

1
2
3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 PAUL BATES, an individual; and)
7 NO MOKE DADDY LLC, doing business)
8 as DIVISION VAPOR, a corporation,)

9 Plaintiffs,)

10 v.)

11 OREGON HEALTH AUTHORITY; and)
12 PATRICK ALLEN, in his official capacity)
13 as Director of Oregon Health Authority,)
14 Defendants.)

Case No. 21CV33671

**REPLY TO CROSS-MOTION FOR
SUMMARY JUDGMENT**

(oral argument requested)

15 Plaintiffs' Cross-Motion for Summary Judgment asks this Court to rule that Defendants'
16 content-based regulation of inhalant delivery systems' ("vaping products") packaging is an
17 unconstitutional law that "restrain[s] the free expression of opinion" and "restrict[s] the right to
18 speak, write or print freely on any subject matter whatever." *See* Oregon Const. Art. I, § 8. In
19 opposition to Plaintiffs' Cross-Motion for Summary Judgment, Defendants advance five
20 contentions: 1) this Court does not have jurisdiction; 2) the Statute and Rule are not directed to
21 speech; 3) the Statute and Regulations fall under a "well-established historical" exception; 4) the
22 Statute and Regulations are not overbroad; 5) and the Statute and Regulations are not vague. All
23 five arguments fail.

1 **I. This Court has jurisdiction.**

2 Plaintiffs challenge the constitutionality of ORS 431A.175, which makes it unlawful “[t]o
3 distribute, sell or allow to be sold an inhalant delivery system if the inhalant delivery system is
4 packaged in a manner that is attractive to minors, as determined by [Defendants’] rule.” While
5 the Court of Appeals in certain circumstances can in the first instance review *regulations*
6 promulgated by state government under Oregon’s Administrative Procedures Act (“APA”), the
7 APA does not apply to *statutes* at all. Defendants admit that the APA does not apply to
8 challenges to a statute. [Combined Response to Plaintiffs’ Cross-Motion for Summary Judgment
9 (“Combined Response”), at page 5, lines 3-4 (“a facial constitutional challenge may be brought
10 in the circuit court under the Declaratory Judgment Act”) (citing *Lake County v. State*, 142
11 Or.App 162, 166 (1996)).]

12 Instead, Defendants incorrectly assert that this case does not involve a challenge to a
13 statute. [*Id.*, at page 5, line 13: “[A]ll of Plaintiffs’ claims are, in substance, challenges to” the
14 Regulations.] Instead, the core issue in this case is the constitutionality of a statute that purports
15 to ban packaging that “is attractive to minors.” The Regulations try (and fail) to articulate
16 appropriate standards to implement this statute. This Court has jurisdiction to consider Plaintiffs’
17 challenge to the statute. The Court of Appeals, under the APA, does not have original
18 jurisdiction. Plaintiffs could not file an original action in the Court of Appeals seeking a
19 determination that the Statute is unconstitutional, a fact Defendants do not and cannot challenge.
20 Just as in the *Lake County v. State* case, this Court can also hear Plaintiffs’ challenge to the
21 Regulations because “the constitutional challenge was initiated by the plaintiffs’ allegations,
22 independent of any agency actions.” 142 Or. at 166.

23 Accordingly, this Court also has jurisdiction to rule upon Plaintiffs’ challenge to the

1 Regulations.

2 **II. The Statute and Regulations restricts speech.**

3 Defendants argue that the Statute and Regulations do not impact speech, because they are
4 “a restriction on the sale and distribution of goods.” [Combined Response, at page 5, lines 21-
5 23.] Oregon’s free speech clause applies to *all speech*, even speech connected to the sale of
6 products. This includes nonverbal artistic forms of expression like painting, photography and
7 nude dancing. *State v. Ciancanelli*, 339 Or. 282 (2005). It “covers any expression of opinion,
8 including verbal and nonverbal expressions contained in films, pictures, paintings sculpture and
9 the like.” *State v. Henry*, 302 Or. 510, 515 (1987). It applies to “any subject whatever.” *Id.*

10 **III. There is no historical exception for speech content restrictions that purport to**
11 **protect children.**

12 Oregon’s free speech protection is broader than the First Amendment to the United States
13 Constitution, in that it bars all content-based restrictions on speech. The only exception to
14 content-based restrictions on speech involve narrow, historically recognized exceptions such as
15 libel and extortion. *E.g., State v. Robertson*, 649 P.2d 569 (Or. 1982). Defendants cannot point
16 to any historical precedent that allows for content-based restrictions justified by a claim the law
17 protects children.

18 Courts have long rejected content-based restrictions justified on the ground that they
19 “protect children.” The analogy to obscenity laws is instructive. The Oregon Supreme Court in
20 *State v. Henry*, 302 Or. 510, 523 (1987), noted that obscenity laws had the stated purpose of
21 “protect[ing] the morals of youth,” but that this did not constitute a historical exception to
22 Oregon’s protections for speech. Oregon’s constitution was founded by “rugged and robust
23 individuals dedicated to founding a free society unfettered by government imposition of some

1 people's views of morality on the free expression of others." *Id.* In some instances non-content
2 restrictions that address time, manner and place of speech "regulated in the interests of unwilling
3 viewers, captive audiences, minors and beleaguered neighbors" could be appropriate. In every
4 instance, content-based restrictions directed to the speech itself are unconstitutional, unless it fits
5 into a narrow historical exception. *State v. Stoneman*, 302 Or. 510, 525 (1987). Age restrictions
6 for adult businesses thus do not run afoul of the constitution. But *Stoneman* makes clear that "no
7 law can prohibit or censor the communication itself." 302 Or. at 525.

8 **IV. The Statute and Regulations are overboard.**

9 Defendants assert that "protecting children" justifies regulating the content of expression
10 on packaging of vaping products. But if the government's objective was to prevent children from
11 purchasing vaping products, it could accomplish this goal without restricting the free expression
12 rights of Plaintiffs and others. Plaintiffs, for example, do not allow children into their stores.
13 Thus, in this case the Statute and Regulations will never "protect" children from images that they
14 may find "attractive" because children are not allowed in the store in the first place. This makes
15 the law overbroad. *Robertson*, 293 Or. at 410 (a law is "overbroad to the extent it announces a
16 prohibition that reaches conduct that may not be prohibited").

17 **IV. The Statute and Regulations are unconstitutionally vague.**

18 A law is unconstitutionally vague if it "cannot be discerned from its terms." *Id.* The
19 Statute and Regulations are unconstitutionally vague because, at its core, the Statute's
20 prohibition against packaging content that is "attractive to minors" is too imprecise and ill-
21 defined to provide any guidance. This problem is even more pronounced if the Court accepts
22 Defendants' argument that only the Statute can be considered. The Statute makes it unlawful
23 "[t]o distribute, sell or allow to be sold an inhalant delivery system if the inhalant delivery

1 system is packaged in a manner that is attractive to minors, *as determined by the authority by*
2 *rule.*” ORS 431A.175(2)(f) (emphasis added). The Statute itself provides no guidance
3 whatsoever on what would make something “attractive to minors.” A law that says the prohibited
4 conduct is to be determined later, and by someone else, is a clear example of an
5 unconstitutionally vague law.

6 **V. Conclusion.**

7 Plaintiffs respectfully request that the Court grant their Cross-Motion for Summary
8 Judgment.

11 Dated: September 6, 2022

12 /s/ Herbert G. Grey

13 Herbert G. Grey, OSB #81025
14 4800 SW Griffith Drive, Suite 320
15 Beaverton, OR 97005-8716
(503) 641-4908
herb@greylaw.org

16 /s/ Stephen Silverman

17 Stephen Silverman
18 (admitted *pro hac vice*)
19 **Scharf-Norton Center for**
20 **Constitutional Litigation at the**
21 **GOLDWATER INSTITUTE**
22 500 E. Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

22 Attorneys for Plaintiffs

23 Trial Attorney: Stephen Silverman

