



BACKGROUND

BATES v. OREGON HEALTH AUTHORITY

Executive Summary

Every business has a right to provide customers with accurate information about the products the business is legally allowed to sell. Freedom of speech doesn't just help businesses succeed, though—it also ensures that customers get the information that they need to make wise choices. That's certainly the case with regard to products that can benefit their health, including e-cigarettes or “vaping” devices that are helping countless people to quit smoking. Yet Oregon is now censoring truthful information about these legal products by prohibiting retailers from putting pictures of apples, strawberries, and oranges—or even those very *words*—on their product labels. This censorship harms Oregon consumers and violates the constitutional rights of responsible entrepreneurs.

The Problem

Whether through television commercials, window signs, or labels on bottles, small businesses need to provide consumers with accurate information about the products they sell, and to effectively market those products to consumers. This kind of speech—sometimes called “commercial speech”—is the lifeblood of American commerce, and it's protected by the First Amendment and every state constitution.

Commercial speech is important to every business in America. Without it, they could not communicate with potential customers about the goods they sell. And it's important to customers who need information about products so that they can make choices about their own lives. But in Oregon, local vape shops are under attack by overly aggressive regulators, who now claim the right to completely control what appears on the labels of vaping liquids. This censorship is not limited to labels that deliberately target children. On the contrary, state regulators are censoring speech to adults, in adults-only businesses, about products that only adults are allowed to buy.

State officials are forbidding companies from putting labels on their bottles that have pictures of fruits (where the product has a fruit flavor) and even prohibiting companies from putting the names of fruits themselves on their products. Thus, for example, a vape shop would not be able

to describe strawberry-flavored vaping liquid as “strawberry-flavored”—even though strawberry-flavored vaping liquids are entirely legal.

Vaping: A Safer Alternative to Smoking

“We recognize [e-cigarettes] as a viable alternative for adult smokers who want to get access to satisfying levels of nicotine without all the harmful effects of combustion,” FDA Commissioner Scott Gottlieb told CNBC in October. “If we could switch every adult smoker to an e-cigarette, it would have a profound public health impact.”¹

Vaping is widely recognized as a vastly safer alternative to smoking,² which is why many ex-smokers have turned to vaping in order to help quit their dangerous habit.

Vaping allows people to ingest nicotine without also ingesting tar, pesticides, and other harmful chemicals. At the same time, “studies of exhaled vapor find that such emissions turn up at concentrations so low they may not pose much of a health risk to bystanders.”³ This is a win-win solution for both ex-smokers and people around them.

One does not need to vape, or even like vaping, to appreciate that it is a safer, cleaner alternative to smoking.⁴ That is why vaping has been a growth industry in Oregon and around the country for over a decade.

Small Business Owner Paul Bates

Portland-based Division Vapor is an upscale vape shop that caters strictly to adults. A customer must be 21 years old to even enter the store. Once inside, he or she encounters hardwood floors, a bar where products can be sampled, glass cases with vaping pens on display, and behind those, racks of vaping liquids in small glass bottles. These liquids come in dozens of flavors, the most popular of which are fruit, vanilla, and other flavors that resemble actual foods. Vaping liquid consists vegetable glycerin, propylene glycol, water, commercial food flavoring, and often—although not always—nicotine. Without the nicotine, vaping liquid is just flavored liquid that turns into vapor when it makes contact with a heating element in the vaping pen. With nicotine, it is the same thing, plus nicotine.

Like drinking alcohol or smoking marijuana (which is legal in Oregon), vaping is not completely safe. But it is safe enough that Oregon allows adults to do it with few restrictions. And it’s far safer than smoking cigarettes.

Division Vapor’s owner, Paul Bates, estimates that over 90 percent of his customers are former smokers. Many of them start vaping with a high level of nicotine—like the amount found in

¹ Angelica LaVito, “FDA to Consider Limiting E-cigarette Sales to Vape Shops to Curb Youth Use,” CNBC, October 19, 2018.

² Lynn T. Kozlowski and David Sweanor, “Withholding Differential Risk Information on Legal Consumer Nicotine/Tobacco Products: The Public Health Ethics of Health Information Quarantines,” *International Journal of Drug Policy* 32 (2016): 17-23.

³ Daniel Engber, “Is Seconhand Vaping Harmful to Your Health?,” *Popular Science*, May 12, 2015.

⁴ Kevin D. Williamson, “The Marlboro Man’s Best Friend,” *National Review*, September 13, 2018.

cigarettes—and slowly work down from there. Vaping has fewer health risks, and vapor, which quickly dissipates, is much less intrusive than cigarette smoke.

Oregon Censors Truthful Speech About A Legal Product

Like all businesses, Division Vapor needs to be able to communicate accurate information about its products to their customers. This includes information on the labels of the vaping liquids Paul sells. But Oregon has placed increasingly onerous restrictions on what information a label may include. State law provides that vaping products may not be “packaged in a manner that is attractive to minors.”⁵

This rule, alone, is difficult to follow because it is so vague. The Oregon Health Authority has subsequently issued a series of additional rules interpreting what it means. Under rules implemented in 2016, labels cannot depict “cartoons...celebrities or fictitious characters played by people...people using the product...food or beverage...[or] resembles any product of the type that is typically marketed to minors...[or] resembles the shape of any animal, commercially recognizable toy or candy.”⁶ While some of these rules are easy to follow, like not including a picture of someone using a vaping product, others are difficult, like not being able to show a drawing of a fruit.

This year, the Health Authority went even further. Under the new rules, labels cannot include “[t]erms or descriptive words for flavors that are likely to appeal to minors such as tart, tangy, sweet, cool, fire, ice, lit, spiked, poppin’, juicy, candy, desserts, soda, sweet flavors including fruit, or alcohol flavors.”⁷

These rules mean that businesses like Paul’s are legally allowed to sell a product, but they are prohibited from marketing, and even accurately describing, that product to their adult customers. Every label must be censored, even those that are only being displayed in “21 and over” vape shops. And shops whose self-censorship does not satisfy state and local officials risk fines of \$500 per day⁸ and possible criminal penalties.⁹

These rules put vape shops in an impossible position. It is legal to sell, for instance, strawberry-flavored vaping liquid. But it is illegal to put the word “strawberry” on the bottle. This does not just harm Oregon entrepreneurs and their customers—it’s also unconstitutional.

As a result of these rules, a metal rack in the back of Paul’s store is labeled “Censor Before Stock!” Above that label is a rack of vaping liquids. That label is a directive for Paul’s employees to place white stickers over the parts of each bottle that violate state law, including any depiction of a fruit and now, many words that describe the liquid inside, like “apple” or “strawberry.”

⁵ O.R.S. 431A.175.

⁶ O.A.R. 333-015-0357(2)(b) and (c).

⁷ O.A.R. 333-015-0357(2)(d).

⁸ O.R.S. 431A.010(1)(d).

⁹ O.R.S. 431A.010(1)(k).

These small glass bottles look ridiculous once they have been censored. In many cases, almost everything on the bottle must be covered. This makes it almost impossible even to tell what is inside. And it prevents Paul from displaying his merchandise in a way that attracts customers or provides them with useful information about their contents.

In short, Oregon's rules make it harder to run a business that Paul is legally allowed to operate because they violate his constitutional right to communicate with his customers. That is why Division Vapor has joined with the Goldwater Institute to challenge Oregon's unconstitutional censorship of vaping labels.

The Constitutional Right of Business Owners to Speak

Like all states, Oregon's state constitution protects free speech. In fact, Oregonians enjoy some of the strongest free-speech protections in the nation under Article 1, Section 8 of the Oregon Constitution—stronger even than the First Amendment to the U.S. Constitution. The Oregon Supreme Court has said that this right was secured by “members of the Constitutional Convention of 1857 [who] were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others.”¹⁰

The Oregon free-speech clause provides that “no law shall be passed restraining the expression of [speech] freely on any subject whatsoever.”¹¹ This means that, unless a recognized historical exception applies, the government cannot censor speech.¹² This has been called a “doctrine of total freedom of expression.”¹³

Oregon's demand that vape shops engage in extreme self-censorship violates this vital constitutional guarantee, which applies to both individuals and the businesses they own. The government may indeed have an interest in protecting children from things that can harm them, but that interest does not give government officials carte blanche to censor speech, between adults, about products that are legally allowed to be sold in the state.

The U.S. Constitution's First Amendment, of course, also protects free speech. And the rights of businesses are no different. The U.S. Supreme Court has ruled that the First Amendment protects the right to communicate truthful information about legal products, and it has declared that “a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it.”¹⁴

Yet thanks to some court rulings that have allowed the government to impose greater limits on “commercial speech” than on other kinds of free expression, states often censor businesses and business owners on the theory that government officials can choose what kind of information consumers really should know.

¹⁰ *State v. Henry*, 302 Or. 510, 523 (1987).

¹¹ Oregon Const. Art. I, Sec. 8.

¹² *Henry*, 302 Or. at 524.

¹³ Wallace Turner, “Oregon Court Broadens Free Speech Rights,” *New York Times*, April 15, 1987.

¹⁴ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996).

Commercial speech is of crucial importance in modern society. Consumers depend on advertisements, labels, signs, and internet-based rating systems to tell them about products and services that could benefit them, as well as what those products are made of and how they might affect them personally. People need this information to make choices about their lives. Just as our democracy depends on the protection of free speech about political issues, so our market-based society depends on protections for the free-speech rights of businesses and of entrepreneurs like Paul Bates. The Goldwater Institute is devoted to ensuring that all forms of speech receive the full protections to which they are entitled by the state and federal Constitutions.

Case Logistics

The plaintiffs in this case is are Paul Bates and his business, Division Vapor, in Portland, Oregon.

The defendants are the Oregon Health Authority and its Director, serving in his official capacity.

Division Vapor seeks a declaration that it is unconstitutional to require vape shops to censor labels that accurately describe vaping liquids and prevent vape shops from displaying those products in a way that is attractive to adult customers.

The case was filed in Oregon State Circuit Court, in Portland, on December 11, 2018.

The Legal Team

Matt Miller is a Senior Attorney at the Goldwater Institute, where he leads the Institute's free-speech litigation efforts. Before joining Goldwater, he served nine years as the Managing Attorney of the Institute for Justice's Texas Office, which he opened in 2008. There, he won important victories for free speech and economic liberty. Prior to that, he worked as a land-use attorney at a large Dallas law firm. Matt's cases have been featured in the Wall Street Journal, Washington Post, Associated Press, Reuters, Dallas Morning News, and other outlets nationwide. Matt has testified by invitation on numerous occasions before state legislatures on many topics. In 2009, he led the effort to reform the Texas Constitution to better strengthen protections for private property owners. Matt holds an undergraduate degree from the University of Texas and a law degree from the University of Chicago Law School.

Adi Dynar is a Staff Attorney at the Goldwater Institute. He litigates cases across the United States relating to fundamental civil rights, free enterprise, freedom of speech and association, and freedom of information, among others. Prior to joining the Goldwater Institute, Adi worked in areas of constitutional law and immigration law. He also serves as a Governor-appointed board member on the Arizona State Board of Dental Examiners, the state agency charged with regulating dental practice in Arizona. He has bachelor's and master's degrees in accounting, finance, and economics, and served as a corporate banking officer for under two years before obtaining his JD degree.

The **Goldwater Institute** opened in 1988, with the blessing of its namesake. Its early years focused on defending liberty in Barry Goldwater's home state of Arizona. Today, the Goldwater Institute is a national leader for constitutionally limited government, with hundreds of legislative and court victories to its name. In 2018, the Goldwater Institute is celebrating 30 years of advancing freedom and defending liberty.