IN THE SUPREME COURT OF THE STATE OF OREGON

SUSAN CLARK,
for herself and/or on behalf of all others similarly situated,
Plaintiff-Appellant,
v.
EDDIE BAUER LLC and EDDIE BAUER PARENT, LLC,
Defendants-Appellees.

Western District of Washington Case No. 2:20-cv-01106-JCC
United States Court of Appeals for the Ninth Circuit No. 2135334
Supreme Court No. S069438

On Acceptance of the Certified Question from the
U.S. Court of Appeals for the Ninth Circuit

Question Certified on April 14, 2022
Author of Order: Christen, Presiding Judge
Before: Christen, Bybee, and Bea, Circuit Judges

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL RETAIL FEDERATION, RETAIL LITIGATION CENTER INC., AND OREGON BUSINESS & INDUSTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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October 2022

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INTRODUCTION

This case is the latest in a spate of lawyer-driven suits bringing so-called "reference pricing" claims against prominent retailers across the country. The essence of these complaints is that a consumer suffers a redressable harm if she buys a product advertised as "on sale" from a higher price when the product normally sells at the lower "sale" price. Or, put another way, the complaint is that some other person may not have had to pay more to purchase the same product.

Despite the proliferation of these cases, courts across the country have found them not to be viable as private consumer actions. For good reason. The Oregon Unlawful Trade Practices Act (UTPA), ORS 646.608(1), like the statutes based on the same model act in other jurisdictions, requires consumers to show they suffered an "ascertainable loss" of money or property from the allegedly unlawful trade practice before they can bring a private cause of action. Consumers' potential disappointment at not receiving as much of a discount as they believed they were getting does not qualify as an ascertainable loss of money or property.

Plaintiff and her supporting amici frame their arguments as a plea to this Court just to clarify that a violation of *any* provision of the UTPA creates a private cause of action, and that such a cause of action should not be limited to circumstances where a retailer misrepresents the characteristics or qualities of the product sold in violation of subdivision (e) of ORS 646.608(1). But that misses the critical issue here. The question is not what qualifies as a violation of the statute, but whether there is a private right of action for any such violation. And that issue turns on whether the consumer can establish an "ascertainable loss" from the alleged violation.

What plaintiff and amici are really asking this Court to do is to rewrite the law to eliminate "ascertainable loss" from the elements of a UTPA private cause of action where the alleged misrepresentation concerns a potentially inaccurate reference price. In other words, plaintiff wants to make an alleged UTPA violation per se actionable by consumers regardless of proof of ascertainable loss, notwithstanding the express terms of the statute.

Amici urge this Court to decline plaintiff's request to change the language of the law. The Court should instead join the majority of states with similar unfair trade practices laws in clarifying that if

the only alleged damage is a supposed misrepresentation of a "false discount," there is no ascertainable loss to consumers – and thus no private cause of action.

QUESTION PRESENTED

The Ninth Circuit certified the following question to this Court:

> "Does a consumer suffer an "ascertainable loss" under Or. Rev. Stat. § 646.638(1) when the consumer purchased a product that the consumer would not have purchased at the price that the consumer paid but for a violation of Or. Rev. Stat. §§ 646.608(1) (e), (i), (j), (ee), or (u), if the violation arises from a representation about the product's price, comparative price, or price history, but not about the character or quality of the product itself?"

Clark v. Eddie Bauer LLC, 30 F4th 1151, 1157 (2022). That is, the question presented is whether a consumer can advance a viable theory of "ascertainable loss" under ORS 646.638(1) based *solely* on the allegation that she bought a product that may have been incorrectly advertised as discounted from a higher price.

This Court should join the other states in answering this question "no."

DISCUSSION

I. Advertising a higher reference price does not by itself cause consumers any ascertainable loss and therefore does not create a private cause of action under Oregon's UTPA.

The UTPA provides as a threshold issue that an individual consumer bringing suit must have suffered "an ascertainable loss of money or property, real or personal." ORS 646.638(1). As this Court has recognized, this means that many violations of the UTPA will not give rise to a private cause of action because the violation does not cause an ascertainable loss to the consumer:

> "[M]any 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. Examples include vague or false representations about where a product was made, ORS 646.608(1)(b); disparaging comments about a competitor's product that are false or misleading, ORS 646.608(1)(h); selling goods door to door without making certain required disclosures, ORS 646.608(1)(n); making a false or misleading statement about a prize or contest, ORS 646.608(1)(p); or attempting to induce membership in a pyramid club, ORS 646.608(1)(r)."

Pearson v. Philip Morris, Inc., 358 Or 88, 116 n 17, 361 P3d 3 (2015). But the state is not similarly limited if it decides to bring an action; the statute makes the ascertainable loss requirement applicable only to consumers. *State ex rel. Rosenblum v. Living Essentials, LLC*, 313

Or App 176, 185, 497 P3d 730 (2021). And as this Court pointed out, for the violations mentioned in *Pearson* "*and many other unlawful practices listed in the statute*, enforcement through a public action . . . is often the most effective means of protecting consumers from the practices that the statute makes unlawful." *Pearson*, 358 Or at 116 n 17 (emphasis added).

Allegedly false or misleading representations about the amount of a price reduction (ORS 646.608(1)(j)) fall within the category of unfair trade practices identified by this Court that do not necessarily result in any ascertainable economic loss by consumers. This Court should join the states that hold that a private consumer does not assert any viable theory of "ascertainable loss" based *solely* on her belief that she did not receive the same bargain she thought she had.

A. Courts consistently hold that the purchase price of a product is only an "ascertainable loss" if the consumer received something different than promised.

Plaintiff urges this Court to hold that a consumer has suffered an "ascertainable loss" any time she alleges she would not have purchased the product but for the alleged misrepresentation about

the reference price. (Plaintiff's Opening Brief at 23-24; Oregon Consumer Justice Amicus Brief at 9-10.)

But this approach conflates the misrepresentation and causation elements of a private UTPA claim with the ascertainable loss requirement. As explained by the Court of Appeals for the First Circuit in applying a similar statute, a claim that a consumer would not have purchased a product but for an alleged misrepresentation that the product was discounted makes the deception itself the injury—not a cognizable harm under the statute. *Shaulis v. Nordstrom, Inc.*, 865 F3d 1, 11 (1st Cir 2017). "The flaw in [plaintiff]'s theory of injury—that the mere purchase of an item may constitute cognizable injury, regardless of the item's specific qualities—is that *it merges the alleged deception with the injury*." *Id.* (applying the Massachusetts Consumer Protection Act, which, like the UTPA, requires actual economic injury for a private consumer action (emphasis added)).

As the First Circuit went on to explain, that sort of "purchase-as-injury claim" would "collapse [the] required distinction between deception and injury by attempting to plead an assertion about a consumer's disappointed expectations of value in place of an

allegation of real economic loss." *Id.*; *see also Johnson v. Jos. A. Bank Clothiers, Inc.*, 2:13-CV-756, 2014 WL 4129576, *6 (SD Ohio 2014) (dismissing reference pricing claim under Ohio's Consumer Sales Practices Act, which requires proof of actual damages, because "Plaintiff's theory of damages improperly conflates pricing strategy and the intrinsic nature or value of the goods sold.").

That logic applies squarely to the Oregon statute and the cases applying it. As this Court recognized in *Pearson*, a consumer seeking to establish an ascertainable economic loss must allege that she received something other than what she bargained for in an objectively verifiable way. *Pearson*, 358 Or at 117, 126 (consumer must show that she would not have purchased the product if she had known it did not have "a character or quality as represented"), *id.* at 127 (plaintiffs' purchase price theory of loss is based on claim that "they did not get what they believed they were buying"); *see also id.* at 142, 144 (Walters, J., concurring) (consumer can establish ascertainable loss if she purchased a product that is "not as desired by the customer" and "not as represented by the seller"); *Weigel v. Ron Tonkin Chevrolet Co.*, 298 Or 127, 136-37, 690 P2d 488 (1984) (" 'Whenever a consumer has received something *other than what he*

bargained for, he has suffered a loss of money or property.' " (emphasis added)).

To illustrate, the Court has held that a consumer suffers ascertainable loss if the car the consumer bought was used rather than new as represented, even if the purported market value of the product is not less than the price. *Weigel*, 298 Or at 136-37. The same is true if the tent a consumer purchased did not have all the features advertised. *Scott v. Western Int'l Sales, Inc.,* 267 Or 512, 515-16, 517 P2d 661 (1973). And the same result follows if art was not sold exclusively to plaintiff as promised. *Feitler v. The Animation Celection, Inc.*, 170 Or App 702, 713, 13 P3d 1044 (2000). But for all those cases the buyer could point to a characteristic or quality of *the product* that differed from what she was told that formed the basis of her economic loss.

Plaintiff invents a variety of names for her legal theories, but they all hinge on the claim that a representation about past price is a representation about the quality or characteristics of the product. That is simply not true. Plaintiff has never cited any Oregon case that found an ascertainable loss under the "purchase price theory" she proposes without *also* identifying some objectively verifiable

difference in the product advertised and the product purchased. *See Clark*, 30 F4th at 1152 ("Plaintiff failed to provide any cases recognizing an 'ascertainable loss' under the UTPA 'based *solely* on a plaintiff's failure to get as good of a deal as the plaintiff anticipated.' ").

Indeed, Oregon courts have never found *any* viable theory of ascertainable loss where the only alleged injury is disappointment in not receiving as much of a bargain as expected. And that is the correct approach. Because, if the consumer's only alleged harm is that she would not have purchased the product but for the stated list price, then she may have alleged deception and causation, but she has not identified ascertainable economic damage because she received exactly what she was promised at the price at which it was offered. *See, e.g., Robey v. PVH Corp.*, 495 F Supp 3d 311, 319-21 (SDNY 2020) (under New Jersey unfair trade practices law, which requires showing of ascertainable loss, consumer must allege she received product that was different in quality, nature, or features than what she was promised); *Shaulis*, 865 F3d at 11-12 (to establish economic injury, consumer must identify something objective about the product that she bargained for but did not receive).

Other courts faced with similar allegations have consistently rejected the viability of such claims where actual economic injury is a required element of the claim. *See, e.g.*, *Robey,* 495 F Supp 3d at 319-21 (to establish "ascertainable loss," consumer must allege the product was worth less than the product advertised or lacked some character or feature promised); *Gerboc v. ContextLogic, Inc.*, 867 F3d 675, 681 (6th Cir 2017) (under the Ohio Consumer Sales Practices Act, plaintiff "must allege more than a mere violation—he must show that the violation damaged him somehow"); *Kim v. Carter's Inc.*, 598 F3d 362, 365-66 (7th Cir 2010) ("it is not enough that Carter's price comparisons deceived the plaintiffs and induced them to buy Carter's clothing," applying Illinois law which requires actual pecuniary damages); *Mulligan v. QVC, Inc.*, 382 Ill App 3d 620, 888 NE2d 1190, 1197 (2008) ("Even if QVC's alleged inflated retail values may have induced Mulligan into altering her purchasing decision because of the represented *bona fide* savings, she suffered no actual pecuniary loss."); *Belcastro v. Burberry Limited*, No 16-cv-1080, 2017 WL 744596, at *4 (SDNY Feb. 23, 2017) ("New York law does not permit a plaintiff to allege 'actual damages' based solely on his claim that he

would not have chosen to purchase the good but for the defendant's misrepresentation" about the discount).

B. Disappointment that a product had not previously sold at a higher amount cannot constitute "ascertainable loss" as a matter of law.

A consumer's complaint that other people didn't pay more for the same product does not mean the consumer suffered an actual "ascertainable loss" under Oregon law. *Pearson*, 358 Or at 117 (ascertainable loss under the UTPA means " 'objectively verifiable monetary losses' "). As this Court has made clear, "noneconomic losses cognizable in a civil action—such as physical pain, emotional distress, or humiliation (ORS 31.710(2)(b))—will not satisfy a private UTPA plaintiff's burden." *Id*.

Nor does a plaintiff's disappointment qualify under any other state law that requires actual economic injury for a private consumer cause of action. See *Robey*, 495 F Supp 3d at 321 ("this Court joins a growing number of courts, in finding that complaints based solely on a plaintiff's disappointment over not receiving an advertised discount at the time of purchase has not suffered an 'ascertainable loss' under the NJCFA"); *Shaulis*, 865 F3d at 12 (plaintiff's " 'subjective belief as to the nature of the value [she] received' " cannot establish actual

injury); *Hennessey v. Gap, Inc.*, 4:19-CV-01867-SEP, 2022 WL 4447399, at *4-7 (ED Mo Sept 23, 2022) (applying Missouri law and dismissing case because "regardless of any other price listed," plaintiff received the product advertised at the price advertised, and plaintiff's disappointment at not receiving discount is not an "ascertainable loss"); *Belcastro*, 2017 WL 744596, at *4 ("Plaintiff has not cited any case in which a court, applying New York law, has recognized a plaintiff's subjective disappointment as a form of 'actual damages.' "); *Johnson*, 2014 WL 4129576 at *4-5, 7 (SD Ohio 2013) (dismissing class action claim "based on a theory of loss of the benefit of the advertised bargain" because "subjective expectancy" does not qualify as "actual injury or damages as a result of the alleged OCSPA violation").

Plaintiff urges this Court to stray from established law and equate absence of a perceived discount with actual economic losses. (Pl Op Br at 31-37.) But simply because a purchased product never sold for the stated reference price does not mean the consumer is not getting the benefit of her bargain. Plaintiff received the clothes she was promised for the price she was promised. *See Gerboc*, 867 F3d at 679, 681 (plaintiff's reference pricing claim fails because the plaintiff

"got what he paid for: a $27 item that was offered as a $27 item and that works like a $27 item," even if it was not actually discounted from $300); *Hennessey*, 2022 WL 4447399 at *5 ("At the time of sale, with all objective characteristics of the products available to the purchaser for inspection, the lower sale price was the price at which Defendants were willing to sell each product," and plaintiff received a $7.49 t-shirt for the price of $7.49). As the *Gerboc* court noted, this theory of loss "fails as a matter of common sense." *Gerboc*, 867 F3d at 679.

Holding that a consumer can claim an ascertainable loss simply because the retailer advertised a reference price at which the product had never sold would also open up a flood of lawsuits with innumerable line-drawing questions. What if the retailer had previously sold the product at the list price, but only once—would that mean the product was "really" worth the listed price and the consumer received a true discount? What if that single sale were a month ago? A year? What if that prior sale was for the same product but in a different color? What if the retailer had offered the product for sale at the list price for months, but nobody actually bought it at that price? What if the retailer only offered the product

at the list price for a single week or day? How does it make sense to say that a plaintiff's "ascertainable loss" depends on whether some random other consumer whom plaintiff never met or knew about paid a higher price, or whether the product sat on the shelves marked at a higher price for some indeterminate amount of time? It doesn't.

For this Court to accept that an allegedly fictitious reference price can cause an ascertainable loss, the Court would need to conclude that, if a retailer identifies a product with a reference sales price at which the product never actually sold, then the consumer has purchased a product with an objective value less than what the retailer represented. In other words, plaintiff's claims are only actionable if two things are true as a matter of law: (1) that by showing a reference price of $39.99, Eddie Bauer represented the Fleece Zip is *worth* $39.99, and (2) because the Fleece Zip never actually sold or was offered for sale for $39.99, the jacket plaintiff purchased was *worth* some unidentified amount less than $39.99. (*See* Pl Op Br at 31; see also ER 3, 11, 13-17, 23.)

But neither of those assertions is necessarily true as a matter of law. *See Hennessey*, 2022 WL 4447399 at *5 ("regardless of any

other price listed, Defendants represented each product as having a value equal to the lower sale price. . . . Defendants represented the T-shirt's value to be $7.49 because that was the price at which they were willing to sell it on that day. . . . Any displayed former price (in the example, $14.99) was irrelevant to the products' represented value *at the time of sale*." (citations omitted)). What a product is worth to a consumer may be more, less, or the same as the listed price.

> "The most important distinction between price and value is the fact that price is arbitrary and value is fundamental. For example, consider a person selling gold bars for $5 a piece. The price of those gold bars is, in this instance, $5. It's an arbitrary amount chosen by the seller for reasons known only to them. Yet, in spite of the fact that those gold bars are priced at $5, their *value* is so much more."

Phil Town, *The Important Difference Between Price and Value*, Forbes, Money (Jan 4, 2018).[1]

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[1] Article available at https://www.forbes.com/sites/forbesfinancecouncil/2018/01/04/the-important-differences-between-price-and-value; *see also* Ralf Leszinski and Michael V. Marn, *Setting Value, Not Price*, McKinsey Quarterly (Feb 1, 1997) ("The real essence of value revolves around the *tradeoff* between the benefits a customer receives from a product and the price he or she pays for it." (emphasis in original.))

Because a product's list price does not necessarily represent the product's "value," the fact that the product never sold at a listed price cannot mean, as a matter of law, that it has never been *worth* that price. Nor does it mean that the product's inherent "value" is something less than that price. Take, for example, two restaurants who purchase their beef from the same supplier at $10 per pound. At the French Laundry, a diner may pay $85 for a ten-ounce filet of that beef, but at Bill's Steakhouse, the diner may pay only $15 for a ten-ounce filet of that same beef. Is the French Laundry representing that the filet is "worth" $85, or is it saying that if a diner wants the ambiance and gravitas of dining at the French Laundry, they will have to pay $85 for a filet purchased at a fraction of that cost? If Bill's Steakhouse never sells its filet for $85, does that mean its filet is of lower quality or worth less than the same beef sold at the French Laundry?[2]

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[2] See Journal of Consumer Research, Inc., *High Quality or Poor Value: When Do Consumers Make Different Conclusions About the Same Product?,* Science Daily (Oct 22, 2012) ("a low price can indicate either good value or low quality, whereas a high price may imply either poor value or high quality"), www.sciencedaily.com/releases/2012/10/121022121908.htm.

Moreover, even if it could objectively be established that the purchased product was worth less than the listed reference price, consumers still do not suffer ascertainable economic loss if they do not pay that inflated price. In other words, even if it could objectively be established that the Fleece Zip was never sold for a full price of the $39.99 listed reference price, the *only* relevant inquiry is whether the plaintiff still received a jacket worth at least $19.99 for the $19.99 that she paid. She did, and thus has no injury: her only "injury" is that the "bargain" or discount she received may have been less than she believed—which, regardless of how the reference price was set, is as irrelevant a measure of value *to the end consumer* as the manufacturer suggested retail price.

But, again, consumers' subjective disappointment that other people didn't pay as much more as she thought they did cannot satisfy the ascertainable economic loss required for a private consumer UTPA action. *Pearson*, 358 Or at 117 n 17 (a violation of the UTPA that is deceptive and frustrates consumer expectations does not always cause an "actual or measurable loss of money or property").

Amici urge this Court to join the "growing number of courts, in finding that complaints based solely on a plaintiff's disappointment over not receiving an advertised discount at the time of purchase" are not sufficient to establish an "ascertainable loss" under the UTPA. *Robey*, 495 F Supp 3d at 321.

II. Allowing private consumers to bring reference pricing claims will harm both businesses and consumers.

Plaintiff argues that consumers have suffered an economic injury when they purchased a product at its regular selling price when they thought they were getting a discount. But this potential disconnect does not actually cause economic harm to consumers, while aggressive private enforcement against retailers can harm both retailers and consumers. *See Stillmock v. Weis Markets, Inc.*, 385 Fed Appx 267, 281 (2010) (Wilkinson, J., concurring) (imposing class-wide statutory penalties on a company for technical violations in which no consumer was actually harmed risks the annihilation of entire companies, which in turn can lead companies to settle "even if they have a strong defense" and pass on those substantial settlement costs "to consumers—the very ones whom Congress sought to protect.").

Reference pricing cases were a prime focus of the Federal Trade Commission during the 1950's and 1960's, accounting for as much as 30 percent of the Commission's advertising related actions. But the FTC has now stopped pursuing these claims altogether, as modern economic knowledge evolved and the FTC came to realize that aggressive enforcement can have the effect of harming consumers rather than helping them. R. Pitofsky, R. Shaheen, and A. Mudge, *Pricing Laws Are No Bargain for Consumers*, 18-SUM Antitrust at 62 (2004) (citing to T. Muris, *Economics and Consumer Protection*, 60 Antitrust LJ 103, 112 (1991)). As former FTC Chairman Robert Pitofsky noted in 2004:

> "The FTC has not brought a single fictitious price case since 1979, and the last two chairs of the FTC—one presiding during a Democratic Administration and the other during a Republican Administration—have indicated that enforcement actions in the area often do more harm than good."

Id.

Pitofsky has explained that FTC or state government enforcement actions may actually dampen the robust price competition that ultimately benefits consumers. Because discounters—and in particular retail outlets such as the target of the

instant action—are natural targets for these claims,[3] aggressive enforcement of unfair trade practices laws could raise the costs to sellers "of ascertaining whether particular discount claims are accurate [and thus] deter them from making such claims at all." *Id.* That is, if the rule were that including a reference price on a sale item was actionable unless the retailer had sold at least one item in the same style and color at that reference price in the previous six months, and that purchase had not been returned, retailers would have to engage in extensive analysis and data-tracking before holding sales to ensure that every single item in the sale had indeed been sold (and not returned) at the list price during the relevant period. Another former FTC Chairman, Timothy Muris, has made similar points, noting the "risk that such an enforcement campaign will discourage exactly the kind of aggressive price competition that

[3] The proliferation of private reference pricing actions in the last decade has primarily been against discounters and outlet stores. *See, e.g.*, *Schertzer v. Kate Spade & Co., LLC*, No 19-330 (SD Cal 2019); *Shaulis*, 865 F.3d 1 (Nordstrom Rack); *Belcastro*, 2017 WL 744596 (Burberry outlet); *Gattinella v. Michael Kors (USA) Inc.*, No 14-05731 (SDNY 2014); *Johnson*, 2014 WL 4129576 (Jos. A. Bank); *Kim*, 598 F3d 362 (Carter's outlets).

the government should seek to encourage." Muris, 60 Antitrust LJ at 113.

The stakes here are massive. Plaintiff class-action attorneys have filed over 200 similar lawsuits against over 120 retailers across the country. As discussed in Section I, most states have rejected these suits since plaintiffs can never show ascertainable loss, but the state most open to these suits (California, which does not have an ascertainable loss requirement) has seen well over 100 suits in its courts.

As plaintiff and her amici repeatedly stress, the statute provided for statutory damages of $200. ORS 646.638(1). Those would potentially be available to a consumer who had bought a single pair of socks for $2, if the label showed a reference price of $3, without any need for the consumer to show she was in any way harmed by getting a pair of socks for $2. And it would be available through class actions, so these statutory penalties would be applied for every consumer who had ever bought those socks, or that vest, or any of the other items. A system that allows for class actions without any need for class members to show any actual economic loss, and provides significant statutory penalties, could be crippling

for retailers and the economy. *Cf. Stillmock*, 385 Fed App'x at 276 (Wilkinson, J., concurring) ("the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer that Congress has not sanctioned. To certify in cases where no plaintiff has suffered any actual harm . . . and where innocent employees may suffer the catastrophic fallout could not have been Congress's intent.").

CONCLUSION

Aggressive price competition is good for consumers. And consumers have the ability, especially now with online price checking tools, to compare prices and evaluate the meaningfulness of claimed discounts. The State, too, has the authority to step in to police pricing claims. Retailers should be encouraged to offer consumers the lowest possible price for their products, not discouraged from doing so by costly litigation. Whether some other consumer ever paid a higher price does not affect whether a later consumer suffered an ascertainable loss. Amici urge this Court to hold that plaintiff suffered no ascertainable loss in this case.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 19, 2022, I directed the original Brief of Amici Curiae the Chamber of Commerce of the United States of America, National Retail Federation, Retail Litigation Center, Inc. and Oregon Business & Industry Association to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Che Corrington, attorney for appellant, Sara Kobak, attorney for respondents on review, Denise G. Fjordbeck and Christopher A. Perdue, attorneys for amicus curiae Oregon Department of Justice, Chris Mertens and Kelly Jones, attorneys for amicus curiae Oregon Consumer Justice, and Nadia H. Dahab, attorney for amicus curiae Oregon Trial Lawyers Association, by using the court's electronic filing system.

I further certify that on October 19, 2022, I directed this amicus brief to be served upon Michael Vatis, attorney for respondents on review, by mailing two copies, with postage prepaid, in an envelope addressed to:

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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) the word count of this brief is 4,544 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.

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