IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL BATES, an individual; and NO MOKE DADDY LLC, doing business as DIVISION VAPOR, a corporation, Plaintiffs-Appellants, Respondents on Review, v. OREGON HEALTH AUTHORITY; and PATRICK ALLEN, in his official capacity as Director of Oregon Health Authority, Defendants-Respondents, Petitioners on Review.)	)	Multnomah County Circuit Court No. 21CV33671 CA A180270

RESPONSE TO PETITION FOR REVIEW

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Multnomah County, Honorable LESLIE G. BOTTOMLY, Judge

Opinion Filed: October 16, 2024
Author of Opinion: Shorr, Presiding Judge
Before: Shorr, Presiding Judge, Mooney, Judge and Pagan, Judge

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RESPONSE TO PETITION FOR REVIEW OF PAUL BATES AND NO MOKE DADDY, LLC

INTRODUCTION

Pursuant to Oregon Rule of Appellate Procedure 9.10(1), Paul Bates and No Moke Daddy, LLC, the Plaintiffs-Appellants below and Respondents on Review, submit this Response to the Petition for Review filed by the Oregon Health Authority ("OHA") and Patrick Allen, along with a contingent request for review of Respondents' additional questions.

The Court should deny the Petition. The decision below is a clear-cut application of this Court's longstanding precedent interpreting article I, section 8 of Oregon's Constitution. Even if the Court wishes to revisit that precedent, this case is not a suitable vehicle to do so. However, if the Court grants the Petition, it should also grant review of the other issues presented to the Court of Appeals, as those issues are closely intertwined with the questions presented in the Petition.

PETITIONERS' QUESTIONS PRESENTED AND RESPONDENTS' PROPOSED RULES OF LAW

Petitioners' First Question Presented

Is a statute that delegates authority to a state agency to regulate the attractiveness of packaging to minors subject to a facial challenge under Article I, section 8?

Respondents' First Proposed Rule of Law

Yes. As the Court of Appeals held, consistent with this Court's longstanding precedent, a statute that directs OHA to prohibit product packaging based on its expressive content and does not provide any standards or criteria for how to do so, but instead entrusts that task completely to OHA, violates Article I, section 8.

Petitioners' Second Question Presented

Does Article I, section 8 bar the legislature from prohibiting product packaging that is attractive to minors when the product is harmful to minors and unlawful for them to possess?

Respondents' Second Proposed Rule of Law

Yes. As the Court of Appeals held, consistent with this Court's longstanding precedent, the legislature may not expressly prohibit product packaging based on its expressive content where it has identified no connection between that expressive content as such and the harms from minors' use of that product, and where it is already unlawful for minors to use that product, possess it, or even enter stores where it is sold. Moreover, even assuming the statute targets the effects of expression rather than the expression itself, it is overbroad and thus violates Article I, section 8.

LEGAL AND FACTUAL BACKGROUND

The Petition correctly and sufficiently sets forth the legal and factual background, and Respondents agree with Petitioners' statement of facts, apart from any legal conclusions Petitioners draw therein.[1]

REASONS REVIEW IS NOT WARRANTED

I. The decision below is a straightforward application of this Court's free speech jurisprudence.

This Court has consistently held for over 40 years that laws "written in terms directed to the substance of any 'opinion' or any 'subject' of communication" are invalid, apart from several narrow historical exceptions not relevant here. *See State v. Robertson*, 293 Or. 402, 412 (1982). Here, Respondents challenged a statute prohibiting products from being "packaged in a manner that is attractive to minors." ORS 431A.175(2)(f). The Court of Appeals correctly determined that that law prohibited the expressive content of packaging and was therefore unconstitutional. *Bates v. Oregon Health Auth.*, 335 Or. App. 464, 475 (App. 2024).

In doing so, the Court of Appeals faithfully applied this Court's holdings that "[s]elling is a form of communicative behavior that includes speech," *City of Hillsboro v. Purcell*, 306 Or. 547, 555 (1988), and that a law

[1] For example, Respondents obviously disagree with Petitioners' characterization that "[t]he Court of Appeals *correctly* determined that the rules are not subject to facial challenge." Pet. at 4 (emphasis added).

addressing the societal effects of expressive material "must be addressed to whatever the government identifies as the harmful effects accompanying the trade in the material, not only describe the material itself," *City of Portland v. Tidyman*, 306 Or. 174, 191 (1988). The Court of Appeals also applied dictionary definitions to conclude that the statute's reference to "packag[ing] … attractive to minors" "refers to the packaging's expressive content." *Bates*, 335 Or. App. at 470.

While Petitioners claim that "[a] facial challenge under Article I, section 8, is strong medicine," Pet. at 6, the Court of Appeals' decision was a correct and straightforward application of this Court's longstanding Article I, section 8 jurisprudence. Nothing in that decision warrants this Court's review.

II. This case is not a suitable vehicle to revisit this Court's free speech jurisprudence.

Even if this Court wishes to revisit its free speech jurisprudence under *Robertson* and its progeny, it should not do so here. Several factors peculiar to this case—including the public-health effects of vaping, the question whether packaging as contemplated by ORS 431A.175(2)(f) is inherently expressive, and the fact that the statute completely delegates to OHA the task of determining what is "attractive to minors"—make it a poor vehicle for reconsidering this Court's broader free speech jurisprudence. The fact that

Petitioners have identified similar language in a handful of other statutes, which are not at issue in this case and differ significantly from ORS 431A.175(2)(f) in other respects,[2] does not outweigh these considerations.

* * *

If the Court *does* grant the Petition, Respondents request that it also review their three additional questions, as these questions are closely bound up with the questions presented in the Petition, and considering all these questions together will allow a more thorough and holistic consideration of the issues. *See* Or. R. App. P. 9.10(1) ("The response may include the party's contingent request for review of any question properly before the Court of Appeals in the event the court grants the petition for review.").

RESPONDENTS' QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Respondents' First Question Presented

Is a statute that prohibits the distribution and sale of products "packaged in a manner that is attractive to minors, as determined by [OHA]," ORS 431A.175(2)(f), but does not include any standards or criteria

[2] ORS 475A.235, for example, entrusts OHA with a wide variety of "duties, functions and powers" concerning psilocybin regulation, including scientific research, law enforcement investigation, and "prohibiting advertising psilocybin products to the public." These provisions and others differ from ORS 431A.175, and any issues regarding their constitutionality would need to be resolved apart from this case.

for determining whether a product is "packaged in a manner that is attractive to minors," unconstitutionally vague?

Respondents' First Proposed Rule of Law

Yes. A statute that prohibits products "packaged in a manner that is attractive to minors" and does not include any standards or criteria for determining what is "attractive to minors," but instead entrusts that task completely to a state agency, is unconstitutionally vague because it impermissibly delegates basic policy matters to executive officials, invites arbitrary and discriminatory applications, and fails to give reasonable notice of what conduct it proscribes.

Respondents' Second Question Presented

Does a circuit court have original jurisdiction over a constitutional challenge to a regulation?

Respondents' Second Proposed Rule of Law

Yes. A circuit court has original jurisdiction over a constitutional challenge to a regulation, notwithstanding ORS 183.400(1)'s authorization to obtain a determination of "[t]he validity of any rule … upon a petition … to the Court of Appeals."

Respondents' Third Question Presented

Does a regulation that includes a non-exhaustive list of prohibited words, references, and images that OHA deems "attractive to minors," and are therefore prohibited from appearing on product packaging, violate Article I, section 8?

Respondents' Third Proposed Rule of Law

Yes. A regulation that includes a non-exhaustive list of prohibited words, references, and images that OHA deems "attractive to minors," which are therefore prohibited from appearing on product packaging, expressly prohibits speech and therefore violates Article I, section 8.

REASONS REVIEW OF RESPONDENTS' QUESTIONS IS WARRANTED IF THE PETITION IS GRANTED

I. ORS 431A.175(2)(f) is unconstitutionally vague.

Because the Court of Appeals held ORS 431A.175(2)(f) was facially unconstitutional as a free speech restriction, it did not need to reach Respondents' contention that the statute was also unconstitutionally vague. *See* Corrected Op. Br. at 33–36; Reply Br. at 11–13. If this Court grants review on the free speech question, it should also consider whether the statute was vague, as it contains virtually no standards and delegates near-total discretion to OHA to determine what kind of packaging is "attractive to minors," and thus prohibited. *See, e.g.*, *City of Damascus v. Brown*, 266 Or.

App. 416, 443 (App. 2014). Particularly because many other statutes similarly delegate to agencies the task of determining what conduct is prohibited with minimal guidance or standards, *see* Pet. at 12 (listing statutes), the vagueness issue warrants this Court's review at least as much as the free speech issue does.

II. The Circuit Court had original jurisdiction over Respondents' challenge to OHA's regulation implementing ORS 431A.175(2)(f).

The Court of Appeals held that "[a] facial challenge to an agency's rules must be brought under the APA, which vests jurisdiction for such actions in [the Court of Appeals], not the circuit court." *Bates*, 335 Or. App. at 475 (citing ORS 183.400(1)). This Court has yet to address whether ORS 183.400(1) vests the Court of Appeals with exclusive jurisdiction over regulatory challenges, particularly where such a claim is intimately bound up with a constitutional challenge to the statute authorizing the regulation. As Respondents detailed in their Opening Brief, ORS 183.400's text, as well as considerations of judicial economy, indicate the Circuit Court had original jurisdiction over Respondents' challenge. *See* Corrected Op. Br. at 37–39. If the Court grants the Petition, it should also grant review on this question and so hold.

III. OHA's regulation is unconstitutional.

Because the Court of Appeals held that the Circuit Court lacked jurisdiction over Respondents' regulatory challenge, it did not consider the constitutionality of the regulations implementing ORS 431A.175(2)(f). As detailed in Respondents' briefing to the Court of Appeals, however, those regulations (which include non-exhaustive lists of expressive content OHA deems "attractive to minors") violate Article I, Section 8 for the same reasons as the statute itself. *See* Corrected Op. Br. at 39–40; Reply Br. at 14. They also shed light on the purpose and necessary legal effect of the statute, because they implement the statute's speech restrictions by enumerating the precise kinds of speech that are prohibited. Thus, this Court's review of the constitutionality of ORS 431A.175(2)(f) would be incomplete without additionally considering the regulations OHA implemented in carrying out its statutory charge.

CONCLUSION

This Court should deny the Petition. If it grants review, then it should also grant review on Respondents' three additional questions.

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/s/ *John Thorpe*
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CERTIFICATION OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

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(2)(a)) is 1739 words.

Type Size

I 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(2)(d)(ii) and 5.05(4)(g).

/s/ *Herbert G. Grey*
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PROOF OF SERVICE

I certify that on December 18, 2024, I served the foregoing Response to Petition for Review upon counsel for the parties hereto by email and the court e-filing system addressed to the following:

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