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TESTIMONY OF

**MICHAEL E. BINDAS**  
**SENIOR ATTORNEY, INSTITUTE FOR JUSTICE**

**IN SUPPORT OF HB 2446**

**OREGON HOUSE COMMITTEE ON AGRICULTURE AND NATURAL  
RESOURCES**

FEBRUARY 19, 2015

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**Senior Attorney, Institute for Justice**  
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**Oregon House Committee on Agriculture and Natural Resources**  
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I thank Chairman Witt and the members of the Committee for the opportunity to speak about House Bill 2446. By repealing Oregon's current ban on the advertisement of raw, or unpasteurized, milk, this bill would restore the First Amendment right of Oregon farmers to speak about a product that is perfectly legal for them to sell.

My name is Michael Bindas and I am a senior attorney with the Institute for Justice. The Institute for Justice is a non-profit, public interest law firm dedicated to defending the fundamental rights of individuals and protecting the basic notions of a free society. Since its founding nearly 24 years ago, the Institute has litigated to defend, among other things, the right of free speech protected by the First Amendment, including, specifically, the right of entrepreneurs and small businesses to engage in commercial speech. To that end, the Institute has successfully litigated free speech cases at all levels of federal and state courts.

One of those cases was *Anderson v. Coba*, No. 13-cv-2053 (D. Or. 2013), in which we represented McMinnville farmer Christine Anderson in challenging Oregon's ban on the advertisement of raw milk. In August 2012, an inspector from the Department of Agriculture arrived at Christine's farm to "investigate . . . raw milk advertising on a farm website," as the inspector's report explained. The inspector noted that Christine's website listed the prices of the raw milk she was legally selling and informed Christine that this constituted illegal advertising in violation of Or. Rev. Stat. § 621.012(1). The inspector instructed Christine to remove the information from her website immediately, which Christine did. Had Christine not complied, she could have faced a year in jail, \$6,250 in fines, and civil penalties up to \$10,000<sup>1</sup> for the "crime" of talking about a perfectly lawful product.

We learned of Christine's situation and offered to represent her, free of charge, in bringing a First Amendment constitutional challenge to Oregon's ban on the advertisement of raw milk. We filed that lawsuit on November 19, 2013. It was not a lawsuit for monetary damages; rather, we asked the court only to declare the advertising ban unconstitutional and enjoin its enforcement. Our argument was simple: the First Amendment prohibits government from banning truthful speech about a lawful product.

That argument was grounded firmly in U.S. Supreme Court precedent. The First Amendment undoubtedly protects commercial speech.<sup>2</sup> In fact, the U.S. Supreme Court has repeatedly stressed the importance of advertising to our free enterprise system, noting that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not

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<sup>1</sup> See Or. Rev. Stat. § 621.991, .995; *id.* §§ 161.615(1), .635(1)(a); Or. Admin R. 603-024-0920.

<sup>2</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-65 (1976).

keener by far, than his interest in the day's most urgent political debate."<sup>3</sup> As the Court has explained:

Advertising . . . is . . . dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.<sup>4</sup>

Given the importance of commercial speech and the protection that the First Amendment affords it, the Supreme Court has routinely struck down restrictions on the advertising of lawful products. "[S]o long as the sale and use of [a product] is lawful," the Court has held, the producer "has a protected interest in communicating information about it[]" and "customers have an interest in receiving that information."<sup>5</sup> In that light, the Court has even struck down advertising restrictions on inherently dangerous or unsafe products, such as tobacco, alcohol, and pharmaceuticals.<sup>6</sup>

Oregon's restriction on the advertisement of raw milk is particularly problematic because it is an absolute ban, effecting a "complete suppression of truthful, nonmisleading commercial speech"<sup>7</sup> concerning raw milk. The Supreme Court has stressed that such restrictions trigger even "more stringent constitutional review."<sup>8</sup>

After reviewing these Supreme Court precedents, the Oregon Department of Justice came to the conclusion that Oregon's advertising ban is constitutionally problematic. Accordingly, it approached us about resolving the case amicably through a settlement agreement by which: (1) Director Coba would issue a directive to her staff instructing them not to enforce the ban; and (2) the Department of Agriculture would request a bill to formally repeal the ban. That bill is HB 2446. In short, it is simply a housekeeping measure to remove an unconstitutional provision from the Oregon Revised Statutes.

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<sup>3</sup> *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366-67 (2002) (omission in original; internal quotation marks and citation omitted).

<sup>4</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

<sup>5</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001).

<sup>6</sup> *See, e.g., id.* (restrictions on location of outdoor tobacco advertisements and height of point-of-sale tobacco advertisements); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (prohibition on advertising liquor prices); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (prohibition on mention of alcohol content on beer labels); *Thompson*, 535 U.S. 357 (prohibition on advertising compounded drugs); *Va. State Bd. of Pharmacy*, 425 U.S. 748 (prohibition on advertising prescription drug prices).

<sup>7</sup> *44 Liquormart*, 517 U.S. at 508 (opinion of Stevens, J., joined by Kennedy, Souter, and Ginsburg, JJ.).

<sup>8</sup> *Id.*; *see also id.* at 501-04 (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 n.9 (1980).

Finally, it important to emphasize what this bill is *not*. It is not an attempt to open a policy debate about raw milk. Nor is it an attempt to expand access to raw milk. The current two-cow/nine-sheep/nine-goat restriction on raw milk sales would remain in effect if this bill passes. So, too, would the condition that raw milk only be sold directly to consumers on-site at the farm where it is produced. The bill would leave these restrictions untouched. It would simply allow farmers who are operating within these strict parameters—farmers like Christine Anderson—to speak about the product they are lawfully selling.

Accordingly, we respectfully urge this Committee to vote “Yes” on HB 2446. Thank you for your attention and for the opportunity to testify this afternoon.