NO. 101769-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TERRY COUSINS, as personal representative of the ESTATE OF RENEE FIELD, deceased,
Petitioner,

v.

STATE OF WASHINGTON, and DEPARTMENT OF CORRECTIONS,
Respondent.

AMICUS CURIAE MEMORANDUM OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, COLUMBIA LEGAL SERVICES, AND WASHINGTON COALITION FOR OPEN GOVERNMENT IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY OF *AMICI* AND SUMMARY OF ARGUMENT

As further described in the accompanying Motion for Leave to File *Amicus Curiae* Memorandum, the American Civil Liberties Union of Washington is a nonprofit organization dedicated to the preservation of civil liberties. Columbia Legal Services is a nonprofit civil legal aid firm that advocates for laws that advance social, economic, and racial equity. Washington Coalition for Open Government is a nonprofit organization dedicated to promoting the public's right to know.

Amici are interested because the decision below, along with another published Division Two decision (*Dotson v. Pierce Cnty.*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020)), impose burdens on Public Records Act ("PRA") requestors that are not permitted by the statute and threaten the ability of citizens to hold the Department of Corrections ("DOC") and other agencies accountable.

Here and in *Dotson*, Division Two has adopted an extratextual "bright line rule" that allows agencies to start the clock on a PRA claim before the agency has completed production, and while the requestor and agency are still discussing the request. Under this rule, the statute of limitations on a PRA claim begins to run as soon as the agency states "the request is closed"—even where, as in *Cousins*, the agency responds to the requestor's follow-up questions by reopening the request, producing over 1,000 additional pages, and sending a *second* closing letter eleven months later.

The *Dotson* rule allows agencies to use artificial "closing letters" to manipulate the PRA's limitations period, in a manner that shields agencies from liability for inadequate searches and improper withholdings, regardless of when the statutory trigger—the agency's "last production" of records—actually occurs. RCW 42.56.550(6). Such a claim is now time-barred unless the requestor can prove equitable tolling—a safety valve this Court endorsed in *Belenski v. Jefferson Cnty.*, 186 Wn.2d

452, 378 P.3d 176 (2016), but which imposes a bad faith standard that, in practice, has proven all but impossible to meet. The rule strips the PRA of its ability to ensure "[t]he people… may maintain control over the instruments that they have created." RCW 42.56.030. That control is needed most in cases like this one, where the underlying records are held by DOC and relate to inmates who depend wholly on its care—like Terry Cousins' sister, who died in DOC custody.

The *Dotson* rule conflicts with *Belenski* and *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) ("*RHA*"), as well as the plain language of the PRA itself. The rule also promotes PRA litigation instead of communication, and encourages agencies to "close" PRA requests before they have completed an adequate search—as DOC regularly does without consequence, and did in this case. The Court should grant discretionary review, reverse the decision below, and overrule *Dotson*.

II. STATEMENT OF THE CASE

Amici adopt Ms. Cousins' Statement of the Case.

III. ARGUMENT

A. Division Two's "Bright Line Rule" Conflicts with this Court's Decisions in *Belenski* and *RHA*.

In *Belenski*, this Court held the statute of limitations for a PRA claim "begins to run on an agency's final, definitive response to a records request." 186 Wn.2d at 455. Division Two mistakenly believes "*Belenski* adopted a bright line rule" that an agency letter purporting to "close" a PRA request is a per se final, definitive response that triggers the statute of limitations under *Belenski*—even "if the agency 'reopens' the request and actually searches for and produces additional records." *Cousins v. Dep't of Corr.*, __ Wn. App. 2d __, 523 P.3d 884, 889-90 (2023).

But *Belenski* adopted no such standard, and this case illustrates the danger of treating an agency "closure" letter as dispositive proof the agency has completed its response to a

PRA request. Ms. Cousins still had open, unresolved questions about her PRA request when DOC sent its first "closing" letter, and after she repeatedly followed up, DOC understood her request had been closed in error. 523 P.3d at 886-87. DOC admits it "re-opened the request," and ultimately produced over 1,000 additional pages of records. *Id*. at 887. To call DOC's initial "closing" letter its "final, definitive response" under *Belenski* ignores the reality that DOC's response indisputably was neither "final" nor "definitive." More important, it ignores the PRA's statute of limitations provision, which states that the one-year limitations period starts with the agency's "last production of a record on a partial or installment basis." RCW 42.56.550(6). DOC's last production occurred *after* its purported closing letter. That production—not DOC's initial closure letter, which it essentially revoked—should have been the "final, definitive response" used to measure whether Ms. Cousins' PRA claim was time-barred.

Division Two's holding also conflicts with *RHA*. There, this Court explained the statute of limitations did not start until the agency "effectively made" a claim of exemption. *RHA*, 165 Wn.2d at 537. It was not enough to send a letter purporting to claim an exemption; the agency had to provide a privilege log that effectuated the PRA's purposes. *Id*. at 540. *RHA* makes clear that courts should look to function, not form, when determining which events trigger the limitations period. The PRA has no place for Division Two's artificial bright-line rule.

B. Division Two's Ruling Implicates an Issue of Substantial Public Interest.

Review is appropriate "where an incorrect holding will have sweeping implications." *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005). In *Kilduff v. San Juan Cnty.*, 194 Wn.2d 859, 453 P.3d 719 (2019), this Court granted discretionary review to reverse a holding that would have allowed agencies "to create an internal barrier to judicial review" by imposing administrative exhaustion requirements on

PRA claims. *Id*. at 873-74. Like *Kilduff*'s unapproved exhaustion requirement, the artificial *Dotson* rule "is not authorized by any provision of the PRA, undermines the PRA's purposes, and is contrary to the PRA model rules." *Id*. at 874. The Court should grant review to correct Division Two's holding before this barrier to judicial review becomes even further entrenched, because the rule discourages agencies from adequately searching for and providing public records, and from cooperating with requestors.

1. The Court Should Not Allow DOC to Continue Escaping Liability for Its Inadequate Searches.

Usually, inadequate agency searches trigger penalties under the PRA. *See, e.g., Neighborhood All. of Spokane Cnty. v. Spokane Cnty.*, 172 Wn.2d 702, 717-18, 261 P.3d 119 (2011) (agency that "timely complied but mistakenly overlooked a responsive document should be sanctioned," albeit "less severely" than agency that "withheld records in bad faith"). "State agencies may not resist disclosure of public records until

a suit is filed and then avoid paying fees and penalties by disclosing them voluntarily thereafter." *Kitsap Cnty. Prosecuting Att'y's Guild v. Kitsap Cnty.*, 156 Wn. App. 110, 118, 231 P.3d 219 (2010) (citing *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005)).

But that is exactly what DOC does. Under the PRA, agency actions must rise to the level of "bad faith" before a requestor who is an inmate is entitled to penalties. RCW 42.56.565(1). As a result, DOC often has little incentive to conduct an adequate initial search due to its volume of inmate requests. Cases show DOC regularly shirks its obligations and "closes" PRA requests until the requestor challenges its response—whether through a follow-up email, an internal agency appeal, or litigation—because its negligence is rarely penalized. Ms. Cousins' experience shows that not only inmate

requestors, but also non-inmates (as here), are subject to this treatment.[1]

For example, in *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014), an inmate requested DOC produce a completed mail log, but DOC produced a blank log. *Id*. at 97-98. DOC did not produce the requested document until after the inmate filed a formal agency appeal. *Id*. Division Three held there was no bad faith because "[t]he error … was the result of an inadvertent mistake in summarizing the request." *Id*. at 108.

In *Thurura v. Wash. Dep't of Corr.*, noted at 15 Wn. App. 2d 1047, 2020 WL 7231100, an inmate requested metadata about an incident report, and DOC responded that it had no records without contacting the author of the report. *Id.* at *2. After the inmate filed a lawsuit, "DOC staff performed a further search" by contacting the report's author, then

[1] Under the PRA, "[a]gencies shall not distinguish among persons requesting records…." RCW 42.56.080(2).

"threatened to seek costs for a frivolous action" if the inmate went forward with his suit. *Id*. Division Three concluded "the agency conducted an inadequate search" but did not award penalties. *Id*. at *5-6.

In *Padgett v. Dep't of Corr.*, noted at 9 Wn. App. 2d 1040, 2019 WL 2599159, DOC again conducted an additional search and produced certain records only after an inmate filed suit. *Id*. at *3-4. The trial court concluded DOC "violated the PRA by not providing the fullest assistance … by failing to seek clarification … and simply clos[ing] the request," but found no bad faith, and Division Two affirmed. *Id*. at *5-6, *12.

In *Curtis v. Wash. Dep't of Corr.*, No. 54758-9-II, 2022 WL 1315654 (May 3, 2022) (unpublished), DOC again failed to produce documents until the inmate requestor sued. *Id*. at *3. The trial court concluded DOC "violated the PRA by failing to disclose the records" but found no bad faith because DOC

"merely made a mistake," and Division Two again affirmed. *Id*. at *3, *6.

In *Haney v. Wash. Dep't of Corr.*, noted at 22 Wn. App. 2d 1008, 2022 WL 1579881, DOC responded to an inmate's PRA request by producing 42 pages along with a letter stating the request was closed. *Id*. at *1-2. Ten months after the inmate filed suit, DOC produced an additional 187 pages along with a letter stating the request "remains closed." *Id*. As Division Three aptly observed, "The letter prompts many unanswered questions." *Id*. at *2. DOC sought to dismiss the inmate's PRA claim on statute of limitations grounds, but the court rejected its arguments. *Id*. at *5.

Here, DOC withheld over 1,000 pages until it finally recognized, through Ms. Cousins' persistence, that it had closed her request in error. *Cousins*, 523 P.3d at 886-87. After it re-opened her PRA request and produced the documents, DOC sent a second closing letter, then produced *yet another*

installment, again prompting "unanswered questions" about what DOC thinks it means to "close" a request. *Id*.

Because Division Two held the statute of limitations ran from DOC's initial "closing" letter, Ms. Cousins was required to prove equitable tolling in order to bring her PRA claim—effectively raising her burden to the same high bar that inmates must prove in order to receive penalties. *See Price v. Gonzalez*, 4 Wn. App. 2d 67, 75, 419 P.3d 858 (2018) (equitable tolling requires "bad faith, deception, or false assurances"). But Ms. Cousins should not be required to show bad faith in order to bring a claim that tests the adequacy of DOC's search—especially because DOC records require particular scrutiny due to the immense control DOC holds over the lives of its inmate population.

And no agency should be allowed to start the clock on a PRA claim by conducting an inadequate search and then purporting to "close" the request, thereby enabling the agency to let the statute of limitations run while it works through

concerns about its response with the requestor. Agencies do not have "the right to decide what is good for the people to know and what is not good for them to know," RCW 42.56.030, and requestors should be entitled to enforce this principle if their concerns are ultimately not addressed—not barred from doing so due to extratextual deadlines. The Court should grant review and reaffirm the agencies' responsibilities under the PRA.

2. The *Dotson* Rule Promotes Conflict Instead of Cooperation.

By allowing agencies to trigger the statute of limitations through conclusory and unsupportable "closing" letters, Division Two's holding punishes requestors like Ms. Cousins who seek to resolve their PRA disputes through communication rather than litigation. In order to preserve their PRA claims, requestors will be forced to file suit rather than explore other options, even though an agency's initial inadequate response could have been resolved with a simple email or phone call.

For example, in *West v. City of Lakewood*, noted at 22 Wn. App. 2d 1048, 2022 WL 2679516, a requestor filed suit after the city told him it did not locate any responsive records. *Id*. at *2. The city then discovered a spelling error, re-ran its search, and ultimately produced more than 1,500 records. *Id*. at *2-3. Had the city not hastily closed the request, and instead engaged with the requestor, it might have avoided litigation, statutory penalties, and the waste of agency and judicial resources. "[T]he purpose of the PRA is best served by communication between agencies and requesters, not by playing 'gotcha' with litigation." *Hobbs v. State*, 183 Wn. App. 925, 941 n.12, 335 P.3d 1004 (2014). If the decision below stands, requestors will be forced to litigate more and communicate less—an outcome that serves no one.

Indeed, both the statute and the courts require a cooperative process. Agencies must "ask[] the requestor to provide clarification for a request that is unclear." RCW 42.56.520(1)(d). Agencies are also "required to make more

than a perfunctory search and to follow obvious leads as they are uncovered." *Neighborhood All.*, 172 Wn.2d at 720. It subverts the PRA's purpose to allow agencies to trigger the statute of limitations by saying the request is "closed" at the same time they invite the requestor to provide information that would assist the agency in completing the request—regardless of whether the agency does so in good faith or bad faith.

This is consistent with the Attorney General's Model Rules, which emphasize communication and encourage "parties… to resolve their disputes without litigation." WAC 44-14-08003. "Communication is usually the key to a smooth public records process for both requestors and agencies." WAC 44-14-04003(4). This guidance applies not only while the agency is responding, but also when the request is "closed." Agencies should send closing letters that "ask the requestor to promptly contact the agency if he or she believes additional responsive records have not been provided." WAC 44-14-04006(1). Requestors should use internal review procedures

that "give the agency a chance to do a 'second look,' and may result in release of additional records or other favorable outcomes at no cost to the requestor." WAC 44-14-08001.

Dotson and *Cousins* undermine potential cooperation with requestors by drawing agencies into unnecessary lawsuits and encouraging requestors to submit duplicative requests. *See Cousins*, 523 P.3d at 890 ("Nothing prevents a requestor from making a new records request for records that were not produced."). The Court should intervene before the sweeping implications of Division Two's incorrect holding waste further resources.

IV. CONCLUSION

The Court should grant Ms. Cousins' petition.

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RESPECTFULLY SUBMITTED this 12th day of May, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby declares that on this 12th day of May, 2023, he electronically filed the foregoing document with the Washington State Supreme Court, which will send notification of such filing to the attorneys of record listed below.

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