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

REPLY 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

---

Continued…

MICHAEL J. SANDMIRE #904410
Buchalter
1331 NW Lovejoy, Ste. 900
Portland, OR 97209
Telephone: (503) 226-1191
Email: msandmire@buchalter.com

RACHEL LEE #102944
Stoel Rives LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
Telephone: (503) 224-3380
Email: rachel.lee@stoel.com

Attorneys for Respondents on Review

NADIA DAHAB #125630
Sugerman Dahab
707 SW Washington St., Ste. 600
Portland, OR 97205
Telephone: (503) 228-6474
Email: nadia@sugermandahab.com

Attorney for Amicus Curiae

CHRISTOPHER J. MERTENS #092230
Mertens Law LLC
4411 NE Tillamook St.
Portland, OR 97213
Telephone: (503) 836-7673
Email: chris@mertenscsblaw.com

Attorney for Amicus Curiae

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
CARSON L. WHITEHEAD #105404
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
carson.l.whitehead@doj.state.or.us

Attorneys for Petitioner on Review

PALOMA SPARKS #084805
Oregon Business & Industry
1149 Court St., NE
Salem, OR 97301
Telephone: (503) 576-4871
Email:
palomasparks@oregonbusinessindustry.com

Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Other Authorities

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

INTRODUCTION

The text of the Unlawful Trade Practices Act (UTPA) does not require proof that a false or misleading representation is material to consumer purchasing decisions. In their response brief, defendants are unable to bridge the gap between the text of the UTPA and the materiality element imposed by the trial court and Court of Appeals. Neither the text, context, nor legislative history show that the legislature intended to require proof of materiality.

Like the Court of Appeals' decision, defendants' statutory argument is premised on idea that it would be absurd and illogical for the legislature to prohibit falsehoods that do not materially affect consumer purchasing decisions. That is incorrect. The conduct prohibited by ORS 646.608(1)(b) and (e) necessarily has the tendency or capacity to influence consumer behavior, including behavior unrelated to the purchasing decision. Accordingly, it is sensible for the legislature to prohibit businesses from making false and misleading statements to consumers without requiring the state to prove that the statements are material to purchasing decisions.

Defendants' core argument is that businesses have a constitutional privilege to lie in their advertisements, unless and until the state can prove that the lies have been effective in coaxing consumers to buy their products. But

neither Article I, section 8, nor the First Amendment protects false commercial speech. Businesses do not have—and never have had—a constitutionally protected right to lie about the products they sell.

A. Defendants' statutory construction arguments are inconsistent with the text, context, and legislative history of the UTPA.

Defendants' arguments, like the Court of Appeals' decision, cannot be reconciled with how Oregon courts interpret statutes. There is no term in ORS 646.608(1)(b) and (e)—or in any other provision of the UTPA—that requires proof that a misrepresentation of the type described in those provisions is material to consumer purchasing decisions.

Defendants lean heavily on the wording of ORS 646.608(1)(b) and (e) being based on the Uniform Deceptive Trade Practices Act (UDTPA). Relying on cases from this court that look at model legislation when construing the terms of an Oregon statute, defendants assert that that the UDTPA commentary shows that the legislature intended to include a materiality element. (Resp Br 21–26).

The initial problem with defendants' argument is that ORS 646.608(1)(b) and (e) and the UDTPA do not include any term that can be interpreted to require the state to prove that the unlawful practice was material to consumer purchasing decisions. In the cases that defendants quote—*Wright v. Turner*, 354 Or 815, 322 P3d 476 (2014), and *Meyer v. Ford Indus., Inc.,* 272 Or 531,

538 P2d 353 (1975)—this court looked to the model acts to construe an ambiguous term of the Oregon statute. In determining the meaning of those specific terms, the commentary to model acts could provide useful guidance as to what the legislature intended. Here, by contrast, there is no term in ORS 646.608(1)(b) or (e) to construe. Neither the text of those the statutes nor the text of UDTPA requires proof that an unlawful practice is material to consumer purchasing decisions.

The UDTPA commentary does not state that proof of materiality to consumer purchasing decisions is an element, either. And as this court recognized in *Denson v. Ron Tonkin Gran Turismo, Inc.,* 279 Or 85, 90 n 4, 566 P2d 1177 (1977), the UDTPA is not a very useful comparator given the differences between the UDTPA and the statute that the legislature actually adopted. For example, the UDTPA was principally focused on businesses, not consumers. *Id*. Nor does the UDTPA define "representation," which the UTPA does. ORS 646.608(2); *Searcy v. Bend Garage Co.*, 286 Or 11, 17, 592 P2d 558 (1979) (explaining that ORS 646.608(2) does not require proof that a representation was material). And the UDTPA does not provide for public enforcement actions, which is one of the core features of the UTPA. As explained in the opening brief, the lack of a materiality requirement is consistent with the state's enforcement powers. (Opening Br 17).

Additionally, the UDTPA had a provision stating: "This Act shall be construed to effectuate its general purpose to make uniform the law of those states which enact it." Uniform Deceptive Trade Practices Act, 54 Trademark Reporter 897, 905 (1964). The legislature did not include that provision in the UTPA. As discussed in the opening brief, the legislature also declined to include a provision requiring the UTPA to be interpreted consistently with federal law. (Opening Br 21–22). If the legislature had intended for the UTPA be construed consistently with the law in other jurisdictions, it would have included a provision stating as much.

Defendants also rely on committee testimony from David Shannon, who explained that the wording of the UDTPA could be traced to existing case law. (Resp Br 22–23, 27–28). Defendants seize on Shannon's testimony to suggest that the materiality element imposed by the Court of Appeals was a part of existing judicial interpretations. And yet defendants do not cite a single case construing the UDTPA to require proof that an unlawful practice was material to consumer purchasing decisions, much less that such judicial interpretations existed when the legislature passed the UTPA in 1971. Nor do any of the cases cited in the commentary to the UDTPA require that proof.

Defendants cite only two authorities for a materiality requirement— (1) a law review article discussing similarities between the UDTPA and the Lanham Act and (2) the commentary to a draft of the Restatement (Second) of Torts

discussing false marketing. (Resp Br 23–26). But neither of those sources suggest that the legislature had an unstated intent to include a materiality element. As discussed in the opening brief, the Lanham Act does not have similar wording to the UTPA, and the legislature did not express any intent that the courts should rely on federal law in construing Oregon law. (Opening Br 20–21). The commentary on the tort of false marketing is not helpful either. That tort concerns fraudulent business practices that harm a competitor. Unsurprisingly, the draft restatement commentary describes a materiality requirement, which is a longstanding feature of tort law. (Def App 12–13). But if the legislature had intended to incorporate a similar requirement into the UTPA, it would have done so in the text of the statute, and not through a cross-reference to the restatement commentary buried in the legislative history.

B. It is not absurd or illogical for the legislature to prohibit false and misleading advertisements without requiring proof that the unlawful practice was material to consumer purchasing decisions.

Defendants, like the Court of Appeals, assert that it would absurd or illogical for the UTPA to prohibit certain types of misrepresentations without requiring the state to prove that those misrepresentations were material to consumer purchasing decisions. (Resp Br 12–14, 29). In their view, the UTPA does not protect consumers if it does not require the state to prove materiality. Defendants are wrong.

It is sensible for the legislature to hold businesses responsible when they lie to consumers and to do so without first requiring the state to prove that the lies affect consumer purchasing decisions. There is almost always an information gap between businesses and consumers. A business knows what goes into its product and what the product does or does not do. A consumer lacks that information and must rely on representations provided by the business. In consideration of that information gap, the UTPA broadly prohibits a business from making false or misleading representations about its products.

The UTPA also gives trial courts discretion to craft a remedy that matches the violation. If the violation of the UTPA proves to be minor, the court can enjoin the unlawful practice and provide appropriate restitution without providing other equitable relief. *See* ORS 646.636 (giving court discretion to enter orders and judgments "as may be necessary" to make consumers whole or ensure cessation of the unlawful practice). Even when an unlawful practice is willful, the court has discretion in setting the amount of a civil penalty and can adjust the amount to correspond to the gravity of the violation. ORS 646.642(3). In short, if a particular misrepresentation of the type prohibited by the statute has a minor impact on consumer purchasing decisions, then the court can take that into account in determining the appropriate remedy.

It is neither illogical nor absurd for the legislature to provide a remedy without first requiring the state to prove that a business's misrepresentations were material to consumer purchasing decisions. As discussed in the opening brief, the legislature targeted the types of false and misleading representations prohibited by the UTPA because those types of representations always have the tendency or capacity to influence consumer behavior.

In this case, for example, the state alleged that defendants made false factual claims about the effects of the vitamin blend in a bottle of 5-hour Energy®. The state put on expert testimony that those claims were a "unique selling proposition" that influenced consumers, and the trial court viewed that testimony as "some evidence of materiality." (ER 68). Defendants put on their own experts, who testified that surveys they performed showed that a large majority of consumers did not care about the vitamin blend in their products and did not base their purchasing decisions on the vitamin claims, despite those claims being a key feature of defendants' advertisements. (ER 68). Relying on defendants' experts, the trial court concluded that the state had failed to carry its burden of proving that the defendants' claims about the ingredients in 5-hour Energy® were material to consumer purchasing decisions. The trial court, however, did not conclude that defendants' marketing claims were trivial, harmless, or immaterial to all consumers.

If defendants' representations about their product were truly trivial or had no tendency to affect consumer behavior, then they would not waste their money by putting those representations in advertisements, whose entire purpose is to influence consumers. A business is in control of the representations it makes. The legislature reasonably concluded that the misrepresentations targeted by the UTPA, like the ones alleged by the state in this case, are harmful and that the state should not have the burden of proving that the misrepresentations were material to consumer purchasing decisions before stopping them. That policy choice is entirely consistent with the legislature's goal of protecting consumers.

In sum, it is not absurd or illogical for the UTPA to prohibit false advertising without a showing that the falsehood was material to consumer purchasing decisions.

C. The Oregon Constitution does not protect false and misleading commercial speech.

Article I, section 8, does not give businesses a constitutional privilege to lie to consumers. False and misleading commercial speech has never been afforded constitutional protection, either in Oregon or elsewhere. Nevertheless, defendants assert that the relevant provisions of the UTPA are facially invalid because those provisions restrict what they can say in their advertisements.

This court should reject defendants' arguments that ORS 646.608(1)(b) and (e) are unconstitutional for all the reasons explained in the state's opening brief.

The consequences of defendants' constitutional argument are stark. In their view, false commercial speech receives full constitutional protection unless the state proves that the falsehood was made knowingly, was material to consumer purchasing decisions, and caused economic loss, which are the core elements of common law fraud. (Resp Br 32–34). In arguing that false commercial speech is protected by the Oregon Constitution, defendants characterize the historical exceptions for fraud and trademark infringement too narrowly.

As discussed in the opening brief, *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), leaves room for the legislature to modify well-established, historical limitations on speech to fit present circumstances, without running afoul of Article I, section 8. (Opening Br at 25–26). And this court has held that the elements of a contemporary statute do not have to match those of a historical statute. *State v. Moyer*, 348 Or 220, 237, 230 P3d 7 (2010). The historical exception for fraud and the related exception for trademark infringement are, at bottom, an exception to Article I, section 8, for lying in the marketplace. The UTPA's prohibition on false and misleading representations readily fits with that exception.

Defendants argue that the UTPA is too dissimilar to the historical prohibitions on fraud and trademark infringement. (Resp Br 32–35). Those arguments miss the point. Those historical prohibitions show that the framers did not intend for Article I, section 8, to protect false commercial speech at all.

The text of Article I, section 8, protects the right to free expression but also holds individuals responsible for the abuse of that right.[1] As discussed in *State v. Ciancanelli*, 339 Or 282, 314, 314 n 27, 121 P3d 613 (2005), the *Robertson* analysis reflects that principle. *Ciancanelli* explains that the historical exceptions this court has identified 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 to the hearer or to society." *Ciancanelli*, 339 Or at 318. In other words, the historical exceptions are an abuse of the right to free expression. Although fraud and trademark infringement prohibit expression, they are not a content-based restriction like obscenity or sedition—the kinds of speech restrictions that, even though longstanding, do not fit within an historical exception. Rather, fraud and trademark infringement prohibit false

[1] Article I, section 8, provides: "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; but every person shall be responsible for the abuse of this right."

commercial speech based on the harm that necessarily follows from that speech. In *Ciancanelli*'s phrasing, the conflict between the historical prohibitions and the absolutist wording of Article I, section 8, is "not very great." Rather, those prohibitions are consistent with "*Robertson's* overall point—that Article I, section 8, is concerned with prohibitions that are directed at the content of speech, not with prohibitions that focus on causing palpable harm to individuals or groups." *Id*.

The UTPA serves the same purpose as the historical prohibitions on fraud and trademark infringement and are based on the same animating principle: false and misleading commercial speech causes palpable harm to consumers. For that reason, false and misleading commercial speech is not—and never has been—protected by Article I, section 8. This court should reject defendants' facial challenge.[2]

D. The First Amendment does not protect false and misleading commercial speech.

To begin, this court should not consider defendants' First Amendment argument because it is not preserved. Defendants did not argue to the trial court that the state's construction of the UTPA violated the First Amendment. They

---

[2] Defendants briefly assert that the UTPA cannot constitutionally be applied to their advertisements. If this court agrees with the state that false and misleading commercial speech is unprotected, then their as-applied argument fails, because the state's claims all depend on proof that the representations were false or misleading.

did not cite *United States v. Alvarez*, 567 US 709, 132 S Ct 2537, 183 L Ed 2d 574 (2012), or *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc*., 538 US 600, 123 S Ct 1829, 155 L Ed 2d 793 (2003), the cases they now rely on. (Resp Br 43–44). *See State v. Link*, 367 Or 625, 639, 482 P3d 28 (2021) (declining to consider federal constitutional argument that was not adequately developed in the lower courts).

In any event, defendants are wrong that those cases hold that the state may not prohibit false and misleading commercial speech under the First Amendment without proof that the falsehood was knowing. Under long-established First Amendment case law, false and misleading commercial speech is not protected. *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). The Supreme Court has never required the state to prove that commercial speech was knowingly false or misleading before such speech could be prohibited, as defendants contend. *See State v. Living Essentials, LLC*, 8 Wash App 2d 1, 25, 436 P3d 857, 869–70 (2019) (examining Supreme Court cases discussing lack of protection for false and misleading commercial speech).

Defendants cite to the plurality opinion in *Alvarez* for the proposition that a statement must be a "knowing or reckless falsehood" to be outside the protection of the First Amendment. 567 US at 719. But that quotation is taken

out of context. *Alvarez* did not concern commercial speech and did not purport to overrule *Central Hudson*. Defendants take *Telemarketing Associates* out of context as well. That case concerned the regulation of charitable solicitation. *Telemarketing Associates*, 538 US at 605. It does not address commercial speech, much less purport to extend First Amendment protection to false commercial speech.

E. Mandatory attorney fees are not available because defendants' AVC was not satisfactory.

Defendants argue that the prosecuting attorney's view of the law is irrelevant to a court's assessment of whether an assurance of voluntary compliance (AVC) was "satisfactory" under ORS 646.632(8) and that considering the state's construction of the UTPA in evaluating whether an AVC was satisfactory would make the word "satisfactory" synonymous with "reasonable," contrary to the legislature's intent. (Resp Br 46–49). They are incorrect.

The state's construction of ORS 646.632(8) does not improperly conflate the terms "satisfactory" and "reasonable." Rather, the state's point is that a reviewing court should consider the reasonableness of the state's legal position in determining whether an AVC was satisfactory. The purpose of an AVC is to end the allegedly unlawful practice and ensure future compliance with the UTPA. But when the AVC itself contains legal standards that are different than

what the UTPA imposes, as the state reasonably understands the law, the dispute between the state and the defendant is not resolved. As explained in the state's opening brief, the text, context, and legislative history of ORS 646.632(8) do not show a legislative intent to require to the state to accept an AVC that does not comply with its reasonable construction of the UTPA.

Defendants also argue that the correct avenue for the state to resolve its conflict with defendants over what the UTPA requires was to accept defendants' AVC, file it with the trial court, and then request a hearing under ORS 18.082 to excise the disputed terms. (Resp Br 54–55). That argument is inconsistent with the process set out in ORS 646.632(2). That statute provides: "If the prosecuting attorney is satisfied with the assurance of voluntary compliance, it may be submitted to an appropriate court for approval and if approved shall thereafter be filed with the clerk of the court." ORS 646.632(2). If the prosecuting attorney reasonably believes that the terms of an AVC conflict with the UTPA, then that attorney cannot simultaneously consider the AVC to be "satisfactory" and submit it to the court for approval. And if the prosecuting attorney did submit an AVC and get court approval for it, that attorney could not return to court under ORS 18.082 and ask the court to modify the AVC. Doing so would fly in the face of the prosecuting attorney's initial determination that the AVC was satisfactory and the court's approval of the AVC as submitted.

Defendants are also incorrect that the state acted unreasonably by not providing its own AVC under ORS 646.632(3)(b) and thereby cutting off defendants' ability to get mandatory fees. (Resp Br 56–57).

ORS 646.632(3)(b) provides that a prosecuting attorney may reject as unsatisfactory 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." That statute authorizes the prosecuting attorney to insert specific requirements, like record keeping, that are not required by the UTPA itself, and allows the prosecuting attorney to reject an AVC that does not include such terms. Here, the state did not reject the AVC because it failed to contain *additional* requirements; it rejected the AVC because it conflicted with the text of the UTPA. ORS 646.632(3)(b) does not require the state to reiterate the text of the UTPA in a proposed AVC or risk liability for mandatory attorney fees.

Because defendants' AVC was not satisfactory under ORS 646.632(8), this court should reverse the Court of Appeals' award of attorney fees, if it reaches the issue.

CONCLUSION

For the reasons stated above and in the state's opening brief, this court should reverse the Court of Appeals' decision.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Carson L. Whitehead
CARSON L. WHITEHEAD #105404
Assistant Attorney General
carson.l.whitehead@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 14, 2022, I directed the original Reply 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; Nadia Dahab, attorney for amicus curiae; Christopher J. Mertens, attorney for amicus curiae; and Paloma Sparks, 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 3,462 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).

/s/ Carson L. Whitehead

CARSON L. WHITEHEAD #105404
Assistant Attorney General
carson.l.whitehead@doj.state.or.us

Attorney for Petitioner on Review
State of Oregon

CLW:kw5/444245067