

No. 94162-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CERTIFICATION FROM UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE, WA

IN

LYFT, INC., a Delaware corporation

Appellant,

v.

KENNETH WRIGHT, on his own behalf and on the behalf of other  
similarly situated persons,

Respondent.

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ANSWER TO AMICUS CURIAE BRIEFS OF  
THE ATTORNEY GENERAL OF WASHINGTON AND  
THE CHAMBER OF COMMERCE OF THE UNITED STATES

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## INTRODUCTION

Just as the District Court Judges addressing the issues in this case concluded, the Attorney General of the State of Washington (AG) also concludes the Legislature intended to ensure that at least statutory damages would be imposed for unsolicited commercial text messages. This conclusion is supported by the text of RCW 19.190.040 and .060, and also by the legislative history carefully assayed in the AG's Amicus Brief. Where, as here, a class action is the only reasonable method for addressing individually *de minimis* injuries as to which the Legislature has not only recognized an injury, but has imposed liquidated damages, the Legislature has plainly found the injury and causation elements of the CPA satisfied.

By contrast, Amicus Chamber of Commerce of the United States of America ("ChamCo") invents an intent evidenced nowhere in the statutes or the legislative history. Each of the violations forbidden in RCW Ch. 19.190 is equally egregious, and the Legislature specifically provided the same statutory damages for both unsolicited commercial emails and unsolicited commercial texts. There is no basis – in the statute, the legislative history, or common sense – on which to distinguish them. ChamCo offers none.

This Court should answer both certified questions yes.

## ANSWER TO ATTORNEY GENERAL

- A. The AG focuses on the second question, as is appropriate in light of its enforcement duties, but its analyses apply equally to a private right of action.**

The AG focuses on the second certified question – whether the liquidated damages provision (RCW 19.190.040) establishes causation and injury under the CPA as a matter of law. AG Amicus (AGA) 3 n.1. This is appropriate, as it has enforcement responsibility for the CPA. AGA 2-3. As further discussed *infra*, Wright agrees with the AG’s analyses on the second question.

But its analyses apply equally to a private right of action under the first certified question. That is, to the same extent that § .040(1) authorizes liquidated damages in a CPA action, it authorizes them elsewhere: the provision is not limited to the CPA (§ .040(1)):

Damages to the recipient of . . . a commercial electronic text message sent in violation of this chapter are five hundred dollars, or actual damages, whichever is greater.

As the AGA makes clear, CEMA’s legislative history fully supports interpreting this provision to require liquidated damages of at least \$500, without an increased burden of proof on causation and injury, under the CPA. That analysis need not be limited, however, to the CPA, as § .040 is not so limited. On the contrary, as explained in Wright’s briefing, § .040 also supports a private right of action.

**B. The AG’s historical analysis is accurate and helpful.**

The AG carefully delineates the legislative history of CEMA. AGA 4-13. Based on that detailed history, the AG correctly concludes that the Legislature intended to treat similar electronic messages – unsolicited emails and texts – similarly. AGA 13-15. The liquidated damages provision applies to both types of messages. RCW 19.190.040(1). The Legislature plainly intended that recipients of both types of unsolicited messages would receive such damages without having to prove the injury and causation elements of the CPA. AGA 13-15. This analysis is both accurate and helpful.

In particular, the AG notes that the Final Bill Report for SHB 2007 (C 137 L 03) (RCW 19.190.060) begins with the history of CEMA pertaining to emails. See AGA App. C. It says that a “violation of laws relating to commercial e-mail messages is also a violation of the” CPA, and specifies damages under the CPA. AGA App. C at 1. It then says precisely the same thing about commercial electronic text messages (*id.* at 2):

A violation of laws relating to commercial electronic text message is also a violation of the [CPA] . . . a violation of the [CPA] may result in a civil fine, treble damages, court costs, and attorney’s fees.

In short, the Legislature treated emails and texts the same.

The AGA also helpfully cites many other statutes under which the Legislature provides statutory (or liquidated) damages for *per se* CPA violations. AGA 14-15 n.3 (citing RCW 80.36.400(3), .530 & .540; RCW 19.162.010 & .070; RCW 19.170.060 & .070). In all such cases, the Legislature signals its intent “to minimize the proof necessary to maximize the deterrent effect” of the legislation. AGA 15. That was its intent here.

**C. The AG’s class action analysis is correct and helpful.**

The AG fully explains the utility of class actions in the CPA context. It also points out that where, “as here, consumers may have suffered nominal individual harm, a class action may be their only effective redress.” AGA 17 (citing *Deposit Guar. Nat. Bank, Jackson, Miss. V. Roper*, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980) (consumers “might not consider it worth the candle” to pursue a claim)). This is the point Wright was making in saying that “citizens (like Wright and the rest of the class) would never undertake a lawsuit of this magnitude against an opponent with Lyft’s financial resources just to stop a few texts that any one individual might receive.” BR 22.

Notwithstanding Amicus ChamCo’s dismissive rhetoric, this is a real problem for the CPA. The AG’s input is correct and helpful.

## ANSWER TO CHAMCO

The Chamber of Commerce of the United States of America (“ChamCo”) attempts to collapse the District Court’s two questions into one. ChamCo Amicus Brief (CAB) at 4. It also purports to respond to the Brief of Respondent, which Lyft already did in its reply. ChamCo’s brief is simply unhelpful.

**A. There is no “calibrated” punishment – and indeed no “punishment” at all – under CEMA.**

ChamCo’s brief is also incorrect for several reasons. First, its basic theme is that the Legislature created a “calibrated” series of “punishments” depending on the “seriousness” of the offense in CEMA. ChamCo cites nothing – no legislative history, no statutory language – supporting its assertion. It is made from whole cloth.

And it makes no sense. Each offense CEMA forbids is equally serious, warranting statutory damages. ChamCo ignores Judges Lasknik and Pechman’s rulings that nothing indicates a legislative intent to regulate similar electronic communications differently. ECF 63 at 11. “Calibration” was neither attempted nor necessary.

Nor is it a “punishment” to permit both a private right of action and a *per se* CPA violation. Rather, the Legislature intended to protect the public. Allowing two causes of action with different elements and remedies is consistent with that intent.

**B. ChamCo misconstrues the meaning of a *per se* violation of the CPA.**

Second, ChamCo argues that a “*per se*” CPA violation includes all five CPA elements (CAB at 2) while admitting elsewhere that “*per se* violation” means that the first two or three elements of the CPA are met (CAB at 7 n.2). Only the footnote is accurate. See, e.g., ***Hangman Ridge Training Stables v. Safeco Title Ins. Co.***, 105 Wn.2d 778, 786, 719 P.2d 531 (1986) (“A *per se* unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated”); 789 (“the violation may [also] satisfy the public interest element *per se*” (citing ***Sato v. Century 21 Ocean Shores Real Estate***, 101 Wn.2d 599, 681 P.2d 242 (1984))). The term *per se* is limited (***Hangman Ridge***, 105 Wn.2d at 792):

[T]here have been three different *per se* uses. First, there has been and continues to be a *per se* public interest impact, as outlined above, which establishes only the element of public interest. Second, as discussed earlier in this opinion, there is a legislatively declared *per se* unfair trade practice which establishes only the first two elements of a CPA action. Finally, the term “*per se* violation” has been broadly used to refer to actions in which either the public interest element or the “unfair or deceptive act” and “in trade or commerce” elements are met *per se*. The term “*per se* violation” is thus imprecise. It should be replaced by “*per se* public interest” or “*per se* unfair trade practice”, depending upon which element or elements are satisfied *per se*.

**Hangman Ridge** goes on to analyze the last two elements (causation and damages) without reference to *per se* violations. *Id.* at 792-93.

Here, both § .030(3) (emails) and § .060(2) (texts) say that a violation of “this section” is a *per se* CPA violation:

The legislature finds that the practices covered by this section are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. A violation of this section is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter 19.86 RCW.

This identical provision in the email and text messaging statutes makes either violation a *per se* CPA violation, meaning that the first *three* elements of a CPA cause of action are met.

**C. Canons of construction do not apply unless and until the statute is deemed ambiguous, a point ChamCo never discusses.**

ChamCo errs in moving directly to an analysis of canons of construction without first establishing that the statute is ambiguous. See, e.g., ***Dep’t of Nat. Res. v. Pub. Util. Dist. No. 1 of Klickitat Cnty.***, 187 Wn. App. 490, 495, 349 P.3d 916 (2015) (“only if a statute remains ambiguous after a plain meaning analysis [do] we resort to external sources or interpretive aids, such as canons of construction and case law”). Yet ChamCo argues that the “plain statutory text”

supports its argument. CAB 6. Since ChamCo nowhere argues that the statute is ambiguous, the Court need not reach its analysis on “canons,” which contradicts its essential claims.

In any event, the “maxim of express mention and implicit exclusion should not be used to defeat legislative intent.” BR 16 (quoting *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998)). There is no conflict among the provisions of RCW 19.190, where each section addresses a similar, but distinct, form of written electronic communication. Since §§ .030 (emails) and .060 (texts) are both expressly incorporated into § .040’s damages provision, while § .090 (phishing) is expressly separate, it makes little sense to argue that an expression in § .090 somehow excludes provisions from §§ .030 and .060. ChamCo’s claim is incorrect. CAB 9-11.<sup>1</sup>

ChamCo misleads the Court in suggesting that liberal construction of the CPA is a mere canon of construction. CAB 11-12. On the contrary, the Legislature expressly mandates liberal

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<sup>1</sup> Even ChamCo does not go as far as Lyft’s Reply, which argues (in one place) that the **only** remedy under §§ .030 and .060 is injunctive relief. Reply at 5. That analysis of course would render statutory damages in § .040 ineffective, which is not permitted. *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 526, 286 P.3d 46 (2012) (no portion of the statute may be rendered ineffective). Indeed, ChamCo *contradicts* Lyft, stating that all “parties in this case agree that the Legislature has allowed plaintiffs who are *injured* by unsolicited text message [*sic*] to seek damages.” CAB at 4.

construction in RCW 19.86.920: “this act shall be liberally construed that its beneficial purposes may be served.” This Court honors that mandate. See, e.g., *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 799, 363 P.3d 587 (2015) (“the CPA evinces a broad, rather than narrow, lens through which we interpret the statute”). Liberal construction is required.<sup>2</sup>

**D. There is no risk of “overdeterrence” here.**

ChamCo again argues that the Legislature “calibrated” the statute to “punish” some things more than others. CAB 13-17. As noted, nothing in the statutes or legislative history supports these assertions. ChamCo cites nothing but an unpublished “working paper” and some questionable internet sites. *Id.*

ChamCo argues that merely honoring the legislative determination to provide statutory damages in cases involving unauthorized commercial text messages might “over-deter” Lyft’s wrongful conduct. That is impossible. This is like ChamCo arguing that imposing ever harsher penalties for drunk driving risks “over-detering” killing people. As with drunk driving, the Legislature has imposed zero tolerance: “No person conducting business in the state

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<sup>2</sup> ChamCo’s Argument “C” (CAB 12-13) pertains to points also covered in the AG’s Amicus Brief, which are addressed *supra*.

may initiate or assist in the transmission of an electronic commercial text . . .” RCW 19.190.060(1). Overdeterrence is not possible where, as here, the Legislature establishes zero tolerance.

The tacit assumption on which ChamCo’s faulty reasoning is based is that sending an unauthorized electronic commercial text is somehow less blameworthy than sending an unauthorized electronic commercial email. Again, nothing in the legislative history – much less in the text of the statutes – even hints that the Legislature saw these two activities as anything less than equivalent wrongs. Indeed, the Legislature authorized *exactly the same liquidate damages* – \$500 – *for both wrongs*. RCW 19.190.040. ChamCo is simply wrong.

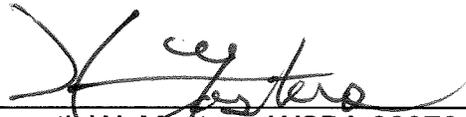
ChamCo asserts – again citing nothing – that the Legislature has not considered app features like Lyft’s, which automatically harvest your contacts at the push of a button. CAB 15. While ChamCo misunderstands this as being an “invite-a-friend” process, the record here establishes that the person from whose phone the Lyft app lifted Mr. Wright’s contact information – so to say – had no idea that the app would do so. She did not “invite” Mr. Wright, whom she hardly even knew. The Legislature has expressly barred such behavior, providing statutory damages to prevent it.

**CONCLUSION**

For the reasons stated here and in Wright's other briefing, the Court should answer both certified questions yes.

RESPECTFULLY SUBMITTED the 26<sup>th</sup> day of October 2017.

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A handwritten signature in black ink, appearing to read "K. Masters", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

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