No. 25-1448

In The United States Court of Appeals for the Ninth Circuit

HADASSAH SHELLENBERGER,

Plaintiff-Appellant,

v.

AIG WARRANTY GUARD, INC. and WHIRLPOOL CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 2:24-cv-00657-JLR
Hon. James L. Robart

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICI CURIAE SUPPORTING DEFENDANTS-APPELLEES

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Fed. R. App. P. 26.1 Disclosure Statement

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Date: July 23, 2025

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

STATUTES

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

INTEREST AND IDENTITY OF AMICI CURIAE

The Retail Litigation Center, Inc. ("RLC"), is a 501(c)(6) non-profit trade association that represents national and regional retailers, including many of the country's largest and most innovative retail businesses, across a breadth of verticals. The RLC provides courts with the perspective of the retail industry on important legal issues affecting its members, and on the potential industry-wide consequences of significant court cases. Since its founding in 2010, the RLC has filed more than 250 amicus briefs on issues of importance to retailers. Its amicus briefs have been helpful to courts throughout the United States, as evidenced by citations to RLC amicus 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 (2013); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020); *Chewy, Inc. v. U.S. Dep't. of Lab.*, 69 F.4th 773, 777–78 (11th Cir. 2023). The RLC's member retailers employ millions of workers throughout the United States, provide goods and services to hundreds of millions of consumers, and account for more than a trillion dollars in annual sales.

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 3 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.

Amici submit this brief (1) to rebut Plaintiff-Appellant's argument that courts apply a least-sophisticated-consumer standard when considering whether language is likely to deceive under the Washington Consumer Protection Act ("CPA"); and (2) to explain why businesses should not be required to include the complete terms and conditions of their products and services in advertisements. Amici and their members have a strong interest in ensuring the proper application of the CPA to businesses in Washington and in allowing those businesses to maintain their operations without unnecessary burdens.

Amici submit this brief with the consent of all parties under Federal Rule of Appellate Procedure 29(a)(2).[1]

[1] No counsel for a party authored this brief in whole or in part; (2) no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief; and (3) no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Shellenberger brought this suit alleging that the marketing materials for the dishwasher service plan she purchased were deceptive under the CPA. The district court twice dismissed Shellenberger's claim, holding that the marketing materials "would not mislead or deceive a reasonable consumer" because: the materials did not contain false or misleading language; they merely provided a summary of benefits along with a disclaimer that limitations and exclusions applied; and they directed consumers to read further to find the complete terms and conditions of the service plan. ER-22–23. The district court was right.

Reasonable-consumer standard. Shellenberger and her amici argue that the district court erred in applying a reasonable-consumer standard—instead of their preferred least-sophisticated-consumer standard—when assessing whether the marketing materials at issue were likely to deceive. But there was no error. For decades, Washington courts have consistently applied a reasonable-consumer standard to determine whether materials are deceptive within the meaning of the CPA. *See* Whirlpool Br. at 61-66; AIG Br. at 28-30, 49-51.

The CPA's legislative history confirms that the district court applied the correct standard. The CPA was modeled after the Federal Trade Commission Act ("FTCA"), codified as amended at 15 U.S.C. § 41 *et seq*. Though courts interpreting the FTCA used to apply something akin to a least-sophisticated-consumer standard, that standard was abandoned

forty years ago. *See Southwest Sunsites, Inc. v. F.T.C.*, 785 F.2d 1431, 1435 (9th Cir. 1986). Following the lead of the Federal Trade Commission ("FTC"), the agency charged with enforcing the FTCA, courts now consider whether a challenged act or practice "is likely to mislead consumers *acting reasonably under the circumstances*." *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006) (emphasis added). In other words, a reasonable-consumer standard applies to actions under the FTCA. *Id.*

In enacting the CPA, the Washington Legislature was clear that "courts be guided by final decisions of the federal courts and final orders of the federal trade commission" interpreting the FTCA. RCW 19.86.920. Courts have heeded that guidance in applying the FTCA's reasonable-consumer standard in actions under the CPA. *See, e.g.*, *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., P.L.L.C.*, 228 P.3d 1260, 1270 (Wash. 2010). Shellenberger and her amici are therefore mistaken in arguing that the district court was required to examine the marketing materials at issue from the long-discarded perspective of the least sophisticated consumer.

Practical implications. The Court should not adopt a rule requiring businesses to include the full terms and conditions of their products and services in advertisements for those products and services. Such a rule would be unduly burdensome and unnecessary where, as here, the

advertisements inform consumers where to find the complete terms and conditions.

Requiring advertisements to include complete terms and conditions for products or services would be impractical for various reasons. Advertisements, whether physical or digital, have significant space and format limitations, making it virtually impossible to include extensive legal text without becoming unreadable or prohibitively expensive. Moreover, consumers typically scan ads for key information, and a dense block of legal jargon would deter engagement and make the advertisement ineffective, undermining its purpose of attracting interest and conveying a core message. Embedding full terms and conditions in advertisements would also create significant logistical challenges, including the administrative burden of having to update advertisements across all platforms for every minor change in those terms and conditions.

While the FTC requires advertisements to be truthful and mandates the inclusion of material disclosures, it does not require that advertisements include complete terms and conditions on their face. Informing consumers where they can access full details (e.g., via a hyperlink to a website) is sufficient under FTC guidance and aligns with both industry practices and consumer protection goals.

ARGUMENT

A. Courts apply a reasonable-consumer standard under the CPA and FTCA in assessing whether language has the capacity to deceive.

Courts applying Washington law have consistently applied a reasonable-consumer standard in assessing whether a practice is likely to deceive within the meaning of the CPA. *See* Whirlpool Br. at 61-66; AIG Br. at 28-30, 49-51. Application of the reasonable-consumer standard to the CPA aligns with the legislative history of the Act and case law interpreting both the FTCA and the CPA.

1. The least-sophisticated-consumer standard was abandoned in FTCA cases forty years ago.

Originally enacted in 1914, the FTCA declares unlawful "[u]nfair methods of competition in or affecting commerce" and "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). The FTC is tasked with "develop[ing] that enforcement policy best calculated to achieve the ends contemplated by Congress" in enacting the legislation. *Moog Indus. v. F.T.C.*, 355 U.S. 411, 413 (1958). To that end, the FTC may act "quasi-legislatively" by engaging in rulemaking and "quasi-judicially" by conducting adjudications. *See* 54A Am. Jur. 2d Monopolies and Restraints of Trade § 1132; *see also id.* §§ 1134, 1154. The FTC is also empowered to conduct investigations and issue orders requiring violators to cease and desist from using unfair or deceptive acts, practices, or methods. 15 U.S.C. § 45(b); *see also* the Federal Trade Commission, A

Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority (May 2021), https://bit.ly/4lKN2DB.

The FTC's cease-and-desist orders are subject to judicial review in the United States Courts of Appeals. 15 U.S.C. § 45(c). In conducting that review, "[t]he findings of the [FTC] as to the facts, if supported by evidence, shall be conclusive." *Id.*; *see also F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) ("[A]s under the essentially identical 'substantial evidence' standard for review of agency factfinding, the court must accept the [FTC's] findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'") (citation omitted).

In early cases upholding cease-and-desist orders issued by the FTC, courts used expansive language in considering whether challenged practices were "deceptive." In *Federal Trade Commission v. Standard Education Society*, for example, the Supreme Court upheld an FTC order requiring defendants to cease and desist a practice of offering "free" encyclopedias along with the purchase of a "loose leaf extension service" where the price of the service was actually the standard price for both the encyclopedias and the service. 302 U.S. 112, 114–15 (1937). While "those who [were] trained and experienced" would likely realize they were paying for both the encyclopedias and the service, the Supreme

Court explained, the defendants' representations could "deceive others less experienced." *Id.* at 116.

That said, even though the Court mentioned "less experienced" consumers, it relied on the FTC's evidence that "teachers, doctors, college professors, club women, [and] business men" had been misled. *Id.* at 116-17. Thus, the Court's holding was not based on a finding that the sales practice had the capacity to deceive the least sophisticated consumer; to the contrary, the evidence showed that even *sophisticated* consumers had been deceived.

Notwithstanding the evidence in *Standard Education Society* regarding sophisticated consumers, federal appellate courts built on the Supreme Court's language regarding "less experienced" consumers to craft a least-sophisticated-consumer standard. In *Exposition Press, Inc. v. Federal Trade Commission*, for instance, the Second Circuit upheld an FTC order requiring defendants to cease and desist from promising royalty payments to authors without disclosing that the authors would be responsible for the costs of printing, promoting, and distributing their books. 295 F.2d 869, 871–872 (2d Cir. 1961). In so holding, the Second Circuit cited *Standard Education Society* for the proposition that the FTC "should look not to the most sophisticated readers but rather to the least" in "evaluating the tendency of language to deceive." *Id.* at 872 (citing 302 U.S. at 116).

In 1983, however, the FTC issued a "Policy Statement on Deception" clarifying that it would not "hold a trade practice deceptive simply because the practice [had] a potential to mislead a consumer who was not acting in a reasonable fashion." Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 386 (1990). Rather, the agency would consider the challenged act or practice "from the perspective of the reasonable consumer." FTC Policy Statement on Deception (Oct. 14, 1983), http://bit.ly/4kmM7rS (capitalizations altered). Specifically, the FTC would find actionable "deception" only if it identified "a representation, omission or practice that [was] likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Id.* at 6. The new standard became binding when the FTC applied it in *Matter of Cliffdale Associates, Inc.*, 103 F.T.C. 110, at *37, 45–50 (1984); *see also Southwest Sunsites*, 785 F.2d at 1435 n.2.

Following *Cliffdale Associates*, this Court recognized that the FTC had adopted "a 'new' standard" that "impose[d] a greater burden of proof on the FTC" to prove a deceptive act or practice. *Southwest Sunsites*, 785 F.2d at 1435–36. The new standard required the FTC to show "potential deception of consumers acting reasonably in the circumstances, not just any consumers." *Id.* at 1436 (cleaned up). It also required the FTC to show "probable, not possible, deception ('*likely* to mislead,' not '*tendency*

and capacity to mislead')" that would be "likely to cause injury to a reasonable relying consumer." *Id.*

2. Courts now apply a reasonable-consumer standard in FTCA cases.

Since *Southwest Sunsites*, this Court has regularly and uniformly applied a reasonable-consumer standard in assessing alleged violations of the FTCA. *See, e.g.*, *F.T.C. v. Hoyal & Assocs., Inc.*, 859 F. App'x 117, 119 (9th Cir. 2021) (asking whether challenged conduct was "likely to mislead consumers acting reasonably"); *F.T.C. v. Lucas*, 483 F. App'x 378, 378–79 (9th Cir. 2012) (same); *F.T.C. v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (same); *Cyberspace.Com,* 453 F.3d at 1199–1200; *F.T.C. v. Munoz*, 17 F. App'x 624, 626 (9th Cir. 2001) (same); *F.T.C. v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001) (same); *F.T.C. v. Magui Publishers, Inc.*, 9 F.3d 1551, 1993 WL 430102 (Table), at *2 (9th Cir. 1993) (same).

Scholars and commentators likewise recognize that a representation, omission, or practice is deceptive under the FTCA only if it is "likely to mislead consumers acting reasonably under the circumstances." 5 Callmann on Unfair Comp., Tr. & Mono. § 25:4 (4th ed.); *see also* 54A Am. Jur. 2d Monopolies and Restraints of Trade § 1087 (explaining that the standard under the FTCA "is whether the act or practice is material and likely [to] mislead customers acting reasonably under the circumstances, as measured by the likely effect on the mind of the ordinary consumer, misleading a consumer to the consumer's detriment") (footnotes omitted);

Jeffrey A. Barker, 13 Bus. & Com. Litig. Fed. Cts. § 145:21 (5th ed.) ("The FTC has stated that it 'believes that[,] to be deceptive, the representation, omission, or practice must be likely to mislead reasonable consumers under the circumstances. The test is whether the consumers' interpretation or reaction is reasonable.'").

The least-sophisticated consumer standard has survived only in a context not relevant here: deceptive debt-collection practices under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692–1692p. The FDCPA was enacted in 1977, *before* the FTC's Policy Statement on Deception setting forth the standard for proving deception under the FTCA. *See* 15 U.S.C. § 1692; Elizabeth Lea Black, Annotation, *Construction and Application of Fair Debt Collection Practices Act*, 150 A.L.R. Fed. 101 (1988). In its "findings and declaration of purpose" incorporated in the FDCPA at its enactment, Congress found that "[e]xisting laws and procedures [were] inadequate to protect consumers" from "abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a), (b). Given Congress's finding that the FTCA had not provided adequate protection from the specific problem of deceptive debt-collection practices, courts concluded that it would be "anomalous" for Congress "to have intended that the legal standard under the FDCPA be *less* protective of consumers" than the least-sophisticated-consumer standard then applied under the FTCA. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1173–74 (11th Cir. 1985). Accordingly, courts began applying

a least-sophisticated-*debtor* standard under the FDCPA, *id.*, and still apply that standard today. *See, e.g.*, *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1117–18 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Oct. 31, 2014); *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 n.2 (9th Cir. 2011).

But as explained further below, the Washington legislature intended that courts construing the CPA follow decisions interpreting the *FTCA*, not the *FDCPA*. And even under the FDCPA, this Court and others have required at least a baseline level of reasonableness, explaining that "although the least sophisticated debtor may be uninformed, naive, and gullible, nonetheless her interpretation of a collection notice cannot be bizarre or unreasonable." *Tourgeman*, 755 F.3d at 1119 (citation omitted); *see also, e.g.*, *Clomon v. Jackson*, 988 F.2d 1314, 1319–20 (2d Cir. 1993) (explaining that "courts have carefully preserved the concept of reasonableness," applying "the least-sophisticated-consumer standard in a manner that protects debt collectors against liability for unreasonable misinterpretations of collection notices"); Elwin Griffith, *The Meaning of Language and the Element of Fairness in the Fair Debt Collection Practices Act*, 27 U. TOL. L. REV. 13, 30 (1995) (same).

3. The CPA was modeled after the FTCA.

Washington's CPA is one of the "Little FTC Acts" enacted in all fifty states and the District of Columbia. *See* Karns, *supra*, 94 Dick. L. Rev. at 373. "The passage of state Little FTC Acts was in large part a response

to the deficiencies in the common law as well as the limited reach of the [FTCA]," which "has never allowed a private right of action for either consumer or business litigants." *Id.* at 375. Many Little FTC Acts, including Washington's CPA, create a private right of action. *See id.*; RCW 19.86.093.

Like the FTCA, the CPA declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The Washington legislature explained that the purpose of the CPA was to complement the FTCA:

> The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the [F]ederal [T]rade [C]ommission interpreting the various federal statutes dealing with the same or similar matters …. To this end this act shall be liberally construed that its beneficial purposes may be served.
>
> It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

RCW 19.86.920.

The CPA thus directs courts to look to interpretations of the FTCA for guidance in construing similar provisions of the CPA. Accordingly,

"[i]n deciding whether a practice or act is 'unfair or deceptive,'" Washington courts "consider federal court decisions that have approved or rejected administrative determinations made by the Federal Trade Commission (FTC) in administering the Federal Trade Commission Act." *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 894 (Wash. 2009). While federal court decisions are not binding on Washington courts, they are "guiding" authority. *Id.* And "[a]ny departure from federal law … must be for a reason rooted in [Washington] statutes or case law and not in the general policy arguments that [the Washington Supreme Court] would weigh if the issue came before [it] as a matter of first impression." *Blewett v. Abbott Lab'ys*, 938 P.2d 842, 846 (Wash. Ct. App. 1997).

4. Courts apply a reasonable-consumer standard under the CPA.

This history helps explain why Shellenberger and her amici—the Washington Attorney General's Office ("AGO") and three consumer-advocacy organizations (collectively, the "Consumer Organizations")[2]— are mistaken in arguing that the correct standard for evaluating whether a practice is deceptive under the CPA is whether it has the potential to deceive the least sophisticated consumer. *See* Shellenberger Br. at 36, 47; AGO Br. at 7–8, 23; Consumer Organizations' Br. at 13. That argument

[2] The Consumer Organizations are the Northwest Consumer Law Center, the National Association of Consumer Advocates, and the National Consumer Law Center.

is based almost entirely on the following few sentences from the Washington Supreme Court's decision in *Panag*:

> Deception exists "if there is a representation, omission or practice that is likely to mislead" a reasonable consumer. *Sw. Sunsites, Inc. v. Fed. Trade Comm'n*, 785 F.2d 1431, 1435 (9th Cir. 1986) (emphasis omitted). "In evaluating the tendency of language to deceive, the [FTC] should look not to the most sophisticated readers but rather to the least." *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174 (11th Cir. 1985) (quoting *Exposition Press, Inc. v. Fed. Trade Comm'n*, 295 F.2d 869 (2d Cir. 1961)).

204 P.3d at 895.

The source of the apparent confusion is that, in those sentences, *Panag* cites *both* the reasonable-consumer *and* the least-sophisticated-consumer standards. It first says that deception exists if a *reasonable consumer* is likely to be misled, and then says that the tendency of language to deceive should be considered from the perspective of the *least sophisticated consumer*. *Id.* Read in isolation, it might appear that the Washington Supreme Court endorsed two contradictory standards.

But the history discussed above strongly supports a more plausible explanation: the reference to the least-sophisticated-consumer standard is an errant snippet of dictum that was not intended to alter the otherwise well-established reasonable-consumer standard courts consistently apply in actions under the CPA.

That explanation comports with the case citations in the sentences above. *Panag*'s reference to the least-sophisticated-consumer standard

comes from the Eleventh Circuit's opinion in *Jeter*, 760 F.2d 1168, which, as explained above, was an FDCPA case. *See supra* at 11. *Jeter* cited *Exposition Press*, the Second Circuit case from 1961, for the proposition that courts apply a least-sophisticated consumer standard under the FTCA, and concluded it would be "anomalous" *not* to apply that standard under the FDCPA given Congress's intention to provide *greater* protection against deceptive debt-collection practices than afforded under the FTCA. *Jeter*, 760 F.2d at 1174. But the Washington legislature never intended for courts to look to the *FDCPA* in interpreting the CPA; indeed, it could not have intended that since the CPA was passed in 1961, about 15 years before the FDCPA. *See* RCW 19.86.020. The *FTCA* provides the relevant guideposts, and the least-sophisticated-consumer standard from *Exposition Press* was abandoned in FTCA cases in the 1980s.

Accordingly, it appears that the Washington Supreme Court picked up language from the Eleventh Circuit's FDCPA case, which in turn cited a Second Circuit FTCA case that has since been superseded. Indeed, the other case *Panag* cited earlier in the very same paragraph—*Southwest Sunsites*, 785 F.2d 1431—recognized the FTC's revised policy and applied the new reasonable-consumer standard in the Ninth Circuit.

Consistent with that view, the Washington Supreme Court has continued to apply the reasonable-consumer standard under the CPA after *Panag*. *See, e.g.*, *Columbia Physical Therapy*, 228 P.3d at 1270 ("Even accurate information may be deceptive if there is a representation, omis-

sion or practice that is likely to mislead a reasonable consumer.") (cleaned up); *Young v. Toyota Motor Sales, U.S.A.*, 472 P.3d 990, 994 (Wash. 2020) ("Deception exists if there is a representation, omission or practice that is likely to mislead a reasonable consumer.") (cleaned up). So has the Washington Court of Appeals. *See, e.g.*, *Eng v. Specialized Loan Servicing*, 500 P.3d 171, 177 (Wash. Ct. App. 2021) ("Deception exists if there is a representation, omission or practice that is likely to mislead a reasonable consumer.") (cleaned up); *State v. Living Essentials, LLC*, 436 P.3d 857, 866 (Wash. Ct. App. 2019) (applying the reasonable-consumer standard from the FTCA to the CPA). Indeed, even the cases upon which Shellenberger heavily relies apply the reasonable-consumer standard. *See State v. LA Invs., LLC*, 410 P.3d 1183, 1193 (Wash Ct. App. 2018) ("A deceptive act or practice is measured by the net impression on a reasonable consumer.") (cleaned up); *State v. Mandatory Poster Agency, Inc.*, 398 P.3d 1271, 1277 (Wash Ct. App. 2017) ("Deception exists if there is a representation, omission, or practice that is likely to mislead a reasonable consumer.") (cleaned up).

The AGO cites the following cases in addition to *Panag* to support the least-sophisticated-consumer standard, but they simply reinforce the point that the standard survives only in FDCPA cases:

- *Standard Education Society*, 302 U.S. at 116: Discussed above; predates *Southwest Sunsites*.

- *Stork Rest. v. Sahati*, 166 F.2d 348, 359 (9th Cir. 1948): Predates *Southwest Sunsites*.
- *Keithly v. Intelius Inc.*, 764 F. Supp. 2d 1257, 1266 (W.D. Wash. 2011): Simply quotes the stray language from *Panag* for the least-sophisticated-consumer standard.
- *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1258–59 (11th Cir. 2014): FDCPA case.

AGO Br. at 7–8, 23.

Accordingly, the *only* support Shellenberger and her amici cite for the least-sophisticated consumer standard comes from the stray language from *Panag*, cases that predate *Southwest Sunsites*, and inapplicable FDCPA cases. By contrast, application of the reasonable-consumer standard is supported by near uniform Washington case law both before and after *Panag* and the legislative and regulatory history of both the CPA and FTCA. Support for the reasonable-consumer standard accordingly overwhelms support for the now-defunct least-sophisticated-consumer standard.

To be sure, federal decisions interpreting the FTCA are not *binding* on Washington courts interpreting the CPA. And as the Consumer Organizations point out (at 15–19), the Washington Supreme Court recently suggested that there are more ways to prove an *unfair practice* under the CPA than the FTCA, in part because of a statutory amendment to that section of the FTCA that has no parallel in the CPA. *Greenberg v. Ama-*

zon.com, Inc., 553 P.3d 626, 638–41 (Wash. 2024), *as amended* (Aug. 16, 2024).[3] But the Washington Supreme Court has *not* announced a departure from the federal standard for *deceptive practices*; nor can stray language from *Panag* reasonably be construed as such a departure given *Panag*'s own restatement of the reasonable-consumer standard and the Court's continued application of the reasonable-consumer standard post-*Panag*.

The district court correctly applied the reasonable-consumer standard, and Shellenberger and her amici are mistaken in arguing otherwise.

B. Requiring complete terms and conditions in advertisements would be impractical and unnecessary.

The district court found that the marketing materials at issue (i) clearly indicated, in multiple ways, that the bullet-point description of the dishwasher service plan was an incomplete summary that "did not embody the full terms" of the plan; and (ii) "informed customers that they needed to look further to understand the plan's repair benefits" by following the hyperlink in the materials. ER-20. Accordingly, reasonable consumers would understand that the materials "did not completely describe the Service Plan's terms and conditions, and that they would need to follow the link provided and view the complete terms and conditions of the

[3] That said, *Greenberg* actually applied the federal "substantial injury" test in assessing unfairness and suggested that its discussion of other ways of establishing unfairness might be "dicta." 553 P.3d at 640–41.

Service Plan, rather than rely only upon the bullet points" in the materials themselves. ER-21.

In arguing for reversal here, Shellenberger and her amici treat the link to the full terms and conditions of the service plan as essentially irrelevant. Shellenberger, for example, argues that the link to the complete terms and conditions should be "excluded from the analysis." Shellenberger Br. at 43–44. The AGO likewise maintains that "the least sophisticated consumer is not required to open a solicitation, read the printed offer, notice and read a disclaimer at the bottom of the page and in tiny font, see a reference to a URL, go to a computer or mobile device and manually type in the URL" to "find the relevant terms and conditions." AGO Br. at 22. And the Consumer Organizations similarly argue that "the web address to the terms and conditions" could not cure the marketing materials' allegedly "misleading assertions." Consumer Organizations' Br. at 13; *see also id.* at 27–29.

If these arguments were correct, then businesses could be faced with the burden of including the complete terms and conditions for their products/services in advertisements for those products/services. In other words, if linking to a website with complete terms and conditions isn't enough, advertisements could be required to include complete (or at least substantially complete) terms and conditions on their face.

Such a rule would impose unnecessary burdens on businesses. Consider:

Space and format limitations. For physical advertisements like those on a billboard or in a magazine, the space available for text is extremely limited. Including comprehensive legal text would be virtually impossible without making the advertisement unreadable, unintelligible, or prohibitively expensive.

While digital ads offer more flexibility, they still operate within constraints. Display ad banners are small, social media posts have character limits, and even video ads have limited time to convey a message before losing a viewer's attention.

Consumer attention and engagement. Consumers typically scan advertisements for key information and a compelling offer. Presenting dense legal jargon would overwhelm them and make the advertisement ineffective. The goal of an advertisement is to attract interest, not to serve as a legal document. An advertisement with full terms and conditions would be visually unappealing and difficult to process quickly, which would significantly reduce its ability to capture attention and convey the core message about the product or service. *See* American Psychological Association, *Speaking of Psychology: Why Our Attention Spans Are Shrinking* (February 2023), http://bit.ly/4lFrubK (discussing the limited and shrinking attention spans of most people).

Dynamic and evolving terms. Terms and conditions, especially for online services, software, or financial products, can change frequently. If they were embedded directly in advertisements, every time a minor

update occurred, the business would have to pull all existing ads and print or publish new ones, leading to immense logistical burdens. And ensuring that every advertisement across various platforms (print, digital, broadcast) consistently reflected the latest version of the terms and conditions would be a daunting and administratively burdensome task.

Advertisements as invitations to contract. Advertisements are generally considered *invitations* to contract, not legally binding offers. *See, e.g.*, *Roley v. Google LLC*, 40 F.4th 903, 909 (9th Cir. 2022) (advertisements are not typically understood as offers unless they offer a reward); *Mesaros v. United States*, 845 F.2d 1576, 1580 (Fed. Cir. 1988) (advertisements are "invitations to deal," not offers that may be accepted); 1 Corbin on Contracts § 2.4 (2025) ("Contract law generally does not regard advertisements as offers. Stated another way, advertisements usually do not create powers of acceptance in the members of the public exposed to them."). The actual "offer" and "acceptance" that form a contract typically occur when a consumer proceeds to purchase a product or service, at which point they are usually presented with the full terms and conditions to review and agree to (e.g., by clicking "I agree" on a website). Requiring full terms and conditions in advertisements would blur this distinction and could lead to unintended legal implications, potentially making every advertisement a binding offer.

Sufficiency of disclosures. While the FTCA requires advertisements to be truthful and non-deceptive and to include necessary material

disclosures (e.g., price, key limitations, risks), it does not require that advertisements include full terms and conditions. *See* Federal Trade Commission, *Advertising FAQ's: A Guide for Small Business*, http://bit.ly/4lk75sF. The aim of disclosures is to prevent consumer harm or misleading impressions, not to replace the detailed contractual agreement.

Indeed, as particularly relevant here, the FTC does not require advertisements for products with a guarantee or warranty to include full terms and conditions. Rather, the FTC says that "[i]f an ad mentions that a product comes with a guarantee or warranty, the ad should clearly *disclose how consumers can get the details*." *Id.* Businesses must also "make *copies of any warranties available* to consumers before the sale." *Id.* (emphasis added). The Better Business Bureau provides similar guidance. *See* Better Business Bureau, Code of Advertising, http://bit.ly/46AT05v ("When using the term 'warranty' or 'guarantee' in product advertising, the advertiser must clearly and conspicuously include a statement that the complete details of the warranty can be seen prior to sale at the advertiser's location, viewed on the advertiser's website or, in the case of mail or telephone order sales, made available free on written request.").

*

In sum, legal authorities and industry practices recognize that the primary function of an advertisement is to engage and inform, not to serve as a comprehensive, legally binding offer. Requiring complete

terms and conditions in advertisements would be impractical, costly, and ineffective for consumer engagement, and could lead to unintended legal consequences.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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July 23, 2025

CERTIFICATE OF SERVICE

I, Kathleen M. O'Sullivan, certify that on July 23, 2025, I electronically filed the foregoing Brief of the Retail Litigation Center, Inc., and the Chamber of Commerce of the United States of American as Amici Curiae with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 23rd day of July, 2025

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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