No. 23-29

IN THE
Supreme Court of the United States

CLA USA INC. AND CLA ESTATE SERVICES, INC.,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Washington Court of Appeals

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Washington's Estate Distribution Documents Act, as interpreted by the Washington courts below, punishes and chills speech under the guise of consumer protection. The Act's sweeping prohibition on certain types of speech by certain categories of people is not apparent on its face—in fact, the Washington Attorney General used to read it much more narrowly—and its enforcement against CLA defied *FCC* v. *Fox Television Stations*, *Inc.*, 567 U.S. 239, 254 (2012), because CLA did not have fair notice of what conduct is prohibited. The Act, as interpreted, also violates the First Amendment because it bans truthful offers to gather information—making it illegal for a nonlawyer to help her father collect estate records or for a company like CLA to offer to assist in compiling information which customers can provide to independent attorneys to receive essential estate-planning guidance.

The Act's constitutional flaws are particularly blatant, but Washington is hardly alone. States around the country have enacted similarly vague statues which are wielded by state attorneys general in ways that chill and punish speech. Without review by this Court, these problems will not go away on their own.

Nor does Washington seriously defend its statute on the merits. Instead, the State devotes most of its brief to vehicle arguments and to assertions about CLA's marketing practices. None of Washington's grounds for avoiding review is persuasive, and its assertions are irrelevant to the questions presented. They are also misleading. Every CLA customer signed a disclosure agreement stating that CLA "may discuss insurance solutions," Pet. App. 86a, and when a customer opted to prepare estate-distribution documents, the customer's own attorney drafted those documents.

Washington's Attorney General knew about this business model for years, yet it refused CLA's requests for guidance—sitting by while CLA unknowingly incurred millions in penalties. Even the court below found that "concern[ing]" and "incongruous." Pet. App. 25a–26a. When states seek to punish speech, the Constitution demands more. The petition should be granted.

ARGUMENT

I. The questions presented are important and will persist until this Court intervenes.

A. This case raises issues of profound national importance because statutes like Washington's threaten due process and protected speech. For most of the Nation's history, a plaintiff dissatisfied with CLA's services would have had to prove causation and damages. Consumer-protection statutes remove those procedural safeguards, allowing state officials to sue without showing that anyone was actually misled. That makes notice all the more important—especially where speech is at stake. Pet. 13. Yet states like Washington have eliminated not only back-end procedural safeguards, but also front-end notice by enacting vaguely worded statutes that chill and punish speech. Questions surrounding such statutes will persist until this Court sets limits. In fact, the lower courts have continued to grapple with these issues even while this case has been pending. E.g., *Tershakovec* v. *Ford Motor Co.*, 79 F.4th 1299, 1322 (11th Cir. 2023) (Tjoflat, J., concurring in part) (voicing notice concerns about state consumer-protection statutes). Washington offers no good reason these issues should continue to percolate.

B. The State's responses are unpersuasive. Washington first insists (at 29) that this case is not certworthy because there is no split. But this Court need not wait for other courts to splinter before resolving an important question about due process and protected speech. Look no further than *Fox*. Respondents there said what Washington says here—but the Court granted certiorari anyway and held that federal agencies may not enforce regulations that "fail[] to provide … fair notice." 567 U.S. at 253.

Washington next claims that a decision on this "specialized statute" would not apply to "other states' consumer protection laws." Opp. 31. But states cannot insulate themselves from this Court's review by enacting statutes that go uniquely far beyond constitutional bounds. Washington should know. Two Terms ago, the State urged the Court not to review a discriminatory worker-compensation law, insisting that there was no split and that the decision would "have no impact beyond" a single worksite. Brief in Opposition at 19, 32, *United States* v. *Washington*, 596 U.S. 832 (2022) (No. 21-404). The Court granted certiorari anyway and held that Washington's law violated the Constitution. That case offered states and lower courts important guidance, and this case would too.

The State also maintains that this case is not certworthy because the Court of Appeals "cited" the correct legal standard. Opp. 22. But that's no reason to deny certiorari when a state court makes a hash of due process, as the Court made clear in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). There (as here), the state court paid lip service to due-process standards before affirming an unprecedented damages award. The respondent then urged

the Court to turn a blind eye, calling the case a "fact-bound" challenge to the "application" of settled law. Brief in Opposition at 21, *State Farm*, 538 U.S. 408 (No. 01-1289). This Court granted certiorari—despite the lack of a split—and reversed, a decision that was "neither close nor difficult," since "[e]lementary notions of fairness … dictate that a person receive fair notice." 538 U.S. at 417–18. If anything, the notice problem here is even greater than that in *Campbell*, where the only question was "the severity of the penalty that [the] State may impose." *Id.* at 417. Here, CLA lacked notice of the very "conduct that w[ould] subject [it] to punishment" in the first place. *Id.*

II. The decision below is wrong.

Washington does not seriously defend the decision below or suggest that the Act passes constitutional muster. Small wonder. As the petition showed, the Court of Appeals flouted this Court's due-process cases, Pet. 12–16, and the Act cannot be squared with the First Amendment, Pet. 16–25.

A. CLA lacked fair notice that the Act outlawed its speech.

1. The Act does not give fair notice that it is always illegal for nonlawyers to ask for or receive estate-related information. Pet. 13. The Act forbids nonlawyers to "market estate distribution documents." RCW § 19.295.020. "[M]arketing," in turn, includes offering or agreeing to "gather information for the preparation of" estate documents. *Id.* § 19.295.010(4). But the phrase "for the preparation of" is ambiguous, granting "[in]sufficient notice of what [wa]s proscribed." *Fox*, 567 U.S. at 254. CLA thought that the statute forbade a nonlawyer to gather information to facilitate the nonlawyer's own preparation of estate documents—a

reading that avoids outlawing broad swaths of indisputably appropriate behavior, like helping a relative gather estate information. Yet Washington pressed for a broader reading, convincing the court below to hold that the Act forbids gathering, or offering to gather, information to help *an attorney* prepare estate documents. That created unfair surprise. Pet. 12–14.

Making matters worse, Washington does not deny that the State previously read the statute the same way that CLA does. The Attorney General's Office was the Act's key proponent—urging its passage and opining on what the legislation would accomplish. Pet. 5–8. On its reading, the Act did not create a "new cause of action" but instead merely codified existing case law on the "unauthorized practice of law." Pet. 6. The State held to that view from 2007 until it brought this case in 2017. By then, the Attorney General's Office had known for years how CLA's business worked. Yet the Office repeatedly declined CLA's requests for guidance—letting CLA unknowingly expose itself to millions in penalties. Pet. 15–16. That "conspicuous inaction" heightened the "unfair surprise." *Christopher* v. *SmithKline Beacham Corp.*, 567 U.S. 142, 158 (2012).

2. Washington's responses fail. The State chiefly argues that CLA had adequate notice because the Act "squarely proscribe[d]" its conduct. Opp. 21, 23–24. But that begs the question. Again: the Act does not say *whose* "preparation of … an estate distribution document" is at issue. RCW § 19.295.010(4). Washington now reads "preparation" to mean "preparation by anyone." CLA, meanwhile, has always understood "preparation" to mean "preparation by the nonlawyer"—a construction that would not outlaw the speech at issue here. Far from "add[ing] words" to the statute, Opp. 24, that is a reasonable way to resolve an ambiguity that exists under either side's interpretation.

Nor is there anything unusual about a business consulting an attorney general's statements when parsing an ambiguous law. *Contra* Opp. 26. In fact, this Court itself "extrapolate[s]" the "allowable meaning" of state statutes by considering how "those charged with enforc[ement]" read the law. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). And while Washington charges CLA with a "selective reading of the legislative history," it cites nothing that cuts the other way. Opp. 26.

Washington is also wrong to suggest that the decision below "answers CLA's claims that the statute could be applied to a family member gathering information to assist another family member." Opp. 24. Actually, the court sidestepped that problem—and the State's brief does little better. According to Washington, the Act doesn't cover "noncommercial interactions" because it "prohibits 'marketing.'" Opp. 24–25. But "marketing" includes "every offer" to "gather information." RCW § 19.295.010(4). Under Washington's reading, that far-reaching phrase would cover a daughter who offers to help her father update his trust by collecting records for the family lawyer. It is no answer that Washington's Consumer Protection Act "applies only to activities 'in trade or commerce.'" Opp. 25. That does not change the scope of liability under the Estate Distribution Documents Act, a violation of which is always a per se Consumer Protection Act violation.

Washington next tries to distinguish this Court's cases—but its efforts only prove CLA's point. The State says (at 25) that the statute in *Fox* was "imprecise and broad." So too here. And the statement of legislative intent does not solve that problem because it sheds no light on whose "preparation" is at issue. *Con-*

tra Opp. 26. Washington also notes (at 25) that *Fox* involved a departure from prior guidance and a pattern of nonenforcement. But that is this case too: the Attorney General's Office told the legislature one thing, then abruptly changed positions—after years of doing nothing. Nor did CLA "forfeit[]" the argument, *contra* Opp. 20 n.3, that fair notice is especially important when speech is at issue. See *Fox*, 567 U.S. at 253–54; *infra* § III.B. Finally, it makes no difference that *SmithKline Beecham* involved deference, not vagueness. In both contexts, the law demands "clear notice" and protects against "unfair surprise." 567 U.S. at 156–57.

B. The Act also violates the First Amendment.

1. As the petition explained, the Act forbids a particular type of speech (speech about estate planning) by a particular type of speaker (anyone who is not a Washington-barred lawyer, accountant, or financial institution). That triggers strict scrutiny. Pet. 16–19. And because there were less-restrictive ways for Washington to further its consumer-protection interests, the Act cannot stand. Pet. 19–21. In all events, the statute flunks even intermediate scrutiny because it is overbroad and because Washington cannot show that the restrictions were narrowly drawn. Pet. 21–25.

2. Washington does not seriously argue that the Act withstands First Amendment scrutiny. The State briefly suggests (at 28) that the commercial-speech doctrine applies because the Act covers only "'marketing' in the conduct of 'trade or commerce.'" But that is wrong, as explained above. See *supra* § II.A.2. And even on Washington's view, the Act would still be unconstitutional. The State never claims the Act applies only to "misleading" speech or to speech "related to unlawful activity." *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

Nor does it deny that its interest "could be served as well by a more limited restriction." *Id.* So the Act's "excessive restrictions cannot survive." *Id.*

Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), is not to the contrary. *Ohralik* upheld a commercial-speech restriction on attorney solicitations, citing states' "special responsibility" to regulate "licensed professions" and noting that lawyers are "officers of the courts." *Id.* at 460 (citation omitted). Since then, the Court has repeatedly refused to extend *Ohralik* to new contexts. E.g., *Edenfield* v. *Fane*, 507 U.S. 761, 774 (1993). And when the Court *has* extended *Ohralik*, it has required special justification. E.g., *Tenn. Secondary Sch. Athletic Ass'n* v. *Brentwood Acad.* 551 U.S. 291, 298 (2007) (plurality) (upholding ban on recruiting middle-school athletes, given "dangers of undue influence"). There is no reason to extend *Ohralik* here: Washington does not license CLA's agents, CLA is not an officer of the courts, and its customers are not eighth graders.

III. This case is an ideal vehicle.

As the petition explained, this case is an excellent vehicle. Pet. 25–27. There is a final judgment, and there are no jurisdictional problems. The issues are cleanly presented, and they are ripe for review. No relevant facts are disputed. And the questions presented are outcome-determinative because the judgment against CLA could not stand if the Constitution precluded enforcement. Washington's contrary arguments all fail.

A. Washington first insists that CLA lacks standing to challenge the Act as unconstitutionally vague because its conduct "falls squarely within" the statute. Opp. 20–21.

That's a puzzling claim. For starters, it misses the point. CLA argues that the Act failed to give *it* fair notice that *its* conduct was prohibited—not that the statute is vague "as applied to others." Opp. 20. Nor does Washington's argument make sense on its own terms. After all: "Article III does not restrict [a defendant's] ability to object to relief being sought at its expense." *Bond* v. *United States*, 564 U.S. 211, 217 (2011). And CLA has appellate standing because the state penalty is a concrete injury, caused by the state-court judgment, and redressable by reversal. As for *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), that case addressed the merits of a vagueness claim—not standing. At bottom, Washington's "standing" objection is just a merits argument in jurisdictional garb. But see *FEC* v. *Cruz*, 596 U.S. 289, 298 (2022) ("For standing purposes, we accept as valid the merits of [a party's] legal claims ….").

B. Washington also says (at 18) that the Court lacks jurisdiction to review CLA's First Amendment argument because the state court "applied long-standing Washington law to determine that CLA had forfeited any First Amendment issue." Wrong again.

First, the decision below rests on a federal rule—not state law. The Court of Appeals held that it "need not address" CLA's First Amendment argument because "naked castings into the constitutional sea" do not "command judicial consideration." Pet. App. 22a. Washington insists (at 18–19) that this holding "did not depend on federal law in any way." But the case that the Court of Appeals quoted attributes the "naked castings" rule to *United States* v. *Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970). In other words: Washington's "state law holding," Opp. 18, is language from a federal opinion that state courts have borrowed and repeated without elaboration. When (as here) a state

decision is "interwoven with" federal law and the adequacy and independence of a state-law ground "is not clear from the face of the opinion," this Court presumes that "the state court decided the case the way it did because it believed that federal law required" that result. *Michigan* v. *Long*, 463 U.S. 1032, 1040–41 (1983).

Second, far from "abandon[ing]" its First Amendment challenge, Opp. 16, CLA adequately preserved that issue. Citing First Amendment case law, CLA argued below that the Act creates "serious free speech … issues" by "inhibit[ing] harmless speech" and "restrain[ing] non-commercial speech." Pet. 12. That's nothing like *Phillips*, where the Eighth Circuit declined to address a "catalog" of "[b]ald" First, Fifth, Sixth, and Tenth Amendment claims—"naked castings" that had "virtually all been previously … rejected." 433 F.2d at 1366. Here, Washington evidently got the point because it urged the state court to reject CLA's argument on the merits. Brief of Respondent at 44–45, *Washington* v. *CLA Estate Servs., Inc.*, 515 P.3d 1012 (Wash. Ct. App. 2022) (No. 82529-I). In fact, Washington's objections below are the same ones it raises now. *Compare id.* at 45 (denying that the Act applies to "non-commercial discussions") *with* Opp. 28 (denying that the Act applies "in a non-commercial context"). While Washington later added that the court "need not consider" CLA's argument, it chiefly argued that the Act passed constitutional muster. Br. 55–56.

C. The State's other vehicle arguments also fail.

Washington claims (at 29–30) that the case is "predicated on factual assertions" that the state courts rejected. Just the opposite: CLA's constitutional challenges present pure legal questions. And while the parties disagree about the inferences to be drawn from various statements and events, all facts relevant to this Court's review are undisputed. The State's own

examples prove the point. Washington faults CLA for relying on "theories about the legislature's intent" and the Attorney General's actions that "the lower court rejected." Opp. 29. But that's a red herring. CLA is accepting those findings and arguing that they support its claims of unfair surprise. As for the claim that CLA was "involved in preparing" estate documents, Opp. 30, the state courts found that CLA "offer[ed] to gather, and gather[ed], information"—but they never suggested that CLA itself prepared such documents.

Washington is also wrong to suggest that a decision by this Court would not change CLA's "ultimate liability." Opp. 31. The Court of Appeals affirmed a $4.2 million award for gathering and offering to gather information in violation of the Act. Pet. App. 105a. If the statute is unconstitutional, those penalties cannot stand. The State speculates (at 31) that CLA might face "the same statutory penalties" on remand—but that is wishful thinking. The $4.2 million penalty was for purported Act-specific violations, and Washington could not just penalize the same speech under its (even vaguer) Consumer Protection Act. In all events, the State's objection poses at most a remand question.

CONCLUSION

The Court should grant CLA's petition.

Respectfully submitted,

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