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NO. 50235-6-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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

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BRELVIS CONSULTING, LLC,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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APPELLANT'S REPLY TO RESPONDENT'S RESPONSE TO  
APPELLANT'S OPENING BRIEF

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## **I. ARGUMENT**

### **A. This Is A Case Of First Impression Because No Washington Court Has Ever Considered Or Ruled On The Issues Presented.**

The first sentence in the State’s brief (“This is not a case of first impression”) is plainly incorrect.

In the Superior Court below:

- The State acknowledged in oral argument that the issues raised have not before been decided by any Washington court. VRP at 21 (“Respondents are . . . attempting to raise novel arguments . . .”).
- The Superior Court Judge, the Honorable James Dixon, concurred with the State’s assertion in his oral ruling. VRP at 24 (“[This] is a novel issue.”).
- In his written Order granting the stay, the Superior Court Judge stated: “The Court finds that the issues to be presented by the appeal are meritorious and debatable and that they may be issues of first impression.” CP 354.

Respondent’s central position—that a Civil Investigative Demand (CID) requiring sworn answers to interrogatories and the production of documents is subject to the self-incrimination protections of United States Constitution, the Washington state constitution, and RCW 10.25.090—has never before been considered by any court in Washington.

Neither party has provided a controlling case that has decided this issue, because there is none. It is, therefore, an issue of first impression.

**B. The State’s Principal Argument, That An Adverse Ruling “Would Cripple Well-Established State Investigative Functions,” Is Unwarranted And Alarmist.**

The State’s principal argument throughout its Response is that an adverse ruling “would cripple well-established state investigative functions.” Response at 25. But this the “sky is falling” argument is a straw man.

The State’s Response attempts to paint a dire picture of a regulatory scheme (the Consumer Protection Act) that will collapse if it is not able to compel incriminating responses and the production of incriminating evidence from those it seeks to investigate.

The clearest parallel that demonstrates the error of this argument is the federal government’s use of Civil Investigative Demands. Pursuant to the federal Civil False Claims Act and 31 U.S.C. § 3733, the Attorney General of the United States (the head of the United States Department of Justice) also issues and enforces Civil Investigative Demands—including interrogatories, requests for production, and depositions—that are identical to those at issue in the case now before this Court. The United States Department of Justice is, however, bound to conduct these inquiries within the bounds of the federal constitutional protections against self-

incrimination and privacy and the federal statutes that are designed to enforce those constitutional safeguards.

The procedures to enforce those constitutional limitations on the federal government's power to issue and enforce CIDs are articulated in this parallel federal Civil Investigative Demand statute:

(b) Protected Material or Information.—

(1) In general.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation[.]

31 U.S.C. § 3733.

Any subpoena issued in a federal “grand jury investigation” is, in turn, subject to the provisions of 18 U.S.C. §§ 6001–6005, which provide that no person can be compelled to provide evidence against himself or herself in a grand jury or other official proceeding without a grant of immunity pursuant to these statutes.

Section § 3733 (h)(7)(B) of the federal Civil Investigative Demand (CID) statute further provides:

If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of

such person may be compelled in accordance with the provisions of part V of title 18.

Title 18 includes most of the provisions of the Federal Criminal Code. Part V of Title 18 includes Sections 6001–6005, which prohibit compulsion of testimony or the “provi[sion] of other information” in any court, grand jury, congressional, or other administrative proceeding absent a grant of federal statutory immunity. 18 U.S.C. §§ 6001–6005.

Thus, under the federal Civil Investigative Demand statute, individuals enjoy the full range of constitutional protections, including the right to refuse to answer questions on the basis of the federal constitutional and statutory privileges against self-incrimination. Certainly the parallel Washington state CID statute cannot provide any less protection.

By applying these statutes, federal law enforcement authorities use civil investigative demands to investigate violations of the civil regulatory law, while at the same time respecting the constitutional privilege against self-incrimination and other important constitutional protections.

In propounding Civil Investigative Demands, the Washington State Attorney General’s Office must abide the constitutional and statutory protections against self-incrimination and privacy in much the same fashion as does the United States Attorney General in propounding Civil Investigative Demands. Accommodating these fundamental constitutional

protections has certainly not crippled the investigative functions of the United States Department of Justice. The suggestion that the Washington Attorney General will somehow be hobbled in performing its functions if it is required to abide by these very same protections is an unwarranted and alarmist argument.<sup>1</sup>

**C. A Vast Array Of Other Traditional Law Enforcement Investigative Techniques—That Do Not Violate The Constitutional And Statutory Privileges Against Self-Incrimination—Are Fully Available To The State In Conducting Its Investigation.**

There is no suggestion made by Appellant here that the State cannot investigate Brelvis and Mr. Mesnekoff. The State is free to investigate them, just not by compelling answers to interrogatories and requests for production that violate the basic constitutional and statutory protections against self-incrimination.

Law enforcement agencies such as the Attorney General's Office (and, of course, the United States Attorney's Offices and the County Prosecutor's Offices throughout the State of Washington) have an

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<sup>1</sup> The alarmist tone throughout the State's Response recalls an era when law enforcement agencies raised the (as it turns out, groundless) fear that requiring police to advise arrested persons of their rights to remain silent and to have counsel would forever cripple and destroy the ability to enforce the criminal law. The 51 years since the implementation of the now ubiquitous *Miranda* warnings teach us that those alarmist tones were unfounded and that following the constitution will not unduly impair law enforcement.

abundance of tools at their disposal to investigate suspected wrongdoing. All of these agencies must conduct their business of investigating suspected wrongdoing without compelling suspects to answer questions under oath or compelling suspects to cooperate in the collection of evidence against themselves and without violating the self-incrimination and privacy protections of the state and federal constitutions and other statutes. These other state and federal law enforcement agencies do this, and successfully, every day.

There are a variety of traditional law enforcement techniques that are available to the State in conducting its investigation of the student loan industry. For example, the State can conduct voluntary interviews of witnesses. The State can collect documents that are available in the public domain. The State can utilize the Internet to conduct searches of other publicly available resources, including social media. Indeed, the State's Response in this Court indicates that it has done exactly these things, including searching the website of the Better Business Bureau in Florida, and the State of Florida's official public document resources to collect what it believes is evidence in this investigation. *See* CP 155–56, 163–65 (including Declaration of John A. Nelson in Support of State's Reply (Mar. 23, 2017), at ¶ 4 & Exh. 2).

The State can also request the issuance of Special Inquiry Judge Proceeding subpoenas for documents or testimony, but all subject to the constitutional and statutory privileges against self-incrimination. *See, e.g.*, RCW 10.27.120 (“Any individual called to testify before a grand jury or special inquiry judge, whether as a witness or principal, if not represented by an attorney appearing with the witness before the grand jury or special inquiry judge, must be told of his or her privilege against self-incrimination.”).

Thus, the State’s argument that the investigative sky will fall if it loses this case is just wrong. The Attorney General’s Office will continue to use the law enforcement tools available—including CIDs—to investigate alleged violations of the Consumer Protection Act and other state regulatory statutes. But, like the United States Department of Justice and every other local, state, and federal law enforcement agency, the Attorney General will need to conduct those investigations within the bounds of federal and state constitutional provisions and Washington statutory provisions that are intended to protect the privilege against self-incrimination.

While the federal immunity statute only provides for use and fruits immunity in a subsequent criminal case, the state use immunity statute prohibits the use of information in a subsequent criminal prosecution *as well as the imposition of any “penalty or forfeiture.”* RCW 10.52.090.

Since a “penalty or forfeiture” is exactly what the Attorney General’s Office is attempting to impose in this case, compelling the answers to the interrogatories and the production of the documents is prohibited absent a grant of immunity from any such penalties or forfeitures.

**D. The State’s Suggestion That Its Characterization Of This Process As “Civil” Renders Irrelevant The Protections Of The State And Federal Constitutions Is Plainly Erroneous Under Well-Established State And Federal Constitutional Precedent.**

Another fundamental premise of the State’s argument—stated on page 1 and then repeated throughout its Response—is that the protections of the state and federal constitutions do not apply here because this is a “civil investigation” and not a criminal case.<sup>2</sup> This premise is plainly erroneous.

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<sup>2</sup> See, e.g., Response at 1 (“Such [constitutional] objections fail to overcome the State’s well-settled authority to issued demand 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 improper and unrecognized privilege against self-incrimination.”); 16 (“Brelvis Consulting’s blanket assertion of the Fifth Amendment is not only improper, but odd given that the State’s investigation is *civil in nature* . . . .”); 28 (“RCW 10.52.090 – a statute passed by the Legislature in

Fundamental constitutional and statutory principles prohibiting compelled self-incrimination apply not only in criminal proceedings, but also in *any official proceeding*, including administrative or investigatory proceedings such as this Civil Investigative Demand:

But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. ***It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory***[.]

*Kastigar v. United States*, 406 U.S. 441, 444 (1972) (emphasis supplied).

Washington state constitutional law is in accord about the type of proceedings to which the privilege applies. These protections against self-incrimination apply with equal force to the refusal “to answer official questions,” *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 351 (2000), *as amended on reconsideration* (Feb. 14, 2001), “in any proceeding civil or criminal, administrative or judicial, investigatory or adjudicatory.” *Eastham v. Arndt*, 28 Wn. App. 524, 527 (1981).

By persistently relying on its characterization of the investigation as “civil” to avoid addressing the constitutional issues, the State’s Response

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1909 – has no application to actions brought pursuant to the CPA, which are *civil proceedings*.”).

simply fails to acknowledge these authorities or address these basic principles.

**E. The State Has Failed To Meaningfully Address The Most Compelling, Novel, And Meritorious Issue In This Case By Refusing To Acknowledge That The CID—By Its Own Terms—Expressly Includes Mr. Mesnekoff Personally (And Not Just As A Custodian Of Records) As A Target Of The Written Interrogatories And Requests For Production.**

Paragraph 3.9 of the CID compels Mr. Mesnekoff to personally answer the interrogatories and produce the documents in violation of his privilege against self-incrimination. *See* Appellant’s Opening Brief at 16–17.

The State’s Response attempts to sidestep the plain language of its own CID—which equates Bruce Mesnekoff (acknowledged by the State as the owner and manager of the entity) personally with the “Brelvis” entity—erroneously suggesting that Mr. Mesnekoff is only implicated as a custodian of the Brelvis records and not also as an individual person.<sup>3</sup>

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<sup>3</sup> *See, e.g.*, Response at 12 (“Brelvis Consulting repeatedly and incorrectly contends that a CID issued to it and lawfully served upon Mr. Mesnekoff in his capacity as registered agent and managing member of the company somehow translates into a CID issued to Mr. Mesnekoff in his individual capacity.”), 12–13 (“[T]he heading of the State’s CID clearly demonstrates that the CID was issued to Brelvis Consulting, LLC, and not to Mr. Mesnekoff in any personal, private capacity.”), 13 (“[T]he definitions of “You” and “Your” contained in the CID (see below) in no way apply to Mr. Mesnekoff in his individual capacity.”), 29 (“[T]he CID in question was not issued to [Mr. Mesnekoff], but rather, a corporate entity.”).

Paragraph 3.9 of the CID explains that the Interrogatories and Requests for Production are directed not only at the Brelvis entity, but also at the individual persons who are “its principals,” “present or former owners, employees,” “officers, directors, agents, representatives,” “and any other persons or entities acting on behalf of” “Brelvis Consulting.” Since Bruce Mesnekoff is *all* of these, the CID applies to him personally. *See* Appellant’s Opening Brief at 16–17.<sup>4</sup>

The Attorney General’s Office drafted the CID and cannot now disavow itself from its plain language. The 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.

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<sup>4</sup> The State’s suggestion that the *caption* of the CID somehow negates the plain language used in the text of the CID to identify its targets and those obliged by its terms to respond has long since been dismissed. “That the title given to a pleading is immaterial has been repeatedly held by this court.” *Schmelling v. Hoffman*, 111 Wash. 408, 412 (1920) (citing *Smith v. Driscoll*, 94 Wash. 441 (1917); *Lawrence v. Halverson*, 41 Wash. 534 (1906); *Casey v. Oakes*, 17 Wash. 409 (1897)); *see also Liberal Construction of Captions; Interpretation of Pleadings According to Captions*, 61A AM. JUR. 2D PLEADING § 92. (“[C]ourts must look beyond the style and caption of pleadings in order to determine their true nature. Pleadings should be interpreted according to their true meaning and effect in order to do substantial justice, rather than interpreted according to their caption.”) (citations omitted)).

Interrogatories are written questions required to be answered under oath. Answering questions under oath such as the questions posed by these interrogatories implicates the core values which the privilege against self-incrimination protects.<sup>5</sup> Compelling Mr. Mesnekoff to answer interrogatories is no different than asking him questions under oath at a deposition or hearing and thus clearly implicates his privilege against self-incrimination, as well as his rights under RCW 10.52.090.

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<sup>5</sup> The CID sets forth 12 Interrogatories directed at Mr. Mesnekoff and Brelvis, and include questions inquiring as to Brelvis's corporate structure; the products and services offered; the source of leads for prospective clients; a list of every Washington consumer and the products or services provided; all owners, members and shareholders; the persons responsible for drafting and approving contracts with Washington customers; the persons responsible for determining and approving the amount of fees in Washington; identifying all Washington consumers who have formally or informally complained about the products and services; all current and former employees, agents, salespersons, and contractors; persons responsible for drafting and approving sales and marketing strategies; all steps taken to ensure compliance with local, state, and federal laws; and all steps taken to ensure all statements to potential customers are truthful. *See* CP 24–27.

**F. The Scope Of Immunity Conferred To Compel Answers To These Interrogatories Must At Least Be Coextensive With The State Statute Providing For Use Immunity For The Compelling Of Answers Under Oath In An Official Proceeding—Which Is Found In RCW 10.52.090—And Which Prohibits *Not Only Use Of Information In A Subsequent Criminal Prosecution, But Also The Imposition Of Any “Penalty Or Forfeiture.”***

The State argues that since RCW 19.86 prohibits use of information in a criminal proceeding, no violation of Mr. Mesnekoff’s rights occurs. However, the pertinent statute, RCW 10.52.090—and, as we have argued in our Opening Brief, Washington Const. art.1, § 9 (*see* Appellant’s Opening Brief at 11–30)—prohibit 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 immunity. This statute states:

[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 incriminate 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.

RCW 10.52.090 (emphasis supplied).

That Mr. Mesnekoff's knowledge concerning any documents such as those called for in the CID—directly implicated in the act of producing them—might be incriminating or subject him to a “penalty or forfeiture,” *see* RCW 10.52.090, is clear. The Attorney General is conducting an investigation into “illegal acts into which [Appellant's] conduct falls: ‘Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.’” *See* CP 8 (Petition at ¶ 5.6) (citing RCW 19.86.020 “Unfair competition, practices, declared unlawful.”). This statute provides comprehensive penalties and forfeitures for violations of its terms. *See, e.g.*, RCW 19.86.140 (setting forth various financial forfeitures and penalties).

To overcome a validly asserted act of production privilege, a grant of immunity is necessary to compel production. *United States v. Doe*, 465 U.S. 605, 617 (1984) (“The act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of use immunity pursuant to 18 U.S.C. §§ 6002 and 6003.”). Title 18 U.S.C. § 6003 authorizes a federal district court to issue an order requiring an “individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination.” Because “a grant of immunity need be only as broad as the privilege against self-incrimination,” a grant “need only protect the witness from the self-

incrimination that might accompany the act of producing his business records.” *Doe*, 465 U.S. at 617 n.17.

In this case, in order to overcome the assertion of the privilege under the state statute and the state constitution, any grant of immunity must *not only protect Mr. Mesnekoff from criminal prosecution, but must also protect him from any “penalty or forfeiture,”* see RCW 10.52.090 (“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”), the very things the State is concededly attempting to impose upon him.

Indeed, the declaration of the Assistant Attorney General (AAG) that accompanies the Petition to Enforce the CID, along with a review of the Attorney General’s website, demonstrates quite clearly that the Attorney General’s Office is attempting to compel Mr. Mesnekoff and Brelvis to answer these interrogatories and to produce these “papers and documents” *in order to* “subject him . . . to a penalty or forfeiture.” RCW 10.52.090.<sup>6</sup>

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<sup>6</sup> Compare Nelson Dec. at CP 13–15 (listing King County Superior Court “enforcement actions against more than a dozen companies operating in the student loan debt adjustment industry and offering services similar to those of Brelvis Consulting, LLC”), *with* the Attorney General’s website at <http://www.atg.wa.gov/news/news-releases/ag-ferguson-surpasses-1-million-student-borrower-recoveries> (listing the student loan companies against whom the Attorney General’s Office has sought and obtained penalties and forfeitures (“Attorney General Bob Ferguson announced today that his office has recovered more than \$1.2 million in the last year cracking down on student loan debt adjusters . . .”). A side-by-side

This violates the Washington use immunity statute in the absence of a concomitant grant of immunity; i.e., a grant of immunity for any use in a subsequent criminal case or the imposition of any “penalty or forfeiture.”

*Id.*

**G. The State’s Refusal To Address The “Particular Context” Analysis Announced In *State v. Russell*, Or To Even Attempt To Conduct A *Gunwall* Analysis, Suggests That The State Either Has No Legitimate Rebuttal For This Argument Or That It Concedes This Point On Appeal.**

In its Opening Brief, Appellant cited and quoted the Supreme Court’s opinion in *State v. Russell*, 125 Wn.2d 24 (1994), for the proposition that the determination as to whether a particular state constitutional provision affords enhanced protection beyond that of the parallel federal constitutional provision must be done on a case-by-case basis with respect to the “particular context” in which the enhanced constitutional protection is asserted:

A determination that a given state constitutional provision affords enhanced protection **in a particular context** does not necessarily mandate such a result in a different context. *State v. Boland*, 115 Wash.2d 571, 576, 800 P.2d 1112 (1990). Similarly, **when the court rejects an expansion of rights under a particular state constitutional provision in**

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comparison of the AAG’s declaration in this matter listing student loan company enforcement actions and the AG’s list of student loan companies who have suffered penalties and forfeitures pursuant to the AG’s current campaign reveals virtual identity. *See* Appellant’s Opening Brief at 33.

**one context, it does not necessarily foreclose such an interpretation in another context.**

*Id.* at 58 (emphasis supplied); *see* Appellant’s Opening Brief at 25–26.

The State’s Response simply ignores the citation to *Russell*, and boldly concludes that “a *Gunwall* analysis . . . is not required.” Response at 17. Having neither taken up the opportunity to conduct the *Russell* “interpretation-in-another-context” analysis as instructed by the Supreme Court, nor conducted a factor-by-factor analysis of the *Gunwall* criteria, the State should be deemed to have conceded this point in the Appellant’s Opening Brief. *See, e.g., State v. Ward*, 125 Wn. App. 138, 144 (2005) (noting that the Respondent/State did not respond to a particular argument made by the appellant, and thus “[t]he State . . . concedes this point”).

**H. The Protections Of Article I, Section 7 Are Implicated Here Because Business Records Constitute Private Affairs.**

Respondent contends that Article 1, section 7 does not apply here because the CID was not issued to Mr. Mesnekeoff in his personal capacity, and does not seek personal documents. Response at 23. Yet, as discussed above, the words of the CID itself demonstrate that it is directed at Mr. Mesnekeoff personally. Additionally, Respondent has failed to address the Washington Supreme Court’s express use of “business records” as an example of the type of documents that “reveal much about a person’s activities, associations, and beliefs,” and has held that it is improper for the

State to collect even *discarded* business records without a warrant. *State v. Boland*, 115 Wn.2d 571, 578 (1990); *see* Appellant’s Opening Brief at 40.

**I. The Location Of The State Immunity Statute (RCW 10.52.090) In Title 10 (Relating To Criminal Procedure) Of The Revised Code Of Washington Is A Fact Of No Consequence. The Parallel Federal Immunity Statutes That Apply To Federal Civil Investigative Demands Are Likewise Located In The Federal Criminal Code (Title 18 Of The United States Code).**

The State ascribes great importance to the location of the state use immunity statute, RCW 10.52.090, in the chapter of the Revised Code of Washington that also includes statutes addressing various aspects of state criminal procedure. State’s Response at 29 (“RCW 10.52.090 is located in Title 10 of the Revised Code of Washington, which relates to criminal procedure. Accordingly, the statute has no bearing on actions brought by the State seeking civil penalties . . .”). This argument is meritless.

Most importantly, the words of the statute itself contain no such limitation *to* criminal matters or exclusion *of* civil matters. Rather than attempting to discern the meaning or application of a statute by deciding which volume of the Revised Code of Washington it is located in, courts in Washington have traditionally looked to the plain meaning of the words used. *See State v. Armendariz*, 160 Wn.2d 106, 110 (2007) (“In interpreting a statute, this court looks first to its plain language. If the plain language of the statute is unambiguous, then this court’s inquiry is at an end. The statute

is to be enforced in accordance with its plain meaning.” (citations omitted)). The language of this statute is plain; there is no limitation in the language to criminal matters.

And this argument is particularly unpersuasive in light of the forgoing discussion of the parallel federal statutes regarding Civil Investigative Demands. Although federal Civil Investigative Demands are utilized to gather information about potential violations of the federal Civil False Claims Act, the federal statutes defining the scope of the immunity that must be provided to compel compliance with the **Civil** Investigative Demands are located in the Federal **Criminal** Code (Title 18 of the United States Code). *See* discussion of 31 U.S.C. § 3733 (7)(B) and 18 U.S.C. §§ 6001–6005 in this Reply Brief at 3–4, *supra*.<sup>7</sup>

So it is not surprising at all—and certainly not any persuasive legal argument—that the state statute defining the scope of immunity that must be provided to compel compliance with state civil investigative demands is

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<sup>7</sup> The State similarly argues that “it would be absurd” for the legislature to create a statute like the Consumer Protection Act and then also provide a statute for use immunity to protect the constitutional rights of citizens subjected to civil investigative demands. Response at 29–30. But it is not at all absurd, and is indeed, as the foregoing discussion demonstrates, exactly what the parallel federal statutory scheme wisely provides.

likewise found in the same title as some of the provisions of state criminal procedure.

**J. The State’s Argument Regarding The 20-Day Provision Is Unpersuasive.**

The State’s argument regarding the 20-day provision: (1) fails to address the legislature’s use of permissive rather than mandatory language in implementing this provision, or to distinguish controlling Supreme Court precedent on that issue; (2) fails to acknowledge the non-self-executing nature of an investigative subpoena; and (3) fails to appreciate that fundamental constitutional rights cannot be forfeited by failing to bring a petition to set aside within the permissive 20-day time period set forth in RCW 19.86.110.

Because grand jury and administrative subpoenas are not self-enforcing, persons or entities served with grand jury or administrative subpoenas (a Civil Investigative Demand is, in effect, an administrative subpoena) such as those issued in the case before this Court have two options. One option is to preemptively file a motion to quash the subpoena on the ground that compliance would implicate the Fifth Amendment right against self-incrimination. *See, e.g., United States v. Doe*, 465 U.S. 605, 606–08 (1984). The other option is waiting to see if the government intends to move to enforce the subpoena:

Grand jury and administrative subpoenas function in similar ways. The Court wrote in *Oklahoma Press* that an administrator's "investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's ... and is governed by the same limitations." 327 U.S. at 216, 66 S.Ct. 494; *see also Morton Salt*, 338 U.S. at 642, 70 S.Ct. 357 (an administrator's "power of inquisition" "is more analogous to the Grand Jury, which ... can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."). ***Neither type of subpoena is self-enforcing.*** *See United States v. Williams*, 504 U.S. 36, 48, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) (grand jury subpoena); *Mont. Sulphur*, 32 F.3d at 444 (administrative subpoena). ***If the subpoenaed party fails to comply, the government must seek a court order compelling compliance.*** *See* 21 U.S.C. § 876(c); *Williams*, 504 U.S. at 48, 112 S.Ct. 1735. ***The court will review both grand jury and administrative subpoenas for compliance with the appropriate standard before issuing an enforcement order.*** *Williams*, 504 U.S. at 48, 112 S.Ct. 1735; *Mont. Sulphur*, 32 F.3d at 444.

*United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1116 (9th Cir. 2012) (emphasis supplied).

Of course, the government—or in this case the Attorney General's Office—may decide that it has other more pressing enforcement priorities and it may never act to enforce the CID. A statute which actually required the subject of the CID to file an original action in Superior Court to object within 20 days to preserve his or her privilege against self-incrimination simply creates more work for the courts and clogs up the judicial system,

particularly in a case where the Attorney General's Office may have moved on to other enforcement priorities.

And, of course, 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 (1982), *amended*, 97 Wn.2d 701 (1983) ("Where 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."). *See* Appellant's Opening Brief at 42.

The State's Response fails to address the *Scannell* case, cited in Appellant's Opening Brief, or the well-established rule of black letter law it reiterates.

Instead, the State cites an Idaho case, *State By & Through Alan G. Lance v. Hobby Horse Ranch Tractor & Equip. Co.*, 129 Idaho 565, 929 P.2d 741 (1996), that is clearly distinguishable.

First, the *Hobby Horse* court never considered the issue presented here: Whether the legislature's use of the word "may" rather than "shall" indicates that filing a preemptive motion to quash is permissive rather than mandatory. Since the *Hobby Horse* court never addressed the legal issue or argument presented by Appellant in the Superior Court below and in this

appeal, the Idaho decision is of no precedential value in the decision in the case now before this Court. *See, e.g., Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824 (1994) (“In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” (citations omitted)).

The objections being raised by the subject of the CID in *Hobby Horse* were not based on the violation of fundamental constitutional rights such as the right against self-incrimination, but rather revolved around trademark infringement, whether the Idaho Attorney General had arbitrarily refused to enforce its laws against foreign tractor manufacturers, and other procedural, non-constitutional issues.

Because it was never raised in that case, the *Hobby Horse* court never had the opportunity to address the issue presented here: Whether the subject of a CID forfeits his fundamental constitutional right against self-incrimination, if his lawyer (here, this was previous counsel, not the undersigned) does not initiate an original action in Superior Court to quash the CID within 20 days of receiving the CID, where the statute permits—but does not require—initiation of such an action to litigate the objection to enforcement of the CID. Because this issue was never raised or addressed by the Idaho court, *Hobby Horse* does not control the outcome here. *See Berschauer/Phillips, supra.*

For these reasons, and because investigative (i.e., grand jury and administrative) subpoenas are inherently not self-enforcing, *see United States v. Golden Valley Elec. Ass'n, supra*, this Court should reject the State's argument on this issue.

## **II. CONCLUSION**

For all these reasons and those stated in the Appellant's Opening Brief, this Court should reverse the decision of the Superior Court.

Dated this 1st day of December, 2017.

s/ Peter Offenbecher  
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**CERTIFICATE OF SERVICE**

I, Jule Sprenger, certify that on December 1, 2017, I served a true and correct copy of the foregoing document electronically on the following party:

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**SKELLENGER BENDER, P.S.**

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