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No. 81512-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON LEAGUE FOR INCREASED TRANSPARENCY & ETHICS, et al.,

Appellants,

vs.

FOX CORPORATION, et al.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

In this case, WASHLITE launched a frontal assault on the First Amendment by seeking a gag order preventing Fox News from airing commentary about the Covid-19 pandemic. The Complaint seeks to impose legal penalties on Fox for airing statements about Covid-19 that WASHLITE believes are "false" and dangerous because they do not conform to the official viewpoint of the Trump administration and the Washington state government about the pandemic. In addition, WASHLITE requests a prior-restraint injunction prohibiting Fox from airing future speech that contradicts the government's proclamations. And even worse, WASHLITE requests an order forcing Fox to recant past commentary and affirmatively endorse the government's viewpoint regarding Covid-19. The Complaint also seeks treble damages based on vague and unspecified harms that WASHLITE claims its members have suffered as a result of Fox's commentary.

WASHLITE thus seeks to restrain, control, and penalize what commentators and opinion hosts may say on cable television about one of the most pressing public issues of our time. Fortunately, neither the First Amendment nor state law allows such brazen interference with the freedom of the press. This Court should affirm the trial court's dismissal and award Fox costs and fees for WASHLITE's frivolous appeal.

II. STATEMENT OF ISSUES

1. Whether the First Amendment protects Fox's right to publish commentary that allegedly contradicts the government's official viewpoint regarding the Covid-19 pandemic.

2. Whether Fox's commentary on the Coronavirus falls under the CPA's prohibition against "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020.

III. STATEMENT OF THE CASE

Since early March 2020, the country has been gripped by an intense public debate about the Covid-19 pandemic. The debate has encompassed many pressing questions of political and scientific controversy: How serious of a threat does the virus pose? Which, if any, public officials should be blamed for its rapid spread? And what measures should be taken in response?

Instead of participating in the national debate through their own speech, WASHLITE sought to shut down the debate by filing suit against Fox Corporation and Fox News Network LLC (collectively, Fox) seeking to impose court-ordered censorship on Fox's commentary. In its Complaint, WASHLITE alleges that commentary aired by Fox unlawfully "contradicted the formal position of the Trump Administration, Governor

Inslee, [and] the urgent messages of public health experts" about the Covid-19 pandemic, thereby "sowing significant public confusion regarding the threat of the disease." CP 117.

As the basis of the Complaint, WASHLITE cherry-picks 18 different statements about the Coronavirus that aired on Fox News and the Fox Business Network between February 27 and April 13. CP 102-16. To take just one representative example, the Complaint repeatedly claims that Fox News opinion host Sean Hannity called the coronavirus a "hoax." CP 107-08. But as the transcripts show, Mr. Hannity has used the term "hoax" to refer to the media's attempts to blame President Trump for Covid-19—he never called the virus itself a hoax. *See* CP 177, 189, 256.

After selectively quoting the statements and plucking them out of context, WASHLITE characterizes the statements as falsely "contradict[ing]" the views of "the Trump Administration[]" and "Governor Inslee[]" by "minimiz[ing] the lethality of COVID-19." *E.g.*, CP 102, 104. Based on that mischaracterization, WASHLITE claims that Fox's commentary violated the Consumer Protection Act (CPA), which prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020.

In an attempt to state a claim under the CPA, WASHLITE alleges that Fox's commentary "persuaded consumers and persons . . . to fail to

properly prepare to stop the spread of COVID-19," and "to ignore Governor Inslee's directives . . . and the warnings of the Trump Administration." CP 119. According to the Complaint, the failure to heed the government's warnings then caused "longer closures of businesses, schools and other enterprises" in order to "combat the spread of the virus." *Id*. WASHLITE claims that this caused unspecified persons to suffer damages in the form of "time taken from work or business, inability to conduct business, loss of jobs, business or occupation [and] additional costs from not having prepared sooner (including paying higher prices for masks, paper products, hand sanitizer, etc. which could have been ordered or purchased earlier)." *Id*.

In its prayer for relief, the Complaint seeks an extraordinary prior restraint: an order that Fox "cease and desist televising any misinformation regarding COVID-19" in the future. CP 120. It also seeks an injunction affirmatively "directing Fox to issue specific retractions of each and every false and/or misleading statement televised through its cable television stations relating to COVID-19." *Id*. In addition, the Complaint seeks "treble damages" for a vague litany of harms supposedly caused by Fox's commentary. *Id*.

In the trial court, Fox filed a motion to dismiss arguing that the First Amendment and state law barred WASHLITE's claims. CP 124-283.

In its opposition brief, WASHLITE made only a single argument for why the First Amendment does not protect Fox's speech: According to WASHLITE, the First Amendment does not apply to cable television, and thus Fox can be censored at will because it simply "does not have First Amendment protections on the cable medium." CP 304.

After the motion was fully briefed, the trial court heard oral argument and granted Fox's motion to dismiss. CP 528-35. The court rejected WASHLITE's argument and held that Fox's cable programming is protected by "the same First Amendment rights accorded to newspapers and broadcast television stations." CP 530-31 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)). Accordingly, the court held that "WASHLITE's CPA claim against Fox is barred" because it seeks to censor and penalize "speech" on "matters of public concern" that lie "at the heart of the First Amendment's protection." CP 530, 533.

Fox sought costs as a prevailing party under RCW 4.84.010, .030, .060. CP 536-40. WASHLITE objected on the ground that fees for filing "working copies" were not recoverable costs. CP 542. The trial court disagreed and awarded Fox costs in the amount of $334.94. CP 561.

This appeal followed.

IV. ARGUMENT

Fox's commentary on the Covid-19 pandemic is core protected speech on a matter of public concern—how dangerous the Coronavirus is, and how society and the government should respond to it. Under both the First Amendment and state law, the value and veracity of this type of speech must be resolved through free and open debate in the marketplace of ideas—not through litigation seeking to impose legal penalties on statements alleged to be "false" or contrary to official government pronouncements. Even more clearly, a court cannot order a "prior restraint" on this type of speech, much less order a media outlet to issue a "retraction" affirmatively endorsing the government's viewpoint.

The trial court properly dismissed WASHLITE's Complaint, and this Court should affirm for three reasons. *First*, as the trial court correctly held, the First Amendment fully protects Fox's commentary on the Covid-19 pandemic because it is pure speech that addresses a matter of public concern. There is no merit to WASHLITE's argument that the First Amendment does not apply to cable television, which would leave all of the major cable news networks at the mercy of government censors. *Second*, as a matter of state law, the CPA does not apply to the type of media commentary at issue here. *Third*, the award of minimal court costs in the amount of $334.94 was proper.

A. The First Amendment Bars WASHLITE's Claims

The trial court correctly held that the First Amendment bars WASHLITE's claims. As a matter of basic constitutional law, media commentary on Covid-19 is speech on a matter of public concern, and thus falls within the heartland of the First Amendment's protection.

Supreme Court precedent flatly contradicts WASHLITE's argument that the First Amendment's protection of free speech depends on the medium through which speech is conveyed. Fox's status as a cable programmer—as opposed to, say, a newspaper or radio broadcaster—does not diminish its First Amendment right to air commentary on matters of public concern.

Nor are the protections of the First Amendment diminished by allegations that the commentary at issue is "false." To the contrary, the very purpose of the First Amendment is to protect free speech so that truth and falsity on matters of public concern can be resolved through free and open debate, not by imposing legal penalties on the losing side. With a few narrow exceptions not implicated here, the remedy for supposedly "false" speech is not court-imposed censorship but rather more speech.

1. Fox's Commentary Is Protected under the First Amendment

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). For that reason, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

Speech on matters of public concern cannot be censored or penalized under the guise of protecting the public from harm. *See Snyder v. Phelps*, 562 U.S. 443, 113 S. Ct. 1207, 179 L. Ed. 2d 172 (2011). In *Phelps*, for example, the Supreme Court held that speech on a "matter[] of public import" could not be restricted even though it directly harmed the plaintiff by intentionally inflicting emotional distress in violation of state law. *Id*. at 460. Although the speech "inflict[ed] great pain," it was fully protected under the First Amendment in order "to ensure that we do not stifle public debate." *Id*. at 460-61. If the rule were otherwise, "the free

and robust debate of public issues" would be impossible. *Id*. at 452. Accordingly, in order to protect vibrant public discourse, speech must be fully protected whenever it addresses "a subject of general interest and of value and concern to the public." *Id.* at 453.

Nor can a plaintiff defeat the First Amendment's "special protection" by alleging that speech on a matter of public concern is "false." Commentary on public controversies cannot be deemed false because, "[u]nder the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 339-40, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id*. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind" on public issues. *Thomas v. Collins*, 323 U.S. 516, 545, 65 S. Ct. 315, 89 L. Ed. 430 (1945) (Jackson, J., concurring). "In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Id*.

Here, Fox's commentary on the Coronavirus is fully protected under the First Amendment because it plainly addresses "a matter of public concern." *Snyder*, 562 U.S. at 458. Even accepting WASHLITE's

false and tendentious characterization of the speech at issue, it plainly addressed the "dangers" posed by the Coronavirus and the appropriate social and political response to it. The speech thus easily satisfies the First Amendment's "public concern" test because it covers "a subject of general interest and of value and concern to the public." *Id.* at 453. For that reason alone, the speech is entitled to "special protection" and cannot be punished under state law. *Id* at 452.

WASHLITE does not seriously dispute this point, and instead argues only that Fox's speech was not "political" because it discussed "fact[s]" not "ideas." Appellant's Opening Br. (AOB) 28-29. But that is irrelevant. The freedom of speech protected by the First Amendment includes the freedom to debate which "facts" are true, just as it does which "ideas" are true. Accordingly, what matters for purposes of the First Amendment analysis is that Fox's speech undeniably addressed a matter of public concern, which includes any "subject of general interest and of value and concern to the public." *Snyder*, 562 U.S. at 453. WASHLITE does not cite any case denying protection to speech discussing "facts" on a matter of such public importance. Instead, for unknown reasons, WASHLITE cites inapposite cases addressing the political-question doctrine, which have nothing to do with First Amendment protection. *See* AOB 29.

In this case, the danger to the First Amendment is especially pronounced because the principal thrust of WASHLITE's Complaint is that Fox should be penalized for (and restrained from) expressing a viewpoint that "contradict[s] the formal position of the Trump Administration" and other government officials on matters of public health and safety. CP 117. WASHLITE thus seeks to impose an official government-backed viewpoint that everyone must adhere to. But that is exactly the type of censorship that the First Amendment was designed to prevent. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed 1628 (1943). Indeed, the entire point of a free press is to allow dissenting viewpoints that *criticize* the government for being wrong on important public issues. Accordingly, Fox cannot be penalized for airing commentary that dissents from the "orthodox" governmental view of how dangerous the Coronavirus is or what types of health and safety measures should be taken in response to it.

WASHLITE's argument would authorize wholesale viewpoint discrimination against anyone who disagrees with the government about

Covid-19 or other issues of "public health, safety, or welfare." AOB 3. That would violate the cardinal principal that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 394, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).

Because the categories of "public health, safety, [and] welfare" are so expansive, denying First Amendment protection to speech that implicates these issues would allow censorship on virtually every important political topic. For example, it would allow speakers to be penalized for contradicting the "formal position of the Trump Administration" (CP 117) regarding the "public safety" threats posed by everything from illegal immigration to medical marijuana to global warming. By WASHLITE's logic, anyone who "misrepresent[s] the dangers" or spreads "misinformation" on these topics (as defined by the government) could be punished for causing others to "fail to take appropriate action to protect themselves and others" from harm. CP 117, 119. Indeed, WASHLITE would make it unlawful even to "persuade[]" others to "ignore . . . the warnings of the Trump Administration," whenever such persuasion results in any "quantifiable [or] non-quantifiable injury." CP 119. It is hard to imagine a greater threat to the

First Amendment, which protects the expression of dissenting viewpoints *especially* when it comes to arguing that the government is wrong on important public issues.

2. WASHLITE Cannot Circumvent the First Amendment

In its attempt to show that Fox's commentary on Covid-19 does not qualify as protected speech, WASHLITE made only a single argument in its brief opposing the motion to dismiss: WASHLITE contended that "cable programmers do not have First Amendment rights on the cable medium." CP 297, 302-05. The trial court rejected that argument as flatly contrary to basic principles of free speech and binding Supreme Court precedent. CP 530-31. WASHLITE renews this same frivolous argument on appeal, but it has not improved by repetition.

For the first time on appeal, WASHLITE also raises a new argument that it did not make in its brief opposing Fox's motion to dismiss. It now contends that supposedly "false" commentary on "statements of fact" categorically is "not protected speech under the First Amendment." AOB 1-2. But because WASHLITE did not raise any such argument below, it has forfeited the right to do so here. In any event, precedent flatly rejects the notion that speech on matters of public concern can be stripped of First Amendment protection whenever a would-be censor alleges that the speech is "false." As the U.S. Supreme Court has

made clear, allegedly "false" speech can be restricted only in certain traditional, narrowly defined categories such as defamation and commercial fraud, which are not alleged here.

Indeed, this case illustrates the dangers that WASHLITE's extreme anti-free-speech position would invite. In an attempt to censor Fox's "false" commentary, WASHLITE plucks statements out of context and badly distorts what they said. It also ignores the diversity of viewpoints expressed on the Covid-19 pandemic by various commentators not only on Fox but also in different media outlets. In the early days of the pandemic in March and April of 2020, all of this commentary was part of a robust and rapidly evolving national discussion about the novel Coronavirus outbreak. Allowing courts to censor and penalize such speech would have a chilling effect on the free exchange of ideas and information, thus *inhibiting* rather than promoting the pursuit of truth.

a. The First Amendment Applies to Cable Programmers

WASHLITE maintains that the First Amendment does not apply to cable television. According to WASHLITE, "cable programmers" such as Fox simply do not "enjoy First Amendment rights on a cable system owned by" a "cable operator" such as "AT&T, Comcast, [or] Spectrum." AOB 23-24. This argument is not only wrong as a matter of law but is so

patently frivolous that WASHLITE exposes itself to sanctions and/or attorney's fees by continuing to make it.

As the trial court explained (CP 531), WASHLITE's argument is squarely foreclosed by binding precedent. The Supreme Court has held that "[c]able programmers and cable operators . . . are entitled to the protection of the speech and press provisions of the First Amendment." *Turner*, 512 U.S. at 636. Indeed, "the basic principles of freedom of speech and the press . . . do not vary" based on the "medium [of] communication." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790-91, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011). Accordingly, state law cannot "restrict expression because of its message, its ideas, its subject matter, or its content" in any medium. *Id*. (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002)); *see also United States v. Playboy Entm't Grp.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) (restricting pornography violated cable programmer's First Amendment rights).

In arguing to the contrary, WASHLITE confuses two distinct points. While cable programmers like Fox generally do not have a right to *force* private cable operators to carry their content, they do have a right against state-imposed censorship—from the courts or any other government entity. Thus, when a cable operator like Comcast agrees to

carry Fox's programming, the First Amendment fully protects the network's speech from legal penalty. *Turner*, 512 U.S. at 636.

WASHLITE relies (AOB 26) on Justice Thomas's opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996). But as that opinion explained, any governmental restriction on "programming that the [cable] operator has agreed to carry" "clearly implicates" the "free speech rights" of cable programmers. *Id*. at 832 (Thomas, J., concurring in part). Justice Thomas's point in the *Denver Area* case was that cable operators also have First Amendment rights, such that the government cannot force *them* to carry content against their will. *Id*. at 816-17. But he never suggested that cable programmers lack a First Amendment right in content that cable operators have agreed to carry.

The other cases that WASHLITE cites (AOB 26-28) are similarly inapposite. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972), held only that the First Amendment does not compel private property owners to provide a forum for others. *Id.* at 570. And *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012), has no bearing on this case, as the Court there did not address the scope of the First Amendment at all. *Id.* at 258.

WASHLITE invokes the principle that "broadcast media" have

sometimes been treated as having more "limited First Amendment protection" than other types of media. AOB 27 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978)). But that is irrelevant because the present case involves cable, not broadcast. The Supreme Court has flatly rejected the notion that cable media are subject to the special First Amendment limitations that may apply to broadcast media. *See Turner*, 512 U.S. at 637; *Playboy*, 529 U.S. at 815; *see also Fox*, 567 U.S. at 258 (flagging possibility that restrictions on broadcast media "should be overruled" because the "rationale" of such restrictions "has been overtaken by technological change"). And, in any event, even the limited restrictions that might be permissible on broadcast would not allow the type of extreme censorship WASHLITE is seeking to impose here, which involves core political speech regarding matters of public concern. *See Pacifica*, 438 U.S. at 745-46 (even if "patently offensive" expletives can be censored in broadcast, such restrictions "must remain neutral in the marketplace of ideas").

Faced with this problem, WASHLITE offers the novel argument that Fox's contractual agreements with "AT&T, Comcast and/or Spectrum" might not give Fox an "unfettered right" to air commentary, and that "discovery of those agreements" is thus required. AOB 28. But the Complaint contains no such allegation, nor did WASHLITE make any

such argument in its trial court briefing. And in any event, Fox's contracts have no bearing on whether the First Amendment protects Fox against court-imposed penalties based on the content of its commentary. Whether the *carrier* could lawfully choose not to carry Fox's broadcasts is irrelevant to whether the *government* (via allowing its courts to be used to prosecute an alleged violation of state law) may suppress speech protected by the First Amendment.

For these reasons, the trial court properly rejected WASHLITE's argument that Fox has no First Amendment rights in the commentary it airs on cable television. CP 531.

b. WASHLITE Cannot Censor Fox's Commentary by Labeling It "False"

For the first time on appeal, WASHLITE argues that Fox's commentary on Covid-19 is not protected under the First Amendment because it is "false" and harmful to society. In its view, commentary in the news media is "not protected by the First Amendment" when it contains allegedly "false statements of fact relating to the public health, safety and welfare." AOB 3, 15. This argument is nothing short of astonishing. Not only did WASHLITE fail to argue it below, but it contradicts the most fundamental principles of the First Amendment.

i. WASHLITE Forfeited This Argument

As a preliminary matter, WASHLITE cannot raise this new First

Amendment argument because it failed to raise it in its brief opposing Fox's motion to dismiss. In general, a party may not raise an argument for the first time on appeal. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007). There are some exceptions: "a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). But those exceptions do not apply here.

ii. The First Amendment Does Not Allow the Use of Legal Penalties to Enforce the "Truth" in Public Debate

Even assuming it is not forfeited, WASHLITE's new First Amendment argument is plainly wrong. WASHLITE argues that purportedly "false statements of fact relating to the public health, safety and welfare are not protected by the First Amendment." AOB 15. WASHLITE contends that, because "protecting the public health is a paramount interest," acts of censorship "taken in connection with that effort are constitutional." *Id.* at 22. If taken seriously, this argument would authorize the Trump administration, state governments, and local officials to impose wide-ranging censorship of "false" speech in the name of protecting "public health" and "welfare"—not only when it comes to the Covid-19 pandemic, but in a wide variety of policy areas that implicate

public health, safety, and welfare. This argument must be rejected.

At the outset, WASHLITE's argument rests on a false premise: Fox submitted an overwhelming array of judicially noticeable material in the trial court showing that the commentators on its air made no false statements of fact. *See supra* p. 3; *infra* pp. 26-29. But the trial court had no need to consider this point, and it did not. Instead, the court correctly relied on longstanding precedent holding, as a matter of law, that speech on matters of public concern does not lose its First Amendment protection when it is alleged to be "false." To the contrary, the very purpose of the First Amendment is to protect the freedom of the press to publish competing viewpoints about what is true on matters of public concern. CP 530-33. Thus, if the freedom of speech enshrined in the Constitution means anything, it does not allow courts to suppress competing viewpoints on matters of public debate pertaining to public health and safety.

The Supreme Court has recognized the dangers of authorizing the censorship of supposedly "false" speech. Free debate requires that speakers be allowed to express disagreement about what is true or false. For that reason, there is no "general exception to the First Amendment for false statements," which are "inevitable if there is to be an open and vigorous expression of views" on any subject. *United States v. Alvarez*, 567 U.S. 709, 718, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) (plurality

op.). To protect open and vigorous debate, allegedly false speech cannot be restricted except in the few "historic and traditional categories [of expression] long familiar to the bar." *Id*. at 717. These traditional categories allow speech restrictions only when absolutely necessary to protect against "defamation, fraud, or some other legally cognizable harm" that cannot be prevented in any other way. *Id*. at 719.

By contrast, policing alleged falsity has never been allowed in the course of public debate in the news media about matters of public concern, because, in this context, the Constitution trusts that "the dynamics of free speech, of counterspeech, of refutation" will "overcome" any falsehood. *Id*. at 726. Indeed, "suppression of speech by the government can make exposure of falsity *more* difficult, not less so," because it makes it harder to learn what views people actually hold, and to see those views publicly debated (and rebutted if they are erroneous). *Id*. at 728 (emphasis added). For all of these reasons, "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id*. at 723.

Even the dissenters in *Alvarez*, who favored allowing *more* restrictions on false speech, recognized that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger" to free debate. *Id*. at 751 (Alito, J., dissenting). In particular, "[l]aws restricting false statements about

philosophy, religion, history, the social sciences, the arts, and other matters of public concern" are impermissible. *Id*. "The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth." *Id*. at 751-52. "Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal." *Id.* at 752.

Here, as the trial court explained, WASHLITE has never made any attempt to "explain how its CPA claim in this case might fall under the few categories identified in *Alvarez*" of permissible speech restrictions. CP 532. Nor does WASHLITE grapple with the concern that any attempt to penalize purportedly "false" statements on matters of public concern would pose an unacceptable risk of chilling free debate on the most important issues, where the unfettered pursuit of truth is most essential.

In an attempt to justify its proposed censorship of Fox's speech, WASHLITE contends that the "protection of the public health, safety and welfare" is a "compelling state interest." AOB 19. But even assuming that is true, censorship of the media has never been regarded as a permissible means of advancing government interests. To the contrary, restricting speech on matters of public concern is impermissible because it is not the

"least restrictive means" to achieve the government's interests. *Alvarez*, 567 U.S. at 729 (plurality op.). Under the First Amendment, the proper remedy for allegedly "false" speech is not censorship, but rather more speech. The First Amendment does not allow censorship because it depends on the principle that "more accurate information will normally counteract" any falsehood. *Id*. at 738 (Breyer, J., concurring). Accordingly, the suppression of alleged "falsehoods" in public debate is subject to "near-automatic condemnation." *Id.* at 731.

WASHLITE attacks a strawman in arguing that "[c]onstitutional rights are not unfettered." AOB 15. Although the First Amendment has narrow exceptions as recognized in *Alvarez*, no such exception applies here. Apparently recognizing this reality, WASHLITE instead cites several cases (AOB 15-22) involving the regulation of *conduct* instead of speech. *Crowley v. Christensen*, 137 U.S. 86, 11 S. Ct. 13, 34 L. Ed. 620 (1890), held that states could restrict the sale of intoxicating liquors. *O'Connor v. Donaldson*, 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975), addressed the constitutionality of involuntary psychiatric confinement. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), addressed compulsory smallpox vaccinations. *See also People ex rel Hill v Lansing Bd of Educ*., 224 Mich. 388, 390, 195 N.W. 95 (Mich. 1923) (same). And *In re Abbott*, 954 F.3d 772, 784 (5th Cir.

2020), dealt with the enforcement of abortion restrictions. None of these cases involved the First Amendment.

WASHLITE also cites *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011), but that case undermines rather than supports WASHLITE's argument. In *Sorrell*, which involved purely commercial speech, the Supreme Court struck down a law that "restrict[ed] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors." *Id*. at 557. The purpose of the law was to "safeguard medical privacy and diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the State." *Id*. But the Court held that even "in the fields of medicine and public health," where the government has weighty interests at stake, it generally cannot "suppress speech" to achieve those interests. *Id*. at 566.

Likewise, *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018), does not support WASHLITE's argument but rather refutes it. In that case, the Supreme Court struck down a law requiring "crisis pregnancy centers" to "inform women how they can obtain state-subsidized abortions." *Id*. at 2370-71. The defenders of the law argued that the speech regulation was allowed because it applied only to "professional speech." *Id*. at 2371. But the

Supreme Court explained that it had never recognized professional speech as an unprotected "category of speech," and it refused to "mark off [a] new categor[y] of speech for diminished constitutional protection." *Id*. at 2372. The logic of *Becerra* thus refutes WASHLITE's attempt to create a new category of unprotected speech involving "threat[s] to the public health in the midst of a pandemic." AOB 15.

Finally, there is no merit to WASHLITE's attempt to analogize this case to others involving commercial "fraud and/or misrepresentation." AOB 17 (citing *Carlile v. Harbour Homes, Inc*., 147 Wn. App. 193, 194 P.3d 280 (2008)). Permissible fraud laws operate only within the realm of *commercial* speech, which is defined as "speech proposing a commercial transaction." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). In *Carlile*, for example, a homebuilder allegedly "engaged in unfair and deceptive practices by making affirmative representations of quality, workmanship, and construction" that turned out to be false. 147 Wn. App. at 211-12.

There is a "commonsense distinction" between commercial speech "and other varieties of speech"—such as commentary in the news media about matters of public concern—that are subject to full First Amendment protection. *Ohralik*, 436 U.S. at 455-56; *see also, e.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)

(distinguishing between "merely 'commercial'" speech and "fully protected expression"). Here, there is no suggestion that Fox's commentary about the Covid-19 pandemic somehow "propos[ed] a commercial transaction." *Ohralik*, 436 U.S. at 456. For that reason, it was not commercial speech and the full protection of the First Amendment applies.

Even if Fox's speech here could somehow be characterized as *partially* commercial, that would ultimately make no difference because it was at the very least "inextricably intertwined with otherwise fully protected speech." *Riley*, 487 U.S. at 796. The Supreme Court has recognized that when commercial speech is "intertwined with informative and perhaps persuasive speech," courts must treat it as "fully protected expression" under the First Amendment. *Id*.

c. WASHLITE's Portrayal of Fox's Speech Is False and Misleading

The full context makes it even clearer that the speech at issue here is fully protected under the First Amendment. WASHLITE has cherry-picked and distorted a handful of statements by certain Fox opinion hosts and guests, while ignoring other views also aired on Fox.

Most egregiously, WASHLITE's brief proceeds from the premise that Fox commentators "repeatedly stated" that Covid-19 "is a hoax and

therefore not a threat to human life." AOB 1; *see also* AOB 2, 12, 19, 23. WASHLITE's assertion is categorically false, as the transcripts show. Tellingly, WASHLITE cites only a single instance of anyone on Fox using the term "hoax." AOB 12. In that commentary, Sean Hannity clearly used the term "hoax" to refer to the media's attempts to *blame President Trump* for the Coronavirus outbreak—he never called the virus itself a hoax. *See* CP 177, 189, 256.[1]

Likewise, WASHLITE falsely claims that "during his evening program" on February 28, Sean Hannity "stated that COVID-19 was an invention of the political left in an effort to 'bring down the president.'" CP 102. In fact, as even the most basic pre-filing investigation would have shown, Mr. Hannity did not even appear on his show that night; there was a fill-in host. *See* CP 145. The fill-in host also did not make the statement that WASHLITE attributes to Mr. Hannity. A statement similar to that alleged by WASHLITE was made by then-Acting White House Chief of Staff Mick Mulvaney—but not on Fox News; it was at the Conservative Political Action Conference (CPAC). And, even then, Mulvaney did not

[1] Although the trial court had no need to rely on them, the transcripts of the telecasts at issue are judicially noticeable because the Complaint refers to the contents of them. *See Rodriguez v. Loudeye Corp*., 144 Wn. App. 709, 726, 189 P.3d 168 (2008). They are also noticeable because they are on LexisNexis and WASHLITE does not contest their accuracy, and that source is "'not subject to reasonable dispute.'" *Id*. (quoting ER 201(b)); *see also Marks v. Seattle*, No. C03-1701, 2003 WL 23024522, at *2 (W.D. Wash. Oct. 16, 2003) (judicially noticing transcripts).

say the virus was an "invention of the political left," but only that some political actors were unfairly blaming the President for the outbreak, "because they thought it would bring down the president." Erik Wemple, *Would the Media Skew Coronavirus Coverage to Damage Trump? Sure, Say CPAC Attendees*, WASH. POST (Feb. 29, 2020, 11:15 AM PST), https://www.washingtonpost.com/opinions/2020/02/29/would-media-skew-coronavirus-coverage-damage-trump-sure-say-cpac-attendees/.

WASHLITE also claims that Hannity and Geraldo Rivera "falsely" reported on February 27 and 28 that nobody had yet died of the Coronavirus in the United States. CP 102-03. But, as the Complaint itself admits, "the first reported death in the United States" did not occur until "February 29." CP 103. While authorities later reclassified two deaths from February 26 as Coronavirus-related, that reclassification did not occur until early March. *See* Mike Baker & Karen Weise, *Coronavirus Deaths Tied To Nursing Center Came Earlier Than Anyone Knew*, N.Y. TIMES (Mar. 3, 2020).[2]

In addition, WASHLITE takes many quotes out of context, deceptively omitting the accompanying warnings about the dangers of

[2] For the announcement of the first known Coronavirus-related death in the United States, *see* Press Release, Governor's Office, "Inslee Issues COVID-19 Emergency Proclamation" (Feb. 29, 2020), *available at* https://www.governor.wa.gov/news-media/inslee-issues-covid-19-emergency-proclamation.

Covid-19. For example, the Complaint ignores Hannity's statements that "the coronavirus is a serious disease," and that "all of us" "need to take necessary precautionary steps," while people who have a "compromised immune system in any way" need to "take extra, extra, extra caution." CP 178, 190. The Complaint likewise derides Laura Ingraham for saying that "the facts are actually pretty reassuring," CP 106, but ignores her statement that "elderly person[s]" and those with "serious underlying condition[s]" should take precautions, CP 195. The Complaint criticizes Judge Jeanine Pirro for comparing the Coronavirus to the flu, but it ignores her explanation: "[T]hey say the mortality rate for coronavirus is higher than a flu. But consider though that we have a flu vaccine, and yet in 2019, sixteen thousand Americans died from the flu. Imagine if we did not have the flu vaccine, the flu would be a pandemic." CP 165. The Complaint also says that Trish Regan "minimized the lethality of COVID-19," CP 107-08, but it fails to note that she urged people to "take [it] seriously and . . . to exercise caution." CP 234.

Compounding its dishonesty, the Complaint seeks to hold Fox liable by selectively targeting a tiny fraction of the commentary Fox has aired regarding Covid-19. There is no allegation that Fox's commentary has *exclusively* minimized the dangers of the Coronavirus, and indeed the opposite is true. WASHLITE simply ignores the fact that the totality of

Fox's programming on the Coronavirus has repeatedly acknowledged the dangers of the disease, while also providing a forum where diverse views can be aired and debated. Tucker Carlson repeatedly warned primetime viewers, more than a month before Governor Inslee declared an emergency, that the Coronavirus is "a real threat" and "a major concern" that they "should worry about." CP 268, 270. Other voices on Fox News told viewers "to be concerned" and "very careful," CP 270 (Ethan Bearman), that the outbreak "could be serious," *id.* (Dr. Michael Baden), to "expect tens of thousands, eventually hundreds of thousands of cases in the U.S.," CP 271 (Maria Bartiromo), and that it was "wrong to compare this to a past flu," CP 272 (Greg Gutfeld). *See also* CP 268-75.

Finally, numerous statements in other media outlets illustrate the chilling effect that penalizing this type of speech would have. For example, on March 4, 2020, CNN's Anderson Cooper told viewers that "if you're freaked out at all about the coronavirus, you should be more concerned about the flu." CP 139. A number of medical correspondents made the same comparison or otherwise minimized the threat. *See, e.g.*, CP 277 (Dr. Jennifer Ashton, ABC: "People should be more concerned right now with the flu in this country."); *id.* (Dr. John Torres, NBC: "[T]he reality is comparing it to the flu, for example, it's not even close to being at that stage."); CP 278 (Dr. David Agus, CBS: "Coronavirus is not going

to cause a major issue in the United States."); *id.* (Dr. Natalie Azar, NBC: "[T]he fatality number is not nearly as striking or concerning as some outbreaks we've seen in the past."); *id.* (Dr. Sanjay Gupta, CNN: "[T]here does seem to be similarities between the coronavirus and the flu."). The *New York Times* likewise published articles comparing the Coronavirus to the flu and arguing that banning travel with China was unnecessary. CP 277, 279. And the *Washington Post* published an article subtitled, "The Flu Is A Much Bigger Threat Than Coronavirus, For Now." CP 279.

In light of all of all these statements and many others, singling out Fox for punishment would be nothing short of impermissible speaker-based discrimination. *See First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978) (the law may not discriminate among "speakers who may address a public issue"). And if *all* such statements are to be censored throughout the media, then free and open debate is a dead letter. That would ultimately do great harm to the public, because nobody has the gift of omniscience about Covid-19 or any other issue. In a free society, the pursuit of truth requires allowing different speakers to express competing viewpoints, and trusting that the truth will have the best chance of prevailing through the process of open debate—not through the selective imposition of legal penalties. Even if certain opinions turn out to be wrong, they are all part of the ongoing

public discussion that advances the truth by provoking criticism and counterpoint. This is the way the First Amendment works—not by enshrining one privileged viewpoint as the Absolute Truth and suppressing all others.

3. The First Amendment Bars WASHLITE's Request for a "Prior Restraint" Injunction

WASHLITE's claims are especially offensive to the First Amendment because of the extraordinary forms of injunctive relief sought in the Complaint. It seeks not only treble damages, but also a prior-restraint injunction that would prevent Fox from airing commentary about Covid-19 in the future. And even worse, it seeks a compelled-speech injunction that would require Fox to affirmatively recant its views and endorse the official government-approved viewpoint advanced by WASHLITE.

First, WASHLITE requests a prior restraint that would bar Fox from "televising any misinformation" about the Coronavirus. CP 120. This type of prior restraint bears "a 'heavy presumption' against its constitutional validity," which cannot be overcome by a plaintiff "attempting to stop the flow of information . . . to the public." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971). Indeed, the Supreme Court has rejected prior restraints even

when critical national-security interests are at stake, as illustrated by the landmark "Pentagon Papers" case in *New York Times Co. v. United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971). In that case, the Court struck down a prior restraint on the publication of "top secret" information leaked from the Pentagon that the Attorney General certified would cause "irreparable injury to the defense interests of the United States." *See* Margaret A. Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* 370 (1992).

Here, by contrast, no government official has even suggested any need to suppress media coverage about Covid-19. To the contrary, the FCC specifically considered and rejected the notion that dissenting viewpoints on Covid-19 should be censored. *See* FCC Order Re: Free Press Emergency Petition for Inquiry Into Broadcast of False Information on COVID-19, DA-20-385, at 1 (Apr. 6, 2020) (explaining that restricting allegedly false statements and commentary regarding the Coronavirus "would dangerously curtail the freedom of the press embodied in the First Amendment"), https://tinyurl.com/y8wmg22b. And WASHLITE long ago forfeited any argument that it has any *urgent* need to suppress Fox's commentary, because it has never sought any temporary restraining order or emergency injunctive relief. It has not even requested an expedited appeal, but instead took a 30-day extension for the deadline of its opening

appellate brief. *See* Appellants' Mot. Ext. Time (Aug. 28, 2020).

WASHLITE's second request for injunctive relief is even more extreme: It asks for an order "directing Fox to issue specific retractions" confessing that its prior statements about the Coronavirus were erroneous. CP 120. This would not only prohibit Fox from airing disfavored viewpoints, but also force Fox to affirmatively endorse the government's viewpoint urged in the Complaint. This type of forced confession on matters of political controversy is anathema to the Constitution. When "individuals are coerced into betraying their convictions" in this manner, "additional damage is done" beyond mere censorship. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464, 201 L. Ed. 2d 924 (2018). As the Supreme Court has explained, it is a bedrock constitutional principle that no person can be "force[d] . . . to confess by word or act their faith" in an official government viewpoint about matters of public concern. *W. Va. State Bd. of Educ.*, 319 U.S. at 642. But that is exactly what WASHLITE requests, which is yet another reason why the trial court was correct to dismiss this case as a matter of law.

B. Fox's Commentary on Covid-19 Does Not Violate the Consumer Protection Act

Even putting aside its myriad constitutional infirmities, WASHLITE's CPA claim also fails as a matter of state law. The CPA

does not regulate speech about public-policy issues in the news media. It applies only to deceptive *commercial* speech that induces the victim to act in a way that causes proximate harm to his business or property. No court has ever thought to apply this commercial consumer-protection statute to political commentary in the news media, which would make the law grossly unconstitutional for all the reasons explained above. Nor has any court ever accepted a CPA claim based on the type of extremely attenuated causal chain that the Plaintiffs rely on here.

The CPA requires a plaintiff to satisfy "five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The CPA does not apply here for at least three reasons: *First*, the CPA regulates commercial speech, not speech about matters of public concern in the news media. *Second*, WASHLITE fails to allege any "injury to plaintiff in [its] business or property." *Id. Third*, WASHLITE fails to adequately allege that Fox's commentary *caused* injury to anyone's business or property.

1. The CPA Does Not Regulate Speech About Matters of Public Concern by the Media

The CPA applies only to deceptions that harm consumers "in the conduct of . . . trade or commerce." RCW 19.86.020. "Trade" and "commerce" are defined as "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). This Court has already held that a "news article . . . is not published 'in the conduct of any trade or commerce'" and thus "does not fall within those activities governed by RCW 19.86.020." *Fidelity Mortg. Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 468, 128 P.3d 621 (2005). It makes no difference if the speech is part of an "advertising" strategy "to drum up interest" and increase revenue. *Delashaw v. Seattle Times Co.*, No. C18-537JLR, 2018 WL 4027078, at *15 (W.D. Wash. Aug. 23, 2018). Thus, if a CPA "claim is based on [a] news article[]," it fails because this type of speech "is not actionable." *Id*. That simple principle decides this case: a media telecast offering news or commentary, like a newspaper article, is not "trade or commerce." The CPA thus does not apply.

WASHLITE concedes that the CPA does not apply to news stories under *Fidelity Mortgage*, but proposes two possible distinctions for this case. First, citing the "Terms of Use" for FoxNews.com, WASHLITE

argues that because Fox supposedly "limits itself as an entertainment source thus disclaiming it is a news source," it is not entitled to the same protections as a newspaper. AOB 34-35. But the "Terms of Use" explicitly apply only to "services" on the FoxNews.com website, not to any Fox content on television. *See* Fox News Network, "Fox News Network, LLC Terms of Use Agreement" (May 19, 2020), http://www.foxnews.com/terms-of-use. They are thus irrelevant.

In any event, WASHLITE's purported distinction between news and entertainment is irrelevant in determining whether Fox's speech constitutes conduct "occurring in trade or commerce." The speech at issue did not propose a transaction nor was it commercial advertising, and therefore it did not occur in "trade or commerce." If the CPA were interpreted so broadly as to cover non-commercial speech and to regulate "falsity" in the news media, it would run into all of the First Amendment problems described above. *See Riley*, 487 U.S. at 796.

Second, and somewhat relatedly, WASHLITE argues that "Fox cannot escape liability under the CPA" because it "is a corporation selling entertainment content, broadcasting, and maintaining subscription services to paying customers." AOB 39-40. But if this were true of Fox, the same would be true of newspapers and other media outlets. In an attempt to support their position, WASHLITE cites *Short v. Demopolis*, 103 Wn.2d

52, 691 P.2d 163 (1984). AOB 40. But that case recognized that while the CPA covers the *commercial* speech of attorneys (pricing, billing, client development, etc.), it does not cover their *non-commercial* speech such as the statements or arguments they make when practicing law. *Short*, 103 Wn.2d at 61-62. Courts apply the same distinction to media companies: the CPA covers their commercial speech (e.g., advertising, billing, contracting, etc.), not their reporting or commentary. *Fidelity*, 131 Wn. App. at 468. Even if commentary advances the company's "entrepreneurial" goals by earning "revenue and notoriety," that does not make it commercial speech subject to the CPA. *Delashaw*, 2018 WL 4027078, at *15. The same principle applies to cable news.

2. WASHLITE Fails to Allege Business or Property Injury

WASHLITE's Complaint further fails to allege any injury to its members' business or property. Instead, the Complaint implausibly alleges that Fox's speech somehow caused the Coronavirus to spread, which caused vague "damages" and "unspecified injuries" to some unspecified victims. CP 119. To the extent the supposed victims are identified at all, they are described only as "consumers" and "persons in Washington State." *Id*. That is not enough to state a claim. See *Hangman Ridge*, 105 Wn.2d at 785 (A CPA claim "requires a showing of injury to plaintiff in his or her business or property.").

Recognizing this, WASHLITE has changed its position on appeal, arguing that its members suffered "economic impact[]" because Fox purportedly "told its viewers that COVID-19 was a hoax thus encouraging them to ignore the various governmental actions implemented to slow the spread of the virus," and thus "more governmental action was required to stem the tide of COVID-19." AOB 2, 44-45.

These new claims of injury fail for two reasons. First, Rule 12 looks only to "the allegations contained in the complaint." *Rodriguez*, 144 Wn. App. at 725-26. Second, WASHLITE still fails to identify any business or property loss. *Ambach v. French*, 167 Wn.2d 167, 172, 216 P.3d 405 (2009) ("The legislature's use of the phrase 'business or property' in the CPA is restrictive of other categories of injury and is 'used in the ordinary sense [to] denote [] a commercial venture or enterprise.'" (alteration in original) (citation omitted)).

In the alternative, WASHLITE argues that this Court must take as true its assertion of injury. AOB 45 (citing *Parrilla v. King County*, 138 Wn. App. 427, 431-32, 157 P.3d 879 (2007)). But *Parrilla* was a negligence case, where the only question before the court was whether the plaintiffs had adequately alleged that the defendants owed them a duty of care. It says nothing about a plaintiff's burden of alleging facts to show an actual injury to business or property in a CPA case.

3. Fox's Commentary Did Not Cause Injury to Anyone's Business or Property

a. WASHLITE Fails to Allege That Fox Induced Its Members to Act or to Refrain from Acting

Under the CPA, the "causation" element is not satisfied unless "the defendant 'induced' the plaintiff to act or refrain from acting." *Robinson v. Avis Rent A Car Sys., Inc*., 106 Wn. App. 104, 113, 22 P.3d 818 (2001); *see also, e.g.*, *Patrick v. Wells Fargo Bank, N.A*., 196 Wn. App. 398, 409, 385 P.3d 165 (2016) (rejecting plaintiffs' CPA claim because defendant did not "cause[] their injuries by inducing them to default"). In *Fidelity*, for example, the court found that the plaintiff company had not satisfied the inducement requirement because the defendant "did not induce [it] to act or refrain from acting." 131 Wn. App. at 469. Instead, the company's claim "rest[ed] on the assumption that the 'misleading' [speech] induced unknown *third parties* to act." *Id*. (emphasis added).

The same is true here. The Complaint does not allege that WASHLITE (or its members) were induced to act on the basis of Fox's commentary. Instead, it alleges that Fox's commentary "caused widespread confusion, and persuaded *consumers and persons located in Washington* State to fail to properly prepare to stop the spread of COVID-19." CP 119 (emphasis added). That allegation is deficient for the same reason it was in *Fidelity*: at best, it rests on the assumption that

WASHLITE was somehow indirectly harmed because Fox supposedly induced "unknown third parties" to fail to take proper steps to stop the spread of the Coronavirus.

In its opening brief, WASHLITE contends, as it did below, that *Hangman Ridge* abolished the "inducement" requirement for CPA causation. AOB 45-46. But WASHLITE ignores the authority showing otherwise. *See, e.g.*, *Robinson*, 106 Wn. App. 104; *Patrick*, 196 Wn. App. at 409. *Hangman Ridge* held only that inducement is not required under the CPA's "public interest element," 105 Wn.2d at 789, which is entirely separate from the causation element.

b. WASHLITE Fails to Explain How Fox's Commentary Proximately Caused Any Injury

Even putting aside the lack of any inducement, the Complaint also fails to explain how Fox's commentary was the *proximate cause* of any injury to WASHLITE. Contrary to WASHLITE's argument, AOB 45-46, it is well established that "proximate cause . . . is required to establish the causation element in a CPA claim." *Schnall v. AT&T Wireless Servs., Inc*., 171 Wn.2d 260, 278, 259 P.3d 129 (2011). This means that the causal connection between the alleged harm and the defendant's conduct cannot be "too remote." *Fidelity*, 131 Wn. App. at 470.

Here, saying that the causal connection is "too remote" is an understatement. The Coronavirus is a global pandemic that has caused, and continues to cause, economic devastation all around the world based on a complex combination of causal factors—even in countries where Fox has no presence. Private individuals and organizations have made their own decisions about how to "properly prepare" for the outbreak (CP 119), and the diversity of opinions expressed in the media have played, at most, an indirect and attenuated role in influencing anyone's actions.

The lack of proximate cause here is especially clear because, as noted above, the CPA covers only injuries to "business or property," and does not cover "[p]ersonal injuries." *Panag v. Farmers Ins. Co*., 166 Wn.2d 27, 57, 204 P.3d 885 (2009). WASHLITE accordingly must show not only that Fox's commentary somehow proximately caused the spread of the Coronavirus, but also proximately caused the "closures of businesses, schools and other enterprises" in Washington State that it says resulted in business or property loss. CP 119. But the clear proximate cause of the closures were the closure orders issued by the state government, not any commentary aired by Fox. And the notion that Fox's commentary caused the government closures—or caused them to last longer—is so speculative and attenuated as to be facially absurd. That is especially true because, according to the Complaint, Fox's commentary

argued *against* the need for such draconian closures, which is the opposite of proximately causing them.

WASHLITE does not appear to contest that Fox's speech was not the "proximate cause" of any business or property injury. Instead, it insists that only "but for" cause is required. AOB 46. But the very case WASHLITE cites says that "the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10 (2007); *see also Folweiler Chiropractic, P.S. v. FAIR Health, Inc.*, No. 15-2-13107-9 SEA, 2016 WL 5475812, at *3 (King Cnty. Super. Ct. July 20, 2016), *aff'd*, 4 Wn. App. 2d 1001, 2018 WL 2684374 (2018) (unpub.). A cause is not proximate unless it "produce[d]" a plaintiff's injuries "in a direct sequence," "unbroken by any superseding cause." WPI 15.01. Thus, even if there is "but for" causation, proximate cause requires a *legal* determination of whether the causal connection is too attenuated. *Tyner v. State*, 141 Wn.2d 68, 82-83, 1 P.3d 1148 (2000); *Folweiler*, 2018 WL 2684374, at *7.

WASHLITE argues this proximate cause presents a jury question (AOB 46), but courts do not hesitate to find proximate cause lacking as a matter of law where, as here, the causal connection is "too remote." *Kim v. Budget Rent A Car Sys., Inc*., 143 Wn.2d 190, 202-04, 15 P.3d 1283

(2001) (causation too remote as a matter of law); *Folweiler*, 2018 WL 2684374, at *7 (causation "too remote to support liability under the CPA" as a matter of law). Here, as previously described, the alleged causal chain between Fox's speech and the harms WASHLITE asserts is too indirect, remote, and speculative as a matter of law.

Even if only "but-for" causation were required, WASHLITE's claim would still fail. WASHLITE argues that it has adequately pled that Fox's conduct was a "but for" cause of its injuries by establishing a "robust correlation between Fox viewers' consumption of misinformation about the dangers of COVID-19, and negative impacts on community-wide health outcomes, and economic impacts as the pandemic have been so severe that the court may take judicial notice of it." AOB 46. Aside from the incoherence of this argument, it suffers from two fatal flaws. First, WASHLITE incorrectly conflates correlation with causation. *See* AOB 42-44, 46. As at least one Court has explained, "correlation is not causation." *In re Marriage of Luckwitz & Waikhom*, 175 Wn. App. 1065, 2013 WL 3965395, at *5 (2013) (unpubl.). And even if correlation were sufficient to show causation, WASHLITE overstates the contents of the reports. For example, the "Misinformation Review" cited and quoted in WASHLITE's opening brief never even mentions Fox. And the Harvard study cites Dr. Anthony Fauci's appearance on Fox as an exemplary

strategy for informing the public. K. Jemieson & D. Albarracín, *The Relation Between Media Consumption and Misinformation at the Outset of the SARS-CoV-2 Pandemic in the US* 3-4, 1 HARV. KENNEDY SCH. MISINFORMATION REV. (Apr. 2020).

Second, WASHLITE's causation argument inappropriately relies on evidence not properly before the Court. On a motion to dismiss, the only facts to consider are those alleged in the complaint or judicially noticeable. *Jackson v. Quality Loan Serv. Corp*., 186 Wn. App. 838, 844, 347 P.3d 487 (2015). But WASHLITE's Complaint does not refer to the University of Chicago and Harvard studies, the Kidder Mathews May 2020 publication, or the *Seattle Times* article about the University of Washington Huskies. Although WASHLITE's brief below cited these materials (CP 318-21), the trial court did not consider them and expressly declined to consider other non-complaint evidence (CP 530).

Nor are these materials judicially noticeable under ER 201. "Generally, judicially noticed facts are 'not subject to reasonable dispute' in the sense that they are 'generally known' or 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Fusato v. Wash. Interscholastic Activities Ass'n*, 93 Wn. App. 762, 772, 970 P.2d 774 (1999) (quoting ER 201(b)). But the assertions in the materials on which WASHLITE seeks to rely do

not satisfy these requirements. For example, the University of Chicago study has not even gone through the peer-review process—indeed, it is a working paper—and has been criticized as rushed and subject to various problems, *see, e.g.*, Anthony Fowler, *Curing Coronavirus Isn't a Job for Social Scientists*, Bloomberg.com (May 2, 2020, 5:00 AM PDT), https://www.bloomberg.com/opinion/articles/2020-05-02/crises-like-coronavirus-are-bad-for-social-sciences.

Because WASHLITE's asserted injuries were not proximately caused by Fox's commentary, its CPA claim fails for that reason as well.

C. The Award of Costs Was Proper

Finally, WASHLITE appeals (AOB 48) the trial court's award of $334.94 in costs to Defendants for filing fees, including $134.94 that Fox paid for the e-filing of "working papers" to the court. CP 542-43, 561-62. The award of costs was proper and should be affirmed.

WASHLITE claims that the $134.94 paid by Fox to file working copies of its pleadings are not "filing fees" recoverable under RCW 4.84.010. That is wrong. Under the plain text, "filing fees" include any fees paid for filing documents. Courts routinely grant fees for filing working copies.[3] *E.g.*, *Luke v. McAfee*, No. 17-2-03477-1 KNT, 2018 WL

[3] King County Superior Court Local Civil Rules (LCR) require "working copies" of papers to be delivered to the "hearing judge," which may be done "using the clerk's

6815661, at *2 (King Cnty. Super. Ct. Oct. 22, 2018) (Scott, J.) (granting "statutory costs" including "Working Paper Fees" of "$112.45" under RCW 4.84.010(1)); *Henderson v. Forest Creek All. Invs. LLC*, No. 16-2-29084-1, 2018 WL 5904580, at *1 (King Cnty. Super. Ct. Oct. 1, 2018) (Ruhl, J.) (awarding costs including five amounts of "$22.49" for working copies); *Boton v. Cape San Lucas Fishing LP*, No. 16-2-19959-3 SEA, 2018 WL 6252245, at *1 & Dkt. 275 at 2-4 (King Cnty. Super. Ct. Oct. 10, 2018) (Scott, J.) (granting costs for e-filing of working copies).

WASHLITE cites *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987), but that case did not address what constitutes a "filing fee." It simply held that awardable costs do not include extraneous expenses such as the photocopying and telephone expenses as addressed in *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987). This case does not involve that type of extraneous cost. It involves costs for e-filing briefs, which are plainly reimbursable as "filing fees."

Accordingly, the award of costs should be affirmed in full.

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eFiling application." LCR 7(b)(4)(F)(i). Local Civil Rule 7 further provides that the "clerk may assess a fee for the electronic submission of working copies." *Id*. Under King County Code 4A.630.190, the e-filing fee is set at $20, plus a $2.49 e-commerce fee.

D. This Court Should Award Costs and Attorney's Fees to Fox

The Court should award Fox costs and attorney's fees for this appeal. Costs are awarded to a prevailing appellee by default. RAP 14.2. The court "may award attorney fees to a party if the opposing party's appeal is frivolous." *Childs v. Allen*, 125 Wn. App. 50, 58, 105 P.3d 411, 415 (2004) (citing RAP 18.9(a)). An appeal is frivolous if it "presents no debatable issues" and there are no "facts or law to support [the appellant's] claim." *Harrington v. Pailthorp*, 67 Wn. App. 901, 913, 841 P.2d 1258 (1992); *see also, e.g.*, *Kearney v. Kearney*, 95 Wn. App. 405, 418, 974 P.2d 872 (1999) (granting fees where appellant "presented no debatable issues over which reasonable minds could differ; th[e] appeal has little merit and the chance for reversal is slim"); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 692, 732 P.2d 510 (1987) (finding appeal frivolous where appellant "provided no grounds for reversing the trial court").

In a First Amendment case, attorney's fees are especially appropriate to ensure that vexatious litigants cannot inflict litigation costs as a penalty for engaging in protected speech. After all, the expense "of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). And if plaintiffs can use frivolous arguments to penalize disfavored viewpoints

with hefty litigation costs, then unpopular speakers "will tend to become self-censors." *Id*. "[D]ebate on public issues" will then "become less uninhibited, less robust, and less wide-open." *Id*. And such censorship-by-litigation is "hardly less virulent for being privately administered." *Id*.

Here, WASHLITE's appeal is frivolous because it is not reasonably "debatable" whether the First Amendment protects Fox's speech. As the trial court explained, binding Supreme Court precedent squarely holds that "'[t]here can be no disagreement'" over the basic "'premise'" that "[c]able programmers . . . are entitled to the protection of the speech and press provisions of the First Amendment.'" CP 530-31 (quoting *Turner*, 512 U.S. at 622). The court also patiently explained that just because cable programmers cannot *force* private cable operators to carry their content, that does not mean they lack First Amendment rights against *government-imposed* censorship. CP 531 (citing *Denver*, 518 U.S. at 812-26). But despite that binding authority and the trial court's clear explanation, WASHLITE filed a vexatious appeal where it continues to argue that Fox does not "enjoy First Amendment rights on a cable system owned by someone else." AOB 23. WASHLITE has no reasonable basis for maintaining this position, and no excuse for continuing to press it other than to penalize Fox for engaging in protected speech.

The trial court also pointed out that "this case involves matters of

public concern . . . at the heart of the First Amendment's protection," and noted that WASHLITE "does not explain how its CPA claim in this case might fall under the few categories [of unprotected speech] identified in *Alvarez*[, 567 U.S. 709]." CP 532. But on appeal, WASHLITE does not even cite *Alvarez*. Much less does it attempt to explain how Fox's speech could fall within one of the "few categories" of unprotected speech that *Alvarez* recognized. *Id*. In short, WASHLITE's position is not debatable, and WASHLITE barely even tries to debate it. The appeal is frivolous.[4]

V. CONCLUSION

The Court should affirm the judgment in full and award Fox costs and attorney's fees for this appeal.

[4] Sanctions are especially appropriate because this case is part of a pattern of vexatious behavior by Arthur West, who is WASHLITE's driving force as well as its agent for service of process, spokesperson, and Board member. As multiple courts have recognized, West has repeatedly engaged in this type of frivolous litigation. *See, e.g.*, Order Granting Sanctions and Entering Vexatious Litigant Order, *West v. Wash. Pub. Ports Ass'n*, No. 11-2-000384-9 (Thurston Cnty. Super. Ct. Mar. 11, 2011); Bar Order Against Plaintiff Arthur West, *In re Arthur West*, No. 11-05022 RBL (W.D. Wash. Oct. 6, 2011), ECF No. 1; Order, *West v. Maxwell*, No. 10-5275 BHS (W.D. Wash. Sept. 1, 2010), ECF No. 59. After losing in the trial court, he described the present case as "a guerrilla war" against Fox and pledged that WASHLITE is "not giving up." Ken Stone, *Fox News Lawyers Seek Only $335 After Beating Back WASHLITE Suit, Times of San Diego* (June 5, 2020), https://timesofsandiego.com/business/2020/06/05/fox-news-attorneys-seek-only-335-after-beating-back-washlite-suit.

SUBMITTED this 30th day of October, 2020

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CERTIFICATE OF SERVICE

I, Erin Fujita, declare that I am employed by the law firm of Harrigan Leyh Farmer & Thomsen LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On October 30, 2020, I caused a true and correct copy of the foregoing document to be served on the person(s) listed below in the manner indicated:

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