IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON ex rel. Ellen F. Rosenblum, in her official capacity as Attorney General of the State of Oregon,
Plaintiff-Petitioner on Review,

v.

LIVING ESSENTIALS, LLC, a Michigan limited liability company, and INNOVATION VENTURES, LLC, a Michigan limited liability company,
Defendants-Respondents on Review.

---

Multnomah County Circuit Court
14CV09149

A163980
N010183

---

On petition for review of a decision of the Court of Appeals
On appeal from a judgment of the Multnomah County Circuit Court
The Honorable Kelly Skye

Opinion Filed: July 14, 2021
Author: Devore, J.
Concurring: Lagesen, P.J. and James, J.

---

# BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

---

Nadia H. Dahab, OSB No. 125630
SUGERMAN LAW OFFICE
707 SW Washington Street, Ste. 600
Portland, OR 97205
Tel: (503) 228-6474
nadia@sugermanlawoffice.com

**Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association**

John W. Stephens, OSB No. 773583
ESLER STEPHENS & BUCKLEY
121 SW Morrison Street, Ste. 700
Portland, OR 97204
Tel: (503) 223-1510
stephens@eslerstephens.com

**Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association**

September 2021

Jona J. Maukonen, OSB No. 043540
Carson L. Whitehead, OSB No. 105404
OREGON DEPARTMENT OF JUSTICE
1162 Court Street NE
Salem, OR 97301-4096
jona.j.maukonen@doj.state.or.us
carson.l.whitehead@doj.state.or.us

**Attorneys for Plaintiff-Petitioner on Review State of Oregon**

Michael J. Sandmire, OSB No. 904410
BUCHALTER ATER WYNNE
1331 NW Lovejoy Ste. 900
Portland, OR 97209
msandmire@buchalter.com

**Attorneys for Defendant-Respondent on Review Living Essentials, LLC**

Rachel Lee, OSB No. 102944
STOEL RIVES LLP
760 SW Ninth Ave. Ste. 3000
Portland, OR 97205
rachel.lee@stoel.com

**Attorneys for Defendant-Respondent on Review Living Essentials, LLC**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Statutes

**Other Authorities**

## REQUEST FOR REVIEW

The Oregon Trial Lawyers Association (OTLA) respectfully urges the Court to allow review of the decision of the Court of Appeals in *State ex rel. Rosenblum v. Living Essentials, LLC*, 313 Or App 176, – P3d – (2021). If review is allowed, OTLA intends to file a brief on the merits.

## SUMMARY OF ARGUMENT

OTLA respectfully contends that the Court of Appeals' decision in *Living Essentials*—to the extent that it holds that proof of materiality is required to establish a violation of ORS 646.608(1)(b) and ORS 646.608(1)(e)—is erroneous and warrants review by this Court. In OTLA's view, the decision is particularly problematic to the extent that it construes core provisions of Oregon's Unlawful Trade Practices Act (UTPA) in a manner that fails to further the UTPA's primary purposes of protecting Oregon's consumers and Oregon markets.

*Living Essentials* holds that proof of "materiality" is required for the government or a private person to establish a violation of ORS 646.608(1)(b) or ORS 646.608(1)(e).[1] For several reasons, that is not correct. First, there is no element of "materiality" in the text of either subsection (1)(b) or subsection (1)(e) of the UTPA. Second, this Court's caselaw expressly has held the

---

[1] Although *Living Essentials* arose in the context of a government enforcement action, *see* ORS 646.632, its holding is not limited in that respect.

opposite. Third, the nature of the injuries that ORS 646.608(1)(b) and ORS 646.608(1)(e) are aimed to prevent include not only individual consumer injuries, but also market injuries that result from confusion, misrepresentations, and unfair competition. The Court of Appeals' decision that misrepresentations, so long as they are not "material," are permissible does not serve that purpose. Finally, there are no constitutional concerns with applying ORS 646.608(1)(b) or (1)(e) to potentially misleading conduct and statements that the provisions seek to avoid.

The Court of Appeals' decision is also particularly concerning to the extent that it is premised on the assumption that it is OK for sellers to lie to consumers so long as the lies they tell are "unimportant." *See* 313 Or App at 196 ("Without a materiality requirement, * * * the statute would * * * punish commercial speech that has no potential to mislead a reasonable consumer."). That assumption is simply not correct. So long as those lies continue, distrust and misinformation will only continue to proliferate, poisoning the markets in which consumers conduct business.

**PROPOSED RULE OF LAW**

Proof of materiality is not required to establish a violation of ORS 646.608(1)(b) or ORS 646.608(1)(e).

## ARGUMENT

OTLA joins the arguments made by the State in support of its first proposed rule of law. *See* Petition for Review at 9–11.[2] OTLA respectfully offers the following additional points supporting the State's request for review.

### I. The Court of Appeals' rule is inconsistent with the UTPA's text, purpose, and prior constructions by this Court.

Oregon's UTPA was enacted as a comprehensive statute intended to protect consumers from unlawful trade practices. *Pearson v. Philip Morris, Inc.*, 358 Or 88, 115, 361 P3d 3 (2015) (citing *State ex rel. Redden v. Discount Fabrics*, 289 Or 375, 382, 615 P2d 1034 (1980)). As such, the statute is to be construed liberally to effectuate that legislative intent. *Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or 85, 90 n 4, 566 P2d 1177 (1977) (stating that the UTPA's legislative history makes clear that the statute "is to be interpreted liberally as a protection to consumers").

Under ORS 646.608(1), the legislature has set forth an extensive list of trade practices that, in its reasoned judgment, are unlawful. *Pearson*, 358 Or at 115 ("The trade practices declared unlawful under the UTPA are extensive, too much so for description."); *see also* ORS 646.608 (listing 79 unlawful trade practices). As relevant here, ORS 646.608(1)(b) and (e) provide that a person

---

[2] OTLA takes no position on the State's second proposed rule of law and therefore does not address it.

engages in an unlawful trade practice if, in the course of the person's business, vocation or occupation, the person

> (b) "[c]auses likelihood of confusion of or misunderstanding as to the source, sponsorship, approval, or certification of * * * goods or services"; or
>
> (e) "[r]epresents that * * * goods or services have * * * characteristics, ingredients, uses, benefits, quantities or qualities that the * * * goods or services do not have * * * *."

ORS 646.608(1)(b), (e). For UTPA purposes, a "representation" includes both "any assertion by words or conduct" and "a failure to disclose a fact." ORS 646.608(2).

In this case, the Court of Appeals held that, in addition to the elements set forth above, subsections (1)(b) and (1)(e) also contain an implied element of "materiality." No such requirement is apparent on the face of the statute. But according to the Court of Appeals, to prove a violation under either subsection, the State or a private person must also prove that the trade practice at issue is one that "materially bear[s] on consumer purchasing decisions." *Living Essentials*, 313 Or App at 189.

The Court of Appeals' decision is inconsistent with the UTPA in several respects. First, the statute's text does not require proof of materiality. *Pearson*, 358 Or at 125 (under this Court's familiar paradigm for statutory construction, "[t]he starting point is the statute"). By its text, ORS 646.608(1)(b) makes unlawful conduct that "[c]auses likelihood of confusion of or misunderstanding

as to the source, sponsorship, approval, or certification of * * * goods or services." There is no requirement that the seller's conduct be "material" to a consumer purchasing decision,[3] and as the State points out, ORS 646.608(1)(b) on its face reflects a legislative judgment that *all* conduct relating to "the source, sponsorship, approval, or certification of * * * goods and services" is "material" (according to the Court of Appeals, "relevant") as a matter of law. Nothing additional is required to establish a violation, and the Court of Appeals erred in holding otherwise.

So, too, with respect to ORS 646.608(1)(e). By its text, ORS 646.608(1)(e) again reflects the legislature's view that a seller cannot make representations that "goods or services have * * * characteristics, ingredients, uses, benefits, quantities or qualities that the * * * goods or services do not have." ORS 646.608(1)(e). Here, again, there is no requirement of "materiality," and instead the provision reflects a legislative judgment that *all* such representations are important as a matter of law—such that no additional proof of "materiality" is required.

In fact, this Court has explicitly stated as much. In *Searcy v. Bend Garage Co.*, this Court held that the legislature, in defining the term "representation" under the UTPA, "did not require that a concealed fact be

---

[3] Indeed, as explained below, there is not requirement that *any* consumer purchase be made, or any actual confusion result, before a seller violates ORS 646.608(1)(b).

material." 286 Or 11, 16–17, 592 P2d 558 (1979).[4] Likewise, in *Wolverton v. Stanwood*, 278 Or 709, 713, 565 P2d 755 (1977), this Court held that "[t]he elements of common law fraud are distinct and separate from the elements of a cause of action under the Unlawful Trade Practice Act and a violation of the Act is much more easily shown."[5] The Court of Appeals' rule is inconsistent not only with the clear rule of *Searcy*, but also with the rationale set forth in *Wolverton*.

Second, the Court of Appeals' materiality requirement fails to further the UTPA's primary purpose of protecting Oregon consumers and Oregon

---

[4] The Court of Appeals distinguished *Searcy* on the ground that "its holding was limited to the definition of the term 'representation' under ORS 646.608(2)." *Living Essentials*, 313 Or App at 188 n 7. That is confusing, because not only did *Searcy* refer explicitly to ORS 646.608(1)(e) (as a trade practice requiring a representation), but its holding is not so limited. *Searcy* held that, with the exception of ORS 646.680(1)(t), "materiality" as an element does not appear anywhere in the UTPA.

[5] Likewise, as the Court of Appeals explained in *Raudebaugh v. Action Pest Control, Inc.*,

> "Had the legislature intended that a consumer prove all the elements of common law fraud in order to recover damages, it would have been unnecessary to create a cause of action by statute. ORS 646.656 provides that the remedies specified in the Act are in addition to all other civil remedies existing at common law. This indicates legislative intent to create a special remedy different from those that exist at common law."

59 Or App 166, 171, 650 P2d 1006 (1982).

markets.[6] By way of example, under the Court of Appeals' rule, a seller can make false representations about the goods it sells or the services it provides, so long as those false representations aren't "material." In other words, the Court of Appeals would give sellers license to lie to consumers about the qualities or characteristics of the sellers' products, so long as the seller can later argue that the lie they chose to tell was not "important." *See Webster's Third New Int'l Dictionary* 1231 (unabridged ed 2002) (defining "material" to mean "having real importance or great consequence").[7] That cannot be the rule the legislature intended in enacting the UTPA, and it is not a rule that aims to protect consumers or the market in which those consumers conduct business. Instead, it is a rule that only invites misinformation—and, as a result, consumer distrust[8]—to proliferate. It sets society on edge.[9]

---

[6] The Court of Appeals suggested that prohibiting sellers from making unimportant misrepresentations would not "serve to accomplish the purpose of the UTPA to prevent consumers from harm." But that's not the only purpose of the UTPA. The UTPA goes a step further and exists to affirmatively *protect* consumers by protecting the transactions in which they engage and the market in which they conduct business. *See Denson*, 279 Or at 90 n 4.

[7] The Court of Appeals did not define "material" but suggested generally that a representation is "material" if it is "relevant to consumers' purchasing decisions." *Living Essentials*, 313 Or App at 194.

[8] In a world where distrust and misinformation are extraordinarily high, *see* Edelman, 2021 Trust Barometer (Mar 2021), *available at* https://www.edelman.com/trust/2021-trust-barometer (surveying 28 countries and finding "an epidemic of misinformation and widespread mistrust of societal institutions"), protecting consumers against commercial misrepresentations is paramount.

The UTPA, in protecting consumers, must at the very least protect consumers' rights to *accurate* information about the products or services they purchase. The Court of Appeals' rule, by contrast, enables dysfunctional markets dominated by misinformation. The Court of Appeals erred in its construction of the UTPA.

## II. ORS 646.608(1)(b) and ORS 646.608(1)(e) protect against market injuries that may occur before a consumer purchasing decision.

Likewise, the Court of Appeals' rule does not align with the scope of injuries against which subsections (1)(b) and (1)(e) exist to protect. Both ORS 646.608(1)(b) and (1)(e) derive from the Lanham Act and seek to protect not only consumers, but also the market, from conduct that has the potential to impact consumers. *See generally Living Essentials*, 313 Or App at 188, 192 (reviewing the legislative history and explaining that the UTPA is derived from, among other sources, the Lanham Act); *Adidas Am., Inc. v. Calmese*, 662 F Supp 2d 1294, 1304 (D Or 2009) (citing *Shakey's Inc. v. Covalt*, 704 F2d 426, 431 (9th Cir. 1983)) (noting same). Thus, the conduct that each subsection prohibits may be conduct that results in injury *to the market*, not simply injuries to consumers through individual consumer transactions. *See generally 88¢*

---

[9] *See* Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* 178 & n 233, 299 (2000) (noting "[t]he experience of betrayal of trust" whether it be "promise-keeping" or "expectations the other will tell one the truth," "is, perhaps, one of the most bitter of human life" (quoting James M. Gustafson, 1 *Ethics from a Theocentric Perspective* 303 (Univ of Chicago Press 1981).

*Stores, Inc. v. Martinez*, 227 Or 147, 153, 361 P2d 809 (1961) (likelihood of consumer confusion of source results in a market impact). Stated another way, subsections (1)(b) and (1)(e) are not UTPA violations that necessarily occur at the point of sale; rather, they are violations that occur at the time of the conduct that it prohibits—*i.e.*, the creation of appreciable consumer confusion or the use of deceptive representations—*before* any consumer transaction takes place.

Requiring that each of a seller's misrepresentations be "material" to a consumer's purchasing decision does not align with that purpose, or the scope of marketplace injuries that the statute seeks to prevent. Again, the legislature has made clear its decision that certain conduct, representations, or omissions made by sellers in the course of their businesses are unlawful—*i.e.*, those relating to the source, sponsorship, approval, or certification of a product, *see* ORS 646.608(1)(b), or relating to the characteristics, ingredients, uses, benefits, quantities, or qualities of goods or services, *see* ORS 646.608(1)(e))—because they are likely to lead to consumer confusion or they simply are not true. Such conduct, representations, or omissions, when they do occur, poison the relevant market and may lead to, among other things, widespread misinformation, consumer confusion, distrust, and unfair competition. *See supra* n 8. The Court of Appeals' additional requirement—proof that the conduct, representation, or omission was "material to the consumer's decision to buy the product," *see Living Essentials*, 313 Or App at 187—imposes an element that not only does

not appear in the statute, but also does not align with the marketplace injuries against which legislature sought to protect.[10]

## III. Neither ORS 646.608(1)(b) nor ORS 646.608(1)(e) raises constitutional concerns.

Finally, the Court of Appeals erroneously presumed that false or deceptive commercial speech is afforded constitutional protection. That is not the case. In *Twist Architecture & Design, Inc. v. Or. Board of Architect Examiners*, an unlicensed architect case, this Court recognized that "[f]alse or deceptive commercial speech" is not protected by the First Amendment. 361 Or 507, 522–23, 395 P3d 574 (2017) (citing *Friedman v. Rogers*, 440 US 1, 99 S Ct 887, 59 L Ed 2d 100 (1979)). Specifically, the Court held that "the false statements about pending licensure on respondents' website, when viewed in conjunction with information on the website about architectural projects in Oregon, *could* mislead Oregon consumers into believing that respondents were

---

[10] The Court of Appeals erred in another respect relevant to this point. In analyzing whether subsection (1)(b) requires proof of materiality, the Court of Appeals did not consider the phrase "*likelihood of* confusion"; rather, it construed only the words "cause * * * confusion," effectively construing the trade practice to require actual consumer confusion. 313 Or App at 187 ("[F]or a seller's unlawful trade practice to 'bring into existence' or 'effect by authority' a 'state of being discomfited, disconcerted, chagrined, or embarrassed' or a 'lack of certainty' or 'power to distinguish, choose, or act decisively' with respect its product, the unlawful conduct *necessarily* must be material to the consumer's decision to buy the product." (Emphasis in original.)). But actual consumer confusion is not required under subsection (1)(b).

authorized to practice architecture in Oregon." *Id.* at 523 (emphasis added). Likewise, in *Friedman*, the U.S. Supreme Court explained,

> "Untruthful speech, commercial or otherwise, has never been protected for its own sake. * * * The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."

440 U.S. at 9–10. Those holdings apply here. Free speech protections do not prohibit the State from protecting Oregon consumers and the markets in which they conduct business from the harms that result from the proliferation of misinformation, half-truths, or conduct otherwise resulting in consumer confusion or unfair competition. The Court of Appeals erred in concluding otherwise.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in the State's petition for review, OTLA respectfully urges the Court to allow review.

DATED this 29th day of September, 2021.

Respectfully submitted,

By: s/ Nadia H. Dahab
**Nadia H. Dahab,** OSB No. 125630
SUGERMAN LAW OFFICE
707 SW Washington Street Ste. 600
Portland, OR 97205
Tel: (503) 228-6474
nadia@sugermanlawoffice.com

By: s/ John W. Stephens
**John W. Stephens**, OSB No. 773583
ESLER STEPHENS & BUCKLEY
121 SW Morrison Street, Ste. 700

Portland, OR 97204
Tel: (503) 223-1510
stephens@eslerstephens.com

**Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association**

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 2658.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes.

DATED this 29th day of September, 2021.

By: s/ Nadia H. Dahab

**Nadia H. Dahab,** OSB No. 125630
SUGERMAN LAW OFFICE
707 SW Washington Street Ste. 600
Portland, OR 97205
Tel: (503) 228-6474
nadia@sugermanlawoffice.com

**Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association**

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 29, 2021, I directed the original **BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW** to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Rachel Lee and Michael J. Sandmire, attorneys for Defendant-Respondent on Review, using the court's electronic filing system.

DATED this 29th day of September, 2021.

By: s/ Nadia H. Dahab

**Nadia H. Dahab,** OSB No. 125630
SUGERMAN LAW OFFICE
707 SW Washington Street Ste. 600
Portland, OR 97205
Tel: (503) 228-6474
nadia@sugermanlawoffice.com

**Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association**