IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

PAUL BATES, an individual; and NO MOKE DADDY LLC, doing business as DIVISION VAPOR, a corporation, Plaintiffs, v. OREGON HEALTH AUTHORITY; and PATRICK ALLEN, in his official capacity as Director of Oregon Health Authority, Defendants.	Case No. 21CV33671 **RESPONSE TO MOTION FOR PROTECTIVE ORDER**

Article 1, Section 8, of the Oregon Constitution provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." In this case, Plaintiffs contend that ORS 431A.175 ("the Statute") and OAR 333-015-0300 to 333-015-360 ("the Regulations") violate this provision of the Oregon Constitution. The Statute makes it unlawful "[t]o distribute, sell or allow to be sold an inhalant delivery system if the inhalant delivery system is packaged in a manner that is attractive to minors, as determined by [Defendants'] rule." ORS 431A.175(2)(f) and ORS 431A.010(1).

The issue of whether a product is "packaged in a manner that is attractive to minors" in violation of ORS 431A.175 is at its core a factual question, not a question of law. A party "may

inquire regarding *any matter,* not privileged, that is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party." ORCP 36(B)(1). The Deposition at issue in this motion seeks information relevant both to Plaintiffs' legal claims and to Defendants' defenses. Defendants cannot meet their high burden under ORCP 36(C)(1) for a protective order prohibiting the deposition. Therefore, Plaintiffs respectfully request that the Court deny Defendants' Motion for Protective Order.

I. Oregon's Free Speech Clause

Oregon's Free Speech Clause provides greater protection than the First Amendment to the United States Constitution. *See, e.g., In re Fadeley*, 802 P.2d 31, 46 (Or. 1990) (Unis, J. concurring in part) ("The text of Article I, section 8, is broader [than the First Amendment]"); *Deras v. Myers*, 535 P.2d 541, 549 n.17 (Or. 1975) ("The difference in the language of the Oregon and federal constitutions may also be pointed to as indicating an intention to provide a larger measure of protection to free expression under the Oregon Constitution."); *State v. Henry*, 732 P.2d 9, 17 (Or. 1987) (finding that obscenity is protected under the Oregon Constitution even where it is not protected by the First Amendment).

Laws that limit the substance of any communication categorically violate the Free Speech Clause *unless* the scope of the restriction is "wholly confined within some historical exception [to speech protections] that was well established when the First American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Moser v. Frohmayer*, 845 P.2d 1284, 1286 (Or. 1993) (citation omitted). A well-established historical exception is narrowly defined and the party opposing the claim of constitutional privilege has the burden to demonstrate that a specific law's restriction of speech falls within a historical exception. *Henry*, 732 P.2d at 11.

2. The challenged Statute and Regulations

ORS 431A.175(2)(f) provides that it is unlawful "[t]o distribute, sell or allow to be sold an inhalant delivery system if the inhalant delivery system is packaged in a manner that is attractive to minors, as determined by the authority by rule."

Pursuant to this statute, the Defendants in this case promulgated regulations at OAR 333-015-0300 to 333-015-0360. The regulations, in part, provide:

> An inhalant delivery system is packaged in a manner that is attractive to minors if because of the packaging's presentation, shape, graphics, coloring or writing, it is likely to appeal to minors.

OAR 333-015-0357(1).

As to what makes something "attractive to minors":

> The Authority [the Defendant in this case] considers the following non-exclusive list to be likely to appeal to minors: (a) Cartoons; (b) Celebrities, athletes, mascots, fictitious characters played by people, or other people likely to appeal to minors; (c) Food or beverages likely to appeal to minors such as candy, desserts, soda, food or beverages with sweet flavors including fruit or alcohol; (d) Terms 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; or (e) The shape of any animal, commercially recognizable toy, sports equipment, or commercially recognizable candy.

OAR 333-015-0357(2).

Cartoon is further defined as:

> any drawing or other depiction of an object, person, animal or creature or any similar caricature that satisfies any of the following criteria: (a) The use of comically exaggerated features; (b) The attribution of human characteristics to animals, plants or other objects, or the similar use of anthropomorphic technique; or (c) The attribution of unnatural or extra-human abilities, such as imperviousness to pain or injury, X-ray vision, tunneling at very high speeds or transformation.

OAR 333-015-0305(3).

3. The requested deposition seeks discovery relevant to the key issue in this case.

The leading Oregon Supreme Court case applying Oregon's Free Speech Clause is *State v. Robertson*, 649 P.2d 569 (Or. 1982). Under *Robertson*, laws that allegedly restrict speech are categorized into one of three categories: (1) laws directed at the substance of opinion or communication, (2) laws that regulate speech only so far as that speech is limited to a particular harm, or (3) laws that do not expressly restrict speech but may incidentally prohibit or limit speech. *Id.* at 579; *see also In re Validation Proceeding to Determine the Regularity & Legality of Multnomah Cnty. Home Rule Charter Section 11.60*, 462 P.3d 706, 710-713 (Or. 2020).

Plaintiffs' Complaint alleges that the Statute and Regulations fall into *Robertson*'s first category: laws directed at the substance of the product packaging. Plaintiffs allege that "[t]he statute and regulations are directed at the substance of the expression on the packaging of products sold by Plaintiff." Compl. ¶ 33. Plaintiffs also allege that "[p]ackaging can only be determined to be 'attractive to minors' based on the content of the packaging." *Id*. ¶ 34.

Of critical importance to this motion is the fact that Defendants **deny** Paragraphs 33 and 34 of the Complaint. The parties have a sharp factual dispute over whether the Statute and Regulations are content based or not, and this is a *factual* issue, and fair game for discovery. The Deposition is reasonably calculated to lead to evidence on whether or not the Defendants' denial is warranted, and whether this case should be analyzed as a category 1 substance-based speech restriction under *Robertson*.

This is readily distinguishable from the only cases cited by Defendants. *Olson v. Coats*, 717 P.2d 176 (Or. App. 1986), *State v. Woodford*, 428 P.3d 971 (Or. App. 2018), and *Stokes v. Lundeen*, 7 P.3d 586 (Or. App. 2000).

Olson simply applies the unremarkable principle that, at trial, a witness cannot generally testify to the jury on matters of law. The case involved a traffic accident between two trucks that

occurred where the defendant, a roadway construction firm hired by the state, had been making repairs to the highway. *Id.* at 178. At trial, the owner of the construction company, over plaintiff's objection, testified that his signage complied "with whatever the requirements were." *Id.* The court held it was error to allow the defendant to testify that his signs complied with statutory requirements. *Id.*

Woodford simply applied *Olson* to expert witness testimony in a criminal case. There, the defendant shot his employee twice, while in the process of firing him. The defendant claimed self-defense. The state's expert witness, a chief of police, was permitted over defendant's objection to testify that he "saw 'no elements of a crime being committed by'" the victim. 428 P.3d at 972.

Lundeen was another tort case involving an automobile collision. Defendant turned in front of plaintiff's vehicle, causing the two vehicles to collide. Defendant contended that plaintiff's negligence caused the accident. Plaintiff sought to ask a deputy sheriff whether he would have cited plaintiff for speeding when "children are present." 7 P.3d at 593. The Supreme Court held that the trial court properly sustained an objection to that specific question. *Id.*

Thus *Olson, Woodford*, and *Lundeen* concerned witnesses being asked to testify on ultimate legal issues. But this case involves a factual question, not a legal one—and the testimony in question involves how government regulates the act, not what the final legal conclusion should be. Government regulators frequently are called upon to testify regarding the meaning of statutes or regulations, and here, Defendants themselves authored the regulations. Testimony from regulators on the interpretation of their regulations is not only admissible, but receives judicial deference. *See, e.g., Siegert v. Crook Cnty.*, 266 P.3d 170, 173–74 (Or. App. 2011). "[C]ourts give careful consideration to administrative interpretations by public agencies

entrusted with the duty of administering particular statutes." *Schoen v. Univ. of Or.*, 535 P.2d 1378, 1381 (Or. App. 1975). Thus there is nothing improper here.

4. The deposition is also reasonably calculated to lead to evidence regarding Plaintiffs' claims that the Statute and Regulations are vague or overbroad.

The fact that Plaintiffs make a facial challenge to the law does not somehow exempt the Defendants from providing testimony on the meaning of the statutes and regulations. Defendants correctly identify this as a "facial" challenge to the Statute and Regulations, but that does not affect the scope of discovery. Defendants do not cite any authority for their assertion that because this is a facial challenge, they are excused from answering questions about the meaning of the statute, or the meaning of regulations they themselves drafted.

A statute or regulation is unconstitutionally vague if it "permits the judge and jury to punish or withhold punishment in their uncontrolled discretion is defective as much for its uncertainty of adjudication as for its failure to notify potential defendants of its scope and reach." *Robertson*, 649 P.2d at 573 (citation omitted). A statute or regulation is overbroad "to the extent that it announces a prohibition that reaches conduct which may not be prohibited." *Id.* at 575 (citation omitted).

Laws and regulations must "notify potential defendants of (the law's) scope and reach." *Id.* at 574 (citation omitted). The Deposition is reasonably calculated to lead to the discovery of admissible evidence as to whether the statute and regulations are unconstitutionally vague. Defendants should have no trouble explaining what is prohibited and what is permitted under the Statute and Regulations.

Indeed, the fact that Defendants refused to answer the allegations in the complaint regarding the scope and meaning of the Statute and Regulations, and persist in doing so now, is

tantamount to a concession that the Statute and Regulations are unconstitutionally vague.

5. Conclusion

Plaintiffs respectfully request that the Court deny Defendants' motion for protective order.

Dated: March 11, 2022

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CERTIFICATE OF SERVICE

I certify that on March 11, 2022, I served the foregoing Response to Motion for Protective Order upon the parties hereto by email and regular mail addressed to the following:

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