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 **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** **and** **CROSS-MOTION FOR SUMMARY JUDGMENT** **(oral argument requested)**

This case challenges the constitutionality of a statute and related regulations that impose content-based restrictions on speech used to market legal nicotine "vaping" products. The challenged 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" and authorizes penalties and fines up to $500 per day. ORS § 431A.175(2)(f) ("the Statute"); *see also* ORS § 431A.010(1). The Defendant Oregon Health Authority's promulgated regulations purport to impose broad content-based restrictions. OAR §§ 333-015-0300 to 333-015-360 ("the Regulations").

Both the statute and the regulations violate the Oregon Constitution's free speech clause. 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."

The Oregon Constitution provides considerably broader protection for speech than the First Amendment to the United States Constitution. Almost all content-based restrictions on speech violate the Oregon Constitution. *See, e.g*. *State v. Robertson*, 293 Or. 402 (1982). The only exceptions involve narrow, historically recognized exceptions such as libel and extortion. Determining whether a product is "packaged in a manner that is attractive to minors" can only be accomplished (if at all) by evaluating the *content* of the packaging, and that fact makes the Statute and Regulations impermissible content-based restrictions that violate Oregon's Constitution. Plaintiff respectfully requests that the Court grant Plaintiff's Cross-Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment.

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*, 310 Or. 548, 574 (1990) ("The text of Article I, section 8, is broader [than the First Amendment]" (Unis, J. concurring in part)); *Deras v. Myers*, 272 Or. 47, 64 n.17 (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*, 302 Or. 510, 524 (1987) (finding that obscenity is protected under the Oregon Constitution even where it is not protected by the First Amendment).

Laws that allegedly restrict speech are categorized into one of three categories: 1) laws directed at 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. *Robertson*, 293 Or. at 579; *In re Validation Proceeding to Determine the Regularity & Legality of Multnomah Cnty. Home Rule Charter Section 11.60*, 366 Or. 295, 301–05 (2020).

The Statute and Regulations fit into category one of *Robertston's* analysis. Laws that fit into the first category are facially unconstitutional unless the speech targeted fits into a well-established historical exception to free speech that was recognized either when the Bill of Rights were ratified or when Oregon's Constitution was ratified in 1859. Laws that fit into the second category are analyzed for overbreadth. Laws in the third category cannot be facially challenged but can be found unconstitutional as applied to specific facts. *Robertson*, 293 Or. at 412–13.

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. Frohnmayer*, 315 Or. 372, 376 (1993) (citation omitted). The category of "well-established historical exceptions" is narrowly defined and the party *opposing* the claim of constitutional privilege—i.e., the government—bears the burden of demonstrating that a challenged restriction of speech fits within a historical exception. *Henry*, 302 Or. at 514.

Article 1, Section 8, applies both to traditional speech and to nonverbal artistic forms of expression like painting and photography. *State v. Ciancanelli*, 121 P.3d 613, 624629 n. 24 (Or. 2005)339 Or. 282, 312 n. 24 (2005). It "covers any expression of opinion, including verbal and nonverbal expressions contained in films, pictures, paintings, sculpture and the like." *Henry,* 302 Or. at 515. It applies to "any subject whatever." *Id.*

Thus, unlike the First Amendment to the United States Constitution, Article 1, Section 8

provides equal protections to *all* categories of speech including, commercial speech and obscenity. *See Moser*, 315 Or. at 382 (Graber, J. concurring in part); *Compare Henry*, 302 Or. at 524. (finding that obscenity is protected under the Oregon Constitution, because obscenity is not a well-established historical exception to free expression) *with Miller v. California*, 413 U.S. 15, 23 (1973) (reaffirming that obscene material is unprotected by the First Amendment).

To emphasize: commercial speech does *not* receive less protection than other forms of speech under the Oregon Constitution. *See Moser*, 315 Or. at 377–78. Laws that limit the substance of any communication violate Article 1, Section 8, 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". *Id.* at 375 (quoting *Robertson*, 293 Or. at 412). The recognized "well-established historical exceptions" are few, and the government bears the burden of showing that a speech restriction falls within such an exception. *Henry*, 302 Or. at 514.

Commercial speech does not fall within any well-established historical exception and therefore is fully protected by Article 1, Section 8. In *Moser*, the Oregon Supreme Court held that a law regulating automatic dialing and recorded messages was unconstitutional because the law only prohibited recorded messages that had a commercial purpose. 315 Or. at 374. The court held that commercial speech was never recognized as a well-established historical exemption to Article 1, section 8. *Moser*. *Id.* at 378 . Therefore, the court analyzed restrictions on commercial speech using the *Robertson* framework, which is the standard test for examining any law that purportedly restricts free speech protection in Oregon. *Id.*; *Robertson*, 293 Or. 402.

The primary and dispositive question is whether the Statute and Regulations are content-

based restrictions. Defendants contend that the Statute and Regulations are not content-based restrictions. The plain text demonstrates otherwise.

II. 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." But whether the packaging is "attractive to minors" can only be determined by reference to the *content*, a fact explicitly admitted on the face of the regulations:

> 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 regulations again catalog a number of clearly *content-based* factors:

> 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.

These are content-based restrictions. A vaping product that is packaged "in a manner that is attractive to minors" can subject the seller to significant monetary fines. If the same vaping product were packaged in a manner that was *not* attractive to minors, it would not violate the Statute or Regulations—based solely on the different content of expression involved. Because the applicability of the Statute and Regulations expressly depends on "the packaging's presentation, shape, graphics, coloring or writing," the Statute and Regulations are clearly content based restrictions. *See* OAR § 333-015-0357(1).

III.. The challenged Statute and Regulations are unconstitutional limitations on speech.

This case is not about the *sale* of tobacco products to minors. Plaintiffs do not allow any minors to even *enter* their stores. Nor is this case about the health effects of tobacco or vaping. Oregon law permits the sale of tobacco products, including vaping products. *See* Defs.' Mot. for Summ. J. ("Motion"), at page 9, lines 18–19.

Rather, this case is about whether the Oregon Constitution permits Defendants to dictate the content of the Plaintiff's speech, or to prohibit certain speech by the Plaintiffs based on what that speech says and how it says it. The Statute and Regulations directly affect the form of expression typically found on vaping products. Packaging that includes pictures of "food or beverages with sweet flavors including fruit," for example, are prohibited, even if the packaging truthfully describes the flavors of the products.

It is the substance of the speech that determines whether it violates the Statute and Regulations. Packaging that includes truthful information about the product is nonetheless unlawful if it contains mere "[t]erms or descriptive words … such as tart, tangy, sweet, [or] cool … including fruit." OAR § 333-015-0357(d).

As such, the Statute and Regulations are content-based speech restrictions, and therefore violate Article 1, Section 8 of the Oregon Constitution. "This constitutional provision is a prohibition on the legislative branch. It prohibits the legislature from enacting laws restraining the free expression of opinion or restricting the right to speak freely on any subject." *Robertson*, 293 Or. at 412 (citation omitted). Regardless of the intent of the Legislature, "[i]f a law concerning free speech on its face violates this prohibition, it is unconstitutional; it is not necessary to consider what the conduct is in the individual case." *Id.*

Defendants nevertheless argue that even as a content-based restriction, "this Court should recognize that there is an historical exception for laws that protect children from being enticed by physically harmful products—even if those restrictions include speech … ." Mot. at 23, line 7–9.

First, there is no such exception. Exceptions to Article 1, Section 8's broad application are extremely narrow. Any and all content-based speech restrictions violate the Constitution, "unless the scope of restraint is wholly confined within *some historical exception 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*." *Robertson*, 293 Or. at 412 (emphasis added). Examples of well-established exceptions to Article 1, Section 8's broad application include "perjury, solicitation or verbal assistance with a crime, some forms of theft, forgery and fraud and their contemporary variants." *Id.*

Second, the Defendants' argument is impracticable precisely because it would require restrictions on constitutionally protected speech. They contend that "laws that protect children from being enticed by physically harmful products" should be exempt from the constitutional prohibition on censorship, Mot. at 23, lines 7–9, but what does "enticing" mean? How is it to be measured? The answer can only be: by censoring the content of constitutionally protected

expression about legal products. In fact, Defendants' argument is nothing more than a revival of the old, long-ago rejected principle of obscenity law whereby books could be censored if they "'tend[ed] to the corruption of the morals of youth.'" *State v. Stoneman*, 323 Or. 536, 545 (1996) (quoting *Henry*, 302 Or. at 522). The *Stoneman* court rejected this legal principle as "provid[ing] no support for any 'well-established historical exception to freedom of expression.'" *Id.* Indeed, the principle was abandoned because it would "'reduce the adult population … to reading only what is fit for children.'" *State v. Jackson*, 224 Or. 337, 358 (1960) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

Contrary to Defendants' arguments, Oregon courts have not recognized an exception to the constitution for laws that purport to protect children. Content-based regulation is categorically prohibited, unless within a well-established historical exception. None of the cases cited by Defendants hold to the contrary. *Henry* categorically rejected the argument that a law banning the possession and dissemination of obscene material could be justified on the ground that it protected children from the potential harm of obscenity: "We emphasize that the prime reason that 'obscene' expression cannot be restricted is that it is speech that does not fall within any historical exception to the plain wording of the Oregon Constitution that 'no law shall be passed restraining the expression of [speech] freely on any subject whatsoever.'" 302 Or. at 525. While content-neutral "reasonable time, place and manner regulations" may be appropriate "to protect the unwilling viewer or children," "*no law can prohibit or censor the communication itself*." *Id*. (emphasis added).

Likewise, the Oregon Supreme Court held in *City of Portland v. Tidyman*, 306 Or. 174 (1988) that a zoning law that prohibited "adult businesses" from operating within 500 feet of "any residential zone or any public or private school" and "1000 feet from any other adult

business" violated Article 1, Section 8. While the *Tidyman* concurrence hypothesized that a law requiring adult businesses to be a specific distance from a school might be constitutional, any such law could not seek to regulate "the protected act of communication itself." 306 Or. at 190 (Gillette, J. concurring in part).

The Defendants cite *Stoneman* for the proposition that Oregon courts have "endorsed a historical exception to Article 1, section 8, for statutes aimed at 'the protection of children,'" (Mot. at 20, lines 20–21) but in fact the opposite is true. *Stoneman* upheld a statute criminalizing the knowing possession of child pornography, in part because it required the defendant to know the pornography featured a child under the age of 18, and because it did *not* purport to apply to *simulated* child pornography that did not feature an actual child. 323 Or. at 542.

Stoneman expressly rejected the argument made here by Defendants. There, the state argued that "because the welfare of children is at stake, we should apply a different, and less stringent, rule" than Robertson's categorical rejection of any content-based speech restriction. *Id*. at 542. Indeed, the state specifically cited the same concurring opinion in *Tidyman* that the Defendants cite in their motion. *Compare id. with* Motion, at page 20, lines 17–18. The court flatly rejected that argument. "[T]he balancing approach for which the state contends is so contrary to the principles that have guided this court's jurisprudence respecting freedom of expression issues under Article 1, section 8," said the justices, "that it cannot be countenanced." *Id.* "[A] state legislative interest, no matter how important, cannot trump a state constitutional command. …We reject the state's suggestion that we abandon the rule that the court traditionally has employed in resolving Article 1, section 8 issues, in recognition of the particular importance of the legislative objective at issue here." *Id.* at 542–43.

IV. Defendants' other arguments

A. This case is not about the health effects of vaping products.

Defendants spend almost half of their brief arguing that the Statute and Regulations are supported by sound public policy. But the issue in this case is not whether the Statue and Regulations are a good idea—that's for the legislature to decide. The issue here is whether the Statute and Regulations are content-based restrictions on free speech. Public policy considerations can never save a law that violates the Constitution, and Oregon courts have refused to water down Article 1, section 8's clear prohibition against content-based regulation. *Stoneman*, 323 Or. at 542.

B. The Administrative Procedures Act does not preclude review of the Statute and Regulations.

This case challenges the constitutionality of ORS § 431A.175. The statute's prohibition against packaging vaping products "in a manner that is attractive to minors" is an impermissible content-based speech restriction that violates Article 1, section 8. Defendants acknowledge that the Court has jurisdiction, but contend that the Court *cannot* consider whether the Regulations also violate the Oregon Constitution.

Unlike the regulations at issue in *Alto v. State*, 319 Or. 382 (1994), Plaintiffs do not separately challenge the validity of the Regulations. In *Alto*, the plaintiff challenged whether the State Fire Marshall "correctly interpreted the statutory term 'at retail'" as used in the pertinent statutes. *Id*. at 393. Plaintiffs here do not challenge whether the "regulation was promulgated according to applicable rulemaking procedures." *Id.* at 393. Nor do they challenge "whether the promulgation of the regulation was within the jurisdictional authority of the promulgating agency and whether the substance of the regulation neither departed from the legal standard expressed or

implied in the enabling statute, nor contravened any other applicable statute." *Id.* at 393–94.

Nor do the Plaintiffs challenge Defendants' process in promulgating the regulations. Likewise, the Administrative Procedure Act provides no basis to challenge the Statute. A trial court lacks jurisdiction only when the Administrative Procedures Act "provide[s] the sole and exclusive means of obtaining judicial review." *Salibello v. Oregon Bd. of Optometry*, 276 Or. App. 363, 367 (2016). Additionally, the APA does not apply "when the petitioner is a party to … a contested case," as is true here. ORS 183.400(1).

Defendants offer no authority for the proposition that Plaintiffs' challenge to the Regulations "must be dismissed on summary judgment for lack of jurisdiction." Mot. at 8, line 24. None of the cases cited by Defendants involved a case where a party challenged the constitutionality of a statute, along with regulations promulgated pursuant to statute. Indeed, *Clastop County v. Land Conservation and Development Commission*, 47 Or. App. 377 (1980) is directly on point rejecting Defendants' argument. In *Clastop County*, as here, Plaintiffs filed suit challenging the constitutionality of the statewide land use program promulgated by the Land Conservation and Development Commission as well as the statutes creating the program. 47 Or. App. at 378. There, as here, the defendants asserted that the Administrative Procedures Act required that the matter be initially brought in the court of appeals. The court rejected defendants' argument. "We need not and do not reach the question whether the trial court had jurisdiction over plaintiffs' challenge to the statewide planning goals, because under ORS 28.020 the trial court obviously had jurisdiction over plaintiffs' challenge to the statutes." *Id.*

A challenge to a statute is permitted under the Uniform Declaratory Judgment Act, and Defendants do not contend otherwise. Defendants' argument that such a challenge must be bifurcated, with the Circuit Court determining the constitutionality of the statute and the Court of

Appeals reviewing the regulations under the APA, defies the law as well as sound judicial economy. Because the APA cannot provide relief to the Plaintiffs, this Court has jurisdiction.

C. The Statute and Regulations are overbroad.

Apart from being impermissible content-based restrictions, the Statute and Regulations are overbroad. If the purpose of the Statute and Regulations is to protect children from being exposed to vaping products that are "packaged" in a "manner attractive to minors," the law is overbroad to the extent it applies to retail establishments that do not allow minors in the first place. A law is "'overbroad to the extent it announces a prohibition that reaches conduct which may not be prohibited.'" *Robertson*, 293 Or. at 410 (citation omitted). The Statute and Regulations, if enforced against Plaintiffs, will never serve their stated policy goals, because children are not allowed in Plaintiffs' store in the first place—so there is no basis for believing that censoring Plaintiffs' product labels will prevent sales to minors who are not in a position to buy the products anyway. While the state's concern with sales to minors is a legitimate one, there are other means, which are both constitutional and more effective, of restricting youth access: such as enforcing existing laws prohibiting the sale of tobacco products to minors.

D. The Statute and Regulations Are Vague.

If the Court accepts Defendants' argument that it can only consider the Statute and not the Regulations, the statute itself is still impermissibly vague. A law is unconstitutionally vague if "the law as interpreted cannot be discerned from its terms." *Id.* The law makes it unlawful to distribute sell, or allow to be sold, vaping products that are *"packaged in a manner that is attractive to minors."* ORS § 431A.175(2)(f). The statute, standing alone, is by its own terms unconstitutionally vague because it acknowledges the need for the term to be "determined by the [defendant Health] [A]uthority by rule." *Id.* The Regulations, however, do not save the Statute.

The Regulations provide no basis to determine which images, words or graphics appeal to minors, and which ones do not.

V. Conclusion

Plaintiffs respectfully request that the Court grant summary judgment in favor of Plaintiffs.

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/s/ *Herbert G. Grey*
Herbert G. Grey, OSB #81025
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
(503) 641-4908
herb@greylaw.org

/s/ *Stephen Silverman*
Stephen Silverman
(admitted *pro hac vice*)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Plaintiffs

Trial Attorney: Stephen Silverman

CERTIFICATE OF SERVICE

I certify that on August 4, 2022, I served the foregoing Response to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment upon the parties hereto by email and regular mail addressed to the following:

Carla Scott
Senior Assistant Attorney General
Department of Justice
100 SW Market Street
Portland, OR 97201
Sarah.weston@doj.state.or.us
Carla.a.scott@doj.state.or.us

/s/ *Stephen Silverman*

Stephen Silverman
(*pro hac vice* application pending)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org