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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.

STATE'S RESPONSE TO AMICI CURIAE ROBERT M. MCKENNA AND MICHAEL C. TURPEN

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I. INTRODUCTION

Amici Robert McKenna and Michael Turpen claim the Court of Appeals decision represents an "especially egregious" invasion of the separation of powers and engages in the unconstitutional prior restraint of commercial speech. They are wrong.

The Court of Appeals properly applied decades-old federal case law in holding that unsubstantiated ads are unfair and deceptive. Requiring substantiation does not create a new *per se* violation under the Consumer Protection Act (CPA) because making claims with no substantiation is itself the unfair or deceptive practice. Indeed, the Court of Appeals held Petitioners' unsubstantiated ads *are* deceptive under the CPA.

Amici's second argument is equally meritless, because deceptive advertisements are not protected by either the First Amendment or Art. I, sec. 5 of Washington's Constitution. Thus, requiring adequate substantiation of claims does not amount to unconstitutional prior restraint of commercial speech.

In reference to the substantiation requirement set out in the Court of Appeals decision, Mr. McKenna scolds the Office of the Attorney General for "creat[ing] new law, which they lack the power to do," and for "engag[ing] in *ad hoc* balancing of the social costs and benefits of restricting truthful speech." Amici Br. at 10. Mr. McKenna's criticisms are

curious because Mr. McKenna, as Washington's Attorney General, demanded injunctive relief requiring prior substantiation at least *thirteen* times in consumer protection cases. When those demands for prior substantiation were made on his watch, Mr. McKenna did not find them to be "especially egregious."

Washington is not alone in requiring prior substantiation under its consumer protection laws. At least 45 states, including Mr. Turpen's home state of Oklahoma, have participated in enforcement actions requiring prior substantiation for advertising claims.

In summary, the Court of Appeals properly held that unsubstantiated ads are unfair and deceptive, and requiring prior substantiation of claims does not constitute unconstitutional prior restraint of commercial speech.

II. ARGUMENT

A. Courts Have Long Held That Unsubstantiated Ads are Unfair and Deceptive

Amici urges this Court to accept the Petition for Review by claiming the Court of Appeals ruling "will have a profound national impact reaching beyond Washington's borders." Amicus Brief at 2. This argument ignores two fundamental facts: (1) the FTC has required prior substantiation nationwide for over 40 years; and (2) law enforcement from at least 45 states

have required prior substantiation under their respective consumer protection laws for many years.

Airing unsubstantiated ads has been prohibited nationwide for over 40 years. In 1972, the FTC concluded it is unfair for companies to make ad claims without reasonable prior substantiation for their claims. *In Re Pfizer Inc.,* 81 F.T.C. 23, 29 (1972). The FTC explained:

> 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.

Id. Because consumers rely on advertisers to have a reasonable basis for their ad claims, making claims without prior substantiation is also deceptive. *See POM Wonderful, LLC v. F.T.C.,* 777 F.3d 478, 490 (D.C. Cir. 2015), *cert. denied* 136 S. Ct. 1839 (2016); *F.T.C. v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012) ("In demonstrating that a representation is likely to mislead, the FTC must establish that . . . 'the advertiser lacked a reasonable basis for its claims.'"). Otherwise, companies could make wide-ranging claims regarding the healing powers of snake oil without any basis to support their claims, so long as there was no scientific study yet published proving their claims false.

Amici argue prior substantiation claims do not involve deception, but they never explain their basis for this argument, and federal courts have consistently held otherwise. The Court of Appeals decision does not have any nationwide impact on substantiation requirements because unsubstantiated advertisements are already prohibited under federal law.

Nor did the State engage in any new practice when it alleged Petitioners violated the CPA when they aired unsubstantiated ads. Mr. McKenna raised the same allegations in at least thirteen different consumer protection matters during his own tenure as Attorney General.[1] For example, in the dietary supplement case, *State v. Airborne Health, Inc.*, Mr. McKenna alleged, "[b]y making health or other claims without competent and reliable scientific evidence to substantiate them, the Defendants have violated the CPA." No. 08-2-42958-0 SEA, Complaint ¶ 42; *see*

[1] *See In re LA Weight Loss Centers Inc.,* No. 05-2-02490-6 (Thurston Co. 2005); *State v. Berkeley Premium Nutraceuticals, Inc.,* No. 06-2-00426-1, Complaint ¶¶ 16-21 (Thurston Co., Mar. 2, 2006); *In re Ceragem International Inc.,* No. 08-2-02494-3, Assurance of Discontinuance ¶ 4.3.1-3 (Thurston Co. Oct. 28, 2008), *State v. Airborne Health, Inc.,* No. 08-2-42958-0 SEA, Complaint ¶ 42 (King Co. Dec. 16, 2008); *In the Matter of Dell Inc.,* No. 09-2-00055-4, Assurance of Discontinuance ¶ 28 (Thurston Co. Jan. 12, 2009); *State v. Evans Glass Inc.,* No. 09-2-33914-7, Consent Decree ¶ 3.4.i, (King Co. Sept. 16, 2009); *State v. Statewide, Inc*., No. 10-2-08534-3 SEA, Consent Decree ¶ 3.4.e (King Co. Mar. 1, 2010); *State v. DMZ Group LLC,* No. 10-2-21187-0 SEA, Consent Decree ¶ 4.3.4 (King Co. Jun 16, 2010); *State v. Energy Exteriors LLC,* No. 10-2-10871-3, Consent Decree ¶ 3.4.f (Pierce Co. July 7, 2010); *State v. Seattle's Best Home Improvements, Inc.,* No. 10-2-11196-0, Consent Decree ¶ 3.4.f (Pierce Co. July 19, 2010); *State v. Great Lakes Window, Inc.,* No. 10-2-12769-6, Consent Decree ¶ 3.4.b (Pierce Co. Sept. 2, 2010); *State v. The Dannon Co.,* No. 10-2-43197-7 SEA, Complaint ¶ 7.3 (King Co. Dec. 15, 2010); *State v. Skechers USA, Inc.,* No. 12-2-17364-8 SEA, Complaint ¶ 24 (King Co. May 3, 2012).

also State v. Skechers USA, Inc., No. 12-2-17364-8 SEA, Complaint ¶ 24 (King Co. Mar. 3, 2012) ("By making health benefit or other claims without competent and reliable scientific evidence to substantiate them, the Defendants have violated RCW 19.86 with each representation."); *State v. The Dannon Co.,* No. 10-2-43197-7 SEA, Complaint ¶ 7.3 (King Co. Dec. 15, 2010), ("Defendant's conduct of making health-related or other claims without competent and reliable scientific evidence to substantiate them violates the CPA."). As attorney general, Mr. McKenna routinely demanded injunctive terms prohibiting defendants from "failing to contemporaneously possess competent and reliable scientific evidence that reasonably substantiates objective advertising claims. . . ." *State v. Energy Exteriors LLC,* No. 10-2-10871-3, Consent Decree ¶ 3.4.f (Pierce Co. July 7, 2010). *See also, e.g.*, *State v. Evans Glass Inc.,* No. 09-2-33914-7, Consent Decree ¶ 3.4.i (King Co. Sept. 16, 2009) (same).

Washington was not the only state to allege that unsubstantiated advertisements violate state consumer protection laws. For example, *Skechers USA* involved 45 states, including Oklahoma. *State v. Skechers USA, Inc*. No. 12-2-17364-8 SEA, Consent Decree ¶ 1 (King Co. May 16, 2012); *see also, e.g. State v. The Dannon Co.*, No. 10-2-43197-7 SEA, Consent Decree ¶ 2.1.P, (King Co. Dec. 17, 2010) (noting 39 participating states); *State v. Airborne Health, Inc*., No. 08-2-42958-0 SEA, Consent

Decree at Judgment Summary (King Co. Dec. 16, 2008), (noting consent decree was part of multistate action).

Amici are also wrong that all other states have rejected federal substantiation concepts. Amici Br. at 8. Maryland, for example, has applied FTC substantiation standards to their state consumer protection laws. *T-UP, Inc. v. Consumer Prot. Div.,* 145 Md. App. 27, 36-39, 47-50, 801 A.2d 173 (2002). Amici rely on *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 456-59 (E.D.N.Y. 2013), to claim California rejects prior substantiation claims. *Amici Br*. at 7. But California law, in fact, requires companies to provide prior substantiation to government authorities upon request. Cal. Bus. & Prof. Code § 17508(b). The New Jersey case cited in *Hughes*, 930 F. Supp. 2d 439 also involved a consumer protection law with significantly different standards from state-brought CPA claims. *Compare Franulovic v. Coca Cola Co.,* 390 F. App'x 125, *2 (3d Cir. 2010) (cited by *Hughes*) (NJ consumer fraud claim requires unlawful conduct, ascertainable injury and causal relationship) *with State v. Kaiser,* 161 Wn. App. 705, 726, 254 P.3d 850 (2011) (state need show only unfairness or deception, occurring in trade or commerce that impacted public interest).

B. The Court of Appeals Properly Applied the Consumer Protection Act as Drafted by the Legislature.

The CPA prohibits "unfair or deceptive acts or practices" occurring

in trade or commerce. RCW 19.86.020. Because "[t]here is no limit to human inventiveness in this field," the Legislature drafted the CPA broadly to allow courts room to encompass all unfair and deceptive conduct rather than narrow, enumerated acts. *Klem v. Washington Mut. Bank,* 176 Wn.2d 771, 786, 295 P.3d 1179 (2013) (quoting *Panag v. Farmers Ins. Co. of Washington,* 166 Wn.2d 27, 48, 204 P.3d 885 (2009)). The Legislature further directed courts "to be guided by final decisions of the federal courts . . . interpreting the various federal statutes dealing with the same or similar matters" in construing the CPA's scope. RCW 19.86.920. Here, the Court of Appeals followed this legislative directive precisely by following 40 years of federal FTC case law holding that unsubstantiated advertisements are deceptive. Petitioners argue the Court of Appeals violated the separation of powers doctrine by applying this FTC case law, but the opposite is true. Potential separation of powers concerns would arise only if the court ignored the FTC precedent despite the legislature's mandate "to be guided by final decisions of the federal courts." RCW 19.86.920.

Amici premise their entire separation of powers argument on the notion that the Court of Appeals created a new CPA violation that "neither requires the capacity to deceive nor has been designated a *per se* violation by the Legislature." Amicus Brief at 6. The Court of Appeals did no such thing. Rather than create a new *per se* violation untethered from deception,

the Court of Appeals specifically held that Petitioners' unsubstantiated ads were deceptive. *See* Op. at 12 ("after weighing all of the evidence before it, the court found that Living Essentials' Superior to Coffee and Decaf claims *were materially misleading*.") (emphasis added); Op. at 23 (noting "there is sufficient evidence in the record to support the trial court's determination that Living Essentials' Decaf Claim *was deceptive*") (emphasis added). The CPA expressly prohibits "unfair or deceptive" conduct, so the Court of Appeals followed the legislature's laws exactly in finding Petitioners' unfair and deceptive conduct a violation of the CPA.

C. Neither the United States nor the Washington Constitution Protects Deceptive Speech

Amici argue that requiring prior substantiation is a prior restraint on speech and prohibited by the state and federal constitutions. Again, amici are wrong on the law. Simply put, unsubstantiated advertisements are deceptive commercial speech, which enjoys no constitutional protection. "[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 Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Because unsubstantiated ads are deceptive, federal

courts have rejected constitutional challenges to reasonable prior substantiation requirements. *See POM Wonderful*, *LLC*, 777 F.3d at 499 (holding that requiring some prior substantiation did not violate First Amendment at 504-05); *Daniel Chapter One v. F.T.C.*, 405 Fed. App'x. 505, 506, 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"); *F.T.C. v. Nat'l Urological Grp, Inc.*, 645 F. Supp. 2d 1167, 1186 (N.D. Ga. 2008); *F.T.C. v. Wellness Support Network, Inc.*, No. 10-cv-04879-JCS, 2014 WL 644749, at *10 (N.D. Cal. Feb. 19, 2014) (unpublished).

Amici discuss prior restraints in broad terms but fail to address *Central Hudson*'s core holding that the First Amendment does not protect deceptive speech. Amici further ignore the extensive case law cited above holding that unsubstantiated ads are not afforded any protection under the First Amendment, and instead point this Court to *Illinois ex rel. Madigan v. Telemarketing Assocs.*, *Inc.*, 538 U.S. 600, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003), to support their case. Amici Br. at 10. *Madigan*, however, held that the Illinois attorney general did *not* violate the First Amendment in filing consumer protection claims against telemarketers because it alleged

the telemarketers engaged in fraud. *Madigan*, 538 U.S. at 619. The *Madigan* court noted that states cannot cap the percentage of proceeds a fundraiser receives because such caps prohibited non-deceptive speech, but fundraising caps have nothing to do with prior substantiation requirements. Here the State alleged, and the Court of Appeals found, that Petitioners engaged in deceptive conduct, which is not constitutionally protected speech. Because Petitioners' conduct was not protected by the First Amendment,[2] the Court of Appeals' ruling did not infringe on their commercial speech rights in holding that their lack of prior substantiation was deceptive and violated the CPA.

III. CONCLUSION

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

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[2] Article I, sec. 5 also does not protect deceptive speech because commercial speech does not receive any greater protection under Washington's constitution than under the First Amendment. *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 800, 231 P.3d 166 (2010).

RESPECTFULLY SUBMITTED this 11th day of September, 2019.

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