NO. 101769-3

SUPREME COURT OF THE STATE OF WASHINGTON

TERRY COUSINS,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

DEPARTMENT'S RESPONSE TO MEMORANDUM OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION

To avoid different statutes of limitations rules based on how an agency responds to a given public records request, this Court adopted a bright-line rule for the triggering of the Public Record Act's (PRA) one year statute of limitations in *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016). *Belenski* has provided a clear and workable rule for requesters, agencies, and courts. The Court of Appeals and superior court correctly applied *Belenski* to conclude Petitioner Terry Cousins' claims are time barred.

Although Amicus Washington Employment Lawyers Association (WELA) suggests that the decision below conflicts with *Belenski*, Amicus would essentially have this Court revisit *Belenski* to engraft an exception onto *Belenski*'s bright-line rule. The Court of Appeals has correctly rejected this argument in a series of decisions. This Court should not grant review to overrule *Belenski* or the Court of Appeals case law that has faithfully applied *Belenski*.

Additionally, the decision below is limited to the application of the PRA's statute of limitations. As such, WELA's suggestion that the decision conflicts with *Cantu v. Yakima School District No. 7*, 23 Wn. App. 2d 57, 514 P.3d 661 (2022) is unpersuasive. *Cantu* did not involve the interpretation of the PRA's statute of limitations, but rather involved an argument that the agency had constructively denied the request. If anything, the fact that a requester has the ability to pursue a legal action under a constructive denial theory suggests that there was no reason in this case for Cousins to wait almost two years after she was informed her request was closed to file suit. As such, Amicus has not presented a persuasive basis for discretionary review.

II. ARGUMENT

WELA argues that this Court should take review for two reasons: first, the Court's decision in *Belenski* "does not apply" to Cousins' claims, and second, the decision below will prevent requesters from suing agencies for a "constructive denial" of a

request. Amicus Br., at 6 & 11. Neither argument is correct. And neither argument presents a basis for review.

First, *Belenski* was intended to apply to "all possible responses under the PRA." *Belenski*, 186 Wn.2d at 460. As such, *Belenski* did not suggest that it intended to adopt a different statute of limitations rule for claims such as Cousins'. To the contrary, *Belenski* recognized the absurdity that would result if "a different statute of limitations would apply based on how the agency responded." *Id.* at 461. Consistent with this, the Court of Appeals has correctly applied *Belenski* to cases similar to Cousins' case in a string of decisions since 2020. *See Dotson v. Pierce Cnty.*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020), *review denied*, 196 Wn.2d 1018 (2020); *Ehrhart v. King Cnty.*, No. 55498-4-II, 23 Wn. App. 2d 1016, 2022 WL 3754904, at *4 (2022) (unpublished) (similar), *review denied*, 200 Wn.2d 1029 (2023); *Earl v. City of Tacoma*, No. 56160-3-II, 22 Wn. App. 2d 1050, 2022 WL 2679522, at *5 (2022) (unpublished) (similar), *review denied*, 200 Wn.2d 1017 (2022).

Although WELA asks this Court to overrule this established case law, it presents no evidence of any concrete harm created by the rule established in *Belenski* and applied in *Dotson*. The absence of such evidence is not particularly surprising because the PRA's statute of limitations does not prevent a requester from obtaining the records they seek. As the Court of Appeals correctly recognized, a requester can always submit another request, and if a requester is dissatisfied with an agency's response, they can also file a timely lawsuit. As such, the concerns raised by Amicus do not justify review.

Second, the decision below does not address a requester's ability to bring a lawsuit under a constructive denial theory. No such theory was ever presented to the superior court in this case. Given that the case was resolved on the statute of limitations, it is difficult to see how the Court of Appeals decision could have had the impact that WELA suggests. The requester in *Cantu v. Yakima School District*, 23 Wn. App. 2d 57, 514 P.3d 661 (2022), timely filed a lawsuit asserting that the agency's response

was unreasonably delayed and there was no statute of limitations issue presented. In contrast, Cousins waited almost two years after he request was closed to file her lawsuit in which she sought $12.4 million in penalties. Given the absence of any argument or application of a constructive denial theory in the decision below, this issue likewise does not present a basis for review.

Therefore, WELA's arguments do not warrant granting review.

A. The Court of Appeals Has Faithfully Applied *Belenski*, and Amicus Is Effectively Asking This Court to Overrule *Belenski*

In *Belenski*, the Court adopted a rule that the one year statute of limitations applies to "all possible responses under the PRA." *Belenski*, 186 Wn.2d at 460. In doing so, the Court chose to adopt a clear, administrable rule that did not depend on how the agency responded to a given request. Indeed, the Court made clear that the agency's response that it had no responsive records triggered the statute of limitations "[r]egardless of whether this answer was truthful or correct." *Belenski*, 186 Wn.2d at 461. The

Court indicated that the solution to concerns about agencies intentionally withholding records was the application of equitable tolling in appropriate cases. *Id.* at 461-62.

WELA suggests that the Court of Appeals' decision in *Dotson* and the decision below conflict with *Belenski*. Amicus Br., at 8-10. WELA claims that that "[t]he ruling in *Belenski* only applies where an agency closes the PRA request without further response or the production of additional records." Amicus Br., at 7. Amicus does not cite any portion of *Belenski* to support such a statement—understandably so, because *Belenski* contains no such qualifications.

When WELA's argument is examined closely, WELA's disagreement appears to be with *Belenski* itself. In interpreting the statute of limitations, the Court sought to adopt a consistent rule for all possible responses under the PRA. And these arguments are impossible to square with the portion of *Belenski* that made clear that the statute of limitations is triggered by the agency's response regardless of whether the response was

truthful or correct. *Belenski*, 186 Wn.2d at 460. If the agency acts in bad faith, equitable tolling can be applied. *Id.* at 461-62.

WELA's rule in which the PRA's statute of limitations can be revived would require the Court to revisit *Belenski*. Cousins, however, has never asked the Court to revisit *Belenski*. *See, e.g.*, *Sundquist Homes, Inc. v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 140 Wn.2d 403, 413-14, 997 P.2d 915 (2000) (stating general rule that court will not address arguments only raised by amici). And not even WELA has argued that *Belenski* is incorrect and harmful, a prerequisite for this Court to overturn its prior precedent. *See Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009) (indicating that prior decisions by this Court will not be overruled absent a clear showing that the established rule is incorrect and harmful). WELA makes no attempt to demonstrate that either *Belenski* or the Court of Appeals decisions applying *Belenski* have caused any concrete harm to public records requesters.

Indeed, it is difficult to see how *Belenski* could create such harm to the requesters. When the PRA's statute of limitations applies, it prevents a PRA requester from seeking relief—primarily monetary penalties—in the courts on a particular request. It does not, however, impede the requester's ability to obtain records, which is the primary purpose of the PRA. As the Court of Appeals recognized, "[n]othing prevents a requestor from making a new records request for records that were not produced." *Cousins v. Department of Corrections*, 25 Wn. App. 2d 483, 495, 523 P.3d 884, 890 (2023). In this case, "Cousins chose not to make a second request, instead insisting that DOC respond to her original request." *Id.* And the bright-line *Belenski* rule provides an avenue to deal with agencies acting in bad faith, via the application of equitable tolling. *Belenski*, 186 Wn.2d at 461-62. Those concerns do not apply to this case, where the trial court explicitly found that the agency acted adequately and reasonably. CP 1794.

Moreover, the rule that WELA asks this Court to adopt in place of *Belenski*'s bright-line rule would present significant potential issues for requesters and would prove unworkable for courts, requesters, and agencies. WELA's proposed rule means the PRA's statute of limitations would be somehow revived when an agency responds further to a requester after the request is closed, or it provides additional records as part of an attempt to resolve a requester's concerns. Such a rule would incentivize public agencies to ignore public records requesters who attempt to correspond with the agency after the closure of a request, especially when such communications involve a request that has been closed for over a year. In other words, agencies who attempt in good faith to address the requester's concerns would be placed in a worse position than those agencies who simply ignore a requester once a request is closed. There is little reason to believe that the Legislature intended such a perverse result.

Additionally, adopting an amorphous interpretation of the statute of limitations would create uncertain expectations for

requesters and agencies. *Belenski* created a clear and workable rule. To retreat from that rule would place requesters in the untenable position of trying to determine when their claims accrue and when their lawsuit would need to be filed. Meanwhile, the precise scope and application of a multi-factored approach to the PRA's statute of limitations would only be determined through years of future litigation among requesters and agencies. Such an approach would create the uncertainty that this Court sought to avoid in *Belenski*.

The *Belenski* decision presents a bright-line rule that is workable and clear for requesters and public agencies. The Court of Appeals faithfully applied this rule in *Dotson*, in the decision below, and in other cases. This Court should not grant review to revisit *Belenski*.

B. Amicus' Suggestion That the Court of Appeals Decision Prevents a Requester from Bringing a Claim for Constructive Denial Misconstrues the Decision Below and the Relevant Case Law

Amicus argues that "[t]he practical effect of *Cousins* is to time-bar some plaintiffs' unreasonable delay claims before they

even ripen." Amicus Br., at 11. However, other than citing to *Cantu v. Yakima School District No. 7*, 23 Wn. App. 2d 57, 514 P.3d 661 (2022), a factually distinguishable PRA case that did not even discuss the PRA's statute of limitations, WELA does not explain how it reaches such a conclusion. This argument misconstrues the case law and ignores the facts of this case.

Although Amicus argues that the decision below conflicts with *Cantu*, there was no statute of limitations issue raised in *Cantu*. As such, *Cantu* did not address the interpretation of the PRA's statute of limitations. Instead, it addressed the merits of the requester's claims. The decision in *Cantu* on an entirely different issue has no discernable impact on the separate issue of when the statute of limitations is triggered for a PRA claim.

To the extent that it sheds any light on the issues in this case, *Cantu* undermines the public policy concerns raised by Amicus by making it clear that requesters are able to pursue judicial remedies in a timely manner when an agency fails to respond adequately to a request. In *Cantu*, the agency failed to

acknowledge the request within five business days as required by the PRA and provided no estimate of time by which records would be produced. *Cantu*, 23 Wn. App. 2d at 68. Over two months later, the requester sent a follow up email, and the agency told her that she could come review the records. *Id.* Then, there was no communication for ten months. *Id.* at 70.

Meanwhile, in an effort to obtain records, the requester submitted two new requests and the agency again failed to provide an estimate of time within five business days. *Id.* After belatedly providing an estimated response date for the second request, the agency missed its response date. *Id.* at 73. The requester followed up with the agency but was again provided no updated response estimate. *Id.* The requester then filed suit.

The Court of Appeals rejected the argument that the requester's lawsuit was premature. *Id.* at 90-93. The Court noted that the agency's argument would allow agencies to avoid liability by doing nothing. *Id.* at 92. As such, the Court concluded that an agency's inaction can ripen into a claim of constructive

denial, and whether constructive denial has occurred will depend on the facts of the case. *Id.* at 88.

Unlike the requester in *Cantu*, who filed suit against an agency in a timely manner to challenge the agency's lack of diligence in responding to the request, Cousins waited almost two years after her request was closed to pursue a lawsuit. Prior to that, during the pendency of her request, Cousins took no steps to file a lawsuit in 2016, 2017, 2018, or 2019 to challenge the timeliness of the Department's response. Instead, she waited until January 2021 to file suit. In a finding that Cousins has not challenged on appeal, the superior court found that Cousins had not been diligent in pursuing her PRA lawsuit. CP 1801.

Unlike the agency in *Cantu*, the Department provided Cousins with a five-day letter and continued to communicate with her throughout the pendency of her request. Indeed, the superior court in this case concluded that the Department's search was "conducted in a manner to timely produce the requested records" and its search was "diligent." CP 1794.

Cousins has not challenged these findings on appeal.[1] As such, the facts in this case differ significantly from *Cantu*.

Moreover, WELA's constructive denial argument was not raised by Cousins in the superior court. At no point did she assert that she was constructively denied records. Although Cousins briefly asserted that her claims were based on a delay in receiving records, she did not characterize this as a constructive denial. CP 618-22 (never characterizing the claim as a constructive denial in response to the summary judgment motion); CP 1771-72. And even once the decision in *Cantu* was issued, Cousins did not rely on this argument in support of her statute of limitations argument but simply mentioned the case when addressing a separate argument. Cousins' COA Reply Br., at 6-8. Unsurprisingly, the Court of Appeals did not mention *Cantu* in its analysis of the statute of limitations, and Cousins does not mention *Cantu* in her

[1] Although WELA makes arguments about the timeliness of the Department's response, these arguments were not raised by Cousins. *See, e.g., Sundquist Homes, Inc.*, 140 Wn.2d at 413-14.

petition for review. Amicus' arguments regarding *Cantu* are not being raised by Cousins, are not implicated by this case, and do not present a basis for review.

III. CONCLUSION

For the reasons discussed above, the arguments presented by WELA do not present a basis for review.

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RESPECTFULLY SUBMITTED this 9th day of June, 2023.

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I certify that on the date below I filed the DEPARTMENT'S RESPONSE TO BRIEF OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION with the Clerk of the Court using the electronic filing system, which will notify the following electronic filing participants:

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EXECUTED this 9th day of June, 2023, at Olympia, WA.

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