

Melinda J. Davison (OR Bar No. 930572)±
DAVISON VAN CLEVE, PC
333 SW Taylor Street, Suite 400
Portland, OR 97204
(503) 241-7242
(503) 241-8160 (fax)
mjd@dvclaw.com

Michael E. Bindas (WA Bar No. 31590)*
INSTITUTE FOR JUSTICE
10500 N.E. 8th Street, Suite 1760
Bellevue, WA 98004
(425) 646-9300
(425) 990-6500 (fax)
mbindas@ij.org

Attorneys for Plaintiffs

± Designated local counsel

* Motion for admission *pro hac vice* concurrently filed

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

CHRISTINE ANDERSON and
CAST IRON FARM LLC, an
Oregon limited liability company,

Plaintiffs,

v.

KATY COBA, in her official capacity as
Director of the Oregon Department of
Agriculture,

Defendant.

Case No.: 13-cv-2053

COMPLAINT
Civil Rights Action (42 U.S.C. § 1983)

INTRODUCTION

1. This is a civil rights lawsuit to vindicate the right of Christine Anderson and Cast Iron Farm to advertise a lawful product—namely, raw, or unpasteurized, milk. In Oregon, it is perfectly legal for Christine to sell raw milk directly to customers at Cast Iron Farm, but she is flatly prohibited from advertising it. That means Christine cannot post a flyer at a local food co-op, erect a sign in front of Cast Iron Farm saying, “We’ve Got Raw Milk,” or even post the prices of her milk on the Cast Iron Farm website. This ban on truthful commercial speech harms not only Christine and the farm, but also consumers, who are denied access to truthful information about products in the marketplace. The First Amendment to the U.S. Constitution does not tolerate government bans on truthful speech concerning lawful products. This Court should accordingly declare Oregon’s ban on raw milk advertisement unconstitutional and enjoin its enforcement so that Oregon’s dairy farmers are free to talk about the products they offer their communities.

JURISDICTION AND VENUE

2. Plaintiffs Christine Anderson and Cast Iron Farm LLC, bring this civil rights lawsuit pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgments Act, 28 U.S.C. §§ 2201–02, for violations of the First and Fourteenth Amendments to the United States Constitution.

3. Plaintiffs seek declaratory and injunctive relief against Oregon’s ban on the advertisement of raw milk, which is set forth at Or. Rev. Stat. § 621.012(1).

4. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), (4).

5. Pursuant to 28 U.S.C. § 1391(b)(1) and (2), venue is proper in this District because Defendant resides in this District and a substantial part of the events giving rise to Plaintiffs' claims occurred in this District.

6. Pursuant to Local Rule 3-2(a), divisional venue is proper in this Division because a substantial part of the events giving rise to Plaintiffs' claims occurred in Yamhill County.

PARTIES

7. Plaintiff Christine Anderson is a resident of McMinnville in Yamhill County, Oregon, and the owner and member-manager of Plaintiff Cast Iron Farm LLC. Christine raises dairy cows, whose unpasteurized milk she sells at Cast Iron Farm. Christine's family has been farming for seven generations.

8. Plaintiff Cast Iron Farm LLC ("Cast Iron Farm") is a family farm and Oregon limited liability company with its principal place of business in McMinnville in Yamhill County.

9. Defendant Katy Coba is the Director of the Oregon Department of Agriculture. Ms. Coba has direct authority over Department of Agriculture personnel and the responsibility and practical ability to ensure that the laws, regulations, and policies that the Department of Agriculture is charged with enforcing and implementing are enforced and implemented in accordance with the United States Constitution. Ms. Coba is sued in her official capacity.

STATEMENT OF FACTS

OREGON'S RAW MILK ADVERTISING BAN

10. Like the majority of states in the nation, Oregon allows the sale of "raw" milk, which is simply milk that has not been pasteurized.

11. Specifically, Oregon allows what it calls small-scale, on-farm sales. A "person" owning not more than three dairy cows that have calved at least once, nine sheep that have

lactated at least once or nine goats that have lactated at least once . . . may sell the fluid milk from those animals for human or other consumption,” Or. Rev. Stat. § 621.012, but only if:

- a. “The person does not advertise the milk for sale,” *id.* § 621.012(1);
- b. “The milk is sold directly to the consumer at the premises where produced,” *id.* § 621.012(2); and
- c. “No more than two producing dairy cows, nine producing sheep or nine producing goats are located on the premises where the milk is produced,” *id.* § 621.012(3).

12. The Oregon Revised Statutes do not define the term “advertise” as it is used in Or. Rev. Stat. § 621.012(1).

13. A farmer who violates the raw milk advertising ban in Or. Rev. Stat. § 621.012(1) is subject to a Class A misdemeanor conviction punishable by up to a year in jail and \$6,250 in fines, as well as civil penalties up to \$10,000. *See* Or. Rev. Stat. §§ 621.991, .995; *id.* § 161.615(1), .635(1)(a); Or. Admin R. 603-024-0920.

CHRISTINE ANDERSON AND CAST IRON FARM

14. Oregon’s raw milk adverting ban makes running a successful business difficult, if not impossible, for farmers like Plaintiff Christine Anderson.

15. Christine is a hardworking mother of two with a third child on the way. She also owns and operates Cast Iron Farm, a small farm in McMinnville, Oregon. Her family has been farming for seven generations.

16. Christine and Cast Iron Farm own not more than three dairy cows that have calved at least once.

17. No more than two producing dairy cows are located at Cast Iron Farm.

18. Christine sells the unpasteurized, fluid milk from her cows directly to consumers at Cast Iron Farm.

19. Christine is passionate about her cows, the milk they produce, and providing her customers the safest product possible.

20. Christine raises her cows in a manner that is caring for both the cows and the environment.

21. For most of the year, Christine keeps her cows on pasture that is rotationally grazed, which ensures the cows return to a new, clean piece of ground after every milking.

22. The pasture at Cast Iron Farm contains a mixture of orchard and timothy grass, as well as alfalfa and clover—legumes that provide high-quality nutrition to the cows and, in turn, to Christine's customers.

23. From November to March, Christine keeps her cows in a dry lot in the barn at Cast Iron Farm. When they are brought to the milking parlor for milking each day, their pens are cleaned and re-bedded with fresh straw.

24. Even during winter months, Christine's cows go out to pasture a couple of times per week.

25. Christine follows a careful milking and bottling protocol at Cast Iron Farm.

26. As each cow comes into the milking parlor, Christine cleans the cow's udder and then dips each teat into an iodine solution.

27. The first few squirts of milk are stripped out, as Christine tests for any signs of off-color or off-texture milk.

28. Christine then tests for mastitis on each teat to ensure there is no inflammation of the udder. Only then does she hang the milker on the cow for milking.

29. The milk is quickly chilled, then filtered and bottled in the creamery in bottles that have been sanitized at a high temperature for an extended period.

30. Christine voluntarily tests her cows' milk regularly. She sends milk samples to an independent lab monthly, and she posts the test results for everyone to see.

31. Christine also keeps daily samples of her cows' milk for a full month so that milk remains available for additional testing if the need were ever to arise.

32. Christine is so committed to responsible farming practices that she maintains an open-door policy at Cast Iron Farm: there is a standing invitation to anyone who wishes to visit the farm and watch Christine care for and milk her cows.

33. Christine's meticulousness has paid off. In fact, Cast Iron Farm is one of only four dairies listed with the Raw Milk Institute, a nationwide organization that provides training to raw milk farmers, promotes common standards to guide the raw milk market, and lists farms meeting the Institute's rigorous safety and testing criteria.

34. Christine is proud of Cast Iron Farm's milk and the measures she takes to ensure her customers get the best product possible. She would love to be able to promote the milk and inform consumers about these measures so that they, in turn, can know exactly what they are getting when they purchase from Cast Iron Farm. Because of Oregon's ban on the advertisement of raw milk, however, she cannot.

ENFORCEMENT OF THE ADVERTISING BAN AGAINST CHRISTINE AND CAST IRON FARM

35. On August 2, 2012, an inspector from the Oregon Department of Agriculture showed up unannounced at Cast Iron Farm to, in the words of the inspector's report, "investigate . . . raw milk advertising on a farm website."

36. The inspector had perused Cast Iron Farm's website for evidence of advertising and found prices that Christine had posted for her milk.

37. The inspector ordered Christine to remove the information because it violated the ban on raw milk advertising set forth in Or. Rev. Stat. § 621.012(1). The inspector also provided Christine a copy of Chapter 621 of the Oregon Revised Statutes, including the ban on raw milk advertising.

38. Christine agreed to remove her prices from the website and did so immediately thereafter.

39. On a separate, less obvious page of the Cast Iron Farm website was additional speech promoting Christine's care for her cows, as well as her milking, bottling, and testing practices. This speech included information discussed in paragraphs 19-33, above. Christine later removed this speech, as well, fearful that it would be construed as advertising if discovered.

HARM TO CHRISTINE AND CAST IRON FARM

40. The Oregon Department of Agriculture has used Oregon's ban on raw milk advertising to silence Christine's speech. The Department's inspector ordered Christine to remove truthful information—the price of Cast Iron Farm's milk—from the farm's website, which Christine did.

41. But for Oregon's ban on raw milk advertising, Christine would again post prices for her milk on the Cast Iron Farm website.

42. Because of Oregon's ban on raw milk advertising, Christine has been unable to advertise Cast Iron Farm's milk in other ways—for example, by posting flyers at a local health food store, promoting Cast Iron Farm's milk at fairs, or erecting a sign in front of Cast Iron Farm indicating that it is a raw milk dairy. In fact, because of the lack of such a sign, new customers

have driven by the farm on multiple occasions confused and not knowing they were in the right place.

43. But for Oregon's ban, Christine would have engaged—and still would engage—in such speech. She would produce and distribute flyers, promote her milk at fairs, and erect a sign in front of Cast Iron Farm indicating that it is a raw milk dairy.

44. Because of Oregon's ban on raw milk advertising, Christine has refrained from promoting discounts when she has had surplus milk.

45. At various times during the year, especially around holidays, many of Christine's regular customers travel on vacation and she consequently has extra milk. She has wanted—and continues to want—to promote discounts for this surplus milk through emails to existing and potential customers, as well as on the Cast Iron Farm website.

46. Because of Oregon's ban on raw milk advertising, Christine has refrained from engaging in such promotions.

47. Because she has not been able to promote surplus milk at a discounted price, Christine has had to dump such milk or feed it to her pigs on many occasions. This has resulted in substantial lost income for the farm and for Christine and her family.

48. But for Oregon's ban on raw milk advertising, Christine would have engaged—and still would engage—in such discount promotions.

49. Because of Oregon's ban on raw milk advertising, Christine has removed speech from the Cast Iron Farm website promoting her care for her cows, as well as her milking, bottling, and testing practices.

50. Christine feared that such speech would be construed as advertising in violation of Oregon's ban and subject her to fines, penalties, and/or jail time.

51. It is important to Christine's business to be able to promote her care for her cows, as well as her milking, bottling, and testing practices, as these things are directly responsible for the quality of Cast Iron Farm's milk. Promoting these things is an important way for Christine to distinguish Cast Iron Farm milk from that of other sources.

52. It is also important to consumers to be able to receive truthful information about how Christine cares for her cows, as well as her milking, bottling, and testing practices. This kind of information is an effective means for consumers to differentiate between milk from Cast Iron Farm and milk from other sources.

53. Because of Oregon's raw milk advertising ban, consumers have been denied this truthful information and have been unable to differentiate between milk from Cast Iron Farm and milk from other sources.

54. But for Oregon's ban on raw milk advertising, Christine would again engage in speech—on the Cast Iron Farm website and in other venues—promoting her care for her cows and her milking, bottling, and testing practices.

55. Because of Oregon's ban on raw milk advertising, Christine's speech has been chilled. Even when she does not believe that particular speech is advertising, she has to second-guess herself before engaging, or declining to engage, in it.

56. Because Oregon does not define the term "advertise" as used in Or. Rev. Stat. § 621.012(1), Christine has had to guess at its meaning and application to certain speech.

57. Christine and Cast Iron Farm have suffered substantially because of Oregon's ban on raw milk advertising. In addition to infringing on their ability to speak freely about their product, it has resulted in lost income to the farm, Christine, and her family.

58. Consumers have likewise suffered substantially because of Oregon's raw milk advertising ban, as they have been denied access to truthful information about products in the marketplace and have been kept in the dark about the availability of such lawful products.

CONSTITUTIONAL VIOLATIONS

CLAIM I: FREE SPEECH

59. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

60. The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech."

61. The First Amendment is incorporated against the state of Oregon through the Fourteenth Amendment to the United States Constitution.

62. By prohibiting the advertisement of raw milk, Or. Rev. Stat. § 621.012(1) abridges the freedom of speech of Christine Anderson, Cast Iron Farm, and other Oregon farmers and farms.

63. The raw milk advertising ban set forth in Or. Rev. Stat. § 621.012(1) harms farmers like Christine, as well as farms like Cast Iron Farm, by preventing them from engaging in truthful speech about their lawful products. The ban results not only in a silencing of their speech, but also in lost business, lost opportunity, and lost income.

64. The raw milk advertising ban set forth in Or. Rev. Stat. § 621.012(1) harms consumers by denying them access to truthful information about lawful products in the marketplace. The ban keeps consumers in the dark not only about how and where to access raw milk, but also about what distinguishes one farm's milk from another's.

65. Or. Rev. Stat. § 621.012(1) is a content-based and speaker-based regulation of speech; it prohibits speech about raw milk only, and only speech by farmers producing such milk.

66. Or. Rev. Stat. § 621.012(1) effects a complete suppression of truthful speech about a lawful product and activity.

67. The raw milk advertising ban set forth in Or. Rev. Stat. § 621.012(1) is not appropriately tailored to any sufficiently important governmental interest.

68. Banning raw milk advertising does not directly or materially advance any sufficiently important governmental interest.

69. On its face and as applied to Christine and Cast Iron Farm, Or. Rev. Stat. § 621.012(1) violates the First Amendment to the United States Constitution.

70. Christine and Cast Iron Farm have no other remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights.

71. Unless the raw milk advertising ban set forth in Or. Rev. Stat. § 621.012(1) is declared unconstitutional and permanently enjoined, Christine and Cast Iron Farm will continue to suffer great and irreparable harm.

CLAIM II: OVERBREADTH

72. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

73. The First Amendment to the United States Constitution, as incorporated against the states through the Fourteenth Amendment, prohibits overbroad laws.

74. The raw milk advertising ban set forth in Or. Rev. Stat. § 621.012(1), on its face and as applied, is unconstitutionally overbroad.

75. Judged in relation to any legitimate sweep that Or. Rev. Stat. § 621.012(1) may have, the statute restricts and punishes a substantial amount of protected speech.

76. The overbreadth of Or. Rev. Stat. § 621.012(1) results in the chilling and silencing of speech by Christine, Cast Iron Farm, and other farmers and farms; consumers, in turn, are denied truthful information about raw milk.

77. On its face and as applied, Or. Rev. Stat. § 621.012(1) violates the First Amendment to the United States Constitution.

78. Christine and Cast Iron Farm have no other remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights.

79. Unless the raw milk advertising ban set forth in Or. Rev. Stat. § 621.012(1) is declared unconstitutional and permanently enjoined, Christine and Cast Iron Farm will continue to suffer great and irreparable harm.

CLAIM III: VAGUENESS

80. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

81. The First Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit vague laws.

82. Because Oregon does not define the term “advertise” as used in Or. Rev. Stat. § 621.012(1), the ban set forth in the statute, on its face and as applied, is fatally vague.

83. Because Oregon does not define the term “advertise” as used in Or. Rev. Stat. § 621.012(1), persons of common intelligence must necessarily guess at the meaning of the ban set forth in the statute and differ as to its application. Because Christine, Cast Iron Farm, and other

farmers and farms must engage in such guessing and face fines, penalties, and/or jail time if they guess wrong, their speech is necessarily chilled or ultimately foregone.

84. The lack of clarity in Or. Rev. Stat. § 621.012(1) leaves Christine, Cast Iron Farm, and other farmers and farms at risk of arbitrary, discriminatory, and *ad hoc* enforcement by the Department of Agriculture.

85. The vagueness of Or. Rev. Stat. § 621.012(1) results in the chilling and silencing of speech by Christine, Cast Iron Farm, and other farmers and farms; consumers, in turn, are denied truthful information about raw milk.

86. On its face and as applied, Or. Rev. Stat. § 621.012(1) violates the First Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

87. Christine and Cast Iron Farm have no other remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights.

88. Unless the raw milk advertising ban set forth in Or. Rev. Stat. § 621.012(1) is declared unconstitutional and permanently enjoined, Christine and Cast Iron Farm will continue to suffer great and irreparable harm.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

A. A declaratory judgment that Or. Rev. Stat. § 621.012(1), on its face and as applied to Christine and Cast Iron Farm, violates the First Amendment to the United States Constitution;

B. A declaratory judgment that Or. Rev. Stat. § 621.012(1), on its face and as applied to Christine and Cast Iron Farm, is unconstitutionally overbroad in violation of the First Amendment to the United States Constitution;

C. A declaratory judgment that Or. Rev. Stat. § 621.012(1), on its face and as applied to Christine and Cast Iron Farm, is unconstitutionally vague in violation of the First Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution;

D. A preliminary and permanent injunction prohibiting the Defendant from enforcing Or. Rev. Stat. § 621.012(1) against Christine, Cast Iron Farm, or anyone else;

E. Reasonable costs and attorneys' fees; and

F. Such other legal or equitable relief as this Court may deem appropriate and just.

Dated: November 19, 2013

Respectfully submitted,

s/Melinda J. Davison

Melinda J. Davison (OR Bar No. 930572)

Davison Van Cleve, PC

333 SW Taylor St., Suite 400

Portland, OR 97204

(503) 241-7242

(503) 241-8160 (fax)

mjd@dvclaw.com

Michael E. Bindas (WA Bar No. 31590)*

INSTITUTE FOR JUSTICE

10500 N.E. 8th Street, Suite 1760

Bellevue, WA 98004

(425) 646-9300

(425) 990-6500 (fax)

mbindas@ij.org

Ari Bargil (FL Bar No. 71454)*

INSTITUTE FOR JUSTICE

999 Brickell Avenue, Suite 720

Miami, FL 33131

(305) 721-1600

(305) 721-1601(fax)

abargil@ij.org

Attorneys for Plaintiffs

* Motions for admission *pro hac vice* filed
concurrently with this document