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

SUPREME COURT OF THE STATE OF WASHINGTON

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.

**BRIEF OF RESPONDENTS JAY INSLEE AND STATE OF
WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH
SERVICES REGARDING NO. 97394-6**

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I. INTRODUCTION

This appeal concerns the statutory prerequisites for filing a citizen's action under a prior version of the campaign finance and disclosure laws, RCW 42.17A, and whether the Freedom Foundation complied with those requirements before filing its lawsuit against the Governor and the Washington State Department of Social and Health Services.

While generally enforced by the State Public Disclosure Commission (the Commission) and the Attorney General, the campaign finance and disclosure laws also allow concerned citizens to file "citizen's complaints" in limited circumstances. At issue here, RCW 42.17A.765(4)(a) (2016) allowed for citizen's actions "only if," after an initial 45-day notice and waiting period, the person "thereafter further notified the attorney general and prosecuting attorney that the person will commence a citizen's action within ten days upon their failure to do so." RCW 42.17A.765(4)(a)(ii) (2016).

The Freedom Foundation sent the notices required by the statute, but it failed to file its citizen's action within the timeframe set forth in its second notice. Specifically, rather than commence its citizen's action "within ten days" of the attorney general's and prosecuting attorney's failure to commence their own action, the Foundation did not commence its lawsuit until approximately one and a half years later.

Because the law required persons filing citizen's actions do so within ten days of the attorney general and prosecuting attorney's failure to bring their

own action, the trial court correctly dismissed this case for failure to comply with the statutory prerequisites.

II. STATEMENT OF THE CASE

A. The State’s Campaign Finance and Disclosure Laws are Primarily Enforced by the State Public Disclosure Commission and the Attorney General, with Limited Exceptions

In 1972, voters in Washington approved Initiative 276 (Laws of 1973, ch. 1) and required public disclosure of political campaign and lobbying contributions and expenditures. I-276 § 1. I-276 established the Public Disclosure Commission to, among other things, “[i]nvestigate and report apparent violations” of the fair campaign practices laws to “appropriate law enforcement authorities” and to otherwise enforce the laws within the power afforded to it. I-276 § 36(5), (7). I-276 also authorized the attorney general and prosecuting attorneys of the State to seek court orders for civil remedies and sanctions for violations of the Act. I-276 §§ 39, 40(1).

While presumptively enforced by the Commission, prosecuting attorneys, and the attorney general, I-276 also allowed “[a]ny person who has notified the attorney general in writing that there is reason to believe that some provision of this act is being or has been violated” to “bring in the name of the state any of the actions (hereinafter referred to as a citizen’s action) authorized under this act” if certain conditions were met. I-276 § 40(4). As described below, successive amendments have

continually narrowed the availability of citizen's actions and the remedies afforded through such actions.

1. Original Citizen's Action Provision in I-276

Originally, I-276 permitted citizen's actions only when: (1) the person wishing to file the action provided written notice to the attorney general "that there is reason to believe that some provision of this act is being or has been violated;" (2) the attorney general "failed to commence an action hereunder within forty days after such notice," (3) the citizen provided a second written notice to the attorney general "advising him that a citizen's action will be brought if the attorney general does not bring an action," and (4) the attorney general "failed to commence an action within ten days" after the second written notice. I-276 § 40(4). Persons successfully bringing such citizen's actions were permitted to recover one-half of any judgment awarded, in addition to costs and attorney's fees. *Id.* However, such persons could also be liable for the defendant's attorney fees and costs for bringing actions without reasonable cause. *Id.* Recognizing that citizen's action lawsuits could be brought for ulterior motives, this Court described the costs and attorney's fee provisions together with the notice requirements as "safeguards" protecting "against frivolous and abusive lawsuits." *Fritz v. Gorton*, 83 Wn.2d 275, 314, 517 P.2d 911 (1974). I-276 originally

established a six-year statute of limitations for any actions brought under the Act. I-276 § 41.

Thus, as enacted, I-276 permitted citizen's actions anytime within six years of the violation, after the forty- and ten-day notices were provided and no action was taken by the attorney general. But I-276 did not require that the notices specify when the citizen's action would be filed within the six-year statute of limitations.

2. 1975 Amendments

Two years after passage of I-276, the Legislature amended I-276 in several key respects. First, the Legislature recognized the potential for abuse under the law, and, to that end, amended I-276's statement of purpose. The Legislature provided that, while the campaign finance and disclosure law were intended to promote "complete disclosure," they should also ensure that persons subject to the law would be "protected from harassment and unfounded allegations" Laws of 1975, 1st Ex. Sess., ch. 294, § 1.

Second, the 1975 amendments narrowed the ability to file citizen's complaints and further limited the remedies available under such actions. Specifically, citizen's actions were permitted only after: (1) the person notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there was reason to believe that a violation was occurring or had occurred; (2) neither the attorney general

nor the prosecuting attorney commenced an action within forty-five days after such notice; (3) the person provided a second notice to the attorney general and prosecuting attorney “that said person will commence a citizen’s action within ten days upon their failure so to do,” and (4) the attorney general and the prosecuting attorney “in fact failed to bring such action within ten days of receipt of said second notice.” Laws of 1975, 1st Ex. Sess., ch. 294, § 27(4).¹ I-276 had previously defined the date of receipt as the date of mailing. *See* I-276 § 42. Persons prevailing in such citizen’s

¹ The amendment read in relevant part:

(4) Any person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself bring in the name of the state any of the actions (hereinafter referred to as a citizen’s action) authorized under this chapter. This citizen action may be brought only if the attorney general ~~((has))~~ and the prosecuting attorney have failed to commence an action hereunder within ~~((forty))~~ forty-five days after such notice and ~~((if the attorney general has failed to commence an action within ten days after a notice in writing delivered to the attorney general advising him that a citizen’s action will be brought if the attorney general does not bring an action.))~~ such person has thereafter further notified the attorney general and prosecuting attorney that said person will commence a citizen’s action within ten days upon their failure to do so, and the attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice. If the person who brings the citizen’s action prevails, ~~((he shall be entitled to one half of any judgment awarded, and to the extent the costs and attorney’s fees he has incurred exceed his share of the judgment,))~~ the judgment awarded shall escheat to the state, but he shall be entitled to reimbursed ~~((for such costs and fees))~~ by the state of Washington for costs and attorney’s fees he has incurred; PROVIDED, That in the case of citizen’s action which is dismissed and which 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.

Laws of 1975, 1st Ex. Sess., ch. 294, § 1.

actions, moreover, were not awarded any part of the judgment, but could be reimbursed by the State for costs and attorney's fees. Laws of 1975, 1st Ex. Sess., ch. 294, § 27(4).

Thus, as amended in 1975, the law required citizens to (1) notify both the attorney general and the relevant prosecuting attorney two separate times, and (2) include in the second notice to the attorney general and the prosecuting attorney a statement "that said person will commence a citizen's action within ten days upon their failure so to do." *Id.*

3. 1982 Amendments

In 1982, the Legislature did not address the prerequisites to filing citizen's actions. However, it did decrease the statute of limitations for any actions brought under the campaign finance and disclosure laws to five years. Laws of 1982, ch. 147, § 18.

4. 2007 Amendments

In 2007, the Legislature further restricted the total time in which a citizen's action could be filed to two years after the occurrence of the alleged violation. Laws of 2007, ch. 455, § 1. The Legislature left in place the five-year statute of limitations applicable to actions brought by the attorney general or prosecuting attorney. *Id. See RCW 42.17.410 (2008).*

5. 2010 Amendments

In 2010, the Legislature reorganized the campaign finance and disclosure laws and tightened up some of the language in the enforcement section, but did not appear to materially change the statutory prerequisites or time periods applicable to citizen's actions. Laws of 2010, ch. 204, § 1004.² Regarding the second notice prerequisite, the law as amended in 2010 required "~~such~~ the person" filing a citizen's action to have "further notified the attorney general and prosecuting attorney that ~~said~~ the person will commence a citizen's action within ten days upon their failure ~~to~~ do so." *Id.* § 1004(4)(a)(ii). The law as amended in 2010 still required the attorney general and the prosecuting attorney to have "failed to bring such action within ten days of receipt of said second notice" before a citizen's action could be commenced. RCW 42.17A.765(4)(a)(iii) (2012). The citizen's action provision as last amended in 2010 is the version at issue in this case.

6. 2018 Amendments

In 2018, the Legislature made further amendments not directly relevant here, since this case was commenced the day before the 2018 revisions took

² See also S.B. Rep. on Second S.H.B 2016, 61st Leg. Reg. Sess. (Wash. 2010) at 3 ("A majority of the bill is a technical clean-up."), <http://lawfilesexternal.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/Senate/2016-S2%20SBR%20GO%2010.pdf> (Appendix at A-133).

effect. *See* Laws of 2018, ch. 304; CP at 1. Even though they do not govern this appeal, the 2018 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. The Legislature clarified that the “intent of the law is not to trap or embarrass people when they make honest remediable errors,” and “campaign finance laws should not be a barrier to participating in the political process, but instead encourage people to participate in the process by ensuring a level playing field and a predictable enforcement mechanism.” Laws of 2018, ch. 304, § 1. Likewise, the Legislature intended to “simplify” the “enforcement process” and “expedite the public disclosure commission’s enforcement procedures so that remedial campaign finance violations can be dealt with administratively.” *Id.*

The law now provides that a person wishing to bring a citizen’s action must first file a complaint with the Commission and wait 90 days to give the Commission an opportunity to take any of the actions authorized under RCW 42.17A.755(1). RCW 42.17A.775(2). “[A]ction authorized under RCW 42.17A.755(1),” broadly includes dismissal, resolution, investigation, hearings, issuing orders, or referring the matter to the attorney general. RCW 42.17A.755(1). What happens next, and the procedural prerequisites that attach, depend on whether and what action the Commission takes.

a. Action other than referral

If 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. RCW 42.17A.775(2). RCW 42.17A.755(1) provides for Commission actions which include dismissal, investigation, or resolution of the complaint. Thus, if the Commissioner receives and dismisses, investigates, or otherwise resolves a citizen's complaint within 90 days of receipt, the citizen may not thereafter pursue a citizen's action. RCW 42.17A.775(2).

b. Referral

If the Commission refers the matter to the attorney general within the 90-day timeframe following the initial complaint to the Commission, the person wishing to file a citizen's action must wait an additional 45 days for the attorney general to commence an action or publish a decision whether to commence an action. RCW 42.17A.755(2)(b). Publication of the decision within that 45-day time period, including the decision not to commence an action, "preclude[s] a citizen's action." RCW 42.17A.765(1)(b).

Following the 45-day waiting period, and assuming no action by the attorney general occurred, the person must provide an additional notice to the attorney general and the Commission "that the person will commence a citizen's action within ten days if the Commission does not take action authorized under RCW 42.17A.755(1), or the attorney general does not commence an action or publish a decision whether to commence an action

pursuant to RCW 42.17A.765(1)(b).” RCW 42.17A.775(3). Again, commencement of an action or publication of a decision whether to commence an action during that ten-day period “preclude[s] a citizen’s action.” RCW 42.17A.765(1)(b).

c. No action

If the Commission takes no action after 90 days following receipt of a citizen’s complaint, the person must then provide additional notice to the attorney general and wait an additional 45 days before commencing an action. RCW 42.17A.775(2)(a). Only after the attorney general does not commence an action or publish a decision whether to commence an action following that 45 day period may the process continue. *Id.*; RCW 42.17A.765.

Next, following 90 days without action by the Commission and 45 more days without action by the attorney general, the person must provide an additional notice to the attorney general and commission that “the person will commence a citizen’s action within ten days if the commission does not take action authorized under RCW 42.17A.755(1), or the attorney general does not commence an action or publish a decision whether to commence an action pursuant to RCW 42.17A.765(1)(b).” RCW 42.17A.775(3). Once again, the attorney general’s publication of a decision whether to commence an action will preclude further action by the citizen. RCW 42.17A.765(1)(b).

Thus, as revised in 2018, the law provides an even narrower opportunity for filing citizen’s actions. Such actions may be filed only where

the Commission and the attorney general have taken no action within multiple notice periods, where “action” for either entity is broadly defined, and includes the decision not to pursue enforcement. In all cases, and assuming all of the other pre-suit requirements are met, the longest period of time in which a citizen’s action may be commenced is two years after the date of the alleged violation. RCW 42.17A.775(4).

B. This Citizen’s Action Lawsuit Was Filed Before the 2018 Revisions took Effect

On June 6, 2018, the Freedom Foundation filed a citizen’s action lawsuit in Thurston County Superior Court under RCW 42.17A.765, as last amended in 2010. The Foundation sued Governor Inslee and the Department of Social and Health Services (collectively referred to as DSHS), and named Service Employees International Union 775 (SEIU 775) as a possible interested party. CP at 2. It alleged that DSHS violated RCW 42.17A.495(3) by making voluntary deductions from payments to Individual Provider home care aides and remitting them to a fund designated by SEIU 775, the union representing the providers, without obtaining the providers’ written authorizations for making and remitting wage deductions to political committees. CP at 2, ¶ 4; CP at 5, ¶ 30.³ The Foundation also

³ DSHS contracts with individual providers to provide personal care or respite care services. RCW 74.39A.270; RCW 74.39A.240(3). Solely for the purposes of collective bargaining, the Governor is the public employer of individual providers. RCW 74.39A.270(1).

alleged DSHS violated RCW 42.17A.495(4) by depriving the Foundation of its right to inspect required authorization forms. CP at 2, ¶ 5.

As a prerequisite to filing suit under RCW 42.17A.765(4)(a)(i) (2016), the Foundation provided written notice of the alleged violation to the attorney general and the relevant prosecuting attorney on September 30, 2016. CP at 1-2. Neither official filed an action within 45 days of that first written notice, which ended on November 14, 2016. CP 2.

RCW 42.17A.765(4)(a)(ii) (2016) required the Foundation to “thereafter further notif[y] the attorney general and prosecuting attorney that the person will commence a citizen’s action within ten days upon their failure to do so.” RCW 42.17A.765(4)(a)(iii) (2016) provided a ten-day window for the attorney general or prosecuting attorney to institute an action following receipt of that second notice. The Foundation provided this second written notice to the attorney general and the prosecuting attorney on November 18, 2016. CP at 1-2. Neither official commenced an action within ten days of receipt of the second written notice as provided in RCW 42.17A.765(4)(a)(iii) (2016). CP at 2.

The Foundation filed a citizen’s action complaint over one and a half years later. CP at 1.

SEIU 775 thereafter filed a Motion for Judgment on the Pleadings, which DSHS joined. CP at 16, 483. SEIU 775 and DSHS argued that,

applying basic rules of grammar and statutory construction, RCW 42.17A.765(4)(a) (2016) required a citizen to commence a citizen's action within ten days after expiration of the time for the attorney general and the prosecuting attorney to bring such an action. CP at 16. The Thurston County Superior Court agreed. CP at 545-46. The court dismissed the Foundation's complaint, adopting SEIU 775's and DSHS's arguments. CP at 545-46; VRP 32.

The Foundation timely filed a notice of appeal and moved this Court for direct review. CP at 541. This Court granted direct review and consolidated this case with two earlier-filed appeals. Order (Sept. 4, 2019). The other two appeals involve the same statutory construction issue here, plus additional issues that are not present in this appeal. *See* Petitioner/Plaintiff, Freedom Foundation's Initial Brief in Consolidated Appeals.

III. ISSUE PERTAINING TO DSHS

RCW 42.17A.765(4)(a) (2016) required a person commencing a citizen's action to first provide notice to the attorney general and prosecuting attorney, and then to provide a second notice at least 45 days later informing the attorney general and the prosecuting attorney "that the person will commence a citizen's action within ten days upon their failure to do so." It further required the "attorney general and the prosecuting

attorney” to “have in fact failed to bring such action within ten days of receipt of said second notice[.]”

In order to commence a citizen’s action, must a person file the action within ten days of the attorney general and prosecuting attorney’s failure to do so?

IV. ARGUMENT

This Court reviews issues of statutory construction like this one *de novo*. *State v. Evergreen Freedom Foundation*, 192 Wn.2d 782, 789, 432 P.3d 805 (2019). The Court’s “fundamental objective” in construing a statute “is to ascertain and carry out the people’s or the legislature’s intent.” *Id.* “When possible,” this Court “derives legislative intent from the plain language enacted by the legislature,” but the Court “may look to legislative history for assistance in discerning legislative intent” if “more than one interpretation of the plain language is reasonable.” *Id.*

As demonstrated by the plain language, context, and progressive legislative tapering of the citizen’s action provision, the Legislature intended to provide a narrow window in which citizen’s actions could supplement the authority of the Commission or the attorney general to enforce and resolve issues under the campaign finance and disclosure laws. Because the Freedom Foundation failed to commence this action within the

window authorized by RCW 42.17A.765(4) (2016), judgment on the pleadings and dismissal should be affirmed.

A. The Citizen’s Action is a Limited Mechanism for Enforcing the Campaign Finance and Disclosure Laws

The campaign finance and disclosure laws are primarily enforced by the Public Disclosure Commission and the Attorney General (and, to a lesser extent, prosecuting attorneys). *See, e.g.*, RCW 42.17A.755, .760, .765 (2016). Citizen’s actions are not generally available, but rather serve as a limited check on the government’s broad enforcement authority. *See, e.g., State ex rel. Evergreen Freedom Found. v. Nat’l Educ. Ass’n*, 119 Wn. App. 445, 446-47, 81 P.3d 911 (2003) (*NEA*) (“[T]he Public Disclosure Commission (PDC), the Attorney General (AG), a county prosecutor or, *in some circumstances*, a citizen, may seek Act enforcement.” (emphasis added)). Persons bringing citizen’s actions do not do so in their individual capacity, but “in the name of the state,” whereby any judgment awarded escheats to the State. RCW 42.17A.765(4) (2016). Thus, they are available “only if” all of the preconditions in the statute are satisfied. *See* RCW 42.17A.765(4) (2016).

The limited nature of citizen’s actions is demonstrated by the multiple notices that must be provided by the citizens to the government before citizen’s actions may be commenced, and by the government’s

ability to foreclose citizen's actions by taking its own action. *See* RCW 42.17A.765(4) (2016). It is further bolstered by the fact that citizen's actions are brought on behalf of the State, not individuals, and the Legislature's statement of policy recognizing that actions under the campaign finance and disclosure laws could be used in an abusive or manipulative manner contrary to the purposes of those laws. *See, e.g.,* RCW 42.17A.001(11) (2016). *See also West v. Wash. State Ass'n of Dist. and Mun. Court Judges*, 190 Wn. App. 931, 940-41, 361 P.3d 210 (2015) (describing primary enforcement authority as belonging to the Public Disclosure Commission, and secondarily to the attorney general and prosecuting attorneys).

At various times, the Freedom Foundation argues for both a strict and liberal construction of RCW 42.17A.765 (2016). *See, e.g.,* Pet'r/Plaintiff's Initial Br. at 27 n.20, 29, 43, 54. But

[t]he distinction between "liberal construction" and "strict construction" is easily overstated. Neither a liberal construction nor a strict construction may be employed to defeat the intent of the legislature, as discerned through traditional processes of statutory interpretation.

Estate of Bunch v. McGraw Residential Ctr., 174 Wn.2d 425, 432, 275 P.3d 1119 (2012). Rather, the Court should give RCW 42.17A.765 (2016) "a fair reading, one that is neither strict nor liberal, to effectuate the legislature's intent." *Id.* at 433.

Additionally, even where a statutory scheme warrants liberal construction to effectuate one or more purposes, a limited cause of action still requires strict compliance with a statute's time limits for filing suit. *See, e.g., Inland Empire Dry Wall Supply Co. v. W. Surety Co. (Bond No. 58717161)*, 189 Wn.2d 840, 844, 408 P.3d 691 (2018); *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 315-16, 53 P.3d 993 (2002) (requiring strict compliance for conditions precedent to commencing suit). And since there is no common law right to file lawsuits for violations of the campaign finance and disclosure laws, the "statutes in derogation of the common law" construction rules are also inapplicable. *See* Pet'r/Plaintiff's Initial Br. at 29 (arguing that since "the common law would require no notice at all as a condition precedent to suit," the requirements in RCW 42.17A.765 (2016) are in "derogation of the common law" and should be strictly construed).

Thus, there is no public policy favoring a broad right by citizens to file actions claiming violations of the campaign finance and disclosure laws. Rather, it is the government's primary prerogative to review and address alleged violations, when found to have merit. The law affords a limited mechanism for citizen's suits. It is through this lens that the Court should consider the Legislature's intent in setting forth statutory prerequisites for the commencement of citizen's actions.

B. The Citizen’s Action Statute Plainly Requires the Second Notice to Inform the Attorney General and Prosecuting Attorney When the Citizen’s Action Will be Commenced

RCW 42.17A.765(4)(a) (2016) expressly requires a citizen wishing to bring a citizen’s action to satisfy five separate prerequisites:

First, the person must have “notified the attorney general” and the relevant “prosecuting attorney” “in writing that there is reason to believe that some provision of” the campaign finance and disclosure laws “is being or has been violated.” RCW 42.17A.765(4) (2016).

Second, the person must wait an initial period of 45 days to allow the attorney general or prosecuting attorney to commence an action. RCW 42.17A.765(4)(a)(i) (2016). If either the attorney general or prosecuting attorney commence an action, the citizen’s action is precluded. *Id.*; *NEA*, 119 Wn. App. at 453 (recognizing the “clear intent” of the statute 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)”). “Commence an action” means to file a lawsuit for violations of the campaign funding and disclosure laws. *Utter v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 412, 341 P.3d 953 (2015) (holding RCW 42.17A.765 “precludes a citizen suit” where “the AG or local prosecuting authorities bring a suit themselves”).

Third, following expiration of the 45-day waiting period, the person must “thereafter further notif[y] the attorney general and prosecuting attorney that the person will commence a citizen’s action within ten days upon their failure to do so.” RCW 42.17A.765(4)(a)(ii) (2016). As the Freedom Foundation agreed below, “to do so” refers to the government’s commencement of an action under the campaign finance and disclosure laws. VRP at 20-21. *See Utter*, 182 Wn.2d at 409 (noting sequencing in subsection (4) “suggests that ‘commenc[ing] an action’ in subsection (4)(a)(i) refers back to the same type of action as the ‘citizen[’s] action’ in subsection (4)(a)” (alterations in original) (quoting RCW 42.17A.765(2))). *See also* RCW 42.17A.765(4) (2016) (defining “citizen’s action” as “any of the actions . . . authorized under this chapter”).

Fourth, “the attorney general and the prosecuting attorney” must “have in fact failed to bring such action within ten days of receipt of said second notice.” RCW 42.17A.765(4)(a)(iii) (2016). Receipt is deemed accomplished by the date shown by the post office cancellation mark. RCW 42.17A.140 (2016). Again, “bring such action” refers to the filing of a lawsuit for violations of RCW 42.17A. *See Utter*, 182 Wn.2d at 409.

Fifth, the citizen action must be filed “within two years after the date when the alleged violation occurred.” RCW 42.17A.754(4)(a)(iv) (2016).

The Freedom Foundation seems to quibble with whether the third requirement—that the person must “notif[y] the attorney general and prosecuting attorney that the person will commence a citizen’s action within ten days upon their failure to do so”—truly means that a person wishing to file a citizen’s action is required to inform the attorney general and the prosecuting attorney “that the person will commence a citizen’s action within ten days upon their failure to do so.” *See, e.g.*, Pet’r/Plaintiff’s Initial Br at 17-23. But that position defies the plain language of the citizen’s action provision and relies on grammatical gymnastics.

The statute plainly requires the citizen to inform the attorney general and prosecuting attorney in the second notice “that the person will commence a citizen’s action within ten days upon their failure to do so.” RCW 42.17A.765(4)(a)(ii) (2016). The attorney general’s and prosecuting attorney’s “failure to do so” occurs when they “have in fact failed to bring such action within ten days of receipt of said second notice.” RCW 42.17A.765(4)(a)(iii) (2016). *See also* VRP at 20. Thus, the second citizen’s action notice must inform the attorney general and prosecuting attorney that the person will commence a citizen’s action within ten-to-twenty days of delivery of that notice. It tells the attorney general and prosecuting attorney that if they do not institute their own action within ten days of receipt of the second notice, the citizen will commence an

action within the subsequent ten days following that failure. RCW 42.17A.765(4)(a)(ii)-(iii) (2016). No statutory construction is necessary to read this from the statute’s plain, unambiguous words. *See Cent. Puget Sound Reg’l Transit Auth. v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 234, 422 P.3d 891 (2018) (“We first examine the plain language of the statute as the surest indication of legislative intent.” (alterations in source omitted) (internal quotation marks omitted) (quoting *State v. Ervin*, 169 Wash.2d 815, 820, 239 P.3d 354 (2010))).

The Freedom Foundation suggests that the qualifying phrase “within ten days upon their failure to do so” modifies not the words immediately preceding that phrase (“that the person will commence a citizen’s action”), but, rather, refers all the way back to the 45-day notice period referenced in the prior subsection, RCW 42.17A.765(4)(a)(i) (2016). Pet’r/Plaintiff’s Initial Br. at 18-19. Alternatively, it suggests that the qualifying phrase was a reference to the same ten-day period the attorney general and prosecuting attorney had to act in RCW 42.17A.765(4)(a)(iii) (2016). Pet’r/Plaintiff’s Initial Br. at 20. Either interpretation is contrary to a common understanding of language and grammar.

“To get at the thought or meaning expressed in a statute, . . . the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have

placed them.” *Lake County v. Rollins*, 130 U.S. 662, 670, 9 S. Ct. 651, 32 L. Ed. 1060 (1889). Courts “employ traditional rules of grammar in discerning the plain language of a statute.” *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). “The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words.” *State v. Simon*, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), *aff’d in part, rev’d in part on other grounds*, 120 Wn.2d 196, 840 P.2d 172 (1992).

Relevant here, the last antecedent rule provides that qualifying words and phrases refer to the last antecedent unless a contrary intention appears in the statute, such as a comma separating the last antecedent and the qualifying word or phrase. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); *Eyman v. Wyman*, 191 Wn.2d 581, 599, 424 P.3d 1183 (2018) (plurality) (“The last antecedent is the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence.” (internal quotation marks omitted) (quoting *Berrocal v. Fernandez*, 155 Wn.2d 582, 593, 121 P.3d 82 (2005))).⁴ Here, the qualifying phrase at the end of RCW 42.17A.765(4)(a)(ii) (2016),

⁴ The Court might find the rule in this context is better titled the “nearest-reasonable-referent cannon.” See *Grecian Magnesite Mining, Indus. & Shipping Co., SA v. Comm’r of IRS*, 926 F.3d 819, 824 (D.C. Cir. 2019) (“Labels aside, the point is the same: ordinarily, and within reason, modifiers and qualifying phrases attach to the terms that are nearest.”).

“within ten days upon their failure to do so,” modifies the rest of the contents of the second notice a person must provide to the attorney general and prosecuting attorney before filing suit: “that the person will commence a citizen’s action.” *See* RCW 42.17A.765(4)(a)(ii) (2016). There is no punctuation or other indication of legislative intent that would suggest a detour from this common grammatical understanding. The Freedom Foundation’s selective attempt to attach the qualifying phrase to an entirely different subsection is “precisely the sort of telescopic interpretation that the last-antecedent rule disfavors: words leaping across stretches of text, defying the laws of both gravity and grammar.” *See Flowers v. Carville*, 310 F.3d 1118, 1124 (9th Cir. 2002). In any event, there is no grammatical basis to attach the phrase “within ten days upon their failure to do so” to anything other than “will commence a citizen’s action.”

The Freedom Foundation argues that the words “to do so” in subsection (ii) “cannot refer to the officials’ failure to file” an enforcement action, because “state officials cannot ‘fail’ to file a citizen’s action.” Pet’r/Plaintiff’s Initial Br. at 45. But this is directly contrary to the Foundation’s admission at oral argument below, where it agreed that Paragraph 4(a)(ii)’s “failure to do so” language referred “to the government not acting within 10 days of receipt of this notice.” VRP at 20. Additionally, this Court in *Utter* already acknowledged that the government’s

commencement of an action “refers back to the same type of action as the citizen’s action.” 182 Wn.2d at 409 (alterations in source omitted) (internal quotation marks omitted). This demonstrates that the Legislature used iterations of the term “commencement” of an enforcement action by the citizen and by the government somewhat interchangeably in this context.

It also makes no sense to suggest that “*their* failure to do so” refers to anyone other than the attorney general and prosecuting attorney. The statute uses the singular noun “person” to reference the person wishing to file a citizen’s action, while the government entities—the “attorney general and prosecuting attorney”—are plural. “*Their* failure to do so” clearly refers to the plural governmental entities’ failure to file an enforcement action. The Legislature used similar language in the Ethics in Public Service Act, except it more precisely replaced “their failure to do so” with “their failure to commence an enforcement action.” See RCW 42.52.460. “Their failure to commence an enforcement action” unambiguously refers to the ethics board and attorney general’s failure. *Id.* Likewise here, “upon their failure to do so” refers to the government’s failure to commence an enforcement action.

The Freedom Foundation suggests previous decisions of the Court of Appeals compel a different reading, but none of those cases addressed the question in this case. Pet’r/Plaintiff’s Initial Br. at 8 (citing *NEA*, 119

Wn. App. at 453), 16-20 (citing *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 604, 49 P.3d 894 (2002) (*EFF*)), 21 (citing *West v. Wash. Ass'n of Dist. & Mun. Court Judges*, 190 Wn. App. at 940-41; *Knedlik v. Snohomish County*, No. 71790-1-I, 2015 WL 1034286, at *3 (Wash. Ct. App. Mar. 9, 2015) (unpublished) (dismissing citizen's action under CR 12(b)(6) where notice to the attorney general and prosecuting attorney was not "specific enough")), 23-24. While the Court of Appeals in *NEA* and *EFF* grappled with what quality of action of the attorney general was sufficient to preclude a citizen's action, neither case addresses head-on the requisite content of the second notice or the timing in which a citizen's action must be filed with respect to that notice. *NEA*, 119 Wn. App. at 452-53. In *West*, the Court of Appeals recognized 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. 190 Wn. App. at 941. It did not address the timeliness of the citizen's action. *Id.* Thus, the cases cited by the Foundation are of little utility in determining what RCW 42.17A.765(4)(a)(ii) (2016) means in this case.

There is no ambiguity with respect to what the second notice to the attorney general and prosecuting attorney must contain. It must inform them "that the person will commence a citizen's action within ten days upon their failure to do so." RCW 42.17A.765(4)(a)(ii) (2016). The next subsection, moreover, informs us exactly when that failure occurs: when the "attorney

general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice.” RCW 42.17A.765(4)(a)(iii) (2016). Thus, the second notice effectively notifies the government that it has a ten-day period to file its own action, and otherwise the citizen will file a lawsuit within the ten days following the government’s ten-day period.

Both parties agree the Court can decide this question on the statute’s plain language, but even if the Court resorts to legislative history, such history confirms the trial court’s interpretation. The original 1972 initiative language provided that the attorney general first receive 40-days’ notice of the alleged violation and then a second ten-day written notice that “a citizen’s action will be brought if the attorney general does not bring an action.” I-276 § 40(4). While I-276 required the person to provide the attorney general with notice that “a citizen’s action will be brought” if the attorney general did not commence an action, it did not require the person to inform the attorney general that such an action would be brought “within ten days” or any other timeframe. *Id.*

Three years later, the Legislature added the requirement that the second ten-day notice specify that “said person will commence a citizen’s action within ten days,” as well as placed other requirements and limitations on citizen actions. Laws of 1975, 1st Ex. Sess., ch. 294, § 27(4). Contrary

to the Freedom Foundation’s argument that the 1975 Legislature “maintain[ed]” the ten-day language from I-276, the 1975 changes were material. *See* Pet’r/Plaintiff’s Initial Br. at 36. Where the citizen was previously only required to notify the government that “a citizen’s action will be brought,” the 1975 changes required the citizen to notify the government that they would “commence a citizen’s action within ten days upon their failure to do so.”

The rules of statutory construction require that the Court “presume[]” a “change in legislative intent” when “a material change is made in a statute.” *Darkenwald v. Emp’t Sec. Dep’t*, 183 Wn.2d 237, 252, 350 P.3d 647 (2015) (internal quotation marks omitted) (quoting *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 967, 977 P.2d 554 (1999)). If 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. The law already required that a citizen provide a second notice following expiration of the first waiting period and then wait an additional ten days before filing suit. I-276 § 40(4). The Court should infer from the Legislature’s material change in the language of the citizen’s action

provision that the Legislature intended to add a requirement regarding the content of the second notice.

Lastly on this point, although the Foundation spends a great deal of time arguing that a citizen's second notice is not required to inform the government that the citizen will file suit within ten days of the government's failure to commence an action during its ten-day period to act, the Foundation also seems to concede that Respondents' position may be correct. *See* Pet'r/Plaintiff's Initial Br. at 7 ("Subsection (ii) contains, at most, requirements for the notice itself"), 20 ("[It] is clear that subsection (ii) concerns nothing more than the second notice that must be provided.").

RCW 42.17A.765(4)(a)(ii) (2016) required the second citizen action notice to "notif[y] the attorney general and prosecuting attorney that the person will commence a citizen's action within ten days upon their failure to do so." RCW 42.17A.765(4)(a)(iii) (2016) provided that the attorney general and prosecuting attorney's "failure to do so" occurred if the government did not commence an enforcement action within ten days of their receipt of the second notice. These subsections together required that the second notice inform the government that the citizen's action would be commenced within ten days following the final ten-day period afforded to the government to commence its own action.

C. The Person Who Commences a Citizen’s Action Must Do So Within the Timeframe Provided in the Second Notice to the Government

By specifying that the second citizen’s notice must inform the government of the precise timeframe that a lawsuit will be commenced, the Legislature also required that persons filing citizen’s actions comply with those timeframes. This is true because otherwise the provision requiring the citizen to inform the attorney general and prosecuting attorney that the person “will commence a citizen’s action within ten days” would be a meaningless threat, and this Court construes statutes to avoid rendering any language meaningless. Additionally, requiring the notice-giver to follow through with the timeframe specified in the notice avoids manipulation of the system and is consistent with the statutory framework and intent. Here, by failing to follow through with the notice required by RCW 42.17A.765(4)(a)(ii) (2016), The Freedom Foundation lost its limited window to commence a citizen’s action.

1. The trial court’s interpretation avoids rendering any part of the statute superfluous

“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Spokane County v. Dep’t of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)). “The legislature is presumed not to

include unnecessary language when it enacts legislation.” *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). *See also In re Det. of Strand*, 167 Wn.2d 180, 189, 217 P.3d 1159 (2009) (“Under rules of statutory construction ‘no part of a statute should be deemed inoperative or superfluous unless it is the result of obvious mistake or error.’” (quoting *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 13, 810 P.2d 917, 817 P.2d 1359 (1991))).

As explained above, the plain language of former RCW 42.17A.765(4)(a)(ii) and (iii) (2016) requires that the second citizen’s action notice specify the timeframe in which the citizen’s action will be filed. The Freedom Foundation minimizes this requirement as merely a “notice requirement,” but that interpretation is not consistent with the rule against surplusage. *See Ralph v. Dep’t of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (holding Court “cannot simply ignore express terms” when construing statutes, rather, “if possible, ‘no clause, sentence, or word shall be superfluous, void, or insignificant’” (quoting *State ex rel. Baisden v. Preston*, 151 Wash. 175, 177, 275 P. 81 (1929))). Requiring notice of a specific timeframe for commencement of a lawsuit is meaningful only if the notice-giver is required to comply with that timeframe. It is “insignificant,” in other words, for a person to notify the government that the person will be

filing a lawsuit on behalf of the government within twenty days,⁵ when instead they sit on the complaint for nearly two years before deciding whether to actually file the lawsuit. *See Ralph*, 182 Wn.2d 248 (holding rules of constructing should render “no clause” “insignificant”). In such a case, the twenty-day notification requirement is meaningless, and the Court should decline such an interpretation when another interpretation is more rational and gives meaning to all of the words in the statute. The more logical interpretation is that RCW 42.17A.765 (2016) not only required the notice-givers to specify when they would commence the lawsuit, but actually commence their lawsuit within the timeframe specified.

The Freedom Foundation’s minimization of the notice requirement as “just a notice requirement” is also contrary to the Legislature’s clear expressed intent. “[A] fundamental guide to statutory construction is that the spirit or intention of the law prevails over the letter of the law.” *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 591, 192 P.3d 306 (2008) (construing the Smoking in Public Places Act and relying on legislative intent to disagree with the challenger’s interpretation of a statutory exception regarding “private facilities”) (alteration in original)

⁵ Since the citizen specifies they will file suit within ten days of the government’s “failure to do so,” and the government has a ten-day window following the citizen’s notice to “do so,” the timeframe required in the notice is twenty days from of the government’s receipt of the second notice. RCW 42.17A.765(4)(a)(ii)-(iii) (2016).

(quoting *Janovich v. Herron*, 91 Wash.2d 767, 772, 592 P.2d 1096 (1979)); *Dumas v. Gagner*, 137 Wn.2d 268, 286, 971 P.2d 17 (1999) (noting “interpretation which best advances the perceived legislative purpose” should “prevail”). 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. *See generally* RCW 42.17A. 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. The Legislature further required that the second notice actually specify the timeframe in which the persons “will” commence their citizen’s actions. This notice provision—and the deference they reflect to the government’s enforcement powers—would be meaningless if the persons intending to file citizen’s actions were not required to actually file their actions within the timeframes specified in their notices. The fact that the Legislature could have been clearer is not determinative. “The purpose of an enactment should prevail” over “inept wording.” *City of Seattle v. State*, 136 Wn.2d 693, 697-98, 965 P.2d 619 (1998). The Legislature must have had something in mind when it required the second citizen’s action notice to specify the timeframe in which the lawsuit would be commenced. The most logical conclusion is

that the Legislature intended that the person filing a citizen's action actually do so within the timeframe they specified.

In this case, the Freedom Foundation lost its limited right to commence a citizen's action lawsuit by failing to do so within the timeframe specified in its second notice. This Court can draw a helpful analogy in this case with the result in *Beverly Health & Rehab. Servs., Inc. v. N.L.R.B.*, 317 F.3d 316 (D.C. Cir. 2003). There, the Court of Appeals for the District of Columbia Circuit concluded that striking employees who provided notice but commenced their strike after the date provided in their notice were not entitled to the statutory protections they would have received if they had complied with the terms of their notice. 317 F.3d at 321. The law required the strikers to provide "ten days notice of a strike specifying the day and time it is to occur." *Id.* Although the workers provided notice of their planned strike, they did not hold the strike on the day and time indicated on the notice. *Id.* The court concluded that the "rigid notice requirement" could only be extended by mutual agreement of the parties. *Id.* Since no such agreement occurred, the court concluded that the workers lost the statutory protections that would have attached to a strike that complied with the strict notice requirements. *Id.*

Similarly here, the law affords a limited right to commence citizen's actions after providing a specific notice to the government of the timeframe

in which such actions “will” be commenced. But a citizen who fails to comply with that timeframe loses the limited statutory right to commence such actions. *See Utter*, 182 Wn.2d at 407 (describing requirements in RCW 42.17A.765(4) as statutory “prerequisite[s]” to suit). If the Freedom Foundation wished to commence its citizen’s action longer than 20 days after providing its final notice to the government, it was required to provide a new notice specifying a new 20-day timeframe, assuming the commencement of the action would still occur within the two-year statute of limitations. RCW 42.17A.765(4)(a) (2016). The Freedom Foundation did not do so, and, accordingly, its citizen’s action was properly dismissed.

Additionally, the Freedom Foundation’s suggestion that its previous agreements with the attorney general to allow the attorney general more time to investigate complaints in its enforcement capacity is at best relevant to the time period for the attorney general and prosecuting attorney to act in response to the second notice. *See generally* Pet’r/Plaintiff’s Initial Br. at 32. It is not determinative of the time period the Foundation had to initiate citizen’s action lawsuits following the appropriate triggering event, which is the attorney general’s and prosecuting attorney’s failure to commence their own action within ten days of receipt of the second notice. The Freedom Foundation does not suggest that any of the Respondents here agreed to extend the Foundation’s time for filing citizen’s actions. And, in

any event, the Foundation's delay in this case far exceeds any extension it might have agreed to with the attorney general's enforcement team. *See* CP at 108 (requesting Freedom Foundation to refrain from filing citizen actions until December 21, 2016); CP at 1 (Complaint filed June 6, 2018).

To give full meaning to the notice requirement, this Court should find that RCW 42.17A.765(4)(a)(ii) and (iii) (2016) require a citizen's action be commenced within ten days of the attorney general's and prosecuting attorney's failure to do so.

2. Requiring the notice-giver to commence a citizen's action within the specified timeframe prevents manipulation of the system and is consistent with the limited nature of citizen's actions

Finally, through its progressive narrowing of the citizen's action mechanism, the Legislature intended to discourage misuse of the campaign finance laws and protect persons subject to the laws from manipulation of the system for political or other ends. *See, e.g.*, RCW 42.17A.001(11) (2016); *Fritz*, 83 Wn.2d at 314 (recognizing potential for abuse in citizen's actions); *EFF*, 111 Wn. App. at 615 (recognizing "policy of discouraging frivolous citizen actions"). To that end, it makes good sense to require persons filing complaints with the government alleging violations of the campaign finance and disclosure laws to timely pursue their actions or forego them. Otherwise, persons filing such complaints could issue a notice

and then sit on it for over a year and a half, thereby enabling themselves and other interested individuals to potentially manipulate elections for political or other purposes based on pending, but, perhaps, ultimately unfounded, allegations of misconduct. Requiring timely filing or forfeiture of citizen's actions following notice to the government discourages this kind of manipulation.

Contrary to the Freedom Foundation's argument, there is nothing "inconsistent" with requiring that citizen's action lawsuits be filed within ten days of the government's failure to act while simultaneously imposing an overall two-year statute of limitations. *See* Pet'r/Plaintiff's Initial Br. at 25. Pre-suit notice and filing requirements can easily coexist with statutes of limitations, as is demonstrated by actions under Title VII. *See* 42 U.S.C. § 2000e-5(e)(1) (requiring initial charge of unlawful employment practice to be filed with EEOC within 180 or 300 days); 42 U.S.C. § 2000e-5(f)(1) (requiring civil action to be brought within 90 days of EEOC notification of right to sue). Further, the requirement that a citizen files a claim within ten days of the government's failure to act does not render the two-year statute of limitations superfluous. A citizen still retains the option of waiting until a few months before expiration of the two-year statute of limitations before serving its 45-day notice and its ten-day notice, meaning that the two-year

statute of limitations still serves the function of placing an outer limit on the time-period in which an action can be brought.

Likewise, the trial court's interpretation does not create a "race to the courthouse" problem, since a complainant has broad discretion to determine when to serve the 45-day and ten-day written notices of any alleged violations as long as the required notice periods would be complete and the case filed within the two-year statute of limitations period. *See* RCW 42.17A.765 (2016). The citizen's initial notice, moreover, must specify the alleged violations with enough detail that the government can investigate and institute its own action, so the citizen is well along in the process of preparing a citizen's action lawsuit even at that early stage. The citizen then has discretion on when to file the second notice, and would presumably wait until ready to file the lawsuit before providing the second notice to the government. The citizen also has ten days following the government's failure to file its own action (which occurs after a ten-day period following receipt of the notice) to refine the complaint before filing in court. Complainants thus have ample time to prepare a complaint to be filed in the event the attorney general and the prosecuting attorney decline to pursue a claim.⁶

⁶ The citizen's action statute as it exists today is not at issue in this case, but DSHS notes that RCW 42.17A.775 provides lengthy waiting periods during which the citizen would have the opportunity to develop and refine a draft complaint. In any event, the

Moreover, it makes no sense to limit the government to a very narrow timeframe in which it may commence actions based on citizen reports, but not hold citizens to the same or more restrictive measures. After a citizen reports a violation under RCW 42.17A.765 (2016), the government has only 45 days following the first notice and ten days following the second notice to file its own action. RCW 42.17A.765(4)(a)(i) and (iii) (2016). Yet, under the Freedom Foundation's reading, the citizen has no similar time constraints. Under the Foundation's interpretation, the citizen could report a violation, then provide a second notice 45 days later indicating a lawsuit will be brought ten days following the government's failure to do so, but then wait to file the lawsuit until up to nearly two years later. This flips the broad discretion afforded to the government and the limited authority for citizens on its head. It is incongruent 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.

D. The Foundation Fails to Identify any Trial Court Error in Deciding Judgment on the Pleadings

The Freedom Foundation also argues that it was improper for the trial court to grant judgment on the pleadings before discovery had

priority of action doctrine would resolve any questions regarding which action(s) may proceed if multiple actions were filed. *See City of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n*, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991) (describing priority of action doctrine).

concluded in at least some of the cases below. Pet'r/Plaintiff's Initial Br. at 54. It is unclear whether the Freedom Foundation argument on this issue includes this case involving DSHS as a party. The Freedom Foundation does not identify this matter in its Assignment of Error or Issue statement with respect to its argument about judgment on the pleadings being premature, but it does mention this case in the body of its argument on this issue. *Compare* Pet'r/Plaintiff's Initial Br. at 2-4 *with Id.* at 54. In any event, the Foundation provides no basis upon which this Court should reverse judgment on the pleadings. The Foundation seems to argue that since the civil rules provide for discovery, it should have been able to complete discovery before responding to a motion under CR 12. But the rules also provide for CR 12 motions. The trial court's determination of the statutory prerequisites to suit was based completely on the pleadings as contemplated by CR 12(c), and the Foundation identifies no dispute of material fact, let alone any discovery, that would have impacted that outcome.

E. There is No Basis for an Award of Attorney Fees to the Freedom Foundation

Lastly, this Court should deny Freedom Foundation's request for attorney fees and costs. RAP 18.1 authorizes them only when "applicable law" grants them. The applicable law here is RCW 42.17A.765(4)(b) (2016), which provides that an individual who "prevails" in a citizen's

action may be “reimbursed by the state of Washington for costs and attorneys’ fees he or she has incurred.” Even if the Foundation were successful in this appeal, the merits of this case have yet to be decided, and even if the Freedom Foundation ultimately prevailed on the merits, the reimbursement would come from the State, not the Respondents in this case.

V. CONCLUSION

The Freedom Foundation failed to comply with the letter and spirit of RCW 42.17A.765(4)(a) (2016) by not commencing its citizen’s action within the ten-day window specified in its final notice to the attorney general and prosecuting attorney. DSHS respectfully request that this Court affirm judgment on the pleadings.

RESPECTFULLY SUBMITTED this 6th day of November 2019.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

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