ATTORNEY FOR APPELLANTS

Christopher Kunz
Marion County Public Defender
Appellate Division
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Kelly A. Loy
Assistant Section Chief Criminal Appeals
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Travis Armes, Eric Settles, and Debra Pennington,
Appellants-Defendants,

v.

State of Indiana,
Appellee-Plaintiff

July 8, 2022

Court of Appeals Case No. 21A-CR-2384

Interlocutory Appeal from the Marion Superior Court

The Honorable James K. Snyder, Magistrate

Trial Court Cause Nos. 49D28-2101-F2-3158, -3159, -3149

Crone, Judge.

Case Summary

[1] The State charged Travis Armes, Eric Settles, and Debra Pennington (collectively Defendants) with various crimes involving a Schedule I controlled substance identified as MDMB-4en-PINACA (MDMB). They filed motions to

dismiss the charging informations, which the trial court denied. In this interlocutory appeal, they argue that the charging informations fail to state facts constituting an offense because the emergency rule (the Emergency Rule) adopted by the Indiana Board of Pharmacy (the Board) purporting to add MDMB to Schedule I failed to comply with the authorizing statute. They also assert that the charging informations are defective because the Emergency Rule failed to provide fair notice of the proscribed conduct and is void for vagueness under the federal constitution.

[2] We conclude that the Emergency Rule complied with the authorizing statute, and thus added MDMB to Schedule I. However, we agree with Defendants that the Emergency Rule fails to provide adequate information for a person of ordinary intelligence to determine whether he or she is dealing a substance that contains MDMB, and therefore it is unconstitutionally vague. Defendants are entitled to dismissal of the charges on this ground, and accordingly we reverse.

Facts and Procedural History

[3] As alleged by the probable cause affidavits, in January 2021, Settles was in custody at the Marion County Jail awaiting trial. Armes worked in the jail kitchen. Settles arranged with Pennington to deliver drugs to Armes so that he could bring the drugs into the jail on January 26. On January 26, two police officers at the jail observed Armes entering the jail through the employee entrance with a plastic grocery bag in his hand. The officers asked Armes to step into the video visitation room, and as he walked into the room, he tossed a clear plastic Ziploc bag up next to one of the monitors. The bag contained

candy and a box of crackers. Under the box of crackers was a damp notebook. Based on one of the officers' training and experience, he believed the paper to be soaked in a synthetic narcotic. According to one of the officers present, "These sheets of paper are regularly found in correctional facilities and can sell for $400 per sheet once in an inmate's possession." Appellants' App. Vol. 2 at 17. Subsequent testing indicated that the paper contained MDMB, "a synthetic cannabinoid" that "is an emergency [S]chedule 1 narcotic." *Id*. at 20.

[4] On January 29, 2021, the State charged Settles and Pennington with level 2 felony conspiracy to commit dealing in a Schedule I controlled substance in violation of Indiana Code Section 35-48-4-2(a)(1) and -(f)(1) and Section 35-41-5-2. The State also charged Armes with level 2 felony dealing in a Schedule I controlled substance in violation of Section 35-48-4-2(a)(1) and -(f)(1) and level 5 felony trafficking with an inmate in violation of Section 35-44.1-3-5(b)(1). Appellants' App. Vol. 2 at 22, 87, 175. The informations identified the controlled substance as "MDMB-4en-PINACA, a controlled substance classified in Schedule I." *Id*. Defendants filed motions to dismiss, arguing that the charges failed to state an offense because the drug was not found under Schedule I and was not otherwise declared to be a Schedule I substance; that the statutory scheme defining controlled substances was unconstitutionally vague as applied under the United States and the Indiana Constitutions; and that the informations failed to cite the rule of law alleged to be violated. *Id*. at 110.

[5] The State filed a motion to amend the informations to add that MDMB was a controlled substance classified in Schedule I "pursuant to Emergency LSA Document #20-516(E)," which the trial court granted. *Id*. at 50, 142, 229. The Emergency Rule, LSA Document No. 20-516(E), was adopted by the Board and filed with the Indiana Register on October 6, 2020, to add drug compounds, including MDMB, to Schedule I and became effective on November 5, 2020. The addition of the citation to the Emergency Rule to the informations rendered Defendants' third argument in support of their motion to dismiss moot. In August 2021, the trial court held a hearing to address the remainder of Defendants' arguments. On September 14, 2021, the trial court issued an order denying Defendants' motions to dismiss. This interlocutory appeal ensued.

Discussion and Decision

[6] Defendants contend that the trial court abused its discretion by denying their motions to dismiss. "We review a trial court's ruling on a motion to dismiss a charging information for an abuse of discretion, which occurs only if a trial court's decision is clearly against the logic and effect of the facts and circumstances," or when it misinterprets the law. *State v. Barnett*, 176 N.E.3d 542, 551 (Ind. Ct. App. 2021), *trans. denied* (2022). We review questions of law de novo. *Id*. "[W]e review a matter of statutory interpretation de novo because it presents a question of law." *Study v. State*, 24 N.E.3d 947, 950 (Ind. 2015) (quoting *Sloan v. State*, 947 N.E.2d 917, 920 (Ind. 2011)), *cert. denied*. Likewise, "[t]he constitutionality of an Indiana statute is a pure question of law we review

de novo." *State v. Katz*, 179 N.E.3d 431, 441 (Ind. 2022) (quoting *Horner v. Curry*, 125 N.E.3d 584, 588 (Ind. 2019)).

Section 1 – MDMB became a Schedule I controlled substance pursuant to the Emergency Rule.

[7] Defendants first argue that they are entitled to dismissal on the basis that the charging informations fail to state facts constituting an offense because MDMB was not a Schedule I controlled substance when the alleged crimes occurred. *See* Ind. Code § 35-34-1-4(a)(5) (permitting dismissal of an information if "[t]he facts stated do not constitute an offense"). In determining whether an information fails to state facts constituting an offense, we take the facts as alleged in the information as true. *Barnett*, 176 N.E.3d at 551. "We will find that dismissal for failure to state an offense is warranted 'only when an information is facially deficient in stating an alleged crime.'" *State v. Sturman*, 56 N.E.3d 1187, 1196 (Ind. Ct. App. 2016) (quoting *Pavlovich v. State*, 6 N.E.3d 969, 974 (Ind. Ct. App. 2014), *trans. denied*).

[8] We begin with a review of the statutory scheme designating Schedule I controlled substances. Indiana Code Section 35-48-2-4 provides a long list of Schedule I controlled substances and is organized into six categories: (b) opiates, (c) opium derivatives, (d) hallucinogenic substances, (e) depressants, (f) stimulants, and (g) synthetic drugs as defined in Section 35-31.5-2-321 (Section 321). Section 321, in turn, provides a lengthy list of synthetic drugs. Although MDMB was not explicitly named in either statute at the time of Defendants'

alleged crimes,[1] Section 321 also includes "[a]ny compound determined to be a synthetic drug by rule adopted under IC 25-26-13-4.1 [(Section 4.1)]." As recognized by our supreme court, the regulation of synthetic drugs "is a particularly challenging pursuit, as minor variants in chemical structure can place the substances beyond the reach of criminal statutes without diminishing their psychotropic effects." *Tiplick v. State*, 43 N.E.3d 1259, 1261 (Ind. 2015). The General Assembly enacted Section 4.1 in 2012 to address the fast pace of evolving chemistry and the rapid introduction of new substances. *Id.*

[9] Section 4.1 grants the Board the authority to adopt emergency rules as follows:

> (a) The board[2] 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 a 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

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[1] The current version of Section 35-48-2-4 lists MDMB as an opiate.

[2] "'Board' means the Indiana board of pharmacy." Ind. Code § 25-26-13-2.

(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 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[3] 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.

[10] The Board maintains a list of Schedule I controlled substances at 856 Indiana Administrative Code 2-2-2. Categories include opiates, opium derivatives, hallucinogenic substances, and depressants. The rule does not include a separate category of synthetic drugs.

[11] The Emergency Rule at issue here provides as follows:

> (a) This SECTION is supplemental to 856 IAC 2-2-2.
>
> (b) Unless specifically excepted or unless listed in another Schedule, any of the following substances, including its analogs, isomers, esters, ethers, salts and salts of isomers, esters, and ethers whenever the existence of such analogs, isomers, esters, ethers, and salts is possible within the specific chemical designation:

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[3] "'Publisher' refers to the publisher of the Indiana Register and Indiana Administrative Code, which is the legislative council, or the legislative services agency operating under the direction of the council." Ind. Code § 4-22-2-3.

(1) MDMB-4en-PINACA.

(2) 4F-MDMB-BICA; 4-fluoro MDMB-BICA, 4F-MDMB-BUTICA; Methyl 2-[[1-(4-fluorobutyl)indole-3-carbonyl]amino]-3,3- dimethyl-butanoate.

(3) Isotonitazene. Synonyms: N,N-diethyl-2-(2-(4 isopropoxybenzyl)-5-nitro-1 *H*- benzimidazol-1-yl)ethan-1-amine.

Ind. Reg. LSA Doc. No. 20-516(E) § 1 (filed Oct. 6, 2020), http://iac.iga.in.gov/iac/20201014-IR-856200516ERA.xml.html [https://perma.cc/63UF-GQQV]. The digest to the Emergency Rule states,

> Temporarily amends 856 IAC 2-2-2 to add drug compounds to Schedule I. Repeals LSA Document #20-498(E), posted at 20200923-IR-856200498ERA. *Statutory authority: IC 25-26-13-4.1*. Effective 30 days after filing with the Publisher.

Id. (emphasis added).

[12] Defendants argue that the Emergency Rule did not comply with Section 4.1 and thus failed to make MDMB a Schedule I controlled substance. They maintain that Section 4.1 authorizes the Board only to "declare that a substance is a synthetic drug[,]" not to add a substance directly to the list of Schedule I controlled substances, and the Emergency Rule does not declare that MDMB is a synthetic substance or even use the word "synthetic." The State counters that given the limited scope of Section 4.1, it is unnecessary to use the word "synthetic" within the language of the Emergency Rule to add MDMB to Schedule I. We agree with the State.

[13] As discussed above, the governing statutes dictate that Schedule I controlled substances include substances adopted under Section 4.1. *See* Ind. Code §§ 35-48-2-4(g), 35-31.5-2-321(13). Section 4.1 was enacted to allow additional substances to be added to Schedule I on an emergency basis. The Emergency Rule's digest specifically states that the Rule temporarily amends 856 IAC 2-2-2 to add drugs to Schedule I and cites Section 4.1 as its authority to do so. The authority granted to the Board under Section 4.1 to adopt an emergency rule is limited to synthetic drugs. As such, it is implicit that the drugs identified in the Emergency Rule, including MDMB, are synthetic drugs because these are the only substances that the Board is authorized to add to Schedule I.

[14] In support of their argument that the Emergency Rule fails to make MDMB a Schedule I controlled substance, Defendants compare the Emergency Rule to an earlier Board emergency rule that was the subject of an unconstitutional vagueness challenge in *Tiplick*. The emergency rule in *Tiplick* read as follows:

> (f) Synthetics. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following synthetic substances, or which contains any of its salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation (for purposes of this subsection only, "isomer" includes the optical, position, and geometric isomers):
>
> ….
>
> (13) XLR11 [(1-(5-fluoropentyl)indol-3-yl)-(2,2,3,3-tetramethylcyclopropyl)methanone].

Ind. Reg. LSA Doc. No. 12-493(E) § 1 (filed Aug. 15, 2012), http://iac.iga.in.gov/iac/20120822-IR-856120493ERA.xml.html [https://perma.cc/U5UK-K8GB].

[15] Defendants note that the emergency rule in *Tiplick* explicitly designated the listed substances to be synthetics. They contend that because that rule explicitly designated the substances to be synthetics, it shows that the Board was aware that 856 Indiana Administrative Code 2-2-2 did not include a separate synthetics category and that to add a synthetic drug to the list, it was required to explicitly include that category in the Emergency Rule itself. According to Defendants, "the fact that [the Board] did not declare MDMB to be a synthetic drug [in the Emergency Rule] compels a conclusion that the substance was not a synthetic drug under Indiana Law at the time the charges were filed." Appellants' Br. at 21. We acknowledge that the explicitness of the emergency rule in *Tiplick* is preferable because it makes it obvious that the drugs are synthetics. However, as discussed above, the Emergency Rule cited Section 4.1 as the source of its authority, the Board's authority under Section 4.1 is limited to synthetic substances, and therefore, by implication, MDMB is a synthetic drug.

[16] Defendants also direct us to *Burk v. State*, 257 Ind. 407, 275 N.E.2d 1 (1971). There, Burk was charged with using LSD under the Indiana Uniform Narcotic Drug Act (the NDA). At that time, LSD was prohibited only under the Indiana Dangerous Drug Act (the DDA). The State argued that by enacting subsection (b) of the NDA, the legislature had delegated the power to define narcotic drugs

to the Board, and that pursuant to this authority, the Board had added all the substances covered under the DDA to the NDA. *Id*. at 410, 275 N.E.2d at 3. Subsection (b) of the NDA provided that the term "narcotic drug" included "any drug which the Indiana board of pharmacy… shall determine has an addiction-forming or addiction-sustaining quality similar to that of any narcotic drug as defined in subsection (a) of this section." *Id*. at 409, 275 N.E.2d at 2-3. The regulation at issue stated that "[t]he terms 'narcotics' and 'other dangerous drugs' *as used in these regulations* shall mean those drugs, biologicals, medicinal substances or devices defined in the [NDA] and the [DDA]." *Id.*, 275 N.E.2d at 3 (emphasis added) (citations omitted).

[17] Our supreme court considered the text of the NDA and concluded that there was "no language in the [NDA] which could be construed to mean that the Indiana Board of Pharmacy ha[d] been given the authority to redefine a narcotic drug." *Id*. at 411, 275 N.E.2d at 3. Furthermore, the court rejected the State's contention that the regulation was an attempt by the Board to redefine a narcotic drug. Specifically, the court observed that the regulation "only define[d] the term 'narcotics and other dangerous drugs' for purposes of clarification of that term as it is used in the regulations." *Id.*, 275 N.E.2d at 3-4.

[18] Defendants contend that similar to *Burk*, "there is no language in [Section 4.1] that simply allows the Board of Pharmacy to add a substance to Schedule I without first declaring it to be a synthetic drug." Appellants' Br. at 22. We do not find *Burk* applicable because the regulation there is markedly different from the regulation at issue here. The regulation in *Burk* did not contain any

language indicating that it was adding substances to a list of narcotic drugs. Here, the Emergency Rule cites Section 4.1 as its statutory authority, states that it is adding substances to Schedule I, and names those substances. The Board is authorized to add substances to Schedule I because Schedule I includes substances that are adopted under Section 4.1. *See* Ind. Code §§ 35-48-2-4(g); 35-31.5-2-321(13). We conclude that the Emergency Rule effectively made MDMB a controlled substance. As such, Defendants are not entitled to dismissal of the charges on the basis that the informations fail to state an offense.

Section 2 – The Emergency Rule is unconstitutionally vague under the United States Constitution.

[19] Defendants also assert that the charging informations are defective and must be dismissed because the Emergency Rule is unconstitutionally vague. *See* Ind. Code § 35-34-1-6(a)(3), -(c) (requiring dismissal of charging information when statute defining offense charged is unconstitutional). In addressing this argument, we are mindful that statutes are presumed to be constitutional, and the party challenging the statute bears the heavy burden of proving otherwise. *Conley v. State*, 972 N.E.2d 864, 877 (Ind. 2012). "Any reasonable doubts and constructions as to the statute's validity are resolved in favor of constitutionality." *Yoakum v. State*, 95 N.E.3d 169, 172 (Ind. Ct. App. 2018) (quoting *Lee v. State*, 973 N.E.2d 1207, 1209 (Ind. Ct. App. 2012), *trans. denied*), *trans. denied*.

[20] Under federal constitutional principles of due process, a penal statute must clearly define its prohibitions, and if it does not, it is void for vagueness. *Brown v. State*, 868 N.E.2d 464, 467 (Ind. 2007). "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*. Here, Defendants challenge the adequacy of the notice provided by the Emergency Rule.

[21] "[A] fundamental aspect of our nation's jurisprudence is that criminal statutes must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden so that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Lock v. State*, 971 N.E.2d 71, 74 (Ind. 2012). However, a statute "need only inform the individual of the generally proscribed conduct; it need not list with exactitude each item of prohibited conduct." *Baumgartner v. State*, 891 N.E.2d 1131, 1136 (Ind. Ct. App. 2008). We will not find a statute to be unconstitutionally vague "if individuals of ordinary intelligence would comprehend it adequately to inform them of the proscribed conduct." *Id*. In addition, "it is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *Reece v. State*, 181 N.E.3d 1006, 1009 (Ind. Ct. App. 2021), *trans. denied* (2022).

[22] We begin with a discussion of *Tiplick*, in which our supreme court was asked to consider whether Sections 321 and 4.1 provided adequate notice under the

federal constitution and concluded that they were not unconstitutionally vague. 43 N.E.3d at 1263-64. There, the defendant was charged with possessing, selling, and dealing in a Schedule I controlled substance designated XLR11, which was identified in Emergency Rule #12-493(E) as "XLR11 [(1-(5-fluoropentyl)indol-3-yl)-(2,2,3,3-tetramethylcyclopropyl)methanone]." *Id*. at 1261 (quoting Ind. Reg. LSA Doc. No. 12-493(E), http://www.in.gov/legislative/iac/20120822-IR-856120493ERA.xml.html) [https://perma.cc/HXX8-3GZ7]. The defendant presented two arguments in support of his vagueness challenge, one of which was that the sheer complexity of Section 321 was beyond the grasp of an ordinary person and thus impermissibly vague. Our supreme court analyzed this argument as follows:

> Our General Assembly is attempting to regulate a field of advanced chemistry that creates synthetic cousins of naturally occurring illegal substances like marijuana. Article 4, Section 20 instructs the General Assembly to avoid the use of technical terms to the extent that it is *practicable*. The novelty, complexity, and rapidly-evolving nature of synthetic drugs necessitates some scientific terminology in the law.

Id. at 1263 (citation omitted). In addition, the court noted that because vagueness challenges, like Tiplick's, that do not threaten First Amendment interests are examined on an as-applied basis, Tiplick was limited to challenging "the chemical description of XLR11," the chemical he was charged with, not the entire text of Section 321. *Id*. The *Tiplick* court concluded,

> [I]t may be that a person with ordinary *experience and knowledge* does not know what [(1–(5–fluoropentyl)indol-3-yl)-(2,2,3,3-

> tetramethylcyclopropyl)methanone] is made of, but that is not the test; rather, it is whether a person of ordinary *intelligence* would understand his conduct was proscribed. Here, an ordinary Hoosier, armed with this chemical formula for XLR11, could determine through appropriate testing whether he was attempting to sell any products containing it. That is what we demand of our penal statutes.

Id.

[23] The defendant also argued that the cross-referencing of Sections 321 and 4.1 created a "statutory maze" preventing "a person of ordinary intelligence from being able to discover which conduct is proscribed." *Id*. The *Tiplick* court rejected this argument, reasoning as follows:

> "Synthetic drug" is defined in Section 321, it names the Section 4.1 emergency rules as the only additional source for prohibited substances, and Section 4.1(c) describes where to look for those published rules, based on the procedures contained in Indiana Code section 4-22-2-37.1 (2012). This is not a "maze," but rather a chain with three links–three discrete statutes which give clear guidance as to how to find everything falling within the definition of "synthetic drug" under Section 321. Such a statutory scheme is not unduly vague.

Id. at 1264.

[24] Here, Defendants limit their federal constitutional argument to the notice provided by the Emergency Rule, which is appropriate because their vagueness claim is considered on an as-applied basis. They emphasize the difference between the Emergency Rule here and the one in *Tiplick* to argue that the

Emergency Rule fails to put an ordinary person on fair notice that dealing in MDMB was prohibited conduct. Unlike the rule in *Tiplick*, the Emergency Rule does not explicitly identify the listed substances as synthetic drugs. An even greater problem is that the Emergency Rule does not provide the chemical composition of MDMB. Thus, there is no official designation of what constitutes MDMB. In *Tiplick*, the court concluded that the rule provided fair notice to a person of ordinary intelligence because "an ordinary Hoosier, armed with this chemical formula for XLR11, could determine through appropriate testing whether he was attempting to sell any products containing it." *Id.* at 1263. The Emergency Rule does not provide adequate information for a person of ordinary intelligence to determine whether he or she is dealing a substance that contains MDMB. Accordingly, the Emergency Rule fails to provide the notice required by due process under the federal constitution. Therefore, the trial court erred in denying Defendants' motion to dismiss the charging informations.

[25] As a final matter, Defendants also assert that the Emergency Rule and Section 4.1 are void for vagueness under the Indiana Constitution. A line of cases by this Court holds that appellate analysis of a vagueness claim is the same under both the federal and state constitutions. *Bemis v. State*, 652 N.E.2d 89, 92 (Ind. Ct. App. 1995); *Johnson v. State*, 648 N.E.2d 666, 670 (Ind. Ct. App. 1995); *Jackson v. State*, 634 N.E.2d 532, 535 (Ind. Ct. App. 1994); *Helton v. State*, 624 N.E.2d 499, 505 (Ind. Ct. App. 1993), *trans. denied*. However, our supreme court has not considered whether the vagueness analysis under the Indiana

Constitution is the same as that under the federal constitution. *Tiplick*, 43 N.E.3d at 1262 n.2.

[26] Defendants contend that the Indiana Constitution provides greater protection to Hoosiers than the federal constitution, and therefore the vagueness analysis under the Indiana Constitution requires higher scrutiny than the federal constitution. In particular, they point to Article 4, Section 20 of the Indiana Constitution, which states, "Every act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms." Defendants note that the delegate who proposed Article 4, Section 20 stated that the purpose of this section was to ensure that the laws "may be readily understood by every citizen who is bound to obey the laws," and "[t]he laws ought to be so plain that every man can interpret them for himself, without the aid of a law dictionary. This is a reform that has been called for by the people. They are loudly complaining of the complexity of the laws." 2 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 1128 (1850), https://quod.lib.umich.edu/m/moa/AEW7738.0002.001/124?rgn=full+text;view=image [https://perma.cc/AN38-JKMS].

[27] The comments in support of Article 4, Section 20 suggest that a higher standard may be appropriate under the Indiana Constitution. *See Hoagland v. Franklin Twp. Cmty. Sch. Corp.*, 27 N.E.3d 737, 741 (Ind. 2015) ("[Q]uestions arising under the Indiana Constitution are to be resolved by examining the language of the text in the context of the history surrounding its drafting and ratification,

the purpose and structure of our Constitution, and case law interpreting the specific provisions.") (quoting *Nagy ex rel. Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 484 (Ind. 2006)). However, we need not resolve this question, given that we have already determined that the Emergency Rule is unconstitutionally vague under the federal constitution.

[28] Based on the foregoing, we reverse the trial court's denial of Defendants' motions to dismiss.

[29] Reversed.

Vaidik, J., and Altice, J., concur.