



## D.C.'s HIGHEST COURT SHOULD VINDICATE THE RIGHT OF BUSINESSES TO DISCUSS ISSUES OF PUBLIC CONCERN

by Jeremy J. Broggi and Boyd Garriott

Today, the D.C. Court of Appeals is set to hear argument in *Earth Island Institute v. The Coca-Cola Company*, a case that will decide whether ideologically motivated plaintiffs can leverage the District's consumer fraud statute to silence speech by businesses with which they disagree. In its now two-and-a-half-year-old lawsuit, Earth Island alleges that Coca-Cola "deceived" consumers when, among other things, the company expressed online its desire to create "a World Without Waste."

The trial court recognized that Earth Island's suit does not present a traditional consumer fraud claim. The court dismissed the action, explaining that Earth Island had not alleged any cognizable marketplace harm. Most of the communications identified by Earth Island as supposedly "deceptive" merely stated Coca-Cola's positions on environmental matters or otherwise reflected the company's corporate values. And even those communications that arguably included objective metrics—such as a "tweet" by Coca Cola about its future recycling targets—did not commit to any specific action but were rather aspirational. For these reasons, the trial court held that Earth Island's action was not authorized by the District's consumer fraud statute.

The trial court was right to conclude that Earth Island's suit is not authorized by the District's consumer fraud statute. But the problems are that deeper than that.

The First Amendment establishes what U.S. Supreme Court Justice Oliver Wendell Holmes famously described as a competitive marketplace of ideas.<sup>1</sup> His basic insight was that free debate is more likely to arrive at truth than government diktats. In a free society, the Supreme Court has since explained, "the general rule is that the speaker and the audience, not the government, assess the value of the information presented."<sup>2</sup>

This case presents a good example. As the trial court recognized, "the heart" of Earth Island's complaint was its disagreement with how "Coca-Cola ha[d] branded itself."<sup>3</sup>

<sup>1</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>2</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (citation omitted).

<sup>3</sup> *Earth Island Institute v. The Coca Cola Company*, No. 2021-CA-001846B, slip op. at 10 (D.C. Sup. Ct. Nov. 10, 2022).

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According to Earth Island, Coca-Cola represents itself as a “sustainable and environmentally friendly” company when, in Earth Island’s opinion, it is not.<sup>4</sup> Earth Island wanted the court to decide that it had the upper hand in this debate and then to stop Coca-Cola from expressing a contrary view. But courts are not equipped to resolve this kind of dispute and we shouldn’t want them to.

Two decades ago, U.S. Supreme Court Justices Breyer and O’Connor warned what would happen if consumer fraud statutes were given an overly broad construction. The statutes would lose their value as tools to help maintain an honest commercial marketplace and instead become cudgels that “authorize a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums.”<sup>5</sup> Traditional fraud suits designed to resolve consumers’ “economic concerns” would give way to “prosecutions designed to vindicate their beliefs.”<sup>6</sup> As a result, uncertainty would “chill” public debate and “impose a serious burden upon speech” as commercial speakers stopped addressing issues of public concern over worries that they could be drawn into costly litigation.<sup>7</sup>

In that case, jurisdictional issues prevented the U.S. Supreme Court from vindicating the First Amendment issues at stake.<sup>8</sup> But there are no such hurdles before the D.C. Court of Appeals now. The court thus has an opportunity to clarify the meaning of the District’s consumer fraud statute in a manner that ensures free speech rights are fully protected. To do so, the court should be guided by the First Amendment principle that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>9</sup> In that way, the court can protect both the commercial marketplace and the free marketplace of ideas.

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<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Nike, Inc. v. Kasky*, 539 U.S. 654, 679 (2003) (Breyer and O’Connor, JJ., dissenting from dismissal of writ of certiorari as improvidently granted).

<sup>6</sup> *Id.* at 680.

<sup>7</sup> *Id.* at 679-81.

<sup>8</sup> *See id.* at 655 (dismissing writ of certiorari as improvidently granted).

<sup>9</sup> *Abrams*, 250 U.S. at 630.