

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LITTLE ARM INC. D/B/A B&B DISTRIBUTIONS,)
BOHEMIAN GROOVE LLC, MELX2 ENTERPRISES)
INC., and IDK ANYTHING LLC,)

Plaintiffs,)

v.)

Case No. 1:13-cv-862

PROSECUTORS: ADAMS, ALLEN, BARTHOLOMEW,)
BENTON, BLACKFORD, BOONE, BROWN,)
CARROLL, CASS, CLARK, CLAY, CLINTON,)
CRAWFORD, DAVIESS, DEARBORN, DECATUR,)
DEKALB, DELAWARE, DUBOIS, ELKHART,)
FAYETTE, FLOYD, FOUNTAIN, FRANKLIN,)
FULTON, GIBSON, GRANT, GREENE, HAMILTON,)
HANCOCK, HARRISON, HENDRICKS, HENRY,)
HOWARD, HUNTINGTON, JACKSON, JASPER,)
JAY, JEFFERSON, JENNINGS, JOHNSON, KNOX,)
KOSCIUSKO, LAGRANGE, LAKE, LA PORTE,)
LAWRENCE, MADISON, MARION, MARSHALL,)
MARTIN, MIAMI, MONROE, MONTGOMERY,)
MORGAN, NEWTON, NOBLE, OHIO, ORANGE,)
OWEN, PARKE, PERRY, PIKE, PORTER, POSEY,)
PULASKI, PUTNAM, RANDOLPH, RIPLEY, RUSH,)
ST. JOSEPH, SCOTT, SHELBY, SPENCER, STARKE,)
STEUBEN, SULLIVAN, SWITZERLAND,)
TIPPECANOE, TIPTON, UNION, VANDERBURGH,)
VERMILLION, VIGO, WABASH, WARREN,)
WARRICK, WASHINGTON, WAYNE, WELLS,)
WHITE, WHITLEY COUNTIES,)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND NOTICE OF
CHALLENGE TO CONSTITUTIONALITY OF STATE STATUTE

I. Introductory Statement

1. This action challenges the constitutionality of the portion of Senate Enrolled Act No. 536 (“Statute”), eff. May 7, 2013, which makes it illegal to, *inter alia*, possess, distribute, or

manufacture any “synthetic drug lookalike substance,” the definition of which is codified pursuant to IND. CODE § 35-31.5-2-321.5, and also challenges the constitutionality of the portion of Senate Enrolled Act No. 246 that amends IND. CODE § 35-48-4-11.5.

2. The Statute creates a definition of “synthetic drug lookalike substance” that tasks a reasonable person with comparing a substance at issue with innumerable chemicals and chemical families that are considered “synthetic drugs” under Indiana law, a task that a reasonable person would not necessarily be able to do.
3. The Statute also calls into play a large number of “factors” that should consider when making the determination if substance or product is in fact violating Indiana Law.
4. The Statute is therefore not objective and can easily be abused to fit whatever criteria law enforcement decides it wants to use on a particular day and lends itself to abuse and harassment of Indiana citizens and business owners.
5. The Statute is unconstitutional under the U.S. Constitution and the Indiana Constitution because:
 - a. It violates due process under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 12 of the Indiana Constitution because it is impossible for a person to know whether or not what they possess might be considered a “synthetic drug” by a “reasonable person” under Indiana law;
 - b. It is irrational in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 23 of the Indiana Constitution because given the current language of the Statute, a person is unable to determine whether or not they will be considered in violation of the law for possession what is otherwise a legal product; and

- c. It constitutes a regulatory taking of property in violation of the Fifth Amendment of the United States Constitution and Article I, Section 21 of the Indiana Constitution because products, which do not contain any enumerated banned substances, could be seized by law enforcement without any warning to the person who is in possession of it without just compensation;
6. The very concept of potentially possessing, distributing, or manufacturing a particular substance, whether intending to do so or not, based on a reasonable person's understanding of the chemical characteristics of infinitely many "synthetic drugs" defined under Indiana law is contrary to the Fourteenth Amendment to the U.S. Constitution and Section 21 of the Indiana Constitution.
7. The very concept of potentially possessing, distributing, or manufacturing a particular substance, whether intending to do so or not, based on a reasonable person's understanding of the chemical characteristics of infinitely many "synthetic drugs" defined under Indiana law is adverse to the freedoms guaranteed under the Fourteenth Amendment to the U.S. Constitution and Section 21 of the Indiana Constitution.
8. The very concept of criminalizing substances that to a "reasonable person" supposedly "look like" particular chemical formulas defined under Indiana law, based on non-exhaustive factors, including, but not limited to, whether the substance is exchanged for money, is utterly nonsensical and irrational, and inimical to the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 23 of the Indiana Constitution.
9. The very concept of denying Plaintiffs' and other Indiana citizens and businesses all economically beneficial or productive use of various products that they have paid for and

do not contain any substances which have been banned by the State of Indiana without just compensation is likewise inimical to the Fifth Amendment to the U.S. Constitution and Article I, Section 21 of the Indiana Constitution.

10. Injunctive and declaratory relief is therefore requested.

II. Jurisdiction, Venue, Cause of Action

11. This Court has jurisdiction over this cause of action pursuant to 28 U.S.C. §§ 1331 and 1343.

12. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391.

13. Declaratory relief is authorized by 28 U.S.C. §§ 2201, 2202, and by Rule 57 of the Federal Rules of Civil Procedure.

14. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States.

15. This preenforcement challenge to the Statute's constitutionality is available to Plaintiffs under Article III of the United States Constitution.

III. Parties

16. Little Arm Inc. d/b/a B&B Distributions ("Little Arm") is a for-profit Indiana corporation that manufactures and distributes, *inter alia*, novelty items, electric cigarettes, apparel, and aromatherapy products.

17. Little Arm is located in Fort Wayne, Indiana and distributes aromatherapy products throughout the State of Indiana, including Marion County, Indiana. Little Arm sues on its own behalf and on behalf of its customers.

18. Bohemian Groove LLC (“Bohemian Groove”) is a for-profit limited liability company organized under the laws of the State of Indiana that sells, *inter alia*, aromatherapy products.
19. Bohemian Groove’s principal place of business is located in Huntington, Indiana and sells its aromatherapy products in other Indiana counties, including Grant County. Bohemian Groove sues on its own behalf and on behalf of its customers.
20. MELX2 Enterprises Inc. (“MELX2”) is a for-profit Indiana corporation that sells, *inter alia*, aromatherapy products.
21. MELX2’s principal place of business is located in Bloomington, Indiana and sells its aromatherapy products in other Indiana counties, including Decatur County and Lawrence County. MELX2 sues on its own behalf and on behalf of its customers.
22. IDK Anything LLC (“IDK”) is a for-profit limited liability company organized under the laws of the State of Indiana that sells, *inter alia*, aromatherapy products.
23. IDK’s principal place of business is located in Carmel, Indiana and sells its aromatherapy products in other Indiana counties, including Marion County. IDK sues on its own behalf and on behalf of its customers.
24. The defendant prosecutors are the elected officials responsible for investigating and prosecuting criminal offenses (including those created by the Statute) within the various counties in the State of Indiana.
25. Defendants, by their actions and through public statements in the media, have targeted Plaintiffs’ legal businesses as the intended focus of the Statute.

IV. Legal Background

26. A true and accurate copy of Senate Enrolled Act No. 536 is attached to this Complaint as Exhibit “A.”

27. The Statute adds a new statutory provision, i.e. IND. CODE § 35-31.5-2-321.5, effective May 7, 2013, which provides:

- (a) “Synthetic drug lookalike substance”, except as provided in subsection (b), means one (1) or more of the following:
 - (1) A substance, other than a synthetic drug, which any of the factors listed in subsection (c) would lead a reasonable person to believe to be a synthetic drug.
 - (2) A substance, other than a synthetic drug:
 - (A) that a person knows or should have known was intended to be consumed; and
 - (B) the consumption of which the person knows or should have known to be intended to cause intoxication.
- (b) The term “synthetic drug lookalike substance” does not include the following:
 - (1) Food and food ingredients (as defined in IC 6-2.5-1-20).
 - (2) Alcohol (as defined in IC 7.1-1-3-4).
 - (3) A legend drug (as defined in IC 16-18-2-199).
 - (4) Tobacco.
 - (5) A dietary supplement (as defined in IC 6-2.5-1-16).
- (c) In determining whether a substance is a synthetic drug lookalike substance, the following factors may be considered:
 - (1) The overall appearance of a dosage unit of the substance, including its shape, color, size, markings or lack of markings, taste, consistency, and any other identifying physical characteristics.
 - (2) How the substance is packaged for sale or distribution, including the shape, color, size, markings or lack of markings, and any other identifying physical characteristics of the packaging.
 - (3) Any statement made by the owner or person in control of the substance concerning the substance’s nature, use, or effect.
 - (4) Any statement made to the buyer or recipient of the substance suggesting or implying that the substance is a synthetic drug.
 - (5) Any statement made to the buyer or recipient of the

substances suggesting or implying that the substance may be resold for profit.

- (6) The overall circumstances under which the substance is distributed, including whether:
 - (A) the distribution included an exchange of, or demand for, money or other property as consideration; and
 - (B) the amount of the consideration was substantially greater than the reasonable retail market value of the substance the seller claims the substance to be.

(“Synthetic Drug Lookalike Substance Definition”).

- 28. The Statute criminalizes the possession, distribution, and manufacture of synthetic drug lookalike substances.
- 29. The Synthetic Drug Lookalike Substance Definition demands that a reasonable person understand Indiana’s definition of “synthetic drug.”
- 30. IND. CODE § 35-31.5-2-321 defines “synthetic drug” as a multitude of specific chemicals, analogs of those chemicals, seven (7) chemical families, and “[a]ny compound determined to be a synthetic drug by rule adopted under IC 25-26-13-4.1.” I.C. § 35-31.5-2-321(9) (“Synthetic Drug Definition”).
- 31. The Synthetic Drug Definition is attached hereto as Exhibit “B.”
- 32. The Synthetic Drug Definition includes compounds emergency scheduled by the Indiana Board of Pharmacy pursuant to IND. CODE § 25-26-13-4.1.
- 33. As of the filing of this Complaint, the Indiana Board of Pharmacy had promulgated three (3) emergency rules that have since been codified in the Statute.
- 34. The Statute further demands that a reasonable person understand Indiana’s definition of “analog” because an “analog” of a “synthetic drug” is itself considered a “synthetic drug.”
- 35. IND. CODE § 35-31.5-2-16.5 defines “analog” as:

[A] new or novel chemical entity, independent of synthetic route or natural origin, having substantially the same:

- (1) carbon backbone structure; and
- (2) pharmacological mechanism of action;

as a compound specifically defined as a synthetic drug in section 321 of this chapter.

36. The Synthetic Drug Definition and the Analog Definition are circular; therefore, analogs of analogs (and so forth) would fall within the Synthetic Drug Definition.

37. The Synthetic Drug Lookalike Substance Definition could be interpreted by a reasonable person to include the following:

- a. cigarettes (since only the tobacco plant itself is exempted from that definition) because the cigarettes can be resold for profit and the retail value and it has an intoxicating affect;
- b. traditional potpourri since it could be said that it looks a synthetic drug. A true and accurate depiction of traditional potpourri is attached hereto as Exhibit "C;"
- c. stamps since they look like the packaging that could contain LSD;
- d. catnip since it looks like marijuana;
- e. talcum powder since some drugs are white powdery substances;
- f. individual packages of condoms since they are sold individually and the consideration they are sold for is much greater than the retail market value if they were bought in bulk. A true and accurate photograph of an individual condom package is attached hereto as Exhibit "D."

38. Complicating matters further, a reasonable person, given that in order for a substance to in fact be a synthetic drug it must contain a specific set of chemicals which are identified

in the statute; a person cannot say what a synthetic drug looks like and therefore be able to say that a substance is a lookalike synthetic drug.

V. Factual Allegations

39. Prior to the State's enactment, Defendants used law enforcement personnel to target Plaintiffs' customers and/or vendors in order to convince said customers and vendors to cease conducting business with those Plaintiffs.
40. Little Arm and its principal and employees were subjected to a search and seizure on or about December 20, 2012, by members of law enforcement, including but not limited to the Fort Wayne Police Department; Bohemian Groove was subjected to searches and seizures on or about May 29, 2012, and on or about September 18, 2012; and MELX2 has been subjected to searches and seizures, including a search and seizure on or about January 17, 2013, all of which were conducted in relation to Little Arm's, Bohemian Groove's, and MELX2's respective aromatherapy products.
41. After the Statute's enactment, an agent of the Indiana State Excise Police seized from a non-party multiple units of a product manufactured by Little Arm, claiming said product to be a lookalike substance.
42. Upon information and belief, after the Statute's enactment, an agent of the Indiana State Excise Police threatened adverse action against a business in the event that business would later choose to sell aromatherapy or air freshener products sold by one of the Plaintiffs.
43. Plaintiffs have suffered a significant loss of revenue and goodwill in their respective communities as a result of Defendants' actions, and will continue to suffer those losses so long as Defendants persist in targeting Plaintiffs' lawful business activities with baseless

accusations, threats, and/or intimidation through media statements and harassment of Plaintiffs' customers and/or vendors.

44. Plaintiffs' respective aromatherapy products do not contain synthetic drugs, but have been suggested by members of Indiana's law enforcement and Indiana's media to contain synthetic drug lookalike substances, despite Plaintiffs' intentions and efforts to comply with federal and Indiana law.

45. First, Plaintiffs manufacture, distribute, and/or sell their respective aromatherapy products in packaging which conspicuously warn that said products are not intended for human consumption and provide instructions for proper usage.

46. A true and accurate photograph of Little Arm's "B2 Da Bomb" product and its packaging, as it existed before the Statute's enactment, is attached hereto as Exhibit "E."

47. Next, as part of Plaintiffs' respective business protocols, Plaintiffs obtain testing results for their proposed aromatherapy products from reputable laboratories to determine whether those products adhere to federal and Indiana law before attempting to manufacture, distribute, or otherwise sell those products.

48. As a result of the Statute's enactment, Plaintiffs no longer can determine whether the current contents of their respective aromatherapy products would fall within the Synthetic Drug Lookalike Substance Definition.

49. A laboratory that Plaintiffs previously used for their testing now refuses to provide an opinion on whether the current contents of Plaintiffs' aromatherapy products would fall within the Synthetic Drug Lookalike Substance Definition.

50. If law enforcement makes a "determination" that Plaintiffs' respective aromatherapy to contain synthetic drug lookalike substances, then Plaintiffs would be forced to shut down

their respective businesses altogether, as their respective aromatherapy product sales constitute a large percentage of their gross revenues.

51. A flyer is present on the Indiana Department of Revenue Website which is titled “Legal Notice” and states, among other things, “RELIANCE ON PACKAGING REPRESENTATIONS, SUPPLIER REPRESENTATIONS, AND LAB REPORTS SHALL BE DONE AT YOUR OWN RISK.” (the “Flyer”). A true and accurate copy of the Flyer is attached hereto as Exhibit “F.”
52. This particular Flyer appears to be aimed at Indiana businesses and is available under a link which states “If you are operating a convenience store or plan to sell bath salts, spice or synthetic drugs, click here.” A true and accurate picture of the webpage with this statement is attached hereto as Exhibit “G.”
53. The Flyer contains the endorsement by the Indiana State Police, Indiana Department of Revenue, Indiana Attorney General, Indiana State Department of Health, Indiana Board of Pharmacy and Indiana Sheriff’s Association.
54. The Flyer attempts to prevent business owners from selling products which are not illegal.
55. The Flyer gives a preview of how law enforcement will attempt to enforce the new Statute; by prosecuting businesses for selling products that do not contain any substances that are listed in the synthetic drug law but that law enforcement decide they believe are look like “synthetic drugs.”
56. Therefore, the Statute directly hinders Plaintiffs’ ability to continue conducting their respective businesses in the State of Indiana.

57. Moreover, the Statute does not provide just compensation to Plaintiffs for threatening to deny or otherwise denying Plaintiffs' all economically beneficial or productive use of their respective aromatherapy product inventory.
58. Alternatively, the Statute would require the Plaintiffs to routinely conduct large sample size polls of "reasonable persons" to determine whether Plaintiffs' respective aromatherapy products are considered by said persons to contain synthetic drug lookalike substances.
59. The costs of conducting such polls on a regular basis would be tremendous.
60. In light of the confusion surrounding what substances the Synthetic Drug Lookalike Substance Definition covers, Plaintiffs are immediately in danger of sustaining direct injury in the form of prosecution, searches, and seizures, especially since many of them were subjected to searches and seizures during a period in which Indiana's laws were more defined.
61. Merely by selling their aromatherapy products in exchange for consideration, Plaintiffs would be considered having met one of the Synthetic Drug Lookalike Substance Definition's factors that could lead one to believe that a synthetic drug was being sold, regardless of Plaintiffs' intent.
62. The term "spice" has been used as a slang term by members of law enforcement in Indiana and Indiana-based media to refer to "synthetic drugs."
63. "Spice" is also a brand of herbal incense.
64. "Spice" is one of the original substances that prompted the Indiana legislature to begin regulating herbal incense.

65. A true and accurate photograph of the packaging for “Spice” and its contents is attached hereto as Exhibit “H.”
66. Merely by selling its aromatherapy products in packaging which is similar in shape and size to the packaging containing the product called “Spice”, Plaintiffs would be considered to have met one of the Synthetic Drug Lookalike Substance Definition’s factors that could lead one to believe that a synthetic drug was being sold, regardless of Plaintiffs’ intent, especially considering the information the State is including in the Flyer.
67. Plaintiffs have no adequate remedy at law and will suffer irreparable harm if their request to preliminarily and permanently enjoin the Statute’s enforcement is denied.
68. Plaintiffs have a likelihood of success on the merits.
69. The balancing of harms favors granting preliminary and permanent injunctive relief.
70. The public interest would not be harmed by preliminarily enjoining the unconstitutional Statute’s enforcement.
71. A decision favoring Plaintiffs in this litigation would redress Plaintiffs’ injuries described herein.

VI. Legal Claims

72. The Statute is unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.
 - a. The Statute is vague because it (i) fails to provide definite notice to individuals regarding what behavior is criminalized and (ii) invites arbitrary and discriminatory enforcement.

- b. The Statute provides no mandatory ascertainable standards for determining what substances are actually banned, thereby denying any party of interest notice of their alleged violation of the Statute.

73. The Statute is fundamentally irrational and therefore is unconstitutional in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 23 of the Indiana Constitution.

74. The Statute constitutes a regulatory taking of property in violation of the Fifth Amendment of the United States Constitution and Article I, Section 21 of the Indiana Constitution.

- c. The Statute, as written, permits a regulatory taking even absent seizure in that it leaves no reasonable economically viable use of Plaintiffs' aromatherapy products.
- d. The seizure of Plaintiffs' property would be based entirely on the subjective beliefs of law enforcement and will deprive Plaintiffs of both the purchase price of any subjected items, as well as the potential profits associated with those items.
- e. Any such enforcement of the Statute at Plaintiffs' businesses will have a chilling effect on the lawful activities of business and will deprive Plaintiff of their right to transact business as licensed, tax-paying retailers.
- f. The Statute also deprives Plaintiffs the liberty to conduct business, enter into contracts and fulfill contractual obligations.
- g. Unless and until the enforcement of the Statute is enjoined, the Plaintiffs will suffer and continue to suffer irreparable harm to their federal and state

constitutional rights to avoid being deprived of private property without just compensation.

75. The Statute is additionally unconstitutional in that it interferes with existing contracts in violation of Article I, Section 10 of the United States Constitution.

VII. Request for Relief

WHEREFORE, Plaintiffs request that this Court:

- a. Accept jurisdiction of this case;
 - b. Declare the Statute unconstitutional in its entirety both on its face and as applied to the Plaintiffs for the reasons specified above;
 - c. Enter a preliminary injunction, later to be made permanent, enjoining the enforcement of the Statute;
 - d. Award Plaintiffs their costs and attorneys' fees pursuant to 42 U.S.C. § 1988;
- and
- e. Award all other proper relief in the premises.

Respectfully submitted,

s/ Mark W. Rutherford

s/ Stephen R. Donham

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