

IN THE COURT OF APPEALS OF THE STATE OF OREGON

VAPOR TECHNOLOGY ASSOCIATION; VAPE CRUSADERS PREMIUM E-LIQUID,
LLC; and SMOKELESS SOLUTIONS, LLC,
Petitioners,

v.

OREGON HEALTH AUTHORITY,
Respondent.

Court of Appeals No. A172417 (Control)

NO MOKE DADDY, LLC, dba Division Vapor, an Oregon limited liability company; and
PAUL BATES, an individual,
Petitioners,

v.

OREGON HEALTH AUTHORITY; KATE BROWN, in her official capacity as Governor
of Oregon and as Chief Executive of the Oregon Health Authority; and PATRICK
ALLEN, in his official capacity as Director of the Oregon Health Authority,
Respondents.

Court of Appeals No. A172419

ORDER GRANTING STAY

Petitioners in this consolidated case seek judicial review of OAR 333-015-1000, a temporary administrative rule adopted by the Oregon Health Authority (OHA).¹ See ORS 183.400(1) ("The validity of any rule may be determined upon a petition by any person in the Court of Appeals in the manner provided for review of orders in contested cases."). That rule provides that, "[o]n or after October 15, 2019, a retailer may not sell

¹ Petitioners filed separate petitions for judicial review and, with those petitions, also filed motions to stay. On October 17, 2019, on its own motion, the court entered an order consolidating the petitions for judicial review and, in discussing the arguments made in the motions to stay, the court refers to petitioners collectively.

ORDER GRANTING STAY

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

or offer for sale a vapor product containing a flavor, to a consumer in Oregon." OAR 333-015-1000(2). Petitioners move to stay enforcement of the rule pending judicial review.

The challenged rule was adopted to implement the Governor's Executive Order 19-09. According to the agency in its statement justifying the temporary rule, the Centers for Disease Control (CDC) have stated that, "as of October 10, 2019, there have been more than 1,200 vaping-related lung injury cases and 26 deaths nationally, with nine vaping-related injuries and two deaths in Oregon." The agency further stated that "[n]o specific types of e-cigarettes, vaping devices, or liquids have been conclusively identified as a cause of illness at this time; the [U.S. Food and Drug Administration] is testing vaping products from cases around the United States to determine which specific products or ingredients may be the cause." However, "[u]ntil a cause is identified," the OHA determined that "it must act promptly" to protect Oregonians.

As noted, the challenged rule provides that "a retailer may not sell or offer for sale a vapor product containing a flavor, to an Oregon consumer." OAR 333-015-1000(2). A retailer includes "any person who sells or offers for sale vapor products containing a flavor to consumers," except that the term does not include "a person licensed by the Oregon Liquor Control Commission under ORS 475B.105." OAR 333-015-1000(1)(d). The rule defines flavor as "an artificial or naturally-occurring substance that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary individual either prior to or during the inhalation of the product, including, but not limited to, any taste or smell relating to chocolate, coffee, cocoa, menthol, mint, wintergreen, vanilla, honey, coconut, licorice, nuts, fruit, any candy, dessert, alcoholic or non-alcoholic beverage, herb, or spice or any concept flavor." OAR 333-015-1000(1)(b). The rule provides that, for purposes of determining whether a vapor product contains a flavor "a public statement or claim, whether express or implied" that the product contains a flavor by a retailer, manufacturer "or any person authorized or permitted by the manufacturer or retailer to make or disseminate a public statement" will be considered "presumptive evidence that the vapor product contains a flavor." OAR 333-015-1000(3).

As explained in *Northwest Title Loans, LLC v. Division of Finance*, 180 Or App 1, 10, 42 P3d 313 (2002), this court has authority to stay enforcement of an administrative rule pending completion of judicial review.² In determining whether to exercise its authority to grant a stay pending completion of rule-challenge proceedings, the court considers the likelihood that a petitioner will prevail on judicial review, the likelihood of

² As the court has further explained, although *Northwest Title Loans* was vacated as moot, the court continues to refer to the portions of that decision that remain persuasive. *Lovelace v. Board of Parole and Post-Prison Supervision*, 183 Or App 283, 288 n 3, 51 P3d 1269 (2002).

ORDER GRANTING STAY

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

irreparable harm to the petitioner absent a stay, and the likelihood of harm to the public if a stay is granted.³ See *id.* at 13 & n 7 (stating that a stay will not be granted absent a showing that failure to grant a stay will result in irreparable harm; suggesting that, in evaluating whether a stay should be granted in judicial review proceedings under ORS 183.400, the court could require a petitioner to meet requirements analogous to those imposed in ORS 183.482). In this case, as explained below, having considered those factors, the court concludes that it is appropriate to stay enforcement of OAR 333-015-1000, pending judicial review.

The court begins with petitioners' likelihood of success on judicial review. In a rule challenge pursuant to ORS 183.400, the court may examine the rule under review, the statutory provisions authorizing the rule, and copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures. ORS 183.400(3). And the court may declare the rule invalid only if it determines that the rule "[v]iolates constitutional provisions; * * * "[e]xceeds the statutory authority of the agency; or * * * [w]as adopted without compliance with applicable rulemaking procedures." Here, petitioners argue that the rule is invalid for all three of those reasons. The court agrees that petitioners are likely to prevail based on their argument that OAR 333-015-1000 exceeds OHA's statutory authority. Therefore, the court does not address the parties' remaining arguments relating to the validity of the rule.

OHA identified five statutes as providing it with the authority to adopt OAR 333-015-1000: ORS 183.360, ORS 413.042, ORS 431.110, ORS 431.141, and ORS 431A.010. According to petitioners, however, none of those statutes provides OHA with the statutory authority to adopt the rule. In response, OHA does not dispute that neither ORS 183.360,⁴ ORS 413.042,⁵ ORS 431A.010,⁶ nor ORS 431.141⁷ independently

³ In their motions to stay, petitioners Vapor Technology Association, Vape Crusaders Premium E-Liquid, LLC, and Smokeless Solutions, LLC, suggest that they may be required to make a showing of a "colorable claim of error." Although, in considering a stay pending judicial review in a contested case, the court evaluates whether a petitioner has demonstrated a "colorable claim of error," see ORS 183.482(3)(a)(B), when considering a motion to stay in a rule challenge under ORS 183.400, the court evaluates, more generally, a petitioner's likelihood of success on review.

⁴ ORS 183.360 provides for the publication of adopted administrative rules.

⁵ ORS 413.042 provides, "In accordance with applicable provisions of ORS chapter 183, the Director of the Oregon Health Authority may adopt rules necessary for the administration of the laws that the Oregon Health Authority is charged with administering."

⁶ ORS 431A.010 empowers OHA to enforce public health laws.

ORDER GRANTING STAY

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

provide it with the authority to adopt the rule. According to OHA, the Governor's Executive Order 19-09, standing alone, is a sufficient source of authority for its adoption of the rule. Furthermore, OHA argues, even if the executive order were not a source of authority, ORS 431.110 provides authority for the rule.

The court begins by addressing ORS 431.110, which sets forth the general powers of OHA. In relevant part, it provides that OHA shall "[h]ave direct supervision of all matters relating to the preservation of life and health of the people of this state." ORS 431.110(1). Petitioners assert that "supervision" does not mean power to adopt regulations. Indeed, according to petitioners, had the legislature intended, within the statute, to provide OHA with the authority to enact regulations pertaining to "all matters relating to the preservation of life and health of the people of the state," it would have expressly said so within the statute. Given that, in ORS 413.042, the legislature expressly gave OHA more limited rule-making authority (the power to "adopt rules necessary for the administration of the laws that [OHA] is charged with administering"), petitioners urge that ORS 431.110 cannot provide a valid statutory basis for the rule. Indeed, they point out that to understand ORS 431.110 to provide OHA with such authority would mean that the legislature "completely * * * delegated away its own legislative power--and did so *sub silentio*."⁸ OHA, for its part, concedes that, in general, supervisory power "may not include the power to adopt regulations in the interest of public health." However, it asserts that, "where the state is threatened by an unanticipated and acute public health crises and fast action is required," the supervisory authority provided by the statute does include the power to adopt the regulation. Petitioners' argument that the statute does not provide OHA with authority to adopt the rule in question is persuasive.

When evaluating whether an agency has statutory authority to adopt a rule, the court examines the statute in question to determine legislative intent and, in doing so, uses familiar rules of statutory construction, examining the text and context of the

⁷ ORS 431.141 requires OHA to establish "foundational programs through which the authority and local public health authorities administer public services in this state."

⁸ Furthermore, according to petitioners, if that statute were understood to provide a valid basis for OHA to adopt OAR 333-015-1000 it would provide OHA with almost unlimited power to ban products. In petitioners' view,

"it would mean that OHA, under the standard of enacting rules related to the 'health of the people of the state,' could ban any product it believed created a public-health issue. A few come readily to mind: non-electric vehicles (childhood asthma), aluminum foil (Alzheimer's), coffee (cysts and gout), cell phones (brain cancer), alcohol (liver disease), salt (blood pressure), butter (stroke and heart attack), and margarine (heart disease)."

ORDER GRANTING STAY

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

relevant statute and, if useful to the analysis, pertinent legislative history. *Assn. of Acupuncture v. Bd. of Chiropractic Examiners*, 260 Or App 676, 678, 320 P3d 575 (2014). Here, ORS 431.110(1) provides for OHA to have "supervision" of matters "relating to the preservation of life and health" of the people of Oregon. The plain meaning of that word does not appear to include the power to enact any and all regulations. And, indeed, the statute, in a later subsection, specifically provides that OHA shall have "full power in the control of communicable diseases." ORS 431.110(7). That demonstrates that, when the legislature intended to grant expansive power to the agency, it expressly stated so within the statute.

As noted, OHA nonetheless asserts that it has the authority to adopt the regulation by way of the executive order alone. The court first observes that an executive order may not, alone, provide an executive agency with rulemaking authority. Instead, rulemaking authority must be properly delegated by statute. See ORS 183.400(4)(b) (a rule is invalid if it exceeds the agency's "statutory" authority). Indeed, as petitioners note, OHA cites no authority for that proposition. However, OHA asserts that the legislature expressly delegated authority to the Governor to address a public threat and the Governor may exercise that power by ordering the agency to adopt a temporary rule like the one at issue here. In support of that contention, OHA cites ORS 431A.015. See ORS 413A.015 (providing for the authority of Public Health Director). In response, petitioners point out that ORS 431A.015 was not cited in the rule as part of the agency's authority to adopt the rule or in the executive order. See ORS 183.335(5)(b) (a temporary rule must include a citation of the statutory or other legal authority relied upon and bearing upon promulgation of the rule). Furthermore, they explain that, in any event, ORS 431A.015 does not authorize OAR 333-015-1000. For the reasons set forth in petitioners' reply, OHA is unlikely to convince the court that Executive Order 19-09, even considered with ORS 431A.015, provides sufficient statutory authorization for the rule.

In light of the foregoing, the court concludes that petitioners have a strong likelihood of success in their challenge to OAR 333-015-1000 pursuant to ORS 183.400 and, therefore, that consideration weighs in favor of granting a stay.

The court next examines the likelihood of irreparable harm to petitioners in the absence of a stay. Irreparable injury is one for which a party cannot receive a reasonable or complete remedy in law. See *Bergerson v. Salem-Keizer School Dist.*, 185 Or App 649, 660, 60 P3d 1126 (2003). Here, petitioners assert that enforcement of the rule is "an extinction-level event that cannot be repaired." According to petitioners, the harm from the rule will be immediate and devastating: If the rule is enforced, they will lose their businesses entirely within weeks, including all the goodwill they have built during their time in business. Their employees will lose their jobs. In addition, one petitioner explains, if they are forced to close their shops, the businesses will lose their leases and, potentially, be on the hook for tens of thousands of dollars in rent that they do not have. Indeed, petitioners assert that enforcement of the rule will cause the entire industry in Oregon to be destroyed. OHA does not contest that enforcement of the rule

ORDER GRANTING STAY

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

will cause petitioners irreparable harm. The court concludes that petitioners have shown that enforcement of the rule will cause them irreparable harm. Therefore, this factor weighs in favor of granting a stay.

With respect to harm to the public, OHA asserts that this factor weighs in favor of denying a stay pending judicial review. According to OHA, as of the filing of its response, nearly 1500 cases of vaping-related lung injuries have been reported across the country and 33 people have died. They contend that "public health professionals across the country are working to determine the cause of the outbreak and how to stop it" and, in the meantime, the court should not stay the temporary rule. Petitioners acknowledge that "laudable goals may underlie" the rule. Nonetheless, they assert that, not only would a stay *not* present a significant risk of harm to the public, denial of a stay would be harmful to "the very individuals the ban is designed to protect: Oregon citizens." The court agrees with petitioners.

In its justification for the temporary rule, OHA acknowledged that the cause of the lung injuries was unknown and that, at that time, no specific types of "e-cigarettes, vaping devices, or liquids" had been identified as causing the illnesses. As it states in its response to the motions to stay, public health professionals have been working to identify the cause of the illnesses. However, as all of the parties acknowledge, the majority of the lung-injury cases involved products containing THC, not the nicotine vaping products that are the subject of the ban.⁹ And, as petitioners point out, there has been no evidence presented to connect the use of flavors in vaping products to a risk of injury. Thus, a rule that prohibits the sale of flavored vaping products, which have not been shown to cause the illness OHA is attempting to address, does not appear strongly connected to the public harm in question. Indeed, given that the cause of the illness is unknown, it would be extremely speculative to say that any risk of harm to the public would result from granting a stay.

Further, petitioners point out that harm to the public may result from denying a stay. In particular, they contend that flavored vaping products assist smokers in transitioning away from combustible cigarettes and that scientific studies have consistently demonstrated that vaping products are less harmful than cigarettes. Indeed, in a declaration, one of the owners of Vape Crusaders states that, if they are unable to obtain flavored vaping products prohibited by the rule, some of the business's customers have said they will return to smoking combustible cigarettes and others have

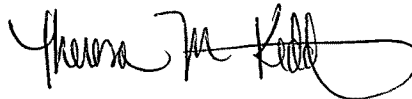
⁹ Indeed, petitioners point out that, since OHA's surreply was filed, "the CDC has released guidance stating that it has likely identified the cause of the" lung injuries. It "now appears that [those] injuries have been cause by vitamin E acetate occurring in 'homemade' or black market THC products." In support of that contention, petitioners cite to an article from the CDC: *Centers for Disease Control and Prevention, Smoking and Tobacco Use: Outbreak of Lung Injury Associated with E-cigarette Use, or Vaping* (Nov 8, 2019), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html#what-is-new (accessed Nov 14, 2019).

ORDER GRANTING STAY

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

said they will seek out the prohibited vaping products on the black market. In light of that possible harm to the public from the denial of a stay, along with the absence of any evidence or persuasive argument that granting a stay would risk harm to the public, the court determines that this factor weighs in favor of granting a stay.

In sum, the court has considered petitioners' likelihood of success on judicial review, the likelihood of irreparable harm to petitioners in the absence of a stay, and the likelihood of harm to the public if a stay is granted. As explained above, all of those considerations weigh in favor of granting a stay. Accordingly, petitioners' request for a stay is granted. Enforcement of OAR 333-015-1000 is stayed pending judicial review or further order of the court.



THERESA M. KIDD
APPELLATE COMMISSIONER
11/14/2019 3:31 PM

c: David H Angeli
Kristen Lynn Tranetzki
Tyler Francis
Benjamin Gutman
J Ryan Adams
Denise G Fjordbeck
Michael A Casper
David Randall J Riskin

ej

ORDER GRANTING STAY

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563