause of action,” which can encompass numerous claims or legal theories. *See, e.g., Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009) (“Res judicata bars such claim splitting if the claims are based upon the same cause of action.”). And in *Utter v. BIAW*, 176 Wn. App. 646, 675, 310 P.3d 829 (2013), *rev’d*, 182 Wn.2d 398 (2015), this Court cited to RCW 4.84.185, making clear that the FCPA’s attorney’s fees provision operates in the same fashion. *See also Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931 (2004) (“The action must be viewed in its entirety and only if it is frivolous as a whole will an award of fees be appropriate.”).

Here, the Foundation argued that if the PAC was not a separate entity, Teamsters 117 itself was a political committee. To be such, Teamsters 117 could be either a receiver of political contributions or a maker of political expenditures. Those are alternative methods to prove that Teamsters 117 was a political committee, which establishes the cause of action, which is that a political committee violates the FCPA when it fails to report. Teamsters 117 would like an award of attorney’s fees for

prevailing on one method of proving it was a “political committee” – even though satisfaction of the other method stated a cause of action that Teamsters 117 was a “political committee” and survived the CR 12(b)(6) motion to dismiss. *See* 971099 CP 8; *see also* *WEA*, 111 Wn. App. at 598 (“Thus, a person or organization can become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals.”). Whether or not the trial court had the power to render such an award – and to then address the thorny issues of offset and whether the claims were “inextricably intertwined” with those on which the Foundation prevailed – the attorney’s fees standard under the FCPA uses a discretionary “may.” RCW 42.17A.765(4)(b). Teamsters 117 identifies no abuse of discretion in the trial court’s declining to do so. Its orders denying attorney’s fees and costs should be affirmed.

C. Respondents Proffer No Reasonable Interpretation of the Former Citizen’s Action Provision.

1. Respondents’ Reliance on Grammar is Selective.

In support of their creation of an obligation that appears *nowhere* in the text, Respondents have consistently, if not exclusively, relied upon the “last antecedent rule.” *See* SEIU PEAFF’s Ans. Br., at pp. 8-9; State’s Ans. Br., at pp. 22-23. They go so far as to chide the Foundation for not mechanistically adhering to that rule, which “grammar ... the lifeblood of

language,” supposedly requires. SEIU PEAFF’s Ans. Br., at p. 22. First, if grammar were the *sine qua non* of statutory construction, it would not be necessary for treatise-writers or judges to spill volumes upon volumes of ink explaining canons of construction. Resort to principles of statutory interpretation is necessary because statutory text is, by its nature, more technical, harder to decipher, and simply different from spoken or written language in other contexts.²¹ The last antecedent rule cannot but recognize this and yield where clues in the text of the statute point to a different result.²² See *Eyman v. Wyman*, 191 Wn.2d 581, 599, 424 P.3d 1183 (2018); *In re Sanders*, 551 F.3d 397, 399 (6th Cir. 2008) (rule is a “rough presumption”).

²¹ It is for this reason that courts do not consider *only* grammar in construing statutes, as the Respondents’ position suggests; they also must consider statutory context, the legislative purpose and the interrelationship of other statutes. See *Douglass v. Shamrock Paving, Inc.*, 189 Wn.2d 733, 739, 406 P.3d 1155 (2017) (citing *Citizens All. For Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 435, 359 P.3d 753 (2015) (“In giving meaning to an undefined term, we ‘consider the statute as a whole and provide such meaning to the term as is in harmony with other statutory provisions ... Though undefined terms in a statute are given their common law or ordinary meanings ... the words ‘must be read in the context of the statute in which they appear, not in isolation or subject to all possible meanings found in a dictionary.’”) *Citizens All. For Prop. Rights Legal Fund*, 184 Wn.2d at 437 (2015) (internal citations omitted)).

²² It is unclear why the State focuses solely on the absence of commas or other distinguishing punctuation to indicate a different legislative intent, when the grammatical effect of the phrase “to do so,” provides the requisite indication of that intent. See State’s Ans. Br., at p. 23. Although punctuation certainly can provide the textual indication, it is not the only reference point. In that regard, *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 146 P.3d 893 (2006), is readily distinguishable. While the holding there was based on the lack of such a comma, the lack was significant in the factual context of that case because preceding the last antecedent was a serial list that did use commas. *City of Spokane*, 158 Wn.2d at 673. Because a serial list is not utilized in subsection (ii) of the citizen’s action provision, the absence of a comma is of much less significance here, if any.

Second, Respondents cannot reconcile their dogmatic reliance on grammar with their argument that “failure to do so” refers to the state officials’ taking an action (a “citizen’s action”) that they have no ability to take – the sentence becomes gibberish. *See Berrocal v. Fernandez*, 155 Wn.2d 585, 594, 121 P.3d 82 (2005) (“Consistent with this observation, a preceding word, phrase, or clause cannot be an antecedent if the addition of the modifier ‘impair[s] the meaning of the sentence.’”). The Respondents have countered that “action” and “citizen’s action” should be interpreted “interchangeably” in the context of RCW 42.17A.765. SEIU PEAFF’s Ans. Br., at p. 9, n.7; p. 25, n.18; State’s Ans. Br., at p. 24. The plain language, however, renders that argument untenable. The statute explicitly states that when the text intends to refer to the citizen taking on state authorities’ enforcement prerogatives, such shall “hereinafter be referred to as a citizen’s action.” *See* RCW 42.17A.765(4) (2018). And indeed, every subsequent use of the word “action” is preceded by the word “citizen’s,” where the Legislature refers to citizen’s actions, such as in subsection (4)(a)(ii) – and not so preceded, where the Legislature did not so intend. *See generally* RCW 42.17A.765(4). In the context of citizen’s actions under the FCPA, the officials’ and citizens’ roles are carefully partitioned and must be treated accordingly. *See, e.g., Utter*, 182 Wn.2d at 410.

Utter is not to the contrary, despite the Unions’ mischaracterization. See SEIU PEAFF’s Ans. Br., at p. 9. In that case, the Court held only that the meaning of “action” was informed by the meaning of “citizen’s action,” in the context of determining whether other steps, such as investigations or issuing an order, counted as “commenc[ing] an action.” *Utter*, 182 Wn.2d at 409 (“This sequencing also suggests that ‘commenc[ing] an action in subsection (4)(a)(i) does not include the other nonaction enforcement steps available to the AG per the previous subsections...”).²³ The Court did not “treat[] citizen and official FCPA enforcement actions interchangeably” (see SEIU PEAFF’s Ans. Br., at p. 9) or even “somewhat interchangeably” (see State’s Ans. Br., at p. 24). Instead, it applied the same aspect of the FCPA that the Foundation relies on here: the text that provides a citizen can bring an enforcement “action,” if the authorities choose not to do so. See RCW 42.17A.765(4). But the Unions conveniently ignore the part of the text that also provides that when the citizen is the one taking the “action,” it shall “hereinafter [be] referred to as a citizen’s action.”²⁴ See *id.* The fact that “the underlying claim always belongs to the State” cannot change the

²³ Thus, the State aptly articulates the entire extent of the relevant holding in *Utter*: “‘Commence an action’ means to file a lawsuit for violations of the campaign funding and disclosure laws.” See State’s Ans. Br., at p. 18.

²⁴ Worse than merely failing to address this language, the State relegates it to an ellipsis in its discussion of the immediately surrounding language that the State believes *supports* its position – such selective quotation is misleading, at best. See State’s Ans. Br., at p. 19.

fact that the FCPA is careful to discuss official enforcement actions and citizen's actions separately when setting forth their procedural requirements – it does not treat them as the same. *See* SEIU PEAFF's Ans. Br., at p. 9, n.7; p. 25, n.18.

Even setting aside the elementary axiom that the use of a different phrasing signals a different legislative intent, *Seeber v. Washington State Public Disclosure Commission*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981),²⁵ the citizen's action provision contains numerous indications that the Unions' interpretation is not even reasonable, much less correct.²⁶ There is

²⁵ "It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent."

²⁶ The Respondents both unabashedly distort the Foundation's statements below, in suggesting that it has somehow admitted the correctness of their position. *See* State's Ans. Br., at pp. 20, 23; SEIU PEAFF's Ans. Br., at p. 22, n.17. As both the State and the Unions are well aware, the Foundation has advanced *alternative* theories of interpretation – which are admittedly not entirely consistent with one another (the Unions' understanding is evident in their criticism of the "leap forward" and "leap back" theories). *See* SEIU PEAFF's Ans. Br., at pp. 18-26; 973946 CP 77, at n.5; 971099 CP 808, at n.3. Under either interpretation, however, subsection (ii) concerns only the second notice that is required prior to filing a citizen's action; the Foundation's recognizing this does not concede that any of the Respondents' points are correct. *See* State's Ans. Br., at p. 28. Further, counsel's "admission" below that subsection (ii)'s "failure" was a failure to file suit within ten (10) days of the second notice spoke only to its *primary* interpretation, that subsection (ii) articulates only the requirements of the notice, and does not affirmatively place any time limit on the filing of the action. This statement does not prevent the Court from considering the Foundation's alternative interpretation – that the "within ten days" language of subsection (ii) places a time limit on the issuance of the second notice once 45 days from the first notice expires, and does not limit the filing of the action. *See Anderson v. Morris*, 87 Wn.2d 706, 716, 558 P.2d 155 (1976) ("In addition, if alternative interpretations are possible, the one that best advances the legislative purpose should be adopted.").

no obligation in the statute for the citizen to do anything “within ten days” of the officials’ failure to initiate an action.²⁷

2. “*Common Law Principles*” Cannot Supply the Missing Obligation.

Nor can such an obligation be conglomerated from a trinity of “three doctrines [that] combine” (*see* SEIU PEAFF’s Ans. Br., at p. 13) to require what none of them, standing alone, is sufficient to accomplish. In the cases that the Union has cited for its implied waiver argument, the courts made clear that an affirmative act is required by the claimant, whether for purposes of express waiver or implied waiver. *See State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015) (affirmative act was defendant’s “voluntary absence” from criminal trial, where trial already begun in his presence); *Wynn v. Earin*, 163 Wn.2d 361, 381, 181 P.3d 806 (2008) (affirmative act of presenting physician’s testimony at trial waived physician-patient privilege); *In re Detention of Black*, 187 Wn.2d 148, 153, 385 P.3d 765 (2016) (“There is no dispute that Black’s decision to waive

²⁷ The Respondents argue that “...the only textually defensible antecedent of ‘their failure’ is the officials’ failure,” as if this obvious bit of grammar were dispositive in their favor. *See* SEIU PEAFF’s Ans. Br., at p. 9, n.6; *see also* State’s Ans. Br., at p. 24. Their observation is hardly so profound as the Respondents apparently believe – in each of the Foundation’s alternative interpretations, it understands “their failure” as referring to the officials’ inaction. There are, however, two (2) instances where the state officials can “fail” to take action on the citizen’s notices, and in using “to do so,” subsection (ii) is reasonably understood as referring back to the first such instance. *See* RCW 42.17A.765(4)(a)(i), (iii).

his presence on the first day of voir dire qualifies as a knowing, voluntary, and intelligent act.”).

The Unions also attempt to rely upon distinguishable cases concerning landlords’ acceptance of rent following issuance of a statutory notice, which the Foundation previously addressed.²⁸ *See* Initial Br., at pp. 28-29. Then, apparently finding their arguments below insufficient, the Unions turn for the first time to the equitable doctrine of forfeiture which, according to them, “does not require knowing action” but is instead grounded in the notion that “people cannot complain of the natural and generally intended consequences of their actions.” *See* SEIU PEAFF’s Ans. Br., at p. 17 (emphasis added).²⁹ Admitting that the Foundation is indeed

²⁸ *Beverly Health & Rehabilitation Services, Inc. v. NLRB*, 317 F.3d 316 (D.C. Cir. 2003), considered a statute that *did* clearly require a labor strike (not a cause of action, notably) to commence on the exact date specified in the notice of same. *See Beverly*, 317 F.3d at 320 (citing 29 U.S.C. Section 158(g)). The provision at issue there contained language that the strike had to be commenced within a certain period of time after the notice, and even provided the exclusive means for extending that deadline. *Id.*, at 321 (“Section 8(g) expressly states that before commencing a strike at a health care institution a union ‘shall, not less than ten days prior to such action, notify the institution in writing’ and that the ‘notice shall state the date and time that such action will commence’ ... Instead, the Congress carved out but a single express exception – when both parties consent in writing – an exception that would be unnecessary if either party could unilaterally extend the statute at will.”); *see also* State’s Answer Br., at p. 33. There is simply no similar language here, and if the FCPA intended to require that suit be filed in some time period shorter than two (2) years, it surely could have said so (as the Congress demonstrated in *Beverly*).

²⁹ The Court should not consider arguments concerning forfeiture, because the Unions did not advance them below. *See Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). To the extent that the Court does consider such arguments, however, they fail for the same reason as those of implied waiver. *See State v. Mason*, 160 Wn.2d 910, 925, 162 P.3d 396 (2007) (“In this case, we will not allow Mason to complain that he was unable to confront Santoso when Mason bears responsibility for Santoso’s absence.”); *State v. George*, 160 Wn.2d 727, 739, 158 P.3d 1169 (2007) (“We believe the ‘failure to appear’ provision is intended to apply to a defendant who thwarts the government’s attempt to provide a trial

“thoroughly counseled” (*see* SEIU PEAFF’s Ans. Br., at p. 16), it remains the case that “implied waiver” or “forfeiture” of a cause of action, simply by the passage of time, is called “laches” – and it is the law of Washington state that laches should virtually never be applied to truncate a statute of limitations. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 610, 94 P.3d 961 (2004).

3. *The Second Notice Serves an Independent Purpose and Is Not Superfluous to the Legislative Intent.*

The Respondents contend that reading subsection (ii) as simply a notice requirement somehow renders the subsection mere “surplusage.” *See*

within the time limits specified by absenting himself from a proceeding.”). Even in *Duskin v. Carlson*, where the Unions contend that a right of action was forfeited by inaction, the surrender of a “person’s right to pursue the action” was able to be accomplished only through the legal fiction of the State’s notice imposing an *assignment* of the right of action from the claimant to the State. *See Duskin*, 136 Wn.2d 550, 562, 965 P.2d 611 (1998) (Johnston, J., dissenting) (“Importantly, we are examining the forfeiture of a significant right – control over a personal injury lawsuit. Mr. Duskin does not challenge the Department’s statutory authority to assignment of the claim but merely argues the Department must provide legal notice in clear and specific terms.”) (emphasis added). That assignment principle does not apply here, because (1) the time limit and subsequent assignment were clearly set forth in the statute, unlike the mere notice requirement that the FCPA presents (*see Duskin*, 136 Wn.2d at 559) (*citing* RCW 51.24.070), and (2) a citizen’s action, which has its own statute of limitations separate from that of the State, is not “assigned” to the State (or to the citizen) by way of the second notice – indeed, providing the second notice is the only means by which the citizen even *has* a right of action. This important feature of the second notice also forecloses the Unions’ suggestion, asserted for the first time here (and even then only in a footnote), that “...the relevant action [to support waiver] in each of these cases was the party’s distribution of a notice representing it would undertake a future action,” and so the “affirmative act” that results in waiver of the rights asserted in the second notice is the distribution of the second notice itself. *See* SEIU PEAFF’s Ans. Br., at p. 16, n.12. This hopelessly circular argument need not detain the Court’s attention for long, in any event – the act that gives rise to the right cannot be the same act that waives the right, simply as a matter of logic. In the Unions’ statutory notice cases, further, the true “affirmative act” was accepting additional rent following the notices that gave rise to the rights at issue. *See supra*, at p. 35.

State’s Ans. Br., at p. 30; SEIU PEAFF’s Ans. Br., at p. 14. The Respondents embrace somewhat inconsistent positions, but each is wrong, because reading subsection (ii) as a notice requirement does not render it (or any portion thereof) superfluous.

The Respondents fail to appreciate that pre-suit notice itself serves a recognized legal function (*i.e.*, it acts as a demand), which appears across a number of contexts. *See, e.g., Gil Enters., Inc., v. Delvy*, 79 F.3d 241, 246, 38 U.S.P.Q.2d 1042 (2nd Cir. 1996) (“By its nature, a demand is intended to trigger certain rights and obligations ... Without notice, the demand would serve no purpose because it would fail to provide Gil with the opportunity to cure any accounting shortfalls. Accordingly, the gravamen of a legal demand is its notice providing function.”) (emphasis added). Much like one potential litigant may be statutorily required to send a pre-suit notice to its potential adversary, such that unnecessary litigation may be avoided, so too does the requirement to provide notice and demand to state officials serve to allow them an opportunity to handle any enforcement action – which the State prefers. *See* State’s Ans. Br., at p. 32 (“Here, the purpose of the citizen’s action law is to provide a limited check on the government’s much broader right to investigate and enforce violations of the campaign finance and disclosure laws ... With that purpose in mind, the Legislature required that persons wishing to commence citizen’s actions

inform the attorney general and the prosecuting attorney not once, but twice prior to filing suit.”).

But the two (2) notices required under Section (4) are not merely duplicative. The first, 45-day notice brings to the officials’ attention a potential violation and asks them to investigate and take action. Only after they have “fail[ed] to do so” can the second notice (the “demand”) be sent. The second notice serves an additional purpose: this time, the citizen does more than just ask the State to take action, the notice says that otherwise, the citizen will bring a citizen’s action. Collectively, Section (4) requires only that the second notice give the authorities ten days “within” which to file suit.³⁰ See RCW 42.17A.765(4)(a)(ii), (4)(a)(iii). This capacity to limit

³⁰ For purposes of the Foundation’s “leap forward” theory, to borrow the Unions’ parlance, it seems entirely possible that the Legislature was simply imprecise in using the word “within” in subsection (ii), when it likely should have said something to the effect of “after.” See *Janovich v. Herron*, 91 Wn.2d 767, 773, 592 P.2d 1096 (1979) (“Janovich contends, however, that the language of the statute is plain on its face and must be accorded the meaning he proposes, even at the cost of substantial curtailment of the recall right ... Admittedly, given the apparent purpose of the statute, the use of the term ‘within’ is inartful.”). This reading is further supported by the use of “in fact,” in subsection (iii), which refers back to subsection (ii) for a 10-day limitation on the officials’ filing an enforcement action. In this regard, the Foundation would heartily agree with the State Respondents that “[t]he purpose of an enactment should prevail over inept wording.” See State’s Ans. Br., at p. 32 (citing *City of Seattle v. State*, 136 Wn.2d 693, 697-98, 965 P.2d 619 (1998)). And the Foundation would further note that giving “within” its literal interpretation in this context would lead to the absurd result that the citizen is precluded from bringing a citizen’s action until such time as his or her deadline to do so has expired – a reading that collapses the timeline and effectively nullifies the citizen’s action in this way should be avoided, as it is obviously not what was intended. See, e.g., *State v. Leech*, 114 Wn.2d 700, 709, 790 P.2d 160 (1990) (“To apply the ‘in furtherance of’ language only to the time in which an arson fire is being set is to achieve an absurd consequence, i.e., a situation in which an arsonist whose fire kills will almost never be liable for murder.”). Alternatively, the Foundation’s “leap back” theory is the only interpretation advanced to date that can reconcile the ordinary meaning of “within” with the rest of the provisions of

the authorities' ability to bring suit may be the only purpose of subsection (ii) – and the ten (10) day limitation may come by way of subsection (iii) – but the demand to “do this or I will do that” still serves a well-recognized legal purpose.

Therefore, to read subsection (ii) as kicking off a 10-day limitations period that short-circuits the longer, two-year statute of limitations appearing shortly thereafter, renders subsection (iv) “insignificant.” *See* Initial Br., at pp. 30-34; State’s Ans. Br., at p. 30. The more recent statute of limitations, enacted in 2007 (*see* State’s Ans. Br., at p. 6), should not be subordinated to a reading of the notice provision that presents a conflicting, shorter limitations period; instead, they should be read harmoniously. *See American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 591, 192 P.3d 306 (2008) (“Thus, we construe the Act in such a way as to achieve a harmonious statutory scheme and give effect to the will of the voters by preferring the more specific and more recently enacted prohibition of smoking in any place of employment.”). The State Respondents seem to acknowledge this intractable problem, in advancing (for the very first time in their Answer Brief) the suggestion that serving the second notice does not have that effect, and that noncompliance with the

the citizen’s action provision, as canons of statutory construction indisputably require. Under the “leap back” theory, moreover, each instance of “within” in RCW 42.17A.765(4) is imbued with the same meaning. *See* SEIU PEAFF’s Ans. Br., at p. 26.

“20 day” period would simply require “...a new notice specifying a new 20-day timeframe.”³¹ *See* State’s Ans. Br., at p. 34. The Unions, however, plod ahead, arguing that “...the Foundation has waived its right to bring a citizen’s action by acting inconsistently with the terms of its second notice.” SEIU PEAFF’s Ans. Br., at p. 15.

The Unions do not bother to explain why on Earth the Legislature would choose to punish a citizen who acts diligently to ripen his or her citizen’s action, by chopping months (perhaps years) off of the period to file suit. *See id.*, at p. 12 (“For its own reasons, the Foundation sent its second notice on the earliest date it could.”). This would perversely incentivize a citizen to “sit on” the claims until nearer to the end of the 2-year limitations period before even issuing a notice to investigate or a demand to take

³¹ Instead of raising this argument to the trial court, the State’s arguments were entirely consistent with the Unions’ there. *See* 973946 CP 483 (“The state adopts SEIU’s Statement of the Case, Arguments and Conclusions set forth in SEIU’s Motion for Judgment on the Pleadings.”). As such, the Court should decline to consider this new argument, which is fundamentally irreconcilable with the position that expiration of the deadline in the second notice forecloses a citizen’s action forever. Its being raised at this late date mirrors the Unions’ raising the 10-day limitations period only in a motion for judgment on the pleadings, after such time as the 2-year Statute of Limitations had expired for a citizen’s action on these allegations, and is similarly calculated to prejudice the Foundation. *See infra*, at p. 53, n.42. If the Court should determine to consider this argument however, it simply raises more questions than it answers. For instance, having waived its statutory rights, why would the citizen not be required to go back to square one, and re-issue its 45-day notice, instead only being required to re-issue the second notice? *See* RCW 42.17A.765(4)(a)(ii) (“The person has thereafter further notified...” (emphasis added). Further, would it not be an “empty gesture” to give the officials a second, ten-day demand, when the citizen already knows how the State will respond? The law does not require such futile acts, so the State’s proposed compromise approach is unavailing. *See Larson v. State*, 9 Wn. App. 2d 730, 745, 447 P.3d 168 (2019). However, advancing this argument does undermine the Unions’ suggestion that compliance with the statutory prerequisites is somehow a matter of the courts’ subject matter jurisdiction. *See infra*.

enforcement action. State’s Ans. Br., at pp. 30-31, 35-36. Aside from being patently unjust and bad public policy, this violates the fundamental canon of statutory construction that a statute should not be interpreted to defeat its own policy goals. *See Asotin County v. Eggleston*, 7 Wn. App. 2d 143, 151, 432 P.3d 1235 (2019) (declining to apply last antecedent rule and stating that “[t]here is a textual basis for a different construction, however, and one that is more consonant with the remaining provisions of RCW 42.56.550 and the purpose of the PRA.”). It is not “meaningless” to issue a notice that starts the officials’ time running, even if the notice itself contains precatory language or idle threats – which assumption is, again, necessary to only one of the Foundation’s alternative interpretations. *See State’s Ans. Br.*, at p. 32.

4. Respondents’ Reading Is Inconsistent with Case Law and the Liberal Construction to Be Afforded the FCPA.

Of course, it cannot be the case that both the “leap forward” and the “leap back” theory are correct divinations of the Legislature’s true intent. *See SEIU PEAFF’s Ans. Br.*, at pp. 25-27, nn.19-20. Looking only to accepted principles of statutory construction, the “leap back” theory is the most natural interpretation, and the only one that reconciles all the language; it offers a “...coherent account of Section 765 as a whole,” laying bare why the Respondents’ interpretation is wrong (*i.e.*, their reading just does not make grammatical sense and is foreclosed by *Utter*). *SEIU PEAFF’s Ans.*

Br., at p. 18.³² However, the Court is not writing on a *tabula rasa*, guided only by the text.

Instead, decisional law to date has acted upon the “leap forward” theory, and simultaneously precluded the argument of two (2) successive, “symmetrical” ten-day periods upon which both the State and the Unions rely. *See WEA*, 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); *see also* State’s Ans. Br., at p. 31, n.5; SEIU PEAFF’s Ans. Br., at p. 22. The Unions’ only rejoinder to this straightforward

³² The Unions offer little in the way of any response to the “leap back” theory, after merely regurgitating their stale invocation of the “last antecedent rule” in opposition to the “leap forward” theory. *See* SEIU PEAFF’s Ans. Br., at pp. 18-26. But the “leap back” theory does not leave “failure to do so” dangling in the middle of a sentence; “to do so” is ordinarily understood as referring back to a previously stated verb, and the only previously-stated “failure” (at least on the part of the state officials, *see supra*, at pp. 29-34) is in subsection (i) (the failure to act within 45 days after the first notice). SEIU PEAFF’s Ans. Br., at 25 (“The officials’ failure to act on the first notice occurs 45 days after that notice.”). The Unions’ argue that “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” (*see id.*), but that ignores the scheme established by the citizen’s action provision. It is not until officials have failed to act in response to the first notice, and the citizen is issuing the second notice, that the citizen can threaten to file suit himself; the first notice only requires language providing notice that “...there is reason to believe that some provision of this chapter is being or has been violated...”. RCW 42.17A.765(4). As such, the second notice is more accurately described as a “demand,” and serves an independent purpose. *See supra*, at pp. 36-41.

application of precedent is to disregard the language in *NEA*³³ and to clamor that *WEA*'s dicta suggested a "more rigorous approach" than the one it so generously advances, with no authority whatsoever. SEIU PEAFF's Ans. Br., at p. 29.

The trouble with this deflection is that the "more rigorous approach" advanced in *WEA* cannot be squared with the Unions' creation of two (2) successive, ten-day periods – the latter of which is absolutely indispensable to their position. For that reason, it is exceedingly unlikely that the Unions' interpretation of the statute is correct – they cannot avoid this problem by merely echoing the trial court's finding that the citizen's action "...would simply be 10 days more untimely than PEAFF contends." SEIU PEAFF's Ans. Br., at p. 29. It was necessary for the trial court to consider this issue in determining who advanced the more reasonable interpretation of the FCPA, and to avoid doing so was itself error – the Legislature's intent was the central question before the trial court and is always the focus in matters of statutory interpretation. *See Dept. of Ecology v. Campbell & Gwinn, LLC*,

³³ *See State ex rel. Evergreen Freedom Foundation v. National Education Association* ("*NEA*"), 119 Wn. App. 445, 449, 452-53, 81 P.3d 911 (2003) ("Before the 10-day period elapsed, the AG forwarded EFF's allegations to the PDC for initial review and investigation ... We agree with EFF that whether the 10-day or 45-day period had been tolled was not before us in *WEA* and that our recitation about it was not necessary to our holding ... 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.) (emphasis added).

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...”).

At bottom, *WEA* and *NEA* both establish that former RCW 42.17A.765(4) contained only one ten-day period – *i.e.*, the ten (10) days that the state authorities have to act, not two (2) successive ten-day periods.³⁴ If RCW 42.17A.76(4)(a)(ii) is read to establish *any* time limit on filing an action, then *WEA* means that it must be two (2) *concurrent* ten-day periods (one of which binds the citizen); therefore, accepting *arguendo* that subsection (ii) does more than to merely require notice, *WEA* sets up a “race to the courthouse,” because whoever acts first within that ten-day period will be entitled to maintain the action.³⁵ It is much more consistent with the

³⁴ It can safely be assumed (at least in most circumstances) that the Attorney General operates in accordance with prevailing law, including the *WEA* and *NEA* opinions that would allow for no distinction between the AG agreeing to extend its own deadline and thereby agreeing to extend the citizen’s deadline for filing a citizen’s action. *See* State’s Ans. Br., at p. 34; SEIU PEAFF’s Ans. Br., at p. 14 (“This Court has long presumed, absent contrary evidence, that public officials act in good faith.”) (*citing Rosso v. State Personnel Bd.*, 68 Wn.2d 16, 20, 411 P.2d 138 (1966) (“In the latter vein ... it is appropriate to point out that we have long and consistently indulged the presumption that public officers will properly and legally perform their duties until the contrary is shown.”)). Also, it is unclear why the Unions believe that to not follow through on a ten-day “promise” would somehow be in bad faith, if there is no legal obligation for the citizen to do so. *See* SEIU PEAFF’s Ans. Br., at p. 15. Even if the citizen does not so follow through, the statute still has an “evident purpose of motivating officials to act on meritorious allegations”; it is not necessary to this purpose that the citizen also advise the state officials of their 10-day time limitation that is unambiguously present in the citizen’s action provision. *See id.*, at p. 15, n.11; *see also* RCW 42.17A.765(4)(a)(iii).

³⁵ But this is itself in contravention of previous case law, all of which required the state officials to have their full ten (10) days, *before* the citizen can file a citizen’s action. *See* Initial Br., at pp. 20-21; *see also* State’s Ans. Br., at p. 25 (“In *West*, the Court of Appeals recognized that the ‘comprehensive enforcement scheme’ required deference to the attorney general and local prosecutor’s authority to enforce the act ‘before a court will entertain a citizen’s’ action”) (*citing West v. Washington Association of District &*

statutory text and purpose of the FCPA that subsection (ii) merely establishes a notice formality, with no time limitation placed on the citizen. The Court should therefore endorse the Foundation’s interpretation in order to avoid a completely untenable and absurd result.

D. The Trial Court Compounded Its Error By Staying Discovery Prior to Entering Judgment on the Pleadings.

1. The Trial Court Improperly Considered an Affirmative Defense That Was Not Asserted in the Pleadings.

At this point, it is necessary to address a procedural defect in the trial court’s disposition of the Teamsters 117 matter; namely, its consideration of an affirmative defense that was not preserved in the pleadings and of which the Foundation did not have proper notice. While the Foundation brought this error to the attention of the trial court (*see* Teamsters’ Ans. Br., at p. 20), Judge Price believed that Teamsters 117’s

Municipal Court Judges, 190 Wn. App. 931, 941, 361 P.3d 210 (2015)). **The State Respondents effectively admit that this “race to the courthouse” would survive under the current version of the citizen’s action provision, which deleted the reference to ten (10) days that had previously appeared in RCW 42.17A.765(4)(a)(iii).** *See* State’s Ans. Br., at pp. 37-38, n.6. The fact that the priority of action doctrine would also operate to preclude the loser of the race from filing an action only serves to highlight the unworkability of the Respondents’ reading, not to mitigate it. *See id.* Furthermore, the State does not explain why the complainant’s supposed “broad discretion to determine when to serve” the notices can solve this problem. *Id.* Whenever the citizen should choose to issue the second notice, he or she will still be firing the starting gun on a 10-day “race to the courthouse,” under the Respondents’ view. And when the citizen chooses to fire that gun does nothing to preclude the state officials from investigating violations and taking action during the first, 45-day notice period, **or at any other time** (as is their right and duty), so it makes little sense to complain that “...the government’s authority to enforce the campaign finance and disclosure laws would be so restricted, whereas the citizen’s ability would be virtually unchecked.” *See* State’s Ans. Br., at p. 38. But if the State cannot be bothered to take action within nearly sixty (60) days after being expressly advised of FCPA violations, Washington law confers upon the citizen the authority to pursue the matter.

invocation of the purported ten-day statute of limitations was a subject matter jurisdiction issue, which could be raised at any time. *See id.*, at p. 14.

That procedural ruling was erroneous because the statutory prerequisites to suit established by former RCW 42.17A.765(4)(a) are just that – conditions precedent to filing a claim, not constraints on the courts’ subject matter jurisdiction. It is black letter law that affirmative defenses must be raised in a defendant’s answer, or they are considered waived. *See Reed v. King County, Dept. of Metro. Svcs.*, 90 Wn. App. 1031, at *2, n.10 (Apr. 20, 1998) (unpublished op.) (*citing Mercer v. State*, 48 Wn. App. 496, 501-02, 739 P.2d 703 (1987)). It is similarly indisputable that Civil Rule 9(c) requires the denial of conditions precedent to be pled with specificity. *See Dyson v. King County*, 61 Wn. App. 243, 809 P.2d 769 (1991). Teamsters 117’s pleadings did neither of those things (*see generally*, 971099 CP 457-473), so they attempt to characterize the 10-day period as a defense of subject matter jurisdiction. *See Teamsters’ Ans. Br.*, at p. 19.

Notwithstanding a plethora of case law to the contrary, Teamsters 117’s simplistic position appears to be that because FCPA citizen’s actions are a “creature of statute,” satisfaction of statutory conditions precedent becomes a matter of the trial court’s subject matter jurisdiction. *See Teamsters’ Ans. Br.*, at p. 21 (“Because citizen’s actions are creatures of statute, the statutory prerequisites to those actions operate as jurisdictional

bars.”). This position ignores the axiom, reiterated in cases cited by the Union, that “[s]ubject matter jurisdiction refers to a court’s ability to entertain a type of case, not to its authority to enter an order in a particular case.” *Buecking v. Buecking*, 179 Wn.2d 438, 448, 316 P.3d 999 (2013). While the Legislature may impose reasonable regulations on a court’s exercise of jurisdiction, it may not divest the court of subject matter jurisdiction – even where jurisdiction exists only by virtue of a statute.³⁶ *In re Estate of Jepsen*, 184 Wn.2d 376, 381, 358 P.3d 403 (2015) (statutory proceeding of will contest) (*citing Buecking*, 179 Wn.2d at 449); *see also In re Marriage of Major*, 71 Wn. App. 531, 533-34, 859 P.2d 1262 (1993).³⁷

Citizens actions fall within the subject matter jurisdiction of superior courts. “If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.” *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 209, 258 P.3d 70 (2011). As the U.S. Supreme Court has recognized in the context of similar conditions precedent under the Copyright Act, the separation of powers dictates that a statute must clearly state that it establishes a jurisdictional bar before courts will infer that intent. *See Reed Elsevier, Inc.*

³⁶ As such, Teamsters 117’s focus on the allegations of the Complaint, to the effect that the Court had subject matter jurisdiction pursuant to Section 765(4), is of no moment. *See Teamsters’ Ans. Br.*, at p. 19.

³⁷ “Even under statutory law, jurisdiction is broadly given; a superior court sits as ‘family court’ in any Title 26 dispute...”.

v. Muchnick, 559 U.S. 154, 164 (2010) (“Moreover, § 411(a)’s registration requirement, like Title VII’s employee numerosity requirement, is located in a provision ‘separate’ from those granting federal courts subject-matter jurisdiction over those respective claims.”). Here, similarly, the citizen’s action provision is set forth separately from the FCPA’s provisions establishing the trial courts’ jurisdiction (*see* RCW 452.17A.750), and is framed in the language of a claim-filing requirement: “The citizen action may be brought only if...”. *See* RCW 42.17A.765(4)(a) (emphasis added).

Teamsters 117 argues that its purported jurisdictional bar “...has been applied specifically to a party’s failure to timely complete pre-filing requirements” (*see* Teamsters’ Ans. Br., at p. 21), but Washington law does not treat timeliness as a question of subject matter jurisdiction. To the contrary, it has long been held in a variety of statutory contexts that “...durational requirements do not affect a court’s subject matter jurisdiction.” *Buecking*, 179 Wn.2d at 453; *see also State v. Moen*, 129 Wn.2d 535, 545, 919 P.2d 69 (1996) (“Here, the trial court had authority to adjudicate the type of controversy, i.e., to impose restitution, but did so in violation of the sixty-day time limit.”) (*applying Marley v. Dept. of Labor & Indus.*, 125 Wn.2d 533, 540, 886 P.2d 189 (1994) (“A lack of subject matter jurisdiction implies that an agency has no authority to decide the claim at all, let alone order a particular kind of relief.”)). “To conclude a

court has the subject matter jurisdiction to hear a case, but then can lose it based upon the timing of its decree, would conflict with the meaning of subject matter jurisdiction and our prior court decisions.” *Buecking*, 179 Wn.2d at 452. Much like the statute of limitations established by the Legislature can be equitably tolled – and therefore necessarily does not concern the court’s subject matter jurisdiction – the statutory conditions precedent to a citizen’s action (even to the extent they concern timeliness) did not constrain the trial court’s jurisdiction here. *See In re Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008) (“We reject the contention that the statute is jurisdictional and address whether equitable tolling applies in this case.”).

In the cases cited by the Union, the jurisdictional defects at issue were all related to the requirements for invoking the courts’ appellate jurisdiction, such as timely filing a notice of appeal and paying the filing fee – these cases are distinguishable because they all involve requirements pertaining directly to what is required to institute an appeal or a petition for judicial review – it is not at all remarkable that such statutes would be considered jurisdictional. *See Community Treasures v. San Juan County*, 192 Wn.2d 47, 51, 427 P.3d 647 (2018) (“Petitioners did not contest the fee amounts at the time of payment, nor do they contest the fact that they did not pursue administrative remedies and did not file land use petitions within

21 days of the assessment of the fees in question.”); *Lewis County v. W. Wa. Growth Mgmt. Hearings Bd.*, 113 Wn. App. 142, 153-54, 53 P.3d 44 (2002) (“Although the requirements for commencing or instituting an action or appeal vary according to the applicable statute or court rule, a court, whether trial or appellate, has jurisdiction only after a party commences or institutes an action or appeal.”); *see also Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 381, 223 P.3d 1172 (“The LUPA time-of-filing requirements control access to the superior court’s substantive review of any LUPA decision and the failure timely file an appeal prevents court access for such review...”). But failure to timely file does not deprive a superior court of jurisdiction.³⁸

There is no precedent whatsoever for the proposition that the FCPA’s conditions precedent have been applied as jurisdictional prerequisites, notwithstanding Teamsters 117’s latching onto passing statements about a lack of “authority.” *See Teamsters Ans. Br.*, at p. 22 (*citing West*, 190 Wn. App. at 941); *see also In re Marriage of Major*, 71 Wn. App. at 534 (“The term ‘subject matter jurisdiction’ is often confused

³⁸ Strangely, Teamsters 117 does not address language in the *Nickum* opinion making clear that even its reliance on LUPA as an analogy is misplaced, because those claim-filing requirements, like the conditions precedent of the FCPA, are not jurisdictional. *See Nickum*, 153 Wn. App. at 380, n.9 (“Some Washington cases speak to the trial court lacking jurisdiction to hear untimely LUPA appeals ... Because superior courts are granted broad general jurisdiction over disputes under the Washington Constitution ... a superior court has jurisdiction to determine whether LUPA petition may go forward.”) (emphasis added).

with a court’s ‘authority’ to rule in a particular manner. This has led to improvident and inconsistent use of the term.”); *Cole*, 163 Wn. App. at 205-06.³⁹ The Union cites *In re Estate of Jepsen* for the proposition that statutory conditions precedent are necessarily to be treated as jurisdictional requirements, but the court there declined to “parse out” the distinction between such conditions and jurisdictional requirements because it had no practical effect in that case (and the question there was one of *personal* jurisdiction, not subject matter). *See* 184 Wn.2d at 380-81, n.5.

In this case, by contrast, the distinction is critically important because, while subject matter jurisdictional defects need not be raised in the pleadings, failure to satisfy conditions precedent is an affirmative defense that *does* have to be so raised. *See* CR 9 (“A denial of performance or occurrence shall be made specifically and with clarity.”). As a result, Teamsters 117 next argues that the statutory conditions precedent “...are part of the plaintiff’s prima facie case and must be pleaded by the plaintiff to state a claim.” *See* Teamsters’ Ans. Br., at p. 23. Here, however, the Union conflates the requirement of providing the second *notice*, with the *separate requirement* (as Teamsters 117 would have it) to subsequently file

³⁹ “Judicial opinions sometimes misleadingly state that the court is dismissing for lack of jurisdiction when some threshold fact has not been established ... Litigants who have failed to preserve a claim of error in the trial court will then seize upon such casual references to ‘jurisdiction’ in appellate court opinions as a basis to argue that an issue may be raised for the first time on appeal. That is what has happened here.” (emphasis added).

suit within ten (10) days. While the former may be a matter for the plaintiff's *prima facie* case (which the Foundation satisfied here by the allegations of its Complaint – see 971099 CP 3, at ¶¶12-13), the latter does not deny that fact, but admits it and raises an issue of timeliness as to the citizen's *action*. See, e.g., *Tucker v. Kittitas County*, 89 Wn. App. 1069, at *4 (1998) (“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 ... it is a matter of avoidance that the County was required to affirmatively plead.”).

As such, the cases Teamsters 117 cites for its statement that “statutorily prescribed procedural prerequisites are part of the plaintiff's *prima facie* case” (see Teamsters Ans. Br., at p. 23) are not helpful. See *Sprague v. Sumitomo Forestry Co., Ltd.*, 104 Wn.2d 751, 757, 709 P.2d 1200 (1985); *Shinn Irrigation Equipment v. Marchand*, 1 Wn. App. 428, 430, 462 P.2d 571 (1969). While Teamsters 117 could have generally denied the fact of providing notice, to the extent it wished to rely upon purported noncompliance with a separate claim filing requirement, such was as an affirmative defense that it was required to plead with specificity. See *King v. Snohomish Cty.*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002).

Lacking any basis to excuse its gamesmanship in not raising this defense until such a late date as February 26, 2019,⁴⁰ Teamsters 117 contends that it is actually the Foundation that has failed to preserve this issue for appellate review. *See* Teamsters’ Ans. Br., at p. 24. As the Union agrees however, “[t]he Foundation raised this argument for the first time on oral argument on the motion” (*see id.*) – in other words, at a time when the trial court still had the opportunity to correct its error (indeed, it had not yet made the error). The Foundation was therefore not required to move for reconsideration following the dismissal; its raising the argument to the trial court – before the matter ever got to appeal, unlike in the cases Teamsters 117 cites – was sufficient to preserve the objection. *See Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *Swank v. Valley Christian School*, 188 Wn.2d 663, 675, n.6, 398 P.3d 1108 (2017); *Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC*, 199 Wn. App. 534, 400 P.3d 347 (2017) (same). As such, Teamsters 117 may not excuse its waiver of this defense by reference to another purported waiver.

⁴⁰ *See Dyson v. King County*, 61 Wn. App. 243, 245-46, 809 P.2d 769 (1991) (“By answering without raising the defense and proceeding to defend the case for an appreciable time period while awaiting the running of the statute of limitations, the City did take the type of misleading affirmative action which was lacking in *Mercer*.”); *King*, 146 Wn.2d at 424 (“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.”).

2. *Staying Discovery Constituted an Abuse of Discretion, Because the Foundation Had No Opportunity to Conduct Discovery on the Claim Filing Defense.*

Central to Teamsters 117's argument that a stay of discovery was proper, leading up to the hearing on its motion for judgment on the pleadings, are its contentions that the Foundation delayed conducting discovery and that, in any event, no discovery would have been relevant. *See* Teamsters' Ans. Br., at p. 44 ("The Foundation had 15 months – from the filing of this case on December 14, 2017, through the issuance of the discovery stay on **March 29, 2019**, to conduct discovery ... Were the Court to treat these last-ditch efforts to identify discovery needed to oppose the motion as preserved for appeal, they would nonetheless be wholly immaterial to its resolution.") (emphasis added).

This argument crumbles upon the slightest scrutiny, however. First, the claim filing defense was not raised until **February 26, 2019** – just over a month prior to the stay of discovery was issued. 971099 CP 801-802. It was raised nowhere in the first Answer, filed on March 28, 2018. 971099 CP, at 403. Nor did Teamsters 117 raise it in the additional affirmative defenses included in its Amended Answer on November 1, 2018. *Id.*, at 469. Furthermore, the Foundation *did* attempt to conduct discovery into

Teamsters 117's affirmative defenses.⁴¹ *See* Interrogatory #40 and answer thereto (971099 CP 742-743).

Instead of timely complying, however, the Union intentionally took advantage of counsel's professional courtesies, by requesting (and obtaining by agreement) two (2) extensions of the deadline for discovery responses, totaling forty (40) days. *See* 971099 CP 843, at ¶¶13-14; 971099 CP 1217, at ¶3. As a result, the Foundation did not receive any response to its Interrogatory #40, identifying the defense, until **March 1, 2019**. *See id.* Indeed, even if the Foundation had served supplemental discovery *the very day* following Teamsters 117's motion for judgment on the pleadings, the deadline for responses to such discovery would not have come due before the trial court erroneously stayed all discovery in the matter.⁴²

As a direct result of Teamsters 117's conscious manipulations and the trial court's improper stay, the Foundation had *no* opportunity to conduct discovery on the claim filing defense. Accordingly, the time frame that should concern the Court is not the 18-month discovery period that was never completed (*see* Teamsters Ans. Br., at p. 44), but the roughly six (6)

⁴¹ *See* Teamsters' Ans. Br., at p. 44 ("At no point in this period did the Foundation issue discovery seeking to flesh out Local 117's affirmative defenses, such as the lack of jurisdiction Local 117 pleaded.").

⁴² The Foundation also attempted to take depositions of persons with relevant knowledge, but the Union refused, wholesale, to cooperate with scheduling any such depositions prior to seeking and obtaining a stay of discovery. *See* Teamsters' Ans. Br., at p. 13.

weeks between the Union's belatedly raising its defense and when judgment on the pleadings was granted, on **April 12, 2019**. Not only was discovery stayed for a third of this time period, it was stayed during the only time period the Foundation could realistically hope to obtain discovery on the claim filing defense – the two (2) weeks leading up to the hearing. As such, the stay was uniquely prejudicial because it effectively dispensed with the Foundation's right to conduct discovery on this defense altogether.

None of the cases cited by Teamsters 117 – below or here – can justify such extraordinarily prejudicial relief. Those cases required some type of a special or inordinate burden imposed by the discovery *in conjunction* with the presence of a dispositive motion filed by the defendant. *See Nissen v. Pierce County*, 183 Wn. App. 581, 590, 333 P.3d 577 (2014) (“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.”); *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) (indicating that qualified immunity protects one from the burdens of litigation, including pretrial actions, and therefore a court should stay discovery during a determination of immunity)). To award that relief in the absence of a compelling reason violated fundamental litigation

principles and ignored the basic rights of the Foundation, as a litigant and a legal person in the United States – yet the Union dismisses these rights as mere “platitudes.” *See* Teamsters’ Ans. Br., at p. 44.

The Union complains much of the “incredibly overbroad pattern requests” that it made little effort to comply with, but says almost nothing about the relevance of additional discovery that could have been sought, but for its gamesmanship. *See* Teamsters’ Ans. Br., at pp. 45-47 (discussing Foundation’s proffer of discovery into “unspecified equitable factors”). It mischaracterizes the issue as one of an “equitable excuse” for the Foundation’s missing the 10-day window, but ignores the actual significance of what the Foundation identified to the trial court. To wit, the Union has relied upon an argument of “common law waiver,” arising from the Foundation’s “promise,” in order to support the Court’s creation of an obligation that does not appear in the text of the citizen’s action provision. *See* SEIU PEAFF’s Ans. Br., at pp. 13-17; Teamsters’ Ans. Br., at p. 17 (“Local 117 agrees with PEAFF’s analysis of Section 765.”). Whether properly understood as one of waiver, estoppel, laches or forfeiture – the Unions’ constant shifting making it somewhat unclear – all of these are equitable affirmative defenses.⁴³ *Go2Net, Inc. v. Freeyellow.com, Inc.*, 126

⁴³ For the first time on appeal, SEIU PEAFF contends that it is actually a matter of forfeiture, rather than an implied waiver of a cause of action based upon inaction and the passage of time (*i.e.*, laches), as it argued below. *See* SEIU PEAFF’s Ans. Br., at p. 17. The distinction

Wn. App. 769, 778, 109 P.3d 875 (2005).⁴⁴ As such, the Foundation did not need to search for an “equitable excuse” to toll the purported statute of limitations, as the Union frames the issue. *See* Teamsters Ans. Br., at p. 47.⁴⁵ But it was entitled to conduct discovery as to whether the party seeking to rely upon equitable defenses did so with clean hands – as unclean hands is a well-recognized rebuttal to the assertion of an equitable defense.⁴⁶ *See Race Track, LLC v. King County*, 183 Wn. App. 1014, at *13 (Sept. 2, 2014) (unpublished op.) (“In general, a party with unclean hands may not assert equitable estoppel or laches.”) (citing *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 949, 640 P.2d 1051 (1982)).

is immaterial for present purposes: “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.’”

⁴⁴ “The defendants sought to present affirmative defenses of estoppel, waiver, and laches ... The appellate court did not think the absence of any reference to equitable defenses in the statute should be construed as legislative intent to make such defenses unavailable.”

⁴⁵ It also appears that Judge Price mistakenly believed the discovery could only be relevant to equitable tolling, rather than to the applicability of an equitable defense. *See* VRP 4/12/19, at pp. 11-13 (“But doesn’t the Court have to agree with you that it’s – or agree with them that it’s an equitable type of remedy as opposed to a statutory remedy...”). But even Teamsters 117 acknowledged below that the citizen’s action provision contained no actual textual obligation to require filing the claim within ten (10) days (by its reliance on “common law principles” to require that the citizen keep its “promise”), so the trial court’s concern with “someone utilizing that particular statutory procedure” was unwarranted and only circumvented the true issue.

⁴⁶ Teamsters 117 argues that the Foundation should have submitted an affidavit to satisfy CR 56(f), ignoring the fact that its motion was made pursuant to CR 12, and that the requirements for obtaining continuance of a summary judgment hearing were therefore totally inapplicable. *See* Teamsters’ Ans. Br., at p. 46. In any event, Judge Price was well aware of the status of discovery, including the Foundation’s five (5) pending requests for relevant depositions, at the time it stayed that and all other discovery in the matter. *See* 971099 CP 547, at ¶¶4-5.

Setting aside this specific topic of discovery, which was only one example proffered to the trial court, it was *per se* improper to grant a CR 12(c) motion before the parties have had an opportunity to develop the record 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 v. State*, 72 Wn.2d 928, 930, 428 P.2d 678 (1967);⁴⁷ *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (citing *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782, 819 P.2d 370 (1991)). While the Court *could have* considered the motion as one for summary judgment, which would have *perhaps* triggered obligations under CR 56 (and the right to conduct additional discovery), it did not do so, instead granting judgment on the pleadings. *See* CR 12(c); *Blenheim v. Dawson & Hall Ltd.*, 35 Wn. App. 435, 438-39, 667 P.2d 125 (1983).⁴⁸ Moreover, it did so in violation of the decisional law that prohibits short-circuiting the discovery process.

This error was abetted by Teamsters 117’s dilatory conduct in the discovery process, which avoided even apprising the Foundation of its

⁴⁷ “The procedural rules under our present practice are to be liberally construed in order that full discovery proceedings will be afforded in all instances where factual inquiries are in order. The judgment dismissing the plaintiff’s action was premature and is therefore reversed.”

⁴⁸ “If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

claim filing defense until it was too late to refile a citizen's action, to otherwise correct the issue, or to even craft a factual counter-attack thereto. *See, e.g., Winter v. Toyota of Vancouver USA, Inc.*, 132 Wn. App. 1029, at *2, n.3 (2006) (not reported) (*citing Barnum*, 72 Wn.2d at 931); *Dyson*, 61 Wn. App. at 245-46; *King*, 146 Wn.2d at 424. The trial court's disposition is a glaring and fundamental error of procedure that should be reversed.

E. The Trial Court Misapplied the Standard for Dismissal, to Rule the Complaint Failed on the "Receiver of Contributions" Prong.

Apparently, Teamsters 117 does not dispute the Foundation's clearly-expressed contention that it was a procedural error for the trial court to grant "dismissal" of one possible avenue of showing "political committee" status, even though the case law allows that status to be shown either by the "expenditures prong" or the "contributions prong." *See Initial Br.*, at p. 57; *see also WEA*, 111 Wn. App. 586, 598, 49 P.3d 894 (2002). Instead, it sees fit only to quibble with the trial court's sustaining the "expenditures" prong," and to defend its "dismissal" of the "contributions" prong; both attempts fail. *See Teamsters' Ans. Br.*, at pp. 26-28.

First, Teamsters 117 relies upon its own bylaws, even though the stated purposes of an organization are hardly dispositive of whether that organization has electoral political activity as **one of** its primary purposes.

See id., at p. 26; *see also WEA*, 111 Wn. App. at 599-600.⁴⁹ Teamsters 117 concedes that it uses political engagement as one of the means to achieving its non-electoral goals, and even that “...this Court has not yet identified a minimum spending level needed to support the conclusion that one of an organization’s primary purposes is spending money on electoral activity,” but then goes on to postulate that its own “de minimus” electoral spending must be below whatever that threshold may be. *See Teamsters’ Ans. Br.*, at p. 28. At bottom, these are factual contentions, and the trial court applied the proper standard on dismissal *to this prong*, by crediting the Foundation’s allegations that the Union’s numerous expenditures were for the purpose of electoral political activity and considering hypothetical facts consistent therewith. *See* 971099 CP 3-14, 17, at ¶¶17-119, 147, 156; *Tenore v. AT&T Wireless Svcs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). Teamsters 117 even recognizes this⁵⁰ but does not explain or otherwise support its subsequent contention that “...the Foundation has pleaded all the facts needed for a full evaluation of the question and this pleaded allegations

⁴⁹ In *WEA*, “[t]he trial court ... adopted the broad standard ‘one of the primary purposes’: An organization is a political committee if one of its primary purposes is to affect governmental decision making by supporting or opposing candidates or ballot propositions, and it makes or expects to make contributions in support of or in opposition to a candidate or ballot measure ... If the activities of an organization reveal that a majority of its efforts are put toward electoral political activity, the fact finder may disregard the organization’s stated goals to the contrary.” (emphasis added).

⁵⁰ *See Teamsters’ Ans. Br.*, at p. 28 (“Below, the Foundation resisted these conclusions on the ground that political committee status is a mixed question of law and fact ... True enough.”).

establish that Local 117 is not a political committee under either prong of the definition.” Teamsters’ Ans. Br., at p. 28. There is no error in the below analysis of the “expenditures” prong, which should be affirmed.

As to the “contributions” prong, the trial court also erred in “dismissing” the claim against the SSF. Teamsters 117 submits that its Separate Segregated Fund (SSF) is not in fact a “political committee,” even though it has elected to receive favorable tax treatment under Section 527 of the Internal Revenue Code, which defines the SSF as a “separate organization” – and even though Washington law defines a “political committee” to include “any other organization or group of persons, however organized.” *See* RCW 42.17A.005(38) (emphasis added); Teamsters’ Ans. Br., at p. 29 (“That definition does not include bank accounts registered with the Internal Revenue Service under Section 527 of the Internal Revenue Code.”). For that proposition, Teamsters 117 cites non-binding letters from the PDC and the Attorney General, in other matters. Teamsters’ Ans. Br., at p. 29.

However, the Union’s reliance on the AG’s definition of “person” is unavailing, because that definition is itself in contravention of the statutory definition, which is set out in plain terms.⁵¹ Indeed, under the

⁵¹ The PDC’s letter did not address any definition of “person,” and did not confront a situation where the entity seeking exemption from Washington’s disclosure requirements had sought preferential tax treatment under Section 527. *See* 971099 CP 162. For its part,

FCPA, “person” includes not only “group[s] of persons,” but also “any other organization, however constituted.” This broad definition surely captures attempts to evade reporting requirements by setting up a bank account that is controlled by the Union itself, which is a group of persons, and who should not have been considered a different “person,” separate from the SSF. *See Voters Educ. Comm. v. WSPDC*, 161 Wn. 2d 470, 491, n.14, 166 P.3d 1174 (2007). The Union makes no effort to defend its efforts at circumvention, which *VEC* and the Ninth Circuit have disapproved.⁵²

Especially given the importance of interpreting the FCPA liberally (*see supra*, at pp. 41-44), as well as that of preventing circumvention schemes like that which Teamsters 117 has concocted, the trial court should not have determined that the Union could not, as a matter of law, be a “political committee” under the “contributions prong.” *See Tenore*, 136 Wn.2d at 330; *see also* 971099 CP 16-18, at ¶¶135-143, 152-154. Among the allegations it should have credited were that “Teamsters Local 117 is a political committee expecting to and actually receiving contributions because it is primarily funded by membership dues, it segregates funds for

the Attorney General’s office is not an agency whose expertise is solely or uniquely necessary in implementing the FCPA, and so no deference should be given to its definition of “person” – particularly where, as here, the statutory definition of “person” unambiguously includes legal persons, in addition to natural persons. *See Short v. Clallam County*, 22 Wn. App. 825, 832, 593 P.2d 821 (1979); *Dept. of Labor & Industries v. Rowley*, 185 Wn.2d 186, 208, 378 P.3d 139 (2016).

⁵² *See* Initial Br., at p. 63 (*citing Brumsickle*, 624 F.3d at 1011-12).

political purposes, and its members know or reasonably should know of the political use.” 971099 CP 18, ¶154. Without the benefit of a more developed factual record, it could not be said that this allegation was without basis, and so the trial court’s determination that neither the Union nor its SSF was a “receiver of contributions” should be reversed.

F. The Foundation Should Be Awarded Its Attorney’s Fees and Costs in this Appeal.

The Respondents each object to an award of appellate attorney’s fees and costs to the Foundation, should it prevail in this appeal, arguing (1) that the Foundation must win an “affirmative judgment” in its favor; and (2) that any award of attorney’s fees can only be levied against the State. *See* Teamsters’ Ans. Br., at pp. 47-48; State’s Ans. Br., at pp. 39-40.⁵³ RAP 18.1 provides that a party may recover attorney’s fees and expenses on appeal, to the extent permissible under “applicable law.” And while many statutory contexts may “generally” require that a successful litigant “receive[] a judgment in its favor” (*see Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990)), the FCPA’s attorney’s provision only requires that “...the person who brings the citizen’s action prevails.” *See* RCW 42.17A.765(4)(b). It does not require that a party be a “prevailing

⁵³ Oddly enough, the State’s own instrumentalities join in this objection, arguing that “...the reimbursement would come from the State, not the Respondents in this case.” State’s Ans. Br., at p. 40. As is clear, this is a distinction without a difference.

party” in the well-understood sense of that phrase; nor does it require that the complainant prevail at any particular stage of the litigation, such as obtaining an affirmative judgment in its favor. As such, the FCPA does not preclude an award of appellate attorney’s fees in the Foundation’s favor.

V. CONCLUSION.

For all of these reasons, 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 denial of reconsideration, in the SEIU PEAFF 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 staying discovery, in the Teamsters 117 Matter; (e) vacate that portion of the trial court’s order of dismissal, 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; and (e) remand to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 6th day of December, 2019.



Robert A. Bouvate, Jr., WSBA # 50220
Eric R. Stahlfeld, WSBA # 20020
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482 | f. 360.352.1874
Rbouvate@freedomfoundation.com

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 6, 2019, I filed this document with the Supreme Court in the State of Washington and delivered a copy of the foregoing Opening Brief on Appeal, by email pursuant to agreement to:

Dmitri Iglitzin, WSBA No. 17673
Darin Dalmat, WSBA No. 51384
Ben Berger, WSBA No. 52909
Barnard Iglitzin & Lavitt, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
Iglitzin@workerlaw.com
dalmat@workerlaw.com
berger@workerlaw.com
woodward@workerlaw.com

Susan Sackett DanPullo, WSBA No. 24249
Margaret McLean, WSBA No. 27558
Alicia O. Young, WSBA No. 35553
Attorney General of Washington
7141 Cleanwater Drive SW
PO Box 40145
Olympia, WA 98504
Susand1@atg.wa.gov
margaretm@atg.wa.gov
Alicia.young@atg.wa.gov
Loris2@atg.wa.gov
Tkia.morgan@atg.wa.gov

Dated this 6th day of December, 2019, at Olympia, Washington.

By: 

Jennifer Matheson

FREEDOM FOUNDATION

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- margaret.mclean@atg.wa.gov
- owens@workerlaw.com
- susan.danpullo@atg.wa.gov
- valenzuela@workerlaw.com
- woodward@workerlaw.com

Comments:

Reply Brief and Answer Brief in Cross-Appeals

Sender Name: Jennifer Matheson - Email: jmatheson@freedomfoundation.com

Filing on Behalf of: Robert Alan BouvatteJr. - Email: rbouvatte@freedomfoundation.com (Alternate Email: jmatheson@freedomfoundation.com)

Address:
P.O. Box 552
Olympia, WA, 98507
Phone: (360) 956-3482

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