NO. 97324-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

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

Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Federal courts have long recognized that because consumers depend on advertisers to have a reasonable basis for their ad claims, making claims without prior substantiation is deceptive. *E.g.*, *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015). Here, the Court of Appeals properly affirmed the trial court's decision that Petitioners engaged in unfair and deceptive acts in violation of the Consumer Protection Act (CPA) when they disseminated dietary supplement ads without anyone with any scientific background having first evaluated the advertising claims. Contrary to Petitioners' arguments, the Court of Appeals did not create a new *per se* CPA violation. Rather, consistent with the legislative mandate set forth in RCW 19.86.920 and with this Court's rulings, the Court of Appeals properly followed almost 50 years of federal guidelines and decisions interpreting the Federal Trade Commission Act (FTC Act).

Petitioners raise other legal issues that similarly lack substantial public interest to warrant review under RAP 13.4. Petitioners' constitutional arguments are without merit because Petitioners' ads are deceptive commercial speech and thus not protected under the First Amendment of the United States Constitution or the Washington Constitution. Additionally, courts have never required the State to present consumer

surveys or other extrinsic evidence to support a CPA deceptive advertising case. The Petition fails to meet RAP 13.4's criteria and should be denied.

II. COUNTERSTATEMENT OF ISSUES

1. Did the Court of Appeals properly look to federal decisions construing the FTC Act for guidance, as directed by RCW 19.86.920, when it held that it is unfair or deceptive to disseminate dietary supplement advertising claims that lack any reasonable substantiation, and properly conclude that such claims lack reasonable substantiation when no one with scientific training assessed the advertisements before they aired?

2. Did the Court of Appeals unconstitutionally prohibit Petitioners' deceptive ads, even though the U.S. Supreme Court held in *Central Hudson* that the First Amendment does not protect deceptive advertising and this Court holds that commercial speech enjoys no greater protections under the state constitution than under the First Amendment?

3. Is the term "competent and reliable scientific evidence" unconstitutionally vague when it has been applied by federal courts for over 30 years and is the subject of extensive FTC guidance?

4. Did the Court of Appeals engage in unconstitutional burden shifting despite requiring the State to prove that Petitioners' advertisements lacked reasonable substantiation, engaged in trade or commerce, and impacted the public interest?

5. Must the State present customer surveys to prove a CPA violation when the weight of authority holds that survey evidence is not required to prove deception?

III. COUNTERSTATEMENT OF THE CASE

Petitioners aired a series of television advertisements making claims about their dietary supplements 5-Hour ENERGY and Decaf 5-Hour ENERGY: (1) they claimed that the combination of caffeine, B vitamins, and amino acids would provide energy that would last longer than

consumers would experience from three to four cups of coffee; (2) they claimed Decaf 5-Hour ENERGY provided hours of energy; and (3) they aired an "Ask Your Doctor" advertisement, which implied that 73% of doctors recommend 5-Hour ENERGY. *State v. Living Essentials, LLC, et al.*, No. 76463-2-I, slip op. at 2-4 (Wash. Ct. App. March 18, 2019). The State alleged at trial that the first two ad claims were unfair and deceptive because they were not reasonably substantiated, and that the "Ask Your Doctor" claim was deceptive because 73% of doctors do not recommend 5-Hour ENERGY, contrary to the ad's net impression.[1] The State further alleged the ads occurred in trade or commerce, impacted the public interest, and were thus violations of the CPA. CP 58, 59, 61.[2]

The trial court and Court of Appeals agreed with the State that Petitioners lacked reasonable substantiation for their advertising claims. The courts concluded Petitioners aired their advertisements without "anyone with any science training ever assess[ing] the ad claims and the science backing up those claims," and that "asking an advertising director who lacks any scientific or medical training to conduct internet research is

[1] Petitioners argue the State "abandoned" any claim that the ads were false at trial. Pet. at 4. The State did not seek to prove the ads were literally false at trial because falsity is not an element of a CPA action—deception is. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 50, 204 P.3d 885 (2009). The State argued the ads were unfair and deceptive throughout trial.

[2] To prevail on a CPA cause of action, the State must prove (1) an unfair or deceptive act or practice, (2) in trade or commerce, and (3) a public interest impact. *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011).

[not] adequate substantiation" for dietary supplement claims. Slip op. at 21. The courts further agreed that the "Ask Your Doctor" ads were unfair or deceptive because they deceptively implied that 73% of doctors recommend 5-Hour ENERGY. Slip op. at 23, 25. The trial court held that Petitioners disseminated their ads thousands of times and therefore engaged in trade or commerce (slip op. at 26-27), that impacted the public interest, and thus concluded Petitioners violated the CPA. The Court of Appeals affirmed.

IV. ARGUMENT

A. The Court of Appeals Properly Concluded that Petitioners' Advertisements Were Unfair and Deceptive Because They Lacked Reasonable Substantiation

Petitioners aired dietary supplement advertisements without any reasonable substantiation. This conduct is unfair and deceptive because:

> The consumer is entitled, as a matter of marketplace fairness, to rely upon the manufacturer to have a 'reasonable basis' for making performance claims. A consumer should not be compelled to enter into an economic gamble to determine whether a product will or will not perform as represented.

In Re Pfizer Inc., 81 F.T.C. 23, 29 (1972). Because consumers rely on advertisers to have a reasonable basis for their ad claims, making claims without prior substantiation is deceptive. *See POM Wonderful*, 777 F.3d at 490; *FTC v. John Beck Amazing Profits*, 865 F. Supp. 2d 1052, 1067 (N.D. Cal. 2012) (To demonstrate a statement is likely to mislead, "the FTC must establish that . . . the advertiser lacked a reasonable basis for its claims.").

Consistent with prior federal decisions interpreting the FTC Act, the Court of Appeals agreed that Petitioners' ads were deceptive because they lacked reasonable substantiation. In reaching this conclusion, the Court of Appeals properly followed the Legislature's intent "that, in construing [the CPA], the courts be guided by final decisions of the federal courts and final orders of the federal trade commission in interpreting the various federal statutes dealing with the same or similar matters. . . ." RCW 19.86.920.

1. The Court of Appeals Did Not Create a New *Per Se* CPA Violation in Determining Petitioners' Advertisements Were Unfair and Deceptive

Petitioners ask this Court to ignore RCW 19.86.920 and reject almost 50 years of federal precedent by contending that the Court of Appeals improperly created a new *per se* violation of the CPA by requiring an advertiser to have reasonable prior substantiation for their advertising claims. *See* Pet. at 3-6. Rather than create a new *per se* deceptive practice, the Court of Appeals and the trial court properly applied FTC precedent in analyzing Petitioners' advertising claims and deciding that they are unfair or deceptive. As the Court of Appeals acknowledged, the trial court also considered other evidence about Petitioners' advertising claims—along with their lack of prior substantiation—to conclude that Petitioners' ads were unfair or deceptive under the CPA. Slip op. at 11-12. The lower courts' analysis makes sense "because the [CPA] does not define 'unfair' or

'deceptive,' this Court has allowed the definitions to evolve through a 'gradual process of judicial inclusion and exclusion.'" *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 786, 295 P.3d 1179 (2013) (quotation omitted). In so holding, this Court necessarily interprets the CPA broadly and liberally because "[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009). By holding that Petitioners' ads were unfair or deceptive, in part because they lacked reasonable prior substantiation, the Court of Appeals reasonably continued the "judicial inclusion" process this Court set forth in *Klem* and *Panag*. And in doing so, it did not define a new category of conduct that violates the CPA *per se*. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 786-87, 719 P.2d 531 (1986) (the Legislature, not the courts, determines a statutory violation to be a *per se* unfair or deceptive trade practice).

Petitioners also argue that the Court of Appeals' decision creates a *per se* public interest impact. Pet. at 6. But, as this Court has held, any unfair or deceptive advertisement can impact the public interest if it, for example, affects many consumers or has a potential for repetition. *Hangman Ridge*, at 788-89. Petitioners aired their ads thousands of times, satisfying the public interest impact element. *See id.* 790-91.

2. Requiring substantiation does not conflict with the CPA

Petitioners also contend that requiring substantiation conflicts with the CPA because the FTC has regulatory expertise and because other states do not have substantiation requirements. Pet. at 5. Petitioners, however, offer no argument that unsubstantiated dietary supplement ads are neither unfair nor deceptive. The CPA prohibits unfair or deceptive advertising.

Rather than provide a rationale for why unsubstantiated dietary supplement claims are not unfair or deceptive, Petitioners ask the Court to reject federal precedent because the FTC has regulatory expertise in analyzing substantiation that the State supposedly lacks. This argument ignores two basic facts: (1) courts can determine whether an ad claim is reasonably substantiated, *see John Beck Amazing Profits*, 865 F. Supp. 2d at 1067 ("the Commission *or the court* must first determine what level of substantiation the advertiser is required to have"); and (2) if credit is to be given to the FTC's expertise, the FTC already applied its expertise and concluded that lacking prior substantiation for an ad claim is unfair or deceptive. Thus, failing to have prior substantiation is an unfair or deceptive act under the CPA just as it is under the FTC Act.

Petitioners also argue that other states with "Little FTC" acts like Washington have rejected the FTC's substantiation position. Pet. at 5. However, this is irrelevant given our Legislature's directive that

Washington courts consider FTC precedent in evaluating the CPA. RCW 19.86.920. In construing the Washington CPA, this Court expressly has declined to follow positions taken by the courts of other states when construing their consumer protection laws. *Hangman Ridge*, 105 Wn.2d at 787-89 (Washington follows a minority view in requiring a public interest impact). Regardless, Petitioners are wrong that all other states have rejected federal substantiation concepts. Pet. at 5. Maryland, for example, has applied FTC substantiation standards. *T-UP, Inc. v. Consumer Protection Div.*, 145 Md. App. 27, 36-39, 47-50, 801 A.2d 173 (2002). The court in *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 456-59 (E.D.N.Y. 2013), cited by Petitioners, primarily was concerned that the private plaintiff class did not plead facts other than lack of substantiation to support their misrepresentation allegations. That is not the case here because the State filed the action and the Court of Appeals did not conclude that the ads violate the CPA solely because Petitioners lacked prior substantiation. Slip op. at 11-12. Petitioners also cite *Gredell v. Wyeth Labs, Inc.*, 367 Ill. App. 3d, 854 N.E.2d 752 (2006), but that case is irrelevant because the underlying issue on appeal was whether the plaintiff could show he suffered damages because of defendant's lack of substantiation. *Id.* at 290-91 (causation and damages were necessary elements of plaintiff's case). Because the plaintiff failed to show he was damaged by the lack of substantiation, the court did

not analyze whether the defendant committed a deceptive act. *Id.* at 293. *Gredell* is not relevant here because causation and damages are not at issue.

B. Petitioners' Ad Claims Lacked Reasonable Substantiation

Petitioners also do not raise an issue of substantial public interest concerning whether their ads were supported by reasonable substantiation. The Court of Appeals held that the trial court's decision regarding the level of required substantiation was erroneous because it would require Petitioners to prove that its Superior to Coffee claim was "an established scientific fact," slip op. at 19, and that its Decaf product would last for five hours, as opposed to hours. *Id.* at 19, 22. Petitioners contend that once the Court of Appeals made these determinations, the only conclusion that could be drawn from the record is that Petitioners' claims were adequately substantiated, based on the testimony of their expert, Dr. Howard Beales, who opined that only *de minimis* substantiation is required. Pet. at 7-8.

Although it rejected the trial court's conclusion that Petitioners' claims were health claims, the Court of Appeals nevertheless agreed that the correct substantiation standard is competent and reliable scientific evidence: "As the amici correctly explained 'the competent-and-reliable standard does not envision scientific unanimity and certainly does not require, as the trial court held, that a claim be "established scientific fact."'" Slip op. at 20. This is in accord with the well-established standard for

substantiating ad claims concerning the structure or function of dietary supplements, which is "competent and reliable scientific evidence." *See Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1156-57 (9th Cir. 1984). The Court of Appeals properly held that Petitioners aired dietary supplement ads without "'anyone with any science training ever assess[ing] the ad claims and the science backing up those claims.'" Slip op. at 21 (quoting trial court decision). And, the Court properly concluded that "'asking an advertising director who lacks any scientific or medical training to conduct internet research is [not] adequate substantiation.'" *Id.* (quoting trial court decision).

C. Requiring Prior Substantiation Does Not Raise Any Constitutional Concerns

Petitioners raise no legitimate constitutional questions because their unsubstantiated advertisements were deceptive and misleading and are thus not protected by the First Amendment or the Washington Constitution. Petitioners cite various cases holding that a government must justify limitations on "speech protected by the First Amendment," *see* Pet. at 12, 16 (citing *Philadelphia Newspapers v. Hepps*, 475, U.S. 767, 777 (1986); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563, 566 (1980)), but Petitioners did not engage in "speech protected by the First Amendment." Unsubstantiated advertisements are *deceptive* commercial speech, and *Central Hudson* holds: "[T]here can be

no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563.

1. Requiring substantiation does not violate the First Amendment

Federal courts have consistently held that requiring competent and reliable scientific evidence for dietary supplemental ads does not violate the First Amendment under *Central Hudson's* commercial speech test because unsubstantiated speech is misleading. *See, e.g., POM Wonderful*, 777 F.3d at 499-501 (inadequately substantiated ads are not protected speech because "the government may ban forms of communication more likely to deceive the public than to inform it") (quoting *Central Hudson*); *Daniel Chapter One v. FTC*, 405 Fed. Appx. 505, 506, 2010 WL 5109600, at *1 (D.C. Cir. 2010) (unpublished) (rejecting argument that *Central Hudson* applies because "[d]eceptive commercial speech is entitled to no protection under the First Amendment and, even if it were, [the FTC order requiring competent and reliable scientific evidence] is carefully tailored to protect DCO's clientele from deception"); *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1186 (N.D. Ga. 2008) (*Central Hudson* test not applicable to "competent and reliable scientific evidence" standard because

Central Hudson applies only to protected speech, and is not used to determine whether or not speech is protected in the first place). The court in *FTC v. Wellness Support Network, Inc.*, No. 10-cv-04879-JCS, 2014 WL 644749, at *10 (N.D. Cal. 2014) rejected Petitioners' same arguments:

> Defendants' reliance on *Pearson* and *Central Hudson* is misplaced. Neither decision stands for the proposition that a manufacturer or seller of dietary supplements—or for that matter, any product—has a First Amendment right to make claims that are false or deceptive. Nor do these cases announce a requirement that the three-part test under *Central Hudson* should be applied to causes of action based on a defendant's allegedly false or misleading advertising. Rather, these cases address the Constitutional requirements that apply to regulations that limit or ban whole categories of speech. . . . Further, it is well-established that deceptive commercial speech is entitled to no protection under the First Amendment.

Petitioners contend that *Jay Norris, Inc. v. FTC*, 598 F.2d 1244 (2d Cir. 1979), *U.S. v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955 (3d Cir. 1981), and *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982)—all of which uphold the constitutionality of requiring prior substantiation—are no longer good law. Pet. at 12. But they do not identify any case stating these decisions have been overruled, and the extensive case law cited above reveals that Petitioners' contention lacks merit.

2. The Washington Constitution does not prohibit restraints on deceptive speech

The Washington Constitution also does not protect Petitioners' deceptive advertisements. This Court has held "no greater protection is

afforded [under art. I, sec. 5] to obscenity, speech in nonpublic forums, *commercial speech*, and false or defamatory statements," than under the First Amendment. *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 800, 231 P.3d 166 (2010) (emphasis added). This Court has reached the same conclusion multiple times. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 116, 937 P.2d 154 (1997); *Nat'l Fed'n of Retired Persons v. Insurance Comm'r*, 120 Wn.2d 101, 119, 838 P.2d 680 (1992). Because commercial speech enjoys no greater protection under Washington's Constitution than under the First Amendment, and because the First Amendment does not protect Petitioners' deceptive commercial speech, Petitioners do not raise a legitimate constitutional question.[3]

Because this Court has already decided that commercial speech receives no greater protection under the Washington Constitution than under the First Amendment, interpretations of other state constitutions are irrelevant. Regardless, neither the Oregon nor the Pennsylvania constitutions (relied on by Petitioners) protect deceptive commercial speech. *See Twist Architecture and Design, Inc. v. Oregon Bd. of Architect Exam'rs*, 361 Or. 507, 522-23, 395 P.3d 574, 583 (2017) (website that could

[3]This Court did not "specifically recognize" that it is an "open question" whether the state constitution affords greater protection to commercial speech than the First Amendment. *See* Pet. at 14 (citing *Kitsap Cy. v. Mattress Outlet*, 153 Wn.2d 506, 511 n.1, 104 P.3d 2180 (2005)). The footnote simply acknowledges that the state constitution may afford greater constitutional protections than the U.S. Constitution.

mislead Oregon consumers was not constitutionally protected speech); *Com., Bureau of Prof'l and Occupational Affairs v. State Bd. of Physical Therapy*, 556 Pa. 268, 275, 728 A.2d 340, 343 (1999) ("Insofar as false or misleading commercial speech is concerned, we have followed the federal view that such speech as not constitutionally protected."). Thus, even if the Court were to follow Oregon and Pennsylvania law, as Petitioners request, the result would not change.

Petitioners also contend that *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 871 P.2d 1050 (1994), prohibits prior restraints on all speech. Pet. at 9-10. To the contrary, in *Soundgarden* this Court "expressly rejected an absolute bar against prior restraints on speech which is *not* constitutionally protected." 123 Wn.2d at 765 (quotation omitted). *Soundgarden* held that a statute regulating erotic music was unconstitutionally overbroad because it restrained speech that was not obscene to adults and was thus protected speech. *Id.* at 778. *Soundgarden* did not address deceptive commercial speech, which is not constitutionally protected.

This Court's subsequent decisions in *Ino Ino* and *Bradburn*, holding that commercial speech does not receive any greater protections under article I, section 5, further undercuts Petitioners' reliance on *Soundgarden*. *See Bradburn*, 168 Wn.2d at 800; *Ino Ino*, 132 Wn.2d at 116. In *Ino Ino*, this Court specifically noted it has declined to afford the full protection of

article I, section 5 to subjects that "cling[] to the edge of protected expression." *Ino Ino*, 132 Wn.2d at 117.

Petitioners' reliance on *In re Marriage of Suggs*, 152 Wn.2d 74, 93 P.3d 161 (2004) also is similarly misplaced because it concerned the constitutionality of an order prohibiting an individual from making statements concerning her former spouse. *Id.* at 83. As with *Soundgarden*, that decision has nothing to do with deceptive commercial speech.

3. "Competent and reliable scientific evidence" is a well-established standard

Petitioners also do not raise a legitimate constitutional question regarding whether the term "competent and reliable scientific evidence" is unconstitutionally vague. The Fourteenth Amendment requires notice be given of what is prohibited, but whether "notice is or is not 'fair' depends upon the subject matter to which it relates . . . and 'common intelligence' is the test of what is fair warning . . ." *State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 273, 501 P.2d 290 (1972) (quotations omitted). Courts further allow greater leeway for laws regulating business activities. *Id.* at 273-74. This Court, for example, held over 40 years ago that the broad "unfair and deceptive" language of the CPA is constitutional. *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 278-79, 510 P.2d 233 (1973). Federal courts and the FTC routinely apply the "competent and

reliable scientific evidence" standard. *See, e.g.*, *Sterling Drug*, 741 F.2d at 1156-57 ("competent and reliable scientific evidence" not unduly vague); *Nat'l Urological Group*, 645 F. Supp. 2d at 1186 (holding "competent and reliable scientific evidence" test not void for vagueness because FTC published definition in its dietary supplement guidelines); *POM Wonderful*, 777 F.3d at 504-05 (applying "competent and reliable scientific evidence" standard); *FTC v. Lane Labs-USA, Inc.*, 624 F.3d 575, 583-87 (3d Cir. 2010) (same); *U.S. v. Alpine Indus., Inc.*, 352 F.3d 1017, 1027 (6th Cir. 2003) (applying standard; "competent and reliable scientific evidence" instruction did not improperly shift burden of proof); *Removatron Int'l. Corp. v. FTC*, 884 F.2d 1489, 1498-99 (1st Cir. 1989) (applying standard).

Aside from being accepted by federal courts, "competent and reliable scientific evidence" is not unduly vague because the FTC offers extensive guidelines to explain the term. It defines "competent and reliable scientific evidence" as:

> [T]ests, analyses, research, studies or other evidence, based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

Dietary Supplements: An Advertising Guide for Industry, at 9 (FTC 2001), https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf (visited 7/10/2019) (CP 8114).

The FTC lists factors to consider when deciding the proper level and type of substantiation, such as product type, cost/feasibility to develop substantiation, consequences of false claims, and amount of substantiation experts in the field think is reasonable. *Id.* at 8-9. (CP 8115-16).

Petitioners ignore the extensive federal court and FTC decisions, orders, and guidance surrounding the term "competent and reliable scientific evidence" and instead contend the term is unduly vague because courts have questioned the precision of different terms not at issue in this litigation. Pet. at 10. *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), concerned a "significant scientific agreement" standard, and Petitioners admit the court never ruled on whether the term was unconstitutionally vague. Pet. at 10. *Kolender v. Lawson*, 461 U.S. 352 (1983), also is not relevant because it found unconstitutional a statute that "require[d] that 'suspicious' persons satisfy some undefined identification requirement, or face criminal punishment." *Id.* at 361. It has no application in this civil matter where there are 35 years of guidance describing the level of substantiation required for advertising claims. Because "competent and reliable scientific evidence" is a well-established term, Petitioners do not raise a valid constitutional issue warranting review.

4. Requiring prior substantiation does not place any unconstitutional burden on Petitioners

Petitioners also contend the Court of Appeals requires them to present evidence proving their speech is truthful, which they claim amounts to an unconstitutional burden shifting. Pet. at 11. Nowhere does the Court of Appeals' decision hold that Petitioners must prove their speech is true. Rather, the State still bears the burden of proving that Petitioners' advertising claims are unfair or deceptive because they are not supported by reasonable prior substantiation, that the advertising occurred in trade or commerce, and that the ads impact the public interest. The Court of Appeals did not change the status quo.

Petitioners more broadly argue that any restriction on unsubstantiated speech necessarily places the burden on Petitioners to ensure their speech is reasonably substantiated. Petitioners' argument again fails to acknowledge that unsubstantiated advertisements are *deceptive* speech, and the only burden Petitioners face is to not engage in deceptive commercial speech. *See* RCW 19.86.080. The Constitution does not protect deceptive commercial speech, and the Legislature properly prohibited it over 50 years ago when it enacted the CPA.

D. The State Need Not Present Consumer Surveys to Establish a Violation of the CPA

Petitioners also contend the State was required to present consumer testimony, surveys, or other empirical evidence to prove the "Ask Your Doctor" ad had a deceptive net impression. Pet. at 20. The case Petitioners rely on—*FTC v. Brown & Williamson Tobacco Corp.*—reached the opposite conclusion: "[W]e do not accept appellant's contention that consumer survey evidence must, as a matter of law, be presented to support a finding that an advertisement has the tendency to deceive and violates section 5 of the FTC Act." 778 F.2d 35, 41 (D.C. Cir. 1985). *Brown* acknowledged that "a court may itself find the deception 'self-evident,'" *id.* (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)), and also noted that "a court may give weight to expert testimony provided by the parties." *Id.* Here, the trial court gave weight to Dr. Anthony Pratkanis's opinion consistent with the *Brown* decision. CR 8109-10.

The law is clear—consumer surveys are not required to prove that an implied message has a tendency to deceive. *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 563 (2d Cir. 1984); *cert. denied* 469 U.S. 1189 (1985) ("In interpreting advertisements the [FTC] may rely on its own expertise in this area and need not resort to surveys and consumer testimony."); *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992) (consumer surveys not required) *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006) (consumer survey not needed to establish what message is conveyed to consumers).

E. The State Requests Attorneys' Fees and Costs Incurred In Answering Living Essentials' 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), (j). The CPA provides the Court with discretion to award the State reasonable attorneys' fees and costs as the prevailing party on appeal. RCW 19.86.080(1). Accordingly, the State respectfully requests the Court award the State reasonable attorneys' fees and costs in answering this Petition.

V. CONCLUSION

For all the foregoing reasons, the Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 12th day of July, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the date below, I caused a true and correct copy of the foregoing to be served on the following:

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DATED this 12th day of July, 2019 at Seattle, Washington.

/s/ Michelle Baczkowski
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CONSUMER PROTECTION DIVISION AGO

July 12, 2019 - 1:06 PM

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Filed with Court:	Supreme Court
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Appellate Court Case Title:	State of Washington v. Living Essentials, LLC, et al.
Superior Court Case Number:	14-2-19684-9

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