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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.<sup>1</sup> The fines imposed for violations of the smoking ban can be up to \$5,000 per violation.<sup>2</sup>

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<sup>1</sup> Marlow, Michael L., *The Economic Losers from Smoking Bans*, *Regulation*, Summer 2010, 17-18.

<sup>2</sup> See O.A.C. 3701-52-09(A) and O.A.C. 3701-52-09(F).

Summer 2010; and “Is the CDC Blowing Smoke?” in Regulations, June 2009. His publications also include “Do Smoking Bans Reduce Heart Attacks?” in the Journal of American Physicians and Surgeons, Spring 2010 and “Epidemiological and Economic Research, and the Question of Smoking Bans” in the Journal of American Physicians and Surgeons, Summer 2009.

## II. 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.<sup>3</sup> 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 \* \* \*.”<sup>4</sup> 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 \* \* \*.<sup>5</sup>

“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.”<sup>6</sup> “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

<sup>3</sup> <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2006ElectionsResults/06-1107Issue5/State%20Issue%205%20Certified%20Ballot%20Language.aspx>, last checked December 23, 2010.

<sup>4</sup> *Id.*

<sup>5</sup> R.C. 3794.03(G), emphasis added.

<sup>6</sup> *Northside Amateur Boxing School Bingo Club v. Hamilton Cty. General Health Dist.* (2009), 184 Ohio App.3d 596, 601, 921 N.E.2d 1091.

who contracts with an employer or third person to perform services for an employer,' but to also include one 'who otherwise performs services for an employer for compensation *or for no compensation.*'"<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup> Among Ohio residents registered to vote, 53.8% responded that the law should be changed to allow smoking in bars.<sup>10</sup>

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."<sup>11</sup> 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, \* \* \*

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<sup>7</sup> *Id.*, at 604, emphasis in original.

<sup>8</sup> R.C. 3794.03(C), emphasis added.

<sup>9</sup> <http://www.enquirer.com/editions/2010/08/03/SmokingOnly.pdf>, at the seventh page, last checked December 29, 2010.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, at 18.



[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 \* \* \*.”<sup>12</sup>

### III. ARGUMENT

#### A. 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.”<sup>13</sup> 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.<sup>14</sup> Legislative power is the power to make laws.<sup>15</sup> It necessarily involves discretion as to what the law will be.<sup>16</sup> The power to make law may be neither delegated to nor exercised by an agency.<sup>17</sup>

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.”<sup>18</sup> “It is well established \* \* \* that administrative rules, in general, may not add to

<sup>12</sup>

*Id.*

<sup>13</sup>

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

<sup>14</sup>

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

<sup>15</sup>

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

<sup>16</sup>

*Id.*, at 88.

<sup>17</sup>

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

<sup>18</sup>

*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.

or *subtract from* \* \* \* the legislative enactment.”<sup>19</sup> 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 the General Assembly.”<sup>20</sup> 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.”<sup>21</sup> 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 because it has eased the burden of enforcement on itself by citing a proprietor whenever there is smoking on the premises.<sup>22</sup> 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*.<sup>23</sup> Furthermore, this type of enforcement adds to R.C. 3794.02(A) by creating new situations in which it may issue a violation.

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<sup>19</sup> *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.

<sup>20</sup> *City of Cincinnati v. Cook* (1923), 107 Ohio St. 223, 140 N.E. 655.

<sup>21</sup> *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.

<sup>22</sup> See Trial Court Decision and Entry, at p. 8.

<sup>23</sup> *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.”)

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).”<sup>24</sup> 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 Defendants’ rights under R.C. 3794.02.”<sup>25</sup> 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,”<sup>26</sup> 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 \* \* \*.”<sup>27</sup>

**B. 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.”<sup>28</sup> “The

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<sup>24</sup> *Id.*, at pp. 8-9.

<sup>25</sup> *Id.*

<sup>26</sup> R.C. 3794.02(A).

<sup>27</sup> R.C. 3794.02(D).

<sup>28</sup> *Norwood v. Horney* (2006), 110 Ohio St.3d 353, 853 N.E.2d 1115, 361-62, internal citations omitted, emphasis added.

right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself \* \* \*.”<sup>29</sup>

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*.<sup>30</sup> This Court has held that courts must consider the burdens that statutes and their applications impose upon the parties’ rights, and whether they are 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*.”<sup>31</sup> 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*.<sup>32</sup>

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.”<sup>33</sup>

When 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

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<sup>29</sup> *Id.*, at 362.

<sup>30</sup> *Palmer v. Tingle* (1896), 55 Ohio St. 423, 45 N.E. 313.

<sup>31</sup> *Direct Plumbing Supply Co. v. City of Dayton* (1941), 138 Ohio St. 540, 546, 38 N.E.2d 70, emphasis added.

<sup>32</sup> *Id.*, quoting *Froelich v. City of Cleveland* (1919), 99 Ohio St. 376, 391, 124 N.E. 212, emphasis added.

<sup>33</sup> *City of Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 49 N.E.2d 412

welfare and private right -- must in any system of constitutional government be the function of the judicial arm of government.”<sup>34</sup> This Court’s precedent is replete with examples of appropriate invalidations of the State’s use of the police power.<sup>35</sup>

**i. Smoking bans, as applied to bars, are not necessary to protect the public.**

Smoking bans, as applied to bars, are not necessary to protect the public because economic forces lead some establishments to cater to smokers, while others cater to non-smokers. Smoking is commonly viewed as a case where private markets “fail” to efficiently allocate resources because resources are allocated without consideration of full costs associated with smoking. This viewpoint singles out smokers as the source of the externality thus leading to the conventional solution that smoking should be banned in all public places.

However, Coase’s (1960) notion of “reciprocal nature of externalities” discusses how both parties – smokers and non-smokers in this case – have incentives to settle disputes efficiently as long as markets direct resources toward highest-valued bidders and transactions costs are not prohibitive.<sup>36</sup> Transactions costs are not so prohibitive in the hospitality industry because owners have incentives to allocate airspaces efficiently. Owners allocate airspaces to highest-valued users leading them to either forbid smoking or to accommodate smoking

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<sup>34</sup> *Direct Plumbing Supply Co., supra*, at 546, citing *State v. Boone* (1911), 84 Ohio St. 346, 95 N.E. 924.

<sup>35</sup> 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).

<sup>36</sup> Coase, Ronald H., “The Problem of Social Cost,” *Journal of Law and Economics* 3:1-44, October 1960. See also Boyes, William J. and Michael L. Marlow, “The Public Demand for Smoking Bans” *Public Choice* 88:57-67, July 1996; Dunham, John and Michael L. Marlow, “Smoking Laws and the Allocation of Restaurant and Bar Seating,” *Economic Inquiry* January 2000A: 38: 151-157; Marlow, Michael L., ““Honestly, Who Else Would Fund Such Research? Reflections of a Non-Smoking Scholar,” *Econ Journal Watch*, 5 (2), pp. 240-268, 2008 for fuller developments of this model for the case of smoking in hospitality venues.

preferences by offering smoking/nonsmoking sections or improving filtration. A range of solutions therefore emerges as owners attempt to resolve conflicts over smoking.

Boyes and Marlow (1996) uncovered an active market in accommodation prior to the 1990 smoking ban in San Luis Obispo, California.<sup>37</sup> They found that 62% of nonsmokers believed smoking/nonsmoking sections effectively dealt with smoking prior to the ban. 61% of owners had reduced smoke prior to the ban and only 32% of owners had received many complaints about smoking prior to the ban.<sup>38</sup> Dunham and Marlow (2000A) analyzed 1,300 restaurant and bar owners across the USA and found that owners allocated non-smoking seating according to how many smoking customers they served.<sup>39</sup> While restaurants averaged 54% non-smoking seating, bars averaged only 5%, thus suggesting bans exert more harm on bars than restaurants.<sup>40</sup> Dunham and Marlow (2004) examined 978 owners of restaurants and bars in Wisconsin and found that accommodation decisions were statistically related to number of smokers, customer occupations, presence of children, whether college town, type of restaurant, whether business has general liquor license, business age, numbers of seats and membership in corporate chain.<sup>41</sup>

A study of 110 Belgian smokers is consistent with expectations that locations that focus on alcohol and social gathering are much more strongly associated with smoking than other

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<sup>37</sup> Boyes, William J. and Michael L. Marlow, "The Public Demand for Smoking Bans" Public Choice 88:57-67, July 1996.

<sup>38</sup> *Id.*

<sup>39</sup> Dunham, John and Michael L. Marlow, "Smoking Laws and the Allocation of Restaurant and Bar Seating," Economic Inquiry January 2000A: 38: 151-157.

<sup>40</sup> *Id.*

<sup>41</sup> Dunham, John and Michael L. Marlow, "The Private Market for Accommodation," Eastern Economic Journal 30:377-91, Summer 2004.

locations.<sup>42</sup> Over one-half of all 6,397 cigarettes (14.5 per day average) over the course of four days smoked were in five locations – from high to low, living rooms, kitchens, outside, cars and in bars. Again, from high to low, most frequent circumstances were “after food,” “while watching TV or listening to the radio,” “during a break,” “on the go,” “together with alcohol,” “in the company of other people,” “while having a coffee,” and “at work.” This study is consistent with expectations that social settings in which alcohol is present are more associated with smoking than restaurants where smokers apparently are more content to smoke upon leaving the premise than during meals.<sup>43</sup> Moreover, studies also suggest that alcohol consumption influences both the magnitude and the emotional valence of cigarette cravings thus again forging the connection between bars and smoking.<sup>44</sup>

For these reasons, the smoking ban forces a non-smoking environment on bars that neither the bars nor the patrons desire or need. As such, the smoking ban is not necessary to protect the public in bars that cater to adults and hire adult employees, all of whom are present in the bar voluntarily.

**ii. Smoking bans, as applied to bars, do not confer upon the public a benefit commensurate with its burdens upon the bars.**

Smoking bans, as applied to bars, do not confer upon the public a benefit commensurate with the burdens placed upon the bars because the empirical data and the non-compliance data

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<sup>42</sup> Van Gucht, Dinska; Omer Van den Bergh, Tom Beckers, and Debora Vansteenwegen, “Smoking Behavior in Context: Where and When Do People Smoke?,” Journal of Behavior Therapy and Experimental Psychiatry Vol. 41, Issue 2, pages 172-177, June 2010.

<sup>43</sup> *Id.*

<sup>44</sup> Burton, Susan M., & Tiffany, Stephen T. (1997). The effect of alcohol consumption on craving to smoke. Addiction, 92, 15–26. See also Sayette, Michael A.; Christopher S. Martin, Joan M. Wertz, Michael A. Perrott, and Annie R. Peters, “The Effects of Alcohol on Cigarette Craving in Heavy Smokers and Tobacco Chippers,” Psychology of Addictive Behaviors Vol. 19, No. 3, 263–270, 2005.

show that smoking bans place a significant burden on bars, and smoking bans provide little, if any, benefit to the public.

**a. Empirical Evidence on Economic Harm**

Bar owner and restaurant owner expectations of the impact of a smoking ban on their respective businesses were distinct, with bar owners anticipating more harm than restaurant owners. Dunham and Marlow (2000A, 2000B) examined predictions of restaurant and bar owners across the USA about how they would be affected by a ban.<sup>45</sup> Bar owners predicted losses roughly twice as often as restaurant owners. For bars, 82% predicted harm, 2% predicted gains and 14% predicted no change. For restaurants, 51% predicted no changes, 39% predicted losses and 10% predicted gains.<sup>46</sup>

Dunham and Marlow's (2004) examination of Wisconsin bar and restaurant owners concluded that bar owners predicted losses roughly 50% more often as restaurant owners.<sup>47</sup> For restaurants, 54% predicted losses, 3% predicted gains and 37% predicted no change. For bar owners, 81% predicted losses, 1% predicted gains, and 13% predicted no change.<sup>48</sup> Adda, Berlinski and Machin (2007) collected data on 2,724 pubs and found that the Scottish ban led to a 10% decrease in sales and a 14% decrease in customers.<sup>49</sup> Tomlin (2009) found bans adversely

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<sup>45</sup> Dunham, John and Michael L. Marlow, "Smoking Laws and the Allocation of Restaurant and Bar Seating," Economic Inquiry January 2000A: 38: 151-157. Dunham, John and Michael L. Marlow, "The Differential Effects of Smoking Laws on Restaurants, Bars and Taverns," Contemporary Economic Policy, 18: 326-333, July 2000B.

<sup>46</sup> *Id.*

<sup>47</sup> Dunham, John and Michael L. Marlow, "The Private Market for Accommodation," Eastern Economic Journal 30:377-91, Summer 2004.

<sup>48</sup> *Id.*

<sup>49</sup> Adda B, Berlinski S, Machin S. Short-run economic effects of the scottish smoking ban. Int J Epidemiol 2007; 36: 149-154.



impacting Indian hospitality owners through adverse effects on stock prices following announcements of bans.<sup>50</sup>

These predictions by bar owners and restaurant owners correlate with the actual impact smoking bans have on the respective establishments. Adams and Cotti (2007) examined effects on bar and restaurant employment across the USA using a sample that ranged from 1,528 counties for bars to 2,837 counties for restaurants.<sup>51</sup> Bar employment fell 4% following bans, and there was an insignificant effect for restaurants. They found degree of harm in bars to be positively and significantly associated with smoking prevalence: jobs fell by 12% in high-prevalence locations, but effects were mostly mitigated in low-prevalence locations.<sup>52</sup>

Studies of gaming revenue in Delaware also conclude harm from bans. Although Mandel et al. (2005a) found an insignificant effect on aggregate Delaware gaming revenue, in an erratum to this study,<sup>53</sup> Mandel et al. (2005b) corrected for a data error and heteroskedasticity that, once corrected, showed the ban exerting a negative but insignificant impact on revenues.<sup>54</sup> Pakko's (2006) re-examination of Mandel et al. (2005a, 2005b) determined that the ban significantly lowered revenues.<sup>55</sup> Pakko (2008) also found evidence of differential harm across three

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<sup>50</sup> Tomlin, Jonathon T., "The Impact of Smoking Bans on the Hospitality Industry: New Evidence from Stock Market Returns," The B.E. Journal of Economic Analysis & Policy: Vol. 9: Iss.1 (Contributions), Article 13, 2009.

<sup>51</sup> Adams, Scott and Chad D. Cotti, "The Effect of Smoking Bans on Bars and Restaurants: An Analysis of Changes in Employment," The B.E. Journal of Economic Analysis and Policy, vol. 7, issue 1, 2007.

<sup>52</sup> *Id.*

<sup>53</sup> Mandel, L. L., B. C. Alamar, and S. A. Glantz. "Smoke-Free Law Did Not Affect Revenue from Gaming in Delaware." Tobacco Control, 14, 2005A, 10-2.

<sup>54</sup> Mandel, L. L., B. C. Alamar, and S. A. Glantz, "Erratum to Mandel, L. L., Alamar, B. C., and Glantz, S. A. 'Smoke-free Law Did Not Affect Revenue from Gaming in Delaware' Tobacco Control 14 (2005), 10-12." Tobacco Control On-Line (Electronic Letter), May 23, 2005B.

<sup>55</sup> Pakko, Michael R. "Smoke Free Law Did Affect Revenue from Gaming in Delaware." Tobacco Control, 15:68-72, 2006.

locations in Delaware, with magnitudes corresponding to availability of alternative gaming venues.<sup>56</sup> Thalheimer and Ali (2008) found a 16% reduction in gaming revenues in Delaware.<sup>57</sup> Finally, Lal and Siahpush (2008) found a 14% drop in gaming revenues due to the smoking ban in Victoria, Australia.<sup>58</sup>

#### **b. Non-Compliance as Indication of Harm**

Violations are concrete evidence of harm since there is no reason to suspect that compliance would be an issue if bans only provide benefits with no costs. Keen (2008) discussed that, although a smoking ban in Illinois was in effect since January 1, 2008, the owner of the Crow Bar in Chicago allowed smoking unless there were customers complaining.<sup>59</sup> However, smoking was usually allowed with the owner keeping a "smoke jug" in view for \$5 donations to offset fines. The bar owner noted that his bar's proximity to Indiana, which allowed smoking in bars, made it clear to him that customers would patronize bars in Indiana if he forced them to smoke outside.<sup>60</sup>

Nick Hogan, a former pub landlord, became the first person to be jailed in connection with the UK smoking ban after refusing to pay a fine, including costs of £7,236 (roughly \$11,000) after finding him guilty of four charges.<sup>61</sup> The Hogan incident is consistent with studies showing that bans harm owners catering to many smokers. Moreover, pub owners began

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<sup>56</sup> Pakko, Michael R. "No smoking at the slot machines: the effect of a smoke-free law on Delaware gaming revenues." Applied Economics 40.13-15 (2008): 1769-1774, July 2008.

<sup>57</sup> Thalheimer, Richard and Mukhtar M. Ali, "The Demand for Casino Gaming With Special Reference to a Smoking Ban," Economic Inquiry Vol. 46, No. 2, 273-282, April 2008.

<sup>58</sup> Lal, A and M. Siahpush, "The effect of smoke-free policies on electronic gaming machine expenditure in Victoria, Australia," J Epidemiol Community Health 2008; 62:11-5.

<sup>59</sup> Judy Keen, "Bars say it's 'good business' to ignore smoking bans," USA TODAY, 12/7/2009.

<sup>60</sup> *Id.*

<sup>61</sup> Hull, Liz, "Pub landlord is first person in Britain to be jailed over smoking ban," Mail Online, 27th February 2010.

shifting away from alcohol and towards food reflects efforts to efficiently minimize harm. Such redirection would have been followed prior to the ban if it was truly profit-enhancing.

In sum, evidence of frequent and continued noncompliance suggests past studies have under-estimated harm since it is predictable that non-complying owners are those with the most to lose from fuller compliance. Non-complying businesses have the most to lose from bans, and fuller enforcement would predictably exert higher costs and possible closures. Owners who do not find it profitable to comply with bans will predictably be those with the most to lose from fuller compliance and, other than those who close their businesses, are those most damaged by bans. For these reasons, smoking bans place a significant burden on bars.

**iii. Ohio's smoking ban has placed a substantial burden Zeno's and this burden is not commensurate with the benefit conferred upon the public by the smoking ban.**

The evidence before the Trial Court demonstrated that 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.<sup>62</sup> The evidence before the Trial Court showed that taverns are affected by a smoking ban differently than other businesses,<sup>63</sup> and that liquor establishments are more affected than non-liquor establishment.<sup>64</sup> 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.<sup>65</sup>

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

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<sup>62</sup> See O.A.C. 3701-52-09(A)(5) and O.A.C. 3701-52-09(F).

<sup>63</sup> Transcript of November 23, 2009 Bench Trial, at 125.

<sup>64</sup> *Id.*, at 143.

<sup>65</sup> *Id.*, at 145.

adverse effect as “a bar that caters to a lot of smokers.”<sup>66</sup> The adverse effect is so large that it is “rather draconian.”<sup>67</sup> 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.”<sup>68</sup> 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.”<sup>69</sup> Most of Zeno's employees are transient employees, working for one to three years on average.<sup>70</sup> Further, Most of Zeno's employees are smokers.<sup>71</sup>

Establishments that are adversely affected by a smoking ban are the ones that have continued violations, because given Zeno's clientele being 75% smokers, many are going to want to smoke regardless of the law.<sup>72</sup> Continued violations of a smoking ban also demonstrates a continuing adverse economic effect upon the establishment.<sup>73</sup> R.C. Chapter 3794 has had a severe negative economic impact on Zeno's.<sup>74</sup> Zeno's has experienced a decrease \$160,000 decrease in revenue between 2008 and 2009, and the enforcement of R.C. Chapter 3794 is a major contributor to the decrease.<sup>75</sup> Zeno's has seen a decline in the number of regular customers, because the customers are forced to leave the establishment every time they want to smoke.<sup>76</sup>

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<sup>66</sup> *Id.*, at 140.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*, at 148.

<sup>69</sup> Trial Court Defendants' Exhibit F.

<sup>70</sup> Tr. 94; 6-18. Tr. 204; 6-10.

<sup>71</sup> Tr. 103; 17-19.

<sup>72</sup> Tr. 141; 12-20.

<sup>73</sup> Tr. 141; 21-23.

<sup>74</sup> Tr. 148; 23- Tr. 149; 3. Tr. 194; 20-22. Tr. 195; 1-19.

<sup>75</sup> Tr. 87; 10-15. Tr. 194; 20-22. Tr. 195; 1-19.

<sup>76</sup> Tr. 194; 6-17.

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.”<sup>77</sup> Dr. Marlow testified in the trial court below that the “epidemiological evidence on the impact of smoking bans on public health \*\*\* shows little to none.”<sup>78</sup> 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.<sup>79</sup>

The evidence before the Trial Court showed that smoking bans do not cause less smoking.<sup>80</sup> However, smoking bans do cause smokers to smoke more intensely.<sup>81</sup> 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.”<sup>82</sup>

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.

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<sup>77</sup> Marlow, Michael L., *Epidemiological and Economic Research, at the Question of Smoking Bans*, Journal of American Physicians and Surgeons, Volume 14, No. 2, p. 58, quoting Siegel, Michael, *Is the Tobacco Control Movement Misrepresenting the Acute Cardiovascular Health Effects of Secondhand Smoke Exposure?*, *Epidemiol Perspect Innov* 2007, 4:1-13.

<sup>78</sup> Tr. 163.

<sup>79</sup> *Id.*, at 162.

<sup>80</sup> *Id.*, at 131.

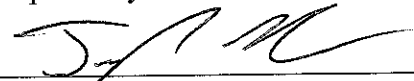
<sup>81</sup> *Id.*, at 122.

<sup>82</sup> *Id.*, at 122.

#### IV. CONCLUSION

The Decision of the Court of Appeals for the Tenth Appellate District should be reversed because ODH's method of enforcing the smoking ban violates the separate of powers, and the application of the smoking ban unreasonably extinguishes the property rights of Zeno's, and other Ohio bar owners.

Respectfully submitted,

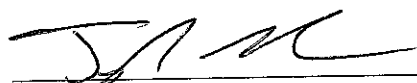


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## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon the parties specified below  
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