No. 23-29

In the Supreme Court of the United States

CLA ESTATE SERVICES, INC. ET AL.,

PETITIONERS,

v.

STATE OF WASHINGTON,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WASHINGTON COURT OF APPEALS

BRIEF IN OPPOSITION

ROBERT W. FERGUSON
Attorney General

NOAH GUZZO PURCELL
Solicitor General
Counsel of Record

CYNTHIA L. ALEXANDER
PETER B. GONICK
TERA M. HEINTZ
Deputy Solicitors General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
noah.purcell@atg.wa.gov

QUESTIONS PRESENTED

In response to exploitation of senior citizens by unscrupulous actors, Washington barred most non-lawyers from marketing estate planning services and from gathering financial information from clients for purposes of preparing estate documents. Petitioners engaged in precisely the conduct prohibited by Washington law. They used non-lawyers to gather financial information from vulnerable Washington seniors, then sent insurance agents, operating on commission, into seniors' homes, using their financial information to sell them millions of dollars worth of complex annuities that no informed investor would ever purchase. The questions presented are:

1. Can Petitioners raise here a First Amendment challenge to Washington law when the Washington Court of Appeals found that Petitioners had forfeited that argument as a matter of state law?

2. Can Petitioners raise a due process challenge to Washington law based on alleged vagueness as to others when their own conduct was clearly outlawed?

3. Should this Court review Petitioners' claims when they allege no disagreement in the lower courts and instead argue only (and inaccurately) that Washington courts misapplied this Court's precedent?

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INTRODUCTION

CLA's long history of deceptive conduct continues in its petition for certiorari. The petition misrepresents CLA's business model, the facts, the lower court opinion, and the issues actually presented here. The truth is that the Washington courts straightforwardly applied this Court's precedent, there is no circuit split, and there is no basis for granting certiorari.

CLA repeatedly violated Washington consumer protection laws as it financially exploited seniors. CLA lured retirees to "free-lunch" estate-planning seminars at which it misrepresented Washington's probate process to convince attendees that their families would be financially vulnerable unless they purchased CLA's "Lifetime Estate Plan." Once these were in place, CLA had the excuse it needed to send its representatives into seniors' homes under the guise of updating their estate plans. Unbeknownst to the consumers, CLA's representatives were actually commission-motivated insurance agents, not financial planning experts. CLA trained its agents to sell complex, high-commission annuities that no informed customer would ever buy. Without financial advisors or family members present, seniors in their homes were highly vulnerable to CLA's sales tactics. CLA's scheme earned the company millions.

CLA's scheme was illegal under Washington law. Washington's Consumer Protection Act prohibits deceptive business practices, and the Estate Distribution Documents Act bars the "unscrupulous practice of marketing legal documents as a means of

targeting senior citizens for financial exploitation." Wash. Rev. Code § 19.295.005. To achieve this goal, the Act prohibits non-lawyers from engaging in the business of "[g]athering information for the preparation of an estate distribution document," Wash. Rev. Code § 19.295.010(3), a prohibition CLA repeatedly violated.

The State of Washington sued CLA for violating these laws, and a state trial court ruled in the State's favor. CLA appealed, arguing that it had not broken these laws and that they were vague. The Washington Court of Appeals rejected these arguments, noting that CLA had not raised a First Amendment claim.

CLA's petition seeks to attack that judgment here on First Amendment and due process grounds, but it suffers from three fatal flaws.

First, neither of CLA's claims is reviewable here. CLA cannot raise a First Amendment claim in this Court because it abandoned any First Amendment argument on appeal in Washington State court, providing an adequate and independent state law ground for the lower court's judgment. And CLA lacks standing to raise its due process claim because its conduct clearly falls within Washington's law, and it cannot base a vagueness claim on arguments about how the law might be applied to others.

Second, even if CLA's claims were reviewable, the petition meets none of this Court's criteria for certiorari. CLA never even alleges a disagreement in the lower courts. CLA also never argues that the lower courts applied the wrong standard in evaluating its claims. Instead, CLA argues that the lower courts misapplied the legal standard. This is no basis for

certiorari, and it is inaccurate in any event. The lower courts applied this Court's due process case law, carefully reviewed CLA's conduct, and found that it was clearly prohibited by Washington law.

Finally, even if CLA's claims were reviewable, this case would be a terrible vehicle to consider CLA's expansive allegations about state consumer protection laws. CLA acknowledges that no other state has a law like Washington's Estate Distribution Documents Act, so any holding would only be relevant in Washington. And CLA's petition is premised on a wide range of inaccurate factual assertions. To give just one of countless possible examples, the lower courts specifically rejected CLA's "misleading" claim that the Attorney General's Office somehow approved of CLA's business model, finding that the facts "do not include any explicit or tacit indication from the [Attorney General's Office] that it had concluded CLA's business model was lawful[,]" and "neither statutory text, court guidance, nor agency guidance indicate that CLA's interpretation of the law was reasonable." Pet. App. 25a-26a.

The Court should deny certiorari.

STATEMENT OF THE CASE

A. Washington's Consumer Protection Laws Protect Consumers from Unfair and Deceptive Practices

Washington's Consumer Protection Act prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce[.]" Wash. Rev. Code § 19.86.020. The Act provides a range of remedies for each violation of the statute, including injunctive

relief, restitution, civil penalties, and costs and fees. Wash. Rev. Code §§ 19.86.080(1)-(2), .140; Pet. App. 92a. During the period at issue, the Consumer Protection Act allowed a civil penalty of up to $2,000 for each violation. Former Wash. Rev. Code § 19.86.140 (1983). Each unfair or deceptive act is a separate violation of the Consumer Protection Act. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wash. 2d 298, 316-17, 553 P.2d 423 (1976); Pet. App. 27a.

Violations of certain statutes are per se violations of the Consumer Protection Act. Washington's Estate Distribution Documents Act (EDDA), Wash. Rev. Code 19.295, is one such statute. In enacting the EDDA, the Washington legislature found "the practice of using 'living trusts' as a marketing tool by persons who are not authorized to practice law . . . to be a deceptive means of obtaining personal asset information and of developing and generating leads for sales to senior citizens." Wash. Rev. Code § 19.295.005. Because "this practice endangers the financial security of consumers and may frustrate their estate planning objectives[,]" the legislature enacted the EDDA "to prohibit the marketing of services related to preparation of estate distribution documents by persons who are not authorized to practice law or who are not a financial institution." Wash. Rev. Code § 19.295.005. The legislature clarified that the statute is "not intended to limit consumers from obtaining legitimate estate planning documents, including 'living trusts,' from those authorized to practice law; but is intended to prohibit persons not licensed to engage in the practice of law from the unscrupulous practice of marketing

legal documents as a means of targeting senior citizens for financial exploitation." Wash. Rev. Code § 19.295.005.

Accordingly, the EDDA makes it "unlawful for a person to market estate distribution documents, directly or indirectly, in or from [Washington] unless the person is authorized to practice law in [Washington]." Wash. Rev. Code § 19.295.020(1). The EDDA contains exceptions for nonlawyer professionals who have legitimate reasons to be involved in the preparation of consumers' estate documents, including financial institutions, accountants, and tax agents. Wash. Rev. Code § 19.295.020(1), (4)-(6).

"Marketing" includes "every offer, contract, or agreement to prepare or gather information for the preparation of, or to provide, individualized advice about an estate distribution document." Wash. Rev. Code § 19.295.010(4). "Gathering information for the preparation of an estate distribution document" means "collecting data, facts, figures, records, and other particulars about a specific person or persons for the preparation of an estate distribution document[.]" Wash. Rev. Code § 19.295.010(3). Because a violation of the EDDA is a per se violation of the Consumer Protection Act, the EDDA's prohibitions apply to acts "in trade or commerce," and do not extend to circumstances outside such commercial contexts. Wash. Rev. Code § 19.295.030. So, for example, a friend or family member collecting information from a loved one without compensation to assist them with estate planning would not be covered.

B. CLA Implemented a Deceptive Scheme to Induce Washington Seniors to Purchase its Lifetime Estate Plan and Expensive, Illiquid Annuities

In 2008, Texas corporations CLA Estate Services, Inc. and CLA USA, Inc. (collectively, CLA) began offering free estate planning seminars to senior citizens in Washington, providing a free meal to encourage attendance. Pet. App. 2a, 33a. CLA sales representatives, who were not attorneys, led the seminars. Pet. App. 2a, 33a.[1]

Following CLA's scripts, the sales representatives gave presentations to attendees filled with misrepresentations about alleged dangers of the Washington probate process. Pet. App. 4a-13a, 34a-50a. Although Washington has one of the simplest, most efficient probate processes in the country, CLA depicted it as slow, expensive, difficult, and likely to leave loved ones financially vulnerable. Pet. App. 12a-13a, 34a-46a. In contrast, CLA described living trusts as having only positive attributes and leading to "peace of mind[.]" Pet. App. 12a, 46a-47a.

CLA used these "scare tactics" to market and sell its Lifetime Estate Plan at a cost of $2,500 to $3,000, and to persuade attendees to set up living trusts. Pet. App. 26a, 53a, 101a. CLA's presenters touted the Lifetime Estate Plan as a full-service estate-planning package, including regular in-home

[1] The facts referenced in this statement are from the findings of the courts below and are not challenged by CLA here.

visits, in which CLA would assist consumers with estate planning to protect their assets and heirs, provide access to attorneys to draft estate documents, and support and coordinate the work of the attorneys. Pet. App. 2a, 50a.

CLA told seminar attendees that financial planners would conduct the promised in-home meetings, but this was a ruse. Pet. App. 13a, 56a-57a. Instead, CLA "mis[led] consumers as to their intentions in order to create a warm and trusting environment for the sale of additional products." Pet. App. 15a; *see also* Pet. App. 66a. Rather than sending knowledgeable financial and estate planners, CLA sent insurance agents, who used the in-home consultations to learn about customers' assets and exploit that information to market annuities. Pet. App. 13a-14a, 54a-69a. CLA never disclosed these facts, or that CLA's agents were paid almost exclusively through commissions from selling annuities. Pet. App. 13a-14a, 54a-69a. "Consumers did not understand that CLA sold insurance. Instead, they believed CLA was offering estate plans that would avoid probate." Pet. App. 61a; *see also* Pet App. 14a.

At its estate-planning seminars, CLA offered to gather information for the preparation of estate documents as part of its promised coordination of non-legal services with attorneys. Pet. App. 17a-18a, 50a-53a. CLA then gathered this information both at its seminars and at the in-home meetings its agents conducted. Pet. App. 17a-18a, 63a-69a.

When a consumer purchased a Lifetime Estate Plan, CLA referred the consumer to an attorney to prepare a living trust and other estate documents. Pet. App. 63a. When the documents were ready, a CLA insurance agent set up a "delivery meeting" at the customer's home, ostensibly to review and notarize the documents and help transfer assets into the trust. Pet. App. 2a-3a, 63a. CLA scheduled similar "review" meetings every year. Pet. App. 58a, 67a.

At these meetings, CLA agents asked customers to identify all assets comprising their estates, representing that CLA needed this information to assist with funding the living trust and for estate-planning purposes. Pet. App. 3a, 68a, 91a. But the agents did not disclose that CLA trained them to use this information to identify assets that could be converted into annuity products. Pet. App. 3a, 14a, 65a. As a former CLA agent testified, assisting with and delivering estate documents caused customers to place their trust in CLA's agents, which in turn allowed them to sell annuities to the customer. Pet. App. 14a, 65a.

A financial economist testified at trial that the annuities CLA marketed and sold were "extraordinarily complex," illiquid, opaque, and expensive, with an undisclosed "very high commission" that was "extraordinary" compared with other financial products. Pet. App. 70a-71a. For example, whereas other financial products, such as bonds, mutual funds, or variable annuities typically charge zero to 4.5 percent commissions, the annuities sold by CLA charged 10 to 12 percent in commissions. Pet. App. 70a. The annuities sold by CLA were also "notable for their illiquidity[,]" with lengthy 10-year

surrender-charge periods, during which time investors would incur penalties of up to 10 percent of the value of the annuity for a sale or transfer. Pet. App. 71a. He testified that purchasers of these annuities suffered immediate economic loss at the time of purchase, because the value of the annuities was "not more than 73 to 86 cents on the dollar when purchased" and very likely "substantially less than that" when taking into account "the extreme illiquidity in these contracts[.]" Pet. App. 73a.

The financial economist further testified that the "Rube Goldberg"-like mechanics of the instruments made it virtually impossible for average purchasers to understand their "true underlying economics[.]" Pet. App. 72a (internal quotation marks omitted). The annuities were "the most complex investments" he had ever seen and "'opaque' to a degree that even someone with a math Ph.D. would have difficulty understanding the likely future payoffs[.]" Pet. App. 71a. He concluded that "there is zero chance that a fully informed investor would ever purchase [these annuities]." Pet. App. 74a. None of these predatory features was disclosed to consumers. Pet. App. 71a-73a.

CLA agents were highly motivated to sell customers these annuities because CLA paid them only $25 to conduct a delivery meeting, and $10 to conduct a review meeting, with agents covering their own travel costs, sometimes driving hours to reach a customer's home. Pet. App. 14a, 67a. Agents only earned additional compensation through commissions from selling annuities. Pet. App. 14a, 67a. CLA and its agents received commissions for every annuity they sold. Pet. App. 74a.

CLA was aware that its tactics were deceiving consumers, as it received a large number of complaints from its clients about its Washington agents. Pet. App. 77a, 101a-02a. Customers testified that CLA's agents marketed unsuitable annuities; failed to disclose material terms of annuities; misrepresented interest rates; used high-pressure sales tactics; added products to annuities without consumer consent; included incorrect income information in annuity applications to ensure consumers would meet qualifications; and forged consumers' signatures on applications. Pet. App. 75a-80a. CLA took no steps to investigate these complaints. Pet. App. 78a-80a, 101a-02a.

CLA made millions from its deceptive practices in Washington. Specifically, it received $2,565,626 from the sale of its Lifetime Estate Plans to Washington consumers, and its subsequent sale of financial products generated commissions to CLA of nearly $3.6 million and to its agents of over $1.8 million. Pet. App. 24a, 54a, 74a, 94a.

In 2009, an attorney whom CLA had attempted to recruit as a referral attorney warned CLA to consider whether its practices complied with the EDDA. Pet. App. 54a, 102a. CLA did not change any of its practices after receiving the letter. Pet. App. 54a, 102a. The attorney declined to receive referrals from CLA after concluding its business model could violate Washington law. Pet. App. 54a, 102a.

C. The State Trial Court Ruled that CLA's Deceptive Scheme Violated Washington's Consumer Protection Laws

The Washington Attorney General's Office carefully investigated CLA's conduct over the course of several years. The Office sent its first civil investigative demands to CLA in 2013, and ultimately brought this enforcement action against CLA in 2017 for violations of the Consumer Protection Act and the EDDA. The State did not seek penalties for CLA's conduct prior to November 3, 2015, as provided in a tolling agreement entered by the parties. Pet. App. 97a n.4.

After deciding several partial summary judgment motions and holding a bench trial, the trial court concluded that CLA serially violated the Consumer Protection Act and the EDDA by engaging in "a deliberate scheme to develop and exploit leads for the sale of annuities." Pet. App. 101a. In detailed findings of fact and conclusions of law, the trial court found that CLA "used scare tactics to instill fear in seniors that they would be left vulnerable and their families unprotected unless they purchased CLA's Lifetime Estate Plan and set up revocable living trusts, which in turn gave CLA agents access to their living rooms and their assets to aggressively market complex annuities." Pet. App. 101a.

The court ruled that CLA violated the Consumer Protection Act by misrepresenting probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington, and by creating a deceptive net impression that a living trust is needed to protect

assets and heirs. Pet. App. 84a-85a. The court found further Consumer Protection Act violations based on CLA's deceptive marketing of the Lifetime Estate Plan and creation of a deceptive net impression that consumers were purchasing robust estate-planning services, not in-home visits from commission-motivated insurance agents. Pet. App. 85a-87a. The trial court determined that CLA also repeatedly violated the EDDA by offering to gather information for the preparation of estate distribution documents at its estate-planning seminars, and gathering such information both at its estate-planning seminars and at in-home meetings its agents held with customers. Pet. App. 87a-92a.

The trial court awarded injunctive relief, restitution, civil penalties, and fees and costs in favor of the State for CLA's violations of the Consumer Protection Act and the EDDA. Pet. App. 92a-110a. As restitution for these violations, the court ordered CLA to return all revenue it received from sales of its Lifetime Estate Plan ($2,565,626) and sales of annuities ($3,597,287.93) to Washington consumers. After carefully analyzing the factors relevant to a civil penalty award under the Consumer Protection Act, including CLA's lack of good faith, harm to the public, and CLA's ability to pay, the court imposed a total civil penalty award of $6,546,000. Pet. App. 96a-105a. This amount included penalties ranging from $667 to $2,000 for each of CLA's thousands of violations of the Consumer Protection Act. Pet. App. 105a. The court separately identified statutory penalties awarded for each type of violation of the Consumer Protection Act and the EDDA. Pet. App. 105a.

D. The Washington Court of Appeals Affirms the Restitution and Penalty Award Against CLA

The Washington Court of Appeals affirmed the trial court decision and upheld the trial court's restitution award and civil penalties. Pet. App. 23a-27a.

The court upheld the handful of findings of fact that CLA had challenged[2] and all of the trial court's legal conclusions, rejecting CLA's arguments that its conduct was not deceptive under the Consumer Protection Act. Pet. App. 1a-28a. The court found that CLA's seminars "gave the deceptive net impression 'that a revocable trust is preferable regardless of individual circumstances.'" Pet. App. 12a. The court also found that CLA engaged in deceptive practices when it "indicated to consumers that its purpose at the in-home meetings was to assist them with their estate planning process, when in fact its purpose was to 'gather lists of assets that could be moved into annuity products' and then to sell them these products." Pet. App. 14a. It further found that CLA profited handsomely from this deception, which "provided CLA with trusting, amenable clients to visit, making these visits particularly desirable from a sales perspective." Pet. App. 14a.

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[2] One exception, not pertinent here, is that the Court of Appeals agreed with CLA that the trial court's finding that CLA's workbook does not mention durable powers of attorney was in error, but found that this error did not affect the court's conclusions of law. Pet. App. 9a.

The court similarly held that CLA serially violated the EDDA, holding that "CLA's business model . . . falls squarely within the realm of the EDDA's prohibited conduct, as expressed by the legislature's statement of intent and the plain language of the statute." Pet. App. 20a. In reaching this conclusion, the Court of Appeals declined to look beyond the plain meaning of the statute to legislative history, which CLA claimed showed the legislature intended to regulate only the unauthorized practice of law when it enacted the EDDA. Pet. App. 20a. Noting that the EDDA does not define, regulate, or even mention the unauthorized practice of law, the court found that the plain meaning of the statute defines a violation of the Consumer Protection Act, not the unauthorized practice of law. Pet. App. 20a.

Relatedly, the court rejected CLA's "misleading" factual contentions that the Attorney General's Office implicitly approved of CLA's business model, finding that the facts "do not include any explicit or tacit indication from the [Attorney General's Office] that it had concluded CLA's business model was lawful[,]" and "neither statutory text, court guidance, nor agency guidance indicate that CLA's interpretation of the law was reasonable." Pet. App. 25a-26a.

The court declined to address the First Amendment issue that CLA mentioned in passing without any analysis, holding that this was insufficient under state law to properly raise a constitutional claim. Pet. App. 22a (citing *Health Ins. Pool v. Health Care Auth.*, 129 Wash. 2d 504, 511, 919 P.2d 62 (1996) (holding that "naked castings into the constitutional sea are not sufficient to

command judicial consideration") (internal quotation marks omitted)). The appellate court also rejected CLA's argument that the EDDA is void for vagueness, holding that the statute clearly prohibits nonlawyers from gathering information for the purpose of preparing estate distribution documents and that CLA told consumers it was gathering the information "for that exact purpose[.]" Pet. App. 22a. It held the EDDA was neither ambiguous nor vague. Pet. App. 22a.

CLA petitioned the Washington Supreme Court to review the decision of the Court of Appeals, and the Washington Supreme Court denied the petition on February 8, 2023. Pet. App. 29a.

REASONS TO DENY REVIEW

This Court lacks jurisdiction over the issues raised in CLA's petition. CLA forfeited its First Amendment argument in state court, depriving this Court of jurisdiction over the issue. And CLA lacks standing to raise its due process vagueness argument under *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982), because its conduct falls squarely within the plain scope of Washington's law, precluding CLA's challenge that the law is vague as to others.

Even if it could bring its claims here, CLA fails to present any basis for review. It fails to identify any conflict with this Court's precedent or any Court of Appeals decision and instead challenges an intermediate state appellate court's *application* of federal law—a request not worthy of this Court's attention under U.S. Supreme Court Rule 10. Beyond that, this case presents a terrible vehicle to review the

issues raised by CLA because most of its legal arguments are premised on misrepresentations about the underlying law, CLA's conduct, and the conduct of the Attorney General's Office, all of which were rejected by the courts below. CLA does not and cannot challenge those underlying factual determinations now. And even setting aside these jurisdictional and vehicle defects, a decision by this Court would have little or no impact on the judgment against CLA, most of which is based on independent and unchallenged violations of Washington's Consumer Protection Act. Moreover, given the uniqueness of the EDDA, by CLA's own admission, any opinion on the law would have limited value as future guidance.

A. This Court Lacks Jurisdiction to Consider CLA's Arguments

This Court should reject CLA's petition because it lacks jurisdiction over the federal issues raised. CLA abandoned its First Amendment claim in its state court appeal, leading the Washington Court of Appeals to reject the argument under independent and adequate state law grounds. And CLA lacks standing for its facial due process claim because the EDDA squarely applies to CLA's conduct as found by the courts below, precluding any argument that the law is vague as applied to others.

1. The Court of Appeals Rejected CLA's First Amendment Argument on Independent and Adequate State Grounds

CLA forfeited its First Amendment argument below, depriving this Court of jurisdiction over this issue. This Court lacks jurisdiction to review a federal

issue on review of a state court judgment "if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989); *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (same). A state court judgment is independent and adequate "if state substantive law is sufficient to support the judgment no matter how the federal question is resolved," or if the "state courts have found adequate procedural reasons for refusing to decide the federal question." 16B Charles Alan Wright et al., *Fed. Prac. & Proc. Juris.* § 4019, Westlaw (3d ed. & Apr. 2023 Update); *see also Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (holding that independent and adequate state ground rule applies "whether the state law ground is substantive or procedural"), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012). The reason for the rule is clear: if the "same judgment would be rendered by the state court after we corrected its views of federal laws, [this Court's] review [w]ould amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

The party seeking certiorari bears the burden of proving that it properly presented a federal issue to the state courts at every level "at the time and in the manner required by the state law[.]" *Adams v. Robertson*, 520 U.S. 83, 87 (1997) (internal quotation marks omitted). Accordingly, petitioners seeking review of a state court judgment must specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal

questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts[.]" Rule 14(g)(i).

Here, the Washington Court of Appeals applied long-standing Washington law to determine that CLA forfeited any First Amendment issue by failing to present argument beyond a passing reference to a single commercial speech case. Pet. App. 22a. CLA did not "attempt to analyze the test articulated in that case for whether a commercial speech restriction is permissible" or how that standard applied to this case, and addressed this issue only in a single paragraph buried in its due process argument. Pet. App. 22a. Unsurprisingly, the court below declined to address the merits, applying well-established state law holding that a "naked" reference to a constitutional doctrine does not properly present a constitutional issue on appeal. Pet. App. 22a (citing *Health Ins. Pool*, 129 Wash. 2d at 511 ("naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion") (internal quotation marks omitted)). This Court follows a similar rule, holding that "discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" *Adams*, 520 U.S. at 88.

The Washington Court of Appeals' finding that CLA failed to properly present a First Amendment argument rests on independent and adequate state law grounds, depriving this Court of jurisdiction over this issue. The lower court's decision did not depend

on federal law in any way. *Herb*, 324 U.S. at 125-26. Nor has CLA argued (much less met its burden of showing) that Washington courts apply this procedural rule in an "irregular, arbitrary or inconsistent manner[,]" as required to show that the determination is inadequate to sustain the judgment. *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 399 (1990) (declining review of appellant's constitutional claims because it failed to substantiate burden of demonstrating that state grounds were inadequate). And CLA cannot meet this burden, as there was nothing arbitrary, irregular, or inconsistent about the Court of Appeals' rejection of CLA's "naked castings into the constitutional sea[.]" Pet. App. 22a (internal quotation marks omitted) (citing *Health Ins. Pool*, 129 Wash. 2d at 511); *see also State v. Johnson*, 119 Wash. 2d 167, 171, 829 P.2d 1082 (1992) (holding that "[p]arties raising constitutional issues must present considered arguments to this court[:] naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion" (internal quotation marks omitted)); *In re Pers. Restraint Petition of Rhem*, 188 Wash. 2d 321, 328, 394 P.3d 367 (2017) (same); *Pub. Hosp. Dist. 1 of King Cnty. v. Univ. of Washington*, 182 Wash. App. 34, 49, 327 P.3d 1281 (2014) (same); *State v. Bonds*, 174 Wash. App. 553, 567, 299 P.3d 663 (2013) (same).

Because any First Amendment ruling by this Court would have no impact on the state court judgment that such argument was waived, it would be purely advisory. This issue is not properly before this Court.

2. CLA Lacks Standing to Assert Its Facial Vagueness Claim

CLA lacks standing on its remaining federal issue, challenging the EDDA as unconstitutionally vague. This Court has long recognized that one "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Vill. of Hoffman Ests.*, 455 U.S. at 495.[3] Because CLA's conduct—as found by the courts below—falls squarely within the EDDA's explicit prohibitions, CLA lacks standing to challenge the statute based on alleged vagueness of the statute as applied to others.

The EDDA explicitly prohibits the conduct that CLA engaged in. Specifically, the EDDA makes it "unlawful for a person to market estate distribution documents, directly or indirectly," unless authorized to practice law in Washington. Wash. Rev. Code § 19.295.020(1). The law defines "market" to include "every offer . . . *to* . . . *gather information for the preparation of*, or to provide, individualized advice about, *an estate distribution document*" and, in turn, defines "[g]athering information for the preparation of an estate distribution document" as "collecting data, facts, figures, records, and other particulars about a specific person or persons *for the preparation of an estate distribution document*[.]" Wash. Rev. Code § 19.295.010(4), (3) (emphases added).

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[3] The exception to this rule is in First Amendment cases, which does not apply here given CLA's forfeiture of that argument.

Here, CLA argues that the EDDA "bars virtually all nonlawyers from helping a person collect information to provide to an attorney for estate planning services in any circumstance" regardless of purpose, and is thus vague as applied to, for example, family members of senior citizens assisting in gathering estate planning documents. Pet. 14. This argument is incorrect, but even if it were not, CLA lacks standing to make it because the courts below correctly determined that CLA gathered estate distribution information for the "exact purpose" prohibited by law. Pet. App. 22a. The Washington Court of Appeals emphasized that EDDA liability hinges on "the purpose for gathering the information, and here the purpose was unambiguously presented and understood as *enabling the preparation of estate distribution documents*." Pet. App. 19a (emphasis added). CLA did not challenge these factual findings below, leading the Washington Court of Appeals to conclude that the "unchallenged findings and the record as a whole clearly establish that CLA represented, and its clients understood, that it was gathering information *for the preparation of estate distribution documents*." Pet. App. 18a (emphasis added).

CLA does not and cannot challenge these factual findings now. *Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("in the absence of exceptional circumstances, we would defer to state-court factual findings, even when those findings relate to a constitutional issue"). Because the EDDA squarely proscribes CLA's conduct, as found by the courts below, CLA lacks standing to argue that the statute is vague as to others.

B. Even If CLA Could Overcome Its Jurisdictional Obstacles, It Fails to Show a Circuit Split or Conflict with this Court's Cases

CLA does not even muster an *allegation* of a conflict with any decision by this Court or a circuit split warranting review here. *See generally* Pet. 12-25. With respect to its vagueness argument, CLA does not claim that the lower court applied the wrong legal standard, but only that the court reached the wrong result, an issue that does not warrant this Court's attention. Pet. 12-16. And with respect to the First Amendment, CLA cannot claim a reviewable conflict because the court below did not even address the issue due to CLA's waiver. Pet. App. 22a. In truth, the opinion below falls comfortably within this Court's jurisprudence on both vagueness and deceptive commercial speech. The Court should deny review.

1. CLA Fails to Show Any Conflict Regarding Its Vagueness Argument

The parties here agree that laws must give fair notice of conduct that is forbidden or required. Pet. 12 (citing *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). More importantly, so did the lower court. Pet. App. 21a. In rejecting CLA's argument, the court below cited the same standard CLA now cites. Pet. App. 21a (citing *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wash. 2d 1, 11, 721 P.2d 1 (1986)). CLA does not and cannot dispute the lower court's recognition that a statute may be void for vagueness if "persons of common intelligence must guess at its meaning and differ as to its application." Pet. App. 21a

(citing *Seven Gables,* 106 Wash. 2d at 11)*; see also Fox Television Stations, Inc.*, 567 U.S. at 253 (citing same standard). It instead argues that the lower courts erred in *applying* this standard. But a petition "is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law." Rule 10. This alone warrants rejection of CLA's petition.

CLA not only fails to show a reviewable conflict, it does not grapple with the lower court opinion at all. It simply repeats arguments about the allegedly ambiguous meaning of the EDDA that the lower courts rejected. But there is nothing ambiguous about the EDDA. Following this Court's precedent, the lower court correctly determined that a statute is not vague "if it is clear what the statute as a whole prohibits," and that the court may look to a statute's announced purpose in making that assessment. Pet. App. 21a (citing *Seven Gables*, 106 Wash. 2d at 11, which in turn cites *Grayned v. Rockford*, 408 U.S. 104, 108 (1972)). Here, the plain language of the EDDA prohibits nonlawyers from gathering information for the purpose of preparing estate distribution documents. Pet. App. 22a; *see also* Wash. Rev. Code §§ 19.295.010(4), .020(1). The Washington legislature made clear that it targeted this conduct to prevent unscrupulous actors from using living trusts as a marketing tool for purposes of gathering information for estate distribution documents, which the legislature deemed a "deceptive means of obtaining personal asset information and of developing and generating leads for sales to senior citizens." Wash. Rev. Code § 19.295.005 (quoted at Pet. App. 17a). In rejecting CLA's argument that the statute applies only when nonlawyers *prepare* estate distribution

documents, the lower court properly declined to "add words where the legislature has chosen not to include them." Pet. App. 19a (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash. 2d 674, 682, 80 P.3d 598 (2003)).

The statute's express prohibition and express purpose describe CLA's predatory business model to a T. CLA does not dispute the lower courts' findings that, under false pretenses of gathering information for the purpose of preparing estate distribution documents, CLA obtained financial information from senior citizens to generate sales leads for its insurance products. Pet. App. 16a-19a. Nor does it dispute that these insurance products were "extraordinarily complex" and "opaque," included an "extraordinarily" high sales commission, and resulted in immediate economic loss to the seniors who purchased them. Pet. App. 3a.

CLA went so far as to argue below that it did not violate the EDDA *because* it had deceived its customers; i.e., while CLA told customers it was gathering financial information for the purpose of preparing estate distribution documents, its actual purpose was to develop sales leads. Pet. App. 18a. In light of the lower court's findings and its own admissions, CLA's argument that it had no notice that its conduct violated the EDDA almost beggars belief.

The lower court's consideration of, and repeated reference to, the statute's text and intent also answers CLA's claims that the statute could be applied to a family member gathering information to assist another family member in seeking legal advice. *See* Pet. 14; Pet. App. 20a, 22a. The statute prohibits

"marketing" of estate distribution documents and the practice of using living trusts as a marketing tool to obtain sales leads as a per se violation of the Consumer Protection Act. Wash. Rev. Code §§ 19.295.005, .020, .030. The Consumer Protection Act, in turn, applies only to activities "in trade or commerce." Wash. Rev. Code § 19.295.020. It has no application to noncommercial interactions between family members and friends. As the lower court correctly determined, the EDDA "is unambiguous and not vague" as applied to CLA's conduct. Pet. App. 22a.

CLA relies almost exclusively on this Court's opinion in *Fox Television Stations, Inc.*, 567 U.S. 239, to argue that the EDDA is unconstitutionally vague. Pet. 12-15. But even a cursory glance at that opinion shows it has no application here. First, unlike this case, *Fox Television* addressed inherently imprecise and broad statutory language prohibiting "obscene, indecent, or profane" material. *Fox Television Stations, Inc.*, 567 U.S. at 243 (quoting 18 U.S.C. § 1464). Second, unlike this case, the Court addressed a regulatory agency that had dramatically departed from its own prior, published guidance, which gave no notice to broadcasters that "fleeting expletives and a brief moment of indecency" would constitute actionable indecency. *Id.* at 254. The published guidance instead informed broadcasters that a key consideration in determining a violation was whether the material dwelled on or repeated at length the offending depiction. *Id.* Further adding to the ambiguity, numerous past enforcement actions had not penalized isolated and brief moments of offending material. *Id.* at 254, 257.

Here, by contrast, the statutory language is not broad or imprecise, and CLA's claimed change in enforcement standards refers to a selective reading of the legislative history in which the Attorney General's Office provided testimony *before* the statute was enacted. Pet. 6, 15. CLA cites no cases in which legislative testimony supports a vagueness challenge, and the State is aware of none. To the contrary, such legislative history is generally irrelevant to statutory construction under Washington law unless the statutory language is itself ambiguous. *Western Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wash. 2d 599, 608-09, 998 P.2d 884 (2000). Moreover, the legislature amended the bill *after* the legislative hearing cited by CLA to add the statement of intent relied on by the Court of Appeals. That statement of intent, in turn, specifies that the purpose of the EDDA was to prohibit precisely the kind of conduct that CLA engaged in here. *See* Washington State Legislature, Bill Information, HB 1441 (2007-08), https://app.leg.wa.gov/billsummary?BillNumber=1441&Year=2007&Initiative=false (showing public hearing date of Jan. 25, 2023, substitute bill Jan. 29, 2023, and including links to both original bill and substitute bill). More broadly, given that the goal of the vagueness doctrine is to ensure that the average individual can understand what a statute proscribes, it would be bizarre to hold that a statute's plain meaning can become ambiguous based on legislative history of which no average citizen would be aware.

CLA's citation to *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157-58 (2012), is similarly unhelpful. Pet. 15. *SmithKline* addressed whether the Court should grant controlling deference to a regulatory agency's interpretation of a statute, not constitutional vagueness. Moreover, the statutes and regulations at issue in *SmithKline* provided no notice to regulated entities of prohibited conduct, and the Department of Labor failed to take any enforcement action for decades despite a well-known industry practice, causing the Court to conclude that "[o]ther than acquiescence, no explanation for the DOL's inaction is plausible." *SmithKline Beecham Corp.*, 567 U.S. at 158. Here, in contrast, the lower court found that, contrary to CLA's "misleading" characterizations, there was no "explicit or tacit indication from the [Attorney General's Office] that it had concluded CLA's business model was lawful[,]" and "neither statutory text, court guidance, nor agency guidance indicate that CLA's interpretation of the law was reasonable." Pet. App. 25a-26a.

In sum, CLA fails to show any conflict with this Court's precedent or any other reason that would justify this Court's review.

2. CLA Fails to Show Any Conflict Regarding Its First Amendment Argument

CLA also cannot show a reviewable conflict regarding the First Amendment claim because the lower court declined to address the issue due to CLA's forfeiture of it under well-settled Washington law. Pet. App. 22a. CLA's failure to identify any conflict

with this Court's First Amendment jurisprudence is thus understandable, but no less fatal to its argument that the Court should accept review.

CLA largely ignores its forfeiture and instead argues that the courts below reached the wrong result. But that is no reason for this Court's review. *See* Rule 10. CLA also repeatedly argues against a strawman version of the EDDA, suggesting the law prohibits innocent gathering of information in a non-commercial context. *See, e.g.*, Pet. 17, 20, 25. But, as explained above, the law applies only to "marketing" in the conduct of "trade or commerce." *Supra* at 24-25. Moreover, the opinion below construed the statute in light of its express intent to prevent the gathering of information as "*a deceptive means of obtaining personal asset information* and of developing and generating leads for sales to senior citizens[.]" Pet. App. 18a (emphasis in original) (quoting Wash. Rev. Code § 19.295.005); *see also* Pet. App. 20a ("CLA's business model therefore falls squarely within the realm of the EDDA's prohibited conduct, as expressed by the legislature's statement of intent and the plain language of the statute."). CLA's attempt to apply non-commercial free speech cases here thus fails.

Moreover, none of the cases CLA discusses are analogous. Here, the legislature banned a practice notoriously abused by unscrupulous actors to take advantage of senior citizens, and the law was applied to a business engaging in precisely such conduct. This case is thus even easier than cases in which this Court allowed regulation of commercial speech because of the danger of deceptive or other harmful conduct even where the specific regulated communication might not

necessarily involve deception. *See, e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456-57 (1978) (upholding attorney discipline for in-person solicitations and cataloging litany of other regulated commercial communications upheld by the Court such as exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employer threats of retaliation). Here, the law is intended to protect against precisely the sort of deception wielded by CLA.

3. CLA Fails to Allege Any Circuit Split

In addition to failing to identify a conflict with this Court's precedent, CLA fails to identify any split among the circuit courts or state supreme courts regarding the questions presented, and thus presents no reason for this Court to grant review on that basis.

C. This Case Is a Poor Vehicle to Review State Consumer Protection Laws

Certiorari should also be denied because this case presents an exceptionally poor vehicle for examining the constitutionality of state consumer protection laws for at least three reasons.

First, CLA's arguments are largely predicated on factual assertions that were rejected by the courts below in rulings that have not been challenged by CLA here. For example, CLA relies heavily on its own theories about the legislature's intent in enacting the EDDA, which the lower court rejected as inconsistent with the actual statements of legislative intent in the statute. *Compare* Pet. 5-8, 15 *with* Pet. App. 20a-22a. Similarly, CLA relies on arguments about the

Attorney General's supposed tacit acceptance of CLA's business model to argue "unfair surprise" here, but the lower court rejected these arguments as "misleading" and inconsistent with the facts, which "do not include any explicit or tacit indication from the [Attorney General's Office] that it had concluded CLA's business model was lawful[.]" Pet. App. 25a-26a. CLA's (waived) First Amendment arguments similarly rely on the false premise that its underlying speech was truthful and non-deceptive, which is contradicted by extensive unchallenged findings below detailing CLA's misrepresentations and deceptive conduct. *E.g.*, Pet. App. 4a-20a, 84a-92a. CLA's vagueness argument also relies on its argument that CLA was never involved in preparing estate planning documents, but the lower courts found to the contrary, citing offers by CLA in its own workbook to "assist consumers in estate planning to protect their assets and heirs, . . . provide access to attorneys to draft estate documents, and *support and coordinate the work of the attorneys*." Pet. App. 9a-10a (alteration in original) (emphasis added). Arguments premised on facts rejected by the lower courts do not provide a suitable vehicle for examining important consumer protection laws. *Hernandez*, 500 U.S. at 366.

Second, any impact on the judgment from a decision by this Court would be short-lived at most. Even if this Court struck down the EDDA, nothing would prevent the courts below from determining on remand that CLA is liable for these same acts under the Consumer Protection Act, warranting precisely the same statutory remedies.

The acts proscribed by the EDDA are "unfair or deceptive act[s] in trade or commerce and an unfair method of competition for purposes of applying the consumer protection act." Wash. Rev. Code § 19.295.030. The lower court's factual findings support a determination that CLA used offers to senior citizens to gather estate distribution documents as a means of establishing trust relationships that CLA deceptively exploited to gain information about financial assets that could be converted into CLA's expensive high-commission financial products that no fully informed, reasonable investor would ever purchase. Under Washington law, each "deceptive act is a separate violation" of the Consumer Protection Act, *State v. Mandatory Poster Agency, Inc.*, 199 Wash. App. 506, 525, 398 P.3d 1271 (2017), subjecting CLA to the same statutory penalties with or without the EDDA. As such, even if the EDDA were struck down, it would likely have little or no impact on CLA's ultimate liability in this case.

Third, by CLA's own admission, any decision here would have no application to other states' consumer protection laws. Indeed, CLA's assertion that no other state has a law similar to the EDDA (Pet. 24) undermines its argument that this case would present a good vehicle to examine other states' consumer protection laws. And CLA never explains how a decision by this Court addressing a specialized statute like the EDDA would have any application to generalized consumer protection statutes prohibiting unfair or deceptive trade practices.

Given CLA's core reliance on facts decided against it, the limited stakes at issue here even for CLA, and the limited relevance of this case as a guide to states generally, this case presents a terrible vehicle for addressing the constitutionality of state consumer protection laws.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General

NOAH GUZZO PURCELL
Solicitor General
Counsel of Record

CYNTHIA L. ALEXANDER
PETER B. GONICK
TERA M. HEINTZ
Deputy Solicitors General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200

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