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.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In rejecting the State's claims against TVI, Inc., the Court of Appeals applied fundamental First Amendment principles. Speech relating to charitable solicitation is fully protected under the First Amendment. The State cannot impose liability or penalties for charitable solicitations unless it can satisfy the highest standards of exacting scrutiny and proof. These and related principles are established by over 40 years of U.S. Supreme Court precedent: *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988); *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

After the superior court found TVI liable on three of the State's CPA claims (rejecting four other claims), TVI sought discretionary review. The Court of Appeals granted TVI's

request because of concerns the superior court had disregarded First Amendment principles. The superior court imposed liability based on its view that TVI's business model and marketing—buying used goods from local charities and promoting the charities—could have a "capacity to deceive" or create a "deceptive net impression" that "TVI itself was a nonprofit corporation" and that "purchases in Value Village stores provided a direct benefit to charities." The superior court based its ruling on ordinary CPA standards and despite its findings that TVI "consistently" and "extensively" explained its business model and charity partner relationships in hundreds of store signs, ads, and brochures; TVI never represented itself as a charity or non-profit (and in fact said just "the opposite"); and the State offered no showing that any consumer or donor was ever deceived or harmed. CP 1080-82, 1095-96, 1110, 1124, 1134.

The Court of Appeals reversed. It laid out the First Amendment principles and precedents the superior court

overlooked. A1 at 816-22.[1] Applying *Madigan*, the Court held that, with no showing of a false statement, no intent to deceive, and no actual deception or harm, the State's CPA claims "do not give 'sufficient breathing room for protected speech,'" as the First Amendment requires. A1 at 822 (quoting *Madigan*, 538 U.S. at 617, 620).

The decision is manifestly correct and presents no basis for review under RAP 13.4(b). Contrary to the State's assertions, there is no "significant question under the Constitution" to be resolved here. The Court of Appeals applied well-established U.S. Supreme Court precedent. The State does not even mention this governing law in its Petition.

The State's arguments also do not show any "issue of substantial public interest." The State's ability to police charitable solicitations is not diminished by the Court of Appeals' decision. The State can continue to regulate charities

[1] The Court of Appeals' opinion, *State v. TVI, Inc.*, 18 Wn. App. 2d 805 (2021), is attached as Appendix A1, and cited here with page cites to the Washington Appellate Reports.

and fundraisers under the Charitable Solicitations Act ("CSA"), RCW ch. 19.09, the primary Washington statute designed for this purpose. And nothing prevents the State from pursuing claims against sham charities and fraudulent solicitations.

The State's Petition presents no grounds to disturb the Court of Appeals' decision or excuse the Attorney General from complying with the First Amendment. The Court of Appeals considered the State's arguments *four times* and ruled in TVI's favor each time, recognizing the constitutional flaws of the State's claims and the superior court's ruling. This Court should decline review.

II. STATEMENT OF THE CASE

A. TVI's Business Model and Charity Partner Relationships.

TVI, Inc. is a Bellevue-based company that operates approximately 150 thrift stores in the U.S. and 14 Value Village stores in Washington. CP 1073-74.[2] Over 50 years ago, TVI

[2] At the time of trial, TVI had 20 stores in Washington.

pioneered a model of partnering with charitable organizations to purchase used goods donated by the public to the charities. CP 1074, 1078. TVI purchases goods the charities collect themselves—through residential pick-ups, donation bins, etc.—or that are donated to the charities at Community Donation Centers ("CDCs") at TVI stores. CP 1075-76, 1078. TVI then sells a portion of these goods in its stores. CP 1077, 1079 (TVI pays charity partners for all goods, even though only about 25% can be sold in stores).

TVI has maintained decades-long relationships with its Washington charity partners, including Northwest Center (52 years) and Big Brothers Big Sisters of Puget Sound (25 years). CP 1078, 1083-84. The State characterizes TVI's relationships with its charity partners as "solely transactional," Pet. at 5, but knows full well—after seven years of investigation and litigation—how incorrect this is. *See* RP 1446-47. TVI provides significant funding to its charity partners: $13 million to Washington charities in 2016 and $125 million over ten

years, CP 1078-80; *see* CP 1076 (finding that TVI's charity partners "receive a steady stream of unrestricted funds they can use to support the incredible work" they do).

TVI promotes its charity partners in store signage and marketing materials, featuring the charities and providing information about their missions. As the Court of Appeals observed, "[t]hese communications at least implicitly advocate for the views, ideas, goals, causes, and values of TVI's charitable partners," and "[m]arketing this relationship benefits both TVI and its charity partners." A1 at 818-19. As the CEO of Big Brothers Big Sisters testified, "part of the value of our partnership is [that TVI] promote[s] our brand" "showcasing the families, kids, the mentors, and showing that it's a real relationship being impacted." RP 1489-90; *see* CP 1111 (superior court's finding that TVI's promotion provides "'extremely valuable' benefit" in "increasing awareness about the organizations and their community missions.").

TVI's business model is based on a cycle of donations to charity partners, TVI's purchase of the goods from the charities, and the sale and reuse of the goods. CP 1080. "TVI explains this cycle in numerous signs and other marketing materials" such as brochures, placards, and even wall-sized murals illustrating the model and charity partner relationships. CP 1080, 1095-96, 1107, 1110, 1124-25. The superior court recognized that TVI's business model is "legal, thoughtful, and successful" and has "benefitted all involved," including the charities, TVI, and the public. CP 1076-77.

B. The State's Claims Against TVI and the Superior Court's Failure to Apply First Amendment Standards.

Following a three-year investigation, the State brought suit against TVI in December 2017.[3] The State asserted six

[3] From 2002-2013, the State examined TVI's business model and practices three times and each time decided that TVI did not act as a commercial fundraiser for charities and so did not have to register or provide disclosures under the CSA. CP 1084-86. In December 2014, the Attorney General's Office reversed course (and the prior determinations of the Secretary of State's Office), and demanded that TVI register under the

claims under the CPA and one under the CSA. CP 33-35, 1090-92. For the CPA claims, the State did not claim TVI made any affirmative misrepresentations, but rather that its business model and marketing allegedly had the "capacity" to create "deceptive net impressions." CP 1090. The complaint focused on past practices, including allegations that TVI did not pay for hard goods like housewares (the "hard goods" claim),[4] and paid a group of charity partners rather than a single charity for donations at Puget Sound and Spokane CDCs (the "shared market" claim). CP 1091, 1147-48. The complaint also alleged, more generally, that TVI's marketing created a "deceptive net impression" that it "was a charity or non-profit organization," and that "purchases at … Value Village [stores]

CSA. CP 1085-86. TVI immediately registered and then fully complied with the CSA and all its disclosure requirements. *See* CP 1152 (superior court's finding that "TVI did not quibble or appeal or argue. They complied."); *see* A1 at 811-12 (Court of Appeals recognizing the same).

[4] Until the hard goods claim was dismissed, the State said it was the "core" of its lawsuit. CP 575.

benefitted charities." CP 1090-91. And the State's CSA claim alleged TVI did not post disclosures quickly enough after registering as a commercial fundraiser in 2015. CP 36, 1092.

TVI moved for summary judgment dismissal under both the CPA and the First Amendment. CP 260-90. The superior court first granted and then denied the motion on reconsideration, but without considering the First Amendment issues. CP 373-78, 533-36.

Before trial, TVI filed a motion reiterating that the superior court was compelled to follow First Amendment requirements that: (1) the State must satisfy "exacting scrutiny," *i.e.*, proving that its action furthers a compelling state interest and is narrowly tailored to be the least speech-restrictive means to achieve the purpose, *see Riley*, 487 U.S. at 789; *Schaumburg*, 444 U.S. at 632; and (2) if the State seeks to pursue claims for alleged fraud, it was required to meet "exacting proof requirements" under *Madigan*, 538 U.S. at 620, *i.e.*, proving that

TVI made knowingly false statements with the intent to deceive consumers and succeeded in doing so. CP 912-17, 933-40.

The superior court only addressed TVI's second argument, saying that under *Madigan* there should be "a meaningful mens rea requirement" and that the State was obligated to show TVI committed a "knowingly unfair or deceptive act/practice." CP 1013-14. Yet the court also couched its ruling a second way: that the State would have to prove only that TVI "engaged in practices or acts that they knew or should have known would be deceptive or misleading, or at least leave a deceptive net impression." CP 1014.

C. The Superior Court Applied Ordinary CPA Standards in Holding TVI Liable.

After trial, the superior court rejected four of the State's seven claims, including the hard goods and shared market claims, on the grounds that TVI's representations were true and the State had presented no evidence that anyone was deceived. CP 1147-50, 1152-53. The court also rejected the State's CSA claim, finding it undisputed that TVI complied with all

registration and disclosure requirements, including by stating in numerous signs that TVI is a "for-profit commercial fundraiser" for identified charity partners. CP 1124-25, 1152-53.

But the superior court found TVI liable on the State's claims that "TVI's advertising and marketing … promoting its relationship with charities and encouraging donations" to the charities had "the capacity to deceive consumers as to [TVI's] for-profit status" and that "purchases in Value Village stores provided a direct benefit to charities." CP 1143, 1146.

The State presented no evidence that TVI ever had any intent to mislead consumers or that anyone was actually misled or harmed. The State did not interview consumers in its investigation, CP 1134, and did not call any consumers to testify. Much of the evidence at trial was signs, brochures, and placards in Value Village stores "extensively explain[ing] TVI's business model and relationships with charity partners." CP 1096; *see* CP 1110 ("TVI consistently included explanations about, and visual depictions of, its business model in numerous

signs, brochures, and collateral material"); *e.g.*, CP 1094-1100, 1103-07, 1109-14 (examples of signs and disclosures). The superior court acknowledged that TVI "never identified itself as a nonprofit company or a charity, but has said the opposite, that it is a 'for-profit thrift store chain.'" CP 1124; *accord* CP 1081. The uniform testimony at trial was that these representations were accurate, TVI never had any aim to mislead, instead made every effort to explain its model and charity partner relationships, and, indeed, could not maintain the "successful" and "legal" business the superior court acknowledged if it were attempting to deceive the public. RP 593-94, 644, 891, 1060-62, 1369-70.

Despite its pre-trial ruling, the superior court ultimately fell back on ordinary CPA standards that liability could be based solely on hypothetical "deceptive net impressions." The court referred to "capacity to deceive" or "deceptive net impression" 42 times its ruling. *See* CP 1081-82, 1088, 1090, 1136-39, 1143-50. It held that "the State is not required to prove" any act

"was intended to deceive" or that there was any "actual deception" or "causation or injury," as this is "irrelevant to whether the State has met its burden under the CPA." CP 1136-38. Nor did the State have to show any false statement according to the superior court, because it could establish a CPA claim based on "truthful communication." CP 1137.

Contrary to the State's characterization now, the superior court did not find a "magnitude of deception." Pet. at 1. The court found no false statements, or knowing misrepresentations, or any intent to deceive,[5] and the State admitted it had no such

[5] In its Petition, the State offers a bullet-point list of what it claims is evidence the superior court found to reflect that TVI knew its model and representations were "deceptive in masking its for-profit status." Pet. at 9-10. Word limitations for this brief do not allow a full response, but TVI addressed these misstatements in prior briefing to the Court of Appeals. *See* A5 at 21-24. In short, the State cites references to a marketing study conducted for TVI with consumers who were unfamiliar with Savers or Value Village stores, eliciting responses to a hypothetical positioning statement that was never used. CP 1120-21; RP 729-32, 1006. Also, to the extent research showed consumers may not have understood the company's model (because other thrift stores like Goodwill and Salvation Army are nonprofits), TVI therefore made efforts to ensure its model

evidence, *see* Ex. 2920 at 199-200, 203-07, 210-12, 217-18. In the end, it concluded TVI could be liable for its truthful representations because "[n]obody required TVI to focus on its business model as part of its marketing" and could have limited its advertising to "finding a great bargain." CP 1077, 1145-46. But, of course, the State cannot preclude TVI's work with or promotion of charities, *see Riley*, 487 U.S. at 792 (a state's efforts to dictate terms between a charity and a fundraiser are "constitutionally invalid").

D. The Court of Appeals Reversed the Superior Court After TVI Sought Discretionary Review.

TVI sought discretionary review of the superior court's ruling, arguing that TVI's charitable solicitation was fully protected speech and the superior court disregarded First Amendment requirements. A Court commissioner granted review, concluding "nothing in the findings or conclusions suggests that the trial court treated TVI's charitable solicitations

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and relationships with charity partners were explained repeatedly, consistently, and accurately. *See* RP 639; CP 1096.

any differently from pure commercial speech, and instead applied only 'typical CPA standards.'" A3 at 3. The State moved to overturn the commissioner's ruling, which a three-judge panel rejected. A4.

After briefing and oral argument, the Court of Appeals unanimously reversed the superior court's ruling and ordered the case be remanded for dismissal of the State's CPA claims. A1 at 810. The Court held that TVI's signs, brochures, and ads promoting its charity partners constitute charitable solicitation that is fully protected speech under the First Amendment. *Id.* at 816-19. Applying long-established U.S. Supreme Court precedent dictating exacting scrutiny, the Court held that the State's CPA claims lack "the exacting proof requirements" that are "critical" under the First Amendment. *Id.* at 822 (quoting *Madigan*, 538 U.S. at 617, 620).

The Court of Appeals further concluded that the superior court erred by creating a new standard to impose liability, as the CPA itself is clear and courts do not have license to rewrite a

law's terms. A1 at 824. And, the Court held that the superior court's ostensible standard ("knew or should have known") failed First Amendment exacting scrutiny in any event. *Id.*

The State again sought reconsideration—raising the same arguments it asserts now. *See* A6 (State's motion); A7 (TVI response). The Court of Appeals panel denied the State's motion, A2, making this the *fourth time* the Court rejected the State's efforts to avoid governing First Amendment principles, including its previous determinations granting review, A3, and denying the State's motion to reconsider that order too, A4.

III. ARGUMENT

A. The Court of Appeals Applied Established First Amendment Law.

The State's central argument urging review seems to be that the Court of Appeals erred because it decided the case solely as a matter of statutory construction (*i.e.*, that it "lacked authority to rewrite the CPA") and "never reached the ultimate issue" of whether the superior court's ruling imposing liability "survives exacting scrutiny under the First Amendment." Pet.

at 1; *see also id.* at 13 (contending the Court of Appeals reversed because "no [*mens rea*] standard appears in the text of the [CPA] itself"). The State's argument is perplexing, because the Court of Appeals' opinion is based on bedrock principles of First Amendment law and plainly held that the State's CPA claims and the superior court's imposition of liability violated First Amendment principles.

The Court of Appeals recognized, first, that "[c]haritable solicitation is fully protected speech under the First Amendment." A1 at 816 (citing *Schaumburg*, 444 U.S. at 632-33; *Munson*, 467 U.S. at 959-60; *Riley*, 487 U.S. at 787-88). The Court observed that if the State seeks to regulate or punish charitable solicitation it must satisfy strict constitutional scrutiny. *Id.* (citing *Riley*, 487 U.S. at 790). This means the State bears the burden to "prove a compelling interest that is *both* narrowly tailored and necessary to achieve the State's asserted interest"—a "'well-nigh insurmountable burden.'" *Id.* (quoting *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No!*

Comm., 135 Wn.2d 618, 628 (1998)) (emphasis in original; internal quotation omitted).

The Court of Appeals concluded that TVI's signs, brochures, and banners featuring its charity partners and promoting donations is charitable solicitation that helps "advocate for the views, ideas, goals, causes, and values of [the charities]." *Id.* at 817-18 (discussing *Nat'l Fed. of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 212 (5th Cir. 2011) (display of charities' names on donation bins is charitable solicitation)).

The Court of Appeals relied on *Madigan* and its holdings that "false statements alone" cannot be the basis for liability; the state had to show "that the fundraiser made a 'false statement of material fact'" and that the statement was made "with the intent to mislead the listener, and succeeded in doing so." A1 at 821 (quoting *Madigan*, 538 U.S. at 620)). Examining the State's claims and the superior court's rulings, the Court held that they "lack[ed] the exacting proof requirements 'critical to First Amendment concerns'" and thus

failed to "give 'sufficient breathing room for protected speech.'" *Id.* at 822 (quoting *Madigan*, 538 U.S. at 617, 620).

In its Petition, the State claims "[t]he Court of Appeals relied almost exclusively on … *City v. Willis*, 186 Wn.2d 210 … (2016) … to hold that the trial court's imposition of a mens rea [sic] required a 'rewrite' of the CPA, and thus, violated separation of powers." Pet. at 13. This is a patent misreading.

The Court of Appeals devoted ten pages of its opinion to analyzing the State's claims and the superior court's rulings based on First Amendment doctrine and precedents and then noted *Willis* in closing as additional support for the proposition that it is inappropriate for a court to "rewrite a … law to conform it to constitutional requirements." A1 at 824 (quoting *Willis*, 186 Wn.2d at 219-20, and *United States v. Stevens*, 559 U.S. 460, 481 (2010)); *see Clark v. Martinez*, 543 U.S. 371, 382 (2005) (the law does not allow reinterpreting a statute whenever constitutional flaws are apparent, as that "would render every statute a chameleon, its meaning subject to change depending

on the presence or absence of constitutional concerns in each individual case.").

The Court of Appeals' ruling is based on established First Amendment precedents according full protection for speech related to charitable solicitation, *i.e.*, *Schaumburg*, 444 U.S. at 620; *Munson*, 467 U.S. at 947; *Riley*, 487 U.S. at 781; *Madigan*, 538 U.S. at 600; *United States v. Alvarez*, 567 U.S. 709, 729 (2012); *Abbott*, 647 F.3d at 202. The Court of Appeals cited these cases and discussed their holdings 35 times. The State's Petition ignores all of this law and the Court of Appeals' analysis of the law. And, while the State tries to make out that the Court of Appeals "did *not* answer the issue" of whether the superior court's "should have known" standard constituted exacting proof, Pet. at 20 (emphasis in original), the Court could not have been more clear in rejecting the State's arguments that the superior court's "knew or should have known" standard supposedly "passes constitutional muster.'" A1 at 824 (saying, "We disagree.").

Contrary to the State's assertion, the Court of Appeals' decision does not raise a "significant question of law under the Constitution." Pet. at 2, *id.* at 19.[6] The Court's decision is consistent with—and dictated by—over 40 years of U.S. Supreme Court precedent. Throughout this litigation, the State has maintained that First Amendment requirements do not cabin its CPA claims against TVI and that the State could instead establish liability with no proof of any false statement, knowing or actual deception, or harm. *See* CP 729-31, 924-25.

[6] The State claims that neither party "raised any issue below, or on appeal, concerning the trial court's authority to impose a mens rea standard on the State," saying: "Indeed, TVI *requested* that the trial court do so …." Pet. at 19 (emphasis in original). The State knows better. TVI has asserted throughout this litigation that the State's claims must be dismissed because they fail First Amendment requirements. *See* CP 277-81 (summary judgment motion); CP 1018-32 (CR 41(b) motion); *TVI v. State*, No. 79223-7-I (Nov. 26, 2018) (TVI's first motion for discretionary review); *TVI v. State*, No. 80915-6-I (Oct. 30, 2020) (TVI opening brief on discretionary review); A1 at 809, 824 (Court of Appeals decision recognizing TVI's motions to dismiss and granting dismissal of State's claims). TVI never asked the superior court to make up a new standard for the State's CPA claims and has never conceded the court had authority to do so.

This is contrary to fundamental First Amendment principles and the extensive case law,[7] as the Court of Appeals correctly held. The Court of Appeals' opinion applies long-settled law.

B. First Amendment Law is Clear That Charitable Solicitation Is Fully Protected Speech.

In similar disregard of established First Amendment law, the State asserts this Court should take review to consider whether TVI's signs, brochures, and other materials featuring its charity partners and promoting donations to the charities constitute charitable solicitation. Pet. at 21-22 (claiming the

[7] Numerous cases have followed the U.S. Supreme Court precedent. *See, e.g.*, *United States v. Lyons*, 472 F.3d 1055, 1065-66 (9th Cir. 2007) ("*Madigan* underscores that the state faces a high burden to demonstrate fraud, including the burden to prove that a defendant made knowing misrepresentations with the intent to defraud."); *United States v. Alvarez*, 617 F.3d 1198, 1212 (9th Cir. 2010) (*Madigan* limits a government claim to "a properly tailored fraud action" in which "there must be proof the false statement was (1) knowing and intended to mislead, (2) material, and (3) did mislead."), *aff'd*, 567 U.S. 709 (2012); *Urzua v. Nat'l Veterans Servs. Fund, Inc.*, 2014 WL 12160751, at *3-4 (S.D. Cal. Jan. 28, 2014); *Linc-Drop, Inc. v. City of Lincoln*, 996 F. Supp. 2d 845, 857 (D. Neb. 2014). The State does not mention these cases either.

Court of Appeals failed to conduct "meaningful fact inquiries" about whether "TVI's advertising was inextricably intertwined with protected speech").

In fact, the Court of Appeals fully considered, addressed, and rejected the State's arguments. The Court held that TVI's signs and ads featuring its charity partners and promoting donations to them *are* charitable solicitation that provides "substantial benefit" to the charities and "advocates [their] causes." A1 at 817 (quoting *Riley*, 487 U.S. at 798, and *Schaumburg*, 444 U.S. at 632). The Court recognized the obvious: The State "aim[ed] its lawsuit squarely at TVI's intertwined speech" promoting its charity partners and thus directly targeted charitable solicitation, "fully protected speech under the First Amendment." A1 at 816, 819.

Here too, the Court of Appeals followed well-established precedent of the U.S. Supreme Court and other courts. In *Schaumburg*, *Munson*, and *Riley*, the Supreme Court held that speech related to charitable solicitation *is fully protected* and

courts may not parse representations to apply lesser scrutiny to one part or another. *Riley*, 487 U.S. at 796 ("This is the teaching of *Schaumburg* and *Munson*, in which we refused to separate the component parts of charitable solicitations from the fully protected whole. … Therefore, we apply our test for fully protected expression."). Scores of cases have followed the Supreme Court's direction that charitable solicitation cannot be treated as commercial speech but is instead subject to strict scrutiny. *See, e.g.*, *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 663-64 (E.D. La. 2017); *Nat'l Fed'n of the Blind of Colo., Inc. v. Norton*, 981 F. Supp. 1371, 1373 (D. Colo. 1997).[8] The issue is not open to debate.[9]

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[8] Again, word limitations preclude a full discussion or citation of even a fraction of the case law rejecting the State's argument. *See* A5 at 5-7 & n.1 (reply brief on discretionary review).

[9] Here again, the State offers no authorities except for ones rejected by the Court of Appeals: *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989), and *Hunt v. City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011). *See* Pet. at 24; A1 at 818-19. These cases did not concern charitable solicitation, but rather Tupperware parties in college dorms (*Fox*) and sidewalk vendors selling incense and shea butter (*Hunt*).

In its Petition, the State provides a depiction of a bag once used in Value Village stores, claiming it exemplifies that "much if not the vast majority of TVI's advertising and other commercial speech is standalone" and unrelated to its business model and promotion of charity partners. Pet. at 22-23. Shrunk down to 1/8th of its actual size, the State asserts that the inclusion of the tag line "Good deeds. Great deals." has no connection to charitable solicitation. But the State disregards (and obscures) what the bag actually states:

> Use this bag to donate reusable clothing and household items. Value Village pays local nonprofits every time you donate. Thank you.

Ex. 602.[10]

Notably, in *Fox* the Supreme Court reiterated that speech relating to charitable solicitation by commercial fundraisers is fully protected, even if it may also advance commercial purposes because the speech is "inextricably intertwined." 492 U.S. at 474. The Supreme Court did not detract from its holdings according full protection to charitable solicitation speech but merely held that speech at Tupperware parties should not be treated the same.

[10] Moreover, contrary to the State's assertion now that there should have been "standalone" review of each sign and ad, in

This case presents no "significant constitutional issues" about whether TVI's marketing promoting and soliciting donations to its charity partners is fully protected speech subject to exacting scrutiny. This law has been settled for decades.

C. The Court of Appeals' Ruling Does Not "Eviscerate" State Authority to Regulate Charitable Solicitation or Prevent Fraud.

Finally, the State asserts this Court should take review because the Court of Appeals' opinion "eviscerates" the "authority of the Attorney General to bring a CPA enforcement action [regarding] charitable solicitation or commercial fundraising" to pursue "fraudsters." Pet. at 2, 25. This is another rehash of an argument the State advanced and the Court of Appeals rejected. A6 at 4, 13-18.

The State has ample authority to oversee charitable solicitation and commercial fundraisers. Although the State

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the superior court the State said the opposite, urging that "no one piece of marketing should be reviewed in isolation" given the "deceptive net impression" standard of the CPA. RP 249; RP 253. Again the State offers shifting theories to try to avoid First Amendment scrutiny.

makes no mention of it, the CSA is Washington's primary statute for regulating charities and fundraisers. To the extent the Attorney General's Office seeks to ensure that consumers "are fully informed when making purchasing and donating decisions," Pet. at 25, that is exactly what the CSA does, as the Court of Appeals recognized: "The CSA provides Washington consumers with information relating to any entity that solicits funds from the public for charitable purposes to prevent deceptive practices and improper use of contributions intended for charitable purposes," and the Act's aim is "to improve the transparency and accountability of charitable solicitors." A1 at 812 n.3 (citing RCW 19.09.010(1) & (2)). Moreover, the U.S. Supreme Court has observed that statutes like the CSA—requiring registration and financial disclosures to state authorities (which can then be made available to the public)—are the appropriate means to regulate charitable fundraisers within First Amendment limits. *See Schaumburg*, 444 U.S. at 637-38 & n.12; *Riley*, 487 U.S. at 800.

It is undisputed that TVI fully complied with the CSA, CP 1152-53 (superior court's finding that "there can be no question" that TVI acted to "ensure that they were compliant with [the CSA]"), including by making disclosures in scores of signs, brochures, and other materials that it is a "for-profit commercial fundraiser" for charities, CP 1090, 1124-25. It is difficult to see how the Attorney General's Office can claim that state powers to ensure proper disclosures are "eviscerated" in this case when it is undisputed TVI complied with all CSA disclosure requirements.

Similarly, nothing in the Court of Appeals' decision challenges the State's authority to pursue a "properly tailored fraud action," as explained in *Madigan* and reiterated by the Court of Appeals. *See Madigan*, 538 U.S. at 619-20; *Riley*, 487 U.S. at 795; A1 at 820; *Alvarez*, 617 F.3d at 1212. Nothing prevents the Attorney General from bringing an action against a sham charity or other "fraudsters," to use the State's term. The Court of Appeals' decision merely restates what has been

established law for decades—such claims must comply with constitutional requirements. There is no issue of substantial public importance warranting review in requiring the Attorney General to comply with settled constitutional law.

IV. CONCLUSION

TVI respectfully requests that the Court deny the State's request to take review of this case.

This document contains 4,998 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 18th day of January, 2022.

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CERTIFICATE OF SERVICE

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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.

APPENDIX TO ANSWER TO PETITION FOR REVIEW

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DATED this 18th day of January, 2022.

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A1

18 Wash.App.2d 805
Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,
v.
TVI, INC., d/b/a Value Village, Appellant.

80915-6-I
|
FILED 8/16/2021

Synopsis

Background: State brought action against for-profit corporation for violations of the Consumer Protection Act (CPA). The Superior Court, King County, Roger Rogoff, J., denied corporation's motion to dismiss. Corporation appealed.

Holdings: The Court of Appeals, Bill Bowman, J., held that:

[1] corporation's marketing communications constituted commercial speech;

[2] corporation's marketing communications constituted charitable solicitation;

[3] commercial and charitable solicitation components of for-profit corporation's marketing communications were inextricably intertwined; and

[4] state's regulation of deceptive commercial speech under CPA was unconstitutional as applied to corporation's marketing communications.

Reversed and remanded.

West Headnotes (39)

[1] **Appeal and Error** Constitutional law

Appeal and Error Statutory or legislative law

The Court of Appeals interprets statutes and constitutional provisions de novo.

[2] **Appeal and Error** Constitutional Rights, Civil Rights, and Discrimination in General

The Court of Appeals reviews challenges invoking the right to free speech under the First Amendment de novo. U.S. Const. Amend. 1.

[3] **Constitutional Law** Presumptions and Construction as to Constitutionality

Constitutional Law Burden of Proof

Generally, the Court of Appeals presumes statutes to be constitutional, and the party challenging a statute bears the burden of proving otherwise.

[4] **Constitutional Law** Freedom of speech, expression, and press

The state usually bears the burden of justifying a restriction on free speech. U.S. Const. Amend. 1.

[5] **Constitutional Law** Freedom of Speech, Expression, and Press

In assessing a First Amendment challenge, the court first determines whether the speech at issue is constitutionally protected; in doing so, the court conducts an independent review of the record to be sure that the speech in question actually falls within a protected category. U.S. Const. Amend. 1.

[6] **Constitutional Law** Freedom of Speech, Expression, and Press

In assessing a First Amendment challenge, the court scrutinizes the law regulating the speech under an evidentiary standard that matches the First Amendment interest at play. U.S. Const. Amend. 1.

[7] **Constitutional Law** What is "commercial speech"

For purposes of the First Amendment, "commercial speech" is expression related solely to economic interests of speaker and its audience; it is speech which does no more than propose commercial transaction. U.S. Const. Amend. 1.

[8] **Constitutional Law** Commercial Speech in General

First Amendment protects commercial speech from unwarranted governmental regulation. U.S. Const. Amend. 1.

[9] **Constitutional Law** Commercial Speech in General

Statutes regulating commercial speech are subject to intermediate level of constitutional scrutiny. U.S. Const. Amend. 1.

[10] **Constitutional Law** Advertising

First Amendment's concern for commercial speech turns on informational function of advertising. U.S. Const. Amend. 1.

[11] **Constitutional Law** False, untruthful, deceptive, or misleading speech

There can be no constitutional objection to suppressing commercial messages that do not accurately inform the public. U.S. Const. Amend. 1.

[12] **Constitutional Law** False, untruthful, deceptive, or misleading speech

Government may ban commercial communications that are more likely to deceive public than to inform it, but commercial speech should not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed. U.S. Const. Amend. 1.

[13] **Constitutional Law** What is "commercial speech"

Constitutional Law Advertising

Constitutional Law Product advertisements

In assessing whether a communication is commercial speech for First Amendment purposes, court considers whether (1) the communication is an advertisement, (2) the communication refers to a particular product, or (3) the speaker has an economic motivation. U.S. Const. Amend. 1.

[14] **Constitutional Law** What is "commercial speech"

No one factor is dispositive in determining whether a communication is commercial speech for First Amendment purposes. U.S. Const. Amend. 1.

[15] **Constitutional Law** What is "commercial speech"

A communication is not necessarily commercial for First Amendment purposes just because it relates to that person's financial motivation. U.S. Const. Amend. 1.

[16] **Antitrust and Trade Regulation** Advertising, marketing, and promotion

Constitutional Law Advertising

Constitutional Law Signs

For-profit corporation's marketing communications in its thrift stores constituted commercial speech for First Amendment purposes, in action for violations of the Consumer Protection Act (CPA); corporation's signs, banners, and in-store announcements induced customers to donate their goods at corporation's stores, after which corporation would resell those goods for profit, corporation's marketing also encouraged shoppers to buy goods at its stores so corporation could have greater profits, and while signs and announcements did not refer to particular products, they were advertisements communicated by a for-profit corporation with economic motivation. U.S. Const. Amend. 1; Wash. Rev. Code Ann. § 19.86.920.

[17] **Constitutional Law** Charities or religious organizations

Charitable solicitation is fully protected speech under First Amendment. U.S. Const. Amend. 1.

[18] **Constitutional Law** Charities or religious organizations

Statutes seeking to regulate charitable solicitation are subject to strict constitutional scrutiny. U.S. Const. Amend. 1.

[19] **Constitutional Law** Freedom of speech, expression, and press

Constitutional Law Charities or religious organizations

State seeking to regulate charitable solicitation bears the burden to prove a compelling interest that is both narrowly tailored and necessary to achieve the state's asserted interest. U.S. Const. Amend. 1.

[20] **Constitutional Law** Charities or religious organizations

"Charitable solicitation," for First Amendment purposes, encompasses more than mere act of seeking financial support for nonprofit organizations; it is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues. U.S. Const. Amend. 1.

[21] **Constitutional Law** Charities or religious organizations

Charitable solicitation is not limited to in-person communications, for First Amendment purposes. U.S. Const. Amend. 1.

[22] **Antitrust and Trade Regulation** Advertising, marketing, and promotion

Constitutional Law Charities or religious organizations

For-profit corporation's marketing communications in its thrift stores constituted charitable solicitation for purposes of determining whether state's regulation of for-profit corporation's communications in its thrift stores under Consumer Protection Act (CPA) was subject to strict scrutiny under First Amendment; corporation's signs, pamphlets, and banners displayed names and logos of corporation's charity partners

and stated that customers' purchases and donations at corporation's store's benefited its charity partners, at least implicitly advocating for views, ideas, goals, causes, and values of those charities. U.S. Const. Amend. 1.

[23] **Constitutional Law** What is "commercial speech"

Communications that contain both commercial speech and noncommercial speech are treated as commercial speech for First Amendment purposes unless the commercial and noncommercial messages are inextricably intertwined. U.S. Const. Amend. 1.

[24] **Constitutional Law** What is "commercial speech"

For First Amendment purposes, a court determines whether the commercial aspects of certain speech are inextricably intertwined with otherwise fully protected speech based on the nature of the speech taken as a whole. U.S. Const. Amend. 1.

[25] **Constitutional Law** What is "commercial speech"

Where the commercial and noncommercial components of speech can be easily separated, they are not inextricably intertwined for First Amendment purposes. U.S. Const. Amend. 1.

[26] **Constitutional Law** What is "commercial speech"

If the commercial and noncommercial component parts of a single speech are inextricably intertwined for First Amendment purposes, the court cannot parcel out the speech, applying one test to one phrase and another test to another phrase; instead it applies the test for fully protected speech. U.S. Const. Amend. 1.

[27] **Constitutional Law** Charities or religious organizations

Commercial and charitable solicitation components of for-profit corporation's marketing communications in its thrift stores were inextricably intertwined for First Amendment purposes, and thus strict scrutiny applied to state's attempt to regulate corporation's speech under Consumer Protection Act (CPA); sales of corporation's goods were directly related to its noncommercial message, as corporation bought its inventory from charities and paid them a fee for goods donated directly to corporation's thrift stores, marketing those relationships benefited both corporation and its charity partners, and state did not seek to regulate when and where corporation sold its goods, but rather alleged that corporation marketed its relationships with charities in a manner that could deceive consumers. U.S. Const. Amend. 1; Wash. Rev. Code Ann. §§ 19.09.340(1), 19.86.920.

[28] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

Under strict scrutiny, court will uphold a statute restricting protected speech only if it serves a compelling state interest and is narrowly drawn to serve that interest without unnecessarily interfering with First Amendment freedoms. U.S. Const. Amend. 1.

[29] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

Under strict scrutiny, a statute restricting protected speech must be the least restrictive means among available,

effective alternatives. U.S. Const. Amend. 1.

[30] **Constitutional Law** Charities or religious organizations

Actions targeting fraud on the part of a charitable organization's solicitations fall outside the First Amendment protection of speech. U.S. Const. Amend. 1.

[31] **Constitutional Law** False Statements in General

Falsity alone may not suffice to bring protected speech outside the First Amendment; the statement must be at least a knowing or reckless falsehood. U.S. Const. Amend. 1.

[32] **Constitutional Law** Charities or religious organizations

Any statute targeting false or misleading charitable solicitation must meet exacting proof requirements to provide sufficient breathing room for protected speech, ensuring that false statement alone does not subject fundraisers to fraud liability. U.S. Const. Amend. 1.

[33] **Antitrust and Trade Regulation** Validity

Constitutional Law Charities or religious organizations

State's regulation of unfair or deceptive acts or practices in trade or commerce that impacted public interest under Consumer Protection Act (CPA) violated First Amendment as applied to charitable solicitation speech for-profit corporation that marketed its relationships with its charitable partners by displaying signs, banners, and pamphlets in its thrift stores stating that customers' purchases and donations at corporation's store's benefited its charity partners; CPA unambiguously did not include a mens rea element, and thus did not meet exacting proof requirements necessary to give corporation's protected speech sufficient breathing room under First Amendment. U.S. Const. Amend. 1; Wash. Rev. Code Ann. §§ 19.09.340(1), 19.86.920.

[34] **Antitrust and Trade Regulation** Nature and Elements

To prevail on a Consumer Protection Act (CPA) claim, the State must prove only three elements: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce, and (3) public interest impact. Wash. Rev. Code Ann. § 19.86.010 et seq.

1 Cases that cite this headnote

[35] **Antitrust and Trade Regulation** In general; unfairness

Antitrust and Trade Regulation Fraud; deceit; knowledge and intent

Antitrust and Trade Regulation Public impact or interest; private or internal transactions

The state can establish an unfair or deceptive act under the Consumer Protection Act (CPA) by showing (1) per se unfair or deceptive conduct, (2) an act that has the capacity to deceive a substantial portion of the public, or (3) an unfair or deceptive act or practice that is not regulated by statute but violates the public interest. Wash. Rev. Code Ann. § 19.09.340(1).

[36] **Antitrust and Trade Regulation** Fraud; deceit; knowledge and intent

The Consumer Protection Act (CPA) does not define "deceptive," but the implicit understanding is that the actor misrepresented something of material

importance; a deceptive act or practice is measured by the net impression on a reasonable consumer. Wash. Rev. Code Ann. § 19.09.340(1).

[37] **Antitrust and Trade Regulation** Fraud; deceit; knowledge and intent

The Consumer Protection Act (CPA) operates prophylactically in that the plaintiff need not show the speaker intended to deceive or succeeded in doing so, only that the communication had the capacity to deceive a substantial portion of the public. Wash. Rev. Code Ann. § 19.86.920.

[38] **Constitutional Law** Judicial rewriting or revision

While it is true that a trial court may construe an ambiguous law to avoid constitutional infirmity, it is barred by the separation of powers from rewriting the law's plain terms.

[39] **Constitutional Law** Rewriting to save from unconstitutionality

Particularly in a First Amendment challenge, the court will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish the legislature's incentive to draft a narrowly tailored law in the first place. U.S. Const. Amend. 1.

**766 Honorable Roger Rogoff, Judge

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PUBLISHED OPINION

Bowman, J.

*809 ¶ 1 The State sued TVI Inc. under the Consumer Protection Act (CPA), chapter 19.86 RCW, alleging that TVI's marketing deceived consumers by creating an impression that TVI is a nonprofit entity and that charities benefit from sales at TVI's Value Village thrift stores. TVI argued its marketing amounts to constitutionally protected charitable solicitation and moved to dismiss the CPA claims. The trial court denied the motion and, after *810 a bench trial, determined that TVI "knew or should have known" that its marketing could deceive consumers. We conclude that TVI's marketing inextricably intertwines commercial speech and charitable solicitation and that statutes 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.

FACTS

¶ 2 TVI is a for-profit corporation that owns and operates several Value Village thrift stores in Washington. It buys donated textiles and household items from selected partner charities[1] at low cost[2] and then sells **767 them to the public at higher prices in its stores. TVI sells unsold items and those unfit for retail sale to recycling centers that ship the items overseas to secondary markets or dispose of the items. TVI also maintains community donation centers at its stores, where it accepts items donated by the public. It

then pays its charity partners a fee based on the amount of materials donated directly to each store.

1 TVI's main charity partners are Big Brothers Big Sisters of Puget Sound, Northwest Center, and the Arc of Washington State.

2 TVI buys the items at a set price per pound.

¶ 3 TVI markets itself as a philanthropic company trying to reduce waste, recycle materials, and support its charity partners' work in the community. TVI does not donate directly to charities, and its charity partners do not receive any of its sales revenue. But by buying in bulk from charitable organizations, TVI provides a predictable source of revenue on which the charities heavily rely.

¶ 4 To induce the public to donate and shop at its stores, TVI uses in-store signs and banners, in-store public address announcements, online marketing, brochures, and social ***811** media posts. TVI identifies itself as a for-profit company in its marketing and does not tell shoppers it donates profits to charity. That said, it markets slogans that suggest its charitable partners benefit from the amount of items TVI sells. For example, one sign reads, " 'These racks support more than just clothes. By shopping and donating at this store, you support: [charity logos][.] Value Village good all around.' " Or, " 'Value Village is about giving back and helping others, too.' " Another states, " 'Donate to a nonprofit here' " and, " 'Clothing [plus] Household Items,' " with a smaller caption that states, " 'Value Village is a for profit professional fundraiser.' " Some advertisements are more detailed:

> "For over 60 years, Value Village has helped charities, communities and the planet prosper through the power of re-use. Our charity partners sell us goods they collect for reliable revenue that helps fund their missions."

¶ 5 Public address announcements made to shoppers include messages like, " 'When you donate your reusable items here at our store, we pay it forward to others in a big way! Your donations mean support for local nonprofits - helping to fund vital programs right here in our community. Pretty awesome, huh?' "

¶ 6 TVI also encourages shoppers to donate at its in-store collection bins with messages like, " '**DO** SOMETHING GREAT **DO** GOOD **DO** YOUR PART **DO**NATE,' " " 'DO A GOOD DEED **DO** FAVORS **DO** YOUR PART **DO**NATE,' " and, " 'Value Village pays local nonprofits every time you donate. **Thank you!**' " Most Value Village stores use a compilation of these themes in their banners, brochures, and signs. Some stores have a "primary" charity partner highlighted in their advertising. The stores also hand out "stamp cards," giving shoppers discounts on purchased items in exchange for donating goods.

¶ 7 In 2014, the State notified TVI that it must register with the secretary of state as a commercial fundraiser ***812** under the charitable solicitations act (CSA), chapter 19.09 RCW.[3] TVI complied. Around the same time, the attorney general's office (AGO) began investigating TVI's marketing for possible CPA violations.[4] The AGO initiated the investigation after receiving at least one complaint accusing TVI of creating a community perception that it was a nonprofit organization and that charities received direct benefits from its sales at Value Village stores.

3 The CSA provides Washington consumers with information relating to any entity that solicits funds from the public for charitable purposes to prevent deceptive practices and improper use of contributions intended for charitable purposes. RCW 19.09.010(1). It also seeks to improve the transparency and accountability of charitable solicitors. RCW 19.09.010(2).

4 The CPA prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. RCW 19.86.020.

¶ 8 Eventually, the State sued TVI under the CSA, alleging that TVI failed to place disclaimers "at the point of solicitation" between January and October 2015, and advertised for solicitations using "false, misleading, or deceptive information." The State also alleged ****768** TVI's marketing was deceptive under the CPA because it created a "deceptive net impression" that TVI is a nonprofit corporation and that customer sales directly benefit charities. The State also accused TVI of deceptive marketing related to the Rypien Foundation, a charity group dedicated to helping families battling cancer. In exchange for using the foundation's logos in its marketing and store windows, TVI paid the Rypien Foundation a flat fee of

$4,000 per month.[5] But the State claimed TVI misled consumers into believing it paid the foundation based on the amount of donations to Value Village stores in Spokane. The State sought injunctive relief as well as civil penalties of up to $2,000 for each CPA violation. It also sought restitution for Value Village customers as well as attorney fees and costs.

5 The parties later changed the compensation fee to a flat rate per pound.

¶ 9 TVI moved to dismiss the State's CPA claims as an unconstitutional regulation of protected speech as applied to its marketing. TVI argued that its marketing amounts to ***813** charitable solicitation, and statutes regulating charitable solicitation must pass strict constitutional scrutiny. It asserted the CPA cannot pass strict scrutiny because it lacks a mens rea element to protect against liability for unintentional false statements or deception. The trial court agreed that TVI's marketing includes some charitable solicitation subject to constitutional scrutiny. But it did not dismiss the State's CPA claims. Instead, the court required the State to prove at trial that TVI "knew or should have known" its marketing could create a deceptive net impression.

¶ 10 The case proceeded to bench trial. At the close of the State's case, TVI again moved to dismiss the CPA claims, arguing that the State failed to satisfy First Amendment strict scrutiny standards. The court denied the motion. After trial, the court determined that the State satisfied its burden of proof on three of its seven claims.[6] The court found the State proved that (1) before 2016, TVI used advertising that had the capacity to deceive consumers by suggesting that TVI itself was a nonprofit entity; (2) TVI used ads that had the capacity to mislead the public into believing that purchasing items at a Value Village store would "benefit the downtrodden, the poor, those who need charity"; and (3) TVI used ads that had the capacity to deceive shoppers into believing the Rypien Foundation received money for each item donated. The court entered findings of fact and conclusions of law.

6 The trial court dismissed the State's allegations that (1) TVI deceived the public into believing charities were paid for every donation, (2) TVI deceived the public into believing only primary charities received payment for donations, (3) TVI misled consumers about how much it paid the Moyer Foundation, and (4) TVI violated CSA disclosure requirements.

¶ 11 TVI petitioned for discretionary review before the trial court determined damages. A commissioner of this court granted TVI interlocutory discretionary review.

ANALYSIS

¶ 12 TVI argues that the CPA, as applied to its marketing, unconstitutionally chills protected speech —charitable ***814** solicitation. The State counters that TVI's marketing amounts to only commercial speech properly regulated under the CPA. In the alternative, the State argues that the CPA as applied to TVI's marketing survives strict scrutiny under the trial court's "knew or should have known" standard. We agree with TVI.

Standard of Review

[1] **[2]** **[3]** **[4]** ¶ 13 We interpret statutes and constitutional provisions de novo. City of Spokane v. Rothwell, 166 Wash.2d 872, 876, 215 P.3d 162 (2009); Fed. Way Sch. Dist. No. 210 v. State, 167 Wash.2d 514, 523, 219 P.3d 941 (2009). We also review challenges invoking the right to free speech under the First Amendment de novo. Catlett v. Teel, 15 Wash. App. 2d 689, 699, 477 P.3d 50 (2020) (citing Resident Action Council v. Seattle Hous. Auth., 162 Wash.2d 773, 778, 174 P.3d 84 (2008)). Generally, we presume statutes to be constitutional, and the party challenging a statute bears the burden of proving otherwise. State v. Bahl, 164 Wash.2d 739, 753, 193 P.3d 678 (2008); ****769** Voters Educ. Comm. v. Pub. Disclosure Comm'n, 161 Wash.2d 470, 481, 166 P.3d 1174 (2007). But the State " 'usually bears the burden of justifying a restriction on [free] speech.' " State v. Immelt, 173 Wash.2d 1, 6, 267 P.3d 305 (2011)[7] (quoting Voters Educ. Comm., 161 Wash.2d at 482, 166 P.3d 1174).

7 Internal quotation marks omitted.

[5] **[6]** ¶ 14 In assessing a First Amendment challenge, we first determine whether the speech at issue is constitutionally protected. Bd. of Trs. of State

Univ. of N.Y. v. Fox, 492 U.S. 469, 475, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). In doing so, we conduct " 'an independent review of the record ... to be sure that the speech in question actually falls within [a] protected category.' " Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 535 (9th Cir. 1984) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)), rev'd on other grounds by City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). Then we scrutinize the law regulating the speech under an evidentiary standard that matches the First Amendment interest at play. Thomson v. Doe, 189 Wash. App. 45, 57, 356 P.3d 727 (2015).

*815

Commercial Speech

[7] [8] [9] ¶ 15 "Commercial speech" is "expression related solely to the economic interests of the speaker and its audience." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561-62, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). It is speech which does " 'no more than propose a commercial transaction.' " State Bd. of Va. Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973)). The First Amendment protects commercial speech from unwarranted governmental regulation. Va. Citizens Consumer Council, 425 U.S. at 761-62, 96 S.Ct. 1817. Statutes regulating commercial speech are subject to an intermediate level of constitutional scrutiny. Cent. Hudson, 447 U.S. at 563-66, 100 S.Ct. 2343.

[10] [11] [12] ¶ 16 The First Amendment's concern for commercial speech turns on the informational function of advertising. See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). As a result, "there can be no constitutional objection" to suppressing commercial messages that do not accurately inform the public. Cent. Hudson, 447 U.S. at 563, 100 S.Ct. 2343. The government may ban commercial communications that are more likely to deceive the public than to inform it. Friedman v. Rogers, 440 U.S. 1, 15-16, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979). But commercial speech should not be defined too broadly "lest speech deserving of greater constitutional protection be inadvertently suppressed." Cent. Hudson, 447 U.S. at 579, 100 S.Ct. 2343 (Stevens, J., concurring).

[13] [14] [15] ¶ 17 In assessing whether a communication is commercial speech, we consider whether (1) the communication *816 is an advertisement, (2) the communication refers to a particular product, or (3) the speaker has an economic motivation. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983); Dex Media W., Inc. v. City of Seattle, 696 F.3d 952, 958 (9th Cir. 2012). No one factor is dispositive. Bolger, 463 U.S. at 66-67, 103 S.Ct. 2875. And a communication is not necessarily commercial just because "it relates to that person's financial motivation." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795-96, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

[16] ¶ 18 Here, TVI's marketing amounts to commercial speech. Its signs, banners, and in-store announcements induce customers to donate goods at its stores, which TVI then sells for profit. The marketing also encourages shoppers to buy goods in its stores so TVI can generate greater profits. While the signs and announcements do not refer to particular products, they are advertisements communicated by a for-profit corporation with economic motivation.

Charitable Solicitation

[17] [18] [19] ¶ 19 Charitable solicitation is fully protected speech under the First Amendment. **770 Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632-33, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980); Sec. of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 959-60, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984); Riley, 487 U.S. at 787-88, 108 S.Ct. 2667. Statutes seeking to regulate charitable solicitation are subject to strict constitutional scrutiny. Riley, 487 U.S. at 790, 108 S.Ct. 2667. That is, the State "bears the 'well-nigh insurmountable' burden to prove a compelling interest that is both narrowly tailored and necessary to achieve the State's asserted interest." State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 135 Wash.2d 618, 628, 957 P.2d 691 (1998) (quoting Meyer v. Grant, 486 U.S. 414, 425, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988)).

[20] ¶ 20 The dictionary defines "solicitation" as "the pursuit, practice, act, or an instance of soliciting." Webster's ***817** Third New International Dictionary 2169 (2002). "Solicit" means "to approach with a request or plea (as in selling or begging)," and "to endeavor to obtain by asking or pleading." Webster's, at 2169. But charitable solicitation encompasses more than the mere act of seeking financial support for nonprofit organizations. See Schaumburg, 444 U.S. at 632, 100 S.Ct. 826; Riley, 487 U.S. at 798, 108 S.Ct. 2667. It is "characteristically intertwined with 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, 100 S.Ct. 826. "[W]here the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself." Riley, 487 U.S. at 798, 108 S.Ct. 2667. Charitable solicitation informs the public about the charity's existence and goals, shares and propagates its views, and advocates its causes. Schaumburg, 444 U.S. at 632, 100 S.Ct. 826.

[21] ¶ 21 Charitable solicitation is not limited to in-person communications. Nat'l Fed. of the Blind of Tex., Inc. v. Abbott, 647 F.3d 202, 212 (5th Cir. 2011). In Abbott, for-profit entities collected donated goods in "receptacles" bearing logos of local charities. Abbott, 647 F.3d at 207, 213. They then paid the charities a flat fee for the goods and resold them for profit. Abbott, 647 F.3d at 207. The court concluded that including the names of local charities on donation bins constitutes charitable solicitation because doing so communicates information about the nonprofit and explicitly advocates for the donation of clothing and household goods to that particular charity. Abbott, 647 F.3d at 212-13. The donation bins are "silent solicitors and advocates for particular charitable causes" that "implicitly advocate for that charity's views, ideas, goals, causes, and values." Abbott, 647 F.3d at 213.

[22] ¶ 22 Like the donation bins in Abbott, TVI's signs, pamphlets, and banners display the names and logos of its charity partners. For example, TVI displays signs saying, "Thank you for shopping and donating. Your support helps ***818** benefit: [Big Brothers Big Sisters of Puget Sound logo]." And, "Value Village is about giving back and helping others, too. ... In this area, your donations support: [Northwest Center logo]." These communications at least implicitly advocate for the views, ideas, goals, causes, and values of TVI's charitable partners. As a result, TVI's marketing also amounts to charitable solicitation.

Intertwined Speech

[23] **[24]** **[25]** **[26]** ¶ 23 We treat communications that contain both commercial speech and noncommercial speech—here, charitable solicitation—as commercial speech unless the commercial and noncommercial messages are "inextricably intertwined." See Riley, 487 U.S. at 795-96, 108 S.Ct. 2667. We determine whether the commercial aspects of the speech are "inextricably intertwined with otherwise fully protected speech" based on "the nature of the speech taken as a whole." Riley, 487 U.S. at 796, 108 S.Ct. 2667. "[W]here the two components of speech can be easily separated, they are not 'inextricably intertwined.' " Hunt v. City of L. A., 638 F.3d 703, 715 (9th Cir. 2011), aff'd, 523 F. App'x 493 (9th Cir. 2013). But if "the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase .... [W]e apply our ****771** test for fully protected speech. Riley, 487 U.S. at 796, 108 S.Ct. 2667.

¶ 24 Citing Hunt and Fox, the State argues that TVI's charitable solicitation is easily separated from its commercial speech. In Hunt, boardwalk vendors challenged city ordinances restricting when and where they could sell their goods as unconstitutionally infringing on protected speech.[8] Hunt, 638 F.3d at 706-09. The court rejected their challenge. Hunt, 638 F.3d at 717. It reasoned that any protected speech could be easily separated from the vendors' commercial ***819** activity because they were "simply explaining the use and meaning of their products in an attempt to convince passers-by to purchase them." Hunt, 638 F.3d at 715-17. The products on their own did not have "any inherently communicative elements that make their sale constitute expressive activity, and nothing prevents [the vendors] from espousing their beliefs without selling these products." Hunt, 638 F.3d at 717. Similarly, in Fox, the United States Supreme Court determined that it could separate commercial speech

promoting the sale of Tupperware from protected speech educating potential customers about home economics because nothing "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." Fox, 492 U.S. at 473-74, 109 S.Ct. 3028.

8 One vendor claimed protected speech because he was selling shea butter by demonstrating its " 'healing power' " on passers-by, and his sales stand was the " 'Garden of Eve.' " Hunt, 638 F.3d at 708. Another vendor argued he was engaged in protected speech because he explained to customers the meaning of religious and mythical symbols engraved on his incense holders. Hunt, 638 F.3d at 708.

[27] ¶ 25 Unlike the boardwalk vendors in Hunt or the Tupperware salespeople in Fox, sales of TVI's goods are directly related to its noncommercial message. TVI buys its inventory from charity partners and pays the charities a fee for goods donated directly to Value Village stores. Marketing this relationship benefits both TVI and its charity partners. Moreover, the State does not seek to regulate when and where TVI sells its goods. Rather, by alleging that TVI markets its relationship with its charity partners in a manner that can deceive consumers, the State aims its lawsuit squarely at TVI's intertwined speech. It asserts that TVI is using its charity partners' "names and logos to encourage consumers to donate goods that it can then resell at a substantial profit," and that TVI is using "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 nonprofit organization."

¶ 26 Taken as a whole, we conclude TVI's commercial and noncommercial speech is inextricably intertwined. As a result, we apply strict scrutiny to the State's attempt to regulate TVI's charitable solicitation under the CPA.

***820** Application of CPA to Charitable Solicitation

[28] **[29]** ¶ 27 Under strict scrutiny, we will uphold a statute restricting protected speech only if it serves a compelling state interest[9] and is "narrowly drawn ... to serve th[at] interest[ ] without unnecessarily interfering with First Amendment freedoms." Schaumburg, 444 U.S. at 636-37, 100 S.Ct. 826. The restriction must be the " 'least restrictive means among available, effective alternatives.' " United States v. Alvarez, 567 U.S. 709, 729, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) (quoting Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004)).

9 The parties agree that the State has a compelling interest in "polic[ing] deceptive speech."

[30] **[31]** **[32]** ¶ 28 The United States Supreme Court has three times considered prophylactic statutes designed to combat fraud or deception in charitable solicitation. See Ill. ex rel. Madigan v. Telemktg. Assocs., Inc., 538 U.S. 600, 617, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003) (citing Schaumburg, 444 U.S. 620, 100 S.Ct. 826; Munson Co., 467 U.S. 947, 104 S.Ct. 2839; Riley, 487 U.S. 781, 108 S.Ct. 2667). Each time, it held the prophylactic measures categorically restrained solicitation and were unconstitutionally burdensome and unnecessary to achieve the state's goal of ****772** preventing donors from being misled. See Schaumburg, 444 U.S. at 637, 100 S.Ct. 826; Munson Co., 467 U.S. at 967-68, 104 S.Ct. 2839; Riley, 487 U.S. at 794-95, 108 S.Ct. 2667. Even so, the Court "took care to leave a corridor open for fraud actions to guard the public against false or misleading charitable solicitations." Madigan, 538 U.S. at 617, 123 S.Ct. 1829. Actions targeting fraud fall on the constitutional side of the line because they are aimed at fraud itself rather than "aimed at something else in the hope that it would sweep fraud in during the process." Munson Co., 467 U.S. at 969-70, 104 S.Ct. 2839. Still, "falsity alone may not suffice to bring the [protected] speech outside the First Amendment. The statement must be [at least] a knowing or reckless falsehood." Alvarez, 567 U.S. at 719, 132 S.Ct. 2537. As a result, ***821** any statute targeting false or misleading charitable solicitation must meet "[e]xacting proof requirements" to provide "sufficient breathing room for protected speech," ensuring that a "[f]alse statement alone does not subject a fundraiser to fraud liability." Madigan, 538 U.S. at 620, 123 S.Ct. 1829.

¶ 29 In Madigan, the Illinois AGO brought common law and statutory fraud claims against for-profit professional fundraisers, alleging they engaged in fraudulent charitable solicitation. Madigan, 538 U.S.

at 606-08, 123 S.Ct. 1829. The solicitors moved to dismiss the claims as barred by the First Amendment. Madigan, 538 U.S. at 609, 123 S.Ct. 1829. The court concluded that "a properly tailored fraud action targeting fraudulent representations themselves employs no '[b]road prophylactic rul[e].' " Madigan, 538 U.S. at 619, 123 S.Ct. 1829[10] (quoting Schaumburg, 444 U.S. at 637, 100 S.Ct. 826). The elements of Illinois' fraud action adequately safeguarded against liability for false statements alone because the state had to show by "clear and convincing evidence" that the fundraiser made a "false representation of a material fact" and that the statement was made "with the intent to mislead the listener, and succeeded in doing so." Madigan, 538 U.S. at 620, 123 S.Ct. 1829.

10 Alterations in original.

[33] [34] [35] [36] ¶ 30 Here, the State sued TVI under the CPA. To prevail on a CPA claim, the State must prove only three elements: "(1) [A]n unfair or deceptive act or practice (2) occurring in trade or commerce, and (3) public interest impact." State v. Kaiser, 161 Wash. App. 705, 719, 254 P.3d 850 (2011). The State can establish an unfair or deceptive act by showing (1) per se unfair or deceptive conduct,[11] (2) an act that has the capacity to deceive a substantial portion of the public, or (3) an unfair or deceptive act or practice that is not regulated ***822** by statute but violates the public interest. State v. Mandatory Poster Agency, Inc., 199 Wash. App. 506, 518, 398 P.3d 1271 (2017).

> The CPA does not define "deceptive," but "the implicit understanding is that the actor misrepresented something of material importance." A deceptive act or practice is measured by "the net impression" on a reasonable consumer.

Mandatory Poster Agency, 199 Wash. App. at 519, 398 P.3d 1271[12] (quoting Kaiser, 161 Wash. App. at 719, 254 P.3d 850; Panag v. Farmers Ins. Co. of Wash., 166 Wash.2d 27, 50, 204 P.3d 885 (2009)).

11 Violation of the CSA is per se unfair or deceptive conduct under the CPA. See RCW 19.09.340(1). The State alleged in its complaint that TVI violated the CSA by failing to place disclaimers "at the point of solicitation" between January and October 2015 and by advertising for solicitations using "false, misleading, or deceptive information." The trial court dismissed the disclaimer allegation. But it does not appear from the record that the State argued or that the court ruled on the State's deceptive advertising claim under the CSA.

12 Footnote omitted; internal quotation marks omitted.

[37] ¶ 31 The CPA "significantly differs from traditional common law standards of fraud and misrepresentation." Deegan v. Windermere Real Estate/Ctr.-Isle, Inc., 197 Wash. App. 875, 884, 391 P.3d 582 (2017). The purpose of the CPA is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920; Panag, 166 Wash.2d at 37, 204 P.3d 885. The ****773** statute operates prophylactically in that the plaintiff need not show the speaker intended to deceive or succeeded in doing so, only that the communication "had the capacity to deceive a substantial portion of the public." Panag, 166 Wash.2d at 47, 204 P.3d 885.

¶ 32 Here, unlike the fraud claim in Madigan, the elements of the State's CPA claim lack the exacting proof requirements "critical to First Amendment concerns," and do not give "sufficient breathing room for protected speech." Madigan, 538 U.S. at 617, 620, 123 S.Ct. 1829.

¶ 33 Citing United Seniors Ass'n, Inc. v. Social Security Administration, 423 F.3d 397, 407 (4th Cir. 2005), the State argues that despite Madigan, the government can regulate deception in charitable solicitation without showing that recipients were intentionally or "actually misled." In United Seniors, a nonprofit challenged a federal statute prohibiting ***823** the use of words or symbols associated with the Social Security Administration in advertising or solicitations " 'in [a] manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved ... by the Social Security Administration.' " United Seniors, 423 F.3d at 400 (quoting Social

Security Act, § 1140(a)(1)(A), as amended, 42 U.S.C. § 1320(b)-10(a)(1) (2005)).

¶ 34 The court recognized the statute reached both deceptive and protected speech. United Seniors, 423 F.3d at 406-07. It concluded that the statute's first prong "plainly reaches only deceptive speech by prohibiting uses of the words that a person 'knows or should know would convey' the false impression of governmental endorsement." United Seniors, 423 F.3d at 407 (quoting § 1140(a)(1)(A)). But the second prong could reach some protected speech because it "does not require the speaker to have an intent to deceive." United Seniors, 423 F.3d at 407. Still, the court let both prongs of the statute stand because "any such non-commercial, non-deceptive speech protected by the First Amendment constitutes, at most, a minuscule portion of the speech reached by the statute." United Seniors, 423 F.3d at 407-08.

¶ 35 Unlike the statute in United Seniors, Washington's CPA has no mens rea element and, as applied to TVI, reaches much more than a "miniscule" portion of protected speech.[13] See United Seniors, 423 F.3d at 407.

13 National Taxpayers Union v. United States Social Security Administration, 302 Fed. App'x 115 (3d Cir. 2008), also cited by the State, does not compel a different result. That case interprets the same federal statute as United Seniors and reaches the same result. Nat'l Taxpayers, 302 Fed. App'x at 119-20. Nor does United States v. Corps. for Character, L.C., 116 F. Supp. 3d 1258 (D. Utah 2015), bolster the State's argument. That court determined that fraud is not the only claim that may survive strict scrutiny as applied to protected speech, but did not reach the merits as to any other causes of action to decide constitutional infirmity. Corps. for Character, 116 F. Supp. 3d at 1267-68. Finally, the State cites In re Breast Cancer Prevention Fund, 574 B.R. 193 (Bankr. W.D. Wash. 2017), as an example of a case that "implicitly rejected a First Amendment defense similar to the one raised by Value Village." But that bankruptcy case addresses only a statutory vagueness challenge. See Breast Cancer Prevention, 574 B.R. at 225.

***824** **[38]** **[39]** ¶ 36 Finally, the State argues that even if strict scrutiny demands the CPA meet exacting proof requirements, the " 'Knew or Should Have Known' Standard Imposed by the Trial Court Passes Constitutional Muster." We disagree. While it is true that a trial court may construe an ambiguous law to avoid constitutional infirmity, it is barred by the separation of powers from rewriting the law's plain terms. City v. Willis, 186 Wash.2d 210, 219, 375 P.3d 1056 (2016). Particularly in a First Amendment challenge, " '[w]e will not rewrite a ... law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish [the legislature's] incentive to draft a narrowly tailored law in the first place.' " Willis, 186 Wash.2d at 219-20, 375 P.3d 1056[14] (quoting United States v. Stevens, 559 U.S. 460, 481, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)).

14 Alterations in original; internal quotation marks omitted.

¶ 37 The CPA is not ambiguous and requires no interpretation. The CPA does not include a mens rea element. The trial court ****774** erred in rewriting the law to include a "knew or should have known" mens rea element to avoid constitutional infirmity as applied to TVI's charitable solicitation.

¶ 38 In sum, the CPA as applied to TVI's inextricably intertwined commercial and noncommercial speech does not meet the exacting proof requirements necessary to give protected speech sufficient breathing room under the First Amendment. We reverse and remand for the trial court to dismiss the State's CPA claims.[15]

15 The State asks for attorney fees under RCW 19.86.080 and RAP 18.1. RCW 19.86.080(1) gives the court discretion to award the prevailing party in a CPA action "the costs of said action including a reasonable attorney's fee." Similarly, RAP 18.1(a) authorizes attorney fees for the prevailing party on appeal. Because the State is not the prevailing party, we deny its request.

WE CONCUR:

Mann, C.J.

Appelwick, J.

493 P.3d 763

All Citations

18 Wash.App.2d 805, 493 P.3d 763

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FILED
11/17/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. TVI, INC., d/b/a Value Village, Appellant.	)	80915-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent the State of Washington filed a motion for reconsideration of the opinion filed on August 16, 2021 in the above case, and the respondent TVI Inc. filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

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The Court of Appeals
of the
State of Washington

RICHARD D. JOHNSON,
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CASE #: 80915-6-I
TVI, Inc., Petitioner v. State of Washington, Respondent

Counsel:

The following notation ruling by Commissioner Jennifer Koh of the Court was entered on May 7, 2020, regarding Petitioner's Motion for Discretionary Review:

RULING ON DISCRETIONARY REVIEW
TVI, Inc. v. State of Washington, No. 80915-6-I
May 7, 2020

TVI, Inc. seeks discretionary review of the superior court's November 22, 2019 Findings of Fact and Conclusions of Law entered after a bench trial on its liability for violations of the Consumer Protection Act (CPA) and the Charitable Solicitations Act as alleged by the State. For the reasons discussed below, review is granted.

TVI is a Washington corporation that operates 20 Value Village thrift stores. TVI has contractual relationships with several charitable nonprofit organizations from which it purchases goods donated by the public to sell in its thrift stores. TVI's business model is based on purchasing donated items from its charitable nonprofit partners, selling some of those items in its stores, and recycling or selling other donated items overseas. TVI includes this business model in various types of advertising materials.

After examining TVI's business model three times between 2002 and 2013, the State directed TCI in November 2014 to register as a commercial fundraiser under the Charitable Solicitations Act, chapter 19.09 RCW, which it did. In December 2017, the State filed a complaint alleging violations of the CPA, chapter 19.86 RCW, and the Charitable Solicitations Act. Among its various theories of liability, the State alleged that all of TVI's advertising over a number of years created a deceptive net impression in violation of the CPA. TVI contended that the State's case must be tested by exacting proof requirements because the United States Supreme Court has recognized that charitable solicitations are constitutionally protected speech. Madigan v. Telemarketing Assoc. Inc., 538 U.S. 600, 611-12, 620 n.9, 123 S. Ct. 1829, 155 L.Ed.2d 793 (2003) ("The Court has long cautioned that, to avoid chilling speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected").

After the trial court entered a series of orders relating to summary judgment of some of the State's claims, TVI petitioned this Court for discretionary review in Case No. 79223-7. On March 4, 2019, Commissioner Neel issued a ruling denying review, noting that issues regarding admissibility and persuasiveness of certain evidence remained to be resolved at trial, at which time the trial court would also be in a position to address TVI's claims regarding the application of the First Amendment to the facts of the case.

The trial court then bifurcated the case into two phases: a liability phase and, if necessary, a remedies phase. After a bench trial from September 26, 2019 to October 21, 2019 on TVI's liability for seven discrete causes of action, the trial court entered an 85-page order with 220 numbered findings of fact and 70 numbered conclusions of law on November 22, 2019. Ultimately, the trial court found CPA liability on the State's claims that TVI's business model and marketing had the "capacity" to cause a "deceptive net impression" that TVI was a nonprofit; that purchases in its stores "provided a direct benefit to charities"; and that it paid the Rypien Foundation for donations in 2014 and 2015. TVI filed a notice for discretionary review attaching one written order, that is, the November 22, 2019 order.

TVI seeks discretionary review under RAP 2.3(b)(1) and/or (2), making essentially the same arguments regarding either standard. The gravamen of TVI's motion is that, in this action involving the State's attempt to regulate the content of charitable solicitations protected by the First Amendment, the trial court failed to apply the exacting scrutiny required by federal and state precedent to the facts it found at the trial to determine liability. TVI argues that allowing the trial court to proceed to the remedy phase will be a useless waste because the application of a proper constitutional standard will necessarily lead to a different outcome as to liability.

The parties agree that a charitable solicitation is characterized as a type of speech that is within the protection of the First Amendment and treated differently than mere commercial speech. Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 787-88, 108 S. Ct. 2667, 101 L.Ed.2d 699 (1988). "First Amendment protection does not hinge on the truth of the matter expressed" or "the distinction between 'facts' and 'ideas,'" but on whether the government can "demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from

protection." U.S. v. Alvarez, 617 F.3d 1198, 1203 (2010). For example, "fraudulent charitable solicitation" and the "intentional lie" "is unprotected speech." Madigan, 538 U.S. at 612.

During the telephonic hearing, the parties also acknowledged, consistent with the view of our Supreme Court, that "it is imperative," "in order to preserve the vital right to free speech," "that a court carefully assess statements at issue to determine whether they fall within or without the protection of the First Amendment." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). However, while TVI contended that the trial court did not engage in this analysis, the State claimed that the trial court treated all the various business model documents and advertising materials as protected charitable solicitations covered by the First Amendment.

A review of the trial court's 70 numbered conclusions of law reveals only one paragraph, number 11, with a reference to First Amendment considerations. The trial court stated that it "did not read Madigan" to require "proof of intentional actions designed to deceive," but that the State need only prove that "TVI engaged in practices or acts that they knew or should have known would be deceptive or misleading, or at least have a deceptive net impression." App. 60. Indeed, nothing in the findings or conclusions suggests that the trial court treated TVI's charitable solicitations any differently from pure commercial speech, and instead applied only "typical CPA standards."

Essentially, the State argues, as the trial court apparently concluded, Madigan only referred to fraud because the Illinois prosecutor brought a claim for fraud in that case and that it need not meet exacting proof requirements for regulating constitutionally protected speech because it did not bring an action for fraud. But, the State fails to identify any federal or state authority suggesting that the regular proof requirements of the CPA are sufficient to allow "the 'breathing space' the First Amendment needs to survive." Alvarez, 617 F.3d at 1206. The trial court's method here appears to be exactly what the Madigan decision describes as prohibited: states may not apply a general regulation "in the hope that it would sweep" any constitutionally unprotected speech "in the process" by "impos[ing] on fundraisers an uphill burden to prove their conduct unlawful." 538 U.S. at 619-20.

Moreover, I am not persuaded by the State's claim that TVI's motion for discretionary review is somehow untimely because TVI did not choose to challenge a pre-trial ruling or wait until after the remedies phase of the proceedings.

Discretionary review is warranted here because the trial court apparently treated charitable solicitations, which are entitled to First Amendment protection, the same as purely commercial speech, which is not entitled to the same protections. Requiring the trial court to complete the remedies phase – which has nothing to do with the constitutional questions at issue – before considering the merits of the appeal would likely be useless, especially in light of the exceedingly cautious independent review that is required on appeal in First Amendment cases, Kilburn, 151 Wn.2d at 49-52.

Discretionary review is hereby granted. TVI should file a designation of clerk's papers and statement of arrangements – or a motion for extension of time – on or before May 21, 2020.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

HCL

Cc: Hon. Roger Rogoff

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. TVI, INC., d/b/a VALUE VILLAGE, Petitioner.	)	No. 80915-6-I ORDER DENYING MOTION TO MODIFY

Respondent, State of Washington, filed a motion to modify the commissioner's May 7, 2020 ruling granting discretionary review. The petitioner, TVI, Inc., has filed a response; the respondent has filed a reply. We have considered the motion under RAP 17.7 and have determined that it should be denied. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Mann, C.J.

Dwyer, J.

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NO. 80915-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Petitioner/Defendant,

v.

STATE OF WASHINGTON,

Respondent/Plaintiff.

REPLY BRIEF OF PETITIONER TVI, INC.

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

TVI's opening brief explained the Supreme Court authority holding that speech relating to charitable solicitation is fully protected under the First Amendment and requires the State to satisfy "exacting scrutiny" to impose punishments or restrictions. The superior court below disregarded this constitutional mandate and instead applied ordinary CPA standards to hold TVI liable on the basis that its business model of working with and promoting its charity partners hypothetically could have a "deceptive net impression." And, the court reached this result notwithstanding — and contrary to — its findings, including that TVI extensively explained its model and charity partner relationships and never represented itself as a charity or nonprofit, the State provided no evidence that any consumer was ever deceived, and TVI undisputedly complied with all disclosure requirements of the Charitable Solicitations Act, RCW ch. 19.09.

The State's opposition sidesteps all of this. The State first seeks to rewrite the law, contending TVI's representations featuring its charity partners and promoting donations to them are merely "commercial speech." The Supreme Court has expressly rejected this argument and has held instead that speech about charitable solicitation is fully protected. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). The State is, in effect, asking this Court to overrule four decades of Supreme Court

precedent. And, after six years of pursuing TVI because of its model promoting charities and donations, for the State to claim now that the case has nothing to do with charitable solicitation is absurd.

The State's opposition also says nothing about the superior court's 42 references to "deceptive net impression" and "capacity to deceive," or its conclusions that liability could be imposed without proof of any false statement, or any intent to mislead, or any harm. The State maintains the superior court found that TVI had "actual knowledge" that its marketing was deceptive and this must be taken as "verities on appeal," Opp. at 1, but this is sophistry. The superior court did not find that TVI ever knowingly misled consumers or donors and did not find that TVI's advertising ever deceived anyone. TVI has challenged the superior court's findings and conclusions, and this Court is constitutionally charged to undertake an "independent review" of the entire record to ensure the State's actions punish only unprotected speech. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984); *State v. Kilburn*, 151 Wn.2d 36, 49-51 (2004); Opening Br. at 5-6, 17-24, 45-50.

The State's approach entirely fails to meet its burdens to satisfy "exacting First Amendment scrutiny," *Riley*, 487 U.S. at 789, and meet "[e]xacting proof requirements," *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). The State's obligation is to show

that its actions are the least restrictive means to punish unprotected speech, but the State has no answer how this action could possibly be such a least restrictive means when TVI undisputedly attempted to cooperate with the State and fully comply with all charitable solicitation laws. First Amendment law in this context, like others, requires that if the State seeks to punish speech, it must prove culpability and harm, *i.e.*, that a defendant made knowingly false statements, with intent to mislead, and succeeded in doing so. *Id.* The State's opposition offers nothing to satisfy these requirements either.

The State's case against TVI is constitutionally flawed, as Commissioners Neel and Koh both recognized. This Court should dismiss the State's claims and bring this six-year-long misguided case to a close.

II. ARGUMENT

A. Representations Concerning Charitable Solicitation Are Fully Protected Speech and May Not Be Treated as Commercial Speech Under the First Amendment.

The State devotes half of its opposition to arguments that TVI's representations about its business model and relationships with charities are merely "commercial speech" deserving of little or no protection under the First Amendment. *See* Opp. at 1, 17-30. Even assuming the State can raise these arguments for the first time on appeal, they can be disposed of easily. In a trilogy of cases dating back more than 40 years, the U.S. Supreme

Court has rejected the contention that charitable solicitations may be treated as commercial speech and has "squarely held, on the basis of considerable precedent" that such speech is "fully protected" under the First Amendment. *Riley*, 487 U.S. at 788, 796.

In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the village sought to defend its ordinance by arguing that it was merely seeking to regulate commercial speech of paid fundraisers. The Supreme Court rejected the argument, recognizing that "charitable appeals … 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." *Id.* at 632. Charitable solicitation, the Court concluded, "is characteristically intertwined" with "speech seeking support for particular causes," and so "has not been dealt with in our cases as a variety of purely commercial speech." *Id*. The Court therefore applied heightened scrutiny to strike down the ordinance. *Id.* at 636.

In *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), the Supreme Court reiterated the holding of *Schaumburg* "that charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment." *Id.* at 959. Here too, the Court rejected arguments that restraints on arrangements between

charities and paid fundraisers were mere "economic regulations," instead applying "exacting First Amendment scrutiny" to strike down the state's statute. *Riley*, 487 U.S. at 789 (citing *Munson*, 467 U.S. at 967).

In *Riley*, the Supreme Court again held that "solicitation of charitable contributions is protected speech" and rejected the state's argument that its statute prohibiting commercial fundraisers from retaining "unreasonable" fees and compelling disclosures of fee arrangements in ads concerned "only commercial speech." 487 U.S. at 789, 795. Because charitable solicitations are "intertwined with informative and perhaps persuasive speech," they may not be treated as "merely commercial" despite that a fundraiser may have a financial motivation for its efforts. *Id.* at 795-96. A "lodestar[] in deciding what level of scrutiny to apply … must be the nature of the speech taken as a whole …." *Id.* at 796. "This is the teaching of *Schaumburg* and *Munson*, in which we refused to separate the component parts of charitable solicitations from the fully protected whole. … Therefore, we apply our test for fully protected expression." *Id.*

Following *Schaumburg*, *Munson*, and *Riley*, courts have consistently held that representations relating to charitable solicitation are fully protected speech and may not be treated as commercial speech. Indeed, the cases rejecting the State's argument are so numerous that only a sampling can be provided here. *See, e.g.*, *Nat'l Fed'n of the Blind of Colo.,*

Inc. v. Norton, 981 F. Supp. 1371, 1373 (D. Colo. 1997) ("[I]n a trilogy of cases, the Supreme Court has held that solicitation of charitable contributions constitutes fully protected speech that may be regulated only when narrowly tailored to further a compelling state interest.").[1] More specifically, courts have held that signage promoting donations of used goods to charities is fully protected charitable solicitation, not commercial speech. *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 212-13 (5th Cir. 2011) ("[I]nclusion of the name of a charity on a donation box communicates information [and] implicitly advocate[s] for that charity's

[1] *See also Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 663-64 (E.D. La. 2017) ("not only does charitable solicitation … involve 'interests protected by the First Amendment's guarantee of freedom of speech,' but also that protection goes beyond the constitutional protections accorded to 'purely commercial speech'" (quoting *Schaumburg*, 444 U.S. at 629, 632)); *Tex. State Troopers Ass'n, Inc. v. Morales*, 10 F. Supp. 2d 628, 632 (N.D. Tex. 1998) ("The Supreme Court has consistently held that charitable telephone solicitation is protected under the First Amendment to a greater extent than commercial speech" and state regulations "are subject to strict scrutiny"); *Am. Ass'n of State Troopers, Inc. v. Preate*, 825 F. Supp. 1228, 1232 (M.D. Pa. 1993) ("Charitable solicitation involves a variety of speech interests protected by the First Amendment; therefore, it is not purely 'commercial speech,' and is subject to traditional 'strict scrutiny' under the First Amendment."); *accord Henry v. City of Cincinnati*, 2005 WL 1198814, at *6 (S.D. Ohio Apr. 28, 2005); *Gospel Missions of Am. v. Bennett*, 951 F. Supp. 1429, 1440 (C.D. Cal. 1997); *Telco Commc'ns, Inc. v. Barry*, 731 F. Supp. 670, 676-77 (D.N.J. 1990); *Ind. Voluntary Firemen's Ass'n, Inc. v. Pearson*, 700 F. Supp. 421, 437 (S.D. Ind. 1988); *Heritage Pub. Co. v. Fishman*, 634 F. Supp. 1489, 1498 (D. Minn. 1986); *Pa. Pub. Interest Coal. v. York Twp.*, 569 F. Supp. 1398, 1401 n.3 (M.D. Pa. 1983); *Optimist Club of N. Raleigh, N.C. v. Riley*, 563 F. Supp. 847, 849 (E.D.N.C. 1982); *People v. French*, 762 P.2d 1369, 1372-75 (Colo. 1988); *League of Mass., Inc. v. Attorney Gen.*, 464 N.E.2d 55, 59 (Mass. 1984).

views, ideas, goals, causes, and values." "[W]e reject Texas's characterization of the speech … as mere commercial speech.").[2]

The State says nothing about *Schaumburg* or *Munson* or any of the dozens of cases rejecting the State's argument. Instead, the State misreads *Riley* to say the opposite of what it holds, asserting the Court *should* parse TVI's ads and representations to determine whether "commercial and non-commercial messages" they convey are sufficiently, "inextricably" intertwined. Opp. at 25. Here, the State relies on *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). *See* Opp. at 26. But that case did not concern charitable solicitations at all. At issue was a university rule that prohibited Tupperware parties in dorms. The Supreme Court in *Fox* recognized its prior holdings that "conducting fundraising for charitable organizations" is "fully protected speech," explaining that, in *Riley*, the state's efforts to compel fundraiser disclosures were "inextricably intertwined with otherwise fully protected speech." 492 U.S. at 474. The Court concluded that selling Tupperware is not the same as charitable solicitation and is instead a commercial transaction even if participants might also discuss issues like home economics. *Id*.

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[2] *Accord Planet Aid v. City of St. Johns, MI*, 782 F.3d 318, 326 (6th Cir. 2015) ("speech regarding charitable giving and solicitation is entitled to strong constitutional protection, and the fact that such speech may take the form of a donation bin does not reduce the level of its protection."); *Linc-Drop, Inc. v. City of Lincoln*, 996 F. Supp. 2d 845, 855 (D. Neb. 2014).

Fox did not alter the holdings of *Schaumburg*, *Munson*, and *Riley* that representations concerning charitable solicitation are fully protected speech subject to exacting scrutiny. No reported case has said or even suggested that *Fox* or *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), or any of the Supreme Court's separate cases about commercial speech protections have anything to do with the established principle that charitable solicitation *may not be treated as commercial speech*.[3] No authority indicates that a court should dissect representations about charities and donations to assess whether they have "hallmarks of commercial speech" or sufficiently "intertwine" charitable messages. *See* Opp. at 23-28. Courts may not "separate the component parts of charitable solicitations from the fully protected whole." *Riley*, 487 U.S. at 796.

Moreover, for the State to argue now that this case does *not* concern charitable solicitation is disingenuous. *See* Opp. at 25-26. The whole focus of the State's claims is that TVI should be liable for its relationships with and representations about its charity partners and donations to them.

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[3] *Bolger* also did not concern charitable solicitation in any way (it concerned ads for condoms), and the Supreme Court did not cite or mention *Schaumburg*, *Munson*, or *Riley* at all. *Hunt v. City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011), which the State also cites, Opp. at 23, is equally inapposite. The case had nothing to do with charitable solicitation; it concerned sidewalk vendors selling shea butter and incense and their challenge to an ordinance as an unreasonable time, place, and manner restriction.

The State began its pursuit of TVI in 2014 by demanding that it register as a commercial fundraiser soliciting donations to charities. CP 1085-86 [F45-51]. The State cannot plausibly contend now that TVI's advertising does not include central messaging seeking public support for its charity partners. At trial TVI presented scores of signs, brochures, and other materials that included TVI's explanations of its model of working with charities, information about the charities' missions, and messaging about donating to the charities. *See, e.g.*, Exs. 2037, 2051, 2103, 2670, 2690; RP 1403. Based on testimony from the charity partners, the superior court found "TVI's promotion of them has 'significant' and 'extremely valuable' benefit … in increasing awareness about the organizations and their community missions." CP 1111 [F132]; *see also* RP 1448-49, 1486-90.

TVI's actions in working with and promoting donations to charity partners falls squarely within the category of charitable solicitation that is fully protected speech. *See Munson*, 467 U.S. at 960 n.8 (charitable solicitation includes requests for donations of money or property, ads seeking donations, or a business using the name of a charitable organization to encourage patronage); *Abbott*, 647 F.3d at 212-13 (signage promoting used goods donations to charities fully protected); *Planet Aid*, 782 F.3d at 326 (same). The State is not challenging advertising about sales or shopping

Value Village stores for Halloween costumes; it attacked TVI *because* it partners with and promotes donations to charities.

The State effectively asks this Court to disregard or overrule 40 years' worth of Supreme Court precedent. But the issue is not open to doubt or debate. Speech relating to charitable solicitations *is* fully protected. The speech at issue in this case must be analyzed under exacting scrutiny and may not be treated as mere commercial speech.

B. The State Ignores the Requirements of First Amendment Exacting Scrutiny.

Under exacting scrutiny, state restrictions are presumed invalid, and the State's burden to overcome this presumption is high. *Riley*, 487 U.S. at 789; *Munson*, 467 U.S. at 967; *Schaumburg*, 444 U.S. at 632; *State ex rel. Pub. Disclosure Comm'n v. 119 No! Comm.*, 135 Wn.2d 618, 624 (1998). The State must prove that its actions are (1) necessary for a compelling state purpose, (2) narrowly tailored to target only unprotected speech, and (3) the approach that inhibits speech rights in the least restrictive way. *See Riley*, 487 U.S. at 798, 800; *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000); Opening Br. at 28-33.

The State does no more than pay lip service to the requisite analysis and elements of exacting scrutiny. The State contends "the parties agree that the State has an interest in combatting deception," Opp. at 32, but like much of the State's arguments, this is not what the record shows. TVI has

acknowledged the State might have "a legitimate interest in combatting fraud" by way of an action "under *Madigan* [that] satisfies First Amendment concerns," *i.e.*, on proof of false representations, intent to deceive, and harm. *See* CP 281 (TVI prior briefing, which the State misquotes); *see also Riley*, 487 U.S. at 792 (state has "a sufficiently substantial interest to justify a narrowly tailored regulation" "in protecting charities (and the public) from *fraud*" (emphasis added)). But the State cannot create a compelling interest just by saying its claims are about hypothetical deception or "capacity to deceive." This argument, too, is foreclosed by Supreme Court precedent which the State does not address, specifically *Ibanez v. Florida Dept. of Bus. & Prof. Regulation*, 512 U.S. 136 (1994): "[W]e cannot allow rote invocation of the words 'potentially misleading' to supplant the [state's] burden to demonstrate that the harms it recites are real …." *Id.* at 145-46 (internal quotation omitted).[4]

As for the other elements of exacting scrutiny, the State offers nothing but its say-so that its lawsuit is "narrowly tailored." Opp. at 33. As the superior court found, TVI "has never identified itself as a nonprofit company or a charity, but has said the opposite, that it is a 'for-profit thrift store chain.'" CP 1124 [F170]; *see also* CP 1081-82 [F31]. And if the

[4] *Ibanez* also demonstrates that the State's claims would fail even under a commercial speech analysis. *See* Opening Br. at 43.

State felt TVI's numerous disclosures that it acts as "for-profit commercial fund-raiser" were inadequate, the straightforward way to address this would have been for the State to discuss additional or different disclosures. *See* Opening Br. at 10-12, 30-32. It is undisputed that TVI sought to comply with all disclosure requirements and repeatedly asked the State to identify any concerns. CP 1152 [C59-60]; CP 1088-89 [F59-65]. But the State refused to respond. *See* CP 1089 [F63] (acknowledging the State's "non-communication" conflicts with the CSA's purpose). Being responsive to TVI's efforts to cooperate would have been an approach far less threatening of speech rights than waiting and suing for millions of dollars of penalties years later. Again, the State has no response.

TVI explained before that the State's action also cannot survive exacting scrutiny because it is undisputed that TVI fully complied with all provisions of the CSA — making all requisite disclosures in signs and ads, registering with the Secretary of State, and submitting financial information to be made publicly available. Opening Br. at 31; *see* CP 1090 [F67]. In its opposition, the State admits again that TVI complied with all CSA requirements, Opp. at 34, and does not contest that the Supreme Court has recognized that laws such as the CSA are "the constitutionally permissible means for states to regulate commercial fundraisers" while respecting protections for charitable solicitations. CP 1085 [F45]; *see Riley*, 487 U.S.

at 800; *Schaumburg*, 444 U.S. at 638. The State's only response is that "full compliance with the CSA" is no defense to claims of possible "deceptive net impression." Opp. at 34.

It is hard to imagine a more threatening approach to protected speech. A fundraiser does everything the law requires to provide transparent information, but the State may still impose penalties — not for fraud or false representations, but for alleged implicit "deceptive net impressions." Yet, preventing misimpressions is exactly what the CSA addresses. *See* RCW 19.09.010. If full compliance with the state's charitable solicitation laws is no defense to liability and penalties, then any fundraiser or business working with charities is at risk to the AGO's claims and vicissitudes.

The point of exacting scrutiny is to ensure the State's actions extend no further than necessary to address unprotected speech and demonstrable public harm. "[G]overnment regulation of speech must be measured in minimums, not maximums." *Riley*, 487 U.S. at 790. The State's obligation is to establish that "more benign and narrowly tailored options are [not] available." *Id.* at 800. The superior court entirely failed to address this issue and the State does the same in its opposition.

C. The State Misunderstands the Exacting Proof Requirements Under *Madigan*.

After devoting many pages trying to avoid applicable First Amendment scrutiny, the State then contends its claims do satisfy the

"exacting proof requirements" of *Madigan*. Opp. at 34. But, like its other arguments, the State misreads Supreme Court precedent and ignores all of the cases that have explained what these requirements actually are.

To recap, in *Madigan* the Supreme Court held that a state AG could pursue "a properly tailored fraud action" against a charitable fundraiser, but is constrained by First Amendment rules in doing so. 538 U.S. at 619. Because charitable solicitation is fully protected speech, the State must satisfy "exacting proof requirements," meaning it bears the "full burden of proof" to show a "defendant made a false representation of a material fact knowing that the representation was false … with the intent to mislead the listener, and succeeded in doing so." *Id.* at 620. These requirements are based on core principles readily understood in First Amendment law, that the government may not restrict or punish speech absent proof of culpability and harm. *Id.* (referencing the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), and *Bose Corp.*, 466 U.S. at 511 (the First Amendment requires proof of "culpability … to eliminate the risk of undue self-censorship")); *see* Opening Br. at 42.

The State's opposition does not address the Supreme Court's analysis in *Madigan* or the antecedents exemplifying the constitutional mandate of heightened standards to ensure sufficient "breathing room" for protected speech. *See* 538 U.S. at 620. The State claims the Court in

Madigan was "careful not to define explicitly" what it meant by "exacting" proof and allowed that "*some* protected speech may be targeted" by the State so long as the burden of proof is "exacting" in some undefined way. Opp. at 34 (emphasis in original). The State is plainly wrong. *Madigan* explained the requirements for "exacting proof" consistent with established standards of First Amendment scrutiny. The Supreme Court has never held or suggested that the State permissibly may target "*some* protected speech"— or *any* protected speech, for that matter.

As before, the State's response just consists of quoting the superior court's ruling and saying the court "carefully considered" *Madigan* and so should be upheld. Opp. at 36-37. But, like the superior court, the State says that *Madigan* requires nothing except that the State must prove its claims, that there be a right of appeal, and that the court may impose liability if it concludes a defendant "knew or should have known" of a "capacity to deceive consumers." *Id.* at 35. These are not heightened requirements at all; they merely restate the traditional *de minimis* standards for CPA claims. *See* Opening Br. at 37-41.

In the superior court — and in the opening brief — TVI discussed numerous decisions explaining that the exacting proof requirements of *Madigan* are that the State's "high burden" is to prove a defendant made material false statements, knowingly with intent to mislead, and which in

fact did mislead consumers. *United States v. Lyons*, 472 F.3d 1055, 1065-66 (9th Cir. 2007); *United States v. Alvarez*, 617 F.3d 1198, 1212 (9th Cir. 2010), *aff'd*, 567 U.S. 709 (2012); *Linc-Drop*, 996 F. Supp. 2d at 857; *Urzua v. Nat'l Veterans Servs. Fund, Inc.*, 2014 WL 12160751, at *3-4 (S.D. Cal. Jan. 28, 2014); *see* Opening Br. at 35-36. As the Supreme Court itself has said of *Madigan*, it requires at a minimum proof of "a knowing or reckless falsehood." *Alvarez*, 567 U.S. at 719. The superior court reached its result by ignoring these cases; the State does the same now.

In its opposition, the State notes cases it maintains "implicitly rejected a First Amendment defense similar to the one raised by [TVI]." Opp. at 41.[5] The State cites two cases in which defendants asserted challenges to section 1140 of the Social Security Act, 42 U.S.C. § 1320b-10, which prohibits references to "Social Security" and similar terms in advertising to convey a false impression that an item is endorsed or authorized by the Social Security Administration. *United Seniors Ass'n, Inc. v. Soc. Sec. Admin.*, 423 F.3d 397, 400 (4th Cir. 2005); *Nat'l Taxpayers Union v. United States Soc. Sec. Admin.*, 302 F. App'x 115, 118 (3d Cir. 2008); Opp. at 37-40. Both cases involved mailings by private organizations emblazoned with references indicating they came from the

[5] The State chides TVI for ignoring these cases, but the State has repeatedly ignored the cases interpreting and applying *Madigan* that TVI has now cited five times in the court below and in previous briefing in this Court.

Social Security Administration. *United Seniors Ass'n*, 423 F.3d at 400, 406 (envelopes labeled "SOCIAL SECURITY ALERT"); *Nat'l Taxpayers Union*, 302 F. App'x at 117 ("Official National Survey on Social Security" "commissioned … for the Social Security Administration"). ALJs in the cases respectively found that the organizations "intended to mislead recipients into thinking that the SSA authorized" the mailings, *United Seniors Ass'n*, 423 F.3d at 404, and "knew that the language used … conveyed the false impression that the SSA authorized the mailing," *Nat'l Taxpayers Union*, 302 F. App'x at 117.

The State mentions none of this, but instead cites portions of the decisions rejecting facial challenges seeking to strike down section 1140 as a whole on grounds of vagueness and overbreadth.[6] The courts rejected these challenges, holding that the statute set forth a sufficient requirement for scienter by specifying 19 proscribed terms, the use of which would demonstrate knowing intent to mislead. *See United Seniors Ass'n*, 423 F.3d at 407 ("[defendant] has not suggested a single instance in which a use of one of the [19 terms] would not "constitute[e] a use that a person knows

[6] Like its misunderstanding of other First Amendment principles, the State also apparently does not appreciate that facial overbreadth challenges are disfavored and require a showing that a statute "reaches a substantial amount of constitutionally protected conduct." *United Seniors Ass'n*, 423 F.3d at 406 (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982)).

or should know would convey a false impression of governmental endorsement" (internal quotation omitted)); *see also Nat'l Taxpayers Union*, 302 F. App'x at 119 (noting the defendant disavowed its First Amendment argument). These cases contradict the State's argument, as they illustrate that the First Amendment requires proof of scienter for punishment of protected speech. In any event, neither case addresses the issue presented here, *i.e.*, whether the State can impose liability for protected charitable solicitations under *Madigan* when there are no false statements, knowing deception, or harm.

The State next offers an out-of-context quote from *United States v. Corporations for Character, L.C.*, 116 F. Supp. 3d 1258 (D. Utah 2015), in which the court stated that claims by the FTC might "pass constitutional muster" if they satisfied strict scrutiny, but declined to address the issue because the defendants had not "presented the applicable constitutional analysis." *Id.* at 1267-68. TVI obviously has presented the analysis here.

The State claims *In re Breast Cancer Prevention Fund*, 574 B.R. 193 (2017), "implicitly rejected a First Amendment defense similar to the one raised by TVI." Opp. at 41. In fact, the issue in that case was whether a provision of the CSA prohibiting a commercial fundraiser from representing itself as a volunteer or employee of a charity was vague and overbroad. The court held that it was not, 574 B.R. at 225, a ruling that has nothing to

do with TVI's First Amendment challenges in this case.

Finally, the State cites *People v. Coalition Against Breast Cancer, Inc.*, 134 A.D.3d 1081 (N.Y. App. Div. 2015), which upheld a trial court's summary judgment that the defendant ran a "sham charity," through "fraudulent" solicitations. *Id.* at 1081-82. The court's one-sentence mention that "[s]tates may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used," *id.* at 1082 (quoting *Madigan*, 538 U.S. at 624), provides no support for the State's position; it underscores *Madigan*'s proof requirements for a "properly tailored fraud action." 538 U.S. at 619.

The State can cite to no authority to avoid First Amendment exacting scrutiny and proof requirements, as there is none.

D. The State Presented No Evidence Sufficient to Satisfy Exacting Proof Requirements.

The superior court's ruling disregarded all of the exacting proof requirements of *Madigan* and instead was based, throughout, on ordinary CPA standards. *See* Opening Br. at 17-23, 38-41.[7] Indeed, the superior

[7] The court held that the State did not have to prove any false statements, CP 1137-38 [C4] (CPA permits liability for "truthful communication[s]"); or that TVI made knowing misrepresentations, CP 1140 [C13-14] (liability can be based on "less than actual knowledge"); or that TVI had any intent to mislead, CP 1140 [C12] ("standards do not require proof of intent"); or that anyone was ever actually deceived or harmed, CP 1136-37 [C2] ("the State is not required to prove causation or injury" under the CPA).

court mentioned "capacity to deceive" or "deceptive net impressions" as the governing standards *42 times*. Opening Br. at 21; *see also* Commissioner Koh's Ruling (Dkt. 12), at 3 ("[N]othing in the findings and conclusions suggests that the trial court treated TVI's charitable solicitations any differently from pure commercial speech, and instead applied only 'typical CPA standards.'"). Again, the State simply does not respond.

The State also says next to nothing about all the evidence at trial that TVI took pains to explain its model and charity partner relationships in hundreds of signs and ads and provided countless disclosures that it is a for-profit company soliciting donations to its charity partners. *See* Opening Br. at 2, 8-10, 17-19. The State also does not mention the uniform testimony that TVI at all times sought to be truthful with consumers, or the State's admission that it had *no evidence* of any intent to mislead. *See* Ex. 2920 at 203-7, 217-18; Opening Br. at 19, 41, 48-49. The State merely parrots the superior court's view that TVI's model and marketing could have a "capacity to deceive" because TVI "promot[ed] its relationship with charities," and members of the public might not take the time to read the actual ads and signs to understand the "business model or the fact that TVI itself is a for-profit corporation." Opp. at 7, 9-10 (quoting CP 1127, 1143 [F183, C21]). In short, the State's position is that TVI can be held liable *despite* the veracity, extensiveness, candor, and intent of its actual

representations, so long as a judge might be persuaded that promoting charities could have a "deceptive net impression" for individuals who paid no attention to the representations. The First Amendment forbids this tack.

E. The State Misrepresents the Record to Claim It Proved "Actual Knowledge of Deception."

In its opposition the State repeatedly claims that it "proved" and the court below found that TVI had "actual knowledge" that its "acts and practices" deceived consumers. Opp. at 1-3, 14-16, 19-20, 42-44. The State mischaracterizes the record, which contains no evidence of any consumer or donor ever deceived by any ads used by TVI, and certainly no evidence TVI ever acted to knowingly deceive anyone.

The State seeks to foreclose review of the record by claiming the superior court's findings about "*actual* knowledge" are "verities on appeal" because, the State asserts, TVI "has not challenged the sufficiency of the evidence." Opp. at 1 (emphasis in original); *see also id.* at 19, 22. This argument is baseless. As the opening brief made clear, TVI challenges the superior court's findings and conclusions as a whole under this Court's mandate to conduct an "independent examination of the whole record" in a First Amendment case such as this. *See* Opening Br. at 24-25, 45-50; *Bose*, 466 U.S. at 508-10; *Kilburn*, 151 Wn.2d at 51. TVI has argued — and showed — that the superior court's findings and conclusions provide no permissible basis for liability, including specifically that there is no

evidence TVI ever sought to deceive consumers or that anyone ever was deceived. *See* Opening Br. at 2-3, 8-10, 12, 17-19, 23, 40-41, 47-49.

The evidence the State points to as supposedly showing TVI had "actual knowledge" its advertising was misleading, Opp. at 15-16, actually shows no such thing. The State cites:

- An April 2014 marketing research report that tested potential "positioning statements" with small focus groups made up primarily of individuals unfamiliar with Savers or Value Village stores. CP 1120 [F158]. The State latched on to one bullet point in the report referencing "[s]ome confusion" in response to a mock statement written by the marketer. Ex. 25 at 14. But this statement was never used and was contrary to TVI's actual advertising. CP 1120-21 [F160]; RP 729-30, 732, 1006.

- A May 2014 "Brand Strategy Recommendation" that merely referenced the April 2014 report and observed that "[t]he model is confusing" and so should be explained, Ex. 94 at 37, which is what TVI has done, extensively, *see, e.g.*, CP 1096 [F89].[8]

- A 2014 request for proposal to ad agencies which acknowledged that "Savers is a for profit company in a mostly not-for-profit world," a fact that "has created confusion among some shoppers and donors." Ex. 1071 at 6. The RFP went on to say that "perceptions of Savers improve dramatically once there is awareness of how Savers' model works," *id.*, and TVI's marketing director testified that this statement was "pointing out the critical nature" of correctly explaining the business model in advertising, RP 639. Again, this is what TVI consistently has done.

- A January 2013 letter to the AGO from an individual who acknowledged that TVI was not a charity or a nonprofit but felt

[8] The State says that multiple market research studies found "TVI's advertising was confusing," Opp. at 15, but actually cites multiple references to the one April 2014 focus group report. The superior court repeated this mischaracterization, *see* CP 1145 [C28], even though it was contradicted by the court's findings, *see* CP 1122 [F164-65].

others might have this impression and so urged the State to require that TVI register as a commercial fundraiser under the CSA. Ex. 726 at 4. The State's position at the time was that TVI was not subject to the CSA, *see* CP 1084-86 [F42-50], and after TVI responded to the letter by explaining its model, Ex. 726 at 5-15, the State took no action except to close its file.

- Testimony of TVI's former CEO, Ken Alterman, in which he stated that customers would know from being charged sales tax that Value Village stores are not nonprofit. RP 1004-5.

None of this shows that TVI had "actual knowledge" that its advertising was deceptive, much less that it was meant to be deceptive. This is evidence reflecting that consumers could misunderstand TVI's business model, given the company's unique status as a for-profit thrift store chain in an industry dominated by far larger nonprofit competitors like Goodwill. The superior court recognized this as well. *See* CP 1074 [F3], 1078 [F15], 1094 [F85] (TVI "is small as compared with the 3,000-plus stores across the country operated by Goodwill, the Salvation Army, and St. Vincent de Paul" and "[a]side from any advertising, [TVI's] business model can make it appear to the public as a non-profit.").

Realizing that consumers might be confused about TVI's business model does not equate to knowingly making misrepresentations to deceive consumers. As the record shows, TVI took extensive efforts to fully explain the model and that it is a for-profit company working with and seeking donations to its charity partners. Opening Br. at 2, 8-10, 17-19, 23, 40, 47; CP 1080-82, 1093, 1095-96, 1105-7, 1110, 1124 [F25, 31, 83, 88-

89, 118, 121-23, 128, 169-71]; RP 1009. TVI's efforts to accurately explain its model cannot conceivably be deemed proof that it made knowing misrepresentations.

The State attempts to muddle the exacting proof it must show in this context of protected speech. *See, e.g.*, Opp. at 1-3, 14, 19-20, 42-43 (allusions to "constructive knowledge" or what the State claims TVI "should have known" or "actual knowledge of deception" with no indication of what is the supposed "deception"). But the State's assertions about TVI's "actual knowledge" — referring to TVI's awareness that its business model might be confusing and its efforts to explain the model to avoid confusion — is not remotely close to proof of "knowing or reckless falsehood[s]" that the First Amendment requires. *Alvarez*, 567 U.S. at 719.

F. The State's Claims Directly Attack Protected Speech Concerning Charitable Solicitation.

At bottom, the State's opposition underscores that its case is an attack on TVI's model of working with and promoting donations to charities. The State argues that TVI was not *required* to promote its charity partners and could have taken a different approach to "advertise its thrift goods for sale." Opp. at 26; *see also id.* at 27 ("Value Village *chose* to promote charities …." (emphasis in original)). The State says TVI should be liable because it does not "donate" money to charities but instead helps support them by purchasing donated goods. *Id.* at 27. In this regard, the

State mimics the superior court. *See* CP 1145-46 [C31] ("Nobody required TVI to focus on its business model as part of its marketing" and it could have limited its advertising to low prices or "finding a great bargain").

This argument again contradicts the Supreme Court's charitable solicitation precedents. The State may not dictate how TVI works with charities. *Riley*, 487 U.S. at 792 (a state's efforts to dictate terms of a fundraising arrangement are "constitutionally invalid"). Businesses that choose to work with and encourage donations to charities are fully entitled to do so. And, as the superior court expressly found, TVI's model is "legal, thoughtful, and successful," has "benefitted all involved," and provides millions in funding that "support[s] the incredible work" its charity partners do in the community. CP 1076-77 [F7, 10, 12]. This is what the Supreme Court's charitable solicitation cases expressly allow and protect.

III. CONCLUSION

The State's opposition disregards and misunderstands fundamental First Amendment precedent. It offers no basis to uphold the superior court's incorrect rulings. Applying independent review, this Court should reverse and direct entry of judgment for TVI.[9]

[9] The State's request for attorneys' fees, Opp. at 46, is premature and inappropriate. The superior court expressly deferred consideration of fees, CP 1155 [C70], and rejected the majority of the State's claims. This Court should leave any fee award (to either party) to the superior court in the first instance. *See* RAP 18.1(i).

RESPECTFULLY SUBMITTED this 29th day of January, 2021.

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NO. 80915-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Petitioner/Defendant,

v.

STATE OF WASHINGTON,

Respondent/Plaintiff.

RESPONDENT'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

The State pleaded and proved below that for over a decade, Appellant TVI, Inc., d/b/a Value Village (TVI), deceptively advertised that it is a non-profit, charitable entity, and that purchases made in its stores benefit charity, in violation of the Consumer Protection Act, RCW 19.86 (CPA).[1] In addition to the typical elements of an Attorney General CPA enforcement action established by statute and case law, the State proved at trial that TVI knew or should have known its advertising was deceptive. The trial court, having found that the advertising at issue constitutes charitable solicitation, imposed this additional knowledge element—a mens rea standard—in order to satisfy the First Amendment.

During years of litigation with extensive motions practice, neither TVI nor the State raised any issue below, or on appeal,

[1] The State also proved that TVI violated the CPA by creating the deceptive net impression that all donations made at certain of its Spokane area stores benefitted the Rypien Foundation. In reality, TVI paid the Rypien Foundation a flat fee for the use of its name and likeness at its stores.

concerning the trial court's authority to impose a mens rea standard on the State, and the propriety of its doing so. Indeed, TVI *requested* that the trial court do so, and the trial court's ruling imposing a mens rea element on the State's burden of proof was entered in response to TVI's motion, captioned "Motion for Pre-Trial Determination of First Amendment Standards." The parties' dispute concerns what standard the trial court should impose—*i.e.*, what standard satisfies the First Amendment—not whether the trial court was within its authority to impose a standard at all.

This Court, however, held that the trial court erred not because it selected the wrong standard, but because it lacked authority to "rewrite" the CPA, in other words, that the imposition of *any* mens rea element by the trial court was error because no such standard appears in the text of the Act itself. Slip Opinion (Opinion) (August 16, 2021) at 18-19. Because the Court raised this issue on its own initiative for the first time in its written ruling, this Court has not had the benefit of receiving

briefing on the question of whether, and under what circumstances, it is proper for a trial court to construe a statute to contain a mens rea element that is not provided for in the statutory language. The State, accordingly, requests that this Court hear the State's argument on this issue, and reconsider its ruling.

The Court should reconsider for the following reasons:

First, the trial court properly interpreted the CPA as including a meaningful mens rea requirement in the context of charitable solicitations—and grounded its ruling in the language of the CPA itself, specifically the prohibition against unfair or deceptive acts under RCW 19.86.020. This Court's Opinion was silent on this aspect of the trial court's ruling.

Second, the trial court's ruling is in accord with decades of well-established case law holding that courts have an obligation to interpret statutes in such a way that they will be constitutional, and specifically, that a mens rea standard may be

imputed[2]. Application of this line of cases is particularly warranted in the context of the CPA, which, per the Act itself, "shall be liberally construed that its beneficial purposes may be served." RCW 19.86.920.

Third, the practical effect of the Court's ruling is to call into question the Attorney General's authority to regulate charities and charitable trusts under existing statutes, not just the CPA—authority that has been entrusted to the Attorney General, by the Legislature, for decades. The Court's ruling, if not reconsidered, will create a chilling effect on the State's ability to police deceptive charitable solicitation, leaving the well-intentioned, donating public unprotected and vulnerable.

The State therefore respectfully requests that this Court reconsider its Opinion and affirm the trial court ruling that TVI violated the CPA by creating the deceptive net impression that

[2] In its Order on Motions in Limine, the trial court declared, "Also, this Court is required to interpret statutes in such a way that they will be constitutional." CP 1013.

(1) TVI was itself a charity or nonprofit, (2) that in-store purchases benefitted charity, and (3) that all donations made a certain stores benefitted the Rypien Foundation.[3]

II. IDENTITY OF MOVING PARTY

Respondent and plaintiff below is the State of Washington (State).

III. STATEMENT OF FACTS PERTINENT TO MOTION

In the lead-up to trial below, Appellant TVI filed a "Motion for Pre-Trial Determination of First Amendment Standards," in which it requested "that before trial begins the Court address the parties' positions concerning the applicability of First Amendment principles in this case and decide the standards that govern the case." CP 912.

[3] The State also maintains that this Court erred in determining that all of TVI's commercial speech is inextricably intertwined with protected charitable speech, and thus, subject to strict scrutiny, but does not seek reconsideration on this issue. The State reserves the right, however, to seek discretionary review on this issue.

The trial court ruled, on TVI's motion, that the State would be required to show that TVI knew or should have known that its advertising was deceptive, and that imposition of this *mens rea* standard satisfied the First Amendment. CP 1014. The trial court held that, in the context of charitable solicitations, the CPA "must include a meaningful mens rea requirement." *Id.* Noting that courts are "required to interpret statutes in such a way that they will be constitutional," the trial court interpreted the CPA as including a mens rea in the context of charitable solicitations, as follows:

> When the statute requires the State to prove that TVI engaged in unfair or deceptive acts or practices in the conduct of any trade or commerce[,]" RCW 19.86.020, as interpreted by caselaw, the State must prove an unfair or deceptive act or practice occurring in trade or commerce which has a public interest impact. *State v. Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 518 (2017). A deceptive act occurs when such act is likely to mislead a reasonable consumer when the actor misrepresented something of material importance. *Id.*, at 519. According to Black's Law Dictionary, misrepresentation is the act or an instance of making a false or misleading assertion about something, usually with the intent to deceive; an incorrect,

> unfair, or false statement; an assertion that does not accord with the facts. – Also termed false representation; (redundantly) false misrepresentation. Black's Law Dictionary (11th ed. 2019).
>
> This Court finds that the common usage of the word "misrepresent" combined with the First Amendment requirements of speech related to charitable solicitation requires the State (in cases involving charitable fundraising) to prove that the Defendant engaged in practices or acts that they knew or should have known would be deceptive or misleading, or at least leave a deceptive net impression. Inclusion of this mens rea requirement satisfies the Madigan analysis. The Court will require it.

CP 1014.

IV. ARGUMENT

A. The Trial Court Properly Construed the Consumer Protection Act to Avoid Constitutional Infirmity

This Court held that the trial court erred "in rewriting" the CPA "to include a 'knew or should have known' mens rea element to avoid constitutional infirmity" as applied to charitable solicitation. Opinion at 19. The trial court, however, did not rewrite the CPA. Rather, the trial court *interpreted* the CPA to

include a mens rea requirement in the context of charitable solicitations.

Specifically, the trial court reasoned as follows: the statutory term "deceptive" under RCW 19.86.020 ("unfair or deceptive act or practice") has previously been interpreted by this Court to mean "misrepresentation" that is likely to mislead a reasonable consumer, and the common usage of the word misrepresentation is flexible enough to include a mens rea component. CP 1014. Combining that common usage with the First Amendment requirements of speech related to charitable solicitations, the trial court thus held, "requires the State (in cases involving charitable fundraising) to prove that the Defendant engaged in practices or acts that they knew or should have known would be deceptive or misleading." *Id.*

This Court did not address this aspect of the trial court's ruling below, simply holding that because "[t]he CPA does not require a mens rea element," the trial court erred in "rewriting the law." Opinion at 18. But this Court overlooked the principle

that courts may impute a mens rea element, where no such standard is set forth in statutory language, in order to avoid constitutional infirmity.

The longstanding rule is that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 1397, 99 L. Ed. 2d 645 (1988). Our own State Supreme Court has further reinforced this rule. *See Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953, 971 (2015) (citing *State v. Robinson,* 153 Wash.2d 689, 693–94, 107 P.3d 90 (2005)) ("We construe statutes to avoid constitutional doubt.").

Particularly in the criminal context, courts routinely read mens rea requirements into statutes. *See*, *e.g.*, *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1

(2015) (citing *Morissette v. United States,* 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952)) ("mere omission from a criminal enactment of any mention of criminal intent should not be read 'as dispensing with it.'"); *Staples v. United States*, 511 U.S. 600, 619, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (interpreting a mens rea element into an unlawful firearm possession statute). Likewise, this Court recently upheld the constitutionality of Washington's cyberstalking law by striking the term "embarrass" from the statute. *State v. Mireles*, 16 Wn. App. 2d 641, 655–56, 482 P.3d 942, 951 (2021) ("We conclude this is a sufficient limiting construction to eliminate the identified overbreadth of the statute as enacted.").

In reversing the trial court ruling and dismissing this case, this Court relied on *City v. Willis*, 186 Wn.2d 210, 375 P.3d 1056 (2016), a case that was not cited by either party at either the trial court or the Court of Appeals. *Willis*, however, is readily distinguished. Construing the panhandling law in *Willis* in such a way as to avoid constitutional infirmity would have required

our Supreme Court to "pretend the ordinance bars protected speech 'in' freeway ramps rather than 'at' ramps and intersections," something it determined would require a rewrite of the law, which is the domain of the Legislature. *Willis* at 220. No such rewrite is necessary here. Much more on point is *State v. Grocery Manufacturers Ass'n*, 195 Wn.2d 442, 455–56, 461 P.3d 334 (2020), in which, discussing the history of judicial narrowing of the "expenditure" and "contribution" prongs of the definition of a political committee under the Fair Campaign Practices Act, the Supreme Court explained:

> This primary purpose requirement is not based on any statutory language. Instead, it was added by this court to reflect 'the spirit or intention of the law' *and to ensure that the expenditure prong does not violate the First Amendment by sweeping too broadly*.

(Internal citations omitted) (emphasis added). *Grocery Manufacturers*, as here, involved an as-applied challenge in the context of a civil action brought by the Attorney General on behalf of the State. *See also City of Tacoma v. Luvene*, 118 Wn.2d 826, 840, 827 P.2d 1374, 1381 (1992) ("A statute or

ordinance will be overturned only if the court is unable to place a sufficiently limiting construction on a standardless sweep of legislation.").

Likewise, in *State v. Blake*, 197 Wn.2d 170, 188, 481 P.3d 521, 531 (2021), citing *Utter*, our State Supreme Court reaffirmed our courts' obligation to avoid constitutional infirmity, noting, "in general, 'we construe statutes to avoid constitutional doubt.'" In striking down the State's simple drug possession law, the Court explained, "we are not interpreting RCW 69.50.4013 for the first time. Instead, we face 40 years of precedent and legislative acquiescence." *Id*. at 190. By contrast, here the trial court ruled on an issue of first impression for courts in Washington. Thus, the Court's reasoning in *Blake* supports the State's argument here that it was appropriate for the trial court to impose a mens rea on the State's CPA lawsuit.

In addition, as this Court noted in the Opinion, the *Willis* holding quotes *United States v. Stevens*, 559 U.S. 460, 130 S. Ct.

1577, 176 L. Ed. 2d 435 (2010), wherein the U.S. Supreme Court made clear that a limiting construction is appropriate if the statute is "readily susceptible" to such a construction. *Stevens*, 559 U.S. at 481. The trial court's construction, discussed above, demonstrates such ready susceptibility, as does the Legislature's direction that the CPA "shall be liberally construed that its beneficial purposes may be served." RCW 19.86.920. Following that direction, the courts, not the Legislature, have developed the elements necessary to bring a successful CPA action. *See*, *e.g., Panag v. Farmers Ins. Co. of Wash.,* 166 Wn.2d 27, 47, 204 P.3d 885 (2009) (holding that intent is not an element of a CPA cause of action).

B. If Not Reconsidered, the Court's Ruling Will Have a Chilling Effect on the State's Authority to Restrain Deceptive Speech

The Court's ruling eviscerates the authority of the Attorney General to bring a CPA enforcement action against any entity that engages in charitable solicitation or commercial fundraising on behalf of a charity, even against entities—such as

TVI—that deceive the public as to their charitable status. By holding (1) that a mens rea element is required to satisfy strict scrutiny, and (2) that no such element may be imputed into the statute, the Court has made it impossible for the State to regulate charitable solicitation under the CPA. As such, the Court's ruling disregards the central and unique role that attorneys general play in the regulation of charities, ignores and undermines the intent of the Charitable Trusts Act, RCW 11.110 (CTA), and Charitable Solicitations Act, RCW 19.09 (CSA), and leaves the giving public with little or no recourse.

The law of charities and charitable trusts has long placed the responsibility for protecting charitable assets and charitable giving squarely in the hands of state attorneys general. *See* Restatement of the Law, Charitable Nonprofit Orgs., §5.01, comment a (Am. Law. Inst. 2021) ("The central role of the state attorney general in the regulation of charities developed as part of the early English common law."). Washington courts have affirmed the Attorney General's role for decades: "It has long

been recognized that at common law, the Attorney General has the duty of representing the public interest in securing the enforcement of charitable trusts." *State v. Taylor*, 58 Wn.2d 252, 255, 362 P.2d 247 (1961).

The Attorney General's role in regulating charitable trusts was codified by the legislature with the CTA, the purpose of which, in part, is to "clarify and implement the powers and duties of the attorney general" as they relate to charitable trusts. RCW 11.110.010. The CTA expressly grants the Attorney General authority to "institute[] appropriate proceedings to secure compliance with [the CTA] and to secure the proper administration of any trust." RCW 11.110.120.

Likewise, the Attorney General is authorized to enforce the CSA, the purpose of which, in part , is to prevent "deceptive and dishonest practices in the conduct of soliciting funds for, or in the name of, a charity." RCW 19.09.010. Moreover, the Legislature made violations of the CSA *per se* violations of the

CPA, under RCW 19.09.340. The CSA, like the CPA, does not explicitly include a mens rea element.

Enactment of these statutes shows that the Legislature has long understood and intended that the Attorney General regulate charities and charitable trusts, including deceptive acts by charities or false charities. Indeed, the central role played by state attorneys general in regulation of charities and charitable trusts is crucial. Individual consumers are rarely in a position to know that they have been deceived because, practically speaking, they have no way of knowing how their charitable gifts will be used. Consistent with its obligation to protect the public, the Attorney General routinely investigates and brings enforcement actions against charities that misrepresent what they are doing with donated funds, and it is essential that it continue in this watchdog role. *See, e.g., In re Breast Cancer Prevention Fund*, 574 B.R. 193 (Bankr. W.D. Wash. 2017); *State v. Veterans Independent*

Enterprises of Washington (VIEW) (Pierce County Superior Court Civil Case 19-2-12198-5).[4]

The Court's ruling calls into question the Attorney General's authority to continue to regulate charities under existing statutes, and in so doing, disregards legislative intent that rests upon centuries of law concerning regulation of charities. The consequences of the Court's ruling, if not reconsidered, will be to encourage businesses to envelop their advertising with a charitable donation or nominal charitable affiliation in the hopes of placing themselves out of reach of liability for unfair and deceptive practices. For example, any grocery store in Washington that sells the Newman's Own line of food products (or any other product that donates all or part of its profits to charity) would feel emboldened, based upon the Court's ruling, to advertise—as did TVI— that in store purchases

[4] https://apnews.com/article/washington-lawsuits-veterans-694de0102ba7d40fab02a89c19aff94c (last accessed September 7, 2021).

benefit charity. This Court's ruling also potentially sweeps more broadly than that, immunizing even outright fraudulent charities that pocket solicited donations from CPA liability. It is for reasons exactly like these that courts are directed to interpret statutes so as to avoid constitutional infirmity, whenever possible—as did the trial court below.

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V. CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court reconsider its previous ruling.

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RESPECTFULLY SUBMITTED this 7th day of September, 2021.

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NO. 80915-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Petitioner/Defendant,

v.

STATE OF WASHINGTON,

Respondent/Plaintiff.

TVI, INC.'S ANSWER TO STATE'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

This Court's August 16, 2021 decision held that the State's claims challenging TVI's marketing and promotion of its charity partners violate the First Amendment. *State v. TVI, Inc.*, — Wn. App. 2d —, 493 P.3d 763 (2021). The Court's ruling, based on forty years of U.S. Supreme Court precedent, is unquestionably correct. The State now seeks reconsideration, but does not mention the governing Supreme Court cases or this Court's rulings applying First Amendment law.

The State's motion instead argues that the Court erred as a matter of statutory construction. The State asserts the superior court should have been allowed to create a new, unheard-of standard to impose liability under the Washington CPA for the State's claims in this case under the rubric of "constitutional avoidance." The State is wrong, and the cases it cites out of context provide no support for the State's effort to create new liability for constitutionally protected speech. General tenets of statutory construction are not "a method of

adjudicating constitutional questions by other means." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

This Court recognized that the CPA has long been interpreted to hold that a "plaintiff need not show the speaker intended to deceive or succeeded in doing so," and that the statute is not ambiguous in this regard. *TVI*, 493 P.3d at 773. What the State asks the Court to do is to sanction rewriting of the CPA on a case-by-case basis to permit claims penalizing constitutionally protected speech. This the law does not allow, as this Court recently reiterated. *See Washington League for Increased Transparency & Ethics v. Fox News*, 2021 WL 3910574, at *4 (Wash. Ct. App. Aug. 30, 2021) (unpublished).

The State's motion argues only generically that the superior court should have been entitled to reinterpret the CPA. The State does not even try to justify the superior court's announced standard or its actual rulings under First Amendment requirements. This Court correctly concluded that TVI's ads and representations are charitable solicitation fully

protected under the First Amendment, and the State's claims fail because they do not satisfy "exacting proof requirements" under *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620-21 (2003).

Finally, the State argues that the "practical effect" of the Court's ruling will be to "create a chilling effect on the State's ability to police deceptive charitable solicitation." Mot. at 4. This is sophistry. The State can and does regulate charities and fundraisers through the Charitable Solicitations Act ("CSA"), RCW ch. 19.09. Supreme Court precedent holds that state authorities may pursue a "properly tailored fraud action" without running afoul of the First Amendment, as this Court recognized. *TVI*, 493 P.3d at 772 (quoting *Madigan*, 538 U.S. at 619). The State did not assert fraud claims against TVI and admitted it could not do so. The issue here is chilling effects on protected speech, not that government powers may be "chilled" to protect speech.

II. BACKGROUND

The State's reconsideration motion persists with mischaracterizations of the record previously addressed, but which unfortunately must be corrected here again.

First, the State did not "plead[] and prove[] below that [TVI] deceptively advertised that it was a non-profit, charitable entity, and that purchases made in its stores benefit charity…." Mot. at 1. The superior court found that TVI "has never identified itself as a nonprofit company or a charity, but has said the opposite, that it is a 'for-profit thrift store chain,'" and found that TVI has "consistently" and "extensively" explained its charity partner relationships and business model in its advertising and representations. CP 1081-82, 1095-96, 1107, 1110, 1124-25. The State also did not "prove[] at trial that TVI knew or should have known its advertising was deceptive." Mot. at 1. To the contrary, the superior court found that TVI's advertising was truthful and accurate and took pains to explain its business model and support of charity partners by

purchasing used goods from them. CP 1080, 1095-96, 1110, 1124-25. The State admitted it had no evidence that TVI ever meant to deceive consumers or donors, Ex. 2920 at 203, 205-7, 217-18, and the superior court's findings were to the same effect, CP 1134, 1136-38, 1140. The court held instead that the State did not have to prove any intent or knowing deception or that any consumer was ever deceived or harmed. CP 1136-37.

The State contends that, throughout this case, "neither TVI nor the State raised any issue … concerning the trial court's authority to impose a mens rea standard." Mot. at 1-2. This is ridiculous. TVI has repeatedly urged in this Court and before that the superior court erred and that the pseudo "*mens rea*" standard violates First Amendment requirements. CP 135-37, 145-46, 262-63, 277-81, 368-70, 780-91, 912-16, 933-40, 1020-21; RP 17-20, 45,1896-98; Mot. for Discretionary Review at 2, 8-9, 13-18; Reply on Mot. for Discretionary Review at 3-9; TVI Opening Br. at 37-45.

III. ARGUMENT

A. The Court Correctly Held That the State's Claims Fail First Amendment Scrutiny.

While the State's reconsideration motion tries to make out that the issue here is a question of statutory interpretation, in fact this Court's decision was based on bedrock principles of First Amendment law. In summary, the Court held:

- "Charitable solicitation is fully protected speech under the First Amendment," *TVI*, 493 P.3d at 769-70 (citing *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632-33 (1980));
- "TVI's signs, pamphlets, and banners display[ing] the names and logos of its charity partners … amount[] to charitable solicitation," *id.* at 770;
- "[B]y alleging that TVI markets its relationship with its charity partners in a manner that can deceive consumers, the State aims its lawsuit squarely at TVI's intertwined [charitable solicitation] speech," *id*. at 771.
- The State's claims are subject to "strict constitutional scrutiny," *id.* at 770 (citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790 (1988));
- The State's CPA claims and the superior court's interpretation as applied to TVI's protected speech and practices do not satisfy "the exacting proof requirements … under the First Amendment," *id.* at 774.

This case is about First Amendment requirements. The Court's decision is founded on First Amendment requirements. The State's reconsideration motion does not contest the First Amendment requirements or any of the Court's rulings in this regard. The State's motion is therefore irrelevant to the fundamental grounds of this Court's decision.

B. The Court Correctly Ruled That the Superior Court Could Not Rewrite the CPA to Override the Constitutional Flaws of the State's Claims.

The thrust of the State's motion is its argument that the superior court was entitled to create a new supposed *mens rea* standard to impose liability under the CPA in the guise of avoiding "constitutional infirmity." Mot. at 2-3, 6-13. Citing cases out of context and without regard to their holdings, the State urges the superior court could "interpret" the CPA contrary to its statutory language and decades' worth of case law – so as to create liability in violation of the constitution.

The State cites cases generally mentioning the interpretive principle of constitutional avoidance but disregards

what the principle actually is. "It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381 (citations omitted). The principle of constitutional avoidance is an aid to statutory interpretation, "a means of giving effect to [legislative] intent, not of subverting it" or substituting a court's views for those of the legislature. *Id.* at 382.

The cases the State cites provide no support for its argument that the constitutional avoidance principle means a court can concoct all new standards to impose statutory liability unlike ever before. For example, in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988), and *Utter v. Building Industry Association of Washington*¸ 182 Wn.2d 398 (2015), the U.S. and Washington Supreme Courts respectively rejected argued statutory interpretations based on the terms, history, and

legislative intent of the statutes at issue, mentioning the canon of constitutional avoidance only as additional support for interpretations the courts found to be correct.[1]

Here, the State offers no plausible argument that the CPA's text or its history reflect that the legislature meant to include a "knew or should have known" standard to create

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[1] In *DeBartolo*, the U.S. Supreme Court rejected an NLRB decision that found a union's distribution of leaflets urging shoppers not to patronize mall stores was an unfair labor practice. Examining the language and legislative history of section 8(b) of the NLRA, the Court held that peaceful leafleting did not amount to conduct to "threaten, coerce, or restrain any person" from doing business with another, within the meaning of the statute. 485 U.S. at 578-80. The Court found additional support for its decision in the interpretative principle of constitutional avoidance. *Id*. at 575, 577.

In *Utter*, in holding that a political committee was subject to registration and disclosure requirements under the state's Fair Campaign Practices Act, the Washington Supreme Court rejected plaintiffs' argument that a provision of the FCPA about attribution of contributions related to the definition of a "political committee," finding that this interpretation was contrary to the statute's terms, history, and intent as expressed in a citizens' initiative. *Id.* at 431-34. Here too, the court discussed the "interpretative principle of constitutional avoidance" only as an additional reason supporting its construction of the FCPA. *Id.* at 434-35.

liability for constitutionally protected speech.[2] In the court below, the State argued repeatedly that under the CPA it was *not required* to prove that TVI knowingly misrepresented anything, or ever had any intent to deceive, or that any consumer or donor was actually deceived or harmed in any

[2] The most the State does is to quote the superior court's ruling and its view that "the CPA 'must include a meaningful mens rea requirement.'" Mot. at 6-7 (quoting CP 1014). The State makes no effort to defend the superior court's reasoning or its actual rulings – they are not defensible.

The superior court's reasoning was that (1) the CPA requires proof of a "deceptive act or practice"; (2) this includes circumstances when a defendant has "misrepresented something"; (3) the word "misrepresentation" can be defined as the act "of making a false or misleading assertion … with the intent to deceive," "[a]lso termed false misrepresentation," and therefore, (4) the CPA is "susceptible" to a construction requiring "meaningful mens rea" so that it may be "liberally construed." Mot. at 6-7, 13 (quoting CP 1014 and RCW 19.86.920). But, from this premise, the court went on to conclude that the "mens rea requirement" permitted liability against TVI on the State's claims when there were no false statements, no intent to deceive, and no harm, *i.e.*, no *mens rea* of any sort. *See* TVI Opening Br. at 21-23; *see also, e.g.*, CP 1136-38 [C2-4, 7]. The superior court created its pseudo *mens rea* standard from thin air, not based on statutory terms or legislative history or intent.

way. *See* TVI Opening Br. at 17, 19; CP 730-31, 925-26; Ex 2920 at 189-90, 199-200. The superior court adopted this approach because it hewed to CPA case law and broad propositions about "capacity to deceive" or hypothetical "deceptive net impression." *See* TVI Opening Br. at 21-23, 44; CP 1081-82, 1088, 1090, 1136-39, 1143-50. In light of its arguments based on CPA cases requiring *no showing* of *mens rea*,[3] the State cannot plausibly claim the superior court was correct in "interpreting" the CPA to engraft a pseudo *mens rea* requirement contrary to the very cases the State urged held the opposite.[4]

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[3] *See, e.g.*, *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785 (1986) ("A plaintiff need not show that the act in question was *intended* to deceive, but that the alleged act had the *capacity* to deceive….") (emphasis in original); *Panag v. Famers Ins. Co. of Wash.*, 166 Wn.2d 27, 47 (2009) (same); *State v. Kaiser*, 161 Wn. App. 705, 719 (2011) ("[T]he State is not required to prove causation or injury, nor must it prove intent to deceive or actual deception."). *See also TVI*, 493 P.3d at 772-73 (mentioning these cases and ordinary CPA standards).

[4] As discussed, the cases cited by the State are inapposite, but some provide analogous support for this Court's decision. For

Trying another tack, the State contends "courts routinely read mens rea requirements into [criminal] statutes." Mot. at 9. Actually, the cases the State cites merely reflect the presumption that criminal laws include a requirement of "guilty intent," because "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 250-52 (1952); *accord Elonis*, 575 U.S. at 734-36 (2015); *see also*

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example, *State v. Blake*, 197 Wn.2d 170 (2021), rejected arguments of the State that Washington's felony drug possession statute, RCW 69.50.4013, should be interpreted to include a *mens rea* element "to avoid constitutional difficulties," because many years' worth of precedents had held that the statute required no *mens rea*. *Id.* at 189-91. This is similar to what this Court said about the CPA. *TVI*, 493 P.3d at 772-73. Here too, allowing the superior court to reinterpret the act contrary to many years' worth of precedents would be to allow rewriting the statute by judicial fiat, contrary to all principles of statutory construction.

Additionally, in *Elonis v. United States*, 575 U.S. 723 (2015), the U.S. Supreme Court held that a lower court's instructions allowing criminal liability based on a "reasonable person" standard violated fundamental principles of *mens rea* as it "reduces culpability … to negligence." 575 U.S. at 737-38. The State's argument here – that a "should have known" standard amounting to no more than negligence should be deemed "meaningful mens rea" – fails under *Elonis*.

United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978) ("'The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)). In each of the cases, the courts scrutinized the statutes at issue to determine whether the legislature meant to abrogate the general requirement of *mens rea* to impose criminal liability.[5] Here again, each decision turned on specific

[5] In *Morrisette*, the Supreme Court reversed the defendant's conviction for taking abandoned shell casings from a practice bombing range, holding that 18 U.S.C. § 641 required proof that the defendant intended to convert government property. 342 U.S. at 270-74.

In *Elonis*, the Court held that 18 U.S.C. § 875(c), proscribing communications containing a threat to kidnap or injure a person, requires proof the defendant had the purpose or knowledge that he was making a threat. 575 U.S. at 737-38.

In *Staples v. United States*, 511 U.S. 600 (1994), the Supreme Court held that the National Firearms Act, 26 U.S.C. § 5845(b), requires proof that a defendant knew the characteristics of a weapon that made it a "firearm" (*i.e.*, a fully automatic machine gun), in order to be found guilty. *Id.* at 619.

In each of these cases, the Supreme Court found no indication in the respective statutes' terms or history that Congress meant to eliminate the rule requiring "an evil state of mind [to] make

statutory terms,[6] not some allowance of unbridled discretion to courts to construe statutes however they like to avoid constitutional restrictions.

The State misunderstands the cases in another respect, as well. The cases reflect that courts will apply interpretation principles to construe an ambiguous statute to *narrow or preclude liability*, not to expand or create new liability.[7] Here,

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criminal an otherwise indifferent act." *Morissette*, 342 U.S. at 264 (footnote omitted).

[6] For example, in *City of Tacoma v. Luvene*, 118 Wn.2d 826 (1992), the state Supreme Court held that a Tacoma drug loitering ordinance, by its terms, *did* contain a *mens rea* element because it required that a defendant act with the "purpose" to engage in drug-related activity. *Id.* at 842-44 (rejecting facial overbreadth challenge to the statute).

[7] *See, e.g.*, *DeBartolo*, 485 U.S. at 588 (holding that NLRA provision could not be interpreted to punish constitutionally protected handbilling); *Utter*, 182 Wn.2d at 434-35 (rejecting interpretation of FCPA provision to expand definition of "political committee" and liability); *Staples*, 511 U.S. at 610 (interpreting firearm statute to avoid criminalizing acts consistent with lawful gun ownership); *State v. Grocery Mfrs. Ass'n*, 195 Wn.2d 442, 455 (2020) (recognizing that "primary purpose requirement" in the FCPA long imposed by interpretations of the state Supreme Court ensure campaign

the State asks the Court to sanction the opposite and permit the superior court to rewrite the CPA in the guise of statutory construction to *expand* the statute's reach to punish protected speech. None of the cases the State cites support such a remarkable proposition.[8]

The State also cites inapposite case law concerning facial challenges to invalidate statutes on grounds of overbreadth,[9] and regarding whether courts may sever unconstitutional

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disclosure law "does not violate the First Amendment by sweeping too broadly").

[8] This also raises serious due process problems under authorities precluding government imposition of liability *post hac* based on standards never announced or applied before. *See, e.g.*, *Landgraf v. USI Film Prod*., 511 U.S. 244, 266-73 (1994) (discussing constitutional problems of retroactive application of laws changing liability standards).

[9] *See United States v. Stevens*, 559 U.S. 460 (2010) (striking down 18 U.S.C. § 48, which imposed felony penalties for "depiction[s] of animal cruelty" because of overbreadth); *see also City of Lakewood v. Willis*, 186 Wn.2d 210, 226 (2016).

provisions in a facial challenge while enforcing the remainder of a statute.[10]

This case does not concern liability under a criminal statute. TVI has not brought a facial challenge and does not seek to invalidate the CPA in its entirety. There is no issue here about whether some provision of the CPA may be facially invalid but possibly could be severed. The issue is that the superior court's rulings violate fundamental First Amendment principles and precedent.

At bottom, the State's argument is that courts have free-floating authority to reinterpret the CPA to devise new grounds for liability as they choose, regardless of statutory terms or history or constitutional requirements. This is wrong, and this Court's conclusion was correct: "While [a] court may construe

[10] *See State v. Mireles*, 16 Wn. App. 2d 641, 654-56 (2021) (upholding Washington's cyberstalking statute in response to a facial challenge by severing provision imposing criminal liability for online communications made with intent "to embarrass," as allowed by severability clause in the statute).

an ambiguous law to avoid constitutional infirmity, it is barred by the separation of powers from rewriting the law's plain terms." *TVI*, 493 P.3d at 773 (quoting *Willis*, 186 Wn.2d at 219).[11] The State "misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory construction." *See Clark*, 543 U.S. at 381.[12] "The canon is not a

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[11] The State's attempt to distinguish *Willis* is unavailing. *See* Mot. at 10-11. In that case, the state Supreme Court held that a city ordinance imposing penalties for begging was a content-based restriction on charitable solicitation, subject to First Amendment strict scrutiny. 186 Wn.2d at 217-18. The defendant raised a facial challenge, and the Supreme Court held that, regardless of general principles about "constru[ing] an ambiguous law so as to avoid constitutional infirmity," "separation of powers principles bar the court from rewriting [a] law's plain terms." *Id.* at 219 (citing *Stevens*, 559 U.S. at 481). The ordinance precluded begging "at" freeway ramps and intersections, and the Supreme Court refused to countenance the lower courts' decisions imposing liability by interpreting the ordinance to mean begging "in" a freeway ramp. *Id.* at 219-20. The Court held the ordinance was unconstitutional on its face and therefore reversed the defendant's conviction. *Id.* at 224-26.

[12] In *Clark*, the Supreme Court held that a provision of federal immigration law, 8 U.S.C. § 1231(a)(6) was clear based on its terms that an alien could not be detained for more than 90 days after expiration of the period when the INS could effect removal. 543 U.S. at 376-78. In dissent, Justice Thomas urged that the Court should have reached a different result by reinterpreting the

method of adjudicating constitutional questions by other means." *Id.* Invoking "constitutional avoidance" to reinterpret statutes whenever a constitutional flaw is apparent, "would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.* at 382.[13] "Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." "That is not how the canon of constitutional avoidance works." *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). As the Washington Supreme Court has explained, "Courts do not amend statutes by judicial construction, nor rewrite statutes 'to avoid difficulties in construing and applying them.'" *In re*

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statute under the doctrine of constitutional avoidance, *id.* at 395-97 (Thomas, J., dissenting), but the majority rejected this "novel interpretive approach," *id.* at 382.

[13] *See also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 n.9 (1996) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question."); *accord Salinas v. United States*, 522 U.S. 52, 60 (1997).

Parentage of C.A.M.A., 154 Wn.2d 52, 69 (2005) (quoting *Millay v. Cam*, 135 Wn.2d 193, 203 (1998)). When a statute or its application is unconstitutional – and particularly when the State asserts claims infringing First Amendment-protected speech – the Court's duty is to uphold the constitution and strike down the claims, as this Court did.

No authority supports the State's approach to allow *carte blanche* authority to reinterpret or rewrite the CPA. A court cannot "invent a statute rather than interpret[ing] one," *Clark*, 543 U.S. at 378, nor disregard First Amendment principles to find a way to allow the State to prevail on its claims.

This Court recently underscored these principles in *Washington League*, 2021 WL 3910574. There, the plaintiff asserted CPA claims challenging statements made on Fox News programs concerning the Covid pandemic, asserting they were false and the CPA should be interpreted to allow the claims, notwithstanding First Amendment proscriptions, based on allegations of actual knowledge or reckless disregard of falsity.

The panel refused to engraft a new standard onto the CPA, citing this Court's decision and stating: "We will not rewrite the CPA to include an 'actual knowledge' or 'reckless disregard' mens rea [standard] where none exists in the statute." 2021 WL 3910574, at *4. *Washington League* reinforces that courts do not have and cannot be allowed unbridled discretion to interpret, reinterpret, or rewrite statutes to avoid constitutional requirements.

C. The State's Motion Provides No Basis for Upholding the Superior Court's Ruling In Any Event.

Even if the State were right that the superior court should have been allowed to reinterpret the CPA under principles of constitutional avoidance or presumed *mens rea* (though the State's arguments are categorically wrong, as discussed above), that does not justify reconsideration or reversal of this Court's decision. Allowing that a court may employ statutory interpretation principles as a general matter does not mean the superior court applied the principles or the constitution

correctly. Here, as this Court's decision held, the superior court's rulings were incorrect under the First Amendment.

The State pretends the superior court imposed a "meaningful mens rea requirement" and then, from this false premise, urges the only issue is whether the court erred by imposing "*any* mens rea element" not whether the court "selected the wrong standard" or applied the CPA to contravene First Amendment protections. Mot. at 2-3 (emphasis in original). But, the core issue in this case is that the superior court applied ordinary CPA standards to penalize fully protected speech (at the urging of the State) contrary to established Supreme Court precedent from *Schaumburg*, 444 U.S. 620, through *Riley*, 487 U.S. at 781, and *Madigan*, 538 U.S. at 600, and First Amendment requirements of exacting scrutiny and proof, *see TVI,* 493 P.3d at 772-73.

In its reconsideration motion, the State argues no more than that statutory interpretation principles such as "constitutional avoidance" *could apply*, but that says nothing

about the superior court's rulings and the lenient principles it *did apply* to impose liability. This Court's decision correctly held that the State's claims fail under strict scrutiny and exacting proof requirements dictated by the First Amendment. Throughout this case, the State has attempted to end run free speech protections by claiming the First Amendment does not apply. But it does. The State's latest attempt at "constitutional avoidance" through misinterpretation of general statutory interpretation principles is every bit as flawed as its prior attempts, which this Court properly rejected.

D. The Court's Decision Does Not Inhibit Proper State Regulation of Charitable Solicitation.

The State argues the "practical effect" of the Court's ruling is to "create a chilling effect" that "eviscerates" the Attorney General's ability to regulate charities, fundraisers, and solicitation. Mot. at 4, 13. This *in terrorem* argument, like the State's other contentions, is unfounded under the law.

The Supreme Court has long recognized that states may regulate charitable solicitations and fundraisers by requiring registration and disclosures to state authorities under appropriate statutes. *See Schaumburg*, 444 U.S. at 637-38 & n.12; *Riley*, 487 U.S. at 800. Washington has such a statute, the Charitable Solicitation Act, RCW ch. 19.09, and even the superior court recognized that the CSA is "the constitutionally permissible means for [the State] to regulate commercial fundraisers and First Amendment-protected charitable solicitations." CP 1085 [F45].[14] Also, contrary to the State's assertion now that "attorneys general play" "the central and unique role … in the regulation of charities," Mot. at 14, the Washington legislature gave the role of overseeing charities and charitable solicitations to the Secretary of State, *not* the

[14] It is also undisputed that TVI fully complied with the CSA by registering; providing financial statements and other disclosures; and stating on signs, placards, and brochures throughout Value Village stores that TVI is a for-profit company that acts as a commercial fundraiser soliciting donations to its charity partners. CP 1088-90, 1124-25, 1152-53.

Attorney General's office. *See* RCW 19.09.065, .068, .071, .075, .079, .081, .085, .097, .210, .271, .279. But, most simply, nothing in this Court's decision precluding the State from pursuing unconstitutional claims has stripped the State of authority to pursue regulation *that is constitutionally permissible* under the CSA.[15]

Similarly, the U.S. Supreme Court's charitable solicitation cases have not precluded state authority to punish fraud – they leave open that the State may pursue a "properly tailored fraud action." *Madigan*, 538 U.S. at 619; *see also United States v. Alvarez*, 617 F.3d 1198, 1212 (9th Cir. 2010); *Urzua v. Nat'l Veterans Servs. Fund. Inc.*, 2014 WL 12160751, at *3-4 (S.D. Cal. Jan. 28, 2014), as this Court recognized, *TVI*,

[15] The State devotes several pages to arguing about the Attorney General's authority under the Charitable Trusts Act, RCW ch. 11.110, *see* Mot. at 14-15, but this case and the Court's ruling does not concern the CTA or any charitable trust at all. This is indicative of how far afield the State will go to try to come up with some basis to justify its claims precluded by the First Amendment.

493 P.3d at 772 ("Actions targeting fraud fall on the constitutional side of the line[.]"). But this means the State must prove that a defendant made false statements, with knowledge and intent to deceive consumers, and succeeded in deceiving consumers, *Madigan*, 538 U.S. at 620, which the State did not do and cannot show here. The State retains the authority it has always had to regulate charitable solicitation under the CSA and pursue claims for fraud consistent with First Amendment requirements. *See Riley*, 487 U.S. at 800; *Madigan*, 538 U.S. at 620.

There is simply no basis for the State to claim that the Court's ruling potentially "immuniz[es] even outright fraudulent charities that pocket solicited donations." Mot. at 18. The State can pursue "outright fraudulent charities" under Washington fraud law. Nothing in the Court's decision "encourage[s] businesses to envelop their advertising with a

charitable donation [sic] or nominal charitable affiliation" to make false representations. *Id.* at 17.[16]

Ultimately, the State's complaint is that it does not like the First Amendment requirements it must abide by, *i.e.*, that a claim of fraudulent charitable solicitation requires the State to prove a defendant made knowingly false misrepresentations with "the intent to mislead the listener, and succeeded in doing so." *Madigan*, 538 U.S. at 621. Though the State may prefer to avoid the "exacting proof requirements" the First Amendment

[16] Here, the State offers a hypothetical about a grocery store selling Newman's Own food products, Mot. at 17, that illustrates again how attenuated the State's arguments are. A grocery store truthfully advertising that Newman's Own contributes profits from its sales to a charitable foundation obviously could not be subject to any claim by the State. Suggesting that, because the grocer stocks Newman's Own products it would falsely advertise that proceeds from all sales of all products in its stores go to charity is baseless. As discussed above, the State is empowered to pursue claims for knowingly false representations that a party makes with the intent to deceive consumers. *See TVI*, 493 P.3d at 772. In any event, the State's exaggerated hypothetical has no bearing on TVI's model of partnering with and promoting community charities, its solicitation of donations to the charities, and the First Amendment protections that accordingly apply.

imposes, that does not mean the State's authority to enforce laws has somehow been "eviscerated" by this Court's decision. The decision requires the State to comply with First Amendment requirements, and rightly so.

The State asserts that this Court's decision could have "a chilling effect" on the Attorney General's ability to bring suits and collect penalties under the CPA. Mot. at 4. The State has it backwards. The concern of the First Amendment is to prevent chilling effects *on speech*. Nothing in First Amendment jurisprudence suggests that courts should permit restrictions or penalties for protected speech out of concerns that government powers may be restricted or "chilled." The First Amendment dictates that government overreach – such as the State's claims in this case – must be precluded.

IV. CONCLUSION

For the foregoing reasons, TVI requests that the Court deny the State's motion for reconsideration.

This document contains 5,049 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 6th day of October, 2021.

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I, James C. Grant, certify that I initiated electronic service of the foregoing document, *TVI, Inc.'s Answer to State's Motion for Reconsideration*, on the parties listed below:

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