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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 INNOVATION VENTURES, LLC, a Michigan limited liability company,

Petitioners.

PETITIONERS' ANSWER TO MEMORANDUM OF AMICI CURIAE ROBERT McKENNA AND MICHAEL C. TURPEN IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

As former attorneys general who oversaw enforcement of state consumer-protection laws, Robert M. McKenna and Michael C. Turpen are well qualified to opine on the issues raised by the petition for review as amici curiae. They focus their memorandum on two issues.

First, amici curiae address the Court of Appeals' recognition of a new per se unfair trade practice under Washington's Consumer Protection Act (CPA). Under the Court of Appeals' decision, no longer must a plaintiff prove that advertising claims are deceptive to establish a CPA violation. It is now a per se unfair trade practice to make advertising claims without adequate substantiation, even if the claims are true. This Court has previously held that the Legislature is the appropriate body to recognize new per se unfair trade practices. Amici curiae aptly point out that the underlying issue is separation of powers, which this Court has acknowledged is a "vital…doctrine" in this state.[1]

Second, amici curiae focus on the Court of Appeals' imposition of a prior restraint on speech. Our state constitution "categorically prohibits" prior restraints, including on commercial speech.[2] Amici curiae correctly identify the serious First Amendment problems with the Court of Appeals' ban on inadequately substantiated advertising claims. Amici curiae also point this Court to United States Supreme Court precedent that further

[1] *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)).

[2] *Bradburn v. N. Cent. Regional Library Dist.*, 168 Wn.2d 789, 801, 231 P.3d 166 (2010).

demonstrates why the Court of Appeals' decision mishandles the prior-restraint issue.

Amici curiae evidently view these two issues as important enough, and the Court of Appeals' decision as so outside established legal bounds, that they feel compelled to take the relatively unusual step of submitting an amicus-curiae memorandum expressing their support for a petition for review. This Court should give serious consideration to their views. Petitioners Living Essentials, LLC, and Innovation Ventures, LLC (collectively, "Living Essentials") agree with and adopt amici curiae's arguments.

II. ANSWERING ARGUMENT

A. Under established precedent, the separation-of-powers doctrine prevents the judicial branch of government from recognizing new per se unfair-trade practices under the Consumer Protection Act.

A per se unfair trade practice is a violation of a specific legal requirement that is deemed to constitute a CPA violation, without requiring proof that the practice has a capacity to deceive a substantial portion of the public. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 786, 791-92, 719 P.2d 531 (1986). Under established precedent, only the Legislature may recognize a new, per se CPA violation. *Id*. at 787.

In a previous case, the Court of Appeals rejected the State's invitation to recognize a new per se unfair trade practice. *State v. Pac. Health Ctr., Inc.*, 135 Wn. App. 149, 143 P.3d 618 (2006). The State

asserted that the unlicensed practice of medicine was inherently deceptive, thus violating the CPA. *Id*. at 171-72. The Court of Appeals recognized the State's position as advocating the adoption of a new per se CPA violation, rejected it, and held that the State had to prove deceptiveness in fact—actual false or misleading representations—to establish CPA liability. *Id*. at 170-73.

Here, in contrast, the Court of Appeals affirmed the trial court's recognition of a new unfair trade practice. Under the Court of Appeals' decision, making advertising claims without substantiation automatically constitutes an unfair trade practice, in violation of the CPA, without proof that the claims are deceptive. This conflicts with precedent and usurps the Legislature's role by expanding the CPA as enacted. As amici curiae observe, the Legislature prohibited conduct that has the "capacity to deceive"; it did not prohibit the making of advertising claims that lack adequate substantiation but are nevertheless candid and truthful. *Amici Mem.* at 6.

Amici curiae correctly identify the underlying issue as one of separation of powers. This Court has recognized that our state has a "vital separation of powers doctrine" that "serves mainly to ensure that the fundamental functions of each branch remain inviolate." *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). Regarding the judicial branch, one of this Court's "primary concerns" is "that the judiciary not be drawn into tasks more appropriate to another branch[.]" *Id*. at 719. This Court

followed this guiding principle when it recognized in *Hangman Ridge* that "the Legislature, not this Court, is the appropriate body" to identify a new per se unfair trade practice. 105 Wn.2d at 787.

Under the Court of Appeals' decision adopting the FTC's administratively adopted adequate-substantiation rule, if the State or a private plaintiff alleges that advertising claims violate the CPA, that plaintiff no longer must prove that the claims are "deceptive" under RCW 19.86.020, *i.e.*, false or misleading. Instead, the making of advertising claims that are found not to be adequately substantiated is now a per se unfair trade practice in Washington. The Court of Appeals so concluded even though Washington, unlike the FTC, cannot claim to have any expertise reviewing and evaluating advertising claims.

This Court should accept review to decide whether the Court of Appeals' holding comports with precedent and should be the law in Washington, or whether Washington should join the other jurisdictions that have uniformly declined to apply the FTC's standard under their state consumer-protection laws.

B. The Court of Appeals' decision imposes an unconstitutional prior restraint on protected speech.

A prior restraint is any ban on speech before it occurs. *In re Marriage of Suggs*, 152 Wn.2d 74, 81, 93 P.3d 161 (2004); *see also Soundgarden v. Eikenberry*, 123 Wn.2d 750, 764, 871 P.2d 1050 (1994) ("Simply stated, a prior restraint prohibits future speech, as opposed to punishing past speech."). "[U]nlike the First Amendment, article I, section

5 [of the Washington Constitution] *categorically prohibits* prior restraints on constitutionally protected speech." *Bradburn v. N. Cent. Regional Library Dist.*, 168 Wn.2d 789, 801, 231 P.3d 166 (2010) (emphasis added).

The prohibition on prior restraints applies to commercial speech. *Soundgarden*, 123 Wn.2d at 764-65. Although whether the Washington Constitution affords greater protection to commercial speech than the First Amendment remains an open question, there is no question that commercial speech is protected under both the First Amendment and the Washington Constitution. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 116, 937 P.2d 154 (1997). Moreover, as amici curiae emphasize, the decision bans advertising claims that are not adequately substantiated, even if the claims are entirely *true*. *Amici Mem.* at 9-10.

This Court has already decided that a ban on "unsubstantiated" statements is an unconstitutional prior restraint because the standard of "unsubstantiated" is vague and has an intolerable chilling effect on speech that may be truthful. *Suggs*, 152 Wn.2d at 84. Amici curiae aptly point to United States Supreme Court precedent similarly rejecting "free-floating" or "indeterminate" prohibitions on speech. *Amici Mem.* at 10 (quoting *United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) (citation omitted), and *Minn. Voters All. v. Manksy*, 585 U.S. __, 138 S. Ct. 1876, 1891 , 201 L. Ed. 2d 201 (2018) (citation omitted)).

The United States Supreme Court has also distinguished between "a properly tailored fraud action [in which] the State bears the full burden of proof" and a prior restraint that imposes on the speaker the "uphill burden"

of proving its conduct lawful. *Amici Mem.* at 10-11 (quoting *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 620, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003)). That analysis is instructive here and helps explain why the Court of Appeals' shifting of the burden of proof to the speaker—the maker of advertising claims—to establish that its claims are adequately substantiated is constitutionally impermissible.

This Court should accept review to resolve the conflict between the Court of Appeals' decision and this Court's precedents and to decide the important constitutional questions raised by Living Essentials' petition.

III. CONCLUSION

This Court should grant review.

Respectfully submitted this 11th day of September, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 11th day of September, 2019.

Patti Saiden, Legal Assistant

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