IN THE COURT OF APPEALS OF THE STATE OF OREGON

NO MOKE DADDY, LLC, doing business as Division Vapor, a corporation, Plaintiffs-Appellants v. PATRICK ALLEN, in his official Capacity as Director of Oregon Health Authority, and OREGON HEALTH AUTHORITY, Defendants-Respondents.	Multnomah County Circuit Court No. 21CV33671 CA A180270

APPELLANTS' CORRECTED OPENING BRIEF AND EXCERPT OF RECORD[1]

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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[1] This brief includes a challenge to the constitutionality of ORS 431A.175(2)(f).

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STATEMENT OF THE CASE

Nature of the Action and Relief Sought

This case involves a free speech challenge to ORS 431A.175(2)(f), which 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 [the Oregon Health Authority ("OHA")] by rule," and to OAR 333-015-0357, the regulations implementing the statute.

Nature of the Judgment

The Circuit Court granted Defendant's motion for summary judgment on October 25, 2022, concluding that ORS 431A.175(2)(f) does not violate Article I, Section 8 of the Oregon Constitution, and that it lacked jurisdiction over Plaintiffs' challenge to the regulations promulgated under the statute. ER-58–63.

Basis of Appellate Jurisdiction

The Order and Judgment of the Circuit Court is appealable pursuant to ORS 19.270(1).

Effective Dates for Appellate Purposes

The circuit court issued final judgment on November 21, 2022, and Plaintiffs filed and served a timely notice of appeal on December 20, 2022. ER-65.

Questions Presented on Appeal

I. Whether the circuit court erred in finding ORS 431A.175(2)(f) does not facially violate Article 1, Section 8 of the Oregon Constitution.

II. Whether the circuit court erred in failing to address that ORS 431A.175(2)(f) is unconstitutionally vague on its face.

III. Whether the circuit court erred in finding that it lacked jurisdiction over Plaintiffs' challenge to OHA's regulations.

IV. Whether OAR 333-015-0357 violates Article I, Section 8 of the Oregon Constitution.

Summary of the Argument

First, the circuit court erred in holding that ORS 431A.175(2)(f) does not violate freedom of speech under the Oregon Constitution. The statute on its face "expressly regulates expression," *State v. Babson*, 355 Or. 383, 395 (2014), for the purpose of proscribing expression, and thus falls under Category One of the framework set forth in *State v. Robertson*, 293 Or. 402 (1982). It does so both because it restricts a medium of expression (packaging) and because it frames its restrictions in terms of message or expressive content (attractiveness to minors). The statute does not fall within

any historical exception justifying content-based regulations, and thus it is unconstitutional. Alternatively, even if the statute targets the effects of speech rather than the speech itself, it still expressly bans speech, and it is overbroad, and thus fails under *Robertson*'s Category Two.

Second, the circuit court erred by completely failing to address Plaintiffs' vagueness claim. This Court should reverse and hold the statute unconstitutionally vague because the statute fails to give Plaintiffs or other people of ordinary intelligence reasonable notice of what conduct is forbidden. Additionally, the statute's vagueness places excessive power in OHA's hands, and OHA's implementing regulations are themselves vague and confusing.

Third, the circuit court erred in holding it lacked jurisdiction over Plaintiffs' challenge to OHA's regulations. While the court held ORS 183.400 vested exclusive jurisdiction over regulation challenges in this Court, that statute applies only to rulemaking challenges, not constitutional challenges. Moreover, even if ORS 183.400 applies, it does not vest *exclusive* jurisdiction in the Court of Appeals, and the circuit court independently had jurisdiction pursuant to the Declaratory Judgment Act. The circuit court's approach was contrary to both the text of the relevant statutes and principles of judicial economy.

Fourth, the OHA's regulations implementing ORS 431A.175(2)(f) unconstitutionally infringe on free speech, because they ban specific kinds of content on product packaging. Not only does this facially regulate expression; it prevents Plaintiffs from even providing factually accurate descriptions of products they legally sell.

Statement of Facts

This case involves a free speech challenge to ORS 431A.175(2)(f), which 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 [the Oregon Health Authority] by rule," and to OAR 333-015-0357, the regulations implementing the statute.

Pursuant to ORS 431A.175(2)(f), OHA promulgated the following regulations to define what is "attractive to minors."

> (1) 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, is likely to appeal to minors.
>
> (2) The Authority 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.

Plaintiff Paul Bates owns a vape shop in Portland, Oregon. ER-2 ¶ 2. His shop, No Moke Daddy, LLC (doing business as Division Vapor), complies with all relevant laws and regulations, and takes care to ensure that its products are only bought and used by adults. Among other precautions, Plaintiffs forbid anyone under 21 years of age from entering the store; they post signs stating that minors may not enter the store; and they keep all products inside glass cases or behind the counter on racks accessible only to employees. ER-2 ¶¶ 5, 7.

ORS 431A.175(2)(f) and its implementing regulations have placed heavy burdens on Plaintiffs. In addition to the loss of the ability to speak freely via product labels and packaging, Plaintiffs must have their employees spend several hours every week placing white stickers over various words and images on each individual bottle of vaping liquid, as many of these bottles include content (such as accurate factual descriptions of the products'

flavors) proscribed by OHA. ER-15 ¶¶ 58–59. In other instances, Plaintiffs have been forced to stop selling certain product lines altogether, because the labels would have to be completely censored with stickers, rendering sale of the products impracticable. ER-16 ¶ 61.

On August 23, 2021, Plaintiffs filed suit in the Multnomah County Circuit Court against Defendants, OHA and Patrick Allen, in his official capacity as Director of OHA. ER-1–24. Plaintiffs sought injunctive and declaratory relief against Oregon's requirements forcing vaping businesses to censor accurate information and expressive speech about products they are legally permitted to offer for sale, and against the associated rules promulgated by OHA. *Id.* Both parties moved for summary judgment. ER-65. An oral argument on the cross-motions for summary judgment occurred on October 14, 2022. *Id.*

The circuit court granted Defendant's motion for summary judgment on October 25, 2022. ER-58–63. It concluded that ORS 431A.175(2)(f) does not violate Article I, Section 8 of the Oregon Constitution. The circuit court reasoned that ORS 431A.175(2)(f) does not expressly regulate speech and therefore does not fall within *Robertson* Category One. ER-61. Moreover, it found that ORS 431A.175(2)(f) does not fall within *Robertson* Category Two and is not overly broad. *Id.* Rather, the court found that ORS 431A.175(2)(f) falls within *Robertson* Category Three and is not subject to a

facial challenge. ER-63. Additionally, the circuit court found that it lacked jurisdiction over Plaintiffs' challenge to the regulations promulgated under the statute. *Id.* Finally, the court rejected Plaintiffs' vagueness claim without discussion. *Id.*

FIRST ASSIGNMENT OF ERROR: The court erred in finding that ORS 431A.175(2)(f) did not facially violate Article I, Section 8 of the Oregon Constitution.

1. Preservation of Error

Plaintiffs raised this issue in their Response to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment. ER-45–47, 49–52.

2. Standard of Review

This court reviews a constitutional challenge to a statute on free speech grounds de novo. *See, e.g.*, *Pangle v. Bend-Lapine School Dist.*, 169 Or. App. 376, 394 (2000); *Jamshidnejad v. Central Curry School Dist.*, 198 Or. App. 513, 518 (2005).

3. Argument

Article I, 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." Courts analyzing a challenge under this provision apply the framework established in *State v. Robertson*, 293 Or. 402 (1982), to determine whether the

challenged law is constitutional. Under *Robertson*, courts first classify the challenged law into one of three categories, each of which is analyzed under a different standard. Laws in "Category One" focus on the content of speech, are aimed at the substance of any opinion or any subject of communication, and are invalid unless they fit wholly within an historical exception. *Id.* at 412.

Laws in "Category Two" regulate expression, not for the sake of proscribing expression per se, but to minimize some resulting harm or negative effect associated with that expression. *Id.* at 417–18. These laws are analyzed for overbreadth. *State v. Chakerian*, 135 Or. App. 368, 372 (1995).

Laws that fall within "Category Three" focus on a forbidden harm or effect, and do not refer to expression at all. *State v. Plowman*, 314 Or. 157, 164 (1992); *City of Eugene v. Miller*, 318 Or. 480, 490 (1994). These laws violate Article I, section 8 if they impermissibly burden protected expression. *State v. Illig-Renn*, 341 Or. 228, 234–35 (2006); *Plowman*, 314 Or. at 164; *Miller*, 318 Or. at 490.

As detailed below, ORS 431A.175(2)(f) is a law that expressly proscribes speech based on the content thereof. Accordingly, it falls under Category One. Because no historical exception applies, it is facially unconstitutional. Alternatively, ORS 431A.175(2)(f) is at best a Category Two law that targets a particular harm but does expressly regulate expression

and speech in doing so. It is therefore overbroad, and therefore still facially unconstitutional.

I. ORS 431A.175(2)(f) falls under *Robertson* Category One, and is therefore facially unconstitutional.

By regulating the expressive content of a product's packaging based specifically on how that content affects viewers, ORS 431A.175(2)(f) facially and directly regulates expression.

A. Regulating the expressive content of a product's packaging means facially regulating speech and falls under *Robertson* Category One.

Robertson Category One includes any law "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." 293 Or. at 412. In analyzing whether a law falls within Category One, courts focus on the statute's text to determine if it "expressly regulates expression." *Babson*, 355 Or. at 395; *City of Portland v. Tidyman*, 306 Or. 174, 184 (1988).

If it does, then the law is unconstitutional unless the state can demonstrate that (1) "the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted" ***and*** (2) "the guarantees then or in 1859 demonstrably were not intended to reach" the regulated speech. *Robertson*, 293 Or. at 412.

1. ORS 431A.175(2)(f) Expressly Regulates Expression.

Here, plain text, common sense, and legislative intent all indicate that the statute "expressly regulates expression." *Babson*, 355 Or. at 395. That is, it regulates not merely the effects of speech, but "speech itself." *Robertson*, 293 Or. at 414 (citation omitted).

Beginning with the text of the statute,[2] ORS 431A.175(2)(f) 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 the [OHA] by rule." "Packaging" a product means "to present [something] in such a way as to heighten its appeal to the public."[3] Alternatively, if (and this is unclear) "packaging" is a term of art borrowed from federal law (such as 21 U.S.C. § 352), the term still inherently includes conveying a message, because the definition expressly refers to the "package" conveying the identity of the manufacturer and "statement[s]" about the quantity of contents.

Packaging inherently communicates some message, such as words or symbols intended to persuade a customer to buy, or conveying warnings or

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[2] *See, e.g.*, *State v. Browning*, 282 Or. App. 1, 3 (2016) ("We begin with the text, which is the best evidence of the legislature's intent." (internal marks and citation omitted)).

[3] *Packaged*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/packaged.

use instructions. In other words, one core purpose of a product's packaging is to convey messages to consumers.

To be sure, packaging has other functions: it can protect a product for transportation and storage. But it is not plausible that the Oregon Legislature was principally concerned with *this* aspect of packaging; what makes packaging "attractive" to a consumer is not its functional qualities of protecting the product. Rather, packaging is *only* "attractive" insofar as it is a means of communication allowing companies to differentiate their products from those of their competitors, particularly when products will appear on shelves beside others. Packaging gives valuable information to the buyer to make an informed purchase. In other words, a core purpose of packaging is to attract buyers, or "to present [something' in such a way as to heighten its appeal to the public." *Id.* The colors, fonts, words used, and style of a product's packaging necessarily convey messages. *Cf. Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth*., 134 F.3d 87, 94–97 (2d Cir. 1998) (product labels convey information and are entitled to constitutional free speech protections).

This message and the means of conveying it (i.e., the words, graphics, etc., on the package) is pure speech squarely within the protections of article I, section 8. That provision says no law may restrain "free *expression* of opinion" or restrict "the right to speak, *write*, or *print* freely on any subject

whatever." (emphasis added). Packages contain *writing* and artistic *expression* that are *printed* on labels and containers and are distributed to the public. As a matter of plain language, this is speech.

2. Regulating the Expressive Content of Packaging Means Regulating Speech.

Unsurprisingly, courts nationwide have consistently found that packaging is an expressive medium, and that regulating packaging as such means regulating speech. *See, e.g.*, *Id.*; *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 547–48 (6th Cir. 2012); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1215 (D.C. Cir. 2012); *United States v. Bell*, 414 F.3d 474, 480 (3rd Cir. 2005); *Serova v. Sony Music Ent.*, 515 P.3d 1, 10 (Cal. 2022).

Likewise, courts have been clear that restricting a medium of expression can be tantamount to restricting the expression itself. The U.S. Supreme Court has made clear that banning an "instrument" or "device" used for communication has the practical effect of restricting speech. In *Saia v. New York*, 334 U.S. 558, 558 (1948), the Supreme Court invalidated an ordinance that banned the use of sound amplification devices except with permission of the chief of police. It explained:

> Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method

> of political campaigning. It is the way people are reached. … When a city allows an official to ban [sound amplification devices] in his uncontrolled discretion, it sanctions a *device* for suppression of free communication of ideas.

Id. at 561–62 (emphasis added).

Just as loud-speakers are "indispensable instruments of effective public speech," product packaging is an "indispensable ***instrument***" of communication with customers. *Id.* at 561. It is "the way [consumers] are reached"; a "***device*** for … free communication of [commercial] ideas." *Id.* at 561–62 (emphasis added). While the Legislature is of course free to regulate ***non-expressive*** components of packaging,[4] it may not (as it did here) expressly regulate packaging ***as a medium of expression***, i.e., as a means of making the product "attractive" to customers.

Notably, many of the decisions cited above recognizing packaging as speech come from jurisdictions that give *less* constitutional scrutiny to commercial speech restrictions. Oregon's Constitution is uniquely protective of *all* lawful speech, notably providing commercial speech the same protections as noncommercial speech. *See Nw. Advancement, Inc. v. Bureau of Labor, Wage and Hour, Div*., 96 Or. App. 133, 140 (1989); *Ackerley Commc'ns, Inc. v. Multnomah Cnty.*, 72 Or. App. 617, 624 (1985). "The

[4] For example, requiring certain methods of canning food, or the inclusion of child locks on medication bottles.

sweeping protection of [Article I, Section 8] *extends to all forms of speech*, regardless of social acceptability or offensiveness of content, and *regardless of the context of the communication*." *Merrick v. Bd. of Higher Educ.*, 116 Or. App 258, 264 (1992) (internal citations omitted, emphasis added).

3. It is irrelevant whether the statute explicitly refers to speech.

The circuit court concluded that because the statute does not detail "what the packaging can and cannot portray," it does not fall within Category One. ER-61. But this is not the test. A statute can still "expressly proscribe expression" even if (as here) it doesn't parse out in detail what speech is and is not permitted. In fact, Oregon courts allow facial challenges where, as here, a sweeping restriction threatens to chill whole categories of speech. *Illig-Renn*, 341 Or. at 234. In such a challenge it is no defense that "the statute manages to avoid any *direct reference* to speech or expression." *Id.* at 235 (emphasis added).

While ORS 431A.175(2)(f) avoids *direct* reference to expression, it necessarily proscribes expression because it restricts a *medium* of expression. "The constitutional prohibition against laws restraining speech or writing cannot be evaded simply by phrasing statutes so as to prohibit 'causing another person to see' or 'to hear' whatever the lawmakers wish to

suppress." *State v. Moyle*, 299 Or. 691, 699 (1985).[5] Thus, it makes no difference whether the statute prohibits expression appealing to customers or, in a more roundabout way, achieves the same thing by prohibiting packaging that might cause viewers to feel appealed to. Either way, the point of the statute is to restrict speech.

B. To regulate the effect of speech on listeners is to facially regulate speech.

ORS 431A.175(2)(f) bans packaging "that is attractive to minors, as determined by the [Oregon Health Authority] by rule." Because it specifically regulates packaging insofar as it is "attractive," the statute is content-based on its face.

A content-based restriction is a restriction that requires the enforcer to consider the communication's message or form in order to apply the statute. *Cf. Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."). The term "message" need not refer to a "narrow, succinctly articulable message," because free speech also protects the "painting of Jackson Pollock, music of Arnold Schoenberg, or

[5] Here, too, there is a parallel to federal law; the Supreme Court has held that proscribing a *medium* of expression is just as constitutionally suspect as proscribing words directly. *See, e.g.*, *City of Lakewood v. Plain Dealer Pub'g Co*., 486 U.S. 750, 762 (1988) (ban on coin-operated newsstands violated First Amendment); *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994) (ban on signs in residential yards violated First Amendment).

Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 569 (1995).[6]

"Attractive" is not defined in ORS 431A.175(2)(f), so we must muse dictionaries, which say it means "'1a: arousing interest or pleasure, 1b: appealing, 2: having or relating to the power to attract.' *Attractive*, Webster's Third New Int'l Dictionary (3rd ed. 1971)."[7] *See* ER–62; *see also Attractive*, Dictionary.com[8] (defining "attractive" as "providing pleasure or delight, especially in appearance"). Indeed, "attractive" comes from the root word "attract," which means "to draw by *appeal* to natural or excited interest, *emotion*, or *aesthetic sense*." *Attract*, Merriam-Webster.com Dictionary (emphasis added).[9] Synonyms of "attractive" include alluring, beautiful, charming, engaging, enticing, good-looking, gorgeous, handsome, interesting, inviting, tempting, lovely, pleasant, captivating, pretty, and fascinating.[10]

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[6] *Hurley* and other cases cited herein which interpreted the federal First Amendment are, of course, cited only as persuasive authority.

[7] Critically, the statute itself does not define "attractive," but instead entrusts OHA with the power to decide what is "attractive to minors." In addition to regulating content, this vague, overbroad restriction chills speech by leaving citizens unsure of how to comply, as discussed below.

[8] https://www.dictionary.com/browse/attractive.

[9] https://www.merriam-webster.com/dictionary/attract.

[10] *Attractive*, Thesaurus.com, https://www.thesaurus.com/browse/attractive.

All of this makes clear that any reasonable reading of the statute's ban on "attractive" necessarily involves communication, aesthetics and the label's subjective effect on a viewer. No definition or accepted usage of "attractive" would limit the concept purely to utility or function. The word "attractive" in the statute makes clear *which type* of packaging is prohibited: "attractive" packaging; that is, packaging that *communicates* by rendering a product aesthetically pleasing or desirable to a viewer.

The regulations promulgated by OHA reinforce the point that "attractive" refers to communication: "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).

OHA therefore defines "attractive" by the *aesthetics* of the packaging, meaning with reference to *pure speech* elements—shapes, graphics, colors, writing—and not utility or function. In other words, OHA employs the ordinary meaning of "attractive" as meaning the conveyance of some message.[11] Attractive just means *pretty*, or *intriguing*, or *alluring*.

[11] Indeed, Oregon law assumes the Legislature intends to give words in statutes their "plain, natural, and ordinary meaning," unless there is evidence to the contrary. *State v. Langley,* 314 Or. 247, 256 (1992).

In *Bad Frog Brewery*, the Second Circuit found that a beer label featuring a cartoon frog making a rude gesture was entitled to First Amendment protections because it "convey[ed] a message that the company has characterized as 'traditionally ... negative and nasty.'" 134 F.3d at 91. The point of the cartoon was to convey a "satir[ical]" bad-boy attitude as a "joke" that appealed to consumers. *Id.* at 94 & n.2. The court found that this form of *attractiveness* was expression entitled to speech protection (the court went on to apply the discriminatory "commercial speech" doctrine that applies under federal law, but which does not apply under the Oregon Constitution. *Nw. Advancement, Inc.*, 96 Or. App. at 140). Here, the label is intended to attract rather than to be offensive or satirical—that is, intended to be *pretty*, or *intriguing*, or *alluring*. And for *that reason*, it is targeted for regulation.

The statute is written in terms directed to the *substance* of a communication because it bans only packaging that is "attractive." "Unattractive" packaging, in contrast, remains lawful. Thus, on its face, the statute is written to restrict certain types of communication—i.e., communication that is "attractive," based on a viewer's aesthetic perception that the content of the package portrays vaping in a positive light. Therefore, the statute is written in terms directed to the substance of communication "because that content itself is deemed socially undesirable or offensive, or

because it is thought to have adverse consequences." *Robertson*, 293 Or. at 416. It therefore falls within *Robertson* Category One.

Defendants have argued that the statute is content-neutral because it is directed only at preventing the sale of harmful products packaged in a manner attractive to minors. Defendants contend the law "allows sellers … to *say* what they want; they just cannot *say it in a way that is 'attractive to minors*.'" Defs.' Mot. for Summ. J., TCF 18 at 13 (emphasis added). But that begs the question. Regulating *the way something is said* is a content-based restriction. Regulating a label because it is "pretty" or "intriguing" or "alluring" would violate free speech—and so does regulating speech because it's "attractive."

C. If OHA only regulated non-expressive components of packaging, then it would not be implementing the statute.

The circuit court concluded that "it is possible" for OHA to interpret the statute in a way that does not implicate pure speech—for example, by requiring that the product be "difficult… to open," or not have "a toy or candy attached," and so on—so the statute is constitutional. ER-63.

But the statute does not say that, and to interpret it that way fundamentally rewrites it. Nothing in ORS 431A.175 indicates that the Legislature meant to regulate only such functional, non-expressive components of packaging. Rather, the plain and ordinary meaning of "attractive" includes not utility, but aesthetics. Courts are not supposed to

add words to statutes. Instead, they're supposed to "declare what is" and "not to insert what has been omitted, or to omit what has been inserted." ORS § 174.010. *See Cook v. Hill*, 224 Or. 565, 568–69 (1960) (courts "cannot insert what has been omitted").

Thus, unsurprisingly, OHA's enforcement of the statute has focused almost exclusively on packaging *as expression*: for example, by banning categories of images and words. *See* OAR 333-015-0357 (a)–(c) (banning cartoons, celebrities, athletes, mascots, fictitious characters played by people, candy, desserts, fruit); *id.* (d) (enumerating a non-exhaustive list of banned words); *id.* (e) (banning "[t]he shape of any animal, commercially recognizable toy, sports equipment, or commercially recognizable candy").[12] Likewise, Plaintiffs' burdens in complying with the statute (spending time and resources censoring product labels, discontinuing product lines that include too much banned content) have solely involved packaging as expression. ER-15–16 ¶¶ 58–61.

[12] The circuit court held it lacked jurisdiction over Plaintiffs' challenge to the regulations. ER-60. While Plaintiffs address that matter under the Third and Fourth Assignments of Error, the regulations are relevant here regardless of those issues. Specifically, the regulations are examples of what the statute's plain language directs OHA to do, and they illustrate that OHA *cannot* faithfully enforce a sweeping ban on expressive speech without expressly banning certain types of speech.

Indeed, while OHA does *also* require that certain product containers be "child-resistant," it lists those rules separately from the provisions addressing packaging that is "attractive to minors." *See* OAR 333-015-0340, 333-015-0345.

Particularly in a facial challenge like this one, the state cannot evade constitutional review of a law that clearly regulates speech by simply suggesting that *some* hypothetical (not actual) instance of enforcing the law might not implicate speech. If it could, then statutes aimed at suppressing speech could evade constitutional review provided some hypothetical enforcement case might *not* violate constitutional rights. That contradicts the high degree of vigilance with which courts are supposed to guard free speech. *Cf. State v. Henry*, 302 Or. 510, 521 (1987) ("[T]he constitutional guarantee of free speech and press will not be overcome by the mere showing of some legal restraints on one or another form of speech or writing.").

Therefore, ORS 431A.175(2)(f) explicitly and by its terms restricts speech, and the statute falls within *Robertson* Category One and is unconstitutional.

II. Even if ORS 431A.175(2)(f) does not fall within *Robertson* Category One, it would fall under Category Two and be facially overbroad.

Robertson Category Two applies to laws that by their terms focus on harm, but expressly proscribe speech as a means of causing that harm. *Moyle*, 299 Or. at 705. To pass constitutional muster, laws that fall into Category Two must not be overbroad. *State v. Stoneman*, 323 Or. 536, 543 (1996). A speech restriction is overbroad if "it announces a prohibition that reaches conduct which may not be [constitutionally] prohibited." *Robertson*, 293 Or. at 410 (internal marks & citation omitted).

The circuit court concluded that the law is permissible because it reasoned that if children are "less interested in or drawn to the product," they will be less likely to ingest or use it, thus reducing the targeted harm. ER-62. But the Supreme Court has expressly rejected this notion of directly regulating speech in order to achieve some desirable effect on society at large: "lawmakers are precluded from enacting restrictions on speech solely on the theory that the speech is connected with some adverse consequences and that, absent the speech, the consequences are, to some indefinable degree, less likely." *State v. Ciancanelli*, 339 Or. 282, 322 n.31 (2005).

Because ORS 431A.175(2)(f) expressly regulates speech and expression as a means of avoiding a particular harm, it falls within *Robertson* Category Two.

A. ORS 431A.175(2)(f) addresses the purported harm *only* by expressly regulating speech.

As detailed above, the statute restricts packaging, a medium of commercial speech, in an attempt to ensure that curious children will be less likely to try the product. In other words, the statute restricts speech based on the premise that the targeted speech will lead to adverse consequences and that those consequences are less likely if this "attractive" speech is banned. But that reasoning would justify virtually *any* infringement on free speech, as long as the Legislature intends the infringement to have positive effects. That is plainly not the meaning of Oregon's free speech clause, and the Supreme Court has expressly rejected it as a basis for regulating expression.

Obviously the State has an interest in preventing children from vaping, and Plaintiffs do not argue that they have a right to advertise vape products *to children*. The State may ban (and has banned) the sale of vape products to children, the use of vape products by children, and the presence of children in establishments that sell vape products.[13] But it may not, in pursuit of this interest, ban expression—including expression that is *not* directed toward children—just because it might portray vaping products as "attractive" to a child who happens to see that expression.

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[13] Indeed, the State has taken these measures, and Plaintiffs have detailed their own compliance with these laws and the steps they have taken to prevent minors from obtaining or using vape products. ER-2 ¶¶ 5–7.

Courts have made clear that the goal of protecting listeners from hearing or viewing certain speech is suspect on its face. *See Ciancanelli*, 339 Or. at 317 ("[Laws] whose *real* focus is on some underlying harm or offense may survive the adoption of Article I, Section 8, while those that focus on protecting the hearer from the message do not."). Moreover, both Oregon and federal courts have rejected the principle that speech in the adult world can be limited by a rule designed to make it safe for children. In *State v. Jackson*, 224 Or. 337 (1960), the court said the so-called "Hicklin rule," which allowed the state to ban speech that might corrupt the morals of the young, was unconstitutional under the state Constitution, noting that such a rule tended "'to reduce the adult population … to reading only what is fit for children.'" *Id.* at 357–58 (quoting *Butler v. State of Mich*., 352 U.S. 380, 383 (1957)).[14] As the U.S. Supreme Court observed more recently:

> It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. … Regardless of the strength of the government's interest in protecting children, the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."

[14] *Jackson* was overruled in *State v. Henry*, 302 Or. 510, 522–23 (1987), but only because it relied on the *Roth* test which the *Henry* court found insufficiently protective of free speech rights.

Reno v. ACLU, 521 U.S. 844, 875 (1997) (internal marks and citations omitted).

Except for narrow historical exceptions, none of which applies here, it is incompatible with free speech principles to intercept and censor speech simply because the state fears what children will do if they discover it.

Moreover, in finding that protection of children justified the statute's sweeping restrictions on packaging, the circuit court overlooked the distinction between the *secondary* effects of speech and the speech itself—and the fact that government may not suppress the latter merely to regulate the former. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 441–42 (2002).

Of course, the subjective effect of speech on the listener's mind is not a "secondary effect" of speech; rather, it is the essential *purpose* of speech, and in the constitutional analysis is inseparable from the speech itself. Thus, preventing speech from being heard is not regulating an *effect* of the speech; it is censoring speech. *Robertson*, 293 Or. at 416–17 ("Laws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end."

To frame the restriction on vape packaging in terms of its primary effect—i.e., conveying a message to an audience—means restricting speech.

The state could not ban expression that is embarrassing to the Governor, favorable to Democrats, or offensive to Christians. Although all these hypothetical restrictions literally refer to the *effects* of speech, they expressly regulate speech because the effects in question are analytically inseparable from the speech itself.

B. Assuming ORS 431A.175(2)(f) falls under Category Two, it is overbroad.

The statute is overbroad for three reasons. First, because the connection between "attractive" vape packaging and harm to children is too attenuated. Second, because it directs OHA to promulgate regulations that must restrict protected expression. Third, because it contains no limiting language confining enforcement or application to the non-expressive elements of packaging. Instead, the plain meaning of the statutory terms capture too much protected expression, thereby chilling lawful speech.

1. The statute is overbroad because the connection between the targeted harm and the proscribed expression is highly attenuated and untailored.

When Oregon courts analyze speech restrictions for overbreadth, they consider the fit between the proscribed expression and the targeted harm. A law will be upheld only if there is a precise fit.

For example, in *Stoneman*, the Supreme Court upheld the constitutionality of a statute criminalizing the production or purchase of child pornography—but only if the creation of such material "necessarily

involve[d] harm to children." 323 Or. at 546. Thus, drawings or paintings would be permissible because no *actual harm* to children occurred. *Id.* at 540, n.3. The *Stoneman* court rejected an overbreadth challenge because the statute was tailored to reach *only* the forbidden effects (actual harm to children) and did not extend to privileged expression (sexually explicit content created without actual harm to children). *Id.* at 546. Thus, because the statute was limited to targeting the effect of actual, real, and substantial harm to children, it was constitutional.

But applying the same approach in *Tidyman*, the court struck down a zoning ordinance restricting adult businesses. 306 Or. 174. That ordinance "restrict[ed] the marketing of the [] communicative material, not only the effects of this marketing." *Id.* at 188. Thus "application of the ordinance necessarily requires showing the reality of the threatening effect at the place and time." *Id.* In short, a Category Two law's "valid application depends on demonstrating the specified harm under changing conditions, not on mere apprehension." *Id.* at 190–91.

Notably, the *Tidyman* court emphasized that Oregon departs from federal jurisprudence on this point. Specifically, Oregon does not use the reasoning of *City of Renton v. Playtime Theatres, Inc*., 475 U.S. 41 (1986), where the U.S. Supreme Court upheld a city zoning ordinance targeting adult businesses on the grounds that the ordinance merely regulated

secondary, non-speech *effects* of those businesses. *Tidyman,* 306 Or. at 187. Oregon courts reject this approach because it "us[es] apprehension of unproven effects as a cover for suppression of undesired expression," which is insufficiently protective of free speech. *Id.* at 188. Yet that is *precisely* what is happening here: the state is restricting speech based on content because of apprehension that it could lead to bad effects.

In *Moyle*, the court considered the constitutionality of a law that prohibited making a threat that was "expected to cause alarm." 299 Or. 691. The court analyzed the law under Category Two, concluding: "[s]peech and writing are merely the means, albeit the only prohibited means, of achieving the forbidden effect—actual and reasonable alarm." *Id.* at 699. The court emphasized:

> Something more must be implied, if the statute is to survive the scrutiny that led us to invalidate the coercion statute in *State v. Robertson*… The threat of violence to person or property must be a *genuine* threat. That is to say, the danger that the message will be followed by action must be found from the evidence to be objectively *probable* from the perspective of the factfinder, not only subjectively from the perspective of the addressee.

Id. at 704. (internal citation omitted, emphasis added). Because it was limited to "actual alarm" and "reasonableness of the alarm under the circumstances," that statute was upheld. *Id.* at 703, 709.

Stoneman, *Tidyman*, and *Moyle* show that when the state targets a forbidden effect or harm, that harm must *necessarily* result from the speech,

must be *actual*, and must be discernible, rather than a mere speculation or apprehension. Otherwise, virtually any well-intended legislative effort to curtail social harms would be sufficient justification for censorship, because *any and all* speech could conceivably lead to some kind of bad consequence.

ORS 431A.175(2)(f) falls short of the standard set forth above. Unlike the statute at issue in *Stoneman*, it is not limited to *actual* harm to children. That is, no child is exploited when sellers create "attractive" vape packaging. Packaging may be "attractive" without harming or exploiting children. In fact, it is entirely possible for "attractive" vape packaging to never be seen by any child—particularly here, where the record shows that the Plaintiffs don't let children in their store. Nevertheless, the law bans such packaging regardless of connection to actual harm. This is overbroad.

Similarly, *Tidyman* struck down the zoning ordinance because there was not a precise fit between the proscription on expression and the targeted effects. Specifically, it said "apprehension" based on "unproven effects" is not an appropriate reason for suppressing expression. 306 Or. at 188. Rather, the city had to "necessarily" show "the reality of the threatening effect." *Id.* Here, there is no precise fit between the restriction on "attractive" vape packaging and the harm it may cause to children.

Further, *Moyle* made clear the threat statute was not overbroad because there was an actual, genuine, and immediate connection between the

prohibited expression and the targeted harm. The statute was saved by that one-to-one relationship between the speech and its immediate and actual harmful effect. Here, there is no one-to-one relationship between "attractive" vape packaging and harm to children. Indeed, the harm the statute seeks to prevent is entirely speculative. Article I, section 8 prohibits the legislature from censoring speech based on speculations about potential harm removed both spatially and temporally from the speech that supposedly causes the harm. If all the state had to do is point to some attenuated, potential harm that the speech might conceivably cause, then the State could restrain practically all speech based on speculation.

2. The statute is overbroad because it directs OHA to restrict constitutionally protected expression.

The statute forces OHA to make subjective determinations about what packaging is "attractive" or not. But the Constitution does not permit an agency to wield "uncontrolled discretion" to decide what speech to allow based on the potential subjective effects of that speech on a listener. *See Robertson*, 293 Or. at 408 (describing how vague speech restrictions "invit[e] standardless and unequal application of penal laws"); *id.* ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Id.* at 409 (citation & internal marks omitted).

Vague laws in any context raise due process concerns. In the free speech context, they are especially problematic because of their "obvious chilling effect on free speech." *Reno*, 521 U.S. at 845; *see also Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." (citations omitted and alterations adopted)).

The statute undeniably tasks OHA with identifying and banning whatever packaging OHA thinks could be "attractive to minors." Naturally, this exceptionally broad mandate has resulted in broad, content-based regulations (as detailed in the Fourth Assignment of Error below).

Courts have repeatedly held that such sweeping, content-based restrictions are overbroad in relation to their goal of preventing minors from using tobacco products. *See, e.g.*, *Discount Tobacco City & Lottery*, 674 F.3d at 548 (holding ban on the use of color and graphics in tobacco advertising was "vastly overbroad"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (invalidating regulations prohibiting outdoor advertising, and some indoor advertising, of smokeless tobacco or cigars within 1,000 feet of a school); *cf. Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 825–28 (9th Cir.

2013) (explaining that a blanket ban on day labor solicitation was broader than necessary to address traffic safety concerns).

Thus, the statute is overbroad because its vague and sweeping prohibition of protected expression found on vape packages, to be enforced at OHA's unconstrained discretion, is far out of proportion to any legitimate interest the statute might advance.

3. The statute is overbroad because it does not contain limiting language restricting the application to non-expressive contexts.

Article I, Section 8 directly applies to packaging: no law may restrain "free expression of opinion" or restrict "the right to speak, write, or print freely on any subject whatever." Packages contain *writing*, *opinions*, and artistic *expression* that are *printed* on labels and containers and are distributed to the public. This is plainly speech. *Cf. Bad Frog Brewery,* 134 F.3d at 94–97.

The statute only prohibits "attractive" vape packaging from being sold. Not only is that content-based, but it sweeps so broadly that it cannot be sustained. For example, if a vape package's artistic depiction of a cartoon orange or apple is "appealing," then it is unlawful. If the orange or apple cartoon appearing on the package is instead *boring or ugly*, then it presumably *may* be sold. Sellers are forced to make subjective

determinations about whether a particular artistic depiction or phrase is "pleasurable" or not.

Subjectivity then leads to over-deterrence: to avoid violating ORS 431A.175(2)(f), sellers will likely just omit or cover the art on packages altogether (as indeed the Plaintiff here tried to do). Because the statute does not provide sellers and manufacturers with any guidance, or limit the application to non-expressive elements of packages, the law chills lawful expression and free speech. The state may not tell sellers, manufacturers, artists, and creatives *how* they can and cannot decorate their vape packages. The state may not tell artists and creatives who create packaging to make only "unattractive", "unappealing", or ugly packages. Such a restriction sweeps so broadly that it chills protected expression far beyond anything that could be justified in reference to the state's legitimate interests.

SECOND ASSIGNMENT OF ERROR: The circuit court failed to address that ORS 431A.175(2)(f) is unconstitutionally vague on its face.

1. Preservation of Error

Plaintiffs raised this issue in their Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment. ER-55–56.

2. Standard of Review

This Court reviews constitutional claims de novo. *See, e.g.*, *Pangle*, 169 Or. App. at 394; *Jamshidnejad*, 198 Or. App. at 518.

3. Argument

One of the claims Plaintiffs brought in their challenge to ORS 431A.175(2)(f) was that it was "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." ER-21 ¶ 87. "This imprecision," Plaintiffs argued, "gives [the State] virtually unconstrained, arbitrary, standardless, and unfettered discretion in interpreting its statutes and regulations." *Id.*

Although Plaintiffs reiterated and elaborated on this claim in their summary judgment briefing, *see* ER-55–56, the circuit court simply "rejected" Plaintiffs' vagueness challenge "without further discussion." ER-63. That alone was error, *cf. Pamplin v. Victoria*, 319 Or. 429, 437 (1994); *see also Fed. Land Bank of St. Paul v. Halverson*, 392 N.W.2d 77, 82 (N.D. 1986) ("When a trial court enters an order on any matter before it, responsible exercise of judicial power suggests a need for explanation of the court's reasons." (citation & internal marks omitted)), but in any event it cannot be sustained. A law is unconstitutionally vague if "as interpreted [its meaning] cannot be discerned from its terms." *Robertson*, 293 Or. at 410. That is the case here. ORS 431A.175(2)(f) frames its prohibition in highly subjective terms: it bans any packaging "attractive to minors."

While Oregon's Constitution does not demand "absolute precision," it does require that a statute give residents "a reasonable degree of certainty" about what conduct is proscribed. *Illig-Renn*, 341 Or. at 239, 243 (citation omitted). Here, the statute gives no definitions, examples, or any other kind of indication as to the scope of its prohibition. "Attractive to minors" is not a term of art. Instead, the statute simply states that "attractive to minors" means whatever OHA decides it means. *See* ORS 431A.175(2)(f) (banning packaging "that is attractive to minors, as determined by the authority by rule").

OHA's regulations do not solve these problems. To begin with, it is the job of the legislature, not the agency, to determine what is legal and illegal. When a statute is so vague that it cedes this function to the agency charged with enforcing the statute, it "permit[s] arbitrary or unequal application and uncontrolled discretion, in violation of Article I, sections 20 and 21, of the Oregon Constitution." *State v. Krueger*, 208 Or. App. 166, 170 (2006).

Moreover, the regulations are themselves vague and confusing. They are simply a "non-exclusive list" of characteristics OHA deems "*likely* to appeal to minors." It is entirely unclear what *else* OHA might also deem "attractive to minors," what standards it would employ in making that determination, or what degree of "likelihood" applies. Nor is it clear whether

the items in OAR 333-015-0357's "non-exclusive list" are per se violations of the statute, or merely examples of things OHA would consider "likely" to appeal to minors. For example, the regulation identifies "[c]elebrities, athletes, mascots, fictitious characters played by people, or other people likely to appeal to minors." Does this necessarily include *any* celebrity or fictitious character played by a person—including those kids today have probably never heard of? Would a picture of Merv Griffin or Edgar Bergen qualify? The 1996 Olympic Mascot "Izzy"? Henry Fonda's Norman Thayer from *On Golden Pond*?

The regulation creates additional confusion by employing circular definitions: characteristics "likely to appeal to minors" include "people likely to appeal to minors" and "[f]ood or beverages likely to appeal to minors." *Id.* (2)(b), (c). Thus, far from adding clarity, the regulations create additional confusion, giving Oregon residents inadequate notice of what they are permitted to do under the law.

For all these reasons, this Court should reverse the grant of summary judgment and hold that ORS 431A.175(2)(f) is unconstitutionally vague on its face. At the very least, given the lack of meaningful explanation from the circuit court regarding its denial of Plaintiffs' vagueness claim, this Court should vacate the grant of summary judgment on this claim and remand for further proceedings.

THIRD ASSIGNMENT OF ERROR: The circuit court erred in finding that it lacked jurisdiction over Plaintiffs' challenge to OHA's regulations.

1. Preservation of Error

Plaintiffs raised this issue in their Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment. ER-53–55.

2. Standard of Review

This is a question of "[t]he proper interpretation of a statute," which this Court "review[s] as a matter of law." *State v. McCathern*, 211 Or. App. 171, 175 (2007).

3. Argument

The circuit court said it lacked jurisdiction over Plaintiffs' free speech challenge to OHA's regulations because Oregon's Administrative Procedure Act (APA) requires "a 'facial' challenge to an agency regulation [to] be brought in the Court of Appeals." ER-60. This was a misinterpretation of the APA that contradicts existing authority and undermines judicial economy.

First, existing authority indicates that the APA's requirement of bringing rule challenges in the Court of Appeals applies only to *rulemaking* challenges—in other words, claims that an agency failed to follow the appropriate procedures in creating a regulation. Here, Plaintiffs are not challenging that. They are challenging the *constitutionality* of both a statute and, by extension, its implementing regulations. *See Clastop Cnty. v. Land*

Conservation and Dev. Comm'n, 47 Or. App. 377, 378 (1980) ("We need not and do not reach the question whether the trial court had jurisdiction over plaintiffs' challenge to the statewide planning goals, because … the trial court obviously had jurisdiction over the plaintiffs' challenge to the statutes [allegedly authorizing the agency to adopt those planning goals].").

Even if the procedures in ORS 183.400 *did* apply to constitutional challenges like this one, nothing in the statute suggests that it provides *exclusive* jurisdiction over such challenges. *See* ORS 183.400(1) ("The validity of any rule *may* be determined upon a petition by any person to the Court of Appeals." (emphasis added)). Here, Plaintiffs sought declaratory judgment regarding the constitutionality of the statute and regulations. The Declaratory Judgment Act gives a trial court jurisdiction over that, regardless of ORS 183.400. *See* ORS 28.010 ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.").

The circuit court's approach would also undermine judicial economy by bifurcating constitutional challenges into two legal proceedings—a challenge to the statute in trial court, and a challenge to the regulations in this Court—despite both challenges involving substantially the same legal and factual issues. That would unnecessarily burden courts and litigants—and would risk conflicting rulings if, for example, a trial court held a statute

unconstitutional while the Court of Appeals simultaneously upheld its implementing regulations against the same constitutional challenge.

FOURTH ASSIGNMENT OF ERROR: The circuit court erred in failing to hold that OAR 333-0015-0357 violates Article I, Section 8 of the Oregon Constitution.

1. Preservation of Error

Plaintiffs raised this issue in their Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment. ER-48–52.

2. Standard of Review

Oregon courts review a constitutional challenge to a regulation on free speech grounds de novo. *See, e.g.*, *Pangle*, 169 Or. App. at 394; *Jamshidnejad*, 198 Or. App. at 518.

3. Argument

As detailed in the First Assignment of Error, banning packaging that is "attractive to minors" expressly regulates expression because it specifically targets a quintessential medium of speech (packaging), and because it regulates based on the message's content.

Unsurprisingly, OHA has promulgated regulations that also target a medium of speech and discriminate based on the content of speech. First, it recognized what was already clear from the statutory text, namely, that "attractiveness to minors" is a matter of expressive content: "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) (emphasis added).

Second, it listed many specific forms of expression that are banned. For example:

- "Cartoons;"
- "Celebrities, athletes, mascots, fictitious characters played by people, or other people likely to appeal to minors;"
- References to "sweet flavors including fruit";
- "Terms or descriptive words" including "tart, tangy, sweet, cool, fire, ice, lit, spiked, poppin', juicy, [or] candy";
- "The shape of any animal, commercially recognizable toy, sports equipment, or commercially recognizable candy."

OAR 333-015-0357(2).

These regulations violate the Constitution for the same reasons ORS 431A.175(2)(f) does. Indeed, virtually every provision specifically regulates expression, banning the use of specific words, references, and images. Some of them even ban accurate factual descriptions of a product's contents or ingredients. For example, Plaintiffs cannot use words connoting "sweet flavors including fruit," or flavors like "tart" or "tangy"— despite the fact that they legally sell vaping liquids with these (and other) flavors.

For these reasons, this Court should reverse the circuit court and hold that OHA's regulations violate the Oregon Constitution's free speech protections and are invalid.

CONCLUSION

Plaintiffs respectfully urge this Court to reverse and hold that ORS 431A.175(2)(f) and OAR 333-0015-0357 are facially unconstitutional. In the alternative, Plaintiffs respectfully request that this Court reverse the grant of summary judgment and remand for additional proceedings.

/s/ *Herbert G. Grey*
Herbert G. Grey (OSB #81025)

/s/ *John Thorpe*
John Thorpe
(Pro Hac Vice Application Pending)

EXCERPT OF RECORD

INDEX

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. _____ COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Free Speech) (Claims not subject to mandatory arbitration) Filing Fee: $281 (ORS 21.135(1), (2)(a))

Plaintiffs Paul Bates and No Moke Daddy LLC, doing business as Division Vapor ("Plaintiffs") allege as follows for their complaint against the Oregon Health Authority and its director sued in official capacity ("Defendants"):

1. Plaintiffs bring this civil rights lawsuit pursuant to the free-speech clause, Article I, Section 8, of the Oregon Constitution and the Oregon Uniform Declaratory Judgment Act, 2017 ORS 28.010. Plaintiffs seek injunctive and declaratory relief against Oregon's requirement that vaping businesses censor accurate information and artistic expression about Electronic Nicotine Delivery Systems (ENDS) and related products (including vaping liquids) that they are legally permitted to offer for sale, and associated rules and practices of Defendant Oregon Health Authority.

GENERAL ALLEGATIONS

2. At all material times, Plaintiff Paul Bates was and is the owner of Plaintiff No Moke Daddy LLC, doing business as Division Vapor. Division Vapor is a vape shop located in Portland, Multnomah County, Oregon.

3. Defendant Oregon Health Authority is a political subdivision of the State of Oregon.

4. Defendant Patrick Allen is the Director of Oregon Health Authority and is sued in his official capacity.

5. Division Vapor requires that anyone entering its store be at least 21 years old, and has a sign posted at the entrance stating this requirement. Division Vapor vigorously enforces its restriction prohibiting entry of under-aged individuals.

6. Division Vapor has never been cited for selling tobacco products to someone under aged.

7. All products inside Division Vapor are displayed either inside glass cases, or behind the counter on racks that are only accessible to employees.

8. Vaping liquids are consumable liquids, typically sold in small glass or plastic bottles, which consist of vegetable glycerin, propylene glycol, water, commercial food flavoring, and sometimes nicotine.

9. Vaping liquids are consumed by atomizing the liquid using a heated coil inside an e-cigarette, which produces vapor, which is then inhaled.

10. Vaping liquids are offered in thousands of flavors and varying levels of nicotine, or no nicotine at all. Fruit and dessert flavors are the most popular.

11. Vaping has "the potential to benefit adults who smoke and who are not pregnant if used as a complete substitute for regular cigarettes and other smoked tobacco products," as recognized by the Centers for Disease Control and Prevention.[1]

12. Vaping is safer than smoking tobacco because vaping does "not burn tobacco and do[es] not produce tar or carbon monoxide, two of the most damaging elements in tobacco smoke."[2]

13. Vaping has helped thousands of smokers to quit smoking.[3]

14. Plaintiffs' customers are former smokers, who prefer vaping for its lower health risks and the fact that water vapor, which quickly dissipates, is less offensive than cigarette smoke.

15. Plaintiff invests substantial time and resources to marketing vaping liquids to its customers. In order to compete with convenience stores and other retail outlets, Plaintiff aims to provide a higher-quality product to a more discerning customer base.

16. One way Plaintiff competes with higher-volume retailers is by making the shopping experience more comfortable for his clients. Plaintiff prohibits anyone under the age of

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[1] https://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html (accessed June 9, 2021).

[2] National Health Service (UK), https://www.nhs.uk/live-well/quit-smoking/using-e-cigarettes-to-stop-smoking/ (accessed June 9, 2021).

[3] *Id.*

21 from entering the store. The store itself is elegantly furnished, as demonstrated by this photograph:

17. Another way Plaintiff competes with convenience stores, online stores and other retail outlets is by focusing on customers seeking a higher quality product. Part of Plaintiff's marketing strategy is brand-building of higher quality products and providing tailored advice to customers.

18. Building a brand requires a significant investment of resources and time.

19. Presentation of the product and its packaging is a critical step in creating a brand for Plaintiff's intended customers.

20. The sale of vaping products, including e-cigarettes and vaping fluids, is legal in the state of Oregon.

21. The statute and regulations challenged in this case interfere with Plaintiff's right to free expression under Article 1, section 8, of the Oregon Constitution.

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22. 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. ("The Statute.")

23. The products sold by Division Vapor are "inhalant delivery system[s]" as defined by ORS 431A.175(1)(a)(A).

24. Defendant Oregon Health Authority promulgated regulations under the authority of ORS 431A.175(2)(f), found at OAR 333-015-0300 to 333-015-0375 ("the Regulations").

25. OAR 333-015-0305 provides in part that "'Cartoon' means 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."

26. OAR 333-015-340 provides in part that "[a] liquid nicotine container for sale to a consumer ... [m]ay not be packaged in a manner that is attractive to minors."

27. OAR 333-015-345 provides in part that "[a] non-nicotine liquid container for sale to a consumer ... [m]ay not be packaged in a manner that is attractive to minors."

28. OAR 333-015-350 provides in part that "[a] prefilled inhalant delivery system for sale to a consumer ... [m]ay not be packaged in a manner that is attractive to minors."

29. OAR 333-015-0355 provides in part that "[a] fillable inhalant delivery system that is not packaged with a liquid nicotine container for sale to a consumer ... [m]ay not be packaged in a manner that is attractive to minors."

30. OAR 333-015-0357(1) provides: "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."

31. OAR 333-015-0357(2) provides: "The [Defendant] 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."

32. OAR 333-015-0375 provides for penalties up to $1,050,000 for violating the regulations set forth in paragraphs 24 to 31 above.

33. The statute and regulations are directed at the substance of expression on the packaging of products sold by Plaintiff.

34. Packaging can only be determined to be "attractive to minors" based on the content of the packaging.

35. The Statute and Regulations are vague, incomprehensible, overly broad, and censor truthful, non-misleading speech about legal products.

36. On May 30, 2017, Defendant via e-mail told Plaintiff the image below violated the statute and regulations because it "shows an image of a girl in *Alice in Wonderland* costume and … meets the definition of 'Packaged in a manner attractive to minors' because it … [d]epicts

celebrities or fictitious characters played by people." (*See* Exhibit 1, May 30, 3017 e-mail from Sharon Graham).

37. Selling vaping liquid in packaging with the image in paragraph 36 above violates the Statute and Regulations.

38. On May 30, 2017, Defendant via e-mail told Plaintiff the image below violated the statute and regulations because it "shows the image of a vampire and … meets the definition of 'Packaged in a manner attractive to minors' because it … [d]epicts celebrities or fictitious characters played by people. In addition, the image above contains glowing eyes and fangs which are exaggerated features and … meets the definition of a … Cartoon."

39. Selling vaping liquid in packaging with the image in paragraph 38 above violates the Statute and Regulations.

40. On May 30, 2017, Defendant via e-mail told Plaintiff the image below violated the statute and regulations because it "contains multiple tails on the fox which are exaggerated features and … meets the definition of a … Cartoon."

41. Selling vaping liquid in packaging with the image in paragraph 40 above violates the Statute and Regulations.

42. On May 30, 2017, Defendant via e-mail told Plaintiff the image below violated the statute and regulations because it "contains altered eyes on the creature which are exaggerated features and … meets the definition of a … Cartoon."

43. Selling vaping liquid in packaging with the image in paragraph 42 above violates the Statute and Regulations.

44. The packaging of vaping liquid in the bottle below violates the Statute and Regulations, despite the fact that it truthfully and non-misleadingly states that the contents are gingerbread flavored:

45. The packaging of vaping liquid in the bottle below violates the Statute and Regulations:

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46. The packing of vaping liquid in the bottle below violates the Statute and Regulations despite the fact that it truthfully and non-misleadingly states that the contents are berry flavored:

47. The packaging of vaping liquid in the bottle below violates the Statute and Regulations despite the fact that it truthfully states that the contents are strawberry flavored:

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48. The packaging of vaping liquid in the bottle below violates the Statute and Regulations despite the fact that it truthfully states that the contents are berry flavored:

49. The packaging of vaping liquid in the bottle below violates the Statute and Regulations:

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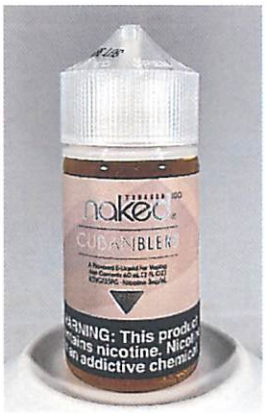
50. The packaging of vaping liquid in the bottle below violates the Statute and Regulations:



51. The packaging of vaping liquid in the bottle below violates the Statute and Regulations:

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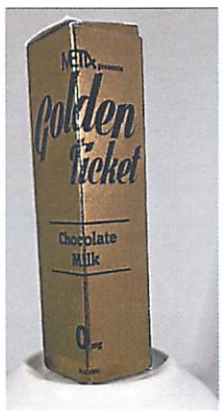
52. The packaging of vaping liquid in the bottle below violates the Statute and Regulations:

53. The packaging of vaping liquid in the bottle below violates the Statute and Regulations:

54. The packaging of vaping liquid in the bottle below violates the Statute and Regulations:

55. The packaging of vaping liquid in the bottle below violates the Statute and Regulations:

56. The packaging of vaping liquid in the bottle below violates the Statute and Regulations:



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57. The packaging of vaping liquid in the bottle below violates the Statute and Regulations:

58. Due to these content-based speech restrictions (i.e., the statute and regulations), an employee of Division Vapor must spend hours per week individually censoring bottles of vaping liquid before these bottles can be offered for sale. This includes, but is not limited to, the bottles depicted in paragraphs 36-57 above. [Full size images of the foregoing are at Exhibit 2] This requires placing variously sized white stickers over various words and images, as required by Oregon law.

59. In its stock room, Division Vapor maintains a metal rack with a label that reads "Censor Before Stock!" This rack holds bottles of vaping liquids whose labels are illegal to display under Oregon law. Division Vapor employees must, and do, censor the labels on this stock by obscuring the labels with stickers or otherwise covering them up; they then then display these bottles for sale on racks behind the counter in the sales area of the store. The bottles are small and, in many cases, virtually the entire label must be censored. This leads to added costs by way of additional salary amounting to additional work hours per week that is needed to be paid to Division Vapor employees to censor bottles of vaping liquid.

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60. These censorship stickers make it difficult for customers to differentiate between vaping fluids. When a label is censored, a store employee must usually describe the product for the customer, rather than relying on the label to convey information about the product.

61. As a consequence of the censorship requirements, Division Vapor has been forced to cease selling certain product lines because the labels must be completely covered by censorship stickers, rendering sale of these products economically impracticable. Division Vapor has also lost sales as a consequence of the censorship rules, have been deprived of the ability to fully explain the qualities of their products to customers, and have been forced to expend time and resources explaining their products to customers rather than simply labeling these products accurately.

62. Like all Oregon vape shops, Division Vapor is subject to periodic random, unannounced inspections conducted by the Oregon Health Authority in coordination with law enforcement agencies. ORS 431A.183(1)(a).

63. During these inspections, an inspector examines the labels of the store's vaping liquids to make sure they comply with the statutory labeling requirements.

64. If a store is found to be offering products with labels that have not been appropriately censored, it is subject to statutory fines and penalties, up to over $1,000,000. ORS 431A.010(1).

INJURIES TO PLAINTIFFS

65. Oregon forces Plaintiffs' vape shop to censor truthful, non-misleading information about products that they are legally permitted to sell; namely, both written and graphical information about vaping liquids. This government-mandated censorship substantially

burdens the constitutionally protected speech of Plaintiffs under Article I, Section 8 of the Oregon Constitution.

66. Like all small businesses, Plaintiffs must be able to freely communicate accurate information to their customers in order to effectively conduct retail transactions. Oregon's label-censorship requirements prevent them from being able to do so, by requiring them to censor simple images, like fruits and pictures of food, and descriptive terms, like "strawberry" and "orange," that truthfully and non-misleadingly describe the contents of the bottles that line their shelves.

67. Oregon's label-censorship statutes and regulations are so vague that they fail to give Plaintiffs and other people of ordinary intelligence reasonable notice about what labels are permitted and what labels are forbidden. This imprecision gives Defendant virtually unconstrained, arbitrary, standardless, and unfettered discretion in interpreting its statutes and regulations, and subjecting Plaintiffs to a continued threat of penalties.

INJUNCTIVE RELIEF ALLEGATIONS

68. Plaintiffs contend that they and their customers are harmed by Defendants' censorship requirements because they prohibit Plaintiffs from conveying—and their customers from receiving—non-misleading information about products that Plaintiffs are legally allowed to sell, leading to confusion, uncertainty, and a loss of valuable information being exchanged between seller and customer.

69. Plaintiffs contend they are harmed because the statute and regulations infringe on their free exercise of artistic expression, which inhibits their ability to market products to an over-21, more upscale client base, by depriving Plaintiffs of an opportunity to use packaging images that convey the products' uniqueness and higher quality.

70. Plaintiffs contend that the censorship regulations violate the Oregon Constitution. Plaintiffs are informed and believe and on that basis allege that Defendants contend otherwise.

71. If not enjoined by this Court, Defendants and their agents, representatives, and employees will administer, implement, and enforce the censorship requirements, which subject Plaintiffs to the unconstitutional deprivation of their freedom of speech and other injuries as specified herein. This course of conduct will cause Plaintiffs to suffer irreparable injury. Plaintiff has no plain, speedy, and adequate remedy at law for such an injury. Accordingly, injunctive relief is appropriate.

COUNT ONE
(Constitutionally Protected Speech)

72. Plaintiffs reallege the allegations of the preceding paragraphs as though fully set forth here.

73. Article I, Section 8 of the Oregon Constitution provides that "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever." This guarantee prohibits the government from mandating that businesses censor truthful, non-misleading speech about the products they sell.

74. Truthful, non-misleading descriptions of products, and images of their contents, are forms of speech protected under the Oregon Constitution.

75. The mandated censorship of vaping liquid bottles is a content-based speech restriction, because it prohibits the truthful, non-misleading communication of information about a legal product based on the content of that communication. For example, it forbids Plaintiffs from identifying a vaping liquid as, e.g., strawberry or apple flavored, by forbidding the use of

the words "strawberry" or "apple" or pictures of strawberries or apples on the labels of such liquids.

76. As a consequence of Defendants' enforcement of the censorship requirements, Plaintiffs have suffered and are currently suffering monetary and non-monetary injuries, including but not limited to the following: censorship of accurate speech about products that Plaintiffs are legally allowed to sell; staff time and expense spent censoring vaping labels prior to displaying them for sale; staff uncertainty about which specific portions of a label must be censored prior to displaying products for sale; damage to Plaintiffs' branding and marketing efforts; loss of a competitive advantage over convenience stores and other retail establishments that sell lower quality products to a mass audience (including children); and the loss of business due to customer confusion or uncertainty about products Plaintiffs offer for sale.

77. This censorship visits a severe burden on Plaintiffs and other vape shops in the state by making their products needlessly difficult to sell to adult customers, creating confusion on the part of customers and retailers, and requiring hours of staff time every week to ensure compliance.

78. This censorship visits a burden on Plaintiffs' customers because those customers are unable to receive timely, accurate information about products they may wish to purchase; may become confused about what they are purchasing; and are frustrated in their efforts to purchase a legal product offered by Plaintiffs.

79. If Plaintiffs are determined to be the prevailing parties herein, they are entitled to recover their court costs and reasonable attorney fees pursuant to *Armatta v. Kitzhaber*, 327 Or. 250 (1998), and *Deras v. Myers*, 272 Or 47 (1975), in an amount to be determined by the court.

80. Because ORS 431A.175, as implemented by OAR 333-015-0357 and other rules promulgated by Defendant, unconstitutionally mandates the censorship of constitutionally protected speech, Plaintiffs are entitled to a declaratory judgment that it is unconstitutional, and a permanent injunction against its future enforcement.

COUNT TWO
(Overbreadth)

81. Plaintiffs reallege the allegations of the preceding paragraphs as though fully set forth here.

82. ORS 431A.175 is overbroad because it requires the censorship of truthful, non-misleading speech inside a business that may only be entered by someone who is at least 21 years of age.

83. Any governmental interest in protecting minors cannot be legitimate inside such a business and, as such, the censorship of vaping liquids inside Plaintiffs' business is unconstitutional under Article I, Section 8 of the Oregon Constitution.

84. OAR 333-015-0357 is overbroad because it mandates the censorship of far more speech than is necessary to protect minors. This overbroad censorship includes, but is not limited to, simple drawings of fruits, like apples and oranges; and words that describe the flavor of liquid inside a particular bottle, like "orange" or "apple." Such censorship also deprives the customers of Division Vapor of their right to receive truthful, non-misleading information about products that are legally sold in Oregon.

85. As a consequence of Defendants' enforcement of the censorship requirements, Plaintiffs have suffered and are currently suffering monetary and non-monetary injuries, including but not limited to the following: censorship of accurate speech about products that Plaintiffs are legally allowed to sell; staff time and expense spent censoring vaping labels prior to

displaying them for sale; staff uncertainty about which specific portions of a label must be censored prior to displaying products for sale; damage to Plaintiffs' branding and marketing efforts; loss of a competitive advantage over convenience stores and other retail establishments that sell lower quality products to a mass audience (including children); and the loss of business due to customer confusion or uncertainty about products Plaintiffs offer for sale.

COUNT THREE
(Vagueness)

86. Plaintiffs reallege the allegations of the preceding paragraphs as though fully set forth here.

87. ORS 431A.175, as implemented by OAR 333-015-0357, 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. This imprecision gives Defendant virtually unconstrained, arbitrary, standardless, and unfettered discretion in interpreting its statutes and regulations, thereby subjecting Plaintiffs to the continued threat of penalties.

88. As a consequence of Defendants' enforcement of the censorship requirements, Plaintiffs have suffered and are currently suffering monetary and non-monetary injuries, including but not limited to the following: censorship of accurate speech about products that Plaintiffs are legally allowed to sell; staff time and expense spent censoring vaping labels prior to displaying them for sale; staff uncertainty about which specific portions of a label must be censored prior to displaying products for sale; damage to Plaintiffs' branding and marketing efforts; loss of a competitive advantage over convenience stores and other retail establishments that sell lower quality products to a mass audience (including children); and the loss of business due to customer confusion or uncertainty about products Plaintiffs offer for sale.

* * * *

WHEREFORE, Plaintiffs request judgment against Defendants as follows:

1. For entry of judgment against Defendant;

2. On Plaintiffs' Claim for Relief, Count One, for a declaration under the Oregon Uniform Declaratory Judgment Act that ORS 431A.175, as implemented by OAR 333-015-0357, is an unconstitutional restriction on speech under the free-speech clause of the Oregon Constitution.

3. On Plaintiffs' Claim for Relief, Count Two, for a declaration under the Oregon Uniform Declaratory Judgment Act that ORS 431A.175 and OAR 333-015-0357, are unconstitutionally overbroad under the free-speech clause of the Oregon Constitution.

4. On Plaintiffs' Claim for Relief, Count Three, for a declaration under the Oregon Uniform Declaratory Judgment Act that ORS 431A.175, as implemented by OAR 333-015-0357, is unconstitutionally vague under the free-speech clause of the Oregon Constitution.

5. For entry of a permanent injunction against Defendant prohibiting it from enforcing ORS 431A.175 and OAR 333-015-0357. For an award of attorney fees, costs, and expenses in this action pursuant to *Armatta v. Kitzhaber*, 327 Or. 250 (1998), and *Deras v. Myers*, 272 Or. 47 (1975), in an amount to be determined by the court.

6. For such other relief as the Court deems just and proper.

Dated: August 13, 2021

/s/ Herbert G. Grey

Herbert G. Grey, OSB #810250
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
Telephone: (503) 641-4908
Email: herb@greylaw.org

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

Attorneys for Plaintiffs

Trial Attorney: Stephen E. Silverman

VERIFICATION

I, Paul Bates, individually and on behalf of No Moke Daddy LLC, declare under penalty of perjury, that I have read the foregoing Complaint for Declaratory and Injunctive Relief, and the matters and things stated therein are true to the best of my knowledge and belief.

Dated: 7/29/21

Paul Bates

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 DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES **ORS 20.140 - State fees deferred at filing**

Defendants, by and through the undersigned, in response to plaintiffs' complaint, admit, deny, and allege as follows:

1.

Paragraph 1 describes the nature of this action, to which defendants respond that the complaint speaks for itself, and is best evidence of its contents.

2.

Defendants admit paragraph 2 on information and belief, except that defendants deny that Division Vapor is an active entity in Oregon with standing to bring this action.

3.

Defendants deny that the Oregon Health Authority (OHA) is a political subdivision of the State of Oregon. OHA is an agency of the State of Oregon.

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4.

Defendants admit paragraph 4 without admitting that Director Allen is a proper party to this action.

5.

Defendants admit that plaintiffs have those obligations under state law, but are without knowledge or information sufficient to form a belief as to how plaintiffs enforce the requirement that those entering its store be at least 21 years old or whether those obligations are complied with in every instance. Defendants deny any allegation relating to Division Vapor which is not an active Oregon entity with standing to bring this action.

6.

Defendants lack knowledge or information sufficient to form a belief as to the allegations in paragraph 6.

7.

Defendants are without knowledge or information sufficient to form a belief as to the allegations in paragraph 7. Defendants deny any allegation relating to Division Vapor which is not an active Oregon entity with standing to bring this action.

8.

Defendants admit paragraph 8, except to the extent they deny that this is necessarily a complete list of the components of vaping liquids. Inhalant Delivery Systems (IDS)[1] emissions contain or produce numerous toxic chemicals, such as formaldehyde and acetone, that are known

[1] Inhalant Delivery Systems (IDS) are defined under Oregon law as devices "that can be used to deliver nicotine or cannabinoids in the form of a vapor or aerosol to a person inhaling from the device." ORS 431A.175(1)(a)(A)(i). The definition of IDS under Oregon Law includes the various components of the device, and the substances "sold for the purpose of being vaporized or aerosolized by the device." ORS 431A.175(1)(a)(ii). The Definition of IDS expressly excludes "any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for any other therapeutic purpose, if the product is marketed and sold solely for the approved purpose." ORS 431A.175(1)(a)(B)(i). Plaintiffs do not allege it markets any such smoking cessation device. FDA approved smoking cessation devices are not at issue in this lawsuit. Use of IDS is sometimes referred to as "vaping," and IDS are sometimes referred to as "e-cigarettes."

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carcinogens and irritants and can damage cells and tissues in the body. Studies have found toxic metals in IDS aerosols, including lead, nickel, chromium, cadmium, aluminum, and tin.

9.

Defendants admit paragraph 9.

10.

In response to the allegations in paragraph 10, defendants admit that IDS liquids are offered in thousands of flavors and varying levels of nicotine. Defendants are without knowledge or information sufficient to form a belief as to which flavors are the most popular generally; evidence from student surveys show that flavors like mint, fruit, coffee and candy are popular among Oregon middle and high schoolers who use IDS.

11.

Defendants admit that paragraph 11 quotes from a website operated by the Centers for Disease Control (CDC) but deny any allegation that use of IDS is "safe," particularly when nicotine, a harmful and addictive chemical, is ingested.

12.

In response to paragraph 12, defendants deny any allegation that use of IDS is "safe," particularly when nicotine, a harmful and addictive chemical, is ingested.

13.

In response to paragraph 13, defendants assert that evidence is mixed on whether IDS use contributes to or aids in the long-term cessation of combustible tobacco use. The IDS sold by plaintiffs are not FDA-approved smoking cessation devices.

14.

Defendants are without knowledge or information sufficient to form a belief as to the allegations in paragraph 14.

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15.

Defendants are without knowledge or information sufficient to form a belief as to the allegations in paragraph 15.

16.

Defendants are without knowledge or information sufficient to form a belief as to the allegations in paragraph 16. Defendants admit that the sale of IDS to persons over the age of 21 is legal in the State of Oregon and that selling IDS to persons under the age of 21 is illegal.

17.

Defendants are without knowledge or information sufficient to form a belief as to the allegations in paragraph 17.

18.

Defendants are without knowledge or information sufficient to form a belief as to the allegations in paragraph 18.

19.

Defendants are without knowledge or information sufficient to form a belief as to the allegations in paragraph 19.

20.

Defendants are without knowledge or information sufficient to form a belief as to the allegations in paragraph 20.

21.

Defendants deny the allegations in paragraph 21.

22.

Paragraph 22 purports to describe ORS 431A.175, to which defendants respond that the statute speaks for itself and is best evidence of its text.

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23.

Paragraph 23 purports to describe ORS 431A.175, to which defendants respond that the statute speaks for itself and is best evidence of its text.

24.

In response to paragraph 24, defendants admit that Oregon Health Authority "OHA" has promulgated administrative rules as contemplated by ORS 431A.175.

25.

In response to paragraph 25, defendants admit that plaintiffs have accurately quoted portions of OAR 333-015-0305.

26.

In response to paragraph 26, defendants admit that plaintiffs have accurately quoted portions of OAR 333-015-340.

27.

In response to paragraph 27, defendants admit that plaintiffs have accurately quoted portions of OAR 333-015-345.

28.

In response to paragraph 28, defendants admit that plaintiffs have accurately quoted portions of OAR 333-015-350.

29.

In response to paragraph 29, defendants admit that plaintiffs have accurately quoted portions of OAR 333-015-0355.

30.

In response to paragraph 30, defendants admit that plaintiffs have accurately quoted portions of OAR 333-015-0357.

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31.

In response to paragraph 31, defendants admit that plaintiffs have accurately quoted portions of OAR 333-015-0357.

32.

Paragraph 32 purports to characterize OAR 333-015-0375, to which defendants respond that the rule speaks for itself and is the best evidence of its contents.

33.

Defendants deny the allegations in paragraph 33.

34.

Defendants deny the allegations in paragraph 34.

35.

Defendants deny the allegations in paragraph 35.

36.

Defendants deny the allegations in paragraph 36. The email referenced in this paragraph was not sent by Defendants.

37.

Paragraph 37 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

38.

Defendants deny the allegations in paragraph 36. The email referenced in this paragraph was not sent by Defendants.

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39.

Paragraph 39 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

40.

Defendants deny the allegations in paragraph 40. The email referenced in this paragraph was not sent by Defendants.

41.

Paragraph 41 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

42.

Defendants deny the allegations in paragraph 42. The email referenced in this paragraph was not sent by Defendants.

43.

Paragraph 43 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

44.

Paragraph 44 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

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45.

Paragraph 45 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

46.

Paragraph 46 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

47.

Paragraph 47 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

48.

Paragraph 48 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

49.

Paragraph 49 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

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50.

Paragraph 50 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

51.

Paragraph 51 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

52.

Paragraph 52 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

53.

Paragraph 53 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

54.

Paragraph 54 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

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55.

Paragraph 55 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

56.

Paragraph 56 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

57.

Paragraph 57 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rules at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions.

58.

In response to Paragraph 58, defendants are without knowledge or information sufficient to form a belief as to how plaintiffs choose to implement the rules, or whether this requires additional staff time or can be completed by staff during existing business hours. Defendants deny that the procedure plaintiffs describe in paragraph 58 are the only way to comply with the rules. Defendants deny any allegation relating to Division Vapor which is not an active Oregon entity with standing to bring this lawsuit. The balance of paragraph 58 states legal conclusions, to which no response is required, but to the extent a response is required, they are denied.

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59.

In response to Paragraphs 59, defendants are without knowledge or information sufficient to form a belief as to how plaintiffs choose to implement the rules, or whether this requires additional staff time or can be completed by staff during existing business hours. Defendants deny that the procedure plaintiffs describe in paragraphs 59 are the only way to comply with the rules. Defendants admit that bottles of liquid for use with IDS are small, and that, if plaintiffs choose to market IDS liquids that have labels that are attractive to minors, it must cover up the portions of the label that are attractive to minors, which might be "virtually the entire label" in some circumstances. Defendants deny any allegation relating to Division Vapor which is not an active Oregon entity with standing to bring this lawsuit. The balance of paragraph 59 states legal conclusions, to which no response is required, but to the extent a response is required, they are denied.

60.

Defendants deny paragraph 60, to the extent it suggests that there are not ample alternate methods to convey information regarding different vaping fluids, or that orally describing the different vaping fluids is the only way to convey that information. Defendants are without knowledge or information sufficient to form a belief as to how plaintiffs choose to implement the challenged rules, or their customers' shopping experience. Defendants deny any allegation relating to Division Vapor which is not an active Oregon entity with standing to bring this lawsuit.

61.

Defendants deny that there is a "censorship requirement" or "censorship rules." Defendants deny paragraph 61, to the extent it suggests that there are not ample alternate methods to convey information regarding different fluids for use with IDS, or that orally describing the different IDS fluids is the only way to convey that information. Defendants are without knowledge or information sufficient to form a belief as to how plaintiffs choose to

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implement the challenged rules, how the rules, as implemented by plaintiffs, have impacted their sales, or their customers' shopping experience. Defendants deny any allegation relating to Division Vapor which is not an active Oregon entity with standing to bring this lawsuit.

62.

Paragraph 62 purports to describe ORS 431A.183(1)(a), to which defendants respond that the statute speaks for itself and is best evidence of its contents. Defendants admit that plaintiffs are subject to inspections under ORS 431A.183 and OAR 333-015-0215, but deny that plaintiffs have in fact been inspected by defendants for compliance with the packaged in a manner that is attractive to minors rule. Defendants deny any allegation relating to Division Vapor which is not an active Oregon entity.

63.

Paragraph 63 purports to characterize how an inspector would conduct a hypothetical inspection for compliance with the packaged in a manner that is attractive to minors rule pursuant to ORS 431A.183(1) (a). Defendants admit that the activities described are activities that could occur during such inspection.

64.

In response to paragraph 64, defendants admit that if a store is found offering products that are packaged in a manner that is attractive to minors, the store is potentially subject to civil penalties pursuant to ORS 431A.178(1), OAR 333-015-0375(1). However, pursuant to OAR 333-015-0375(1), monetary civil penalties may only be issued after a warning letter. See OAR 333-015-0375(1)(a). ORS 431A.010(1) speaks for itself, and is best evidence of its contents.

65.

Paragraph 65 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rule at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents, and that no response is required to allegations that are legal conclusions. Defendants deny that any censoring or

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censorship is required by the rules.

66.

In response to paragraph 66, defendants admit the first sentence, except to the extent it suggests that the challenged statute and rule prevent such communication. The balance of paragraph 66 purports to characterize the effect of, and states legal conclusions regarding, the statute and administrative rule at issue in this case, to which defendants respond that these laws speak for themselves and are best evidence of their contents. Defendants deny that any censoring or censorship is required by the rules.

67.

Paragraph 67 states legal conclusions, to which no response is required, but to the extent a response is required, they are denied. Defendants deny that any censoring or censorship is required by the rules.

68.

Paragraph 68 characterizes plaintiffs' contentions in this case to which no response is required. To the extent a response is required as to the truth of those contentions, defendants deny paragraph 68.

69.

Paragraph 69 characterizes plaintiffs' contentions in this case to which no response is required. To the extent a response is required as to the truth of those contentions, defendants deny paragraph 68.

70.

Paragraph 70 characterizes plaintiffs' contentions in this case to which no response is required. To the extent a response is required as to the truth of those contentions, defendants deny that the statute and rules at issue involve any censorship or that they violate the Oregon Constitution. Defendants admit the second sentence in paragraph 70.

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71.

Paragraph 71 states legal conclusions, to which no response is required, however, to the extent a response is required, Defendants deny that injunctive relief is necessary or appropriate, and further deny plaintiffs' allegation that defendants would continue to enforce statutes or administrative rules that had been declared invalid by a court.

72.

Defendants respond to paragraph 72 as they responded to paragraphs 1-71, above.

73.

Paragraph 73 purports to quote from the Oregon Constitution, to which defendants respond that the Constitution speaks for itself, and is best evidence of its contents. The balance of paragraph 30 states legal conclusions, to which no response is required.

74.

Paragraph 74 states legal conclusions, to which no response is required.

75.

Paragraph 75 states legal conclusions, to which no response is required. To the extent a response is required, defendants deny the allegations in paragraph 75.

76.

In response to paragraph 76, defendants deny that the listed consequences are "as a consequence of Defendants' enforcement." The balance of paragraph 76 states legal conclusions, to which no response is required. To the extent a response is required, defendants deny the allegations. Defendants further deny plaintiffs' characterization of the statute and rules at issue as involving "censorship."

77.

In response to paragraph 77, defendants deny that any censoring or censorship is required by the statute or rules at issue in this case. Defendants lack information sufficient to form a belief as to how plaintiffs are ensuring compliance with the statute and rules at issue in this case,

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but deny that the statute and rules "visit[] a severe burden on Plaintiffs and other vape shops by making their products needlessly difficult to sell to adult customers, creating confusion on the part of customers and retailers."

78.

Defendants deny paragraph 78.

79.

Paragraph 79 states legal conclusions and describes the relief requested, to which defendants respond that legal conclusions do not require a response, and all relief should be denied.

80.

Defendants deny paragraph 80.

81.

Defendants respond to paragraph 81 as they responded to paragraphs 1-80, above.

82.

Paragraph 82 states legal conclusions, to which no response is required. To the extent a response is required, defendants deny the allegations. Defendants admit that Oregon law prohibits minors from entering shops like that operated by plaintiffs.

83.

Paragraph 83 states legal conclusions, to which no response is required. To the extent a response is required, defendants deny the allegations.

84.

Paragraph 84 states legal conclusions, to which no response is required. To the extent a response is required, defendants deny the allegations. Defendants deny any allegation relating to Division Vapor which is not an active Oregon entity with standing to bring this lawsuit.

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85.

In response to paragraph 85, defendants deny that the listed consequences are "as a consequence of Defendants' enforcement." The balance of paragraph 85 states legal conclusions, to which no response is required. To the extent a response is required, defendants deny the allegations. Defendants deny plaintiffs' characterization of these rules as involving "censorship."

86.

Defendants respond to paragraph 86 as they responded to paragraphs 1-85, above.

87.

Paragraph 87 states legal conclusions, to which no response is required.

88.

In response to paragraph 88, defendants deny that the listed consequences are "as a consequence of Defendants' enforcement." The balance of paragraph 88 states legal conclusions, to which no response is required. To the extent a response is required, defendants deny the allegations. Defendants deny plaintiffs' characterization of these rules as involving "censorship."

89.

The complaint includes numerous footnotes citing to various articles in the press or publicly available documents and other sources. In response to these citations, Defendants assert that these cited sources speak for themselves and, except as expressly admitted herein, deny any allegations describing their contents that are inconsistent with their text. In admitting to these references, Defendants intend only to authenticate that these documents exist, not to admit the truth of any or all matters stated therein.

90.

All allegations not expressly admitted herein are denied.

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91.

The balance of the complaint describes the requested relief, to which defendants respond that no relief should be awarded.

FIRST AFFIRMATIVE DEFENSE

Jurisdiction Over the Subject Matter (APA exclusivity)

92.

Plaintiffs' claims are barred for lack of subject matter jurisdiction. The claims in the complaint are effectively facial rule challenges, which may proceed only in the Court of Appeals in the first instance. *See, e.g., Alto v. State Fire Marshal*, 319 Or 382, 390-95 (1994).

SECOND AFFIRMATIVE DEFENSE

Improper Party

93.

Mr. Allen is not a proper defendant.

THIRD AFFIRMATIVE DEFENSE

Ripeness

94.

Because the statutes and rules at issue have not been enforced by defendants, not as applied challenge is ripe for review.

FOURTH AFFIRMATIVE DEFENSE

Lack of Standing

95.

Division Vapor is an inactive, unregistered entity. Unregistered entities lack standing before Oregon courts to maintain a cause of action for the benefit of the business. ORS 648.007(1); ORS 648.135(1).

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WHEREFORE, having fully answered plaintiffs' complaint, defendants pray for a judgment in favor of defendants against plaintiffs, dismissing plaintiffs' complaint in its entirety and awarding defendants their costs and disbursements incurred herein, and for such other and further relief as the Court may deem appropriate.

DATED October 19, 2021.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/ Carla A. Scott

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CERTIFICATE OF SERVICE

I certify that on October 19, 2021, I served the foregoing DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES upon the parties hereto by the method indicated below, and addressed to the following:

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Stephen Silverman Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE 500 E. Coronado Road Phoenix, AZ 85004 *Of Attorneys for Plaintiffs*	___ HAND DELIVERY _X_ MAIL DELIVERY ___ OVERNIGHT MAIL ___ SERVED BY E-FILING _X_ VIA EMAIL

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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.

Dated: August 4, 2022

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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:

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
1200 SW First Avenue Portland Oregon 97204

Case No: 21CV33671

No Moke Daddy LLC; Paul Bates
Plaintiff

v.

Patrick Allen; Oregon Health Authority
Defendant

ORDER on Motions for Summary Judgment

Having heard oral argument on the parties cross-motions for summary judgment on October 14, 2022, and having considered the submissions of the parties, the court hereby makes the following order:

This case involves a free speech challenge to ORS 431A.175(2)(f) which provides that it is unlawful:

"To 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 [Oregon Health Authority] by rule."

In addition, Plaintiff's challenge the Oregon Health Authority rule implementing this statute, which provides:

> "(1) 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.
>
> (2) The Authority 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.

At the outset, it should be noted that only the State of Oregon submitted a declaration in support of its Motion for Summary Judgment. The declaration submitted ample testimony stating the harmful effects of vaping and ingestion of vaping products by minors. See Price Decl. in Support of Defs.' Mot. for Summ. Jdg. Ex. 12 at 14. Because Plaintiff did not submit any contradictory evidence and for purposes of the cross motions for summary judgment, the court accepts all facts submitted by the Price Declaration as true and not disputed. In summary, there are significant harmful health effects from minors intentionally or accidentally ingesting or inhaling vaping products.

Plaintiffs assert three claims:

1. "Free Speech"

Plaintiffs contend that ". . . ORS 431 A.175, as implemented by OAR 333-015-0357 and other rules promulgated by Defendant, unconstitutionally mandates the censorship of constitutionally protected speech . . ." Complaint at 20.

2. "Overbreadth"

Plaintiffs contend that ORS 431A.175 is overbroad because these products are sold in stores that don't allow minors inside, thus imposing an unnecessary regulation. In addition, Plaintiffs contend that OAR 333-015-0357 is overbroad because it ". . . mandates the censorship of simple drawings of fruits, like apples and oranges; and words that describe the flavor of liquid inside a particular bottle, like "orange" or "apple."" *Id.*

3. "Vagueness"

Plaintiffs assert that "ORS 431A.175, as implemented by OAR 333-015-0357, 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." *Id.* at 21.

Plaintiffs ask the court to grant summary judgment in their favor on these claims.

The State of Oregon asks the court to grant summary judgment in its favor on the grounds that:

1. This court lacks jurisdiction to adjudicate a challenge to the regulation because the exclusive avenue for such an action is Oregon's Administrative Procedures Act ("APA").

2. The statute does not infringe free speech under Article 1 Section 8 of the Oregon Constitution.

A. The Court's Jurisdiction

Jurisdiction over a challenge to state agency regulations is governed by ORS 183.400(1) and (2), which provide:

> "(1) The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.
>
> (2) The validity of any applicable rule may also be determined by a court, upon review of an order in any manner provided by law or pursuant to ORS 183.480 (Judicial review of agency orders) or upon enforcement of such rule or order in the manner provided by law."

In summary, a "facial" challenge to an agency regulation must be brought in the Court of Appeals under the APA. When APA review is available, APA jurisdiction is exclusive. See *Lake County v. State of Oregon*, 142 Or. App 162, 165-66 (1996) and cases cited therein. If Plaintiffs were challenging an enforcement action by the Oregon Health Authority, this court may have had jurisdiction, but that is not the case.

Plaintiffs' attempt to bootstrap their rule challenge to the statutory challenge (and thereby gain jurisdiction in this court) by contending that the statute "as implemented by" the rule and other rules violates the free speech clause. Complaint at 20. If that were enough to bypass the Court of Appeals, every rule challenge could be brought in the trial court simply by tying it to a statute. That cannot have been the intent of the statute. Furthermore, Plaintiffs' action does not fall under the exceptions in subparagraph (2). Therefore, this court does not have jurisdiction over Plaintiffs' challenge to the regulations at issue here.

B. Free Speech Claim.

That leaves the task of examining the constitutionality of the statute itself. If ever there was an area of law that could use some clarification and simplification, it is the interpretation of Article 1 Section 8 of the Oregon Constitution, Oregon's free speech clause.

The free speech clause in Oregon's Constitution Article 1 Section 8 provides:

> "[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 . . .".

State v. Robertson, 293 Or. 402 (1982) provides the framework for analyzing whether a statute violates the free speech clause. The parties in this case agree that this court should apply the *Robertson* framework in analyzing this free speech question but disagree on how it is applied. Under ***Robertson***, a law restricting speech falls into one of three categories, with each category calling for a different constitutional analysis.

1. *Robertson* Category 1

The first *Robertson* category encompasses any law "that is 'written in terms directed to the substance of any "opinion" or any "subject" of communication.'" *State v. Babson*, 355 Or. 383, 393-94 (2014) (quoting *Robertson*, 293 Or. at 412). Laws in this category are unconstitutional on their face, "unless the restriction is wholly confined within an historical exception." *Id*. at 394.

In support of their assertion that the statute should be analyzed under Category 1, Plaintiffs quote the regulations, which do refer to considerations such as the packaging's presentation, shape, graphics, coloring, or writing and whether there are cartoons, celebrities, reference to candy, soda, animals, toys, and other items. OAR 333-015-0357(1) and (2). However, as is discussed above, the court does not have jurisdiction to review the regulations, thus it cannot consider these items.

The court must look at just the statute. ORS 431A.175(2)(f) provides that it is unlawful:

> "To 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 [Oregon Health Authority] by rule."

The statute does not say what the packaging can and cannot portray. It does not, for example, prohibit using specific phrases, such as "tastes like candy", "children love it!" or "be one of the cool kids." Those would be examples of a proscription directed at the substance or subject of a communication. Instead, it focuses on the effect of packaging on children, specifically whether children are "attracted" to the product. Accordingly, the court concludes that the statute does not fall under the first *Robertson* category.

2. *Robertson* Category 2

Category 2 applies to laws that by their terms focus on harm, but expressly proscribes speech as a means of causing that harm. If a statute falls under Category 2, the court must examine whether it is overly broad. *State v. Stoneman*, 323 Or. 536, 543 (1996).

To fall into this category, the law must expressly regulate speech but do so only insofar as that speech is linked to a particular harm. *Id.* (emphasis in original). In *Stoneman*, the court held that a statute prohibiting persons from paying to obtain or view sexually explicit materials of child under 18 years of age was aimed at protecting children from sexual exploitation, rather than at the substance of the communication, thus falling under Robertson Category 2. The statute was not overbroad because production of the prohibited expression "*necessarily* involves harm to children." *Id.* at 546 (emphasis in original).

In *State v. Moyle*, 299 Or. 691 (1985), the court considered the constitutionality of a law that forbade making a threat that is expected to and does cause alarm. The court analyzed the statute under Category 2, concluding "[s]peech and writing are merely the means, albeit the only prohibited means, of achieving the forbidden effect—actual and reasonable alarm." *Id*. at 699 .

As discussed above, this court has concluded that the statute does not expressly regulate speech. Therefore, it does not fall under the second *Robertson* category. Even assuming it did fall under this category, it can survive constitutional challenge if the statute is focused on preventing the harm rather than regulating speech.

The legislative history for this statute includes a report from the Multnomah County Health Department submitted to the Senate committee on HealthCare on March 23, 2015. Price Decl. Ex. 15. This report outlines concerns regarding sale of vaping products to minors but also discusses the harmful health effects from minors using nicotine and inhaling vaping products, both from an addiction and health perspective when used over time and in terms of the danger of accidental ingestion by children younger than five. *Id.* There is no support for the contention that the purpose of the statue is to regulate the communicative substance of the packaging as an end in and of itself. Rather, the focus is preventing the targeted harm.

Plaintiffs assert it is overly broad because the State's interest is preventing sales to minors and minors are not even allowed in the stores where these products are sold. Pls.' Resp. to Defs.' Mot. for Summ. Jdg. and Cross-Mot. for Summ. Jdg. at 12.

Plaintiffs' characterization of the government's interest (sales to minors) is too narrow. As discussed above, the harm is the health effects of these products on minors, with sales being one way to address that concern. Although minors cannot enter the stores where these products are sold, the products leave the stores and become accessible to minors in the world at large. "Attractive" is not defined by the statute. It is defined by the dictionary as:

> "1a: arousing interest or pleasure,
> 1b: appealing, 2: having or relating to the power to attract."

Attractive, Webster's Third New Int'l Dictionary (3rd ed. 1971).

By addressing how attractive the packaging is to children, childrens' interest in the product and the appeal of the product to children will be affected. If children are less interested in or drawn to the product, it logically follows that they will be less likely to ingest it or use it, thus reducing the targeted harm.

Plaintiffs fail to articulate how prohibiting packaging attractive to minors is overly broad given the government's legitimate interest in regulating the use or ingestion of the product by minors.

3. *Robertson* Category 3

The third ***Robertson*** category includes laws that do not expressly restrict speech but that may have the effect of prohibiting or limiting it. These laws are not facially invalid, but they are subject to as-applied challenges. ***Babson***, 355 Or. 383 at 404. As discussed above, the court concludes that the language of the statute does not expressly restrict speech and, therefore, the statute at issue in this case, falls under Category 3.

Plaintiffs argue that, because packaging often has a communicative element, by regulating the packaging, speech is necessarily limited. Pl.'s Resp. to Defs.' Mot. for Summ. Jdg. and Cross-Mot. for Summ. Jdg. at 7.

The court in *Babson* addressed a similar argument. There, defendants charged with criminal trespass challenged a rule that prohibited overnight use of the steps of the State Capitol between 11:00 p.m. and 7:00 a.m. Although the area is used for expressive conduct such as protests or vigils, the court explained that it also could be used for non-expressive conduct, such as walking through the area. *Babson* at 403. The court reasoned:

> ". . . if the expression is not a proscribed means of causing harm, and is not described in the terms of the statute, the possible or plausible application of the statute to protected expression is less apparent. That is, in the former situation, ever time the statute is enforced, expression will be implicated, leading to the possibility that the law will be considered overbroad; in the latter situation, the statute may never be enforced in a way that implicates expression, even if it is possible, or even apparent, that it *could* be applied to reach protected expression. When a law does not expressly or obviously refer to expression, the legislature is not required to consider all apparent applications of that law to protected expression and narrow the law to eliminate them."

Id. at 383.

Although Plaintiffs insist that the statute necessarily implicates speech, it is possible that the statute would not be interpreted this way. For example, if the Oregon Health Authority promulgated rules that interpreted "attractive to children" only in relation to how difficult it is to open, whether the product is visible through the packaging or not, whether the packaging has a toy or candy attached, whether the product can be detected by smell outside of the packaging. These factors may affect whether or not the product is "attractive to children" while the expressive, communicative, or "opinion" value of these factors in this context is questionable.

Because the statute at issue here falls under *Robertson* Category 3, it is not subject to a facial challenge. *Id. at* 400. Plaintiffs do not bring an as applied challenge and therefore, their challenge fails.

Plaintiffs' vagueness challenge is rejected without further discussion.

Therefore, as a matter of law, the court finds that it does not have jurisdiction to review the regulation at issue in this case and, as a matter of law, the statute at issue (ORS 431A.175) does not violate Article 1 Section 8 of Oregon's Constitution. Therefore, Defendant's motion for summary judgment is GRANTED in its entirety and Plaintiffs' cross motion for summary judgment is DENIED in its entirety.

Defendant is directed to prepare a form of judgment and, after conferral, submit it to the court for entry.

10/25/2022 11:15:44 AM

Circuit Court Judge Leslie G. Bottomly

REGISTER OF ACTIONS

CASE NO. 21CV33671

No Moke Daddy LLC, Paul Bates vs Patrick Allen, Oregon Health Authority

§
§
§
§
§
§

Case Type: **Injunctive Relief**
Date Filed: **08/23/2021**
Location: **Multnomah**
Court of Appeals: **A180270**

PARTY INFORMATION

		Attorneys
Defendant	**Allen, Patrick** 500 Summer Street NE Suite e-20 Salem, OR 97301-1097	**CARLA SCOTT** *Retained* 971 673-1915(W) Alexander C Jones *Retained* 503 378-4402(W)
Defendant	**Oregon Health Authority** 500 Summer Street NE E-20 Salem, OR 97301	**CARLA SCOTT** *Retained* 971 673-1915(W) Alexander C Jones *Retained* 503 378-4402(W)
Plaintiff	**Bates, Paul** 2929 SE Powell Boulevard Suite 2A Portland, OR 97202	**HERBERT G GREY** *Retained* 503 641-4908(W)
Plaintiff	**No Moke Daddy LLC** 2929 SE Powell Boulevard Suite 2A Portland, OR 97202	**HERBERT G GREY** *Retained* 503 641-4908(W)

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

11/21/2022 **Judgment - General Dismissal** (Judicial Officer: Bottomly, Leslie G)
Party(Allen, Patrick; Oregon Health Authority)
Created: 11/21/2022 4:29 PM

OTHER EVENTS AND HEARINGS

08/23/2021 **Complaint**
Declaratory and Injunctive Relief; NOT SUBJECT TO MANDATORY ARBITRATION
Created: 08/23/2021 11:52 AM

08/23/2021 **Service**

Allen, Patrick	Served	09/08/2021
	Returned	09/08/2021
Oregon Health Authority	Served	09/08/2021
	Returned	09/08/2021

Created: 08/23/2021 11:52 AM

08/25/2021 **Exhibit**
2 to Complaint
Created: 08/25/2021 12:07 PM

08/25/2021 **Exhibit**
1 to Complaint
Created: 08/26/2021 5:57 PM

09/08/2021 **Proof - Service**
Created: 09/08/2021 9:56 AM

09/15/2021 **Proof - Service**
Corrected
Created: 09/15/2021 2:42 PM

10/19/2021 **Answer - Affirmative Defense**
Created: 10/20/2021 6:46 AM

10/28/2021 **Notice**
Appointment of Judge

Created: 10/28/2021 8:35 AM
10/28/2021 **Order** (Judicial Officer: Marshall, Christopher J)
Appoitning Judge Kathleen Dailey as Motions Judge
Signed: 10/28/2021
Created: 10/28/2021 8:35 AM
02/22/2022 **Motion - Protective Order**
Created: 02/25/2022 9:47 AM
03/11/2022 **Response**
Created: 03/15/2022 11:04 AM
03/14/2022 **Order** (Judicial Officer: Marshall, Christopher J)
Appointing Judge Adrian Brown as Motions Judge
Signed: 03/14/2022
Created: 03/14/2022 4:21 PM
03/14/2022 **Notice**
Appointment of Judge
Created: 03/14/2022 4:22 PM
03/14/2022 **Order** (Judicial Officer: Marshall, Christopher J)
Corrected Order Appointing Judge Adrian Brown as Motions Judge
Signed: 03/14/2022
Created: 03/14/2022 4:39 PM
03/21/2022 **Reply**
Created: 03/22/2022 10:12 AM
06/01/2022 **Order - Protected** (Judicial Officer: Brown, Adrian L)
Granted
Signed: 05/27/2022
Created: 06/15/2022 8:44 AM
06/27/2022 **Motion**
to set summary jgm hrng w/a sitting judge (not yet set)
Created: 06/29/2022 10:36 AM
06/27/2022 **Order** (Judicial Officer: Ryan, Thomas M)
to set summary jgm hrng w/a sitting judge (not yet set) GRANTED
Signed: 06/27/2022
Created: 06/29/2022 10:37 AM
06/28/2022 **Order** (Judicial Officer: Marshall, Christopher J)
assigning all summary jgm motions to Judge Adrian Brown
Signed: 06/27/2022
Created: 06/29/2022 10:41 AM
06/28/2022 **Declaration**
Created: 06/29/2022 1:52 PM
06/28/2022 **Motion - Summary Judgment**
Created: 06/29/2022 1:52 PM
08/05/2022 **Motion - Summary Judgment**
Response to Motion for Summary Judgmentt & Cross-Motion for Summary Judgment
Created: 08/05/2022 2:18 PM
08/25/2022 **Response**
Combined Response to Ptf's cross-motion for SJ and Reply ISO Def's motion for SJ
Created: 08/29/2022 3:16 PM
09/02/2022 **Notice - Compliance**
Created: 09/02/2022 3:28 PM
09/06/2022 **Reply**
Created: 09/13/2022 8:36 AM
09/21/2022 **Order** (Judicial Officer: Marshall, Christopher J)
Reappointing Motions Judge to Case
Signed: 09/21/2022
Created: 09/21/2022 3:00 PM
09/21/2022 **Notice**
Appointing Judge Leslie Bottomly as Motions Judge
Created: 09/21/2022 3:06 PM
10/14/2022 **Hearing - Summary Judgment** (9:00 AM) (Judicial Officer Bottomly, Leslie G)
Hearing will be held remotely by Webex.
10/14/2022 Reset by Court to 10/14/2022
Result: Held
Created: 07/15/2022 11:39 AM
10/25/2022 **Order** (Judicial Officer: Bottomly, Leslie G)
On Motions for Summary Judgment
Signed: 10/25/2022
Created: 11/02/2022 11:39 AM
11/02/2022 **Notice - Dismiss Want Prosecution**
No trial setting order filed
Created: 11/02/2022 11:01 AM
11/17/2022 **Digitized Judgment Document** (Judicial Officer: Bottomly, Leslie G)
General Dismissal
Signed Date: 11/17/2022
Created: 11/21/2022 4:30 PM
11/21/2022 **Notice - Judgment Entry**
Created: 11/21/2022 4:31 PM
11/21/2022 **Closed**
Created: 11/21/2022 4:32 PM
12/07/2022 **Bill - Cost**
Created: 12/08/2022 1:25 PM
12/22/2022 **Notice - Appeal**
(Copy) w/Designaiton of record in ites entirety w/attached General Jgm
Created: 12/22/2022 10:40 AM

01/04/2023	**Assignment - Transcriber** Created: 01/04/2023 8:44 AM	
01/04/2023	**Certificate** *CERTIFICATE OF NOTICE TO COURT REPORTER/TRANSCRIBER* Created: 01/04/2023 8:47 AM	
04/04/2023	**Notice** *SENT TO COA - A180270. FILE SUBMITTED ELECTRONICALLY, 0 ENVELOPES OF EXHIBITS SUBMITTED VIA SHUTTLE.* Created: 04/04/2023 11:47 AM	

Financial Information

	Plaintiff No Moke Daddy LLC			
	Total Financial Assessment			503.00
	Total Payments and Credits			503.00
	Balance Due as of 05/02/2023			**0.00**
08/23/2021	Transaction Assessment			281.00
08/23/2021	xWeb Accessed eFile	Receipt # 2021-531408	No Moke Daddy LLC	(281.00)
08/05/2022	Transaction Assessment			222.00
08/05/2022	xWeb Accessed eFile	Receipt # 2022-516197	No Moke Daddy LLC	(222.00)

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(1)(b)) is 8,717 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*
Herbert G. Grey (OSB #81025)

PROOF OF SERVICE

I certify that on May 17, 2023, I served the foregoing OPENING BRIEF upon counsel for the parties hereto by email and the court e-filing system addressed to the following:

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Of Attorneys for Respondents

/s/ *Herbert G. Grey*
Herbert G. Grey (OSB #81025)