NO. 97324-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LIVING ESSENTIALS, LLC, a Michigan limited liability company, and INNOVATION VENTURES, LLC, a Michigan limited liability company,

Petitioners.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Beth M. Andrus, Judge

MEMORANDUM OF AMICI CURIAE ROBERT M. MCKENNA AND MICHAEL C. TURPEN IN SUPPORT OF PETITION FOR REVIEW

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Robert M. McKenna and Michael C. Turpen, *amici curiae*, present the following memorandum in support of Appellant's Petition for Review.

I. IDENTITY AND INTEREST OF AMICI

Robert M. McKenna served as Attorney General ("AG") of the State of Washington from 2005 to 2013. Michael C. Turpen served as AG for the State of Oklahoma from 1983 to 1987. In both Washington and Oklahoma, as in other states, the AGs are the chief law enforcement officers for their states and are tasked with enforcing consumer protection laws prohibiting unfair and deceptive conduct. The AGs also swear to uphold the United States Constitution and constitutions of their respective states.

As former State AGs, *amici* have a unique perspective regarding (i) allocation of power between different branches of government, and (ii) protecting consumers from unfair and deceptive conduct while ensuring that rights enumerated in the federal and state Constitutions are not imperiled. This Court should grant the Petition for Review because the decision below violated the separation of powers doctrine; the First Amendment to the United States Constitution; and Article I, Section 5, of the Washington Constitution.

The Court of Appeals exceeded the proper role of the judiciary to interpret laws enacted by the Legislature. At the AG's invitation, it created new law outside the Washington Legislature by importing wholesale into

the Washington Consumer Protection Act ("CPA") a federal standard to create an entirely new theory of liability not adopted by the Legislature. The Court of Appeals compounded that error by limiting the constitutional right of companies and individuals to engage in truthful speech by sanctioning a form of prior restraint never before adopted by a state court to mandate that a company "adequately substantiate" statements prior to making them even if they are fully true.

If the AG's interpretation is allowed to stand, it will have profound national impact reaching beyond Washington's borders, prohibiting truthful speech by any person or business that might be heard or viewed by any Washington consumer if such person or company did not "adequately substantiate" the truthful speech prior to speaking. As longtime advocates for consumers' rights and constitutionally-protected free speech rights, *amici* are well-positioned to contribute to this discussion.

II. STATEMENT OF THE CASE

Amici rely on the facts presented in Appellant's Petition for Review.

III. ISSUES PRESENTED FOR REVIEW

The decision of the Court of Appeals raises two profound issues of first impression which merit review by this Court:

1. Is the importation of a federal standard into state law which creates a theory of liability not found in the State's statutory scheme an

unlawful usurpation of the legislative function?

2. In a case where the AG presents no evidence that commercial speech actually was false or had the capacity to deceive, is it an unconstitutional prior restraint for the AG to require that a company establish the truth of speech by some indefinite standard prior to engaging in such speech?

IV. ARGUMENT

A. Summary of Argument

The doctrine of separation of powers does not permit the judiciary to usurp the legislative function to create new law by enforcing a federal standard that expands the CPA in a manner not provided for by the Legislature. *Brown v. Owen,* 165 Wn.2d 706, 206 P.3d 310 (2009). The power of Washington courts to be guided by federal law in interpreting the CPA is not a grant of authority to invade the province of the Legislature by inserting a standard into the CPA which the Legislature did not adopt.

A requirement that a company provide "adequate substantiation" for truthful claims before it engages in truthful speech violates the absolute ban on prior restraint under Article I, Section 5, of the Washington Constitution and grants excessive discretion to the AG amounting to censorship prohibited by the First Amendment. The AG may not engage in the prior restraint of speech by requiring that a company establish the truthfulness of

its statements prior to making them. Such prior restraint improperly shifts the burden of justifying speech to the company, rather than requiring the AG who seeks to restrain speech to meet his burden of justifying the restraint on speech by demonstrating that such speech is false or has the capacity to deceive.

B. This Court should grant review to preserve from judicial usurpation the Legislature's power to create law.

This Court has recognized that separation of powers applies in Washington:

> Our constitution does not contain a formal separation of powers clause. "Nonetheless, the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine." "The doctrine serves mainly to ensure that the fundamental functions of each branch remain inviolate."

Brown, 165 Wn.2d at 718 (citations omitted). The Court went on to emphasize that "'the right of a legislative body to exercise its legislative powers will not be invaded by the judicial branch of government.'" Id. at 720. The Legislature, or the people via popular initiative, can create law:

> The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

Washington Constitution, Art. II, §1. The courts, in clear contrast, are

granted judicial power: "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." Washington Constitution, Art. IV, §1. "The judicial function is to construe and declare existing law," *State ex rel. Campbell v. Superior Court,* 25 Wash. 271, 274, 65 P. 183, 184 (1901), not to create new law. And the AG, as a member of the executive branch, cannot be permitted to impose new or different standards that are not legislatively adopted. In *State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011), this Court explained that the executive branch is not permitted to invade the province of other branches of government:

> [The overruled decision] allows the prosecutor, as a member of the executive branch, to bind the court to a particular sentence through the plea agreement. This invades the court's prerogative to impose what it considers to be an appropriate sentence in the case before it. Second, [the overruled decision] potentially requires the court to enforce a sentence outside the parameters authorized by the legislature. While the court may exercise its discretion in sentencing, it must do so within the bounds of the sentencing laws. By enforcing a sentence outside such bounds, the court would be invading the legislature's prerogative.

Id. at 872 (citation and footnote omitted).

The Court of Appeals accepted the AG's invitation to violate the separation of powers doctrine by endorsing the AG's insertion into the CPA a federal standard which the Legislature did not adopt. The CPA, like the consumer protection laws of other states, represents a balance adopted by the Legislature—it gives the AG broad latitude to investigate unfair and

deceptive conduct believed to possibly violate the law, and also delineates the boundaries of that authority. The Legislature prohibited conduct that either has "the capacity to deceive" or has been explicitly designated as a *per se* violation. *State v. P. Health Ctr., Inc.*, 135 Wn. App. 149, 170-71, 143 P.3d 618 (2006), *as amended* (Oct. 17, 2006). It did not prohibit the making of a statement because the statement lacks adequate prior substantiation.

The theory of liability advocated by the AG and adopted by the Court of Appeals far exceeds the CPA's legislatively-defined boundaries by importing into the CPA the Federal Trade Commission's ("FTC") prior substantiation standard, an expansive federal standard that neither requires the capacity to deceive nor has been designated a *per se* violation by the Legislature. In so doing, the AG and Court of Appeals have created new law, which they lack the power to do. Only the Legislature or the people of Washington can choose to incorporate this standard into Washington law.

The CPA states that:

> It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters . . . .

RCW 19.86.920 (emphasis added). While it is appropriate for state authorities to consider FTC decisions for guidance in applying the CPA's

provisions, this does not convey authority to incorporate substantive provisions from federal law into the CPA. The Legislature could have included the federal substantiation standard in the CPA, but it has not chosen to do so. If Washington's people desire such a change, their elected representative can choose to amend the CPA or the CPA can be amended by initiative. It is not for the AG or judiciary to usurp this role.

In addition, Washington's consumer protection system is distinct from the federal system. The FTC is an independent federal commission directed by five commissioners and possessing extensive internal processes and safeguards for administrative rulemakings, hearings, review, and enforcement. *See generally* 15 U.S.C. §45 *et seq*. In contrast, Washington's AG wields sweeping discretion to initiate investigations of "possible" violations, *see* RCW 19.86.110, and to sue to enjoin such acts, *see* RCW 19.86.080. Courts in other jurisdictions have rejected interpretations of state consumer protection laws that would incorporate the FTC's prior substantiation standard into those laws, recognizing that state legislatures have focused their laws on whether conduct actually is false and deceptive, and not merely unsubstantiated. *See, e.g., Hughes v. Ester C Co.,* 930 F. Supp. 2d 439, 455-459 (E.D.N.Y. 2013) (collecting decisions rejecting the prior substantiation standard under the California, Illinois, and New Jersey state consumer protection acts).

Neither the Washington AG nor judiciary should be the first to approve the importation of federal policy to substantively change or expand state statutory law. To do so here would be an especially egregious violation of the separation of powers doctrine since requiring prior substantiation is tantamount to prior restraint of free speech. Reversing the Court of Appeals will not expose Washington consumers to unfair or deceptive practices by companies doing business in the state. The AG will still have broad authority and a clear duty to protect consumers by investigating and punishing conduct that has the capacity to deceive or constitutes a *per se* violation of the CPA as enacted and amended by the Legislature.

C. This Court should grant review to protect speech from unconstitutional prior restraint and censorship.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). "[A]ny system of prior restraint . . . bear[s] a heavy presumption against its constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), *holding modified on other grounds by City of Littleton, Colo. v. Z.J Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988)). "[G]overnment cannot limit

speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." *Philadelphia Newspapers v. Hepps,* 475 U.S. 767, 777 (1986). A system of prior restraint "that places 'unbridled discretion in the hands of a government official or agency'" results in unconstitutional censorship under the First Amendment to the U.S. Constitution. *FW/PBS*, 493 U.S. at 225-26. Moreover, this Court has interpreted the Washington Constitution as providing even greater protection: "[U]nlike the First Amendment, article I, section 5 categorically prohibits prior restraints on constitutionally protected speech." *Bradburn v. N Cent. Regl. Lib. Dist.,* 168 Wn.2d 789, 801, 231 P.3d 166 (2010) (citing *Sanders v. City of Seattle,* 160 Wn.2d 198, 156 P.3d 874 (2007)).

The decision below requires that an "advertiser must have some recognizable substantiation for a representation *prior* to advertising it," Ct. App. Dec. at 9 (emphasis in original). A company therefore has no right to speak if it lacks prior "adequate substantiation" for its speech, however truthful the speech. *Id.* As former State AGs responsible for enforcing the consumer protection laws of our respective states, *amici* can attest that the Washington AG, like his counterparts in other states, wields extensive discretion to undertake a sweeping investigation "of a possible violation" of the CPA. RCW 19.86.110; *see also* 15 O.S. § 757(A) (the AG may act if he "has reason to believe a person has engaged in or is about to engage in any

practice declared to be unlawful"). The decision below permits the Washington AG to engage in *ad hoc* balancing of the social costs and benefits of restricting truthful speech without establishing that such speech, in fact, is false or has the capacity to deceive.

The U.S. Supreme Court "has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage . . . [based on] an *ad hoc* balancing of relative social costs and benefits.'" *United States v. Alvarez,* 567 U.S. 709, 717 (2012) (quoting *United States v. Stevens,* 559 U.S. 460, 470 (2010)). The Court recently emphasized that "[i]t is 'self-evident' that an indeterminate prohibition carries with it '[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.'" *Minn. Voters All. v. Mansky,* 585 U.S. ___, 138 S.Ct. 1876, 1891 (2018) (quoting *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U S. 569, 576 (1987)).

Under the decision below, the truth of speech does not matter. Every company is prohibited from advertising in Washington, even if its statements are true, unless it is completely certain it can prove it has met the vague requirement of "adequate substantiation" to the AG's satisfaction. In *Illinois ex rel. Madigan v. Telemarketing Assocs.,* 538 U.S. 600 (2003), the U.S. Supreme Court considered a case brought by a State AG against telemarketers for a charity. The Court distinguished between the liability

telemarketers could have for actual false statements and the First Amendment's prohibition on state laws that completely barred organizations from soliciting, regardless of the truth or falsity of their statements. In allowing the action to proceed, the Court emphasized that an AG's claim based on *actual* falsity "falls on the constitutional side of the line . . . between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud away in the process." *Id.* at 619-20 (internal quotations omitted). The Court emphasized that "[o]f prime importance, and in contrast to a prior restraint on solicitation, or a regulation *that imposes on fundraisers an uphill burden to prove their conduct lawful*, in a properly tailored fraud action the State bears the full burden of proof" that the speech is false. *Id.* at 620 (emphasis added).

Here, the Court of Appeals would impose just such an "uphill burden" on speakers to prove their statements truthful before speaking. Such a requirement clearly falls within this Court's definition of prior restraint—"an official restriction imposed on speech or another form of expression in advance of its occurrence." *Bradburn,* 168 Wn.2d at 802. Imposing that restriction violates both the Washington Constitution's absolute ban on prior restraint and the First Amendment's prohibition on placing *ad hoc* discretion to censor speech in the AG's hands.

CONCLUSION

Amici urge this Court to grant Petitioners' Petition for Review.

DATED this 12th day of August, 2019.

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Comments:

(1) RAP 13.4(h) Motion to File Amici Curiae Memorandum; (2) Motion to File Overlength Amici Curiae Memorandum; (3) Memorandum of Amici Curiae Robert M. McKenna and Michael C. Turpen in Support of Petition for Review; (4) Motion for Limited Admission Pursuant to APR 8(b) (Pro Hac Vice) and Order; (5) Affidavit of Service

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