No. 94162-9

SUPREME COURT OF THE STATE OF WASHINGTON

LYFT, INC., a Delaware corporation,

Appellant,

v.

KENNETH WRIGHT, on his own behalf and on behalf of other similarly situated persons,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Respondent Kenneth Wright's central arguments—that there is an implied cause of action for damages under the Commercial Electronic Mail Act for damages with respect to text messages and that all five elements of a Consumer Protection Act claim are automatically satisfied whenever a text message is sent in violation of CEMA—are contrary to the statute's text and well-established canons of statutory construction. First, the fact that the damages cause of action in CEMA is expressly limited to "phishing" communications proves that the Washington Legislature did ***not*** impliedly create a damages cause of action under CEMA as to text messages. Second, the fact that CEMA's text message provision addresses only the first three elements of a CPA claim—notably omitting reference to the remaining two elements when other statutes expressly cover all five elements—demonstrates that the Legislature did ***not*** intend for text messages to automatically satisfy the other two elements.

Respondent relies heavily on RCW 19.190.040(1), the CEMA provision that sets an amount of damages that could be recovered by the recipient of an unlawful text message. Respondent contends that, because CEMA contains that provision, that must mean that the Legislature either gives the recipients of commercial text messages an implied private right

of action under CEMA itself or implicitly establishes that a commercial text message per se satisfies the causation and injury elements of the CPA. But neither of these possibilities is consistent with the text of the statute. The far better reading—because it honors the Legislature's words—is that Section 19.190.040(1) sets the amount of statutory damages that can be recovered in a CPA action predicated on a violation of CEMA if, and only if, the plaintiff can satisfy all five of the elements for a CPA claim, including injury.

Respondent contends (Resp. Br. 13) that this reading of Section 19.190.040(1) gives consumers a right without a remedy, but that argument is incorrect. Under the carefully balanced scheme created by the Legislature, consumers who receive improper commercial text messages ***do*** have a remedy: they not only can seek injunctive relief under CEMA itself, but also can sue for damages under the CPA if they have suffered monetary or property injury. By contrast, respondent's approach would upset the statutory framework that the Legislature created and encourage an enormous amount of litigation that the Legislature sought to prevent.

Accordingly, the answer to both certified questions is "no."

II. ARGUMENT

A. CEMA Does Not Create a Private Right of Action Authorizing a Recipient of an Unsolicited Commercial Text Message to Sue for Damages.

We showed in the opening brief (at 16-23) that CEMA's text does not allow the recipients of commercial text messages to sue for damages, and that the legislative history and context of CEMA's enactment do not change that fact. When the Legislature sought to create a private right of action under CEMA in 2005, it did so expressly, and it carefully limited the availability of a private right of action for damages to "phishing" communications. Section 19.190.090(1) expressly states: "A person ***who seeks damages*** under this subsection may ***only*** bring an action against a person or entity that directly violates RCW 19.190.080"—*i.e.*, the prohibition on phishing. RCW 19.190.090(1) (emphasis added). The Legislature's choice to limit damages actions under CEMA to phishing violations demonstrates that damages for violations ***not*** involving phishing are only available under the CPA under certain circumstances (as discussed below).

Respondent argues that RCW 19.190.040(1), which sets forth a measure of damages for emails or text messages sent in violation of the statute, must create an "implied" right of action for damages for commercial texts in order to give the provision meaning. But that

argument is wrong. The function of the damages provision is to set forth the measure of damages recoverable in CPA suits, not to create an "implied" right of action.

1. The Text of CEMA Does Not Authorize Damages for Commercial Text Messages.

Respondent contends that CEMA impliedly creates a right of action for damages based on commercial text messages, citing a three-part test from *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990). Resp. Br. 13-14. But that test has no application here.[1] The test is used to determine whether to imply a right of action when a statute "provides protection to a specified class of persons but creates ***no*** remedy." *Bennett*, 113 Wn.2d at 920 (emphasis added). That is not the case here: CEMA expressly creates a private right of action, under which a recipient of an unlawful text message ***can*** seek injunctive relief. *See* RCW 19.190.090. The question for this Court is not whether CEMA creates a right of action at all—it expressly authorizes an action for ***injunctive*** relief—but whether

[1] In any event, as we explained in the opening brief (at 19-23), under that test, CEMA does not create any implied right of action, because the legislative intent here "supports . . . denying a remedy" and because an implied right of action would conflict with the "underlying purpose of the legislation," which was to provide a system of remedies calibrated to the many different types of communications covered by CEMA. *See Bennett*, 113 Wn.2d at 920-21.

damages are available as a remedy when the violation alleged is an unsolicited commercial text message.

The answer to that question is "no," because the private right of action created in Section 19.190.090 provides that ***only*** recipients of phishing communications may sue for damages, while other plaintiffs are limited to injunctive relief. *See id.* Because the Legislature chose to provide for injunctive relief as the sole remedy under CEMA itself for text message violations, the courts lack the ability to imply additional remedies for those violations. *See, e.g., Nat'l R. R. Passenger Corp. v. Nat'l Ass'n of R. R. Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); *see also, e.g., R. B. J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n*, 315 N.W.2d 284, 289 (N.D. 1982) ("The comprehensive character of a remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize other remedies.") (citing *Nat'l Passenger R.R. Corp.*, 414 U.S. at 458). As this Court has put it in another setting, "Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of expressio unius est exclusio alterius applies." *Wash. State Republican Party v. Wash.*

State Pub. Disclosure Comm'n, 141 Wn.2d 245, 280, 4 P.3d 808 (2000).[2] That maxim applies with equal force here.

2. The Damages Provision for Text Messages Applies to CPA Claims Rather Than Authorizing CEMA Claims.

Respondent attempts to overcome CEMA's clear textual limitation on the availability of damages by pointing to Section 19.190.040(1), the statute's liquidated damages provision. He asks: "[W]hat is the point" of this section "if not to provide fixed statutory damages for unsolicited commercial emails and texts?" Resp. Br. 14. But the question is a red herring: No one questions that damages are available for text messages that violate CEMA, but that does not mean that CEMA ***itself*** is the vehicle for recovering those damages.

In fact, the statutory scheme makes clear that CEMA ***does not*** supply a cause of action for these damages. Section 19.190.040(1) provides a measure of damages ($500 or actual damages, whichever is greater) that is recoverable in a suit ***under the CPA***—not under CEMA itself. The 2003 amendment to CEMA reflected the Legislature's intent to

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[2] Because the text of the statute has a straightforward meaning, respondent's argument that this Court should give Section 19.190.040(1) a liberal construction (Resp. Br. 13, 17) is incorrect. As this Court has held, the interpretive principle of liberal construction cannot overcome the clear import of a statute's text. *Salts v. Estes*, 133 Wn.2d 160, 162, 943 P.2d 275 (1997) ("What the Legislature has not seen fit to do—change the wording of the statute—we decline to do by judicial proclamation in the guise of liberal construction.").

make text-message violations of CEMA actionable under the CPA, just as email violations already were. That is why the Legislature enacted language providing that an unlawful text message under CEMA automatically satisfies the first three elements of a CPA claim. There would have been no reason for the Legislature to create an ***express*** link between the text message provisions of CEMA and the CPA if there were already an implied private right of action under CEMA itself.

The most rational explanation for the damages provision (RCW 19.190.040(1)) in CEMA is that the Legislature wished to create a measure of damages for CPA claims for commercial text messages. The CPA itself provides only for ***actual*** damages (potentially subject to trebling). *See* RCW 19.86.090. Because actual damages may be hard to measure, the provision in CEMA authorizing a minimum amount of statutory damages would allow CPA claims to proceed without proof of the measure of damages—so long as the CPA's standards for injury are met, as we discuss below. That is the most rational explanation for why the Legislature enacted Section 19.190.040(1)—and it is the only explanation consistent with the text of CEMA.

3. Respondent's "Implied Repeal" Argument Is Wrong.

Respondent contends that we have argued that "by enacting RCW 19.190.090(1) in 2005, the Legislature impliedly repealed the claim for

damages it had provided to consumers in 2003 under RCW 19.190.040(1)." Resp. Br. 15. But respondent's contention misses the mark because it assumes (incorrectly) that Section 19.190.040(1) created a new cause of action. That, of course, is the first certified question presented to this Court, and for the reasons just discussed, its answer is "no": Section 19.190.040(1) sets statutory damages recoverable under the CPA, *not* under CEMA. Because Section 19.190.040(1) did not create a cause of action, there was no right of action that could be impliedly repealed. Rather, as we have shown, a different provision—Section 19.190.090(1)—created a cause of action for damages under CEMA *for the first time* (before then, damages were entirely unavailable under CEMA itself) and ***limited*** that cause of action to phishing communications.

Respondent relatedly argues that any "conflict" between Sections 19.190.040(1) and 19.190.090(1) should be resolved by "enforc[ing] the provision relatively more important or principal to the statute." Resp. Br. 16-17 (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 190 & nn.5 & 6 (1st ed. 2012)). But courts follow that approach only when two provisions of a statute are "truly irreconcilable." Scalia & Garner, *supra*, at 189. That is not the case here; as we have shown, the two provisions are easily harmonized by holding

that Section 19.190.090(1) limits any private right of action for damages under CEMA to phishing violations, while Section 19.190.040(1) provides for statutory damages in CPA actions.

4. Respondent's Interpretation of CEMA Renders Two Provisions of the Statute Superfluous.

Finally, as we showed in the opening brief (at 18-19), implying a private right of action in Section 19.190.040(1) would improperly render two other provisions of CEMA—Sections 19.190.090(1) and 19.190.060—superfluous. First, if respondent were correct that Section 19.190.040(1) creates a private right of action for damages for text messages, then Section 19.190.090(1)'s limitation on an action for damages under CEMA to cases in which a defendant "directly violates" the prohibition on phishing would serve no purpose. That language makes sense ***only*** if Section 19.190.090(1)'s private right of action is the ***exclusive*** private right of action for damages under CEMA. Respondent has no persuasive answer to this observation.

Second, if respondent were correct that Section 19.190.040(1) created a private cause of action for commercial texts, Section 19.190.060(2)—which provides that an unsolicited commercial text establishes the first three elements of a CPA claim—would serve no purpose, because a CPA claim would be duplicative of that CEMA cause

of action. Respondent has no answer to this point either. His brief promises (at 18) that it will explain why it is "reasonable to have two (or more) causes of action" for the same conduct, but it never delivers on that promise. It is true that, as respondent observes, it is "common" for plaintiffs to bring a tort claim and a CPA claim based on the same facts, Resp. Br. 22-23, but respondent ignores that tort claims derive from the common law, not a statute.

In short, everything in CEMA's statutory language points to the conclusion that a consumer who seeks damages for unlawful text messages must proceed under the CPA, not under CEMA itself. The Court should therefore conclude that RCW 19.190.040(1) does not create an implied private cause of action for damages for commercial text messages under CEMA itself.

B. The CPA Requires a Recipient of a Commercial Text Sent in Violation of CEMA to Prove Injury-in-Fact in Order to Recover Statutory Damages Under RCW 19.190.040.

CEMA's text, in conjunction with established canons of statutory construction, makes clear that the answer to the second certified question is also "no": Section 19.190.040(1) does not establish the causation and injury elements of a CPA claim.

In 1998, when the Legislature sought to declare that spam emails are per se violations of the CPA, it did so expressly and unambiguously,

providing that "[i]t is a violation of the consumer protection act . . . to initiate the transmission of a [misleading] commercial electronic mail message." RCW 19.190.030(1). That unqualified language paralleled the language that the Legislature had used to define violations of the CPA in many other statutes. *See, e.g.*, RCW 80.36.400(3) (unlawful commercial solicitation using an automatic dialer "is a violation of chapter 19.86 RCW"); RCW 19.130.060 ("Violation of this chapter [Telephone Buyers' Protection Act] constitutes a violation of [the CPA.]"); RCW 19.142.100 ("A violation of this chapter [the Health Studio Services Act] constitutes an unfair or deceptive act or practice and is a per se violation of the consumer protection act.").

If the Legislature had wanted to provide that an unlawful commercial ***text message*** satisfies all of the elements of a CPA claim, it would have used the same or similar language. But it expressly chose otherwise; instead, it provided only that an unlawful commercial text message satisfies the first three of the CPA's five elements. *See* RCW 19.190.060(2). That difference indicates that the Legislature did ***not*** intend for unlawful text messages to satisfy the latter two CPA elements automatically. As this Court has explained, "Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." *In re Detention of*

Swanson, 115 Wn.2d 21, 27, 804 P.2d (1990) (brackets omitted) (quoting *United Parcel Serv., Inc. v. Dep't of Rev.*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)).[3] That principle parallels the U.S. Supreme Court's recognition of "the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quotation marks omitted).[4]

Respondent attempts to overcome the clear import of CEMA's language by falling back on *Gragg v. Orange Cab Co.,* 145 F. Supp. 3d 1046 (W.D. Wash. 2015), in which a federal district judge held that Section 19.190.040(1) establishes the final two elements of a CPA claim—causation and injury. Resp. Br. 20-21. The *Gragg* court acknowledged that the Legislature had not stated that commercial text message violations of CEMA automatically violate the CPA, as it had with respect to spam emails. *Gragg*, 145 F. Supp. 3d at 1053. But—notwithstanding the express difference in statutory text—the court stated

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[3] *See also, e.g.*, *State v. Cronin*, 130 Wn.2d 392, 399, 923 P.2d 694 (1996); *Cont'l Sports Corp. v. Dep't of Labor & Indus.*, 128 Wn.2d 594, 600, 910 P.2d 1284 (1996) (calling this rule "well-accepted"); *Seeber v. Wash. State Pub. Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981).

[4] *See also, e.g.*, *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 102 n.5 (2012); *DePierre v. United States*, 564 U.S. 70, 83 (2011) (noting rule).

that "there is also no indication that the legislature intended to regulate the two forms of communication differently." *Id.*

Gragg's reasoning is misplaced, however. Contrary to the *Gragg* court's conclusion, there ***is*** an "indication"—and a crystal clear one at that—proving that the Legislature "intended to regulate [emails and text messages] differently": it chose to provide that (1) unlawful emails are always CPA violations but (2) text messages satisfied only three of the five CPA elements. The amendment to CEMA addressing text messages—enacted five years after the provision addressing emails—makes it readily apparent that the Legislature ***did*** see a difference between the two forms of communication, and the Legislature affirmatively declined to make text messages a per se violation of the CPA. The *Gragg* court's apparent discounting of the clear difference in the statute's treatment of emails and text messages cannot be squared with this Court's holding in *Hangman Ridge* that "[w]here the Legislature specifically defines the exact relationship between a statute and the CPA, this court will acknowledge that relationship." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787, 719 P.2d 531 (1986).[5]

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[5] *Gragg* observed that the Legislature "used identical language to declare an unfair or deceptive act in trade or commerce that affects the public interest and inserted [language regarding text messages] into the liquidated damages provision that previously applied only to 'commercial electronic

The *Gragg* court also believed that, if Section 19.190.040(1) does *not* create a private right of action under CEMA itself, "the only way to give effect to the legislature's stated intent" that consumers be able to recover liquidated damages for unlawful text messages was to "construe the liquidated damages provision as establishing the injury and causation elements of a CPA claim." *Gragg*, 145 F. Supp. 3d at 1053. But that view is incorrect. The legislative history quoted by *Gragg* states only that consumers are able to "bring a civil action against the sender [of a text message] for the greater of $500 or actual damages"; it does not say that consumers can recover these damages ***automatically*** without satisfying the injury and causation elements of the CPA. *Id.* (quotation marks omitted). The only reading of the legislative history that is consistent with the text of CEMA is one that requires a plaintiff to prove that the elements of injury and causation are met. *Cf. State ex rel. M.M.G. v. Graham,* 159 Wn.2d 623, 632, 152 P.3d 1005 (2007) (noting that statutory interpretation

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mail messages.'" 145 F. Supp. 3d at 1053. But that is neither surprising nor relevant. The Legislature regularly uses this language to show that the first three elements of a CPA claim are met. *See, e.g.*, RCW 9A.58.030 ("[T]he practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying [the CPA]"); RCW 18.300.140 (same language); RCW 18.320.020(1) (same language). But the use of that standard language does not suffice to show that the Legislature concluded that ***all five*** of the elements of a CPA claim are automatically satisfied.

begins with the text and that legislative history comes in only when the text is ambiguous).

The remainder of respondent's contentions also lack merit. He again points to what he calls the principle of "necessity of liberal construction to best protect consumers" (Resp. Br. 21), but that principle applies to interpretation of the CPA ***itself***—not to the interpretation of the relationship between the CPA and ***another*** statute. *See* RCW 19.86.920 ("***[T]his act*** shall be liberally construed . . . .") (emphasis added). The relationship between the CPA and other statutes is governed by this Court's decision in *Hangman Ridge*, which made clear that it is the Legislature's prerogative—not the courts'—to determine the degree of "interaction" between these statutes. *Hangman Ridge*, 105 Wn.2d at 787. And here, the Legislature has made clear that a text message sent in violation of CEMA's requirements only satisfies the first three elements of a CPA claim and does not automatically satisfy the CPA's injury and causation elements.

Respondent also argues that "the CPA takes a relatively expansive view of what constitutes a compensable injury to property." Resp. Br. 20 (quotation marks omitted). But this Court has made clear that the injury-to-property requirement is not automatically satisfied without proof: "The injury involved need not be great, but it must be established." *Hangman*

Ridge, 105 Wn.2d at 792. Unless the Legislature expressly instructs otherwise, therefore, this Court should not presume that the Legislature believed that ***every*** CEMA violation ***automatically*** gives rise to an injury to property under the CPA.

In any event, the standard for "injury to property" under the CPA is not relevant to answering to the certified questions here. The second certified question asks not whether a particular text message can ***sometimes*** qualify as an "injury to property" under the CPA—there may well be particular circumstances where it can—but instead whether the Legislature determined that an unwanted text message ***automatically and without any additional evidence*** constitutes such an injury in every case. And the answer to that question is straightforward: The Legislature chose not to do so.

Finally, respondent argues that statutory damages must be available, because without statutory damages, "[i]ndividual citizens" would lack the financial incentive to sue over commercial text messages. Resp. Br. 22. But that argument misses the point. For the reasons discussed above, plaintiffs can receive statutory damages in CPA suits for improper text messages under appropriate circumstances. The relevant question is whether they must prove an injury to property and causation as

part of their CPA claim. And the language of CEMA does not excuse plaintiffs from that obligation.

In sum, plaintiffs who assert a claim under the CPA that rests on a text message sent in violation of CEMA must prove injury to property and causation—the last two elements of a CPA claim. That approach is the only one that both gives effect to the Legislature's intent to provide a damages remedy for CEMA violations via the CPA while accounting for the Legislature's clear and conspicuous choice ***not*** to treat commercial text messages as per se CPA violations.

III. CONCLUSION

The Court should answer both certified questions in the negative.

DATED this 21st day of August, 2017.

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The undersigned attorney certifies that on the 21st day of August, 2017, a true copy of the foregoing was served on each and every attorney of record herein via email:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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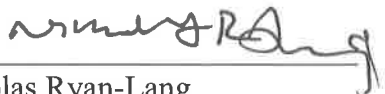

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