IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, *ex rel.* ELLEN F. ROSENBLUM, in her official capacity as Attorney General for the State of Oregon,

Plaintiff-Appellant
Cross-Respondent,
Petitioner on Review,

v.

LIVING ESSENTIALS, LLC, a Michigan limited liability company, and INNOVATION VENTURES, LLC, a Michigan limited liability company,

Defendants-Respondents
Cross-Appellants,
Respondents on Review.

Multnomah County Circuit Court Case No. 14CV09149

Court of Appeals Case No. A163980

Supreme Court Case No. S068857

BRIEF OF *AMICUS CURIAE* OREGON BUSINESS & INDUSTRY ASSOCIATION

On Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Multnomah County, Honorable Kelly Skye, Judge

Opinion Filed July 14, 2021.
Author of Opinion: Devore, J.
Before: Lagesen, Presiding Judge, Devore, Judge, and James, Judge.

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In the event that this Court considers the question whether ORS 646.608(1)(b) and (e) infringe the free speech guarantee of Article I, section 8 of the Oregon Constitution, *amicus curiae* Oregon Business & Industry Association ("OBI") hereby submits this brief in support of the position of the Respondents on Review.

I. SUMMARY OF ARGUMENT

The Court of Appeals correctly grasped that "serious constitutional questions are patent" in the relevant provisions of ORS 646.608(1)(b) and (e). *State ex rel. Rosenblum v. Living Essentials, LLC*, 313 Or App 176, 195, 497 P3d 730 (2021). If those provisions are read to lack a materiality element, as the State and *amici curiae* Oregon Trial Lawyers Association ("OTLA") and Oregon Consumer Justice ("OCJ") argue, they prohibit speech based on its content. The Unlawful Trade Practice Act ("UTPA") makes unlawful commercial speech about particular subjects and expressing prohibited opinions on those subjects: representations that are inaccurate about certain aspects of goods or services or that cause a likelihood of confusion or misunderstanding about other aspects. ORS 646.608(1)(b), (e). Construing these provisions as prohibiting even immaterial speech would, as the Court of Appeals noted,

"raise[] more than just a tenable possibility that the statute would run afoul of Article I, section 8" of the Oregon Constitution. 313 Or App at 195. Indeed, contrary to the arguments of the State, OTLA, and OCJ, without a materiality element these UTPA provisions *would* violate the freedom of speech to which all Oregonians are entitled.

Unlike the First Amendment to the United States Constitution, Article I, section 8 of the Oregon Constitution makes no attempt to calibrate the value of speech depending on its context and topic. Rather, Article I, section 8 scrutinizes laws regulating speech in the commercial realm, in the political arena, and to one's family and friends all under the same protective standard. As a result, Oregon businesses and consumers benefit from the freedom of commercial speech, and this Court should not permit the UTPA to erode that right. But the even-handed treatment of commercial and non-commercial speech under Article I, section 8 also means that upholding a restraint on commercial speech has broader implications. OBI urges the Court to be cognizant that under Article I, section 8, if the State is allowed to curtail free speech in the

market, it will likewise gain the power to regulate speech in the marketplace of ideas and around the hearth.

The Court also should not be swayed by the arguments made by the State, OTLA, and OCJ about the importance of protecting consumers and the market. OBI would be the first to agree that protecting consumers and the market is indeed critical to the health of our state. But there are two reasons that this consideration does not render ORS 646.608(1)(b) and (e) constitutional. First, this Court's precedents instruct that it is repugnant to the Oregon Constitution to allow the State to outlaw protected speech, even in the service of other vital governmental interests. And second, the premise of the State, OTLA, and OCJ is wrong. Punishing immaterial speech that may contain false implications does not, in fact, serve the interests of either consumers or the market.

Finally, even beyond the context of this case, the Court should bear in mind the precedent that the State asks it to set. Under the well-established analytical framework of Article I, section 8, the State has the power to make laws directly forbidding disfavored speech *only within the bounds of historical exceptions* to free speech. But here, the State urges the Court to treat ORS 646.608(1)(b) and

(e) as permissible extensions of the historical exception for fraud, notwithstanding that these statutory provisions diverge greatly from the initial principle of fraud. If the Court were to adopt this expansive approach here, it would convert the historical-exception standard from a meaningful limit on government power to a conveniently elastic boundary. Article I, section 8 will be unable to guard Oregonians' liberty in the future unless this Court guards the integrity of the historical-exceptions test today.

II. ARGUMENT

A. Article I, Section 8 of the Oregon Constitution Protects Commercial Speech No Less Than Non-Commercial Speech.

Article I, section 8 of the Oregon Constitution is not merely a carbon copy of the First Amendment to the United States Constitution. The founders of our nation and the founders of our state shared a commitment to freedom of speech. But they adopted different provisions to guard against infringement of that freedom of speech, resulting in different legal analyses and overlapping but distinct scopes of protection. Crucially, unlike the First Amendment, Article I, section 8 robustly protects commercial speech.

The First Amendment provides that Congress shall make no law "abridging the freedom of speech." US Const, Amend I. This prohibition is stated in highly general terms. In grappling with it over the years, the federal courts have recognized various classes of speech and treat them differently. Speech deemed to be particularly valuable receives a higher level of protection. For instance, the United States Supreme Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 US 138, 145, 103 S Ct 1684, 75 L Ed 2d 708 (1983) (internal quotation marks and citation omitted). By contrast, "commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression."[1] *Fla. Bar v. Went For It, Inc.*, 515 US 618, 623, 115 S Ct 2371, 132 L Ed 2d

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[1] "A regulation of commercial speech will survive First Amendment scrutiny * * * if the regulation directly advances a substantial governmental interest and is not more extensive than necessary. This is a lesser level of protection than is applied to so-called 'core' First Amendment speech." *Moser v. Frohnmayer*, 315 Or 372, 377 n 3, 845 P2d 1284 (1993).

541 (1995) (internal quotation marks, citation, and brackets omitted)).

In Oregon, on the other hand, the more specific text of Article I, section 8 of the Oregon Constitution expressly applies across the board to all subjects of speech. "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely ***on any subject whatever*** * * *." Or Const, Art I, § 8 (emphasis added). Oregon's ensuing analytical framework firmly rejects calibrating the level of protection to the perceived value of the speech or balancing other governmental interests against the free speech guaranty.

The adjudication of a challenge under Article 1, section 8 begins by classifying the type of law, not the type of speech. Laws are placed into three categories depending on whether (1) the law is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication"; (2) the law focuses on an effect of the speech and proscribes speech as a means of causing that effect; or (3) the law focuses only on an effect and does not expressly restrict speech at all. *State v. Robertson*, 293 Or 402, 412, 417-19, 649 P2d 569 (1982). Within the first category, the burden is on the party

defending the speech regulation to prove that "the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Id.* at 412. Within category two, the court looks to whether the law is facially overbroad and reaches protected communication. *Id.* at 418. And within category three, a law is subject only to an as-applied challenge. *Id.* at 417.

Importantly, there is no scale of Article I, section 8 values that relegates disfavored types of speech to a less protective test. In *Bank of Oregon v. Independent News, Inc.*, 298 Or 434, 693 P2d 35 (1985), this Court confirmed that

> "[t]here is no basis under the Oregon Constitution to provide more protection to certain non-abusive communication based upon the content of the communication. Speech related to political issues or matters of 'public concern' is constitutionally equal to speech concerning one's employment or neighbors, so long as that speech is not an abuse of the right."

Id. at 439-40. Thus, within *Robertson* category one, if speech cannot be shown to be "wholly confined within" a historical exception or close modern analogue, it is unconstitutional, period. *Robertson*, 293

Or at 412. OBI is aware of no Oregon case that excuses a poor fit between a historical exception and a restraint because the speech being restrained is perceived as less worthy. *Cf. State v. Henry*, 302 Or 510, 525, 732 P2d 9 (1987) ("We emphasize that the prime reason that 'obscene' expression cannot be restricted is that it is speech that does not fall within any historical exception * * *."). Similarly, the fear that disfavored speech may be particularly harmful does not excuse regulating the speech as such. "Our cases under Article I, section 8, preclude using apprehension of unproven effects as a cover for suppression of undesired expression, because they require regulation to address the effects rather than the expression as such." *City of Portland v. Tidyman*, 306 Or 174, 188, 759 P2d 242 (1988).

Consistent with these general principles, commercial speech in Oregon has never been deemed to be subject to any different standard than non-commercial speech. In fact, 30 years ago, a prior Oregon Attorney General attempted to establish just such a distinction, to no avail. In *Moser v. Frohnmayer*, 315 Or 372, 845 P2d 1284 (1993), this Court noted that the Attorney General could offer "little support" for any historical exception for "advertising or commercial solicitations." *Id.* at 378 (holding that restriction on

auto-dialing telephone solicitations "does not fit within an historical exception").[2]

A subsequent Attorney General summarized the lesson:

> "[F]or purposes of Article I, section 8, the Oregon courts make no distinction between commercial speech and non-commercial speech. Commercial speech is afforded the same constitutional protection as is non-commercial speech."

49 Op Or Att'y Gen 27 (1998). Even in its current brief, the State admits—as it must—that Oregon courts have never afforded lesser protection to commercial speech. (State's Brief at 26.) This principle has three important consequences for the positions that the State and its supporting *amici* are now advocating.

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[2] *See also Nw. Advancement, Inc. v. Bureau of Labor, Wage & Hour Div.*, 96 Or App 133, 140, 772 P2d 934 ("Under the Oregon Constitution, commercial speech is afforded the same protection as noncommercial speech."), *rev den*, 308 Or 315, 779 P2d 618 (1989); *City of Hillsboro v. Purcell*, 87 Or App 649, 653, 743 P2d 1119 (1987) ("Article I, section 8, does not permit commercial and noncommercial speech to be regulated differently on the basis of content."), *aff'd*, 306 Or 547, 761 P2d 510 (1988); *Ackerley Commc'ns, Inc. v. Multnomah Cnty.*, 72 Or App 617, 625, 696 P2d 1140 (1985) ("We hold that the ordinance violates Article I, section 8, because it regulates one kind of speech and not another, based on the difference in their content. The county can have no constitutionally acceptable interest in regulating commercial and noncommercial expression differently because of the content." (emphasis omitted)).

First, because commercial and non-commercial speech are indistinguishable in the eyes of the Oregon Constitution, the State must prove that ORS 646.608(1)(b) and (e), as category one restraints on commercial speech, are wholly within a historical exception that would encompass non-commercial speech too. The State has not even attempted to do this.[3]

Second, if the Court were to hold that a historical exception permits the State to punish immaterial *commercial* speech that is not shown to have harmed anyone, it will be implicitly holding that Article I, section 8 does not protect immaterial, harmless *non*-commercial speech either. That would be an ominous day for Oregon businesses, but equally so for ordinary Oregonians.

And third, the equal treatment of commercial and non-commercial speech under the Oregon Constitution renders inapposite the efforts by *amici* OTLA and OCJ to rely on federal First Amendment doctrine, which as noted above is less protective of commercial speech. *Fla. Bar*, 515 US at 623. Both OTLA and OCJ

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[3] (*See* State's Brief at 29 ("Historical regulation of trademarks shows that false *commercial* speech is not protected." (emphasis added)).)

assert that under *Friedman v. Rogers*, 440 US 1, 9, 99 S Ct 887, 59 L Ed 2d 100 (1979), and *Twist Architecture & Design, Inc. v. Oregon Board of Architect Examiners*, 361 Or 507, 522-23, 395 P3d 574 (2017), false or misleading commercial speech is unprotected. (*Amicus* OTLA's Brief at 12; *Amicus* OCJ's Brief at 32.) But neither case is on point here. *Friedman* is a federal First Amendment case; it has nothing to do with the settled three-category *Robertson* analysis of Article I, section 8. *See* 440 US at 8-16 (reversing district court's holding that statute infringed First Amendment). Likewise, in *Twist Architecture*, the Oregon Court of Appeals did not reach the constitutional issues,[4] and no Article I, section 8 argument was developed before this Court. Instead, the *Twist* respondents made brief "generic" constitutional arguments unsupported by any legal authority, and this Court addressed only the First Amendment and invoked only federal First Amendment caselaw. *See* 361 Or at 522-23 (noting that "[i]t is true that false statements may be protected to some extent by the First Amendment to the United States

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[4] *Twist Architecture & Design, Inc. v. Oregon Board of Architect Examiners*, 276 Or App 557, 571 n 9, 369 P3d 409 (2016) ("[W]e decline to review petitioner's constitutional challenges.").

Constitution," but that false or deceptive commercial speech "is a different matter" (citing *United States v. Alvarez*, 567 US 709, 132 S Ct 2537, 183 L Ed 2d 574 (2012); *Friedman*, 440 US 1)). Accordingly, neither *Friedman* nor *Twist Architecture* speaks to Article I, section 8's protection of commercial speech.

In sum, Article I, section 8 extends our free society's foundational guarantee of free speech to commercial speech and non-commercial speech alike.

B. Robust Protection of Commercial Speech in Fact Promotes the Welfare of Consumers and Society, Although Other Government Interests Cannot Trump Article I, Section 8 in Any Event.

It is also well established under Article I, section 8 that not even the most important governmental interests can outweigh the constitutional protection on speech. In *State v. Stoneman*, 323 Or 536, 542, 920 P2d 535 (1996), which involved a statute prohibiting the production or purchase of child pornography, this Court firmly rejected just such a balancing approach. In *Stoneman*, the State of Oregon argued that "because the welfare of children is at stake, [this Court] should apply a different, and less stringent, rule than the" usual *Robertson* analysis. *Id.* "In particular, the state urge[d]" this Court "to follow federal constitutional jurisprudence by balancing the

state's strong interest in protecting children against the relatively insignificant burden that the statute imposes on free expression." *Id.* In response, this Court admonished that "the balancing approach for which the state contends is so contrary to the principles that have guided this court's jurisprudence respecting freedom of expression issues under Article I, section 8, that it *cannot be countenanced*."[5] *Id.* (emphasis added). "[A] state legislative interest, no matter how important, cannot trump a state constitutional command." *Id.* Here too, even if the State's asserted desire to broadly protect consumers or the warnings by *amicus* OTLA about the dangers of misinformation were well founded, they could not trump the free speech guarantee of Article 1, section 8. *Id.*

But the State's and *amici*'s arguments are misplaced from the start. Robust protection of commercial speech—even inadvertently

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[5] In *State v. Ciancanelli*, 339 Or 282, 307 n 19, 121 P3d 613 (2005), this Court rebuffed yet another attempt by the State to convert this Court to a balancing approach. This Court noted that "there is no evidence of any body of thought in nineteenth century America to the effect that the values involved in the concept of freedom of expression involved a balancing of the interests of the government against the individual's interest" and that "the idea of balancing in the area of free speech[] did not appear until around 1910." *Id.*

inaccurate commercial speech—serves the interests of consumers, the market, and society better than a strict liability regime that polices even immaterial statements, as the State attempts to do here.

Protecting commercial speech creates the "breathing room" that allows businesses to offer goods and services to the public—and provide information about those choices—even in disputed areas. For example, some consumers considering whether to buy solar panels may value learning from the seller the net carbon footprint of the panels over their full lifecycle—even if there may be different methods for attempting to calculate electricity output and the lifecycle energy inputs from mining, manufacturing, transportation, installation, and disposal. As another example, some consumers may even specifically desire information believed by the majority to be "unsound and unscientific." *Marks v. City of Roseburg*, 65 Or App 102, 108, 670 P2d 201 (1983) (holding that ordinance criminalizing palmistry and fortunetelling violated Article I, section 8). But in either case, if immaterial statements or honest disagreements could subject a business to massive liability under the UTPA, that will be a disincentive to offer information and controversial goods or services to consumers—to consumers' detriment. Both consumers and the

market itself are better off when businesses can provide more information and more choices to them.

Furthermore, the increasing polarization of our society underscores that government is unlikely to be seen as a neutral umpire of truth when it accuses businesses of misrepresentations. High levels of social mistrust almost certainly will not be improved by what will be perceived by some as arbitrary or biased government efforts to punish them for immaterial speech. The State certainly does itself no favors in this regard by irrational enforcement. In this case, for example, the Department of Justice sued Respondents on Review (who had already offered an assurance of voluntary compliance) where there was no evidence of any consumer complaints about the products, the State at trial ultimately failed to prove falsity as alleged, and the State failed to prove that the overwhelming majority of the allegedly false statements had ever been material to Oregon consumers. This is not a track record that inspires trust in government.

None of this is to say that the legislature cannot lawfully regulate speech that is truly a modern analogue of fraud—knowingly

false, material, harmful speech. But in ORS 646.608(1)(b) and (e), the legislature has not done so.

C. The State Invites the Court to Set a Dangerous Precedent by Distorting Oregon's Historical Exceptions Analysis Under Article I, Section 8.

OBI urges the Court not to embark on the path of distorting the historical-exception analysis in the manner invited by the State. The historical-exception inquiry is not arbitrary. The peril of laws directed at the substance of speech, as the United States Supreme Court has astutely observed, is that "future government officials may one day wield such statutes to suppress disfavored speech." *Reed v. Town of Gilbert, Ariz.*, 576 US 155, 167, 135 S Ct 2218, 192 L Ed 2d 236 (2015). So the historical-exception test serves to constrain the government from enacting new laws written in terms expressly directed at the content of speech *unless* the government can show that (1) the restraint was already a well-recognized traditional one at the founding of this nation; and (2) it is clear that the framers of the First Amendment and Article I, section 8 never intended those constitutions to preclude the restraint going forward. *See Robertson*, 293 Or at 412 ("[T]he scope of the restraint is wholly confined to some historical exception that was well established when the first

American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach."); *State v. Ciancanelli*, 339 Or 282, 315-16, 121 P3d 613 (2005) (""The party opposing a claim of constitutional privilege must demonstrate that the guarantees of freedom of expression were not intended to replace the earlier restrictions."" (emphasis omitted) (quoting *Henry*, 302 Or at 521)).[6]

The rigor of the historical exceptions test is the only judicial bulwark against the majoritarian impulse to punish speech with unpopular content. Stable historical exceptions also create the predictability that encourages economic activity and wards off the chilling route of self-censorship. Were historical exceptions to be generously malleable, they would fail badly as safeguards in all these regards. Thus, "contemporary variants" of historical exceptions are

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[6] *Ciancanelli* goes on to observe that mere continued existence of a "historical crime" after 1859 is more suggestive of the founders' intent not to vitiate it by adopting Article I, section 8 where the exception, although defined in terms of content, is "ultimately focus[ed] on some underlying nonspeech harm." 339 Or at 318. *Ciancanelli*'s comment on the second prong of the historical-exception test grants no license to untether even a historical crime from its traditional principle.

viable only "as long as the extension remains true to the initial principle." *Robertson*, 293 Or at 412, 434.

Certainly, some limited extensions are possible. *Robertson* holds as an example that the legislature has "some leeway" to extend the traditional prohibition on "defraud[ing] people by crude face-to-face lies" to defrauding them by remote communications and more "sophisticated" lies. *Id.* at 433-34. But "[w]hen extending an old crime to wider 'subjects' of speech or writing, * * * there is need for care that the extension does not leave its historical analogue behind * * *." *Id.* at 434.

Here, the fraud historical analogue has all but disappeared in the State's rear-view mirror. The tort of fraud prohibits culpably false, material speech that actually caused harm to another person. *See State ex rel. Redden v. Discount Fabrics, Inc.*, 289 Or 375, 384, 615 P2d 1034 (1980) (listing elements of common law fraud and distinguishing them from elements of UTPA violation). The State contends that ORS 646.608(1)(e) enjoys sufficient similarity to fraud because of the statute's supposed "focus on preventing the harmful economic effects of false representation." (State's Brief at 25.) But

this argument brazenly ignores that ORS 646.608(1)(b) and (e)—under the State's interpretation—share at most[7] ***only one characteristic*** with fraud: a false representation. Aside from that single point of similarity:

- ORS 646.608(1)(b) and (e) do not contain any knowledge element; they do not require that the speech be ***knowingly*** false or confusing.
- In a suit brought by the State, the statute expressly provides that there does not need to be any "actual confusion or misunderstanding." ORS 646.608(3).
- The State's position is that the statute does not even require that the misrepresentation or confusion be material. (State's Brief at 10.)
- And most devastatingly for the State's theory that the statute is focused on economic harm, the State argues that **no economic loss is necessary to violate ORS 646.608(1)(b) and (e)**. (State's Brief at 17 ("Proof of harm to specific consumers * * * is not required.")); *see also Pearson v. Philip Morris, Inc.*, 358 Or 88, 116, 361 P3d 3 (2015) (State need not show "that any consumer has suffered economic loss or other injury as a result of the unlawful practice").

This is not a mere extension from lying face-to-face to lying over the telephone. It is not an extension from a crude lie to a more complex

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[7] In fact, ORS 646.608(1)(b) has even less in common with fraud. It does not require any falsity at all, but only a lack of clear communication. *See* ORS 646.608(1)(b) ("likelihood of confusion or of misunderstanding").

one. Rather, it is a quantum leap from deliberate material injurious lies to punishing innocent immaterial harmless errors. That is far from "remain[ing] true to the initial principle." *Robertson*, 293 Or at 434. And if a historical exception can be blown this wide open, then *every* restraint on speech can be creatively defended as a distant cousin to some historical exception.

Oregon courts have not previously taken such a view of historic exceptions. For example, in *State v. Hirschman*, 279 Or App 338, 352-53, 379 P3d 616 (2016), the Oregon Court of Appeals concluded the initial principle of the historical exception for solicitation of crime was to prevent "the commission of the criminal act that had been solicited." That principle is remarkably parallel to the State's argument here, which is that the initial principle of fraud is "preventing the harmful economic effects of false representation." (State's Brief at 25.) But in *Hirschman*, that objective alone was insufficient to constitute a modern variant of solicitation. Instead, *Hirschman* held that a statute criminalizing the offer to purchase a ballot did not correspond to solicitation's initial principle, simply because the statute did not require any *intent* to actually complete the transaction. 279 Or App at 352-53. Yet here, the State argues

that the initial principle of fraud is capacious enough to include innocent representations made with no intent to deceive, that are immaterial, and that cause no economic harm. Article I, section 8 may grant lawmakers "some leeway to extend the fraud principle," *Robertson*, 293 Or at 433, but it does not give the legislature carte blanche to stretch it past any reasonable variation of fraud. The Court of Appeals recognized in *Hirschman* that taking a broad-brush approach to preventing a harm that a narrower historic exception targeted is insufficient. This Court should recognize the same here.

In sum, if historical exceptions are as elastic as the State believes, the future of free speech in Oregon is far from assured.

III. CONCLUSION

For all the foregoing reasons, if the Court reaches the constitutionality of the provisions of ORS 646.608(1)(b) and (e) that are at issue in this litigation, OBI respectfully urges the Court to

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hold that those provisions infringe the free speech protections of Article I, section 8 of the Oregon Constitution.

DATED: March 28, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to ORAP 5.05(1)(d), I certify that this Amicus Brief complies with the word-count limitation in ORAP 5.05(1)(b) because it contains 4,352 words. I further certify that this brief complies with the legibility and readability requirements of ORAP 5.05(3)(b) because it uses proportionately-spaced type that is not smaller than 14 point for both the text of the brief and footnotes.

DATED this 28th day of March, 2022.

/s/ *Paloma Sparks*
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 28, 2022, I electronically filed the foregoing document with the Appellate Court Administrator, Appellate Court Records Section, by using the Court's electronic filing system. The following person(s) were served by the appellate court's eFiling system, at the email address as recorded on the date of service in the eFiling system, as provided in ORAP 1.35(2)(d)(i):

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