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IN THE
UTAH COURT OF APPEALS

MIKE'S SMOKE, CIGAR & GIFTS,

Petitioner and Appellant,

v.

CITY OF ST. GEORGE,

Respondent and Appellee.

On appeal from a judgment of the Fifth District Court for Washington County,
The Honorable Jeffrey C. Wilcox

BRIEF FOR APPELLEE CITY OF ST. GEORGE

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UTAH APPELLATE COURTS**

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1. City's Council's Findings and Conclusions
2. District Court's Decision and Order Affirming Business License Revocation
3. Utah Code § 58-37-2(1)(g)(i) and other cited statutes
4. Statutory Comparison

JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code § 78A-4-103(j).

ISSUE AND STANDARD OF REVIEW

Do the absurd results and constitutional avoidance canons of statutory interpretation vest the court with the power to invalidate a statutory amendment and rewrite unambiguous statutory language in a manner that is inconsistent with legislative intent?

Standard of Review. “Judicial review of license revocations by municipalities is limited to a determination whether the municipality acted within its lawful authority and in a manner that is not arbitrary or capricious.” *Mike’s Smoke, Cigar & Gifts v. St. George City*, 2015 UT App 158, ¶ 14, 353 P.3d 626 (quoting *Dairy Prod. Servs., Inc. v. City of Wellsville*, 2000 UT 81, ¶ 42, 13 P.3d 581). A municipal license revocation decision is not arbitrary or capricious if it is supported by “substantial evidence in the record.” *Id.* (quoting *14th St. Gym, Inc. v. Salt Lake City Corp.*, 2008 UT App 127, ¶ 10, 183 P.3d 262). Under the substantial evidence standard, this Court’s reviews the City Council’s license revocation decision as if it were reviewing the decision directly, affording no deference to the district court. *See Fox v. Park City*, 2008 UT 85, ¶ 11, 200 P.3d 182; *Pen & Ink, LLC v. Alpine City*, 2010 UT App 203, ¶ 16, 238 P.3d 63.

Preservation. This issue was preserved in the parties’ briefing and in the district court’s decision. (R. 624-641, 317-342, 344-382.)

DETERMINATIVE PROVISIONS

Central to the outcome of this appeal are the following statutes, the relevant portions of which are reproduced at Addendum 3.

- Utah Code Ann. § 58-37-2(1)(g)(i) (LexisNexis 2012)
- Utah Code Ann. § 58-37-8(1)(a) (LexisNexis 2012)

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below.

This matter arises from an appeal of a business license officer's revocation of Mike's Smoke, Cigar & Gifts' business license for trafficking in a controlled substance—the drug analog “spice”—in violation of Utah law. Mike's appealed the revocation to the St. George City Council. After a hearing, the City Council affirmed the revocation. Mike's petitioned for judicial review in the district court asserting that there was not substantial evidence in the record to support the City Council's decision, and that Utah's controlled substance analog definition was unconstitutionally vague.

The district court did not reach the merits of either claim. It concluded instead that there were disputed issues of material fact raised by conflicting expert reports. It reversed and remanded the matter to the City Council to hold an evidentiary hearing and consider live testimony from the competing experts.

The City appealed to this Court, arguing that the district court applied the wrong legal standard. This Court agreed and reversed and remanded with instructions to the district court to analyze the license revocation appeal under the arbitrary, capricious, or illegal standard. *See Mike's Smoke, Cigar & Gifts*, 2015 UT App 158, ¶ 16. On remand,

the district court issued a detailed decision affirming the City Council. Mike's now appeals.

II. Statement of Facts.

A. Legislative efforts to stop "spice" trafficking.

For context, we first summarize the statute at issue: Utah Code section 58-37-2(1)(g)(i), which defines controlled substance analogs such as "spice." *See* Utah Code Ann. § 58-37-2(1)(g)(i) (LexisNexis 2012).

"Spice" is marketed as a "legal" alternative to drugs, often labeled "not for human consumption," and containing "shredded plant material and chemical additives that are responsible for their psychoactive (mind-altering) effects." (R. 346.)¹ Spice manufacturers evade legal restrictions "by substituting different chemicals in their mixtures" thus staying a step ahead of legislative attempts to list these various mixtures as controlled substances. (R. 346-347.) The Utah Legislature has tried to get out in front of these problems. In 1997, it amended Utah's Controlled Substances Act to define drug analogs. *See* 1997 Utah Laws Chap. 64, § 2 (codified as Utah Code Ann. § 58-37-2(f)(i)(A), (B) (amended 2011)). In this initial definition, to qualify as a controlled substance analog the law required an initial showing that the substance had a substantially similar chemical structure and next required either: (A) a substantially similar effect as a listed controlled substance; or (B) a representation as having such an effect. *See* 1997 Utah Laws Chap. 64, § 2.

¹ Citing www.drugabuse.gov/publications/drugfacts/spice-synthetic-marijuana (last visited Oct. 23, 2013).

In 2011, the Legislature revisited and amended the statute to expand the list of controlled substances as well as the definition of a controlled substance to include synthetic equivalents to cannabinoid substances (marijuana) and their analogs found in spice products. *See* 2011 Utah Laws Chap. 12, §§ 2, 3 (codified as Utah Code Ann. §§ 58-37-2(1)(g)(i), -4.2 (amended 2012)).

Only a year later, during the 2012 General Session, the Legislature again amended the statute with the enactment of House Bill 254. The driving force behind this amendment was the substantial increase in emergency room incidences involving spice, something the Legislature was attempting to curtail. *See* AV Recording: House Debate of H.B. 254, 59th Gen. Leg. Sess. (Feb. 17, 2012) (comments of Rep. Froerer).² The Legislature was concerned that chemists were changing the molecular structure of substances in the slightest of ways to avoid falling under one of the listed controlled substances in Utah's Controlled Substances Act, thus staying one step ahead of the law. *See id.* (comments of Rep. Froerer); *see also* AV Recording: Senate Debate of H.B. 254, 59th Gen. Leg. Sess. (March 1, 2012) (comments of Sen. Christensen).³

The Legislature's 2012 amendment sought to eliminate this activity. *See id.* Additionally, the amendment was intended to define a controlled substance analog as a substance with a substantially similar chemical structure of a listed controlled substance without having to submit proof of its effects. *See id.* (comments of Sen. Christensen). In

² Available at <http://le.utah.gov/~2012/bills/static/HB0254.html> (Day 26).

³ Available at <http://le.utah.gov/~2012/bills/static/HB0254.html> (Day 38).

fact, the enrolled copy of H.B. 254 highlighted the fact that it was amending “the definition of a controlled substance analog to allow proof that the substance is chemically substantially similar to a controlled substance, without requiring proof of the effect of the substance by the expert testimony of a pharmacologist.” H.B. 254 (enrolled copy).⁴

To achieve these goals, the Legislature changed the statute’s text and grammatical structure, inserting a colon after ““*Controlled substance analog*’ means” and moving the opening clause—which required an initial showing of a “*substantially similar*” chemical structure—down to a new subsection, thereby creating three separate subsections, and connecting them with the term “or.” The changes track as follows:⁵

(g) (i) “Controlled substance analog” means :

(A) a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a substance listed in Section 58-37-4.2 , or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513~~;~~ ;

~~[(A)]~~ (B) a substance which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances ~~[in the schedules set forth in Subsection (1)(f), or a substance listed in Section 58-37-4.2 ; or]~~ listed in Schedules I and II of Section 58-37-4 , substances listed in Section 58-37-4.2 , or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513; or

~~[(B)]~~ (C) A substance which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances ~~[in the schedules or list set forth in this Subsection (1)]~~ listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled

⁴ Available at <http://le.utah.gov/~2012/bills/static/HB0254.html>.

⁵ We have highlighted in blue and red the revisions that are significant here.

Substances Act, Title II, P.L. 91-513.

2012 Utah Laws Chap. 297 (codified as Utah Code Ann. § 58-37-2(1)(g)(i) (LexisNexis 2012)) (emphasis added). This amendment took effect on May 8, 2012. *See id.*

B. The Drug Task Force targets Mike's; the City revokes Mike's business license.

Municipalities are authorized to regulate “retail tobacco specialty businesses” within their borders through business licensing requirements. *See* Utah Code Ann. § 10-8-41.6 (LexisNexis 2012). This includes revoking these licenses if authorized by the provisions of any state law or local ordinance. *See id.* § 10-8-41.6(6)(b). St. George City has adopted an ordinance regulating retail tobacco specialty businesses. *See* St. George City, Utah, Code § 3-9-1.⁶ It allows the City to revoke a tobacco sales business license if the licensee, owner, operator, or an employee while on business premises, violates any laws or regulations related to alcohol or controlled substances, or commits any felony level offense. *See id.* §§ 3-9-5(A); 3-1-19.

Petitioner/Appellant Mike's Smoke, Cigar & Gifts (“Mike's”) is a retail tobacco specialty business. (R. 42.)⁷ The City issued Mike's a business license to sell cigarettes,

⁶ The St. George City Code is available at http://www.sterlingcodifiers.com/codebook/index.php?book_id=399.

⁷ We recite the facts as found by the City Council below, and as contained in the administrative record. (R. 42-49) (City Council's findings and conclusions); (R. 36-316) (administrative record.) The administrative record was numbered as AR. 00001-00275, which corresponds to the record at R. 36-316 as paginated by the district court clerk. The trial record has been numbered twice, once manually (first appeal) and once electronically (on this appeal), which resulted in a different pagination. This brief cites to the more recently paginated electronic record.

cigars, tobacco pipes, lighters, oil burners, incense, flavored tobacco, sports memorabilia, novelty items, perfume, and calling cards. (R. 42.)

In early 2012, the Washington County Drug Task Force began investigating Mike's for possible spice distribution. (R. 43.) During the course of the investigation, Mike's employees told Task Force officers that Mike's did not sell spice because it was illegal, but they did sell products they referred to as "aroma therapy." (R. 43.) The Task Force made various undercover buys of these "aroma therapy" products. (R. 43.) Based on these buys, the Task Force obtained and executed a search warrant. (R. 43.)

During execution of the search warrant, a detective interviewed store manager Kyle Best ("Best"), who is also the son of Mike's co-owner, Christie Best. (R. 42-43.) Best told the detective that Mike's had tested the "aroma therapy" products and also consulted with its attorney about the law. (R. 69.) Best said he was told to call the product "aroma therapy" and that he tells customers that if they smoke it they will go to jail. (R. 43.) Despite its "aroma therapy" label, he indicated that he only sells the product to people over 19-years-old. (R. 43.)

From July 2012 through January 2013, the Task Force made additional undercover buys. (R. 43.) During these transactions, the "aroma therapy" product—dubbed "Reborn"—was behind the counter, concealed from public view. (R. 43.) The packets containing the Reborn did not have barcodes like the other products in the store. (R. 43.) Rather, employees scanned a sticker on the side of the cash register's monitor to enter the price when selling it. (R. 43.)

Based on this information, in January 2013 the Task Force obtained and executed another search warrant. (R. 43.) Multiple packets of “Reborn” were seized from behind the counter, out of public view, and also from a safe in the back room. (R. 43.) Best was interviewed again and responded affirmatively when asked if the names given to the spice—“Reborn” or “aroma therapy”—were simply a camouflage to skirt law enforcement investigations. (R. 43.)

The Task Force sent the products to the Utah Bureau of Forensic Services (the Utah State Crime Lab) for testing. (R. 43.) Three different tests confirmed that the products contained XLR11. (R. 43.) According to the state crime lab, XLR11 is a structural analog of AM-694, which is a listed controlled substance under Utah Code section 58-37-4.2(4).⁸ (R. 43.)

Best was charged with possession with intent to distribute under Utah Code section 58-37-8(1)(A)(iii), a third degree felony. (R. 352; 425-449.) Shortly after Best’s initial appearance, the City’s business license officer sent an order revoking Mike’s business license and ordering the owners to stop conducting business in St. George. (R. 42.)⁹

⁸ Utah Code section 58-37-4.2, which lists the controlled substances, provides: “The following substances, their analogs, homologs, and synthetic equivalents are listed controlled substances: ... (4) AM-694; 1-[(5-fluoropentyl)-1H-indol-3-yl]-(2-iodophenyl) methanone,” Utah Code Ann. § 58-37-4.2 (LexisNexis Supp. 2013).

⁹ Best pleaded no contest in his criminal case after the district court denied his motion to dismiss. (R. 425-449.) That motion asserted that drug analog statute was unconstitutionally vague. *See State v. Best*, Criminal No. 131500096 (5th Dist. Ct., Washington Cnty.). (R. 425-449.)

C. The City Council affirms the revocation.

Mike's appealed the license revocation to the City Council and requested a hearing. (R. 42.) At the hearing, both Mike's and the City were represented by counsel who presented arguments and documentary evidence. (R. 42; R. 298-304.) As Mike's explained below, the facts were never really in dispute. (R. 481, 509-510 - Hr'g Tr. 29:13-25, 30:1-10.) Based upon the evidence presented, the City Council issued findings of fact and conclusions of law, affirming the business license officer's revocation, concluding that there was substantial evidence in the record to demonstrate that Mike's possessed and sold a controlled substance analog with intent to distribute in violation of Utah Code section 58-37-8(1)(a). (R. 42-49.) The evidence before the City Council, and its corresponding findings are as follows.

1. Reborn (XLR-11) has a substantially similar chemical structure to the listed controlled substance AM-694.

At the City Council hearing, each side submitted writings prepared by their experts, along with curriculum vitae and related information about the experts. (R. 148-165; 219-224; 232-255.)

The City submitted reports from the state crime lab along with the credentials of the state crime lab and the forensic scientist at the lab who actually tested the "Reborn," Terry Lamoreaux. (R. 148-165; 219-224.) Lamoreaux examined the samples obtained from Mike's and concluded that they contained XLR11, which Lamoreaux determined was a structural analog of AM-694. (R. 44; 159-165.) This conclusion was based on the fact that the tests showed that XLR11 and AM-694 had a common core structure with a

single point of divergence. (R. 44; 159-165.) Each of Lamoreaux's reports was signed and verified under "criminal penalty of the State of Utah." (R. 160, 163, 165.)

Mike's presented no evidence to call into question the state crime lab's accreditations or procedures, or Lamoreaux's skills or qualifications. (R. 44; 36-316.) Instead, it submitted written statements from Karl De Jesus, Ph.D., and Owen Michael McDougal, Ph.D. (R. 44; 246-250, 252-255.) Neither De Jesus nor McDougal actually tested or analyzed the substances at issue. (R. 44; 246-250, 252-255.) The City Council examined each letter and concluded that in each the two experts merely offered their opinion that XLR11 should not be considered an analog of AM-694. (R. 44; 246-250, 252-255.)

In his opinion letter, De Jesus referred to Utah law prior to the 2012 amendment, a point that the City Council found significant. (R. 44.) Based on the former law, De Jesus opined that XLR11 is a synthetic cannabinoid; that the structure was substantially different from AM-694; that the effect on the nervous system was less potent with decreased hallucinogenic effects; and therefore, in his opinion, the product should not be considered an analog of a controlled substance. (R. 44.) McDougal's opinion letter did not address Utah law. (R. 44.) Instead, McDougal discussed the molecular structures of AM-694 and XLR11 and the chemical effects of the substances. (R. 44.) Both letters appeared to be generic in nature, addressing various substances in addition to XLR11. (R. 246-250, 252-255.) Neither letter was signed or verified under oath or criminal penalty of the State of Utah. (R. 250, 255.) The DeJesus letter was not signed at all. (R. 250.)

Mike's experts also provided information to the City Council which enabled it to confirm Lamoreaux's conclusions. Specifically, Mike's own experts provided two-dimensional drawings for each substance, which allowed the City Council to compare and reasonably conclude there was a structural similarity between XLR-11 and AM-694. (R. 640; 253, 257.)

2. The surrounding, undisputed evidence confirms the criminal nature of Mike's trafficking operation

Turning from the experts to the surrounding evidence, the City Council found that Best knew the product Mike's sold as "aroma therapy" was being ingested by at least some of the people who purchased it—despite the fact that Mike's marketed it as "aroma therapy" and labeled it not for human consumption. (R. 44.) Best also admitted to smoking it himself. (R. 44.) Best ordered the Reborn, which was manufactured by a company known only as "GOS," location unknown. (R. 44.) Mike's co-owner, Mike Connors, said Mike's got its "aroma therapy" products from a male he only knows by a first name, and relied on Best to work with attorneys to clear it. (R. 45.)

When a task force officer asked Best for a copy of the test results for "Reborn," Best provided a report from a company known as AIBio Tech. (R. 44.) The test results were for 36 chemicals but the product was not tested for any analogs and did not identify the chemical makeup of the product. (R. 68.) The lab report was addressed to a business listed as "DVS" with a St. George address but no such business existed at that address, and no business called "DVS" had a business license with the City. (R. 44.)

Best had offered “Reborn” for sale in the store for at least six months. (R. 44.) He moved the “Reborn” under the counter behind the cash register because people were stealing it and had burglarized the store to get to it. (R. 44.)¹⁰ He explained that Mike’s St. George store sells the “Reborn” for \$10 a packet and averages 50 to 60 packets a day. (R. 44.) The product comprised approximately 40% of Mike’s daily sales. (R. 43.)

Best did the ordering and admitted that the owners are aware of and approve items that are offered for sale, and told him to sell this product. (R. 44-45.) He would not sell the product to any person that asked for “spice,” but would only sell it to customers who asked for it by its name. (R. 45.) Best admitted that the labels placed on the spice products – “Reborn” and “aroma therapy”—were a camouflage to skirt law enforcement investigations. (R. 45.) He knew customers smoke it or ingest it like marijuana, including one elderly man who smokes it for his cancer and comes in every other day. (R. 45.) Best admitted that it made him sick when he ingested it. (R. 45.)

When asked why he hid the Reborn rather than putting it in the glass display case in front like most retailers would do with their hot-selling products, Best responded that moved it because he did not have room for the “Reborn” out front, that he had made it easier for him to grab, and that it would get stolen. (R. 45.) Connors indicated that the “aroma therapy” products were hidden behind the register because he believed that displaying it made it illegal. (R. 45.) He also put it out of view so kids could not get to it. (R. 45.)

¹⁰ There is no evidence that Mike’s ever once reported the burglaries to police.

Mike's other co-owner, Christie Best, told Task Force officers that she was not "dumb," and that she knew what people were doing with the "aroma therapy" products. (R. 45.) Customers told her that they were smoking it. (R. 45.) She said the "Reborn" product was kept behind the counter and in the safe, and that she left the testing of the product up to Best. (R. 45.) She confirmed that when the store is broken into, Reborn is the first thing stolen. (R. 45.)

The manager of Mike's Washington City store also admitted to seeing people smoke the "aroma therapy" in the parking lot, and customers admitted to her that they smoked it—as she had on one occasion. (R. 45.) As with the St. George store, she kept the product hidden behind the counter in the Washington store and required customers to specifically request it in order to buy it. (R. 45.)

Mike's never once disputed the fact that the product it sold or possessed with intent to distribute contained XLR11. (R. 44; R. 481, 509-510 [Hr'g Tr. 29:13-25, 30:1-10 (conceding fact to district court)].)

3. The City Council's determination and conclusions.

Based on these facts and evidence, and after considering all of the arguments and materials submitted by the parties, the City Council concluded that the product that Mike's sold "contained XLR11, an analog of AM-694." (R. 47.) The City Council further concluded that "the evidence establishes that XLR11 is an analog of AM-694, a listed controlled substance, and that Mike's Smoke Shop sold and possessed product with the intent to distribute that contained XLR11 in violation of U.C.A. 58-37-8." (R. 47.) Among other things, in making this finding the City Council found it significant that the

state crime lab actually tested the substance on three different occasions; whereas Mike's experts never tested the substance at all. (R. 43 ¶ 4) (City Council findings emphasizing the term "tested" three different times); R. 44 ¶ 6 (finding that the "experts for Mike's Smoke Shop did not test or analyze the actual products").)

The City Council then concluded that, "based on the totality of the facts, there is substantial evidence that Mike's Smoke Shop, its owner and employees, had the requisite knowledge and intent to commit a violation of the law by distributing, or possessing with the intent to distribute, analogs of an illegal substance. This evidence," the City Council continued, "goes far beyond what is required for a business license revocation, but is demonstrative of the weight of the evidence supporting the decision to revoke Mike's Smoke Shop's business license." (R. 48.) Thus, the City Council upheld the business license officer's decision to revoke Mike's business license and ordered Mike's "to cease conducting business in the City of St. George" (R. 49.)

D. The district court affirms the City Council.

Mike's filed a petition for judicial review in the district court. (R. 1-8.) Its petition asserted two claims: (1) that there was not substantial evidence in the record to support the City Council's decision, and (2) that "Utah's controlled substance analog definition is unconstitutionally vague under both the federal and state constitutions." (R. 1-8.) After full briefing and two hearings, the district court affirmed the City Council's decision. (R. 624.)

Mike's appeals.

SUMMARY OF ARGUMENT

1. Mike's presents this appeal as a question of statutory interpretation.

Statutory interpretation is an effort to determine legislative intent. The starting point in that effort is the plain language of the statutory text. In reviewing that text, we assume the Legislature meant what it said and used each term advisedly. Here, the Legislature amended Utah Code section 58-37-2(1)(g)(i) to redefine controlled substance analogs. That amendment changed the text and structure of the drug analog definition by moving the predicate showing from the opening clause (to show a substantially similar chemical structure) to a subordinate subsection, equal to what was previously two subordinate subsections. After creating three separate subsections, the Legislature connected them with the term "or," thereby mandating a disjunctive interpretation so that only one of the subsections need be satisfied, not all.

By its plain language, under section 58-37-2(1)(g)(i), a substance need only have one of three things to qualify as a controlled substance analog: (A) a substantially similar chemical structure as a listed controlled substance; (B) a substantially similar effect as a listed controlled substance; or (C) is represented as having such an effect. *See* Utah Code Ann. § 58-37-2(1)(g)(i). That is how the City Council interpreted the statute. That interpretation, fully informed by the facts, is correct and must be affirmed.

2. Mike's concedes that this is what the Legislature meant and intended. But it argues that the Court should read subsection (A) conjunctively with either subsection (B) or (C)—exactly how it read prior to amendment—based on federal court interpretations of the federal drug analog definition. It contends that if the Court reads

the statute as written it could lead to absurd results or constitutional challenges. But the conjunctive reading that federal courts labored to find in the federal statute resulted from ambiguities in the text of the federal statute which are conspicuously absent from the Utah statute. Those ambiguities made it possible for the federal courts interpreting the federal statute to read it conjunctively. In the absence of any ambiguity in the Utah statute, Utah courts are not at liberty to apply the absurd results or constitutional avoidance canons to rewrite statutory text in a manner contrary to its plain language and legislative intent.

3. Mike's assertion that the Court must interpret the statute contrary to its plain language to avoid possible constitutional challenges is nothing but a veiled facial challenge to the constitutionality of the statute. That was Mike's original claim. But as the case has progressed, Mike's has refused to follow through on its challenge, opting instead for the constitutional avoidance canon and hypotheticals about the statute's application to others. When the statute is applied to Mike's, however, any constitutional infirmities evaporate. A party has no standing to advance constitutional vagueness challenges on behalf of others when, as applied to that party, there is a set of circumstances under which the statute is valid. This is so because "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," the court should "examine the complainant's conduct before analyzing other hypothetical applications of the law." *Greenwood v. City of North Salt Lake*, 817 P.2d 816, 820 (Utah 1991) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982)). A

review of the facts forecloses Mike's claim that the City "interpreted" the statute in an unconstitutional manner.

This is not a case about the general public not knowing what the law is. It is not about various hypotheticals that pose the question of whether caffeine, ginseng, flour, Doritos, or energy drinks fall within what the statute proscribes. Vagueness does not rise or fall on the basis of hypotheticals because anyone can spin "hypertechnical theories as to what the statute covers." *Hill v. Colorado*, 530 U.S. 703, 733 (2000). When there is "no uncertainty regarding the statute's proscription of [the defendants'] conduct, we refuse their invitation to conjure conditions under which the statute could be vague." *State v. Ansari*, 2004 UT App 326, ¶ 45, 100 P.3d 231. Here, there is certainty as to the statute's application to Mike's. That forecloses Mike's veiled constitutional challenge on vagueness grounds.

4. Finally, even if the Court reads Utah Code section 58-37-2(1)(g)(i) conjunctively (and it should not), it must still affirm. Mike's failed to challenge the City Council's fact findings. Those findings establish that subsections (A) and (C) were satisfied. The City Council found that XLR-11 has a substantially similar chemical structure as a listed controlled substance. And the irregular and clandestine activities which surrounded Mike's purchase and sale of Reborn and "aroma therapy" products can certainly lead a reasonable mind to conclude that Mike's represented and intended to have the same effects as a listed controlled substance. Even under Mike's conjunctive reading, the statute is satisfied. The Court should affirm.

ARGUMENT

I. The Framework for Reviewing a Business License Revocation.

A. The arbitrary, capricious, or illegal standard of review.

This appeal arrives at the Court (for the second time) on review of a business license revocation. But even after this Court reiterated the long-established arbitrary, capricious, or illegal standard of review and remanded to the district court to properly consider it, *see Mike's Smoke, Cigar & Gifts v. St. George City*, 2015 UT App 158, ¶ 14, 353 P.3d 626, Mike's refuses to acknowledge the standard. At no point in its brief does Mike's specify whether it is challenging the City Council's decision on the basis that it is arbitrary and capricious, or on the basis that it is illegal.

A decision is arbitrary and capricious if there is not substantial evidence in the record to support it. *See Mike's Smoke, Cigar & Gifts*, 2015 UT App 158, ¶ 14. Under this standard, the reviewing court does not "reweigh the evidence," but instead "consider[s] all the evidence in the record, both favorable and contrary, and determine[s] whether a reasonable mind could reach the same conclusion as the [c]ity." *Id.* (quoting *14th St. Gym*, 2008 UT App 127, ¶ 10) (last alteration original).

A decision is illegal "if it violates a law, statute, or ordinance in effect at the time the decision was made." *Hodgson v. Farmington City*, 2014 UT App 188, ¶ 7, 334 P.3d 484 (quoting *Fox v. Park City*, 2008 UT 85, ¶ 11, 200 P.3d 182). Under this standard, illegality may result from an incorrect interpretation of an applicable statute, in which case the Court reviews a determination of illegality for correctness, but in doing so "afford[s] some level of non-binding deference to the interpretation advanced by" the

City. *Fox*, 2008 UT 85, ¶ 11 (quoting *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 28, 104 P.3d 1208). Illegality may also result if the statute or ordinance at issue is unconstitutional. See *Gillmor v. Summit County*, 2010 UT 69, ¶ 29, 246 P.3d 102.

When it filed its petition for review, Mike's asserted both that the City Council's decision was not supported by substantial evidence in the record, and that the decision was illegal because the underlying statute was unconstitutional. (R. 1-8.) Yet, as this matter has progressed, Mike's has abandoned both, treating the case as more of an academic exercise in statutory interpretation as opposed to an appeal of a license revocation in which the City Council made uncontested findings. Within the appropriate framework, it seems that Mike's is appealing the legality of the City Council's decision.

B. The City Council's findings stand because Mike's has failed to properly challenge them.

Mike's has not only abandoned a substantial evidence challenge, it has also abandoned and waived any challenge to the City Council's factual findings. Instead, it merely drops a footnote in its brief conceding the facts related to "the possession and sale of Reborn," but professing "disagree[ment] with any statement of fact concluding Reborn contained a controlled substance or controlled substance analog or that Mike's knew or intended the product to be a controlled substances analog." (Br. 2 n.2.) That "disagreement" is wholly insufficient for Mike's to properly discharge its burden on appeal.

A party challenging fact findings has a duty to marshal the evidence and demonstrate that the findings are not supported by substantial evidence. See *Carlsen v.*

Board of Adjustment, 2012 UT App 260, ¶ 7, 287 P.3d 440 (reasoning that an appealing party cannot demonstrate lack of substantial evidence in the record by focusing on “selected facts that support his position and simply ignor[ing] contradictory facts that support the Board’s decision”). Mike’s has made no effort to meet this burden. Nor could it. It conceded below that the findings were not in dispute. (R. 322 & 509 - Hr’g Tr. 29:13-15, 30:1-10.)¹¹

By failing to challenge the findings at any level, and refusing to marshal the evidence in its opening brief, Mike’s has waived any substantial evidence challenge to the City Council’s decision. *See Pixton v. State Farm Mut. Auto. Ins. Co.*, 809 P.2d 746, 751 (Utah Ct. App. 1991) (“Generally, where an appellant fails to brief an issue on appeal, the point is waived.”); *Carlsen*, 2012 UT App 260, ¶ 7 (“By failing to address the evidence that supports the Board’s decision, [appellant] has failed to marshal the evidence; by not marshaling the evidence, [appellant] has failed to bear his burden to show that the Board’s decision is not supported by substantial evidence.”).

In sum, the only question Mike’s has raised for the Court on appeal—albeit impliedly—is the claimed illegality of the City Council’s interpretation of the controlled substance analog definition. But in reviewing that question, the City Council’s interpretation, which was fully informed by its undisputed factual findings, is entitled to deference. *See Fox*, 2008 UT 85, ¶ 11.

¹¹ Mike’s asserted, “In the present case the parties are not disputing most of the factual determinations of the City.” (R. 322; Pet’r Br. at 6.) As it sole “dispute,” it criticized the City Council’s determination to side with the State Crime Lab over Mike’s generic and unsworn opinion letters. (*Id.*) It does not advance that argument on appeal.

II. The City's Statutory Interpretation was in all Respects Correct, Consistent with Legislative Intent, and Followed Established Rules of Statutory Construction.

Mike's presents what it calls a single question of statutory interpretation: Whether the definition of a controlled substance analog in Utah Code section 58-37-2(1)(g) should be read conjunctively or disjunctively. (Br. 1, 5.) It contends the Court must read the statute conjunctively in order to avoid "absurd results and valid constitutional challenges." (Br. 5.) To set up its analysis, Mike's spends the first nearly seven pages of its argument laying the Utah and federal drug analog definitions side-by-side and claiming that because they are similar and were intended to address the same evil, this Court must blindly follow various federal court interpretations of the federal statute when interpreting Utah's statute. (Br. 5-11.) That is not so.

Interpretation of a Utah statute does not begin with an analysis of federal law. It begins with the actual language of the Utah statute and an effort to determine the intent of the Utah Legislature. "It is well settled that when faced with a question of statutory interpretation, 'our primary goal is to evince the true intent and purpose of the Legislature.'" *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (quoting *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 27, 234 P.3d 1105). "'The best evidence of the legislature's intent is 'the plain language of the statute itself.'" *Id.* (quoting *State v. Miller*, 2008 UT 61, ¶ 18, 193 P.3d 92).

To that end, we assume "'that the legislature used each term advisedly according to its ordinary and usually accepted meaning.'" *Id.* (quoting *Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 32, 219 P.3d 918). We also assume that the expression of one term means the

Legislature intended to exclude another term. *Id.* Moreover, courts must avoid any interpretation that renders any parts or words of a statute “inoperative or superfluous.”

State v. Morrison, 2001 UT 73, ¶ 11, 31 P.3d 547.

Here, the Legislature amended Utah Code section 58-37-2(1)(g)(i) to redefine controlled substance analogs. That amendment had a singular purpose: To combat the underground chemists driving Utahns to emergency rooms and worse, by manufacturing drug analogs that were a step ahead of statutory definitions. Under the amended statute,

“‘Controlled substance analog’ means:

(A) a substance the chemical structure of which is substantially similar to the chemical structure of a [listed] controlled substance ...;

(B) a substance which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of [listed] controlled substances ...; or

(C) A substance which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of [listed] controlled substances ...”

Utah Code Ann. § 58-37-2(1)(g)(i).

Use of the disjunctive “or” between enumerated subsections in a statute “clearly mandates” that only one of the subsections need be satisfied, not all. *Calhoun v. State Farm Auto. Ins. Co.*, 2004 UT 56, ¶ 20, 96 P.2d 916. The term “or” creates alternatives in a list as opposed to combining items in the list. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012). That has long been the established meaning of the connector “or” under Utah’s rules of statutory interpretation: “The words being used in series, the only connective being the disjunctive ‘or,’ it applies

to the whole series. Therefore the ordinary and usual meaning of the language would be that the subject is deemed to give his consent to a test of some one of the designated substances, or of another, but not all of them.” *Ringwood v. State*, 333 P.2d 943, 944 (Utah 1959).

By its plain language, under section 58-37-2(1)(g)(i), a substance need only have one of three things to qualify as a controlled substance analog: (A) a substantially similar chemical structure as a listed controlled substance; (B) a substantially similar effect as a listed controlled substance; or (C) is represented as having such an effect. *See* Utah Code Ann. § 58-37-2(1)(g)(i).

The 2012 amendments reinforce this plain language interpretation. With those amendments, the Legislature moved the predicate showing in the opening clause (substantially similar chemical structure) to a subordinate subsection, equal to what was previously two subordinate subsections, and left the disjunctive “or” between them. *See* 2012 Utah Laws Chap. 297 (codified as Utah Code Ann. § 58-37-2(1)(g)(i) (LexisNexis 2012)). We cannot ignore these structural changes. *See, e.g., T-Mobile USA, Inc. v. Utah State Tax Comm’n*, 2011 UT 28, ¶ 27, 254 P.3d 752 (“As part of our plain language analysis, we place significance on the removal of a term from a piece of legislation.”).

By placing the colon directly after the introductory clause—“*Controlled substance analog’ means:*”—and using semi-colons to set off the list that follows, the Legislature had one thing in mind: create alternative stand-alones between the three subsections that follow. “Where the opening clause of a statutory section ends with a colon, the further use of semicolons to set off sub-sections suggests that the subsections

are closely related to the opening clause and that the sub-sections comprise the list of items of equal or similar importance.” 1A Sutherland Statutory Construction § 21:15 (7th ed. West 2012). A before and after look at the statute demonstrates the significance of the change in text and structure:

Pre-2012	2012 Amendment
<p>(1)(g)(i) “Controlled substance analog” means a substance the chemical structure of which is substantially similar to ...:</p> <p style="padding-left: 40px;">(A) which has a stimulant, depressant, or hallucinogenic effect ... substantially similar to ...; or</p> <p style="padding-left: 40px;">(B) which, with respect to a particular individual, is represented or intended ...</p>	<p>(1)(g)(i) “Controlled substance analog” means:</p> <p style="padding-left: 40px;">(A) a substance the chemical structure of which is substantially similar to ...</p> <p style="padding-left: 40px;">(B) a substance which has a ...; or</p> <p style="padding-left: 40px;">(C) A substance which, with respect to a particular individual, is represented or intended ...</p>

This was no accident. By breaking it out like this, the Legislature jettisoned the predicate requirement plus (A) or (B) and created three stand alones: (A), (B), or (C).

Thus, taking all things into account—the changes to the text, structure, and punctuation; the overriding goals the Legislature was seeking to achieve; and most importantly the plain language of the statute itself—there is one correct way to interpret the statute: exactly as the City Council (and district court) did. By the statute’s plain language, a controlled substance analog is a substance that has one of the following characteristics: (A) a substantially similar chemical structure as a listed controlled substance, (B) substantially similar chemical effects as a listed controlled substance, or

(C) is represented as having substantially similar chemical effects as a listed controlled substance. *See* Utah Code Ann. § 58-37-2(1)(g)(i).

III. The Absurd Results and Constitutional Avoidance Canons Do Not Authorize Judicial Revisions to Unambiguous Statutes.

Significantly, Mike's agrees that the Legislature's intent is precisely what the City Council said it was, which is exactly how the statute reads: disjunctively. (R. 327.) It conceded the point below: "Let it be said at the outset that [Mike's] has never argued that the legislature ever intended anything other than precisely what the City claims it meant. There is no question the legislature intended for the amended UCA § 58-37-2(g) to be read in the disjunctive." (R 327, Pet'r Dist. Ct. Br. at 11.) Seizing on this concession, the district court noted, "[Mike's] actually goes as far as to affirmatively endorse this [disjunctive] interpretation ..." (R. 629; Dist. Ct. Ruling at 6 n.1.)

Still, Mike's argues that the Court must read subsection (A) conjunctively with either subsection (B) or (C). This is so, Mike's contends, based of two seldom-used tools of statutory interpretation: the absurd results and constitutional avoidance canons. (Br. 5.) So even as it concedes the City Council's interpretation was consistent with legislative intent, Mike's argues that the Court is duty bound to save the Legislature from itself and interpret the statute as though the Legislature never touched it in 2012, lest it result in absurdities or suffer an unconstitutional fate. (Br. 11-23.)

That assertion is erroneous for several reasons. First, it rests entirely on federal cases that were decided by ambiguities in the federal statute that are not present in Utah's statute. Second, as a threshold matter, the absurd results and constitutional avoidance

canons do not apply in the absence of ambiguity. And third, the judiciary cannot employ either canon to rewrite statutory text in a manner contrary to legislative intent. To hold otherwise would result in judicial usurpation of the lawmaking authority that only the people's elected representatives may exercise.

A. The federal conjunctive interpretation was based on ambiguous language in the federal statute that is not present in the Utah statute.

The centerpiece of Mike's argument is a pair of federal cases, *United States v. Turcotte*, 405 F.3d 515 (7th Cir. 2005), and *United States v. Hodge*, 321 F.3d 429 (3d Cir. 2003). (Br. 11-12.) The federal courts in both cases interpreted the federal drug analog definition conjunctively. But as the district court aptly explained below, the reasons for the conjunctive reading of the federal statute are based on differences, not similarities in the federal and state statutes. (R. 629-634; Dist. Ct. Ruling at 6-11.)

In both *Turcotte* and *Hodge*, the courts ended at the conjunctive interpretation that Mike's advances here, only after laboring to find the federal drug analog definition ambiguous. *See Turcotte*, 405 F.3d at 521; *Hodge*, 321 F.3d at 436. Both courts concluded that clause (i) in the federal statute could be read as stating an independent requirement, whereas clauses (ii) and (iii) appeared subordinate to (i), because the "functional language in each,"—the term "which"—more naturally referred back to (i) as opposed to the opening clause. *See Hodge*, 321 F.3d at 436; *Turcotte*, 405 F.3d at 522. As best explained in *Hodge*, this "suggests that clauses (ii) and (iii) more likely modify clause (i)'s phrase 'controlled substance in schedule I or II' than the word 'substance' in the main clause." *Hodge*, 321 F.3d at 436. Thus, in both *Turcotte* and *Hodge*, the courts

concluded that the qualifying language “which” at the beginning of clauses (ii) and (iii) of the federal statute resulted in two equally plausible interpretations of a controlled substance analog: one conjunctive, one disjunctive.

Not so in the corresponding provisions in Utah Code section 58-37-2(1)(g)(i). Subsections (B) and (C) in the state statute begin, not with the word “which,” but with the phrase “a substance which.” Utah Code § 58-37-2(1)(g)(i)(B), (C). As the district court explained, this difference “yields a different conclusion.” (R. 633; Dist. Ct. Ruling at 10.) It reinforces the legislative intent evident in the statute’s plain language that, unlike the federal statute, each of the subdivisions in the state statute “is intended to stand on its own rather than modifying subdivision (A).” (R. 633; Dist. Ct. Ruling at 10.) When viewed side-by-side, the differences become apparent:

Utah Code § 58-37-2(1)(g)(i)	28 U.S.C. § 802(32)(A)
<p>“Controlled substance analog” means:</p> <p>(A) <u>a substance</u> the chemical structure of <u>which</u> is substantially similar ...</p> <p>(B) <u>a substance which</u> has a ...; or</p> <p>(C) <u>A substance which</u>, with respect to a particular individual, is represented or intended ...</p>	<p>[T]he term “controlled substance analogue” means <u>a substance</u>--</p> <p>(i) <u>the chemical structure of which</u> is substantially similar ...</p> <p>(ii) <u>which</u> has a stimulant, depressant, or hallucinogenic effect ...; or</p> <p>(iii) with respect to a particular person, <u>which</u> such person represents or intends ...</p>

Unlike the federal analog definition in which two plausible interpretations result from the wording of clause (i) in relation to (ii) and (iii) and the remoteness of (ii) and (iii) from the term “substance” in the opening clause, the wording of each subsection of

Utah's statute begins with "a substance which," and thus all stand alone. The ambiguity in the federal statute made it possible for the courts in *Turcotte* and *Hodge* to employ a conjunctive reading. That same ambiguity is not present in Utah's statute and therefore does not plausibly allow a similar conjunctive reading.

That is not all. The *Hodge* court went further in its analysis to get to a conjunctive reading, relying on Congress's successive use of the term "or" after every subordinate clause when defining another term in the same section of the federal controlled substances law. That resulted in ambiguities not present in the state counterpart. The *Hodge* court explained that in the overall context of the federal drug analog statute, the proposition that "'or' between two words" means they can each stand alone (*i.e.*, are disjunctive) is not always the case because "even within [28 U.S.C.] § 802, Congress did not always consider a single 'or' between the final terms of a series sufficient evidence of disjunctive intent." *Id.* at 436. Rather, when defining a "depressant or stimulant substance" in [§] 802(9), Congress inserted an "or" after *each* clause. *Hodge*, 321 F.3d at 436. Thus, the court reasoned, "where 'or' is absent between clauses (i) and (ii) [in § 802(32)(A),] but present between (ii) and (iii), we do not find conclusive evidence for a disjunctive reading." *Id.*

By comparison, successive use of the term "or" is "conspicuously absent" in defining the same term in the Utah statute. (R. 631; Dist. Ct. Ruling at 8.) Even though Utah statute defines "depressant or stimulant substance" by tracking the language of the federal definition nearly verbatim, it omits the successive use of the term "or" after the provisions corresponding with subdivisions (A) and (B) in the federal definition.

Compare Utah Code Ann. § 58-37-2(1)(l) (LexisNexis 2012) *with* 21 U.S.C. § 802(9) (comparison reproduced at Addendum 4).

These distinctions may seem minor at first glance. But they paved the way for the conjunctive reading in *Turcotte* and *Hodge*. And with all the similarities between the state and federal statutes, these key terms are not among them. So even as Mike’s uses the similarities between the statutes to push its conjunctive interpretation, even suggesting (at 7-9) that Utah may have copied the federal statute, the material differences that Mike’s refuses to acknowledge do not mandate an interpretive departure from the plain language of Utah’s statute. *See, e.g., Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 904 (Utah 1984) (“[W]hen the Legislature adopts a statute from another state, the presumption is that the Legislature is familiar with that state’s judicial interpretations of that statute and intends to adopt them also ...” but that canon “is not applicable where there have been material changes made in the second statute.”).¹²

When we consider these differences in light of established rules of statutory construction, along with the unmistakable differences between the 2011 and 2012 versions of Utah Code section 58-37-2(1)(g)(i), we are left with a single, plausible conclusion: section 58-37-2(1)(g)(i) does not suffer from the same ambiguities as the federal statute. And without the same ambiguity, there is no opportunity to go beyond the plain language under either the absurd results or constitutional avoidance canons. *See*

¹² Utah’s “controlled substances analog” definition contains other differences. For example, Utah’s definition expressly excludes various “dietary supplements, vitamins, minerals, herbs or other similar substances ...” Utah Code Ann. § 58-37-2(g)(ii)(F). The federal statute does not. *See* 28 U.S.C. § 802(32)(C).

Marion Energy, Inc., 2011 UT 50, ¶¶ 25-26 (explaining that absurdity canon is only employed if statute is ambiguous); *Utah Dep't of Transp. v. Carlson*, 2014 UT 24, ¶¶ 24-25, 332 P.3d 900 (explaining that constitutional avoidance canon is only employed if statute is ambiguous).

B. Hypothetical absurd results provide no basis for judicial revisions to unambiguous statutes.

Instead of addressing these differences, Mike's plods down the federal path and asserts that each subsection of 58-37-2(1)(g)(i), standing alone, would lead to absurd results. (Br. 12-19.) This, Mike's proclaims, justifies a judicial rewrite. That argument cannot stand.

For starters, as just explained, the canon is only employed after statutory language proves ambiguous because it yields two plausible interpretations. *See Marion Energy, Inc.*, 2011 UT 50, ¶¶ 25-26. In that circumstance, the court opts for the alternative that avoids the absurd results. *See id.* ¶ 26. This is so, because when given two plausible readings of statutory text, the court assumes the legislature could not have intended the one resulting in an absurdity. *See id.*

As explained at length above, there is no ambiguity in section 58-37-2(1)(g)(i). And there is no indication that the Legislature did not intend each subsection to stand on its own. In fact, as Mike's concedes, the opposite is true. Indeed, the statutory amendments at issue were adopted in 2012, after federal courts like *Turcotte* and *Hodge* had grappled with the conjunctive/disjunctive interpretation of the federal analog definition. If anything, the Legislature ensured that the terminology which created the

ambiguities in the federal analog statute did not make it into Utah's version, thereby removing any doubt.

The canon to interpret statutes in order to avoid absurd results does not allow the judiciary to wield a legislative pen to rewrite an unambiguous statute in a manner that is contrary to Legislative intent. Nor does it give the judiciary a veto power over statutory amendments through force of interpretation. That is the result Mike's seeks, as it would effectively roll the statute back to its pre-amendment form, as if the Legislature never touched it in 2012. The request goes too far. The judiciary does not determine "what the law ought to be." *Hanchett v. Burbidge*, 202 P. 377, 380 (Utah 1921). The judiciary is "guided by the law as it is." *Id.* It therefore "cannot by construction liberalize the statute and enlarge its provisions. When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction." *Id.*¹³

C. The constitutional avoidance canon is not a license to rewrite legislation.

The same is true with the second canon Mike's invokes, the canon of constitutional avoidance. Again, our supreme court has explained that, "for the constitutional avoidance canon to even apply, 'the statute must be genuinely susceptible to two constructions'—a determination that is made 'after, and not before, its complexities are unraveled.'" *Utah Dep't of Transp. v. Carlson*, 2014 UT 24, ¶¶ 24-25,

¹³ Any question about whether the Legislature imagined the absurd results that could follow is answered by the scienter requirement in section 58-37-8(1). See *infra* Point IV.A at 33.

332 P.3d 900 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998)).

As explained above, it is not.

What’s more, “the avoidance canon is not a license to rewrite statutes. It is a tool for interpreting them.” *Orlando Millenia, LC v. United Title Servs. of Utah, Inc.*, 2015 UT 55, ¶ 84, 355 P.3d 965. So even though, as a general proposition, courts should “whenever possible, construe a statute so as to save it from constitutional infirmities,” there are limitations on its right to do so. *I.M.L. v. State*, 2002 UT 110, ¶ 25, 61 P.3d 1038. The primary limitation is the rules of statutory interpretation. *See id.* (explaining that even on constitutional questions courts are “limited” in construing statutes “by reasonable canons of statutory construction”). When interpreting the constitutionality of statutes, ““we will not “infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and [we have] no power to rewrite the statute to conform to an intention not expressed.”” *Id.* (quoting *Assoc. Gen. Contrs. v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶ 30, 38 P.3d 291) (quoting *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994)). In other words, even when courts endeavor to construe a statute to avoid unconstitutionality, they must do so consistent with established rules of statutory interpretation. *See State v. Morrison*, 2001 UT 73, ¶ 12, 31 P.3d 547 (reasoning that statute was not unconstitutionally overbroad after applying required “principles of statutory construction”).

Mike’s concedes that it seeks an interpretation of section 58-37-2(1)(g)(i) that is at odds with its plain language and the legislative intent. Still, it asks this Court to insert a qualifier—to supply the missing “and” after subsection (A) in order to avoid

“constitutional challenges.” That is not something the courts can do. “[T]he mere existence of such questions does not give us license to add a qualifier or limitation not evident on the face of the statute.” *Orlando Millenia, LC*, 2015 UT 55, ¶ 84. Indeed, “the Due Process Clause is not a license for judicial second-guessing of legislative policy judgments.” *Id.* ¶ 85. To hold otherwise would constitute a usurpation of legislative power.

* * *

The touchstone for statutory interpretation is legislative intent. *Savage v. Utah Youth Vill.*, 2004 UT 102, ¶ 18, 104 P.3d 1242. That intent is evident in section 58-37-2(1)(g)(i)’s plain language; confirmed by its legislative history; and suffers no ambiguity allowing a contrary interpretation.

IV. The Facts Establish that Mike’s Knowingly and Intentionally Violated Utah’s Controlled Substance Laws.

A. The scienter requirement prevents absurdities and limits governmental overreach.

To be sure, Mike’s has imagined (at 12-17) some remote and entirely unintended consequences of applying the three subsections as the Legislature wrote them. The court in *United States v. Vickery*, 199 F. Supp. 2d 1363 (N.D. Ga. 2002), pointed out the potential absurdities that could result if each federal subsection is read alone without the predicate qualifier in the first federal subsection. *See id.* at 1369. Imagine a drug task force raiding the corner market and bagging energy drinks and Doritos as evidence while hauling the unsuspecting shopkeeper down to the station to book on drug charges. But

we can only imagine, because we are not aware of any case in Utah where this has happened, and certainly not in the four years since the Legislature amended the statute.

Moreover, Mike's is not the unsuspecting storekeeper. It seeks to have the Court interpret a statutory definition in the abstract, without reference to its own conduct. But no matter how many scenarios it spins to demonstrate the supposed absurdity of reading each subsection by itself, this case is about the facts. Uncontested facts. And those facts close the gap between any "absurdity" or "constitutional issues" between the controlled substance analog definition and the reason the City revoked Mike's business license: There was substantial evidence to show that Mike's knowingly and intentionally possessed a controlled substance with the intent to distribute in violation of Utah law. *See Utah Code Ann. § 58-37-8(1)* (LexisNexis 2012). That finding was confirmed when Best pleaded no contest to the underlying criminal charges.

The controlled substance analog definition criminalizes nothing. It is definitional, and merely brings certain analogs within the definition of "controlled substances." Utah Code Ann. § 58-37-2(f)(i)(C). The definition has little meaning without reference to the knowing and intentional requirement found in Utah Code section 58-37-8(1). *See Utah Code Ann. § 58-37-8(1)* (LexisNexis 2012). This analysis is reflected in the recent case *McFadden v. United States*, 135 S. Ct. 2298 (2015), wherein the United States Supreme Court addressed the mental state required to prove a defendant knowingly manufactured, possessed, or distributed a controlled substance analog. *See id.* at 2305. It held that "the Government must prove that a defendant knew that the substance with which he was dealing was 'a controlled substance,' even in prosecutions involving an analogue." *Id.*

This knowledge can be established with evidence showing the defendant (1) knew he was dealing with a controlled substance even if he didn't know its particular identity; or (2) establishing that the defendant knew that he was dealing with a specific analogue by showing that he has knowledge that the substance possesses any of the features in the controlled substance analog definition. *See id.*¹⁴

Importantly here, in response to the defendant's "constitutional avoidance" argument, the Court explained that "[u]nder our precedents, a scienter requirement in a statute 'alleviate[s] vagueness concerns,' 'narrow[s] the scope of the [its] prohibition[,] and limit[s] prosecutorial discretion.'" *Id.* at 2307 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 149, 150 (2007)) (alterations original).¹⁵ The scienter requirement in section 58-37-8(1) limits its application to those who "knowingly and intentionally" possess and distribute a controlled substance. It protects the class of unsuspecting people that Mike's attempts to hide behind in an effort to cover its criminal enterprise. The scienter requirement ensures an individual understands the facts which fit the elements of the prohibited conduct. *See Morissette v. United States*, 342 U.S. 246, 251-52 (1952)

¹⁴ In *McFadden*, the Court noted that it was not addressing the conjunctive/disjunctive debate surrounding 28 U.S.C. § 802(32)(A), because the government had simply assumed that it was conjunctive. *See McFadden*, 135 S. Ct. at 2305 n.3. The question, so far as the federal statute is concerned, thus remains unresolved. *Id.*

¹⁵ Chief Justice Roberts put it more bluntly in concurrence, stating that where the statute expressly includes a "knowing" requirement as part of the offense, "a person's lack of knowledge regarding the legal element can be a defense." *McFadden*, 135 S. Ct. at 2308 (Roberts, C.J., concurring).

(explaining that the scienter requirement causes a convergence of an “evil-meaning mind with an evil-doing hand”).

B. When facts are applied, any potential constitutional infirmities disappear.

The facts place still another barrier in front Mike’s. Though it presents this appeal as an issue of pure statutory interpretation, professing that it is not really a vagueness challenge to the constitutionality of the statute,¹⁶ Mike’s is trying to achieve the same result without having to clear the same constitutional hurdles. It asks this Court to rewrite legislation to avoid hypothetical constitutional concerns, because it knows that it cannot meet a vagueness challenge head on. Though it urges the Court to read the statute conjunctively in order to avoid “valid constitutional challenges” (Br. 5), it refuses to follow through on its own challenge, even as it relies on cases that were vagueness challenges. *See U.S. v. Washam*, 312 F.3d 926 (8th Cir. 2002) (addressing vagueness challenge); *U.S. v. Roberts*, 2002 WL 31014834 (S.D.N.Y. Sept. 9, 2002) (addressing vagueness challenge), *vacated*, 363 F.3d 118 (2d Cir. 2004).

But a party challenging the constitutionality of a statute cannot brush off the facts as applied to its conduct; it must confront them head on. *See State v. Ansari*, 2004 UT App 326, ¶ 27, 100 P.3d 231 (explaining that a party lacks standing to challenge a statute on vagueness grounds if statute is not vague as as-applied to that party). It must prove

¹⁶ Even after staking out constitutional ground in its petition for review, Mike’s made the same assertion below: “While discussing vagueness it must be made clear that [Mike’s] petition for judicial review is not necessarily tantamount to a challenge on the constitutionality of UCA § 58-37-2(g). The question is not its constitutionality but rather its proper interpretation.” (R. 332, Pet’r Dist. Ct. Br. 16.)

unconstitutionality “beyond a reasonable doubt,” and against a presumption of constitutionality. *State v. Krueger*, 1999 UT App 54, ¶ 21, 975 P.2d 489 (citing *State v. Tritt*, 463 P.2d 806, 808 (Utah 1970)).

A vagueness challenge to a statute may be raised on two fronts: (1) a facial challenge—*i.e.*, the statute is unconstitutional on its face; or (2) an as-applied challenge—*i.e.*, the statute is “unconstitutional as applied to the facts of a given case.” *State v. Gallegos*, 2009 UT 42, ¶ 14, 220 P.3d 136. The as-applied concept is conspicuously absent from Mike’s brief. But the veiled facial challenge is front and center.

A facial challenge seeks to vindicate not only the rights of the challenger but also the rights of “others who may be adversely impacted by the statute in question.” *Gallegos*, 2009 UT 42, ¶ 14 (quoting *State v. Ansari*, 2004 UT App 326, ¶ 27, 100 P.3d 231 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55-56 (1999))). When asserting a facial challenge, the party must demonstrate that the statute at issue “is so constitutionally flawed that no set of circumstances exists under which the [statute] would be valid.” *Id.* (quoting *Ansari*, 2004 UT App 326, ¶ 27). This is particularly true “[w]here, as here, a statute ‘implicates no constitutionally protected conduct,’”¹⁷ in which case “a court will uphold a facial vagueness challenge “only if the [statute] is impermissibly vague in all of its applications.” *State v. MacGuire*, 2004 UT 4, ¶ 12, 84

¹⁷ Such as regulation of free speech or association. See *Village of Hoffman Estates*, 455 U.S. at 499.

P.3d 1171 (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982)). This is Mike’s unsuspecting storekeeper argument.

Conversely, “[w]hen asserting an as-applied challenge, the party claims that, under the facts of his particular case, the statute was applied ... in an unconstitutional manner.” *Gallegos*, 2009 UT 42, ¶ 14 (quoting *Ansari*, 2004 UT App 326, ¶ 27). Thus, if an as-applied challenge fails, then the facial challenge also fails because there is a set of circumstances under which the statute is valid. *See id.* (stating that “if a ‘statute ... is clear as applied to a particular complainant [it] cannot be considered impermissibly vague in all of its applications and thus will necessarily survive a facial vagueness challenge’”) (quoting *State v. MacGuire*, 2004 UT 4, ¶ 12, 84 P.3d 1171).

Because “[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,” the court should “‘examine the complainant’s conduct before analyzing other hypothetical applications of the law.’” *Greenwood v. City of North Salt Lake*, 817 P.2d 816, 820 (Utah 1991) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982)). Here, that analysis forecloses Mike’s claim that the City “interpreted” the statute in an unconstitutional manner in upholding the business license revocation.

This is not a case about the general public not knowing what the law is. It is not about various hypotheticals that pose the question of whether caffeine, ginseng, flour, Doritos, or energy drinks fall within what the statute proscribes. Vagueness does not rise or fall on the basis of hypotheticals because anyone can “proffer hypertechnical theories

as to what the statute covers.” *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (explaining that there is “little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question”) (citation omitted)). When there are facts to apply, the hypotheticals are meaningless, no matter how absurd they can be spun: Where there is “no uncertainty regarding the statute’s proscription of [the defendants’] conduct, we refuse their invitation to conjure conditions under which the statute could be vague.” *Ansari*, 2004 UT App 326, ¶ 45.

The unchallenged and undisputed facts establish the following:

- As part of a lengthy drug task force investigation, the State Crime Lab actually tested Mike’s Reborn on three different occasions—each time confirming that these products contained XLR11, which is an analog of the listed controlled substance AM-694.
- Mike’s did not dispute the fact that the product that it sold or possessed with intent to distribute contained XLR11.
- Mike’s hid its Reborn out of public view, in the safety of a backroom, believing that it was illegal to display it.
- Mike’s admittedly labeled its product “Reborn” or “aroma therapy” as a camouflage to intentionally fool law enforcement investigations.
- Although it treated its “Reborn” product differently from other products in its store by presenting various obstacles to its purchase—hiding it from public view and requiring customers to ask for it by name—the product nevertheless generated approximately 40% of Mike’s daily sales.
- Mike’s only sold the Reborn to people over 19-years old and knew exactly what people were doing it with: Smoking it as they would marijuana. In fact, Mike’s employees told people if they smoked it they would go to jail.
- Mike’s put special safeguards on the product because people were stealing it—and had even burglarized the store to get their hands on it.

- Mike's bought its product from a person known only by first name only, from a company known only by an acronym—"GOS"—and obtained lab reports from a testing company for a business listed by another acronym—"DVS"—which had a fake St. George business address and no business license to operate in St. George.
- Apparently concerned enough about their activities, Mike's consulted with its attorney on the statute.

This is ample evidence—indeed substantial evidence—from which the City Council could reasonably conclude, as it did, that Mike's was using its business premises to traffic in a controlled substance in violation of Utah law. Thus, the City was entitled to revoke its business license. *See 14th St. Gym, Inc.*, 2008 UT App 127, ¶ 10. That is, after all, what this case is about.

Mike's Orwellian concerns (at 17) about who is going to stop government from prosecuting the unwary is not enough to overcome facts.¹⁸ Moreover, this case is not a criminal prosecution at all. All of the cases on which Mike's relies were appeals in criminal prosecutions. This case is a business licensing matter. There is a distinction. In the context of this case, the drug analog statute is part of a municipal licensing issue; a business regulation. The distinction is important, not only as it relates to the standard of review—giving deference to a regulatory decision versus prison time—but as it relates to the degree of vagueness the constitution will tolerate.

¹⁸ In any event, the Due Process Clause will apply differently to the unwary shopkeeper selling common products and not engaging in conduct with all the hallmarks of a drug trafficking operation. As with most cases, facts make all the difference in how the law is applied. *See Morrison*, 2001 UT 73, ¶ 14 (explaining that where statute is "sufficiently clear to convey warning as to the proscribed conduct when measured by common understanding and practices[, t]he Constitution requires no more") (citations omitted). This is why a party challenging the constitutionality of a statute must confront the facts as-applied to that party.

“The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). This is “because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.” *Id.* See also *State v. Green*, 2004 UT 76, ¶ 43, 99 P.3d 820 (“The constitution tolerates a greater degree of vagueness in civil statutes than in criminal statutes.”) (citing *Village of Hoffman Estates*, 455 U.S. at 498-99). Through this lens, Mike’s arguments carry little objective force.

Mike’s understood that its actions were prohibited by the statute. It went out of its way to conceal those activities. Further, as the Supreme Court said businesses would likely do, Mike’s consulted with its attorneys in advance about the law. Mike’s intent is in plain view: Get as close as it can to the line. But ““one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.”” *State v. Morrison*, 2001 UT 73, ¶ 15, 31 P.3d 547 (quoting *State v. Jordan*, 665 P.2d 1280, 1286 (Utah 1983) (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952))).

Mike’s knowingly took the risk. And having done so, it cannot now complain that it should be spared because of the potential absurd results that may befall others. Rather, Mike’s own conduct demonstrates that it was reasonably certain as to the meaning of the drug analog statute to understand its conduct fell within what the statute proscribes. That

is enough. *See Morrison*, 2001 UT 73, ¶ 15 (“Words are symbols of communication and as such are not invested with the quality of a scientific formula. It is enough that they can be construed with reasonable certainty.”) (citations omitted). No more is required. *See id.* ¶ 14.

* * *

In sum, as applied to this case, Utah Code section 58-37-2(1)(g)(i) suffers from no constitutional infirmities that would justify adopting Mike’s proposed interpretation. As the district court held, the City Council’s interpretation was in all respects correct. This Court should affirm.

V. Even Under a Conjunctive Reading, the Court Should Affirm Because Reborn Still Qualifies as a Controlled Substance Analog.

Finally, if the Court harbors any doubts about the Legislative intent and how to read the controlled substance analog definition (and it should not), it should still affirm under the facts of this case. Though Mike’s asks (at 25-26) the Court to reverse and remand for the City Council to apply a conjunctive reading of the statute, Mike’s failure to challenge the City Council’s fact findings is fatal, because those findings show that subsections (A) and (C) were satisfied. Thus, the Court should affirm even if it concludes that the conjunctive reading is the correct reading. *See Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158 (reiterating that it is “well settled” that an appellate court may affirm on any ground).

A. XLR-11 has a substantially similar chemical structure to the listed controlled substance, AM-694.

First, the City Council found that XLR-11 is a substance with a substantially similar chemical structure to the listed controlled substance AM-694. (R. 47.) That finding is uncontested on appeal. As the district court concluded, it was based on substantial evidence in the record in the form of the reports generated from actual testing conducted by the state crime lab. The City Council, as the fact finder, was free to review the expert opinions—the State Crime Lab on the one hand, and Mike’s “experts” on the other—and make a determination as to which, if any, it would accept and how much weight it would assign to each. *See Carlsen*, 2012 UT App 260, ¶ 8 (explaining that court will not substitute its judgment for administrative fact finder’s determination between two conflicting views). That is what it did, and it was not simply flipping a coin. The City Council made findings and explained its reasoning. Mainly, that the credentials and experience of the State Crime Lab and the forensic scientist who conducted the tests, Lamoreaux, were unquestioned. (R. 44 ¶ 5.) That courts around the state had accepted Lamoreaux’s expertise and opinions in the area. (R. 44.) And, significantly, that Lamoreaux actually examined the samples from Mike’s on three different occasions and found that the samples contained XLR11, a structural analog of AM-694. (R. 44 ¶ 5.)

As for Mike’s experts—the written statements from De Jesus and McDougal—the the City Council found that De Jesus’s opinion letter referred to the former instead of the current Utah drug analog statute and that McDougal’s opinion letter did not address Utah law at all. (R. 44 ¶ 6.) Instead, McDougal discussed the structural compound of AM-694

and XLR11 and the chemical effects of the substance. (R. 44 ¶ 6.) And, significantly, neither De Jesus nor McDougal actually tested or analyzed the products. They merely stated that in their opinion XLR11 should not be considered an analog of AM-694. (R. 44 ¶ 6.)

Ultimately, the City Council concluded that “the evidence provided by the State Crime Lab and Mr. Lamoreaux is credible and reliable.” (R. 47 ¶ 3.) As such, it concluded that “[i]t is reasonable to rely on the determination made by the State Lab that the product sold or possessed by Mike’s Smoke Shop with the intent to distribute, contained XLR11 which has a chemical structure substantially similar to the chemical structure of the listed controlled substance AM-694 and that the chemical had a common core structure with a single point of divergence.” (R. 47 ¶ 3.) As the record demonstrates, the City Council’s decision was based on a close examination of the reports and writings, most significantly the fact that the state crime lab actually tested the product; Mike’s experts did not. The City Council was also able to look at the diagrams and compare the structure of XLR11 and AM-694 and see for themselves the substantial similarities in the two. (R. 640; 253, 257.) What’s more, the record shows that of the reports submitted, Lamoreaux’s was the only one signed and verified under criminal penalty. The DeJesus letter bears no signature at all.

There was nothing arbitrary about the City Council’s conclusion. This is particularly true when considered in light of all of the surrounding evidence in the case: from the drug task force investigation; to the criminal charges and no contest plea; to the re-labeling of product to fool law enforcement. These surrounding facts clinch the

findings. Indeed, a reasonable person could conclude that if Mike's experts were correct, then Mike's had no reason to engage in any of the irregular and clandestine activities which surrounded its purchase and sale of Reborn and "aroma therapy" products. *See State in re K.C.*, 2013 UT App 201, ¶ 13, 309 P.3d 255 (explaining that courts, juries, and administrative fact finders are never bound to accept any expert's opinions but are "'free to judge the expert testimony as to its credibility and its persuasive influence in light of all of the other evidence in the case'" (quoting *State v. Maestas*, 2012 UT 46, ¶ 200, 299 P.3d 892)).

The first element in section 58-37-2(1)(g)(i) is therefore met: XLR-11 has a substantially similar to the chemical structure of a listed controlled substance. *See* Utah Code § 58-37-2(1)(g)(i)(A).

B. The evidence shows that the Reborn (XLR-11) was represented or intended as having a substantially similar effect as a listed controlled substance.

Subsection (C) is also satisfied. This subsection requires a showing that the substance is "represented or intended to have" a substantially similar effect as a listed controlled substance. Utah Code § 58-37-2(1)(g)(i)(C). Once again, those same surrounding facts, as found by the City Council and undisputed on appeal, confirm Mike's represented and intended Reborn to have substantially similar chemical effects as a listed controlled substance.

The City Council included as a finding—unchallenged on appeal—that "based on the totality of the facts, there is substantial evidence that Mike's Smoke Shop, its owner and employees, had the requisite knowledge and intent to commit a violation of the law

by distributing, or possessing with the intent to distribute, analogs of an illegal substance. (R. 48.) This evidence,” the City Council continued, “goes far beyond what is required for a business license revocation, but is demonstrative of the weight of the evidence supporting the decision to revoke Mike’s Smoke Shop’s business license.” (R. 48.) It was reasonable for the City Council to infer, based on the uncontested facts—which included the criminal charges against Best—that Mike’s both represented and intended its Reborn to have substantially similar chemical effects as a listed controlled substance. Its conduct bears all the hallmarks of a drug trafficking operation.

C. Mike’s experts opined of the substantially similar chemical effects.

Finally, there was also evidence of substantially similar chemical effects described in subsection (B). *See* Utah Code Ann. § 58-37-2(1)(g)(i)(B). Mike’s own experts delivered that evidence in their opinion letters. DeJesus opined that XLR-11 had “hallucinogenic effects.” (R. 250.) McDougal opined that XLR-11 had less detrimental effects, but would go no further than that, indicating that it should “be considered on an individual basis.” (R. 252.)

When these statements are considered side-by-side with the State Crime Lab’s confirmation that the products have a substantially similar chemical structure to a listed controlled substance and the surrounding facts referenced above, a reasonable mind could infer that XLR-11 has substantially similar effects. In other words, using McDougal’s case-by-case approach, there is sufficient evidence to conclude that the admittedly hallucinogenic effects in Reborn were substantially similar to those of a listed controlled

substance, AM-694. That is sufficient in the context of this business license revocation to conclude that the subsection (B) is met. *See 14th St. Gym*, 2008 UT App 127, ¶ 10.

* * *

In sum, even if the Court agrees with Mike's and reads the statute to require that a substance to meet the requirements in subsections (A) plus (B) or (C), it should still affirm as those requirements were met in this case.

CONCLUSION

This Court should affirm the City Council's decision to uphold the revocation of Mike's business license.

DATED: May 25, 2016.

DURHAM JONES & PINEGAR, P.C.



BRYAN J. PATTISON
THOMAS J. BURNS

ST. GEORGE CITY ATTORNEY'S OFFICE

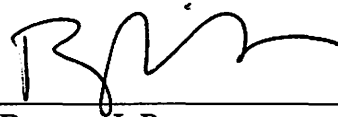
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CERTIFICATE OF COMPLIANCE
WITH RULE 24(F)(1)

1. This brief complies with the type-volume limitation of UTAH R. APP. P. 24(f)(1) because according to the word processing program used to prepare this brief (Word 2010), this brief contains 12,929 words, excluding the parts of the brief exempted by UTAH R. APP. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of UTAH R. APP. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 13-point Times New Roman font.

Dated: May 25, 2016.

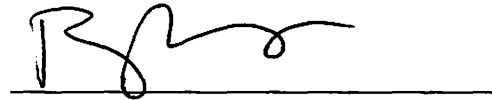


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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2016, I served two copies of the **Brief for Appellee City of St. George**, along with a CD containing a searchable PDF copy of the Brief, on the following by U.S. mail, postage prepaid, addressed to the following:

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A handwritten signature in black ink, appearing to read 'R. Holdaway', is written over a horizontal line.

Tab 1

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IN THE CITY COUNCIL MEETING OF THE CITY OF ST. GEORGE
COUNTY OF WASHINGTON, STATE OF UTAH

IN THE MATTER OF

MIKE'S SMOKE, CIGAR & GIFTS
ADDRESS OF SUBJECT PROPERTY:
1973 W Sunset Boulevard
St. George, UT 84770

**FINDINGS OF FACT,
CONCLUSIONS AND ORDER**

The above-entitled matter came before the St. George City Council, the appeal board, on an appeal from an order of revocation for the business license for Mike's Smoke, Cigar & Gifts (Mike's Smoke Shop) which is located at 1973 W. Sunset Boulevard in St. George, Utah. The City of St. George (City) appeared by and through its attorney of record, Paula Houston, and Mike's Smoke Shop appeared by and through its attorney of record, Ryan Holdaway, on April 4, 2013 for the hearing. The City Council having heard and reviewed the proffered evidence of both parties and being otherwise fully advised enters the following findings and order:

FINDINGS OF FACT

The City Council makes the following findings of fact:

1. Mike's Smoke Shop is located at 1973 W. Sunset Boulevard in St. George, Utah. This business is licensed by the City to sell cigarettes, cigars, tobacco pipes, lighters, oil burners, incense, flavored tobacco, sports memorabilia, novelty items, perfume and calling cards. Christie Best and Michael Connors are the owners of the business. Kyle Best, the son of owner Christie Best, is the manager of the St. George location.
2. The City business license officer sent an order of revocation to the owners of Mike's Smoke Shop on January 28, 2013, revoking the business license and ordering the owners to stop conducting business in St. George. On February 1, 2013, the owners filed an appeal of the decision and requested a hearing on the revocation. The City allowed Mike's Smoke Shop to continue doing business during the appeal period.

3. Complaints were received and a number of cases were investigated by the Washington County Drug Task Force (Task Force) for the possible distribution of a substance commonly known as "spice" which is regulated by the Utah Controlled Substance Act and the Imitation Controlled Substance Act. In the course of these investigations, the Task Force investigated Mike's Smoke Shop for possible violations. Employees of Mike's Smoke Shop told Task Force officers they did not sell spice because it was illegal but they did sell products they referred to as "aroma therapy". Undercover purchases of the "aroma therapy" products were made at Mike's Smoke Shop by the Task Force in March and April of 2012. A search warrant was obtained and executed by the Task Force in April 2012. During the execution of the search warrant, a detective interviewed Kyle Best. Kyle Best told the detective that the "aroma therapy" products had been tested and that Mike's Smoke Shop consulted with their attorney about the law. Kyle Best said he was familiar with the different compounds of spice. He said he has been told to call the product "aroma therapy" and he tells customers that if they smoke it they will go to jail. He said he only sells it to people 19 years of age and over and it comprises approximately 40% of their daily sales. In July 2012 another purchase was made by the Task Force of four more "aroma therapy" packets. Additional purchases were made by the Task Force in December 2012 and January 2013. During these transactions, the "aroma therapy" product, which is called "Reborn", was behind the counter, out of the public view. The packets of "Reborn" did not have barcodes like the other products in the store. The employee scanned a sticker on the side of the cash register's monitor to enter the price of the packet of "Reborn" when selling it to a customer. Based on this information, a search warrant was obtained and executed by the Task Force in January 2013. Multiple packets of "aroma therapy" product called "Reborn" were seized from behind the counter, out of view of the public, and also from a safe in the back room. During the officers' interview with Kyle Best, when asked if it was safe to say that no matter what name the spice was called, "Reborn" or "aroma therapy", it was camouflage to skirt the law enforcement investigations, and he said "Yeah".
4. The following illegal distribution and possession with intent to distribute cases occurred at Mike's Smoke Shop after the 2012 Utah State Legislature amended U.C.A. 58-37-2 and 58-37-4.2 in HB 254 which became effective May 8, 2012:
- July 10, 2012 - Case # 12T0334 - The Utah Bureau of Forensic Services (State Crime Lab) tested the substance and found that Evidence 1-4 contained XLR11, a structural analog of AM-694 which is a listed controlled substance in U.C.A. 58-37-4.2.
 - January 2, 2013 - Case # 13T0001 - The State Crime Lab tested the substance and found that both packets contained XLR11, a structural analog of AM-694 which is a listed controlled substance in U.C.A. 58-37-4.2.
 - January 11, 2013 - Case # 13T0001 - The State Crime Lab tested products (8 items), all products contained XLR11, a structural analog of AM-694 which is a listed controlled substance in U.C.A. 58-37-4.2.

5. The State Crime Lab is an accredited forensic crime lab which holds an additional accreditation for forensic testing and analysis of drug chemistry including controlled substances and general chemical testing. Terry Lamoreaux, the forensic scientist that analyzed the products described herein, is a certified criminalist with a degree in Chemistry and over 35 years of professional employment dealing with analytical chemistry and toxicology. His extensive experience and training, as identified in his curriculum vitae, qualifies him as an expert in analyzing controlled substances and determining if a substance is an analog of a listed controlled substance. No evidence was presented by Mike's Smoke Shop to call into question the Lab's accreditations or procedures, or the skills or qualifications of Lamoreaux. Lamoreaux has testified in numerous court proceedings and his findings have been accepted by courts on prior cases. Lamoreaux examined the samples in the above cases and found that the samples contained XLR11, a structural analog of AM-694. XLR11 is an analog of AM-694 because it has a substantially similar chemical structure of the controlled substance AM-694 due to a common core structure with a single point of divergence. Mike's Smoke Shop did not dispute the fact that the product sold or possessed with intent to distribute contained XLR11. Identification of the chemical structure of the substance was made solely by the State Crime Lab.
6. Mike's Smoke Shop presented statements from Karl De Jesus, Ph.D., and Owen Michael McDougal, Ph.D., along with their curriculum vitae. De Jesus, in his opinion letter dated July 18, 2012, referred to the former instead of the current State law. The former law required a showing that the substance is structurally similar to a listed controlled substance and that the substance had "substantially similar effects on the central nervous system". Based on the former law he stated the following: that XLR11 is a synthetic cannabinoid; that the structure was substantially different from AM-694; that the effect on the nervous system was less potent with decreased hallucinogenic effects; and therefore, in his opinion, the product should not be considered an analog of a controlled substance. In McDougal's opinion letter, Utah law was not addressed. McDougal discussed the structural compound of AM-694 and XLR11 and the chemical effects of the substance. The experts for Mike's Smoke Shop did not test or analyze the actual products. They merely stated that in their opinion XLR11 should not be considered an analog of AM-694.
7. Kyle Best admitted that he knew the product they sold as "aroma therapy" was being ingested by at least some of the people that purchased it. This despite the fact that Mike's Smoke Shop marketed it as "aroma therapy" and not for human consumption. He also admitted to smoking it himself on at least one occasion. Kyle Best told the police officers that a company called "GOS" manufactured the "Reborn" product but he didn't know where GOS was located. When the police officer asked for a copy of the test results for "Reborn", Kyle Best provided a report from AIBio Tech. The test results were for 36 chemicals; however the product was not tested for any analogs and did not identify the chemical makeup of the product. The lab report was addressed to a business listed as "DVS" with a St. George address; however no such business existed at that address and no business called "DVS" had a business license with St. George. Kyle Best stated that he had offered "Reborn" for sale in the store for at least 6 months. He said he moved the "Reborn" under the counter behind the cash register because people were stealing it and that people have broken into the store to steal it. He said Mike's Smoke Shop in St. George sells the "Reborn" for \$10 a packet and they sell 50 to 60 packets a day. Kyle Best said that he does the ordering and that the owners

are aware of and approve items that are offered for sale and that he was told to sell this product. He also stated that he wouldn't sell the product if the person asks for "spice" and that about a 1/3 of his sales are "Reborn". When asked why the "Reborn" was hidden if it was such a hot seller, he responded that he didn't have room for the "Reborn" out front, that it made it easier to grab, and that it would get stolen. When asked why he didn't put it in the glass display case, he responded that it had been but he moved it. He agreed other businesses would display their hot selling items out front. He also stated that customers have to ask for it by name to get it. Kyle Best said that he knew customers smoke it or ingest it like marijuana including one old man who smokes it for his cancer and comes in every other day. He also admitted that he has used it in the past. When asked what effect the "Reborn" had, he said it made him sick. When asked if it was safe to say that no matter what name the "spice" was called, whether it was called "Reborn" or "aroma therapy", it was camouflage to skirt the law enforcement investigations, Kyle Best said "Yeah". He said that people will find ways to get high.

Christie Best, the owner, told Task Force officers that she wasn't "dumb" and that she knew what people were doing with the "aroma therapy". She also said customers had told her that they smoke it. Christie said that she comes to the St. George store two to three times a week to do paperwork, pay bills and sign checks. She said the "Reborn" product was kept behind the counter and in the safe and that she left the testing of the product up to Kyle Best. She said that when the store is broken into the first thing the thief steals is the "Reborn".

The manager of the Washington City store, Christina Best, daughter of the owner, also admitted to seeing people smoke the "aroma therapy" in the parking lot, that people admitted they smoked it and that she had smoked it once. She also kept the product hidden behind the counter in the Washington store and said that the customer had to know about it and request it or they wouldn't sell it to the customer.

Michael Connors, one of the owners, said they got their "aroma therapy" from a male he only knows by a first name and he asks Kyle Best if it is legal, if the paperwork is in order and if the attorneys have cleared it. Connors said he hides the "aroma therapy" behind the register because if he displays it, it becomes illegal. He also said he puts it out of view so kids can't get it.

CONCLUSIONS

Based on the facts presented at the hearing including all submitted materials, the City Council makes the following conclusions:

1. In examining the evidence presented, the Council must determine whether the evidence supports the business license officer's revocation of Mike's Smoke Shop's business license. The Utah Supreme Court stated that "Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. This standard does not require or specify a quantity of evidence but requires only such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *WWC Holdings Co., Inc. V. Public Service Commission of Utah*, 44 P.3d 714,

2001 UT 23 (2002). Put simply, the decision cannot be arbitrary or capricious; it must be based in fact.

2. The plain language of the Utah state statute is clear and should be applied as written. In *State v. Jeffs*, the Utah Supreme Court stated when "interpreting a statute, we look to its plain language. We read statutory provisions literally, unless such a reading would result in an unreasonable or inoperable result." *State v. Jeffs*, 243 P.3d 1250 (Utah 2010). This decision is supported by a review of House Bill 254 which was adopted by the 2012 Utah Legislature. The State Legislature amended the law to clarify the definition of a controlled substance analog and eliminated the requirement to prove two elements before a substance could be classified as an analog. Prior to this amendment, the prosecutor in a criminal case had to prove that a substance had a chemical structure substantially similar to the chemical structure of a controlled substance or a listed controlled substance AND that it had a substantially similar effect OR was represented or intended to have a substantially similar effect. The 2012 amendments removed this two step approach from Utah law. Mike's Smoke Shop argues the language still requires this two step approach arguing that the elements should be read in the conjunctive even though they are separated by an "or" instead of an "and". However, the Legislature would not have removed the clear language using the word "and" which clearly required two steps and changed it to three separate paragraphs using the disjunctive format of "or" if it really wanted to keep the requirement for two steps. Such an interpretation is nonsensical and unreasonable.

The relevant changes are as follows:

HB 254:

78 (g) (i) "Controlled substance analog" means:
79 (A) a substance the chemical structure of which is substantially similar to the chemical
80 structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a
substance
81 listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances
Act,
82 Title II, P.L. 91-513[?];
83 [(A)] (B) a substance which has a stimulant, depressant, or hallucinogenic effect on the
84 central nervous system substantially similar to the stimulant, depressant, or hallucinogenic
85 effect on the central nervous system of controlled substances [in the schedules set forth in

86
Subsection (1)(f), or a substance listed in Section 58-37-4.2; or] listed in Schedules I and II of
87 Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I
and
88 II of the federal Controlled Substances Act, Title II, P.L. 91-513; or
89 [(B)] (C) A substance which, with respect to a particular individual, is represented or
90 intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous
system
91 substantially similar to the stimulant, depressant, or hallucinogenic effect on the central
92 nervous system of controlled substances [in the schedules or list set forth in this Subsection
93 (1)] listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2,
or
94 substances listed in Schedules I and II of the federal Controlled Substances Act, Title II,

Excerpt from enrolled copy of House Bill 254 enacted by the 2012 General Session of the Utah Legislature.

It is clear from the changes that were made that the Legislature intended the statute to be disjunctive as "or" is normally read, rather than "conjunctive" as argued by Mike's Smoke Shop. The Council concludes that the current law, especially with its history, is very clear and should be applied in the disjunctive as it is written. When applied to the facts of this case it does not create an unreasonable or inoperable result.

3. The product sold at Mike's Smoke Shop contained XLR11, an analog of AM-694. The Council concludes that the evidence provided by the State Lab and Mr. Lamoreaux is credible and reliable. It is reasonable to rely on the determination made by the State Lab that the product sold or possessed by Mike's Smoke Shop with the intent to distribute, contained XLR11 which has a chemical structure substantially similar to the chemical structure of the listed controlled substance AM-694 and that the chemical had a common core structure with a single point of divergence. In *United States v. Saffo*, 227 F.3d 1260, 1263 (10th Cir. 2000), the government's expert witnesses testified that the substance in that case had a substantially similar chemical structure to the listed controlled substance because there was only one difference in the chemical structure between the substance in question and the listed controlled substance. The defendant's expert witnesses in *Saffo* claimed the substance did not have a substantially similar chemical structure because their functional groups were different. The court stated that experts need not agree in order to affirm a criminal conviction under the analog statute.

Based on this conclusion and the findings of fact stated above, the Council concludes the evidence establishes that XLR11 is an analog of AM-694, a listed controlled substance, and that Mike's Smoke Shop sold and possessed product with the intent to distribute that contained XLR11 in violation of U.C.A. 58-37-8.

4. The Council finds that Mike's Smoke Shop had notice that the product they sold was a controlled substance that was illegal to distribute and the City is not required to prove intent on the part of Mike's Smoke Shop.

The case before the Council is a civil business license revocation. Civil business license revocations do not require an intent element. The mere fact that a sale of an illegal substance was made at the business is sufficient to justify the revocation of the business license. Owners and operators are responsible for the activities that occur at their businesses. It is their responsibility to ensure compliance with the law. Assuming arguendo that the City had to prove intent, the standard of proof used to measure an individual's level of mens rea in a criminal case would be whether the individual had a "reasonable cause to believe" or reason to know that their actions are illegal. This can be shown by the subjective facts surrounding the event in question which demonstrates that the person had reason to know their acts were illegal.

In another criminal case, *United States v. Washam*, 312 F.3d 926, 929 (8th Cir. 2002), the defendant, in an attempt to circumvent the banned chemicals, found a chemical, 1,4 Butanediol, to sell that was not on the controlled chemicals list, but that had similar effects to those illegal chemicals when ingested. The defendant also had "not for human consumption" placed on the packaging of the chemical, in hopes of persuading law enforcement that the chemicals were not intended to be used in the same manner as the listed controlled chemicals GHB and GLB. The court concluded in *Washam* that while the chemical 1,4 Butanediol did not have the exact same chemical structure, and even though the packaging had a label stating "not for human consumption," the surrounding facts proved that the defendant knew the chemical was substantially similar to the listed controlled chemicals, and the defendant knew that the analogous chemical would be consumed by those who purchased the chemical, even if the packaging advised otherwise. Similarly, the *Saffo* court held that the defendant could not claim lack of notice because her behavior and activities showed she knew selling the product was illegal.

In the case at hand, the facts are similar to *Saffo* and *Washam*. "Reborn", a product which contained the analog of a listed controlled substance, was sold or possessed with the intent to distribute at Mike's Smoke Shop located at 1973 W Sunset Blvd, St. George, Utah. It was marked "not for human consumption", it was sold for \$10 a packet from a hidden location distinct from the legal inventory, it was rung up by scanning a tag on the monitor instead of marking the product, the customer had to specifically request it to buy it, and the owners and employees knew that the customers were smoking or ingesting it. If a customer asked for spice they would be told that the store does not sell spice, but that they sell "aroma therapy". The employees' and owners' conduct demonstrates an understanding of the illegality of the product, and that the customers buying the product were not using it for its advertised use of aroma therapy. Kyle Best, the manager of the store, even stated that these acts were to mislead law enforcement. The totality of these facts, in addition to those listed above in the findings of fact, establishes there is "reasonable cause to believe" the owners, the manager and the employees knew the product was illegal. This is the standard for a criminal conviction, a much higher standard than is necessary for a business license revocation. In addition, the Fifth District Court held a hearing to determine if there was sufficient evidence to proceed on criminal charges against Kyle Best for distributing a controlled substance stemming from the events which occurred in January 2013, and the Court ruled that there was sufficient evidence for a criminal prosecution. The criminal case against Kyle Best is based on the same facts as this revocation.

The Council concludes that based on the totality of the facts, there is substantial evidence that Mike's Smoke Shop, its owner and employees, had the requisite knowledge and intent to commit a violation of the law by distributing, or possessing with the intent to distribute, analogs of an illegal substance. This evidence goes far beyond what is required for a business license revocation, but is demonstrative of the weight of the evidence supporting the decision to revoke Mike's Smoke Shop's business license.

The City has authority under its business license ordinance to revoke a license when it finds that the licensee/owner/operator is in violation of Section 3-1-19 of the St. George Municipal Code by violating any drug related offense or by finding that an employee while on the business's premises violates any laws related to controlled substances. No criminal

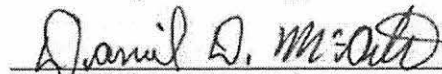
conviction or charge is required. The City is simply required to show by substantial evidence that there was a violation. Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." 14th St. Gym, Inc. v. Salt Lake City Corp., 2008 UT App 127, 183 P.3d 262, 265.

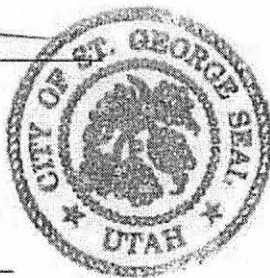
ORDER

Based on all the facts in this case, the Council hereby upholds the business license officer's decision to revoke the business license for Mike's Smoke Shop as a result of the business being in violation of Section 3-1-19 of the St. George Municipal Code, and hereby ORDERS Mike's Smoke Shop to cease conducting business in the City of St. George and shall cease operations at 1973 W. Sunset Boulevard in St. George, Utah no later than 4:00 p.m. on July 31, 2013. Pursuant to Section 3-1-20 of the St. George Municipal Code, a business that has had its license revoked shall not be granted a business license for six months following the revocation. Any subsequent business license application shall be subject to all applicable Municipal Codes at the time of the application.


DATED this 18th day of July, 2013.

CITY: City of St. George

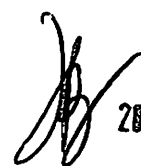

Daniel D. McArthur, Mayor



ATTEST:


Christina Fernandez, City Recorder

Tab 2

 **FILED**
2015 NOV 24 AM 10:47
5TH DISTRICT COURT
ST. GEORGE

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

MIKE'S SMOKE, CIGAR & GIFTS, Petitioner, vs. CITY OF ST. GEORGE, Respondent.	DECISION AND ORDER AFFIRMING BUSINESS LICENSE REVOCATION Case No. 130500429 Judge Jeffrey C. Wilcox
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Petitioner Mike's Smoke, Cigar & Gifts has filed a Petition for Judicial Review, challenging the City of St. George's ("City") decision upholding the revocation of its business license. Following remand from the Court of Appeals, the court once again heard oral argument on October 21, 2015, at the conclusion of which it took the matter under advisement. As explained below, the City Council's decision is affirmed.

Standard of Review

The parties previously disputed the standard of review, but the Court of Appeals clearly resolved that question:

"Judicial review of license revocations by municipalities is limited to a determination whether the municipality acted within its lawful authority and in a manner that is not arbitrary or capricious." Dairy Prod. Servs., Inc. v. City of Wellsville, 2000 UT 81, ¶ 42, 13 P.3d 581 (citation and internal quotation marks omitted). This court has indicated that a "municipality's license revocation decision is deemed arbitrary or capricious if it is not supported by substantial

evidence in the record.” 14th St. Gym, Inc. v. Salt Lake City Corp., 2008 UT App 127, ¶ 10, 183 P.3d 262 (citation and internal quotation marks omitted). This standard does not allow the reviewing court to reweigh the evidence, Dairy Prod. Servs., 2000 UT 81, ¶ 42, 13 P.3d 581, but requires the court to “consider all the evidence in the record, both favorable and contrary, and determine whether a reasonable mind could reach the same conclusion as the [c]ity,” 14th St. Gym, 2008 UT App 127, ¶ 10, 183 P.3d 262.

Mike's Smoke, Cigar & Gifts v. St. George City, 2015 UT App 158, ¶ 14, 353 P.3d 626.

2012 Amendment to Utah’s Definition of “Controlled Substance Analog”

The parties agree on the changes made in 2012 to the statutory provisions defining a “controlled substance analog” in Utah. The following table demonstrates the changes between the 2011 and 2012 versions of the statute (which, as far as this case is concerned, involve only the structural changes to the statute (i.e., the movement of the initial provision into subdivision (A), and the movement of former subdivisions (A) and (B) to (B) and (C), respectively)):

<p>Utah Code Ann. § 58-37-2(g)(i) (2011).</p> <p>(g)(i) “Controlled substance analog” means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a substance listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513:</p> <p>(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the</p>	<p>Utah Code Ann. § 58-37-2(g)(i) (as amended in 2012).</p> <p>(g)(i) “Controlled substance analog” means:</p> <p>(A) a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a substance listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513;</p> <p>(B) a substance which has a stimulant, depressant, or hallucinogenic effect on the</p>
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<p>central nervous system of controlled substances in the schedules set forth in Subsection (1)(f), or a substance listed in Section 58-37-4.2; or</p> <p>(B) which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules or list set forth in this Subsection (1).</p>	<p>central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513; or</p> <p>(C) A substance which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513.</p>
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Utah and Federal Controlled Substances Analog Statutes

The relevant provisions of the 2012 version of the Utah statute overlap significantly with the corresponding federal provisions, as indicated in the following table:

<p>Utah Code Ann. § 58-37-2(g)(i) (as amended in 2012) (emphasis added).</p> <p>(g)(i) "Controlled substance analog" means:</p> <p>(A) a substance <u>the chemical structure of which is substantially similar to the chemical</u></p>	<p>21 U.S.C.A. § 802(32)(A) (emphasis added).</p> <p>(32)(A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance--</p> <p>(i) <u>the chemical structure of which is</u></p>
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<p><u>structure of a controlled substance</u> listed in Schedules I and II of Section 58-37-4, a substance listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513;</p> <p>(B) a substance <u>which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system</u> of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513; or</p> <p>(C) A substance which, <u>with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system</u> of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513.</p>	<p><u>substantially similar to the chemical structure of a controlled substance in schedule I or II;</u></p> <p>(ii) <u>which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system</u> of a controlled substance in schedule I or II; or</p> <p>(iii) <u>with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system</u> of a controlled substance in schedule I or II.</p>
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Competing Interpretations

Stressing the similarities between the Utah and federal statutes, Petitioner argues that the two statutes should be interpreted similarly. Petitioner correctly points out that the cases

interpreting the federal statute are virtually, if not entirely, unanimous in reading the statute conjunctively, as summarized in an ALR annotation discussing the subject:

The construction of the definition of controlled substance analogue in 21 U.S.C.A. § 802(32) has been a subject of controversy. The government has argued that it should be construed in the disjunctive, so that a substance is a controlled substance analogue if it satisfies either clause (i), (ii), or (iii). The only case so far to adopt this disjunctive interpretation, however, has been reversed, and all cases at this time have construed the definition in the conjunctive as requiring a substantially similar chemical structure to a controlled substance (i), and then either an effect similar to a controlled substance (ii) or the intent to have such an effect (iii)

Tracy Bateman Farrell, Annotation, Validity, Construction, and Operation of Controlled Substance Analogue Enforcement Act of 1986, 188 A.L.R. Fed. 325 §2[a] (Originally published in 2003; WestlawNext database updated weekly) (footnote omitted); id. §16 (collecting cases); accord United States v. Ketchen, No. 1:13-CR-00133-JAW, 2015 WL 3649486, at *8 (D. Me. June 11, 2015) (unpublished) (“Although the First Circuit has not addressed the issue, nearly all (or perhaps all) circuit courts that have considered the question have concluded that § 802(32)(A) should be read in the conjunctive.”) (citations omitted). As explained below, the court cannot properly follow this federal case law.

“Above all, this court’s primary objective in construing enactments is to give effect to the legislature’s intent.” LPI Servs. v. McGee, 2009 UT 41, ¶ 11, 215 P.3d 135 (emphasis added and citation and internal quotation marks omitted). In doing so, the court should “look first to the statute’s plain language.” Id. (citation and internal quotation marks omitted). “When the plain

meaning of the statute can be discerned from its language, no other interpretive tools are needed." Id. (emphasis added and citation omitted). Further, in conducting a plain language analysis, the court may consider the effect of statutory amendments. See T-Mobile USA, Inc. v. Utah State Tax Comm'n, 2011 UT 28, ¶ 27, 254 P.3d 752.

In its "Findings of Fact, Conclusions and Order" ("Council Decision"), the City Council compared the statute as it stood before and after the 2012 amendment, and concluded that "the Legislature would not have removed the clear language using the word 'and' which clearly required two steps and changed it to three separate paragraphs using the disjunctive format of 'or' if it really wanted to keep the requirement for two steps. Such an interpretation is nonsensical and unreasonable." AR-00005 (Council Decision at 5). Without questioning this interpretation of the 2012 amendment,¹ and without undertaking an analysis of the statutory language to show that it can even bear a conjunctive construction, Petitioner simply urges the court to follow the federal decisions holding that the federal statute should be read conjunctively. The court declines this invitation.

As previously quoted, the language of the two statutes overlaps substantially, but there are also critical differences requiring a departure from the federal lead. See Jensen v.

¹ Petitioner actually goes as far as to affirmatively endorse this interpretation, saying, after reciting the above excerpt from the Council Decision, that "[t]here is no question the legislature intended for the amended UCA § 58-37-2(g) to be read in the disjunctive." Petitioner's Opening Brief at 11.

Intermountain Health Care, Inc., 679 P.2d 903, 904 (Utah 1984) (recognizing “that when the Legislature adopts a statute from another state, the presumption is that the Legislature is familiar with that state’s judicial interpretations of that statute and intends to adopt them also,” but stating that the presumption “is not applicable where there have been material changes made in the second statute”) (emphasis added and citations omitted).

As relevant to the conjunctive/disjunctive question, the two statutes’ chief similarity is the connection of the three definitional subdivisions by the term “or” between the second and third. The general rule is that when words are “used in series, the only connective being the disjunctive ‘or,’ it applies to the whole series.” Ringwood v. State, 8 Utah 2d 287, 289, 333 P.2d 943, 944 (1959). Of course, as Petitioner emphasized at oral argument, this rule is not absolute. In a case exemplifying the federal cases treating the language of the federal analog statute, the Third Circuit reiterated that “canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meaning unless the context dictates otherwise,” and that “[w]hether requirements in a statute are to be treated as disjunctive or conjunctive does not always turn on whether the word ‘or’ is used; rather it turns on context.” United States v. Hodge, 321 F.3d 429, 436 (3d Cir. 2003) (emphasis added and citations and internal quotation marks omitted).

In deciding how “or” should be understood in Hodge (i.e., as applying to each of the three subdivisions it connects or only to the final two), the court first noted that “even within § 802, Congress did not always consider a single ‘or’ between the final terms of a series sufficient

evidence of disjunctive intent”; the court referenced the fact that “the definition of ‘depressant or stimulant substance’ in § 802(9) contains an ‘or’ after each clause,”² and concluded that, as to subdivision (32)(A), “where ‘or’ is absent between clauses (i) and (ii) but present between (ii) and (iii), we do not find conclusive evidence for a disjunctive reading.” 321 F.3d at 436 (citations omitted). The basis for this initial conclusion is conspicuously absent in the Utah statute, which defines “depressant or stimulant substance” by tracking the language of the federal definition virtually verbatim, but omitting the “or” after the provisions corresponding with subdivisions (A)

² Section 802(9) provides:

The term “depressant or stimulant substance” means--

(A) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or

(B) a drug which contains any quantity of (i) amphetamine or any of its optical isomers; (ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (iii) any substance which the Attorney General, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

(C) lysergic acid diethylamide; or

(D) any drug which contains any quantity of a substance which the Attorney General, after investigation, has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

21 U.S.C.A. § 802 (emphasis added).

and (B) of section 802(9). See Utah Code Ann. § 58-37-2(l).

The court next said “that the definition of a controlled substance analogue reads more naturally in the conjunctive. First, clause (i) seems to state an independent requirement; even the dictionary defines chemical analogues in terms of their similar chemical structures.” 321 F.3d at 436 (citing American Heritage Dictionary 65-66 (3d ed. 1992) (defining “analogue” in chemistry as “[a] structural derivative of a parent compound that often differs from it by a single element”)). The court immediately highlighted the limited value of this point, however, in a footnote acknowledging “that arguments from dictionary definitions can only take us so far when construing a provision that is itself definitional. Absent an absurd departure from conventional English, Congress of course is free to define terms in statutes differently than any particular dictionary does.” *Id.* at 436 n.5 (emphasis added). Accord Hercules Inc. v. Utah State Tax Comm’n, 2000 UT App 372, ¶ 9, 21 P.3d 231 (“When a statute fails to define a word, we rely on the dictionary to divine the ‘usual meaning.’”) (emphasis added and citations omitted).

Next, the court observed that

clauses (ii) and (iii) read in parallel and appear subordinate to clause (i) because the functional language in each begins with the relative pronoun “which.” The doctrine of the last antecedent teaches that “qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding” and not to “others more remote.” That suggests that clauses (ii) and (iii) more likely modify clause (i)’s phrase “controlled substance in schedule I or II” than the word “substance” in the main clause.

321 F.3d at 436 (citations omitted).

Again, comparison with the corresponding provisions of the Utah statute shows that applying the same analysis to the Utah statute yields a different conclusion. “[T]he functional language in” subdivisions (B) and (C) of section 58-37-2(g)(i) begins, not with the word “which,” but with the phrase “a substance which” (emphasis added), reinforcing the conclusion that each of these subdivisions is intended to stand on its own rather than modifying subdivision (A).

After conducting its plain-language analysis, the Hodge court “readily concede[d] that the disjunctive reading is plausible” based on “[t]he word ‘or’ between clauses (ii) and (iii),” but concluded that the other features noted above made section 802(32)(A) “ambiguous as to whether it should be read conjunctively or disjunctively.” 321 F.3d at 436-37.

Because section 58-37-2(g)(i) includes the same “or” between subdivisions (B) and (C), but not the features that the Hodge court said made it possible to read § 802(32)(A) conjunctively (except for the dictionary definition of “analogue,” the significance of which the Hodge court itself properly minimized), the court concludes that section 58-37-2(g)(i) is not ambiguous, and that the plain meaning of the language in this subdivision requires it to be read disjunctively.

This interpretation of section 58-37-2(g)(i) is further supported by contrasting the 2011 and 2012 versions of the statute, as Petitioner freely admits. See footnote 1, supra, and accompanying text. This is also consistent with legislative history; the State has presented the enrolled copy of the bill amending the statute in 2012, which expressly states that the bill

“amends the definition of a controlled substance analog to allow proof that the substance is chemically substantially similar to a controlled substance, without requiring proof of the effect of the substance by the expert testimony of a pharmacologist” AR-00129 (H.B. 254 (enrolled copy), lines 11-15), available at <http://le.utah.gov/~2012/bills/static/HB0254.html> (emphasis added).

Despite acknowledging the Legislature’s manifest intent that the statute be read disjunctively, Petitioner nevertheless argues that it should be read conjunctively because to read it disjunctively “renders it unconstitutionally vague.” Petitioner’s Opening Brief at 12.³ Importantly, however, Petitioner is not challenging the constitutionality of the statute.⁴ As

³ Petitioner has cited Papachristou v. City of Jacksonville, 405 U.S. 156, 163, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), for the proposition that a law is unconstitutionally vague if it “makes criminal activities which by modern standards are normally innocent,” and Lanzetta v. State of N.J., 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939), for the proposition that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” Petitioner argues that if the statute is interpreted disjunctively, it fails on both of these counts because people who sell “aromatherapy products, caffeine, tobacco, or sugar” “are now left guessing and hoping their conduct is lawful.” Petitioner’s Opening Brief at 15-16.

⁴ No doubt this is because, in order to challenge the statute’s facial vagueness, as the City correctly points out, “Defendant must show that the statute is totally invalid and ‘incapable of any valid application.’” Salt Lake City v. Lopez, 935 P.2d 1259, 1265 (Utah Ct. App. 1997) (citations and some internal quotation marks omitted), superseded by statute on other grounds as stated in Baird v. Baird, 2014 UT 08, ¶ 39, 322 P.3d 728. “[A] person ‘who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant’s conduct before analyzing other hypothetical applications of the law.’” Id. (citations and some internal quotation marks omitted). Petitioner makes no attempt to show that the statute is incapable of any valid

Petitioner puts it, “the question is not whether the application of the statute in the present case is unconstitutionally vague but rather whether the interpretation used by the City can withstand vagueness challenges under the federal constitution and in light of federal law.” Id. at 16. At oral argument, Petitioner cited Utah Department of Transportation v. Carlson, 2014 UT 24, ¶ 23, 332 P.3d 900, and clarified that it is invoking the canon of constitutional avoidance, the premise of which

is a presumption that the legislature “either prefers not to press the limits of the Constitution in its statutes, or it prefers a narrowed (and constitutional) version of its statutes to a statute completely stricken” by the courts. Thus, when a court rejects one of two plausible constructions of a statute on the ground that it would raise grave doubts as to its constitutionality, it shows proper respect for the legislature, which is assumed to “legislate[] in the light of constitutional limitations.”

2014 UT 24, ¶ 23 (citations omitted).

Petitioner’s argument is unpersuasive. First, as Carlson itself clearly explains, “[t]he canon of constitutional avoidance is an important tool for identifying and implementing legislative intent.” Id. (emphasis added). Here, as already stated, there is no dispute as to the Legislature’s intent, so there is no need to apply this canon to “identify[] and implement[]” it,

application, and the evidence in the record (summarized by the City at pages 28-29 of its brief filed November 20, 2013) clearly shows that Petitioner’s owners and manager “had knowledge of the illegality of [their] activities, and thus this is not a situation where [they] ‘could not reasonably understand that [their] contemplated conduct is proscribed.’” United States v. Saffo, 227 F.3d 1260, 1270 (10th Cir. 2000) (citations omitted).

much less to openly circumvent it. Accord McFadden v. United States, 135 S. Ct. 2298, 2306-07, 192 L. Ed. 2d 260 (2015) (canon of constitutional avoidance “‘has no application’ in the interpretation of an unambiguous statute”) (citation omitted).

Second, Petitioner also incorrectly states that there is “a wealth of federal case law directly on point which states unequivocally that a disjunctive reading of the language such as that contained in UCA § 58-37-2(g) renders it unconstitutionally vague.” Petitioner’s Opening Brief at 11-12. The cases cited by Petitioner, however, reach no such conclusion. Rather, they merely identify some “absurdities” that could result from a disjunctive reading, such as (regarding § 802(32)(A)(ii)) caffeine or alcohol qualifying as controlled substance analogs (because, in concentrated form, their effects are similar to those of controlled substances), or (regarding § 802(32)(A)(iii)), flour or sugar or any number of other harmless substances likewise so qualifying (because represented by someone to have effects similar to those of a controlled substance). See United States v. Turcotte, 405 F.3d 515 (7th Cir. 2005); United States v. Vickery, 199 F. Supp. 2d 1363, 1369 (N.D. Ga. 2002), United States v. Forbes, 806 F. Supp. 232, 235 (D. Colo. 1992). Such situations are not entirely hypothetical. See Hodge, 321 F.3d at 439 (overturning controlled substance analog convictions for sale of candle wax and flour mixture misrepresented to be crack cocaine).⁵

⁵ Petitioner also cites United States v. Washam, 312 F.3d 926 (8th Cir. 2002), in which a defendant asserted – as part of a constitutional vagueness challenge to the federal analog law –

Again, however, the federal cases cited were dealing with an ambiguous statute. Under such circumstances, application of the absurd consequences canon makes sense. See Utley v. Mill Man Steel, Inc., 2015 UT 75, ¶ 46, --- P.3d --- (opinion concurring in part of Durrant, C.J., for majority of court) (“If statutory language lends itself to two alternative readings, we choose the reading that avoids absurd consequences.”) (emphasis added and footnote omitted); State v. Redd, 1999 UT 108, ¶ 12, 992 P.2d 986 (“Where we are faced with two alternative readings, and we have no reliable sources that clearly fix the legislative purpose, . . . we interpret [the] statute to avoid absurd consequences.”) (quoted in Utley, 2015 UT 75, ¶ 46 n.15) (emphasis added). Because section 58-37-2(g)(i) unambiguously requires a disjunctive reading, however, there is no basis for applying the absurd consequences canon here. See Visitor Info. Ctr. Auth. of Grand Cnty. v. Customer Serv. Div., Utah State Tax Comm'n, 930 P.2d 1196, 1198 (Utah 1997) (“When language is clear and unambiguous, it must be held to mean what it expresses, and no

that the law was subject to arbitrary enforcement because the food additive MSG (like the analog substance the defendant was convicted of distributing) “also becomes GHB in the human body,” thereby qualifying as a substance with a substantially similar chemical structure to a listed controlled substance. In rejecting this argument, the court pointed out that the federal law requires more than just a substantially similar chemical structure. Id. at 932. Petitioner’s reliance on Washam is misplaced. As stated, the court there was addressing a direct vagueness challenge, not deciding whether the statute should be read conjunctively or disjunctively (which issue had been decided in a footnote earlier in the decision, see id. at 930 n.2). Here, as previously indicated, see footnote 6 and accompanying text, supra, Petitioner makes no vagueness challenge, so the arbitrary enforcement supposedly allowed by the statute is not an issue. See State v. Anderson, 701 P.2d 1099, 1103 (Utah 1985) (“It is a fundamental rule that this Court should avoid addressing constitutional issues unless required to do so.”) (footnote omitted).

room is left for construction.”) (citation and internal quotation marks omitted).⁶ Moreover, contrary to Petitioner’s argument that the statute will be unconstitutionally vague unless it is read

⁶ In addition to the “absurd consequences” canon, the court in Utley also discusses the “absurdity doctrine,” which “has nothing to do with resolving ambiguities,” but which is applied “to reform unambiguous statutory language where applying the plain language leads to results so overwhelmingly absurd no rational legislator could have intended them.” 2015 UT 75, ¶ 46 (footnote omitted). To the extent this very limited canon has been invoked, the court declines to apply it here. While at least one court addressing a vagueness challenge to an unambiguously disjunctive analog statute has indicated that absurd consequences would prevent it from being applied to someone possessing alcohol, see People v. Silver, 230 Cal. App. 3d 389, 395, 281 Cal. Rptr. 354, 357 (Ct. App. 1991) (where statute defined, with some exceptions, “controlled substance analog” to “mean[] either of the following: (1) A substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance (2) A substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance,” the court tersely rejected the argument that the statute “could be used to convict a person of possession of alcohol,” saying, “[t]he answer is that the statute will be construed to avoid absurd consequences”) (emphasis added and citations omitted), such statement was dicta, and at any rate the court did not say that the statute would therefore be read conjunctively, so the statement did not help the defendant there, who was prosecuted under the substantially similar chemical structure alternative, and it does not help Petitioner here. In another case involving an unambiguously disjunctive analog statute, the court took a more circumspect approach that the court adopts as its own. See Robinson v. State, 783 S.W.2d 648, 650 n.4 (Tex. App. 1989) (declining to “address the constitutionality or alleged definitional deficiencies of [a statutory provision] concerning the effects of substances because the stipulated evidence and record only present[ed] evidence as to the structural similarity,” and because the court could not “pass on the validity of any part of the Controlled Substance Act which [was] not shown to have been violated, nor [could it] decide constitutional issues on a broader basis than the record require[d]”) (emphasis in original; citation omitted), aff’d, 841 S.W.2d 392 (Tex. Crim. App. 1992) (en banc). Accord State v. Roberts, 2015 UT 24, ¶ 47, 345 P.3d 1226, 1240 (“[A] party may only challenge a statute ‘to the extent the alleged basis of its infirmity is, or will be, applied to his detriment.’”) (citation omitted); Anderson, 701 P.2d at 1103 (court will not reach constitutional issues unnecessarily).

conjunctively, courts in other states have rejected vagueness challenges to analog statutes that, like Utah's, are unambiguously disjunctive. See Silver, 230 Cal. App. 3d 389; Robinson, 783 S.W.2d 648. In sum, Petitioner's argument that the language of Utah Code section 58-37-2(g)(i) should be read conjunctively is without merit.

Conclusion that XLR-11 Is a Controlled Substance Analog

Petitioner also assails the Council Decision rejecting the opinions of Petitioner's experts and adopting the rather conclusory opinion of Terry Lamoreaux that "XLR11 has a chemical structure which is substantially similar to the chemical structure of the controlled substance AM-694 due to a common core structure with a single point of divergence." AR-00119.

It is not altogether surprising that Petitioner objects to the short shrift the City Council apparently gave the reports of Petitioner's experts. Petitioner's experts certainly spent more time explaining their opinions than Mr. Lamoreaux did his, and there is clearly room to quibble over how accurately the Council Decision summarizes the bases for Petitioner's experts' opinions.

Nevertheless, the question before the court is whether the City Council could reasonably have found that XLR-11 is an analog to AM-694, and that question must be answered in the affirmative. As indicated in the preceding section, the Legislature clearly intended to make a substantial similarity in chemical structure (between a listed controlled substance and another substance) a sufficient ground on which to make the analog determination. Because Petitioner does not challenge the statute's constitutionality, the only question is whether there is enough

evidence for a reasonable person to conclude that XLR-11's chemical structure is substantially similar to that of AM-694. There clearly is.

Although, as indicated above, Mr. Lamoreaux's opinion is stated in somewhat conclusory terms, Petitioner's own experts provided two-dimensional drawings for the chemical substances in question (as well as for other substances). See AR-00206 and AR-00212. By reviewing these drawings in connection with Mr. Lamoreaux's opinion, the City Council could reasonably conclude that the chemical structure of the two substances is substantially similar (and that XLR-11 is therefore an analog to AM-694). Cf. United States v. McKinney, 79 F.3d 105, 108 (8th Cir. 1996) ("[A] reasonable layperson could . . . have examined a chemical chart and intelligently decided for himself or herself, by comparing their chemical diagrams, whether the chemical structure of two substances were substantially similar."), rev'd on other grounds, 520 U.S. 1226, 117 S. Ct. 1816, 137 L. Ed. 2d 1025 (1997). This same comparison would also enable the City Council to reasonably disagree with the opinions of Petitioner's experts that the chemical structures were not substantially similar. Thus, based on "the evidence in the record, both favorable and contrary," the court determines that "a reasonable mind could reach the same conclusion as the [C]ity [Council]." Mike's Smoke, Cigar & Gifts v. St. George City, 2015 UT App 158, ¶ 14, 353 P.3d 626 (citation and internal quotation marks omitted).

Conclusion

Because Petitioner has not shown either that Utah Code section 58-37-2(g)(i) should be

read conjunctively, or that the City Council was not justified in concluding that XLR-11 is a controlled substance analog, the court declines to disturb the City Council's decision upholding the revocation of Petitioner's business license.

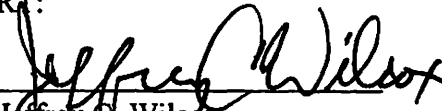
ORDER

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. the court affirms the City Council's decision upholding the revocation of Petitioner's business license.

Dated this 24th day of November, 2015.

BY THE COURT:



Jeffrey C. Wilcox
District Court Judge

Tab 3

ADDENDUM 3

Utah Code § 58-37-2(1)(g)(i)

(g)(i) "Controlled substance analog" means:

(A) a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a substance listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513;

(B) a substance which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513; or

(C) A substance which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513.

* * * *

Utah Code § 58-37-8(1)

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct that results in any violation of any provision of Title 58, Chapters 37, Utah Controlled Substances Act, 37a, Utah Drug Paraphernalia Act, 37b, Imitation Controlled Substances Act, 37c, Utah Controlled Substance Precursor Act, or 37d, Clandestine Drug Lab Act, that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, Utah Controlled Substances Act, 37a, Utah Drug Paraphernalia Act, 37b, Imitation Controlled Substances Act, 37c, Utah Controlled Substance Precursor Act, or 37d, Clandestine Drug Lab Act, on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

* * * *

28 U.S.C. § 802(32)(A)

(32)(A) Except as provided in subparagraph (C), the term “controlled substance analogue” means a substance--

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

* * * *

Utah Code § 58-37-2(1)(l)

(l) "Depressant or stimulant substance" means:

(i) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid;

(ii) a drug which contains any quantity of: (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (C) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system;

(iii) lysergic acid diethylamide; or

(iv) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

* * * *

21 U.S.C. § 802(9)

(9) The term "depressant or stimulant substance" means—

(A) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or

(B) a drug which contains any quantity of (i) amphetamine or any of its optical isomers; (ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (iii) any substance which the Attorney General, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

(C) lysergic acid diethylamide; or

(D) any drug which contains any quantity of a substance which the Attorney General, after investigation, has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

Tab 4

ADDENDUM 4

Statutory Comparison

Utah Code § 58-37-2(1)(l)	21 U.S.C. § 802(9)
<p>(l) "Depressant or stimulant substance" means:</p> <p>(i) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid;</p> <p>(ii) a drug which contains any quantity of: (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (C) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system;</p> <p>(iii) lysergic acid diethylamide; OR</p> <p>(iv) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.</p>	<p>(9) The term "depressant or stimulant substance" means—</p> <p>(A) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; OR</p> <p>(B) a drug which contains any quantity of (i) amphetamine or any of its optical isomers; (ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (iii) any substance which the Attorney General, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; OR</p> <p>(C) lysergic acid diethylamide; OR</p> <p>(D) any drug which contains any quantity of a substance which the Attorney General, after investigation, has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.</p>