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 No. 14CV09149 CA A163980 SC S068857

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

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, and DeVore, Judge and James, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Other Authorities

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

INTRODUCTION

The main issue in this case is whether the Unlawful Trade Practices Act (UTPA) requires the state to prove that false representations are material to consumer purchasing decisions before the state can stop a business from making those representations in its advertisements.

When a business lies in its advertisements, the harm extends beyond a consumer's decision to purchase the product. False representations harm the marketplace by reducing consumer confidence and putting honest businesses at a disadvantage. False representations about a product—particularly when those representations involve ingredients or effects of the product—may harm the user of the product, regardless of whether that person was the one who purchased it. The legislature targeted those harms when it chose the specific types of conduct the UPTA makes illegal. It did not require separate proof of materiality because such illegal conduct always has the tendency or capacity to influence consumer behavior.

Requiring the state to prove materiality to obtain prospective relief in a public enforcement action would give businesses a license to lie to consumers so long as the state cannot show how the lie affects purchasing decisions. That

construction is contrary to the plain text of the UTPA and would frustrate the law's purpose: preventing harm to consumers.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

ORS 646.608(1)(b) and (e) prohibit deceptive advertising about a product's sponsorship, approval, or characteristics. To prove a violation of those statutes, must a prosecuting attorney show that a misrepresentation is material to consumer purchasing decisions?

First Proposed Rule of Law

No. The prosecuting attorney must prove that the representations about the product's sponsorship, approval, or characteristics are false or misleading. The prosecuting attorney does not need to prove separately that the misrepresentations are material to consumer purchasing decisions.

Second Question Presented

If a prosecuting attorney rejects an assurance of voluntary compliance (AVC) because it reflects an understanding of the UTPA that is at odds with the prosecutor's reasonable understanding, is the AVC "satisfactory" within the meaning of ORS 646.632(8)?

Second Proposed Rule of Law

No. A prosecutor may reject an AVC as unsatisfactory if its terms do not commit the company to complying with the disputed provision of the UTPA as

reasonably construed by the prosecutor. A general promise to obey the law does not make an AVC satisfactory when the parties continue to disagree about what the law requires.

LEGAL BACKGOUND

The UTPA provides broad protection for Oregon consumers against a host of unlawful trade practices, including false and misleading representations in product advertisements. *Pearson v. Philip Morris, Inc*., 358 Or 88, 115, 361 P3d 3 (2015). This court has recognized that the UTPA is to be "interpreted liberally as a protection to consumers." *Denson v. Ron Tonkin Gran Turismo, Inc.,* 279 Or 85, 90 n 4, 566 P2d 1177 (1977); *see also State ex rel. Redden v. Discount Fabrics*, 289 Or 375, 386 n 8, 615 P2d 1034 (1980) (same). In keeping with its consumer protection purpose, a violation of the UTPA is "much more easily shown" than other types of deceptive conduct like fraud. *See Wolverton v. Stanwood*, 278 Or 709, 713, 565 P3d 755 (1977) ("The elements of common law fraud are distinct and separate from the elements of a cause of action under the Unlawful Trade Practices Act and a violation of the Act is much more easily shown.").

As pertinent here, a person engages in an unlawful trade practice if the person, in the course of doing business:

> (b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.

> * * *
>
> (e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that the real estate, goods or services do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.

ORS 646.608(1).[1]

The UTPA broadly defines a "representation" as "any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact." ORS 646.608(2). An actionable representation "may be express or implied." *Rathgeber v. Hemenway*, 335 Or 404, 412, 69 P3d 710 (2003).

The UTPA authorizes actions by the state[2] and by private parties. Actions by the state have different substantive and procedural requirements than a private action. *Compare* ORS 646.632 *with* ORS 646.638 (setting out requirements for state and private actions respectively). Three differences are particularly significant. First, the state may seek prospective relief based on "probable cause to believe that a person is engaging in, has engaged in, or is

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[1] Citations to the UTPA are to the current version of the statute.

[2] A public enforcement action can be brought by either the Attorney General or a district attorney. *See* ORS 646.605(5) ("'Prosecuting attorney' means the Attorney General or the district attorney of any county in which a violation of ORS 336.184 and 646.605 to 646.652 is alleged to have occurred."); ORS 646.632(1) (authorizing enforcement actions by a prosecuting attorney).

about to engage" in an unlawful trade practice. ORS 646.632(1). Second, to show that a representation was false or misleading, the state does not have to prove "actual confusion or misunderstanding." ORS 646.608(3). Third, the state does not have to prove that consumers suffered an economic loss as a result of the unlawful practice or that consumers relied on the unlawful practice. *Discount Fabrics*, 289 Or at 384; *Pearson*, 358 Or at 116 (explaining that a private action may require proof of reliance to show economic loss as a "result of" the unlawful practice, depending on the specific allegations in a private action).

Under ORS 646.632(2), a prosecuting attorney must give notice to a person prior to filing suit to enforce the UTPA. The person may then submit an assurance of voluntary compliance to the prosecuting attorney that sets out "what actions, if any, the person charged intends to take with respect to the alleged unlawful trade practice." ORS 646.632(2). If "satisfied" with the AVC, the prosecuting attorney may submit it to the court for approval and then enforce it through a contempt action and seek civil penalties. ORS 646.632(2), (4); ORS 646.642(2).

The court may award reasonable attorney fees to the prevailing party in a UTPA action. ORS 646.632(8). If the defendant prevails and "the court finds that the defendant had in good faith submitted to the prosecuting attorney a satisfactory assurance of voluntary compliance prior to the institution of the suit

* * * the court shall award reasonable attorney fees at trial and on appeal to the defendant." ORS 646.632(8).

STATEMENT OF MATERIAL FACTS

Defendants produce 5-hour ENERGY® (5HE), a two-ounce beverage that they market as an energy supplement. In this case, the state alleged that defendants violated the Unlawful Trade Practices Act, ORS 646.608(1)(b) and 646.608(1)(e), by claiming in advertisements that the non-caffeine ingredients in a bottle of 5HE —B-vitamins, amino acids, and enzymes—provide consumers with energy and alertness, when those ingredients do not have the claimed effects. The state also alleged that defendants falsely represented, in a series of advertisements called "Ask Your Doctor," that doctors approved of 5HE and would recommend it to their patients. The state sought equitable relief and civil penalties. *State ex rel Rosenblum v. Living Essentials, LLC*, 313 Or App 176, 178–80, 497 P3d 730 (2021).

Before filing suit, the state notified defendants of the alleged violations, as required by ORS 646.632(2), and defendants submitted an AVC. Although defendants promised generally that they would comply with the UTPA, they defined compliance with the UTPA as requiring only that they refrain from making "*material* representations that are false" or misleading "consumers *acting reasonably to their detriment*" or omitting "*material* information such that the express or implied claim, statement or representation deceives

consumers *acting reasonably to their detriment.*" *Living Essentials*, 313 Or App at 206–07 (emphasis added). The state rejected the AVC because, among other reasons, the state understood the UTPA to be more protective than defendants' proposed terms. *Id.*

Following a lengthy bench trial, the trial court entered a verdict and general judgment in defendants' favor. In its verdict, the trial court held that ORS 646.608(1)(e) requires the state to prove that defendants "made representations that were material to consumer purchasing decisions," in addition to the elements listed in the text of the statute. (ER 64). Similarly, for a violation of ORS 646.608(1)(b), the trial court held that the state must prove that defendants "caused confusion or misunderstanding that was material to consumer purchasing decisions." (ER 73). The trial court concluded that the state had failed to prove that the representations in defendants' advertisements were material to consumer purchasing decisions. (ER 68, 72–73).

Defendants petitioned for an award of mandatory attorney fees under ORS 646.632(8), seeking over $2 million. The trial court denied the request for fees in a supplemental judgment. *Living Essentials*, 313 Or App at 208.

The state appealed the general judgment, arguing that the trial court misconstrued the legal standards in granting a verdict for defendants. The state's principal argument was that the trial court erred by requiring proof that defendants' misrepresentations were material to consumer purchasing decisions

as an element of the state's claims under ORS 646.608(1)(b) and (e). Defendants cross-appealed the supplemental judgment, arguing that the trial court erred by denying mandatory attorney fees under ORS 646.632(8).

The Court of Appeals affirmed on appeal and reversed on cross-appeal. The court construed the UTPA to require proof that the unlawful practices were material to consumer purchasing decisions. *Living Essentials*, 313 Or App at 196–97. On cross-appeal, the court held that defendant's AVC was satisfactory as a matter of law and so the trial court erred in denying attorney fees. *Id*. at 218. Defendants filed a petition for attorney fees in the Court of Appeals, seeking over $1 million for the work on appeal. At the parties' request, the Court of Appeals held the fee petition in abeyance, pending resolution of the case in this court.

SUMMARY OF ARGUMENT

The Court of Appeals inserted into the UTPA a materiality element that is not there: By their plain terms, neither ORS 646.608(1)(b) nor ORS 646.608(1)(e) require the state to prove that false advertising was material to consumer purchasing decisions before the state can stop it. That plain-text construction is supported by the context, which shows that the legislature intended to broadly prohibit false and misleading representations that have the tendency or capacity to influence consumer behavior. The legislative history, though sparse, confirms that intent. Because the trial court and Court of

Appeals inserted an element that does not appear in the text and is contrary to the legislature's intent, this court should reverse.

The Court of Appeals' insertion of a materiality element was driven by a concern that without that element, ORS 646.608(1)(b) and (e) might violate Article I, section 8, of the Oregon Constitution. That concern is misplaced. Although a violation of the UTPA does not require the same proof as common law fraud, the historical exception for fraud and other activities involving deception described in *State v. Robertson* and subsequent cases encompasses the same kind of false and misleading commercial speech prohibited by the UTPA. Even if the historical exception does not apply, the provisions of the UTPA at issue in this case properly focus on the harmful effects of false and misleading commercial speech and are not overbroad. There is no constitutional infirmity.

Even if it affirms the Court of Appeals' statutory construction, this court should reverse the Court of Appeals' decision to award mandatory attorney fees to defendants. To be "satisfactory" under ORS 646.632(8), an AVC must, at a minimum, ensure future compliance with the UTPA and be sufficient to resolve the dispute between the state and the defendant. Defendants' AVC was not satisfactory because it contained terms that imposed a lesser standard than the UTPA, as the state reasonably understood the statute. Because defendants promised to adhere to a standard that is lower than what the statute requires, the

AVC could not resolve the dispute between the parties. The legislature did not intend for attorney fees to be mandatory in those circumstances.

ARGUMENT

A. The UTPA does not require proof that an unlawful trade practice is material to consumer purchasing decisions.

Identifying the elements of a UTPA violation is a question of legislative intent. To determine legislative intent, this court looks primarily to the text and context of the statutory provisions, and, as needed, the pertinent legislative history. *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009). If the meaning of the statute remains ambiguous after considering those sources of legislative intent, the court considers general maxims of statutory construction. *Id*. Applying that methodology here demonstrates that the legislature did not intend the UTPA to require proof that an unlawful trade practice was material to consumer purchasing decisions.

1. ORS 646.608(1)(b) does not require proof that a consumer's confusion or misunderstanding is material to a purchasing decision.

ORS 646.608(1)(b) provides that a person engages in an unlawful trade practice if the person, in the course of doing business, "[c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services." The plain text of ORS 646.608(1)(b) is unambiguous and identifies exactly what the state must prove—a likelihood of confusion or misunderstanding. Nowhere in that text is

there an additional element requiring the state also to prove that the unlawful practice was material to consumer purchasing decisions.

As this court has explained, "the elements constituting a violation of ORS 646.608(1) are apparent on the face of the statute." *Daniel N. Gordon, PC v. Rosenblum*, 361 Or 352, 367, 393 P3d 1122 (2017). In *Gordon*, which concerned whether the UTPA applied to a law firm's debt collection practice, this court agreed with the state that ORS 646.608(1)(b) consists of three elements: (1) a "person" (2) "in the course of the person's business, vocation or occupation" (3) "[c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification[.]" 361 Or at 367.

Gordon specifically addressed the causation element of ORS 646.608(1)(b), concluding that it encompassed two requirements: "First, the person must 'cause[]' the likelihood of confusion or misunderstanding experienced by the other person. ORS 646.608(1)(b). And second, that causal relationship must exist in the context of 'the course of the [first] person's business, vocation or occupation[.]'" *Gordon*, 361 Or at 369 (alterations in *Gordon*). The court then explained that "the causal relationship must 'arise out of transactions which are at least indirectly connected with the ordinary and usual course of [the person's] business, vocation or occupation.'" *Id*. (quoting *Wolverton*, 278 Or at 345) (alterations in *Gordon*). Although *Gordon* did not address the precise question presented by this case, the addition of a

materiality element to the statute is inconsistent with *Gordon*'s conclusion that the elements of a UTPA violation are apparent on the face of the statute and with its discussion of causation.

Whether a business caused a likelihood of consumer confusion or misunderstanding about a product is an entirely distinct question from whether any confusion or misunderstanding is material to a consumer's decision to purchase the product. The text of the statute plainly requires that the likelihood confusion or misunderstanding concern the "source, sponsorship, approval, or certification" of the product. It says nothing about whether the likelihood of confusion or misunderstanding caused the consumer's decision to purchase the product. By adding the requirement to prove that the unlawful practice was material to purchasing decisions, the Court of Appeals' standard suggests that proof of causation or reliance is a part of that showing. But the plain text does not support that reading of the statute.

The statutory context also supports the state's plain-text reading. ORS 646.608(3) provides that "a prosecuting attorney need not prove * * * actual confusion or misunderstanding" to prevail in an action under ORS 646.608(1). ORS 646.608(3) shows that the legislature considered whether to limit or qualify what a prosecuting attorney needed to prove under ORS 646.608(1)(b) and expressly removed a potential limitation by making clear that actual confusion or misunderstanding was not a requirement. Adding

a tacit requirement that the state must show materiality regarding consumer purchasing decisions is inconsistent with that provision. Such a showing would, as a practical matter, require empirical proof of actual confusion or misunderstand, not merely a likelihood.

2. ORS 646.608(1)(e) does not require proof that a false representation is material to consumer purchasing decisions.

The text of ORS 646.608(1)(e) does not support the imposition of a materiality element either. That statute provides that a person engages in an unlawful trade practice if the person, in the course of doing business:

> Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that the real estate, goods or services do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.

ORS 646.608(1)(e). As with ORS 646.608(b), there are three elements: (1) a "person" (2) "in the course of the person's business, vocation or occupation" (3) represents that goods have "sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities" that the goods "do not have."

One logical place the legislature could have included a materiality requirement, had it intended to do so, is in the definition of "representation." In ORS 646.608(2), the legislature broadly defined a "representation" as "any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact." ORS 646.608(2). In *Searcy v. Bend Garage*

Co., 286 Or 11, 17, 592 P2d 558 (1979), this court rejected a proposed jury instruction that would have read a materiality requirement into that definition. The proposed instruction provided:

> A representation is an actual definite statement or actual definite conduct that is *material* and that was relied upon by the plaintiffs. It can also include concealment of a *material* fact that would normally have been relied upon by the plaintiffs and that defendant had a duty to disclose to plaintiffs.

Id. at 16 (emphasis in original). In rejecting that instruction, this court reasoned as follows: "Many of the enumerated unlawful trade practices involve representations. *See* ORS 646.608(1)(e), (f), (g), (j), (k), (L), and (s). But in the section defining 'representation' the legislature did not require that a concealed fact be material." *Id*. at 17. Although *Searcy* did not address the elements of ORS 646.608(1)(e), its rejection of a materiality element in the definition of "representation" and its reference to the numerous provisions of the UTPA that involve representations, including ORS 646.608(1)(e), strongly support the state's construction.

3. The UTPA, considered as a whole, supports the state's plain-text construction of ORS 646.608(1)(b) and (e).

The larger context of the UTPA also supports that the state's construction of ORS 646.608(1)(b) and (e). The UTPA prohibits an extensive list of trade practices that the legislature has determined to harm consumers and thus violate public policy. ORS 646.607; ORS 646.608(1); *see Pearson*, 358 Or at 115

(describing the UTPA as a "comprehensive statute for the protection of consumers from unlawful trade practices"). The legislature has already determined that those unlawful practices are material to consumers because they have the tendency or capacity to influence consumer behavior.

The nature of the unlawful trade practices shows a broad concern for limiting the harms to consumers that necessarily arise from false and misleading representations. Those prohibited practices have the tendency or capacity to influence consumer behavior, including a consumer's use of a product, the decision to buy a product, or the decision to patronize a business selling the product. *See* ORS 646.608(1)(a)–(u). Although an important concern of the statute is ensuring that products are not purchased under false pretenses, the statute also protects consumers from a broad array of harms that follow from false and misleading information, separate from the decision to purchase a product. Those harms include the health and safety risks of false information about product characteristics or ingredients, ORS 646.608(1)(e); the loss of confidence in the marketplace that follows false and misleading information about competitors, ORS 646.608(1)(h); and the frustration of consumer expectations about products, businesses, and financing. ORS 646.608(1)(j), (k), (L), and (p). The legislature's broad concern with preventing harm that follows from the listed practices does not support the inclusion of an element requiring

proof that the unlawful practice was material to *consumer purchasing decisions*, because a purchasing decision is simply one type of consumer behavior.

In considering the activities that have the tendency or capacity to harm consumers, the legislature defined "trade" and "commerce" broadly. ORS 646.605(8) provides that "trade" and "commerce" include "advertising" for "goods," which is the subject of this case. The definition also includes a catchall phrase, which covers "any trade or commerce directly or indirectly affecting the people of this state." ORS 646.605(8). Those words do not indicate a legislative intent to limit trade or commerce to only those activities that the state can prove were material to consumer purchasing decisions. Rather, the limiting principle is whether the trade or commerce "*directly or indirectly affects* the people of Oregon."

The legislature's decision to authorize public actions with fewer requirements than private actions provides further support for the state's position. Public actions, like this one, do not require proof of economic injury to enjoin an unlawful trade practice. *See* ORS 646.632(1) (authorizing public actions); ORS 646.638(1) (requiring proof of "ascertainable loss" for private actions); *Discount Fabrics*, 289 Or at 384. In *Pearson*, this court stated that the legislature's choice "makes sense because many of the trade practices made unlawful by the statute, although contrary to public policy because of their *potential* for economic injury, deception, and frustration of consumer

expectations, would not necessarily or even likely result in actual or measurable loss of money or property." *Pearson*, 358 Or at 116 n 17 (emphasis in original).

The legislature also made clear that the state need not prove "actual confusion or misunderstanding" in a public action. ORS 646.608(3). That provision lines up with the text of ORS 646.608(1)(b), which requires only "likelihood" of confusion or misunderstanding to prove a violation of that provision. Those provisions further signal the legislature's intent that the unlawful trade practices are contrary to public policy because they have the tendency or capacity to influence consumer behavior. Proof of harm to specific consumers or their purchasing decisions is not required.

Finally, the state's broad authority to seek prospective relief supports its construction of the UTPA. The state can file suit if it has "probable cause to believe that a person is engaging in, has engaged in, or is *about to engage in an unlawful practice*." 646.632(1). That express authorization to seek prospective relief shows that the legislature did not intend for consumers to suffer a concrete injury before the state could file stop an unlawful practice. To the contrary, it shows that the unlawful practices have the capacity to influence consumer behavior and can be enjoined for that reason.

Of course, if a business engaged in an unlawful trade practice that had no tendency or capacity to influence Oregon consumers, the state would have no

reason to file suit. But the scenarios in which a false representation or a representation causing a likelihood of confusion or misunderstanding would have no capacity to influence consumers will be exceedingly rare, if they exist at all. When an unlawful practice has any tendency or capacity to influence consumer behavior, the public benefits when that unlawful practice ceases. Again, as *Pearson* explains, "enforcement through a public action, which within 10 days of filing can result in cessation of the unlawful practice through a defendant's voluntary compliance agreement (ORS 646.632(2)), is often the most effective means of protecting consumers from the practices that the statute makes unlawful." 358 Or at 116 n 17.

By enumerating an extensive list of unlawful practices, authorizing public actions that do not require proof of economic harm or actual confusion or misunderstanding, and providing an efficient mechanism for public enforcement actions to resolve unlawful practices and enjoin them prospectively, the legislature signaled its intent that the enumerated practices are harmful and should be prohibited. The statute, as a whole, is focused on protecting consumers from the unlawful practices, all of which have the tendency or capacity to influence consumer behavior. Proof that an unlawful practice is material to consumer purchasing decisions is not a necessary element.

4. The legislative history does not support adding a materiality element.

The legislative history confirms what is clear from the statute's unambiguous text: There is no requirement to prove that an unlawful practice is material to consumer purchasing decisions.

As explained by this court in *Denson*, "the legislative history of the Oregon Unlawful Trade Practices Act supports the view that it is to be interpreted liberally as a protection to consumers." *Denson*, 279 Or at 90 n 4. The legislative history contains no discussion of materiality and no suggestion that the legislature intended to impose that element. Consistently with the discussion in *Denson*, the legislative history shows an intent to protect consumers by making a violation of the UTPA easier to prove than a violation Oregon's previous consumer protection law, by expanding the remedies available, and by authorizing enforcement by the attorney general.

In 1969, Attorney General Lee Johnson convened a committee to propose reforms to Oregon's consumer protection law, which resulted in House Bill 1088 (1971). Exhibit File, House Judiciary Committee, Subcommittee on Consumer Protection, HB 1088, Attorney General Lee Johnson, "Consumer Protection Act Proposal", at 6 ("CPA Proposal"). The committee included Senators Betty Roberts and Vic Atiyeh and Representatives Floyd Hart and George Cole, two district attorneys, and representatives for businesses. Core

provisions from HB 1088 were included in House Bill 3037 (1971), the bill that became the UTPA, including the provisions at issue in this case.

The committee explained that the proposed act was intended to be more protective of consumers by closing loopholes in existing law and making violations of the act easier to prove by removing the then-existing intent element. CPA Proposal at 2, 4. The proposed act also broadened the types of representations that would be actionable by making clear that "representation" included failure to disclose a fact. CPA Proposal at 5. Further, the proposal explained, "Under the Attorney General's bill, it is *only* necessary for the state to prove that a deceptive trade practice occurred in order to bring an injunction suit." CPA Proposal at 5 (emphasis added).

Requiring the state to prove that a person's unlawful conduct was material to consumer purchasing decisions is inconsistent with the Attorney General's proposal. Adding that materiality element makes a case harder to prove and improperly focuses on a consumer's decision to purchase a product, which pushes the legal standard closer to reliance, a showing the state does not have make.

In reaching a contrary conclusion, the Court of Appeals relied on the Uniform Deceptive Trade Practices Act (UDTPA), which provided the wording for ORS 646.608(1)(b) and (e). *Denson*, 279 Or at 90 n 4. The court emphasized a reference in the UDTPA commentary for the provision analogous

to ORS 646.608(1)(e), which stated that section 43(a) of the federal Lanham Act, 15 USC § 1125(a) (1958), "authorizes similar private actions." *Living Essentials*, 313 Or App at 192–93 (quoting Uniform Deceptive Trade Practices Act § 2(a)(5) comment, 54 Trademark Rep 897, 900 (1964)).

But the bare reference to the Lanham Act in the UDTPA's commentary does not show that the Oregon legislature intended federal law to guide interpretation of the UTPA. As *Denson* explained, the UDTPA is focused on competition between businesses not consumer protection, like the UTPA. 279 Or at 90 n 4. The Lanham Act also addresses competition between businesses and authorizes private actions, not public ones. If the legislature had intended for the courts to look to federal law for guidance in construing Oregon law, it could have easily done so. Unlike states with so-called "little FTC acts," Oregon law does not provide that the courts should look to federal law for guidance in construing the UTPA. *See, e.g.*, *Tucker v. Sierra Builders*, 180 SW3d 109, 115 (Tenn Ct App 2005) (noting that the Tennessee Consumer Protection Act "explicitly provides that it is to be interpreted and construed in accordance with the interpretations of 15 U.S.C.A. § 45(a)(1) by the Federal Trade Commission and the federal courts").

In fact, one of the bills presented during the 1971 session, Senate Bill 50, included a provision that would have required courts to look to the FTC Act in interpreting Oregon Law. Section 5(1) of Senate Bill 50 provided that "[i]t is

the intent of the Legislative Assembly that in construing section 3 of this 1971 Act, due consideration shall be given to the interpretation by the Federal Trade Commission and the federal courts of section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended." The legislature did not include that provision in the version of the UTPA that ultimately passed, which strongly suggests that the legislature did not intend federal law to guide the court's construction of the UTPA.

In sum, the legislative history of the UTPA, to the extent it bears on the question, does not support a construction that requires proof that the unlawful conduct is material to consumer purchasing decisions.

B. The Oregon Constitution does not require proof that the unlawful practices barred by ORS 646.608(1)(b) and (e) are material to consumer purchasing decisions.

The Court of Appeals concluded that materiality was an element of the UTPA largely because of its concern that reading the statute as its plain text suggests would violate businesses' right to free speech under Article I, section 8, of the Oregon Constitution. But those concerns are misplaced. Article I, section 8, does not require including a materiality element in the UTPA. [3]

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[3] The Court of Appeals considered the constitutionality of ORS 646.608(1)(b) and (e) because it was applying the canon of constitutional avoidance. That canon applies, however, only if a statute is ambiguous. *See State v. Lane*, 357 Or 619, 637, 355 P3d 914 (2015) ("The canon of interpretation that counsels avoidance of unconstitutionality applies only when a disputed provision remains unclear after examination of its text in context and

Footnote continued…

Article I, section 8, provides in relevant part: "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[.]" This court analyzes Article I, section 8, challenges under framework set out in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982). The *Robertson* framework divides laws into three categories. Under the first category, laws that are "written in terms directed to the substance of any 'opinion' or any 'subject' of communication" are invalid unless the scope of the restraint is wholly confined to an historical exception to free speech protections. *Id*. at 412. Under the second category, laws that focus on a forbidden effect and proscribe speech as a means of causing the effect are examined for overbreadth. *Id*. at 417–18. Laws that are overbroad and cannot be saved by a narrowing construction are invalid. *Id*. Under the third category, laws that focus on forbidden effects but do not expressly restrict speech can only be challenged as applied. *Id*. at 417; *see also State v. Babson*, 355 Or 383, 390–91, 326 P3d 559 (2014) (summarizing *Robertson* categories).

Beginning with ORS 646.608(1)(e), that statute is valid under *Robertson* category 1 because it fits within the historical exception for fraud. Alternatively, that statute is also permissible under category 2 because the

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in light of its enactment history."). Because the text of the UTPA is not ambiguous, the avoidance canon does not apply. The state provides an analysis of Article I, section 8, as it did at trial and in the Court of Appeals, should this court reach the constitutional question.

statute focuses on prohibiting the harmful effects of false advertising on Oregon consumers. Turning to ORS 646.608(1)(b), that statute is not subject to facial challenge at all because the terms of the statute do not target speech. But if this court disagrees, ORS 646.608(1)(b) is valid under *Robertson* category 2. Finally, if this court were to view either statute as overbroad, it could construe the statutes narrowly to apply to unlawful activities that have the potential to harm consumers. It should not require proof that the unlawful activities were material to consumer purchasing decisions.

1. ORS 646.608(1)(e) fits within the historical exception for fraud.

As explained above, Article I, section 8, allows direct regulation of speech so long as the scope of the regulation falls within a well-established historical exception to free speech protections. The historical exception test does not require a one-to-one match between the elements of the contemporary regulation and the historical one if the contemporary variant "remains true to the initial principle" of the historical exception. *Robertson*, 293 Or at 434. Here, ORS 646.608(1)(e) "remains true to the initial principle" of common law fraud, and so the statute is facially valid.

a. The UTPA is focused on the same harm as common law fraud.

There is no dispute that speech constituting common law fraud is not protected by Article I, section 8. The elements of fraud and a UTPA violation are distinct, and it is easier for the state to show a violation of the UTPA. *See*

Discount Fabrics, 289 Or at 384–85 (examining differences between fraud and UTPA). *Robertson*, however, does not require the elements of a modern statute to be "identical or matched perfectly with historical prohibitions to fall within a historical exception." *State v. Moyer*, 348 Or 220, 237, 230 P3d 7 (2010). ORS 646.608(1)(e) shares significant similarities with common law fraud—most importantly a focus on preventing the harmful economic effects of false representation—and those similarities are sufficient for the historical exception to apply.

In *Robertson*, the court noted that the common law crimes that were excepted from Article I, section 8, could be extended by the legislature to adapt to "contemporary circumstances or sensibilities." 293 Or at 433. The court specifically noted that, "[i]f it was unlawful to defraud people by crude face-to-face lies, for instance, free speech allows the legislature some leeway to extend the fraud principle to sophisticated lies communicated by contemporary means." *Id*. at 433–34. In discussing how to apply the historical exception test, this court explained in *State v. Ciancanelli*, 339 Or 282, 318, 121 P3d 613 (2005), that the contemporary restraint on speech must be "of a sort that is consistent with the spirit of Article I, section 8." The court also observed that some historically permissible category 1 laws, such as fraud, focused on the harmful effects underlying the prohibited speech even though the law was directed "in terms" at speech. In that scenario, the conflict between the

historical law and Article I, section 8, was "not very great." *Id*. In contrast, laws that prohibited speech in 1859 and thereafter but were directed at speech "both 'in terms' and in their real focus" would likely fail the historical exception test, absent some express intent by the framers that the law survive the adoption of Article I, section 8. *Id*. at 318–19.

Here, the real focus of the UTPA, as with common law fraud, is preventing harm to consumers, not prohibiting disfavored expression. Although the Oregon appellate courts have not crafted a separate test (or afforded lesser protections) for commercial speech under Article I, section 8, *see Moser v. Frohnmayer*, 315 Or 372, 377–78, 845 P2d 1284 (1993), as the federal courts have under the First Amendment, the United States Supreme Court's discussion of commercial speech is instructive. Under *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 US 557, 563–64, 100 S Ct 2343, 65 L Ed 2d 341 (1980), protection for truthful commercial speech is rooted in "the informational function of advertising." False commercial speech, however, is not protected under the First Amendment. *Id.* "The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech." *Rubin v. Coors Brewing Co.*, 514 US 476, 496, 115 S Ct 1585, 131 L Ed 2d 532 (1995) (Stevens, J.

concurring). Because false commercial speech is harmful, "[t]he government may ban forms of communication more likely to deceive the public than to inform it[.]" *Central Hudson*, 447 US at 564 (citations omitted). The historical exception for fraud under this court's Article I, section 8, cases relies on a similar rationale.

Although common law fraud has more elements than ORS 646.608(1)(e), that does not prevent the statute from falling within the historical exception. This court has previously upheld laws under the historical exception that lack all the elements of fraud, including materiality and intent. In *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997), *abrogated on other grounds by Multnomah County v. Mehrwein*, 366 Or 295, 313, 462 P3d 706 (2020), for example, this court upheld a voter fraud law that had no mental state or materiality element. That law, which prohibited a candidate from violating a pledge to abide by campaign expenditure limitations, fit within the historical exception for fraud because voters could have relied on the candidate's pledge in casting their ballot.[4] The state could prohibit that false speech based on the

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[4] *Vannatta* does not quote the relevant provision of the law. It provides:

> If the Secretary of State or the Attorney General finds under section 9 of this 1994 Act that a candidate described in section 6 of this 1994 Act filing a declaration of limitation on expenditures under section 6 of this 1994 Act has exceeded the applicable expenditure limit, at the next primary and general elections at

Footnote continued…

potential effect on voters, even if the candidate intended to keep the promise at the time it was made. *Id.* at 544, 544 n 28; *see also Moyer*, 348 Or at 236–37 (discussing *Vannatta*). It was the *potential* effect of the false speech that made the law fit within the historical exception for fraud. Similarly, the court in *Moyer* upheld a statute barring campaign contributions made with a false name under the historical exception for fraud, even though the statute did not have the materiality element or the "intent-to-deceive" element required for common law fraud.[5] 348 Or at 237-38.

In *Vannatta* and *Moyer*, the challenged laws prohibited false representations by candidates or those making campaign contributions. Those laws were "an extension or modern variant of the initial principle that underlies

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> which the candidate is a candidate for nomination or election to an office for which a portrait or statement is included in the voters' pamphlet, the Secretary of State shall include with the portrait and information required under ORS 251.075 and 251.085 a statement in boldfaced type indicating that the candidate violated a previous declaration of limitation on expenditures under section 6 of this 1994 Act. The statement required by this subsection shall identify the date of the election at which the candidate exceeded the applicable expenditure limit.

Or Laws 1995, ch 1, § 13(3).

[5] As in *Vannatta*, that statute did not contain a mental-state requirement, although the indictment in that case alleged that the misrepresentations were "knowingly" made. *Moyer*, 348 Or at 236–7. The court noted that "Whether it would be permissible under Article I, section 8, to punish a contributor for inadvertently making a contribution in the name of another person is a question not presented in this case." *Id*. at 241 n 9.

the historic legal prohibition against deceptive or misleading expression," *Moyer*, 348 Or at 237, because the false statements could mislead the electorate and could result in a candidate being elected under false pretenses. In both of those cases, the court rejected arguments that the elements had to be the same as that for common law fraud for the historical exception to apply.

b. Historical regulation of trademarks shows that false commercial speech is not protected.

Moreover, although common law fraud may be the most directly applicable historical analogue for ORS 646.608(1)(e), other common law and statutory provisions protected consumers and businesses from false representations at the time the constitution was adopted. The law regulating trademarks is instructive. At common law, trademarks were protected on "the ground that a party shall not be permitted to sell his own goods as the goods of another; and therefore he will not be allowed to use the names, marks, titles or other indicia of another by which he may pass off his own goods to purchasers as the goods of another." *Duniway Pub. Co. v. Northwest P. & Pub. Co.*, 11 Or 322, 8 P 322 (1884) (quoting *McLean v. Fleming*, 96 US 245 (1878)). The *Duniway* court went on to explain that a showing of intentional fraud was not required in a trademark case, relying on *Coffeen v. Brown*, 4 McLean 516, 5 F Cas 1184 (D Ind 1849), a circuit court case from Indiana that discussed the long common law history of trademark infringement.

The Deady Code also contained a civil and criminal laws regulating trademarks. The civil code prohibited a person from using "any name, mark, brand, designation or description the same as, or similar to one [recorded with the Secretary of State], for the purpose of deception or profit." General Laws of Oregon, Civil Code, ch XXX, § 3, p 781 (Deady 1845–1864). If a person violated that provision, the statute required the person to forfeit one-half of the goods or their value to the owner of the trademark. *Id*. If the person violated that provision a second time, the owner of the trademark was entitled to the whole value of the goods. *Id*. at § 4, p 781. The criminal code also prohibited using a "private brand, label, stamp or trade mark of another" or using any "colorable imitation of such brand, label, stamp or trade mark" with intent to deceive. General Laws of Oregon, Crim Code, ch XLIV, § 583, p 545 (Deady 1845–1864).

The common law and statutory prohibitions on trademark infringement show that at the time Article I, section 8, was adopted, the framers of the constitution would not have viewed false representations about a product as protected speech, much less viewed materiality as a requirement for prohibiting false representations. As discussed in *Ciancanelli*, the historical exception for fraud and other verbal crimes concerned crimes that "have at their core the accomplishment or present danger of some underlying actual harm to an individual or group, above and beyond any supposed harm that the message

itself might be presumed to cause the hearer or to society." 339 Or at 318. That same rationale should apply to the common law and statutes governing trademark infringement. Those laws prevented harm to consumers and to businesses by barring false or misleading representations about a product without requiring proof those representations were material to purchasing decisions. And like fraud, those laws were concerned with that underlying harmful effect and not with "any supposed harm that the message itself" might cause. As noted, those laws were well established at the time that the Oregon Constitution was adopted, and given the historical exception for fraud, it is unlikely that the framers intended to abrogate those laws by passing Article I, section 8.

In short, ORS 646.608(1)(e) prohibits a business from making false representations about its goods. When a business makes those false representations, it engages in fraudulent conduct that harms Oregon consumers by misleading them and harms the market by giving that business an unfair advantage. Like the election laws in *Moyer* and *Vannatta*, the UTPA in general and ORS 646.608(1)(e) specifically are a modern variant of fraud and common law trademark protections because they seek to prohibit the harms that follow from false representations about goods. Accordingly, the statute is facially valid.

2. ORS 646.608(1)(e) is valid under Robertson's second category.

ORS 646.608(1)(e), which prohibits making representations that a product has a benefit that it does not have, is also valid if examined as a *Robertson* category 2 law, because the law targets the harmful effects that flow from false advertising and is not overbroad.

The distinction between a category 1 law and a category 2 law is often difficult to ascertain. *See Moyer*, 348 Or at 229 (noting that the distinction between the categories is often "elusive"). The key inquiry for choosing between the two is whether the legislature intended to target a forbidden effect that is accomplished by speech (generally category 2) or whether the legislature has targeted the speech itself (generally category 1). The legislature can signal its intent directly by expressly stating the forbidden effect or the forbidden effect can be implied by the text, context, and legislative history of the statute. *Moyer*, 348 Or at 230–31; *Babson*, 355 Or at 396.

The text, context, and history of ORS 646.608(1)(e) show that the legislature intended to target the harmful effects of speech. Although some cases, such as *Moyer*, have placed laws in category 1 when the law does not expressly target a harmful effect and the implied harmful effects of speech will not always occur, that is not the case here. The harmful effects targeted by the UTPA include the risk to consumers from false advertising being permitted in the marketplace, which will always undermine the market and threaten

consumer confidence. That is a harm that necessarily accompanies false representations about goods. *See State v. Stoneman*, 323 Or 536, 545–47, 920 P3d 535 (1996) (concluding that child pornography law targeted harm, not speech, because the harm to children necessarily would occur). When a business makes a false representation in advertising, it is also likely that consumers will be influenced by that representation, even if the representation is not proven to be material to consumer purchasing decisions.

Because ORS 646.608(1)(e) targets only the harmful effects of speech, it is valid under *Robertson* category 2, unless it is overbroad. A law is overbroad when it "reaches substantial areas of communication that would be constitutionally privileged and that cannot be excluded by a narrowing interpretation." *State v. Moyle*, 299 Or 691, 701–02, 705 P2d 740 (1985). Under category 2, ORS 646.608(1)(e) is not overbroad. It applies only to a specific subset of speech: false representations made "in the course of the person's business, vocation or occupation" concerning the "sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities" of goods or concerning the "standard, quality, or grade" of goods. Because false representations about a business's goods necessarily result in harm, the law's impact on protected speech—as distinct from the harm that follows from that speech—cannot be substantial. Stated differently, there is no constitutional privilege to make false representations that harm consumers.

3. ORS 646.608(1)(b) is facially valid because it targets only a forbidden effect and does not, by its terms, restrict expression.

ORS 646.608(1)(b) provides that a person "engages in an unlawful practice if in the course of the person's business" that person "[c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services." Because ORS 646.608(1)(b) does not, by its terms, restrict expression the statute is not subject to facial challenge under the *Robertson* framework. If it were subject to facial challenge, it is not overbroad.

Under *Robertson*, this court has limited facial challenges "to statutes that more or less expressly identify protected speech as a statutory element of the offenses they define or that otherwise proscribe constitutionally protected speech 'in [their] own terms,'" *State v. Illig-Renn*, 341 Or 228, 235, 142 P3d 62 (2006) (quoting *Robertson*). Accordingly, "a law that is not an express restriction on speech is not subject to a facial challenge at all." *Mehrwein*, 366 Or at 313.

By its terms, ORS 646.608(1)(b) does not make speech a statutory element or otherwise proscribe constitutionally protected speech. Rather, that statute prohibits a particular effect: *causing* "likelihood of confusion or of misunderstanding" concerning goods. While one can certainly violate that statute by speaking—as the state alleged here—speech is not necessary.

Because the statute does not restrict speech by its terms, ORS 646.608(1)(b) is facially valid.

In *Babson*, 355 Or 383, this court engaged in an extended discussion of when a law is subject to facial challenge. To be sure, the court noted that the legislature cannot evade free speech protections by drafting a law that makes no explicit mention of speech but nevertheless obviously proscribes expression. *Id.* at 402–03 (discussing *Moyle*). But the fact that a law has apparent applications to speech is not enough to subject that law to facial challenge. Rather, the statute must be a "mirror of a prohibition on words." *Id.* at 403. Although ORS 646.608(1)(b) can be violated by speech, it can also be violated by any conduct that has the forbidden effect. For example, a business could violate ORS 646.608(1)(b) by designing a product that looks identical to a product from a particular, unique source and thereby cause confusion or misunderstanding as the source of that business's product.

Even if ORS 646.608(1)(b) were subject to facial challenge, that challenge would fail. ORS 646.608(1)(b) is a *Robertson* category 2 law because it focuses exclusively on an express forbidden effect: causing a likelihood of confusion or misunderstanding regarding certain aspects of goods.

[6] For the state to prove a violation, the state must put on evidence that the person's conduct actually causes that forbidden effect. Accordingly, to the extent that speech is implicated by the statute, it is the effect—and not the speech itself—that is regulated. For that reason, the reach of ORS 646.608(1)(b) is narrowly defined and well within constitutional bounds.

4. If this court were to narrow ORS 646.608(1)(b) and (e) to avoid a constitutional question, it should require only that the unlawful trade practice has the tendency or capacity to influence Oregon consumers.

For the reasons explained above, ORS 646.608(1)(b) and (e) are valid under Article I, section 8. Even if there were an overbreadth problem, this court would not need to construe the statutes as requiring proof that the unlawful practice is material to consumer purchasing decisions to narrow them.

A law is overbroad if it "reaches substantial areas of communication that would be constitutionally privileged and that cannot be excluded by a narrowing interpretation." *Moyle*, 299 Or at 701–02. "[A]ny judicial narrowing construction, adopted to address a statute's unconstitutional overbreadth, must keep faith with the legislature's policy choices, as reflected in the statute's words, and respect the legislature's responsibility in the first

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[6] If this court determined that ORS 646.608(1)(b) is a category 1 law, it would fit within the historical exception for fraud for the same reasons as discussed above with respect to ORS 646.608(1)(e).

instance to enact laws that do not intrude on the constitutionally protected right of free speech." *State v. Rangel*, 328 Or 294, 304, 977 P2d 379 (1999).

The Court of Appeals effectively gave the statutes a narrowing construction by requiring proof that the unlawful practices were material to consumer purchasing decisions. But the court's standard is too stringent. By requiring proof that an unlawful practice "would materially affect consumers' buying decisions," 313 Or App at 197, the court focused too narrowly on one aspect of consumer behavior, the decision to purchase. And by requiring the unlawful practice to "materially affect" that decision, the Court of Appeals' standard blurs the line between materiality and reliance. The text of the UTPA requires proof of neither.

If a narrowing construction were needed to save either ORS 646.608(1)(b) or (e) from overbreadth, it should be a low threshold and require only that the unlawful practice has the tendency or capacity to influence consumer behavior.[7] That narrowing construction is more consistent with the purpose of the UTPA. As discussed above, the text of the UTPA and the cases construing it show that the legislature intended the statute to broadly protect

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[7] A "tendency or capacity" standard for deceptive conduct is a common feature of consumer protection law in other states. *See, e.g.*, *Kidwell v. Master Distributors, Inc.*, 615 P2d 116, 122 (Idaho S Ct 1980) ("An act or practice is unfair if it is shown to possess a tendency or capacity to deceive consumers."); *Spartan Leasing Inc. v. Pollard*, 400 SE2d 476, 482 (NC Ct App 1991) (same).

consumers. False commercial speech is inherently harmful to consumers. But assuming that some amount of false speech about a product could be harmless and that such speech is common enough to warrant a narrowing construction, proof that the speech could harm consumers—in any way—would be enough to cure the constitutional infirmity. The nature of the harm would, of course, vary with the alleged unlawful practice. Thus what, exactly, the state would need to prove to show a tendency or capacity to influence consumer behavior would also vary. *See Pearson*, 358 Or at 116 (explaining that proof necessary to satisfy an element of a UTPA claim will depending on the specific allegations).

The standard would be easy to meet in most cases. When a business makes a false claim about its product in an advertisement, like the allegations in this case, that claim will always have the capacity to influence consumer behavior, or very nearly so. The obvious purpose of an advertisement is to influence consumers, by telling them what a product is, how it works, or what benefits it provides. That kind of information in an advertisement can affect whether the consumer buys the product, where the consumer buys the product, and how it is used, whether by the purchaser or another person. Likewise, when an advertisement causes a likelihood of confusion or misunderstanding about the approval or sponsorship of a product, the capacity to influence the consumer will invariably be present.

The materiality standard adopted by the trial court and the Court of Appeals would not be an appropriate narrowing construction of the statute. Any narrowing construction must be consistent with overall intent of the UTPA to protect broadly the consumers who purchase products and the consumers who use them.

C. The Court of Appeals erred in awarding mandatory attorney fees because defendants' AVC was not satisfactory.

As argued above, the UTPA does not require proof that representations were material to consumer purchasing decisions, as the trial court and Court of Appeals concluded. Because that error requires reversal, defendants are not the prevailing party and attorney fees are not available. Even if this court were to disagree and impose a materiality requirement, fees are not appropriate because the state was entitled to reject defendants' AVC as unsatisfactory, based on the text of the UTPA and the case law existing at the time the AVC was offered.

Under ORS 646.632(2), a prosecuting attorney must give notice to a person prior to filing suit to enforce the UTPA. The person may then submit an assurance of voluntary compliance to the prosecuting attorney that sets out "what actions, if any, the person charged intends to take with respect to the alleged unlawful trade practice." ORS 646.632(2). If "satisfied" with the AVC, the prosecuting attorney may submit it to the court for approval and then

enforce it by filing a contempt action or seeking civil penalties. ORS 646.632(2), (4); ORS 646.642(2).

The statute also sets out two specific, but nonexclusive, scenarios in which a prosecuting attorney may reject an AVC as "unsatisfactory." ORS 646.632(3). First, a prosecuting attorney may reject an AVC if it fails to "contain a promise to make restitution in specific amounts or through arbitration for persons who suffered any ascertainable loss of money or property as a result of the alleged unlawful trade practice[.]" ORS 646.632(3)(a). Second, a prosecuting attorney may reject an AVC that "does not contain any provision, including but not limited to the keeping of records, which the prosecuting attorney reasonably believes to be necessary to ensure the continued cessation of the alleged unlawful trade practice, if such provision was included in a proposed assurance attached to the notice served pursuant to this section." ORS 646.632(3)(b).

The court may award reasonable attorney fees to the prevailing party in a UTPA action. ORS 646.632(8). If the defendant prevails and "the court finds that the defendant had in good faith submitted to the prosecuting attorney a satisfactory assurance of voluntary compliance prior to the institution of the suit * * * the court shall award reasonable attorney fees at trial and on appeal to the defendant." ORS 646.632(8).

In the pre-suit notice in this case, the state advised defendants of its intent to sue under the UTPA based on alleged conduct relating to deceptive promotional claims about the effects of caffeinated and decaffeinated 5HE, misrepresentations that those products had been recommended by doctors, and misleading claims that the products do not cause users to experience a "crash." (SER 25–26). The notice provided that the state would be seeking civil penalties, injunctive relief, and restitution to harmed consumers. (SER 26).

In response, defendants submitted an AVC. The AVC provided, in paragraph 12, that defendants

> shall not make any express or implied claim, statement, or representation in connection with the marketing or advertising of [5-HE] Products in the United States, including through the use of an endorsement, depiction, or illustration, that contains material representations that are false or mislead consumers acting reasonably to their detriment; or omits material information such that the express or implied claim, statement, or representation deceives consumers acting reasonably to their detriment.

Living Essentials, LLC, 313 Or App at 206 (alteration in opinion).

In paragraph 11 of the AVC, defendants made a general promise to "obey Oregon's Unlawful Trade Practices Act, ORS 646.605 to ORS 646.656." *Id*. The AVC also contained a severability clause in paragraph 29, which provides, in relevant part:

> The Parties further acknowledge that this AVC constitutes a single and entire agreement that is not severable or divisible, except that if any provision herein is found to be legally

> insufficient or unenforceable, the remaining provisions shall continue in full force and effect.

Living Essentials, 313 Or App at 217.

After defendants prevailed, the trial court denied their request for mandatory fees under ORS 646.632(8). On defendants' cross-appeal, the Court of Appeals reversed, concluding that defendants were entitled to mandatory fees at trial and on appeal.

1. An AVC is not satisfactory under ORS 646.632(8) if the terms would not end the dispute between the parties.

For purposes of ORS 646.632(8), an AVC can qualify as "satisfactory" only if, based on the circumstances at the time, the AVC would ensure future compliance with the UTPA and would end the dispute between the parties. The legislature did not intend to impose mandatory fees when the state reasonably understood an AVC to contain terms that are inadequate to ensure future compliance. Imposing mandatory fees notwithstanding a reasonable dispute about the meaning of the law would punish the state unnecessarily and would deter meritorious claims, even if those claims were ultimately unsuccessful.

What the term "satisfactory assurance of voluntary compliance" means is a question of legislative intent, which this court resolves by examining the text, context, and any pertinent legislative history. *Gaines*, 346 Or at 171–72.

Beginning with the text, the term "assurance of voluntary compliance" refers to a promise by the defendant in response to the state's pre-suit notice

setting out "what actions, if any" the defendant intends to take regarding the alleged violations. ORS 646.632(2). Accordingly, the AVC is effectively a settlement offer to the state that sets out how the defendant will comply with the UTPA and resolve the disputed issues.

The term "satisfactory" means "sufficient to meet a condition or obligation;" "adequate to meet a need or want;" and "having all the necessary qualities for effective use." *Webster's Third New International Dictionary* 2017 (3rd ed 1971). A "satisfactory" AVC, then, is one that is sufficient, adequate, or has the necessary qualities to ensure compliance with the UTPA and end the dispute between the state and the defendant over the unlawful trade practices alleged in the state's notice.

The wording of ORS 646.632(8) makes clear that the court determines whether an AVC is satisfactory based on the circumstances that existed at the time the AVC was offered, not based on conduct of trial or its results. To award mandatory fees, the court must find that the defendant "*had in good faith submitted* to the prosecuting attorney a satisfactory assurance of voluntary compliance *prior to the institution of the suit*." ORS 646.632(8) (emphasis added). As the Court of Appeals correctly explained, the legislature's use of the past tense signals its intent the court consider the conditions existing at the time the defendant submitted the AVC. *Living Essentials*, 313 Or App at 211.

Turning the context, the process set out in ORS 646.632 encourages efficient and timely resolution of alleged violations of the UTPA. By requiring a pre-suit notice from the state and the opportunity for voluntary compliance by a defendant under ORS 646.632(2), the statute seeks to protect Oregon consumers without the burden and uncertainty of litigation. For many violations of the UTPA, "enforcement through a public action, which within 10 days of filing can result in cessation of the unlawful practice through a defendant's voluntary compliance agreement (ORS 646.632(2)), is often the most effective means of protecting consumers from the practices that the statute makes unlawful." *Pearson*, 358 Or at 116 n 17.

The possibility of mandatory attorney fees against the state under ORS 646.632(8) creates an incentive for the state to settle when a defendant provides a satisfactory AVC. The AVC process and the possibility of mandatory fees, however, are not intended to compel the state to accept a settlement that would not resolve the disputed practice.

If the state does not agree with a defendant about what the UTPA requires, the state cannot submit an AVC for court approval that contains terms that do not ensure that the defendant will comply with the UTPA. By agreeing to a defendant's AVC that contains legal standards that do not cover the full range of disputed conduct, the state would have impliedly—and perhaps expressly—agreed to the defendants' view of the law, which would preclude an

action by the state to enforce its contrary view. There is no indication that legislature intended for the state to concede to a defendant's construction of the UTPA or be liable for mandatory attorney fees, if that defendant ultimately prevails. Moreover, an AVC containing legal terms on which the parties do not agree would be worthless. It would not end the disputed practice, and the parties would have to go to court anyway to resolve the matter. An AVC cannot be satisfactory under ORS 646.632(8) if the state would have to file suit to determine what terms were enforceable and thus what conduct the AVC prohibited.

The legislative history supports the state's view. The Attorney General's proposal for House Bill 1088 (1971) contained the AVC provision that was eventually passed and described the mandatory-fee requirement as follows: "The purpose of this section is to reduce unnecessary litigation and protect the merchant against an irresponsible prosecutor who might bring a suit solely for publicity purposes." Exhibit File, House Judiciary Committee, Subcommittee on Consumer Protection, HB 1088, Attorney General Lee Johnson, "Consumer Protection Act Proposal", at 6 (emphasis added). Relatedly, Attorney General Johnson testified, as summarized in the minutes, that "[t]his provision would reduce the possibility that an irresponsible prosecutor might bring an unjustified action against an individual or firm." Minutes, House Committee on Judiciary, HB 1088, Feb. 10, 1971, 1. Based on the Attorney General's comments, the

purpose of awarding mandatory fees when the state rejects a satisfactory AVC was to prevent "unnecessary" and "unjustified" litigation brought by an "irresponsible" prosecutor. When parties have divergent views of the what the UTPA requires, litigation to resolve which view is correct is neither unnecessary, unjustified, nor irresponsible.

2. Defendants' AVC was not satisfactory.

The AVC in this case made clear that defendants continued to assert the right to make false statements about 5HE in its advertisements as long as those statements were not material. Because that was the very legal dispute at issue, the state was entitled to reject the AVC as unsatisfactory. That defendants' AVC promised generally to comply with the UTPA did make the AVC satisfactory.

Here, the state reasonably believed that the proposed AVC imposed injunctive terms that would have held defendants to a different and lower standard than the UTPA requires. Defendants promised that they would not make claims in advertisements for 5HE "that contains material representations that are false or mislead consumers acting reasonably to their detriment; or omits material information such that the express or implied claim, statement, or representation deceives consumers acting reasonably to their detriment." 313 Or App at 206. In the state's view, however, defendants were not entitled to continue making false or misleading claims regardless of whether they were

"material" to consumer purchasing decisions. The AVC therefore did not resolve the key dispute between the parties.

Even if this court disagrees with the state's construction of ORS 646.608(1) and imposes a materiality requirement, the state's construction of the UTPA was reasonable, based on the text and the case law existing at the time the AVC was offered. The legislature did not intend to require a mandatory fee award for advancing a reasonable, but ultimately incorrect, legal position.

Separate from the issue of materiality, defendants' AVC was also unsatisfactory because it imposed a standard for misleading claims and for omissions of information that was based on a showing that "consumers act[ed] reasonably to their detriment." That is not a requirement contained in the UTPA.[8] Neither of the provisions at issue in this case—nor any other provision of the UTPA—requires proof that the unlawful practice deceived "consumers acting reasonably to their detriment." As discussed above, the elements of a UTPA violation are apparent on the face of the statute.

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[8] Under federal law, the Federal Trade Commission "will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *FTC Policy Statement on Deception* at 2, appended to *Cliffdale Associates, Inc.*, 103 FTC 110, 174 (1984).

Because the terms proposed in defendants' AVC included elements that are not in the UTPA and thus would increase the state's burden to enforce those terms, the AVC would have permitted defendants to engage in conduct that the UTPA would not allow.

Defendants' general promise to obey the UTPA and the severability clause do not cure that problem, as discussed above. If the state were required to accept an AVC as satisfactory even though its terms conflict with a reasonable construction of the UTPA, that would simply shift the litigation to a fight about which terms of the AVC were valid and how to enforce them.

Below, defendants argued that their AVC was satisfactory because it gave the state more than was required by the UTPA, including a promise to refrain from making claims about the safety and efficacy of 5HE unless defendants "possess and rely upon competent and reliable scientific evidence" and a promise to refrain from using survey data unless substantiated. (Def Resp/Cross-Opening Br at 67). Assuming that defendants were correct that the AVC made promises that could not be required under the UTPA, that does not mean that the state was compelled to accept the other provisions of the AVC, which would not ensure compliance with the UTPA, as explained above.

In sum, defendants' AVC left them free to make false representations to consumers so long as the state could not show that the representations were "material" and that consumers "acting reasonably to their detriment" would be

misled. Based on the text of the UTPA, the case law, and the state's reasonable understanding of the law as it then existed, the AVC was not satisfactory. Accordingly, defendants are not entitled to a mandatory fee award.

CONCLUSION

This court should reverse the Court of Appeals' decision.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 24, 2022, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Michael J. Sandmire and Rachel Lee, attorneys for respondents on review, and Nadia Dahab, attorney for amicus curiae, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 11,410 words. I further 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 as required by ORAP 5.05(3)(b).

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