STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	No. 13-2-00871-5 (consolidated with 13-2-00953-3) DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF STATE OF WASHINGTON
ROBERT INGERSOLL and CURT FREED, Plaintiffs, v. ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Defendants.	

I. INTRODUCTION AND RELIEF REQUESTED

Defendants respectfully file this motion for a grant of summary judgment in their

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favor, based on certain non-constitutional defenses asserted in their Answer to the State of Washington's Complaint. The Attorney General does not have authority to bring this action in State Court, and the State of Washington is required to exhaust its administrative remedies by the Washington Human Rights Commission ("WHRC") before this Court may hear the State's claim.

The Attorney General's action here, on behalf of the State of Washington, is based on an unprecedented interpretation of the Washington Law Against Discrimination ("WLAD") and the Consumer Protection Act ("CPA"). The State's action goes against the statutes' specific terms and more than thirty years of prior agency practice by successive Attorneys General. This Court should reject the Attorney General's illegitimate claim of authority to bring this action. This Court should implement the Legislature's intent to rest the power to define and identify potential violations of the WLAD, in the first instance, by the WHRC. Accordingly, this Court should dismiss the Complaint filed by the State of Washington for lack of primary jurisdiction, failure to exhaust administrative remedies as required by law, and lack of standing.

II. STATEMENT OF ISSUES

A. Whether the Attorney General has the statutory authority to bring a CPA enforcement action, in the first instance, based on the allegation of a previously unsubstantiated WLAD violation.

B. Whether the Attorney General's failure to exhaust administrative remedies required by the WLAD warrants dismissal of this lawsuit.

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III. EVIDEND RELIED UPON

The facts are not in dispute. Evidence relied upon in this motion are (1) prior representations and advisory opinions of the Washington Attorney General's office, and (2) discovery obtained in this action, attached to the Declaration of JD Bristol in Support of Defendants' First Motion for Summary Judgment Against Plaintiff State of Washington, (hereinafter "Bristol Dec'n") and the pleadings filed herein. Defendants also reserve the right to rely on responses to additional discovery requests that the Attorney General has yet to provide.

IV. STATEMENT OF FACTS

For more than thirty (30) years, the Washington Attorney General's Office has persistently refused to address discrimination complaints, preferring to defer discrimination issues to the WHRC, as required by the WLAD. The Washington Attorney General's Office has never, at any time until this case, attempted to convert a claim arising under the WLAD, into a CPA claim. No CPA claim brought by the Washington Attorney General has ever involved a claim of discrimination in violation of the WLAD. Since sexual orientation discrimination was statutorily proscribed in 2006, the Attorney General's office has received numerous complaints from members of the public, regarding allegations of discrimination on the basis of sexual orientation. The Attorney General took no action on any of those complaints.

In 1990, a state representative requested advisory opinions from the Attorney

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General's office about the legality of certain regulations adopted by the Superintendent of Public Instruction, concerning gender-specific athletic teams. 1990 Op. Att'y Gen. No. 12, 1990 WL 505781, at *1 (Oct. 22, 1990). The Attorney General answered some questions as they related to the Washington Constitution and certain statutory law. However, the Attorney General expressly declined to construe or give any opinion on whether the athletic policies at issue were in violation of the WLAD. Rather, the Attorney General responded as follows:

> [W]e express no views in this opinion on the possible impact of chapter 49.60 RCW on school districts' ability to provide or sponsor 'separate but equal' athletic teams for males and females. *That chapter, the law against discrimination, is administered by the Washington State Human Rights Commission.* RCW 49.60.030(1).
>
> *Id.* at *5 n.7 (emphasis added) (citing, RCW 49.60.215, 49.60.040; WAC 162-28-030).

This refusal to intrude into the WHRC's province, by defining and identifying potential violations of the WLAD, is consistent with the practice of successive Attorneys General for decades. When asked by the Superintendent of Public Instruction in 1975 for advice regarding enforcement of a potential requirement that local school districts adopt affirmative action policies, the Attorney General gave some advice that is relevant here. 1975 Op. Att'y Gen. No. 1, 1975 WL 165890, at *1 (Jan. 8, 1975). He explained that absent direct authority to punish offenders, the Superintendent could "possibly, bring[] the situation to the attention of the [WHRC] for investigation by it to see if the noncomplying school district involved might, thereby, be committing unfair practices under the [WLAD]." *Id.* at 7.

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In 1976, the Attorney General faced a question from a state legislator, regarding the permissibility of selecting roommates based on sex, age, or religion. The Attorney General's answer was based entirely on a declaratory ruling by the WHRC. 1976 Op. Att'y Gen. No. 17, 1976 WL 168501, at *2-5 (Sept. 28, 1976). The opinion notes that the WHRC understood its power under the WLAD to "interpret the statute in view of its purposes, and ... give weight to policy considerations." *Id.* at *3. The Attorney General agreed with the WHRC, characterizing the WHRC's conclusion that landlords could choose roommates, in certain situations, based on sex, age, and religion "as an authoritative interpretation of the [WLAD] until and unless the ruling is reversed or modified by a court or by subsequent action of the commission itself." *Id.*

Declining to usurp the WHRC's jurisdiction by independently construing the terms of the WLAD was the Attorney General's standard practice, until now. As late as 2002, when the Attorney General answered questions posed by the Insurance Commissioner, regarding employers' religious objections to covering contraceptives in their healthcare policies, this was still true. 2002 Op. Att'y Gen. No. 5, 2002 WL 31936085, at *1 (Aug. 8, 2002). The Attorney General's opinion interprets multiple state statutory provisions and even Title VII. But, it does not even attempt to apply the WLAD despite its clear relevance. Rather, the Attorney General defers to the State Agencies delegated responsibility to enforce the WLAD, stating that "[t]he insurance commissioner and the human rights commission have concurrent jurisdiction under this section." *Id.* at

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5 n.2 (citing, RCW 49.60.178).

Given the long history of Attorneys General leaving the definition and identification of potential WLAD violations to the WHRC, it should not be surprising that this case is one of a kind. The State's responses to Defendants' discovery requests only verify that the Attorney General is usurping the authority of the WHRC in this case. The Attorney General admits that no Washington Attorney General has ever filed suit for a violation of the CPA, based on an alleged violation of the WLAD. State Responses to Defendants' Request for Admission Nos. 1-2.[1]

Moreover, since sexual orientation discrimination was prohibited in 2006, the Attorney General has received at least eight complaints from members of the public, alleging sexual orientation discrimination. The Attorney General has taken no action on any of these complaints. *See*, State Response to Defendants' Interrogatory 4 (Bristol Dec'n Ex. B at 10 – 11), Defendants' August 9, 2013, Request for Supplemental Discovery Responses (Bristol Dec'n Ex. C at 2), State's Supplemental Response to Defendants' Discovery Requests (Bristol Dec'n Ex. D at 2 and attached AFI 001440 - 001465), and correspondence between Attorney JD Bristol and Attorney General Todd Bowers, re. further inquiry to supplement the State's response to Defendants' Interrogatory No. 4.[2] Currently, Defendants' await discovery from the State regarding

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[1] Bristol Dec'n Ex. A at 6-7.

[2] Bristol Dec'n at Ex. E (JD Bristol: "We absolutely need any and all documentation related to each complainant referenced in response to Arlene's interrogatory no. 4, including correspondence from the AG to the complainants." Todd Bowers: "We have provided you with all of the information we have regarding the complaints referenced . . . in response to this interrogatory . . .).

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what, if anything the Attorney General does with discrimination complaints filed in the Attorney General's office. Bristol Dec'n at ¶ 6.

The Attorney General's action in this case is unprecedented. The Attorney General has apparently never taken any action, whatsoever, in response to any complaint concerning allegations of discrimination in violation of the WLAD. The Attorney General's action in this case is also contrary to the opinions of Washington Attorneys General for more than thirty (30) years. Most importantly, the Attorney General's action in this case is contrary to his legal authority and usurps the role of the WHRC, as designated in the WLAD.

V. STANDARD OF REVIEW

A party against whom a claim is asserted, or declaratory judgment is sought may move with or without affidavits for a summary judgment in her favor as to all or any part thereof. Civil Rule 56(b). Summary judgment is appropriate when no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. *Parks v. Fink*, 173 Wash. App. 366, 374 (2013). A plaintiff's failure to demonstrate "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" results in a grant of summary judgment in the defendant's favor. *Burton v. Twin Commander Aircraft LLC*, 171 Wash.2d 204, 223 (2011) (en banc) (quotation omitted).

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VI. ARGUMENT

The Attorney General characterizes the State's claim against Defendants as a CPA claim. However, a CPA claim requires that the State first and foremost prove an "unfair act or practice." *State v. Kaiser*, 161 Wn. App. 705, 719 (2011), *citing* RCW 19.86.080(1) and *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 114 n.22, (2001). The Attorney General relies on an alleged violation of the WLAD to establish the "unfair act or practice" element of the State's CPA claim.[3] Yet, the Legislature established the WHRC to review and pass upon a discrimination claim on behalf of the State, as an "unfair act or practice" as defined in the WLAD. RCW 49.60.120(4). Here, the Attorney General asks this Court to usurp the statutorily prescribed role of the WHRC to initially define an "unfair act or practice" under the WLAD. Therefore, this Court should dismiss the State's complaint.

A. The Attorney General Lacks Statutory Authority to Bring a CPA Enforcement Action, in the First Instance, Based on the Allegation of a Previously Unsubstantiated Violation of the WLAD.

The Attorney General's argument that he possesses the independent authority to initiate a CPA lawsuit based on the allegation of a previously unsubstantiated WLAD violation runs headlong into well-established principles of statutory interpretation and the relevant statutory text. No such authority exists. Because the Attorney General lacks statutory authority to file this lawsuit, the Court should grant Defendants' motion for summary judgment on their non-constitutional defenses and dismiss the State's case.

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[3] The "unfair act or practice" alleged by the State is sexual orientation discrimination in violation of RCW 49.60.215; *see*, Plaintiff's Complaint at ¶¶ 5.2 – 5.7.

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1. Respecting the Legislature's Intent Requires the Court to Consider the Entire Legislative Scheme and to Adopt an Interpretation that Maintains the Integrity of Both the WLAD and the CPA.

Statutory construction's primary goal "is to discern and carry out the legislature's intent." *State v. Bunker*, 144 Wash. App. 407, 415 (2008). Fulfilling that purpose requires the Court to view statutory language "in the context of the overall legislative scheme" and to read interrelated provisions together "to achieve a harmonious and unified" whole that is "complementary, rather than in conflict." *State v. Creegan*, 123 Wash. App. 718, 726 (2004) (quotations omitted). Determining the interplay between the WLAD and CPA thus requires the Court (1) to consider "the entire sequence of [relevant] statutes," rather than merely the few, isolated provisions the Attorney General repeatedly cites, and (2) to ensure that a "total statutory scheme evolves which maintains the integrity of the respective statutes." *State v. Wright*, 84 Wash.2d 645, 650 (1974); *see also Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682 (2003) (recognizing that courts must "look to all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question" (quotation omitted)).

Caselaw provides established ground rules for ensuring that a statute's integrity remains intact. First, "[a] statute should be construed to effect its purpose." *Oytan v. David-Oytan*, 171 Wash. App. 781, 288 P.3d 57, 67 (2012). Second, "[t]he court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous." *Id.* Third, "[c]onstructions that yield unlikely, absurd, or strained consequences must be avoided." *City of Seattle v. Fuller*, 177 Wash.2d 263, 270 (2013).

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Fourth, courts generally "favor specific statutory language over general provisions." *Sanger v. Sanger*, 159 Wash. App. 741, 748 (2011). Application of these principles, as demonstrated below, uniformly contradicts the Attorney General's claim of independent authority to file CPA enforcement actions, in the first instance, based on the allegation of a previously unsubstantiated violation of the WLAD. *See State v. Superior Court for King County.*, 2 Wash.2d 575, 579 (1940) (recognizing that "arms or agencies of the state" have "no powers except those expressly conferred by the constitution and state laws, or those which are reasonably or necessarily implied from the granted powers").

2. The Legislature Created the Washington Human Rights Commission to Administer the WLAD and Denied the Attorney General Independent Authority Over Suspected Violations of the Statute.

From the outset, the Legislature identified the WHRC as the "state agency ... created with powers with respect to [the] elimination and prevention of discrimination" under the WLAD. RCW § 49.60.010. There is consequently no doubt as to which agency of the State of Washington the Legislature granted "general jurisdiction and power for such purposes." *Id.* As the Supreme Court has explained, "the WHRC is statutorily charged with interpreting and enforcing the WLAD." *Hegwine v. Longview Fibre Co.*, 162 Wash.2d 340, 349 (2007); *see also McFadden v. Elma Country Club*, 26 Wash. App. 195, 201 (1980) ("The Human Rights commission ... was created by RCW 49.60.010 to carry out the purpose of the law against discrimination ...."). Not only is the WHRC statutorily charged with "formulat[ing] policies to effectuate the purpose of" the WLAD, the Legislature also made it responsible for advising or "mak[ing]

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recommendations to [other] agencies and officers of the state"—including the Attorney General—"in aid of such policies and purposes." RCW § 49.60.110.

In carrying out its broad responsibilities, the Legislature empowered the WHRC to co-opt "the services" of any other "governmental departments and agencies" upon request. RCW 49.60.120(2). The WHRC, not the Attorney General, accordingly takes the lead in any "cooperat[ive] or "joint[]" action "with other Washington state agencies" to enforce the WLAD. RCW § 49.60.120(7). A lone exception to this rule exists. The Legislature explicitly granted "[t]he insurance commissioner," not the Attorney General, "concurrent jurisdiction" over WLAD claims involving insurance transactions. RCW § 49.60.178. Because this case does not involve an insurance policy or claim, that exception does not apply. No other executive agency, apart from the WHRC, thus possesses statutory authority to initiate or substantiate a WLAD claim.

Private individuals may bring alleged WLAD violations before the state courts, as the Legislature accorded "[t]he superior court and the [WHRC] ... concurrent jurisdiction" over such claims. *Mut. of Enumclaw Inc. v. WHRC*, 39 Wash. App. 213, 216 (1984) (citing RCW § 49.60.030(2)). But the Legislature did not include similar language in the statute granting the Attorney General "concurrent jurisdiction" over alleged WLAD violations. When a statute establishes a certain class, such as government entities exercising "concurrent jurisdiction" over alleged WLAD violations in the first instance, "an inferences arises in law that the [L]egislature intentionally omitted all [those] omitted from it," including the Attorney General. *Mason v. Ga.-Pac. Corp.*, 166

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Wash. App. 859, 834 (2012).

Nothing in the Attorney General's submissions grapples with this simple fact. But the Court should not so readily ignore such a clear indication of the Legislature's intent. The canon *expressio unius est exclusio alterius*, *i.e.*, the express mention of one thing excludes all others, is one of the most venerable and widely used principles of statutory construction known to the common law. The courts of this state have employed it for at least 122 years. *See State v. Sachs*, 3 Wash. 371, 376 (1891); *Mason*, 166 Wash. App. at 866 ("The principle of *expressio unius est exclusio alterius* is the law in Washington, barring a clearly contrary legislative intent." (quotation omitted)).

Expressio unis est exclusion alterius clearly demonstrates that although the Legislature granted the WHRC and the Insurance Commissioner (in certain instances), "concurrent jurisdiction" to determine whether a violation of the WLAD has occurred in the first instance, it intentionally denied the Attorney General that same right. Similarly, although the Legislature gave allegedly injured individuals an exclusive private right of action in superior court, the Legislature did not grant the State a right of action in superior court. RCW § 49.60.030(2). *See, Restaurant Dev., Inc.*, 150 Wash.2d at 682 (recognizing that "a court must not add words where the [L]egislature has chosen not to include them.").

3. The WLAD's Plain Text Assigns the Attorney General a Dependent, Secondary Role in Establishing Violations of the Statute.

The Attorney General takes the Legislature's mere proviso that an established WLAD violation may constitute the predicate for a private CPA claim completely out of

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context and twists it into a grant of prosecutorial authority coextensive with that reserved to the WHRC (RCW §§ 49.60.120, 230, & 250), the Insurance Commissioner (RCW § 49.60.178), and private plaintiffs (RCW §§ 49.60.030(2) & 230). But that is obviously not what the Legislature had in mind. We know this because the Legislature, in the plain text of the WLAD, explicitly assigned the Attorney General a dependent, secondary role in establishing particular violations of the WLAD.

Two sections of the statute specifically address the limited role the Legislature intended the Attorney General to play in validating potential violations of the WLAD. First, RCW § 49.60.340(1) allows a complainant, respondent, or aggrieved person in a case involving a "real estate transaction," for which the WHRC has determined "reasonable cause" for discrimination, to institute a civil action under RCW § 49.60.030(2). Once that election occurs, the WHRC must "authorize" and "*the attorney general shall commence*, a civil action on behalf of the aggrieved person in a superior court of the state of Washington." RCW § 49.60.340(2) (emphasis added). That provision clearly does not apply here, because neither the WHRC, nor any real estate transaction is involved in this case.

Second, the WHRC's administrative process takes time and is ill suited to providing a temporary restraining order, or preliminary injunction in extraordinary circumstances. The Legislature consequently empowered the WHRC to "petition … *through the attorney general*" any superior court "to seek appropriate temporary or preliminary relief to enjoin any unfair practice in violation" of certain WLAD provisions

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when "prompt judicial action is necessary to carry out" the purposes of the act. RCW § 49.60.350; *see also* RCW 49.60.120(2) (allowing the WHRC "[t]o obtain upon request and utilize the services of all governmental departments and agencies"). Again, this provision obviously does not apply here, because the WHRC is not a party to this action, and the Attorney General is not seeking preliminary relief.

Both RCW §§ 49.60.340 and 49.60.350 make clear that the Legislature intended the Attorney General to play a limited, secondary, and dependent role in establishing particular violations of the WLAD, on behalf of the WHRC. No WLAD subsection specifically relating to the Attorney General comes into play until it is invoked by an independent party, *i.e.*, a respondent, aggrieved person, the WHRC, or another complainant. Even then, these statutory provisions merely require the Attorney General to serve that independent party's pre-established interests. It is still the private complainant, or the WHRC that must bring the complaint and invoke the superior court's jurisdiction under RCW § 49.60.340. Similarly, when the attorney general institutes a civil action to establish a likely WLAD violation under RCW 49.60.350, it is only because the WHRC demands it. The Attorney General's broad claim of authority to identify and prosecute alleged WLAD violations thus runs headlong into the statute's plain text and the Legislature's evident intent to assign this role elsewhere.

4. Any Interpretation of the WLAD that Permits the Attorney General to Usurp the WHRC's Express Authority to Define, Receive, Investigate, and Pass Upon Alleged Violations of the Statute In the First Instance is Contrary to the Legislature's Clear Intent.

Although the Attorney General may choose to ignore them, the Legislature had

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obvious reasons for confining his role in identifying and challenging potential WLAD violations in the first instance. The WLAD and the CPA undoubtedly further the same interests at the macro level, but the Legislature tailored each statute to serve those purposes in radically different ways. "To receive, impartially investigate, and pass upon complaints alleging unfair practices" as defined by the WLAD, the Legislature created the WHRC. RCW § 49.60.120(4); *see also* 1977 Letter Op. Att'y Gen. No. 54, 1977 WL 26022, at *1 (Nov. 29, 1977) ("By its enactment of the [WLAD] ... the [L]egislature created the [WHRC] and gave it 'general jurisdiction and power' to eliminate discrimination and prevent unfair practices as defined in the law. One of the authorized means of doing this is to process complaints of unfair practices.").[4]

Each discrimination complaint is forwarded to "the commission's staff for prompt review and evaluation." RCW § 49.60.240(1)(a). If the facts may "constitute an unfair practice under [the WLAD], a full investigation and ascertainment of the facts [is] conducted." *Id.* That investigation results in "written findings of fact" by the WHRC as to whether "reasonable cause" exists "that an unfair practice has been or is being committed." RCW § 49.60.240(2).

If the WHRC concludes that "there is reasonable cause for believing that an unfair practice" has occurred, the Legislature required its staff to "immediately endeavor to eliminate the unfair practice by *conference, conciliation, and persuasion.*" RCW § 49.60.240(3) (emphasis added). The obvious hope is that the private parties involved

[4] *See Skagit Cnty. Pub. Hosp. Dist. No. 304 v. Skagit Cnty. Pub. Hosp. Dist. No. 1*, 177 Wash.2d 718, 725 (2013) (en banc) ("Opinions of the attorney general are entitled to considerable weight ....").

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will amicably reach an agreement that disposes of the case. *See id.* And the Legislature clearly viewed the WHRC's reconciliatory role in this process as a key part of the statutory scheme. State courts have held—consistent with the WLAD's plain text—that the administrative process cannot move forward unless "the Commission conducted [its] conciliation endeavors in good faith." *Loveland v. Leslie*, 21 Wash. App. 84, 88 (1978) (concluding the WHRC's reconciliatory efforts are "jurisdictional" and examining whether "staff has made a bona fide, good faith effort to eliminate an alleged unfair practice by 'conference, conciliation and persuasion'").

The WLAD's administrative hearing process thus moves forward if, and only if, (1) the WHRC conducts an investigation, (2) the WHRC finds reasonable cause to conclude an unfair practice has occurred, and (3) a mandatory conciliatory process between the parties, facilitated by the WHRC in good faith, fails. *See* RCW § 49.60.240. Under those circumstances, an administrative law judge ("ALJ") holds a hearing, makes factual findings, determines based "upon all the evidence" whether "the respondent has engaged in any unfair practice," and enters an order either remedying an unfair practice or dismissing the complaint. RCW § 49.60.250(1), (5), & (8). Any party may seek state court review of the ALJ's decision under the Washington Administrative Procedure Act. RCW § 49.60.250(7); RCW § 49.60.270.

Nothing about this conciliatory administrative process, which the Legislature entrusted to the WHRC, is even remotely similar to the general prosecutorial function that the Legislature assigned to the Attorney General under the CPA. Rather than

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creating "an intricate administrative mechanism," *Stahl v. Univ. of Wash.*, 39 Wash. App. 50, 54 (1984), as it did to construe and implement the terms of the WLAD, the Legislature created "a unit within the office of the attorney general for the purpose of detection, investigation, and prosecution of any act prohibited or declared to be unlawful" by the CPA, RCW § 19.86.085. The language the Legislature used to describe the Attorney General's authority under the CPA is noticeably stark, providing simply that he "may bring an action in the name of the state, or as *parens patriae* on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful." RCW § 19.86.080.

Thus, the Attorney General has no authority to "adopt, amend, and rescind suitable rules to carry out the provisions" of either the WLAD or the CPA, nor may he formally "pass upon complaints alleging unfair practices" under either statute. RCW 49.60.120. All the Attorney General may do is perform his general function of "detection, investigation, and prosecution" of CPA violations in state court, a task to which he is well suited. RCW § 19.86.85. But defining, receiving, investigating, and passing upon potential violations of the WLAD in the first instance is a job the Legislature reserved for the WHRC and its carefully-defined administrative process. *See* RCW 49.60.120; *see also Hegwine*, 162 Wash. 2d at 349 (recognizing "the WHRC is statutorily charged with interpreting and enforcing the WLAD" and that even state courts normally "give 'great weight' to [its] interpretations" (quoting *Marquis v. City of Spokane*, 130 Wash. 2d 97, 111 (1996)).

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Any reading of the WLAD that would allow the Attorney General to not only usurp the WHRC's function in determining what conduct likely violates the statute, but also to preempt or completely bypass the WHRC's "intricate administrative mechanism," *Stahl*, 39 Wash. App. at 54, is contrary to the Legislature's clear intent and should therefore be rejected by this Court. *Cf. Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Nw., Inc.*, 168 Wash. App. 56, 74 (2012) (rejecting an "outcome [that] would undermine the legislature's statutory scheme").

B. The Doctrine of Exhaustion of Administrative Remedies Precludes the Attorney General's Present Suit.

The doctrine of exhaustion of administrative remedies holds "that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene." *Cost Mgmt. Servs., Inc. v. City of Lakewood*, No. 87964-8, __ Wash.2d __, 2013 WL 5570223, at *2 (Wash. Oct. 10, 2013) (quotation omitted); *see also*, *Wright v. Woodard*, 83 Wash.2d 378, 381 (1974). This doctrine is "founded upon the belief that the judiciary should give proper deference to [administrative bodies] possessing expertise in areas outside the conventional expertise of judges," *Cost Mgmnt. Servs, Inc.*, at *3 (quotation omitted). The WHRC qualifies as an administrative body with special competence regarding the WLAD that is outside the conventional wisdom of judges. *See, e.g.*, RCW § 49.60.110 (charging the WHRC with "formulat[ing] policies to effectuate the purposes of" the WLAD); RCW § 49.60.120 (empowering the WHRC "[t]o receive, impartially investigate, and pass upon complaints alleging unfair practices" under the WLAD).

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The requirement to exhaust administrative remedies applies where (1) a claim is cognizable in the first instance by an agency alone; (2) the agency's authority establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties; and (3) the relief sought can be obtained by resort to an adequate administrative remedy. *Retail Store Employees Local 1001 v. Washington Surveying and Rating Bureau*, 87 Wn.2d 887, 906-09 (1976). Each one of these elements applies in this case. RCW 49.60.010; RCW 49.60.120 – 160 and 250.

Several of the policy bases for the administrative exhaustion rule apply in full force here as well, including (1) "insur[ing] against premature interruption of the administrative process," (2) "allow[ing] exercise of agency expertise in its area" of particularized knowledge, (3) "provid[ing] for a more efficient process" than litigation, and (4) protect[ing] the administrative agency's autonomy by allowing it to" formulate policy and "correct its own errors and insuring that individuals" and other arms of State government are "not encouraged to ignore its procedures by resorting to the courts." *Cost Mgmt. Servs.*, 2013 WL 5570223, at *3.

In *State v. Tacoma-Pierce County Multiple Listing Service*, 95 Wn.2d 280 (1980), the Washington Attorney General filed an action on behalf of the State, alleging violation of the CPA, RCW 19.86, *et seq.*, against the Tri-Cities and Spokane Board of Realtors and the Tacoma-Pierce County MLS. The State's CPA action alleged "unfair or deceptive acts or practices" by the defendants for violation of anti-trust and restraint of trade activities. The defendants argued that they were under the regulatory and

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administrative authority of the Department of Licensing and the Real Estate Commission, pursuant to RCW 18.85, *et seq.*, and therefore, regulatory and administrative remedies must be exhausted before the Superior Court had authority to exercise jurisdiction.

The Supreme Court rejected the defendants' regulatory and exhaustion of administrative remedies arguments in the *Tacoma-Pierce County MLS* case, because: (1) the State had not alleged any violation of RCW 18.85, *et seq.*, (2) nor did the State's case concern RCW 18.85, *et seq.*, in any way. The State *only* alleged violation of RCW 19.86.030, prohibiting contracts for restraint of trade. (3) Anti-trust and restraint of trade are issues specifically addressed in the CPA, and the Attorney General has explicit authority to enforce those provisions of the CPA. *Tacoma Pierce-County MLS*, 95 W.2d at 285, *citing* RCW 19.86.140; *see also*, RCW 19.86.030 – 040. (4) Also, the court noted that the MLS was *not* regulated by the Department of Licensing or the Real Estate Commission, so there were no administrative remedies to be exhausted. *Tacoma Pierce-County MLS*, 95 W.2d at 284-85.

The case at bar presents the exact opposite set of circumstances as those presented in the *Tacoma-Pierce County MLS* case to obviate the requirement of exhaustion of administrative remedies. (1) In this case, the State has alleged violation of RCW 49.60.030 / 215 as a means of establishing the "unfair act or practice" element of the State's CPA claim under RCW 19.86.020. (2) The State's case squarely concerns the Washington Law Against Discrimination ("WLAD"), RCW 49.60 *et seq.*, and the State incorporates the WLAD into its CPA claim. (3) Alleged discrimination on the basis of

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sexual orientation, *etc.*, is not addressed in the CPA, and the Attorney General does not have any, let alone explicit authority to enforce the WLAD. (4) Finally, and most importantly, the WHRC has explicit statutory authority to administratively enforce the WLAD, in regard to "unfair practices" *as defined* in the WLAD, including alleged discrimination on the basis of sexual orientation. RCW 49.60.120(4); RCW 49.60.215.

The *Tacoma-Pierce County Multiple Listing Service* case thus demonstrates that if an administrative remedy had been available in the context of that case, the State would have been required to exhaust it. *See id.* at 283-84 ("[W]hen an adequate administrative remedy is provided, it must be exhausted before the courts will intervene." (quotation omitted)). In this case, the WHRC provides an adequate administrative remedy for the alleged WLAD violation that alone forms the basis for the State's CPA claim. *See supra* Part VI.A.4. As such, the doctrine of exhaustion of administrative remedies applies.

The Attorney General formerly argued that this Court has original jurisdiction over WLAD actions brought by private plaintiffs, thus the doctrine of exhaustion of administrative remedies does not bar the State's lawsuit. *See* RCW § 49.60.030(2). Of course, that private right of action under the WLAD does not apply to a State action. *See* RCW § 49.60.030(2) (providing a right to sue in state court to "[a]ny person deeming *himself or herself injured* by any act in violation of" the WLAD) (emphasis added). Therefore, the doctrine of exhaustion of administrative remedies has clear application here. Analysis under that doctrine is simple. The Court first asks "whether the party seeking relief has an administrative remedy." *Cost Mgmt. Servs.*, 2013 WL 5570223, at 2

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(quotation omitted). If so, the Court determines "whether any attempt has been made to pursue that remedy." *Id.* (quotation omitted). If not, "then it is error for a trial court to entertain the action." *Id.*

The State's CPA claim in this case is predicated directly on an alleged violation of the WLAD. *See, e.g.*, Complaint at 3 ¶ 5.7 ("Pursuant to RCW 49.60.030(3), violations of Washington's Law Against Discrimination are *per se* violations of the consumer Protection Act, RCW 19.86."). And, the WHRC can provide the relief the State seeks for that alleged violation. Indeed, the WHRC's authority to identify and remedy unfair practices is quite broad. *See, e.g.*, RCW § 49.60.250(5). They may issue orders "requiring … respondent[s] to cease and desist from [an] unfair practice" and "take such other action as, in the judgment of the [ALJ], will effectuate the purposes of this chapter," generally including all "action that could be ordered by a court." *Id.*; *see also Blaney v. Int'l Ass'n of Machinists & Aerospace Workers*, 151 Wash. 2d 203, 214 (2004) (explaining that WLAD's "'any other appropriate remedy'" clause stands on its own as a third WLAD remedy," which "provid[es] a catchall remedy provision in addition to injunctive relief, actual damages, and cost of suit") (*citing* RCW § 49.60.030(2)).

An administrative remedy is therefore available for the alleged violation of the WLAD that is the foundation of the State's case. It is undisputed that the State has not attempted to access that administrative remedy. Consequently, it would be "error for [this Court] to entertain the action." *Cost Mgmt. Servs.*, 2013 WL 5570223, at *2.

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VII. CONCLUSION

The Attorney General cannot establish his authority to file this lawsuit merely by repeatedly citing RCW § 49.60.030(3) and RCW §19.86.080. Neither statutory provision explicitly provides the Attorney General with the authority to file a CPA action, in the first instance, based on a previously unsubstantiated violation of the WLAD. His claim to authority is only an inference contradicted by the WLAD's and CPA's more specific terms, longstanding rules of statutory construction, and over thirty years of agency practice by successive Attorneys General. This Court should accordingly adopt Defendants' reading of RCW § 49.60.030(3) as a double enforcement provision that allows the Attorney General to bring a CPA action based on a violation of the WLAD only when substantiated by the WHRC, or the Insurance Commissioner.

In addition, the doctrine of exhaustion of administrative remedies requires this Court to dismiss the State's Complaint, as the State has undeniably failed to pursue any of the broad range of remedies available through the WHRC's administrative process. That conciliatory process is clearly the Legislature's preferred vehicle for the resolution of the State's claims in this case.

RESPECTFULLY SUBMITTED this 25th day of October, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on the date indicated below I caused this document to be served via email pursuant to agreement of counsel and sent for delivery via U.S. mail to the Attorneys for Plaintiffs at their respective electronic and physical addresses of record and on file with the WSBA.

Signed at Kennewick, Washington on October 25, 2013.

Alicia Berry
[sign]

ALICIA BERRY
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