SUPREME COURT NO. 100493-1
COA NO. 80915-6-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

TVI, INC., d/b/a VALUE VILLAGE,

Respondent.

PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

JOHN A. NELSON, WSBA #45724
SHIDON B. AFLATOONI, WSBA #52135
SEANN COLGAN, WSBA #38769
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
Assistant Attorneys General
Attorneys for the State of Washington

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I. INTRODUCTION

The King County Superior Court found that for over a decade, the for-profit company TVI, Inc., d/b/a Value Village (TVI), repeatedly and consistently violated the CPA by creating the deceptive net impression among Washington consumers that (1) TVI was itself a charity or nonprofit (it is neither), (2) purchases made at its stores benefitted charity (they do not), and (3) all donations made at its stores in Spokane benefitted the Rypien Foundation (they did not). In its detailed, 85-page order, the trial court found that the State proved that TVI actually *knew* that its marketing deceived consumers.

Despite the magnitude of the deception found at trial, on appeal, the Court of Appeals dismissed the case in its entirety when it determined that the trial court erred by applying a "knew or should have known" mens rea standard to the CPA. The Court of Appeals never reached the ultimate issue of whether the mens rea standard imposed by the trial court survives exacting scrutiny under the First Amendment. The Court of Appeals' ruling

misunderstood that courts may require additional proof to satisfy constitutional concerns, as TVI itself had asked the trial court to do below. Moreover, the Court of Appeals was incorrect in holding that all of TVI's marketing was inextricably intertwined with protected speech and deserving of constitutional protection.

This Court may accept review if there is a significant question of law under the Constitution or if there is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(3), (4). The State requests review on both of these grounds. In the context of an action brought by the State under the CPA where protected charitable speech is implicated, it is an issue of first impression whether a "knew or should have known" mens rea standard passes constitutional muster. This case also presents an issue of significant public importance that directly impacts the State's ability to police deceptive charitable speech under the CPA. The State requests this Court to grant review of the Court of Appeals' ruling, which currently encourages fraudsters to envelop their scam with a

charitable donation or nominal charitable affiliation in the hopes of placing themselves further out of reach of prosecution for unfair and deceptive practices. The deleterious effects of the Court of Appeals' ruling have already been felt in other misrepresentation cases.[1] This Court should grant review.

II. IDENTITY OF PETITIONER

Petitioner is the Attorney General of the State of Washington ("State" or "Attorney General").

III. DECISION BELOW

The Attorney General seeks review of the decision issued by Division One of the Court of Appeals on August 16, 2021. A copy of the decision is in the Appendix at A-1 through 19. The Court of Appeals denied the Attorney General's timely motion for reconsideration on November 17, 2021. A-20.

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[1] *See Washington League for Increased Transparency & Ethics v. Fox News*, No. 81512-1-I, 2021 WL 3910574, at 4 (Wash. Ct. App. Aug. 30, 2021) ("This court held that the trial court 'erred in rewriting the law to include a "knew or should have known" mens rea element [in an effort] to avoid constitutional infirmity.'").

IV. ISSUES PRESENTED FOR REVIEW

1. Whether a court may properly overlay constitutional protections onto the Consumer Protection Act (CPA), RCW 19.86, in actions brought by the State targeting deceptive charitable speech?
2. Whether TVI's commercial speech (marketing and advertising) is inextricably intertwined with any protected charitable speech, and thus, subject to exacting scrutiny under the Constitution?
3. Whether, in cases brought under the CPA that target protected charitable speech, a "knew or should have known" mens rea satisfies exacting scrutiny?

V. STATEMENT OF THE CASE

TVI is a Washington-based, for-profit company that owns and operates over 300 thrift stores globally, including several Value Village stores in Washington. CP 1074; A-2. TVI purchases most of its inventory from non-profit, charitable entities that collect or accept donations of used goods from the

public. CP 1074-1077, *see also* A-2. In this regard, TVI's relationship with these charities is solely transactional. TVI makes no donations to charities nor does it pay any portion of the proceeds from sales in its stores to charities or nonprofits. CP 1078; A-2.

In 2017, the State sued TVI under the CPA for, among other claims, unfairly and deceptively creating the net impression that TVI is a charity or non-profit organization and that purchases at TVI's retail stores benefit charities when they do not. CP 1090-91.

A. The Trial Court Applied a Mens Rea Standard to the CPA to Address TVI's First Amendment Concerns Before Trial.

Before trial, TVI filed a motion requesting "the Court [to] address the parties' positions concerning the applicability of First Amendment principles in this case and decide the standards that govern the case." CP 912-916. TVI argued that the State should prove the elements of fraud in order to hold TVI liable under the CPA for unfair or deceptive speech that touched on

charitable solicitation. CP 914. The State contended that the State need only prove TVI's speech had a capacity to deceive to satisfy the CPA and the constitutional issues raised and need not prove intent to deceive or actual deception. CP 1011.

The trial court issued an order imposing a heightened standard on the State's burden of proof, ruling that "[i]n the context of charitable contributions, the statute must include a meaningful mens rea requirement," and "[t]he CPA … can be read in a way that a mens rea requirement is unnecessary." RP 140. The trial court summarized its conclusion regarding the applicable legal standard as follows:

> This court finds that … the First Amendment requirements of speech related to charitable solicitations requires the State, in cases involving charitable fundraising, to prove that the defendant engaged in practices or acts that they *knew or should have known* would be deceptive or misleading, or at least have a deceptive net impression. Inclusive of this knowledge or should have known mens rea requirement satisfies the Madigan analysis, satisfies the First Amendment, and the Court will require it….

> I will find that *knowledge or should have known, knows or should have known*, will be part of the analysis for the Court in deciding whether or not the State has proved its case…
>
> So I'm including a *knowing or should have known element*, and, from my perspective, with that, it satisfies the First Amendment.

RP 141-42 (emphasis added), *see also* CP 1010-1014 (written order on October 2, 2019, memorializing oral ruling).

For purposes of the First Amendment, the trial court treated all of TVI's advertising and marketing as charitable speech, although it "questioned . . . whether under the causes of action, particularly the first two … whether TVI falls within the charitable solicitation exception…." RP 141-42.

As a result of the trial court's pretrial ruling creating a heightened mens rea standard under the CPA, the State was required to try its case under the presumption that TVI's commercial speech was inextricably intertwined with protected charitable speech and also prove that TVI violated the CPA with respect to all of its advertising and marketing.

B. The Trial Court Found that the State Had Proved TVI's Advertising and Marketing Had the Capacity to Deceive and that TVI Actually Knew That Consumers were Deceived.

Following a bifurcated trial on liability (the trial on remedies has not occurred), the trial court issued oral findings, CP 1247-1303, followed by a detailed, 85-page written findings and conclusions that the State prevailed on its primary claims – that TVI's advertising and marketing created the deceptive net impression that TVI, itself, is a non-profit entity and that in-store purchases benefit charities – as well as the State's claim that TVI's advertising and marketing created the deceptive net impression that TVI paid the Rypien Foundation for donations in 2014 and 2015. CP 1143-47, 1149-50; *see also* A-5 through 6.

For purposes of determining liability, the court cited evidence of deceptive advertising starting in 2009 and continuing through 2019. CP 1096-1119, 1143 (trial court noting that "[p]articularly prior to 2016-2017, TVI's advertising and marketing was focused on promoting its relationship with charities," and therefore was deceptive).

The trial court found that the State proved that TVI *knew* its advertising and marketing was deceptive in masking its for-profit status, including the following evidence:

- A consumer complaint to the AGO, which was provided to TVI in 2013, stating: "My problem is perception. The impression any donor or customer receives is that Value Village is a nonprofit giving most of their profits to xyz charities," and TVI's response that it was aware some customers believe all thrift stores are nonprofits. CP 1098, 1145;

- Market research commissioned by TVI, which reported that "some shoppers and donors felt that Savers[2] itself is a non-profit," and that consumers believed TVI "donate[s] to the community," and "give[s] … to the community," as well as testimony from TVI's CEO stating he personally reviewed the research, CP 1121, 1145;

- Additional testimony by TVI's CEO stating that customers sometimes ask why sales tax is applied to their purchases, because they mistakenly believe Value Village is a non-profit, CP 1122-23, 1145;

- Another market research study commissioned by TVI, which found that TVI's advertising was confusing and invited questions about "whether or not [Value

[2] TVI operates stores in states outside Washington under the "Savers" brand name. CP 1164. It employs the same advertising and marketing under both brand names. CP 1189.

Village] is for-profit or non-profit," also reviewed by TVI's CEO, CP 1122, 1145; and,

- A request for proposal issued to advertising agencies by TVI, in which it advised bidders that "[t]here is confusion surrounding the brand" and that some consumers "feel that Savers is itself a non-profit," CP 1122-23, 1145.

The trial court thus concluded "that [TVI] should have known its advertising and marketing had the capacity to deceive consumers, *in addition to the actual knowledge of consumer deception provided by its research studies*." CP 1145 (emphasis added).

The trial court cited and discussed the same evidence of actual knowledge in connection with TVI's advertising and marketing regarding in-store purchases, finding that the market studies in particular "indicat[ed] consumer misperception about in-store purchases." CP 1147. Concerning TVI's advertising and marketing related to the Rypien Foundation, the court found that TVI "knew what the contract [with Rypien] said," and "knew what they were telling customers," which was "inconsistent and deceptive." CP 1150.

The trial court also concluded that TVI's depictions of its business model were themselves deceptive and, even where clear disclosures were made, they were insufficient to dispel the deceptive net impression left by its advertising: "any disclosures of its for-profit status made during this time period were not sufficiently prominent to dispel the deceptive net impression caused by its advertising and marketing." CP 1144.

C. On the Basis of Intertwined Charitable Speech and the Fact that the CPA Does Not Refer to a Mens Rea Standard, the Court of Appeals Dismissed the CPA Claim Against TVI.

After the State prevailed at trial in the liability phase, TVI filed a notice of discretionary review. CP 1157-58. The Court of Appeals granted discretionary review and later issued a published opinion reversing the trial court's ruling and remanding to dismiss the State's CPA claims. A-1 through 19.

The Court of Appeals held that TVI's marketing amounts to commercial speech:

> [TVI's] signs, banners, and in-store announcements induce customers to donate goods at its stores, which TVI then sells for profit. The marketing also

> encourages shoppers to buy goods in its stores so TVI can generate greater profits. While the signs and announcements do not refer to particular products, they are advertisements communicated by a for-profit corporation with economic motivation.

A-9.

Additionally, the Court of Appeals held that certain of TVI's marketing, such as those that "display the names and logos of [TVI's] charity partners[3]" amounts to charitable speech because "[t]hese communications at least implicitly advocate for the views, ideas, goals, causes, and values of TVI's charitable partners." A-11.

The Court of Appeals held that TVI's commercial speech and non-commercial speech were inextricably intertwined and analyzed the trial court's ruling under a strict scrutiny standard.

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[3] TVI's advertising consistently referred to the charities from which it purchased inventory as its "partners." CP 1075. Partnership, however, implies a sharing of profits and liabilities. In fact, as the trial court found, TVI's own marketing research showed that referring to its "non-profit partners" resulted in "consumer misperception" about the relationship between TVI and charities. CP 1147.

A-13. In reversing the trial court's ruling, the Court of Appeals held that the trial court erred not because it selected the wrong standard for exacting scrutiny, but because it lacked authority to "rewrite" the CPA; in other words, that the imposition of *any* mens rea element by the trial court was error because no such standard appears in the text of the Act itself. A-18 through 19. Thus, the Court of Appeals never reached the issue of whether the "knew or should have known" mens rea requirement imposed by the trial court passes constitutional muster.

The State filed a motion for reconsideration of the Court of Appeal's ruling, which the appellate court denied. A-20.

VI. ARGUMENT

A. Because the Trial Court Properly Applied Constitutional Protections to the Charitable Speech at Issue, the Court of Appeals Erred in Relying on This Court's Opinion in *City v. Willis* to Dismiss the State's Case.

The Court of Appeals relied almost exclusively on this Court's opinion in *City v. Willis*, 186 Wn.2d 210, 375 P.3d 1056 (2016), a case that was not cited by either party at the trial court

or the Court of Appeals, to hold that the trial court's imposition of a mens rea required a "rewrite" of the CPA, and thus, violated separation of powers. A-18 through 19. But in holding that the CPA required a rewrite, the Court of Appeals misunderstood the application of the CPA to charitable speech. As all parties here acknowledge, the CPA statute does not require a mens rea. In a vacuum, then, TVI has violated the CPA if its statements had the capacity to deceive, without regard to whether it knew, should have known, or intended its statements to be deceptive. It is only because TVI raised a free speech defense that the trial court, in order to comply with constitutional protections for charitable speech, required that the State prove that TVI knew or should have known its statements were deceptive. CP 1010-1014. Thus, it is not statutory language that requires the State to show that TVI knew or should have known its statements were deceptive, but constitutional requirements that are an overlay to any action that targets speech. Indeed, it was TVI, bringing an as-applied challenge to the CPA, who filed a motion requesting "the Court

[to] address the parties' positions concerning the applicability of First Amendment principles in this case and decide the standards that govern the case." CP 912-916.[4]

This is similar to what courts routinely do in adding heightened requirements to common law claims for defamation brought by public officials in order to satisfy constitutional free speech and free press concerns. *E.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *cf. Fields v. Dep't of Early Learning*, 193 Wn.2d 36, 434 P.3d 999 (2019) (addressing as-applied challenge to regulation prohibiting those with a criminal conviction from working as a child care provider by requiring individualized assessment of challenger's qualifications, despite regulation's prohibition).

[4] In concluding its motion, TVI requested "that, before trial, the Court address and decide the First Amendment standards applicable in this case and determine which, if any, of the State's claims may proceed to trial under the governing standards." CP 916.

Here, rather than examine the statutory requirements of a CPA claim, the Court of Appeals should have analyzed TVI's as-applied challenge – *i.e.*, that as applied to TVI's charitable speech, the CPA violated free speech unless a higher standard of proof was met by the State, which would satisfy exacting scrutiny. TVI asserts that the State must meet the elements of fraud to satisfy free speech concerns, and it urged the trial court to impose that burden on the State. CP 912-916. The State disagrees because precedent[5] instead establishes that the

[5] *See, e.g., Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin.*, 302 Fed. Appx. 115, 118 (3d Cir. 2008) (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980) ("Section 1140 requires only that charities refrain from using deceptive language when soliciting. Therefore, Section 1140 is constitutional as-applied because it serves a strong, subordinating interest.") (internal quotations omitted)); *United States v. Corporations for Character, L.C.,* 116 F. Supp. 3d 1258 (D. Utah 2015) (holding that the FTC need not prove fraud to limit charitable speech, but only show that the limitation (1) "serves a sufficiently strong, subordinating interest that the [government] is entitled to protect" and (2) is "narrowly drawn … to serve those interests without unnecessarily interfering with First Amendment freedoms." *Id*. at 1267 (emphasis added) (internal citations omitted).

standard met by the State here – that TVI *knew* its statements were deceptive – satisfied free speech concerns. Until the Court of Appeals misapplied the *Willis* opinion to this case, the issue on appeal was disagreement over the proper standard, not whether the trial court could impose *any* additional standard.

The *Willis* opinion, on which the Court of Appeals relied for its holding that the CPA could not apply to charitable speech, does not suggest the contrary.[6] First, unlike here, *Willis* involved a facial, overbreadth challenge, which by its nature does not allow for individualized accommodation to the alleged constitutional concern.[7] *Willis*, 186 Wn.2d at 219 (rejecting

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[6] Even on its own terms, the Court of Appeals' application of *Willis* to this case was incorrect, as the State primarily argued in its motion for reconsideration. Unlike the proposed interpretation of the ordinance at issue in *Willis*, imputing a mens rea on a CPA action is not inconsistent with the statute but merely adds a constitutionally required protection for charitable speech.

[7] *Willis* also brought an as applied challenge to the ordinance, but this Court overturned the ordinance based upon the facial challenge before it. *Willis*, 186 Wn.2d at 226.

Court of Appeals' reliance on the individual facts of the case because it "conflicts with controlling authority on how to address facial First Amendment challenges."). Second, imposing a mens rea on the State's CPA action required no "rewrite" of the statute that would be inconsistent with the statutory language. Whereas the holding in *Willis* rested in large part on the Court's reluctance to change the ordinance's language that prohibited speech "at" a freeway ramp to speech "in" a freeway ramp, here, the trial court made no change to the existing CPA. Rather, the trial court merely placed an overlay of constitutional protection—specific to the case before it—to account for protected speech.

The Court of Appeals erred in rejecting the trial court's actions in ensuring that the CPA was applied in this case with due regard to the constitutional protections afforded charitable speech. The Court should grant review because the error involves both significant constitutional questions and issues of substantial public interest. *See* RAP 13.4(b)(3), (4).

B. The State's Petition for Review Presents an Issue of First Impression Involving the Significant First Amendment Implications of a State CPA Enforcement Action Against a For-Profit Company Misrepresenting Charitable Interests.

This petition involves an issue of first impression in Washington: how is the State able to enforce the CPA in instances of deceptive marketing involving charities by a for-profit company? As noted above, during nearly seven years of investigation and litigation with extensive motions practice, neither TVI nor the State raised any issue below, or on appeal, concerning the trial court's authority to impose a mens rea standard on the State, and the propriety of its doing so. Indeed, TVI *requested* that the trial court do so, and the trial court's ruling imposing a mens rea element on the State's burden of proof was entered in response to TVI's motion. Put differently, the parties' dispute concerns what standard the trial court should impose—*i.e.*, what standard satisfies the First Amendment—not whether the trial court was within its authority to impose a standard at all.

While the Court of Appeals held that "the CPA as applied to TVI's inextricably intertwined commercial and noncommercial speech does not meet the exacting proof requirements necessary to give protected speech sufficient breathing room under the First Amendment," it did *not* answer the issue of first impression before it—whether the knew or should have known standard applied by the trial court constituted exacting proof. A-19. Thus, the parties (and by extension, all Washington residents) are left without clarity on the ultimate question, and instead, are left with uncertainty. Without review by this Court, the significant question of what standard applies will remain unsettled.

C. The State's Petition for Review Presents a Significant Question of Law under the Constitution: under US Supreme Court and Federal Court of Appeals Precedent, Whether TVI's Unprotected Commercial Speech (Marketing and Advertising) is Inextricably

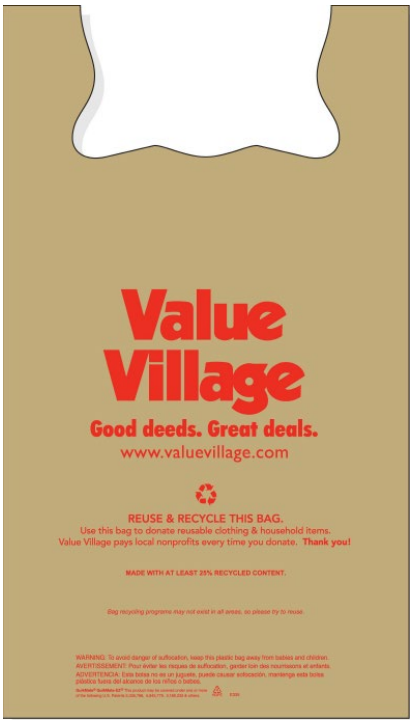
Intertwined with Protected Charitable Speech, and Thus, Subject to Exacting Scrutiny.

While the Court of Appeals properly held that TVI's marketing and advertising constituted commercial speech,[8] it erred by holding that such messaging could not be separated from any protected charitable speech. A-9, 13. Therefore, this Petition also involves the issue of whether the trial court and Court of Appeals erred by determining that *all* of TVI's commercial speech (*e.g.*, commercials, advertisements, in-store announcements, etc.) was inextricably intertwined with protected charitable speech, and thus, subject to heightened scrutiny.

Under *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988),

[8] Ordinary commercial speech is not subject to heightened First Amendment protection, and thus, would be properly targeted under an ordinary CPA cause of action. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562–63, 100 S. Ct. 2343, 2350, 65 L. Ed. 2d 341 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

determination that TVI's advertising is properly categorized as commercial speech for First Amendment purposes does not end the inquiry because commercial speech may be afforded additional protection "when it is inextricably intertwined" with otherwise fully protected speech. However, both the trial court and the Court of Appeals failed to conduct meaningful fact inquiries into whether all of TVI's advertising was inextricably intertwined with protected speech. Indeed, a simple review of the evidence admitted before the trial court demonstrates that much, if not the vast majority of TVI's advertising and other commercial speech is standalone and thus, not inextricably intertwined. For example, TVI's shopping bags (displayed below) deceptively suggested that shopping or donating at its stores was a "Good Deed" without any reference to an *actual* charity or that charity's mission. Tr. Ex. 602.



An ordinary consumer viewing this messaging on a shopping bag does not see a charity logo or mission statement. Rather, that consumer merely sees a deceptive message that shopping at Value Village is a "Good Deed."[9]

Because "[n]o law of man or nature makes it impossible" for TVI to promote purchases at its stores without wrapping itself in a nonspecific, charitable veneer, the Court of Appeals erred in

[9] As previously noted, no portion of any sale made at a Value Village store goes to charity. *Supra* Section V.

holding that the commercial speech at issue in this case was inextricably intertwined with protected speech. *See Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 474, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989); *see also Hunt v. City of Los Angeles*, 638 F.3d 703, 715-716 (9th Cir. 2011) ("Implicit in [the *Riley*[10]] standard … is that where the two components of speech can be easily separated, they are not "inextricably intertwined"; holding that sales of merchandise containing religious messages was commercial speech, and not inextricably intertwined with non-commercial speech as "[n]othing in the nature of Plaintiffs' products requires their sales to be combined with a noncommercial message."). Nothing required TVI to wrap itself in a charitable veneer when advertising its goods. Instead, TVI purposefully marketed itself in such a way as to blur the lines between what benefitted a charity (donating at Value Village stores) and what did not (purchasing items at Value

[10] *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

Village stores). By improperly holding that all of the marketing at issue in this case is protected, charitable speech, the Court of Appeals incentivizes other for-profit businesses to mix deceptive marketing with some form of charitable appeal to shield themselves from regulatory action. This Court should therefore accept review.

D. The State's Petition for Review Presents Issues of Significant Public Importance that Should be Determined by this Court, Namely, Whether the Washington Attorney General May Bring Actions under the Consumer Protection Act to Target Misleading and Deceptive Charitable Speech.

Ensuring that Washington consumers are fully informed when making purchasing and donating decisions is an issue of significant public importance. As the law currently stands, the Court of Appeals' ruling eviscerates the authority of the Attorney General to bring a CPA enforcement action against any entity that engages in charitable solicitation or commercial fundraising on behalf of a charity, even against entities—such as TVI—that deceive the public as to their charitable status. By holding (1) that a mens rea element is required to satisfy strict scrutiny, and (2)

that no such element may be imputed into the statute, the Court has made it impossible for the State to regulate charitable solicitation under the CPA. Compounding its error, the Court of Appeals' overly broad interpretation of when commercial speech is inextricably intertwined with charitable speech will incentivize businesses to simply include reference to charitable organizations in its deceptive marketing in order to evade regulation.

Moreover, the Court of Appeals' ruling disregards the central and unique role that the Attorney General plays in the regulation of charities, and leaves the giving public with little or no recourse. Consistent with its obligation to protect the public, the Attorney General routinely investigates and brings enforcement actions against charities that misrepresent what they are doing with donated funds, and it is essential that it continue in this watchdog role. *See, e.g., In re Breast Cancer Prevention Fund*, 574 B.R. 193 (Bankr. W.D. Wash. 2017); *State v. Haueter*

(King County Superior Court Case 17-2-33-03503)[11]; *State v. Veterans Independent Enterprises of Washington* (Pierce County Superior Court Civil Case 19-2-12198-5).[12] The Court of Appeals' erroneous decision not only fails to resolve the standard of proof necessary in CPA enforcement actions involving deceptive commercial solicitations but calls into doubt the Attorney General's ability to protect consumers in those settings.

VII. CONCLUSION

Given the First Amendment issues at stake, including an issue of first impression in Washington, this case represents numerous compelling reasons to accept review. Accordingly, the State respectfully request that this Court accept review under RAP 13.4(b)(1), 13.4(b)(3), and 13.4(b)(4).

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[11] https://www.atg.wa.gov/news/news-releases/ag-lawsuit-leads-lifetime-ban-family-who-used-charities-deceive-washingtonians (last accessed December 17, 2021).

[12] https://apnews.com/article/washington-lawsuits-veterans-694de0102ba7d40fab02a89c19aff94c (last accessed December 17, 2021).

This document contains 4,571 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 17th day of December, 2021.

ROBERT W. FERGUSON
Attorney General

s/JOHN A. NELSON
JOHN A. NELSON, WSBA #45724
SHIDON B. AFLATOONI, WSBA #52135
SEANN COLGAN, WSBA # 38769
Assistant Attorneys General
Attorneys for the State of Washington

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:

James C. Grant Ross Siler Sarah Cox Daniela Najera Lisa Bass Sheilagh Hankins Davis Wright Tremaine LLP Madison Centre 920 5th Ave., Suite 3300 Seattle, WA 98104 jimgrant@dwt.com ross.siler@dwt.com sarahcox@dwt.com danielanajera@dwt.com lisabass@dwt.com SheilaghHankins@dwt.com	☐Legal Messenger ☐First-Class Mail, Postage Prepaid ☐Certified Mail, Receipt Requested ☐Facsimile ☒Email ☐FTP site

DATED this 17th day of December, 2021, at Seattle, Washington.

s/JOHN A. NELSON
JOHN A. NELSON
Assistant Attorney General

APPENDIX

FILED
8/16/2021
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. TVI, INC., d/b/a Value Village, Appellant.	)	80915-6-I PUBLISHED OPINION

BOWMAN, J. — The State sued TVI Inc. under the Consumer Protection Act (CPA), chapter 19.86 RCW, alleging that TVI's marketing deceived consumers by creating an impression that TVI is a nonprofit entity and that charities benefit from sales at TVI's Value Village thrift stores. TVI argued its marketing amounts to constitutionally protected charitable solicitation and moved to dismiss the CPA claims. The trial court denied the motion and, after a bench trial, determined that TVI "knew or should have known" that its marketing could deceive consumers. We conclude that TVI's marketing inextricably intertwines commercial speech and charitable solicitation and that statutes regulating charitable solicitation must survive strict constitutional scrutiny. Because the CPA as applied to TVI's marketing does not leave sufficient breathing room for protected speech under the First Amendment to the United States Constitution, we reverse and remand to dismiss the State's CPA claims.

FACTS

TVI is a for-profit corporation that owns and operates several Value Village thrift stores in Washington. It buys donated textiles and household items from selected partner charities[1] at low cost[2] and then sells them to the public at higher prices in its stores. TVI sells unsold items and those unfit for retail sale to recycling centers that ship the items overseas to secondary markets or dispose of the items. TVI also maintains community donation centers at its stores, where it accepts items donated by the public. It then pays its charity partners a fee based on the amount of materials donated directly to each store.

TVI markets itself as a philanthropic company trying to reduce waste, recycle materials, and support its charity partners' work in the community. TVI does not donate directly to charities, and its charity partners do not receive any of its sales revenue. But by buying in bulk from charitable organizations, TVI provides a predictable source of revenue on which the charities heavily rely.

To induce the public to donate and shop at its stores, TVI uses in-store signs and banners, in-store public address announcements, online marketing, brochures, and social media posts. TVI identifies itself as a for-profit company in its marketing and does not tell shoppers it donates profits to charity. That said, it markets slogans that suggest its charitable partners benefit from the amount of items TVI sells. For example, one sign reads, " 'These racks support more than just clothes. By shopping and donating at this store, you support: [charity

[1] TVI's main charity partners are Big Brothers Big Sisters of Puget Sound, Northwest Center, and the Arc of Washington State.

[2] TVI buys the items at a set price per pound.

logos][.] Value Village good all around.' " Or, " 'Value Village is about giving back and helping others, too.' " Another states, " 'Donate to a nonprofit here' " and, " 'Clothing [plus] Household Items,' " with a smaller caption that states, " 'Value Village is a for profit professional fundraiser.' " Some advertisements are more detailed:

> "For over 60 years, Value Village has helped charities, communities and the planet prosper through the power of re-use. Our charity partners sell us goods they collect for reliable revenue that helps fund their missions."

Public address announcements made to shoppers include messages like, " 'When you donate your reusable items here at our store, we pay it forward to others in a big way! Your donations mean support for local nonprofits - helping to fund vital programs right here in our community. Pretty awesome, huh?' "

TVI also encourages shoppers to donate at its in-store collection bins with messages like, " '**DO** SOMETHING GREAT **DO** GOOD **DO** YOUR PART **DO**NATE,' " " '**DO** A GOOD DEED **DO** FAVORS **DO** YOUR PART **DO**NATE,' " and, " 'Value Village pays local nonprofits every time you donate. **Thank you!**' " Most Value Village stores use a compilation of these themes in their banners, brochures, and signs. Some stores have a "primary" charity partner highlighted in their advertising. The stores also hand out "stamp cards," giving shoppers discounts on purchased items in exchange for donating goods.

In 2014, the State notified TVI that it must register with the secretary of state as a commercial fundraiser under the charitable solicitations act (CSA),

chapter 19.09 RCW.[3] TVI complied. Around the same time, the attorney general's office (AGO) began investigating TVI's marketing for possible CPA violations.[4] The AGO initiated the investigation after receiving at least one complaint accusing TVI of creating a community perception that it was a nonprofit organization and that charities received direct benefits from its sales at Value Village stores.

Eventually, the State sued TVI under the CSA, alleging that TVI failed to place disclaimers "at the point of solicitation" between January and October 2015, and advertised for solicitations using "false, misleading, or deceptive information." The State also alleged TVI's marketing was deceptive under the CPA because it created a "deceptive net impression" that TVI is a nonprofit corporation and that customer sales directly benefit charities. The State also accused TVI of deceptive marketing related to the Rypien Foundation, a charity group dedicated to helping families battling cancer. In exchange for using the foundation's logos in its marketing and store windows, TVI paid the Rypien Foundation a flat fee of $4,000 per month.[5] But the State claimed TVI misled consumers into believing it paid the foundation based on the amount of donations to Value Village stores in Spokane. The State sought injunctive relief as well as

[3] The CSA provides Washington consumers with information relating to any entity that solicits funds from the public for charitable purposes to prevent deceptive practices and improper use of contributions intended for charitable purposes. RCW 19.09.010(1). It also seeks to improve the transparency and accountability of charitable solicitors. RCW 19.09.010(2).

[4] The CPA prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. RCW 19.86.020.

[5] The parties later changed the compensation fee to a flat rate per pound.

civil penalties of up to $2,000 for each CPA violation. It also sought restitution for Value Village customers as well as attorney fees and costs.

TVI moved to dismiss the State's CPA claims as an unconstitutional regulation of protected speech as applied to its marketing. TVI argued that its marketing amounts to charitable solicitation, and statutes regulating charitable solicitation must pass strict constitutional scrutiny. It asserted the CPA cannot pass strict scrutiny because it lacks a mens rea element to protect against liability for unintentional false statements or deception. The trial court agreed that TVI's marketing includes some charitable solicitation subject to constitutional scrutiny. But it did not dismiss the State's CPA claims. Instead, the court required the State to prove at trial that TVI "knew or should have known" its marketing could create a deceptive net impression.

The case proceeded to bench trial. At the close of the State's case, TVI again moved to dismiss the CPA claims, arguing that the State failed to satisfy First Amendment strict scrutiny standards. The court denied the motion. After trial, the court determined that the State satisfied its burden of proof on three of its seven claims.[6] The court found the State proved that (1) before 2016, TVI used advertising that had the capacity to deceive consumers by suggesting that TVI itself was a nonprofit entity; (2) TVI used ads that had the capacity to mislead the public into believing that purchasing items at a Value Village store would "benefit the downtrodden, the poor, those who need charity"; and (3) TVI used

[6] The trial court dismissed the State's allegations that (1) TVI deceived the public into believing charities were paid for every donation, (2) TVI deceived the public into believing only primary charities received payment for donations, (3) TVI misled consumers about how much it paid the Moyer Foundation, and (4) TVI violated CSA disclosure requirements.

ads that had the capacity to deceive shoppers into believing the Rypien Foundation received money for each item donated. The court entered findings of fact and conclusions of law.

TVI petitioned for discretionary review before the trial court determined damages. A commissioner of this court granted TVI interlocutory discretionary review.

ANALYSIS

TVI argues that the CPA, as applied to its marketing, unconstitutionally chills protected speech—charitable solicitation. The State counters that TVI's marketing amounts to only commercial speech properly regulated under the CPA. In the alternative, the State argues that the CPA as applied to TVI's marketing survives strict scrutiny under the trial court's "knew or should have known" standard. We agree with TVI.

Standard of Review

We interpret statutes and constitutional provisions de novo. City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009); Fed. Way Sch. Dist. No. 210 v. State, 167 Wn.2d 514, 523, 219 P.3d 941 (2009). We also review challenges invoking the right to free speech under the First Amendment de novo. Catlett v. Teel, 15 Wn. App. 2d 689, 699, 477 P.3d 50 (2020) (citing Resident Action Council v. Seattle Hous. Auth., 162 Wn.2d 773, 778, 174 P.3d 84 (2008)). Generally, we presume statutes to be constitutional, and the party challenging a statute bears the burden of proving otherwise. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); Voters Educ. Comm. v. Pub. Disclosure

Comm'n, 161 Wn.2d 470, 481, 166 P.3d 1174 (2007). But the State " 'usually bears the burden of justifying a restriction on [free] speech.' " State v. Immelt, 173 Wn.2d 1, 6, 267 P.3d 305 (2011)[7] (quoting Voters Educ. Comm., 161 Wn.2d at 482).

In assessing a First Amendment challenge, we first determine whether the speech at issue is constitutionally protected. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 475, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). In doing so, we conduct " 'an independent review of the record . . . to be sure that the speech in question actually falls within [a] protected category.' " Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 535 (9th Cir. 1984) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)), rev'd on other grounds by City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). Then we scrutinize the law regulating the speech under an evidentiary standard that matches the First Amendment interest at play. Thomson v. Doe, 189 Wn. App. 45, 57, 356 P.3d 727 (2015).

Commercial Speech

"Commercial speech" is "expression related solely to the economic interests of the speaker and its audience." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561-62, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). It is speech which does " 'no more than propose a commercial transaction.' " State Bd. of Va. Pharmacy v. Va. Citizens Consumer Council, Inc.,

[7] Internal quotation marks omitted.

425 U.S. 748, 762, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973)). The First Amendment protects commercial speech from unwarranted governmental regulation. Va. Citizens Consumer Council, 425 U.S. at 761-62. Statutes regulating commercial speech are subject to an intermediate level of constitutional scrutiny. Cent. Hudson, 447 U.S. at 563-66.

The First Amendment's concern for commercial speech turns on the informational function of advertising. See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). As a result, "there can be no constitutional objection" to suppressing commercial messages that do not accurately inform the public. Cent. Hudson, 447 U.S. at 563. The government may ban commercial communications that are more likely to deceive the public than to inform it. Friedman v. Rogers, 440 U.S. 1, 15-16, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979). But commercial speech should not be defined too broadly "lest speech deserving of greater constitutional protection be inadvertently suppressed." Cent. Hudson, 447 U.S. at 579 (Stevens, J., concurring).

In assessing whether a communication is commercial speech, we consider whether (1) the communication is an advertisement, (2) the communication refers to a particular product, or (3) the speaker has an economic motivation. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983); Dex Media W., Inc. v. City of Seattle, 696 F.3d

952, 958 (9th Cir. 2012). No one factor is dispositive. Bolger, 463 U.S. at 66-67. And a communication is not necessarily commercial just because "it relates to that person's financial motivation." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795-96, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

Here, TVI's marketing amounts to commercial speech. Its signs, banners, and in-store announcements induce customers to donate goods at its stores, which TVI then sells for profit. The marketing also encourages shoppers to buy goods in its stores so TVI can generate greater profits. While the signs and announcements do not refer to particular products, they are advertisements communicated by a for-profit corporation with economic motivation.

Charitable Solicitation

Charitable solicitation is fully protected speech under the First Amendment. Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632-33, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980); Sec. of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 959-60, 104 S. Ct 2839, 81 L. Ed. 2d 786 (1984); Riley, 487 U.S. at 787-88. Statutes seeking to regulate charitable solicitation are subject to strict constitutional scrutiny. Riley, 487 U.S. at 790. That is, the State "bears the 'well-nigh insurmountable' burden to prove a compelling interest that is both narrowly tailored and necessary to achieve the State's asserted interest." State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 135 Wn.2d 618, 628, 957 P.2d 691 (1998) (quoting Meyer v. Grant, 486 U.S. 414, 425, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988)).

The dictionary defines "solicitation" as "the pursuit, practice, act, or an instance of soliciting." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2169 (2002). "Solicit" means "to approach with a request or plea (as in selling or begging)," and "to endeavor to obtain by asking or pleading." WEBSTER'S, at 2169. But charitable solicitation encompasses more than the mere act of seeking financial support for nonprofit organizations. See Schaumburg, 444 U.S. at 632; Riley, 487 U.S. at 798. It is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." Schaumburg, 444 U.S. at 632. "[W]here the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself." Riley, 487 U.S. at 798. Charitable solicitation informs the public about the charity's existence and goals, shares and propagates its views, and advocates its causes. Schaumburg, 444 U.S. at 632.

Charitable solicitation is not limited to in-person communications. Nat'l Fed. of the Blind of Tex., Inc. v. Abbott, 647 F.3d 202, 212 (5th Cir. 2011). In Abbott, for-profit entities collected donated goods in "receptacles" bearing logos of local charities. Abbott, 647 F.3d at 207, 213. They then paid the charities a flat fee for the goods and resold them for profit. Abbott, 647 F.3d at 207. The court concluded that including the names of local charities on donation bins constitutes charitable solicitation because doing so communicates information about the nonprofit and explicitly advocates for the donation of clothing and household goods to that particular charity. Abbott, 647 F.3d at 212-13. The

donation bins are "silent solicitors and advocates for particular charitable causes" that "implicitly advocate for that charity's views, ideas, goals, causes, and values." Abbott, 647 F.3d at 213.

Like the donation bins in Abbott, TVI's signs, pamphlets, and banners display the names and logos of its charity partners. For example, TVI displays signs saying, "Thank you for shopping and donating. Your support helps benefit: [Big Brothers Big Sisters of Puget Sound logo]." And, "Value Village is about giving back and helping others, too. . . . In this area, your donations support: [Northwest Center logo]." These communications at least implicitly advocate for the views, ideas, goals, causes, and values of TVI's charitable partners. As a result, TVI's marketing also amounts to charitable solicitation.

Intertwined Speech

We treat communications that contain both commercial speech and noncommercial speech—here, charitable solicitation—as commercial speech unless the commercial and noncommercial messages are "inextricably intertwined." See Riley, 487 U.S. at 795-96. We determine whether the commercial aspects of the speech are "inextricably intertwined with otherwise fully protected speech" based on "the nature of the speech taken as a whole." Riley, 487 U.S. at 796. "[W]here the two components of speech can be easily separated, they are not 'inextricably intertwined.' " Hunt v. City of L.A., 638 F.3d 703, 715 (9th Cir. 2011), aff'd, 523 F. App'x 493 (9th Cir. 2013). But if "the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to

another phrase . . . . [W]e apply our test for fully protected speech. Riley, 487 U.S. at 796.

Citing Hunt and Fox, the State argues that TVI's charitable solicitation is easily separated from its commercial speech. In Hunt, boardwalk vendors challenged city ordinances restricting when and where they could sell their goods as unconstitutionally infringing on protected speech.[8] Hunt, 638 F.3d at 706-09. The court rejected their challenge. Hunt, 638 F.3d at 717. It reasoned that any protected speech could be easily separated from the vendors' commercial activity because they were "simply explaining the use and meaning of their products in an attempt to convince passers-by to purchase them." Hunt, 638 F.3d at 715-17. The products on their own did not have "any inherently communicative elements that make their sale constitute expressive activity, and nothing prevents [the vendors] from espousing their beliefs without selling these products." Hunt, 638 F.3d at 717. Similarly, in Fox, the United States Supreme Court determined that it could separate commercial speech promoting the sale of Tupperware from protected speech educating potential customers about home economics because nothing "prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages." Fox, 492 U.S. at 473-74.

[8] One vendor claimed protected speech because he was selling shea butter by demonstrating its " 'healing power' " on passers-by, and his sales stand was the " 'Garden of Eve.' " Hunt, 638 F.3d at 708. Another vendor argued he was engaged in protected speech because he explained to customers the meaning of religious and mythical symbols engraved on his incense holders. Hunt, 638 F.3d at 708.

Unlike the boardwalk vendors in Hunt or the Tupperware salespeople in Fox, sales of TVI's goods are directly related to its noncommercial message. TVI buys its inventory from charity partners and pays the charities a fee for goods donated directly to Value Village stores. Marketing this relationship benefits both TVI and its charity partners. Moreover, the State does not seek to regulate when and where TVI sells its goods. Rather, by alleging that TVI markets its relationship with its charity partners in a manner that can deceive consumers, the State aims its lawsuit squarely at TVI's intertwined speech. It asserts that TVI is using its charity partners' "names and logos to encourage consumers to donate goods that it can then resell at a substantial profit," and that TVI is using "the names and logos of the charities to encourage consumers to shop at its stores by creating the illusion that Value Village is a charitable or nonprofit organization."

Taken as a whole, we conclude TVI's commercial and noncommercial speech is inextricably intertwined. As a result, we apply strict scrutiny to the State's attempt to regulate TVI's charitable solicitation under the CPA.

Application of CPA to Charitable Solicitation

Under strict scrutiny, we will uphold a statute restricting protected speech only if it serves a compelling state interest[9] and is "narrowly drawn . . . to serve th[at] interest[ ] without unnecessarily interfering with First Amendment freedoms." Schaumburg, 444 U.S. at 636-37. The restriction must be the " 'least restrictive means among available, effective alternatives.' " United States v. Alvarez, 567 U.S. 709, 729, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) (quoting

[9] The parties agree that the State has a compelling interest in "polic[ing] deceptive speech."

Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004)).

The United States Supreme Court has three times considered prophylactic statutes designed to combat fraud or deception in charitable solicitation. See Ill. ex rel. Madigan v. Telemktg. Assocs., Inc., 538 U.S. 600, 617, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003) (citing Schaumburg, 444 U.S. 620; Munson Co., 467 U.S. 947; Riley, 487 U.S. 781). Each time, it held the prophylactic measures categorically restrained solicitation and were unconstitutionally burdensome and unnecessary to achieve the state's goal of preventing donors from being misled. See Schaumburg, 444 U.S. at 637; Munson Co., 467 U.S. at 967-68; Riley, 487 U.S. at 794-95. Even so, the Court "took care to leave a corridor open for fraud actions to guard the public against false or misleading charitable solicitations." Madigan, 538 U.S. at 617. Actions targeting fraud fall on the constitutional side of the line because they are aimed at fraud itself rather than "aimed at something else in the hope that it would sweep fraud in during the process." Munson Co., 467 U.S. at 969-70. Still, "falsity alone may not suffice to bring the [protected] speech outside the First Amendment. The statement must be [at least] a knowing or reckless falsehood." Alvarez, 567 U.S. at 719. As a result, any statute targeting false or misleading charitable solicitation must meet "[e]xacting proof requirements" to provide "sufficient breathing room for protected speech," ensuring that a "[f]alse statement alone does not subject a fundraiser to fraud liability." Madigan, 538 U.S. at 620.

In Madigan, the Illinois AGO brought common law and statutory fraud claims against for-profit professional fundraisers, alleging they engaged in fraudulent charitable solicitation. Madigan, 538 U.S. at 606-08. The solicitors moved to dismiss the claims as barred by the First Amendment. Madigan, 538 U.S. at 609. The court concluded that "a properly tailored fraud action targeting fraudulent representations themselves employs no '[b]road prophylactic rul[e].' " Madigan, 538 U.S. at 619[10] (quoting Schaumburg, 444 U.S. at 637). The elements of Illinois' fraud action adequately safeguarded against liability for false statements alone because the state had to show by "clear and convincing evidence" that the fundraiser made a "false representation of a material fact" and that the statement was made "with the intent to mislead the listener, and succeeded in doing so." Madigan, 538 U.S. at 620.

Here, the State sued TVI under the CPA. To prevail on a CPA claim, the State must prove only three elements: "(1) [A]n unfair or deceptive act or practice (2) occurring in trade or commerce, and (3) public interest impact." State v. Kaiser, 161 Wn. App. 705, 719, 254 P.3d 850 (2011). The State can establish an unfair or deceptive act by showing (1) per se unfair or deceptive conduct,[11] (2) an act that has the capacity to deceive a substantial portion of the public, or (3) an unfair or deceptive act or practice that is not regulated by statute

[10] Alterations in original.

[11] Violation of the CSA is per se unfair or deceptive conduct under the CPA. See RCW 19.09.340(1). The State alleged in its complaint that TVI violated the CSA by failing to place disclaimers "at the point of solicitation" between January and October 2015 and by advertising for solicitations using "false, misleading, or deceptive information." The trial court dismissed the disclaimer allegation. But it does not appear from the record that the State argued or that the court ruled on the State's deceptive advertising claim under the CSA.

but violates the public interest. State v. Mandatory Poster Agency, Inc., 199 Wn. App. 506, 518, 398 P.3d 1271 (2017).

> The CPA does not define "deceptive," but "the implicit understanding is that the actor misrepresented something of material importance." A deceptive act or practice is measured by "the net impression" on a reasonable consumer.

Mandatory Poster Agency, 199 Wn. App. at 519[12] (quoting Kaiser, 161 Wn. App. at 719; Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 50, 204 P.3d 885 (2009)).

The CPA "significantly differs from traditional common law standards of fraud and misrepresentation." Deegan v. Windermere Real Estate/Ctr.-Isle, Inc., 197 Wn. App. 875, 884, 391 P.3d 582 (2017). The purpose of the CPA is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920; Panag, 166 Wn.2d at 37. The statute operates prophylactically in that the plaintiff need not show the speaker intended to deceive or succeeded in doing so, only that the communication "had the capacity to deceive a substantial portion of the public." Panag, 166 Wn.2d at 47.

Here, unlike the fraud claim in Madigan, the elements of the State's CPA claim lack the exacting proof requirements "critical to First Amendment concerns," and do not give "sufficient breathing room for protected speech." Madigan, 538 U.S. at 617, 620.

[12] Footnote omitted; internal quotation marks omitted.

Citing United Seniors Ass'n, Inc. v. Social Security Administration, 423 F.3d 397, 407 (4th Cir. 2005), the State argues that despite Madigan, the government can regulate deception in charitable solicitation without showing that recipients were intentionally or "actually misled." In United Seniors, a nonprofit challenged a federal statute prohibiting the use of words or symbols associated with the Social Security Administration in advertising or solicitations " 'in [a] manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved . . . by the Social Security Administration.' " United Seniors, 423 F.3d at 400 (quoting Social Security Act, § 1140(a)(1)(A), as amended, 42 U.S.C. § 1320(b)-10(a)(1) (2005)).

The court recognized the statute reached both deceptive and protected speech. United Seniors, 423 F.3d at 406-07. It concluded that the statute's first prong "plainly reaches only deceptive speech by prohibiting uses of the words that a person 'knows or should know would convey' the false impression of governmental endorsement." United Seniors, 423 F.3d at 407 (quoting § 1140(a)(1)(A)). But the second prong could reach some protected speech because it "does not require the speaker to have an intent to deceive." United Seniors, 423 F.3d at 407. Still, the court let both prongs of the statute stand because "any such non-commercial, non-deceptive speech protected by the First Amendment constitutes, at most, a minuscule portion of the speech reached by the statute." United Seniors, 423 F.3d at 407-08.

Unlike the statute in United Seniors, Washington's CPA has no mens rea element and, as applied to TVI, reaches much more than a "miniscule" portion of protected speech.[13] See United Seniors, 423 F.3d at 407.

Finally, the State argues that even if strict scrutiny demands the CPA meet exacting proof requirements, the " 'Knew or Should Have Known' Standard Imposed by the Trial Court Passes Constitutional Muster." We disagree. While it is true that a trial court may construe an ambiguous law to avoid constitutional infirmity, it is barred by the separation of powers from rewriting the law's plain terms. City v. Willis, 186 Wn.2d 210, 219, 375 P.3d 1056 (2016). Particularly in a First Amendment challenge, " '[w]e will not rewrite a . . . law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish [the legislature's] incentive to draft a narrowly tailored law in the first place.' " Willis, 186 Wn.2d at 219-20[14] (quoting United States v. Stevens, 559 U.S. 460, 481, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)).

The CPA is not ambiguous and requires no interpretation. The CPA does not include a mens rea element. The trial court erred in rewriting the law to

[13] National Taxpayers Union v. United States Social Security Administration, 302 Fed. App'x 115 (3d Cir. 2008), also cited by the State, does not compel a different result. That case interprets the same federal statute as United Seniors and reaches the same result. Nat'l Taxpayers, 302 Fed. App'x at 119-20. Nor does United States Corps. for Character, L.C., 116 F. Supp. 3d 1258 (D. Utah 2015), bolster the State's argument. That court determined that fraud is not the only claim that may survive strict scrutiny as applied to protected speech, but did not reach the merits as to any other causes of action to decide constitutional infirmity. Corps. for Character, 116 F. Supp. 3d at 1267-68. Finally, the State cites In re Breast Cancer Prevention Fund, 574 B.R. 193 (Bankr. W.D. Wash. 2017), as an example of a case that "implicitly rejected a First Amendment defense similar to the one raised by Value Village." But that bankruptcy case addresses only a statutory vagueness challenge. See Breast Cancer Prevention, 574 B.R. at 225.

[14] Alterations in original; internal quotation marks omitted.

include a "knew or should have known" mens rea element to avoid constitutional infirmity as applied to TVI's charitable solicitation.

In sum, the CPA as applied to TVI's inextricably intertwined commercial and noncommercial speech does not meet the exacting proof requirements necessary to give protected speech sufficient breathing room under the First Amendment. We reverse and remand for the trial court to dismiss the State's CPA claims.[15]

Brunson, J.

WE CONCUR:

Mann, C.J.

Appelwick, J.

[15] The State asks for attorney fees under RCW 19.86.080 and RAP 18.1. RCW 19.86.080(1) gives the court discretion to award the prevailing party in a CPA action "the costs of said action including a reasonable attorney's fee." Similarly, RAP 18.1(a) authorizes attorney fees for the prevailing party on appeal. Because the State is not the prevailing party, we deny its request.

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

STATE OF WASHINGTON, Respondent, v. TVI, INC., d/b/a Value Village, Appellant.	)	80915-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent the State of Washington filed a motion for reconsideration of the opinion filed on August 16, 2021 in the above case, and the respondent TVI Inc. filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

UNITED STATES CONSTITUTION AMENDMENT I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

RCW 19.86.020

Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[1961 c 216 § 2.]

CONSUMER PROTECTION DIVISION AGO

December 17, 2021 - 4:38 PM

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Appellate Court Case Number:	80915-6
Appellate Court Case Title:	TVI, Inc., Appellant v. State of Washington, Respondent

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Comments:

State of Washington's Petition for Review with Appendix attached.

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