No. 1041624

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SHAWNNA MONTES,

Plaintiff-Appellant,

v.

SPARC GROUP LLC,

Defendant-Appellee.

BRIEF OF AMICI CURIAE NATIONAL RETAIL FEDERATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, RETAIL LITIGATION CENTER, INC., AND WASHINGTON RETAIL ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE SPARC GROUP LLC

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INTRODUCTION

Plaintiff Shawnna Montes asks this Court to hold that she was injured under Washington's Consumer Protection Act (CPA) when she was offered a pair of leggings for $6; bought them for $6; received them; had no complaint about their quality; and did not return them. Why? Because Defendant, operator of Aéropostale, listed a reference price of $12.50 for the leggings, which allegedly was not their "regular" price (no matter that Montes admits Aéropostale offered them for $12.50 three days before she bought them on sale for $6).

The CPA does not sweep so broadly. The CPA authorizes a private right of action only by a person "injured in his or her business or property by a [qualifying] violation." RCW 19.86.090. "The legislature's use of the phrase 'business or property' in the CPA is restrictive of other categories of injury and is 'used in the ordinary sense [to] denote[] a commercial venture or enterprise.'" *Ambach v. French*, 167 Wn.2d 167, 172–73 (2009). That phrase thus requires an actual injury to tangible

"business or property." None of Montes's creative theories to avoid this requirement works.

Aéropostale has rebutted the arguments Montes makes in her Opening Brief. Amici thus file this brief to make four related but distinct points to assist the Court.

First, Montes ignores that the history of the CPA's private-action provision differs from that of other states' consumer-protection statutes. The Washington Legislature modeled the CPA's private cause of action on federal antitrust and consumer-protection laws, and told courts to look to precedent addressing those laws in interpreting the CPA. The "business or property" language in those statutes, in turn, requires injury to a tangible business or property interest, and subjective disappointment over the extent of a bargain or savings, without more, does not qualify.

Second, the CPA differs from the California and Oregon laws on which Montes relies. Those laws have language that courts interpret to allow claims based on spending *any* money

tied to alleged deception, even absent injury to business or property. This Court has rejected that interpretation of the CPA.

Third, the Court should not undertake specific regulation of reference pricing through the CPA, a statute of general application. The California and Oregon legislatures enacted laws addressing whether, when, and how reference-pricing assertions are unlawful—and *expressly* made violations of those laws violations of the more general consumer-protection statutes. The Washington Legislature has not done so. Permitting these claims would circumvent the Legislature's authority—and force courts to confront countless complicated policy questions about whether, and if so, precisely when, reference pricing is unlawful.

Fourth, allowing claims like Montes's to proceed is bad policy. Limiting reference pricing discourages new market participants, deters sales promotions, and drives up prices—which explains why the FTC has not brought a reference-pricing claim in over 45 years.

The Court should answer the certified question "No."

IDENTITY AND INTEREST OF THE AMICI

Amici are trade associations actively participating in the national debate on whether "reference pricing" violates state consumer-protection laws or otherwise should be regulated. This brief offers their perspectives on this important issue and urges the Court to hold that there is no injury under the Washington CPA when a consumer pays precisely the price that she was offered for precisely the product that she was offered.

Founded in 1911 as the National Retail Dry Goods Association, today the **National Retail Federation (NRF)** is the world's largest retail trade association. Its members include department stores; specialty, discount, catalog, and independent retailers; chain restaurants; and grocery stores. NRF educates policy makers, at both the state and federal levels, on pressing issues of the day for the retail industry. NRF also monitors important litigation throughout the country, appearing as amicus curiae wherever appropriate to help ensure the retail industry's voice is heard.

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

The **Retail Litigation Center, Inc. (RLC)** is a nonprofit trade association that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than

250 amicus briefs on issues of importance to the retail industry. Its briefs have helped courts throughout the United States, as evidenced by citation to the RLC's briefs in numerous precedential opinions. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542–43 (2013); *Chewy, Inc.* v. *U.S. Dep't of Lab.*, 69 F.4th 773, 777–78 (11th Cir. 2023); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020).

The **Washington Retail Association (WR)** serves as primary stewards of Washington's retail experience with a mission to safeguard the interests of retailers representing all sectors and sizes from the largest national chains to small independent businesses. WR represents every segment of the retail sector including apparel, grocery, home improvement, automotive, specialty retail, and online commerce, with over 3,500 storefronts located in communities across the state. The retail industry accounts for approximately $200 billion in annual taxable sales and pays over $19.8 billion annually in wages

supporting Washington's economy. WR works to advance and protect the jobs of nearly 400,000 employees and the employers who provide them.

Amici have amassed institutional knowledge and perspective critical to striking the right balance between retailers and consumers purchasing their goods. Retail is the largest private-sector industry in the United States, consisting of over 3.8 million retail establishments and supporting more than 52 million employees. The issues that amici champion affect every consumer in the country.

STATEMENT OF THE CASE

Amici adopt Aéropostale's Statement of the Case.

ARGUMENT

A. Consumers cannot allege an injury under the CPA based solely on a reference price.

Montes has not and cannot allege an injury under the CPA. The CPA authorizes a private right of action only by a person "injured in his or her business or property by a [CPA] violation." RCW 19.86.090. Aéropostale has demonstrated that Montes's

theory of injury is inconsistent with both Washington precedent and the interpretation of numerous other state consumer-protection laws.[1] Amici address four additional reasons why this Court should reject Montes's theory of injury.

B. Federal law demonstrates that the CPA's injury to "business or property" requirement bars Montes's claim.

The CPA's private cause of action is modeled on federal antitrust and consumer-protection laws. *See Ameriquest Mortg. Co. v. Off. of Att'y Gen.*, 177 Wn.2d 467, 496 n.20 (2013); *Greenberg v. Amazon.com, Inc.*, 3 Wn.3d 434, 454–55 (2024), *as amended* (Aug. 16, 2024). Under those laws, Montes could not state a claim because she cannot plead a covered injury.

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[1] *See generally* Ans. Br.; *see also Montes v. Sparc Grp., LLC*, 136 F.4th 1168, 1175–76 (9th Cir. 2025) (Collins, J., concurring) (noting that in certifying this case the majority "cherry-picked decisions addressing California and Oregon law" but that many "non-Washington decisions … have reached [contrary] conclusions"); *Hansen v. Newegg.com Am., Inc.*, 25 Cal. App. 5th 714, 732–33 (2018) (noting "California law is different" than other state consumer-protection laws for reference-pricing claims).

Section 4 of Clayton Act authorizes suit only by a person "injured in his business or property." 15 U.S.C. § 15(a). The Racketeer Influenced and Corrupt Organizations Act (RICO) contains the same injury requirement. 18 U.S.C. § 1964(c) (permitting suit only by a person "injured in his business or property"); *see also Rice v. Janovich*, 109 Wn.2d 48, 53 (1987) (RICO private civil-remedy injury provision patterned after Clayton Act).

The Washington Legislature expressly imported the CPA's private-suit provision from the Clayton Act, limiting private rights of action to individuals "injured in his or her business or property." RCW 19.86.090; *Greenberg*, 3 Wn.3d at 492 (McCloud, J. dissenting) (discussing CPA history and modeling after Clayton Act). Underscoring this link, the Legislature explicitly instructed that, "in construing" the CPA, courts should "be guided by" federal decisions and FTC orders "interpreting the various federal statutes dealing with the same or similar matters." RCW 19.86.920.

Given the materially identical language, "[c]ourts have applied [federal] antitrust and RICO statutory standing principles"—that is, the definition of injury—"to Washington CPA claims." *Blaylock v. First Am. Title Ins. Co*., 2008 WL 8741396, *7 (W.D. Wash. 2008). Courts have, for example, drawn heavily on federal cases interpreting the Clayton Act and RICO to hold that personal injuries are not compensable "injuries to … business or property" under the CPA. *E.g.*, *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp*., 122 Wn.2d 299, 317–18 (1993); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc*., 241 F.3d 696, 705–06 (9th Cir. 2001).

Federal cases examining whether a plaintiff's unmet expectations satisfy the injury to "business or property" requirement are particularly instructive here. Federal courts uniformly hold that a plaintiff's disappointed expectation based on an alleged misrepresentation is not an injury to "business or property." Montes "ha[s] not explained"—and cannot explain—"how a party's 'expectation' can constitute 'business or

property.'" *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228 (2d Cir. 2008); *see also Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1087 (9th Cir. 2002); *Bowen v. Adidas Am. Inc.*, 84 F.4th 166, 177 (4th Cir. 2023); *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 409–10 (5th Cir. 2015).

1. As for Montes's "purchase-price" theory, courts reject the notion that the mere act of spending money on the underlying transaction is itself sufficient to establish a cognizable injury to "business or property."

In *Price v. Pinnacle Brands, Inc.*, for example, the plaintiffs bought packages of sports trading cards, with the representation that the package might include "rare and valuable collectibles" "randomly inserted in some of the packages." 138 F.3d 602, 604 (5th Cir. 1998). Plaintiffs alleged that defendants' marketing of the cards constituted illegal gambling and, like Montes here, claimed their injury was paying money "in the amount spent for trading cards." *Id.* at 606. The Fifth Circuit rejected that theory because "[p]laintiffs do not allege that they

received something different than precisely what they bargained for," nor that "the value of the cards that they did receive is less than the consideration paid." *Id.* at 607. At most, plaintiffs suffered an "injury to mere expectancy interests," but that is not a cognizable injury to "business or property." *Id.* at 606–07; *see also Chaset*, 300 F.3d at 1087 ("disappointment" that trading cards were not more valuable "is not an injury to property").

To recognize a "purchase-as-injury claim," as Montes urges, would erase the CPA's injury element, such that any purchase based on an alleged deception would result in injury to "business or property." As the First Circuit explained in a case involving reference pricing for a sweater, "[s]uch a purchase-as-injury claim" would "collapse[]" the CPA's "required distinction between deception and injury by attempting to plead an assertion about a consumer's disappointed expectations of value in place of an allegation of real economic loss." *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 11 (1st Cir. 2017).

2. As for Montes's "benefit of the bargain" theory, federal courts routinely refuse to find a cognizable injury to "business or property" based on the difference between *represented* value and *actual* value in the underlying transaction. A "lost bargain" is not a tangible injury to "business or property." *Ivar v. Elk River Partners, LLC*, 705 F. Supp. 2d 1220, 1235 (D. Colo. 2010).

In *Heinold v. Perlstein*, for example, the purchaser of a diamond ring claimed he was injured because the seller had induced him to buy the ring by misrepresenting it as a "bargain opportunity" worth more than the purchase price. 651 F. Supp. 1410, 1411 (E.D. Pa. 1987). Likewise in *Ivar*, plaintiffs alleged that the defendants had misrepresented the value of land to induce the plaintiffs' purchase. 705 F. Supp. 2d at 1232. Both the *Heinold* and *Ivar* courts rejected this theory, noting that a plaintiff who gets what he pays for but just does not "c[o]me out" "as far ahead as he had hoped" has not suffered any "property injury." *Heinold*, 651 F. Supp. at 1411; *Ivar*, 705 F. Supp. 2d at

1234; *see also In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 122 (2d Cir. 2013) (injury to "business or property" requirement precludes recovery based on a "benefit of the bargain" theory; *i.e.*, no "recovery of what the fraudster promised, as opposed to the property the victim lost").

3. Finally, as to Montes's "price-premium theory," federal courts refuse to find injury to "business or property" when a plaintiff claims the alleged misrepresentation increased demand, thereby artificially inflating prices.

In *McLaughlin*, the plaintiffs argued they lost money by overpaying for "light" cigarettes based on the defendants' misrepresentation that "light" cigarettes are healthier than "full-flavored" cigarettes. 522 F.3d at 228. Like Montes, the *McLaughlin* plaintiffs claimed that "defendants' implicit representation that Lights were healthier" enabled them to charge "an artificially high price, resulting in plaintiffs' overpayment." *Id.* at 220. The Second Circuit rejected this argument, finding that "Defendants' misrepresentation could in no way have

reduced the value of the cigarettes that plaintiffs actually purchased." *Id.* at 228–29. Moreover, when the alleged violation is one involving fraudulent inducement of the underlying transaction, there's no injury to "business or property" if the alleged injury is based on an expectation that would not have existed but for the fraudulent inducement. *Id.* To hold otherwise would eliminate the injury to "business or property" requirement found in the plain language of the statute and authorize private actions for per se violations. *See id.*

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These federal cases decide the certified question. As the Third Circuit put it—quoting a leading antitrust scholar—"It would be stretching beyond credibility the words 'injury in business or property' to include within their terms this kind of disappointed expectation." *Alberta Gas Chems. Ltd. v. E.I. Du Pont De nemours & Co.*, 826 F.2d 1235, 1243 (3d Cir. 1987) (quoting P. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1134 (1976) (internal

alterations omitted)). Just as in *Pinnacle*, *Chaset*, *Heinold*, *Ivar*, and *McLaughlin*, there is simply no injury to "business or property" here because—whether framed as a loss of a perceived bargain or an unmet expectation of greater savings—expectations are not property, and disappointment cannot substitute for real, tangible economic loss. An "assertion about a consumer's disappointed expectations of value" is no substitute for "allegation of real economic loss." *Shaulis*, 865 F.3d at 11.

C. Montes's reliance on interpretations of Oregon and California consumer-protection laws is misplaced.

The Washington Legislature explicitly told this Court to look to federal law to interpret the CPA. RCW 19.86.920. Ignoring this, Montes focuses primarily on how courts have interpreted the injury requirement for California and Oregon consumer-protection laws. But those laws are materially different. In particular, the laws in those states define injury to

include any "loss of money" or "lost money."[2] The laws do not employ the more restrictive language authorizing suit only by a person "injured in his or her business or property."[3]

Had the Washington Legislature intended for personal injuries (disappointment) or the mere act of spending money (loss of money) to qualify as cognizable injuries under the CPA, it would have used a less restrictive phrase. *See Ambach*, 167 Wn.2d at 174 (courts must give weight to legislature's intent in using a "restrictive phrase" that limits cognizable CPA injury to "business or property"). The Legislature knows how to include personal injuries as a remedy, but has not done so with the CPA.

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[2] Oregon's Unlawful Trade Practices Act requires an "ascertainable loss of money or property." *Clark v. Eddie Bauer LLC*, 371 Or. 177, 179 (2023); *see also* ORS 646.638(1). California's Unfair Competition Law and False Advertising Law require the plaintiff to have "lost money or property." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013); *see also* Cal. Bus. & Prof. Code §§ 17204, 17535.

[3] As discussed in Section C, *infra*, the legislatures in those states have expressly addressed reference pricing.

Washington's "little RICO," for example, authorizes suit by any "person who sustains injury to his or her *person*, business, or property." RCW 9A.82.100 (emphasis added).

Indeed, this Court has expressly drawn a distinction between spending money in a transaction and suffering an injury to business or property: "To state a valid CPA claim, a plaintiff must prove that the injury, *separate from any monetary loss*, is to business or property." *Ambach*, 167 Wn.2d at 174 n.3 (emphasis added).[4] For this reason, even though the plaintiff in *Ambach* claimed that she sustained a "qualifying injury" based on "the cost of [the] product … acquired due to fraud or deception," this Court found that payment alone for the goods or services acquired is insufficient to establish injury to "business or property" under the CPA. *Id.* at 174. If spending money on a transaction that the consumer now regrets were enough to

[4] *See also Moritz v. Daniel N. Gordon, P.C.*, 895 F. Supp. 2d 1097, 1117 (W.D. Wash. 2012) (payment made in response to unlawful debt collection practices cannot be CPA injury if the underlying debt was valid).

support injury to "business or property," then this Court would have come out differently in *Ambach*.

No amount of amendment or repleading would cure the deficiency inherent in Montes's theories.[5] The fundamental problem is that the "loss" she alleges is simply not cognizable under the CPA. The advertised former price is *by definition* not the current price. It thus cannot represent the current value, and in no way could it reduce the objective worth of the leggings that Montes actually purchased. Nor are Montes's subjective expectations based on a reference price her "property." The CPA is not limitless, and Montes has not suffered any cognizable injury to her "business or property" to support a CPA claim.

[5] This Court also expressly warned against conflating "the idea of what constitutes proof of the injury element with the facts relevant to a plaintiff's damages." *Ambach*, 167 Wn.2d at 174 n.3. For this reason, Montes's arguments about how to *measure* damages are irrelevant and no substitute for allegations supporting a cognizable injury.

D. Courts should not undertake to regulate reference pricing via a general consumer-protection law like the CPA.

Montes's plea should also be declined because it would require this Court to contort the CPA to cover her claim. "It is primarily a legislative, and not a judicial, function to determine economic policy." *Greenberg*, 3 Wn.3d at 470 (quoting *State v. Sears*, 4 Wn.2d 200, 207 (1940)). "Washington courts … depart from federal law only when it is 'rooted in our statutes or case law and not in … general policy arguments.'" *Ameriquest Mortg.*, 177 Wn.2d at 496 n.20.

Regulation here falls squarely within the domain of the Legislature because it would require intensive fact-finding and careful consideration to create the right balance and framework for factors such as the relevant price-reference time, duration, market, and other benchmarks. Indeed, in states that have chosen to regulate reference pricing, their legislatures have enacted *specific* laws to do so.

California, for example, requires that an advertised former price reflect the "prevailing market price" within the past three months "in the locality wherein the advertisement is published[,]" or the advertisement must conspicuously disclose when that price was in effect. Cal. Bus. & Prof. Code § 17501. Oregon requires that any advertised former price clearly and conspicuously identify the origin of the former price. ORS 646.883; *see also* ORS 646.608(1)(j), (ee), 646.885. And Virginia requires that any advertised former price be proven through, for example, "substantial sales" made at or above that price "in the recent regular course of business" or offers made "in good faith" "for a reasonably substantial period of time." Va. Code § 59.1-207.41.

What's more, the California and Oregon laws on which Montes focuses—Oregon's Unlawful Trade Practices Act and California's Unfair Competition Law and False Advertising Laws—*expressly* incorporate violations of the state's focused reference-pricing laws. Oregon authorizes suit for violations of

its price comparison law. *See* ORS 646.638 (incorporating violations of ORS 646.608); ORS 646.608(1)(ee) (incorporating violations of prohibition on unlawful price comparison under ORS 646.883). The same is true for the California laws, which define "unfair competition" or other covered violations to encompass California's reference-pricing law, Cal. Bus. & Prof. Code § 17501. *See id.* §§ 17200, 17535.

In contrast, Washington does not have any comparable reference-pricing laws, let alone any provision in the CPA cross-referencing such laws. Washington's statutory scheme thus makes clear that the CPA simply doesn't recognize reference-pricing claims. Indeed, Montes's counsel conceded in the Ninth Circuit that "there is no state or federal appellate precedent that adopts Plaintiff's purchase price theory of injury under the law of a State that *lacks* a special statute, such as in California or Oregon, that specifically condemns price-discount misrepresentations." *Montes*, 136 F.4th at 1176 (Collins, J., concurring). This Court should not be the first. After all, a

"decision about whether to create such a claim and whether to include other market-based elements or defenses should be based on economic policy considerations; weighing those numerous, difficult, competing considerations is the job of the legislature, not the courts." *Greenberg*, 3 Wn.3d at 488 (McCloud, J., dissenting).

A contrary result would thrust dozens of complex economic policy questions onto courts—without any legislative guidance. For example:

- How often, how long, and how recently must Aéropostale sell leggings at the reference price to avoid liability for referencing that price later during a sale?

- If, as Montes suggests, Aéropostale must "regularly offer[]" the leggings at the reference price before a sale (ER 17 ¶ 8), does that mean 20% of the time or 90% of the time? Does that mean within the last week, month, or year? Does that mean in all or some physical stores or online?

- Must the leggings actually be sold at that price, or just offered at it?

- What if black leggings routinely sell at the $12.50 reference price but the heather-gray leggings Montes bought do not—are consumers injured if

Aéropostale still lists the higher reference price for all leggings?

- What if the products are seasonal (e.g., Christmas trees, Halloween costumes, fireworks), so there is no recent reference price?

- If Aéropostale wants to get rid of old merchandise and advertises a 10-day sale based on forecasts that this will suffice to clear out stock—is it barred from continuing the sale beyond 10 days if it still has too much stock?

- What if a discounter sees Aéropostale's success in selling leggings and buys 10,000 pairs of identical leggings in bulk to sell for $5.00, while Aéropostale sells them for $12.50—can the discounter list Aéropostale's reference price, even though it has never sold leggings at that price?

- If that discounter can sell leggings at the lower price while referencing Aéropostale's reference price, could *Aéropostale* bring a successful CPA claim against the discounter on the same theory (i.e., the discounter never sold at the reference price), thereby harming consumers by discouraging sale pricing and market competition?[6]

[6] Former FTC Chair Timothy Muris warned that reference-price laws may "render[] it all but impossible to make advertising claims about useful price or quality information," which will "protect[] weak competitors from strong ones" rather than "protecting the interest of consumers." T. Muris, *The Interface of Competition and Consumer Protection*, Prepared Remarks at the Fordham Corp. L. Inst.'s 29th Annual Conf. on Int'l Antitrust

- What if Aéropostale creates new leggings with expensive materials and hand-made designs that cost $50 to make, and offers them for a break-even price of $50, but nobody buys them because (after all) they are just leggings? To avoid a total loss, can Aéropostale sell them for $6.00 with a reference price of $50 when nobody bought them for $50?

- If, as here, Plaintiff paid $6.00 but claims that she was injured by the difference between that price and the reference price ($12.50), what is her remedy? Free leggings? $6.50? $12.50? Some combination (potentially trebled)?

The unanswered questions caused by stretching the CPA (rather than any targeted legislation) to enforce reference pricing are limitless.[7] This Court should not stretch the CPA in a way that would require Washington courts to resolve these issues grounded in economic policy and judgment.

L. & Pol'y 8 & n.25 (Oct. 31, 2002), https://www.ftc.gov/sites/default/files/documents/public_statements/interface-competition-and-consumer-protection/021031fordham.pdf.

[7] The certified question addresses only the injury prong of a CPA claim. Amici believe that, in at least the vast majority of reference-pricing cases, there is also no *violation* of the CPA—no unfair or deceptive act or practice and no public interest impact. But the interpretation of those CPA elements is outside the scope of the Ninth Circuit's certification.

E. Interpreting the CPA to cover reference-pricing claims would harm businesses and consumers.

The Washington Legislature's studied silence on whether to regulate reference pricing makes sense. Regulators and economists generally agree that reference-price regulation and enforcement "often do more harm than good." R. Pitofsky et al., *Pricing Laws Are No Bargain for Consumers*, 18-SUM ANTITRust 62, 62 (2004). Former FTC Chairman Timothy Muris explained that such regulations run the risk of "discourag[ing] exactly the kind of aggressive price competition that the government should seek to encourage." T. Muris, *Economics and Consumer Protection*, 60 ANTITRUST L.J. 103, 113 (1991); *see id.* at 115 (consumer-protection laws should not require "seller[s] [to] sell more at a higher price, or reduce the price without telling [customers,]" to avoid liability).

As economists' understanding of the modern market has evolved, leading economists and regulators, including numerous chairs of the FTC, have recognized that aggressive regulation

and enforcement of reference pricing can backfire and *harm* consumers. Former FTC Chairman Robert Pitofsky noted in 2004 that "[t]he FTC has not brought a single fictitious price case since 1979, and the last two chairs of the FTC—one presiding during a Democratic Administration and the other during a Republican Administration—have indicated that enforcement actions in this area often do more harm than good." Pitofsky et al., 18-SUM ANTITRUST at 62. Nor, to the best of amici's knowledge, has the FTC brought such a case in the ensuing 20 years.

This is because regulation in this arena—by rule, enforcement action, or private litigation—would dampen price competition that ultimately benefits consumers. Discounters such as outlet malls and other entities that make bulk purchases to sell at lower prices would necessarily be the natural targets for such regulation. But that regulation—and in particular, aggressive enforcement of unfair trade practices laws—could raise the costs to sellers "of ascertaining whether particular

discount claims are accurate [and thus] deter them from making such claims at all." *Id.* at 63.

The rule that Montes proposes, or even a derivation of that rule, will disincentivize discounts. Suppose the rule were that including a reference price on a sale item is actionable unless at least one consumer had bought and not returned the item in the same style and color at that reference price in the previous six months. Retailers could not confidently discount prices without risk of inviting litigation unless they engaged in extensive analysis and data-tracking (the costs of which must then be factored into the price) before promoting sales to ensure that every item in the sale had indeed been sold (and not returned) at the list price during the relevant period. Similarly, if the rule were that reference prices can be advertised only if "substantial sales" have been made in the past six months at the reference price, retailers may find themselves "in trouble if sales increase too much when they lower prices." Muris, 60 ANTITRUST L.J. at 114–15. "Because economics teaches that consumers will

purchase more when price falls, orders will be greater at the lower price. That, after all, is the reason for having a sale." *Id.* But "[i]f consumers buy 'too much' when the price is low," the retailer must artificially restrict the quantity sold at the lower price to ensure the accuracy of the reference price to still meet the "substantial sales" requirement. *Id.* "*Consumers can hardly afford such protection*." *Id.* (emphasis added).

These balancing questions for legislatures and regulators, of course. Here, the question before the Court is the meaning of the CPA, which is clear and precludes Montes's claim. But the point is that even were the Court to approach this question as a matter of public policy, the Court should find that there is no liability based on an advertised reference price when a plaintiff receives the goods she ordered at the price she agreed to pay.

CONCLUSION

Aggressive price competition is good for consumers. And in the modern internet era consumers can easily compare prices and evaluate the meaningfulness of claimed discounts. Retailers

should be encouraged to offer consumers the lowest possible price for their products, not discouraged from doing so by the threat of costly litigation. Whether someone else has ever paid a higher price has no effect on a later purchaser's business or property. Consistent with the long line of federal cases interpreting the same injury to "business or property" requirement, the Court should hold that Montes has suffered no cognizable CPA injury in this case.

RESPECTFULLY SUBMITTED this 12th day of September, 2025.

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DECLARATION OF SERVICE

I hereby certify that I caused the foregoing to be served on counsel of record for the parties in this matter via the Court's e-filing platform.

Dated: September 12, 2025

s/ Fred Burnside
Fred Burnside, WSBA #32491

DAVIS WRIGHT TREMAINE LLP

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