

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

A.B.A.T.E. OF OREGON, INC.
and LARRY SCHALK,
Plaintiffs,

vs.

LERON R. HOWLAND,
Superintendent of the
Oregon State Police, and
John Doe 1 through 100.
Defendants

Civil No. 96-957 JE
DECLARATORY
JUDGEMENT

IT IS HEREBY ADJUDGED AND DECLARED that Oregon House Bill 3422 means that as long as a motorcycle rider is wearing a protective covering on his head that has a hard outer shell, padding adjacent to and inside the outer shell and a chin-strap retention system with a sticker indicating that the motorcycle helmet meets standards established by the United States Department of Transportation the rider is in compliance with state law with respect to his helmet and a police officer may not inquire further to determine if the helmet worn meets United States Department of Transportation testing standards.

Dated this 9th day of May, 1997

/s/ JOHN JELDERKS

John Jelderks

United States Magistrate Judge

Submitted by
Spencer M. Neal
of Attorneys for Plaintiff

A.B.A.T.E. of OREGON v. HOWLAND

OPINION OF THE COURT

Plaintiffs A.B.A.T.E. of Oregon, Inc. ("ABATE") and Larry Schalk bring his 42 USC §1983 action against defendant Leron Howland, Superintendent of the Oregon State Police, and additional Doe defendants.^[fn1] The principal issue in this case is the effect of changes made to the Oregon motorcycle helmet law during the 1995 legislative session. Plaintiffs contend that members of the Oregon State Police have refused to accept the modifications to the law and have continued to enforce the old law or an unreasonable interpretation of the new law. Plaintiffs also contend they are being illegally stopped, detained, and ticketed for allegedly violating a law that was repealed in 1995, in violation of their Fourth Amendment rights.

Finally, plaintiffs contend the stops are part of a campaign of harassment against them because of their association in motorcycle clubs, and constitute retaliation against plaintiffs because of their successful efforts to change the motorcycle helmet law. Plaintiffs seek declaratory and injunctive relief, compensatory and punitive damages, and attorney fees.

Plaintiffs have moved for partial summary judgment regarding the interpretation of the helmet law. Defendants have also moved for summary judgment on that issue, and for qualified immunity on the damage claims.

Jurisdictional Matters

Before reaching the merits, I first must decide if this court should interpret the new Oregon motorcycle helmet law when the Oregon appellate courts have not yet spoken on this issue. Although neither party raised this issue in its briefs, a federal

court has a duty to consider that question *sua*

sponte. Richardson v. Koshiba, 693 F2d 911, 915 (9th Cir 1982). Among the factors that weigh in favor of my exercising jurisdiction include:

A. The Oregon Legislature is presently in session and can amend the law to address any concerns raised by my ruling. The legislature will not meet again for another two years.

B. The Oregon Attorney General's office has expressly requested that I exercise jurisdiction in this case so the parties may obtain an expedited ruling before the legislature adjourns.

C. If I certify questions to the Oregon Supreme Court, it will significantly delay these proceedings.

D. There are no parallel state court actions, either pending or anticipated.

E. All necessary parties are before the court.

F. Prompt resolution of the dispute may prevent additional cases from arising (e.g. claims for Fourth Amendment violations, false arrest, harassment.)

G. The parties already have expended considerable time and effort briefing the matter, without objection from either side regarding the forum.

H. There is no evidence of forum shopping.

I. Resolution of the state law issue will assist in deciding the federal claims presented in this case.

J. The statute is clearly worded, and there are no complex state law issues or questions committed to the judgment of the state courts (e.g., whether to recognize a new tort).

K. There are no novel federal constitutional questions that might reasonably be avoided by interpretation of this state law.

The principal factor weighing against the exercise of jurisdiction is that this case presents a question of state law that has not previously

been decided by an Oregon appellate court. I am very sensitive to the federalism concerns that are reflected in the various abstention doctrines and related The 1995 statutes. However, after carefully weighing the various considerations and the views of the Oregon Attorney General's office, I conclude this is a proper case in which to exercise jurisdiction. I therefore will address the pending motions.

Background

Prior to 1995, Oregon law contained detailed minimum standards and specifications for "protective headgear" worn by motorcyclists. ORS 815.050 (1993). The Oregon Department of Transportation ("DOT") was required to adopt and enforce such rules, which were to be consistent with federal safety standards for motorcycle helmets. *Id.* ODOT also was required to establish procedures for testing and certifying "protective headgear." *Id.* By regulation, ODOT adopted Federal Motor

Vehicle Safety Standard Number 218 ("FMVSS 218") and decreed that "[h]elmets designed and manufactured to this standard are acceptable protective headgear. . ." OAR 735-102-020 (April 1988).

Certain motorcycle rider organizations, including plaintiff ABATE, complained that their members were being harassed by police officers who they said stopped motorcyclists on the pretext of examining the rider's helmet for compliance with the federal standards, when the officers actually had another reason for making the stop. There also were complaints that police officers had seized helmets from riders on grounds that the helmet did not conform to the federal standards, and there was disagreement as to whether the police understood or were properly applying those standards.

The 1995 Oregon Legislature sought to redress those concerns by repealing ORS 815-050 (and by implication the ODOT regulations that had

been enacted to implement that law.) The Legislature Also amended ORS 814.269 to read, in relevant part:

1. A person commits the offense of failure of a motorcycle operator to wear a motorcycle helmet if the person operates a motorcycle and is not wearing a motorcycle helmet.

The Legislature then enacted a new statute:

"Motorcycle helmet means a protective covering for the head consisting of a hard outer shell, padding adjacent to and inside the outer shell and chin-strap type retention system with a sticker indicating that the motorcycle helmet meets standards established by the United States Department of Transportation." (Comments on the Opinion #1)

1995 Oregon Laws, Ch. 492, § 2 (codified at ORS 801.366 (1995)). It is the interpretation of the ORS 801.366 that is at the heart of the present dispute.

Plaintiffs contend that ORS 801.366 means precisely what it says: so long as a rider is wearing a protective covering on his head that meets the above physical description, and has a sticker which indicates the helmet meets USDOT standards, he or she is in compliance with the law and the police may not inquire further. (Comments on the Opinion #2)

Defendants contend they are not required to accept the "DOT" sticker at face value, because there are many counterfeit stickers, or genuine stickers that have been affixed to a helmet that does not conform to the USDOT standards, or helmets that originally conformed to those standards but have since been modified or otherwise no longer meet those standards. In reliance upon that interpretation, defendants have continued to stop motorcycle riders to conduct helmet inspections to ascertain for themselves whether the helmet actually complies with the USDOT standards, and have issued citations to riders who are wearing

helmets which in the officer's judgment do not comply with the USDOT standards notwithstanding that a "DOT" sticker is affixed to the helmet.

The parties have submitted information regarding FMVSS 218 and the "DOT" sticker. Those topics also were explored in several recent decision concerning the helmet laws enacted by our neighboring states of California and Washington.

Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F3d 1486 (9th Cir 1996) (California law); *Bianco v. California Highway Patrol*, 29 Cal Rptr 2d 711 (Calif App 1994); *Buhl v. Hannigan*, 20 Cal Rptr 2d 740 (Calif App 1993); *State v. Maxwell*, 878 P2d 1220 (Wash App 1994).

FMVSS 218 is a highly technical regulation that establishes standards for the manufacture of motorcycle safety helmets. *See* 49 CFR § 571.218 (1995). Special laboratory tests

utilizing sophisticated equipment are employed to measure factors such as resistance to penetration, dissipation of energy, and the strength of the chin strap. 49 CFR § 571.2181 *Easyriders* 92 F3d at 1490; *Maxwell*, 878 P2d 122-23; *Taggart v. Super Seer Corp.*, 40 Cal Rptr 2d 56, 59 (Calif App 1995) (discussing testing of motorcycle helmets in the context of a products liability action.) For that reason, actual compliance with FMVSS 218 cannot positively be verified in the field simply by examining the helmet. The appearance of the helmet, or the thickness of the interior padding or the outer shell, may offer some clues but those factors by themselves are not an accurate method of determining compliance with these standards. *Id.* See also *Buhl* 20 Cal Rptr 2d at 1622; *Taggart*, 40 Cal Rptr 2d at 59-60 (expert testified that helmet was "defective" because it was too rugged and survived an accident with only cosmetic damage; in an accident a good helmet would be "squashed" and the liner

"crushed", presumably to help absorb the energy of the impact, which is somewhat counter-intuitive.)

The federal government does not certify helmets, nor does it furnish "DOT" stickers. Rather, the federal statutory scheme contemplates [a] system in which each helmet manufacturer is responsible for testing its own helmets to determine compliance with FMVSS 218 before the helmets are sold to the public.

(Comments on the Opinion #3) The manufacturer "self-certifies" compliance with FMVSS 218 by placing a sticker on the outside of the helmet with the initials "DOT."

Easyriders, 92 F3d at 1490-91; *Bianco*, 29 Cal Rptr 2d at 717. Each manufacturer furnishes its own "DOT" stickers, or in some cases embosses the letters directly onto the helmet.

The National Highway Transportation Safety Administration ("NHTSA") occasionally contracts with private laboratories to test

selected helmets for compliance with FMVSS 218. *Easyriders*, 92 F3d at 1491. If a helmet is found not to be in compliance, the manufacturer must notify owners of the helmets and stop selling non-complying helmets with the DOT certification. *Id.* Manufacturers that do not recall non-complying helmets are subject to substantial fines. *Id.* The NHTSA releases information regarding non-complying helmets to law enforcement agencies and through consumer advisories, and consumer may contact the NHTSA to determine if a particular helmet has been recalled. *Id.* Recalls are also published in the Federal register. *Id.* A police officer may be able to determine that a helmet more than likely does not comply with FMVSS 218 if that particular model appears on a list of non-complying helmets.[fn2]

Manufacturers of helmets that do not comply with FMVSS 218 may continue to sell them without the DOT sticker as "novelty" helmets. *Id.* Defendants have offered evidence that it is

possible to for someone to purchase "after-market DOT stickers" and affix such a sticker to a "novelty helmet" which would then have the appearance of being a legal helmet. It also is possible that the manufacturer or some other person may affix a DOT sticker to a helmet that does not meet the USDOT standards, or that a sticker is on a helmet which at one time met those standards but has since been altered, damaged, or worn out. (Comments on the Opinion #4)

Interpretation of the Statute

In construing the statute, the court begins by analyzing the text and context of the statute. *PGE v. Bureau of Labor & Industries*, 317 Or 606, 610-11 (1993.) The court's task is "not to inset what has been omitted, or to omit what has been inserted." ORS 174.010. If the legislative intent is not clear from the face of the statute, the court may then consider the legislative history. *Id.* at 611-12.[fn3]

I find nothing ambiguous about the language in ORS 801.366. The legislature in effect established a conclusive presumption that a motorcycle rider is in compliance with the Oregon helmet law if he or she is wearing a helmet that has (1) a hard outer shell, (2) padding adjacent to and inside the outer shell, (3) a chin-strap type retention system, and (4) a sticker which indicates that the helmet meets USDOT standards. This statute does not require a motorcyclist to second-guess a manufacturer's "DOT" sticker, nor does it allow a police officer to make an independent assessment as to whether the helmet complies with the complex USDOT standards.

Had the legislature intended for police officers to conduct their own field tests to determine whether the helmet complied with USDOT standards, there would be no reason for the Legislature to even mention the sticker. The law would simply require the rider to wear a helmet "that meets standards established by the United

States Department of Transportation." Indeed, that was what Oregon law required prior to 1995. The 1995 Legislature repealed that requirement. Defendants' proposed interpretation would disregard the plain language of the statute and would require a finding that the changes made by the 1995 Legislature were only cosmetic and not substantive. The express language of the statute is to the contrary. I reject defendant's contention that ORS 801.366 incorporates the USDOT standards into Oregon law or mandates that all helmets actually meet USDOT standards.

A review of recent decisions from our neighboring states suggests that serious constitutional questions may be posed by a statute that requires the rider to wear a helmet that actually meets USDOT standards. In *Maxwell*, 878 P2d at 1222-23, the Washington Court of Appeals found that those standards were so complex that ordinary citizens could not determine whether a given helmet met the

requirements. Consequently, the law violated the Due Process Clause of the Fourteenth Amendment because it failed to provide fair notice of what conduct was proscribed. The court suggested that the state redraft the helmet law so "that ordinary citizens would know what to look for to be certain they are complying with the law." *Id.* at 1223.

A similar challenge was mounted against the California helmet law. The California Court of Appeals avoided the constitutional issue by creating a legal presumption that a helmet bearing a "DOT" sticker complies with the USDOT standards. *Buhl*, 20 Cal Rptr 2d at 745. In a subsequent case, the Court of Appeals established a narrow exception to that presumption where the rider has actual knowledge that the helmet does not comply with the USDOT standards. *Bianco*, 29 Cal Rptr 2d at 717.

The new Oregon helmet law is consistent with

the results reached in *Maxwell* and *Bianco*. A rider is not required to conduct scientific tests to determine whether his or her helmet actually complies with the USDOT standards. Instead, the presence of a "DOT" sticker establishes a presumption that the helmet complies with those standards. However, in Oregon the presence of the sticker is dispositive, while under the California law a citation may be issued if the rider has actual knowledge that the helmet does not comply with those standards.

Defendants have devoted considerable effort to persuading this court that a "DOT" sticker by itself is not conclusive proof that a helmet complies with federal safety standards or will effectively protect the rider in the event of a mishap. Defendants have also argued that the literal application of the statutory language would "permit an individual to comply with Oregon's mandatory helmet law simply by taking a coal bucket, affixing a bandana to the inside," attaching "two shoe laces" as a chin-

strap, and "placing a DOT sticker on the coal bucket."

Even assuming that were true,^[fn4] defendants have directed their arguments to the wrong forum. This court's task here is not to write the law but to apply the law that was enacted by the Legislature. Even if this court agreed with defendants' concerns regarding the wisdom of the new helmet law, this court would have no power to re-write that law to redress those concerns. If the Legislature did not fully comprehend the problem, or the language used in the bill does not accurately reflect the legislative intent, then it is up to the Legislature to amend the statute.

There are instances where the literal application of a law would lead to such an irrational result that the courts will assume the Legislature made a clerical error and construe the statute in the manner which it appears the Legislature actually intended. However, there is no occasion to

apply that rule of statutory construction here. After reviewing the materials submitted, the arguments of the parties, and the cases from our neighboring states, it appears that there are several rational bases that might have induced the Oregon Legislature to establish a conclusive presumption that a helmet bearing a "DOT" sticker is a lawful helmet. The Legislature rationally could have concluded that:

1. most motorcycle riders will voluntarily choose to wear a high-quality helmet,^[fn5] and the time and effort being expended to stop motorcyclists and inspect their helmets could better be devoted to more pressing police business;
2. the USDOT standards do not readily lend themselves to field testing, and motorcyclists could erroneously be cited and their helmets seized based upon misapplication of the USDOT standards;

3. the helmet law could be used to harass certain motorcycle riders or organizations, and the Legislature wanted to reduce the possibility of such encounters;
4. a motorcycle rider should be able to purchase and wear a helmet with a "DOT" sticker affixed and be assured that the rider is not violating the helmet law;
5. a law that required actual compliance with USDOT standards might violate the Due Process Clause; or
6. the Legislature might have preferred to repeal the helmet law entirely but feared losing federal highway funds if it did, and therefore was content to weaken the law.

Notably, the Legislature simultaneously reduced the penalty for violating the helmet law to a Class D infraction, which is the lowest offense level there is under Oregon law.

The court does not necessarily agree or disagree with these arguments, and I need not decide whether the legislature reached any of the above conclusions. For purposes of this case, it is sufficient that there is a rational basis which could support the Legislature's decision to modify the helmet law, and conversely, that the plain meaning of the statute is not patently irrational.

Although I believe the law is clear on its face, I also have examined the legislative history that was submitted by the parties. I find nothing in that legislative history which compels a different interpretation of the statute. In anything, the legislative history supports the plain

meaning of the statute. There was testimony during committee hearings regarding alleged harassment of motorcycle organizations, the difficulties of applying USDOT standards in the field, and erroneous seizures of helmets for allegedly not complying with USDOT standards. There was also concern that a person should be able to buy a motorcycle helmet and be confident that it satisfies the requirements of the Oregon helmet law.

During the committee hearing on the bill, Rep. Grisham inquired: "By adopting the -2 amendments, are we enabling anyone who rides a motorcycle to have a sticker on the outside of the helmet and not be subject to harassment?" Committee Chair Hayden responded, "That would be my hope." Rep. Grisham then stated, "That would be the intent." Minutes of April 18, 1995 meeting of House Committee on General Government and Regulatory Reform Subcommittee on Transportation

("Transportation Subcommittee"), page 9.[fn6]

The legislative history also reveals that Chair Hayden specifically requested that the penalty for failing to wear a helmet be reduced to the "lowest possible violation." Minutes of April 11, 1995 meeting of Transportation Subcommittee, Page 15. The bill was then amended to make violation of the helmet law a Class D traffic infraction, which is the very lowest level of infraction that exists in Oregon. The maximum fine that can be assessed for a Class D traffic infraction is \$95.

In summary, ORS 801.366 means precisely what it says: so long as a rider is wearing a "protective covering" on his or her head consisting of "a hard outer shell, padding adjacent to and inside the outer shell and a chin-strap type retention system," and the helmet bears a "DOT sticker" indicating that the helmet meets USDOT standards, the rider is in compliance with the helmet law and the police

may not inquire further. If that is not what the Legislature intended, then the Legislature may amend the statute as it sees fit.[fn7]

Plaintiff is entitled to partial summary judgment on this issue and declaratory relief consistent with that interpretation of the law.

Fourth Amendment Claim

Construing the facts in the light most favorable to plaintiffs, during Memorial Day Weekend of 1996 the Oregon State Police diverted some officers from their normal duties and sent them to Fossil, Oregon, where plaintiffs were holding an annual gathering. The officers stopped and ticketed a number of motorcyclists on ground that in the officer's opinion the rider's helmet did not comply with the USDOT standards.

The Fourth Amendment claim appears to be limited to the citation issued to plaintiff Schalk by Trooper Mark Mitchell. Before proceeding to the merits, I note that the complaint named as defendants the Superintendent of the Oregon

State Police, Leron Howland, and John Does 1 through 100. Upon reviewing the file it does not appear that Mitchell formally was named as a defendant, nor does his name appear in the body of the complaint. Despite those omissions, I will address the merits of this claim anyway because the parties have proceeded under the assumption that Mitchell already was a defendant. Both parties fully briefed the motion, and Mitchell has been represented in this action by the Oregon Attorney General's office. Mitchell will be considered as John Doe number one.

It is undisputed that Schalk was wearing a helmet that consisted of a hard shell, inner padding, a chin-strap, and a "DOT" sticker. However, based upon the appearance of the helmet -- which "fit very tightly on the head" -- Trooper Mitchell stopped Schalk to inspect his helmet. Mitchell decided there was not enough padding in the helmet to meet the USDOT standards. In fact, the USDOT standards do not require a specific amount of padding, through as

a practical matter a helmet without sufficient padding may have difficulty satisfying the energy dissipation requirements of FMVSS 218. See *Taggart*, 40 Cal Rptr 2d at 59. There is some evidence Mitchell also asserted that the helmet was inadequate because it didn't cover the wearer's ears. Mitchell issued Schalk a citation for violating the Oregon helmet law. The citation later was dismissed.

The Ninth Circuit addressed a somewhat similar situation in *Easyriders*. The Circuit concluded that the officers had a "reasonable suspicion" that the helmets in question did not comply with FMVSS 218, and that was sufficient to support an investigatory stop. *Easyriders*, 92 F3d at 1497. That case concerned the California helmet law, which differs somewhat from Oregon's helmet law. In Oregon, the "DOT" sticker is conclusive evidence that the helmet is legal, while in California that presumption may be rebutted by proof of "actual knowledge" that the helmet does not comply with FMVSS 218. The

Circuit also concluded that the California Highway Patrol had violated the riders' Fourth Amendment rights by issuing citations when the officers lacked probable cause to believe that the rider had violated the helmet law. *Id.* at 1499-1500

Applying *Easyriders* to the facts here, Trooper Mitchell violated plaintiff Schalk's Fourth Amendment rights if Mitchell either (1) issued Schalk a citation when Mitchell did not have probable cause to believe that Schalk had violated the Oregon helmet law, or (2) conducted an investigatory stop without having a reasonable suspicion that Schalk was violating the helmet law.

Assuming, but not deciding, that Trooper Mitchell did violate plaintiff's Fourth Amendment rights, Mitchell nonetheless is entitled to qualified immunity if a reasonable officer could have believed, in light of settled law, that he was not violating

Schalk's Fourth Amendment rights. *Carlo v. City of Chino*, 105 F3d 493, 500 (9th Cir 1997).

I grant the motion for qualified immunity on this claim. The statute was comparatively new and there still were questions regarding its proper application. At the time there had not been a single published judicial opinion interpreting the new law. Mitchell's conduct was not so objectively unreasonable, the interpretation of the statute so obvious, or the facts of the alleged violation so egregious, that Mitchell should be held liable for damages.

First Amendment Claim(s)

Plaintiffs First Amendment claim(s) appear to allege that the Oregon State Police have been conducting a campaign of harassment against plaintiffs because of their association in motorcycle clubs, and that the police have been retaliating against plaintiffs because of their successful efforts to change the motorcycle

helmet law.

The allegations in the complaint are vague. The only named defendant is Superintendent Howland along with John Does 1 through 100. The parties did not specifically address this claim when they were briefing the cross-motions for summary judgment. Because the allegations are so vague, and the defendants uncertain, I will dismiss the First Amendment claim(s), with leave to replead those claims within ten days or else the dismissal becomes final.

Plaintiff's Motion to Strike

Plaintiffs have moved to strike Defendants' exhibits "1, 3, and 4." I question whether those are the correct exhibit numbers. The arguments plaintiffs make are inapposite to the exhibits in question. In fact, Plaintiffs have offered Exhibit 3 themselves. I need not resolve this discrepancy since in light of my other rulings the motion to strike is now moot.

Conclusion

The court has jurisdiction and will not abstain or certify questions to the Oregon Supreme Court. I grant plaintiffs' motion (#12) for partial summary judgment on the statutory interpretation issue. Plaintiff is entitled to declaratory relief. Defendants' cross motion (#18) for partial summary judgment is granted as to the Fourth Amendment claim and denied as to the statutory interpretation issue. Trooper Mitchell will be considered as Defendant John Doe number one. Plaintiffs' First Amendment claim is dismissed with leave to replead within ten days or else the dismissal becomes final. Plaintiffs' motion (#23) to stike is denied as moot.

DATED this 21st day of March, 1997.

(signed)

John Jelderks

United States Magistrate Judge

(footnotes)

fn1 In their briefs and arguments on the instant motion, the parties assumed that certain individual police officers were also defendants for purposes of the First and Fourth Amendment claims. However, it does not appear that the individual officers were ever formally named as parties via an amended complaint. In addition, notwithstanding the caption, no plaintiff class has been certified. [Back](#)

fn2 I say "more than likely" since it is possible that an entire batch of helmets will be recalled even though only a percentage of that batch fails the laboratory tests and the remainder of the batch in fact complies with FMVSS 218. There may also be differences in the results reached by different laboratories. See Taggart, 40 Cal Rptr 2d at 59-60 (conflicting test results). [Back](#)

fn3 A further consideration is that failure to wear a "motorcycle helmet" as defined in ORS 801.366 is a traffic offense. Indeed, that is the only application for this law. Although Oregon has modified the common law rule that penal statutes are strictly construed, and there are some distinctions between a traffic infraction and a criminal offense, the law still must provide fair warning as to the conduct that it proscribes. Maxwell,

878 P2d at 1222-23 (holding Washington helmet law unconstitutional on that grounds.) [Back](#)

fn4 By definition, a "motorcycle helmet" is a "protective covering for the head." ORS 801.366
Consequently, some of the more extreme examples suggested by defendants may not satisfy the statutory definition. [Back](#)

fn5 Some studies have found that over ninety percent of motorcyclists wear helmets that comply with USDOT standards. Easyriders, 92 F3d at 1494 n3.
[Back](#)

fn6 These may no be exact quotes, but paraphrasing.
[Back](#)

fn7 For the purposes of this case the court is not called upon to decide every issue that potentially might arise under the statute, e.g., if an obviously home-made "DOT" sticker has been affixed to the helmet, or whether a motorcycle rider would have a good defense if the helmet complies with the USDOT standards but the "DOT" sticker had fallen off. Such issues can be addressed by the state courts when there is an actual controversy presenting those facts. [Back](#)

(comments)

Opinion #1: This language will be the hinge-point of

the court ultimately finding the Oregon helmet law statute sufficiently clear in its requirements. We believe this is the fault of the lawyers arguing the case for the plaintiffs. The standards adopted by the Oregon Legislature are not contained in the federal regulation, FMVSS 218, which they MUST be. Had the plaintiff's lawyers introduced the court to **Juvenile Products v. Edmisten**, particularly with the quality of analysis demonstrated by Judge Jelderks, the eventual outcome of this case would have been substantially different than what was had instead. Judge Jelderks had no way of knowing, because he could only work with what was given to him, that the criteria adopted by the Oregon Legislature (because it is not "identical" to the federal standard) violated the Code of Federal Regulations ("CFR"), and is therefore NOT justification for ignoring the defects in the statute, but justification for ruling the statute *VOID* instead. Throughout the opinion, the saving grace of the statute was repeatedly referenced -- the "hard outer shell, padding adjacent to and inside the outer shell and chin-strap type retention system" -- with the court never realizing that such criteria, because it appears nowhere in the federal standard, therefore because it is not "identical" to the federal regulation (FMVSS 218), cannot foundation the state statute. (You can click

[here](#) and find out why.) As you read the decision, pay close attention to how many times the court references the criteria adopted by the Oregon Legislature, to save the statute. And none of this was the judge's fault. The court simply cannot address information that is not presented to them. All ABATE's lawyers had to do was introduce the court to the *Juvenile Products* decision, and Oregon's helmet law would have been gone over a decade ago. [Back](#)

Opinion #2: The statement "has a sticker which indicates the helmet meets USDOT standards" is going to prove troublesome before this opinion is concluded, because the judge is missing a very important point -- the DOT sticker on a helmet does *not* indicate the helmet actually meets the USDOT standards, but rather simply that the manufacturer *certified* that the helmet meets USDOT standards. The distinction is important mostly because almost all of the citations written to motorcyclists for violating the helmet law, are written to motorcyclists who are wearing helmets. In these cases, the citing officer will often accuse the rider of not wearing a helmet that actually complies with the federal standards -- calling the helmet a "novelty helmet" and "illegal helmet" or some other term created by the police. Just keep in

mind that the DOT sticker is *not* put on by the Department of Transportation as evidence it meets DOT standards. The DOT sticker is put on a helmet by the manufacturer to indicate the manufacturer's certification of compliance with the federal regulations, and no more. Indicating that a helmet must actually meet USDOT standards creates an impossible situation, for both enforcement and compliance, because there is no way to determine whether or not the helmet actually meets such standards without actually testing it. Since the test destroys the helmet, that can't be done. So, as a practical matter, there's absolutely no way to establish one way or the other, whether a helmet meets the DOT standard. Only whether or not the manufacturer certified that it would. (Read this as many times as is necessary for you to completely wrap yourself around it. It foundations the problem with ALL mandatory helmet use laws.) **Back**

Opinion #3: It is a commonly held misunderstanding that manufacturers are required to test helmets, or as stated here "responsible for testing its own helmets," which foundations a LOT of misunderstanding of the problem(s) with the statute. The manufacturer is only required to *certify* that a given helmet will, if tested,

not fail that testing. The manufacturer may, if they choose, test their helmets prior to certification of compliance with the federal standards, but there is absolutely no requirement that they test helmets themselves. or even have them tested by anyone else. It might not seem like an important point, but without making that point, this court, like others, would have a hard time explaining how anybody is supposed to know if a helmet actually meets the requirements of the federal standard -- FMVSS 218. In fact, since the tests destroy the helmet, there is **ABSOLUTELY NO WAY** anyone can tell whether **ANY** helmet is in compliance with FMVSS 218, at least not at a point where it can still be used. The police, just like bikers, are forced to rely on the **manufacturer's certification of compliance**, and **NOTHING ELSE!** If you think that fact alone makes helmet laws pretty ridiculous, welcome to the collective. **Back**

Opinion #4: See there?!? They just finished saying that the DOT sticker would serve as conclusive proof that a helmet meets the requirements of the helmet law, and then explain that it doesn't always. NHTSA gave the police that argument when they first introduced the story about "fake DOT stickers" and then created the "novelty helmet." If you read closely

throughout this decision, you will find that every time the court tells us that the DOT sticker has some meaning as to whether or not a helmet complies with the state statute, they then follow that up explaining how it might also not. There's never been another statute like this on the books in any state. We are entitled to know what is required of us in clear and concise terms. Although this court clearly understood that requirement for "notice," the other information provided in the opinion removes any chance of conveying that notice, as does the statute. That's why we continue to ask, "How can a motorcyclist comply, with certainty, with the provisions of the helmet law?" They continue to be unable to answer. **Back**

JELDERKS, Magistrate judge:

[The following text is heavily redacted with multiple horizontal lines in red and blue.]