STATE OF INDIANA

COUNTY OF LAKE

IN THE LAKE SUPERIOR COURT
CIVIL DIVISION ROOM ONE
HAMMOND, INDIANA

TED BILSKI, CHARLIE BROWN, CHRISTINE CID, DANIEL DERNULC, DAVID HAMM, CHRISTIAN JORGENSEN and ALFREDO MENCHACA,
Plaintiffs,

CASE NO. 45D01-2102-PL-134

v.

BRIAN C. ROCKENSUESS, as Commissioner of the Indiana Department of Environmental Management and JOE HOAGE as Commissioner of the Indiana Bureau of Motor Vehicles,
Defendants.

ORDER GRANTING DEFENDANTS' SUMMARY JUDGMENT
ORDER DENYING PLAINTIFFS' SUMMARY JUDGMENT

The plaintiffs, Ted Bilski, Charlie Brown, Christine Cid, Daniel Dernulc, David Hamm, Christian Jorgensen and Alfredo Menchaca, appear by Attorney Gerald Bishop, and the defendants, Brian C. Rockensuess, as Commissioner of the Indiana Department of Environmental Management, Joe Hoage, as Commissioner of the Indiana Bureau of Motor Vehicles appear by Attorney Meredith McCutcheon, Attorney Blake Erickson and Attorney Valerie Tachtiris for hearing on the Bilski plaintiffs' Motion for Partial Summary Judgment and the Commissioner defendants' Cross-Motion for Summary Judgment.

Mandatory emissions testing for nearly all motor vehicles in Lake and Porter Counties is universally despised. Residents have to take the time every two years to go to an emissions testing station, wait in line (sometimes for more than an hour) to have the test performed, all the while seething over the fact that, twenty-four seven, semi-tractor-trailer rigs

travel through Lake and Porter on one of the busiest stretches of interstate in the nation, the Borman Expressway, belching gasoline and diesel exhaust for miles on end, polluting the air, then travelling on to Chicago or points east. No emissions testing for them, only us in our personal vehicles. Or so the lament goes.

It is no doubt that this universal public dissatisfaction served as a part of the impetus for the bringing of this action. Be that as it may, prior to any analysis of the constitutional questions presented, the words of Justice Hugo Black, who served as an Associate Justice on the United States Supreme Court from 1937 to 1971, spoken at a Washington, D.C. news conference must be kept in mind:

> The layman's Constitutional view is that what he likes is Constitutional and that which he doesn't like is un-Constitutional. That about measures up the Constitutional acumen of the average person, *The New York Times*, p. 38. (February 25, 1971).

The Bilski plaintiffs seek summary judgment on Counts I and II of the Amended Complaint that 326 IAC 13-1.1-2 violates Section 23 of Article 1 and Section 23 of Article 4 of the Indiana Constitution. The Commissioner defendants seek summary judgment in their favor as to Bilski's entire Amended Complaint.

The standard of review for alleged violations of the Indiana Constitution is well established:

> Every statute stands clothed with the presumption of constitutionality until clearly overcome by a contrary showing. The party challenging the constitutionality of the statute bears the burden of proof, and all doubts are resolved against that party. If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, we will choose that path which permits upholding the statute because we will not presume that the legislature violated the constitution unless the unambiguous language of the statute requires that conclusion, *State Bd. Of Tax*

Comm'rs v. Town of St. John, 702 N.E.2d 1034, 1037 (Ind. 1998), *citations omitted.*

The issues in this case involve pure questions of law. There are no genuine issues of fact, so the Trial Rule 56 motions filed by the parties are a proper means to decide the constitutionally of the regulation under the well-established standards set forth in *State Bd. Of Tax Comm'rs, id.* In addition, the use of the Uniform Declaratory Judgment Act, found at IC 34-14-1, by its own terms, is appropriate to "...settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations....," IC 34-14-1-12 and is a proper remedy to determine the constitutionality of a statute, *Neswick v. Board of Com'rs of Newton County,* 426 N.E. 2d 53 (Ind.Ct.App. 1981); *City of Anderson v. Associated Furniture & Appliances, Inc.*, 423 N.E.2d 293 (Ind. 1981).

The fact that the Bilski plaintiffs and the Commissioner defendants have made cross motions for summary judgment does not alter the standard of review set forth above: Each motion is considered separately, and a separate determination is made as to whether the moving party is entitled to judgment as a matter of law, *Auto-Owners Ins. Co. v. Long,* 112 N.E.3d 1165, 1167 (Ind. Ct. App. 2018), *MacGill v. Reid,* 850 N.E.2d 926, 928 (Ind. Ct. App. 2006).

The Bilski Plaintiffs' Motion For Partial Summary Judgment

The Indiana General Assembly enacted I.C. 13-17-3-11 and I.C. 13-17-3-4, under the authority of which 326 IAC 13-1.1-2 was promulgated, in response to United States Environmental Protection Agency regulations issued pursuant to the federal Clean Air Act, 42 U.S.C. § 740. The Act and the regulations were designed to establish uniform ambient national air quality standards for pollutants. The EPA was granted authority to designate air quality regions and determine whether or not a particular region has attained the air quality standard. If a region has not so attained the standard (with the state in which the region is located being responsible for ensuring attainment), the state must submit an implementation plan addressing the deficiencies and to include motor vehicle testing and maintenance to comply. As a part of its implementation plan, the State of

Indiana determined that Lake and Porter Counties fell into the category of non-attainment and enacted the statutes and regulations cited above to ensure attainment. To enforce the imposition of air quality standards by a state, the federal government holds the cudgel of freezing federal highway funding.

The Bilski plaintiffs claim the regulation violates Article I, Section 23 of the Indiana Constitution which provides:

> The General Assembly shall not grant to any citizen, or any class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

Residents of Lake and Porter Counties are required to have motor vehicle emission testing while residents of the other 90 counties in Indiana are not. This, the plaintiffs argue, violates Article 1, Section 23.

The Bilski plaintiffs also claim the regulation violates Article 4, Section 23 of the Indiana Constitution which provides:

> In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.

In an analysis of any statute or regulation which is alleged to violate Article I, Section 23, any disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes, and the preferential treatment must be uniformly applicable and equally available to all persons similarly situated, *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), *Dvorak v. City of Bloomington*, 702 N.E.2d 1121, 1124 (Ind. Ct. App. 1998). Courts must employ this standard while giving substantial deference to legislative discretion, *Collins id.* at 82.

Article 4, Section 23 does not proscribe a classification of elements of legislation provided there exists a relationship between the classification in question and the purpose of the legislative act which is inherent in its subject matter, *Evansville-Vanderburgh, etc., et al v. Kamp* (1960), 240 Ind. 659,

663, 168 N.E.2d 208, 210, *Heminger v. Police Com. Of Ft. Wayne* (1974) 161 Ind. App. 72, 82, 314 N.E.2d 827, 834.

For a determination to be made as to whether or not this regulation passes constitutional muster, the Bilski plaintiffs must designate evidence sufficient to demonstrate, first, that the disparate treatment accorded by the regulation is not reasonably related to inherent characteristics which distinguish the unequally treated classes or a relationship between the classification and the purpose of the regulation and, second, that the preferential treatment is not uniformly applicable and equally available to all persons similarly situated. A designation of evidence to support this demonstration is necessary to overcome the presumption that 326 IAC 13-1.1-2 is constitutional.

The only evidence designated by the Bilski plaintiffs to overcome the presumption of the constitutionality of 326 IAC 13-1.1-2 is their own Amended Complaint, the Commissioner defendants Answer to it, and an Affidavit of one of the plaintiffs establishing ownership of a motor vehicle registered in Indiana for which he was required to have emission testing to obtain a license plate. This designated evidence does not overcome the reasonable relationship between the classification, emissions testing for Lake and Porter County residents, and the purpose of the regulation, attaining ambient air quality. The observation of constant travel of even thousands of semi-tractor-trailers and vehicles through the counties in question, without empirical evidence to frustrate the relationship between emissions testing for residents and goal of attaining ambient air quality, is simply not enough to overcome the presumption of constitutionality.

The Commissioner Defendants' Motion for Summary Judgment Regarding the Indiana Constitution

Conversely, the Commissioner defendants must designate evidence that the disparate treatment accorded by the regulation is reasonably related to inherent characteristics which distinguish the unequally treated classes or a relationship between the classification and the purpose of the regulation for the court to determine, as a matter of law, the presumption

that 326 IAC 13-1.1-2 is constitutional.

The Commissioner defendants argue that the Article VI, Clause 2 of the United States Constitution, the Supremacy Clause, preempts Indiana state law, *Kurns v. Railroad Friction Products*, 565 U.S. 625, 630-631 (2012). The Supremacy Clause requires that state law yield to conflicting federal law. The statutory scheme of the federal Clean Air Act leaves the states, not the federal government, responsible for assuring attainment. Any state could exercise the choice not to implement a means for attainment. If the State of Indiana did not require vehicle emissions testing in Lake and Porter Counties, the penalty for non-compliance would be the elimination of a good portion of Indiana's highway funding. This statutory and regulatory scheme, when taken with the evidence designated by the Commissioner defendants, particularly the Air Quality Designations and supporting documentation, is sufficient for the court to determine, as a matter of law, that a reasonable relationship exists between the requirement of emissions testing in Lake and Porter Counties and the purpose of attaining ambient air quality. 326 IAC 13-1.1-2 does not offend the Constitution of the State of Indiana.

The Commissioner Defendants' Motion for Summary Judgment Privileges and Immunities, Due Process and Equal Protection Clauses of the United States Constitution

In the same manner, as a matter of law, supported by the evidence designated by the Commissioner defendants, 326 IAC 13-1.1-2 does not violate the Privileges and Immunities, Due Process or Equal Protection clauses of the United States Constitution.

The Privileges and Immunities clause bars discrimination against citizens of other states for the mere fact that they are citizens of other states, *Saenz v. Roe*, 526 U.S. 489, 502 (1999). Leaving aside the fact that the discrimination here mainly involves citizens of the same state, if there is a substantial reason for the discrimination, the clause affords no protection, *Saenz, id.* at 502. The evidence designated by the Commissioner defendants provides meets the "substantial reason" requirement set forth by *Saenz,id.*

Neither does the challenged regulation violate the Due Process clause. Indiana adopted the standard set forth in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005) that the clause is violated only if an owner is deprived of all or substantially all economic or productive use of his or her property, *Chevron, id.* at 538-540, *State v. Kimco of Evansville, Inc.* 902 N.E.2d 206, 211 (Ind. 2009). Requiring emissions testing, though inconvenient, does not deprive anyone of all economic or productive use of their motor vehicle. As to any claim of a substantive due process violation, the very nature of the claim is not an infringement:

> [U}pon a fundamental right or liberties deeply rooted in our nation's history, *Ind. High School Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 236 (Ind. 1997) citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

As the 7th Circuit held in *Sung Park v. Ind. Univ. Sch. of Dentistry*, 692 F.3d 828, 832 (7th Cir. 2012), the list of fundamental rights "... is, however, a short one, including things like the right to marry, the right to have children, the right to marital privacy, the right to contraception, and the right to bodily integrity."

Finally, Equal Protection under the law is not violated by the regulation. As set forth above, if the disparate treatment accorded by the regulation is reasonably related to inherent characteristics which distinguish the unequally treated classes or a relationship between the classification and the purpose of the regulation, it passes constitutional muster.

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification, *F.C.C. v. Beach Comms., Inc.*, 508 U.S. 307, 313 (1993).

Again, the materials designated by the Commissioner defendants demonstrate no procedure along suspect lines nor any infringement of fundamental constitutional rights.

The statutory and regulatory scheme put in place by the Environmental Protection Agency, the Indiana General Assembly, the Indiana Department of Environmental Management and the Indiana Bureau of Motor Vehicles to achieve ambient air quality standards may not be wise, fair or logical, *F.C.C. v. Beach Comms., Inc., id.* Its uniform unpopularity among residents[1] of Lake and Porter Counties who question its efficacy in actually improving air quality standards is, standing alone, not enough to prevail on a constitutional determination. The designated materials provided by the Bilski plaintiffs and the Commissioner defendants, when taken with the law surrounding the issue, lead to only one conclusion: the statutory and regulatory scheme is constitutional.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The Motion for Partial Summary Judgment of the plaintiffs, Ted Bilski, Charlie Brown, Christine Cid, Daniel Dernulc, David Hamm, Christian Jorgensen and Alfredo Menchaca, is denied.

2. The Cross-Motion for Summary Judgment of the defendants, Brian C. Rockensuess, as Commissioner of the Indiana Department of Environmental Management and Joe Hoage, as Commissioner of the Indiana Bureau of Motor Vehicles is granted.

3. There being no just reason for delay, a final and appealable judgment is entered in favor of the defendants, Brian C. Rockensuess, as Commissioner of the Indiana Department of Environmental Management, Joe Hoage, as Commissioner of the Indiana Bureau of Motor Vehicles and against the plaintiffs, Ted Bilski, Charlie Brown, Christine Cid, Daniel Dernulc, David Hamm, Christian Jorgensen and Alfredo Menchaca.

---

[1] The Commissioner defendants also raised the question of the standing of the Bilski plaintiffs to bring this lawsuit. This court has determined the constitutionality of the statutory and regulatory scheme without reaching the issue of standing.

Dated July 11, 2023

JOHN M. SEDIA, JUDGE
LAKE SUPERIOR COURT
CIVIL DIVISION, ROOM ONE