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No. 100493-1

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*
TRUTH IN ADVERTISING, INC.,
UC BERKELEY CENTER FOR CONSUMER LAW
& ECONOMIC JUSTICE, AND
PROFESSOR REBECCA TUSHNET**

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INTRODUCTION

If a sneaker company broadcasts a commercial touting its commitment to fair labor practices, it's still a commercial. If a product's packaging encourages its buyers to recycle, other statements on the packaging are still part of an effort to sell the product. And if these statements are false or deceptive, they should not be insulated from applicable consumer-protection laws simply because they touch upon matters of public concern.

Indeed, that is how most courts view the problem of mixed commercial speech—speech that is commercial in nature (and therefore not fully protected by the First Amendment) but which also incorporates fully protected speech. Applying a test articulated by the U.S. Supreme Court more than thirty years ago, courts faced with this question must analyze whether the commercial speech is “*inextricably* intertwined” with the accompanying protected speech. Is there some “law of man or nature” that *requires* the commercial speech to be combined with fully protected speech? In other words, is it practically

impossible for the speaker to engage in the commercial speech without engaging in fully protected speech? If the answer to these questions is no, then the commercial speech is not afforded full constitutional protection and government regulations of the speech (typically consumer-protection laws) are not subjected to strict scrutiny.

In this case, the Court of Appeals purported to apply the “inextricably intertwined” test, but it did not ask the right questions. Rather than asking whether TVI was *required* to combine charitable solicitations with its commercial speech, or whether it was practically impossible to separate one from the other, the Court of Appeals asked only whether the commercial speech and charitable solicitations were “directly related.” This corruption of the “inextricably intertwined” test is pernicious for two primary reasons.

First, the Court of Appeals’ “directly related” test runs contrary to established “inextricably intertwined” jurisprudence, as applied by both federal and state courts. No other court has

ever adopted a “directly related” test, making the Court of Appeals an outlier in how it applies the First Amendment to mixed commercial speech. *See infra* at 9–26.

Second, the “directly related” test has dangerous policy implications. A test that merely requires commercial speech to be “directly related” to otherwise fully protected speech is easy to abuse and will all but immunize fraudsters from government oversight (to the detriment of Washington consumers). This is not just a theoretical problem—real-world examples of false and deceptive commercial speech being “directly related” to charitable solicitation and other fully protected speech abound. The Court of Appeals’ ruling will encourage more. *See infra* at 26–31.

For these reasons, this Court should reject the Court of Appeals’ novel “directly related” analysis and ensure that Washington law both aligns with U.S. Supreme Court precedent and effectively protects Washington citizens from false and misleading commercial speech.

IDENTITY AND INTEREST OF AMICI

Truth in Advertising, Inc. (“TINA”) is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, and government agencies to advance countermeasures that are effective in practice. Through its collaborative approach and attention to emerging issues and complexities, TINA has become a trusted source of expertise on matters relating to consumer fraud. TINA regularly draws on this expertise to advocate for consumer interests before the FTC and other governmental bodies and has testified before Congress on issues related to consumer protection, deceptive marketing, and economic justice.

TINA frequently appears as *amicus curiae* in cases raising important questions of consumer protection law. For example, along with other consumer groups, TINA recently filed a brief in support of consumers in *Serova v. Sony Music Entertainment*,

515 P.3d ----, 2022 WL 3453395 (Cal. Aug. 18, 2022), helping persuade the California Court that certain statements made by Sony could amount to actionable commercial speech and not protected speech. TINA also participated as *amicus curiae* in *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021), which involved courts' long-recognized power to order restitution in appropriate cases brought by the FTC. And in *Federal Trade Commission v. Quincy Bioscience Holding Co., Inc.*, 753 F. App'x 87 (2d Cir. 2019), TINA helped persuade the Second Circuit to reinstate an FTC Act suit against a business falsely marketing a dietary supplement as clinically proven to improve memory.

Center for Consumer Law and Economic Justice ("Center") is a research and advocacy center housed at the UC Berkeley School of Law. Through participation as *amicus curiae* in major cases around the state and throughout the nation, the Center seeks to develop and enhance protections for consumers and to foster economic justice. The Center appears in this

proceeding to emphasize the importance of maintaining the carefully wrought commercial speech regime that for decades has preserved both freedom of expression and protection from false and deceptive marketing.

Rebecca Tushnet is the inaugural Frank Stanton Professor of First Amendment Law at Harvard Law School. She has written numerous articles and amicus briefs on advertising law and on the First Amendment, and her work has been cited by multiple courts, including the U.S. Supreme Court.

ISSUES TO BE ADDRESSED BY AMICI

- I. Whether commercial speech is “inextricably intertwined” with noncommercial speech where the commercial speech is not legally compelled to accompany the noncommercial speech and can be addressed independently.
- II. The policy implications stemming from the Court of Appeals’ determination that TVI’s deceptive commercial speech was “inextricably intertwined” with its charitable solicitation.

STATEMENT OF THE CASE

This appeal concerns whether for-profit TVI violated the Washington Consumer Protection Act, RCW 19.86, by deceiving Washington consumers with respect to its status as a

charity or nonprofit and the nature of purchases and donations made at its stores. *See State v. TVI, Inc.*, 493 P.3d 763, 766 (Wash. Ct. App. 2021). Though TVI sells second-hand goods for profit, it claims to support certain nonprofits by purchasing these goods from them, providing them with a steady source of income. *Id.* at 767. It also accepts donations from consumers within its stores. *Id.* But a consumer shopping in one of TVI's stores—unlike a consumer shopping in a Salvation Army or Goodwill, for example—is not directly supporting a charity. *Id.*

After receiving at least one complaint from consumers who felt that TVI deceptively portrayed itself as a nonprofit, the Washington Attorney General's Office investigated, and the State of Washington ultimately filed this suit. *Id.* After a bench trial, the trial court concluded that TVI had knowingly engaged in deceptive speech and found in favor of the State of Washington on three of seven counts. *Id.* at 768.

The Court of Appeals reversed. *Id.* at 774. Though it recognized that TVI’s speech promoting itself and advertising the sale of goods was commercial, it concluded that this commercial speech was “inextricably intertwined” with TVI’s speech soliciting donations for other nonprofits. *Id.* at 771. It reached this conclusion based on its determination that TVI’s commercial speech was “directly related” to its charitable solicitations. *Id.* It did not consider whether TVI was compelled by law to combine its commercial advertising with its charitable solicitation, nor whether it would be practically impossible for TVI to separate its commercial speech from its charitable solicitations.

On the basis of its “inextricably intertwined” determination, the Court of Appeals held that any restrictions on TVI’s speech must be subjected to strict scrutiny, the highest level of First Amendment protection. *Id.*

ARGUMENT

I. The Court of Appeals failed to apply the proper test for determining when mixed commercial speech is entitled to full constitutional protection.

The U.S. Supreme Court has interpreted the Free Speech Clause “to protect against government regulation of certain core areas of ‘protected’ speech ... while giving the government greater leeway to regulate other types of speech” Victoria L. Killion, Congressional Research Service, *The First Amendment: Categories of Speech* at 1 (Jan. 16, 2019), <https://sgp.fas.org/crs/misc/IF11072.pdf>. Thus, while speech soliciting charitable contributions receives full constitutional protection, *see Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632–33 (1980), commercial speech does not, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

Of course, in practice, speech does not always fit into such neat boxes. It is therefore incumbent upon courts to determine the degree of protection to be afforded *mixed* speech—speech

that has some elements that fall into a fully protected category and some elements that do not—like TVI’s. Fortunately, the U.S. Supreme Court has set out a test that specifically applies where commercial speech is mixed with fully protected speech; unfortunately, the Court of Appeals did not faithfully apply that test here.

A. Under *Riley* and *Fox*, mixed commercial speech is only entitled to full constitutional protection if it is inextricably intertwined with fully protected speech.

The “inextricably intertwined” test is derived from a pair of U.S. Supreme Court decisions decided more than thirty years ago. In the first, the Court held that mixed commercial speech is only afforded fully constitutional protection if it is “*inextricably intertwined* with otherwise fully protected speech.” *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 796 (1988) (emphasis added). In the second, the Court explained what it meant by “inextricably intertwined.” *See Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 474

(1989). A closer examination of both decisions makes clear that the Court of Appeals erred in its analysis.

1. In *Riley*, the Supreme Court reviewed a North Carolina law requiring professional fundraisers to disclose to potential donors the percentage of contributions actually given to charity before soliciting funds. 487 U.S. at 795. The Court had already recognized that charitable solicitations are entitled to full constitutional protection, *see Schaumburg*, 444 U.S. at 632–33; *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959–60 (1984), so the issue in *Riley* was whether to afford the same full protection to the disclosure that was legally compelled to accompany the solicitation, 487 U.S. at 795. Assuming that the compelled disclosures were commercial speech, the Court held that such speech does not “retain its commercial character when it is *inextricably intertwined* with otherwise fully protected speech.” *Id.* at 796 (emphasis added).

The Court in *Riley* did not expressly define “inextricably intertwined,” but it provided the following insights regarding which types of speech that term should encompass.

First, it referred to “compelled” statements—*i.e.*, statements required by law. *Id.* (“Our lodestars in deciding what level of scrutiny to apply to a *compelled statement* must be the nature of the speech taken as a whole and the effect of the *compelled statement* thereon.” (emphasis added)). Because North Carolina *required* fundraisers to make the challenged disclosures before soliciting, the disclosures were inextricably intertwined with protected charitable solicitations. *Id.*

Second, drawing on its earlier decisions in *Schaumburg* and *Munson*, the *Riley* court explained that charitable speech involves more than just asking for money—it may also include “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; *see also Munson*, 467 U.S. at 960. Such informative speech is integral—not

incidental—to charitable solicitation. Imagine a fundraiser simply asking for money; that solicitation would be far less successful than the one that explains why donations are needed. Context is necessary. Statements about a charity’s purpose cannot practicably be separated from the donation request.

2. A year later, in *Fox* the Supreme Court further clarified what it meant by “inextricably intertwined.” There, a company attempted to (1) sell housewares to students while (2) discussing topics such as “how to be financially responsible and how to run an efficient home.” *Id.* at 473–74. The Court held that the two types of speech were not “inextricable” because “[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.” *Id.* at 474 (emphasis added). Looking at the challenged regulation, the Court observed that “[n]othing 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.* As a result, the noncommercial speech at issue (e.g., home economics teachings) did not convert the company’s sales pitch into protected educational speech, just as recitation of a prayer or the Pledge of Allegiance would not convert the sales pitch into religious or political speech. *Id.* at 474–75.

Fox is instructive. It articulates a test that can be broadly and easily applied. When faced with situations like the one presented in this case, courts must ask the following: (1) is the commercial speech compelled by law to accompany the noncommercial, fully protected speech; and (2) is it practically impossible for the speaker to address the commercial topic without engaging in fully protected speech? If the answer to either question is “yes,” then the commercial speech is inextricably intertwined with the fully protected speech; if the answer to both is “no,” then it is not.

B. State and federal appellate courts have consistently applied the “inextricably intertwined” test.

State supreme courts and federal appellate courts throughout the country have understood *Riley* and *Fox* to require

more than a “directly related” analysis of mixed speech to determine whether commercial speech is inextricably intertwined with protected speech. *See, e.g., Serova v. Sony Music Entertainment*, 515 P.3d ----, 2022 WL 3453395, at *11 (Cal. Aug. 18, 2022) (“Sometimes speech will have commercial and noncommercial components. If a *legal command or law of nature makes it impossible* to separate the commercial components from the noncommercial, the two are inextricably intertwined, and we bestow noncommercial status on both components.”) (emphasis added) (internal quotation marks omitted); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 521 (7th Cir. 2014) (“Properly understood, ... the inextricably intertwined doctrine applies only when it is legally or practically impossible for the speaker to separate out the commercial and noncommercial elements of his speech.”).

In *Kasky v. Nike, Inc.*, for example, the California Supreme Court considered whether Nike’s representations about its labor practices were inextricably intertwined with its thoughts

on economic globalization. 45 P.3d 243, 260 (Cal. 2002). In response to accusations that it provided inadequate wages and conditions to workers in factories overseas, Nike made a series of statements. *Id.* at 248. The statements included factual representations about Nike’s labor practices (commercial speech) and discussed issues such as domestic companies’ responsibility for working conditions in factories abroad and the merits of economic globalization (noncommercial speech). *Id.* at 260. The California Supreme Court concluded that the two types of speech were not inextricably intertwined because “[n]o law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately.” *Id.* at 260–61.

The Ninth Circuit applied the doctrine similarly in *Hunt v. City of Los Angeles*, where two vendors—one that sold shea butter and one that sold incense—challenged local ordinances barring vendors from the Venice Beach Boardwalk. 638 F.3d

703, 708 (9th Cir. 2011). The vendors claimed that, in addition to speech geared towards selling their respective items, they also employed noncommercial speech, including statements about the “healing power” of shea butter and the “religious and/or mythological significance” of symbols on incense holders. *Id.* The Ninth Circuit rejected this attempt to insulate commercial speech. Because the vendors “could easily sell their wares without reference to any religious, philosophical, and/or ideological element, and they could also express any noncommercial message without selling these wares,” their commercial speech was not inextricably intertwined with fully protected speech, so as to subject the challenged ordinances to strict scrutiny. *Id.* at 716; *see also id.* (“Nothing in the nature of [the vendors’] products requires their sales to be combined with a noncommercial message.”).

Similarly, in *Association of National Advertisers v. Lungren*, the Ninth Circuit addressed whether manufacturers’ and distributors’ representations that consumer goods were

“ozone friendly,” “biodegradable,” “photodegradable,” “recyclable,” or “recycled” were inextricably intertwined with editorialization about the environment. 44 F.3d 726, 727, 730 (9th Cir. 1994). The Ninth Circuit affirmed the district court’s conclusion that “editorializing was not essential to product advertising.” *Id.* at 730; *see also id.* (recognizing that while “statements that a firm supports recycling, for instance, are undoubtedly included in advertisements as a marketing tool and may in fact augment sales, firms can nevertheless sell their wares without editorializing about the environment”). For that reason, the relevant commercial and noncommercial speech were not inextricably intertwined.

Countless decisions across the country have applied the inextricably intertwined doctrine in the same way. *See e.g., Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1119 (9th Cir. 2021) (allegedly rigged ratings of supplements in a nutritional guide were not inextricably intertwined with speech describing benefits and science of supplements, because the two types of speech

were “easily separable”); *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1276 (9th Cir. 2017) (speech concerning “limited medical services” a clinic provided was not inextricably intertwined where it could have been “easily separated” from speech concerning “truthful information about pregnancy”); *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App’x 251, 261–62 (4th Cir. 2017) (nonprofit’s warning to grocery stores that an egg producer lacked up-to-date certifications was not inextricably intertwined with the nonprofit’s promotion of eggs from producers it certified, where the nonprofit was “capable of notifying grocery stores” about the former without promoting its own certification); *Jordan*, 743 F.3d at 521 (an advertisement’s promotion of supermarket operator’s brand loyalty was not inextricably intertwined with statements congratulating athlete, because supermarket operator was not compelled to combine both elements in a single advertisement); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013) (solicitation of work by day laborers was not

inextricably intertwined with laborers’ political and economic messages, because “[n]othing in [the law] prohibits a worker from expressing his views publicly, nor is there any reason such views cannot be expressed without soliciting work”); *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 97 (2d Cir. 1998) (social commentary on beer labels was not inextricably intertwined with information identifying the source of the beer); *Palekaiko Beachboys Club, Inc. v. City & Cnty. of Honolulu*, 2022 WL 2908008, at *7 (D. Haw. July 22, 2022) (selling merchandise was not inextricably intertwined with distributing educational materials where “there [was] simply no evidence that [the speakers] are required to combine their commercial and non-commercial messages”); *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1346 (E.D. Tex. 1995), *aff’d*, 100 F.3d 953 (5th Cir. 1996) (newsletter articles relating to public health and safety were not inextricably intertwined with attorney’s advertising, nor would anything prevent the attorney from distributing the noncommercial

information separately from the advertising); *Dawson v. E. Side Union High Sch. Dist.*, 34 Cal. Rptr. 2d 108, 119 (Cal. App. Ct. 1994) (current events programming in video programs for students was not inextricably intertwined with commercial advertising time in the same programs because “either message might have been conveyed without the other”).

While the majority of decisions applying this test conclude that commercial speech is *not* inextricably intertwined with otherwise fully protected speech, even those decisions applying full protection to commercial speech do so within the appropriate *Fox/Riley* rubric. *Riley* itself is the quintessential example of commercial speech being “inextricably intertwined” with noncommercial speech because the disclosure was compelled by law to accompany the noncommercial speech. *See* 487 U.S. at 781. Meanwhile, cases like *Gaudiya Vaishnava Soc. v. City & Cnty. of San Francisco*, 952 F.2d 1059 (9th Cir. 1990), *as amended on denial of reh’g* (Dec. 26, 1991), illustrate scenarios where the commercial aspects of speech cannot practically be

separated from the noncommercial aspects. In *Gaudiya*, nonprofits including the Gaudiya Vaishnava Society sold t-shirts and other merchandise to raise funds and awareness for their causes. Though the sale of this merchandise involved commercial speech, the merchandise itself was marked with, and therefore itself “disseminate[d,] their organizations’ message.” *Id.* The commercial aspects of the speech were thus “inextricably intertwined” with the messages conveyed by the merchandise itself. *Id.*; *see also White v. City of Sparks*, 500 F.3d 953, 955 (9th Cir. 2007) (limiting *Gaudiya* to sales of merchandise deriving express value from “statement[s] carrying a religious, political, philosophical or ideological message”); *compare Hunt*, 638 F.3d at 714 (distinguishing between products that are vendor-created and “inherently communicative,” and those that are not).¹

¹ As illustrated in *Gaudiya*, the “inextricably intertwined” standard can also help to distinguish speech whose primary purpose is to sell a product from speech that is *itself* the product. *See also, e.g., Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894, 906–

C. The Court of Appeals misapplied the “inextricably intertwined” test by asking only whether TVI’s commercial speech was “directly related to” protected speech.

It is clear that the Court of Appeals misapplied the “inextricably intertwined” doctrine in this case. Rather than determining whether TVI’s commercial speech could be addressed independently of its charitable solicitation, the Court of Appeals held that the former was inextricably intertwined with the latter because “sales of TVI’s goods are *directly related* to its noncommercial message.” *TVI*, 493 P.3d at 771 (emphasis

07 (9th Cir. 2002) (though satirical song “Barbie Girl” by Aqua was used to sell records, it was not purely commercial speech because “the song also lampoons the Barbie image and comments humorously on the cultural values Aqua claims she represents”); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185–86 (9th Cir. 2001) (though magazine article containing altered images of Hollywood icons dressed in modern designer clothes was intended in part to “‘rev up’ the magazine’s profile,” the “commercial aspects [were] inextricably intertwined with expressive elements”). In these cases, the commercial and noncommercial aspects of speech are inextricably intertwined because the speech *itself* is the product being sold and regulation of the commercial aspect would necessarily impact the expressive aspect. That is not the case here.

added).² Whether commercial speech may be “directly related” to otherwise fully protected speech is not the test. The Court of Appeals ignored the teaching of *Fox* that commercial speech is only inextricably intertwined with noncommercial speech if a “law of man or nature” makes it impossible to separate the two. It thus effectively created a new, diluted test that is at odds with binding U.S. Supreme Court precedent.

The Court of Appeals’ misapplication of the “inextricably intertwined” doctrine conflicts with numerous, correctly decided opinions. Indeed, it is often the case that commercial speech is “directly related” to—but not inextricably intertwined with—noncommercial speech. *See e.g., Lungren*, 44 F.3d at 730 (noting that noncommercial speech, which was not inextricably intertwined with commercial speech, was nonetheless “undoubtedly included in advertisements as a marketing tool

² The Court of Appeals’ premise that TVI’s “sale of goods” is “directly related” to its charitable solicitation is questionable, given that TVI’s charity partners do not directly receive any of the revenue generated by the sale of such goods.

[that] may in fact augment sales”); *Handsome Brook Farm*, 700 F. App’x at 261 (nonprofit’s commercial speech regarding promotion of its licensees’ eggs was not inextricably intertwined with its noncommercial speech cautioning grocery stores about purchasing a non-licensee’s eggs); cf. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 68 (1983) (“We 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.” (internal quotation marks omitted)).³ That TVI’s marketing “benefits both TVI and its charity partners” because of TVI’s business model has no bearing on whether TVI’s commercial speech is inextricably intertwined with its noncommercial speech. *TVI*, 493 P.3d at 771.

³ Consider, as well, the sale of commercial products that are inherently connected to public debates, like contraceptives or firearms. The marketing of these products should not be insulated from consumer-protection laws simply because their sale “directly relates” to a political message.

Had the Court of Appeals properly applied the “inextricably intertwined” doctrine, it would have asked: (1) whether TVI’s commercial speech was compelled by law to accompany its charitable solicitations; and (2) whether it was practically impossible for TVI to promote the sale of its goods separately from its charitable solicitation. Instead, the Court of Appeals ignored a decades-long line of cases applying the “inextricably intertwined” doctrine and created a new test that places Washington law alone in its application of the doctrine.

II. The Court of Appeals’ “directly related” test will enable and encourage fraud.

The decision below is not only wrong; it is pernicious. The practical effect of the Court of Appeals’ decision is that now unsavory companies and scammers have clear guidance regarding how to insulate their deceptive commercial speech from exacting judicial review and evade consumer-protection laws while they defraud and deceive Washington consumers.

Under the Court of Appeals’ test, all a for-profit company needs to do to insulate its advertisements and promotions from

scrutiny is combine it with some form of charitable solicitation. So long as the company can show the commercial and noncommercial elements of the speech are “directly related,” the former will be exempted from the otherwise applicable commercial-speech doctrine and will therefore be extremely difficult to police.

Imagine a company encourages shoppers to purchase its products because they are “made in the U.S.A.” and because one percent of all proceeds will go to charity. In reality, the Company’s products are actually manufactured abroad. Applying the “inextricably intertwined” doctrine as instructed by *Fox*, the analysis would be simple: The company’s promotion of its products is not inextricably intertwined with its charitable giving message because no law compels it to make both statements simultaneously, nor is there anything that would prohibit Company from marketing its goods separately from promoting its charitable giving. But under the Court of Appeals’ analysis, the company’s deceptive speech would be entitled to

the same protection afforded to its charitable solicitation because its commercial speech (the marketing of its goods) is directly related to its noncommercial message (donating a portion of revenues from sales to charity).

This is no far-fetched hypothetical. For example, *amicus curiae* TINA has frequently encountered this type of deception. See, e.g., TINA.org, *Ad Alert: 4Amazonia* (Jan. 30, 2020), <https://truthinadvertising.org/articles/4amazonia/> (for-profit's tagline, "One Bracelet. One Tree" misled consumers into thinking that the company was a charity where the company only donated five percent of a bracelet's price to plant trees); TINA.org, *Ad Alert: Treehuggers Bracelets* (Feb. 13, 2020), <https://truthinadvertising.org/articles/treehuggers-bracelets/> (similar); TINA.org, *Ad Alert: RegrowAustralia* (June 30, 2020), <https://truthinadvertising.org/articles/regrowaustralia/> (similar); TINA.org, *Ad Alert: Peter Popoff's "Miracle Spring Water"* (Aug. 25, 2020), <https://truthinadvertising.org/articles/peter-popoffs-miracle-spring-water/> (fraudster requested money in

exchange for “miracle” checks, interlacing those requests with religious and faith-based speech); TINA.org, *Ad Alert: The Math Behind Stella Artois’ Partnership with Water.org* (Mar. 19, 2018), <https://truthinadvertising.org/articles/math-behind-stella-artoiss-partnership-water-org/> (beverage company advertised limited-edition chalice while misleadingly claiming that purchase would equate to five years of clean water for someone in need).

Other courts encountering this type of deceptive commercial speech have addressed it using the appropriate “inextricably intertwined” test. *See, e.g., Kasky*, 45 P.3d at 248 (allegedly misleading statements about labor practices combined with expressions of political opinion on globalization); *Lungren*, 44 F.3d at 730 (potentially misleading statements about sustainability of products combined with editorialization on the environment); *Ariix*, 985 F.3d at 1119 (allegedly rigged nutritional supplements ratings combined with scientific and educational speech); *First Resort*, 860 F.3d at 1276 (misleading

advertisements regarding pregnancy clinic's services combined with truthful information about pregnancy).

In short, it is quite easy for commercial speakers to shroud fraud and deception under the cloak of protected speech. Just as the U.S. Supreme Court has rightfully observed that “many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety,” *Cent. Hudson*, 447 U.S. at 563 n.5, the same is true with respect to charitable solicitations. Any deceptive advertiser can encourage sales by drawing a connection to charitable contributions. The Court of Appeals’ “directly related” test is thus particularly susceptible to abuse, all but encouraging fraudsters to use charitable speech to deceive consumers.

Governments are already at a disadvantage when trying to regulate charitable solicitation, given the law’s full protection of noncommercial speech which is, at heart, part of a commercial pitch. See James J. Fishman, *Rethinking Riley: New Approaches to State and Federal Regulation of Charitable Solicitation*, 25

Geo. Mason L. Rev. 471, 520 (2018) (observing that “the reality of fundraising speech, in most cases, is commercial in nature, not educational”). Affording purely commercial speech the same protection as charitable solicitations any time they are “directly related” would make it even more difficult for consumer-protection agencies to do their important work. As the California Supreme Court has recognized, a diluted test for mixed commercial speech risks “immuniz[ing] false or misleading product information from government regulation.” *Serova*, 2022 WL 3453395, at *11. It is bad policy to enable and encourage potential fraudsters at the expense of consumers.

CONCLUSION

The Court of Appeals failed to properly apply the “inextricably intertwined” doctrine and instead applied a new test that is inconsistent with First Amendment jurisprudence and susceptible to abuse. As a matter of doctrine and policy, this Court should vacate the Court of Appeals’ judgment and remand for consideration under the proper First Amendment standard.

This document contains 4,930 words, exclusive of the words contained in the sections identified by Washington State Court Rule of Appellate Procedure 18.17.

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Respectfully submitted,

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