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.

LYFT, INC.'S OPENING BRIEF ON CERTIFIED QUESTIONS

BYRNES KELLER CROMWELL LLP
Bradley S. Keller, WSBA No. 10665
Keith D. Petrak, WSBA No. 19159
Nicholas Ryan-Lang, WSBA No. 45826
38th Floor
1000 Second Avenue
Seattle, WA 98104
(206) 622-2000
Attorneys for Appellant

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I. INTRODUCTION

The Commercial Electronic Mail Act (RCW 19.190, *et seq.*, "CEMA") was enacted in 1998 to address the emerging problem of deceptive spam emails. It was subsequently amended twice to address new forms of communication: in 2003, the Legislature added provisions prohibiting unsolicited commercial text messages, and in 2005, new provisions were added to address the rise of "phishing" – a practice whereby criminals seek private information to engage in identity theft and other forms of fraud.

The Legislature treated each form of communication differently. In 1998, it declared that deceptive emails are per se violations of the Consumer Protection Act (RCW 19.86, *et seq.*, "CPA") and entitle a plaintiff to damages under the CPA, irrespective of whether the plaintiff can show actual injury caused by the violation. In 2003, it likewise made unsolicited *text messages* actionable under the CPA, but it provided that such messages automatically satisfy only the first three of the five elements of a CPA violation, *requiring plaintiffs to show the last two elements – injury and causation – if they wished to obtain actual or statutory damages*. And in 2005, the Legislature created a damages cause of action under CEMA itself for "phishing" communications.

The two questions certified to this Court boil down to whether the Court should honor the Legislature's clear intent – expressed in the plain text of CEMA – to distinguish between the proof needed and remedy available for unlawful text messages and proof needed and remedy available for other CEMA violations. The certified questions respectively ask (1) whether CEMA treats unsolicited text messages in the same way as phishing violations do and therefore such text messages give rise to a damages cause of action under CEMA itself, and (2) whether receipt of an unsolicited text message is a per se violation of all five elements of the CPA and, hence, automatically (without a showing of injury and causation) gives rise to a damages claim under the CPA, like deceptive spam emails.

The Court should decline to upset the carefully constructed framework that the Legislature put in place and should answer both certified questions in the negative. ***First***, the Court should hold that CEMA itself authorizes damages claims only for phishing schemes. The plain text of the statute compels that result, and to the extent the text leaves any doubt, it is confirmed by the history of the Legislature's development of CEMA and by established rules of statutory construction. Indeed, *nothing* in CEMA or the history of its enactment indicates that the

Legislature intended to create a right of action for damages for unsolicited text messages under CEMA.

Second, the Court should hold that a plaintiff seeking damages for unsolicited text messages under the CPA must prove the last two elements of a CPA violation – injury and causation – and that CEMA's liquidated damages provision does not automatically satisfy those elements. When the Legislature wants to provide that a statutory violation is a per se violation of all five elements of the CPA, it knows how to do so – as it did in CEMA's deceptive email provision – and it did not include any language to that effect in the unsolicited text messages provisions of CEMA. Plaintiffs must therefore prove injury to their business or property and causation before they can recover statutory damages under the CPA based on unsolicited text messages.

II. CERTIFIED QUESTIONS

The federal district court certified the following questions:

1. Does the recipient of a text message that violates the Consumer Electronic Mail Act, Ch. 19.190 RCW ("CEMA"), have a private right of action for damages (as opposed to injunctive relief) directly under that statute?

2. Does the liquidated damages provision of CEMA, RCW 19.190.040(1), establish the causation and/or injury elements of a claim under the Washington Consumer Protection Act, Ch. 19.86 RCW ("CPA"), as a matter of law or must the recipient of a text that violates CEMA first

> prove injury in fact before he or she can recover the liquidated damage amount?

ECF 73.

III. STANDARD OF REVIEW

"Certified questions from federal court[s] are questions of law that [this Court] review[s] de novo." *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). When a federal court certifies a question, this Court does "not have jurisdiction to go beyond the specific question presented by the Certification Order." *La.-Pac. Corp. v. Asarco, Inc.*, 131 Wn.2d 587, 604, 934 P.2d 685 (1997); RCW 2.60.020.

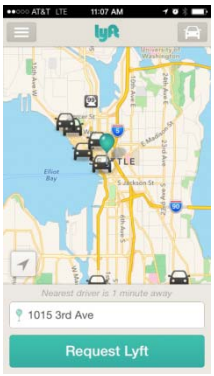
IV. STATEMENT OF THE CASE

A. Factual Background and Plaintiff's Claims.

Lyft operates a mobile phone application that is used to access an "on-demand peer-to-peer ridesharing" network. ECF 62, Second Am. Compl. ¶ 10. A person who wants a ride can use Lyft's application to find nearby drivers who are willing to provide it. *Id.* ¶ 11. Lyft's application includes a feature called "Invite Friends," which allows a user to send texts that invite her friends to download Lyft's application. *Id.* ¶ 19. The texts are initiated by Lyft users, not by Lyft, because the texts are not sent unless the Lyft user initiates and manually completes multiple steps to prompt the text. *See generally id.* ¶¶ 11, 19. Specifically, the "Invite

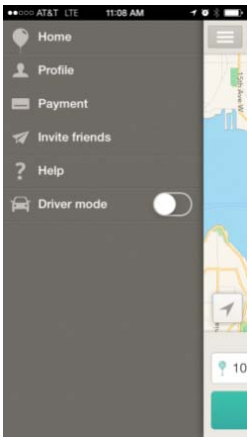
Friends" function operates as follows:

(1) The user must manually open the Lyft application on her mobile phone.



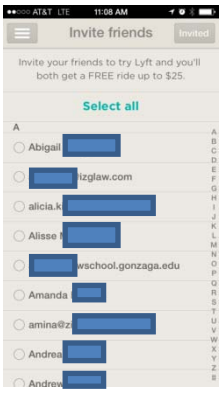
(2) The user must then locate and open the settings menu within the application.

(3) From that menu, the user must manually select the "Invite Friends" function. *Id.* ¶ 19.

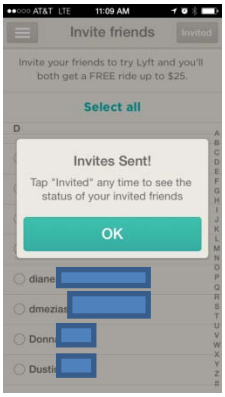


(4) The "Invite Friends" function displays the user's phone contact list, from which the user must either manually

select one or more individual(s) to whom to send an invitational text, or manually choose to "Select All" of her contacts at once. *Id.*



(5) The user then must affirmatively confirm her intent to send the invitational text by manually pressing "Send Invites."



ECF 18 at 6-7; ECF 19 ¶ 2. Only if a user reaches the end of this process and presses "Send Invites" will Lyft's computer system process the data received from the user and send an invitational text. ECF 18 at 8:5-7; ECF 62, Second Am. Compl. ¶ 19.

Wright's claims are based on a single text he received on March 20, 2014, sent at the request of an acquaintance (Jo Ann C.) that invited him to download Lyft's free mobile phone application and offered him a free $25 Lyft ride if he did so:

> Jo Ann C. sent you a free Lyft ride worth $25. Claim it at http://lyft.com/getapp/MD15M215.

Id. ¶ 23. Wright sued four days later, based on this lone, allegedly unsolicited text, asserting that Lyft violated (i) the Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227); (ii) CEMA (RCW 19.190, *et seq.*); and (iii) Washington's Consumer Protection Act (CPA) (RCW 19.86, *et seq.*).

B. Relevant Procedural Background.

Wright filed this action on March 24, 2014, in the U.S. District Court for the Western District of Washington. ECF 1. Lyft moved to dismiss all claims pursuant to Federal Rule of Civil Procedure 12(b)(6) on May 15, 2014. ECF 8. Wright filed an amended complaint, and the court stayed the case pending the release of an anticipated FCC ruling addressing whether invitational text messages sent by the user of an application could trigger liability under the TCPA for the application provider. ECF 40, 52. After the FCC released its ruling, Lyft renewed its motion to dismiss on November 19, 2015. ECF 54. On April 15, 2016, the

District Court dismissed the TCPA claim, but declined to dismiss Wright's CEMA and CPA claims. ECF 63. It then retained jurisdiction over the remaining claims, and stayed the case pending this Court's ruling on several questions certified in *Gragg v. Orange Cab Co.*, No. 2:12-cv-00576-RSL (W.D. Wash.). ECF 65. When *Gragg* settled before those certified issues could be resolved, the parties filed a stipulated motion to certify the same questions to this Court in this case, which the District Court granted. ECF 71, 72.

V. ARGUMENT

CEMA distinguishes between the various types of electronic communications it governs and authorizes different remedies for each. Victims of attempted "phishing" schemes (*i.e.*, attempts to induce others to provide personal information while concealing one's identity) may sue for injunctive relief or damages under CEMA. Those who receive deceptive commercial emails may sue for injunctive relief under CEMA, and under the CPA for statutory or actual damages. And lastly, those who receive unsolicited commercial texts may sue for injunctive relief under CEMA, and under the CPA for statutory or actual damages – *if* they can also prove actual injury to their business or property that was caused by the defendant's conduct.

The Legislature adopted this three-tiered approach in order to tailor the relief available to plaintiffs to the nature of the potential harm being addressed. For more egregious conduct, such as phishing or sending deceptive emails, damages are available irrespective of whether the plaintiff has suffered injury. In contrast, for conduct that the legislature deemed less egregious – sending an unsolicited commercial text – a plaintiff must show actual injury in order to recover damages. The Court should preserve that statutory framework.

A. In Enacting and Amending CEMA, the Legislature Distinguished Between Three Types of Electronic Communications and Treated Each Type Differently.

1. The Legislature Enacts CEMA in Response to Complaints Related to Spam Email.

CEMA was enacted in 1998, when consumers were fast becoming heavy users of email. The Attorney General's Office "received 322 complaints over a five-month period in 1997 about unsolicited electronic messages." Wash. Final B. Rep., 1998 Reg. Sess. H.B. 2752 (Apr. 6, 1998). Broadly speaking, citizens were complaining about "spam," much of which consisted of "commercial advertisements" that contained "untrue or misleading information." *Id.* The Legislature recognized that consumers were losing time and money sifting through unwanted and potentially misleading email because they "connect[ed] to the Internet through

interactive computer services that charge fees for time spent utilizing a dial-up connection to their computer servers." *Id.*

CEMA addressed this problem by declaring that sending false or misleading commercial *email* constituted a per se violation of the CPA:

> (1) It is a violation of the consumer protection act, chapter 19.86 RCW ... to conspire to initiate … or to initiate the transmission of a commercial electronic mail message that: … [is] false or misleading....
>
> (2) It is a violation of the consumer protection act, chapter 19.86 RCW, to assist in the transmission of a commercial electronic mail message, when the person providing the assistance knows [or should know] that the initiator … intends to … [violate] the consumer protection act.
>
> (3) The legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act .... A violation of this chapter is not reasonable … and is an unfair or deceptive act in trade or commerce and an unfair method of competition for purposes of [the CPA].

RCW 19.190.030(1)-(3). By virtue of the clear language defining the prohibited conduct as "a violation of the consumer protection act," the Legislature obviated the need to satisfy the five-element test for CPA violations announced by this Court in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 784-85, 719 P.2d 531 (1986). If consumers could prove receipt of a false or misleading email,

they automatically were entitled to recover the greater of statutory damages or actual damages through a CPA action.

In a separate section, the Legislature defined the "[d]amages to a recipient of" a commercial email sent in violation of those provisions as the greater of "five hundred dollars, or actual damages." RCW 19.86.040(1). But no language in the original version of CEMA provided for any direct cause of action under the statute itself. The legislative history confirms that the Legislature contemplated that *private* actions based on spam emails would be brought only under the CPA. Wash. Final B. Rep., 1998 Reg. Sess. H.B. 2752 (Apr. 6, 1998) ("a violation of the Consumer Protection Act occurs when a sender" sends an unlawful email message).

2. <u>The Legislature Amends CEMA to Address the Rise of Text Messaging</u>.

In 2003, the Legislature amended CEMA in response to the emergence of text messaging as a way for businesses to communicate with consumers. The Legislature noted that while CEMA prohibited email messages "that contain deceptive or false information," texts "sent to cellular phones or pagers" did not fall within the statute's provisions. Wash. Final B. Rep., 2003 Reg. Sess. H.B. 2007 (June 27, 2003). Thus, the Legislature enacted new sections prohibiting substantially ***all***

commercial texts that were not solicited, whether or not deceptive:

> (1) No person conducting business in the state may initiate or assist in the transmission of an electronic commercial text to a telephone number assigned to a Washington resident for cellular telephone … equipped with … any … capability allowing the transmission of text messages.
>
> (2) The legislature finds that the practices covered by this section are matters vitally affecting the public interest for the purpose of applying the consumer protection act .... A violation of this section is not reasonable … and is an unfair or deceptive act in trade or commerce and an unfair method of competition for purpose of applying the [CPA].

RCW 19.190.060; *see* RCW 19.190.070(1)(b) (no violation where recipient consents to receiving messages). The Legislature also amended the definition of "damages to the recipient" to include recipients of commercial texts. RCW 19.190.040(1).

The legislative history explains that the Legislature deliberately chose to enact a broad prohibition on *all* unsolicited text messages – not merely deceptive ones – because it believed that such messages posed different problems from spam emails:

> When a person receives unwanted e-mail messages on their computer, they can press delete. It's different on wireless devices. You pay to receive the messages ... Unsolicited commercial text messages also cost in terms of missed messages because the memory in these devices is not large enough to handle a flood of unwanted text messages. Some exceptions for carriers offering cellular service should [be] include[ed]…. Otherwise, the recipient should be able to

> opt in and not receive commercial messages unless they agree to receive them. It makes sense to set limits before this practice gets out of hand.

Testimony For: Wash. H.B. Rep., 2003 Reg. Sess. H.B. 2007 (Apr. 21, 2003).

In light of its choice to prohibit all unsolicited commercial text messages, rather than only deceptive ones, the Legislature placed more careful limits on the *remedy* for such text messages. As it had with spam emails, the Legislature made unsolicited text messages actionable under the CPA – but it refused to provide that unsolicited text messages were per se violations of all five elements of the CPA, as it had for spam emails. Rather, the Legislature only found that unlawful text messages satisfy the first three elements of a CPA claim. RCW 19.190.060(2). CEMA thus created a distinction between misleading and deceptive emails, which had greater potential to cause injury, and commercial texts, which were generally seen as merely inconvenient rather than dangerous. For that reason, to bring suit based on unsolicited text messages, private plaintiffs would need to produce proof of actual injury in order to recover damages.

3. The Legislature Amends CEMA to Prohibit Phishing Scams and Adds a Limited Private Right of Action for Damages Resulting From Them.

The Legislature amended CEMA again in 2005, this time in order to address "phishing," which the Legislature defined as "a type of Internet

activity that uses fraudulent e-mails and websites to solicit personal information from an e-mail recipient." Wash. B. Analysis, 2005 Reg. Sess. H.B. 1888 (Feb. 15, 2005). The provision states that:

> It is a violation of this chapter to solicit, request, or take any action to induce a person to provide personally identifying information by means of a web page, electronic mail message, or otherwise using the internet by representing oneself, either directly or by implication, to be another person, without the authority or approval of such other person.

RCW 19.190.080. The legislative history indicates that "phishing" was a matter of particular concern and urgency because of the huge impact the practice was having on Washington consumers:

> This is a widespread problem. Many computer users receive multiple fraudulent e-mails per day. These phishing emails create a sense of urgency and look very real. It is very easy for phishers to forge e-mail addresses. Often, the link the computer user sees on his or her screen is not where the link actually goes to. The fake site looks almost identical to the real site. Financial institutions support this bill because ultimately it is their customers that are the bait. The banks often have to bear some of the costs. ***This bill is needed because it is estimated that phishing-related losses will exceed $150 million in Washington this year.***

Testimony For: Wash. H.B. Rep., 2005 Reg. Sess. H.B. 1888 (Mar. 2, 2005) (emphasis added).

In response to the phishing problem, the Legislature – for the very first time – created a civil cause of action under CEMA itself:

> A person who is injured ***under this chapter*** may bring a civil action in the superior court to enjoin further violations, and to seek up to five hundred dollars per violation, or actual damages, whichever is greater. ***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.***

RCW 19.190.090(1) (emphases added). The civil cause of action applied to any injuries "under this chapter," meaning under CEMA as a whole. But it limited any action for ***"damages under this subsection"*** – *i.e.*, the new CEMA cause of action – to claims arising under RCW 19.190.080, the phishing prohibition. For all other CEMA violations – that is, misleading or deceptive emails or unwanted texts – only injunctive relief would be available.

Like the earlier amendment to CEMA, therefore, the 2005 amendment that created the CEMA cause of action drew a distinction between different kinds of electronic communications. Phishing communications – a particularly harmful form of communications that could lead to fraud and identity theft – would give rise to a new civil cause of action for damages under CEMA itself. Spam emails and unsolicited text messages would be actionable under CEMA as well, but would only entitle a plaintiff to injunctive relief.

* * *

In sum, CEMA's history demonstrates that, as technology has evolved and new consumer issues have arisen, the Legislature has carefully calibrated the remedies it authorizes to the particular threat being addressed. CEMA should accordingly be read in a way that respects the distinctions the Legislature drew between deceptive spam emails, unsolicited text messages, and phishing communications. As we explain below, such a reading of CEMA compels the conclusion that unsolicited text messages ***do not*** give rise to (1) a ***damages*** cause of action under CEMA (which is reserved for phishing violations) or (2) a ***per se*** damages cause of action under the CPA (which is reserved for deceptive spam emails). Instead, recipients of text messages may seek damages only under the CPA, and only if they show actual injury and causation as required by the CPA.

B. A Recipient of an Unsolicited Commercial Text Message Has No Private Right of Action for Damages Under CEMA.

The answer to the first question certified in this case – *i.e.*, whether CEMA's cause of action authorizes recovery of actual or statutory damages for unlawful text messages – is "no." The text of the statutory provision creating the CEMA cause of action excludes the possibility of damages under CEMA itself for text messages. That straightforward reading of the text is supported by the history and context of CEMA's

enactment and amendment, which make crystal clear that the Legislature did not intend for damages to be available under CEMA for text messages.

1. <u>The Plain Language of CEMA Does Not Authorize Any Private Right of Action for Unwanted Texts</u>.

CEMA's private right of action does not provide those who receive unsolicited texts the right to recover damages. The statutory provision creating the CEMA cause of action states:

> A person who is injured under this chapter may bring a civil action in the superior court to enjoin further violations, and to seek up to five hundred dollars per violation, or actual damages, whichever is greater. ***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.***

RCW 19.190.090(1) (emphasis added). The only sensible reading of the emphasized statutory text is that damages are limited to violations of RCW 19.190.080 – CEMA's phishing prohibition – and that CEMA itself does not authorize claims for damages based on other CEMA violations, such as sending commercial texts in violation of RCW 19.190.060.

The fact that RCW 19.190.040, CEMA's statutory damages provision, defines the statutory damages for text message violations does not change this analysis. RCW 19.190.040 simply sets the minimum damages that a party may recover ***if*** that party prevails on a cause of action authorized elsewhere; it does not itself create any cause of action.

2. Implying a Private Right of Action for Damages Would Render Two Provisions of CEMA Superfluous.

Wright may argue that, although CEMA does not create any express cause of action for damages based on unsolicited text messages, it creates one impliedly. But that argument would fail as an initial matter because it would violate a fundamental canon of statutory construction – namely, that "all of the provisions of the [statute] must be considered in their relation to each other, and ... harmonized to insure proper construction of each provision." *City of Seattle v. Fontanilla,* 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). Implying a private right of action would render two separate provisions of CEMA meaningless, in violation of the rule that "effect should be given to all the [statutory] language used." *Id.*

First, RCW 19.190.090 expressly authorizes a private right of action for any "person who is injured under this chapter," but limits the availability of damages to victims of phishing schemes. RCW 19.190.090(1). Implying a private right of action for damages for unsolicited commercial texts would render the second sentence of CEMA's express private right of action – limiting availability of damages to phishing schemes – superfluous. In Washington, courts "must not interpret a statute in any way that renders any portion meaningless or superfluous." *State v. K.L.B.,* 180 Wn.2d 735, 742, 328 P.3d 886 (2014).

Second, implying a private damages cause of action for commercial texts would also render meaningless RCW 19.190.060(2) – the section of CEMA providing that receipt of an unsolicited commercial text establishes the first three elements of a claim under the CPA. If CEMA created an implied private right of action for damages for unsolicited text messages, there would be no need to link the statute to the CPA's remedial scheme: the CEMA private right of action would provide complete recovery. The fact that the Legislature made unsolicited text messages actionable under the CPA shows that it clearly did not intend to make them actionable under the CPA itself.

3. Wright Cannot Satisfy This Court's Test for Implying a Private Right of Action.

Any effort by Wright to persuade this Court to imply a private right of action under CEMA for damages for unsolicited text messages fails for an independent reason: Wright cannot satisfy this Court's test for determining whether the legislature intended to imply a private right of action. As this Court has explained, the test has three parts:

> First, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; ***and*** third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 422, 334 P.3d 529

(2014) (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990)). Even assuming Wright is within the class of people that the Legislature intended to protect, neither of the other two prongs support implying a private right of action for damages under CEMA.

a. The Legislature's Intent Supports Denying a Damages Remedy Under CEMA for Text Messages.

First, there is no explicit expression of legislative intent to imply a private right of action *for damages* in regard to commercial texts sent in violation of CEMA. The Court has defined "explicit" intent as a legislative statement (outside the plain language of the statute) that "without vagueness, ambiguity, or implication – addresses whether one can bring an action for damages." *Frias*, 181 Wn.2d at 425. No such statement of intent exists regarding a civil claim based on receiving a commercial text.

Indeed, CEMA makes clear that the legislature intended to *foreclose* a damages remedy for unsolicited text messages under CEMA. Washington courts routinely decline to imply a private right of action when – as here – the Legislature has created an express damages action for some claimed statutory violations but not others. *See, e.g., Ives v. Ramsden*, 142 Wn. App. 369, 389, 174 P.3d 1231 (2008). In *Ives*, the Court of Appeals considered whether an implied private right of action existed for violations of the Securities Act's "suitability" rule, RCW

21.20.702. The court looked to RCW 21.20.430, which created an express private right of action for certain enumerated violations of the Securities Act, but not for the suitability rule. The court concluded:

> Clearly, our legislature decided that private individuals can sue investment brokers under some provisions of the Securities Act, but cannot sue for violations of the suitability rule. Accordingly, no private cause of action exists for violations of the suitability rule.

142 Wn. App. at 390.

The same is true here. The Legislature excluded violations of RCW 19.190.060 (regarding text messages) from CEMA's private civil action for damages, by expressly limiting the private damages action under CEMA to phishing communications. *See* RCW 19.190.090(1) (action for damages under CEMA exists *only* for "action against a person or entity that directly violates RCW 19.190.080 [phishing]"). Moreover, the Legislature created two other explicit remedies for text violations: (1) the right under RCW 19.190.090(1) to sue for injunctive relief, and (2) the right under RCW 19.190.060 to sue for damages under the CPA, provided that the recipient can show that an injury to their business or property occurred and was caused by the violation. The existence of these explicit remedies demonstrates that the Legislature did not intend to imply a separate cause of action for damages under CEMA.

This Court follows the "age old rule expressio unius est exclusio alterius," meaning that where "a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions." *State v. LG Elecs., Inc.*, 186 Wn.2d 1, 9, 375 P.3d 636 (2016), *cert. denied*, __ U.S. __, 137 S. Ct. 648 (2017). Applying this principle, Washington courts have consistently held that the omission of an explicit private cause of action "implies the *absence*, not the presence, of intent to create a private statutory cause of action." *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 718-19, 197 P.3d 686 (2008); *see also, Crisman v. Pierce Cnty. Fire Prot. Dist. No. 21*, 115 Wn. App. 16, 23, 60 P.3d 652 (2002) (declining to imply private cause of action for damages, in part because "unlike statutes that provide no remedy, chapter 42.17 RCW, authorizes enforcement by the attorney general or county prosecutor and finally by a citizen in the name of the state"). As in these cases, in CEMA the Legislature expressly chose two methods through which Washington residents can enforce it in regard to commercial texts. The Legislature thus did not imply a private right of action for damages for unsolicited text messages; on the contrary, it "clearly expressed its intent to disallow [such] suits." *Ives*, 142 Wn. App. at 389.

b. Implying a Private Damages Right of Action Would Conflict With the Legislature's Purpose.

Implying a private right of action for damages for text violations based on statutory damages as defined in RCW 19.190.040 would also be inconsistent with CEMA's purpose. CEMA evolved as technology changed, giving rise to a balanced system of remedies that vary based on the prohibited conduct. Unsolicited commercial texts are prohibited without regard to whether they are deceptive, but text messages to consenting customers are permitted. RCW 19.190.070(1)(b). Permitting commercial text messaging in some contexts is consistent with CEMA's legislative purpose of limiting, but not entirely banning, such messages. The two remedies for text violations described above are consistent with that purpose: (1) injunctive relief under CEMA where no injury occurs; and (2) damages under the CPA in cases of actual injury. Implying a private cause of action for damages under CEMA for any text message violation would upset this balanced remedial scheme by deterring businesses from sending any text messages to consumers at all.

C. A Recipient Who Claims That a Commercial Text Was Sent in Violation of CEMA Must Prove Actual Injury and Causation in Order to Recover Damages.

Washington's Consumer Protection Act provides a private right of action for damages to any person "who is ***injured*** in his or her business or

property." RCW 19.86.020; 19.86.090 (emphasis added). A plaintiff bringing a private action for damages thus "must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) *injury to plaintiff in his or her business or property*; (5) *causation*." *Hangman Ridge*, 105 Wn.2d at 780 (emphasis added).

The Legislature has the power to declare that a violation of a different statute automatically satisfies one or more elements of the *Hangman Ridge* test – and it did so in RCW 19.190.060, which provides that sending an unsolicited text message in violation of CEMA establishes the first three CPA elements. But it follows equally that a plaintiff still must prove the remaining two elements of injury and causation, and that the second certified question should be answered in the negative. Holding that an unsolicited text message automatically satisfies all five elements of a CPA violation would be inconsistent with the text of the statute and the Legislature's clear intent.

1. The Plain Language of RCW 19.190.060 States Unambiguously That Its Violation Establishes Only the First Three Elements of a CPA Claim.

"Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself." *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn. 2d 444, 451, 210 P.3d 297

(2009). Here, the operative provision is RCW 19.190.060(2),[1] which unambiguously provides that a violation of that provision establishes only the first three CPA elements:

> The legislature finds that the practices covered by this section are matters vitally affecting the public interest for the purpose of applying the [CPA]. A violation of this section ... is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the [CPA].

Neither RCW 19.190.060(2) – nor any other CEMA provision applicable to a text message violation – speaks to injury or causation. That omission is dispositive of the second certified question here. Because "the Legislature [has] specifically define[d] the exact relationship between [RCW 19.190.060] and the CPA," this Court must "acknowledge that relationship" (*Hangman Ridge*, 105 Wn.2d at 787) and hold that a text message violation of CEMA does not, in itself, establish the injury and causation elements of the CPA. *See id.* (explaining that "the Legislature, not this court, is the appropriate body to establish th[e] interaction" between another statute and the CPA).

[1] RCW 19.190.060(2) provides that a violation of CEMA consisting of an improper text message establishes the first three elements of a CPA violation. RCW 19.190.100 further provides that any violation of CEMA – whether by text or otherwise – establishes the first three elements of a CPA violation. The two provisions contain identical language.

2. Had the Legislature Wanted Every CEMA Violation to Establish All Five Elements of a CPA Claim, It Would Have Drafted CEMA Differently.

The Legislature frequently drafts statutes to provide that a statutory violation will automatically establish all five elements of a CPA claim – demonstrating that when the Legislature intends to achieve that result, it knows how to do it.

For example, as discussed above, RCW 19.190.030(1), the deceptive spam email provision of CEMA, states that "[i]t is a violation of the consumer protection act, chapter 19.86 RCW ... to initiate the transmission of a [deceptive] commercial electronic mail message." It is a basic principle of statutory construction in Washington that provisions of a statutory scheme should be read together, and that where the Legislature omits language in one provision that is included elsewhere, such omissions are deliberate. *See Fontanilla*, 128 Wn.2d at 498 (provisions of a statute "must be considered in their relation to each other, and . . . harmonized to insure proper construction of each provision"); *LG Elecs., Inc.*, 186 Wn.2d at 9 ("there is an inference that the Legislature intended all omissions"). The different language the Legislature selected in addressing deceptive emails and commercial text messages thus clearly indicates its intent that unsolicited commercial texts would only satisfy the first three elements of a CPA claim.

Numerous other statutes, moreover, use the broader language found in RCW 19.190.030(1) to denote that a violation of a particular statute is a *per se* CPA violation. *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.]").

Each of the statutes cited predates the enactment of CEMA's text-message provisions, showing that if the Legislature had wished to provide that unsolicited text messages categorically satisfy all five *Hangman Ridge* elements, it knew how to do so. The fact that it did not is further proof that plaintiffs must prove injury to business or property, as well as causation, before they are entitled to CEMA statutory damages for unwanted text messages.

3. RCW 19.190.040(1) Does Not Suggest a Different Result.

Wright may point to RCW 19.190.040(1), which defines the amount of damages that a plaintiff who receives an unsolicited text message can receive, to support his contention that a text message violation per se establishes all five CPA elements. But that argument should fail.

Section 19.190.040(1) provides that "[d]amages to the recipient of a commercial electronic mail message or a commercial electronic text message sent in violation of this chapter are five hundred dollars, or actual damages, whichever is greater." RCW 19.190.040(1) (emphasis added). The provision says ***nothing*** about establishing the injury and causation requirements of the CPA. It merely provides for a minimum amount of damages that plaintiffs may recover *if* they can prove all five elements of a CPA claim.

In any event, construing RCW 19.190.040(1) to provide that the injury and causation elements of a CPA claim are met in every case involving an unsolicited text message would effectively mean that all five CPA elements are met in regard to ***any*** violation of CEMA. That interpretation would contradict the Legislature's express intent to have unsolicited text messages satisfy the first three elements of a CPA claim rather than all five.

VI. CONCLUSION

CEMA's language and history demonstrate that the Legislature found some kinds of electronic communication to be more detrimental than others, and crafted remedies that it considered appropriate to each. With respect to unsolicited text messages, it chose not to create a private cause of action for damages under CEMA. It also chose not to make

sending a prohibited commercial text message a *per se* violation of the CPA. In accordance with the Legislature's unmistakable intent, the Court should answer both certified questions in the negative and hold that private plaintiffs who allege that they received unsolicited text messages can seek damages only under the CPA, not CEMA, and must prove actual injury to business or property in order to recover statutory damages.

DATED this 21st day of April, 2017.

BYRNES KELLER CROMWELL LLP

By _____

Bradley S. Keller, WSBA No. 10665
Keith D. Petrak, WSBA No. 19159
Nicholas Ryan-Lang, WSBA No. 45826
1000 Second Avenue, 38th Floor
Seattle, WA 98104
Telephone: (206) 622-2000
Facsimile: (206) 622-2522
bkeller@byrneskeller.com
kpetrak@byrneskeller.com
nryanlang@byrneskeller.com

CERTIFICATE OF SERVICE

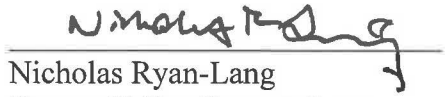
The undersigned attorney certifies that on the 21st day of April, 2017, a true copy of the foregoing was served on each and every attorney of record herein via email:

Donald Heyrich
Heyrich Kalish McGuigan PLLC
600 Stewart Street, Suite 901
Seattle, WA 98101

Peter Stutheit
Stutheit Kalin LLC
2300 SW 1st Avenue, Suite 101
Portland, OR 97201
Attorneys for Respondents

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

DATED in Seattle, Washington, this 21st day of April, 2017.



Nicholas Ryan-Lang
Byrnes Keller Cromwell LLP
1000 Second Avenue, 38th Floor
Seattle, WA 98104
Telephone: (206) 622-2000