No. 25-1448

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HADASSAH SHELLENBERGER,

Plaintiff-Appellant,

v.

AIG WARRANTYGUARD, INC., *et al.*

Defendants-Appellees.

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

BRIEF OF THE NATIONAL RETAIL FEDERATION AND THE WASHINGTON RETAIL ASSOCIATION AS AMICI CURIAE SUPPORTING APPELLEES

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* the National Retail Federation and the Washington Retail Association are not publicly held corporations, neither have a parent corporation, and no publicly held corporation owns 10 percent or more of either company's stock.

Date: July 23, 2025

/s/ Michael D. Meuti
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NATIONAL RETAIL FEDERATION STATEMENT OF INTEREST

Established in 1911, the National Retail Federation ("NRF") is the world's largest retail trade association. The retail sector is the nation's largest private-sector employer, contributing $5.3 trillion to annual GDP and supporting one in four U.S. jobs.

NRF's membership includes retailers of all sizes, formats, and channels of distribution, including many businesses that sell goods via a website and communicate with customers through a website. Those members include retailers and industry partners not only based in the United States, but also companies headquartered in over 45 countries abroad. NRF's members also are often targeted as defendants in lawsuits asserting claims under state consumer-protection lawsuits—often brought as class actions. NRF is thus familiar with consumer-protection class-action litigation, both from the perspective of individual defendants in class actions and from a more global perspective. And many of NRF's members sell goods to Washington consumers, including through internet transactions.

For over a century, NRF has been a voice for every retailer and every retail job, communicating the impact retail has on local

communities and global economies. NRF's amicus briefs have been cited favorably by multiple courts. *E.g.*, *Constellation Brands, U.S. Operations, Inc. v. Nat'l Lab. Rels. Bd.*, 842 F.3d 784 (2d Cir. 2016); *Byars v. Hot Topic, Inc.*, 656 F. Supp. 3d 1051 (C.D. Cal. 2023); *Licea v. Am. Eagle Outfitters, Inc.*, 659 F. Supp. 3d 1072 (C.D. Cal. 2023); *Vita v. New England Baptist Hosp.*, 494 Mass. 824, 243 N.E.3d 1185 (2024); *Robey v. SPARC Grp. LLC*, 256 N.J. 541, 311 A.3d 463 (2024).

NRF files this brief to provide the Court with the retail sector's perspective on the theory of deception that Plaintiff and her Amici offer here. As explained below, that theory threatens to disrupt settled law and retailers' operations. The Court should reject that theory and affirm.

WASHINGTON RETAIL ASSOCIATION STATEMENT OF INTEREST

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. 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.

INTRODUCTION[1]

The Washington Legislature passed the Consumer Protection Act ("CPA") to balance the public interest in fair trade and competition against the "development and preservation of business." RCW § 19.86.920. Plaintiff-Appellant Shellenberger's appeal seeks to undo that delicate balance by offering new legal theories under the CPA that conflict with Washington Supreme Court precedent and longstanding principles of contract law.

Ms. Shellenberger premises her appeal on her subjective belief that Defendants-Appellees AIG WarrantyGuard Inc. and Whirlpool Corporation's marketing materials, which advertised a service plan (the "Service Plan") for a dishwasher she purchased, were deceptive. Her theory of deception lies in the speculative inference that the "least-sophisticated-consumer" would have a "net impression" of deception because Defendants failed to disclose the Service Plan's full terms in the marketing materials. The Service Plan's full terms, however, were readily available online to Ms. Shellenberger and the materials clearly

[1] Pursuant to FRAP 29(a)(2), NRF and WR submit this brief with consent of all parties. No party's counsel authored any part of this brief, and no person other than Amici funded its preparation or submission.

stated this. Therefore, as the district court held, a reasonable consumer would not be misled by the marketing materials' language because they clearly did not purport to represent the Service Plan's full terms. *See Shellenberger v. AIG WarrantyGuard, Inc.*, No. C24-0657, 2025 WL 732874, *6 (W.D. Wash. Feb. 3, 2025).

Ms. Shellenberger and the Appellant's amici dispute the district court's conclusion and advocate that the Court should apply the "least-sophisticated-consumer" standard to the parties' transaction. They are wrong. The reasonable-consumer standard controls.

Ms. Shellenberger's claim centers on conjured-up inconsistencies between the marketing materials and the Service Plan. The problem, though, is that she refused to read the Service Plan. So, her theory of deception would effectively absolve consumers of the duty to read contractual documents. Worse, her theory would provide them with a cause of action whenever they are later surprised by terms they refused to read. A reversal in this case threatens to upend the way retailers advertise and operate in the marketplace, leading to confusion and uncertainty in the face of contract enforcement.

The Court should affirm the district court's ruling and decline Ms. Shellenberger's invitation to destabilize established legal doctrine and retail consumer contracts by adopting a novel theory of deception untethered to objective reasonableness.

ARGUMENT

I. The reasonable-person standard, not the least-sophisticated-consumer standard, governs claims under the CPA.

It is well-established that the CPA incorporates a reasonable-person standard when assessing whether conduct is deceptive. *Young v. Toyota Motor Sales, U.S.A.*, 472 P.3d 990, ¶ 10 (Wash. 2020). Despite that precedent, Ms. Shellenberger and her amici beg the Court to apply a "least-sophisticated-consumer" standard when evaluating whether the marketing letter had the capacity to deceive. (Appellant Br. at 36 & 47; Wash. Att'y Gen. Amicus Br. at 4–5 & 7; Northwest Consumer Law Center et al. Amici Br. at 13–16.) The least-sophisticated-consumer standard does not control.

Ms. Shellenberger anchors her plea to apply the least-sophisticated-consumer test upon dicta in *Panag v. Farmers Ins. Co. of Washington*, 204 P.3d 885 (2009). In that dicta, the court noted that some stale federal authority suggested that when evaluating "the tendency of

language to deceive, the [FTC] should look not to the most sophisticated readers but rather to the least." *Id.* ¶ 44 (alteration in original) (quoting *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174 (11th Cir. 1985)). Plaintiffs and their Amici contend that that dicta amounts to adopting the least-sophisticated-consumer standard.

Not so. *Panag* did not hold that courts addressing CPA claims must apply the least-sophisticated-consumer standard. Instead, the court's holding was narrow: the CPA applies to deceptive insurance-subrogation activities. *Id.* at ¶¶ 55 & 80. And the court concluded that the communications at issue were deceptive because they resembled legitimate debt-collection notices, causing reasonable recipients to feel obligated to pay. *Id.* at ¶¶ 39–40.

Indeed, the *Panag* Court *did not apply* the least-sophisticated-consumer standard when holding that the insurance subrogation communications were deceptive. In the same paragraph as the *Jeter* quote, the court applied the reasonable-person standard, stating that, "[a]n ordinary consumer would not understand the meaning of" the collection agency's subrogation notices. *Id.* at ¶ 44; *see also id.* (explaining that a communication may be deceptive even if it contains

accurate information, because even accurate information could still "be deceptive").

Other Washington Courts recognize that passage in *Panag* is dicta. Subsequent Washington Court of Appeals cases that cite *Panag* favorably also focus their analysis on the "reasonable consumer." *See, e.g.*, *State v. LA Investors, LLC*, 410 P.3d 1183, ¶¶ 41–42 & 48–50 (Wash. Ct. App. 2018); *State v. Mandatory Poster Agency, Inc.*, 398 P.3d 1271, ¶¶ 22 & 31 (Wash Ct. App. 2017); *Behnke v. Ahrens*, 294 P.3d 729, ¶ 24 (Wash. Ct. App. 2012); *Peterson v. Kitsap Comm. Fed. Credit Union*, 287 P.3d 27, ¶¶ 37 & 41 (Wash. Ct. App. 2012). Even the Washington Supreme Court itself recognizes that the reasonable-consumer standard governs. *See Young*, 472 P.3d at ¶ 10 (citing *Panag*, 204 P.3d at ¶ 39) (describing the standard for deception under the CPA as whether the communication "is likely to mislead a reasonable consumer").

While the CPA is to be "liberally construed," it should not be interpreted to reach such "acts or practices which are reasonable in relation to the development and preservation of business." RCW § 19.86.920. The Washington Supreme Court has explained that when evaluating whether some challenged conduct constitutes an "unfair

method of competition," the CPA "warrants a narrower interpretation . . . than that given by federal courts." *State v. Black*, 676 P.2d 963, 969 (Wash. 1984).

The same is true for the standard applicable to a communication's capacity to deceive. Ms. Schellenberger's standard would expand liability under the CPA beyond what the Washington Legislature intended, and courts have recognized. It would expose retailers to claims based not on what a "substantial portion of the public" would deem misleading, *Panag*, 204 P.3d at ¶ 39, but on how an abnormally uniformed or inattentive consumer might interpret their statements. If adopted, the least-sophisticated-consumer standard would shift the "objective" reasonable person standard to something subjective, allowing virtually all misunderstandings—no matter how fanciful or idiosyncratic—to "becom[e] a triable violation" of the CPA. *See Mandatory Poster Agency*, 398 P.3d at ¶ 28.

Accordingly, the Court should apply the reasonable-consumer standard, as that standard is objective and faithful to both statutory intent and the Washington Supreme Court's interpretation and

application of the CPA. And applying that standard, the Court should affirm the dismissal of Ms. Shellenberger's claims.

II. Ms. Shellenberger's theory of deception would absolve consumers of the duty to read contractual documents that govern the transaction.

Ms. Shellenberger claims that the marketing materials deceived her because they did not contain all the terms governing her Service Plan. At bottom, Ms. Shellenberger's purported deception stems from her choice not to read the available terms of the Service Plan. The Court should not allow consumers to establish deception under the CPA by refusing to confront the terms of the transaction when the full terms of a contract form the basis of the claim.

It is a fundamental tenet of Washington contract law that parties to a contract are charged with knowledge of its contents. *Skagit State Bank v. Rasmussen*, 745 P.2d 37, 39 (Wash. 1987) (describing this concept as supporting the "whole panoply of contract law"). The Washington Supreme Court has explained that "a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." *Michak v. Transnation Title Ins. Co.*, 64

P.3d 22, 27–28 (Wash. 2003); *Yakima Cnty. (W. Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 858 P.2d 245, 255 (Wash. 1993).

Additionally, courts presume that legislatures draft legislation with the common law as a backdrop. *Parrish v. United States*, 145 S. Ct. 1664, 1671, 605 U.S. --- (2025); *Wynn v. Earin*, 181 P.3d 806, ¶ 20 (Wash. 2008). If the Washington Legislature had intended to undo this longstanding common-law principle, it needed to say so. *Antio, LLC v. Department of Revenue*, 557 P.3d 672, ¶ 14 (Wash. 2024) (quoting *In re Marriage of Williams*, 796 P.2d 421, 424 (1990)) ("Absent an indication that the Legislature intended to overrule the common law, new legislation will be presumed to be consistent with prior judicial decisions."). Its failure to renounce the common law in this instance shows that the CPA provides no exception to the rule that parties to a contract are charged with knowledge of its terms.

Perhaps a situation where the full terms of a contract are unavailable to a consumer or one that represents a true-bait-and-switch (where the marketing materials represent the terms as one thing, but the actual terms are the opposite) could potentially deceive a reasonable consumer. *See Yakima Cnty.*, 858 P.2d at 255 (describing that a party to

a contract who was a victim of "fraud, deceit, or coercion" could later challenge the validity of her assent to the contract's terms); *Adler v. Fred Lind Manor*, 103 P.3d 773, 781 (Wash. 2004) (describing that a contract could be unconscionable where "important terms were hidden in a maze of fine print") (cleaned up). But that is not this case.

To the contrary, the listed benefits contained qualifying language, indicating they accrued only to "*covered* repairs and replacements." (Appellant Br. at 13 (emphasis added).) This language highlights for consumers that some repairs and replacements may not be covered under the policy. *See Freeman v. Trime, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (concluding that a consumer's claims of deception were unpersuasive where qualifying language "appear[ed] immediately next to the representation[] it qualifie[d]" and none of that language was "hidden or unreasonably small").

Moreover, the marketing letter itself flagged its list of benefits with an asterisk. *Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771, 785 (9th Cir. 2024) (explaining that the "presence of an asterisk alone puts a consumer on notice that there are qualifications or caveats"). The text defining the asterisk's meaning noted that AIG Warranty Guard would

administer the Service Plan, that "[l]imitations and exclusions apply," and that consumers could find the full terms at a specified URL. (Appellant Br. at 14.) And those terms plainly stated that AIG Warranty Guard retained discretion to buy out a malfunctioning product, rather than repair it. (*Id.* at 11.) Therefore, Ms. Shellenberger received notice that the marketing materials themselves did not describe all the Service Plan's terms, which she was able to read before deciding to purchase it. *See* RCW § 62A.1-202(a)(3) (charging a person with notice if she "has reason to know that it exists" "[f]rom all the facts and circumstances known to the person at the time in question").

Reasonable consumers do not ignore information that is available to them. *Whiteside*, 108 F.4th at 785. Pleading after the fact that consumers are "conditioned to ignore" such information is merely another way of pleading ignorance. (Appellant Br. at 14.)

Simply put, when, as here, marketing material flags that additional terms apply, a consumer cannot manufacture her own deception by refusing to avail herself of that information. And that is especially true here, as the item that Ms. Shellenberger purchased was a contract itself, as opposed to any tangible good. Under different facts, such as a contract

of adhesion, a plaintiff might be able to demonstrate that a reasonable consumer would not read incomprehensible boilerplate. But this is not that case. Ms. Shellenberger had every opportunity to read the terms of the Service Plan before she voluntarily purchased it, as they were made available to her in plain language. Ms. Shellenberger invents inconsistencies between the marketing materials and the Service Plan to concoct a CPA claim. Yet, she ignores the Service Plan itself, which was clear and straightforward.

Ms. Shellenberger's proposed standard would create an exception to clear, objective rules of contract formation whenever consumers later claim confusion or deception, even if that "deception" stems from their failure to read readily available and disclosed terms and conditions. It would also erode the predictability of contract enforcement, which would disrupt retailers' business operations. Retailers would face constant uncertainty as to whether their contract terms would be enforced, all depending on whether a consumer later claimed not to have read them.

Therefore, the Court should not excuse a plaintiff from reading a contract's terms where they are central to the alleged deception.

III. Adopting Ms. Shellenberger's theory of deception could have disastrous consequences for retailers.

For retailers that sell warranties, service plans, or other contract-based products or services including subscriptions, the effects of adopting Ms. Shellenberger's ambitious theory of deception are obvious.

If consumers can claim ignorance of any contract term they do not read, then retailers selling these products would be forced to insert all potentially material terms into the consumer-facing marketing materials themselves. Here, the marketing materials would transform from an advertisement with four bullet points summarizing the terms of the Service Plan and qualifying its applicability, to a fine-print-laden flyer with contractual disclosures. (*See* Appellant Br. at 13–14.)

Taking this argument to Ms. Shellenberger's extreme, applying the least-sophisticated-consumer standard, retailers would have to engage in costly compliance efforts to ensure that even the most uninformed hypothetical consumer could not misapprehend the contract's full terms. This effort would reduce clarity for all consumers by congesting consumer-facing materials with unnecessary or redundant explanations. Neither the least-sophisticated consumer nor the reasonable, ordinary

consumer would be better protected from purportedly deceptive practices in that case.

These maladies threaten to extend beyond retail advertising. Virtually any transaction could fall prey to this new theory of deception. For instance, under well-established law, online contract terms are enforceable when a consumer receives reasonable notice and takes an affirmative step to manifest assent. *Marshall v. Hicamp, Inc.*, 735 F. Supp. 3d 1283, 1293 (W.D. Wash. 2024) (noting that clickwrap agreements are routinely enforced under Washington law because the parties have received notice of and assented to the terms); *Oberstein v. Live Nation Entm't, Inc.*, 60 F.4th 505, 513 (9th Cir. 2023) ("Courts routinely find clickwrap agreements enforceable."); *Berman v. Freedom Fin. Network, LLC*, 30 F. 4th 849, 855–56 (9th Cir. 2022) (same).

Under Ms. Shellenberger's theory, however, a consumer who clicks the "I acknowledge the terms and conditions" checkbox could claim deception if she did not read the terms and they turn out to be something different than she expected. Such a framework encourages retroactive interpretations of otherwise-clear contract terms. Moreover, it would place in jeopardy commonly accepted contract terms like choice-of-venue

provisions, arbitration clauses, and intellectual-property-use restrictions—terms that were created to benefit both retailers and consumers.[2] Without reliable enforcement of these provisions, retailers could face fragmented litigation and legal uncertainty across many jurisdictions, leading to higher transaction costs. *See* Restatement (Second) of Contracts § 211 cmt. a (noting that with standardized agreements "[s]carce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions").

Because retailers often operate in multiple states and advertise through different mediums, the inability to enforce consistency across such consumer contracts would restrict the retailers' ability to offer

[2] "Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution . . . . Operations are simplified and costs reduced, to the advantage of all concerned." Restatement (Second) of Contracts § 211 cmt. a. The benefits of standardized terms include "(a) drafting efficiency; (b) reduced uncertainty over the meaning and validity of a term due to prior judicial rulings; and (c) familiarity with a term among" the larger community. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 719–20 (1997); Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I)*, 62 CLEV. ST. L. REV. 373, 385–87 (2014).

services on a large scale. Indeed, without enforceable standardized agreements, retailers would have to revert to more expensive models of contracting to protect themselves. *Id.* at cmt. b (noting that the efficiencies attendant to standardization are not served if consumers retained counsel to review standard terms for each transaction).

The Ninth Circuit has explained that a "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." *Berman*, 30 F.4th at 857 (quoting *Specht v. Netscape Comms. Corp.*, 306 F.3d 17, 35 (2d Cir. 2002)). The Court should not indulge Ms. Shellenberger's invitation to disrupt both the law and retailers' operations by adopting her theory of deception. There is no integrity or credibility in allowing consumers, who are given notice and the opportunity to review contract terms and affirmatively accept them, to have a cause of action every time they encounter subjective, after-the-fact surprises due to their failure to read those terms.

CONCLUSION

The Court should affirm the judgment of the district court. Doing so will permit retailers to continue operating in an environment where courts enforce the foundational principles of contract law. Nothing would be gained by permitting consumers to feign deception every time they are surprised by contract terms that they failed to read before assenting to those terms. But cornerstone values—integrity, predictability, and stability—would be lost.

Dated: July 23, 2025

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number: 25-1448

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Dated: July 23, 2025

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I hereby certify that on July 23, 2025, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the Appellate Case Management System ("ACMS"). I certify that all participants in the case are registered ACMS users and that service will be accomplished by the ACMS system.

/s/ Michael D. Meuti
Michael D. Meuti