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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

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

Respondent.

**BRIEF OF *AMICI CURIAE* STATES OF MINNESOTA,
OREGON, CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, THE DISTRICT OF COLUMBIA, IDAHO,
ILLINOIS, MAINE, MARYLAND, NEVADA, NEW MEXICO,
PENNSYLVANIA, and RHODE ISLAND IN SUPPORT OF
THE STATE OF WASHINGTON**

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INTRODUCTION AND INTERESTS OF *AMICI*

The *Amici* States of Minnesota, Oregon, California, Colorado, Connecticut, Delaware, the District of Columbia, Idaho, Illinois, Maine, Maryland, Nevada, New Mexico, Pennsylvania, and Rhode Island file this brief in support of the State of Washington. Like the State of Washington, the *Amici* States have a duty to (1) protect their citizens from unfair, misleading, and deceptive practices; (2) guard the public's interest in charitable assets; and (3) enforce regulations related to charitable solicitation.

Charitable contributions represent a significant public resource. They promote a wide range of important activities in areas like public health, education, the environment, social services, civil rights, and legal aid. But these efforts cannot succeed without financial support from the public, which comes only when the public trusts that its donations will actually support charities.

Indeed, the overall amount of charitable support declines when public trust declines. *See, e.g.,* Brief of 47 States & Territories as *Amici Curiae* Supporting Petitioners at *9, *Illinois ex rel. Madigan v. Telemarketing Assoc., Inc.*, 538 U.S. 600 (2003) (No. 01-1806), 2002 WL 31921091 (collecting studies); *2019 Give.org Donor Trust Report: State of Public Trust in the Charitable Sector* 3 & n.1 (2019) (stating that “higher trust in charities translates to higher public engagement” and citing studies showing high trust companies outperform their sector);¹ Lijun Yin et al., *Charity Misconduct on Public Health Issues Impairs Willingness to Offer Help*, 18 Int’l J. Env’t. Res. & Pub. Health 13039 (2021) (concluding that charity misconduct reduces the public’s willingness to help the charitable sector as a whole, not just the particular charity that committed misconduct);² Janet Greenlee et al., *An Investigation of Fraud in*

¹ <https://www.give.org/docs/default-source/donor-trust-library/2019-donor-trust-report.pdf>.

² <https://www.mdpi.com/1660-4601/18/24/13039>.

Nonprofit Organizations: Occurrences and Deterrents (The Hauser Ctr. for Nonprofit Orgs., Working Paper No. 35, 2006) (losses from fraud in the nonprofit sector directly reduce resources available to address charitable purposes).³

The practice of for-profit companies masquerading as charities is therefore a significant threat to the public and the charitable sector. States must be able to protect the public and legitimate charities from organizations that use “the charitable label as a cloak for profitmaking.” *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 637, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). Otherwise, such practices will escalate and limit the ability of real charities to maximize their fundraising and provide critical services to society.

ARGUMENT

Respondent TVI, Inc. is a multi-million-dollar for-profit business with 150 stores throughout the United States, including

³ https://cpl.hks.harvard.edu/files/cpl/files/workingpaper_35.pdf?m=1440179121.

in many of the *Amici* States. The State of Washington accused TVI of using charitable labels as a cloak for profitmaking in violation of the Washington Consumer Protection Act.⁴ After considering all the evidence, the trial court found that this for-profit company deceptively conflated itself with charities, deceptively conflated shopping at its stores with donating to charity, and inundated customers with deceptive claims about its connections to charities. (Findings of Fact & Conclusions of Law 73, 76–77 (Nov. 21, 2019).)

The Court of Appeals, however, agreed with TVI that this type of deception is fully protected by the First Amendment and therefore cannot be prohibited by Washington’s Consumer Protection Act. *State v. TVI, Inc.*, 18 Wn. App. 2d 805, 824, 493 P.3d 763 (2021). The *Amici* States, like the State of

⁴ The State of Minnesota filed a similar lawsuit against this company in 2015. *See* Complaint, *State of Minnesota ex rel. Swanson v. TVI, Inc.*, No. 27-cv-15-9043 (Minn. Dist. Ct. May 21, 2015); *see also* Washington Supp. Br. at 10.

Washington, have an interest in correcting this misapplication of the First Amendment.

The Court of Appeals misapplied the First Amendment in at least three ways. First, it failed to recognize that deceptive commercial speech is not protected by the First Amendment. Second, it mistakenly concluded that commercial speech with deceptive charitable references is fully protected speech. Third, it erroneously held that commercial speech and deceptive speech can be inextricably intertwined.

I. DECEPTIVE COMMERCIAL SPEECH IS NOT PROTECTED BY THE FIRST AMENDMENT.

In most contexts, the First Amendment severely restricts regulation based on content of the message. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 n.6, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). But the law is different when a speaker engages in false, deceptive, or misleading commercial speech. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (“We have always been careful to distinguish

commercial speech from speech at the First Amendment's core.”).

In this unique context, it is “well settled” that “[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.” *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985); *see also Cent. Hudson*, 447 U.S. at 563 (stating that, in commercial settings, States have the power to “ban forms of communication more likely to deceive the public than to inform it”). Indeed, “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public.” *Cent. Hudson*, 447 U.S. at 563.⁵

⁵ This type of content-based regulation is permissible for two primary reasons: (1) commercial speakers can easily “evaluate the accuracy” of their speech due to “extensive knowledge of both the market and their products”; and (2) commercial speech is fueled by economic self-interest, which makes it a “hardy breed of expression” unlikely to be crushed by government regulation. *Cent. Hudson*, 447 U.S. at 564 n.6.

To be sure, when commercial speech is not false, deceptive, or misleading, it receives some limited protection from the First Amendment under a “less extensive” form of scrutiny. *Zauderer*, 471 U.S. at 637. But when commercial speech is false, deceptive, or misleading, it is simply “not protected by the First Amendment.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002).

This case is primarily about TVI’s commercial speech, not charitable speech.⁶ TVI is not a charity or nonprofit, it does not make donations to charities or nonprofits, and it does not pay any portion of the proceeds from its sales to charities or nonprofits. (Findings & Conclusions 8, 11.) Rather, TVI is a for-profit company that makes “many millions of dollars per year.” (*Id.*)

⁶ The scope of this brief is limited to Cause of Action #1 (TVI deceptively conflated itself with charities) and Cause of Action # 2 (TVI deceptively presented in-store purchases as benefitting charities). (Findings & Conclusions 73–77.)

In order to make many millions of dollars per year, TVI focuses its advertising on shopping and retail sales. Indeed, ninety percent of TVI's advertising and marketing budget promotes shopping and retail sales. (*Id.* at 22.) TVI keeps 100% of the revenue from these sales. (*Id.* at 11, 74.) As the trial court found, "[t]here is no direct benefit to any charity when a person buys something" at TVI stores. (*Id.* at 74.) This advertising and marketing is commercial speech because it is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson*, 447 U.S. at 561; *see also TVI*, 18 Wn. App. 2d at 815–16 (concluding that TVI's marketing is commercial speech).

TVI's commercial speech was also found to be deceptive. According to the trial court, TVI deceptively conflated itself with charities, deceptively conflated shopping at TVI with donating to charity, and inundated customers with deceptive claims about its connections to charities. (Findings and Conclusions 73, 76–77.) Deceptive commercial speech is not protected by the First

Amendment. This type of speech is harmful to the public, and States are free to ban it. The Court of Appeals erred by holding otherwise.

II. A FOR-PROFIT COMPANY THAT DECEPTIVELY CONFLATES ITSELF WITH CHARITIES IS NOT ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT.

Instead of applying U.S. Supreme Court precedent regarding deceptive commercial speech, the Court of Appeals took a different tack. It held that because TVI deceptively referenced charities, its unprotected commercial speech suddenly transformed into fully protected charitable solicitation. *TVI*, 18 Wn. App. 2d at 817–19. In other words, by using deception, TVI received greater protection under the First Amendment, not less. That is simply not the law.

As the U.S. Supreme Court has explained, advertisers are not “permitted to immunize false or misleading product information from government regulation simply by including references to” other important public issues. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68, 103 S. Ct. 2875, 77 L. Ed.

2d 469 (1983). For example, opening a sales presentation with a prayer or the Pledge of Allegiance does not convert commercial speech into religious or political speech. *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). Similarly, teaching home economics while selling housewares does not convert commercial speech into educational speech. *Id.* at 474–75.

The same is true here. TVI’s charitable references did not convert its commercial speech into charitable solicitation; it converted its commercial speech into deceptive commercial speech. TVI can certainly make separate comments about important public issues like charities and enjoy the full panoply of First Amendment protections. *Cent. Hudson*, 447 U.S. at 562 n.5. But it cannot intermingle deceptive charitable references with commercial speech and then claim the protections afforded to charitable solicitations. *Id.* (stating that “there is no reason” to grant “broad constitutional protection to any advertising that links a product to a current public debate” because “many, if not

most, products may be tied to public concerns”); *see also Vill. of Schaumburg*, 444 U.S. at 637 (contrasting actual charitable solicitation with organizations that use “the charitable label as a cloak for profitmaking”).

This case is about commercial speech, and it must be analyzed as such. If Washington’s courts had found the evidence insufficient to prove that TVI was deceptive, that would be one thing. It is quite another to say that a for-profit company can use deception in its commercial speech, and the Washington Attorney General cannot do anything about it because the deception relates to charities.

III. TVI’S DECEPTIVE REFERENCES TO CHARITIES ARE NOT INEXTRICABLY INTERTWINED WITH ITS COMMERCIAL SPEECH.

The Court of Appeals also misapplied U.S. Supreme Court precedent regarding intertwined speech. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, the U.S. Supreme Court held that speech does not “retain[] its commercial character when it is inextricably intertwined with otherwise fully

protected speech.” 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988). *Riley* involved a statute that governed the solicitation of charitable contributions by professional fundraisers. *Id.* at 784. The statute required professional fundraisers to disclose to potential donors upfront how much of their donation would actually go to charity (as opposed to being retained by the fundraisers). *Id.* The Court viewed “the nature of the speech taken as a whole” and held that the commercial speech (profit disclosure statement) was inextricably intertwined with the charitable solicitation that followed. *Id.* at 796. Because charitable solicitation is fully protected expression, the Court applied exacting scrutiny to the intertwined commercial speech. *Id.* at 796, 798.

One year later, the Court addressed intertwined speech again in *Fox*, which involved a company that wanted to sell housewares to college students on campus. 492 U.S. at 471–72. These “Tupperware parties” also involved discussions of “how to be financially responsible and how to run an efficient home.”

Id. at 474. A state university prohibited this kind of commercial activity on its campus. *Id.* at 471–72. Students challenged the prohibition, arguing that it violated the First Amendment. *Id.* at 472–73.

The U.S. Supreme Court held that “[t]here is no doubt” that selling housewares is commercial speech. *Id.* at 473. But the commercial speech (selling housewares) was not inextricably intertwined with noncommercial speech (home economics). *Id.* at 474–75. The Court explained that “[i]ncluding these home economics elements no more converted [these] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech.” *Id.*

The Court reiterated that “communications can constitute commercial speech notwithstanding the fact that they contain discussions of important public issues.” *Id.* at 475 (quoting *Bolger*, 463 U.S. at 67–68) (quotation marks omitted). The Court emphasized that “[w]e have made clear that advertising which

links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech.” *Id.* (quoting *Bolger*, 463 U.S. at 67–68 and *Cent. Hudson*, 447 U.S. at 562 n.5) (quotation marks omitted).

The Court contrasted these facts with the intertwined speech in *Riley*. *Id.* at 474. The Court explained that, in *Riley*, “of course, the commercial speech (if it was that) *was* inextricably intertwined because the state law *required* it to be included.” *Id.* In *Fox*, by contrast:

[T]here is nothing whatever ‘inextricable’ about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution 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.

Id.

Like the housewares in *Fox*, there is no doubt that marketing used clothes and household goods is commercial

speech. TVI is a multi-million-dollar for-profit company that devotes ninety percent of its advertising to retail sales and keeps all of its revenue from retail sales. (Findings & Conclusions 8, 11, 22, 74.)

In addition, not one single part of TVI's deceptive charitable references is inextricable from its commercial speech. Nothing requires TVI to combine deceptive references to charities with advertisements for its merchandise. Nor does any "law of man or of nature" make it impossible for TVI to sell its merchandise without deceptively referencing charities.

In fact, it is clearly possible to extricate the deceptive charitable references because TVI has done so. Before 2009, TVI did not include deceptive references to charities in its marketing. Instead, TVI's "marketing focused on thrift benefits such as price and the possibility of finding a great bargain." (Findings & Conclusions 75.)

In addition, TVI agreed in a settlement with the State of Minnesota to stop using deceptive advertising and signs that may

reasonably lead Minnesotans to believe that it is a nonprofit or suggest that it is a charitable organization. (*See* Agreement and Order, *State of Minnesota ex rel. Swanson v. TVI, Inc.*, No. 27-cv-15-9043 (Minn. Dist. Ct. June 25, 2015); *see also* Washington Supp. Br. at 10.) By continuing to operate thrift stores in Minnesota, TVI has further demonstrated that deceptive charitable references are not inextricable from its commercial speech.

The Court of Appeals' contrary holding is deeply troubling. Instead of addressing whether TVI's speech was deceptive, it held that even if TVI was deceptive, TVI's deceptive references to charities were inextricable from its commercial speech. But the charitable references in TVI's speech is exactly what made the speech deceptive. (Findings & Conclusions 73, 76.) The *Amici* States are not aware of any case holding that deceptive speech can be inextricable from other speech. Speakers can always remove deception from their speech—it is never inextricably intertwined.

CONCLUSION

For these reasons, the *Amici* States respectfully request that this Court reverse the Court of Appeals.

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