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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF JOSEPHINE

STATE OF OREGON,

Plaintiff,

v.

REVER GRAND, INC.,

Defendant.

Case No. 24CR42893

**DEFENDANT’S DEMURRER TO THE SUPERSEDING INDICTMENT**

**ORAL ARGUMENT AND A PRETRIAL HEARING  
PRIOR TO THE DATE OF TRIAL REQUESTED**

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1 Defendant requests oral argument and a pretrial hearing before trial. Defendant  
2 estimates 90 minutes for oral argument. Official court reporting services are requested.  
3 UTCR 4.010 and UTCR 4.050(1).

4 Defendant, Rever Grand, Inc., through counsel, hereby demurs to the  
5 superseding indictment pursuant to ORS 135.610 and ORS 135.630.

6 **I. Introduction**

7 A defendant is authorized to demur to a charging instrument based on any of the  
8 six grounds specified in the demurrer statute, ORS 135.630. “A demurrer is a challenge  
9 to the charging instrument itself. It must be resolved based on the face of the charging  
10 instrument. When ruling on a demurrer, a trial court cannot consider facts other than  
11 those alleged in the charging instrument.” *State v. Warren*, 364 Or 105, 113 (2018)  
12 (internal citations omitted).

13 The superseding indictment charges two counts of Making a False Claim for  
14 Health Care Payment in violation of ORS 165.692(2). Although the superseding  
15 indictment does not cite to subsection (2), the superseding indictment tracks the  
16 language of subsection (2). The superseding indictment varies substantially from the  
17 original indictment which charged twelve counts in violation of ORS 165.692, each  
18 count alleging a separate six-month period.

19 Each count in the superseding indictment alleges an “on or about” date of  
20 October 29, 2021. Count 1 charges defendant Rever Grand, Inc., while Count 2  
21 charges Rever Grand, LLC. These counts are identical to Counts 4 and 5 of the Sesso  
22 superseding indictment in alleging that the defendant did:

23 “knowingly, and with the intent to obtain a health care payment to which  
24 defendant was not entitled, conceal from and fail to disclose to the  
Department of Human Services, a health care payor, the existence of

1 information to wit: information required to be disclosed on the Disclosures  
2 List of the Oregon Department of Human Services Provider Enrollment  
3 Application and Agreement....”

4 Count 1 alleges the document is signed and dated the same date, October 29,  
5 2021, whereas Count 2 alleges the document is signed October 29, 2021 and dated  
6 December 1, 2021.

7 Defendant demurs to those charges on multiple grounds.

8 First, “the facts stated do not constitute an offense,” ORS 135.630(4), because  
9 ORS 165.692(2) fails to provide fair notice and is unconstitutionally vague in violation of  
10 Article I, section 21, of the Oregon Constitution and the Fourteenth Amendment of the  
11 United States Constitution.

12 Second, the statute is facially invalid for infringing on the rights guaranteed under  
13 the First Amendment of the United States Constitution.

14 Third, the superseding indictment fails to state facts that constitute an offense in  
15 violation of ORS 135.630(4), or it fails to contain “[a] statement of the acts constituting  
16 the offense in ordinary and concise language, without repetition, and in such manner as  
17 to enable a person of common understanding to know what is intended,” as required  
18 under ORS 132.550(7), and is subject to demurrer for failing to “substantially conform to  
19 the requirements” of ORS 132.550, ORS 135.630(2).

20 The Oregon Department of Human Services Provider Enrollment Application and  
21 Agreement (Commonly referred to as a PEAA), is administered by DHS pursuant to  
22 Oregon Administrative Rules 407-120-0320. The OAR states that being enrolled as a  
23 provider is a condition of eligibility for an ODHS contract for certain services and  
24 reimbursement for covered services will be made under separate contract requirements.  
OAR 407-120-0320(1). The PEAA form is a state form requesting certain information,

1 including a business designation section referring to an Exhibit C 'Disclosures List'. It is  
2 this latter section the superseding indictment alleges that the defendant concealed from  
3 and failed to disclose information "required to be disclosed on the disclosures list..."

4 The superseding indictment in this case do not contain a statement of acts in  
5 ordinary and concise language about what information existed that was required in the  
6 PEAA; what contract, if any, ODHS entered with each defendant or any statement about  
7 health care payments defendants obtained to which they were not entitled. Merely  
8 regurgitating the statutory language, in this context, does not enable the defendants to  
9 know what is intended by the allegations of not disclosing information required by the  
10 disclosures list.

11 The superseding indictments allege ORS 165.692(2) was violated because  
12 defendants failed to disclose unnamed information in the Provider Enrollment  
13 Application and Authorization (PEAA), with the intent to obtain a health care payment  
14 which the person is not entitled.

15 ORS 165.690 states a "claim for health care payment" means any request or  
16 demand for a health care payment, whether made in the form of a bill, claim form, cost  
17 report, invoice, electronic transmission or any other document. The PEAA documents  
18 submitted by Rever Grand, signed by Jolene Sesso as a manager, are not claims for  
19 health care payments as defined by the Oregon Revised Statute. As such, the facts  
20 alleged in the superseding indictments do not constitute an offense.

21 ///

22 ///

1 **II. ORS 165.692(2) Is Unconstitutionally Vague Under The Oregon And United**  
2 **States Constitutions.**

3 **A. Legal Standards**

4 Criminal statutes run afoul of the *ex post facto* provisions in Article I, section 21,  
5 of the Oregon Constitution when they are so vague that they confer to the judge or jury  
6 “uncontrolled discretion in punishing defendants.” *State v. Graves*, 299 Or 189, 195  
7 (1985). A criminal statute offends the equal privileges and immunities clause in Article I,  
8 section 20, when it lacks standards governing its application, thereby leaving it to the  
9 particular prosecutor, judge and jury to determine what is prohibited in a given case. *Id.*  
10 As the Oregon Supreme Court has explained: “A criminal statute need not define an  
11 offense with such precision that a person in every case can determine in advance that a  
12 specific conduct will be within the statute's reach. However, a reasonable degree of  
13 certainty is required by Article I, sections 20 and 21.” *Id.*

14 Similarly, the due process guaranteed under the Fourteenth Amendment of the  
15 United States Constitution prevents a state from “taking away someone's life, liberty, or  
16 property under a criminal law so vague that it fails to give ordinary people fair notice of  
17 the conduct it punishes, or so standardless that it invites arbitrary enforcement.”  
18 *Johnson v. United States*, 576 U.S. 591, 595 (2015). “To satisfy due process, ‘a penal  
19 statute [must] define the criminal offense [1] with sufficient definiteness that ordinary  
20 people can understand what conduct is prohibited and [2] in a manner that does not  
21 encourage arbitrary and discriminatory enforcement.’” *Skilling v. United States*, 561 U.S.  
22 358, 130 S. Ct. 2896, 2904 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357  
23 (1983)) (alteration in *Skilling*). “[A] statute which either forbids or requires the doing of  
24 an act in terms so vague that men of common intelligence must necessarily guess at its



1 meaning and differ as to its application, violates the first essential of due process of  
2 law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Federal due process  
3 also requires statutes defining crimes to set forth clear standards or guidelines for their  
4 application because "[w]here the legislature fails to provide such minimal guidelines, a  
5 criminal statute may permit a standardless sweep [that] allows policemen, prosecutors,  
6 and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (internal  
7 quotation and citations omitted; alteration in original).

8 In sum, people are constitutionally entitled to fair notice of what constitutes  
9 criminal behavior, particularly when the criminal behavior involves a failure to act. See  
10 *Lambert v. California*, 355 U.S. 225 (1957) (finding that a conviction under a law  
11 requiring convicted felons to register with police within five days of entering Los Angeles  
12 violated the Fourteenth Amendment because the law did not require "the commission of  
13 acts, or the failure to act under circumstances that should alert the doer to the  
14 consequences of his deed" and instead could be violated by "conduct that is wholly  
15 passive," the "mere failure to register," and where a penalty may result from an  
16 individual's failure to act and holding that "actual knowledge of the duty to register or  
17 proof of the probability of such knowledge and subsequent failure to comply are  
18 necessary before a conviction under the ordinance can stand."). Specifically, statutes  
19 that prohibit the failure to do an act, like ORS 165.695(2), must set out with sufficient  
20 clarity and definiteness standards from which ordinary people can discern whether they  
21 are subject to the statute, what act they must do in order to avoid violating the statute,  
22 and when they must perform that act because due process prohibits a conviction under  
23 a statute that fails to do so. *Id.*

1 A defendant challenging a statute under the Oregon Constitution must  
2 "demonstrate that he was unable to determine from a reading of [the statute defining the  
3 offense] that *his* conduct was prohibited." *State v. Butterfield*, 128 Or App 1, 8  
4 (1994) (emphasis in original); see also *State v. Howard*, 325 Or App 696, 702 (2023)  
5 (same). Under the United States Constitution, a defendant must show that he did not  
6 have fair notice that his conduct was prohibited. *Grayned v. City of Rockford*, 408 U.S.  
7 104, 108 (1972); see also *Howard*, 325 Or App at 702 (same). As set forth below, ORS  
8 165.692(2), defining the crime of making a false claim for health care payments, is  
9 unconstitutionally vague because it failed to provide constitutionally adequate notice to  
10 defendant that his conduct was prohibited and fails to set forth any discernable  
11 standards for its application.

12 **B. ORS 165.692(2) Is Unconstitutionally Vague.**

13 The crime of making a false claim for health care payment is defined in ORS  
14 165.692 as follows:

15 "A person commits the crime of making a false claim for health care  
16 payment when the person:

17 "(1) Knowingly makes or causes to be made a claim for health care  
18 payment that contains any false statement or false representation  
19 of a material fact in order to receive a health care payment; or

20 "(2) Knowingly conceals from or fails to disclose to a health care payor  
21 the occurrence of any event or the existence of any information with  
22 the intent to obtain a health care payment to which the person is  
23 not entitled, or to obtain or retain a health care payment in an  
24 amount greater than that to which the person is or was entitled."

21 Subsection (1) of the statute is straightforward. The offense in ORS 165.692(1) is  
22 committed when a person "makes" a claim for health care payment, an act which is  
23 made unlawful under the statute if committed by a person who knows the claim contains  
24 a materially false statement. Subsection (1) further requires that the proscribed act is

1 committed “in order to receive a health care payment,” a requirement that provides  
2 context for determining the materiality of the false statement. The requirement that the  
3 false statement be “material” serves to narrow the scope of the statute, ensuring that it  
4 reaches the type of false statements warranting criminal punishment while excluding  
5 from the statute’s reach claims containing false statements that are immaterial to the  
6 person’s receipt of payment on the claim.

7 Subsection (2) is a horse of a different color. It is not straightforward. It is vague  
8 and indefinite. Although entitled “making false claim for health care payment,” the  
9 offense defined in Subsection (2) does not require the act of making a claim—its  
10 elements do not even contain the words “make” or “claim.” The proscribed conduct  
11 under subsection (2) occurs when a person, with the requisite intent, “[k]nowingly  
12 conceals from or fails to disclose to a health care payor the occurrence of any event or  
13 the existence of any information \* \* \*.” ORS 165.692(2). Subsection (2) does not prohibit  
14 an act at all; it prohibits a *failure* to act, *i.e.*, an omission.

15 Nor does subsection (2) require that the person actually obtain or retain a health  
16 care payment to which the person is not entitled”; rather, it requires only the *intent* to  
17 obtain or retain such a payment. No resulting pecuniary harm is required. And unlike  
18 subsection (1), subsection (2) does not contain a materiality requirement or other  
19 limitation or guidance on what information a person must disclose to avoid violating the  
20 statute. Instead, the language in ORS 165.692(2) seemingly eschews any such  
21 limitation, expressly criminalizing a person’s failure to disclose “the occurrence of *any*  
22 event or the existence of *any* information” with the requisite intent. (Emphasis added).

23 While various crimes may be carried out by an “omission” rather than an “act,”  
24 very few statutes in Oregon directly criminalize a person’s failure to act. Those that do

1 provide fair notice and constitutionally adequate standards from which a person can  
2 discern whether they are subject to the statute, what act they must perform to avoid  
3 violating the statute, and when they must perform that act. For example, one way that a  
4 person can commit theft is through deception, including when a person “fails to correct a  
5 false impression that the person previously created or confirmed.” ORS 164.085(1)(d).  
6 The requirement that the person previously engaged in the act of creating or confirming  
7 that false impression both gives rise to the duty and puts the person on notice that they  
8 have a duty to correct that false impression. Furthermore, the statute does not extend to  
9 “any” false impression; it must be one having pecuniary significance, ORS 164.085(2),  
10 and the person must have both the intent to deprive the owner of the property and, in  
11 failing to correct the false impression, the intent to defraud, ORS 164.015(1); ORS  
12 164.085(1).

13 Similarly, under ORS 164.015(2) and ORS 164.065, a person who actually  
14 obtains property, *e.g.*, a health care payment, and “knows or has good reason to know”  
15 that they are not entitled to that payment or the full amount of the payment and, with the  
16 intent to deprive the health care payor of those funds, “fails to take reasonable  
17 measures to restore the property to the” health care payor commits the crime of theft.  
18 ORS 164.065; ORS 164.015(2). By obtaining the payment to which they knew or had  
19 good reason to know they were not entitled, the person was put on notice of their duty  
20 to act.

21 Comparing ORS 165.692(2) to any other Oregon criminal statute defining an  
22 offense in terms of a failure to act, the deficiencies in ORS 165.692(2) are obvious. *See*,  
23 *e.g.*, ORS 411.630; ORS 163.693; ORS 164.868; ORS 164.872; ORS 164.085; ORS  
24 164.065; ORS 181.599; ORS 657.300; ORS 657B.120. For example, ORS

1 411.630(1)(b) provides that “[a] person may not knowingly obtain or attempt to obtain \* \*  
2 \* any public assistance or medical assistance to which the person \* \* \* is not entitled \* \*  
3 \* by means of:”

4 “(b) Failure to immediately notify the Department of Human Services or  
5 the Oregon Health Authority, if required, of the receipt or  
6 possession of property or income, or of any other change of  
7 circumstances, which directly affects the eligibility for, or the  
8 amount of, the assistance.”

9 Like ORS 165.692(2), ORS 411.630(1)(b) can be violated by a person’s failure to  
10 disclose information. However, ORS 411.630(1)(b) requires circumstances which  
11 ensure that the person is on notice of their duty to act, *i.e.*, the person must knowingly  
12 obtain or attempt to obtain public assistance benefits to which they are not entitled. It  
13 sets forth the specific information that the person must disclose to avoid violating the  
14 statute, *i.e.*, the person’s “receipt or possession of property or income, or of any other  
15 change of circumstances, which directly affects the eligibility for, or the amount of, the  
16 assistance” to which the person is entitled.” *Id.* Its application is limited to those  
17 situations wherein the person is, in fact, “required” to disclose the information because it  
18 “directly affects” the person’s entitlement to the public assistance. Finally, it identifies  
19 when the person must come forward with the information, *i.e.*, “immediately” upon the  
20 receipt or possession of property or change of circumstances.

21 To avoid violating ORS 165.692(2), a person must make a disclosure, but the  
22 statute does not set forth any circumstances that would notify a person of their duty to  
23 act or provide any guidance as to the potential source of that duty. It does not identify or  
24 set forth any standard for determining what information the person must disclose to  
avoid violating the statute. It also does not identify when, or the circumstances under  
which, the person must come forward with the information to avoid violating the statute.

1 It does not require that the person actually obtain, attempt to obtain, or retain a health  
2 care payment to which the person is not entitled—the person must merely form the  
3 intent to do so. Thus, its application is not limited to situations where the information not  
4 disclosed is, in fact, material to the person’s entitlement to a health care payment.  
5 These deficiencies are fatal. There is no way for a person to discern from the language  
6 in ORS 165.692(2) what it prohibits or what a person must do to avoid violating the  
7 statute.

8 The statute is unconstitutionally vague under Article I, sections 20 and 21, of the  
9 Oregon Constitution because defendant did not and could not know or determine from  
10 reading ORS 165.692(2) what conduct it prohibits or that any of his conduct was  
11 prohibited. *See Butterfield*, 128 Or App at 8. It is also unconstitutional under the Due  
12 Process Clause of the Fourteenth Amendment of the United States Constitution  
13 because defendant did not have fair notice that his conduct was prohibited. *See*  
14 *Grayned*, 408 US at 108. Moreover, the statute fails to set forth standards governing its  
15 application which, as shown in this case, allows law enforcement officers and  
16 prosecutors to use the statute to “pursue their personal predilections.” Accordingly,  
17 defendant demurs to the superseding indictment charging a violation of ORS 165.692(2)  
18 on grounds that those counts fail to state an offense due to constitutional defect. ORS  
19 135.630(4); *see State v. Robertson*, 293 Or 402, 405-406 (1982) (stating that demurrer  
20 under ORS 135.630(4) is proper vehicle for challenging constitutional defect in a  
21 statute).

22 **C. ORS 165.692(2) Is Facially Invalid Under The First Amendment**

23 The United States Supreme Court has long recognized that the right to freedom  
24 of speech guaranteed under the First Amendment of the United States Constitution

1 “extends not only to the right to speak and write freely, but to the underlying right of  
2 ‘freedom of thought.’” *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). It has held  
3 “that the right of freedom of thought protected by the First Amendment against state  
4 action includes both the right to speak freely and the right to refrain from speaking at  
5 all,” because “[t]he right to speak and the right to refrain from speaking are  
6 complementary components of the broader concept of ‘individual freedom of mind.’”  
7 *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The United States Supreme Court has  
8 explained that federal constitutional guarantees, including the freedom of speech and  
9 the right to privacy reflects that “[o]ur whole constitutional heritage rebels at the thought  
10 of giving government the power to control men’s minds” and that a state law aimed at  
11 “control[ling] the moral content of a person’s thoughts \* \* \* is wholly inconsistent with the  
12 philosophy of the First Amendment.” *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).  
13 Accordingly, a state “cannot constitutionally premise legislation on the desirability of  
14 controlling a person’s private thoughts.” *Id.* at 566.

15       ORS 165.692(2) is facially invalid because it criminalizes a person’s private  
16 thoughts, thereby infringing on the rights to freedom of speech and thought and the right  
17 to privacy protected under the First and Fourteenth Amendments. Despite its location in  
18 a statute entitled “making false claim for a health care payment,” ORS 165.692(2) does  
19 not require a person to make a false claim for a health care payment. It does not require  
20 an act that causes or threatens to cause a financial harm. It does not require any act at  
21 all. Nor does it proscribe the actual infliction of a financial harm, as the statute does not  
22 require the person to actually obtain or retain a health care payment to which the person  
23 is not entitled. The element that a person must knowingly fail to disclose “the  
24 occurrence of *any* event or the *existence* of *any* information” is a nullity without a

1 materiality requirement or other limitations on the type and scope of information that  
2 must be disclosed and the circumstances under which the disclosure must be made.  
3 That is, there will always be information within a person's knowledge which has not  
4 been disclosed and the existence of undisclosed information, alone, does not cause or  
5 present a risk of a cognizable harm.

6         The only remaining component of the offense defined under ORS 165.692(2) is  
7 the intent element: the intent to obtain or retain a health care payment to which the  
8 person is not entitled. That is a culpable mental state and the state is permitted to make  
9 criminal an act committed with that intent, as it did in ORS 165.692(1). The state is also  
10 permitted to criminalize a failure to act by a person who has, in fact, obtained a health  
11 care payment to which the person is not entitled, as it did in the theft statutes, ORS  
12 164.015(2) and ORS 164.065. However, the state is *not* permitted to criminalize the  
13 mere formation of an intent to obtain or retain a health care payment to which a person  
14 is not entitled, as it did in ORS 164.692(2). The offense under ORS 164.692(2) is  
15 committed and completed the moment the person forms an intent to obtain or retain a  
16 health care payment to which they are not entitled. No act in furtherance of that intent is  
17 required and no resulting harm is required. Thus, the "harm" proscribed under ORS  
18 165.692(2) is the mere formation of a bad intent. However, the state cannot  
19 constitutionally proscribe thoughts which it deems harmful. Thus, even if the state finds  
20 such an intent to be blameworthy, it "cannot constitutionally premise legislation on the  
21 desirability of controlling a person's private thoughts." *Stanley*, 394 US at 565. B

22         Accordingly, defendant demurs to the charges of making a false claim for health  
23 care payment on grounds that the facts stated do not constitute an offense, ORS  
24



1 135.630(4), as ORS 165.692(2) is facially invalid under the First and Fourteenth  
2 Amendments of the United States Constitution.

3 DATED this 13<sup>th</sup> day of December, 2024.  
4

5 s/ Neil J. Evans  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date below, I served the foregoing document on the  
3 following attorneys by the method listed below:

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5 District Attorney  
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