Supreme Court No. 96975-2

Court of Appeals No. 50235-6-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRELVIS CONSULTING, LLC,

Petitioner.

STATE OF WASHINGTON'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

John A. Nelson
Assistant Attorney General
WSBA No. 45724
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Attorneys for Respondent
State of Washington

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Court Rules

I. INTRODUCTION

The State of Washington (State), through its Attorney General, took the unremarkable step of sending a Civil Investigative Demand (CID) pursuant to RCW 19.86.110 to a company alleged to have duped consumers into paying for services it did not perform in violation of the Consumer Protection Act (CPA), RCW 19.86, and for charging excessive fees in violation of the State's Debt Adjustment Act, RCW 18.28. Instead of cooperating with the State's investigation, Petitioner Brelvis Consulting, LLC (Brelvis Consulting) chose not to respond to the State's CID. Having (1) declined to file a petition to set aside the CID, (2) lost its opposition to the State's Petition to Enforce the CID, and (3) failed to persuade the Court of Appeals, Division Two (twice), Brelvis Consulting now petitions this Court to take up review of the pedestrian, well-established CID process. Not surprisingly, none of the arguments proffered by Brelvis Consulting merits this Court's review.

In its Petition, Brelvis Consulting repackages legal arguments that have been routinely rejected by our state courts, including this Court, and by the United States Supreme Court. It is well settled that corporate entities like Brelvis Consulting enjoy no Fifth Amendment protections, and the Washington State Constitution provides no greater protections. A privilege against self-incrimination is not implicated here, where the statute

authorizing the State to issue CIDs likewise prohibits the materials produced to be introduced as evidence in criminal prosecutions. Additionally, Brelvis Consulting failed to assert *any* Fifth Amendment privilege—instead, it ignored the CID.

In sum, Brelvis Consulting raises no significant questions of law under the federal or state Constitutions nor any issues of significant public importance to warrant review by this Court. Despite raising a number of *post hoc* arguments, Brelvis Consulting has not established any grounds for review under RAP 13.4, and this Court should deny the petition for review.

II. COURT OF APPEALS DECISION

The Court of Appeals filed an opinion on November 20, 2018, and an amended opinion on March 12, 2019, (see Petitioner's App. A and B). The Court of Appeals' opinions affirmed in its entirety the trial court's decision, which required Brelvis Consulting to respond to the State's CID.

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in applying long-standing precedent to hold that the privilege against self-incrimination under both the Fifth Amendment to the United States Constitution and Article 1, Section 9 of the Washington Constitution does not apply to closely held corporate entities?

2. Whether the privilege against self-incrimination may be invoked in the context of a CID issued pursuant to RCW 19.86.110, which expressly states that material

produced as part of a demand may not be introduced as evidence in a criminal prosecution?

3. Whether a blanket assertion of the privilege against self-incrimination applies in cases where, as here, the Petitioner failed to invoke the privilege against self-incrimination in its response to the CID and indeed pointedly failed to respond to the State's CID, despite the State's concerted efforts to solicit a production or response from Petitioner?

4. Whether RCW 10.52.090 requires a grant of transactional immunity in order for the State to compel responses to a *civil* investigative demand, when RCW 10.52.090 expressly precludes its application outside the context of criminal procedures?

5. Whether, as the prevailing party under RAP 18.1 and CR 37(a), the State is entitled to attorney's fees, when the State successfully brought an action to "restrain and prevent the doing of any act" under RCW 19.86.080?

6. Whether an individual's right to contest enforcement of a CID issued pursuant to RCW 19.86.110 is forfeited if not raised before expiration of 20 days of service of the CID?

IV. STATEMENT OF THE CASE

Until recently, through its web site and by telephone, Brelvis Consulting, doing business as the Student Loan Help Center, marketed student loan consolidation and related services to consumers nationwide, including in Washington. CP 158-161. On its web site, Brelvis Consulting advertised a document preparation fee that appeared to exceed the amount allowed under Washington's Debt Adjustment Act, RCW 18.28.080. Moreover, consumer complaints indicate that Brelvis Consulting did not provide the services it was paid to perform. At the time the State issued its CID,

Brelvis Consulting had been the subject of 82 Better Business Bureau (BBB) complaints, earning itself a "D" rating from the BBB.[1] CP 162-65.

The State served a CID on Brelvis Consulting on October 21, 2016. CP 31. Bruce Mesnekoff is the owner, manager and registered agent of the company, and as the corporate agent, Mr. Mesnekoff would have produced CID responses on behalf of Brelvis Consulting. CP 4. Brelvis Consulting was required to respond to the CID by November 28, 2016. CP 19; CP 40.

After serving the CID, attorneys for the State met and conferred with three consecutive law firms representing Brelvis Consulting. CP 13; CP 41-73. The State also granted multiple extensions to Brelvis Consulting to respond to the CID, running from November 28, 2016, through February 10, 2017. CP 13; CP 59. At no time during the five-month period between service of the CID and the State's filing of the petition to enforce did Brelvis Consulting ever raise a single constitutional objection related to the CID. Instead, despite the numerous extensions granted by the State, Brelvis Consulting provided no response to the CID – not a letter to the State's counsel,[2] not a petition to set aside the CID - nothing.

---

[1] BBB also issued a consumer alert 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." CP 164.

[2] Counsel for Brelvis Consulting sent the State an e-mail on January 3, 2017, which did not invoke constitutional objections to the CID but only a dilatory response, promising later action that never came to fruition. CP 64. Brelvis Consulting's counsel said: "[W]e do not acknowledge the Washington AG's demands because our position is

The Trial Court Decision

When the extensions of time granted to Brelvis Consulting to respond to the CID passed and Brelvis Consulting submitted no response or specific objections to the CID, the State petitioned to enforce its CID in Thurston County Superior Court on February 24, 2017. CP 4-11. On March 24, 2017, after considering the parties' briefings and oral argument, the trial court granted the State's petition and ordered Brelvis Consulting to respond in full to the State's CID within 60 days. CP 171-72. On April 12, 2017, the trial court denied Brelvis Consulting's motion for reconsideration. CP 251. On May 1, 2017, the trial court granted the company's motion to stay its order. CP 354-55.

The Court of Appeals Decision

In a published opinion, on February 20, 2018, the Court of Appeals affirmed the trial court's order requiring Brelvis to respond to the State's CID. On March 12, 2019, after granting in part Brelvis' motion for reconsideration, the court issued an amended opinion again affirming the trial court. Citing *United States v. Blackman*, 72 F.3d 1418, 1426 (9th Cir. 1995), among others, the Court of Appeals held that, "Both state and federal courts have determined that corporate defendants cannot claim a Fifth

---

that it lacks jurisdiction as to the CID. However, in the interests of professionalism I intend to respond on my client's behalf. You [sic] on the list, just not at the top." *Id.* But, Brelvis Consulting never sent that response.

Amendment privilege with regard to corporate records" (internal quotations omitted). In rejecting Brelvis Consulting's argument that the Washington Constitution affords greater protection in this context, the Court of Appeals explained, "[W]e conclude... that article I, section 9 does not provide greater protection than the Fifth Amendment in the context of a CID." Order Granting Motion for Reconsideration and Amending Filed Opinion at 2 (hereinafter Slip Op. 2)

V. ARGUMENT

Brelvis Consulting's Petition for Review raises no issues of substantial public interest and fails to present significant questions of law under the Constitution. Rather, the Petition attempts to push well-settled constitutional law off course in order to portray that law as "unresolved." *See* Petition at 1. The Court should deny the Petition under RAP 13.4.

A. As a Corporate Entity, Brelvis Consulting Enjoys No Right Against Self-Incrimination

1. Under the Fifth Amendment, Corporations and their Agents Do Not Enjoy a Right Against Self-Incrimination

The United States Supreme Court has settled the issue: Corporate entities, unlike individuals, may not avail themselves of a Fifth Amendment right against self-incrimination under the United State Constitution. *Braswell v. United States*, 487 U.S. 99, 110, 108 S. Ct. 2284 (1988) ("Any claim of Fifth Amendment privilege asserted by the [corporate] agent would

be tantamount to a claim of privilege by the corporation—*which of course possesses no such privilege*.") (emphasis added).

That corporations do not enjoy Fifth Amendment protection has long been the law. *E.g., Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208, 66 S. Ct. 494 (1946) (explaining "the fair distillation . . . seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers . . ."). Over 40 years after *Oklahoma Press*, the *Braswell* Court acknowledged the potential dangers of gamesmanship to law enforcement if the rule held otherwise: "[R]ecognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities." *Braswell*, 487 U.S. at 115. A corporate representative like Mr. Mesnekoff cannot seek an end run around the State's civil investigation by hiding behind an improper and unrecognized privilege against self-incrimination.

Despite overwhelming Supreme Court decisions to the contrary,[3] Brelvis Consulting cites two inapposite Supreme Court cases that fall well

[3] With no apparent grounding in RAP 13.4, Brelvis Consulting urges this Court to accept review to adopt the reasoning of the *dissent* in *Braswell* and what it perceives as a "legal landscape . . . tipped decidedly against the collective entity doctrine." Pet. for Rev., p. 7. Brelvis Consulting points to no Washington decision in conflict with *Braswell* to warrant consideration by this Court.

short of holding that a corporation enjoys a right not to self-incriminate. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __, 134 S. Ct. 2751 (2014), and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), the Supreme Court held that corporations enjoy *some* constitutional protections, namely, the right to free speech, but neither *Hobby Lobby* nor *Citizens United* considered whether corporations enjoyed Fifth Amendment protections.

The Ninth Circuit recently analyzed *Braswell* in the context of *Hobby Lobby* and *Citizens United* and noted, "as to Appellant's argument that we should treat *Braswell* as having been overruled by *Hobby Lobby* and *Citizens United*, we are skeptical that either case has any bearing on the collective entity rule as articulated and applied in *Braswell*. . . . [W]e remain bound by *Braswell* until the Supreme Court says otherwise." *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525, 528-29 (9th Cir. 2018) (internal footnote omitted).

2. Article I, Section 9 of the Washington Constitution is Coextensive to the Fifth Amendment and Affords Brelvis Consulting No Right Against Self-Incrimination

Following Petitioner's Motion for Reconsideration, the Court of Appeals held that a *Gunwall* analysis was required to determine whether article I, section 9 of the Washington Constitution was more protective than the Fifth Amendment to the United States Constitution. (Slip Op. 2 at 2)

The Court of Appeals concluded that the Washington Constitution afforded the same protection as the Fifth Amendment. *Id.* In its Petition, Brelvis Consulting does not demonstrate how the Court of Appeals erred in reaching this conclusion, only that it wishes for a different outcome.

Brelvis Consulting's reliance on a Massachusetts state court decision interpreting that state's constitution is unavailing. The Massachusetts court decided a corporate agent cannot be held in contempt for invoking a privilege against self-incrimination in response to a subpoena duces tecum issued by a grand jury. *Com. v. Doe*, 405 Mass. 676, 544 N.E.2d 860 (1989). But the Massachusetts court recognized the endurance of *Braswell*: "In Fifth Amendment jurisprudence, it is settled that a corporation cannot resist compelled production of its documents by claiming that such documents will incriminate the corporation. . . . [A] custodian of corporate records may not rely on the privilege even where his act of production would incriminate him personally." *Id.* at 678 & n.3 (citing *Braswell*). Instead, the Massachusetts court found that under that state's constitution, where the state is investigating corporate *criminal* conduct, an individual cannot be held in contempt for refusing to turn over records when the act of doing so would incriminate him personally. *Id.* at 680. This is not the case here.

Com. v. Doe is inapposite and not persuasive authority for extending

any protections against self-incrimination to anyone, including the corporate agent, under the Washington Constitution, because unlike the Massachusetts grand jury's subpoena deces tecum, the State's CID is based on a civil investigation pursuant to RCW 19.86.110. By statute, the materials produced cannot be introduced as evidence in a criminal prosecution. RCW 19.86.110(7(b). As the appeals court recognized: "This conclusion [that Article I, Section 9 is coextensive with Fifth Amendment protections] is buttressed by RCW 19.86.110(7), which . . . specifies that [materials produced] 'may not be introduced as evidence in a criminal prosecution.' RCW 19.86.110(7)(b)." Slip Op. 2 at 2.

3. Fifth Amendment Protections Are Not Implicated Here Because Materials Produced In Response to the State's CID Cannot Be Used In Any Criminal Prosecutions

Materials produced pursuant to a CID cannot be introduced into evidence in any criminal prosecution. *See* RCW 19.86.110(7)(b); *see also* RCW 19.86.110(1) ("This section shall not be applicable to criminal prosecutions."); *see also* RCW 19.86.110(7)(b) ("The material provided under this subsection... may not be introduced as evidence in a criminal prosecution.").

Even assuming *arguendo* that Brelvis Consulting could assert a right against self-incrimination under the Fifth Amendment – which it cannot – the express statutory language prohibiting the use of the CID responses in a

criminal prosecution belies the falsity of Brelvis Consulting's argument that it did not properly invoke its Fifth Amendment privilege because it could not do so without articulating how its "truthful answers might incriminate" itself, which would "defeat the interests the privilege is intended to protect." Pet. for Rev. at 12-13.

First, as a matter of fact, Brelvis Consulting never invoked a Fifth Amendment privilege against self-incrimination. Instead, it chose not to respond to the State's CID in any manner. CP 13.

Second, as a matter of law, because CID responses cannot be introduced in a criminal prosecution, neither Brelvis Consulting nor its corporate agent faced a genuine fear of criminal prosecution. Brelvis Consulting's reliance on *Hoffman v. U. S.*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951) is unavailing. In *Hoffman*, the Court said:

> But this [Fifth Amendment] protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . .

Id. at 486.

In sum, Brelvis Consulting, as a corporate entity, has no privilege against self-incrimination under the Fifth Amendment or under the Washington Constitution. Even assuming *arguendo* that it enjoyed some

Fifth Amendment protection, because CID responses cannot be used for criminal prosecutions, Brelvis Consulting is without a basis for genuinely fearing criminal prosecution. There was no legal justification for its failure to response to the State's CID. Brelvis Consulting fails to establish any conflict between the Court of Appeals and the Supreme Court or other state appellate courts to warrant this Court's review of the Court of Appeals' holding that Brelvis Consulting had no privilege against self-incrimination in response to the State's CID.

4. Brelvis Consulting Never Invoked the Protection Against Self-Incrimination under the Fifth Amendment, But Even If it Did, a Blanket Invocation of the Fifth Amendment is Improper

As noted previously, Brelvis Consulting never invoked Fifth Amendment protections. Assuming *arguendo* that (1) Brelvis Consulting could assert a privilege against self-incrimination, and (2) that Brelvis Consulting *had* invoked this privilege, a blanket refusal to comply with the State's CID is improper. *Dep't of Revenue. v. March*, 25 Wn. App. 314, 323, 610 P.2d 916, 922 (1979) ("The subject of a summons must appear before the examining officer and raise the claim of privilege in response to particular questions. A blanket refusal is not sufficient."); *see also United States v. Malnik*, 489 F.2d 682, 686 (5th Cir. 1974), *cert. denied*, 419 U.S. 826 (1974) (holding that recipient of a subpoena for testimony and

documents must assert the privilege as to each request for information or documents); *United States v. Clark*, 847 F.2d 1467, 1474 (10th Cir. 1988) ("[A]ppellants must comply with the instructions of the summonses. **At the appropriate time, appellants may interpose their claim of Fifth Amendment privilege *pertaining to specific documents*** *and in response to individual questions upon their reasonable belief that a compulsory response by them to these testimonial matters will pose a substantial and real hazard of subjecting them to criminal liability.*") (italics in original) (bolded emphasis added).

"The Fifth Amendment privilege is only applicable where the defendant has 'reasonable cause to apprehend danger from a direct answer.'" *State v. Levy*, 156 Wn.2d 709, 731-32, 132 P.3d 1076 (2006) (quoting *United States v. Goodwin*, 625 F.2d 693, 700 (5th Cir.1980)). "The trial judge must inquire into the legitimacy of the assertion and the scope may not extend to all relevant questions." *Id.* The *Levy* court held that it was error to allow a "blanket" assertion of the privilege through counsel without taking steps to determine whether assertion of the privilege was proper and to consider the possibility that the witness could have answered at least some questions without potentially incriminating herself. *Id.* For example, RFP No. 11 of the CID requests Brelvis Consulting's "registration with the Secretary of State (or similar official) for the state in which [Brelvis

Consulting was] incorporated or registered..." CP 30. This information does not tend to incriminate Brelvis Consulting.

Brelvis Consulting argues that "[t]he 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." Pet. for Rev. at 14. In support, Brelvis cites *United States v. Bright*, 596 F.3d 683 (9th Cir. 2010).[4] However, the facts of *Bright* are distinguishable. In upholding a contempt order, the *Bright* court explained that appellants "were able to litigate fully their asserted Fifth Amendment privilege concerning document production in the enforcement proceeding..." *Id* at 691. Put differently, the court refused to allow appellants to relitigate their Fifth Amendment privilege on appeal because they could have done so before the trial court, since, unlike in an interview, appellants knew exactly what the document request contained.

In contrast, Brelvis Consulting never asserted a Fifth Amendment privilege with respect to particular documents or over a set of related document requests. Brelvis Consulting did not assert a Fifth Amendment privilege at all, much less provide any response. Putting aside whether Brelvis Consulting had any privilege against self-incrimination, Brelvis

[4] Brelvis Consulting also cites *State v. Delgado*, 105 Wn. App. 839, 18 P.3d 1141 (2001). But that case involves a blanket assertion of a criminal defendant's Fifth Amendment right at trial, which is of no import here.

Consulting is not entitled to argue that it could invoke a blanket assertion of its privilege when it chose not to respond to the CID at all.

B. The Transactional Immunity Described in RCW 10.52.090 Does Not Apply to CIDs Issued Pursuant to RCW 19.86.110

In yet another *ex post facto* attempt to justify its failure to respond to a legally issued CID, Brelvis Consulting argues that the State must provide transactional immunity as a condition precedent to it responding to the CID. But as the Court of Appeals held, a plain reading of RCW 10.52.090 demonstrates that this statute does not apply to actions brought under the CPA: "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. Brelvis Consulting' argument fails." Slip Op. at 15.

Further, a criminal procedure statute like RCW 10.52.090, plainly does not apply to actions brought under the CPA. Indeed, it would be absurd for the Legislature to enact the CPA and include mandatory penalties for violations as well as an investigative method that required law enforcement to grant immunity due to those very same penalties in order to obtain the information needed to establish violations in the first place.

The absurdity created by Brelvis Consulting's interpretation would not by limited to CPA enforcement because numerous Washington

regulatory agencies possess similar investigatory and civil penalty powers. As one example of many, under RCW 70.94.141(2), the Washington Air Pollution Control Authority has the power to "*issue subpoenas to compel the attendance of witnesses and the production of evidence*, administer oaths and take the testimony of any person under oath." (emphasis added). Further, under RCW 70.94.431(1), the Air Pollution Control Authority may assess civil penalties for violations of the Act. Of course, such investigatory and civil penalty schemes are commonplace among state and federal regulators. Thus, to follow Brelvis Consulting's line of reasoning, the Air Pollution Control Authority must grant a polluter transactional immunity prior to subpoenaing documents from it, thereby waiving any civil penalty liability as a result of uncovering violations during the investigation. The Legislature never intended an absurd result, and this Court should decline to create one. Brelvis Consulting raises no argument that merits review.

C. Strong Policy Reasons Support Foreclosing on a Respondent's Right to Set Aside a CID After 20 Days of Service, But Even If Petitioner Had Properly Moved to Set it Aside, the State's CID Survives Petitioner's Legal Challenges

This Court need not grant review to determine whether Brelvis Consulting waived its right to object to the State's CID when it failed to move to set it aside within the 20-day window set forth in RCW 19.86.110(8), because the State's CID survives without it. As the

Court of Appeals noted, "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." Slip Op. at 16. In any event, the trial court's ruling was correct because strong policy reasons support foreclosing a respondent's right to set aside a CID after 20 days of service.[5]

The existence of a 20-day window within which one must file a motion to set aside a CID under the CPA promotes expedited and efficient resolution of an investigation. Indeed, both the State and any recipient of a CID benefit from speedy resolution of a matter. Eliminating consideration of late objections by respondents outside of the 20-day window is also consistent with the Legislature's stated intent that the CPA be broadly construed. The Court of Appeals did not rely on the 20-day window to set aside a CID as a justification for upholding the State's CID. But even if it did, such a position would have a sound basis. In any event, this issue does not merit review by this Court.

[5] This principle was reinforced by the Idaho Supreme Court in *State By & Through Alan G. Lance v. Hobby Horse Ranch Tractor & Equip. Co.*, 129 Idaho 565, 568, 929 P.2d 741 (1996) (ruling that the recipient of a CID issued by the Idaho Attorney General waived its right to object to the CID when it failed to respond within the requisite 20-day period).

D. By Successfully Enforcing its CID, the State is a "Prevailing Party" under RCW 19.86.080, and the Court of Appeals Properly Awarded it its Fees under RAP 18.1

When issuing a CID under RCW 19.86.110, the State acts "to restrain and prevent the doing of any act herein prohibited or declared to be unlawful." RCW 19.86.080. Thus, when awarding the State its costs and fees under RAP 18.1, the Court of Appeals properly held, "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)." (Slip Op. at 23) (internal quotations omitted). Brelvis Consulting takes issue with this conclusion because "[t]here has been no determination by any judge or jury that Brelvis or Mr. Mesnekoff have committed any act prohibited or declared to be unlawful." Pet. for Rev. at 19. It is a distinction without a difference in this case.

In enacting the CPA, our Legislature directed the courts to liberally construe the Act such that "its beneficial purposes may be served." RCW 19.86.920. This Court has made it clear that requiring those who violate the CPA to pay the costs and fees associated with any investigation or litigation brought under the Act is consistent with this liberal construction mandate because "[s]uch awards will encourage an active role in the enforcement of the consumer protection act. This construction places the

substantial costs of these proceedings on the violators of the act, and it does not drain respondent's public funds." *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 314-15, 553 P.2d 423, 435 (1976). In this case, the Court of Appeals rejected each and every argument raised by Brelvis Consulting to thwart a valid CID issued pursuant to the CPA and rejected Brelvis Consulting's attempt to narrowly construe both the CPA and RAP 18.1. The costs of enforcing the CPA here – in assuring that targets do not willfully ignore a validly issued CID brought under the Act – should be borne by Brelvis Consulting.

Even assuming *arguendo* that a motion to enforce compliance with a CID issued under RCW 19.86.110 were not an action to prevent and restrain the doing of an unlawful act, the State would nevertheless be entitled to its costs and fees as the prevailing party under RAP 18.1. If this Court were to view this strictly as a civil discovery matter governed by the Civil Rules, the State would be the prevailing party under CR 37(a) 4: "If the motion [to compel] is granted, the court shall . . . require the party or deponent whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees . . ." If a trial court may award fees under CR 37(a)(4) following the grant of a motion to compel discovery, so too may the Court of Appeals in response to this appeal.

E. The State Requests Attorneys' Fees and Costs Incurred In Answering Brelvis Consulting's Petition For Review

A prevailing party is entitled to attorneys' fees and costs in responding to a petition for review if requested in the party's answer and if "applicable law grants to a party the right to recovery." RAP 18.1(a) and (j). Accordingly, the State respectfully requests the Court to exercise its discretion and award the State reasonable attorneys' fees and costs in answering this Petition. The CPA also provides the Court with discretion to award the State reasonable fees and costs as the prevailing party on appeal. RCW 19.86.080(1); *State v. Kaiser*, 161 Wn. App. 705, 726, 254 P.3d 850 (2011). Should the Court grant the State's request, the State will file an affidavit detailing the fees and costs incurred. RAP 18.1(d).

VI. CONCLUSION

For each of these reasons stated, the State respectfully asks this Court to deny Brelvis Consulting's Petition for Review.

RESPECTFULLY SUBMITTED this 13th day of May, 2019.

ROBERT W. FERGUSON
Attorney General

WSBA #50003 for

JOHN A. NELSON, WSBA #45724
Assistant Attorney General
Attorneys for Respondent
State of Washington

CERTIFICATE OF SERVICE

I, Serina Clark, hereby certify that on May 13, 2019, I caused a true and correct copy of Answer of Respondent State of Washington to Petition for Review to be filed with the Court, via electronic filing, and caused to be served on all counsel of record as follows:

PETER OFFENBECHER
Skellenger Bender, P.S.
1301 Fifth Ave., Ste. 3401
Seattle, WA 98101
poffenbecher@skellengerbender.com

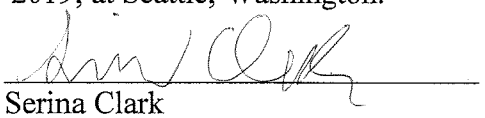
☑ Via Email
☑ Via e-file/ECF

COOPER OFFENBECHER
Allen Hansen Maybrown & Offenbecher
600 University Street, Suite 3020
Seattle, WA 98101
cooper@ahmlawyers.com

☑ Via Email
☑ Via e-file/ECF

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

DATED this 13th day of May 2019, at Seattle, Washington.



Serina Clark
Legal Assistant

CONSUMER PROTECTION DIVISION AGO

May 13, 2019 - 3:30 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96975-2
Appellate Court Case Title:	State of Washington v. Brelvis Consulting, LLC
Superior Court Case Number:	17-2-00906-4

The following documents have been uploaded:

- 969752_Answer_Reply_20190513152326SC341885_2789.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 2019_05_13StatesAnswer.pdf

A copy of the uploaded files will be sent to:

- cooper@ahmlawyers.com
- courtney.amidon@atg.wa.gov
- john.nelson@atg.wa.gov
- poffenbecher@skellengerbender.com
- serina.clark@atg.wa.gov

Comments:

State of Washington's Answer to Petition for Review

Sender Name: Serina Clark - Email: serinac@atg.wa.gov
Filing on Behalf of: John Nelson - Email: johnn2@atg.wa.gov (Alternate Email: cprreader@atg.wa.gov)

Address:
800 Fifth Ave
Suite 2000
Seattle, WA, 98133
Phone: (206) 464-7745

Note: The Filing Id is 20190513152326SC341885