COURT OF APPEALS, STATE OF COLORADO 2 East 14th Street, Denver, CO 80203	DATE FILED: February 4, 2021 9:04 AM FILING ID: E31C90C3EBB7D CASE NUMBER: 2020CA1692
Appeal From: DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Judge Ross B.H. Buchanan, No.: 2014CV34530	
PLAINTIFFS-APPELLEES/CROSS-APPELLANTS: STATE OF COLORADO, EX. REL. CYNTHIA H. COFFMAN, ATTORNEY GENERAL, and JULIE MEADE, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, v. **DEFENDANTS-APPELLANTS/CROSS-APPELLEES:** CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., a not-for-profit company; COLLEGEAMERICA DENVER, INC. and COLLEGEAMERICA ARIZONA, INC., divisions thereof, d/b/a COLLEGEAMERICA; STEVENS-HENAGER COLLEGE, INC., a division thereof, d/b/a STEVENS-HENAGER COLLEGE; COLLEGEAMERICA SERVICES, INC., a division thereof, CARL BARNEY, CARL BARNEY LIVING TRUST, and ERIC JUHLIN.	▲COURT USE ONLY▲ Court of Appeals Case No.: 2020CA1692

Attorney for CollegeAmerica Appellants:
Sean Connelly, #33600
CONNELLY LAW LLC
3200 Cherry Creek So. Dr., #720
Denver, CO 80209
303-302-7849
sean@sconnellylaw.com

OPENING BRIEF OF DEFENDANTS-APPELLANTS CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC.; COLLEGEAMERICA DENVER, INC.; COLLEGEAMERICA ARIZONA, INC., divisions thereof, d/b/a COLLEGEAMERICA; STEVENS-HENAGER COLLEGE, INC., a division thereof, d/b/a STEVENS-HENAGER COLLEGE; and COLLEGEAMERICA SERVICES, INC. [collectively, "COLLEGEAMERICA"]

Certificate of Compliance

I hereby certify that this Opening Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Opening Brief complies with the applicable word limits set forth in C.A.R. 28(g). It contains 9,072 words (including screenshots and the "References in Brief to Record" section).

The Opening Brief complies with all other requirements of C.A.R. 28. It contains, under a separate heading before discussing each issue, a concise statement of (1) the applicable standard of review with citations to authority; and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

s/ Sean Connelly
Sean Connelly, # 33600
Attorney for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Rules

Other Authorities

References in Brief to Record

The separate Court Files are cited by year/CF/page. Thus, Defendants' jury demand found on page 4704 of the 2015 Court File is "15CF4704." The supplemental court file, containing post-judgment filings, is cited as "S-CF."

The district court's 8/21/20 opinion and judgment, attached to the notice of appeal and found in 20CF1-160, is "Op." It is cited by paragraph or page number.

The trial transcripts are cited (as the trial court cited them) by the lettered exhibits attached to the State's post-trial proposed findings. Thus, Tr. C:200 is page two hundred of the lettered "C" transcript of the third trial day (10/18/17).

The trial exhibits are cited by their original number (with volume and page number). For example, Exhibit 3406 (found in exhibits volume 4 at page 1139) is "Ex. 3406(4:1139)."

Introduction and Statement of Issues

Daniel Webster famously told the Supreme Court his alma mater was "a small college. And yet, there are those who love it." Oral arguments in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

CollegeAmerica (CA) never claimed to be Dartmouth. And yet … there are those who "loved" it. Tr. N:64 (Kristy Thompson); P:113 (Charlene Lowery). *Many* witnesses had "very positive feelings about their [CA] experience." Op. ¶ 551. A national expert extolled CA's "extraordinary" success with "at risk" students, and a prominent Ph.D.'s cost-benefit analysis detailed how CA graduates benefited.

The Colorado Attorney General's Office did not love CA. And, unlike the federal Department of Education (DOE), it believed CA and other private colleges serving non-traditional students were overpriced. It unleashed the heavy artillery of the Colorado Consumer Protection Act (CCPA) to launch a broad attack on the quality and value of a CA education and degree.

Defendants preserved legal objections to this qualitative attack while also presenting evidence that CA substantially benefited students—showing, in the words of Judge Mullins, that "CollegeAmerica has a place in our community." Tr. 5/8/15 at 173. They also showed that the qualitative attack wrongly expanded Colorado law to usurp DOE, the college's national accreditor, and state regulators.

The trial judge denied these legal objections and abridged important procedural protections. First, he struck a jury demand, even though the State sought $235 million: the $3 million in penalties ultimately awarded plus another $232 million. Next, he retroactively applied a 2019 law eliminating the requirement to prove significant public impact. Then, he delayed ruling for almost three years: until 4:46 a.m., on the very day a state judicial commission was meeting to review his delay, when he released an opinion copying most of the State's proposed findings, including typos.

The legal questions presented are:

(1) Did the trial judge wrongly: (a) adopt qualitative attacks on the value of CA's education by substituting his own policy judgments and rules for those of educational experts; and (b) retroactively apply, to past events in a case tried in 2017, new 2019 legislation eliminating a statutory element?

(2) Did each CCPA claim fail as a matter of law on many other grounds?

(3) Did the court abridge procedural rights by (a) denying Defendants a jury trial; (b) delaying ruling almost three years; and (c) copying most of the State's proposed findings?

Statement of Case and Facts

A. CA successfully educated at-risk students.

Between 2006 and 2016, more than ten thousand Coloradans enrolled at CA's campuses in Denver, Colorado Springs, and Fort Collins. Op. ¶ 6. CA's students were more "at risk" than traditional college or community college students because:

- They typically were of low socioeconomic status.
- Forty percent were minorities, mainly African American and Hispanic.
- Sixty-eight percent were women, including many single mothers.

Op. ¶¶ 8-9; Ex. 2626(4:1250); Tr. R:119-29. CA nonetheless far outperformed the graduation rates of its neighboring community colleges (Ex. 3406(4:1139)):

CollegeAmerica vs. Community Colleges

Average Graduation Rates 2012 - 2015

Institution	Graduation Rate
CollegeAmerica - Colorado Springs	44%
CollegeAmerica - Fort Collins	32%
CollegeAmerica - Denver	31%
Front Range Community College	19%
Pikes Peak Community College	15%
Community College of Denver	11%

CollegeAmerica's Graduation Rates Far Exceed Community Colleges

Source: Integrated Postsecondary Education Data System (IPEDS), U.S. Department of Education, NCES. https://nces.ed.gov/ipeds/

B. A regulatory "triad" set and enforced educational rules and standards.

CA was regulated by a "triad." DOE set and enforced rules; the Accrediting Commission of Career Schools and Colleges (ACCSC) accredited CA and approved its programs; and Colorado's Division of Private Occupational Schools (DPOS) was the state regulator. Op. 6-7, 10-11.

DOE recently extolled the "personalized" benefits of proprietary college education, while criticizing "condescending" approaches and rejecting rules that "could significantly disadvantage institutions or programs that serve these already underserved communities." 84 Fed. Reg. 31392, 31398, 31415 (July 1, 2019). As a "market viability test," DOE requires that such colleges receive at least ten percent of funds from non-federal Title IV loans. Op. 7.

Federal rules require colleges to make website disclosures of occupation-based wage data from the federal Bureau of Labor Statistics (BLS). 34 C.F.R. § 668.6; Tr. Q:132-35, R:293. After years of struggling with intractable issues of how colleges should calculate their own gainful employment statistics, DOE in 2019 "rescinded" a rule that would have required reporting college-specific graduate earnings. Op. 7; *see* 84 Fed. Reg. at 31392-93. Colorado's DPOS never required reporting college-specific data and offered no guidance for calculating such numbers. Tr. J:85-86.

C. This lawsuit was a qualitative attack on CA.

1. The State claimed CA was worthless or at least not worth its cost.

The State's theory was that CA was overpriced and indeed worthless. That theory culminated in the State's demand for individual money judgments equaling "100%" of all tuition CA received over a decade, which the State calculated as more than $232 million. 17CF6159 & 17CF11073¶824.

Throughout a 2015 preliminary injunction hearing, the State denigrated CA by arguing "[i]t absolutely should matter" that CA "is a career college. This is not CU Boulder." *Id.* at 60-61. After Judge Mullins suggested "the Attorney General's office has basically said CollegeAmerica's a bad thing" that "has no worth," *id.* at 87, the State said it was "not asking this Court to judge whether or not the degrees CollegeAmerica offers are worthwhile." *Id.* at 88. But that denial was belied by the State's ultimate financial demands, and it rang hollow given its other arguments, as illustrated by the following exchange:

> [THE COURT]: But see, I keep thinking that's a bias against these types of schools as opposed to a traditional school.
>
> [Assistant AG]: Bias maybe. I'm not arguing that. But it's a reality. …

Tr. 5/8/15 at 124.

The qualitative attack reached its apex when the State sought against every Defendant every dollar every student paid CA over more than a decade, plus penalties. The court considered six penalty claims: three broad ones denigrating a CA degree, and three narrow ones involving specific programs. The three broad rulings held: (1) CA could not advertise truthful national wage data because its mostly minority and female students supposedly cared only about college-specific data (Op. ¶¶ 596, 603); (2) CA did not follow ACCSC reporting rules (Op. ¶¶ 210-306); and (3) EduPlan financing was not truly "affordable" and credit-helpful "for the vast majority of students" (Op. 79).

2. Defendants argued the qualitative attack was legally misguided but also proved that CA benefited students.

Throughout this case, in dispositive motions and proposed conclusions, Defendants raised legal challenges to the qualitative attacks. 17CF9110-11, 9150-54, 9205-13. When these legal challenges failed, Defendants met the State's qualitative attack directly, by proving the value of a CA education through testimony of many satisfied students and through educational and economics experts.

Ten former students—supposed victims, according to the State—testified regarding their life-changing education. Tr. K:267,278, L:8,37, M:209,228, N:53, O:163, P:61,105. The court acknowledged the many witnesses with "very positive feelings about their [CA] experience." Op. ¶ 551.

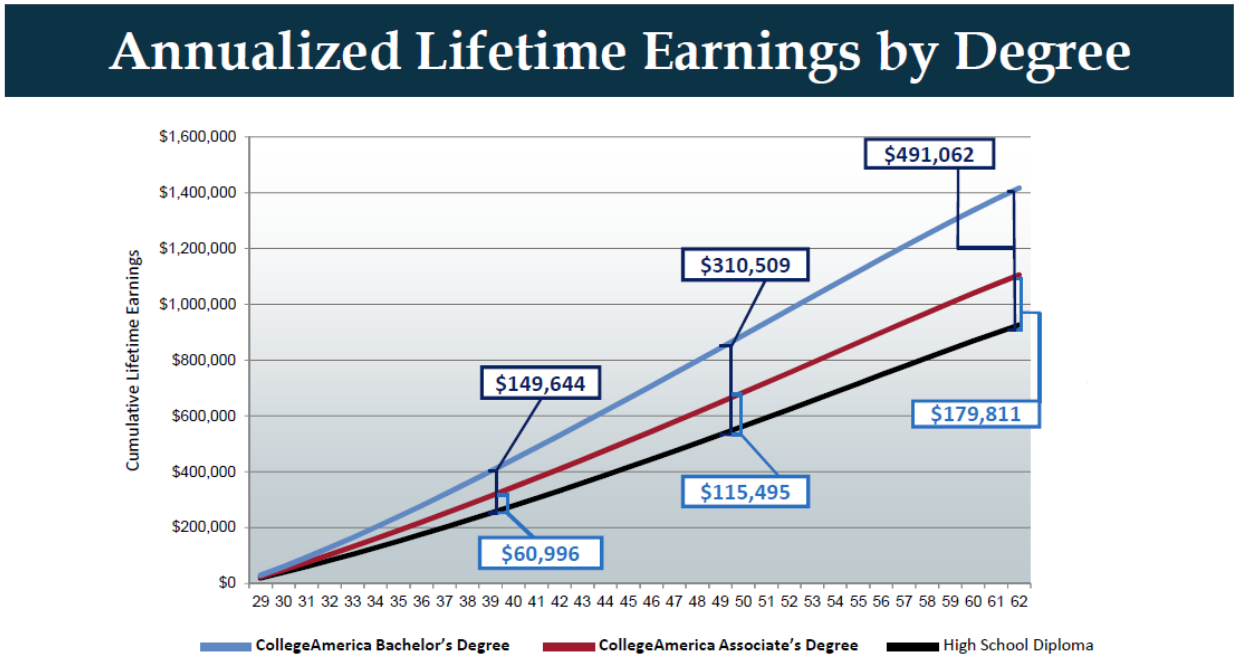
These students' often-emotional testimony detailed how CA provided the extraordinary personal support they needed to succeed in college and beyond. A single mother who at the time could not afford Christmas presents for her children tearfully recalled how CA's staff bought her children Christmas presents. Tr. P:113-14. The many other witnesses who glowingly described their CA experiences included:

- Claudio Herrera described how CA's flexibility helped him continue his education despite personal tragedy, Tr. K:269-70.
- Anthony Chavez said CA "completely changed my life," L:10-25.
- Veronica Huerta testified that CA's "supportive" environment helped secure her "dream job," L:46-56.
- Wendy Blanchard fondly recalled CA's "amazing" staff, M:222.
- Beth Gray said CA's "passionate" instructors made attending CA a "great decision," O:179-85.
- Camden DeJong described how he had received "one-on-one" classroom attention and said that attending CA was the "best decision of my life," M:237-44.

Many CA students had failed in prior educational endeavors, including in community colleges. Almost half turned to CA after dropping out from another college or community college. Ex. 3400(4:1237).

Diane Auer Jones, a national education expert who testified a week before being named to a senior federal position (with DOE), described how CA benefited its students by being able to "tailor" their education with special schedules and services. Tr. R:74-75,130-57. She said comparable institutions would "give their right arm" for CA's "extraordinary" graduation rate. R:136-38.

Dr. Jonathan Guryan, a tenured Northwestern University economics professor with a Princeton degree and M.I.T. doctorate, detailed the financial benefits of a CA degree based on his analysis of 2,365 graduates. Op. ¶ 541; Tr. L:70-83. He testified that some graduates would earn a million dollars more from their CA degree, Tr. L:155-56, and he presented this chart of averages (Ex. 3375(4:1179)):



3. Two district judges viewed the qualitative attacks differently.

a. Judge Mullins in 2015 found that CA had a place in the Colorado community.

In 2015, a four-day evidentiary hearing and another day of closing argument revealed that the State's case was a broad qualitative attack on CA. In rejecting that qualitative attack, and denying all preliminary injunctive relief, Judge Mullins affirmed, "CollegeAmerica has a place in our community." *Id.* at 173.

b. Judge Buchanan's belated 2020 ruling imposed $3 million in penalties and created new rules.

The case was reassigned to Judge Buchanan, who struck a jury trial demand in 2016 (16CF720-24) and completed a bench trial in 2017. In January 2020, a state judicial commission contacted the judge about his delay and repeatedly urged him to rule. Yet he delayed many months more, until finally ruling *at 4:46 a.m.* on the August morning the commission again was taking up his delay—by copying the structure and large swaths of the State's proposed findings.[1]

[1] Further details regarding the commission and the judge—and the commission's ultimate 8/27/20 decision—are revealed by exhibits (transmitted to this Court under seal) attached to Defendants' post-trial motion. A 10/8/20 email therein shows the commission told a defendant he could make the documents public. And the First Amendment affords him that right. *See* Bryan E. Keyt, *Reconciling the Need for Confidentiality in Judicial Disciplinary Proceedings with the First Amendment: A Justification Based Analysis*, 7 Geo. J. Legal Ethics 959 (1994). But the judge nonetheless ordered them sealed, *see* S-CF 2947, so this brief will not detail the exhibits, which the division can review.

The judgment imposed the maximum $3 million penalties by assessing $500,000 on all six CCPA claims (three broad ones impugning CA's value and three very narrow ones). Op. ¶¶ 734-60. It declined to order that Defendants repay the $232 million total tuition received by CA. Op. ¶¶ 769-74.[2]

The court retroactively applied new 2019 legislation providing (contrary to a 2019 appellate decision) that the Attorney General need not prove significant public impact in CCPA cases. Op. 109-17. It also enacted new "affirmative" rules on how CA must report its own graduates' "median wages." Op. ¶ 723(b) & (d).

Defendants' timely motion to alter the judgment identified legal problems in the judge's belated ruling; it also showed that the 2020 injunctions were moot the day they issued because CA had stopped enrolling students in 2019 and announced permanent closure in 2020. S-CF 30-33, 42. The judge denied the motion in its entirety. S-CF 2507-12.

[2] The court also rejected most of the State's challenges to EduPlan financing under the Uniform Consumer Credit Code (UCCC). Op. ¶¶ 663-702. While it did order UCCC restitution for fourteen students, Op. ¶ 725, Defendants unconditionally satisfied that restitution order. S-CF 310-12. Penalties were awarded only under the CCPA, Op. 153 n.16, so this appeal raises no UCCC issues.

Summary of Argument

This State distorted the CCPA to mount a qualitative attack on a college's value. Defendants presented extensive evidence showing how CA provided value: satisfied students testified how CA transformed their lives; a national education expert testified that CA served more at-risk students yet outperformed community colleges; and a prominent Ph.D. provided a cost-benefit analysis showing how CA graduates benefited financially.

This qualitative attack defied the educational malpractice doctrine and usurped the roles of DOE, DPOS, and a national accreditor. The court erred further by giving retroactive effect to a 2019 law eliminating a statutory element requiring significant public impact—even though there admittedly was no clear legislative intent for retroactivity.

The improper qualitative attack manifested itself in the court's first ruling: that although no student was misled, CA could not *truthfully* advertise national wage data used by DOE itself and by almost every Colorado college. The court failed to apply the reasonable consumer standard and deemed CA's advertising improper by paternalistically reasoning that "general" benefits of college education were irrelevant to prospective CA students. Op. ¶ 603.

All six CCPA claims failed as a matter of law, for many reasons. The three broad rulings were impermissible qualitative attacks and also failed for other reasons: the first broad ruling, holding CA liable for advertising national wage data, failed to apply correct legal standards for truthful advertising alleged to imply something misleading; the second broad ruling usurped accreditation functions and defied accreditation methodology to audit CA's accreditation reports; and the third broad ruling misconstrued a truthful statement that students could afford college to make an improper qualitative judgment that CA was not worth its cost. The three narrow rulings (involving EMT, radiology, and sonography) failed because they involved private misunderstandings of a handful of students about CA catalog listings.

Finally, procedural errors require a new trial before a new trier of fact. The judge wrongly denied a jury trial in a case seeking *$235 million* from every Defendant. To make matters worse, the judge delayed for almost three years—and belatedly ruled by copying wholesale most of the State's proposed findings. Such a flawed decision resulting from such a flawed process cannot stand.

Argument

I. Overarching legal errors permeated the CCPA claims.

Colorado and other states barring educational malpractice claims reject broad attacks on the quality of a college's education—in part because judges lack expertise of regulators and accreditors. Here, to adopt three broad claims raising qualitative attacks, the judge created new rules usurping regulators and accreditors. Then, to adopt three narrow claims affecting a handful of students, he retroactively applied a 2019 law eliminating the significant public impact element.

A. The court wrongly decided the three broad claims by allowing improper qualitative attacks on CA's education.

1. Preservation and Standard of Review

Defendants repeatedly argued below that the State's qualitative attacks were for "educational malpractice," overstepped CCPA boundaries, and usurped regulatory and accreditation roles. 17CF9110-11, 9150-54, 9205-13; 15CF148-70. The court rejected these arguments. Op. 104-08; *see also* 15CF4604-05 (order denying motion to dismiss). The viability of a claim "for educational malpractice is a question of law." *Tolman v. CenCor Career Colleges, Inc.*, 851 P.2d 203, 205 (Colo. App. 1992) (*Tolman I*), *aff'd*, 868 P.2d 396 (Colo. 1994) (*Tolman II*). Legal conclusions after a bench trial are reviewed de novo. *State Farm Mut. Ins. Co. v. Johnson*, 2017 CO 68, ¶ 12.

2. Discussion

a. The CCPA does not allow educational malpractice claims.

Like most states, Colorado does not recognize claims for "educational malpractice." *Tolman I*, 851 P.2d at 205. Lawsuits may challenge an institution's failure to "provide *specifically promised* educational services," but may not mount broad qualitative attacks. *Tolman II*, 868 P.2d at 399 (emphasis added).

A "plaintiff may bring a claim under consumer protection statutes only to the extent that the plaintiff does not allege educational malpractice." *Jones v. Capella Univ.*, ___ F. Supp. 3d ___, 2020 WL 6875419, *4 (D. Minn. Nov. 23, 2020); *accord Alsides v. Brown Institute, Ltd.,* 592 N.W.2d 468, 472-74 (Minn. Ct. App. 1999) (citing *Tolman II* in rejecting a consumer protection act claim challenging the "general quality" of proprietary trade school education); *see* Sarah Anjum, *Students as Consumers*, 43 U. Tol. L. Rev. 151, 170 (2011) (a "most compelling reason to limit application of consumer fraud statutes is the difficulty in distinguishing a consumer fraud claim from a claim for educational malpractice"). Judge Kane rejected a claim that "can be fairly construed as one for educational malpractice." *Houston v. Mile High Adventist Acad.*, 846 F. Supp. 1449, 1456 (D. Colo. 1994) (following *Tolman I-II*).

Other courts have rejected claims attacking the "general quality" of a college's education and requiring "comparative value judgments," dismissing them as "repackaged actions asserting educational malpractice." *Basso v. NYU*, 2020 WL 7027589, *15 (S.D.N.Y. Nov. 30, 2020). Although no Colorado case countenances a qualitative attack on the general value of educational services, the trial judge invoked CCPA provisions covering "deceptive trade practice[s]" about "goods, food, services, or property." C.R.S. § 6–1–105(1). He relied on three subsections, involving misrepresenting "benefits" of things, misrepresenting "a particular standard, quality, or grade," and not disclosing "material" information. *Id.* (e), (g) & (u); *see* Op. 101.

While educational services are not categorically outside CCPA coverage, nothing reveals legislative intent to reach beyond "specifically promised educational services." *Tolman II*, 868 P.2d at 399; *see Alsides,* 592 N.W.2d at 472-74 (citing *Tolman II* to reject consumer protection act claim challenging "general quality" of proprietary trade school education). This case is far afield from the landmark CCPA case involving deceptive pricing of fungible goods. *May Dept. Stores Co. v. State*, 863 P.2d 967 (Colo. 1993). Indeed, even in fields like law or medicine, which *are* subject to malpractice claims, a CCPA claim is not established simply because services were deficient. *See Crowe v. Tull*, 126 P.3d 196, 208 (Colo. 2006).

The CCPA does not allow courts to value college education. No "traditional" college would suffer that qualitative inquiry, and many would flunk it. Is it worth paying three times more for a private rather than a state college? What if it is Daniel Webster's Dartmouth? But what if it has little or no prestige? The educational malpractice doctrine removes these value judgments from judicial inquiry.

b. The attack raises troubling issues of bias and elitism.

The divergent views of two Denver judges illustrate the legal problems with the State's qualitative attack. Judge Mullins recognized "bias" against proprietary colleges but affirmed that "CollegeAmerica has a place in our community." Tr. 5/8/15 at 124, 136, 173. Judge Buchanan admitted it was "difficult to express [some] conclusions without sounding pejorative or elitist." Op. 144 n.15. He compounded the problem by relying on the fact that "the population of students who typically enrolled at CollegeAmerica – racial minorities and women – earned less than the national average." Op. ¶ 596. A college may cite truthful national data on general educational benefits despite serving students facing racial, gender, or class barriers not faced by more privileged students. To hold otherwise perpetuates historical discrimination. *Cf. Ross v. Creighton Univ.*, 957 F.2d 410, 415 (7th Cir. 1992) (rejecting educational malpractice claims that could discourage educating "students from disadvantaged backgrounds").

c. The court usurped regulatory and accreditation functions by making policy decisions and creating new rules.

The trial judge overstepped judicial boundaries and usurped each leg of the "regulatory triad." Op. 6, 10. First, deciding the value of proprietary colleges participating in Title IV funding is the role of the federal government, which uses a "90/10 rule" as a "market viability test." Op. 7; *see* 34 C.F.R. § 668.14(b)(16). After years of struggling with an intractable issue, DOE in 2019 "rescinded" a rule that would have required reporting college-specific "median earnings," Op. 7—yet Judge Buchanan the very next year usurped DOE by creating new "affirmative" rules on how CA must report "median wages." Op. ¶ 723(b, d).

Second, the trial judge usurped CA's national accreditor by assuming the role as initial arbiter and adjudicator of "ACCSC's Standards" and "methodology." Op. ¶¶ 287-88. This was improper, as courts lack "the expertise or the resources to perform the accreditation function *ab initio*." *Prof. Massage Training Ctr. v. ACCSC*, 781 F.3d 161, 172 (4th Cir. 2015).

Third, the judge usurped the Colorado DPOS, which did not require reporting college-specific data and provided no guidance for calculating those numbers. Tr. J:85-86. Only by creating new rules, Op. ¶ 723(b, d), and essentially applying them retroactively, could the judge fault Defendants for omitting CA-specific data. Op. ¶¶ 604-06.

B. The court erred by retroactively applying a 2019 law eliminating the significant public impact element.

1. Preservation and Standard of Review

Defendants repeatedly argued that the State was required, but failed, to prove "significant public impact." 19CF128-36, 19CF608-21, 19CF820-44. The court initially denied this was an element (17CF8605-09) and adhered to that ruling even after the contrary holding in *State v. Castle Law Group, LLC*, 2019 COA 49, because a later 2019 statutory amendment removed that element in Attorney General suits. Rejecting defense arguments, the court held that this 2019 amendment applied retroactively. Op. 109-17. Appellate review is de novo. *Taylor Morrison of Colo., Inc. v. Bemas Constr., Inc.*, 2014 COA 10, ¶ 16.

2. The 2019 law cannot apply retroactively.

Some retroactivity issues are "difficult." *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 11 (Colo. 1993). This one is not.

Statutes are "presumed" to operate prospectively only, as retroactivity is "generally disfavored by the common law, and by statute." *Id.* (citing C.R.S. § 2-4-202). Cases "require a *clear legislative intent* that the law apply retroactively to overcome the presumption of prospectivity." *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006) (emphasis added). Even then, Colorado's Constitution bars "retrospective" legislation. Colo. Const. art. II, § 11.

There was no clear intent that this 2019 amendment apply retroactively. When the legislature intended to apply *other* provisions in that same law to earlier transactions (but even then, *not* to pending lawsuits), it expressly said they "apply to civil actions filed on or after the effective date of this act." Laws 2019, Ch. 268 (H.B. 19-1289), § 5. That language, conspicuously inapplicable to our provision, *id.* §§ 1 & 5, shows retroactive intent. *Taylor*, 2014 COA 10, ¶ 23. The trial judge acknowledged that the significant public impact provision was "decidedly less than clear" on retroactivity (Op. 116), which necessarily means it flunks the "clear legislative intent" requirement. *Parker*, 138 P.3d at 290.

To accord retroactivity, the court defied another presumption as well as the *Castle* decision, by deeming the amendment one that effected no "change" and served merely as "clarification" of what an "ambiguous" law always meant. Op. 115. But courts "presume that by amending the law the legislature has intended to change it" (*City of Colo. Springs v. Powell*, 156 P.3d 461, 465 (Colo. 2007)), so "even a clear indication of intent to clarify rather than change existing law could not dispositively establish the meaning of previously enacted legislation." *Dep't of Transp. v. Gypsum Ranch Co.*, 244 P.3d 127, 131 (Colo. 2010). And *Castle* identified three legal reasons why the CCPA required significant public impact. 2019 COA 49, ¶¶ 105-11.

The decision was unconstitutionally retrospective because eliminating a statutory element or defense "attaches a new disability, in respect to [past] transactions." *Parker*, 138 P.3d at 290 (internal quotations omitted). Under *Castle*, Defendants could not have suffered CCPA penalties for conduct that did not significantly impact the public; the 2019 law imposes new CCPA liability where once there was none. Even where a defendant could have been held liable for false claims, the Supreme Court precluded retroactivity because an amendment that "changes the substance of the existing cause of action" and "eliminates a defense" would "attach a new disability, in respect to transactions or considerations already past." *Hughes Aircraft Co. v. U.S.*, 520 U.S. 939, 948-50 (1997) (internal punctuation omitted). That reasoning applies even more strongly to amendments eliminating claim *elements* rather than mere potential defenses.

3. The judgment cannot stand because the judge did not, and on three narrow claims could not, find significant public impact.

Because significant public impact is a factual element, *One Creative Place, LLC v. Jet Center Partners, LLC*, 259 P.3d 1287, 1289-90 (Colo. App. 2011), the judgment minimally must be vacated and the case remanded on all claims. On the last three narrow claims, involving only a few students, judgment should be entered for Defendants as a matter of law. *See Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 24-26 (Colo. App. 2010).

The three narrow claims collectively involved *less than ten* of CA's ten-thousand-plus students: (1) "two consumers" for EMT; (2) "five consumers" for LSO; and (3) "two consumers" for sonography. Op. ¶¶ 740, 747, 752. Those programs were listed in the CA "catalog" a few years or in an admissions "binder" one year; EMT also was "on the website for one day." Op. ¶¶ 742-45, 749-50, 754.

Obscure listings in a private college catalog—affecting only two, five and two students, respectively—do not "significantly impact[] the public as actual or potential consumers." *Castle*, 2019 COA 49, ¶ 106. Indeed, significant public impact has been held lacking as a matter of law on much stronger records than this one. *See, e.g., Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 150 (Colo. 2003) ("Three affected dealers out of approximately 550 worldwide does not significantly affect the public…."); *Colo. Coffee Bean*, 251 P.3d at 24-26 (no significant public impact, even where franchises were subject of "widespread advertising" on internet and more than five hundred persons responded, but only 68 information packets ultimately were sent); *see also Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP*, 230 P.3d 1275, 1281 (Colo. App. 2010) (discussing *Rhino Linings*, *Colo. Coffee Bean*, and *Curragh Queensland Mining Ltd. v. Dresser Indus., Inc.*, 55 P.3d 235, 241 (Colo. App. 2002)). Defendants therefore are entitled to judgment as a matter of law on the final three narrow claims.

II. Other legal errors infected each CCPA claim.

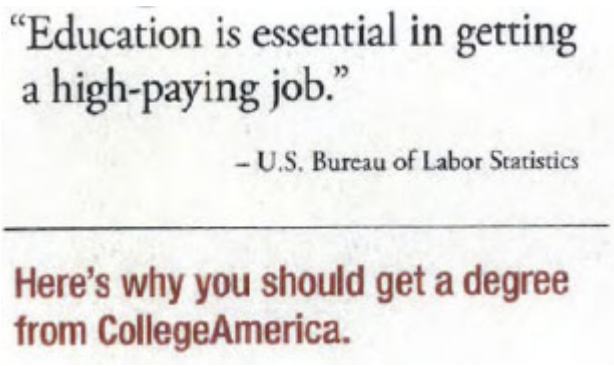
A. Preservation and Standard of Review

Defendants identified the CCPA claims' legal deficiencies. 17CF9042-9252. The court rejected those arguments and upheld legal liability on all six claims. Op. 101-131. In CCPA cases, "whether the challenged conduct constitutes an unfair or deceptive trade practice is a question of law that we review de novo." *Shekarchian v. Maxx Auto Recovery, Inc.*, 2019 COA 60, ¶ 33.

1. CA did not violate the law by truthfully citing national wage data.

The court wrongly imposed lability for CA's *truthfully* using national wage information—the same national wage data used "frequently" by DOE and "numerous sources within the education industry"—on the "general" value of college degrees. Op. ¶¶ 39-40. "Focusing solely on Ex. 608" (a mailed brochure), it imposed the maximum $500,000 penalty. Op. ¶ 738.

The mailer singled out by the court stated [Ex. 608(1:302)]:



Like "numerous sources within the education industry, including … the DOE" (Op. ¶ 39), it added, "You could earn about a million dollars more over your lifetime if you hold the right degree." Ex. 608(1:302). This statement expressly and correctly identified its "Source" as the U.S. Census Bureau and provided a federal website citation. *Id.* It added, "The amount of increased earnings varies by field and degree, and your actual earnings could be more or less than $1,000,000." *Id.*

a. The court disregarded the reasonable consumer standard.

The "reasonable consumer" inquiry governs whether advertising is deceptive. *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1017 (9th Cir. 2020); *see Rhino Linings*, 62 P.3d at 148 n.11 (quoting a Michigan case considering the effect on a "reasonable person"). It "requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 973 (7th Cir. 2020) (quotations omitted). This inquiry is particularly important where "true" claims are challenged for "misleading implications." Op. 103-04, quoting *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948); *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 322 (7th Cir. 1992). There, "what matters is how consumers actually understand the advertising." *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 479 (7th Cir. 2020) (quotations omitted).

The trial court never found that reasonable consumers would be, or that anyone was, deceived into believing that national data sourced to the federal government was CA-specific. The court cited *Kraft* (Op. 104) but ignored its teaching that courts "generally require extrinsic proof that an advertisement conveys an implied claim." 970 F.2d at 319. This may be relaxed by "credit[ing] the expertise of the FTC," but even those cases "relied on survey data to establish that the deception was material." *Beardsall*, 953 F.3d at 975. As former FTC consumer chief Howard Beales explained, truthful information cannot be deemed impliedly deceptive absent consumer survey evidence. Op. ¶¶ 49-51 (quoting Tr. M:108-16).

Lacking any evidence of consumer deception, in what Dr. Beales found to be "a colossal waste of resources" (Tr. M:183), the court jettisoned the reasonable consumer test to impose its own policy views. It compounded this legal error in two key respects.

First, the court turned the inquiry on its head to relieve the State of the burden of proving deception. It wrote, "To the uninitiated, a simple reference to … 'BLS' or the 'Census Bureau,' does not necessarily mean that the information provided is not CollegeAmerica-specific data." Op. ¶ 598. But that double negative description of the "uninitiated" is a far cry from affirmatively applying the reasonable consumer standard.

Second, the court imposed its own paternalistic view that general benefits of college education were irrelevant to prospective CA students, for whom supposedly "the question is not whether education *in general* is good, but rather, *how good* is a CollegeAmerica education?" Op. ¶ 603. Still worse, the court relied on the fact that "the population of students who typically enrolled at CollegeAmerica – racial minorities and women – earned less than the national average." Op. ¶ 596. It is not just legally wrong, but morally and constitutionally offensive, to opine that minority and female students do not care about national wage averages because they are destined to make less.

b. Colleges cannot be liable for advertising truthful federal wage data that DOE requires them to disclose.

DOE *required* disclosing BLS wage data on CA's website. 34 C.F.R. § 668.6; Tr. J:177, Q:132-33, R:293. Preventing advertising that data defies at least the spirit, if not the letter, of C.R.S. § 6-1-106 (CCPA "does not apply" to "[c]onduct in compliance with" federal agency rules).

Using national wage data is a "safe zone," avoiding problems with college-specific data. Tr. R:346-47. It thus is "extremely common" for colleges throughout Colorado to use national data on the economic benefits of college degrees, *even though all but two schools (Colorado School of Mines and another school) fell below BLS averages*. Tr. S:67-78,106; Ex. 3519(4:899). Here are some examples:

- Regis University used BLS data of "median annual salaries by level of degree earned."

- CU-Boulder used BLS data that environmental engineers' "annual median pay in 2016 was $84,890 per year."

- CSU used BLS data chart to tout "value of a degree" and "financial returns of education."

- Trinidad State used BLS data chart as "salary information for some of the careers for which Trinidad State helps prepare students."

Ex. 3517(4:900-02,924).

The court itself ultimately illustrated why using national data is a "safe zone," avoiding problems inherent in college-specific data. Tr. J:82-92; R:346-47. To require disclosing CA-specific data, the court exceeded the judicial role by legislating new "affirmative" rules on what "timeframe" CA should use and how it should report "less than ten graduates during that timeframe." Op. ¶ 723(d).

c. The court erred in declining holistic review.

The trial court recognized, but then refused to effectuate, the need "to consider the entire advertisement, transaction or course of dealing." Op. ¶ 53 (discussing Dr. Beales's expert testimony at Tr. M:146). Especially where truthful statements are challenged as impliedly misleading, courts must consider "all the information available to consumers and the context in which that information is provided and used." *Bell*, 982 F.3d at 477.

CA's admissions and orientation processes, along with its three-week "false start" period (when students can withdraw for any reason with no financial obligation), indisputably provided detailed disclosures. Tr. C:79-89, I:39-44, N:99-104. Considering this holistic process, Judge Mullins found:

> Enrollment in CollegeAmerica is a multi-step process which takes place over several weeks [and] … provides progressively more information to prospective students as they advance through the enrollment process. No student incurs any financial obligation until after completing the enrollment process and attending the first three weeks of classes…. The process provides institutional safeguards to ensure that prospective students get the accurate information they need to make an informed decision about whether to enroll.

15CF4248.

The trial court eschewed holistic review by reasoning that false statements cannot be "cured" by disclosure. Op. 103; *but cf. State v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 15 (Colo. App. 2009) ("Disclosure may eliminate an otherwise deceptive trade practice."). Here, there were no false statements to "cure," and holistic review confirmed that truthful national data misled no one.

Finally, this holistic process refutes any notion that by using truthful data, Defendants "*knowingly* engaged in a deceptive trade practice." *Crowe*, 126 P.3d at 204 (emphasis added). Advertising national data is ubiquitous in higher education, including by DOE (Op. ¶ 39), and CA's advertising was regularly reviewed by ACCSC and state regulators. *See* Tr. Q:14-16,30-54; J:100-12.

2. CA followed accreditation rules on reporting employment.

The court itself called the second CCPA claim "hypertechnical." Op. ¶ 609. As required, CA reported graduate-employment data to ACCSC, but the State hired its own auditor, who "disagreed with [CA's] calculations" and "recalculated" numbers the court deemed more "consistent with ACCSC's Standards" and "methodology." Op. ¶ 225, 287-88. This ruling suffers from many legal flaws.

a. Courts cannot apply accreditation rules in the first instance.

The Fourth Circuit identified several reasons why it is "improper" and "impermissible" for courts to review ACCSC accreditation rules de novo. *PMTC v. ACCSC*, 781 F.3d at 169-77. First, as even the trial court recognized in calling this claim "hypertechnical" (Op. ¶ 609), the rules may be "highly technical and specialized." 781 F.3d at 171. Second, ACCSC not only employs staff with special "expertise and knowledge" but "also relies on occupational specialists with training … as part of the on-site visits." *Id.* at 172. Third, courts making the initial determination of how accreditation rules should be interpreted and applied deprive ACCSC of the opportunity "to allow itself flexibility." *Id.* at 174. For these and related reasons, courts review ACCSC rules only after the fact, as "it is not realistic to think courts possess either the expertise or the resources to perform the accreditation function *ab initio*." *Id.* at 172.

The trial court violated each of these principles by becoming an arbiter and adjudicator of "ACCSC's Standards" and "methodology." Op. ¶¶ 287-88. First, despite lacking educational expertise, it dove headfirst into construing and applying highly technical ACCSC Standards. *See, e.g.,* Op. ¶¶ 228-29, 275, 299 (opining on when a 2011 alert took effect, whether "certified nursing assistants [are] employed in field," and whether the distinction between "Standards of Accreditation" and "guidelines" is a "distinction without a difference"). Second, the court relied on the State's hired CPA with no expertise in or experience applying ACCSC employment reporting standards, even though ACCSC recognizes "nuances" in this area and discourages using CPAs. Ex. 3511(4:897); *see* Tr. G:24-25, Q:198-99. Third, the court accepted the auditor's rigid documentary approach even though ACCSC itself recognizes the need for "flexibility." *PMTC*, 781 F.3d at 174.

Judicially usurping accreditation functions, at the behest of a state attorney general's office, creates a vicious cycle. A state attorney general's lawsuit puts pressure on ACCSC. Tr. R:183-84. In October 2020, after the court held Defendants violated ACCSC rules, ACCSC relied on the ruling to question the accreditation status of Defendants' other colleges. *See* S-CF 641-47. This vicious cycle is self-selective and unfair: accreditors, not courts or state attorneys general, should enforce accreditation rules in the first instance, subject to later judicial review.

b. The state audit defied ACCSC's approach.

The State's auditor defied how ACCSC applies its own Standards. More than half (177) of the 326 employment classifications he rejected were for *documentation problems*: 151 for "lacks sufficient documentation/information" and 26 more for "unknown/no documentation." Op. ¶¶ 243-47.

Unlike ACCSC, which recognizes that students and employers do not always provide employment information, the auditor made no effort to determine actual employment. Tr. G:240-41. He admittedly defied the methodology of ACCSC, which tries by other means to verify employment if documentation is lacking. Tr. G:234-41; Tr. Q:179-80. That is why ACCSC recommends verifying employment within six months, while information is "fresh." Tr. G:240-41. Recognizing these "nuances," ACCSC has expressed concerns that CPAs "struggle at a higher rate in making contact with graduates and employers (resulting in more 'unable to verify' in particular)." Ex. 3511(4:897); *see* Tr. G:24-25, Q:198-99.

The State's very mission contradicted ACCSC's approach. Accreditation standards were not meant to be punitive, and the accreditation process allows ACCSC to *clarify* "concerns." Tr. Q:107-13; Ex. 19(2:1435). In contrast, the State hired its auditor in an adversarial setting to make a retrospective "reclassification" that was purely punitive.

The divergent approaches are illustrated by the issue of whether associate's degree graduates of CA's Medical Specialties program, in certified nursing assistant (CNA) positions, are "employed in field." Op. ¶¶ 269-76. In 2016, an ACCSC review team and CA engaged in good faith dialogue on this issue. *See* Ex. 22(2:2093). Although CA "provided more information regarding the duties of those positions during the on-site evaluation," the review team disagreed. *Id.* CA then advocated to ACCSC why this classification was historically accepted and appropriate. *See* Ex. 19(2:1433-38). ACCSC ultimately was "not persuaded" that this historical record showed "tacit acceptance or approval of the practice, or justification for continuing" it. *Id.* at 1435.

When ACCSC conclusively resolved the CNA classification issue in 2017, using that "opportunity to make this clear," it did so prospectively by requiring "comprehensive analysis of the [program's] educational objectives." *Id.* at 1435-38. In contrast, the court used that 2017 determination retroactively, solely to impose backward-looking penalties for classification choices made years earlier.

c. <u>There can be no CCPA liability regardless</u>.

For two additional reasons, the claim would fail even if the court properly could and did apply ACCSC Standards and methodology. First, the graduate-employment rates reported to ACCSC were never used in advertisements but were

(as required) disclosed on CA's website and in campuses. Op. ¶¶ 300-06. The court deemed it enough that "reports to ACCSC … *appear to have some practical effect* on Colorado consumers." Op. ¶ 300 (emphasis added). But that is a far cry from finding that the reports "significantly impacted the public as actual or potential consumers." *Castle*, 2019 COA 49, ¶ 99 (internal punctuation omitted). Significant public impact is not established simply because information was posted on the internet. *See, e.g., Colo. Coffee Bean*, 251 P.3d at 24-26, discussed *supra*.

Second, CA contemporaneously had hired independent third parties to audit reports for two key years. Tr. Q:19-95; *see* Op. ¶¶ 282-85 (discussing 2011 Shaw Mumford audit and 2015 MMI audit). The court noted that it could be an administrative "nightmare" for CA's "compliance department" to track "three cohorts, to be reported in the next three annual reports, which involve as many as 9000 students." Op. ¶ 217. Yet, while not suggesting bad faith in either outside audit, the court deemed the State's audit more "comprehensive" and "helpful." Op. ¶¶ 284-85. But it failed to explain how, in the face of independent audits on which they reasonably relied in real time, Defendants "knowingly engaged in a deceptive trade practice." *Crowe*, 126 P.3d at 204. This hypertechnical claim necessarily failed because the CCPA does not punish a "negligence or an honest mistake" in applying technical standards. *Id.*

3. CA properly described educational benefits.

The third CCPA claim—challenging statements that EduPlan financing could help make college "affordable" and re-establish credit—attacked the value of a CA degree. But, as Judge Mullins found, saying that "EduPlan helps make college 'affordable' is not misleading" because many students otherwise could not afford to pay tuition. 15CF4254. Judge Buchanan, in contrast, wrongly used that truism as a springboard for a qualitative analysis of student outcomes. *See* Op. ¶¶ 407-562.[3]

The truthful statement that CA's financing could help students afford college and re-establish credit did not justify a qualitative comparison between CA and community colleges. As part of its educational mission, CA designed EduPlan to help students with poor credit histories gain the confidence and skills to help manage credit after graduation. *See* Ex. 235(2:596). CCPA liability should not turn on superficially surveying how many students ended up feeling "better off financially as a result of attending CollegeAmerica." Op. ¶ 498.

[3] The court relied on erroneous premises that (a) CA's "tuition is much higher" than tuition at community colleges, and (b) both "share a similar student demographic." Op. ¶ 407. First, as the court later recognized, community colleges impose "opportunity costs" because their programs take longer to complete. Op. ¶¶ 549, 688; *see* Tr. L:176-80, R:196-97 (Guryan and Jones); Ex. 2571(4:1320) (comparative chart); *accord* 84 Fed. Reg. at 31405 (discussing community colleges' "opportunity cost"). Second, CA served a far higher percentage of older, minority, and low-income students than did nearby community colleges. Ex. 2626(4:1250); Tr. R:125-28.

4. College catalog listings did not violate the CCPA.

a. Listing EMT did not violate the CCPA.

The 2006-08 catalog covering three Colorado campuses and a Wyoming campus listed EMT courses with eleven possible credit hours—with an express disclaimer that the "EMT option may not be available at all campuses." Op. ¶¶ 370. A 2009 admissions binder listed EMT among "Possible Certifications and Licenses," with another disclaimer. Op. ¶ 376; Ex. 188(2:1771). CA never offered EMT in Colorado, but two Coloradans testified they enrolled (in January 2008 and August 2009, respectively) thinking it did. Op. ¶¶ 367, 740.

Many legal problems (in addition to lack of significant public impact) precluded CCPA liability on this EMT claim. *First*, the disclaimer that EMT "may not be available at all campuses" (Op. ¶ 371) means reasonable consumers would not be misled when reading the catalog "holistically." *Beardsall*, 953 F.3d at 978.

Second, nothing showed that using a combined Colorado-Wyoming catalog was designed to deceive (two) Coloradans. This *at worst* was "negligence or an honest mistake." *Crowe*, 126 P.3d at 204.

Third, the statute of limitations barred claims for pre-December 2009 acts. Op. ¶ 655; *see* 17CF9213-15 (raising limitations defenses); *State v. Robert J. Hopp & Assocs.*, 2018 COA 69M, ¶ 28 (limitations reviewed de novo where facts are

undisputed). The 2006-08 catalog, 2009 binder, and enrollments all preceded that date. An EMT reference appearing "on the website for one day in or around August 2010" (Op. ¶ 742) was a simple "mistake" (Tr. J:43) on which no consumer relied—not part of any prior "series" of violations. C.R.S. § 6-1-115.

Fourth, this conduct cannot support $500,000 in penalties. Rather than assess two $2,000 "per consumer" penalties, the court assessed them "per transaction"—with "transaction" defined as *each day* covered by the catalog. Op. ¶¶ 741-46. But that catalog was a singular "publication." *Cf. May*, 863 P.2d at 975 (separate penalties for ads in different newspapers).

b. Listing LSO certification did not violate the CCPA.

The court similarly erred by imposing CCPA liability for statements regarding "possible" x-ray LSO certification that appeared in 2006-11 catalogs, a 2009 admissions binder, and an internal manual. Op. ¶¶ 318, 321. While CA provided the necessary requirements for LSO licensure exams in other states, and provided the requisite *didactic* hours for Colorado, the issue arose because Colorado's health department in 2005 added new *clinical* prerequisites requiring not only eighty didactic hours that CA provided but also at least 320 on-the-job clinical hours. Op. ¶ 308. Many legal problems (in addition to the significant public impact and penalties issues above) infected this claim.

First, the statements were true: LSO *was* a "possible" certification, albeit for which Colorado (after 2005), unlike other states, required "additional cost and study for the examination." Ex. 188(2:1771). Even the *internal* admissions document that the trial court deemed most damning, which stated CA courses could "lead to" LSO licensure (Op. ¶¶ 319, 634), was true. *See* Tr. J:272 (health department witness confirmed that CA's providing all didactic hours and some clinical hours could "lead to" satisfying LSO exam requirements).

Second, the court failed to read disclosures "holistically." *Beardsall*, 953 F.3d at 978. It failed to effectuate the enrollment agreement's bolded language, "**We do not guarantee that our educational programs will necessarily be sufficient to obtain any certification or license issued by a public or private agency.**" Op. ¶ 320; *see also id.* (quoting but not effectuating language, also in catalog, that "**such certifications and licenses will likely require additional study and/or cost**").

Third, this was not "knowingly engag[ing] in a deceptive trade practice." *Crowe*, 126 P.3d at 204. Just "*two days* after he learned of the first student complaint, Mr. Barney personally drafted and sent out a Data Letter addressing the certification requirements for virtually all of [CA's] programs, including the requirements for LSO licensure in Colorado." Op. ¶ 343 (emphasis added). There was no evidence any later-enrolling student complained about LSO. Op. ¶ 344.

c. Listing sonography did not violate the CCPA.

The final CCPA claim involved just "*two consumers*" who allegedly were misled that CA offered a sonography program. Op. ¶¶ 752-55 (emphasis added). This claim fails for many of the same legal reasons as the prior two claims, including lack of significant public impact and improper imposition of *per diem* penalties for each day sonography was listed in 2012-14 catalogs. Op. ¶ 754.

At state regulators' behest, CA first considered offering sonography in 2009, when another college "closed its doors" leaving students "without a way to finish their studies." Op. ¶¶ 383-84. In a 2010 meeting with fifteen students (two of whom later enrolled at CA), CA said it planned to launch a sonography program in a few months. Op. ¶¶ 386-87. CA took steps to launch the program—including obtaining ACCSC approval and listing sonography in its catalog—but decided not to do so in 2014 after a market study showed poor employment prospects. Op. ¶¶ 398-406.

The "CCPA does not create liability for those who intend to live up to the[ir] pronouncements … but are negligent in action despite those intentions." *Crowe*, 126 P.3d at 204. The court did not find that CA falsely stated its then-present intent to offer sonography but faulted it for conduct that at worst was negligent: not initially mentioning a "possibility" the program might not launch and not earlier removing sonography from the catalog. Op. ¶¶ 390, 395, 405-06, 646-48.

III. A new trial before a new trier of fact is required for other reasons.

A. Defendants were entitled to a jury trial.

1. Preservation and Standard of Review

Defendants demanded a jury and opposed a motion to strike. 15CF4704, 16CF32-39. The court struck the demand by deeming the claims mostly equitable. 16CF720-24. Appellate review is de novo. *People v. Shifrin*, 2014 CO 14, ¶ 14.

2. Discussion

The State's claims fell within the "general" rule that "actions for money damages are legal." *Mason v. Farm Credit of So. Colo.*, 2018 CO 46, ¶ 10 (discussing C.R.C.P. 38 and cases). Whether a claim is legal or equitable turns on the "nature of the remedy sought" (the "preferred" method) and the "historical nature of the right." *Id.* ¶ 27 (internal quotations omitted). Notably, these same two inquiries govern the Seventh Amendment right to a federal jury. *Tull v. United States*, 481 U.S. 412, 417-18 (1987).

The State pleaded a fraud claim that "Defendants have deceived, misled, and unlawfully acquired money from consumers." 14CF33. Historically, that type of consumer protection act "claim for 'deception' … is analogous to 18th-century actions at law, such as fraud, deceit, or misrepresentation." *Full Spectrum Software, Inc. v. Forte Auto. Sys., Inc.*, 858 F.3d 666, 676 (1st Cir. 2017).

More importantly, the State's claim for $3 million in penalties plus another $232 million sought "a *legal* remedy, not an equitable one" against "general assets." *Montanile v. Bd. of Trustees*, 577 U.S. 136, 145 (2016) (emphasis in original). Such "fraud" claims did not lie in equity because "dollars are fungible." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 47-49 & n.7 (1989).

A "civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Tull,* 481 U.S. at 422. Restitution also was "'available in certain cases at law'" so "'classification depended on the specific kind of restitution'" sought. *Am. Fam. Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 322 (Colo. 2009) (quoting treatise). The $232 million sought jointly and severally, untethered from any "wrongful profits," defeats any equitable characterization. *See Liu v. SEC*, 140 S. Ct. 1936 (2020); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

The jury trial claim here is stronger than in *Mason*, where legal claims were "more substantive and more numerous than [any] equitable claim." 2018 CO 46, ¶ 32. Our case involving a $235 million claim is not controlled by *Shifrin*, which relied on out-of-state cases holding that "similar consumer protection actions are primarily equitable," where the "state's primary objective" was to "put an end to [the wrongful] conduct." 2014 COA ¶ 19 & n.2.

The record here defeats any notion that the State's "primary objective" was prospectively remedial rather than retrospectively punitive: in 2016, when the court struck the jury demand, another judge already had denied equitable relief. Then, in 2020, when the court belatedly ruled, injunctive relief was moot as CA had ceased enrolling students and was permanently closing. S-CF 30-33, 42.

Under Colorado law, where "plaintiffs seek damages and subsequent injunctive relief there is a right to a jury trial on the legal issues." *Miller v. Carnation Co.*, 516 P.2d 661, 664 (Colo. App. 1973). Similarly, federal cases hold that jury rights cannot be denied by deeming legal claims "incidental" to equitable ones. *Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). In that respect, Colorado law accords with federal law. *See* 4 *Colo. Prac., Civil Rules Annotated* § 38.2(D) (*Miller* "reached a result that would almost surely have been the same in federal court applying *Beacon-Dairy Queen* standards.").[4]

[4] Unlike in Colorado, some other state consumer act cases denying jury trials reject the *Beacon-Dairy Queen* standards and the *Tull* holding. *E.g., Nationwide Biweekly Admin., Inc. v. Super. Ct.*, 462 P.3d 461, 489-93 (Cal. 2020) (rejecting *Tull*, *Beacon*, and *Dairy Queen*, in citing "several" ways in which "federal interpretation of the Seventh Amendment departs from California's interpretation of the California jury trial provision"); *but see id.* at 494-99 (Kruger, J., with two other judges, concurring) ("government actions seeking civil penalties, generally speaking, sound in law rather than equity" so there may be right to jury in California where "the government asks for massive penalties" dwarfing injunctive relief).

B. The egregious delay and copying denied timely and impartial justice.

1. Preservation and Standard of Review

When the trial judge had not ruled more than two years after trial, the commission proceedings detailed in the sealed supplemental file ensued. *See supra* note 1. The judge's belated ruling copied wholesale the structure and most of the State's proposed findings. *See* S-CF 78-245 (comparative charts illustrating breadth of the copying). The division should review de novo whether the judge acted improperly and how to remedy improprieties. *Uptime Corp. v. Colo. Research Corp.,* 420 P.2d 232 (Colo. 1966) (deciding these issues with no deference).

2. Discussion

Chief Justice Roberts recently called "jury trials, the bedrock of fairness in our system of justice." *2020 Year-End Report on the Federal Judiciary*, at 3 (Dec. 31, 2020). In stark contrast, the present case was egregiously unfair.

Rather than allowing a jury to issue a fair and timely verdict, the judge held a bench trial and delayed ruling for almost three years. He then copied the State's proposals—including typos. *Compare* Op. ¶¶ 21, 758, *with* 17CF10804,10943 ¶¶ 28, 865 (both misspelling "principal" as "principle" and repeating "266:14-23"). This was wrong. *See Uptime*, 420 P.2d at 235; *Trask v. Nozisko*, 134 P.3d 544, 548-49 (Colo. App. 2006).

This confluence of circumstances warrants outright reversal. *Uptime* did not reverse where a court adopted findings after "delay of a year and ten months between the close of the trial and the rendition of judgment." 420 P.3d at 233-36. But the delay here was almost a year more, and there is a full transcript. *Contrast id.* at 233, 235-36 ("repeat[ing]" there was no transcript to review). One possibility is "to give very little weight to the trial court's findings when examining them to determine their propriety in the light of the evidence." *Id.* at 236. But upholding the flawed product of such a fundamentally flawed and unfair process would itself be unfair.

Conclusion

The Court should reverse the judgment as a matter of law or minimally vacate and remand for new proceedings before a jury and new judge.

Respectfully submitted,

s/ Sean Connelly

Sean Connelly, #33600
Attorney for Center for Excellence in Higher Education, Inc.; CollegeAmerica Denver, Inc.; CollegeAmerica Arizona, Inc., divisions thereof, d/b/a CollegeAmerica; Stevens-Henager College, Inc., a division thereof, d/b/a Stevens-Henager College; and CollegeAmerica Services, Inc.

Certificate of Service

I hereby certify that on this 4th day of February 2021, this Opening Brief was filed and served via Colorado Courts E-filing upon all counsel registered to receive electronic notifications.

s/ Sean Connelly
Sean Connelly