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Administrative & Constitutional Law—Reliance on Indiana Pharmacy Board’s Synthetic Drug Statute Creates Constitutionally Void Criminal Statute—*Tiplick v. State of Indiana*, 25 N.E.3d 190 (Ind. Ct. App. 2015).

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The legislature grants administrative agencies the ability to implement binding law, however, issues arise when the regulations drafted by these agencies conflict with constitutional requirements.¹ The Indiana Pharmacy Board, a state regulatory agency, has statutory authority to determine which chemicals and chemical compounds constitute illegal synthetic drugs and the ability to issue an Emergency Rule that lists newly discovered synthetic drugs.² In *Tiplick v. State of Indiana*,³ the Court of Appeals of

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¹ See U.S. CONST. amend. V; U.S. CONST. amend. XIV; *infra* note 18 and accompanying text (describing administrative law and its constitutional concerns).

² See IND. CODE § 35-31.5-2-321 (2012) (defining precisely what a “synthetic drug” means); IND. CODE § 35-31.5-2-321.5 (2012) (providing the clarification of a “synthetic drug lookalike substance”); IND. CODE § 35-48-4-10 (2012) (describing the criminal consequences associated with the dealing in hash or synthetic cannabinoid); IND. CODE § 35-48-4-10.5 (2012) (describing the criminal consequences associated with dealing synthetic drugs or lookalikes); IND. CODE § 35-48-4-11 (2012) (describing the criminal consequences associated with possession of hash or synthetic cannabinoid); Ind. Code § 35-48-4-11.5 (2012) (describing the criminal consequences associated with possession of synthetic drugs or lookalikes); IND. CODE § 35-48-4-12 (2012) (describing the condition discharge associated with the first offense of possessing synthetic drugs). The Pharmacy Board may also issue an Emergency Rule related to synthetic drugs:

(a) The board may adopt an emergency rule to declare that a substance is a synthetic drug. (b) The board may, on its own initiative or under a written request from the state police department, the United States Drug Enforcement Administration, or a poison control center, adopt an emergency rule declaring a substance to be synthetic drug if the board finds that the substance: (1) has been scheduled or emergency scheduled by the United States Drug Enforcement Administration; (2) has been scheduled, emergency scheduled, or criminalized by another state; or (3) has: (A) a high potential for abuse; and (B) no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision. (c) In making its determination under subsection (b)(3), the board shall consider the

Indiana considered whether the Indiana synthetic drug statute, and by implication, the Indiana Pharmacy Board's Emergency Rule, were void for vagueness.⁴ The court in *Tiplick* ultimately held that the Indiana Pharmacy Board's complex statutory language did not clearly set forth provisions describing prohibited conduct in a manner which a person of ordinary intelligence could understand.⁵

Christopher Tiplick ("Tiplick") owned and operated a chain of three smoke shops in Marion County, Indiana, where he sold various synthetic drugs.⁶ After an undercover operation by the Indianapolis Metro Police Department, Tiplick was charged with selling, possessing, and entering into a conspiracy to sell XLR11 in September and October of 2012.⁷ At the time of the arrest, the Indiana Pharmacy

following factors relating to the substance: **(1)** The actual or relative potential for abuse. **(2)** Scientific evidence of the substance's pharmacological effect, if known. **(3)** The state of current scientific knowledge regarding the substance. **(4)** The history and current pattern of abuse of the substance. **(5)** The scope, duration, and significance of abuse of the substance. **(6)** The degree of risk to the public health. **(7)** The psychic or psychological dependence liability of the substance. **(d)** A rule adopted under this section becomes effective thirty (30) days after it is filed with the publisher under IC 4-22-2-37.1. **(e)** A rule adopted under this section expires on June 30 of the year following the year in which it is filed with the publisher under IC 4-22-2-37.1. **(f)** The board may readopt under this section an emergency rule that has expired.

IND. CODE § 25-26-13-4.1 (2012). "We have held that the Legislature may constitutionally delegate rule-making powers to an administrative agency if that delegation is accompanied by sufficient standards to guide the agency in the exercise of its statutory authority." *Barco Beverage Corp. v. Indiana Alcoholic Beverage Comm'n*, 595 N.E.2d 250, 253-54 (Ind. 1992). See also Joseph A. Cohen, *The Highs of Tomorrow: Why New Laws and Policies are Needed to Meet Unique Challenges of Synthetic Drugs*, 27 J.L. & HEALTH 164, 165 (2014). Synthetic substances are designed "to mimic the molecular structures and effects of controlled substances." *Id.*

³ 25 N.E.3d 190 (Ind. App. Jan. 27, 2015).

⁴ *Id.* at 192.

⁵ *Id.*

⁶ *Id.* at 191. See Jack Rinehart, *Indy Smoke Shop owner faces 18 felony charges in synthetic drug arrest*, THE INDY CHANNEL (Oct. 19, 2012, 7:11 PM), <http://www.theindychannel.com/news/local-news/indy-smoke-shop-owner-faces-18-felony-charges-after-synthetic-drug-arrest> (describing the facts surrounding Tiplick's arrest).

⁷ *Tiplick*, 25 N.E.3d at 191. XLR11 is a synthetic drug compound made of XLR11(1-(fluoropentyl)indol-3-yl)-2, 2, 3, 3-tetramethylcyclopropy) methanone). *Id.* See Rinehart, *supra* note 6. The raid of Tiplick's three smoke shops resulted in over 1,800 packets of synthetic drugs

Board had recently filed an Emergency Rule that placed XLR11 on the banned synthetic drug list.⁸ Consequently, Tiplick was charged with eighteen counts in violation of the Indiana synthetic drug statute.⁹

Tiplick moved to dismiss the counts against him, claiming that the Indiana synthetic drug statute and the Pharmacy Board's Emergency Rule were unconstitutionally void for vagueness.¹⁰ The trial court denied Tiplick's motion and

and over \$8,300 in cash. *Id.* In September 2012, around the time the synthetic drug statute was implemented, Marion County sent letters to retailers notifying them that any sale of synthetic drugs and look-alike substances (a form of synthetic drug created to mimic the effects of illegal drugs) would be prosecuted. *Id.* See also Press Release, Attorney General, Curry, Zoeller join forces to put retailers on notice about sale of illegal synthetic drugs (Sept. 5, 2012, 11:59PM), available at <http://archive.indystar.com/assets/pdf/BG19428795.PDF> (announcing the Attorney General's plan to notify retailers of prosecution if synthetic drugs are sold).

⁸ *Tiplick*, 25 N.E.3d at 194. See Indiana Board of Pharmacy Emergency Rule, LSA Document #12-493(E), IND. REG. (Aug. 15, 2012, 2:56 PM), <http://www.in.gov/legislative/iac/20120822-IR-856120493ERA.xml.pdf> (listing XLR11 as an illegal synthetic drug).

⁹ *Tiplick*, 25 N.E.3d at 191. Tiplick's charges included:

Count I, Class C felony conspiracy to commit dealing in a lookalike substance; Count II, Class C felony dealing in a lookalike substance; Count III, Class C felony conspiracy to commit dealing in a lookalike substance; Count IV, Class C felony dealing in a lookalike substance; Count V, Class C felony conspiracy to commit dealing in a lookalike substance; Count VI, Class C felony dealing in a lookalike substance; Count VII, Class D felony conspiracy to commit dealing in a synthetic drug; Count VIII, Class D felony dealing in a synthetic drug; Count IX, Class D felony possession of a synthetic drug; Count X, Class D felony conspiracy to commit dealing in a synthetic drug; Count XI, Class D felony dealing in a synthetic drug; Count XII, Class D felony possession of a synthetic drug; Count XIII, Class D felony conspiracy to commit dealing in a synthetic drug; Count XIV, Class D felony dealing in a synthetic drug; Count XV, Class D felony possession of a synthetic drug; Count XVI, Class C felony dealing in a lookalike substance; Count XVII, Class D felony dealing in a synthetic drug; and Count XVIII, Class D felony possession of a synthetic drug.

Id.

¹⁰ *Id.* at 191. Among Tiplick's unconstitutional vagueness claim, Tiplick argued that the Indiana synthetic drug statute as well as the Emergency Rule were "unconstitutionally 'vague' in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve and Thirteen of the Constitution of the State of Indiana and . . . the statutes cited violate the Distribution of Powers Clause contained in Article Three, Section One of the Constitution of the State of Indiana." *Id.* at 191-92 (citing App. Motion to Dismiss at 37). The Court of Appeals of Indiana did not find the need to discuss these issues, as the constitutional vagueness claim was dispositive. *Id.* at 192, n.7.

upheld the Indiana synthetic drug statute as constitutionally valid.¹¹ The trial court held that it was the duty of the individual to monitor statutes before taking action and placing themselves at risk of prosecution.¹² Tiplick subsequently moved to certify the court's order for interlocutory appeal and the Court of Appeals of Indiana accepted jurisdiction.¹³

Synthetic drugs, chemically crafted substances intended to produce reactions similar to controlled substances, have increased in production at an astonishing rate since U.S. Border Patrol first discovered them in the United States in 2008.¹⁴ As more synthetic drugs reached consumers, concerns grew over misconceptions that the drugs were safe for human consumption.¹⁵ Recognizing the need for regulation, State Senator

¹¹ *Id.* at 192 (describing that the statute did not violate the Constitution).

¹² *Tiplick*, 25 N.E.3d at 192.

¹³ *Id.* at 192 (accepting to reconsider the denial of Tiplick's motion to dismiss before trial by trial court).

¹⁴ See Cohen, *supra* note 2, at 164. "Synthetic drugs, as opposed to naturally occurring drugs (e.g. cocaine and opium), are man-made chemical substances that are manufactured in laboratories and are designed to mimic the molecular structures and effects of controlled substances." *Id.* In 2008, law enforcement authorities first discovered the existence of synthetic drugs when noticing the sale of "legal" alternatives to cocaine and heroin. *Id.* See also *Synthetic Drug Fact Sheet*, Office of National Drug Control Policy, Executive Office of the President, THE WHITE HOUSE (last visited Sept. 13, 2015), available at https://www.whitehouse.gov/sites/default/files/page/files/synthetic_drugs_fact_sheet_455_2_15_12.pdf. Officials have encountered the manufacturing and sale of such synthetic drugs within residential neighborhoods and the drugs are also available for shipping via the Internet. *Id.* See also Tricia Escobedo, *What you need to know about synthetic drugs*, CNN (Sept. 13, 2013), <http://www.cnn.com/2013/09/13/health/synthetic-drugs-7-things/> (describing the health risks associated with synthetic drugs); Abby Phillip, *DEA raids synthetic drug manufacturers in a major nationwide crackdown*, Washington Post (May 7, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/05/07/dea-raids-synthetic-drug-manufacturers-in-a-major-nationwide-crackdown/> (last visited Sept. 13, 2015) (describing the DEA's first seizure of synthetic marijuana). Only two synthetic cannabinoids were known of in 2009 however as of 2012 that number spiked to 158. *Synthetic Drugs*, Office of National Drug Control Policy, THE WHITE HOUSE, available at <https://www.whitehouse.gov/ondcp/ondcp-fact-sheets/synthetic-drugs-k2-spice-bath-salts> (last visited Sept. 13, 2015).

¹⁵ See *Synthetic Drug Threats*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 13, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/synthetic-drug-threats.aspx> (highlighting the increasing health concerns associated with synthetic drugs and legislature's attempt to control them). The health risks to the public from the use of synthetics is so great because the effects and contents are so unpredictable as a result of the continuously changing

Jim Merritt (R-Indianapolis) introduced House Bill 1196 to the Indiana General Assembly, which expanded Indiana's ability to tackle the dangerously evolving synthetic drug market.¹⁶

makeup and the lack of governmental regulation or oversight during production. *Id.* See *Synthetic Drug Fact Sheet*, THE WHITE HOUSE, *supra* note 14. See also *Indiana Cracking Down on Synthetic Drugs*, GOVERNING.COM (May 23, 2014), <http://www.governing.com/news/headlines/indiana-cracking-down-on-synthetic-drugs.html>. Senator Merritt, R-Indianapolis, described the threat synthetic drugs have on the community: “[h]oosiers under the impression that designer drugs are safer than the illicit substances they are designed to mimic are paying with their lives.” *Id.* On March 4, 2012, Yvette Burnett found her son dead in their family hot tub after trying synthetic marijuana. Ayesha Tejpar, *Synthetic Drugs: Warning Signs and What You Need to Know*, CNN (Dec. 1, 2014), <http://www.cnn.com/2014/12/01/us/iyw-synthetic-drugs-resources/index.html>. She spoke on the senseless death caused by synthetic drugs: “A child, teenagers, walk into a store thinking it’s legal, thinking it’s not going to hurt them. They purchased something that shouldn’t be sold. And we just don’t want the pain of what we’re going through to affect other families.” *Id.*

¹⁶ See H.R. 1196, 117th Gen. Assemb., 2nd Reg. Sess. (Ind. 2012), *available at* <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2012&request=getBill&docno=1196>. See generally *Criminal Law*, THE LEGISLATIVE UPDATE, THE INDIANA JUDICIAL CENTER (Feb. 24, 2012) <http://indianacourts.us/blogs/legislative/?p=1781> (blogging Sen. Merritt’s introduction of the changes to Indiana’s synthetic drug statutes). Senator Merritt’s decision to call for swift legislative action resulted from the news of a 17-year-old girl was hospitalized after alleging buying synthetic drugs from a gas station. Press Release, Senate Republican Caucus, Sen. Merritt Calls Emergency Meeting on Synthetic Drugs (Oct. 17, 2012), *available at* http://www.in.gov/activecalendar/EventList.aspx?fromdate=10/17/2012&todate=10/17/2012&display=Month&type=public&eventidn=59752&view=EventDetails&information_id=120578&print=print. See also Dave Stafford, *Zoeller asks justices to uphold ‘Spice’ law COA struck down*, THE INDIANA LAWYER (Mar. 2, 2015), <http://www.theindianalawyer.com/article/print?articleId=36502>. The current Attorney General Greg Zoeller of Indiana addressed the increasing problems: “Synthetic drug law is designed to be flexible and allow the Board of Pharmacy to update the banned synthetics list because the nature of these drugs allows manufactures to come up endless new versions of these deadly products.” *Id.* The Attorney General went on to say that individuals, particularly the youth, tend to believe synthetic drugs are safer because they are sold at retail. *Id.* He further claimed that finding the Indiana statute is void for vagueness only sets back the progress made in protecting the community and makes it more difficult to prosecute evolving chemical compounds. *Id.* Senator Merritt noted the legislation was especially important in order to place pressure on those attempting to bend the law and the definition of “legal” in order to avoid existing synthetic drug law. *Indiana Cracking Down on Synthetic Drugs*, *supra* note 15. Since the decision in *Tiplick*, Senator Merritt introduced a new piece of legislation, Bill No. 0093, in order clarify the illegality of synthetic drugs and the Pharmacy Board’s ability to declare a substance a synthetic drug if *Tiplick*’s ruling stands. S.B. 93, 119th Gen. Assemb. 1st Reg. Sess. (Ind. 2015), *available at* <https://iga.in.gov/legislative/2015/bills/senate/93#> (last visited Dec. 23, 2015). The bill:

requires the publisher of the Indiana administrative code to publish a list of substances declared by the board of pharmacy to be synthetic drugs in a specific location in the Indiana administrative code, and requires the board of

To appropriately regulate the extremely complex pharmaceutical drug market, the Indiana executive branch created the Indiana Pharmacy Board within the Indiana Professional Licensing Agency.¹⁷ The creation of the Pharmacy Board allowed experts within the field of pharmaceutical distribution to implement binding laws and regulations without encountering the bureaucratic hurdles of the state legislature.¹⁸ In

pharmacy to include a link to that provision of the Indiana administrative code on its Internet web site.

Id. See also Kristine Guerra, *Do you understand Indiana's spice law?* INDY STAR (Feb. 3, 2015 10:48AM), <http://www.indystar.com/story/news/crime/2015/02/02/understand-indianas-spice-law/22656847/> (describing local law enforcement frustration with the majority's decision in *Tiplick*).

¹⁷ See Indiana Professional Licensing Agency: Indiana Board of Pharmacy, *available at* <http://www.in.gov/pla/pharmacy.htm> (last visited Oct. 16, 2015). The Pharmacy Board consists of six pharmacists and one member of the general public appointed by the governor for terms of four years. Indiana Board of Pharmacy: Members of the Indiana Board of Pharmacy, *available at* <http://www.in.gov/pla/2941.htm> (last visited Oct. 16, 2015). See Indiana Board of Pharmacy and Indiana Professional Licensing Agency Laws and Regulations, A Compilation of Indiana Code and Indiana Administrative Code 35 (2013 ed.) *available at* http://www.in.gov/pla/files/2013_Law_Compilation.pdf (compiling all of the Indiana Pharmacy Board's duties granted by Indiana Statute). See generally Todd J. Weatherholt, *Not for Human Consumption: How Inept Legislative Policy Proliferates the Synthetic Drug Problem*, 103 KY. L.J. 1, 2-3, *available at* <http://law-apache.uky.edu/wordpress/wp-content/uploads/2015/02/Weatherholt-Note-Final-Typeset-1.pdf> (last visited Oct. 16, 2015) (discussing the legislative struggles with synthetic drug protection).

¹⁸ See IND. CONST. art. III, § 1. "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." *Id.* See IND. CONST. art. IV, § 20 (stating "[e]very act and joint resolution shall be plainly worded, avoiding . . . the use of technical terms"). See Richard J. Peirce, *Administrative Law* (2nd ed., 2008) (analyzing the political and legal nature of administrative law). The idea is that these agencies are far better off knowing what is most important in the field than any general legislator walking the halls of Congress. *Id.* Congress is simply unable to carry out the functions of every particular field of law without the use of agencies and therefore, Congress' reliance on agencies is great. *Id.* The development of Administrative law and agencies came to address growing public problems that were particular to certain issues in the early nineteenth century. See ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS, IN A NUTSHELL 1 (2006). The flexibility of regulatory process and agency's resources is another reason administrative law is so heavily relied upon as opposed to the strenuous congressional process and years of litigation within the judicial branch. *Id.* at 2. Particularly within the economic sector, the uniformity and predictability of agencies is highly depended upon. *Id.* at 11. See also NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (upholding National Labor Relations Board's ability to adjudicate cases granted by Congress); SEC v. Chenery Corp., 332 U.S. 194 (1947) (upholding agencies' traditional ability to implement generally applicable rules of administrative law); See City of Carmel v. Martin Marietta Materials,

2012, the Indiana legislature granted the Pharmacy Board the ability to declare a substance a synthetic drug, as well as the ability to issue an Emergency Rule declaring a chemical or chemical compound an illegal synthetic drug.¹⁹ Although both the House and Senate largely supported the act, some argued that conferring agencies with the ability to implement law raised questions of the constitutionality of those laws.²⁰

In drafting criminal legislation, the validity of a statute rests in its plain language.²¹ In *Healthscript Inc. v. State*, the Indiana Supreme Court questioned the

Inc., 883 N.E.2d 781 (Ind. 2008) (holding a mining ordinance did not unlawfully assign legislative authority to administrative officials).

¹⁹ See *supra* note 2 and accompanying text (outlining the criminal statute of the list of banned substances). The Indiana Board of Pharmacy is tasked with the responsibility of overseeing the Drug Legend, pharmacists, pharmacies, drug stores, physician assistants, controlled substances, Indiana State Board of Nursing, and the Synthetic Drug Emergency Rule. See also Statutes & Rules, Indiana Board of Pharmacy, available at <http://www.in.gov/pla/2545.htm> (outlining the Synthetic Drug Emergency statutes and rules).

²⁰ See *Tiplick v. State*, 25 N.E.3d 190, 194-95 (2015) (stating that defendant argued that the statutes are unconstitutionally vague). See H.R. 1196, 117th Gen. Assemb., 2nd Reg. Sess. (Ind. 2012), available at <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2012&request=getBill&docno=1196> (reporting the House and Senate votes of 2012 House Bill 1196). See *Klein v. State*, 698 N.E.2d 296 (Ind. 1998). A statute or law is void for vagueness if its prohibitions are not distinctively defined. *Id.* at 299. A law can also be void for vagueness if the language suggests arbitrary or discriminatory application. *Id.* “There must be something in a criminal statute that indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur. It cannot be left to juries, judges and prosecutors to draw such lines.” *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985). See generally *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1268 (10th Cir. 2008) (stating the court’s process to find proof of factual assertions should be direct). At times the Supreme Court has suggested using the non-delegation doctrine (Congress’ non-delegable power to issue policy decisions that result in legally binding consequences) to hold statutes and law issued by agencies from the rulemaking power granted by Congress as unconstitutional. See *Gellhorn & Levin, supra* note 18, at 2 (explaining why there is an influx in new agencies and regulatory programs). An issue arises between administrative law and constitutional law when agencies attempt to solve constitutional concerns using their rulemaking powers. Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1901 (2013). Some argue that allowing the uniform practice of agency rulemaking jeopardizes basic individual constitutional rights, and courts failure to address these constitutional concerns undercut the constitutional rights of every citizen. Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2033 (2011).

²¹ See *Brown v. State*, 868 N.E.2d 464 (Ind. 2007). In light of criminal statutes “a criminal statute may be invalidated for vagueness for either of two independent reasons: (1) for failing to provide notice enabling ordinary people to understand the conduct that it prohibits, and (2) for the possibility that it authorizes or encourages arbitrary or discriminatory enforcement.” *Id.* at 467 (citing *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)). However, a constitutionally valid

validity of a Medicaid fraud statute when it analyzed whether the language within the statute allowed a person of ordinary intelligence to fully comprehend the statute.²² The Indiana Supreme Court held that the language provided in the Indiana Medicaid fraud statute was “too attenuated to permit [] prosecution to proceed.”²³ Following *Healthscript*, the Court of Appeals of Indiana upheld the constitutionality of the synthetic drug law for the first time in *Kaur v. State* after the validity of the law’s language was questioned soon after its enactment.²⁴ Later, in *Elvers v. State*, the Court of Appeals of Indiana upheld the Indiana synthetic drug law and ruled it was not too complex for an

statute does not have to give an itemized list of prohibited conduct. *See* *State v. Lombardo*, 738 N.E.2d 653, 656 (Ind. 2000). *See generally* *Dewald v. State*, 898 N.E.2d 488, 493 (Ind. Ct. App. 2008) (reiterating that “ignorance of the law is no excuse for criminal behavior”); *Marmont v. State*, 48 Ind. 21, 31 (1874) (stating “every man is presumed to know the laws of the country in which he dwells”).

²² 770 N.E.2d 810 (Ind. 2002). In *Healthscript*, the Court of Appeals of Indiana affirmed the denial of the defendant’s motion to dismiss the charges. *Id.* at 812. On appeal, the Supreme Court of Indiana reversed the Court of Appeals of Indiana’s ruling and held that the Indiana criminal statute under which the defendant was charged was “too vague in defining the conduct sought to be proscribed to meet the requirements of due process.” *Id.* at 816.

²³ *Id.* at 815. The charge under Indiana Code referenced entirely different Indiana Code, which covered over 50 pages and 280 sections in 37 organized sections. *Id.* at 816. The statute was therefore too cumbersome to place the defendant, or any person of ordinary intelligence, on notice. *Id.*

²⁴ *Kaur v. State*, 987 N.E.2d 164 (Ind. Ct. App. 2013) (discussing concerns regarding vagueness of synthetic drug charging statutes). In *Kaur*, the defendant claimed that the charging statute did not provide enough specific information to put her on notice of the crime, that the synthetic drug statute was unconstitutionally vague, and that the synthetic drug statute violated the delegation of powers. *Id.* at 166. The defendant’s arguments here rested only on those synthetic drugs that the board could designate. *Id.* at 169. “[The defendant’s] synthetic drug vagueness challenge to Indiana’s synthetic drug laws fails because her argument applies only to synthetic drug laws that have been or might be designated by the Board.” *Id.* The Court of Appeals of Indiana upheld *Kaur*’s conviction because the synthetic drug alleged to have been possessed and dealt was explicitly named in the relevant statutes. *Id.* at 168-69. *See generally* *Baumgartner v. State*, 891 N.E.2d 1131, 1136 (Ind. Ct. App. 2008). “[A] statute is void for vagueness only if its vagueness as applied to the precise circumstances of the present case. The defendant is not at liberty to devise hypothetical situations which might demonstrate vagueness.” *Id.* The court in *Kaur* also had the opportunity to address whether the synthetic drug law represented an unconstitutional delegation of legislative authority by violating the Indiana Distribution of Powers Clause. *Kaur*, 987 N.E.2d at 169. The court held that the synthetic drug under which the Defendant was charged under was outlawed by the General Assembly and thus capable of constitutional application. *Id.* at 169. However, the court did not address whether synthetic drugs declared by the Pharmacy Board under rulemaking policies would violate the Distribution of Powers Clause. *Id.*

ordinary person to comprehend.²⁵

In *Tiplick v. State*, the majority held that the Indiana synthetic drug statute and the Indiana Pharmacy Board's Emergency Rule were void for vagueness because the Indiana synthetic drug law had "numerous cross references, undefined terms, and required monitoring of Indiana statutes and promulgations of the Pharmacy Board [which could not] be understood by an ordinary person."²⁶ In applying the analysis of *Healthscript*, the Court of Appeals of Indiana reasoned that an individual of ordinary intelligence could not be expected to understand the list of illicit chemicals and chemical compounds cataloged as synthetic drugs under the Indiana statute.²⁷ The majority went on to note that XLR11 was listed as a "synthetic substance" under the Emergency Rule, and because the Indiana synthetic drug statute only allowed the Indiana Pharmacy Board to declare a chemical a "synthetic drug" and not a "synthetic substance," the distinction

²⁵ *Elders v. State*, 22 N.E.3d 824 (Ind. Ct. App. 2014) (discussing whether a statute can be unconstitutional due to vagueness). Among evidentiary issues and probable cause issues, in *Elders* the Court of Appeals of Indiana addressed whether the synthetic drug statute was unconstitutional for vagueness. *Id.* at 830. The defendant argued that the synthetic drug statute was written, "like a chemical engineer's dissertation, [such that] ordinary citizens, who are supposed to be at the top of the power chain, will not know what is proscribed." *Id.* (citing Appellant's Br., 7-8). The court disagreed and held that certain fields of law require the scientific nature and terminology in order to appropriately enforce the law. *Id.* Furthermore, "[b]y identifying both the name and the chemical structures of the banned substances, the Synthetic Drug Law ensures that individuals are charged only if found in possession of a compound that is specifically proscribed." *Id.*

²⁶ *Tiplick v. State*, 25 N.E.3d 190 (2015), (citing Br. of Appellant at 27) (agreeing with the Appellant's arguments).

²⁷ *Tiplick*, 25 N.E.3d at 195. "To understand the charges against him, a person of ordinary intelligence would have to first find the definition of 'synthetic drug' in Ind. Code § 35-31.5-2-321, determine the synthetic drug alleged to be illegal is not in the very long list in the statute, and finally look to Ind. Code § 25-26-13-4.1 to determine whether the drug may have been declared a synthetic drug by a Pharmacy Board Emergency Rule." *Id.* The majority stated the statute here in question was as equally vague as *Healthscript*, where one had to jump from statute to statute to determine what is outlawed. *Id.* at 195. See *Healthscript Inc. v. State*, 770 N.E.2d 810 (Ind. 2002) (holding a statute that confuses one to direction to another statute deeming conduct to be illegal is unconstitutional).

created further statutory confusion and ambiguity.²⁸ Although the Court of Appeals of Indiana had previously held the synthetic drug statute to be void for vagueness, the court distinguished *Tiplick* from prior holdings: in *Kaur*, the defendant's arguments centered on chemicals that the Pharmacy Board had the power to deem illicit, and in *Elves*, the synthetic drug in question was among those enumerated in the penal statute, not the Pharmacy Board's Emergency Rule.²⁹

In a separate dissenting opinion, Judge Bailey argued that the Indiana synthetic drug statute was neither unclear for an ordinary person to understand, nor too cumbersome for a person to notify themselves of the prohibited conduct.³⁰ Unlike in *Healthscript*, which encompassed a variety of conflicting provisions that identified the prohibited conduct, here, the Pharmacy Board's Emergency Rule directed a person "to one, and only one section of the code," leaving the ability to know the list of illegal synthetic drugs plausibly accessible.³¹ To Judge Bailey, *Tiplick*'s void for vagueness

²⁸ See *Tiplick*, 25 N.E.3d at 190. The majority stated the distance between a synthetic substance and a synthetic drug was crucial because a synthetic substance may be used for medical purposes and not immediately deemed criminal, as opposed to a synthetic drug that carries criminal consequences. *Id.* See also *supra* note 8 (providing Pharmacy Board's Emergency Rule LSA Document #12-493(E), under which *Tiplick* was charged). See generally *Brown v. State*, 868 N.E.2d 464, 468 (Ind. 2007) (discussing the statutory terms' alternative meaning and their unconstitutional application of such terms).

²⁹ *Tiplick*, 25 N.E.3d at 194. The majority in *Tiplick* pointed out that in *Kaur*, the defendant's constitutional arguments surrounded a synthetic drug listed within the Indiana synthetic statute and not the Indiana Pharmacy Board's Emergency Rule. *Id.*; see *Kaur*, 987 N.E.2d at 168. The *Tiplick* court also noted that although the court in *Elvers* stated scientific terminology was constitutional within a specialized criminal statute, the court acknowledged the defendant's case did not revolve around the issuance of the Pharmacy Board Emergency Rule. See generally *Tiplick*, 25 N.E. 3d at 195; *Elvers*, 22 N.E.3d at 830.

³⁰ *Tiplick*, 25 N.E. 3d at 197. "The applicable laws and regulations are not so complex or overly broad as to preclude a person of ordinary intelligence from having fair notice of the criminal nature of the sale of XLR11 on the basis of vagueness." *Id.* The dissent went on to mention that at the time *Tiplick* was charged, the Pharmacy Board had "expressly identified" XLR11 in Emergency Rule # 12-493(E) published in August 2012, effective September 2012. *Id.*

³¹ *Tiplick v. State*, 25 N.E.3d 190, 197 (2015). In his dissent, Judge Bailey pointed out in the case of *Healthscript, Inc. v. State*, the court found the Medicaid fraud statute void for vagueness because the statute directed one to over fifty pages of Code covering 280 sections within thirty-seven

claims were “more akin to an attempt to claim ignorance of the law as a defense to criminal liability.”³²

In *Tiplick v. State*, the Court of Appeals of Indiana wrongfully overlooked the expertise of the Pharmacy Board and its power to establish binding law when it held that the language used in the Indiana synthetic drug statute and the Pharmacy Board’s Emergency Rule created confusion and placed an unnecessary burden to locate the proscribed conduct.³³ By allowing experts to implement law relevant and appropriate to concerns in specific fields, administrative agencies provide an efficient method of promulgating law without overburdening the legislative branch.³⁴ By effectively usurping the power and expertise of the Pharmacy Board, the court has now established a more strenuous regulatory policy for synthetic drugs that is legislative, rather than administrative, in nature.³⁵

The majority of the Court of Appeals of Indiana claimed that the listing of chemicals and chemical compounds placed an unreasonable burden on an individual

chapters all referencing different types of Medicaid situations, thus the notice provision was extraordinary broad and unclear. *Id.* at 196. Judge Bailey explained that “[s]uch [Indiana Pharmacy Board Emergency Rules] are published in the Indiana Register in a format determined by the publisher.” *Id.* at 197. In other words, the statute was properly designed in the manner that the publisher required and therefore does not lead one into a “Where’s Waldo” expedition when appropriate direction was given. *Id.* at 196.

³² *Tiplick*, 25 N.E. 3d at 197. Judge Bailey further stated, “not having looked to the laws that apply to one’s actions does not excuse an individual from violating those laws.” *Id.* See *Dewald v. State*, 898 N.E.2d 488, 493 (2008) (noting ignorance of the law is not an excuse to act in violation of it); *Marmont v. State*, 48 Ind. 21, 31 (1874) (stating every man is responsible to know the laws of the land in which he lives).

³³ See *supra* note 26 and accompanying text (stating the majority’s ruling in *Tiplick*). See also *supra* notes 17-18 and accompanying text (discussing the principles of agencies in the legislature); *Healthscript, Inc. v. State*, 770 N.E.2d 810, 814 (Ind. 2002) (noting Indiana’s recognition of agency legal-binding rule making capabilities).

³⁴ See *Pierce*, *supra* note 18, at 3 (describing administrative law and its ability to answer issues relative to specialized areas of law); *Gellhorn & Levin*, *supra* note 18, at 2 (discussing the flexibility and extensive resources associated with agency law).

³⁵ See *supra* note 18 (providing the roles granted to the Indiana Pharmacy Board by Indiana’s General Assembly); *SEC v. Chenery Corp.*, 332 U.S. 194, 194 (1947) (reaffirming the ability of agencies to establish binding law).

attempting to abide by the law.³⁶ However, the court failed to acknowledge that the chemical components must be determined in order to distinguish between a legal synthetic substance and an illicit synthetic drug.³⁷ The *Tiplick* court undoubtedly ignored the precedent in *Eivers*, which reasonably held that “[t]he novelty, complexity, and rapidly-evolving nature of synthetic drugs necessitates some scientific terminology in the law,” and ultimately contradicted itself by claiming that scientific terminology is too complex for an ordinary person to understand when the terminology is required to classify chemicals as illicit.³⁸ Stripping the Indiana Pharmacy Board’s ability to issue an Emergency Rule impedes the regulation of these dangerous, evolving synthetic drugs, and subsequently leaves Indiana in the same position as it was prior to the enactment of the statute.³⁹

Judge Bailey was justified in claiming that the Indiana synthetic drug law was neither too complex nor too burdensome for the ordinary person to comprehend.⁴⁰ In arguing that the majority incorrectly applied the analysis of *Healthscript* to the synthetic drug statute, Judge Bailey correctly identified the difference between a statute that directs one to multiple laws of illegal conduct and a statute that leads to explicitly

³⁶ See *supra* note 26 and accompanying text (describing the majority’s holding regarding statutory language of the synthetic drug law).

³⁷ See *Eivers v. State*, 22 N.E.3d 824, 830 (Ind. Ct. App. 2014) (holding synthetic drug laws need to list the scientific terminology because of its very purpose). “As the forensic scientist from the State Police Lab explained, the chemical composition of synthetic drugs varies by manufactures, products, and batches, so chemical analyses are necessary to discern whether a particular product contains an illegal drug.” *Id.*

³⁸ *Eivers*, 22 N.E.3d at 830.

³⁹ See *supra* note 15 and accompanying text (outlining increasing health concerns with development of synthetic drugs and the challenges to control them); Cohen, *supra* note 2, at 165 (discussing synthetic drugs’ ability to morph at rapid rates thereby challenging ability to regulate them). See also *supra* notes 19 and accompanying texts (outlining the history of the synthetic drug statutes and the reasons for enactment); Stafford, *supra* note 1616 (discussing Indiana’s Attorney General disappointment in *Tiplick*’s decision); H.R. 1196, *supra* note 1616 (stating Senator Merritt’s introduction of new legislation if *Tiplick*’s rule stands to protect the community).

⁴⁰ See *infra* note 41 and accompanying text (explaining ease with which one could determine steps necessary to follow Indiana’s law).

identified prohibitions.⁴¹ Furthermore, both those who understand the scientific complexities of synthetic compounds and those less qualified can comprehend the broad theme of the Indiana statute, namely, that the chemicals listed are banned.⁴² Judge Bailey appropriately noted that Tiplick's arguments are more akin to ignorance of the law than any valid claim of constitutional vagueness.⁴³ By allowing one to argue a statute is vague simply because it leads to more than one provision and includes scientific terminology, the court essentially allows one to mask any ignorance of law with claims of vagueness and inevitably opens the floodgates of litigation and continuous statutory redesign.⁴⁴

In *Tiplick v. State*, the Court of Appeals of Indiana questioned whether the Indiana synthetic drug statute and the Indiana Pharmacy Board's Emergency Rule were constitutional.⁴⁵ The court held that the Indiana synthetic drug statute was unconstitutionally vague because it required a person to meticulously search through numerous provisions to find proscribed conduct, confused the reader by using the word

⁴¹ *Tiplick*, 25 N.E.3d at 195 (explaining the difficulty of an ordinary person understanding the law). The short steps needed to be taken in order to place a person on notice or to find the appropriate governing law place an ordinary person on a "Where's Waldo" expedition in order to follow the law. *Id.* Only four statutory provisions and a small number of Indiana Pharmacy Board's regulations pointed an individual to the appropriate listing of the chemicals found to be illegal by a specialized group of individuals that fairly describe the proscribed conduct. *Id.* at 197. See *supra* note 2 (listing the illegal chemicals found in the Indiana synthetic drug statute). See *supra* note 31 and accompanying text (analyzing the incorrect application of *Healthscript* to the case in chief by the dissenting Justice).

⁴² See *supra* note 2 (listing definitions of illegal chemicals and criminal implications). The very distinction between an illegal and legal drug is the chemical makeup. *Id.* It is logical that the illegal synthetic drugs are listed by their chemical makeup because the chemical governs the determination of whether the drugs are illicit themselves. See *Elvers*, 22 N.E.2d at 830 (holding the Indiana drug statute constitutional and synthetic drug list not too technical).

⁴³ See *supra* note 30 and accompanying text (discussing Justice Bailey's position on Tiplick's vagueness claims).

⁴⁴ See *Dewald v. State*, 898 N.E.2d 488, 493 (2008) (reiterating that "ignorance of the law is no excuse for criminal behavior"); *Pierce*, *supra* note 18, at 3 (describing Congress' failure to function properly without the use of agencies' ability to implement law).

⁴⁵ *Tiplick*, 25 N.E.3d at 190 (holding the statutes were unconstitutionally vague).

“substance” and not “drug,” and placed a duty on the reader to understand difficult chemical compounds.⁴⁶ The majority improperly applied the rules of vagueness and instead overstepped its ability to analyze administrative law.⁴⁷ As a result of its decision, the court left the state of Indiana with only inefficient legislative hurdles to regulate the Indiana synthetic drug market by preventing the Board from using its expertise to explicitly determine illicit synthetic drugs.⁴⁸

⁴⁶ *Id.* at 195 (detailing the "Where's Waldo" expedition for an ordinary person).

⁴⁷ *Id.* at 196-97. *See supra* notes 30-32 and accompanying text (discussing Justice Bailey's dissent).

⁴⁸ *See supra* notes 16-17 and accompanying text (discussing the history of the statute and its reasons for introduction); Stafford, *supra* note 16 (describing Indiana's Attorney General upset with the majority's ruling).