

IN THE SUPREME COURT OF OHIO

ALVIN D. JACKSON, M.D.
DIRECTOR OF OHIO DEPARTMENT
DEPARTMENT OF HEALTH,

CASE NO. 11-0019

Appellee,

On Appeal from the
Franklin County Court of Appeals
Tenth Appellate District

vs.

Court of Appeals
Case No. 10-AP-000173

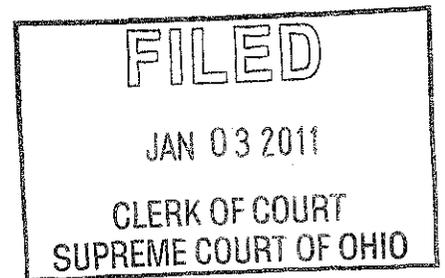
BARTEC, INC.
D/B/A ZENO'S VICTORIAN VILLAGE, et al.,

Trial Court Case No. 09 CV 12197

Appellants,

vs.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL,



Appellee.

MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICI CURIAE* OHIO
LICENSED BEVERAGE ASSOCIATION, AND BUCKEYE LIQUOR PERMIT
HOLDERS ASSOCIATION

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I. INTERESTS OF AMICI CURIAE

The Ohio Licensed Beverage Association (“OLBA”) is a membership service organization devoted to representing owners and suppliers. The association exists for the protection of its members through a unified effort for the promotion of the liquor industry in Ohio. The OLBA is a professional association specifically targeted to permit holders in Ohio. The OLBA is comprised of approximately 500 liquor permit holders.

Buckeye Liquor Permit Holders Association (“BLPHA”) is a non-profit association of liquor permit holders in the State of Ohio, the objective of which is to promote the interests and to protect the rights of small business in Ohio, specifically those that engage in this business of selling alcohol.

In the time period of May 2007 through December 31, 2009, bars, most of which are small businesses rather than large corporate chains, accounted for 60% of the smoking ban violations.¹ The fines imposed for violations of the smoking ban can be up to \$5,000 per violation.²

II. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case is of public or great general interest because (1) the smoking ban is being enforced in a manner inconsistent with the law as written, (2) the smoking ban, as applied to bars and private clubs, exceeds the State’s police power and unconstitutionally infringes upon property rights, and (3) the right of Ohioans to have their rights and obligations under a statute declared by a court has been sharply curtailed by the Court of Appeals for the Tenth Appellate District.

¹ Dr. Michael L. Marlow, *The Economic Losers from Smoking Bans*, Regulation, Summer 2010, 17-18.

² See O.A.C. 3701-52-09(A) and O.A.C. 3701-52-09(F).

This case is of public or great general interest because the law is being enforced in a manner inconsistent with the actual language of R.C. Chapter 3794. Although the ballot language approved by the voters included a generic exemption for private clubs and family owned and operated business, the law in fact provides only a limited exemption. In addition, ODH is enforcing the ban as if a proprietor violates R.C. 3794.02(A) whenever smoking is present, and ODH has yet to cite a single individual for a violation of R.C. 3794.02(D).

This inconsistency is having a significant effect upon many of the bars and private clubs subjected to R.C. Chapter 3794. Ohio is one of 27 states with a statewide smoking ban.³ An additional 10 states have a smoking ban, but exempt bars.⁴ Among these 37 states, 12 states exempt private clubs.⁵ 11 states have no statewide smoking ban.⁶ As such, bars are not subject to a smoking ban in 21 states, and private clubs are not subject to a smoking ban in 23 states.

This Court should ensure that property rights are not violated as ODH enforces the smoking ban. The manner in which the smoking ban is being enforced provides this Court with a case of first impression and an opportunity to define the extent of the State's police power and the property rights of Ohioans with respect to R.C. Chapter 3794.

R .C. 3794.01(B) declares that private property becomes public property where it is "an enclosed area to which the public is invited or in which the public is permitted and that is not a private residence." Moreover, the smoking ban implicates the use and enjoyment of private property because it prohibits a bar owner from using the air within his establishment as he sees

³ http://en.wikipedia.org/wiki/List_of_smoking_bans_in_the_United_States#Statewide_smoking_bans_exempting_bars, last checked December 29, 2010.

⁴ Id.

⁵ Id.

⁶ Id.

fit. As this Court stated in *Norwood v. Horney*,⁷ “[t]he rights related to property, i.e., to acquire, use, enjoy, and dispose of property, are among the most revered in our law and traditions.”⁸ This Court should review this case and ensure that the smoking ban is a constitutionally valid law because “the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were *per se* valid.”⁹

Furthermore, the Court of Appeals for the Tenth Appellate District significantly impaired the ability of an Ohioan to have his rights and obligations under a statute declared, where the Appellate Court held that declaratory relief should not have been granted in this case.¹⁰ By making prospective declaratory relief unavailable, the Appellate Court’s decision would deny access to prospective declaratory relief, with respect to a statute, to anyone who has previously been cited for violation of that same statute.¹¹ This is contrary to the principles described by this Court in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*:¹²

The people in this, their fundamental law, have entered into a solemn covenant with every individual citizen, that [their] inherent rights shall be protected, even against the encroachments of legislative authority. * * * [C]ould not the devoted victims of such legislative tyranny, claim, with a confidence inspired by the constitution, the interfering power of the judicial courts? Could they not entrench themselves within the ramparts raised by the constitution, and then in safety bid defiance to such attempts?¹³

⁷ *Norwood v. Horney* (2006), 110 Ohio St.3d 353, 853 N.E.2d 1115.

⁸ *Id.*, at 361-62, internal citations omitted, emphasis added.

⁹ *City of Cincinnati v. Correll* (1943), 141 Ohio St. 535, 546, 49 N.E.2d 412.

¹⁰ *Jackson v. Bartec, Inc.*, 2010 Ohio 5558, at page 19.

¹¹ *Id.*, at page 16.

¹² *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

¹³ *Id.*, at 463-64, quoting *Rutherford v. M’Faddon* (1807), Pollack, Ohio Unreported Judicial Decisions Prior To 1823 (1952) 71, 85, 86.

For these reasons, this Court should accept jurisdiction over this case. In doing so, this Court can decide the extent not only of the smoking ban, but also of the availability of declaratory relief to Ohioans.

III. STATEMENT OF THE CASE AND THE FACTS

Amici will defer to the Appellants' Statement of the Case and the Facts. However, several important facts should be noted in addition to those described in the Appellants' Statement of the Facts. R.C. Chapter 3794 was proposed by Initiative.¹⁴ The certified ballot language of Issue 5 stated, *inter alia*, that "[t]he proposed law would [p]rohibit smoking in public places and places of employment; [e]xempt from the smoking restrictions certain locations, including * * * private clubs, and family-owned and operated places of business * * *."¹⁵ However, the actual exemption for private clubs provides that a private club is exempt from R.C. Chapter 3794 only if:

the club has *no employees*; the club is organized as a not for profit entity; *only members of the club are present in the club's building*; no persons under the age of eighteen are present in the club's building; the club is located in a freestanding structure occupied solely by the club * * *.¹⁶

"Thus, pursuant to R.C. 3794.03(G), a private club is exempt from the smoking prohibitions of the Act 'provided all' of the above listed criteria are met."¹⁷ "The term 'employee' is broadly defined under R.C. 3794.01(D) to mean not only 'a person who is employed by an employer, or who contracts with an employer or third person to perform services for an employer,' but to also

¹⁴ <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2006ElectionsResults/06-1107Issue5/State%20Issue%205%20Certified%20Ballot%20Language.aspx>, last checked December 23, 2010.

¹⁵ *Id.*

¹⁶ R.C. 3794.03(G), emphasis added.

¹⁷ *Northside Amateur Boxing School Bingo Club v. Hamilton Cty. General Health Dist.* (2009), 184 Ohio App.3d 596, 601, 921 N.E.2d 1091.

include one ‘who otherwise performs services for an employer for compensation *or for no compensation.*’¹⁸

Similarly, the actual exemption for family-owned and operated businesses provides that the family-owned and operated business is exempt from R.C. Chapter 3794 only where:

all employees are related to the owner, but *only if the enclosed areas of the place of employment are not open to the public*, are in a free standing structure occupied solely by the place of employment, and smoke from the place of employment does not migrate into an enclosed area where smoking is prohibited under the provisions of this chapter.¹⁹

After approximately three years of enforcement of R.C. Chapter 3794, Ohioans do not want places that serve alcohol subjected to the smoking ban. In a June 2010 poll conducted by the Institute for Policy Research, University of Cincinnati, and the Health Foundation of Greater Cincinnati, 51.4% of Ohio residents responded that the law should be changed to allow smoking in bars.²⁰ Among Ohio residents registered to vote, 53.8% responded that the law should be changed to allow smoking in bars.²¹

As Dr. Marlow noted in *The Economic Losers from Smoking Bans*, “[c]ases of continued noncompliance apparently indicate where smokers congregate and continue to smoke in the presence of the ban.”²² Bars and private clubs receive most of the violations; however, “[b]ars and most of the organizations cited for continued noncompliance do not cater to children, * * * [m]embers of social clubs and patrons of bars also voluntarily choose these locations and it would appear that nonsmokers have plentiful opportunities for avoiding smoking * * *.”²³

¹⁸ Id., at 604, emphasis in original.

¹⁹ R.C. 3794.03(C), emphasis added.

²⁰ <http://www.enquirer.com/editions/2010/08/03/SmokingOnly.pdf>, at the seventh page, last checked December 29, 2010.

²¹ Id.

²² Id., at 18.

²³ Id.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The Health Department’s method of enforcing the smoking ban violates separation of powers.

The Court of Appeals for the Tenth Appellate District erred where it concluded that “[t]he testimony at the trial court indicated ODH investigates claimed violations on a case-by-case basis.”²⁴ The Ohio Department of Health and its designees’ (hereinafter collectively “ODH”) method of enforcing the smoking ban violates separation of power where it adds to, and subtracts from, R.C. Chapter 3794. Section 1, Article II of the Ohio Constitution vests all legislative power in Ohio in the General Assembly.²⁵ Legislative power is the power to make laws.²⁶ It necessarily involves discretion as to what the law will be.²⁷ The power to make law may be neither delegated to nor exercised by an agency.²⁸

Additionally, “it is axiomatic that administrative agency rules, just as statutes, must have a reasonable relation to a proper legislative purpose and be neither arbitrary nor discriminatory in their effect.”²⁹ “It is well established * * * that administrative rules, in general, may not add to or *subtract from* * * * the legislative enactment.”³⁰ When agencies pursue policies that are beyond or different from what is articulated in legislation, “they go beyond their administrative powers and exercise a legislative function which, under our Constitution, belongs exclusively to

²⁴ *Jackson v. Bartec, Inc.*, 2010 Ohio 5558, at page 17.

²⁵ *City of Cleveland v. Piskura* (1945), 145 Ohio St. 144, 157.

²⁶ *Cincinnati, Wilmington and Zanesville, Rail Road Company v. Commissioners of Clinton County* (1852), 1 Ohio St. 77, 91.

²⁷ *Id.*, at 88.

²⁸ *Id.*, at 88-89, see also *State ex rel. Selected Properties, Inc. v. Gottfried* (1955), 163 Ohio St. 469, 471.

²⁹ *Ohio Academy of Nursing Homes v. Barry* (1990), 56 Ohio St.3d 120, 127, 564 N.E.2d 686, citing *State ex rel. Allstate Ins. Co. v. Bowen* (1936), 130 Ohio St. 347, 199 N.E. 355, paragraph four of the syllabus.

³⁰ *Central Ohio Joint Vocational School Dist. Bd. of Ed. v. Admn. Ohio Bureau of Employment Serv.* (1986) 21 Ohio St.3d 5, 10, 487 N.E.2d 288, emphasis in original.

the General Assembly.”³¹ As Ohio courts have noted, “[a] rule which is unreasonable, arbitrary, discriminatory, or in conflict with law is invalid and unconstitutional because it surpasses administrative power and constitutes a legislative function.”³² Consequently, an agency’s pursuit of a policy that is inconsistent with the plain language of a statute is tantamount to unlawful policymaking.

Here, ODH runs afoul of these principles in attempting to enforce the law and *Amici* and their members because it has eased the burden of enforcement on itself by citing a proprietor whenever there is smoking on the premises.³³ ODH enforces R.C. 3794.02(A) as a strict liability offense whenever there is smoking on the premises. This is the same type of enforcement the Court of Appeals for the Tenth Appellate District of Ohio rejected in *Pour House v. Ohio Dept. of Health*.³⁴ Furthermore, this type of enforcement adds to R.C. 3794.02(A) by creating new situations in which it may issue a violation.

By enforcing the smoking ban in this manner, ODH completely ignores R.C. 3794.02(D). As the Trial Court noted, “the Department of Health has never once cited an individual for violation of R.C. 3794.02(D).”³⁵ As such, ODH has subtracted from R.C. 3794.02.

The Trial Court correctly concluded that “[b]y not inquiring as to whether Defendants actually permitted smoking at Zeno’s, the Department of Health added to the number of situations when it was authorized to issue citations. The Department further subtracted from

³¹ *City of Cincinnati v. Cook* (1923), 107 Ohio St. 223, 140 N.E. 655.

³² *Midwestern College of Massotherapy v. Ohio Medical Bd.* (1995), 102 Ohio App.3d 17, 23, 656 N.E.2d 963, citing *Weber v. Bd. of Health* (1947), 148 Ohio St. 389, 396, 74 N.E.2d 331.

³³ See Trial Court Decision and Entry, at p. 8.

³⁴ *Pour House v. Ohio Dept. of Health* (2009), 185 Ohio App.3d 680, 685, 925 N.E.2d 621 (“R.C. 3794.02(A) is a strict liability statute, but there is no liability unless there has been conduct that violates the statute. * * * Without evidence that the proprietor permitted smoking, there is no basis for finding the proprietor violated the statute. Unless there is violative conduct, the strict liability nature of the statute is irrelevant.”)

³⁵ *Id.*, at pp. 8-9.

Defendants' rights under R.C. 3794.02.”³⁶ By adding to, and subtracting from, R.C. 3794.02, ODH has and continues to violate the separation of powers. As such, the fines imposed under this unlawful framework should be invalidated. More importantly, ODH's violation of the separation of powers must be stopped. Rather than simply cite a proprietor whenever smoking is present, ODH must actually conduct investigations to determine whether a proprietor has in fact “permit[ted] smoking in the public place or place of employment,”³⁷ or instead whether a smoker has “refuse[d] to immediately discontinue smoking * * * when requested to do so by the proprietor or any employee of an employer * * *.”³⁸

Proposition of Law No. 2: Application of the smoking ban unreasonably extinguishes the property rights of Zeno's and other Ohio bar owners.

The application of the smoking ban to bars exceeds the State's police powers, and unreasonably extinguishes the property rights of Bartec, Inc. (“Zeno's”), and other bar owners. As this Court stated in *Norwood v. Horney*, “[t]he rights related to property, i.e., to acquire, *use*, *enjoy*, and dispose of property, are among the most revered in our law and traditions.”³⁹ “The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself * * *.”⁴⁰

While the right to property is fundamental, it is still subject to the State's police power. However, the police power is not plenary: it may only be exercised to interfere with fundamental rights when *necessary* to protect the *public*.⁴¹ This Court has held that courts must consider the burdens that statutes and their applications impose upon the parties' rights, and whether they are

³⁶ Id.

³⁷ R.C. 3794.02(A).

³⁸ R.C. 3794.02(D).

³⁹ *Norwood, supra*, at 361-62, internal citations omitted, emphasis added.

⁴⁰ Id., at 362.

⁴¹ *Palmer v. Tingle* (1896), 55 Ohio St. 423, 45 N.E. 313.

justified in light of the benefits: “[t]o be truly in the public welfare within the meaning of Section 19, and thus superior to private property rights, any legislation must be *reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property.*”⁴² Put another way, this Court stated:

It must be remembered that neither the state in the passage of general laws, nor the municipality in the passage of local laws, may make any regulations which are unreasonable. The means adopted must be suitable to the ends in view, they must be impartial in operation, and *not unduly oppressive upon individuals*, must have a real and substantial relation to their purpose, and *must not interfere with private rights beyond the necessities of the situation.*⁴³

In determining whether an interference with property rights is unduly burdensome or beyond the necessities of the situation, this Court has stated that Ohio courts should be “extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power.”⁴⁴

In determining the necessity of a law, “the final decision upon these questions of reasonableness and degree of interference -- and the final setting of the balance between public welfare and private right -- must in any system of constitutional government be the function of the judicial arm of government.”⁴⁵ This Court’s precedent is replete with examples of appropriate invalidations of the State’s use of the police power.⁴⁶

⁴² *Direct Plumbing Supply Co. v. City of Dayton* (1941), 138 Ohio St. 540, 546, 38 N.E.2d 70, emphasis added.

⁴³ *Id.*, quoting *Froelich v. City of Cleveland* (1919), 99 Ohio St. 376, 391, 124 N.E. 212, emphasis added.

⁴⁴ *City of Cincinnati v. Correll*, *supra*, at 539.

⁴⁵ *Direct Plumbing Supply Co.*, *supra*, at 546, citing *State v. Boone* (1911), 84 Ohio St. 346, 95 N.E. 924.

⁴⁶ See *City of Cincinnati v. Correll*, *supra*, (striking down a restriction on barber shop hours); *Olds v. Klotz* (1936), 131 Ohio St. 447, 3 N.E.2d 371, (striking down a law limiting the hours of retail food sales); *Direct Plumbing Supply Co.*, *supra*, (striking down a regulation requiring the labeling, registration, and licensing of plumbing equipment and inventory).

Bars suffer very real burdens under the smoking ban. Bars and private organizations are subject to a fine of up to \$5,000 for a violation of the smoking ban.⁴⁷ The evidence before the Trial Court showed that taverns are affected by a smoking ban differently than other businesses,⁴⁸ and that liquor establishments are more affected than non-liquor establishment.⁴⁹ In addition to distinctions between bars and non-bars, establishments are affected by smoking bans more adversely in cold weather states, such as Ohio, than in warm weather states.⁵⁰

At trial, Dr. Marlow testified that Zeno's, with a smoking prevalence of 75% among its patrons, is 271% above the Ohio average prevalence. As such, Zeno's experiences a large adverse effect as “a bar that caters to a lot of smokers.”⁵¹ The adverse effect is so large that it is “rather draconian.”⁵² Looking at smoking bans in general, Dr. Marlow testified that “in many cases, restaurants don't have any effects; but bars in every state did.”⁵³ Dr. Marlow concluded that “[b]ars such as Zeno's with very high percentages of smokers (75%) are most likely to be 'victimized' by patrons who may light up irrespective of the ban thus leading to more fines.”⁵⁴

By comparison, the benefit conferred upon the public is slight, if any is conferred at all. “[T]here appears to be no scientific basis for claims that brief, acute, transient exposure to secondhand smoke increases heart attack risk in individuals without coronary disease, * * * or that it represents any other significant acute cardiovascular health hazard in nonsmokers.”⁵⁵ Dr.

⁴⁷ See O.A.C. 3701-52-09(A)(5) and O.A.C. 3701-52-09(F).

⁴⁸ Transcript of November 23, 2009 Bench Trial, at 125.

⁴⁹ Id., at 143.

⁵⁰ Id., at 145.

⁵¹ Id., at 140.

⁵² Id.

⁵³ Id., at 148.

⁵⁴ Trial Court Defendants' Exhibit F.

⁵⁵ Dr. Michael L. Marlow, Ph.D., *Epidemiological and Economic Research, at the Question of Smoking Bans*, Journal of American Physicians and Surgeons, Volume 14, No. 2, p. 58, quoting Michael Siegel, *Is the Tobacco Control Movement Misrepresenting the Acute*

Marlow testified that the “epidemiological evidence on the impact of smoking bans on public health *** shows little to none.”⁵⁶ Dr. Marlow stated that jurisdictions around the country that have imposed smoking bans were as likely to see an increase in hospital admissions for tobacco-related illnesses as they were to see a decrease.⁵⁷

The evidence before the Court shows that smoking bans do not cause less smoking.⁵⁸ However, smoking bans do cause smokers to smoke more intensely.⁵⁹ Dr. Marlow testified that if a smoker “expect[s] not to be able to smoke over a two- or three-hour interval, they will smoke two or three cigarettes quickly in succession, and that causes more damage to internal organs.”⁶⁰

With such a significant burden being placed upon bars and private clubs, balanced against the minimal public benefit, this Court should hold that the smoking ban as applied to Zeno’s, other bars, and private clubs, is an invalid application of the State’s police power.

Proposition of Law No. 3: Past citations under the same statute do not prohibit Ohioans from seeking and obtaining prospective declaratory and injunctive relief.

By concluding that “Bartec is not entitled to either declaratory or injunctive relief against ODH or against the Attorney General,”⁶¹ the Decision of the Court of Appeals for the Tenth Appellate District of Ohio would strip Ohioans of the ability to have his or her rights under a statute declared where past citations have been issued under the same statute. The Trial Court concluded that “[s]ufficient evidence has been presented to the Court to show that the Department of Health implemented a policy of strict liability *against property owners* for

Cardiovascular Health Effects of Secondhand Smoke Exposure?, *Epidemiol Perspect Innov* 2007, 4:1-13.

⁵⁶ Tr. 163.

⁵⁷ Id., at 162.

⁵⁸ Id., at 131.

⁵⁹ Id., at 122.

⁶⁰ Id., at 122.

⁶¹ *Jackson v. Bartec, Inc.*, 2010 Ohio 5558, at page 19.

violations of the SmokeFree Act. If someone was smoking on the premises, *the property owner* was cited.”⁶²

The Appellate Court acknowledged that the Trial Court “effectively granted Bartec’s request for a declaratory judgment that ODH unconstitutionally enforced the Smoke Free Act as applied to Bartec in the context of its prior ten violations.”⁶³ However, the Appellate Court then concluded that the Trial Court should not have vacated the existing fines, and that “[w]ith that determination, we need not consider whether ODH actually adopted a policy of strict liability in enforcing the Smoke Free Act because the issue was not properly before the trial court.”⁶⁴

This conclusion is at odds with R.C. 2721.03. R.C. 2721.03 provides, *inter alia*, that “any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, [or] rule as defined in section 119.01 of the Revised Code * * * may have determined any question of construction or validity arising under the * * * constitutional provision, statute, [or] rule, * * * and obtain a declaration of rights, status, or other legal relations under it.”

The Appellate Court’s conclusion is also inconsistent with this Court’s precedent. This Court has held that:

[I]t is settled in Ohio that an action for a declaratory judgment may be alternative to other remedies in those cases in which the court, in the exercise of sound discretion, finds that the action is within the spirit of the Uniform Declaratory Judgments Act, that a real controversy between adverse parties exists which is justiciable in character, and that speedy relief is necessary to the preservation of rights which may be otherwise impaired or lost.⁶⁵

⁶² Trial Court Decision and Entry, at p. 11, emphasis added.

⁶³ Id.

⁶⁴ Id., at p. 11, emphasis added.

⁶⁵ *Herrick v. Kosydar* (1975), 44 Ohio St.2d 128, 130, 339 N.E.2d 626, quoting *American Life & Accident Ins. Co. v. Jones* (1949), 152 Ohio St. 287, 295, 89 N.E.2d 301.

Further, this Court has “long held that failure to exhaust administrative remedies is not a necessary prerequisite to an action challenging the constitutionality of a statute, ordinance, or administrative rule.”⁶⁶ This Court then stated that “[t]he policy interest underlying the rule distinguishing between cases presenting constitutional issues and others is simply the conservation of public resources. Because administrative bodies have no authority to interpret the Constitution, requiring litigants to assert constitutional arguments administratively would be a waste of time and effort for all involved.”⁶⁷

Even if Zeno’s could not challenge the constitutionality of its prior violations, Zeno’s still had the right to challenge the prospective enforcement of the smoking ban through its declaratory judgment claim. As this Court has stated, “[c]onsistent with what has been termed the *Sunburst* Doctrine, state courts have * * * recognized and used prospective application of a decision as a means of avoiding injustice in cases dealing with questions having widespread ramifications for persons not parties to the action.”⁶⁸ The Court of Appeals for the Tenth Appellate District erred when it reversed the declaratory judgment granted by the Trial Court, because the Trial Court made a conclusion about the ODH’s enforcement of the smoking ban against property owners generally. As such, even if Zeno’s could not challenge its prior violations, the *Sunburst* Doctrine should have been applied to make the decision prospective as a means of avoiding injustice to other bars and members of BLPHA and OLBA, including Zeno’s.

⁶⁶ *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, 460, 674 N.E.2d 1388, citing *Driscoll v. Austintown Assoc.* (1975), 42 Ohio St.2d 263, 328 N.E.2d 395, paragraph two of the syllabus; *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 17, 526 N.E.2d 1350; *Fairview Gen. Hosp. v. Fletcher* (1992), 63 Ohio St.3d 146, 149, 586 N.E.2d 80.

⁶⁷ *Id.* at 460-61, citing *Karches v. Cincinnati*, *supra* at 17, *Driscoll v. Austintown Assoc.*, *supra* at 275.

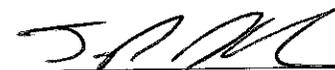
⁶⁸ *DiCenzo v. A-Best Products Co.* (2008), 120 Ohio St.3d 149, 152, 897 N.E.2d 132, ellipsis in original, quoting *Minister Farmers Coop. Exchange Co., Inc. v. Meyer* (2008), 117 Ohio St.3d 459, 884 N.E.2d 1056.

The Court of Appeals for the Tenth Appellate District erred in reversing the declaratory judgment of the Trial Court. The Appellate Court's Decision should be reversed because it is inconsistent with R.C. 2721.03 and this Court's precedent, and the Trial Court's declaratory judgment should be reinstated.

V. CONCLUSION

This case is of public or great general interest because (1) the smoking ban is being enforced in a manner inconsistent with the ban as approved by the voters and with the law as written, (2) the smoking ban, as applied to bars and private clubs, exceeds the State's police power and unconstitutionally infringes upon property rights, and (3) the right of Ohioans to have their rights and obligations under a statute declared by a court has been sharply curtailed by the Court of Appeals for the Tenth Appellate District. The Decision of the Court of Appeals for the Tenth Appellate District should be reversed because (1) ODH's method of enforcing the smoking ban violates the separate of powers, (2) the application of the smoking ban unreasonably extinguishes the property rights of Zeno's, and other Ohio bar owners, and (3) past citations under the same statute do not prohibit Ohioans from seeking and obtaining prospective declaratory and injunctive relief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon the parties specified below by ordinary U.S. mail this 31st day of DECEMBER, 2010.



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