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Supreme Court No. 100493-1
Court of Appeals No. 80915-6-I

In The Supreme Court Of The State of Washington

STATE OF WASHINGTON,

Petitioner

v.

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

Respondent

BRIEF OF AMICI CURIAE
NORTHWEST CENTER AND
BIG BROTHERS BIG SISTERS OF PUGET SOUND

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IDENTITY AND INTEREST OF AMICI CURIAE

Northwest Center and Big Brothers Big Sisters of Puget Sound (collectively “Amici Charities”) are 501(c)(3) nonprofit organizations headquartered in Seattle. Northwest Center’s mission is to promote the growth, development, and independence of people with disabilities. Big Brothers Big Sisters of Puget Sound’s mission is to connect families and youth with volunteer mentors in one-to-one relationships. Amici Charities have partnerships with TVI that are threatened by the State’s positions before this Court. Amici Charities, therefore, have significant interest in the outcome of this case.

INTRODUCTION AND STATEMENT OF THE CASE

The dismissal by the Court of Appeals properly balanced the Constitutionally protected right to make charitable solicitations against the State’s legitimate need to protect the public. Amici Charities urge this Court to respect the legislature’s balance, protect

charities whose work improves the lives of thousands of our fellow citizens each year, and affirm the dismissal of this case.

* * *

The Washington Charitable Solicitation Act (“CSA”) was intended by the legislature to be a vehicle by which the State can protect the public from unscrupulous charities and their fundraisers. Violation of the CSA is deemed a violation of the Consumer Protection Act (the “CPA”), and both civil and criminal remedies are available. The CSA represents a robust body of law balancing, on the one hand, the recognized First Amendment right to make charitable solicitations, and on the other, the legitimate need to protect the public.

Yet, the State did not pursue TVI for an alleged violation of the CSA with its built-in protections for Constitutionally protected speech. Instead, the State pursued TVI under a novel theory plucked from the CPA, which indisputably lacks such protections. According to the State, TVI’s partnerships with Amici

Charities might—at least in theory—create a “deceptive net impression” that TVI is, itself, a charity. Based on this strictly theoretical possibility, the State sought to hold TVI liable to the tune of many millions of dollars in fines. The State’s theory—by which a business partnering with charities exposes itself to millions of dollars in fines based on a mere theoretically possible misunderstanding—threatens a dramatic chilling effect of Constitutionally protected speech, and significant unintended consequences.

Consider, for instance, the effect the State’s theory would have on businesses interested in partnering with charities to help them increase donations. These businesses, seeking to benefit the community by helping expand the reach of charities, could do everything within their power to conform with the CSA—check every box, fill-out every form, post every sign, notice, and disclosure—and yet, *still* face millions of dollars in fines under the State’s amorphous “deceptive net impression” theory. Worse yet, in the State’s view, no

member of the public *actually* needs to be deceived, and the business need not *actually* say anything false. Instead, according to the State, liability attaches whenever a business model of working with charities hypothetically creates a “deceptive net impression” that the business is, itself, a charity.

Given that even undisputed compliance with the CSA is no guarantee that a business partnering with charities will not face massive fines under the State’s theory, why would a business sign up to work with charities? Under the State’s theory, liability is unbound by, and disconnected from, compliance with the CSA, and so, businesses partnering with charities face substantial risks that compliance with the CSA does not, and indeed cannot, mitigate.

Now, consider how that unacceptable risk to business translates into direct harm to charities like Amici Charities. Many charities are resource constrained and in need of predictable sources of funding to pursue their missions. Indeed, that is precisely why

Amici Charities turn to partnerships like those with TVI—the partnerships allow Amici Charities to focus on their missions while TVI provides a reliable source of funding, and, at the same time, helps publicize their missions. Yet, the State’s theory of liability creates so much uncertainty and unmitigable risk that ethical businesses like TVI may be unwilling to partner with charities, choking off crucial sources of reliable funding and hamstringing charities as they pursue their charitable missions.

To be clear, no one is suggesting that the State is powerless to pursue and punish unscrupulous charities or businesses. To the contrary, the State has an entire body of law—the CSA—that the legislature carefully crafted to balance important Constitutionally protected speech against the legitimate need to protect the public. But the CPA—and, in particular, the CPA as interpreted by the State and applied by the trial court—is far too blunt an instrument for such delicate

work. This Court should protect charities and their business partners, and affirm dismissal of this case.

FACTS

1. THE CHARITABLE MISSION OF NORTHWEST CENTER.

In 1965, four mothers in Seattle were told that their children could not be educated with their peers, and that, instead, their children should be institutionalized. These mothers, believing that all children should have an equal opportunity to education, started what became Northwest Center. Five decades later, Northwest Center is one of Seattle's largest charitable organizations for individuals with disabilities.

Northwest Center provides a variety of services from birth through adulthood. For example, Northwest Center provides early intervention, including in-home therapy, from birth to age three. Northwest Center also aids with classroom based early learning, serving children from six months to five years old. And Northwest Center serves adults with employment

services by conducting skills identification and development, job placement, and continued coaching throughout the life of their careers.

Northwest Center's services touch thousands of people each year. For instance, Northwest Center's early intervention program currently serves more than 800 children per year, while its early learning services include 160 students. Northwest Center places about 350 adults into meaningful employment each year, and with continuing coaching, Northwest Center helps thousands of adults.

2. THE CHARITABLE MISSION OF BIG BROTHERS BIG SISTERS OF PUGET SOUND.

The mission of Big Brothers Big Sisters of Puget Sound is to connect families and youth to volunteer mentors in one-to-one relationships. Big Brothers Big Sisters of Puget Sound helps young people fulfill their potential by providing support to family and kids through mentoring relationships.

Big Brothers Big Sisters of Puget Sound recruits thousands of mentors, and serves about 1,500 youths per year with one-to-one mentorships. Big Brothers Big Sisters of Puget Sound's staff screens mentors and families looking for compatibility, so that there is a strong relationship between youth and mentors.

Strong relationships are critical because some of the youths Big Brothers Big Sisters of Puget Sound serves are facing life's most difficult challenges—many are from single parent homes where an immediate family member has been incarcerated, and many regularly experience homelessness. At any given time, Big Brothers Big Sisters of Puget Sound has more than a thousand youths on its waiting list, waiting for mentors. By pairing youths with screened mentors and coupled with ongoing case management, Big Brothers Big Sisters of Puget Sound helps these youths through difficult times to find success and fulfillment.

3. AMICI CHARITIES' PARTNERSHIPS WITH TVI.

Amici Charities have long-standing partnerships with TVI. Northwest Center has partnered with TVI for nearly half a century, while Big Brothers Big Sisters of Puget Sound has partnered with TVI for almost thirty years. These partnerships have been critical to the ability of Amici Charities to deliver on their missions. For example, in 2018 at the time of trial in this case, Big Brothers Big Sisters of Puget Sound's partnership with TVI contributed twenty-four percent to its total operating revenues.

In broad strokes, Amici Charities collect donations of household goods, clothing, and small appliances and sell those donated goods to TVI. Some of these donations end up in TVI stores for resale; some do not. But regardless of whether TVI actually sells a single one of the many thousands of pounds of donated goods Amici Charities receive every year, TVI pays Amici Charities for *everything* provided to TVI.

In addition, TVI maintains at many of its retail locations—and at its sole expense—attended donation stations called “Community Donation Centers” (“CDCs”). CDCs at five TVI retail locations accept donations on behalf of Northwest Center, and CDCs at two TVI retail locations accept donations on behalf of Big Brothers Big Sisters of Puget Sound. Donations at these branded CDCs are credited to Northwest Center or Big Brothers Big Sisters of Puget Sound. The result is that Amici Charities are paid for each donation made at a CDC without incurring the overhead costs associated with operating the CDCs, or of picking up, sorting, or transporting the donations. Just as importantly, TVI brands these CDCs with the names and logos of Amici Charities and publicizes their mission statements at TVI retail stores, helping educate the public about Amici Charities and their missions.

4. THE STATE MISCHARACTERIZES THE NATURE OF THE PARTNERSHIPS.

The revenue Amici Charities receive from TVI is a predictable pool of unrestricted¹ revenue that has been a lifeline for decades. Yet, one of the overarching themes of the State’s briefing is that there is something untoward about these partnerships—that somehow, the nature of TVI’s partnerships with Amici Charities is less than charitable. The State mischaracterizes the nature and benefits of these partnerships.

For instance, the State says that “TVI purchases most of its inventory from nonprofit suppliers that collect donated goods from the public.” State of Washington Supplemental Brief (“SOWSB”) at 4. In fact, Amici Charities receive donations from the public, and those

¹ Many donations are restricted by donors, meaning that the donations may only be used for particular designated purposes. But the revenue Amici Charities receive from TVI is not like that; it can be used for any appropriate purpose, and thus, is a highly valuable source of revenue.

donations are sold to TVI. But there is significantly more to it than that.

The partnerships between Amici Charities and TVI materially affect the ability of Amici Charities to fundraise, and therefore, pursue their missions. This is so because, like many charities, Amici Charities receive donated goods, but have no meaningful ability on their own to convert those donated goods into revenue. Large-scale operations to convert donated goods into usable revenue—for example, the operation of a retail thrift shop—are not within the core competencies of Amici Charities. But through their partnerships with TVI, Amici Charities turn the conversion functions over to TVI, thereby benefitting from charitable giving of goods, while remaining focused on their missions. The at-meaningful-scale conversion of donated goods into usable revenue simply would not be possible without the partnerships with TVI. That TVI *also* benefits from these partnerships does not make the partnerships any less charitable.

The State also says that “TVI ... [does not] pay[] any portion of sales in its stores to charities” *id.*, implying that TVI is being deceptive. But what the State does not say is that this arrangement—where TVI pays Amici Charities *regardless* of whether TVI resells donated goods—is intended to, and does, benefit Amici Charities.

Most donated goods can never be resold. Instead, most donated goods are either recycled or otherwise disposed of without being resold in a retail shop. As a result, if Amici Charities were paid only when goods they provided to TVI were actually resold at retail, Amici Charities’ funding would be drastically reduced and highly unreliable. Not conditioning payment to Amici Charities on in-store resale is, thus, a significant benefit to Amici Charities, not a deceptive practice by TVI.

The State also says that “TVI can earn more profit selling [goods donated at CDCs] than it does

selling goods collected by the charities themselves.”

SOWSB at 4. This is not the whole story.

Having branded CDCs at TVI retail locations represents a significant benefit to Amici Charities on, at least, two different levels. First, the CDCs and the associated on-site advertising help educate the public about Amici Charities and their missions, reinforcing their brands as community partners. This is extremely valuable no-cost public outreach. Second, having designated CDCs reduces donation-collection costs, as Amici Charities do not have to collect or transport goods donated at the CDCs. As the trial court recognized, the CDCs are “particularly important to TVI’s charity partners because they receive payments for these goods, and although the payment rates are less than for delivered goods, they provide revenues to the charity partners without having to incur solicitation or collection expenses.” CP 1119–20.²

² Aside from failing to tell the whole story of the CDCs, the State’s briefing misstates the record below.

ARGUMENT

1. THE COURT OF APPEALS DISMISSAL WAS CORRECT.

The State attacks the decision of the Court of Appeals on essentially two grounds. First, the State says that the Court of Appeals erred by concluding that TVI's promotion of its work with Amici Charities is Constitutionally protected speech. Second, the State says that even if TVI's speech is Constitutionally protected, what the State calls the trial court's "knew or

Citing CP 1119–20, the State says that TVI "can earn more *profit* selling these [on-site donated goods] than it does selling goods collected by the charities themselves." SOWSB at 4 (emphasis added). But nothing in the cited passage says anything about the profit TVI does or does not earn from these sales. Instead, the cited portion of the lower court's order discusses TVI's lower cost of goods associated with goods donated at CDCs. CP 1119 (CDCs "represent a lower cost of goods for TVI, because there are no costs for collection efforts."). Lower cost of goods is not the same thing as higher profits, and the State offers no explanation for its misleading conflation of the two.

should have known *mens rea* standard” was sufficient protection for that speech.

The State is incorrect on both counts.

1.1. The Targeted TVI Speech Is Protected By The First Amendment.

It is indisputable that charitable solicitation is Constitutionally protected speech. As the Supreme Court put it in *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980), charitable solicitations “involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.” As a result, regulation of such speech must satisfy strict Constitutional scrutiny. *Id.*

But the State claims that it need not satisfy strict scrutiny because the speech it seeks to punish is not charitable solicitation at all, but rather, is commercial in nature. According to the State, TVI’s speech should receive the lesser protection accorded commercial

speech. And to make that case, the State offers a handful of cherry-picked examples of the targeted speech. The State claims that on the basis of these cherry-picked examples, the Court can conclude that all of TVI's speech is mere commercial speech. The State is incorrect.

The Supreme Court has specifically warned against the State's approach to understanding the nature of challenged speech. That is, instead of focusing on narrow, cherry-picked examples as the State proposes, the Supreme Court *requires* that the targeted speech be evaluated by analyzing "the nature of the speech *taken as a whole*" to determine what level of First Amendment protection the challenged speech receives. *Riley v. Nat'l Fed'n. of the Blind of N.C.*, 487 U.S. 781, 796 (1988) (emphasis added). When so viewed—that is, when considered as a whole as the Supreme Court requires—TVI's speech is fully protected charitable solicitation.

As reported by the Court of Appeals, the State sought to punish TVI's use of "its charity partners' 'names and logos to encourage consumers to donate goods that it can then resell at a substantial profit,' and [TVI's use of] '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 non-profit organization.'" *State v. TVI, Inc.*, 18 Wash. App. 2d 805, 819, 493 P.3d 763, 771 (2021).

This type of speech—the authorized use of charities' logos and mission statements to encourage customers to donate—has been found to be fully protected charitable solicitation and not commercial speech. For instance, in *Nat'l Fed'n. of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202 (5th Cir. 2011), a Texas statute required for-profit fundraisers to make certain disclosures under certain circumstances. *Id.* at 206. Charities whose fundraisers were obligated to make the disclosures claimed that the statute unconstitutionally burdened protected speech. In response,

Texas—just as the State does here—contended that when businesses place charity logos on collection bins to encourage donations, the speech is unprotected commercial speech—as the State put it, the bins “‘represent nothing more than an upturned palm.’” *Id.* at 212 (quoting the Texas brief).

The Fifth Circuit rejected this contention. The Fifth Circuit recognized that even though there was an economic motivation for the businesses to seek donations for the charities—namely, they could sell the donated items for a profit—“the mere inclusion of the name of a charity on a donation box communicates information about the beneficiary of the benevolence and explicitly advocates for the donation of clothing and household goods to that particular charity.” *Id.* at 213. Indeed, the Fifth Circuit found that the bins “implicitly advocate for that charity’s views, ideas, goals, causes, and values.” *Id.* Because the use of the charities’ logos on bins were “silent solicitors and advocates for particular charitable causes,” the Fifth Circuit

rejected the State’s characterization of the subject speech as mere commercial speech, and found the speech protected charitable solicitation. *Id.*

When viewed as a whole, TVI’s targeted speech—as the Court of Appeals characterized it, the “us[e of TVI’s] ... charity partners’ ‘names and logos to encourage consumers to donate goods,” *TVI*, 18 Wash. App. 2d at 819—is even more clearly protected than the speech the Fifth Circuit found in *Abbott* to be protected. In *Abbott*, businesses placed the logos of their partner charities on donations bins. Here, TVI has attended CDC’s that are advertised as benefiting Northwest Center or Big Brothers Big Sisters of Puget Sound. Far from the mere “silent solicitors and advocates” described in *Abbott*, the CDCs are vocal solicitors and advocates for Amici Charities and their charitable missions. TVI’s speech in which TVI advocates for Amici Charities by prominently using their logos and extensively publicizing their missions, brings this case undeniably closer to the heart of protectable

charitable solicitation than in *Abbott*. TVI's challenged speech is, thus, clearly protected speech.

While the State says its cherry-picked examples of TVI's speech demonstrate its commercial nature, in fact, none of the State's examples meet the Supreme Court's criteria for commercial speech. The Supreme Court in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983) said that to determine whether a communication is commercial speech, the Court should consider whether (1) the communication is an advertisement, (2) the communication refers to a particular product, and (3) the speaker has an economic motivation.

Applying the *Bolger* criteria to the State's examples of targeted speech confirms that even the State's cherry-picked examples are not commercial speech. As shown in the collection of images below taken from the State's brief, none of the targeted speech

constitutes an advertisement in any traditional sense.³

Nor does any of the targeted speech refer to particular products. Instead, in each example, TVI can be seen advocating for its customers to donate.



In fact, of the three *Bolger* criteria, only the third—economic motivation—arguably applies to the targeted speech. But both the Supreme Court and the

³ TVI contends that several of the images shown in the State's brief are missing important context. Amici Charities use the images as presented by the State because, even when considered without their full context, the images show the subject speech is clearly not commercial speech. The full—and apparently missing—context of these images makes that conclusion inevitable.

Ninth Circuit have expressly held that an economic motivation, by itself, is insufficient to transform protected speech into commercial speech. *Bolger*, 463 U.S. at 67 (“[A]n economic motivation ... would clearly be insufficient by itself to turn the materials [in question] into commercial speech.”); *Pitt. Press Co. v. Pitt. Comm’n on Human Relations*, 413 U.S. 376, 385 (1973) (“If a newspaper’s profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales.”); *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 960 (9th Cir. 2012) (“under *Bolger* and other Supreme Court precedent, economic motive in itself is insufficient to characterize a publication as commercial”).

The speech the State seeks to punish, whether considered broadly as required by the Supreme Court or narrowly as the State proposes, fits comfortably

within the protected category of charitable solicitation, and is not commercial speech. Thus, suits by governmental agencies seeking to punish that speech, must satisfy strict scrutiny. “The First Amendment protects the right to engage in charitable solicitation,” *Ill., ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 611 (2003), even when the charitable solicitation is made by a for-profit business, *Riley*, 487 U.S. at 787–88 (“The village argued [in *Schaumburg*] that charitable solicitation is akin to a business proposition, and therefore constitutes merely commercial speech. We rejected that approach.”). Simply put, TVI’s challenged speech does “more than propose a commercial transaction,” *Va. Pharm. Bd. v. Va. Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 762 (1976), and it is fully protected by the First Amendment. The Court of Appeals was, therefore, correct in so finding. *TVI*, 18 Wash. App. 2d at 809 (“[S]tatutes 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.”)

1.1.1. The State Misapplies The Inextricably Intertwined Doctrine.

The State claims that even if some portion of TVI’s speech is protected charitable solicitation, other portions of its speech are commercial speech, and the supposed commercial speech is not “inextricably intertwined” with the protected speech. SOWSB at 20. According to the State, this means that none of TVI’s speech should be protected as charitable solicitation. *Id.* The State is incorrect for, at least, two reasons.

First, as shown above, the supposedly commercial speech is not, in fact, commercial. The State has not and cannot satisfy the *Bolger* criteria with respect to the challenged speech. As a result, the question of whether protected and unprotected speech—

sometimes called “hybrid speech”—is inextricably intertwined is neither here nor there; it is all protected.

Second, even if the doctrine of inextricably-intertwined speech was relevant—and it is not—the State misapplies the rule. The State says that “‘inextricably intertwined’ means more than just that commercial and noncommercial speech *are* mixed together; it means that they *have to be* mixed together.” SOWSB at 20 (emphasis in original). But the Ninth Circuit in *Dex* rejected this precise formulation.

In *Dex*, the City of Seattle sought to regulate the distribution of telephone directories. The State contended that telephone directories constituted mere commercial speech because the directories, which contained advertisements, did not *have to* contain advertisements. That is, the State made the same argument in *Dex* that it makes here—namely, that hybrid speech is only inextricably intertwined, and hence fully protectable, when the speech cannot be made without incorporating the unprotected commercial speech.

The Ninth Circuit easily rejected this proposition. The Ninth Circuit found that the State’s view on inextricably intertwined speech had the effect of rendering all hybrid speech unprotected. Such a result is anathema to the First Amendment: “It surely cannot be the case that newspapers (or other clearly expressive, mixed-content speech such as magazines or televised political debates that are interspersed with commercials) can only qualify for full First Amendment protection if the advertisements in the newspapers are required by a ‘law of man or of nature’ to be intertwined with the daily headlines.” *Dex*, 696 F.3d at 961–62. The Ninth Circuit found that the phone directories were not entitled to less protection simply because they were funded by advertisements that *could have* been removed. As the Ninth Circuit put it, “[t]hat the yellow pages directories depend financially upon advertising does not make them any less entitled to protection under the First Amendment.” *Id.* at 964.

If the yellow pages are fully protected speech as in *Dex*, surely TVI's entreaties to the public to donate to charities are no less worthy of full First Amendment protection. Indeed, while the State goes to great lengths to denigrate TVI's partnerships with Amici Charities, the truth is far different. As representatives of Northwest Center and Big Brothers Big Sisters of Puget Sound recounted in extensive, under oath testimony before the trial court, TVI has been an invaluable partner and supporter of Amici Charities for decades. CP 1200-01 (citing Amici Charities' trial testimony that TVI's promotion of Amici Charities is "'significant'" and an "'extremely valuable' benefit to the charity partners"). These partnerships are not built on commercial exploitation, as the State colors it. Instead, the partnerships are founded on TVI's genuine investment in helping Amici Charities further their missions by providing reliable sources of unrestricted funding. TVI's partnerships with Amici Charities are, thus, material to the missions of Amici Charities and the

improvement of the lives of thousands of citizens of this State each year.

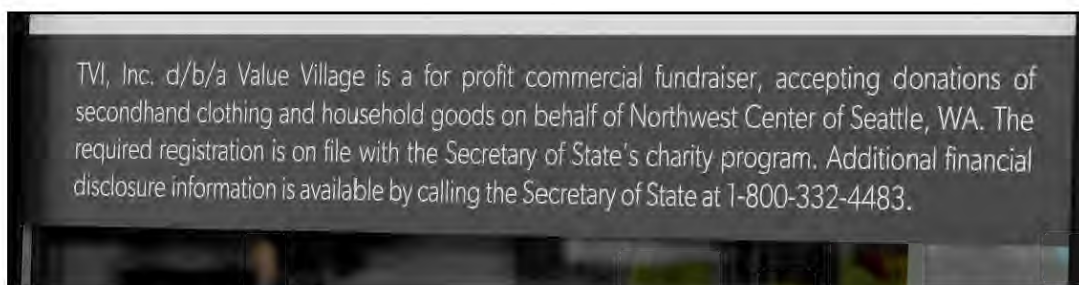
But even if the Court takes the State's mischaracterization of TVI's motives at face value, it would not matter: Having an economic motive to use protected speech does not change the protected nature of the speech itself, as the *Dex* court clearly found. *Dex*, 696 F.3d at 960 ("economic motive in itself is insufficient to characterize a publication as commercial").

1.2. The Trial Court Applied A Standard That Was Not Recognized By The Legislature And Was Constitutionally Infirm.

The Court of Appeals dismissed this case because it recognized the danger inherent in allowing a trial court to stitch from whole cloth a *mes rea* standard that is not recognized by the applicable statute. The Court of Appeals was correct.

One specific example of the problem inherent in allowing a trial court to freestyle its own preferred standards is the trial court's treatment of on-site

disclosures. The legislature has concluded that for a business subject to the CSA—which TVI was for portions of the relevant time period—disclosures must be “clear and conspicuous.” RCW 19.09.100(1). To that end, TVI had an 8-foot-long sign over the entrance to its stores clearly and conspicuously making the required disclosures, as shown below.



In addition to the 8-foot-long sign, TVI had, among other things: (1) “a sign the size of an entire wall ... using stick figures and explaining that ‘items donated to nonprofits are purchased by Value Village,’ which provides ‘essential support for nonprofits,’ and ‘unsold items are recycled’”; (2) “signs explaining the cycle and how it works, including a chalkboard-style illustration”; and (3) “large signs explaining how TVI has, ‘for over 60 years,’ ‘helped charities ... [and that]

‘our charity partners sell us goods they collect for reliable revenue that helps fund their missions.’” CP 1095–96. Given these disclosures, the State could not plausibly contend that TVI failed to make the required clear and conspicuous disclosures under the CSA.

Yet, the trial court still found that TVI’s disclosures were insufficient under its own understanding of the CPA. This resulted in two contradictory standards—the legislature-approved “clear and conspicuous” standard verses the trial court’s home-brewed “deceptive net impression” standard—applicable to the same conduct.

Much the same is true for the trial court’s “knew or should have known” standard. The CPA did not provide the trial court with guardrails to articulate a standard that would be consistent with the legislature’s intent, and that would properly balance Constitutionally protected interests against the need to protect the public. The legislature is charged with finding this balance in the first instance, not the court. That is

why the Court of Appeals was correct to find that the trial court erred by rewriting the law to include a “knew or should have known” standard. *TVI*, 18 Wash. App. 2d at 824.

In any case, the trial court’s “knew or should have known” standard was Constitutionally deficient. To survive Constitutional review, a state’s attack on protected charitable solicitation must meet “exacting proof requirements.” *Madigan*, 538 U.S. at 620. The trial court’s standard, that the defendant “knew or should have known” its statements *might* lead to a “deceptive net impression,” was akin to negligence. CP 1140 (the requirement is “objective—rather than subjective,” “suggests something less than actual knowledge,” and “do[es] not require proof of intent”). Negligence is, by definition, not an “exacting proof requirement.”

Indeed, the Supreme Court has never approved a negligence standard as satisfying the “exacting proof requirements” for the regulation of protected speech.

To the contrary, the Supreme Court has approved standards akin to fraud including proof that (1) the “defendant made a false representation of material fact knowing that the representation was false ... [and (2) that] the defendant made the representation with the intent to mislead the listener, and succeeded in doing so.” *Id.* The Supreme Court has *never* approved a lesser standard such as the trial court’s negligence standard, and this Court should not do so now.

CONCLUSION

The Court of Appeals was correct to dismiss this case as the State’s theory of liability threatens to chill core First Amendment speech. Amici Charities, thus, urge that the Court to affirm the dismissal by the Court of Appeals.

CERTIFICATE OF COMPLIANCE

This document contains 4,957 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated: September 7, 2022 PERKINS COIE LLP

/s/Grant Kinsel

Grant Kinsel

Counsel for Amici Curiae Northwest Center and Big Brothers Big Sisters of Puget Sound

CERTIFICATE OF SERVICES

I, Grant Kinsel, certify that I initiated electronic services of the foregoing **BRIEF OF AMICI CURIAE NORTHWEST CENTER AND BIG BROTHERS BIG SISTERS OF PUGET SOUND** on the parties listed below:

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