

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II**

CIVIL ACTION No. 24-CI-00374

DERBECIGS, LLC, et al.

PETITIONERS

vs.

**ALLYSON TAYLOR, in her official capacity as
Commissioner of the Kentucky Department of
Alcoholic Beverage Control, et al.**

RESPONDENTS

ORDER

This matter is before the Court upon Respondents’ *Motion to Dismiss* and Petitioners’ *Cross-Motion for Judgment*. This matter was called before the Court on Monday, July 8, 2024, during the Court’s civil motion hour. Upon review of the parties’ briefs and papers, and being sufficiently advised, the Court hereby **GRANTS** Respondents’ *Motion to Dismiss* and **DENIES** Petitioners’ *Cross-Motion for Judgment*.

STATEMENT OF FACTS

During the 2024 Regular Session, the General Assembly enacted House Bill 11 (“HB 11”). HB 11, “AN ACT relating to nicotine products,” amends portions of KRS Chapters 438 and 241 to permit only the sale of authorized vapor products that contain nicotine for which the U.S. Federal Drug Administration (“the FDA”) has authorized or the manufacturer has received a safe-harbor certification. Moreover, in Sections 9 and 10 of HB 11, the General Assembly removed language from the statutes that previously treated vapor products as distinct from nicotine products. Governor Andy Beshear signed HB 11 on April 5, 2024, and HB 11 is set to take effect on January 1, 2025.

Petitioners are retailers who sell vapor products, specifically “vapeable [*sic*] hemp-derived products.” Petitioners allege HB 11 interferes with their livelihood because come January 1, 2025, they will be unable to sell “vapable hemp-derived products” as they are not “authorized vapor products” under HB 11. Petitioners contend that HB 11 violates Sections 2 and 51 of the Kentucky Constitution and that they are entitled to attorneys’ fees under 42 U.S.C. § 1983. Respondents have moved to dismiss this action arguing that Petitioners have failed to demonstrate that HB 11 violates Sections 2 and 51 of the Kentucky Constitution and that Petitioners are unable to prevail on their § 1983 claim. Additionally, Respondents initially raised the issue of standing, however, upon invitation from Respondents, and leave from the Court, Petitioners have amended their Complaint to satisfy the standing requirement.

ANALYSIS

I. Respondents’ *Motion to Dismiss*

a. Standard of Review

When considering a motion to dismiss, Civil Rule 12.02 requires the Court to construe the pleadings liberally “in a light most favorable to the plaintiff” and to take all factual allegations in the complaint to be true. *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. Ct. App. 1987) citing *Ewell v. Central City*, 340 S.W.2d 479 (Ky. 1960). “The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Mims v. W.-S. Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. Ct. App. 2007) quoting *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. Ct. App. 2002).

b. Acts of the General Assembly are Presumed Constitutional

Acts of the General Assembly are given a “strong presumption of constitutionality.” *Wynn v. Ibold, Inc.*, 969 S.W.2d 695, 696 (Ky. 1998). Thus, a party challenging a duly enacted statute by the General Assembly is faced with the burden of proving the challenged act unconstitutional. *Id.* To declare an act unconstitutional, the constitutional violation “must be clear, complete and unmistakable.” *Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998). The Court is bound to resolve “any doubt in favor of constitutionality rather than unconstitutionality.” *TECO/Perry Cty. Coal v. Feltner*, 582 S.W.3d 42, 45 (Ky. 2019) (citations omitted). Moreover, a facial challenge, as has been mounted here, is “the most difficult challenge to mount successfully” as Petitioners “must establish that no set of circumstances exists under which the [act] would be valid.” *Williams v. Commonwealth*, 213 S.W.3d 671, 681 (Ky. 2006) (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)).

c. HB 11 does not Violate Section 51 of the Kentucky Constitution

Section 51 of the Kentucky Constitution provides:

No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length.

KY. CONST. § 51.

Petitioners argue that HB 11 violates Section 51 of the Kentucky Constitution because they allege the title of HB 11, “AN ACT relating to nicotine products,” clearly concerns nicotine only products, but HB 11 also contains references to products of “other substances.” Respondents offer that Petitioners are too narrowly reading Section 51 and

misunderstand the title/one (1) subject requirement. Specifically, Respondents assert that discussing non-nicotine vapor products does not make HB 11 a two (2) subject bill. Rather, Respondents believe it is logical and germane to discuss what is not authorized in addition to what is authorized.

Respondents are correct that Section 51 does not require a bill's title to "contain a detailed index of everything that its body contains." *Talbott v. Laffoon*, 79 S.W.2d 244, 247 (Ky. 1934). Instead, "if the title is sufficient to furnish a clue to its contents, the constitutional provision is not violated." *Id.* Here, HB 11's title, "AN ACT relating to nicotine products," more than furnishes a clue to its contents and provides a general idea of the bill's contents. *Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 443 (Ky. 1986). HB 11's reference to "other substances" is not used in a manner outside of the context of the bill, but rather to logically indicate what is unauthorized. The Court agrees with Respondents that what is unauthorized is germane and naturally connected to what is authorized—specific nicotine vapor products. It is reasonable and practical to include both authorized and unauthorized products in a bill and the inclusion of "unauthorized products" is not "distinct and wholly disconnected." *Grayson Cnty. Bd. of Edu. V. Casey*, 157 S.W.3d 201, 208 (Ky. 2005). The purpose of Section 51's title and one (1) subject requirement is to prevent "surprise and fraud." *Id.* Because the title "furnish[es] general notification of the general subject in the act," HB 11 does not violate Section 51 of the Kentucky Constitution. *Collins*, 709 S.W.2d at 443.

d. HB 11 does not Violate Section 2 of the Kentucky Constitution

Section 2 of the Kentucky Constitution states, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the

largest majority.” KY. CONST. § 2. Petitioners assert that HB 11 is arbitrary and thus violates Section 2 of the Kentucky Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioners’ argument claims “[a] legislative action is arbitrary if it conditions a grant of marketing authority upon compliance with an impossibility” and that the “absence of a regulatory pathway” to get market authorization for their hemp-based vapor products violates their due process rights. Respondents argue that Petitioners have failed to assert a valid Section 2 argument or demonstrate any violation of their due process rights. The Court agrees.

In applying Section 2, the Kentucky Supreme Court has held that “[w]hatever is contrary to democratic ideals, customs and maxims is arbitrary.” *Kentucky Milk Marketing v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985). “Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary.” *Id.* “When economic and business rights are involved, rather than fundamental rights, substantive due process requires that a statute be rationally related to a legitimate state objective.” *Stephens v. State Farm Mutual Automobile Ins. Co.*, 894 S.W.2d 624, 627 (Ky. 1995). Here, the burden is on Petitioners to demonstrate the intent behind HB 11—regulating the sale of vapor products—is not rationally related to a legitimate state interest. Petitioners must negate “every conceivable basis which might support it whether or not the basis has a foundation in the record.” *Zuckerman v. Bevin*, 565 S.W.3d 580, 596 (Ky. 2018) (quoting *Steven Lee Enters. v. Varney*, 36 S.W.3d 391, 395 (Ky. 2000)). Petitioners have failed to meet this burden. Instead, Respondents offer that the Kentucky Constitution grants the General Assembly legislative power, including police power over the health, safety, and general welfare of the citizens of the Commonwealth. *Jones v. Russell*, 6 S.W.2d 460,

461 (Ky. 1928). Respondents state the regulation of nicotine and vapor products is a proper subject for the General Assembly given that the products directly concern the health and safety of the Commonwealth's citizens. Finally, Respondents argue that HB 11 affords Petitioners due process because HB 11 operates equally, has established a method of procedure for vapor products to be authorized under Kentucky law, and provides notice of which vapor products are authorized and which vapor products are not authorized.

The Court entirely agrees with Respondents' position. The sale of nicotine and vapor products are highly regulated in every state, and the Court will not question the specific reasons for the General Assembly's decision to regulate and limit the sale of nicotine and vapor products to only products approved by the FDA or granted a safe-harbor certification by the FDA. The regulation of these products directly relates to the health and safety of the Commonwealth's citizens, the power of which is vested by the Kentucky Constitution in the General Assembly.

Therefore, the Court holds that HB 11 does not violate Section 2 of the Kentucky Constitution or the Due Process Clause of the Fourteenth Amendment because, HB 11 is not arbitrary and the General Assembly's decision to permit only the sale of FDA approved nicotine vapor products or products granted a safe-harbor certification by the FDA is related to a legitimate state interest and is well within the scope of the General Assembly's police power over the health and safety of the Commonwealth's citizens.

e. Petitioners are not Entitled to Relief Under 42 U.S.C. § 1983

Petitioners' § 1983 claim is grounded on entitlement to injunctive relief and attorneys' fees upon succeeding on the merits of their claims. However, as determined

above, have failed to prevail on their claims because HB 11 does not violate Section 2 or Section 51 of the Kentucky Constitution. Thus, Petitioners § 1983 claim is without merit.

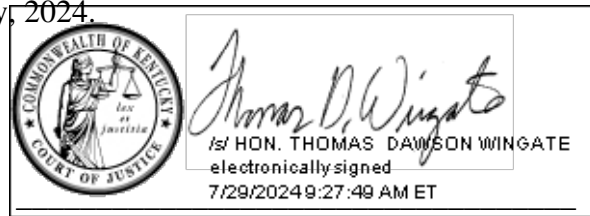
II. Petitioners' Cross-Motion for Judgment

Because the Court has found that Respondents are entitled to dismissal of this action, the Court need not entertain Petitioners' *Cross-Motion for Judgment*. Accordingly, Petitioners' *Cross-Motion for Judgment* is **DENIED AS MOOT**.

WHEREFORE, Respondents' *Motion to Dismiss* is **GRANTED** and Petitioners' *Cross-Motion for Judgment* is **DENIED**.

This order is final and appealable and there is no just cause for delay.

SO ORDERED, this 29th day of July, 2024.



THOMAS D. WINGATE
Judge, Franklin Circuit Court

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this _____ day of July, 2024, to the following:

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