No. 101858-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
IN

ALVIN GREENBERG, *et al.,*

Plaintiffs,

v.

AMAZON.COM, INC.,

Defendant.

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT

David R. Fine
K&L GATES LLP
17 N. Second St., 18th Floor
Harrisburg, PA 17101

Tyler S. Badgley
Maria C. Monaghan
U.S. CHAMBER LITIGATION CENTER
1615 H St., N.W.
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

Robert B. Mitchell,
WSBA #10874
K&L GATES LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

Counsel of Record for
Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

As the district court's decision to certify questions to this Court suggests, this case has implications beyond the interests of the parties. The Chamber urges this Court to hold that there is no unwritten cause

[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

of action for alleged "price gouging" in the Washington Consumer Protection Act.

INTRODUCTION

Courts derive their legitimacy not only from the justice of their decisions, but also from the stability and predictability of their rulings. When faced with the unenviable task of construing vague statutory language on which the legislature has provided little guidance, courts should reject novel theories that create new substantive legal rules out of thin air. Instead, as this Court has recognized, they must adhere to established interpretative principles that yield consistent and predictable results.

No court in Washington has ever interpreted the nebulous "unfairness" standard of this state's Consumer Protection Act ("CPA") to encompass the practice known as "price gouging," a term that has been defined differently in different legal contexts, and for which there is no clear judicial standard. The "case-by-case" approach urged by the plaintiffs here would supply no standard, and would instead permit lower courts and juries to act as improv actors on the legal stage,

inventing those rules one case at a time. The Court ought not embrace this approach, but should rather interpret the statute using established canons of statutory interpretation that promote stability, consistency, and the rule of law.

STATEMENT OF THE CASE

In this putative class action filed in the United States District Court for the Western District of Washington, plaintiffs alleged that Amazon and third-party vendors on its platform raised prices during the COVID-19 pandemic on a wide range of consumer goods, food items, and a myriad of other products. Plaintiffs said that they used Amazon.com to purchase those items during the pandemic, not only because they found the online platform to be safer and more convenient, but also because they were unable to obtain the goods elsewhere. Plaintiffs claimed they paid amounts exceeding pre-pandemic prices, sometimes significantly.

Plaintiffs asserted claims for negligence, unjust enrichment, and violations of the CPA, alleging that so-called "price gouging" is, within the meaning of the CPA, an "unfair or deceptive act[] or practice[] in

the conduct of any trade or commerce." RCW 19.86.020. They sought to pursue a class action on behalf of "persons who purchased any consumer good or food item on Amazon.com after January 31, 2020 at a price at least 15 percent greater than the price charged on Amazon.com for the same consumer good or food item immediately prior to the U.S. Department of Health and Human Services' January 31, 2020 declaration of a national emergency related to COVID-19." Dkt. 19 ¶ 128.

Amazon moved to dismiss the complaint, arguing (among other things) that the CPA does not afford a remedy for "price gouging." With silence from the CPA and limited guidance on the issue from Washington courts, the district court certified two questions of law to resolve the "competing policy and public interests at stake." This Court accepted the certification.

CERTIFIED QUESTIONS

1. Does the Washington Consumer Protection Act's prohibition on "unfair" acts or practices comprehend a price-gouging claim of the type alleged in the First Amended Complaint?

2. If yes, does the Court or the jury determine what percentage increase in the price of goods is "unfair" for purposes of the statute?

ARGUMENT

Prices rise or fall depending on any number of market conditions, from supply-chain disruptions, to changes in demand, to variations in production costs. The COVID-19 pandemic brought all of these challenges together—in addition to steep inflation, drastic shifts in consumer habits, fluctuations in financial markets, workforce disruptions, and sharp declines in GDP across the globe. In this unstable environment, businesses of all sizes in all industries struggled to adapt their pricing strategies to stay in business and serve their customers. Plaintiffs' novel theory, if accepted, would make an already difficult economic situation impossible for businesses and, ultimately, harm consumers.

Judges and juries are not equipped to discern as a matter of law whether and under what circumstances a price increase is "unfair." *See Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 835, 355 P.3d 1100

(2015) ("Whether an act is unfair or deceptive is a question of law.").[2] The term "price gouging" has been defined differently in various contexts and jurisdictions, but courts in other states can at least look to state statutes that address the practice for guidance. *Online Merchants Guild v. Cameron*, 995 F.3d 540, 557 (6th Cir. 2021) (noting "some variation in what qualifies as unlawful price gouging under" various state statutes). Washington has no such statute.

For their part, plaintiffs propose no real standard, urging instead that the issue can evolve through case-by-case adjudication, leaving lower courts and juries to determine what price increases are unlawful and businesses to hope for the best when adapting to changing conditions. Indeed, although the Amended Complaint posits that a "price increase of 15% on any consumer good or food item after a declared emergency is 'unfair' for purposes of the []CPA," Dkt. 19

[2] Should the Court resolve the first certified question in the negative, as we urge it to do, it need not reach the second. If the Court reaches the second question, it should hold that judges, not juries, must decide the percentage at which price increases become "unfair." *See* Amazon Opening Brief at 56–67.

¶ 145, plaintiffs state here that the threshold could be "10%, 25%, 50%, 100%, or even 500%"—to be decided on a case-by-case basis. Ans. Br. at 20.

This would be an untenable outcome. Such ad hoc decision-making inherently creates inconsistency among courts and juries, breeds uncertainty among regulated parties, and undermines basic notions of due process and the rule of law. Without any notice or guidance as to the rules that will apply to them, parties cannot conform their behavior to the law. The uncertainty would also invite a flood of lawsuits in the wake of every meaningful change in market conditions.

1. Case-by-case adjudication of "price gouging" is inconsistent with this Court's interest in promoting certainty in the law and would contradict numerous canons of statutory construction.

This Court recognizes the importance of crafting stable, predictable rules that allow parties to manage their affairs in accordance with the law. "Certainty in the law," this Court has explained, "is of the first importance." *State v. Natsuhara*, 136 Wash. 437, 440, 240 P. 557 (1925) (*quoting In re City of Seattle*, 62 Wash. 218, 225, 113 P. 762 (1911)). "Bad laws and rules can be endured; but the uncertain law or

rule—one that shifts and changes each time it is invoked in the courts—'is as sore an evil and as heavy a curse as any people can suffer.'" *In re Whittier's Estate*, 26 Wn.2d 833, 857, 176 P.2d 281 (1947) (Millard, C.J., dissenting).

In the First Amendment context, for example, courts scrutinize vague statutes that leave individuals unsure about what they can and cannot say. *See City of Bellevue v. Lorang*, 140 Wn.2d 19, 31, 992 P.2d 496 (2000) (voiding a portion of an ordinance for vagueness where the ordinance failed to give notice of what conduct was forbidden and failed to provide objective standards as guidance). In expounding the law of torts, this Court is conscious of the need to foster "consistent, predictable results" by harmonizing bodies of law and deciding new legal issues under established precedent and in a way that respects settled expectations. *See Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 285, 358 P.3d 1139 (2015). In contracts, stable judicial standards provide assurance to parties and the public by enforcing settled expectations. *See City Nat. Bank of Anchorage v. Molitor*, 63 Wn.2d 737, 747, 388 P.2d 936 (1964) (discussing parol-evidence rule).

Stability, consistency, and predictability of legal standards "help[] hold together in a goodly degree the economic fabric of the nation." *Id.* (discussing assurance that courts will respect written contracts).

The same principles guide courts when they interpret statutes. A court's proper role is not to "amend [statutes] by judicial construction"; instead, courts must "provide consistency and predictability to the law so the people of Washington may conform their behavior accordingly." *Salts v. Estes*, 133 Wn.2d 160, 170, 943 P.2d 275 (1997). In *Salts,* this Court weighed two competing interpretations of a statute governing service of process. *Id.* at 164–70. The Court opted for the interpretation that comported with due process and did not "stretch[] the meaning" of the statute beyond what the Legislature intended. *Id*. at 170. The Court also stressed its "purpose of establishing predictable standards" through careful and narrow interpretation of a statute in line with settled expectations. *Id.*

We urge this Court to do the same here. Allowing ad hoc and after-the-fact determinations of "price-gouging" claims under the CPA

would not only disrupt the stability of business operations but also lead to unpredictable consequences for the market.

Permitting case-by-case determination of "price gouging" would invite a patchwork of inconsistent legal judgments, fostering a make-it-up-as-you-go legal process depriving businesses of clear rules as they attempt to adapt in times of crisis to best serve their customers. The resulting landscape would leave businesses vulnerable to arbitrary and varying interpretations of what constitutes "price gouging," hindering businesses' ability to anticipate the legal consequences of their actions. This approach would promote legal ambiguity and subjectivity, detracting from the clarity and consistency that businesses need to serve the people of Washington. Smaller, less sophisticated businesses would feel the greatest impact, as they are ill equipped to navigate uncertain legal rules.

The rule in *Salts* functions as a "stabilizing canon" of statutory construction—an interpretative principle that ensures continuity, serves as a guardrail against judicial excess, and protects reliance interests that develop around established legal norms. Stabilizing canons "promote[]

the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (2015) (Kagan, J.) (referencing *stare decisis*). In short, they allow people and businesses to "plan their lives . . . and assume that most of the really important rules will continue to be in place." William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 555 (2013). Individuals and businesses alike need courts to prevent abrupt shifts in legal interpretation and foster the sense of reliability necessary to ensure citizens' confidence in the rule of law.

A second stabilizing canon is the doctrine of constitutional avoidance, under which courts "construe statutes to avoid constitutional doubt." *State v. Blake*, 197 Wn.2d 170, 188, 481 P.3d 521 (2021); *see* William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681, 720–23 (2023) (discussing constitutional avoidance as a stabilizing canon). When a statute is susceptible to two constructions, one of which gives rise to

"grave and doubtful constitutional questions," courts opt for the other reading. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998) (quoting *United States ex rel. Att'y Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408, 29 S. Ct. 527, 53 L. Ed. 836 (1909)). This canon—which encourages courts to reject unconstitutional readings that would result in invalidation and chaos for regulated parties—avoids dramatic and unpredictable shifts in the legal landscape. Like all stabilizing canons, the doctrine of constitutional avoidance promotes continuity, consistency, and predictability.

The canon of constitutional avoidance counsels rejection of plaintiffs' interpretation of the CPA, which threatens a new rule of general application without any guidelines or workable standards for lower courts to apply. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012). That "requirement of clarity in regulation is essential to the protections

provided by" the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.*; *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–18, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) (discussing punitive damages). A law violates that requirement if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008); *Watson v. Wash. Preferred Life Ins. Co.*, 81 Wn. 2d 403, 409, 502 P.2d 1016 (1972) (holding that a provision of the Washington Business Corporation Act "fail[ed] to provide for sufficient notice to meet the constitutional test of due process."). A defendant is deprived of "fair warning" when a statute is "unforeseeably and retroactively expanded by judicial construction." *Bouie v. City of Columbia*, 378 U.S. 347, 352, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

Interpreting the CPA to encompass "price gouging," particularly when no Washington court has ever endorsed that interpretation, would create a new standard of liability with unforeseen consequences and no governing standards. We urge this Court to interpret the CPA to avoid

the serious constitutional issues raised by the reading that plaintiffs advocate.

2. Case-by-case adjudication of "price-gouging" claims would unleash a flood of lawsuits just as businesses try to respond to catastrophic events.

The lack of a clear standard for assessing claims of "unfair" pricing would create confusion among businesses, possibly leading apprehensive sellers to withdraw products from the marketplace in times of need or, worse yet, allowing unscrupulous individuals to exploit judicially created ambiguities for their own benefit. The case-by-case method of adjudicating "price-gouging" claims urged by plaintiffs would invite inconsistent decisions among state and federal judges alike, undermining the rule of law. These inconsistencies would erode public confidence in the legal system, create ripple effects in the economy, and produce untold amounts of litigation, uncertainty, and attendant economic consequences.

Facing this uncertainty, many businesses confronting dynamic and unpredictable market conditions could opt to withdraw from the market altogether, seeking to avoid potential liability down the road

based on newly devised judicial standards that will be applied retrospectively and on an ad hoc basis. Plaintiffs' theory would limit a company's ability to keep its shelves stocked by raising doubts about its ability to recoup associated costs. Unscrupulous individuals would be motivated to buy up mass quantities of essential goods, then attempt to charge more exorbitant prices, causing harm to consumers and disruptions to the economy.

And when reputable retailers do not have essential goods, consumers often turn elsewhere, potentially causing more than pocketbook harms. At the peak of the recent baby-formula shortage, the Better Business Bureau issued a warning to consumers that the "shortage leads to potential scams."[3] Desperate parents, unable to find formula on store shelves, were turning to unregulated peer-to-peer marketplaces, where formula was never delivered, was out of date, or was the subject of a recall.

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[3] https://www.bbb.org/article/news-releases/26998-bbb-warning-baby-formula-shortage-leads-to-potential-scams

The practice of adjusting prices in response to market conditions is commonplace among economic actors throughout the economy, including state and local governments. Here in Washington, the Washington State Transportation Commission sets toll rates and policies for all state highways and bridges.[4] The State Route 99 tunnel that runs beneath downtown Seattle, for example, charges rates ranging from $1.20 to $2.70 for two-axle vehicles—a 125% increase for drivers traveling through the tunnel during rush hour, when demand is higher.[5] In some cases, the Transportation Commission implements "dynamic tolling" projects, allowing tolls to vary automatically depending on traffic volumes and speeds.[6] The prices rise in response to increased traffic on those routes, as would be likely to happen during a catastrophic event. This approach mirrors the pricing strategies employed by businesses in response to fluctuating market demand, as

[4] https://wstc.wa.gov/programs/tolling/

[5] *Id.*

[6] *Id.*

they attempt to allocate scarce resources in a manner that benefits the overall stability of the marketplace.

By adhering to established interpretive principles, courts promote a sense of continuity and reliability for businesses and individuals. Straying from existing interpretations to fashion retrospective rules on an ad hoc basis risks creating uncertainty, confusion, and a lack of trust in the stability and predictability of the legal system. Consistency in applying established legal norms helps ensure fairness and due process, allowing parties to conduct their affairs with confidence and in accordance with recognized legal standards.

CONCLUSION

The Court should answer the first certified question in the negative: the CPA does not authorize lawsuits for "price gouging" as plaintiffs use that term in their complaint. Should the Court reach the second certified question, it should conclude that judges, not juries, must decide the percentage at which price increases become "unfair."

This document, excluding the parts exempted from the word count by RAP 18.17, contains **2,955** words.

DATED this 4th day of December 2023.

Respectfully submitted,

K&L GATES LLP

By /s/ Robert B. Mitchell
Robert B. Mitchell, WSBA # 10874

Attorneys for Amicus Curiae
the Chamber of Commerce of
the United States of America

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RAP 18.17

1. This brief contains 2,874 words, excluding the parts of the brief exempted from the word count by Rule 18.17(c).

2. This brief complies with the font, spacing, and type-size requirements stated in Rule 18.17(a)(2).

/s/ Robert B. Mitchell
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K&L GATES LLP

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- steverummage@dwt.com
- wloegering@gibsondunn.com

Comments:

Sender Name: Robert B. Mitchell - Email: rob.mitchell@klgates.com
Address:
925 4TH AVE STE 2900
SEATTLE, WA, 98104-1158
Phone: 206-623-7580 - Extension 7640

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