STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM NO. 4
COUNTY OF MARION	)	CAUSE NO.: 49D04-1407-PL-023480

INDIANA PETROLEUM MARKETERS AND CONVENIENCE STORE ASSOCIATION, RICKER OIL COMPANY INC., and FREEDOM OIL, LLC,

Plaintiffs,

v.

DAVID COOK, in his official capacity as Chairman of the Indiana Alcohol and Tobacco Commission,

Defendant.

FILED

AUG 12 2015

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Myla A. Eldridge
CLERK OF THE MARION CIRCUIT COURT

FINDINGS AND CONCLUSIONS ON SUMMARY JUDGMENT

This matter is before the Court on the parties' cross motions for summary judgment. The issues have been fully briefed, and oral argument was held. The Court now grants summary judgment in favor of Defendant and against Plaintiffs. No genuine issues of material fact remain in dispute and the law is in Defendant's favor. Indiana's prohibition in Ind. Code § 7.1-5-10-11 does not violate Article I, Section 23, of the Indiana Constitution, and separately does not violate the void-for-vagueness due process protections of the Indiana and U.S. Constitutions.

The Statute

Plaintiff, the Indiana Petroleum Marketers and Convenience Store Association ("IPCA") and two of its members, Ricker Oil Company, Inc. and Freedom Oil, LLC, challenge the constitutionality of Ind. Code § 7.1-5-10-11, which prohibits the holder of a beer dealer's permit to offer or display for sale, or sell, barter, exchange or give away a bottle, can, container, or package of beer that was iced or cooled by the permittee before or at the time of the sale, exchange, or gift.

Previous Litigation

Prior to this lawsuit, Plaintiffs attempted to invalidate Ind. Code § 7.1-5-10-11 through a case, captioned *Indiana Petroleum Marketers and Convenience Store Association, et al. v. Huskey*, Case No., 1:13-cv-00784-RLY-DML (hereinafter the "Federal litigation"). Chief Judge Young granted summary judgment for the defendant in his summary judgment opinion. In the Federal litigation, Plaintiffs challenged the cooled beer prohibition on both federal and state constitutional grounds. The federal court entered summary judgment against the Plaintiffs' federal claims. That court dismissed the state law claims without prejudice. The State claims in controversy were left to be addressed by an Indiana state court. Plaintiffs then filed the current lawsuit in this Court.

The Plaintiffs

The IPCA is an Indiana association that represents Indiana convenience stores and petroleum marketers. The association advances the interests of its members through various programs and services. IPCA has 115 members which includes approximately 1,000 retail stores in Indiana. Approximately seventy-five percent (75%) of these stores have permits to sell beer and do sell beer on a regular basis.

The other two Plaintiffs in this case own a number of convenience stores throughout Indiana, some of which sell alcohol. Freedom Oil, LLC is an Indiana business operating six convenience stores in Kosciusko and Marshall Counties. Several Freedom stores have permits and do sell beer. Ricker Oil Company, Inc. is an Indiana business. Ricker's has forty-nine (49) stores in Indiana, forty-five (45) of which have permits and also sell beer.

The Prohibition

There is a cooled beer prohibition in Indiana whereby only "package liquor stores" have licenses to sell cooled beer directly to consumers. Convenience stores (which are classified as grocery stores for permitting purposes) in Indiana may sell alcohol under a "beer dealer's permit." Ind. Code §7.1-3-5-2. It is "unlawful for the holder of a beer dealer's permit to offer or display for sale, or sell, barter, exchange or give away a bottle, can, container, or package of beer that was *iced* or *cooled* by the permittee before or at the time of the sale, exchange, or gift." Ind. Code §7.1-5-10-11 (emphasis added). Due to the general prohibition on the sale of "iced or cooled" beer, Indiana limits holders of a beer dealer's permit to the sale of warm beer for public consumption off of their premises. Ind. Code §7.1-3-5-3. The law prohibits the permit holder from cooling beer prior to sale. However, Indiana law does allow customers to cool beer prior to sale by placing the beer into a cooler while they continue to shop. Indiana law also allows the permit holder to cool the beer for a customer after the sale is completed. Also, a permit holder may sell beer at the same temperature as the ambient air in the store, even if that temperature would be perceived as "cool" to the customers. Indiana is the only state to regulate the sale of beer based on whether it is warm or "cooled." Convenience stores may sell wine and wine coolers, including wine or wine coolers that are cooled. The alcohol content in wine beverages may be three times higher than what is typically found in beer. For instance, convenience stores may sell "Black Box" wine, which can be cooled prior to sale. "Black Box" wine has a content of 13.5 percent alcohol by volume. The temperature of beer does not control or alter its alcohol content. Ostensibly, alcohol content was not one of the factors included in the State's goal of controlling the sale of cooled beer.

Effective July 1, 2014, the prohibition on the sale of "iced or cooled beer" became part of Indiana's criminal code. The new Indiana law made a knowing or intentional sale of "cooled" beer a Class B misdemeanor. *See* Ind. Code §7.1-5-10-11. A Class B misdemeanor is punishable by up to 180 days in jail and a fine up to $1,000.00. Ind. Code §35-50-3-3. The civil penalty for violations of the prohibition on the sale of cooled beer is $1,000.00 per charge. This charge may be levied on a container-by-container basis. The Alcohol Tobacco Commission (ATC) may also revoke, upon a proven violation, a dealer's license to sell alcohol.

Convenience Store Characteristics

Convenience stores are usually small in size and are designed to provide ease of access to products for consumers. While they do not offer the same scope of merchandise offered at big box stores or supermarkets, they generally offer similar products commonly found in package liquor stores. Customers of convenience stores are able to purchase products such as chips, lottery tickets, tobacco products, snacks, warm beer, and other products all in one place and at the same time when they frequent these establishments.

Convenience stores that sell beer do so pursuant to a "*dealer permit*" and there are four types: (a) a permit type to sell beer only at a grocery store located in an incorporated area; (b) a permit type to sell beer only at a grocery store located in an unincorporated area; (c) a permit type to sell beer and wine at a grocery store located in an incorporated area; and (d) a permit type to sell beer and wine at a grocery store located in an unincorporated area.

All permits under which convenience stores can operate are issued with the following conditions: (a) all beer and malt products must be sold and stored non-cooled, non-chilled, and non-iced; (b) no alcohol may be sold on Sunday; (c) no state or local licensing is required for individual clerks to sell alcohol; (d) no specialized server training is required for individual

clerks by the state in order to sell alcohol; (e) clerks must be 19 years of age to sell alcohol; (f) on-premise consumption is forbidden; (g) alcohol is not allowed to be sold through a window or outside of the building; and (h) there is no age limit on individuals to enter the premises. Businesses that sell beer pursuant to a beer dealer permit include convenience stores like Thornton, Ricker, Freedom, Speedway, Circle K; grocery stores like Marsh, Kroger, Meijer; drug stores like CVS and Walgreens; and big-box stores like Walmart, Target, and K-Mart. These businesses cannot offer, display, or sell beer that has been cooled by it prior to selling it. Ind. Code § 7.1-5-10-11.

The business model of a convenience store is different from that of other sellers of beer. The model is premised on convenience and product accessibility which is achieved in several ways: (a) being open 24 hours/day; (b) being open 365 days/year; (c) having no age restriction on customers; (d) providing a variety of goods including many basic necessities; (e) having products available for customers to simply pick up and take to the register; (f) being a one-stop shopping place for customers. These conveniences are not provided by package liquor stores.

Package Liquor Store Characteristics

A "commodities list" set out in Ind. Code §7.1-3-10-5 and modified by the ATC's regulations (the "Commodities List") dictates the non-alcoholic products that package liquor stores may sell. The Commodities List allows package liquor stores to sell items normally found at convenience stores, including: cigarettes and other tobacco products, potato chips, cheese, pretzels, crackers, popcorn, and other fried package snacks, etc. These products are commonly purchased by customers of convenience stores. Many package liquor stores also sell cold soda and similar beverages through machines located just outside their buildings. Both package liquor stores and convenience stores often offer check-cashing services.

Package liquor stores that sell cooled beer may operate in close proximity to convenience stores that are prohibited from selling cooled beer. Some of these convenience stores may share owners, names, employees, and even a common wall with a package liquor store. There are numerous examples of situations that involve a liquor store that can sell cooled beer which is located in close proximity to a convenience store wherein the convenience store is prohibited from selling the exact same product. Ostensibly, proximity in location of divergent vendors was not one of the factors included in the State's goal of controlling the sale of cooled beer.

In addition to being essentially different businesses, package liquor stores have more restrictions placed upon them (as it relates to the sale of alcohol) than do convenience stores. Package liquor stores sell cold beer for take-away pursuant to a "dealer permit" and there is only one type: a permit to sell beer, wine, and liquor for locations in incorporated areas. A package liquor store that sells take-away beer can operate under the following conditions: (a) all alcohol may be served cooled, iced, or chilled or non-cooled, non-iced, or non-chilled; (b) state licensing is required for individuals to sell alcohol; (c) specialized server training is required for individuals to sell alcohol; (d) clerks must be twenty-one (21) years of age to sell alcohol; (e) anyone under the age of 21 is not allowed to enter the premises; (f) alcohol may not be sold on Sunday; (g) on-premises consumption is not allowed; (h) a limited type of non-alcoholic commodity may be sold; and (i) alcohol may not be sold outside the building. The cost associated with obtaining a package liquor store permit is higher than a permit to sell alcohol for a convenience store.

Unincorporated Towns

It is unclear whether Indiana statutes allow permits for grocery stores, convenience stores, and pharmacies in unincorporated towns to sell beer without temperature restrictions.

Plaintiffs argued that grocery stores and the like may sell cooled beer through an interpretation of several statutes including Ind. Code §7.1-3-4-6(c). Defendants argued that such stores in unincorporated towns are subject to the same cooled beer restrictions as convenience stores in towns elsewhere in the state. However, no grocery or convenience stores have been found to sell cooled beer in unincorporated towns in Indiana or have been cited for such violation.

Vagueness

The Plaintiffs claim that Ind. Code §7.1-5-10-11 should be invalidated because it is void for vagueness. As to that claim, Indiana's regulation of alcohol includes a ban on "cooled" beer at convenience stores, but exempts package liquor stores from that ban. *See* Ind. Code §§7.1-3-4-3 & 4. The legislature provided no definition for what is deemed "cooled" in the statute. There are no administrative rules explaining what "cooled" actually means. The witnesses in this case for the state testified that they rely on their common sense and experience in determining whether beer is "cooled." One witness, Major Poindexter of the Excise Police stated that his personal understanding of what "cooled" meant was "[c]older than warm – than room temperature." He further acknowledged that he derived that definition from his own "common sense."

Discussion and Ruling

To the extent any of the foregoing findings of fact is a conclusion of law, it is hereby adopted as a conclusion of law. To the extent any of the conclusions of law set forth below is a finding of fact, it is hereby adopted as a finding of fact.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and other matters reveal that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.

Morris v. Economy Fire and Cas. Co., 848 N.E.2d 663, 665 (Ind. 2006); *McIntyre v. Baker*, 660 N.E.2d 348, 349 (Ind. Ct. App. 1996); *see* Ind. T.R. 56(C). The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. *Kottlowski v. Bridgestone/Firestone, Inc.*, 670 N.E.2d 78, 82 (Ind.Ct.App. 1996), *trans. den.* 683 N.E.2d 584. "All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party." *Hopper v. Carey*, 810 N.E.2d 761, 764 (Ind. Ct. App. 2004) (citing *Monar v. Hurt*, 791 N.E.2d 280, 282 (Ind. Ct. App. 2003)). Significantly, moreover, "[a] fact is material where its resolution *is* decisive of the action" and a "factual issue is 'genuine' if it is not capable of being conclusively foreclosed by reference to undisputed facts." *Auto-Owners Inc. Co. v. Hughes*, 943 N.E.2d 432, 437 (Ind. Ct. App. 2011).

As to the Article 1, Section 23 claim, the State argues that it can avoid the unconstitutionality of its statutes through one or both forms of preclusion. The State contends that the void-for-vagueness claims are barred both by issue and claim preclusion. On the claims of issue and claim preclusion/res judicata, the Court finds that neither legal premise applies in this case. Issue preclusion "bars subsequent litigation of the same fact or issue that was necessarily adjudicated in a former suit." *Miller Brewing Co. v. Indiana Department of Revenue*, 903 N.E.2d 64, 68 (Ind. 2009). "It applies to matters actually litigated and decided, not all matters that could have been decided." *Id. See also Wedel v. American Power Service Corp.*, 681 N.E.2d 1122, 1131 (Ind. Ct. App. 1997). ("Where issue preclusion applies, the previous judgment is conclusive only regarding those issues actually litigated and determined therein."

There are three requirements that must be met for the party invoking issue preclusion: (1) a final judgment on the merits in a court of competent jurisdiction; (2) identity of the issues; and (3) the party to be estopped was a party or the privity of a party in the prior action." *Thrasher*

Buschman & Voelkel, P.C. v. Adpoint, Inc. 24 N.E.3d 487, 494 (Ind. Ct. App. 2015). In addition, issue preclusion requires consideration of "whether the party against whom the judgment is pled had a full and fair opportunity to litigate the issue, and whether it would be otherwise unfair under the circumstances to permit the use of collateral estoppel. Issue preclusion does not apply when there have been intervening changes in the law. As the Indiana Supreme Court explained, "Issue preclusion may not apply where there are new facts or where a change in the law or legal climate would dictate a different outcome." *Miller*, 903 N.E.2d at 68 (citing Restatement (Second) of Judgments, §28 cmt. a. (1981) ("A rule of law declared in an action between two parties should not be binding on them for all time, especially as to claims arising after the first proceeding has been concluded, when other litigants are free to urge that the rule should be rejected"). Here, the intervening change in the law is the criminalization of the cooled beer ban. The federal district court did not examine the cooled beer prohibition under the heightened review necessary for criminal statutes, a fact it noted in its findings. Therefore, issue preclusion does not apply in this case.

Claim preclusion also does not bar the void-for-vagueness challenge. "When claim preclusion applies, all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action." *Afolabi v. Atlantic Mortg. & Investment Corp.*, 849 N.E.2d 1170, 1173 (Ind. Ct. App. 2006). "In order for a claim to be precluded under the doctrine of *res judicata,* the following four requirements must be satisfied: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies." *Afolabi,* 849 N.E.2d at 1173. The State does not

argue that claim preclusion bars the Indiana constitutional claim. As to the federal claim, the intervening change in the law prevented the State from relying on the federal adjudication in several respects. For claim preclusion to apply, "the matter now in issue was or could have been determined in the prior action." *Id.* The modified version of the cooled beer statute – with its criminal penalties and accompanying heightened standard of review – was not in front of the federal court. July 1, 2014. *See* P.L.159–2014, Sec. 76. No claim preclusion can apply given these circumstances.

The cooled beer prohibition is not void because it is unconstitutionally vague. This Court agrees with the conclusions reached by Chief Judge Young on this issue. He said, "The void-for-vagueness doctrine requires that a statute that prescribes a penalty be written "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citation omitted). Federal SJ Decision (at Def's MSJ Ex. AA), § II(E)(1), ¶ 20.

There is evidence in the record presented by the State that Indiana retailers understand what kind of cooled beer sale is prohibited by statute. Judge Young found specifically that Plaintiffs knew exactly what Indiana Code § 7.1-5-10-11 prohibited "by their admissions but also by the fact that there have been few citations issued for violations of this provision." Federal SJ Decision, § II(E)(1), ¶ 23. He concluded that Indiana Code § 7.1-5-10-11 was not unconstitutionally vague: "Plaintiffs display, offer, and sell many items that have been cooled by them, such as soda, milk, eggs, and wine. To sell 'cooled' beer would merely require them to place the beer that is now on the shelves of their respective stores in the refrigerator." Federal SJ Decision, § II(E)(1), ¶ 23.

The State's prohibition on cooled beer does not violate the prohibition on the grant of special privileges and immunities in the Indiana Constitution. "When an enactment is challenged under the Indiana Constitution, it stands before this Court clothed with the presumption of constitutionality until clearly overcome by a contrary showing," and "the party challenging the constitutionality of the enactment bears the burden of proof, and all doubts are resolved against that party." *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 237-8 (Ind. 2003) (internal quotations removed). "In Indiana, the lodestar of statutory interpretation is legislative intent, and the plain language of the statute is the 'best evidence of . . . [that] intent." *Estate of Moreland v. Dieter*, 576 F.3d 691, 695 (7th Cir. 2009) (citing *Cubel v. Cubel*, 876 N.E.2d 1117, 1120 (Ind. 2007)). The court examines the statute as a whole, with the understanding that the statute should be "applied in a logical manner consistent with the statute's underlying policy and goals." *Cubel*, 876 N.E.2d at 1120.

The "*Collins* Test" is the accepted standard for analyzing violations of Article 1, Section 23. *Collins* applies a two-part test: "First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics [that] distinguish the unequally treated classes." *Collins v. Day,* 644 N.E.2d 72, 80 (Ind. 1994). The definition of the word *inherent* according to Webster's Dictionary is: "involved in the constitutional or essential (essential is defined as: extremely important and necessary) character of something." *Source: Merriam-Webster's Dictionary of Law ©1996.* "Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Collins,* 644 N.E.2d 72 at 80. *See also Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) (striking down two-year statute of limitations for medical malpractice claims under *Collins* test).

Further, this Court agrees with Chief Judge Young's findings and conclusions on these issues. He found as to the Article 1, Section 23 claim, in the federal case, that in addition to similarities between the two types of stores, there were important differences between package liquor stores and convenience stores when the sale of cooled beer was involved. *See* Federal SJ Decision, § I(C), ¶¶ 19, 22-23; Federal SJ Decision, § I(D), ¶¶ 26-28.

Chief Judge Young found:

> 47. The State could have rationally believed that limiting the sale of immediately consumable cold beer to package liquor stores furthers its legitimate goal of curbing underage consumption of alcohol. The court's finding is supported in the record.
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> 48. As noted several times before, package liquor stores are subject to much stricter regulations than grocery/convenience/drug stores. It costs far more for a package liquor store to enter the market than it does a grocery/convenience/drug store; consequently, there are far fewer package liquor stores in the State than grocery/convenience/drug stores. This naturally results in fewer outlets in the State to purchase cold beer.
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> 51. Were the law otherwise and grocery/convenience/drug stores were permitted to sell cold beer, the evidence suggests that many more outlets for the sale of cold beer will be constructed, and Indiana's alcoholic beverage laws will be tougher to enforce.
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> 52. Restricting the sale of cold beer to certain types of businesses and restricting the sale of cold beer only to businesses that have more restrictions placed on them is a classic example of legislative line-drawing. Indiana's legislative classifications, which serve to limit the outlets for immediately consumable cold beer, is rationally related to the legitimate goals of Indiana's alcoholic beverage laws; opening this market to others without restriction is not.
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> 53. In sum, the State drew a line between package liquor stores, beer retailers, and beer dealers, such as grocery stores, convenience stores, and drug stores. Plaintiffs essentially argue that the line was drawn incorrectly. "[L]egislation 'does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect.'" *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1072 (7th Cir. 2013) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

> 54. The State has advanced a plausible reason for the classifications in Indiana's alcoholic beverage statute. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end."). The State's motion for summary judgment on Plaintiffs' equal protection claim (Count I) is therefore **GRANTED**.

Federal SJ Decision, § II(E)(2)(b), ¶¶ 47-48, 51-54.

Further, Judge Young concluded: "The court finds that Indiana's 'cooled beer' provision, which restricts a business with a beer dealer permit from offering, displaying, and selling beer that has been cooled by it, applies uniformly to Plaintiffs' business model -- convenience stores, grocery stores, and drug stores that operate pursuant to beer dealer permits." Federal SJ Decision, § II(E)(2)(a), ¶ 40. The District Court's findings included the determination that convenience stores/grocery stores in Indiana were all treated the same, regardless of whether the store is located in an incorporated area or an unincorporated area. Federal SJ Decision, § II(E)(2)(a), ¶¶ 35-40. Plaintiffs, here, make the argument that the sale of cooled beer does not apply equally to all grocery and convenience stores in Indiana; that unincorporated towns have the privilege to sell cooled beer due to interpretations of several Indiana statutes, when read together, which may exclude such towns from the ban. However, no evidence was presented that any convenience store has actually sold cooled beer or would be allowed to sell cooled beer. Therefore, there is no disparate treatment in regard to cooled beer sales in unincorporated towns.

The temperature distinction drawn by the ban on cooled beer is reasonably related to inherent characteristics of package liquor stores as opposed to convenience stores. The state focused on a list of features of convenience stores in order to demonstrate that there are "inherent characteristics" that separate convenience stores and groceries from package liquor stores. The state argued that convenience stores were inherently different from package stores because they sold several different types of items, they can be open twenty-four (24) hours a day, there was no

age restriction to enter the premises, there was a cap on the amount of their alcohol sales, and there was no restriction on the number of licenses that could be issued to convenience and grocery stores.

While it is true that package stores would enjoy all of the same features that convenience stores enjoy if the legislature had chosen to include these same rights and privileges in the State's alcohol laws, the Indiana General Assembly drew a clear and distinct line between two different types of sellers in the liquor industry for specific non-economic reasons. The laws do not allow package liquor stores to stay open twenty-four (24) hours a day, nor do they allow minors on the premises. They also do not allow a package liquor stores to sell an enhanced variety of goods outside the extensive commodities list. These conditions were placed on convenience stores, as opposed to package liquor stores, in order to achieve certain purposes concerning a particular kind of alcohol sale. Again, as Judge Young stated in the federal case, "The State could have rationally believed that limiting the sale of immediately consumable cold beer to package liquor stores furthers its legitimate goal of curbing underage consumption of alcohol. The court's finding is supported in the record." Federal SJ Decision, § II(E)(2)(b), ¶¶ 47-48, 51-54. The same is true in the case before this bench.

This Court may consider legislative purpose when determining whether the treatment is reasonably related to the inherent differences between the classes. *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 239 (Ind. 2003). Testimony elicited from Plaintiff's witness in the federal case revealed that if the restriction on cold beer sales by convenience and other retail grocery outlets was lifted, as a result, more cold beer would be sold and there would be more outlets selling cold beer. Therefore, by disallowing the right to sell cooled beer in convenience stores, the legislature promoted its goal of limiting the number of outlets for cooled beer. This

measure helps to control alcohol sales to both to minors and adults, and by doing so, diminishes the need to police more liquor outlets.

In consideration of other guiding principles, "... our Supreme Court has stated that, in general, the question of classification for the purpose of the Equal Privileges and Immunities Clause is a legislative question; it becomes a judicial question "only where the lines drawn appear arbitrary or manifestly unreasonable." *Collins*, 644 N. E. 2d at 80 (internal quotations removed). "... [so] long as the classification is based upon substantial distinctions with reference to the subject matter, this Court will not substitute our judgment for that of the legislature; nor will we inquire into the legislative motives prompting such classification." *Id.* Therefore, this Court may consider the legislative purpose when determining whether the treatment is reasonably related to the inherent differences between the classes. *Dvorak Id.* The legislative purpose of Indiana's alcohol laws includes, among other restrictive measures, limiting the sale of alcohol. Ind. Code § 7.1-1-1-1. Restricting the sale of cold beer to certain types of businesses and restricting the sale of cold beer only to businesses that already have more constraints placed on them than other kids of retailers is a classic example of legislative line-drawing. Indiana's legislative classifications, which serve to limit the outlets for immediately consumable cold beer, are therefore rationally related to the legitimate goals of Indiana's alcoholic beverage laws.

Thus, the *Collins* test requires only rational reasonability and uniform application of the law governing the sale of cooled beer. It follows then that a law that allows disparate treatment between divergent retailers may be defended and found constitutional even if the inherent differences are legislatively-created conditions. In this case, since there is evidence in the record that the law furthers legitimate legislative goals of regulating the consumption of alcohol and since the laws have been uniformly applied, both prongs of the *Collins* test have been met.

The notion that inherent characteristics must be only those factors that are naturally occurring or essentially innate would require complete and precise comparisons between persons or in this case, businesses treated differently under the law, whenever disparate treatment issues are considered. *Collins* does not require this kind of perfect matching of characteristics. Evidence considered in this case, and in the federal case, revealed that in spite of the fact that the retail establishments at issue here share many of the same core characteristics, there are inherent differences rationally related to the legitimate goals of Indiana's alcoholic beverage laws between different vendors that are important in the State's desire to control the sale of alcohol, curtail the sale of alcohol to minors, and to adequately police alcohol sales. Evidence presented by the State revealed that the under-regulated and exponential increase of cooled beer sales and the availability of cooled beer to a larger perhaps under-policed audience would be a likely result if the statute is found to be void.

Further, the Indiana Supreme Court does not require perfect precision when the comparison between disparately treated groups is being made. In *Paul Stieler Enterprises, Inc. v. City of Evansville*, 2 N.E. 3d 1269 (Ind. 2014), the Court found the an amended Evansville smoking ordinance violated the Equal Privileges and Immunities of the Indiana Constitution by exempting riverboat casinos from the smoking ban because the disparate treatment between bars/restaurants and riverboats was not "reasonably related to the inherent differences between divergently treated classes." In *Stieler*, the Court invalidated the amended ordinance and restored the Evansville smoking ban as it existed before the amendment. In *Stieler,* however, sound policy reasons alone, however, were not enough to justify disparate treatment. In describing the economic and fiscal considerations of allowing a smoking exception in casinos, the Court in *Stieler* said, "But this quarrel misses the point. *Collins* requires that, to comply with Indiana's

Equal Privileges and Immunities Clause, the disparate treatment must be reasonably related to the inherent distinctions between the classes. It does not merely require that sound policy reasons exist to justify the special privilege or immunity. In determining a claimed violation of the Equal Privileges and Immunity Clause, we focus not on the *purposes* presumably motivating the enactment, but on the disparate treatment it accords. It is "the treatment, not the legislative purpose, which must be reasonably related to the inherent distinctions between the classes..."quoting Dvorak, 796 N.E. 2d at 239.

In comparing *Stieler* to the case before the bench, the evidence revealed that the classifications of package liquor stores compared to convenience stores was based upon "substantial distinctions with reference to the subject matter" as required in *Collins* even without the necessity of a detailed inquiry into legislative motives *Collins,* 644 N.E.2d at 80. There is a connection between the ban and the alleged inherent characteristics of convenience stores. The disparate treatment that the General Assembly gave to package liquor stores is reasonably related to their characteristics. The state presented evidence that beer was intended and preferred to be consumed cold and that minors prefer cooled beer as opposed to drinking warm beer. While it is true that the issue here is *beer temperature*, not the overall sale of beer and that convenience stores already sell beer, the state has, however, withheld an additional option from convenience stores to cool that beer for a purpose. The justification for the difference in temperature for beer sold at different types of establishments in Indiana appears to lie in limiting beer that is available for immediate consumption. In other words, since the General Assembly has found that although convenience stores may safely sell beer, it chose to confer an additional special privilege on package liquor stores by exempting them from the otherwise broad restriction on cooling beer to further that goal. The arguments about economic protectionism as a consequence of legislative

policy were raised in *Stieler* and the Indiana Supreme Court explained that the City of Evansville "was explicit in identifying its principal purpose: the protection of public health". Here, the State's aims in restricting the sale of cooled beer to only package liquor outlets were also clearly spelled out.

The evidence revealed, and Plaintiffs admitted, that the State of Indiana has a legitimate state interest in restricting (and making harder) the sale of cooled beer to minors and others. The State emphasized that the ban should not be invalidated because the necessary increase to staffing levels for excise police would cause administrative problems. This drawback, standing alone, would be an issue for the State; however, the need to increase excise police staffing levels is not determinative in statutory invalidation considerations. Indiana law makes clear that a purpose of alcohol laws is, among other things, to limit the sale of alcohol. Ind. Code § 7.1-1-1-1. The state's evidence revealed an *essential purpose* in reducing the amount of alcohol sold in Indiana by citing the differing characteristics between package stores and convenience stores and how the sale of beer could be better supervised.

In addition, Indiana has authority to set limits on the sale of cold beer via the Twenty-first Amendment, which gives Indiana "'virtually complete control whether to permit importation or sale or liquor and how to structure the liquor distribution system;'" within its borders. *Granholm v. Heald*, 544 U.S. 460, 488 (2005) (emphasis added) (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 110 (1980)). Plaintiffs' challenge before the Court is based, in part, on how Indiana has decided to control the sale of cooled beer to the public. This policy decision is constitutionally grounded in the Twenty-first Amendment and is, thereby, protected from constitutional challenge. S*ee Granholm*, 544 U.S. at 489.

CONCLUSION

Based on the foregoing and there being no genuine issues of material fact that remain for trial, this Court GRANTS Defendant's motion for summary judgment, DENIES Plaintiffs' motion for summary judgment and declares that Indiana's prohibition on the sale of cooled beer by a grocery or convenience store does not violate Article 1, Section 23 of the Indiana Constitution. Additionally, the cooled beer prohibition does not violate the due process void-for-vagueness doctrines of the Indiana and United States Constitutions. Therefore, Defendants are not enjoined from enforcement of the cooled beer prohibition of Ind. Code §7.1-5-10-11. There being no just reason for delay hereby enters judgment for the Defendant and against Plaintiffs. Plaintiffs' cross motion for summary judgment is hereby DENIED.

SO ORDERED, ADJUGED and DECREED, this 12th DAY of AUGUST, 2015.

Marion Superior Court Civil Division
Room IV
Honorable Cynthia J. Ayers, Judge

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