NO. 90871-I

SUPREME COURT OF THE STATE OF WASHINGTON

YEVGENY SEMENENKO and NATALYA SEMENENKO,

Petitioners,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF THE STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES IN RESPONSE TO BRIEFS OF AMICI CURIAE SUPPORTING REVIEW

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I. INTRODUCTION

The Fred T. Korematsu Center for Law and Equality and Columbia Legal Services (CLS/Korematsu) and the American Civil Liberties Union of Washington (ACLU) both write to support granting the petition for review. But neither brief provides any sound reason for review.

The ACLU writes to urge review of a due process challenge to the former 20 day statutory filing deadline that barred the Semenenkos' untimely request. The Petition does not raise a due process challenge and the lower court did not address a due process challenge. The ACLU, therefore, offers no basis for granting the Petition because this Court does not address issues raised solely by amicus.

With regard to the Semenenkos' issue of whether a regulation defining "good cause" modified a statutory deadline for administrative appeals, CLS/Korematsu predicts dire changes in the way the Department of Social and Health Services handles appeals of benefits such as supplemental nutrition or health care. CLS/Korematsu Brief 2-6. Because that regulation has never applied to appeal deadlines for food and health benefits, amici's speculation of harm is unfounded. Amici also ignore other due process protections for food and health beneficiaries, which defeat their unrealistic parade of horribles. The amici's unfounded

concern about other programs provides no reason to review the Petition's strained misinterpretation of the "good cause" definition.

CLS/Korematsu also supports review of whether founded findings made past 90 days are void and ultra vires, claiming a decision on that legal theory is needed to protect children. CLS/Korematsu Brief 6-9. Their argument that the Court of Appeals encourages future delays in founded findings is illogical. The Court merely rejected the Semenenkos' theory that the Department's finding was automatically void because that application of ultra vires doctrine is contrary to Washington law and legislative intent. Moreover, the amici ignore how the Petition's "ultra-vires-and-void" theory would imperil children and vulnerable adults. Thus, CLS/Korematsu offers no valid reason for review of the ultra vires question.

II. FACTS RELEVANT TO AMICI BRIEFS

In April of 2010, Yevgeny and Natalya Semenenko received notice that they had been found to have committed child abuse/neglect. Administrative Record (AR) at 36-45. Notice of the "founded finding" stated that they had a right to seek review of the finding and that the agency:

> [M]ust receive your written request for review within 20 calendar days from the date you receive this letter. **If CA [Children's Administration] does not receive the**

> **request within 20 calendar days of the date you receive this letter, you will have no further right to challenge the CPS findings.**

AR at 37, 41 (emphasis in originals). As the notice states, RCW 26.44.125(3) at that time required an individual to request review within 20 days. The Semenenkos received notice and claimed only that it was not until seven months later (November 2010) that they understood the need to appeal. AR at 5-6, 30-31. Then, the Semenenkos waited *four more months* (March 2011) to request a hearing. AR at 18-20, 49-50. The Department declined the untimely request. On May 12, 2011, the Office of Administrative Hearings (OAH) denied the request for an administrative hearing as untimely. AR at 49. That decision was upheld by the DSHS Board of Appeals, King County Superior Court, and Court of Appeals. AR at 1, 10-17, 21-27, CP at 1, 39.

III. ARGUMENT

A. The ACLU Due Process Argument Provides No Basis for Accepting Review Because the Petition Does Not Make a Due Process Claim, nor Did the Lower Court Address Due Process

The ACLU argues that the former 20-day limitation period for seeking review of founded findings raises a significant issue of constitutional law, due process, warranting review under RAP 13.4(b)(3) (review of constitutional issues). The Petition, however, did not raise the constitutional issue argued by the ACLU.

This Court only addresses claims made by parties, not issues raised solely by amicus curiae. *E.g. Cummins v. Lewis Cnty.*, 156 Wn.2d 844, 465, 133 P.3d 458 (2006); *Madison v. State*, 161 Wn.2d 85, 102, 163 P.3d 757 (2007) (Court does not consider issues raised first and only by amicus) (Fairhurst J., with two justices concurring and three justices concurring in result); *Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 629, n.30, 90 P.3d 659 (2004) ("[W]e have many times held that arguments raised only by amicus curiae need not be considered."). The Court should apply its well-established rule here and conclude that the ACLU brief provides no relevant reason supporting review.

The ACLU's issue would require the Court to examine the constitutionality of legislative choices regarding the effect of founded findings and the time period for appeals. Addressing that issue requires a record fairly developed by parties who are on notice that they are making or defending a constitutional challenge. Without a record developed in defense of the legislation, the Court will not have a fair basis to examine competing public and private interests relevant to deciding if legislation meets or violates due process. Moreover, the Court would be forced to analyze that issue without the benefit of any lower court decision.[1]

[1] Moreover, a due process analysis of the 20 day time period is inherently moot because the statute was amended in 2012 to allow for a 30 day appeal period. It also

Nor does the ACLU's due process issue aid the Semenenkos. This case exists because they neglected the notice and opportunity to be heard afforded by RCW 26.44.125(2) and RCW 26.44.125(3). They received notice letters from DSHS informing them of the founded findings and setting forth the procedure to initiate appeal. AR at 36-45. They understood it was a negative action. AR at 30-31. They claimed no impediment prevented a timely administrative review except their disregard of the notice in reliance on a conversation between their daughter and a nameless DSHS employee. AR at 5-6, 30-31. But even the Semenenkos' excuse fails because they further slumbered on their rights after November 2010, when the findings directly affected Ms. Semenenko's job. AR at 5-6, 30-31, 36-45, 49-50. The ACLU brief does not (and cannot) show that due process allows an individual to delay for months after such notice.

Accordingly, the ACLU's brief does not support granting review. The due process issue is not presented by the Petition and cannot be raised by amicus.

B. The ACLU Brief Overstates the Court of Appeals Holding

The ACLU brief is also unhelpful because it makes inaccurate arguments about the decision below. For example, the brief says there is

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allows untimely requests for review to be heard if DSHS did not properly serve the founded finding letter.

"***no possibility*** for parents or anyone else to obtain a hearing on the merits of the charges if they miss the internal twenty-day (now thirty-day) deadline ***for any reason.***" ACLU Brief at 3 (emphasis in the original).

The brief ignores the current statutory exception in RCW 26.44.125(3), where the deadline is not applicable when the Department fails to comply with notice requirements. The ACLU also leaves out cases where administrative appellants were equitably relieved from appeal deadlines based on extreme circumstances. *Rodriguez v Dep't of Labor & Indus.*, 85 Wn.2d 949, 952-53, 540 P.2d 1359 (1975) (Appellant was illiterate monolingual Spanish speaker absent from home for entire appeal period); *Ames v. Department of Labor & Indus.*, 176 Wash. 509, 513-14, 30 P.2d 239 (1934) (Appellant declared mentally incompetent and psychiatrically hospitalized during the relevant appeal period). Thus, the ACLU overstates the ruling (even if it were precedential, which it is not) and those overstatements provide no reason for this Court's review.

C. CLS/Korematsu Concerns About Appeals of Food or Health Benefits Ignore the Status Quo and the Appeal Rights and Remedies Available to DSHS Food and Health Clients

The CLS/Korematsu brief urges review of the Semenenkos' reliance on the "good cause" definition, saying that it is necessary to protect hearing requests for needy populations in other programs.

CLS/Korematsu Brief at 1-5. This argument makes no sense, because the Court of Appeals maintained the status quo in holding that the "good cause" definition in WAC 388-02-0020 does not expand the deadline in RCW 26.44.125(2). There has never been application of this good cause definition to allow additional appeals of benefits. The unpublished ruling will not alter the programs of concern to CLS/Korematsu.

Rather than change the law, the Court of Appeals decision reflected existing law. The definition of good cause if codified in WAC 388-02, but that chapter does not determine when a person seeking a hearing on a DSHS decision has a right to hearing:

> Nothing in this chapter is intended to affect the constitutional rights of any person or to limit or change additional requirements imposed by statute or other rule. Other laws or rules determine if you have a hearing right, including the APA and DSHS program rules or laws.

WAC 388-02-0005(2). Unsurprisingly, the Court of Appeals agreed that a term that does not appear in a statute cannot be grafted on and then defined by an unrelated regulation to alter a statute's meaning. *Semenenko v. DSHS*, No. 70354-4-I, slip op. at 12. Amici's claim about impacts on other benefit programs is a misconception; it cannot be an effect of the issue raised by the Petition. Those Department clients have the same procedural rights now as before.

After subtracting the amici's false assumption that the ruling below is a change, the statistics cited by amici actually undermine their arguments. Those statistics show that thousands of individuals request timely hearings and are heard. Those hearings never relied on the good cause definition, and amici cannot fairly claim that such appeals would be negatively affected by the Court of Appeals ruling if the rule has never had the effect assumed by the amici.

CLS/Korematsu also ignores how food and health benefits programs already possess significantly different procedural rights than an appeal of a founded finding. First, a recipient has 90 days to seek review. RCW 74.08.080(2)(a). Second, even if benefits are lost, recipients may reapply for benefits based on a change in circumstances that allows them to requalify. *See e.g.* WAC 388-472-0050. Third, there are procedures within benefits programs to assist those unable to comply with program requirements. *See e.g.* WAC 388-406-0065. Fourth, the Department has informal means such as meetings, conferences, or other special program that do not have the same time limits or bars. *See, e.g.*: WAC 388-02-0080(2).

CLS/Korematsu also includes a glaring omission: it offers no legal analysis for using the regulatory definition of "good cause" in WAC 388-02-0020 to alter RCW 26.44.125 (the issue presented) or to alter the

timing of appeals under RCW 74.08.080 (their focus). Accordingly, their brief identifies an important public concern, but does not demonstrate why that concern would be implicated by this Court's review of the pending Petition.

D. The Amici Concern With Speedy Investigations Does Not Support Review of the Petition's Extraordinary Theory That Founded Findings Are Void and Ultra Vires

Amici express concern that the unpublished Court of Appeals decision will inspire the Department to hold child abuse/neglect investigations open "indefinitely," to the detriment of the purposes served by prompt investigation or individual due process rights. ACLU Brief 10; CLS/Korematsu Brief 7-9. These concerns are unfounded.

First, refusing to void founded findings as ultra vires is not related to due process rights. The Semenenkos received notice and opportunity to be heard and then neglected it. This is not a case where a delay in the founded findings affected notice or opportunity to be heard.

Second, voiding a founded finding is not needed to promote the legislative and Department policies promoting speedier investigations. The amici claim the Court of Appeals ruling will cause the Department to delay investigations. This speculation is absurd in light of the obvious advantages to children, vulnerable adults, and families that animate the legislative and Department policies for prompt investigations. These

reasons for prompt investigations outweigh any Department interest in delaying an investigation.

Most importantly, the amici offer no legal analysis to support their harmful remedy. The amici cannot show that making all founded findings void if issued after the 90th day protects children or vulnerable adults. Nor do they discuss the disturbing consequence of their theory – where persons who have abused children or adults could continue to work with vulnerable populations if the Department finding is made after the 90th day. In the absence of legislative intent for such a result, the ultra vires issue raised by the Petition does not warrant this Court's review.

IV. CONCLUSION

Neither amicus brief provides a reason for this Court to exercise its extraordinary power and grant review. The ACLU asks the Court to consider a due process issue not raised by the Petition. CLS/Korematsu relies on potential impacts not traceable to the decision of the Court of Appeals. And both amici briefs complain about the Department's action outside the 90th day, but offer no legal analysis to suggest that would be a

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serious or colorable ultra vires issue for this Court's review.

RESPECTFULLY SUBMITTED this 22nd day of December, 2014.

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No. 90871-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re: YEVGENY SEMENENKO and NATALYA SEMENENKO, Petitioners, v. STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	CERTIFICATE OF SERVICE

I, Sandra K. Kent, declare as follows:

I am a Legal Assistant employed by the Washington State Attorney General's Office. On December 22, 2014, I sent a copy of: **Brief of the State of Washington Department of Social and Health Services in Response to Briefs of Amici Curiae Supporting Review and Certificate of Service** via email to:

1. **Meagan MacKenzie,** Northwest Justice Project, 711 Capitol Way South, Suite 704, Olympia, Washington 98501-1237

   E-mail Address: meaganm@nwjustice.org; and

2. **Deborah Perluss,** Northwest Justice Project, 401 2nd Avenue South, Suite 407, Seattle, Washington 98104-3811 Suite 704, Olympia, Washington 98501

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I declare under penalty of perjury, under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of December, 2014, at Seattle, Washington.

SANDRA K. KENT
Legal Assistant
OID #91016

OFFICE RECEPTIONIST, CLERK

To: Kent, Sandy K (ATG)
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Good Afternoon

Attached please find copies of the following documents in connection with the above captioned case:

- Brief of the State of Washington Department of Social and Health Services in Response to Briefs of Amici Curiae Supporting Review; and
- Certificate of Service.

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"The greatest achievement of the human spirit is to live up to one's opportunities and make the most of one's resources."
Vauvenargues, Marquis de quotes

(French moralist and essayist, 1715-1747)

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