IN THE COURT OF APPEALS OF THE STATE OF OREGON

PAUL BATES; and NO MOKE DADDY, LLC, doing business as DIVISION VAPOR, Plaintiffs-Appellants v. OREGON HEALTH AUTHORITY; and PATRICK ALLEN, Defendants-Respondents.	)	Multnomah County Circuit Court No. 21CV33671 CA A180270

APPELLANTS' REPLY BRIEF

Appeal from the Judgment of Dismissal of
The Circuit Court for Multnomah County
Dated November 21, 2022, The Honorable Leslie G. Bottomly

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I. The statute is unconstitutional because it directly regulates protected expression.

ORS 431A.175(2) directly regulates expression by banning an inherently expressive activity: namely, packaging products in ways that could render them appealing to minors. Because this direct regulation is unjustifiable as either a Category One or Category Two speech restriction, *see State v. Robertson*, 293 Or. 402 (1982), the statute is unconstitutional.

A. The Legislature's speculation about preventing harm to minors cannot justify facial restrictions on speech.

As an initial matter, the State argues at length that "[v]aping products are harmful to minors." Ans. Br. at 5. Plaintiffs have never disputed that, and they do not dispute it now. The State does indeed have a legitimate interest in preventing minors from buying or using vaping products, and it has taken a variety of measures to achieve this goal. It prohibits minors from buying or using vape products, for example, and even prohibits them from entering Plaintiffs' store. ER-2 ¶ 5, 39 ¶ 82, 49. But what the State cannot do is to gratuitously suppress speech directed at *adults* (who *may* lawfully buy and use vaping products) based on speculation about what might happen if children inadvertently overhear some of that speech.

In other words, the State's interest in protecting minors is not a roving license to restrict speech wherever it believes that such censorship will help prevent adverse social consequences in the off chance such speech is seen by

minors (who, as noted above, are not even allowed on the premises in the first place).

B. The statute directly regulates speech.

The State does not dispute that packaging is often inherently expressive and is a key medium for conveying information to readers. Moreover, the State gives no plausible explanation how a blanket restriction on "packag[ing] … attractive to minors," ORS 431A.175(2)(f), could be interpreted as anything but a restriction on constitutionally protected speech.

The State argues that the statute merely "prohibits conduct—the act of distributing, selling, or allowing to sell inhalant delivery systems if the packaging does not conform to OHA rules." Ans. Br. at 10. It further argues that "[d]istributing and selling a product is not an inherently expressive activity." *Id.* That may be true, but as Plaintiffs explained in their Opening Brief, *packaging* a product within the meaning ORS 431A.175(2)(f) *is* an inherently expressive activity. In fact, the statute itself implicitly recognizes that fact, because it contemplates packaging as a medium for sharing content that could be "attractive to minors." ORS 431A.175(2)(f).

While the State devotes considerable briefing to defining the terms "distribute" and "sell," this is irrelevant to the constitutional analysis, because the State's regulation of "conduct" like "distributing [and] selling" is ancillary to its regulation of expression. If the State banned the

"distribution or sale of books" expressing certain messages, it would be no defense to argue that "distribution or sale" is conduct rather than speech. *Cf. Wexler v. City of New Orleans*, 267 F. Supp. 2d 559, 567–68 (E.D. La. 2003) (holding restriction on "conduct" of selling books in public was insufficient to survive First Amendment protections). Nor could the State argue that such a law only regulates "steps in the commercial process." Ans. Br. at 10. *See, e.g.*, *Weinberg v. City of Chicago*, 310 F.3d 1029, 1044–45 (7th Cir. 2002) (holding that restrictions on the commercial process of selling books violated the First Amendment because "[t]he sale of a book is a form of expression").

Likewise, here, it is immaterial that the statute includes words like "distribute, sell or allow to be sold." ORS 431A.175(2)(f). Instead, **the question is whether the target of the restriction—products "packaged in a manner that is attractive to minors"—restricts expression.** *Id.* It does, and it is therefore unconstitutional.

The State cannot escape this conclusion by identifying hypothetical alternative forms of packaging that might not be "inherently expressive." Ans. Br. at 13. While the "materials used to enclose a product," such as "plain cardboard box or clear plastic," *id.*, are not expressive in themselves, the statute does not contemplate "materials" in this functional sense, because it restricts only those types or "manner[s]" of packaging that could be

"attractive to minors." ORS 431A.175(2)(f). Thus, while the State may be able to identify some aspects of "packaging" in the abstract that are not expressive, those are plainly not what the Legislature was targeting, and they are irrelevant here.

What's more, in trying to identify "examples of packaging that … have nothing to do with expression," Ans. Br. at 14, the State actually shows the degree to which packaging *is* inherently expressive. For example, the State speculates about scented packaging. *Id.* But scents are often used expressively. "Since human beings might use as a 'symbol'… almost anything at all that is capable of carrying meaning," it is well established that all sorts of media of expression, including "a shape, a sound, and a fragrance[,] can act as symbols," and thus serve an essentially expressive function. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995); *see also, e.g.*, Marjorie Ingall, *What's That Smell? Constitutionally Protected Free Speech*¸ Tablet Magazine (Sept. 28, 2016)[1] (describing how a perfume company created "scents tied to landmark events in censorship" to commemorate Banned Books Week). Likewise, "packaging… designed to be used as a toy or as a game," Ans. Br. at 14, could be expressive, at least insofar as such content might render a product more "attractive." *See, e.g.*,

[1] https://www.tabletmag.com/sections/news/articles/whats-that-smell-constitutionally-protected-free-speech.

Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 790 (2011) (holding law restricting violent video games triggered free speech protections).[2]

Be that as it may, the State's wide-ranging hypotheticals obscure the issue presented here: by targeting any packaging that could be attractive to minors, the Legislature has directly restricted a whole swath of speech, including not just esoteric forms of packaging like scented wrappers, but basic factual descriptions of products, like manufacturer labels identifying the flavors and ingredients of vaping liquids. Plaintiffs are not being censored based on some exotic form of expression, but on one of the core elements of free speech—**"truthful, nonmisleading speech about a lawful product" to customers who may lawfully buy it—and for reasons "unrelated to consumer protection**." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996). The State's hypotheticals cannot obscure the fact that such censorship is unconstitutional.

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[2] The State also gives the example of "packaging vaping liquid with a stuffed animal or a toy car" could be attractive to minors but not inherently expressive. But offering a free bonus along with a product isn't "packaging" the product—rather, it's providing a whole separate, additional product. Thus, many states restrict the use of giveaways, prizes, and other promotional gimmicks to market liquor. *See, e.g.*, Ohio Admin. Code 4301:1-1-45(A) ("[N]o merchandise or thing of value shall be given away in connection with the purchase of an alcoholic beverage."). But such laws are not restrictions on *packaging*.

Finally, the statute doesn't just regulate a forum for expression like the law in *Babson* that closed the capitol steps overnight. *State v. Babson*, 355 Or. 383, 386 (2014). Instead, it regulates an entire *mode* of expression, in all places and at all times. That is not analogous to temporarily closing a public area like the steps of the state capitol. Instead, it is akin to targeting a whole medium of communication like newspapers, sound trucks, or pamphlets. *See Saia v. New York*, 334 U.S. 558, 561 (1948) (invalidating sound truck restriction as regulation of "indispensable instruments of effective public speech"); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (invalidating ban on "pamphlets and leaflets," which "have been historic weapons in the defense of liberty" and "a vehicle of information and opinion").

Courts have made clear that targeting a recognized medium of expression is tantamount to targeting the expression itself. *See* Opening Br. at 12–13. They have also made clear that the State cannot impose a censorship regime that "reduce[s] the adult population to reading only what is fit for children." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252 (2002) (citation omitted and alterations adopted). But the intended effect of this statute is *precisely* to reduce the adult population of Oregon "to reading only what is fit for children" when it comes to vaping products. *State v. Jackson*, 224 Or. 337, 358 (1960) (citation omitted).

Reading the statute fairly and in context leads inescapably to the conclusion that the statute on its face regulates an inherently expressive activity. The State responds that Plaintiffs "misunderstand the nature of a facial challenge," in which "[i]t is not enough to show that the statute *could* apply to some expression; the party challenging the statute must show that the statute *does*, in fact, reach expression." Ans. Br. at 17 (emphasis added). But that is precisely what Plaintiffs have done. He has shown, based on common sense and the statute's plain language, that it *directly* targets expressive activity. It is irrelevant that some of the statute's words could, in some abstract, alternative way, be defined to include non-expressive activity.

Thus, for example, it does not matter that one possible definition for the word "package" is "to enclose in a package or protective covering," *id.* at 11 (citation omitted). *See State v. Clemente-Perez*, 357 Or. 745, 765 (2015) ("Of course, dictionaries are only the starting point for our textual analysis. We must consider the statutory words in context to determine which of multiple definitions is the one that the legislature intended."); *State v. Ziska*, 355 Or. 799, 805 (2014) (noting "resort to dictionaries does not reveal which sense the legislature had in mind when it adopted [a] statute"; "[f]or that, we look to the terms of the statute and how the words in dispute are used in context"); *see also, e.g.*, *Mason v. BCK Corp.*, 292 Or. App. 580, 599 (App. 2018) (holding that "encouragement" in dram shop liability statute must be

construed expansively in light of statute's purpose and other language, notwithstanding abstract definitions of "encouragement" or use of same term in other contexts). Reading the entire statute in context, it is clear that the Legislature was not regulating packaging as "protective covering." Rather, it was regulating packaging specifically insofar as it could be "attractive to minors." ORS 431A.175(2)(f). That is, packaging as expressive activity.

In sum, it is clear from the statute that "the legislature intended to punish the speech itself" by banning packaging attractive to minors, and so the law by its plain terms restricts speech, even if it may be technically worded in a way to avoid references to expression, because the law's terms "'mirror' a prohibition on the words themselves." *State ex rel. Rosenblum v. Living Essentials, LLC*, 371 Or. 23, 55 (2023) (citation omitted). As Plaintiffs have explained, this is unjustified under either *Robertson* Category One or Category Two, and therefore, ORS 431A.175(2)(f) is invalid.

II. The packaging restrictions are unconstitutionally vague.

A. Preservation

The State admits that Plaintiffs preserved their argument that ORS 431A.175(2)(f) is unconstitutionally vague under Article I, section 8 of the Oregon Constitution, but confusingly, it also maintains that "Plaintiffs did *not* preserve their argument that the trial court was required to address their vagueness argument in its letter opinion." Ans. Br. at 19 (emphasis added).

But a litigant need not accompany every argument with a reminder that the court "ha[s] an obligation to address that argument," *id.*; that's axiomatic to the judicial process, and generally goes without saying, as explained below. Plaintiffs argued at length in their summary judgment motion that the statute is unconstitutionally vague. That was more than enough to preserve the issue for appeal, as it gave the circuit court "'the chance to consider and rule on [the] contention.'" *State v. Hallam*, 307 Or. App. 796, 803 (2020) (quoting *Peeples v. Lampert*, 345 Or. 209, 219 (2008)).

The State also argues that Plaintiffs failed to preserve their argument that the provisions are unconstitutionally vague in violation of Article I, sections 20 and 21 of the Oregon Constitution, because they "did not cite those provisions in their complaint." Ans. Br. at 21. That is incorrect and misapprehends this Court's standards for preservation. Plaintiffs argued at length that the provisions are "impermissibly vague" because "'the law as interpreted cannot be discerned from its terms.'" ER-55 (quoting *State v. Robertson*, 293 Or. 402, 410 (1982)); *see also* ER-21 (asserting statute "is unconstitutionally vague because it fails to give Plaintiffs and other people of ordinary intelligence reasonable notice about what labels are permitted and what labels are forbidden"); Reply to Cross-Motion for Summary Judgment at 4 (Sept. 6, 2022) (arguing "prohibition … is too imprecise and ill-defined to provide any guidance"). These points unambiguously indicated

that Plaintiffs were making a void-for-vagueness argument under Article I, sections 20 and 21 of the Oregon Constitution, for two reasons.

First, the language Plaintiffs used—attacking the statute as "imprecise," "ill-defined," and impossible to "discern[] from its own terms"—tracks the well-established standards for vagueness under those constitutional provisions. *See, e.g.*, *Robertson*, 293 Or. at 410 ("A constitutional claim that the law as interpreted cannot be discerned from its terms … is a claim of vagueness … ."").

Second, the principal authority Plaintiffs cited in support of their vagueness argument specifically grounds the void-for-vagueness doctrine in sections 20 and 21 of the Oregon Constitution. *See id.* Again, this gave the circuit court "the chance to consider and rule on [the] contention," and thus preserved it for appeal. *Hallam*, 307 Or. App. at 803 (citation omitted). The idea that Plaintiffs somehow waived this issue for appellate review merely by omitting citations to specific sections of the Oregon Constitution is hyper-formalistic and has no support under the Court's precedents.[3] *See, e.g.*, *State v. Phillips*, 314 Or. 460, 466–67 (1992) (rejecting argument "that

[3] Indeed, this Court has frequently analyzed and applied Oregon's void-for-vagueness doctrine without explicitly citing Sections 20 and 21 of the Oregon Constitution. *See, e.g.*, *Cascade Fireworks, Inc. v. State*, 86 Or. App. 355, 358 (1987); *State v. Williams*, 37 Or. App. 419, 421–24 (1978); *State v. Larsen*, 37 Or. App. 425, 428–29 (1978).

defendant did not preserve error, because he did not cite a specific section of the Oregon Evidence Code in support of his position at trial," and concluding that it "was enough to preserve the claimed error" where defendant "generally identified the source for his position by discussing the Oregon Evidence Code").

B. Merits

The State admits that ORS 431A.175(2)(f) contains virtually no standards and delegates near-total discretion to OHA. Indeed, in the State's view, the statute does not even instruct OHA whether to regulate expression at all. *See* Ans. Br. at 18 ("[T]he statute does not require OHA to regulate expression. Rather, it gives OHA discretion to determine how packaging should be regulated to address the harm to minors."); *id.* at 10 ("[T]he statute itself does not contain any operative prohibition on … conduct.").

As described above, the statute itself *does* target expression, and the Legislature cannot render a sweeping restriction on speech constitutional merely by leaving it up to an agency to fill in the details. Nevertheless, the statute is unconstitutionally vague because it leaves an agency complete discretion to decide what kind of conduct to proscribe, and indeed whether to proscribe conduct at all. *See id.* at 11 ("Any potential restriction on speech caused by the regulation of packaging, then, follows from the rules not the statute."); *id.* at 16 ("[T]he statute does not, on its face, prohibit packaging

that is attractive to minors. … [T]he statute prohibits the sale of products that violate OHA rules regarding packaging that is attractive to minors."). Notably, the State characterizes the rules as "an exercise of legislative authority delegated to OHA," while simultaneously admitting the lack of any democratic accountability for those rules: "the rules themselves were not passed by the legislature and were not signed by the governor. They are not statutory in nature." *Id.*

But the process the State describes in its brief—the Legislature delegating complete legislative authority to administrative agencies, without meaningfully delineating the substance of the restrictions—is forbidden by the Oregon Constitution. As the State observes, a legislative enactment must "contain[] a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application." *City of Damascus v. Brown*, 266 Or. App. 416, 443 (App. 2014) (citation omitted). And surely that requirement is at its most imperative when dealing with the "supremely precious" right of free speech. *Minielly v. State*, 242 Or. 490, 502 (1966). But here, **by the State's own admission, the statute contains *no* procedural safeguards and barely any meaningful expression of policy,** apart from a general opposition (which the State argues does not even necessarily amount to an actual prohibition) to anything that might conceivably render vaping products attractive to minors.

If it is not unconstitutionally vague to task an agency with *total* discretion over how (and even whether) to regulate packaging that it believes, in its sole judgment, could be attractive to minors, then it is hard to imagine what law could ever be unconstitutionally vague.

Additionally, the State misses the point in defending the circuit court's failure to give any reasoned decision regarding Plaintiffs' vagueness challenge. To be sure, it is a fundamental principle of the judicial process that courts provide litigants with some meaningful rationale for their decisions. *See, e.g.*, *Concepcion v. United States*, 142 S. Ct. 2389, 2404 (2022) (noting trial courts' "standard obligation to explain their decisions and demonstrate that they considered the parties' arguments"). But more importantly here, Plaintiffs' key argument on appeal is not merely that the circuit court inadequately showed its work; the point is that the circuit court erred in its *conclusion*: namely, that the law was not unconstitutionally vague. As explained above, the statute is void for vagueness, and this Court should reverse the judgment below.

III. The circuit court should have held the OHA regulations implementing ORS 431A.175(2)(f) were invalid.

Finally, the circuit court erred in dismissing Plaintiffs' challenge to the OHA regulations for lack of subject-matter jurisdiction. Indeed, the State gives no response to Plaintiffs' arguments based on the text of ORS 183.400

and principles of judicial economy. It merely observes that *Clatsop County v. Land Conservation and Development Commission*, 47 Or. App. 377 (1980) does not specifically "hold that a circuit court has jurisdiction to hear rule challenges under the Declaratory Judgments Act." Ans. Br. At 25. While the State is correct that there is no precedent directly resolving this question, ORS 183.400 does not bar circuit courts from hearing constitutional challenges to regulations for all the reasons Plaintiffs explained in their Opening Brief. *See* Op. Br. at 37–39.

On the merits, the State offers no response at all to Plaintiffs' constitutional arguments against the regulations. As Plaintiffs have already detailed in their Opening Brief, the regulations unconstitutionally infringe on free speech because they ban specific forms of expression: indeed, **they include whole lists of banned words, concepts, and references**. Because the circuit court had jurisdiction over this challenge, and because the regulations are constitutionally unsustainable restrictions on expression, this Court should reverse the judgment below and hold that the regulations are invalid.

CONCLUSION

This Court should reverse and hold that ORS 431A.175(2)(f) and OAR 333-0015-0357 are facially unconstitutional. In the alternative, this

Court should reverse the grant of summary judgment and remand for additional proceedings.

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CERTIFICATION OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

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I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,232 words.

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PROOF OF SERVICE

I certify that on September 6, 2023, I served the foregoing Appellants' Reply Brief upon counsel for the parties hereto by email and the court e-filing system addressed to the following:

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