NO. 96975-2

IN THE SUPREME COURT OF WASHINGTON
FOR THE STATE OF WASHINGTON

THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II NO. 50235-6-II

THURSTON COUNTY SUPERIOR COURT NO. 17-2-00906-34

BRELVIS CONSULTING, LLC,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Brelvis Consulting, LLC.

II. COURT OF APPEALS DECISION

On November 20, 2018, the Court of Appeals issued a published Opinion in *State v. Brelvis Consulting LLC*, No. 50235-6-II, affirming the trial court's decision compelling "Brelvis to comply with the [Civil Investigative Demand]." On March 12, 2019, the Court of Appeals issued an Order "granting" Petitioner's Motion for Reconsideration, amending the original opinion, but again affirming the trial court's decision.[1]

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This Petition for Review presents the Court with an opportunity to address important and unresolved legal issues of first impression concerning the interaction between the Attorney General's use of Civil Investigative Demand procedures to investigate alleged violations of state law, and the privilege against self-incrimination protected by state and federal constitutional provisions and state statutes.

The issues presented include:

1. Whether the constitutional privilege against self-incrimination applies to closely held entities as well as individual persons—in the specific context of the enforcement of an Attorney General's Civil Investigative Demand—where the compelled act of production of the entity's documents would require the company and its sole owner/manager to

[1] Copies of the Opinion and Order amending Opinion are attached as Appendices A, B.

admit testimonial facts regarding the existence, authenticity, and possession of inculpatory evidence and would incriminate the sole individual custodian of those records in his personal and individual capacity, in violation of the Fifth Amendment to the United States Constitution and Article 1, Section 9 of the Washington Constitution.

2. Whether this Court should accept review to resolve the conflict between the Court of Appeals decision and established law providing that the privilege against self-incrimination is properly invoked where it is readily apparent that truthful answers to the interrogatories could form a link in the chain of evidence needed to support a criminal prosecution.

3. Whether the blanket assertion rule—requiring a question-by-question assertion of the privilege against self-incrimination—applies where the questions posed and the documents demanded are fully known ahead of time.

4. Whether RCW 10.52.090 ("Incriminating testimony not to be used") prohibits compulsion of answers to interrogatories or the production of documents that might incriminate a person, or which might subject the person to a "penalty or forfeiture," unless the compulsion order is accompanied by a concomitant grant of transactional immunity.

5. Whether the Court of Appeals may award attorney fees under RCW 19.86.080(1) where the Attorney General has never brought "an action in the name of the state . . . against any person to restrain and prevent the doing any act [therein] prohibited to or declared to be unlawful."

6. Whether a Civil Investigative Demand is a non-self-enforcing subpoena that requires the state to seek a court order to compel compliance such that the subpoenaed person's right to contest enforcement cannot be forfeited by expiration of the 20-day time period in RCW 19.86.110(8).

IV. STATEMENT OF THE CASE

The Civil Investigative Demand (CID) is an extrajudicial prelitigation investigative tool routinely used by the Washington State Attorney General (AG) to compel persons to answer questions under oath and produce

documents when the AG suspects a person of committing violations of state law, including fraudulent misconduct that violates statutes such as the Consumer Protection Act (CPA) and the Medicaid False Claims Act.

The AG alleged that Brelvis engaged in deceptive acts, false promises and misrepresentations, and unfair business practices, including alleged violations of Washington state law. State's Response Brief at 21.

This is an appeal from a Thurston County Superior Court Order enforcing a CID issued by the AG. The CID required the answering of 12 compound interrogatories under oath as well as 13 requests for production of documents relating to alleged violations of the CPA by Brelvis and its sole managing member, owner, and manager, Bruce Mesnekoff.

Both in the Superior Court and in the Court of Appeals, the Petitioner raised objections to enforcement of the CID's interrogatories and requests for production based on state and federal constitutional, as well as state statutory, grounds, including the privilege against self-incrimination. On November 20, 2018, the Court of Appeals issued a published Opinion affirming the trial court's decision requiring "Brelvis to comply with the CID." Slip Op. at 23.

However, in a decision of first impression, the Court of Appeals concluded that "where the interrogatories propounded by the AG might tend to incriminate Mesnekoff in future criminal proceedings, the Fifth

Amendment privilege against self-incrimination permits Mesnekoff to refuse to answer official questions asked in the context of the CID." Slip Op. at 6.

The Court of Appeals nevertheless affirmed the trial court's order enforcing the CID, finding, *inter alia*, that the privilege against self-incrimination had not been properly invoked. Slip Op. at 11–12.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Summary of Reasons Why Review Should be Accepted Pursuant to RAP 13.4

The issues raised by this petition are "significant question[s] of law under the Constitution of the State of Washington [and] of the United States," RAP 13.4(b)(3), as well as "issue[s] of substantial public interest that should be determined by the Supreme Court," RAP 13.4(b)(4), because:

(1) The ubiquitous use of the CID procedures by the AG to investigate violations of state law makes this an important and recurring issue for judges and lawyers throughout Washington.[2]

[2] The State posits that dozens of loan adjustment companies have been brought to heel by use of the CID procedures (State's Response Brief at 4) and argues that recognition of the privilege against self-incrimination would "cripple" its power to investigate fraudulent practices (*Id*. at 25) and "have far-reaching, negative implications for numerous State regulators that conduct investigations" (*Id*. at 25) in areas other than student loan servicing such as "investigations into violations of the Medicaid Fraud False Claims Act (RCW 74.66.120) and investigations into violations of The Service Members Civil Relief Act (RCW 38.42.150)." (State's Response Brief at 25). In both examples, the State cites the specific statutory provisions that provide for use of the CID as the commonplace tool of investigation.

(2) In both the Superior Court and the Court of Appeals, the State has taken a position directly contrary to long-standing authority that the privilege against self-incrimination does not apply to a CID (which seeks to compel sworn answers intended to produce evidence of fraudulent misconduct) because of the State's characterization of this as a "civil investigation" and not a criminal case. [3] This suggests that authoritative guidance is needed from this Court on basic principles of constitutional law.

(3) The issues presented here are almost all issues of first impression in the Washington courts as well as issues of constitutional magnitude for which authoritative guidance for lower courts is critical.[4]

(4) The Court of Appeals Opinion in this case creates a conflict with established federal and state constitutional caselaw interpreting the

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3 *See, e.g.*, State's Response Brief at 1 ("Such [constitutional] objections fail to overcome the State's well-settled authority to issue demands for information in civil investigations conducted pursuant to the CPA."); 2 ("the State is conducting a civil investigation. . . ."); *id*. ("Brelvis Consulting repeatedly raises arguments rooted in criminal law, but based upon its designation as a civil investigative demand, the State's CID is a civil subpoena. . . . Thus, Brelvis Consulting's continued appeal to purported rights in criminal proceedings is futile."); 11 (stating that Mr. Mesnekoff does not have a "valid privilege against self-incrimination. . . . in this civil investigation"); 14 ("A corporate representative cannot seek an end run around the State's civil investigation of Brelvis Consulting and prevent the State from lawfully inspecting corporate records by hiding behind an. . . . unrecognized privilege against self-incrimination."); 16 ("Brelvis Consulting's. . . . assertion of the Fifth Amendment is not only improper, but odd given that the State's investigation is civil in nature. . . .").

4 Indeed, in this case, in his Order granting a stay, the experienced Superior Court Judge found that "the issues to be presented by the appeal are meritorious and debatable and that they may be issues of first impression." CP 354. But in the absence of any supporting Supreme Court authority, the trial judge agreed with the State's incorrect position that the CID did not implicate the constitutional privilege against self-incrimination, and granted the motion to compel compliance with the CID. RP 23–24. CP 171–173.

specificity and scope requirements for the assertion of the privilege against self-incrimination.

B. This Court Should Accept Review to Decide Whether the Constitutional Privilege Against Self-Incrimination Applies to Closely Held Entities as well as Individual Persons—in the Specific Context of the Enforcement of an Attorney General's Civil Investigative Demand—Where the Compelled Act of Production of the Entity's Documents Would Require the Company and Its Sole Owner/Manager to Admit Testimonial Facts Regarding the Existence, Authenticity, and Possession of Inculpatory Evidence and Would Incriminate the Sole Individual Custodian of those Records in his Personal and Individual Capacity, in Violation of the Fifth Amendment to the United States Constitution and Article 1, Section 9 of the Washington Constitution. [5]

This is an issue of first impression in Washington.

1. The Fifth Amendment to the U.S. Constitution

Citing *Braswell v. United States,* 487 U.S. 99, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988), the Court of Appeals agreed with the AG's assertion that the Fifth Amendment privilege against self-incrimination does not apply to protect a corporate custodian of records where the request for production is directed to an entity such as Brelvis, because an entity such as a corporation has no Fifth Amendment right to be free from self-incrimination. Slip Op. at 9–10. No Washington state court has ever before cited to *Braswell*, much less relied upon it.

[5] The merits of this issue are more fully discussed in the Court of Appeals briefing. *See* Brelvis's Opening Brief at 11–24; Brelvis's Reply Brief at 10–12; Brelvis's Motion for Reconsideration at 15–17.

Writing for the four-justice dissent in *Braswell*, Justice Kennedy argued that the collective entity rule, upon which the *Braswell* majority relied, should not prevent a corporate custodian from invoking the Fifth Amendment privilege to protect himself or herself individually from the incriminating effect of producing documents on behalf of the entity. Kennedy further concluded that the testimonial aspects implicit in the act of production of the documents constituted compelled testimony that violated the custodian's individual Fifth Amendment rights. *See Braswell*, 487 U.S. at 125–26 (Kennedy, J., dissenting).

Since *Braswell*, the legal landscape has tipped decidedly against the collective entity doctrine and in favor of recognition that corporations do have fundamental constitutional rights, particularly where failure to recognize the entity's rights jeopardizes the concomitant constitutional rights of the owners, shareholders, officers, and employees of the entity. [6]

[6] *See* Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?,* 2005 Colum. Bus. L. Rev. 1 (2005); Lila L. Inman, *Note, Personal Enough for Protection: The Fifth Amendment and Single-Member LLCs*, 58 Wm. & Mary L. Rev. 1067 (2017)(arguing for extension of Fifth Amendment rights against self-incrimination to single-member LLCs); Preston Burton, Bree Murphy, and Leslie Meredith, *The Arrival of Justice Gorsuch May Bring Opportunity to Reform the Collective Entity Doctrine*, Law Journal Newsletters, (May 11, 2018), http://www.lawjournalnewsletters.com/2017/06/01/the-arrival-of-justice-gorsuch-may-bring-opportunity-to-reform-the-collective-entity-doctrine/. (A copy of this article is attached in Appendix C for the Court's convenience.)

For example, in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), the Court invalidated a federal statute that restricted corporate campaign contributions because the statute violated a corporation's First Amendment right to free speech:

> The Court has recognized that First Amendment protection extends to corporations. . . . The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'

Id. at 342–43.

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), the Court extended the right of freedom of expression to corporations in order to protect the rights of the individual owners, officers, and employees of the corporate entity:

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being.

Id. at 706–07.

This Court should accept review, adopt the reasoning of Justice Kennedy in *Braswell*, reject the collective entity doctrine, and conclude that

the Fifth Amendment privilege applies to entities as well as individual persons in the specific context of the enforcement of a CID's request for production of documents by a closely held entity.

2. Article I, Section 9 of the Washington Constitution

This Court should also accept review to consider whether Article I, Section 9 of the state constitution provides broader protection than the Fifth Amendment.

This is an issue of first impression, as the Court of Appeals recognized: "No opinions have been cited to us holding whether article I, section 9 and the Fifth Amendment are co-extensive with respect to a CID." Order Granting Motion for Reconsideration and Amending Filed Opinion at 2.

All of the *Gunwall* [*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)] factors strongly support a holding that the state constitution extends broader rights than the federal constitution in this context: (1) & (2) the differences in the texts between the state and federal constitutions are significant and favor broader protection; (3) the constitutional history of Article 1, Section 9, relying on the common law, rather than the federal constitution, supports an independent interpretation; (4) existing state statutory law provides broader protection than the Fifth Amendment; (5) the state constitution limits powers of state government while the federal constitution grants powers to federal government, always favoring an

independent state interpretation; and (6) the particular issue—use of a CID to investigate potential violations of a peculiar state law concerning student loan debt servicing—is clearly a matter of local, and not national, concern.

Importantly, the Supreme Judicial Court of Massachusetts has rejected *Braswell*, adopted the reasoning of Justice Kennedy's dissent, and concluded that *Braswell*'s majority holding is a "fiction" incongruent with the Massachusetts state constitution:

> The Commonwealth contends that we should adopt the rule enunciated in *Braswell v. United States,* 487 U.S. 99, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988). In that case, the Supreme Court held that a custodian of corporate records cannot rely upon the Fifth Amendment privilege against self-incrimination. *Id.* 108 S.Ct. at 2295. The Court reasoned that the custodian acts only as a representative, and that his act, therefore, is deemed to be one of the corporation only and not an act of the individual. *Id.* **We decline to engage in such a fiction. The act of production is demanded *of the witness* and the possibility of self-incrimination is inherent in that act.** The witness's status as a representative does not alter the fact that in so far as he is a natural person he is entitled to the protection of art. 12. **It would be factually unsound to hold that requiring *the witness* to furnish corporate records, the act of which would incriminate him, is not *his act.*** As we said in *Emery's Case,* 107 Mass. 172, 181 (1871), "[i]f the disclosure . . . would be capable of being used against himself . . . such disclosure would be an accusation of himself, within the meaning of the constitutional provision." The same is true here when the witness's act of production would incriminate him. **His status as custodian of the corporation's records does not require that he lose his individual privilege under art. 12.**

Com. v. Doe, 405 Mass. 676, 679–80, 544 N.E.2d 860 (1989) (emphasis supplied). The Massachusetts constitutional provision at issue in *Doe* is

virtually identical to the Washington provision. Article 12 of the Massachusetts constitution states: "No subject shall be held to. . . . *furnish evidence against himself.*" Mass. Const. Pt. 1, art. XII, while Article 1, Section 9 of the Washington constitution states: "No person shall be compelled. . . . to *give evidence against himself*. . . ." Wash. Const. art. I, § 9. (emphasis supplied in each).

This Court should accept review, find that Article 1, Section 9 provides broader protection than the Fifth Amendment in the context of a CID, and adopt the holding in *Doe:* "Thus, we hold that the witness cannot be held in contempt for invoking his privilege under art. 12 in so far as the very act of production demanded of him is protected." *Doe*, 405 Mass. at 681.

C. This Court Should Accept Review to Resolve the Conflict Between the Court of Appeals Decision and Established Law Providing that the Privilege Against Self-Incrimination Is Properly Invoked Where It Is Readily Apparent that Truthful Answers to the Interrogatories Could Form a Link in the Chain of Evidence Needed to Support a Criminal Prosecution.

The AG accuses Brelvis and Mesnekoff of predatory behavior, obtaining money by making "false promises and misrepresentations," and engaging in "deceptive acts" and "unfair business practices," charging "exorbitant fees" for services otherwise offered for free, including alleged violations of Washington state law. State's Response Brief at 21.

If proved, these alleged facts could constitute a state crime. *See, e.g.*, RCW 9A.56.020 (1)(b) (Theft—Definition, defense) (prohibiting obtaining control over the property of another by color or aid of deception). If proved, these facts could also constitute a federal crime. *See, e.g.*, 18 U.S.C. §1343 (prohibiting participation in a scheme to defraud another person out of money or property by the use of interstate wire communications).

The Court of Appeals correctly concluded that Mesnekoff's constitutional privilege against self-incrimination includes the right to refuse to answer interrogatories propounded in "the context of the CID," but erroneously concluded that "neither Brelvis nor Mesnekoff properly invoked the Fifth Amendment privilege with regard to those interrogatories," Slip Op. at 12, because, in part, Brelvis and Mesnekoff "failed to explain how responding to those requests for production and interrogatories would be testimonial and incriminating." Slip Op. at 11.

The Court of Appeals here misapprehended the legal standard required to invoke the privilege against self-incrimination. It would not be much of a privilege against self-incrimination if one had to articulate to the government and the Court how one's truthful answers might incriminate oneself. It makes no common sense that one must incriminate oneself in order to invoke the privilege. It is, after all, the privilege ***against*** self-incrimination. To require one to articulate the incrimination to invoke the

privilege would defeat the interests the privilege is intended to protect. This is a principle well established in state and federal law:

> [I]n order to sustain a claim of Fifth Amendment privilege, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Hoffman v. United States, 341 U.S. 479, 486–87, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).[7]

It does not take much judicial imagination to conclude that truthful answers to the interrogatories in this case—which require disclosure of the specific details regarding Brelvis's alleged false promises and misrepresentations and deceptive business practices all allegedly conducted over the internet and telephone—"could furnish a link in the chain of evidence needed to prosecute [Brelvis and Mesnekoff] for a [state or] federal crime." *Hoffman*, 341 U.S. at 486–87.

This Court should accept review to resolve this conflict among the Court of Appeals and federal cases regarding the legal standard applicable to the invocation of the privilege against self-incrimination.

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[7] *Accord Seventh Elect Church in Israel v. Rogers*, 34 Wn. App. 105, 114, 660 P.2d 290 (1983) (*quoting Hoffman*, 341 U.S. at 486); *see Eastham v. Arndt*, 28 Wn. App. 524, 530–31, 624 P.2d 1159 (1981) (noting that one compelled to articulate the incriminating facts "will be forced to disclose those very facts which the privilege protects.").

D. This Court Should Accept Review to Decide Whether the Blanket Assertion Rule—Requiring a Question-by-Question Assertion of the Privilege Against Self-Incrimination—Applies where the Questions Posed and the Documents Demanded Are Fully Known Ahead of Time.[8]

This is an issue of first impression in Washington.

The Court of Appeals correctly concluded that Mesnekoff's constitutional privilege against self-incrimination includes the right to refuse to answer interrogatories propounded in "the context of the CID," Slip Op. at 6, but then affirmed the trial court,[9] finding that "neither Brelvis nor Mesnekoff properly invoked the Fifth Amendment privilege with regard to those interrogatories," Slip Op. at 12, because it was an improper blanket assertion of the privilege. Slip Op. at 11–12. The Court of Appeals misapprehended the scope of the blanket assertion rule.

The caselaw's rejection of the validity of a blanket assertion of the privilege applies only in the context of an unscripted interview, deposition, hearing with live testimony, or in the trial context. This is because the person being questioned in those contexts cannot know—and the trial judge assessing the validity of the assertion of the privilege cannot know—what

[8] The merits of this issue are more fully discussed in the Court of Appeals briefing. *See* Brelvis's Motion for Reconsideration at 10–15.

[9] Citing *Alsager v. Bd. of Osteopathic Med. & Surgery*, 196 Wn. App. 653, 384 P.3d 641 (2016), *review denied*, 187 Wn.2d 1026 (2017), and *cert. denied*, 138 S. Ct. 165, 199 L. Ed. 2d 40 (2017) and *State v. Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006).

the next question is going to be and cannot thus evaluate whether a truthful answer to the next question would be incriminating. The witness is therefore required to make an assertion of the privilege as to each question as it is asked. The trial judge can then be in a position to rule on the merits of the assertion of the privilege in the context of that particular question.

But this rationale does not apply—and the blanket privilege doctrine does not apply—if the questions are already scripted out ahead of time. If the questions are specifically scripted out ahead of time, then both the witness and the trial judge are in a position to assess the merits of an assertion of the privilege against self-incrimination. *United States v. Bright*, 596 F.3d 683, 691–692 (9th Cir. 2010).

The *Bright* court explained this rationale in the context of an IRS demand for documents similar to the discovery requests in the Brelvis case:

> The application of privilege to a document production is different from a blanket privilege claim at an interview. An unscripted interview is undefined, so a court cannot make a reasoned assessment of privilege before particular questions have been posed. . . . In contrast, a document request lays out categories of documents requested. A claim of privilege over all documents can be assessed as repeated assertions of privilege in response to each category. . . . The effect ... was as if the revenue agent had asked ... 'for each document listed in the summons, and the taxpayer had responded by repeatedly raising his fifth amendment privilege in response. The scope of the assertion is clear and circumscribed. Thus, although in the context of oral questioning a taxpayer has not fully litigated the privilege by issuing a general claim of privilege, the same cannot be said of a claim of privilege over documents.

Bright, 596 F.3d at 691–692 (citations, internal quotation marks omitted).

This same rationale applies when the questions—here interrogatories—are scripted out ahead of time. "A claim of privilege over all" the interrogatories "can be assessed as repeated assertions of the privilege in response to each" interrogatory. *Id*. "The scope of the assertion is clear and circumscribed." *Id*. *See State v. Delgado*, 105 Wn. App. 839, 18 P.3d 1141 (2001) (affirming a blanket assertion by the witness, explaining "rather than engaging in the useless exercise of requiring him to assert the privilege with respect to every question individually," the judge already knew what questions were going to be asked and reasonably determined that the witness intended to invoke the privilege as to each question. *Id.* at 845).[10]

Thus, the Court of Appeals's statement that a blanket assertion of the privilege is not proper or effective is a misapprehension of the law when it is applied in *this context*, *i.e.*, where the questions asked (interrogatories) and the specific documents requested are fully set forth ahead of time, resulting in a situation where "the scope of the assertion" of the privilege is "clear and circumscribed." *Bright*, 596 F.3d at 691–692.

[10] Thus, where a judge knows what questions are being asked and can reasonably anticipate what answers to expect from the witness, requiring that witness to assert the privilege for every question is a "useless exercise." *Id.* Written interrogatories provide both the deponent and the judge a crystal-clear expectation as to the questions being asked. The AG's factual allegations provide a sufficient preview of the expected answers to permit the trial court to rule on the assertion of the privilege.

E. This Court Should Accept Review to Decide Whether RCW 10.52.090 ("Incriminating Testimony Not To Be Used") Also Prohibits Compulsion of Answers to Interrogatories or the Production of Documents That Might Incriminate a Person, or Which Might Subject the Person to a "Penalty or Forfeiture," Unless the Compulsion Order Is Accompanied by a Concomitant Grant of Transactional Immunity.[11]

This is an issue of first impression in Washington.

Compelling compliance with this CID would also violate RCW 10.52.090, which prohibits a court from compelling the answering of questions *or* the production of papers or documents that might incriminate the person *or* which might subject the person "to a penalty or forfeiture," unless the compulsion order is accompanied by a concomitant grant of transactional immunity ("but he or she shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter, or thing concerning which he or she shall so testify").[12]

The Court of Appeals' suggestion—first surfaced in the Order on Reconsideration—that the limited use immunity provided in RCW 19.86.110(7)(b) resolves these issues reflects a further, and fundamental,

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[11] The merits of this issue are more fully discussed in the Court of Appeals briefing. *See* Brelvis's Opening Brief at 13–14, 21–24, 30–34; Brelvis's Reply Brief at 5–8, 13–16, 18–20.

[12] The State is unquestionably attempting to compel Mr. Mesnekoff and Brelvis to produce these "papers and documents" *in order to* "subject him. . . . to a penalty or forfeiture" for alleged violations of the Consumer Protection Act. Because the compulsion order failed to include a grant of transactional immunity, Mr. Mesnekoff's and Brelvis's statutory rights against self-incrimination were violated.

misunderstanding of the Fifth Amendment. RCW 19.86.110(7)(b) (evidence provided to federal and state law enforcement "may not be introduced as evidence in a criminal prosecution") does not provide the protection required by the Fifth Amendment, *see* 18 U.S.C. §6002 (prohibiting use of "any information directly or indirectly derived from such testimony or other information") and *Kastigar v. United States*, 406 U.S. 441, 453, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972) (Fifth Amendment requires use *and* derivative use immunity), or the protection provided by state law. *See* CrR 6.14 (providing for transactional immunity); RCW 10.52.090 (prohibiting compulsion of information subjecting one to incrimination *or* penalty or forfeiture absent transactional immunity).

F. This Court Should Accept Review to Decide Whether the Court of Appeals May Award Attorney Fees Under RCW 19.86.080(1) where the Attorney General Has Never Brought "An Action in the Name of the State. . . . Against Any Person to Restrain and Prevent the Doing Any Act [Therein] Prohibited to or Declared to Be Unlawful."[13]

This is an issue of first impression in Washington.

In Washington, the award of attorney's fees is generally disfavored absent specific statutory authority.[14] The Court of Appeals awarded fees

[13] The merits of this issue are more fully discussed in the Court of Appeals briefing. *See* Brelvis's Motion for Reconsideration at 20–23; Brelvis's Objections to Attorney's Fees and Costs at 1–3.

[14] *See City of Seattle v. McCready*, 131 Wn.2d 266, 274, 931 P.2d 156 (1997) (discussing Washington's adherence to the American rule in refusing to award attorney fees as costs or damages absent contract, statute, or one of four equitable exceptions).

pursuant to RCW 19.86.080(1), which provides that "[t]he attorney general may bring an action in the name of the state, ... against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee."

In this case, however, no such action "to restrain and prevent the doing of any act herein prohibited or declared to be unlawful" has been filed, and the State has most certainly not prevailed in any such action. There has been no determination by any judge or jury that Brelvis or Mr. Mesnekoff have committed any act prohibited or declared to be unlawful. This statute does not authorize the award of attorney's fees under these circumstances.

G. This Court Should Accept Review to Decide Whether a Civil Investigative Demand Is a Non-Self-Enforcing Subpoena That Requires the State to Seek a Court Order to Compel Compliance Such That the Subpoenaed Person's Right to Contest Enforcement Cannot Be Forfeited by Expiration of the 20-Day Time Period in RCW 19.86.110(8).[15]

This is an issue of first impression in Washington.

The trial court erroneously relied upon the 20-day time period set forth at RCW 19.86.110(8). *See* RP 24 ("[W]ithin twenty days after the demand has been served, ... a petition to. . . . set aside a [Civil Investigative]

[15] The merits of this issue are more fully discussed in the Court of Appeals briefing. *See* Brelvis's Opening Brief at 41–43; Brelvis's Reply Brief at 20–24.

[D]emand. . . . may be filed in the superior court. . . .") (*quoting* RCW 19.86.110(8)). The Court of Appeals declined to address this issue. Slip Op. 13. As set forth in the briefs, the trial court's reasoning contravenes settled authority and basic principles of statutory construction.[16]

VI. CONCLUSION

For all these reasons, and pursuant to RAP 13.4, Petitioner respectfully requests that this Court grant this Petition for Review. The Court of Appeals' published decision in this case impacts important constitutional rights and protections, resolves several new issues of first impression, and conflicts with established state and federal precedent. Given the broad impact of this decision, and the novel constitutional issues at stake, it should not be left to stand without review from this state's highest court.

Dated this 11th day of April 2019.

s/ Peter Offenbecher	s/ Cooper Offenbecher
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Attorneys for Petitioner	Attorneys for Petitioner

[16] First, under long-standing federal case law, administrative subpoenas are investigative subpoenas and are therefore *not* self-enforcing. *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1116 (9th Cir. 2012). This means that "[i]f the subpoenaed party fails to comply, the government must seek a court order compelling compliance." *Id.*

Second, by using the permissive "may" rather than the mandatory "shall," the Legislature has not *required* the subject of the CID to file a motion to quash, but rather only *permitted* such an action to be taken. *See, e.g.*, *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982), *amended*, 97 Wn.2d 701 (1983) ("[w]here a provision contains both the words 'shall' and 'may,' it is presumed that the lawmaker intended to distinguish between them, 'shall' being construed as mandatory and 'may' as permissive.").

VII. APPENDICES

A	Opinion (No. 50235-6-II)
B	Order Amending Opinion (No. 50235-6-II)
C	*The Arrival of Justice Gorsuch May Bring Opportunity to Reform the Collective Entity Doctrine* Law Journal Newsletters (May 11, 2018)
D	Civil Investigative Demand
E	RAP 13.4 Discretionary Review of Decision Terminating Review
F	United States Constitution, Amendment 5
G	Washington State Constitution, Article 1, Section 9
H	RCW 9A.56.020 Theft—Definition, defense
I	18 U.S.C. §1343 Fraud by wire, radio, or television
J	RCW 10.52.090 Incriminating testimony not to be used
K	RCW 19.86.110 Demand to produce documentary materials for inspection, answer written interrogatories, or give oral testimony—Contents—Service—Unauthorized disclosure—Return—Modification, vacation—Use—Penalty
L	18 U.S.C. §6002 Immunity generally
M	CrR 6.14 Immunity
N	RCW 19.86.080 Attorney general may restrain prohibited acts—Costs—Restoration of property

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

November 20, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRELVIS CONSULTING LLC, Appellant.	No. 50235-6-II PUBLISHED OPINION

BJORGEN, J. — Brelvis Consulting LLC (Brelvis) appeals from the superior court's order requiring it to comply with the civil investigative demand (CID) issued and served on Brelvis by the Attorney General's Office (AGO) pursuant to RCW 19.86.110. Brelvis argues that the superior court erred by compelling it to comply with the CID because it violates Brelvis' (1) right against self-incrimination, (2) right against intrusion into its private affairs, and (3) right against unreasonable search and seizure. Brelvis also argues that the CID is directed at the managing member of Brelvis, Bruce Mesnekoff, in his personal capacity.

We hold that the superior court properly required Brelvis to comply with the CID and consequently affirm its decision.

FACTS

On August 3, 2016, the AGO received a complaint regarding an entity known as the Student Loan Help Center LLC. Although the complaint identified the "National Student Loan Help Center" as its subject, it included an Internet address for the "Student Loan Help Center." Clerk's Papers (CP) at 159-60. The complaint also included a link to the Better Business Bureau's (BBB) Internet complaint page regarding the Student Loan Help Center. The BBB webpage for the Student Loan Help Center included the following information:

> Pattern of Complaints
>
> BBB files indicate that The Student Loan Help Center has a pattern of complaints stating that the business does not consolidate loans after the consumer pays an initial fee. Complaints further show that consumers['] request for refunds go unanswered by the business.
>
> In September 2014, July 2015, and December 2016, BBB sent a request to The Student Loan Help Center to address this pattern and what actions the business has taken to help eliminate the causes of complaints. As of today's date, BBB has not received a response from the business.

CP at 164.

The Student Loan Help Center also does business under the name Brelvis Consulting LLC. Mesnekoff owns and operates Brelvis and is its registered agent. On October 21, the AGO sent a CID to Brelvis pursuant to RCW 19.86.110 as part of its investigation into whether Brelvis had engaged in unfair or deceptive business practices in violation of RCW 19.86.020.[1] The CID was addressed to Brelvis, in care of Mesnekoff. The AGO's investigation related to possible misrepresentations about student loan forgiveness and other possible violations of Washington's Debt Adjusting Act, chapter 18.28 RCW, and Consumer Protection Act, chapter 19.86 RCW,

[1] RCW 19.86.020 states, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

based on the August 3 complaint. The CID included 12 interrogatories and 13 requests for production. The CID requested several categories of documents and responses from Brelvis regarding matters such as advertisements, payment records, customer complaints, client intake and communication records, and other information about Brelvis' business, its employees, and any litigation against the company.

On November 22, counsel for Brelvis contacted the AGO requesting additional time to respond to the CID. On December 29, after multiple e-mail communications, the AGO informed Brelvis that if it did not respond to the CID by January 5, 2017, the AGO would file a motion to enforce the CID. Brelvis retained new counsel who, on January 12, e-mailed the AGO requesting additional time to respond to the CID. Then, on January 27, counsel informed the AGO that Brelvis was again seeking new counsel with regard to the CID. On January 30, the new counsel for Brelvis contacted the AGO to confirm that it had taken over representation for Brelvis. On February 3, the AGO told Brelvis that it would give it until February 10 to respond to the CID. Brelvis did not respond to the interrogatories and requests for production.

On February 14, the AGO filed a petition to enforce the CID, which the superior court granted. Brelvis filed a motion for reconsideration of the order enforcing the CID, which the superior court denied. Brelvis appealed both the superior court's order enforcing the CID and its order denying reconsideration to our court. On April 21, Brelvis filed a motion to stay the superior court's March 24 order, which the superior court granted.

ANALYSIS

Brelvis argues that the superior court's order compelling compliance with the CID is erroneous because it violates Brelvis' (1) right against self-incrimination, (2) right against unlawful intrusion into its private affairs, and (3) right against unreasonable search and seizure. We disagree.

I. SCOPE OF CID

As an initial matter, Brelvis argues that Mesnekoff's individual rights against self-incrimination, unlawful intrusion into his private affairs, and unreasonable search and seizure are implicated. We disagree.

The CID noted that it was directed to "Brelvis Consulting LLC" and to Mesnekoff as its registered agent for service. CP at 18. The interrogatories and requests for production defined "You," "Your," and "Brelvis" as referring to Brelvis Consulting LLC, including any principals, owners, employees, officers, agents, and "any other persons or entities acting on behalf of or under the direction, authorization or control of Brelvis." CP at 18, 20. Brelvis argues that because the definition of "You," "Your," and "Brelvis" encompasses Mesnekoff, "the CID applies to him personally." Reply Br. of Appellant at 10-11. Brelvis asserts that

> [t]he plain language of the CID equates Mr. Mesnekoff individually and personally with the word "Brelvis." Mr. Mesnekoff is therefore required by the terms of this CID to answer the interrogatories under oath.

Reply Br. of Appellant at 11. Brelvis also argues that Mesnekoff is personally implicated because the CID was addressed to Brelvis in care of him.

A corporation is "artificial, invisible, intangible," and it exists only in law. *Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 76-77, 265 P.3d 956 (2011); *Broyles v. Thurston County*, 147 Wn. App. 409, 428, 195 P.3d 985 (2008). Our case law recognizes that

> [t]he invisible, intangible object of our legal contemplation cannot answer discovery or be effectively sanctioned if it does not. By necessity it acts through its officers, directors, employees, and other agents. As with a corporation's duties in every other sphere in which it operates, it is the corporate officers, directors, and other agents who must discharge its duties in a lawsuit.

Diaz, 165 Wn. App. at 76-77 (internal citation omitted). Further, a "'corporation exists as an organization distinct from . . . its shareholders.'" *State v. Chase*, 1 Wn. App. 2d 799, 805, 407 P.3d 1178 (2017), *review denied*, 190 Wn.2d 1024 (2018) (quoting *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 552, 599 P.2d 1271 (1979)). Accordingly, corporations acting through corporate officers and corporate officers acting in their personal capacity "maintain distinct legal obligations and interests." *Id*. A corporation's separate legal identity is not lost because it is owned by one person or members of a single family. *Id*.

Brelvis' claim that the CID targets Mesnekoff in his personal capacity is belied by case law and the record. The United States Supreme Court has held that

> without regard to whether the subpoena is addressed to the corporation, or as here, to the individual in his capacity as a custodian, . . . a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds.

Braswell v. United States, 487 U.S. 99, 108-09, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988) (internal citations omitted).[2] Nevertheless, the "privilege against self-incrimination includes the right of a witness not to give incriminatory answers in any proceeding—civil or criminal,

[2] We note that *Braswell* also stated,

> We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.

Braswell, 487 U.S. at 118, n.11. However, it was not briefed and argued whether this open question should be resolved by deviating from *Braswell*'s holding for LLCs with a single member.

administrative or judicial, investigatory or adjudicatory." *Eastham v. Arndt*, 28 Wn. App. 524, 527, 624 P.2d 1159 (1981) (citing *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)).

Thus, Mesnekoff, in his capacity as Brelvis' custodian, may not resist a request for production of Brelvis' records on Fifth Amendment grounds. *See Braswell*, 487 U.S. at 108-09. However, where the interrogatories propounded by the AGO might tend to incriminate Mesnekoff in future criminal proceedings, the Fifth Amendment privilege against self-incrimination permits Mesnekoff to refuse to answer official questions asked in the context of the CID. *See King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 351, 16 P.3d 45 (2000), which held that the "Fifth Amendment privilege permits a person to refuse to testify at a criminal trial, or to refuse to answer official questions asked in any other proceeding, where the answer might tend to incriminate him or her in future criminal proceedings."

For these reasons, we limit our review to Brelvis' assignments of error as they apply to Brelvis, and we also address whether Mesnekoff properly invoked his Fifth Amendment privilege against self-incrimination.

II. General Legal Standards

We review constitutional issues de novo. *City of Seattle v. Evans*, 184 Wn.2d 856, 861, 366 P.3d 906 (2015), *cert. denied*, 137 S. Ct. 474 (2016). We also review issues of statutory interpretation de novo. *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012). Our fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Id*. If a statute's meaning is plain on its face, then we give effect to that plain meaning as an expression of legislative intent. *Id*. at 594. We discern plain meaning not only from the provision in question, but also from closely related statutes. *Id*. "[W]e will not

read additional language into a statute that the legislature did not write." *Killian v. Seattle Pub. Sch.*, 189 Wn.2d 447, 459, 403 P.3d 58 (2017). We do not interpret a statute such that it renders any portion meaningless or superfluous. *Jongeward*, 174 Wn.2d at 601.

III. PRIVILEGE AGAINST SELF-INCRIMINATION

A. Legal Standards

The Fifth Amendment to the United States Constitution states, in part, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST., amend. V. Similarly, article I, section 9 of the Washington constitution provides, "No person shall be compelled in any criminal case to give evidence against himself." WASH. CONST., art. I, § 9. Article I, section 9 provides the same protection as the Fifth Amendment. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

A person who seeks to prevent disclosure of evidence under the privilege against self-incrimination must show that the evidence is (1) compelled, (2) testimonial, and (3) incriminatory. *United States v. Hubbell*, 530 U.S. 27, 34-38, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000). Whether an act of production is testimonial in this regard is a fact-intensive determination. *In re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905, 909 (9th Cir. 2004).

Generally, "a person must invoke the Fifth Amendment protections in order for them to apply." *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995). A person may invoke the privilege against self-incrimination under the Fifth Amendment when that person is compelled to provide testimonial evidence that may be incriminating. *Hubbell*, 530 U.S. at 34-35. Although both constitutional provisions refer to criminal cases, one may assert the privilege against self-

incrimination in any proceeding. *Alsager v. Bd. of Osteopathic Med. & Surgery*, 196 Wn. App. 653, 664, 668-69, 384 P.3d 641 (2016), *cert. denied*, 138 S. Ct. 165 (2017).

A "party in a civil proceeding need not answer questions 'where the answer might incriminate him in future criminal proceedings.'" *Alsager*, 196 Wn. App. at 668 (quoting *State v. King*, 130 Wn.2d 517, 524, 925 P.2d 606 (1996)). Further,

> "[t]he privilege [against self-incrimination] not only extends to answers that would in themselves support a conviction under a . . . criminal statute but likewise embraces those [answers] which would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime."

Eastham, 28 Wn. App. at 528 (alterations in original) (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)). In a civil proceeding, however, "the right against testifying 'necessarily attaches only to the question being asked and the information sought by that particular question.'" *Alsager*, 196 Wn. App. at 668-69 (quoting *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000)); *State v. Hobble*, 126 Wn.2d 283, 289-90, 892 P.2d 85 (1995).

B. Article I, Section 9—*Gunwall* Analysis

Brelvis argues that we must engage in an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), to determine if article I, section 9 of the Washington Constitution provides greater protections than the Fifth Amendment in the context of a corporation invoking the right against self-incrimination. We disagree.

Washington courts have already determined that article I, section 9 provides the same protection as the Fifth Amendment. *Easter*, 130 Wn.2d at 235-36; *State v. Russell*, 125 Wn.2d 24, 57-58, 882 P.2d 747 (1994); *State v. Mecca Twin Theater & Film Exch., Inc.*, 82 Wn.2d 87, 91, 507 P.2d 1165 (1973); *State v. Terry*, 181 Wn. App. 880, 889, 328 P.3d 932 (2014).

Accordingly, a *Gunwall* analysis is unnecessary. We analyze Brelvis' self-incrimination arguments only under the Fifth Amendment.

C. Invocation of the Privilege Against Self-Incrimination

Brelvis claims that the superior court erred in granting the AGO's motion to enforce the CID because it violates Brelvis' constitutional privilege against self-incrimination. Brelvis also contends that both individuals and entities can properly invoke the privilege against incrimination.

1. Brelvis' Privilege Against Self-Incrimination

Brelvis contends that the privilege against self-incrimination applies generally to both individuals and entities. We disagree.

Both state and federal courts have determined that corporate[3] defendants "cannot claim a Fifth Amendment privilege with regard to corporate records." *United States v. Blackman*, 72 F.3d 1418, 1426 (9th Cir. 1995). More broadly, in *Braswell*, the Supreme Court held that "it is well established that . . . artificial entities are not protected by the Fifth Amendment." 487 U.S. at 102; *accord, Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 134 F. Supp. 3d 1199, 1202 (N.D. Cal. 2015) ("Case law is dispositive that the corporate defendants may not assert Fifth Amendment rights."). Washington case law mirrors these holdings. In *Diaz*, 165 Wn. App. at 74, the court held it was well settled that a corporation does not have a Fifth Amendment privilege; and in *Mecca*, 82 Wn.2d at 91, our state Supreme Court held that neither corporations nor corporate officers acting on behalf of the corporations are protected by the constitutional privilege against self-incrimination.

[3] Here and at other points in the Analysis, we cite case law dealing with corporations. Brelvis is a limited liability company (LLC). No party argues that we should not rely on otherwise relevant case law applying to corporations in deciding the issues raised in this appeal.

Brelvis contends that other case law has eroded these holdings. Citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), and *Commonwealth v. Doe*, 405 Mass. 676, 679, 544 N.E.2d 860 (1989), Brelvis argues that the privilege against self-incrimination may be invoked by corporate officers acting on behalf of the corporation. However, neither *Hobby Lobby* nor *Doe* support this proposition.

In *Hobby Lobby*, the United States Supreme Court held that corporations were "persons" for the purpose of the application of the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb, but did not purport to expand or alter a corporation's rights under the Fifth Amendment. *Hobby Lobby*, 134 S. Ct. 2768-69. More pointedly, *Hobby Lobby* did not abandon or alter the Supreme Court's holding in *Braswell* that artificial entities such as corporations "are not protected by the Fifth Amendment." 487 U.S. at 102.

Doe, on the other hand, addressed the individual rights of a records custodian, not the rights of a corporation to assert a right against self-incrimination. 405 Mass. at 679 n.4. The court stated flatly that it did not "reach the issue whether a corporation has art[icle] XII rights [rights against self-incrimination]." *Id.* at 679. Even if we were inclined to follow Massachusetts law, it would not serve Brelvis' case.

Finally, Brelvis points out that *Braswell* has never been cited by a Washington State court. That may be true, but allowing a state court to disregard established Supreme Court precedent simply by not citing it would leave little of the Supremacy Clause, U.S. CONST., art. VI, cl. 2. This invitation we decline.

Under established case law, a corporate entity does not enjoy a constitutional privilege against self-incrimination, and its officers and agents may not invoke that privilege on its behalf.

2. Proper Invocation of the Right Against Self-Incrimination

Brelvis argues that it properly invoked its right against self-incrimination because the answers to interrogatories were testimonial and Mesnekoff could have been personally incriminated. Even if we assume that the answers to the CID were testimonial and that Brelvis was able to invoke a right against self-incrimination, Brelvis failed to properly invoke its right.

The right against self-incrimination must be invoked "through specific, individual objections, not by invoking blanket constitutional protection to avoid participating in the proceedings." *Alsager*, 196 Wn. App. at 668. Our Supreme Court has explained that in order to invoke the privilege against self-incrimination, "the danger of incrimination must be substantial and real, not merely speculative." *Hobble*, 126 Wn.2d at 290. A "witness cannot establish the privilege [against self-incrimination] merely by making a 'blanket declaration . . . that he cannot testify for fear of self-incrimination.'" *State v. Levy*, 156 Wn.2d 709, 732, 132 P.3d 1076 (2006) (alterations in original) (quoting *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975)). A witness who does not assert the privilege against self-incrimination as to specific topics or requests does "not properly invoke it as to matters potentially related to criminal liability." *Alsager*, 196 Wn. App. at 669.

Brelvis failed to produce any responsive documents. Brelvis and Mesnekoff also failed to properly object to the CID, including its requests for production and interrogatories, and failed to explain how responding to those requests for production and interrogatories would be testimonial and incriminating. Blanket assertions of privilege are insufficient to invoke the Fifth Amendment protections. *Levy*, 156 Wn.2d at 732; *Alsager*, 196 Wn. App. at 668. As stated above, Mesnekoff, in his capacity as Brelvis' custodian, may not resist a request for production of records on Fifth Amendment grounds. *See Braswell*, 487 U.S. at 108-09. Furthermore, even

assuming that interrogatories in the CID might tend to incriminate Mesnekoff in his individual capacity, neither Brelvis nor Mesnekoff properly invoked the Fifth Amendment privilege with regard to those interrogatories. Accordingly, this argument fails.

D. RCW 10.52.090

Brelvis argues that the superior court erred by ordering it to comply with the CID because, without a grant of immunity, compliance with the CID would violate RCW 10.52.090. We disagree.

First, as discussed above, Brelvis has not validly asserted any privilege protecting it from the CID. Second, RCW 10.52.090 does not apply to the CID.

RCW 10.52.090 states:

> In every case where it is provided in this act that a witness shall not be excused from giving testimony tending to criminate himself or herself, no person shall be excused from testifying or producing any papers or documents on the ground that his or her testimony may tend to criminate or subject him or her to a penalty or forfeiture; but he or she shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter or thing concerning which he or she shall so testify, except for perjury or offering false evidence committed in such testimony.

The reviser's note to RCW 10.52.090 refers to the note following RCW 9.01.120 for the definition of "this act." The note following RCW 9.01.120, in turn, states that "this act" includes various titles and sections, including former RCW 19.60.010 (2011), RCW 19.60.025, .040, .042, .045 and .050, former RCW 19.60.055 (1991), and RWC 19.60.057 and .060, which address pawnbrokers and secondhand dealers. "This act," however, does not include RCW 19.86.110 or RCW 19.86.020. RCW 9.01.120 reviser's notes.

The AGO sent a CID to Brelvis pursuant to RCW 19.86.110 as part of its investigation into whether Brelvis had violated RCW 19.86.020. Based on the plain language of RCW

10.52.090 and the scope of its reference to "this act" in the reviser's notes, RCW 10.52.090 does not apply to the AGO's investigation under chapter 19.86 RCW.[4] Thus, Brelvis' argument fails.

E. RCW 19.86.110(8)

Brelvis argues that the superior court erred in relying in part on Brelvis' failure to file a petition to modify or set aside the CID within the 20-day time period set forth in RCW 19.86.110(8). At the March 24, 2017 hearing, the superior court explained:

> The Court finds that the request for discovery being sought by the State [via the CID] does not implicate or constitute an unreasonable search under either the Fourth Amendment, the Fifth Amendment, Article I, Subsection 7 of the State Constitution.
>
> The Court finds that the definition of "person" as it applies to this particular statute includes the Respondent, Brelvis Consulting, LLC. The Court finds that the Respondent did not move to set aside the [CID] within 20 days, as is required by the statute. The Court grants the motion of [the] State of Washington.

Verbatim Report of Proceedings (Mar. 24, 2017) at 24.

Assuming, without deciding, that the superior court erred in relying on Brelvis' failure to meet the 20-day deadline, it is of no moment to this appeal. Even without that ground, the CID survives Brelvis' challenges to it, as shown by this opinion.

IV. ARTICLE I, SECTION 7

Brelvis argues that the requirement to comply with the CID is an unconstitutional intrusion into private affairs without authority of law under article I, section 7 of the Washington Constitution. Article I, section 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Our analysis of an issue under article I, section 7 consists of two components. *State v. Reeder*, 184 Wn.2d 805, 814, 365 P.3d 1243 (2015). First,

[4] The AGO's interrogatory number 11 references RCW 18.28, 19.134, 19.86, and 19.190. "[T]his act" does not include those chapters. RCW 9.01.120 reviser's notes.

we consider whether a private affair has been disturbed. *Id.* Second, we consider whether the disturbance was justified by authority of law. *Id.*

A. Private Affair

1. Brelvis

Brelvis argues that its business records are private affairs that are subject to protection under article I, section 7.

As a threshold issue, the AGO apparently takes the position that the protections of article I, section 7 are limited to Washington citizens. This reading is supported by the definition of "private affairs" as those "'interests which *citizens* of this state have held, and should be entitled to hold, safe from government trespass.'" *State v. Jorden*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007) (emphasis added) (quoting *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997)).

As noted, however, article I, section 7 states, "No *person* shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I § 7 (emphasis added). To reduce the scope of the provision to Washington citizens on the basis of this statement from *Jorden* and *Maxfield* would be to significantly confine its reach in reliance on cases which did not analyze that potentially significant a change. In addition, *Jorden*'s reference to "citizens" can be harmonized with the use of "person" in article I, section 7. The constitutional guarantee would extend to all persons within the state of Washington, while the determination of what counts as a private affair would look to interests the state's citizens have held and should be entitled to hold safe from government trespass. For these reasons, we decline any suggestion that the shield of article I, section 7 is limited to state citizens.

Alternatively, if article I, section 7 were confined to state citizens, Brelvis would fall outside its scope and its claims under article I, section 7 would fail for that reason. In *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1014, 194 L. Ed. 2d 71 (2016), the Court held that a real estate investment trust takes the citizenship of its members for purposes of diversity jurisdiction. In reaching this conclusion the court noted that *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497, 558, 11 L. Ed. 353 (1844), held that for diversity jurisdiction a corporation is a citizen of the state it is created by and doing business in.

A rule that corporations are citizens for diversity purposes, though, does not travel well into other settings. First, the general legal definition of "citizen" does not include corporations and other business entities. *Black's Law Dictionary* 298 (10th ed. 2014) defines "citizen" as

> 1. Someone who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges.

Neither a corporation, limited liability company, nor similar entity is born or naturalized. Therefore, none of these entities are citizens under this general definition. *Black's Law Dictionary* does recognize the diversity exception to this rule in its second definition of "citizen":

> 2. For diversity-jurisdiction purposes, a corporation that was incorporated within a state or has its principal place of business there. 28 USCA § 1332(c)(1).

Id. This recognition of corporate citizenship in federal diversity jurisdiction only highlights the exclusion of these business entities from the class of citizens generally.

Second, the Privileges and Immunities Clause of our state constitution treats citizens and corporations as separate categories. That clause states:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

WASH. CONST. art. I § 12. In *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 807-08, 83 P.3d 419 (2004), our Supreme Court described the background of the clause:

> Article I, section 12 of the Washington State Constitution was modeled after article I, section 20 of the Oregon State Constitution. . . .
>
> The Washington provision differs from that of the Oregon provision only in that the Washington provision added a reference to corporations, which our framers perceived as manipulating the lawmaking process. Thompson, 69 Temp. L.Rev. at 1253. Washington's addition of the reference to corporations demonstrates that our framers were concerned with undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority.

The separate listing of "citizen" and "corporation" in the state Privileges and Immunities Clause shows that each were viewed as discrete categories by the framers. To view "corporation" as a subcategory of "citizen" would make the former superfluous in the constitution, a result the court is to avoid in interpretation. *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 811, 982 P.2d 611 (1999). This conclusion is buttressed by the fact that "corporation" was specifically added by the framers of the Washington Constitution to guard against "undue political influence exercised by those with large concentrations of wealth." *Grant County*, 150 Wn.2d at 808. The framers acted deliberately in treating "citizen" and "corporation" as different categories.

This authority counsels that corporate entities should not be deemed state citizens for purposes of article I, section 7. Thus, if article I, section 7 applies only to state citizens, Brelvis would not be protected by this provision.

We conclude above, however, that article I, section 7 is not confined to state citizens, but

rather applies to "persons." Assuming that Brelvis is a person for these purposes, we next address whether governmental conduct, in this case the CID, intrudes on a private affair. To answer that question, courts look at "'the nature and extent of the information which may be obtained as a result of the government conduct' and at the historical treatment of the interest asserted." *State v. Hinton*, 179 Wn.2d 862, 869, 319 P.3d 9 (2014) (quoting *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007)).

In *Miles*, a state agency issued an administrative subpoena for the bank records of an individual suspected of securities fraud. In striking down the subpoena under article I, section 7, the court explained that its holding in *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990), that an individual's garbage bags count as private affairs was based, in part, on the observation that "garbage bags could include sensitive information about business records, bills, correspondence, tax records, and so on." *Miles*, 160 Wn.2d at 245. The court then held that personal banking records are private affairs under the state constitution because business records, bills, and financial records could reveal "sensitive personal information, such as 'where the person has travelled, the person's reading habits, and the person's financial condition.'" *Chase*, 1 Wn. App. 2d at 804 (quoting *Reeder*, 184 Wn.2d at 244). A corporation's business records, however, are distinct from personal records. *Id.* at 805.

Each of these types of information is the sort of thing that would be sensitive personal information for a natural person, but not for a legal abstraction like a corporation or LLC. *See id.* at 804-05 The CID requested information exclusively regarding Brelvis' business practices. The information sought would not reveal potentially sensitive personal information of any individuals and does not meet the standard for a private affair under article I, section 7.

For these reasons, Brelvis' business records are not protected under article I, section 7 of the Washington Constitution.

2. Mesnekoff

Brelvis contends that Mesnekoff can also assert a privacy interest in Brelvis' business records as a member and manager of Brelvis. Division One of our court recently rejected a similar argument in *Chase*, 1 Wn. App. 2d at 799. In *Chase*, the defendant, a shareholder and principal officer in a corporation, attempted to assert a privacy interest in the corporations' banking records. 1 Wn. App. 2d at 801-02. The court determined that the defendant could not assert a privacy interest in the corporation's banking records because those records have not been historically considered part of a shareholder or officer's private affairs and "a corporation's financial transactions do not reveal sufficiently sensitive information about a person's personal contacts and associations." *Id*. at 807. Therefore, Mesnekoff does not have a personal privacy interest in Brelvis' business records under article I, section 7.

With these conclusions, it is unnecessary to examine the second component in analyzing claims under article I, section 7: whether the disturbance was justified by authority of law. However that may be resolved, the CID did not violate this constitutional provision.

V. FOURTH AMENDMENT

Brelvis also maintains that the CID constituted an unreasonable search under the Fourth Amendment. We disagree.

In *Steele v. State ex rel Gorton*, our Supreme Court considered whether a CID issued to a corporation pursuant to RCW 19.86.110 was reasonable in the context of the Fourth Amendment. 85 Wn.2d 585, 537 P.2d 782 (1975). In *Steele*, the AGO issued a CID to an

employment agency as part of an investigation into unfair or deceptive practices. It requested records related to

> services rendered to applicants for employment; the manner of payment agreed upon by the applicant and respondent; training materials and manuals supplied by the franchisor to the respondent; applications for employment that had been placed in the inactive file in the past year; refunds to applicants or fee adjustments; certain pleadings filed in courts of record of this State in which respondent was a party; certain contracts between respondent and lending or financial institutions; and certain advertisements for employment placed by the agency in local newspapers.

Id. at 587.

The court observed that:

> [W]e start with the well-established proposition that although corporations and businesses are protected by the Fourth Amendment, . . . the privacy of their books and records is not as stringently protected as is that of the privacy of individuals. Indeed, both in England and in the United States, corporations and businesses historically have been subject to wide investigative powers.

Id. at 592-93 (citations omitted). The court explained that the test

> for determining the reasonableness of a subpoena . . . or similar order . . . requires that (1) the inquiry is within the authority of the agency; (2) the demand is not too indefinite, and (3) the information sought is reasonably relevant [to the purpose of the subpoena].

Id. at 594.

Considering the first factor, the court stated, "[T]here is no question but that RCW 19.86.080 and RCW 19.86.110(1) accord to the Attorney General power to investigate possible unfair or deceptive practices." *Id*. at 594. Turning to the second factor, the court determined that the demand was not impermissibly indefinite because "[t]here was no general or [undiscriminating] request for all business records. Rather, the types of records and information sought were in all instances explained with reasonable clarity" and were limited to records less than three years old. *Id*. Finally, the court concluded that the information was reasonably relevant to the investigation because "the requested information was directed at ascertaining the

manner in which the [agency] filled supposed job openings and dealt with applicants seeking employment." *Id*. at 595.

After considering the three factors, the Supreme Court concluded:

> Therefore, by application of the three-prong test . . . we are convinced that the instance [CID] did not violate the prohibitions of the Fourth Amendment. Situations could, of course, arise where the Attorney General arbitrarily serves a [CID] upon a business. . . . But the record in the instant case discloses that the Attorney General did not act arbitrarily in instituting the investigation. On the contrary, the record discloses that an adequate foundation for the investigation existed since the Attorney General had received various complaints with respect to the operation of the employment agency.

Id. We now examine the present CID under the test in *Steele*.

B. Authority of the Agency

The AGO issued a CID to Brelvis as part of its investigation into whether Brelvis had engaged in unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce under RCW 19.86.020. Specifically, the AGO was investigating whether Brelvis made misrepresentations about student loan forgiveness and committed other violations of Washington's Debt Adjusting Act, chapter 18.28 RCW, and Consumer Protection Act, chapter 19.86 RCW. Our Supreme Court has held that "there is no question but that RCW 19.86.080 and RCW 19.86.110(1) accord to the Attorney General power to investigate possible unfair or deceptive practices." *Steele*, 85 Wn.2d at 594. Therefore, the AGO had the authority to investigate whether Brelvis engaged in possible unfair or deceptive business practices.

C. Definiteness of Demand

The CID requested several categories of documents and contained interrogatories regarding matters such as advertisements, payment records, customer complaints, client intake and communication records, and other information about Brelvis' business, its employees, and litigation against the company. The CID requested customer information related only to

Washington consumers, rather than all of Brelvis' clients. The United States Supreme Court has approved broad categorical requests pursuant to a subpoena. *See, e.g., McPhaul v. United States*, 364 U.S. 372, 374, 81 S. Ct. 138, 5 L. Ed. 2d 136 (1960) (approving a subpoena for all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the entity). The CID issued to Brelvis was properly focused and definite.

D. Relevance of Information Sought

As described above, the CID requested several categories of documents and contained interrogatories covering matters such as advertisements, payment records, customer complaints, client intake, communication records, Brelvis' employees, and litigation against the company. The CID requested customer information related only to Washington consumers, rather than all of Brelvis' clients. All of the information requested in the CID is reasonably relevant to the AGO's investigation into possible misrepresentations regarding student loan forgiveness and other unfair methods of competition or unfair or deceptive acts by Brelvis.

E. Not Issued Arbitrarily

Brelvis argues that the AGO arbitrarily issued its CID because it did not have an adequate foundation of complaints to initiate its investigation. As part of this argument, Brelvis asserts that the AGO improperly conflated the Student Loan Help Center, a name under which Brelvis does business, with the National Student Loan Help Center. We disagree.

"[T]he primary purpose of the Fourth Amendment is to protect the privacy of an individual from arbitrary intrusions by government officials." *State v. Smith*, 88 Wn.2d 127, 140, 559 P.2d 970 (1977). "Arbitrary" is generally defined as "relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or

procedures." BLACK'S LAW DICTIONARY 125 (10th ed. 2014). In *Steele*, our Supreme Court recognized that situations could "arise where the Attorney General arbitrarily serves a civil investigative demand upon a business." 85 Wn.2d at 595.

Here, though, the record shows that the AGO did not act arbitrarily in instituting the investigation. The AGO relied on the August 3, 2016 complaint in issuing the CID. Although the complaint identified the National Student Loan Help Center as its subject, it also included an Internet address for the Student Loan Help Center and a link to the BBB's Internet complaint page regarding the Student Loan Help Center. Therefore, the AGO could have reasonably interpreted the August 3 complaint to pertain to Brelvis, doing business as the Student Loan Help Center. More importantly, the BBB page clearly relates to Brelvis and describes a "pattern of complaints" regarding Brelvis' failure to consolidate loans and respond to customer requests for refunds. CP at 164. Therefore, the AGO had an adequate foundation to initiate its investigation and did not act arbitrarily in doing so.

With this, the *Steele* test has been satisfied, and issuance of the CID did not violate Brelvis' rights under the Fourth Amendment.

VI. APPELLATE FEES AND COSTS

The AGO asks that we award the State attorney fees on appeal under RAP 18.1(a). RAP 18.1(a) allows a party to recover fees on appeal "if applicable law grants a party the right to recover reasonable attorney fees or expenses." RCW 19.86.080(1) states,

> The attorney general may bring an action in the name of the state . . . against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

In the present case, the State asks the court to enforce the CID. Under RCW 19.86.110(5)(a) and (b), one receiving a CID must produce documentary material demanded and

answer interrogatories subject to restrictions. Brelvis did not produce documents or answer interrogatories in response to a CID we have determined to be valid. Thus, the present case is an action "to restrain and prevent the doing of any act herein prohibited or declared to be unlawful" under RCW 19.86.080(1). Therefore, we award reasonable appellate attorney fees to the State under RCW 19.86.080(1).

CONCLUSION

The superior court properly required Brelvis to comply with the CID. Therefore, we affirm its decision.

Bjorgen, J.

Bjorgen, J.

We concur:

Sutton, J.

Sutton, J.

Penoyar, J.P.T.

Penoyar, J.P.T.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

March 12, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRELVIS CONSULTING LLC, Appellant.	No. 50235-6-II ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING FILED OPINION

The appellant filed a motion for reconsideration of the published opinion filed November 20, 2018. After consideration, it is hereby

ORDERED that the motion for reconsideration is granted, it is further

ORDERED that the filed opinion shall be amended as follows:

On page 8, beginning at line 16, we delete the text within section B. Article I, Section 9—*Gunwall* Analysis.

We replace the deleted text, beginning at line 16 as follows:

> Brelvis argues that we must engage in an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), to determine if article I, section 9 of the Washington Constitution provides greater protections than the Fifth Amendment in the context of a corporation invoking the right against self-incrimination.
>
> Several Washington appellate decisions have held that article I, section 9 provides the same protection as the Fifth Amendment. *Easter*, 130 Wn.2d at 235-36; *State v. Mecca Twin Theater & Film Exch., Inc.*, 82 Wn.2d 87, 91, 507 P.2d 1165 (1973); *State v. Terry*, 181 Wn. App. 880, 889, 328 P.3d 932 (2014). However, in *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994), the Supreme Court held that

> when the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in another context.

The State had argued in *Russell* that no *Gunwall* analysis was necessary, since this court had previously held that the two constitutional provisions are coextensive. *Russell*, 125 Wn.2d at 58 (citing *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991)). *Russell* rejected that view, holding that the State's position takes language out of context and gives *Earls* "an overly expansive interpretation." *Russell*, 125 Wn.2d at 57-58.

No opinions have been cited to us holding whether article I, section 9 and the Fifth Amendment are coextensive with respect to a CID. To give effect to *Russell*, as well as the other cases cited above, we hold that a *Gunwall* analysis is required to determine whether article I, section 9 is more protective in this context.[1]

In *Gunwall*, the Washington Supreme Court set out the following set of factors to consider in determining whether a state constitutional provision extends broader rights than its federal counterpart: (1) the textual language of the constitutional provisions at issue, (2) differences in the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. 106 Wn.2d at 59. Brelvis and the State have offered competing *Gunwall* analyses as to whether article I, section 9 should be deemed more protective than the Fifth Amendment in the circumstances presented. *See* Br. of Appellant at 24-30; Respondent's Answer to Motion for Reconsideration, at 12-17.

After reviewing each analysis and the *Gunwall* criteria, we conclude that the State's analysis is the sounder and that article I, section 9 does not provide greater protection than the Fifth Amendment in the context of a CID. This conclusion is buttressed by RCW 19.86.110(7), which prohibits the disclosure of documentary material, answers to written interrogatories, or transcripts of oral testimony produced pursuant to a CID, subject to narrow exceptions. One such

[1] In *State v. Mayfield*, -- Wn.2d --, 434 P.3d 58 (2019), our Supreme Court held that because article I, section 7 of the Washington Constitution has been deemed more protective than the Fourth Amendment, it is unnecessary to carry out a new *Gunwall* analysis in each new context in which article I, section 7 is applied. The rule in *Russell* deals with a different situation, holding that a decision that constitutional provisions are coextensive in one context does not preclude finding the state provision more protective in a different context.

exception allows this material to be provided to an official charged with the enforcement of antitrust or consumer protection laws, but specifies that it "may not be introduced as evidence in a criminal prosecution." RCW 19.86.110(7)(b).

Because article I, section 9 does not offer increased protection in the context of a CID issued pursuant to RCW 19.86.110, we analyze Brelvis' self-incrimination arguments only under the Fifth Amendment.

IT IS SO ORDERED.

Jjs.: Bjorgen*, Sutton, Penoyar*

Bjorgen, J.P.T.

We concur:

Sutton, J.

Penoyar, J.P.T.

* Judges Thomas Bjorgen and Joel Penoyar are serving as judge pro tempore for the Court of Appeals, pursuant to RCW 2.06.150.

Filed
Washington State
Court of Appeals
Division Two

November 20, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRELVIS CONSULTING LLC, Appellant.	No. 50235-6-II PUBLISHED OPINION

BJORGEN, J. — Brelvis Consulting LLC (Brelvis) appeals from the superior court's order requiring it to comply with the civil investigative demand (CID) issued and served on Brelvis by the Attorney General's Office (AGO) pursuant to RCW 19.86.110. Brelvis argues that the superior court erred by compelling it to comply with the CID because it violates Brelvis' (1) right against self-incrimination, (2) right against intrusion into its private affairs, and (3) right against unreasonable search and seizure. Brelvis also argues that the CID is directed at the managing member of Brelvis, Bruce Mesnekoff, in his personal capacity.

We hold that the superior court properly required Brelvis to comply with the CID and consequently affirm its decision.

FACTS

On August 3, 2016, the AGO received a complaint regarding an entity known as the Student Loan Help Center LLC. Although the complaint identified the "National Student Loan Help Center" as its subject, it included an Internet address for the "Student Loan Help Center." Clerk's Papers (CP) at 159-60. The complaint also included a link to the Better Business Bureau's (BBB) Internet complaint page regarding the Student Loan Help Center. The BBB webpage for the Student Loan Help Center included the following information:

> Pattern of Complaints
>
> BBB files indicate that The Student Loan Help Center has a pattern of complaints stating that the business does not consolidate loans after the consumer pays an initial fee. Complaints further show that consumers['] request for refunds go unanswered by the business.
>
> In September 2014, July 2015, and December 2016, BBB sent a request to The Student Loan Help Center to address this pattern and what actions the business has taken to help eliminate the causes of complaints. As of today's date, BBB has not received a response from the business.

CP at 164.

The Student Loan Help Center also does business under the name Brelvis Consulting LLC. Mesnekoff owns and operates Brelvis and is its registered agent. On October 21, the AGO sent a CID to Brelvis pursuant to RCW 19.86.110 as part of its investigation into whether Brelvis had engaged in unfair or deceptive business practices in violation of RCW 19.86.020.[2] The CID was addressed to Brelvis, in care of Mesnekoff. The AGO's investigation related to possible misrepresentations about student loan forgiveness and other possible violations of Washington's Debt Adjusting Act, chapter 18.28 RCW, and Consumer Protection Act, chapter 19.86 RCW,

[2] RCW 19.86.020 states, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

based on the August 3 complaint. The CID included 12 interrogatories and 13 requests for production. The CID requested several categories of documents and responses from Brelvis regarding matters such as advertisements, payment records, customer complaints, client intake and communication records, and other information about Brelvis' business, its employees, and any litigation against the company.

On November 22, counsel for Brelvis contacted the AGO requesting additional time to respond to the CID. On December 29, after multiple e-mail communications, the AGO informed Brelvis that if it did not respond to the CID by January 5, 2017, the AGO would file a motion to enforce the CID. Brelvis retained new counsel who, on January 12, e-mailed the AGO requesting additional time to respond to the CID. Then, on January 27, counsel informed the AGO that Brelvis was again seeking new counsel with regard to the CID. On January 30, the new counsel for Brelvis contacted the AGO to confirm that it had taken over representation for Brelvis. On February 3, the AGO told Brelvis that it would give it until February 10 to respond to the CID. Brelvis did not respond to the interrogatories and requests for production.

On February 14, the AGO filed a petition to enforce the CID, which the superior court granted. Brelvis filed a motion for reconsideration of the order enforcing the CID, which the superior court denied. Brelvis appealed both the superior court's order enforcing the CID and its order denying reconsideration to our court. On April 21, Brelvis filed a motion to stay the superior court's March 24 order, which the superior court granted.

ANALYSIS

Brelvis argues that the superior court's order compelling compliance with the CID is erroneous because it violates Brelvis' (1) right against self-incrimination, (2) right against unlawful intrusion into its private affairs, and (3) right against unreasonable search and seizure. We disagree.

I. SCOPE OF CID

As an initial matter, Brelvis argues that Mesnekoff's individual rights against self-incrimination, unlawful intrusion into his private affairs, and unreasonable search and seizure are implicated. We disagree.

The CID noted that it was directed to "Brelvis Consulting LLC" and to Mesnekoff as its registered agent for service. CP at 18. The interrogatories and requests for production defined "You," "Your," and "Brelvis" as referring to Brelvis Consulting LLC, including any principals, owners, employees, officers, agents, and "any other persons or entities acting on behalf of or under the direction, authorization or control of Brelvis." CP at 18, 20. Brelvis argues that because the definition of "You," "Your," and "Brelvis" encompasses Mesnekoff, "the CID applies to him personally." Reply Br. of Appellant at 10-11. Brelvis asserts that

> [t]he plain language of the CID equates Mr. Mesnekoff individually and personally with the word "Brelvis." Mr. Mesnekoff is therefore required by the terms of this CID to answer the interrogatories under oath.

Reply Br. of Appellant at 11. Brelvis also argues that Mesnekoff is personally implicated because the CID was addressed to Brelvis in care of him.

A corporation is "artificial, invisible, intangible," and it exists only in law. *Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 76-77, 265 P.3d 956 (2011); *Broyles v. Thurston County*, 147 Wn. App. 409, 428, 195 P.3d 985 (2008). Our case law recognizes that

> [t]he invisible, intangible object of our legal contemplation cannot answer discovery or be effectively sanctioned if it does not. By necessity it acts through its officers, directors, employees, and other agents. As with a corporation's duties in every other sphere in which it operates, it is the corporate officers, directors, and other agents who must discharge its duties in a lawsuit.

Diaz, 165 Wn. App. at 76-77 (internal citation omitted). Further, a "'corporation exists as an organization distinct from . . . its shareholders.'" *State v. Chase*, 1 Wn. App. 2d 799, 805, 407 P.3d 1178 (2017), *review denied*, 190 Wn.2d 1024 (2018) (quoting *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 552, 599 P.2d 1271 (1979)). Accordingly, corporations acting through corporate officers and corporate officers acting in their personal capacity "maintain distinct legal obligations and interests." *Id*. A corporation's separate legal identity is not lost because it is owned by one person or members of a single family. *Id*.

Brelvis' claim that the CID targets Mesnekoff in his personal capacity is belied by case law and the record. The United States Supreme Court has held that

> without regard to whether the subpoena is addressed to the corporation, or as here, to the individual in his capacity as a custodian, . . . a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds.

Braswell v. United States, 487 U.S. 99, 108-09, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988) (internal citations omitted).[3] Nevertheless, the "privilege against self-incrimination includes the right of a witness not to give incriminatory answers in any proceeding—civil or criminal,

[3] We note that *Braswell* also stated,

> We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.

Braswell, 487 U.S. at 118, n.11. However, it was not briefed and argued whether this open question should be resolved by deviating from *Braswell*'s holding for LLCs with a single member.

administrative or judicial, investigatory or adjudicatory." *Eastham v. Arndt*, 28 Wn. App. 524, 527, 624 P.2d 1159 (1981) (citing *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)).

Thus, Mesnekoff, in his capacity as Brelvis' custodian, may not resist a request for production of Brelvis' records on Fifth Amendment grounds. *See Braswell*, 487 U.S. at 108-09. However, where the interrogatories propounded by the AGO might tend to incriminate Mesnekoff in future criminal proceedings, the Fifth Amendment privilege against self-incrimination permits Mesnekoff to refuse to answer official questions asked in the context of the CID. *See King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 351, 16 P.3d 45 (2000), which held that the "Fifth Amendment privilege permits a person to refuse to testify at a criminal trial, or to refuse to answer official questions asked in any other proceeding, where the answer might tend to incriminate him or her in future criminal proceedings."

For these reasons, we limit our review to Brelvis' assignments of error as they apply to Brelvis, and we also address whether Mesnekoff properly invoked his Fifth Amendment privilege against self-incrimination.

II. General Legal Standards

We review constitutional issues de novo. *City of Seattle v. Evans*, 184 Wn.2d 856, 861, 366 P.3d 906 (2015), *cert. denied*, 137 S. Ct. 474 (2016). We also review issues of statutory interpretation de novo. *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012). Our fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Id*. If a statute's meaning is plain on its face, then we give effect to that plain meaning as an expression of legislative intent. *Id*. at 594. We discern plain meaning not only from the provision in question, but also from closely related statutes. *Id*. "[W]e will not

read additional language into a statute that the legislature did not write." *Killian v. Seattle Pub. Sch.*, 189 Wn.2d 447, 459, 403 P.3d 58 (2017). We do not interpret a statute such that it renders any portion meaningless or superfluous. *Jongeward*, 174 Wn.2d at 601.

III. PRIVILEGE AGAINST SELF-INCRIMINATION

A. Legal Standards

The Fifth Amendment to the United States Constitution states, in part, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST., amend. V. Similarly, article I, section 9 of the Washington constitution provides, "No person shall be compelled in any criminal case to give evidence against himself." WASH. CONST., art. I, § 9. Article I, section 9 provides the same protection as the Fifth Amendment. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

A person who seeks to prevent disclosure of evidence under the privilege against self-incrimination must show that the evidence is (1) compelled, (2) testimonial, and (3) incriminatory. *United States v. Hubbell*, 530 U.S. 27, 34-38, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000). Whether an act of production is testimonial in this regard is a fact-intensive determination. *In re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905, 909 (9th Cir. 2004).

Generally, "a person must invoke the Fifth Amendment protections in order for them to apply." *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995). A person may invoke the privilege against self-incrimination under the Fifth Amendment when that person is compelled to provide testimonial evidence that may be incriminating. *Hubbell*, 530 U.S. at 34-35. Although both constitutional provisions refer to criminal cases, one may assert the privilege against self-

incrimination in any proceeding. *Alsager v. Bd. of Osteopathic Med. & Surgery*, 196 Wn. App. 653, 664, 668-69, 384 P.3d 641 (2016), *cert. denied*, 138 S. Ct. 165 (2017).

A "party in a civil proceeding need not answer questions 'where the answer might incriminate him in future criminal proceedings.'" *Alsager*, 196 Wn. App. at 668 (quoting *State v. King*, 130 Wn.2d 517, 524, 925 P.2d 606 (1996)). Further,

> "[t]he privilege [against self-incrimination] not only extends to answers that would in themselves support a conviction under a . . . criminal statute but likewise embraces those [answers] which would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime."

Eastham, 28 Wn. App. at 528 (alterations in original) (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)). In a civil proceeding, however, "the right against testifying 'necessarily attaches only to the question being asked and the information sought by that particular question.'" *Alsager*, 196 Wn. App. at 668-69 (quoting *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000)); *State v. Hobble*, 126 Wn.2d 283, 289-90, 892 P.2d 85 (1995).

B. Article I, Section 9—*Gunwall* Analysis

Brelvis argues that we must engage in an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), to determine if article I, section 9 of the Washington Constitution provides greater protections than the Fifth Amendment in the context of a corporation invoking the right against self-incrimination. We disagree.

Washington courts have already determined that article I, section 9 provides the same protection as the Fifth Amendment. *Easter*, 130 Wn.2d at 235-36; *State v. Russell*, 125 Wn.2d 24, 57-58, 882 P.2d 747 (1994); *State v. Mecca Twin Theater & Film Exch., Inc.*, 82 Wn.2d 87, 91, 507 P.2d 1165 (1973); *State v. Terry*, 181 Wn. App. 880, 889, 328 P.3d 932 (2014).

Accordingly, a *Gunwall* analysis is unnecessary. We analyze Brelvis' self-incrimination arguments only under the Fifth Amendment.

C. Invocation of the Privilege Against Self-Incrimination

Brelvis claims that the superior court erred in granting the AGO's motion to enforce the CID because it violates Brelvis' constitutional privilege against self-incrimination. Brelvis also contends that both individuals and entities can properly invoke the privilege against incrimination.

1. Brelvis' Privilege Against Self-Incrimination

Brelvis contends that the privilege against self-incrimination applies generally to both individuals and entities. We disagree.

Both state and federal courts have determined that corporate[4] defendants "cannot claim a Fifth Amendment privilege with regard to corporate records." *United States v. Blackman*, 72 F.3d 1418, 1426 (9th Cir. 1995). More broadly, in *Braswell*, the Supreme Court held that "it is well established that . . . artificial entities are not protected by the Fifth Amendment." 487 U.S. at 102; *accord, Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 134 F. Supp. 3d 1199, 1202 (N.D. Cal. 2015) ("Case law is dispositive that the corporate defendants may not assert Fifth Amendment rights."). Washington case law mirrors these holdings. In *Diaz*, 165 Wn. App. at 74, the court held it was well settled that a corporation does not have a Fifth Amendment privilege; and in *Mecca*, 82 Wn.2d at 91, our state Supreme Court held that neither corporations nor corporate officers acting on behalf of the corporations are protected by the constitutional privilege against self-incrimination.

[4] Here and at other points in the Analysis, we cite case law dealing with corporations. Brelvis is a limited liability company (LLC). No party argues that we should not rely on otherwise relevant case law applying to corporations in deciding the issues raised in this appeal.

Brelvis contends that other case law has eroded these holdings. Citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014), and *Commonwealth v. Doe*, 405 Mass. 676, 679, 544 N.E.2d 860 (1989), Brelvis argues that the privilege against self-incrimination may be invoked by corporate officers acting on behalf of the corporation. However, neither *Hobby Lobby* nor *Doe* support this proposition.

In *Hobby Lobby*, the United States Supreme Court held that corporations were "persons" for the purpose of the application of the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb, but did not purport to expand or alter a corporation's rights under the Fifth Amendment. *Hobby Lobby*, 134 S. Ct. 2768-69. More pointedly, *Hobby Lobby* did not abandon or alter the Supreme Court's holding in *Braswell* that artificial entities such as corporations "are not protected by the Fifth Amendment." 487 U.S. at 102.

Doe, on the other hand, addressed the individual rights of a records custodian, not the rights of a corporation to assert a right against self-incrimination. 405 Mass. at 679 n.4. The court stated flatly that it did not "reach the issue whether a corporation has art[icle] XII rights [rights against self-incrimination]." *Id.* at 679. Even if we were inclined to follow Massachusetts law, it would not serve Brelvis' case.

Finally, Brelvis points out that *Braswell* has never been cited by a Washington State court. That may be true, but allowing a state court to disregard established Supreme Court precedent simply by not citing it would leave little of the Supremacy Clause, U.S. CONST., art. VI, cl. 2. This invitation we decline.

Under established case law, a corporate entity does not enjoy a constitutional privilege against self-incrimination, and its officers and agents may not invoke that privilege on its behalf.

2. Proper Invocation of the Right Against Self-Incrimination

Brelvis argues that it properly invoked its right against self-incrimination because the answers to interrogatories were testimonial and Mesnekoff could have been personally incriminated. Even if we assume that the answers to the CID were testimonial and that Brelvis was able to invoke a right against self-incrimination, Brelvis failed to properly invoke its right.

The right against self-incrimination must be invoked "through specific, individual objections, not by invoking blanket constitutional protection to avoid participating in the proceedings." *Alsager*, 196 Wn. App. at 668. Our Supreme Court has explained that in order to invoke the privilege against self-incrimination, "the danger of incrimination must be substantial and real, not merely speculative." *Hobble*, 126 Wn.2d at 290. A "witness cannot establish the privilege [against self-incrimination] merely by making a 'blanket declaration . . . that he cannot testify for fear of self-incrimination.'" *State v. Levy*, 156 Wn.2d 709, 732, 132 P.3d 1076 (2006) (alterations in original) (quoting *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975)). A witness who does not assert the privilege against self-incrimination as to specific topics or requests does "not properly invoke it as to matters potentially related to criminal liability." *Alsager*, 196 Wn. App. at 669.

Brelvis failed to produce any responsive documents. Brelvis and Mesnekoff also failed to properly object to the CID, including its requests for production and interrogatories, and failed to explain how responding to those requests for production and interrogatories would be testimonial and incriminating. Blanket assertions of privilege are insufficient to invoke the Fifth Amendment protections. *Levy*, 156 Wn.2d at 732; *Alsager*, 196 Wn. App. at 668. As stated above, Mesnekoff, in his capacity as Brelvis' custodian, may not resist a request for production of records on Fifth Amendment grounds. *See Braswell*, 487 U.S. at 108-09. Furthermore, even

assuming that interrogatories in the CID might tend to incriminate Mesnekoff in his individual capacity, neither Brelvis nor Mesnekoff properly invoked the Fifth Amendment privilege with regard to those interrogatories. Accordingly, this argument fails.

D. RCW 10.52.090

Brelvis argues that the superior court erred by ordering it to comply with the CID because, without a grant of immunity, compliance with the CID would violate RCW 10.52.090. We disagree.

First, as discussed above, Brelvis has not validly asserted any privilege protecting it from the CID. Second, RCW 10.52.090 does not apply to the CID.

RCW 10.52.090 states:

> In every case where it is provided in this act that a witness shall not be excused from giving testimony tending to criminate himself or herself, no person shall be excused from testifying or producing any papers or documents on the ground that his or her testimony may tend to criminate or subject him or her to a penalty or forfeiture; but he or she shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter or thing concerning which he or she shall so testify, except for perjury or offering false evidence committed in such testimony.

The reviser's note to RCW 10.52.090 refers to the note following RCW 9.01.120 for the definition of "this act." The note following RCW 9.01.120, in turn, states that "this act" includes various titles and sections, including former RCW 19.60.010 (2011), RCW 19.60.025, .040, .042, .045 and .050, former RCW 19.60.055 (1991), and RWC 19.60.057 and .060, which address pawnbrokers and secondhand dealers. "This act," however, does not include RCW 19.86.110 or RCW 19.86.020. RCW 9.01.120 reviser's notes.

The AGO sent a CID to Brelvis pursuant to RCW 19.86.110 as part of its investigation into whether Brelvis had violated RCW 19.86.020. Based on the plain language of RCW

10.52.090 and the scope of its reference to "this act" in the reviser's notes, RCW 10.52.090 does not apply to the AGO's investigation under chapter 19.86 RCW.[5] Thus, Brelvis' argument fails.

E. RCW 19.86.110(8)

Brelvis argues that the superior court erred in relying in part on Brelvis' failure to file a petition to modify or set aside the CID within the 20-day time period set forth in RCW 19.86.110(8). At the March 24, 2017 hearing, the superior court explained:

> The Court finds that the request for discovery being sought by the State [via the CID] does not implicate or constitute an unreasonable search under either the Fourth Amendment, the Fifth Amendment, Article I, Subsection 7 of the State Constitution.
>
> The Court finds that the definition of "person" as it applies to this particular statute includes the Respondent, Brelvis Consulting, LLC. The Court finds that the Respondent did not move to set aside the [CID] within 20 days, as is required by the statute. The Court grants the motion of [the] State of Washington.

Verbatim Report of Proceedings (Mar. 24, 2017) at 24.

Assuming, without deciding, that the superior court erred in relying on Brelvis' failure to meet the 20-day deadline, it is of no moment to this appeal. Even without that ground, the CID survives Brelvis' challenges to it, as shown by this opinion.

IV. ARTICLE I, SECTION 7

Brelvis argues that the requirement to comply with the CID is an unconstitutional intrusion into private affairs without authority of law under article I, section 7 of the Washington Constitution. Article I, section 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Our analysis of an issue under article I, section 7 consists of two components. *State v. Reeder*, 184 Wn.2d 805, 814, 365 P.3d 1243 (2015). First,

[5] The AGO's interrogatory number 11 references RCW 18.28, 19.134, 19.86, and 19.190. "[T]his act" does not include those chapters. RCW 9.01.120 reviser's notes.

we consider whether a private affair has been disturbed. *Id.* Second, we consider whether the disturbance was justified by authority of law. *Id.*

A. Private Affair

1. Brelvis

Brelvis argues that its business records are private affairs that are subject to protection under article I, section 7.

As a threshold issue, the AGO apparently takes the position that the protections of article I, section 7 are limited to Washington citizens. This reading is supported by the definition of "private affairs" as those "'interests which *citizens* of this state have held, and should be entitled to hold, safe from government trespass.'" *State v. Jorden*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007) (emphasis added) (quoting *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997)).

As noted, however, article I, section 7 states, "No *person* shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I § 7 (emphasis added). To reduce the scope of the provision to Washington citizens on the basis of this statement from *Jorden* and *Maxfield* would be to significantly confine its reach in reliance on cases which did not analyze that potentially significant a change. In addition, *Jorden*'s reference to "citizens" can be harmonized with the use of "person" in article I, section 7. The constitutional guarantee would extend to all persons within the state of Washington, while the determination of what counts as a private affair would look to interests the state's citizens have held and should be entitled to hold safe from government trespass. For these reasons, we decline any suggestion that the shield of article I, section 7 is limited to state citizens.

Alternatively, if article I, section 7 were confined to state citizens, Brelvis would fall outside its scope and its claims under article I, section 7 would fail for that reason. In *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1014, 194 L. Ed. 2d 71 (2016), the Court held that a real estate investment trust takes the citizenship of its members for purposes of diversity jurisdiction. In reaching this conclusion the court noted that *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497, 558, 11 L. Ed. 353 (1844), held that for diversity jurisdiction a corporation is a citizen of the state it is created by and doing business in.

A rule that corporations are citizens for diversity purposes, though, does not travel well into other settings. First, the general legal definition of "citizen" does not include corporations and other business entities. *Black's Law Dictionary* 298 (10th ed. 2014) defines "citizen" as

> 1. Someone who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges.

Neither a corporation, limited liability company, nor similar entity is born or naturalized. Therefore, none of these entities are citizens under this general definition. *Black's Law Dictionary* does recognize the diversity exception to this rule in its second definition of "citizen":

> 2. For diversity-jurisdiction purposes, a corporation that was incorporated within a state or has its principal place of business there. 28 USCA § 1332(c)(1).

Id. This recognition of corporate citizenship in federal diversity jurisdiction only highlights the exclusion of these business entities from the class of citizens generally.

Second, the Privileges and Immunities Clause of our state constitution treats citizens and corporations as separate categories. That clause states:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

WASH. CONST. art. I § 12. In *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 807-08, 83 P.3d 419 (2004), our Supreme Court described the background of the clause:

> Article I, section 12 of the Washington State Constitution was modeled after article I, section 20 of the Oregon State Constitution. . . .
>
> The Washington provision differs from that of the Oregon provision only in that the Washington provision added a reference to corporations, which our framers perceived as manipulating the lawmaking process. Thompson, 69 Temp. L.Rev. at 1253. Washington's addition of the reference to corporations demonstrates that our framers were concerned with undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority.

The separate listing of "citizen" and "corporation" in the state Privileges and Immunities Clause shows that each were viewed as discrete categories by the framers. To view "corporation" as a subcategory of "citizen" would make the former superfluous in the constitution, a result the court is to avoid in interpretation. *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 811, 982 P.2d 611 (1999). This conclusion is buttressed by the fact that "corporation" was specifically added by the framers of the Washington Constitution to guard against "undue political influence exercised by those with large concentrations of wealth." *Grant County*, 150 Wn.2d at 808. The framers acted deliberately in treating "citizen" and "corporation" as different categories.

This authority counsels that corporate entities should not be deemed state citizens for purposes of article I, section 7. Thus, if article I, section 7 applies only to state citizens, Brelvis would not be protected by this provision.

We conclude above, however, that article I, section 7 is not confined to state citizens, but

rather applies to "persons." Assuming that Brelvis is a person for these purposes, we next address whether governmental conduct, in this case the CID, intrudes on a private affair. To answer that question, courts look at "'the nature and extent of the information which may be obtained as a result of the government conduct' and at the historical treatment of the interest asserted." *State v. Hinton*, 179 Wn.2d 862, 869, 319 P.3d 9 (2014) (quoting *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007)).

In *Miles*, a state agency issued an administrative subpoena for the bank records of an individual suspected of securities fraud. In striking down the subpoena under article I, section 7, the court explained that its holding in *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990), that an individual's garbage bags count as private affairs was based, in part, on the observation that "garbage bags could include sensitive information about business records, bills, correspondence, tax records, and so on." *Miles*, 160 Wn.2d at 245. The court then held that personal banking records are private affairs under the state constitution because business records, bills, and financial records could reveal "sensitive personal information, such as 'where the person has travelled, the person's reading habits, and the person's financial condition.'" *Chase*, 1 Wn. App. 2d at 804 (quoting *Reeder*, 184 Wn.2d at 244). A corporation's business records, however, are distinct from personal records. *Id.* at 805.

Each of these types of information is the sort of thing that would be sensitive personal information for a natural person, but not for a legal abstraction like a corporation or LLC. *See id.* at 804-05 The CID requested information exclusively regarding Brelvis' business practices. The information sought would not reveal potentially sensitive personal information of any individuals and does not meet the standard for a private affair under article I, section 7.

For these reasons, Brelvis' business records are not protected under article I, section 7 of the Washington Constitution.

2. Mesnekoff

Brelvis contends that Mesnekoff can also assert a privacy interest in Brelvis' business records as a member and manager of Brelvis. Division One of our court recently rejected a similar argument in *Chase*, 1 Wn. App. 2d at 799. In *Chase*, the defendant, a shareholder and principal officer in a corporation, attempted to assert a privacy interest in the corporations' banking records. 1 Wn. App. 2d at 801-02. The court determined that the defendant could not assert a privacy interest in the corporation's banking records because those records have not been historically considered part of a shareholder or officer's private affairs and "a corporation's financial transactions do not reveal sufficiently sensitive information about a person's personal contacts and associations." *Id*. at 807. Therefore, Mesnekoff does not have a personal privacy interest in Brelvis' business records under article I, section 7.

With these conclusions, it is unnecessary to examine the second component in analyzing claims under article I, section 7: whether the disturbance was justified by authority of law. However that may be resolved, the CID did not violate this constitutional provision.

V. FOURTH AMENDMENT

Brelvis also maintains that the CID constituted an unreasonable search under the Fourth Amendment. We disagree.

In *Steele v. State ex rel Gorton*, our Supreme Court considered whether a CID issued to a corporation pursuant to RCW 19.86.110 was reasonable in the context of the Fourth Amendment. 85 Wn.2d 585, 537 P.2d 782 (1975). In *Steele*, the AGO issued a CID to an

employment agency as part of an investigation into unfair or deceptive practices. It requested records related to

> services rendered to applicants for employment; the manner of payment agreed upon by the applicant and respondent; training materials and manuals supplied by the franchisor to the respondent; applications for employment that had been placed in the inactive file in the past year; refunds to applicants or fee adjustments; certain pleadings filed in courts of record of this State in which respondent was a party; certain contracts between respondent and lending or financial institutions; and certain advertisements for employment placed by the agency in local newspapers.

Id. at 587.

The court observed that:

> [W]e start with the well-established proposition that although corporations and businesses are protected by the Fourth Amendment, . . . the privacy of their books and records is not as stringently protected as is that of the privacy of individuals. Indeed, both in England and in the United States, corporations and businesses historically have been subject to wide investigative powers.

Id. at 592-93 (citations omitted). The court explained that the test

> for determining the reasonableness of a subpoena . . . or similar order . . . requires that (1) the inquiry is within the authority of the agency; (2) the demand is not too indefinite, and (3) the information sought is reasonably relevant [to the purpose of the subpoena].

Id. at 594.

Considering the first factor, the court stated, "[T]here is no question but that RCW 19.86.080 and RCW 19.86.110(1) accord to the Attorney General power to investigate possible unfair or deceptive practices." *Id*. at 594. Turning to the second factor, the court determined that the demand was not impermissibly indefinite because "[t]here was no general or [undiscriminating] request for all business records. Rather, the types of records and information sought were in all instances explained with reasonable clarity" and were limited to records less than three years old. *Id*. Finally, the court concluded that the information was reasonably relevant to the investigation because "the requested information was directed at ascertaining the

manner in which the [agency] filled supposed job openings and dealt with applicants seeking employment." *Id*. at 595.

After considering the three factors, the Supreme Court concluded:

> Therefore, by application of the three-prong test . . . we are convinced that the instance [CID] did not violate the prohibitions of the Fourth Amendment. Situations could, of course, arise where the Attorney General arbitrarily serves a [CID] upon a business. . . . But the record in the instant case discloses that the Attorney General did not act arbitrarily in instituting the investigation. On the contrary, the record discloses that an adequate foundation for the investigation existed since the Attorney General had received various complaints with respect to the operation of the employment agency.

Id. We now examine the present CID under the test in *Steele*.

B. Authority of the Agency

The AGO issued a CID to Brelvis as part of its investigation into whether Brelvis had engaged in unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce under RCW 19.86.020. Specifically, the AGO was investigating whether Brelvis made misrepresentations about student loan forgiveness and committed other violations of Washington's Debt Adjusting Act, chapter 18.28 RCW, and Consumer Protection Act, chapter 19.86 RCW. Our Supreme Court has held that "there is no question but that RCW 19.86.080 and RCW 19.86.110(1) accord to the Attorney General power to investigate possible unfair or deceptive practices." *Steele*, 85 Wn.2d at 594. Therefore, the AGO had the authority to investigate whether Brelvis engaged in possible unfair or deceptive business practices.

C. Definiteness of Demand

The CID requested several categories of documents and contained interrogatories regarding matters such as advertisements, payment records, customer complaints, client intake and communication records, and other information about Brelvis' business, its employees, and litigation against the company. The CID requested customer information related only to

Washington consumers, rather than all of Brelvis' clients. The United States Supreme Court has approved broad categorical requests pursuant to a subpoena. *See, e.g., McPhaul v. United States*, 364 U.S. 372, 374, 81 S. Ct. 138, 5 L. Ed. 2d 136 (1960) (approving a subpoena for all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the entity). The CID issued to Brelvis was properly focused and definite.

D. Relevance of Information Sought

As described above, the CID requested several categories of documents and contained interrogatories covering matters such as advertisements, payment records, customer complaints, client intake, communication records, Brelvis' employees, and litigation against the company. The CID requested customer information related only to Washington consumers, rather than all of Brelvis' clients. All of the information requested in the CID is reasonably relevant to the AGO's investigation into possible misrepresentations regarding student loan forgiveness and other unfair methods of competition or unfair or deceptive acts by Brelvis.

E. Not Issued Arbitrarily

Brelvis argues that the AGO arbitrarily issued its CID because it did not have an adequate foundation of complaints to initiate its investigation. As part of this argument, Brelvis asserts that the AGO improperly conflated the Student Loan Help Center, a name under which Brelvis does business, with the National Student Loan Help Center. We disagree.

"[T]he primary purpose of the Fourth Amendment is to protect the privacy of an individual from arbitrary intrusions by government officials." *State v. Smith*, 88 Wn.2d 127, 140, 559 P.2d 970 (1977). "Arbitrary" is generally defined as "relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or

procedures." BLACK'S LAW DICTIONARY 125 (10th ed. 2014). In *Steele*, our Supreme Court recognized that situations could "arise where the Attorney General arbitrarily serves a civil investigative demand upon a business." 85 Wn.2d at 595.

Here, though, the record shows that the AGO did not act arbitrarily in instituting the investigation. The AGO relied on the August 3, 2016 complaint in issuing the CID. Although the complaint identified the National Student Loan Help Center as its subject, it also included an Internet address for the Student Loan Help Center and a link to the BBB's Internet complaint page regarding the Student Loan Help Center. Therefore, the AGO could have reasonably interpreted the August 3 complaint to pertain to Brelvis, doing business as the Student Loan Help Center. More importantly, the BBB page clearly relates to Brelvis and describes a "pattern of complaints" regarding Brelvis' failure to consolidate loans and respond to customer requests for refunds. CP at 164. Therefore, the AGO had an adequate foundation to initiate its investigation and did not act arbitrarily in doing so.

With this, the *Steele* test has been satisfied, and issuance of the CID did not violate Brelvis' rights under the Fourth Amendment.

VI. APPELLATE FEES AND COSTS

The AGO asks that we award the State attorney fees on appeal under RAP 18.1(a). RAP 18.1(a) allows a party to recover fees on appeal "if applicable law grants a party the right to recover reasonable attorney fees or expenses." RCW 19.86.080(1) states,

> The attorney general may bring an action in the name of the state . . . against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

In the present case, the State asks the court to enforce the CID. Under RCW 19.86.110(5)(a) and (b), one receiving a CID must produce documentary material demanded and

answer interrogatories subject to restrictions. Brelvis did not produce documents or answer interrogatories in response to a CID we have determined to be valid. Thus, the present case is an action "to restrain and prevent the doing of any act herein prohibited or declared to be unlawful" under RCW 19.86.080(1). Therefore, we award reasonable appellate attorney fees to the State under RCW 19.86.080(1).

CONCLUSION

The superior court properly required Brelvis to comply with the CID. Therefore, we affirm its decision.

Bjorgen, J.

Bjorgen, J.

We concur:

Sutton, J.

Sutton, J.

Penoyar, J.P.T.

Penoyar, J.P.T.

APPENDIX C

BUSINESS CRIMES BULLETIN

JUNE 2017

The Arrival of Justice Gorsuch May Bring Opportunity to Reform the Collective Entity Doctrine

By Preston Burton, Bree Murphy and Leslie Meredith

A little over 100 years ago, the Supreme Court declined to extend the Fifth Amendment privilege against self-incrimination to corporations responding to grand jury subpoenas for documents, establishing what has been termed the "collective entity doctrine." *Hale v. Henkel*, 201 U.S. 43, 74-76 (1906) (corporate officer, who had been immunized in his individual capacity, attempted to assert Fifth Amendment right on behalf of his employer). Some Justices have expressed discomfort with the application of the collective entity doctrine to small corporations responding to grand jury subpoenas, and recent decisions by the Court have extended First Amendment rights to corporations that had previously been limited to individuals. These developments suggest that the Court, particularly with the arrival of Justice Neil M. Gorsuch, might be receptive to reconsidering the scope of the collective entity doctrine, a rule whose principal virtue seems to be that it is a bright-line, particularly in the context of small, closely-held corporations.

The Collective Entity Doctrine

From its inception, the collective entity doctrine has been premised on two considerations: first, the notion that only natural persons can "testify" within the meaning of the Fifth Amendment's self-incrimination privilege; and second, the fear that prosecuting corporations or other artificial entities would be all but impossible if they could claim the privilege in response to document subpoenas. *See Wilson v. United States*, 221 U.S. 361, 383-84 (1911); *Hale v. Henkel*, 201 U.S. 43, 74 (1906). Over the course of the 20th century, the Court expanded the doctrine, first by holding that corporate officers cannot invoke their personal self-incrimination privilege to avoid turning over corporate documents in their possession. *Wilson*, 221 U.S. at 379-80.

The Court subsequently held that the doctrine applied to other types of organizations, such as labor unions (*United States v. White*, 322 U.S. 694, 698-705 (1944)); partnerships (*Bellis v. United States*, 417 U.S. 85, 101 (1974)); and political parties (*Rogers v. United States*, 340 U.S. 367, 371-72 (1951)). In *Bellis*, for example, the Court invoked the collective entity doctrine to deny a custodian's ability to assert Fifth Amendment rights even where the entity was extremely small (or even defunct) and the records sought were in the possession of a former partner, rejecting the argument that in such scenarios, it is unrealistic to separate the individual from the entity. *See Bellis*, 417 U.S. at 94-95.

As discussed in greater detail below, after the Court decided *Fisher v. United States*, 425 U.S. 391, 410-411 (1976) — which articulated, but declined to apply, the act-of-production doctrine and affirmed the non-testimonial nature of pre-existing business records — the rationales underlying the collective entity doctrine have been called into question. (The act-of-production doctrine recognizes that the physical act of turning over responsive documents may itself have testimonial qualities.) In particular, tension has arisen between the bright-line rule and its capacity to impact the Fifth Amendment rights of individuals associated with closely held entities.

In *Doe v. United States*, 465 U.S. 605, 612-14 (1984) (*Doe I*), the Court recognized that a sole proprietor could invoke the act-of-production doctrine, deferring to the district court's finding that producing records, in the context of a sole proprietorship, did raise colorable self-incrimination concerns. This decision recognized that individuals can be so closely associated with entities that the natural person/artificial entity distinction drawn by the collective entity doctrine, if applied to a sole proprietorship, would deprive the respondent of his Fifth Amendment rights. In doing so, the Court left intact the rule articulated a decade earlier in *Bellis* that rejected the ability of a former partner of a defunct three-partner law firm to assert a Fifth Amendment privilege in responding to a subpoena for the firm's records, despite leaving open the question of whether the rule could apply to "small family partnerships." *See Bellis*, 417 U.S. at 101.

Shortly after arguing *Doe I* on behalf of the government, now-Justice Samuel A. Alito, Jr., recognized this practical shortcoming in a law review article, observing that the Court "has experienced great difficulty in articulating a durable rationale" for the collective entity doctrine. Samuel A. Alito, Jr., Documents and the Privilege Against Self-Incrimination, 48 *U. Pitt. L. Rev.* 27, 65-66 (1986).

The last time the collective entity doctrine was squarely before the Court, a 5-4 majority held that custodians of even small, closely held corporations "may not resist a subpoena for corporate records on Fifth Amendment grounds." *Braswell v. United States*, 487 U.S. 99, 109 (1988). Justice Anthony Kennedy dissented, arguing that "the so-called collective entity rule" should not prevent corporate custodians from invoking their Fifth Amendment privilege to protect them individually from the incriminating effect of producing documents on behalf of the entity. *Id.* at 121. While the majority distinguished *Doe I* based on the fact that that case involved a sole proprietorship, not a closely held corporation, Justice Kennedy rejected this as a technicality, stating "the nature of the entity is irrelevant to determining whether there is ground for the privilege." *Id.*

Justice Kennedy expressed concern that the individual custodian could be incriminated in his or her individual capacity as a result of having to produce documents on behalf of an entity and

noted that even the government acknowledged that there are testimonial aspects "implicit in the act of production." *Id*. at 125. He pointed out that in *Curcio v. United States*, 354 U.S. 118 (1957), the Court held that a labor union official could not be required to testify about the whereabouts of records that were not produced in response to a grand jury subpoena — deeming that sort of compelled testimony to cross the line and implicate the custodian's individual Fifth Amendment rights. *See Braswell*, at 125-26.

For Justice Kennedy, *Doe I* protected the testimonial aspects of the custodian's physical act of collecting and producing records just as much as *Curcio* protected the custodian's actual testimony. *Id*. He dismissed fears about the purported interference with government investigations that would result from recognizing a Fifth Amendment privilege for corporate custodians who are individual targets of such investigations, observing that "the text of the Fifth Amendment does not authorize exceptions premised on such rationales." *Id*. at 129. He noted that the ability to assert the privilege would not exist in all cases (such as where the existence of the sought records is a foregone conclusion) and that the government could immunize the custodian's act of production, limiting the supposed calamities that would ensue to their impact on just one individual.

More recently, in his concurring opinion in *United States v. Hubbell*, 530 U.S. 27 (2000), clarifying the scope of the permissible derivative use of materials and information provided by an individual who has been given act-of-production-immunity, Justice Thomas, joined by Justice Scalia, questioned Fisher's limitation of Fifth Amendment privilege to only the act of producing documents as opposed to the incriminating effect of the contents of the records, inviting an opportunity in a future case to "reconsider the scope and meaning of the Self-Incrimination privilege." *Hubbell*, 530 U.S. at 55-56 (signaling a willingness to return to the more expansive protections articulated in *Boyd v. United States*, 116 U.S. 616 (1886)).

Citizens United* and *Hobby Lobby

In contrast to the "natural person" versus "artificial entity" distinction undergirding the collective entity doctrine, two recent decisions in the First Amendment context have expanded the concept of corporate personhood and extended certain constitutional rights to entities. In both decisions, *Citizens United v. FEC* 552 U.S. 1278 (2010), and *Burwell v. Hobby Lobby Stores, Inc*. 134 S. Ct. 2751 (2014), the Court focused on the impact that limiting corporations' rights would have on the individuals who animate the corporations.

In *Citizens United*, the Court invalidated campaign finance laws that restricted nonprofit corporations from spending money to support political candidates. Justice Kennedy's majority opinion, joined by the Chief Justice and Justices Scalia, Thomas and Alito, was premised on the belief that the First Amendment protects associations of speakers, not just individual speakers. Therefore, limiting a corporation's ability to spend money restricts the speech of the individuals who formed it. In *Hobby Lobby*, the Court ruled that closely held corporations could not be compelled to provide certain forms of contraception as part of their health plans due to the entities' owners' religious objections. Justice Alito's majority opinion, joined by the Chief Justice and Justices Scalia, Thomas, and Kennedy, held that because corporations protect individuals "associated with a corporation," even for-profit corporations can assert free exercise rights to

protect "religious beliefs." The Court observed that "a corporation is simply a form of organization used by human beings to achieve desired ends," and without human beings a corporation "cannot do anything at all." *Hobby Lobby*, 134 S. Ct. at 2768.

On its way to the Supreme Court, the *Hobby Lobby* case passed through the U.S. Court of Appeals for the Tenth Circuit, where then-Judge Gorsuch joined the majority opinion that reached the same result as the Supreme Court. Judge Gorsuch wrote a separate concurrence foreshadowing the Supreme Court's concern about the impact on the family that formed Hobby Lobby, lamenting that they were confronted with "a choice between exercising their faith or saving their business." *Hobby Lobby Stores Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013) (Gorsuch, J., concurring).

Concerns about restriction of individuals' rights via limitations on corporations through which they act drove the majority decisions in *Citizens United* and *Hobby Lobby*. These recent decisions suggest a meaningful opportunity to revisit the meaning of the Fifth Amendment privilege in the context of the impact on individuals operating small business entities responding to government subpoenas compelling production of their records. *Accord* Ramzi Abadou, "High Court May Take on Corporate 5th Amendment Privilege" March 25, 2015, available at www.law360.com. The collective entity doctrine forces these individuals, particularly in a small corporation setting, to effectively forfeit their Fifth Amendment privilege under a fiction, exposed by Justice Kennedy in *Braswell*, that their actions are not testimonial or that they have somehow forfeited their Fifth Amendment rights through electing to conduct their business affairs via an entity, even where some of the impacted individuals may not have had any role in choosing such a business structure.

The Road Ahead

The collective entity doctrine requires corporations under investigation to offer up employees as custodial witnesses on behalf of the company and turn over their business phones, computers, and emails. The modern business records at issue are not just the sort of dry tax and foregone financial records at issue in the seminal collective entity doctrine cases. These types of records are often much more intimate records of individual employees' thoughts and communications, which can then be used against them individually. The testimonial effect of the production of these types of records by individual custodians in small business settings was precisely the concern identified by Justice Kennedy in his dissent in *Braswell*. (Beyond impacting employees, companies themselves are compelled to speak, too.)

The level of cooperation companies are now expected to display goes far beyond simply locating particular responsive documents. Today, companies are expected to conduct an internal investigation of the purported violation, turn over the results and serve up their employees as witnesses. Today's subpoenas are usually quite broad and force corporations to make extensive use of their custodians' personal knowledge in order to comply. The subpoena characterized in *Hale v. Henkel* as potentially too expansive would seem narrow and targeted by today's standards. *See Hale v. Henkel*, 201 U.S. at 79.)

Notably, Justice Kennedy is the sole remaining member of the Court that decided *Braswell*. He wrote the majority opinion in *Citizens United* and joined the majority in *Hobby Lobby*. His former

law clerk, now-Justice Gorsuch, expressed his willingness to extend at least some heretofore individual constitutional rights to entities in his concurrence in *Hobby Lobby*. As such, the opportunity to revisit the blanket application of the collective entity doctrine seems timely.

Even assuming that the potential impact on the government's ability to investigate white-collar crime or regulatory violations is a valid consideration for the Court — a point disputed by Justice Kennedy in *Braswell* — the purported damage from limiting the collective entity doctrine seems unlikely to materialize for a number of reasons. As articulated in Justice Kennedy's dissent in *Braswell*, many corporations would not be able to assert a Fifth Amendment right under the foregone conclusion analysis described in *Fisher* and *Hubbell*, and the required records doctrine. *See Braswell* 487 U.S. at 121; *Shapiro v. United States*, 335 U.S. 1 (1948) (required records doctrine).

Additionally, many large and highly regulated corporations may be less likely to exercise an available Fifth Amendment privilege because of public relations or other business concerns, such as fear of losing government contracts; or, for large companies, the ability to have a disinterested custodian provide company records without impacting testimonial rights of potential targets arising from the act of production. However, for small and closely held companies or entities, granting the ability to assert an act-of-production or even, as Justice Thomas intimated, to potentially articulate a broader Fifth Amendment claim regarding the content of records, would have a significant effect on individuals affected by the act of responding to corporate subpoenas.

But even in those situations, as Justice Kennedy noted, the government enjoys the unique power to immunize custodians. *Braswell*, 487 U.S. at 129. And, in appropriate cases, the government would only need to meet the very low probable cause standard to obtain a search warrant to obtain corporate records. The occasional frustration of the government's ability to proceed via subpoena seems a small price to pay for recognizing and protecting the constitutional rights of the affected individual employees or owners of the entities, particularly small entities where the testimonial aspects of producing records on behalf of the entity clearly implicate the individual's self-incrimination privilege.

Conclusion

In sum, recognizing a Fifth Amendment privilege for corporations — whether through wholesale abolition of the collective entity doctrine or by recognizing some limited exception for custodians of smaller corporations — would not foreclose meaningful white collar prosecutions, but it would restore protection of the Fifth Amendment rights of individuals that are sacrificed under the current bright-line rule. Given the lingering criticism of the rule's rationales and the Court's recent willingness to recognize First Amendment rights of corporations in order to protect the rights of individuals associated with the corporations, Justice Gorsuch's arrival on the Court may present a meaningful opportunity to revisit this doctrine.

***** **Preston Burton** is a partner, **Bree Murphy** is counsel and **Leslie Meredith** is an associate at Buckley Sandler. The authors wish to thank **Tariq El Baba** and the firm's white-collar practice group for their assistance with this article.

APPENDIX D

OFFICE OF THE ATTORNEY GENERAL
STATE OF WASHINGTON

IN THE MATTER OF: BRELVIS CONSULTING, LLC,	CIVIL INVESTIGATIVE DEMAND FOR ANSWERS TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

THE STATE OF WASHINGTON TO: Brelvis Consulting, LLC
2660 Cypress Ridge Blvd., Ste. 101
Wesley Chapel, FL 33544

and

c/o Bruce Mesnekoff
27203 Fern Glade Ct.
Wesley Chapel, FL 33544

DEMAND IS HEREBY MADE upon you by the Consumer Protection Division, Office of the Attorney General, State of Washington, to answer in writing and under oath, the Interrogatories contained in this Civil Investigative Demand (Demand) and to produce the documents requested herein. The Demand is made pursuant to RCW 19.86.110. The Attorney General believes you have knowledge relevant to the subject matter of an investigation now in progress. Said investigation involves possible past or current violations of RCW 19.86.020 (unfair or deceptive acts or practices in the conduct of any trade or commerce), specifically practices associated with the marketing and sale of services relating to the adjusting or consolidation of student loan debt owed by Washington consumers.

ATTORNEY GENERAL OF WASHINGTON
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7745

I. TIME AND PLACE OF PRODUCTION

The requested documents are to be produced to Benjamin Roesch, Assistant Attorney General, at the Attorney General's Office at 800 5th Avenue, Suite 2000, Seattle, WA 98104, within thirty (30) days of being served with this Civil Investigative Demand, or at such other time and place as is agreed to by the parties.

II. COMMUNICATIONS

All notices, questions or communications concerning this Civil Investigative Demand should be directed to Benjamin Roesch, Assistant Attorney General, 800 5th Avenue, Suite 2000, TB-14, Seattle, WA 98104, (206) 254-0559, BenjaminR@atg.wa.gov.

III. DEFINITIONS

3.1 "Communications" means any expression or exchange of information by speech, writing, or conduct, including but not limited to in-person or telephone conversations, facsimiles, email correspondence, or notes.

3.2 "Document" or "Documents" means all computer files and written, recorded, and graphic materials of every kind, including audio material, video material, and photographic material regardless of whether in digital, analog or in another form, in your possession, custody, or control. The term "documents" includes electronic correspondence and drafts of documents, copies of documents that are not identical duplicates of the originals, and copies of documents the originals of which are not in your possession, custody, or control.

3.3 "Identify," shall mean, with respect to a natural person, the person's (a) full name, (b) current or last known residence address and telephone number, (c) current or last known business address and telephone number, (d) current position or occupation, and (e) relationship to you.

3.4 "Identify" shall mean, with respect to an entity other than a natural person, the entity's (a) full legal name or title, (b) form of business (i.e. profit corporation, partnership), (c) complete business location and mailing address, (d) telephone and facsimile numbers, (e) state

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of incorporation or juridical organization, (f) address of headquarters or principal place of business, and (g) if the business is a corporation, then state the firm is incorporated.

3.5 "Identify" shall mean, with respect to a document, (a) the identity of the persons who signed it or over whose name it was issued, (b) the identity of each addressee or other recipient, (c) the nature and substance of the writing or document with sufficient particularity to enable the document to be identified, (d) the date of the writing or document, (e) the source from whom or from which you obtained the writing or documents, and (f) the identity of each person who has custody or control of the writing or document or any copy thereof.

3.6 "Identify" means, with respect to a communication, a communication, (a) the date and time of the communication, (b) the method of communication (i.e., telephone or in-person oral communication, written), (c) each participant in the communication (including sender and recipient of any written communication and all persons participating or listening to a conversation), and (d) the subject matter and substance of the communication.

3.7 "Relating to" means constituting, containing, concerning, discussing, describing, analyzing, identifying, referring to, or stating.

3.8 "The Student Loan Help Center" means The Student Loan Help Ceter and all of its affiliated entities.

3.9 "You," "Your," and "Brelvis" refer to Brelvis Consulting, LLC, whether doing business as The Student Loan Help Center, National Student Loan Help Center, or any other fictitious business name and any parent, affiliate, subsidiary, predecessor, successor or assignee of it, and its principals, operating divisions, present or former owners, employees, servants, officers, directors, agents, representatives, attorneys, accountants, independent contractors, distributors, and any other persons or entities acting on behalf of or under the direction, authorization or control of Brelvis Consulting, LLC, including any foreign or overseas affiliates.

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IV. INSTRUCTIONS

4.1 This Civil Investigative Demand requests production of all described documents in your possession, custody or control without regard to the person or persons by whom or for whom the documents were prepared (e.g., your employees, distributors, representatives, competitors, or others).

4.2 This request includes documents in possession of your employees, agents, representatives, and attorneys, unless privileged. If any document or information is withheld under claim of privilege, Identify the document and state the basis for the privilege, and provide a detailed privilege log that contains at least the following information for each document or information that you have withheld:

a. The name of each author, writer, sender, creator, or initiator of such document;

b. The name of each recipient, addressee, or party for whom such document was intended or to whom the document was sent;

c. The date of such document, or an estimate thereof if no date appears on the document;

d. The general subject matter of the document; and

e. The claimed grounds for withholding the document, including, but not limited to, the nature of any claimed privilege and grounds in support thereof.

4.3 These document requests impose a continuing duty to produce promptly any responsive information or item that is not objected to, which comes into your knowledge, possession, custody or control after your initial production of responses to the requests.

4.4 In each instance in which a document is produced in response to a request, produce the current edition, along with all earlier editions or predecessor documents serving the same function, even though the title of earlier documents may differ from current versions.

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4.5 The following procedures shall apply to the production of documents and information in response to this Civil Investigative Demand:

a. The recipient of this Civil Investigative Demand shall label each responsive document (i.e., Response to Request No. 1, Response to Request No. 2, and so forth), group all documents responsive to a particular request together, and place a label on each group of documents which identifies the corresponding Request;

b. All attachments to responsive documents or information shall be produced with, and attached to, the responsive documents (or digitally in corresponding order);

c. Each responsive document or information shall be produced in its entirety and no portion of any document or information shall be edited, cut, masked, redacted or otherwise altered, unless for applicable privilege which shall be logged according to the procedures set forth above;

d. The recipient of this Civil Investigative Demand shall provide a key to all abbreviations used in the documents or information and shall attach the key to the corresponding documents or information.

4.6 Documents or information that may be responsive to more than one numbered request in these Requests need not be submitted more than once. However, for each such document or information, the recipient of this Civil Investigative Demand shall identify all of the numbered requests to which the document or information is responsive. If any responsive document or information has been previously supplied to the Washington State Attorney General's Office, you shall identify the document(s) or information previously provided and the date(s) of submission.

4.7 You shall consecutively number each page of all documents or information produced with your response and indicate the total number of pages produced with your response. This page numbering must be separate from and must not alter any original page numbering on the responsive documents or information.

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4.8 Your responses to these Interrogatories and Request for Production should include all relevant electronically stored information in your possession, custody, or control. Washington State considers electronically stored information to be an irreplaceable source of evidence in this matter. Accordingly, Washington State insists that you implement appropriate safeguard against the destruction of evidence until the final resolution of this issue.

4.9 Production of electronically stored information and other documents in electronic format shall conform to the standards set forth in **Exhibit A** (attached).

4.10 If you are unable to fully answer any particular Interrogatory or Request for Production, supply all of whatever information is actually available. Designate such incomplete information as incomplete and accompany the information with an explanation that includes the reasons for the incomplete answer; a description of any and all of your efforts to obtain the information; and the source from which the Office of the Attorney General may obtain information to complete your response. If books, records, or other sources that provide accurate answers are not available, provide your best estimates and describe how you derived the estimates, including the sources or bases of such estimates. Designate estimated data as such by marking it with the "est." notation. If there is no reasonable way for You to make an estimate, provide an explanation.

4.11 If particular documents responsive to this Civil Investigative Demand no longer exist for reasons other than the ordinary course of business but you have reason to believe they have been in existence, describe the documents, state the circumstances under which such documents were lost or destroyed, and identify persons having knowledge of the content of the documents.

4.12 If you contend that the information requested by any document request is privileged in whole or in part or if you otherwise object to any part of any document request, or contend that any identified document would be excluded from production to the Attorney General in discovery regardless of its relevance, state the reasons for such objection or ground

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for exclusion and identify each person having knowledge or the factual basis, if any, on which the objection, privilege or other ground is asserted.

4.13 In order for your response to this Demand to be complete, submit with your response the attached certification form, as executed by the official supervising your compliance with this Demand.

4.14 **Do not destroy any documents relating to any of these Interrogatories or Requests for Production.**

V. INTERROGATORIES

INTERROGATORY NO. 1: Describe your corporate structure, including all relationships with any parent, affiliate, d/b/a, sister, subsidiary, predecessor, or successor companies.

ANSWER:

INTERROGATORY NO. 2: Identify and describe with specificity the products and/or services offered, sold, or provided to Washington consumers by you or any entity identified in your response to Interrogatory No. 1 above.

ANSWER:

INTERROGATORY NO. 3: Explain your source(s) of leads for prospective clients for products or services related to student loans. Include in your answer an identification of all persons or companies who generate leads to or sell consumer contact information to you, the methods that such persons or companies use (including, without limitation, advertising,

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telemarketing, and email marketing), and all contact methods (including specific telephone numbers) that such persons or companies use to route potential customers to you.

ANSWER:

INTERROGATORY NO. 4: For each Washington consumer with whom you have contracted or provided products or services, state:

1. The product or service provided;
2. The date and amount of your first or initial fee or charge;
3. The date(s) and amount(s) of any and all subsequent fees or charges;
4. The date that the consumer's loan was consolidated, modified, forgiven, placed into an alternate payment plan, or otherwise altered;
5. The consumer's monthly payment following consolidation, modification, forgiveness, or other change;
6. The total fees collected by you from the consumer to date;
7. Future fees owed to you by, or which you intend to collect from, the consumer; and
8. Any amount(s) refunded to the consumer.

ANSWER:

INTERROGATORY NO. 5: Identify all of your owner(s), member(s), or shareholder(s).

ANSWER:

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INTERROGATORY NO. 6: Identify the person(s) responsible for drafting and approving your contracts with Washington consumers.

ANSWER:

INTERROGATORY NO. 7: Identify the person(s) responsible for determining and approving the amount of fees charged to Washington consumers by you, including both the initial fee and any subsequent fees.

ANSWER:

INTERROGATORY NO. 8: Identify all Washington consumers who have formally or informally complained to you about your product(s), service(s), fee(s), or charge(s). As part of your response, include the reason(s) for their complaint(s) and resolution, if any.

ANSWER:

INTERROGATORY NO. 9: Identify all current and former employees, agents, salespersons, or contractors of you or your firms, and the dates they were employed by or under contract with you or your firms. For each individual identified who is no longer employed by or associated with your firms, provide the last known address, email address, and telephone number(s).

ANSWER:

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INTERROGATORY NO. 10: Identify all persons responsible for drafting and approving sales and marketing strategies, tactics, and materials, including without limitation telemarketing scripts, website content, internet advertisements, and email campaigns, whether conducted by your or any other person or entity acting on your behalf.

ANSWER:

INTERROGATORY NO. 11: Identify all steps taken to ensure that you and your employees, agents, contractors, and vendors comply with any state, local, or federal law, including without limitation Florida laws regulating telemarketing, the Federal Trade Commission Act and all regulations promulgated thereunder (including without limitation the Telemarketing Sales Rule), Washington's Debt Adjusting Act, RCW 18.28, Credit Service Organizations Act, RCW 19.134, Washington's Consumer Protection Act, RCW 19.86, and Washington's Commercial Electronic Mail Act, RCW 19.190.

ANSWER:

INTERROGATORY NO. 12: Identify all steps taken, including due diligence and data verification, to ensure that you and your employees, agents, contractors, and vendors make solely truthful statements to potential customers, including without limitation statements regarding whether the potential customer owes student loans, and the amount of such loans.

ANSWER:

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VI. REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Produce documents sufficient to identify all advertising that you reasonably expected to reach Washington consumers, including without limitation, direct mailing, online banner ads, Google AdWords, coupon distribution services, emails, and all other forms of advertisement, whether sent or arranged by you or by another person or entity on your behalf.

RESPONSE:

REQUEST FOR PRODUCTION NO. 2: Produce copies of all telemarketing scripts used by you in the course of selling or promoting your products or services to Washington consumers.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3: Produce all your contracts, agreements, acknowledgments, and or statements of understanding for services related to student loans with consumers who live in Washington.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4: Produce all payment records for all Washington consumers for payments made to you.

RESPONSE:

REQUEST FOR PRODUCTION NO. 5: Produce all payment records for all refunds made by you to Washington consumers.

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RESPONSE:

REQUEST FOR PRODUCTION NO. 6: Produce employment applications and current resumes/CVs for all your owners, members, shareholders, and current and former employees.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7: Produce blank copies of all client intake sheets, questionnaires, scripts, or other documents used by you during any initial assessment/counseling with Washington consumers.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8: Produce all documents related to any and all Washington consumers who have formally or informally complained to you about your product(s), service(s), or fee(s), including any resolution.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9: Produce all written correspondence to and from Washington consumers, including without limitation, letters and email.

RESPONSE:

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REQUEST FOR PRODUCTION NO. 10: Produce all recordings and documents related to oral or telephone communications with Washington consumers, including without limitation, call logs, digital recordings, and notes.

RESPONSE:

REQUEST FOR PRODUCTION NO. 11: Produce your articles of incorporation, membership agreement, and registration with the Secretary of State (or similar official) for the state in which you are incorporated or registered, as well as all annual certifications or registration renewals with that official.

RESPONSE:

REQUEST FOR PRODUCTION NO. 12: Produce copies of any lawsuits, complaints, and/or pleadings filed against you by persons in any of the fifty (50) states and the District of Columbia and your responses. For purposes of this Request for Production, "persons" includes individuals, government agencies, businesses, and/or any other legal entity.

RESPONSE:

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(206) 464-7745

REQUEST FOR PRODUCTION NO. 13: Produce copies of all contracts between you and any lead generator or other person or entity that (a) advertises or markets your services, (b) sends email to potential customers with a telephone number or contact information that some or all of the time leads to you; or (c) provides consumer names and contact information. For the avoidance of confusion, this request seeks your contracts with persons or entities that provide the services and information described above to you, regardless of whether such persons or entities provide similar or identical services or information to others as well.

RESPONSE:

This Civil Investigative Demand is issued pursuant to the powers vested in the Attorney General of the State of Washington by RCW 19.86.110 of the Consumer Protection Act. The Attorney General is authorized to enforce this Demand and failure to comply with this Demand shall subject You to sanctions as provided in RCW 19.86.110.

Dated this 21st day of October, 2016.

ROBERT W. FERGUSON
Attorney General

BENJAMIN J. ROESCH, WSBA #39960
JOHN NELSON, WSBA #45724
Assistant Attorneys General
Attorneys for State of Washington

ATTORNEY GENERAL OF WASHINGTON
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7745

CERTIFICATION

I, _____, having made the foregoing responses to Interrogatories and Requests for Production of Documents, certify under penalty of perjury under the laws of the State of _____, that I am authorized to sign legal documents on respondent's behalf and know the responses herein to be true, correct and complete.

Signature: _____

Title or Position: _____

Date: _____

City and State: _____

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Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7745

PROOF OF SERVICE

I certify that I served a copy of this document on the following party(s) via Certified Mail at the following address:

Brelvis Consulting, LLC
2660 Cypress Ridge Blvd., Ste. 101
Wesley Chapel, FL 33544

and

c/o Bruce Mesnekoff
27203 Fern Glade Ct.
Wesley Chapel, FL 33544

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

DATED this 21st day of October, 2016, at Seattle, WA.

P. JOSEPH DROUIN
Legal Assistant

ATTORNEY GENERAL OF WASHINGTON
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7745

Washington State Attorney General's Office
Consumer Protection Division
Document Production Standards

This document describes the technical requirements for electronic document productions to the State of Washington Attorney General's Office (AGO), Consumer Protection Division.

It is highly recommended that parties confer in advance of any large-scale document production.

Any proposed file formats other than those described below must be discussed with the legal and technical staff of the AGO Consumer Protection Division prior to submission.

General Production Requirements

- Reference the specific portion of the request to which you are responding.
- All submissions must be organized **by custodian**, unless otherwise instructed.
- Electronic files must be produced in their native format, i.e., the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet.
- Emails and attachments if produced natively must be produced as PST files. The file name must include the name of the email custodian.

  (Note: An Adobe PDF file is **not** considered a native file unless the document was initially created as a PDF.)
- Productions must be submitted on media such as a CD, DVD, thumb drive or hard drive. The media must be clearly marked with the **matter name, producing party,** and **production date** at a minimum.
- Only alphanumeric characters and the underscore character are permitted in file names. Special characters are not permitted.
- Documents designated as confidential pursuant to a protective order should be clearly labeled as such to avoid inadvertent disclosure of confidential information.

Productions of Imaged Collections

While the AGO accepts imaged productions **in addition to** native formats, imaged productions without native formats are not permitted unless the original document only exists in hard copy form. When images are produced, they must comply with the following requirements:

- Black and white images must be 300 DPI Group IV single-page TIFF files.
- Color images must be produced in JPEG format.
- File names cannot contain embedded spaces or special characters.

Exhibit A

• Images must be endorsed with sequential Bates numbers in the lower right corner of each image.

Note: Adobe PDF files are **not** acceptable as imaged productions. PDF files are acceptable only when the document content was initially created as a PDF and not converted from another format.

Load Ready Productions

Whenever possible, the AGO strongly encourages the production of documents in a Concordance load-ready format with native files (most ESI and legal copy vendors are familiar with this format).

When data is produced in a Concordance load-ready format, the following requirements apply:

- Include native files, extracted text, fielded data, OCR and linked image files, if these elements exist.

- If the production includes imaged emails and attachments, the attachment fields must be included in the delimited text file to preserve the parent/child relationship between an email and its attachments.

- For production with native files, a NATIVELINK field must be included in the delimited text file to provide the file path and name of the native file on the produced storage media. Extracted text must be included in a separate folder, one text file per document.

- The delimited text file must contain an IMAGEKEY field (image key used to reference images in Concordance Image). The image key must be unique, fixed length and can contain the same value as the Bates number endorsed on each document image.

- The delimited text file must include a header record identifying field names.

- The delimiters for the file must be Concordance default delimiters as follows:

  Field delimiter - ASCII character 20
  Text delimiter – ASCII character 254
  Newline indicator – ASCII character 174.

- OCR text produced to the AGO must be delivered as multi-page text (.txt) files, but the name of the file must match the value in the IMAGEKEY field. OCR text files should reside in their own directory separate from the image and native files.

- Whenever possible (regardless of delivery method), place page markers at the beginning or end of each OCR text page as shown:

  SAMPLE-LA0000001

  The data surrounded by *** is the IMAGEKEY value (see example below).

  Sample Concordance Image Cross-reference File:
  SAMPLE-LA0000001,,E:\001\00010001.TIF,Y,,,
  SAMPLE-LA0000002,,E:\001\00010002.TIF,,,,
  SAMPLE-LA0000003,,E:\001\00010003.TIF,Y,,,
  SAMPLE-LA0000004,,E:\001\00010004.TIF,,,,

- Include a comma delimited Concordance cross-reference file that contains a line for every image in the database and it needs to consist of six fields per line. The format for the file is as follows:

  ImageKey, VolumeLabel, ImageFilePath, DocumentBreak, FolderBreak, BoxBreak,

  - ***ImageKey:*** This is the unique designation that Concordance and Concordance Image uses to identify and retrieve an image. This value may be the same as the Bates number endorsed on each image.
  - ***VolumeLabel:*** Leave this field empty.
  - ***ImageFilePath:*** This is the full path to the image file on the produced storage media.
  - ***DocumentBreak:*** This field is used delineate the beginning of a new document. If this field contains the letter "Y," then this is the first page of a document. If this field is blank, then this page is not the first page of a document.
  - ***FolderBreak:*** This field is used to delineate the beginning of a new folder in the same manner as the *DocumentBreak* field. If this information is not available, then it may be left empty.
  - ***BoxBreak:*** This field is used to delineate the beginning of a new box in the same manner as the *DocumentBreak* and *FolderBreak* fields. If this information is not available, then it may be left empty.

- The following fielded data must be included in all productions:

Field	Description	Required
Begno	Displays the document identifier of the first page in a document or the entire document of an E-Doc.	Yes
Endno	Page ID of the last page in a document (for image collections only).	If it exists
BegAttach	Displays the document identifier of a parent record.	If it exists

Field	Description	Required
EndAttach	Displays the document identifier of the last attached document in a family	If it exists
PgCount	Number of pages in a document (for image collections only).	If it exists
FileDescription	Description of a native file type.	Yes
Filename	Original filename of a native file or the subject of an e-mail message for e-mail records.	Yes
RecordType	Displays the record type for each entry in the load file	Yes
ParentID	Displays the document identifier of the attachment record's parent (only for attachments).	If it exists
NumAttach	Total number of records attached to the document. The value will always be 0 (zero) for the actual attachment records.	If it exists
Attachmnt	Populates parent records with document identifier of each attached record and is separated by semi-colons.	If it exists
From	Author of the e-mail message.	If it exists
To	Main recipient(s) of the e-mail message	If it exists
CC	Recipient(s) of "Carbon Copies of the e-mail message.	If it exists
BCC	Recipient(s) of "Blind Carbon Copies" of the e-mail message.	If it exists
Email_Subject	Subject of the e-mail message	If it exists
DateSent	Sent date of an e-mail message.	If it exists
TimeSent	Time the e-mail message was sent.	If it exists
InMsgID	Internet Message ID assigned to an e-mail message by the outgoing mail server.	If it exists
ConversationIndex	E-mail thread identification	If it exists
EntryID	Unique identifier of e-mails in mail stores.	If it exists
Author	Author value pulled from metadata of the native file.	If it exists
Organization	Company extracted from metadata of the native file.	If it exists
Subject	Subject value extracted from metadata of the native file.	If it exists
DateCreated	Creation date of the native file.	If it exists
DateLastMod	Date the native file was last modified	If it exists
DateLastPrnt	Date the native file was last printed .	If it exists

Field	Description	Required
MD5Hash	MD5 hash value.	Yes
EDSource	Fully qualified original path to the source folder, files, and/or mail stores.	Yes
NativeFile	Hyperlink to the native file.	Yes
*Any other fields considered relevant by the producing party		

APPENDIX E

Rules of Appellate Procedure

RAP 13.4
DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file pro0f of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated:

(1) Cover. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with

reference to the pages of the brief where cited.

(3) Identity of Petitioner. A statement of the name and designation of the person filing the petition.

(4) Citation to Court of Appeals Decision. A reference to the Court of Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration.

(5) Issues Presented for Review. A concise statement of the issues presented for review.

(6) Statement of the Case. A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record.

(7) Argument. A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.

(8) Conclusion. A short conclusion stating the precise relief sought.

(9) Appendix. An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) Answer and Reply. A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) Form of Petition, Answer, and Reply. The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

(f) Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices, title sheet, table of contents, and table of authorities.

(g) Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5.

(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.

(i) No Oral Argument. The Supreme Court will decide the petition without oral argument.

APPENDIX F

United States Constitution

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

Washington State Constitution

ARTICLE I
DECLARATION OF RIGHTS

SECTION 9 RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

APPENDIX H

Revised Code of Washington

RCW 9A.56.020
THEFT—DEFINITION, DEFENSE

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

APPENDIX I

United States Code

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

SECTION 1343. FRAUD BY WIRE, RADIO, OR TELEVISION. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX J

Revised Code of Washington

RCW 10.52.090
INCRIMINATING TESTIMONY NOT TO BE USED

In every case where it is provided in this act that a witness shall not be excused from giving testimony tending to criminate himself or herself, no person shall be excused from testifying or producing any papers or documents on the ground that his or her testimony may tend to criminate or subject him or her to a penalty or forfeiture; but he or she shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter or thing concerning which he or she shall so testify, except for perjury or offering false evidence committed in such testimony.

APPENDIX K

Revised Code of Washington

RCW 19.86.110
DEMAND TO PRODUCE DOCUMENTARY MATERIALS FOR INSPECTION, ANSWER WRITTEN INTERROGATORIES, OR GIVE ORAL TESTIMONY—CONTENTS—SERVICE—UNAUTHORIZED DISCLOSURE—RETURN—MODIFICATION, VACATION—USE—PENALTY.

(1) Whenever the attorney general believes that any person (a) may be in possession, custody, or control of any original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate, which he or she believes to be relevant to the subject matter of an investigation of a possible violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or federal statutes dealing with the same or similar matters that the attorney general is authorized to enforce, or (b) may have knowledge of any information which the attorney general believes relevant to the subject matter of such an investigation, he or she may, prior to the institution of a civil proceeding thereon, execute in writing and cause to be served upon such a person, a civil investigative demand requiring such person to produce such documentary material and permit inspection and copying, to answer in writing written interrogatories, to give oral testimony, or any combination of such demands pertaining to such documentary material or information: PROVIDED, That this section shall not be applicable to criminal prosecutions.

(2) Each such demand shall:

(a) State the statute and section or sections thereof, the alleged violation of which is under investigation, and the general subject matter of the investigation;

(b) If the demand is for the production of documentary material, describe the class or classes of documentary material to be produced thereunder with reasonable specificity so as fairly to indicate the material demanded;

(c) Prescribe a return date within which the documentary material is to be produced, the answers to written interrogatories are to be made, or a date, time, and place at which oral testimony is to be taken; and

(d) Identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying, to whom answers to written interrogatories are to be made, or who are to conduct the examination for oral testimony.

(3) No such demand shall:

(a) Contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum, a request for answers to written interrogatories, or a request for deposition upon oral examination issued by a court of this state; or

(b) Require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.

(4) Service of any such demand may be made by:

(a) Delivering a duly executed copy thereof to the person to be served, or, if such person is not a natural person, to any officer or managing agent of the person to be served; or

(b) Delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

(c) Mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in this state, or, if said person has no place of business in this state, to his or her principal office or place of business.

(5) (a) Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the attorney general;

(b) Written interrogatories in a demand served under this section shall be answered in the same manner as provided in the civil rules for superior court;

(c) The oral testimony of any person obtained pursuant to a demand served under this section shall be taken in the same manner as provided in the civil rules for superior court for the taking of depositions. In the course of the deposition, the assistant attorney general conducting the examination may exclude from the place where the examination is held all persons other than the person being examined, the person's counsel, and the officer before whom the testimony is to be taken;

(d) Any person compelled to appear pursuant to a demand for oral testimony under this section may be accompanied by counsel;

(e) The oral testimony of any person obtained pursuant to a demand served under this section shall be taken in the county within which the person

resides, is found, or transacts business, or in such other place as may be agreed upon between the person served and the attorney general.

(6) If, after prior court approval, a civil investigative demand specifically prohibits disclosure of the existence or content of the demand, unless otherwise ordered by a superior court for good cause shown, it shall be a misdemeanor for any person if not a bank, trust company, mutual savings bank, credit union, or savings and loan association organized under the laws of the United States or of any one of the United States to disclose to any other person the existence or content of the demand, except for disclosure to counsel for the recipient of the demand or unless otherwise required by law.

(7) No documentary material, answers to written interrogatories, or transcripts of oral testimony produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by a superior court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, other than an authorized employee of the attorney general, without the consent of the person who produced such material, answered written interrogatories, or gave oral testimony, except as otherwise provided in this section: PROVIDED, That:

(a) Under such reasonable terms and conditions as the attorney general shall prescribe, the copies of such documentary material, answers to written interrogatories, or transcripts of oral testimony shall be available for inspection and copying by the person who produced such material, answered written interrogatories, or gave oral testimony, or any duly authorized representative of such person;

(b) The attorney general may provide copies of such documentary material, answers to written interrogatories, or transcripts of oral testimony to an official of this state, the federal government, or other state, who is charged with the enforcement of federal or state antitrust or consumer protection laws, if before the disclosure the receiving official agrees in writing that the information may not be disclosed to anyone other than that official or the official's authorized employees. The material provided under this subsection (7)(b) is subject to the confidentiality restrictions set forth in this section and may not be introduced as evidence in a criminal prosecution; and

(c) The attorney general or any assistant attorney general may use such copies of documentary material, answers to written interrogatories, or transcripts of oral testimony as he or she determines necessary in the enforcement of this chapter, including presentation before any court: PROVIDED, That any such material, answers to written interrogatories, or transcripts of oral testimony which contain trade secrets shall not be presented except with the approval of the court in which action is pending after adequate notice to the person furnishing such material, answers to written interrogatories, or oral testimony.

(8) At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside a demand issued pursuant to subsection (1) of this section, stating good cause, may be filed in the superior court for Thurston county, or in such other county where the parties reside. A petition, by the person on whom the demand is served, stating good cause, to require the attorney general or any person to perform any duty imposed by the provisions of this section, and all other petitions in connection with a demand, may be filed in the superior court for Thurston county, or in the county where the parties reside. The court shall have jurisdiction to impose such sanctions as are provided for in the civil rules for superior court with respect to discovery motions.

(9) Whenever any person fails to comply with any civil investigative demand for documentary material, answers to written interrogatories, or oral testimony duly served upon him or her under this section, or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the attorney general may file, in the trial court of general jurisdiction of the county in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one county such petition shall be filed in the county in which such person maintains his or her principal place of business, or in such other county as may be agreed upon by the parties to such petition. Whenever any petition is filed in the trial court of general jurisdiction of any county under this section, such court shall have jurisdiction to hear and determine the matter so presented and to enter such order or orders as may be required to carry into effect the provisions of this section, and may impose such sanctions as are provided for in the civil rules for superior court with respect to discovery motions.

APPENDIX L

United States Code

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

SECTION 6002. IMMUNITY GENERALLY. Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

APPENDIX M

Superior Court Criminal Rules

RULE 6.14
IMMUNITY

In any case the court on motion of the prosecuting attorney may order that a witness shall not be excused from giving testimony or producing any papers, documents or things, on the ground that such testimony may tend to incriminate or subject the witness to a penalty or forfeiture; but the witness shall not be prosecuted or subjected to criminal penalty or forfeiture for or on account of any transaction, matter, or fact concerning which the witness has been ordered to testify pursuant to this rule. The witness may nevertheless be prosecuted for failing to comply with the order to answer, or for perjury or the giving of false evidence.

APPENDIX N

Revised Code of Washington

RCW 19.86.080
ATTORNEY GENERAL MAY RESTRAIN PROHIBITED ACTS—COSTS—RESTORATION OF PROPERTY

(1) The attorney general 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; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

(2) The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

(3) Upon a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, the court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers. The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.

SKELLENGER BENDER, P.S.

April 11, 2019 - 3:02 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Brelvis Consulting, LLC
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