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No. 102592-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROXANN BROWN, et al.,

Plaintiffs,

v.

OLD NAVY, LLC; OLD NAVY (APPAREL), LLC; OLD
NAVY HOLDINGS, LLC; GPS SERVICES, INC.; AND
THE GAP, INC., inclusive.,

Defendants.

***AMICI CURIAE* BRIEF OF
RETAIL LITIGATION CENTER AND
WASHINGTON RETAIL ASSOCIATION**

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The Retail Litigation Center, Inc. represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The Retail Litigation Center provides courts with the perspective of the retail industry on important legal issues affecting its members, and on potential industry-wide consequences of significant court cases. Since its founding in 2010, the Retail Litigation Center has filed more than 200 amicus briefs on issues of importance to retailers. Its amicus briefs have been favorably cited by multiple courts. *See, e.g., South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020); *Chewy, Inc. v. U.S. Dep't. of Lab.*, 69 F.4th 773, 777–78 (11th Cir. 2023). Its member retailers employ millions of workers throughout the United States, provide goods and services to hundreds of millions of consumers, and account for more than a trillion dollars in annual sales.

The Washington Retail Association serves as

primary stewards of Washington's retail experience with a mission to safeguard the interests of retailers representing all sectors and sizes from the largest national chains to small independent businesses. The retail industry accounts for \$200 billion in annual taxable sales and pays over \$19.8 billion annually in wages supporting Washington's economy. Washington Retail Association works to advance and protect the jobs of nearly 400,000 employees and the employers who provide them.

The Retail Litigation Center and Washington Retail Association have a strong interest in this case. Retailers frequently use email as a tool to inform customers about upcoming sales, promotions, and other updates and opportunities. Both consumers and retailers benefit from a robust marketplace of information about retailers' goods and services, and email communications allow retailers to offer timely information on product availability and discounts in a way consumers can selectively review based on their purchasing preferences. As explained below, Plaintiffs' proposed expansive reading of the Commercial Electronic Mail Act would not only be detrimental to the

marketplace of information, but also would go far beyond the problem the legislature intended to address when it adopted this legislation.

II. ISSUE ADDRESSED BY AMICI

The certified question to this Court involves RCW 19.190.020(1)(b) of the Commercial Electronic Mail Act (CEMA), which says, “[n]o person may initiate the transmission . . . of a commercial electronic message that . . . (b) [c]ontains false or misleading information in the subject line.” Plaintiffs ask this Court to interpret this subsection with a broad brush and to sweep in alleged conduct covered in other Washington statutes (*any* misleading information).

In contrast, Defendants ask the Court to recognize this subsection prohibits false or misleading information in the subject line *about the subject of the email*. As Defendants correctly argue, an analysis of the statute’s legislative history shows the legislature intended this meaning. In support of Defendants, this amici brief (a) provides additional historical context regarding the problems created by spam email that the legislature sought to curtail by passing CEMA, and (b) explains real world problems that would be created for both retailers

and consumers if the Court adopts Plaintiffs' interpretation.

III. ARGUMENT

A. To ascertain the legislature's intent in passing CEMA, the Court should consider the historical context in which the statute was passed.

When interpreting a statute, this Court's "fundamental objective is to ascertain and carry out the Legislature's intent." *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "[B]ackground facts of which judicial notice can be taken are properly considered as part of the statute's context because presumably the legislature was also familiar with them when it passed the statute." *Id.* at 11 (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48A:16, 809–10 (6th ed. 2000)). The legislative purposes behind a statute "can be found by examining the historical context in which a statute was passed to identify the problem that the statute was intended to solve." *Wash. State Nurses Ass'n v. Bd. of Med. Exam'rs*, 93 Wn.2d 117, 121, 605 P.2d 1269 (1980).

CEMA was passed to address the proliferation of

“spam” emails in the early days of personal internet use.¹ Although Washington was one of the first states to pass an anti-spam statute, this was not a problem unique to the state. State legislatures around the country, as well as the federal government, all wrestled with what to do about this budding problem.

At a June 1997 workshop addressing the issues of privacy on the internet, the Federal Trade Commission (FTC) held a discussion about the problems presented by unsolicited commercial emails, otherwise known as spam. *Unsolicited Commercial E-mail: Hearing Before the Subcomm. On Telecomm., Trade, & Consumer Prot. of the H. Comm. on Com.*, 106th Cong. (1999) (statement of Eileen Harrington, Federal Trade Commission Bureau of Consumer Protection).² In response, industry and advocacy groups formed an “Ad-Hoc Working Group

¹ The term “spam” refers broadly to unsolicited “junk” email. See *State v. Heckel*, 143 Wn.2d 824, 826 n.1, 24 P.3d 404 (2001) (explaining the linguistic origins of the term, including that the phrase originates from a Monty Python skit where every item offered at a restaurant includes [SPAM®](#) ()).

² Amici cite a number of publicly accessible legislative history documents and historical reports. For the Court’s convenience, these documents are included at Appendix A.

on Unsolicited Commercial E-Mail,” which released a formal report to the FTC in July 1998. *Id.* at 3. In that report, the Working Group noted that a common issue was that senders were “dynamically forging header information,” including subject lines, to “avoid detection, frustrate remove requests, misdirect replies, and generally frustrate efforts by users to prevent their continued receipt of [spam emails] from the same sender.” AD-HOC WORKING GROUP ON UNSOLICITED COMMERCIAL EMAIL, REPORT TO THE FEDERAL TRADE COMMISSION 13 (1998).³ The report also emphasizes the common understanding that Washington’s then recently passed statute, CEMA, was enacted to solve this problem—namely to prohibit deceptive headers that would deceive consumers as to the nature of the message. *Id.* at 14.

Congress eventually passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) in 2003 to address the issue. 15 U.S.C. §§ 7701–7713. CAN-SPAM bars the practice of including “header information that is materially false or

³ See Appendix A.

materially misleading,” 15 U.S.C. § 7704(a)(1), or using a subject line that “would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.” *Id.* § 7704(a)(2).

In the months before the passage of CAN-SPAM, the FTC made clear that it was specifically concerned with emails led by subject lines that would disguise the contents of the email. In April 2003, the FTC filed suit charging two people who sent spam with subject lines such as “Did you hear the news?” and “New movie info” to trick users into opening emails that contained sexually explicit material. Press Release, Federal Trade Commission, *FTC Settles with Deceptive Spammers* (May 6, 2004), <https://www.ftc.gov/news-events/news/press-releases/2004/05/ftc-settles-deceptive-spammers>. And during a May 2003 statement to the Senate, the FTC emphasized the importance of that lawsuit and noted that a recent study showed that 22% of spam messages contained “indicia of falsity” in the subject line that was intended to deceive the user as to the content of the email. *Unsolicited Commercial E-mail: Hearing Before the S. Comm. on Com., Sci. & Transp.*, 108th

Cong. 9 (2003) (statement of Federal Trade Commission).⁴

This context helps to frame the problem that legislatures across the country at that time were trying to solve: senders of spam were hiding advertisements or sexually explicit materials behind false and unrelated subject lines.

Around the same time, in October 2002, the National Conference of State Legislatures released a briefing paper titled, “The Problem of Spam.” PAM GREENBERG, THE PROBLEM OF SPAM: UNSOLICITED COMMERCIAL E-MAIL, 10 NATIONAL CONFERENCE OF STATE LEGISLATURES LEGISBRIEF 1 (2002).⁵ The study concluded that, “[w]hile legitimate businesses can responsibly use email to advertise their products and services, an increasing number of operations use questionable marketing practices, such as . . . [u]sing misleading subject lines—language that is unrelated to the content of the message.” *Id.* at 1.

The legislative history of other similar anti-spam statutes from various states passed within just a few

⁴ See Appendix A.

⁵ See Appendix A.

years of each other further affirms this framing of the problem the Washington legislature and other sister states were trying to solve. Although Washington was one of the first states to pass an anti-spam statute in June 1998, numerous states passed similar legislation over subsequent years to address the issue.

For example, in July 1997, Nevada was the first state to pass an anti-spam statute. Nevada's anti-spam statute prohibits "us[ing] false or misleading information in the subject line of the electronic mail." Nev. Rev. Stat. Ann. § 41.730(3)(b).⁶ The legislative history shows that the legislature's intent was to prevent deceptive subject lines that conceal the source and thereby the nature of the message. *See Minutes of the Meeting, Assemb. Comm. on Judiciary*, at 3 (Nev. Feb. 27, 2003) ("This would be \$500 per piece of spam that disguises the source of advertisement. [It would cover] using false or misleading information in the subject line like, 'hello, I just lost your address . . . met

⁶ The initial version did not discuss subject lines, but the statute was subsequently amended in 2003 to prevent the use of false or misleading information in the subject line of an email.

you at the reunion . . . did you lose your wallet?’ Then you click it open and it is something that you don’t want to see.”).⁷

Likewise, Illinois passed the Illinois Electronic Mail Act, which prohibits any email that “contains false or misleading information in the subject line.” 815 Ill. Comp. Stat. § 511/10 (effective January 1, 2000).⁸ The legislative history shows the legislature’s intent to prevent subject lines that mislead consumers about the *content* of the email. *See* S. Transcript, 93rd Gen. Assemb., Reg. Sess. 44, at 28 (Ill. May 13, 2003) (“This is going to let our children who look at that subject line—and if we can tell them don’t open anything that has an —advertising letters ahead of it, maybe we can alleviate some of these misleading subject lines that people are putting out”).

Texas similarly passed a statute that prohibits sending an email that “contains false, deceptive, or misleading information in the subject line.” Tex. Bus. &

⁷ *See* Appendix A.

⁸ Although the statute was originally passed in 2000, it was amended in 2003 to require email advertisements to include an “ADV:” label in the subject line.

Com. Code § 46.002(a)(2) (effective September 1, 2003) (repealed April 1, 2009). Texas legislators hoped that “[b]y prohibiting messages that deceptively conceal their origin, content, or purpose, HB 1282 would eliminate several dubious practices. Some spam messages include misleading subject lines that conceal the commercial purpose of the email (e.g. ‘Hi, I got your message’ or ‘Jennifer asked me to contact you’).” *H. Rsch. Org. B. Analysis, HB 1282*, at 3–4 (Tex. April 2, 2003).⁹

Some states went even one step further in ensuring that subject lines are not misleading, requiring commercial emails to include the letters “ADV:” in the subject line. *See, e.g.*, Ariz. Rev. Stat. Ann. § 44-1372.01(B)(1); Conn. Gen. Stat. Ann. § 52-570c(b); Ind. Code Ann. § 24-5-22-8(1); Kan. Stat. Ann. § 50-6,107(c)(1)(C); La. Rev. Stat. Ann. § 51:2002(4); Me. Rev. Stat. Ann. tit. 10, § 1497(3)(A); Mich. Comp. Laws Ann. § 445.2503(a); Minn. Stat. Ann. § 325F.694 Subd. 3; Mo. Rev. Stat. § 407.1138(3); N.M Stat. Ann. § 57-12-23(B)(3); Tenn. Code Ann. § 47-18-2501(d).

The fact that so many states added the “ADV”

⁹ *See* Appendix A.

requirement reinforces that the prevailing problem concerned subject lines used to deceive users about the *contents of the email*. An “ADV:” label helps avoid that problem. When CEMA was initially proposed, the bill contained a similar requirement to indicate if an email is an advertisement. H.B. 2752 § 4(1)(a), 55th Leg. (Wash. 1998) (original bill, introduced on January 19, 1998). Although this requirement was removed in the final version after First Amendment concerns were raised by the ACLU and others, it nonetheless shows the legislature’s intent was to avoid misleading subject lines as to the *subject* of the email. *See* COMMERCIAL ELECTRONIC MESSAGES SELECT TASK FORCE REPORT 10 (1998).¹⁰

In sum, CEMA was passed during a time when legislators around the country were grappling with the onslaught of spam emails. And clauses like the one in RCW 19.190.020 were necessary because one of the

¹⁰ The Washington Legislature created a task force after passing CEMA to “explore cost, technical, and legal issues surrounding the use of electronic messages for commercial purposes and to recommend any potential legislation needed for regulating commercial electronic messages.” Report Summary. *See* Appendix A.

biggest problems with spam was that marketers were using disingenuous subject lines to induce users to open the emails. This historical context is important to understanding the Washington legislature's intent and demonstrates that Plaintiff's interpretation of CEMA is unmoored from its historical context. The legislature did not intend to address already illegal (under the Consumer Protection Act) deceptive practices that happen to occur in subject lines. Rather, the legislature was simply targeting the problem of spam emails whose subject lines disguised the nature and contents of the email itself. A holding that CEMA extends beyond misleading information about the subject of the email would improperly stretch the statute beyond the legislature's intent.

B. Given the inherently short nature of subject lines, Plaintiff's proposed interpretation would produce absurd results.

When engaging in statutory interpretation, the Court may also look to closely related statutes, "because legislators enact legislation in light of existing statutes." *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (citations omitted). As Defendants note,

it would be unnecessary and duplicative for CEMA to provide for greater penalties for false or misleading *subject lines*, when the Washington Consumer Protection Act already generally penalizes false and misleading marketing in all forms. *See* RCW 19.86. Such a reading would create absurd results, because subject lines are, by design, short.

A subject line is simply a preview to inform the reader what is to come. For the reasons explained above, CEMA and other anti-spam statutes, prohibit using subject lines to deceive consumers about the *nature* of the email. The goal is to prevent consumers from wasting time on emails that pretend to be something they are not. Given the practical usage of and restrictions around subject lines, Plaintiffs' interpretation of CEMA is as impractical and detrimental as it is implausible.

For example, a business may send an email with a subject line including the phrase: "BIG SALE – One Day Only!" That sale may be limited to certain products and different categories of those products may offer various levels of discounts. Or portions of the sale could be limited to the first 200 customers to visit the store, while

other sale items are available all day. Consumers who see the subject line and are interested in information about the sale know that they should reference the body of the e-mail for additional information. It is widely understood that subject lines of emails (personal or commercial) do not provide comprehensive information and the body of the corresponding email will provide additional detail on the topic identified in the subject line.

Besides the impracticality of including all details in a subject line, there are character and display limits that inherently limit the amount of information that can be captured in a subject line. As a leading international organization explains, there is a “line length” character limit of 998 characters, but each line “SHOULD be no more than 78 characters” to “accommodate the many implementations of user interfaces that display these messages which may truncate, or disastrously wrap, the display of more than 78 characters per line.” INTERNET ENGINEERING TASK FORCE, REQUEST FOR COMMENTS 2822, § 2.1.1 (P. Resnick, ed. Apr. 2001),

<https://www.rfc-editor.org/info/rfc2822>.¹¹ Subject lines inherently cannot contain every detail about the contents of the e-mail it is previewing.¹²

If Plaintiffs were to prevail, businesses big and small would risk allegations that any missing information in the subject line violates CEMA, and thereby potentially incur massive exposure.¹³ *See, e.g., Harbers v. Eddie Bauer, LLC*, 415 F. Supp. 3d 999, 1004 (W.D. Wash. 2019) (Plaintiff estimated damages under CEMA of over one *billion* dollars based on 43 allegedly

¹¹ The Internet Engineering Task Force (IETF) is an international organization that provides voluntary standards that have been widely adopted by internet users, network operators, and equipment vendors. Although initially supported by the U.S. Government, the IETF now operates on a volunteer basis as a non-profit organization. The IETF publishes its technical documentation as “Requests for Comments” or RFCs. *See Introduction to the IETF*, <https://www.ietf.org/about/introduction/> (last visited March 20, 2024).

¹² To provide a frame of reference, the paragraph above starting with “A subject line is simply a preview” has 485 characters and runs on for nine lines of text.

¹³ Adopting Defendants’ reading of the statute would also prevent courts from having to engage in a fact intensive analysis to determine if a subject line is actually misleading or false and would be more workable in practice. *See generally* Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465 (2012).

misleading emails sent by defendant). High statutory penalties could entice any number of theories that a concise subject line was misleading (e.g., an allegation that a certain discount amount was not a “big” sale even though the body of the email specifies the exact discount) and thus be used to threaten companies when the company provided truthful information in the email body and worked diligently to ensure accuracy in the subject line itself.

In reality, customers understand that subject lines are a short highlight of what is to come in the email and open emails of interest for complete information. In today’s phone age, users may spend only seconds reading the subject line of any given email. If it is clear from the subject line that the email is a marketing email, the user can just delete the message if they don’t want to know more or the reader can open the email for additional information.¹⁴ Users who no longer wish to receive marketing emails from a given sender can go one step further and opt out of future messages entirely by

¹⁴ And that information is already prohibited from containing false or misleading information under the Washington Consumer Protection Act. *See* RCW 19.86.

clicking “unsubscribe.”

Thus, as long as the nature of the message is clear, consumers’ interests are served and the legislature’s purpose is accomplished. *Amici* and their retail members support consumers’ ability to opt out of future marketing emails. With the option to opt out, consumers can decide if they do not want to receive marketing emails with the frequency or the style in which a retailer chooses to send marketing emails. But consumers who choose to continue receiving information and *not* to opt out benefit from a robust marketplace of information about the goods and services, including sales that businesses provide. It would be detrimental to all involved—if not a First Amendment problem—if businesses were forced to revert to subject lines that said “Marketing Email from Business X” out of fear of violating CEMA. Consumers want subject lines that help them identify if they want to read more and retailers are already accountable for misinformation that is included in the body of the email.

In sum, Plaintiffs’ proposed interpretation is not only in tension with the historical context of CEMA, but also would result in the absurd effect of penalizing

inherent subject line limitations when Washington statutes already require truthful information in the body of the email where all consumers will look for relevant information.

IV. CONCLUSION

For these reasons, *Amici* Retail Litigation Center and Washington Retail Association respectfully request that this Court answer the certified question by concluding that RCW 19.190.020(1)(b)'s prohibition is limited to subject lines containing false or misleading information about the *commercial nature or subject of the email message*.

Certificate of Compliance: I certify this brief contains 3,392 words in compliance with Rules of Appellate Procedure 10.4 and 18.17(b).

RESPECTFULLY SUBMITTED this 21st day of
March, 2024.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on the 21st of March, 2024, I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal which will send a copy of the document to all parties of record via electronic mail.

DATED this 21st day of March, 2024.

s/ June Starr

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