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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF MULTNOMAH

6 PAUL BATES, an individual; and )  
7 NO MOKE DADDY LLC, doing business )  
8 as DIVISION VAPOR, an Oregon limited )  
9 liability company, )  
10 Plaintiffs, )  
11 v. )  
12 OREGON HEALTH AUTHORITY; and )  
13 PATRICK ALLEN, in his official capacity )  
14 as Director of Oregon Health Authority, )  
15 Defendants. )

Case No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

(Free speech under Oregon Constitution  
Article I, § 8)

Filing fee: \$265 (ORS 21.135(1), (2)(f))

**(Claims not subject to  
mandatory arbitration)**

13 Plaintiffs Paul Bates and No Moke Daddy LLC, doing business as Division Vapor  
14 (“Plaintiffs”) allege as follows for their complaint against the Oregon Health Authority and its  
15 director sued in official capacity (“Defendants”):

16 1.

17 Plaintiffs bring this civil rights lawsuit pursuant to the free-speech clause, Article I, § 8 of  
18 the Oregon Constitution and the Oregon Uniform Declaratory Judgment Act, 2017 O.R.S.  
19 28.010. Plaintiffs seek injunctive and declaratory relief against Oregon’s requirement that  
20 vaping businesses censor accurate information about vaping liquids that they are legally  
21 permitted to offer for sale, and associated rules and practices of Defendant Oregon Health  
22 Authority.

1 **GENERAL ALLEGATIONS**

2 2.

3 At all material times, Plaintiff Paul Bates was and is the owner of No Moke Daddy LLC,  
4 doing business as Division Vapor. Division Vapor is a vape shop located in Portland, Multnomah  
5 County, Oregon.

6 3.

7 Defendant Oregon Health Authority is a political subdivision of the State of Oregon.

8 4.

9 Defendant Patrick Allen is the Director of Oregon Health Authority and is sued in his  
10 official capacity.

11 5.

12 Division Vapor requires that anyone entering its stores be at least 21 years old, and has a  
13 sign posted at the entrance stating this requirement.

14 6.

15 All products inside Division Vapor are displayed either inside glass cases, or behind the  
16 counter on racks that are only accessible to employees.

17 7.

18 Vaping liquids are consumable liquids, typically sold in small glass or plastic bottles,  
19 which consist of vegetable glycerin, propylene glycol, water, commercial food flavoring, and  
20 sometimes nicotine.

21 8.

22 Vaping liquids are consumed by atomizing the liquid using a heated coil inside an e-  
23 cigarette, which produces vapor, which is then inhaled.

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9.

Vaping liquids are offered in thousands of flavors and varying levels of nicotine. Fruit and dessert flavors are the most popular.

10.

Vaping is a safe alternative to ordinary cigarettes, recognized as such by the federal Food and Drug Administration. Vaping has helped thousands of smokers to quit smoking. Approximately 90 percent of Plaintiffs' customers are former smokers, who prefer vaping for its lower health risks and the fact that water vapor, which quickly dissipates, is less offensive than cigarette smoke.

11.

The sale of vaping products, including e-cigarettes and vaping fluids, is legal in the state of Oregon.

12.

O.R.S. 431A.175 provides that vaping products may not be packaged "in a manner that is attractive to minors."

13.

Defendant Oregon Health Authority has issued a series of rules interpreting and expanding on the statutory restrictions for vaping liquids. Under rules implemented in 2016, labels cannot depict things like "[c]elebrities, athletes, mascots, fictitious characters played by people, or other people likely to appeal to minors" and "[f]ood or beverages likely to appeal to minors such as candy, desserts, soda, food or beverages with sweet flavors including fruit or alcohol." O.A.R. 333-015-0357(2)(b) and (c).

1 14.

2 In 2018, Defendant implemented new rules which in addition to the foregoing, also  
3 forbid labels from including “[t]erms or descriptive words for flavors that are likely to appeal to  
4 minors such as tart, tangy, sweet, cool, fire, ice, lit, spiked, poppin’, juicy, candy, desserts, soda,  
5 sweet flavors including fruit, or alcohol flavors.” O.A.R. 333-015-0357(2)(d).

6 15.

7 The list of images and words that are prohibited by O.A.R. 333-015-0357(2) is  
8 extensive. Images of fruit and other food products and certain specified words, including the  
9 names of fruits such as “apple” or “strawberry,” are prohibited.

10 16.

11 These rules are content-based speech restrictions on protected speech. They are also  
12 vague, incomprehensible, and overbroad, and they censor truthful, non-misleading speech about  
13 legal products. For instance, under these rules, a vape shop is forbidden from putting the word  
14 “strawberry” or a picture of a strawberry on the label of a strawberry-flavored vaping liquid.

15 17.

16 Due to these content-based speech restrictions, an employee of Division Vapor must  
17 spend several hours per week individually censoring bottles of vaping liquid before they can be  
18 offered for sale. This requires placing variously sized white stickers over various words and  
19 images, as required by Oregon law. In its stock room, Division Vapor maintains a metal rack  
20 with a label that reads “Censor Before Stock!” This rack holds bottles of vaping liquids whose  
21 labels are illegal to display under Oregon law. Division Vapor employees then censor this stock  
22 by obscuring the labels with stickers or otherwise covering them up, and then display these  
23 bottles on racks behind the counter in the sales area of the stores. The bottles are small and, in

1 many cases, virtually the entire label must be censored. This leads to added costs by way of  
2 additional salary amounting to several additional work hours per week that is needed to be paid  
3 to Division Vapor employees to censor bottles of vaping liquid.

4 18.

5 These censorship stickers make it difficult for customers to differentiate between vaping  
6 fluids. When a label is censored, a stores employee must usually describe the product for the  
7 customer, rather than relying on the label to convey information about the product.

8 19.

9 As a consequence of the censorship requirements, Division Vapor has been forced to  
10 cease selling certain product lines because the labels must be completely covered by censorship  
11 stickers, rendering sale of these products economically impracticable. Division Vapor has also  
12 lost sales as a consequence of the censorship rules, has been deprived of the ability to fully  
13 explain the qualities of their products to customers, and have been forced to expend time and  
14 resources explaining products to customers rather than simply labeling these products accurately.

15 20.

16 Like all Oregon vape shops, Division Vapor is subject to periodic random, unannounced  
17 inspections from the Oregon Health Authority in coordination with law enforcement agencies.

18 O.R.S. 431A.183(1)(a).

19 21.

20 During these inspections, an inspector examines the labels of the store's vaping liquids to  
21 make sure they comply with the statutory labeling requirements.

22 //

23 //

1 22.

2 If a store is found to be offering products with labels that have not been appropriately  
3 censored, it is subject to statutory fines and other penalties. O.R.S. 431A.010(1).

4 **INJURY TO PLAINTIFFS**

5 23.

6 Oregon forces Plaintiff’s vape shop to censor truthful, non-misleading information about  
7 products that they are legally permitted to sell; namely, both written and graphical information  
8 about vaping liquids. This government-mandated censorship substantially burdens the  
9 constitutionally protected speech of Plaintiff under Article I, §8 of the Oregon Constitution.

10 24.

11 Like all small businesses, Plaintiffs must be able to freely communicate accurate  
12 information to their customers in order to effectively conduct retail transactions. Oregon’s label-  
13 censorship requirements prevent them from being able to do so, by requiring them to censor  
14 simple images, like fruits and pictures of food, and descriptive terms, like “strawberry” and  
15 “orange,” that describe the contents of the bottles that line their shelves.

16 25.

17 Oregon’s label-censorship statutes and regulations are so vague that they fail to provide  
18 Plaintiffs and other people of ordinary intelligence reasonable notice about what labels are  
19 permitted and what labels are forbidden. This imprecision gives Defendants virtually  
20 unconstrained, arbitrary, standardless, and unfettered discretion in interpreting its statutes and  
21 regulations, and subjecting Plaintiffs to a continued threat of penalties.

22 //

23 //

1 **INJUNCTIVE RELIEF ALLEGATIONS**

2 26.

3 Plaintiffs contend that they and their customers are harmed by Defendants’ censorship  
4 requirements because they prohibit Plaintiffs from conveying—and their customers from  
5 receiving—non-misleading information about products that Plaintiffs are legally allowed to sell,  
6 leading to confusion, uncertainty, and a loss of valuable information being exchanged between  
7 seller and customer.

8 27.

9 Plaintiffs contend that the censorship regulations violate the Oregon constitution.  
10 Plaintiffs are informed and believe that Defendants contend otherwise.

11 28.

12 If not enjoined by this Court, Defendants and their agents, representatives, and employees  
13 will administer, implement, and enforce the censorship requirements, which subject Plaintiffs to  
14 the unconstitutional deprivation of their freedom of speech and other injuries as specified herein.  
15 This course of conduct will cause Plaintiffs to suffer irreparable injury, for which Plaintiff has no  
16 plain, speedy, and adequate remedy at law. Accordingly, injunctive relief is appropriate.

17 **CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF**  
18 **COUNT ONE**  
19 **(Constitutionally Protected Speech)**

20 29.

21 Plaintiffs reallege the allegations of preceding paragraphs as though fully set forth here.

22 30.

23 Article I, § 8 of the Oregon Constitution provides that “No law shall be passed restraining  
the free expression of opinion, or restricting the right to speak, write, or print freely on any

1 subject whatever.” This guarantee prohibits the government from mandating that businesses  
2 censor truthful, non-misleading speech about the products they sell.

3 31.

4 Truthful, non-misleading descriptions of products, and images of their contents, are forms  
5 of speech protected under the Oregon Constitution.

6 32.

7 The mandated censorship of vaping liquid bottles is a content-based speech restriction,  
8 because it prohibits the truthful, non-misleading communication of information about a legal  
9 product based on the content of that communication. For example, it forbids Plaintiffs from  
10 identifying a vaping liquid as, e.g., strawberry or apple flavored, by forbidding the use of the  
11 words “strawberry” or “apple” or pictures of strawberries or apples on the labels of such liquids.

12 33.

13 As a consequence of Defendants’ enforcement of the censorship requirements, Plaintiffs  
14 have suffered and are currently suffering monetary and non-monetary injuries, including but not  
15 limited to the following: censorship of accurate speech about products that Plaintiffs are legally  
16 allowed to sell; staff time and expense spent censoring vaping labels prior to displaying them for  
17 sale; staff uncertainty about which specific portions of a label must be censored prior to  
18 displaying products for sale; and loss of business due to customer confusion or uncertainty about  
19 products Plaintiffs offer for sale.

20 34.

21 This censorship visits a severe burden on Plaintiffs and other vape shops in the state by  
22 making products needlessly difficult to sell to adult customers, creating confusion on the part of  
23 customers and retailers, and requiring hours of staff time every week to ensure compliance.



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35.

This censorship visits a burden on Plaintiffs' customers because those customers are unable to receive timely, accurate information about products they may wish to purchase; may become confused about what they are purchasing; and are frustrated in their efforts to purchase a legal product offered by Plaintiffs.

36.

Because O.R.S. 431A.175, as implemented by O.A.R. 333-015-0357 and other rules promulgated by Defendants, unconstitutionally mandates the censorship of constitutionally protected speech, Plaintiffs are entitled to a declaratory judgment that it is unconstitutional, and a permanent injunction against its future enforcement.

37.

If Plaintiffs are determined to be the prevailing parties herein, they are entitled to recover their court costs and reasonable attorney fees pursuant to *Armatta v. Kitzhaber*, 327 Or 250 (1998) and *Deras v. Myers*, 272 Or 47 (1975) in an amount to be determined by the court.

**COUNT TWO  
(Overbreadth)**

38.

Plaintiffs reallege the allegations of preceding paragraphs as though fully set forth here.

39.

O.R.S. 431A.175 is overbroad because it requires the censorship of truthful, non-misleading speech inside a business that may only be entered by someone who is at least 21 years of age.

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40.

Any governmental interest in protecting minors cannot be legitimate inside such a business and, as such, the censorship of vaping liquids inside Plaintiffs' business is unconstitutional under Article I, Section 8 of the Oregon Constitution.

41.

O.A.R. 333-015-0357 is overbroad because it mandates the censorship of far more speech than is necessary to protect minors. This overbroad censorship includes, but is not limited to, simple drawings of fruits, like apples and oranges; and words that describe the flavor of liquid inside a particular bottle, like "orange" or "apple." Such censorship also deprives the customers of Division Vapor of their right to receive truthful, non-misleading information about products that are legally sold in Oregon.

42.

As a consequence of Defendants' enforcement of the censorship requirements, Plaintiffs have suffered and are currently suffering monetary and non-monetary injuries, including but not limited to the following: censorship of accurate speech about products that Plaintiffs are legally allowed to sell; staff time and expense spent censoring vaping labels prior to displaying them for sale; staff uncertainty about which specific portions of a label must be censored prior to displaying products for sale; and loss of business due to customer confusion or uncertainty about products Plaintiffs offer for sale.

**COUNT THREE  
(Vagueness)**

43.

Plaintiffs reallege the allegations of preceding paragraphs as though fully set forth here.

1 44.

2 O.R.S. 431A.175, as implemented by O.A.R. 333-015-0357, is unconstitutionally vague  
3 because it fails to give Plaintiffs and other people of ordinary intelligence reasonable notice  
4 about what labels are permitted and what labels are forbidden. This imprecision gives  
5 Defendants virtually unconstrained, arbitrary, standardless, and unfettered discretion in  
6 interpreting its statutes and regulations, subjecting Plaintiffs to the continued threat of penalties.

7 45.

8 As a consequence of Defendants' enforcement of the censorship requirements, Plaintiffs  
9 have suffered and are currently suffering monetary and non-monetary injuries, including but not  
10 limited to the following: censorship of accurate speech about products that Plaintiffs are legally  
11 allowed to sell; staff time and expense spent censoring vaping labels prior to displaying them for  
12 sale; staff uncertainty about which specific portions of a label must be censored prior to  
13 displaying products for sale; and loss of business due to customer confusion or uncertainty about  
14 products Plaintiffs offer for sale.

15 \* \* \* \*

16 WHEREFORE, Plaintiffs request judgment against Defendants as follows:

- 17 1. For entry of judgment against Defendants;
- 18 2. On Plaintiffs' Claim for Relief, Count One, for a declaration under the Oregon  
19 Uniform Declaratory Judgment Act that O.R.S. 431A.175, as implemented by O.A.R. 333-015-  
20 0357, is an unconstitutional restriction on speech under the free-speech clause of the Oregon  
21 Constitution.
- 22 3. On Plaintiffs' Claim for Relief, Count Two, for a declaration under the Oregon  
23 Uniform Declaratory Judgment Act that O.R.S. 431A.175 and O.A.R. 333-015-0357, are  
unconstitutionally overbroad under the free-speech clause of the Oregon Constitution.

