C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Fax: (562) 216-4445
cmichel@michellawyers.com

Attorneys for Plaintiffs/Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25, Defendants and Respondents.	CASE NO. 10CECG02116 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: October 28, 2010 Time: 3:30 p.m. Location: Dept. 97A Judge: Hon. Jeffrey Y. Hamilton Action Filed: June 17, 2010

Plaintiffs Sheriff Clay Parker, *et al.*, through their attorneys of record, request the Court take judicial notice pursuant to California Evidence Code section 452(d) and California Rules of Court, rules 3.1113(l) and 3.1306(c), of the following court records in support of their Motion for Preliminary Injunction:

///

///

C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Fax: (562) 216-4445
cmichel@michellawyers.com

Attorneys for Plaintiffs/Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25, Defendants and Respondents.	CASE NO. 10CECG02116 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: October 28, 2010 Time: 3:30 p.m. Location: Dept. 97A Judge: Hon. Jeffrey Y. Hamilton Action Filed: June 17, 2010

Plaintiffs Sheriff Clay Parker, *et al.*, through their attorneys of record, request the Court take judicial notice pursuant to California Evidence Code section 452(d) and California Rules of Court, rules 3.1113(l) and 3.1306(c), of the following court records in support of their Motion for Preliminary Injunction:

///

///

C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Fax: (562) 216-4445
cmichel@michellawyers.com

Attorneys for Plaintiffs/Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25, Defendants and Respondents.	CASE NO. 10CECG02116 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: October 28, 2010 Time: 3:30 p.m. Location: Dept. 97A Judge: Hon. Jeffrey Y. Hamilton Action Filed: June 17, 2010

Plaintiffs Sheriff Clay Parker, *et al.*, through their attorneys of record, request the Court take judicial notice pursuant to California Evidence Code section 452(d) and California Rules of Court, rules 3.1113(l) and 3.1306(c), of the following court records in support of their Motion for Preliminary Injunction:

///

///

Exhibit	Document Description
Exhibit "54"	Certified Copy of Amended Complaint for Injunctive and Declaratory Relief in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed July 6, 2009;
Exhibit "55"	Certified Copy of Order of Chancellor Claudia Bonnyman in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed November 25, 2009.[1]

The relevance of each court record requested to be noticed is set forth in the Reply to Opposition to Plaintiffs' Motion for Preliminary Injunction.

Dated: October 8, 2010

MICHEL & ASSOCIATES, PC

C. D. Michel
Attorney for Plaintiffs

[1] Although Plaintiffs' Reply to Defendants Motion cites directly to Chancellor Bonnyman's November 20, 2009 Bench Ruling in *Tennessee ex rel. Rayburn v. Cooper*, certified copies of that document alone were not made available by the Tennessee Court of Chancery. Instead, Plaintiffs have attached a certified copy of Chancellor Claudia Bonnyman's November 25, 2009, Order. The Order attaches and fully incorporates the Excerpt of the Proceedings that includes Chancellor Bonnyman's Bench Ruling.

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Valerie Pomella, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On October 8, 2010, I served the foregoing document(s) described as

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

Edmund G. Brown, Jr.
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General (185098)
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

___ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on October 8, 2010, at Long Beach, California.

___ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on October 8, 2010, at Long Beach, California.

_X_ (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on October 8, 2010, California.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

VALERIE POMELLA

EXHIBIT "54"

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

2009 JUL -6 PM 4:15

STATE OF TENNESEE *ex rel.* RANDY RAYBURN; JOHN (JANE) DOES NOS. 1-13;	)	
Petitioners,	)	
vs.	)	**Civil Action No. 09-1284 -I**
	)	**CHANCELLOR CLAUDIA C. BONNYMAN**
ROBERT E. COOPER, JR., TENNESSEE ATTORNEY GENERAL	)	
Defendant.	)	

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF ORIGINAL INSTRUMENT FILED IN MY OFFICE, THIS 5TH DAY OF October 2010
CRISTI SCOTT, CLERK & MASTER
BY: B. Welch
DEPUTY

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I. NATURE OF THE ACTION

1. On July 14, 2009 an act of Tennessee Legislature, HB 0962/SB 1127, "An Act to amend Tennessee Code Annotated, Title 39, Chapter 17, relative to firearms" (*Exhibit A* hereto) is scheduled to become law (over a veto of Tennessee Governor Phil Bredesen). HB 0962/SB 1127, which became Public Law 339 on May 14, 2009 amends prior T.C.A. § 39-17-1305(c)[1] to make Tennessee the first state in the nation *expressly* to allow carrying a loaded concealed firearm into a bar[2].

---

[1] [Old] § 39-17-1305. Sale of alcoholic beverages; premises; possession of firearms

(a) It is an offense for a person to possess a firearm within the confines of a building open to the public where liquor, wine or other alcoholic beverages, as defined in § 57-3-101(a)(1)(A), or beer, as defined in § 57-6-102(1), are served for on premises consumption.
(b) A violation of this section is a Class A misdemeanor.
(c) The provisions of subsection (a) shall not apply to a person who is:
(1) In the actual discharge of official duties as a law enforcement officer, or is employed in the army, air force, navy, coast guard or marine service of the United States or any member of the Tennessee national guard in the line of duty and pursuant to military regulations, or is in the actual discharge of duties as a correctional officer employed by a penal institution; or

2. The challenged law, Public Chapter 339, as passed provides :

SECTION 1. Tennessee Code Annotated, Section 39-17-1305(c), is amended by adding the following language as a new, appropriately designated subdivision: [to section 1305 which makes it a Class A misdemeanor to carry a firearm where liquor, wine or other alcoholic beverages are served for on premises consumption, except for persons such as law enforcement and on one's own property and, now an exception for persons...]

(3)
(A) Authorized to carry a firearm under § 39-17-1351 who is not consuming beer, wine or any alcoholic beverage, and is within the confines of a restaurant that is open to the public and serves alcoholic beverages, wine or beer.
(B) As used in this subdivision (c)(3), "restaurant" means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served and where meals are actually and regularly served, such place being provided with adequate and sanitary kitchen and dining room equipment, having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests. At least one (1) meal per day shall be served at least five (5) days a week, with the exception of holidays, vacations and periods of redecorating, and the serving of such meals shall be the principal business conducted.

3. Tennessee's liquor laws do not differentiate between bars and restaurants; *all* places that that are licensed to serve liquor by the drink are "restaurants." T.C.A. 57-

(2) On the person's own premises or premises under the person's control or who is the employee or agent of the owner of the premises with responsibility for protecting persons or property.

[2] A "bar" where firearms may not be carried by persons with firearms permits is variously defined under state liquor laws, as: an area or areas of a restaurant primarily devoted to drinking (the bar area of a restaurant); or a drinking establishment that derives 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption; or a drinking establishment that restricts entry to persons age 21 and above; or an establishment whose primary purpose is drinking. *See* footnote 3 *infra*. This Complaint's use of the term "bar" encompasses all of these definitions. As will be shown herein, however, in Tennessee *all* "bars" as defined above are considered "restaurants" as Tennessee law does not use any of these definitions, does not define a "bar" for liquor licensing purposes or for firearm restrictions and licenses *all* drinking establishments serving liquor by the drink for on premises consumption as "restaurants." *See infra* ¶ 3 & 4.

4-102 (27)(A).[3] Proponents of the new law misleadingly labeled the law a "restaurant carry" law or "restaurant bill." In Tennessee, however, *all* nightclubs, clubs, bars, and bar areas of restaurants that presently serve alcohol (until the wee hours of the morning : 3:00 a.m.; 24/7 Memphis) are licensed as "restaurants."

4. Because the new Tennessee law *expressly permits* bringing firearms into *all* drinking establishments (i.e. bars, nightclubs, or portions of restaurant premises that serve alcohol) Tennessee stands alone in expressly permitting bringing guns into all places in the state that serve liquor by the drink (including bars). Bringing firearms into drinking establishments (i.e. bars, nightclubs, or portions of restaurant premises that serve alcohol) is expressly prohibited by state statute, common law nuisance action or local laws.[4]

---

[3] "Proponents of the curfew [removed from the final bill and law] said they wanted handgun carry rights to extend to family restaurants that also happen to serve alcohol. The 11 p.m. curfew was meant to differentiate those restaurants from bars, since Tennessee law doesn't make an official distinction between the two." *CBS News website, "Guns In Bars? Tenn. House Says OK"* http://www.cbsnews.com/stories/2009/05/08/national/main5001150.shtml?tag=contentMain;contentBody

[4] **Nine states** expressly prohibit loaded guns in restaurants and bars (Arizona, Louisiana, Maine, Montana, North Carolina, North Dakota, New Mexico, Ohio and South Carolina).

Virginia prohibits *concealed* carrying of weapons in bars and restaurants.

Alaska prohibits carrying loaded firearms where alcohol is served; the law creates an affirmative defense for carrying a firearm in a "restaurant" (defined and limited by law to serve only beer or wine [not liquor]) if alcohol is not consumed.

Fourteen states expressly permit a concealed weapons permit holder to carry a gun into a *restaurant* that serves alcohol (Arkansas, Florida, Georgia, Kansas, Kentucky, Michigan, Missouri, Mississippi, Nebraska, Oklahoma, South Dakota, Texas, Washington, Wyoming). However in none of these states can a concealed loaded weapon be brought into a bar. **Five** of those 14 states expressly *preclude* carrying a loaded weapon into areas of the restaurant primarily devoted to drinking (i.e. the bar) (Arkansas, Florida, Kentucky, Mississippi and Wyoming). **Six** other states prohibit carrying guns in establishments that derive less than 50% of their total annual food and beverage sales from prepared meals (Georgia, Missouri, Nebraska, South Dakota Texas and Kansas (30%). **Washington** prohibits guns in 21 and up establishments. **Oklahoma and Michigan** prohibit carrying guns if the primary purpose of the establishment is drinking.

5. No state, by statute or regulation, *expressly* allows firearms in *bars*. Because bars, saloons, nightclubs and restaurants with bar areas are notorious for fights, assaults and breaches of the peace, carrying loaded guns is *expressly* prohibited in bars, nightclubs or bar areas serving alcohol in **24 states** (Alaska (AK ST s 11.61.220; AK § 04.11.100) , Arizona (AZ ST s 4-244), Arkansas (AR ST s 5-73-306); Florida (FL ST s 790.06) Georgia (GA ST s 16-11-127), Kansas (K.S.A. 75-7c10(12)), Kentucky (KY ST s 237.110), Louisiana (LA R.S. 40:1379.3), Maine (ME ST T. 17-A s 1057), Michigan (MI ST 28.425o), Mississippi (MS ST s 45-9-101), Missouri (MO ST 571.107), Montana (MT ST

Illinois and Wisconsin prohibit carrying concealed weapons in all places in the state.

22 other states (Alabama, California, Colorado Connecticut, Delaware, Hawaii, , Idaho, Iowa Indiana, Maryland, Massachusetts, Minnesota, New Jersey, New Hampshire, New York, Nevada, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia) have no express permission or express prohibition statutes related to carrying a gun where alcohol is served. However, these states take action under public nuisance laws when the state or city becomes aware that guns and/or shootings are occurring in bars.

Nuisance bars: Vermont, nuisance bars shut down; http://bit.ly/LiqSk (""The City of Burlington has a long history of dealing with issues revolving around bars and alcohol. And in the past, the city has shut down several places that were perceived to be a public nuisance." California nuisance bar shut down (shooting at bar; public nuisance): http://bit.ly/GI21t; Florida nuisance bar shut down (shootings at the bar): http://bit.ly/wlOrp; Kansas: nuisance bar shut down: http://bit.ly/GI21t; Maryland: nuisance bar shut down: http://bit.ly/gt5wZ; Minnesota: nuisance bar closed (gunshots at bar): http://bit.ly/2qwUus; Pennsylvania: nuisance bar shut down (shooting): http://bit.ly/gt0L1

States also do not issue or restrict permits to not allow carrying in bars or places that serve alcohol. *See e.g.* Connecticut ("The permit to carry handguns allows people to carry them openly or concealed, but mature judgment, says the Board of Firearm Permit Examiners, dictates that (1) "every effort should be made to ensure that no gun is exposed to view or carried in any manner that would tend to alarm people who see it. . . [and] (2) no handgun should be carried unless carrying the gun at the time and place involved is prudent and proper in the circumstances. "
For example, according to the board, handguns should not be carried: 1. *into a bar or other place where alcohol is being consumed"* www.cga.ct.gov/2007/rpt/2007-R-0369.htm; California (permit itself prohibits carrying in places where primary purpose is serving alcoholic beverages for on-site consumption)
http://rkba.org/ccw/ca_ccw_app.pdf

The point must simply be stressed: **no** state by act of positive law permits guns in bars and when guns are found in bars or bar shootings occur public nuisance laws are applied or state permits preclude carrying where alcohol is served.

45-8-328), Nebraska (NE LEGIS 430 (2009), New Mexico (NM ST s 30-7-3), North Carolina (NC ST s 14-269.3) , North Dakota (ND ST 62.1-02-04) , Ohio (OH ST s 2923.126), Oklahoma (OK ST T. 21 s 1272.1), South Carolina (SC Code 1976 § 16-23-465), South Dakota (SDCL § 23-7-8.1), Texas (V.T.C.A., Penal Code § 46.03), Washington (WA ST 9.41.300(1)(d), Wyoming (W.S.1977 § 6-8-104). Two states do not permit carrying weapons permits (Illinois, 720 ILCS 5/24-1 and Wisconsin, W.S.A. 167.31(2)(b)). Virginia expressly prohibits carrying concealed weapons where alcohol is served.[5].

6. Absent an injunction guns can be brought into any bar or restaurant or nightclub that serves alcohol on July 14, 2009 and the law will decriminalize carrying a permitted gun into a *posted* bar or restaurant (where the owner has posted "no firearms") making the act a fine of "no more than $500." Websites for Tennessee Firearms Association members and blogs of the Tennessee Firearms Association are already discussing the topics of what is the penalty for bringing a gun into a bar or restaurant and whether the law prohibits having consumed alcohol prior to entering the bar or restaurant (it does not). *See* Tennessee Firearms Association website blog.

7. Legislators who supported this law have claimed that "36" or more states have "similar laws" allowing permit holders to go armed in establishments serving alcohol. Legislative proponents stated 36 states have similar laws and later that "40 states allow citizens that have handguns to carry their handguns where alcohol is served." http://www.youtube.com/watch?v=s2pZclaNqi4.

8. The National Rifle Association released statistics that "38 states" had laws similar to the new Tennessee law:

> "According to Alexa Fritts, media relations associate for the National Rifle Association, the following states already allow similar forms of gun

[5] Virginia law *expressly* prohibits carrying *concealed* weapons where alcohol is served. Va. Code Ann. 18.2-308(J3) (2005). *See* http://www.youtube.com/watch?v=aeR9LKDtQws

carrying laws in restaurants which serve alcohol: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Idaho, Indiana, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming."

9. In fact: *none* of these 38 states identified by the NRA and the law's proponents *expressly* permit guns in bars. Fourteen of these 38 states *expressly prohibit* loaded guns in bars or bar areas (Alaska, Arkansas, Florida, Georgia, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Oklahoma, South Dakota, Texas, Washington and Wyoming). In the remaining 24 states cited by the NRA these states have *no statutes that expressly permit* (or prohibit) guns where alcohol is served. However these states in fact take action to close nuisance bars where guns are present or shootings occur. *See supra* fn. 4.

10. Tennessee will also be the first state in the nation to *decriminalize* bringing a permitted firearm into a drinking establishment that posts a notice (forbidding guns on the premises). Under prior law, T.C.A. § 39-17-1305 carrying a concealed weapon into a drinking establishment was a criminal offense, Class A misdemeanor ("(b) A violation of this section is a Class A misdemeanor"—meaning the person carrying a gun into a drinking establishment, licensed to carry or not, could be arrested, detained, taken to jail, dispossessed of the gun by police officers, and faced a criminal penalty– Class A misdemeanor – "of not greater than eleven (11) months, twenty-nine (29) days or a fine not to exceed two thousand five hundred dollars ($2,500), or both." T. C. A. § 40-35-302.; T. C. A. § 40-35-111.

11. The newly passed law removes the specific Class A misdemeanor criminal penalty for carrying a firearm into a drinking establishment by permit holders, and over 220,000 permitted gun owners (and permit holders in 19 reciprocity states) can

carry a firearm *even on the premises of a posted drinking establishment that serves alcohol and* will face a mere fine (a ticket) of up to $500. T.C.A. § 39-17-1359. Carrying a gun into a drinking establishment is no longer a criminal offense or an incarcerative offense and there is no forfeiture of the firearm.[6] *Compare e.g.,* Kansas law, K.S.A. 75-7c11, (criminal Class B misdemeanor to bring a gun onto *posted* property). Imposing small fines or penalties for illegally carrying a gun into at or near drinking establishment causes more firearms at bars and presents a risk to public safety. *See "Mayor* [of Lawrence, Kansas] *seeks stricter gun law: Amyx wants jail time for carrying firearms near bars"* [local ordinance prohibits Kansas permit holders to carry firearm within 200 feet of any bar in Lawrence, KS but imposed no mandatory jail time; mayor called for stiffer law].[7]

12. A permit owner, under the new law, although not permitted to consume alcohol on the premises, can enter the premises of a drinking establishment, having *previously* consumed alcohol (if not "intoxicated). T.C.A. § 39-17-1321.[8]

13. *Public Nuisance.* Petitioners challenge the legality of T.C.A. § 39-17-1305(c)(3) as an unlawful public nuisance that unreasonably threatens the life, health and safety of the public.

---

[6] Although the general right of an individual or property owner to post a notice that firearms are not allowed on the premises under . T.C.A. § 39-17-1359 is described as a "criminal act" the penalty is limited to a fine of not more than five hundred dollars. The mere labeling of an act as criminal or civil is not dispositive of whether the act in fact criminal or civil and the lack of an incarcerative penalty (and small fine) effectively removes criminal status from this offense as well as constitutional protections such as right to trial by jury. *See State v. Anton*, 463 A.2d 703, 706 (Me.,1983) (". . .[T]his Court has stated that the label "civil" or "criminal" is not dispositive of the nature of a proceeding. *State v. Gleason*, 404 A.2d 573, 583 (Me.1979).

[7] http://www2.ljworld.com/news/2007/feb/22/mayor_seeks_stricter_gun_law/

[8] "The rules [new law] say they may not drink when they're in here, but who's to say they're not drunk when they walk in, or been doing drugs before they walk in?" *"Guns in bars debate rages on following Bredesen veto,"* http://www.wmctv.com/global/story.asp?s=10447876

14. *Due Process/Taking*. Petitioners aver that the law violates due process and amounts to a taking of property that exposes bars and restaurants that serve alcohol to guns with no effective deterrent to carrying guns on posted premises and increases civil liability for shootings. *See "Patron injured in shooting sues bar"* (PA bar patron sued bar for inadequately screening for firearms, http://bit.ly/1arT1V.

15. *Due Process/Arbitrary and Capricious Exercise of Police Power*. Petitioners challenge the law and on the grounds that the law is an unconstitutional deprivation of due process because it is an unreasonable, arbitrary and capricious exercise of the police power.

16. *Tennessee Occupational Safety and Health Act of 1972*. Petitioners challenge the guns in bar law as in violation the general duty clause of the Tennessee Occupational Safety and Health Act of 1972, T.C.A. § 50-3-105(1).[9]

17. *Tennessee Constitution*. Petitioners aver the guns in bar law violates due process and the rights guaranteed by Art. I ,Secs. 1[10], 8[11], 17[12], 23[13] of the Tennessee Constintution. Petitioners further challenge the law as in violation of Art. XI, Sec. 8 of the Tennessee Constitution: "The Legislature shall have no power to suspend any

[9] T.C.A. § 50-3-105(1) provides that "[e]ach employer shall furnish to each of their employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm to their employees."

[10] "That all power is inherent in the people, and all free governments are founded on their authority, and instituted *for their peace, safety,* and happiness;"

[11] "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

[12] "Suits may be brought against the state in such manner and in such courts as the Legislature may by law direct."

[13] "That the citizens have a right, in a peaceable manner, to assemble together for their common good"

general law for the benefit of any particular individual, *nor to pass any law for the benefit of individuals inconsistent with the general laws of the land."* (emphasis supplied).

18. *42 U.S.C. § 1983 State-Created Danger and State-Created Vigilantism.* Petitioners challenge the law as an unconstitutional deprivation of civil and constitutional rights under the "state-created danger" doctrine recognized under cases and law construing 42 U.S.C. 1983.[14]

19. *Due Process and the Fundamental Right to be Free from Gun Violence in "Sensitive Places".* Petitioners challenge the law on the ground that the law is an unconstitutional deprivation of due process because it violates a fundamental right to be free from gun violence in sensitive public places.

20. The Second Amendment right to keep and bear arms is not implicated in this case. Just as there is no First Amendment right falsely to cry "fire" in a crowded theater[15] : "There is nothing in the language of our state constitution or in the history of the right to 'bear arms', as protected by the federal and various state constitutions, which lends any credence whatsoever to the claim that there is a constitutional right to carry a firearm into a drinking establishment." *Second Amendment Foundation v. City of Renton*, 35 Wash.App. 583, 588, 668 P.2d 596, 599 (Wash. Ct. App. 1983). The U.S. Supreme Court has recently recognized in *District of Columbia v. Heller*, 128 S.Ct. 2783,

[14] *Henderson v. City of Chattanooga*, 133 S.W.3d 192, 211 (Tenn.Ct.App.,2003): "The next issue addressed in *Kallstrom I* [*Kallstrom v. City of Columbus*, 136 F.3d 1055 C.A.6 (Ohio),1998] was whether a state could be held liable for private acts of violence under 42 U.S.C. § 1983. Relying on the state-created-danger theory, the Sixth Circuit concluded that a state can be held liable for the actions of a private individual, such as a gang member, when the state's action places the individual victim "specifically at risk, as distinguished from a risk that affects the public at large." *Id.* at 1066. Owners and employees (wait staff, bartenders, servers, etc) are placed at direct and grave risk of guns in drinking establishments).

[15] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." *Schenck v. U.S.* 249 U.S. 47, 39 S.Ct. 247, 249 (U.S. 1919).

2817 (2008) that the right of an individual to bear arms is not unlimited and that firearms may not be carried "in sensitive places"[16]

21. Tennessee law has long recognized that guns in the presence of alcohol is a dangerous and volatile combination. "It has been stated in several opinions of this Court that alcohol and firearms are a volatile combination as someone will likely be hurt." *State v. Parker*, 932 S.W.2d 945, 957 (Tenn.Cr.App.,1996); *see also* *United States v. Prescott*, 599 F.2d 103 (5th Cir. 1979) (discussing the " volatile mixture" of alcohol and firearms."

22. Petitioners seek a temporary and permanent injunction to enjoin the guns in bars law from taking effect. Simply put, guns and alcohol don't mix. The combination of guns and alcohol on the premises of drinking establishments is a state-created danger and threat to public safety that violates common law, statutory and constitutional rights of the public and persons who own and work at drinking establishments. Courts have the power and duty to strike down state-created nuisances and laws that unreasonably or unconstitutionally threaten the health, safety and welfare of the public.

II. FACTUAL AND LEGAL BASIS FOR CLAIMS

23. Although a state legislature may pass laws in pursuit of its regulation and police powers, judicial review is necessary and appropriate "[i]f the means employed have no real, substantial relation to public objects which government may legally accomplish, [or] if they are arbitrary and unreasonable . . . the judiciary will . . .

[16] "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 128 S.Ct. 2783, 2817 (2008)

interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt." *Chicago, B. & Q. Ry. Co. v. People of State of Illinois*, 200 U.S. 561, 593 26 S.Ct. 341 U.S. (1906).

24. A legislative enactment will be deemed invalid if it bears no real or substantial relationship to the public's health, safety, morals or general welfare or if it is unreasonable or arbitrary. *See Nashville, C & L. Ry. v. Walters*, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949 (1935); *Estrin v. Moss*, 221 Tenn. 657, 430 S.W.2d 345, 348 (Tenn.1968), cert. dismissed, 393 U.S. 318, 89 S.Ct. 554 (1969); *First Tennessee Bank Nat. Ass'n v. Jones*, 732 S.W.2d 281 (Tenn.App.,1987) (statute is an invalid exercise of the police power burden if "the statute is arbitrary, capricious and unreasonable, and has no real tendency to effectuate the legislative purpose." *Templeton v. Metropolitan Government of Nashville and Davidson Co.*, 650 S.W.2d 743 (Tenn.App.1983).

25. The Attorney General of the State of Tennessee is the proper defendant in this action. T.C.A. § 8-6-109. *Peters v. O'Brien*, 152 Tenn. 466, 278 S.W. 660 (1925) (Attorney General is proper party in a declaratory judgment action to determine validity of a state statute). Petitioners aver that pursuant to T.C.A. § 8-6-109 the Attorney General should exercise his discretion and *not* defend the validity and constitutionality and give notice to the speakers of each house of the general assembly of his decision.

26. *Public Nuisance.* Petitioners bring this challenge to Tennessee's "guns in bar law" on the grounds that the law *creates* and abets an unlawful public nuisance: loaded weapons (concealed or carried openly) on premises where alcoholic beverages, wine or beer is served.

27. The "guns in bar law" is a public nuisance under RESTATEMENT OF TORTS (SECOND) § 834 in that it is an unreasonable interference with a right common to the

general public and creates a significant threat to the public health, public safety, and public peace.

28. The "guns in bar law" permits concealed (and openly carried) loaded firearms to be carried by gun permit holders into bars, nightclubs and restaurants serving alcohol. Petitioners aver the law itself creates a public nuisance (public nuisances) and threatens the health, safety, welfare and the very lives of the Petitioners.[17]

29. "In Tennessee, a public nuisance is defined as "an act or omission that unreasonably interferes with or obstructs rights common to the public." *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 283 (Tenn. Ct. App. 1988) (citing Restatement (Second) of Torts § 821B (1977)), cited in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 549 F.Supp.2d 725 , 735 (W.D.N.C.,2008).

30. A public nuisance may be enjoined "even though it has not yet resulted in any significant harm" if "harm is *threatened*" where "harm is threatened that would be significant." Restatement Second of Torts § 821F (comment b).

31. *Shootings* that occur in a bar or nightclub are evidence of a public nuisance which Tennessee courts may abate. *State ex rel. Gibbons v. Club Universe*, 2005 WL 175035 (Tenn.Ct.App.,2005) (Memphis nightclub declared a public nuisance and Court enjoined the nightclub from further operation based upon, inter alia, evidence of "shootings" "in the nightclub"). Id. at * 1. *See also People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 929 P.2d 596 (Cal.,1997) ("shootings" supported finding of public nuisance.").

---

[17] The Tennessee statute defines nuisance as: any place in or upon which lewdness, assignation, promotion of prostitution, patronizing prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, and sale, exhibition or possession of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver, or distribute matter or materials, ... quarreling, drunkenness, fighting or *breaches of the peace are carried on or permitted*, and personal property, contents, furniture, fixtures, equipment and stock used in or in connection with the conducting and maintaining any such place for any such purpose. Tenn.Code Ann. § 29-3-101(2) (2000) (emphasis supplied).

32. The Court should take judicial notice pursuant to Tenn. R. Evid. 201 that shootings in bars, nightclubs and restaurants that serve alcohol is a "recognized hazard" to life, public health and public safety--whether the shooter has a permit or not:

- shooting by a Tennessee permit holder outside restaurant that served alcohol in Memphis Tennessee[18],
- Violent crimes and gun offenses by permit holders[19]
- That Tennessee's "shall issue" gun permit law forces officials to give permits to "almost everyone," including persons with a violent criminal history.
- bar shooting in Nashville: 4/2009: http://www.wkrn.com/Global/story.asp?S=10124657
- bar shooting Knoxville: 6/2008 http://www.wbir.com/news/local/story.aspx?storyid=59690
- bar shooting Millington:12/2008 http://www.myeyewitnessnews.com/news/local/story/2-Charged-in-Millington-Bar-Shooting/arFbGrqg00GMqAr4gp7dmg.cspx
- bar shooting Jackson: 12/2008 http://www.wmctv.com/global/story.asp?s=9472549
- Numerous shootings in bars reported in Tennessee cases.[20]

---

[18] http://www.commercialappeal.com/news/2009/jun/04/grand-jury-indicts-man-second-degree-murder-cordov/

[19] "Sims is among dozens of Shelby Countians with violent histories who have received permits to carry handguns in Tennessee, according to an investigation by The Commercial Appeal. The newspaper identified as many as 70 county residents who were issued permits despite arrest histories, some with charges that include robbery, assault, domestic violence and other serious offenses." http://bit.ly/6TYnm

[20] *Chattanooga-Hamilton County Hosp. Authority v. Bradley County*, 249 S.W.3d 361 (Tenn., March 10, 2008)(" suspect injured in a shooting at a bar in Cleveland"; *State v. Snow*, 2002 WL 1256142 (Tenn.Crim.App., June 07, 2002) ("The shooting occurred in a bar in Nashville"; *State v. Baldwin*, 1998 WL 426199 (Tenn.Crim.App., July 29, 1998) ("Martin stated that the only other person in the bar when the shooting took place"); *State v. Bolden*, 1996 WL 417673, Tenn.Crim.App., July 26, 1996 (" Raymond Davis, and Charles Belk met in Tiptonville and proceeded to a "bar" where they practiced shooting a nine millimeter, semi-automatic pistol belonging to the appellant. The pistol was a "Tec-DC9," manufactured by Intratec, commonly referred to as a Tec-nine. The appellant testified that he had bought the gun earlier that month. After shooting at the "bar"); *State v. Sinclair*, 1996 WL 181432, (Tenn.Crim.App., April 17, 1996) (Mary Hall testified that she was sitting beside the victim at the bar immediately before the shooting and that the victim had no weapon in his hand when the Defendant approached."; *State v. Richardson*, 1993 WL 523630, (Tenn.Crim.App., December 16, 1993) ;("Mr. Jones, who knew the appellant, saw him return to the bar and start shooting"); *Kelton v. Park Place Center*, 1993 WL 415637, Tenn.Ct.App., October 12, 1993 ("...an increase in crime during the evening hours in the east Memphis area. In the six months prior to the shooting at bar"; *State v. Bates*, 1990 WL 39698, Tenn.Crim.App., March 30, 1990 (" The appellant was indicted for murder by use of a firearm after a shooting incident at a bar

- Cases of shootings at bars by persons licensed to carry permits.[21]

33. In supporting the new law, legislative proponents and the NRA cited examples to demonstrate the new law would expressly allow gun permit holders to carry their guns into bars and engage in vigilante *shooting* at drinking establishments:

- Nashville bar shooting fatality involving the death of Benjamin Goeser.
- http://blogs.nashvillescene.com/pitw/2009/05/lawmakers_vote_to_drop_curfew.php
- http://blogs.tennessean.com/politics/2009/nra-says-bredesen-broke-2006-pledge-to-support-guns-in-restaurants-bill/

34. "[O]therwise lawful actions may be the subject of nuisance lawsuits [under Tennessee law]," *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 549 F.Supp.2d 725 , 735 (W.D.N.C., 2008), citing *Sherrod v. Dutton*, 635 S.W.2d 117, 121 (Tenn. App. 1982).

---

in which an employee was shot in the head."); *State v. Wray*, 1987 WL 7990 (Tenn.Crim.App., March 17, 1987)("Tommy's After Hours Bar, where the shooting occurred").

[21] Bartlett, TN: permit holder shoots in parking lot of restaurant that served alcohol. http://www.commercialappeal.com/news/2009/jun/04/grand-jury-indicts-man-second-degree-murder-cordov/;
Memphis, TN: permit holder off duty police officer shoots at a bar. http://www.commercialappeal.com/news/2009/may/19/former-deputy-had-alcohol-and-demons-shooting/.
St. Louis, MO: permit holder off duty police officer shoots at a bar. http://www.ksdk.com/news/local/story.aspx?storyid=159746;
Sturgis, SD: permit holder off duty police officer shoots at a bar. http://www.seattlepi.com/local/376865_sturgis29.html
Minnesota: "Consider Zachary Ourada, who was proud of his newly obtained permit to carry a concealed handgun. A local bartender commented that the twenty-seven year old 'felt like somebody because he had a permit.' Ourada had met the requirements of Minnesota's Personal Protection Act, which, among other things, requires a background check, and completion of a gun safety course. On the night of May 13, 2005, however, Ourada had a little too much to drink. He does not clearly remember what happened that night, but does remember being asked to leave a popular supper-club and being escorted out by Billy Walsh, the doorman. A few moments later, Walsh was dead with four gunshot wounds in his back. "I'm sorry," Ourada told the court." *Comment A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce Controversy?*, 29 HAMLINE L. REV. 638-639 (2006).

35. "The definition of 'nuisance' is marked by flexibility and reasonable breadth, rather than meticulous specificity." *State ex rel. Woodall v. D&L Co., Inc.*, 2001 WL 524279 (Tenn. Ct. App., 2001) *citing, Grayned City of Rockford*, 408 U.S. 104, 110 (1972). Liability for public nuisance "is based on interference with the public's use and enjoyment of a public place or with other common rights of the public." *Metro. Gov't of Nashville & Davidson County v. Counts*, 541 S.W.2d 133, 138 (Tenn. 1976) (An individual may maintain an action based on public nuisance if that individual has sustained some special injury as a result of the nuisance; and a public nuisance is the interference with the public's use and enjoyment of a public place); *66 C.J.S. Nuisances § 65* (1998); *Hale v. Ostrow*, 2004 WL 1563230 (Tenn.Ct.App.,2004), *rev'd on other grounds, Hale v. Ostrow*, 166 S.W.3d 713 (Tenn. 2005). A state or governmental entity that *creates* a public nuisance is not entitled to immunity and may be sued for creating a public nuisance. *Johnson v. Tennessean Newspaper,Inc.* 28 Beeler 287, 241 S.W.2d 399 (Tenn. 1951); *Jones v. Knox County*, 9 McCanless 561, 327 S.W.2d 473 (Tenn. 1959).

36. Where a governmental entity maintains or aids and abets a public nuisance, although it does so while in the discharge of a public duty, or in the performance of a governmental function, it cannot claim immunity. *Bobo v. City of Kenton*, 22 Beeler 515, 212 S.W.2d 363 (Tenn. 1948); Knoxville v. Lively, 1918, 141 Tenn. 22, 206 S.W. 180 (1918).

37. T.C.A. § 6-2-201(23) empowers municipalities in Tennessee to "prescribe limits within which business occupations and practices liable to be nuisances or detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted or maintained."

38. It is the law and public policy of the State of Tennessee for local governments to control and abate public nuisances. *See e.g.* T.C.A. § 6-54-127(g) (graffiti

as nuisance) "Nothing in this section shall be construed to impair or limit the power of the municipality to define and declare nuisances and to cause their removal or abatement under any procedure now provided by law for the abatement of any public nuisances." *To the same effect:* T.C.A. § 13-21-103(6)

39. It is the law and public policy of the State of Tennessee that governmental power may not be used to create, maintain or abet public nuisances. *See e.g.,* T.C.A. § 7-54-103(j),(k):

> "(j) Any municipality or county exercising, whether jointly or severally, any authority conferred upon it by this chapter, as amended, is hereby declared to be acting in furtherance of a public or governmental purpose. (k) Provided, that such separation and disposition neither creates a public nuisance nor is otherwise injurious to the public health, welfare, and safety."

40. It is the law and public policy of the State of Tennessee that the Courts have the power and jurisdiction to "abate nuisances." *See* T.C.A. § 16-10-110.

41. It is the law and public policy of the State of Tennessee that aiding and abetting a public nuisance is unlawful. *See* T.C.A. § 29-3-101(b): "Any person who uses, occupies, establishes or conducts a nuisance, or aids or abets therein, and the owner, agent or lessee of any interest in any such nuisance, together with the persons employed in or in control of any such nuisance by any such owner, agent or lessee, is guilty of maintaining a nuisance and such nuisance shall be abated as provided hereinafter."

42. It is the law and public policy of the State of Tennessee that the state may be sued for creating or maintaining nuisances." *See e.g.,* T.C.A. § 9-8-307(a)(1)(b) (State may be sued for monetary damages for "(B) Nuisances created or maintained.").

43. It is the law and public policy of the State of Tennessee that buildings that are dangerous to human life are declared "public nuisances." *See* T.C.A. § 13-6-102(8):

> "'Public nuisance' means any vacant building that is a menace to the public health, welfare, or safety; structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, dangerous to human life, or no longer fit and habitable; a nuisance as defined in § 29-3- 101(a); or is otherwise determined by the local municipal corporation or code enforcement entity to be as such."

44. It is the law and public policy of the State of Tennessee that citizens affected by nuisances may bring a civil action to abate a nuisance in their community. *See* T.C.A. § 13-6-106(a):

> "...[A]ny interested party or neighbor, may bring a civil action" to abate a public nuisance"; T.C.A. § 29-3-102: "The jurisdiction is hereby conferred upon the chancery, circuit, and criminal courts and any court designated as an environmental court pursuant to Chapter 426 of the Public Acts of 1991 to abate the public nuisances defined in § 29-3-101, upon petition in the name of the state, upon relation of the attorney general and reporter, or any district attorney general, or any city or county attorney, or without the concurrence of any such officers, upon the relation of ten (10) or more citizens and freeholders of the county wherein such nuisances may exist, in the manner herein provided."

45. It is the law and public policy of the State of Tennessee that citizens may sue "all aiders and abettors" of a public nuisance. T.C.A. § 29-3-103.

46. It is the law and public policy of the State of Tennessee that a temporary injunction to abate a public nuisance should issue upon presentation of a proper bill or petition for public nuisance. T.C.A. § 29-3-105. Temporary injunction (a) In such proceeding, the court, or a judge or chancellor in vacation, shall, upon the presentation of a bill or petition therefore, alleging that the nuisance complained of exists, award a temporary writ of injunction, enjoining and restraining the further continuance of such nuisance, and the closing of the building or place wherein the same is conducted until the further order of the court, judge, or chancellor. (b) The award of a temporary writ of injunction shall be accompanied by such bond as is required by law in such cases, in case the bill is filed by citizens and freeholders; but no bond shall be required when such is filed by the officers provided for, if it shall be made to appear to the satisfaction

of the court, judge or chancellor, by evidence in the form of a due and proper verification of the bill or petition under oath, or of affidavits, depositions, oral testimony, or otherwise, as the complaints or petitioners may elect, that the allegations of such bill or petition are true."

47. It is the law and public policy of the State of Tennessee that fighting, drunkenness, breaches of the peace and property used in breaches of the peace constitute public nuisances. *See* T.C.A. § 29-3-101(a)(2):

> "'Nuisance' means that which is declared to be such by other statutes, and, in addition thereto, means any place in or upon which lewdness, prostitution, promotion of prostitution, patronizing prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, any sale, exhibition or possession of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver or distribute matter or materials in violation of §§ 39-17-901 – 39-17-908, § 39-17-911, § 39-17-914, § 39-17-918, or §§ 39-17-1003 – 39-17-1005, quarreling, *drunkenness, fighting* or *breaches of the peace* are carried on or permitted, *and personal property*, contents, furniture, fixtures, equipment and stock *used* in or in connection with the conducting and maintaining any such place for any such purpose."

48. It is the law and public policy of the State of Tennessee that courts may abate nuisances and order that "all means, appliances, fixtures, appurtenances, materials, supplies, and instrumentalities used for the purpose of conducting, maintaining, or carrying on the unlawful business, occupation, game, practice or device constituting such nuisance" be removed. T.C.A. § 29-3-110.

49. It is the law and public policy of the State of Tennessee that the trial of public nuisance cases be "given precedence over all other causes." T.C.A. § 29-3-108.

50. It is the law and public policy of the State of Tennessee that "Any person who is visibly intoxicated and who is disorderly" creates a public nuisance. T.C.A. § 68-14-602; T.C.A. § 68-14-605.

51. "A nuisance has been defined as anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable." *Pate v. City of Martin*, 614 S.W.2d 46 at 47 (Tenn. 1981). "The key element of any nuisance is the reasonableness" of the "conduct under the circumstances." *Sadler v. State*, 56 S.W.3d 508 (Tenn.Ct.App.,2001), *citing*, 58 AM.JUR.2D NUISANCES § 76.

52. When the Petitioners' theory of liability is public nuisance, the pleading requirements are not exacting because the concept of common law public nuisance elude[s] precise definition The existence of a nuisance depends on the peculiar facts presented by each case. *Young v. Bryco Arms*, 213 Ill.2d 433, 821 N.E.2d 1078 (Ill.,2004).

53. Petitioners allege a cause of action for public nuisance: a right common to the general public for life and safety at public places including places that serve alcohol, the transgression of that right by the "guns in bars law" and resulting injury.

54. Petitioners aver the "guns in bar law" creates and abets a public nuisance because, under public nuisance law, even assuming *arguendo* the mere presence of permitted guns in bars is not *per se* harmful, the guns m*ay become harmful by the intervention and acts of other persons and patrons* and thus a public nuisance exists. *See* RESTATEMENT OF TORTS (SECOND) § 834[22], and *comment f*[23]. The mere presence of guns on the premises can establish proof and evidence of a public nuisance because by actions of

---

[22] "One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." RESTATEMENT OF TORTS (SECOND) § 834.

[23] f. *Causation.* In some cases the physical condition created is not of itself harmful, but becomes so upon the intervention of some other force, the act of another person or force of nature. In these cases the liability of the person whose activity created the physical condition depends upon the determination that his activity was a substantial factor in causing the harm, and that the intervening force was not a superseding cause. RESTATEMENT OF TORTS (SECOND) § 834, *comment f.*

patrons, shootings and fights with guns may occur, which would make the premises a nuisance.

55. Because bars, saloons and nightclubs are notorious for fights, assaults and breaches of the peace, carrying loaded guns is *expressly* prohibited in bars and nightclubs serving alcohol in 24 states. *See supra* ¶ 2. No state by statute or case law *expressly* permits a gun permit holder to take a concealed loaded gun into a bar or nightclub that serves alcohol for consumption.

56. In states where there is no express prohibition against bringing guns into bars or nightclubs, courts in such states (and historically Tennessee) treat guns and alcohol as a "volatile combination" and routinely declare bars or nightclubs where guns are found to be present as public nuisances, particularly when shootings occur. *See supra* footnote 4. *See e.g. Spitzer v. Sturm Ruger & Co., Inc.*, 309 A.D.2d 91, 98; 761 N.Y.S.2d 192 (N.Y. Sup. Ct. 2003) (unlike true public nuisance cases where "firearms" together with "the character of the premises as a nightclub serving alcoholic beverages" supports public nuisance; mere manufacture of guns did not cause/constitute public nuisance); *Suleiman v. City of Memphis Alcohol Com'n*, 2008 WL 2894679 (Tenn.Ct.App.,2008) (beer permit denied on public nuisance grounds because shootings had occurred at the market); *Kingsport v. Club 229*[24] (City of Kingsport filed public nuisance action to close bar where shooting and breaches of the peace had occurred); *Philadelphia v. Franchise Bar & Grille*[25]("A North Philadelphia bar that police say is at the center of a wild shootout for the second time in two years was shut down yesterday for being a "public nuisance."); *State of Tennessee v. Joseph Patrick Patton,*

[24] http://www.timesnews.net/article.php?id=3640427

[25] http://www.metro.us/us/article/2009/06/16/01/5110-85/index.xml

Tropicana Club (Davidson County Chancery Ct.);[26] *Gelletly v. Commonwealth of Virginia*, 16 Va. App. 457, 430 S.E. 2d 722 (1993) (evidence of patrons possessing guns in a bar on two different occasions was relevant to public nuisance; which the court found existed and was affirmed on appeal); *City of Rochester v. Premises Located at 10-12 South Washington Street*, 180 Misc.2d 17, 687 N.Y.S.2d 523 (N.Y.Sup.,1998) (frequent shooting of firearms and fighting in vicinity of night club, was public nuisance).

57. Prior Tennessee law, T.C.A. § 39-17-1305 expressly recognized that citizen health and safety was threatened by guns on premises where alcohol was served or sold.

58. The passage of the new law did not change the *facts* that guns and alcohol don't mix, that guns and alcohol are a volatile combination, and that carrying loaded and concealed weapons into bars, nightclubs and restaurants that serve alcohol presents an unreasonable threat to public safety and an increased risk of shootings. "Studies by Kwon et al. (1997), Jarrell and Howsen (1990) and Kellermann et al. (1993) all show that higher alcohol consumption or availability is associated with higher rates of gun-related fatalities." National Bureau of Economic Research, *Working Paper 7500* at p. 2 (Jan. 2000)[27].

II. PARTIES

59. Petitioner Randy Rayburn (John Randy Rayburn) is an individual of the full age of majority and is domiciled in Tennessee.

---

[26] "In 2006, a nightclub in Nashville Tennessee had more than three hundred calls for police service in a one year period. Most of those calls were for gunshots, fights and assaults. The owners, who tried beefing up security, could not control the type of people who flocked to their establishment and eventually the city used a civil nuisance law to padlock their door and force them to close down." http://bit.ly/19IWXk; *State of Tennessee v. Joseph Patrick Patton, Tropicana Club (Davidson County Chancery Ct.).*

[27] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=214614

60. Petitioners John (Jane) Does 1-9 are individuals of the full age of majority and who are domiciled in Tennessee. Each Doe plaintiff works in a bar or restaurant in Tennessee and faces the threat, risk and danger of guns being brought into drinking establishments. Does 1-9 ask that they be allowed to pursue this action anonymously, as they fear community reprisals and attacks, and ostracism from their stance to challenge the guns in bars law.

61. Petitioners John Does 10, 11, 12 and 13 are Tennessee residents who may lawfully carry concealed firearms by a Tennessee handgun carry permit pursuant T.C.A. § 39-17-1351. Petitioners John Does 10, 11, 12 and 13 fear actual or threatened prosecution (as a Class A misdemeanor) under T.C.A. § 39-17-1305 because the law makes it a crime to carry a firearm into an establishment that serves alcohol but is not a restaurant defined as "the serving of such meals shall be the principal business conducted."

62. Defendant Robert Cooper, Jr. is sued in his official capacity as Tennessee Attorney General, P.O. Box 20207, Nashville, TN 37202.; Tennessee, Tennessee State Capitol, Nashville, Tennessee 37243;

III. STANDING

63. Petitioner Rayburn has suffered a special injury vesting him with standing to bring this nuisance action because the use and enjoyment of his restaurants, bars and nightclubs has been impaired by the new law which will bring patrons carrying guns to his premises. His injury and damages are markedly different from members of the public generally.

64. Petitioners Does 1-9 have or will suffer a special injury vesting them with standing to bring this nuisance action because they work in bars and/or restaurants that serve alcohol and will face the dangers and risks from patrons carrying guns to

their workplaces (whether posted or not). Their injury and damages are markedly different from members of the public generally.

65. Petitioners John Does 10-13 are Tennessee residents who may lawfully carry concealed firearms by a Tennessee handgun carry permit pursuant T.C.A. § 39-17-1351. Petitioners John Does 10-13 fear actual or threatened prosecution (as a Class A misdemeanor) under T.C.A. § 39-17-1305.

66. Petitioners' injuries will be rectified by a favorable decision declaring and/or enjoining the enforcement as unconstitutional the guns in bars law.

67. Petitioners have a distinct and palpable injury (and are particularly aggrieved) by the guns-in-bars law.

V. First Count: Public Nuisance

68. Petitioners re-allege and re-aver all of the allegations contained in the previous paragraphs.

69. Permitting guns in bars threatens the security, life, safety and health of the public and Petitioners in a special manner and the law interferes with *community* interests and a collective ideal of civil life in a civil society. *People ex rel Gallo v. Acuna*, 14 Cal. 4th 1090, 1105, 60 Cal. Rptr. 2d 277, 929 P.2d 596 (1997).

70. Newly enacted T.C.A. § 39-17-1305(c) is an unlawful state-created public nuisance. The State of Tennessee is creating, aiding, and abetting an unlawful public nuisance. Just as, for example, the State of Tennessee may not create a public nuisance by pouring concrete into the Cumberland River[28], the State may not create, aid or abet placing guns in bars or restaurants with bar areas.

VI. Second Count: Due Process—Taking of Property

[28] *See e.g.*, North Carolina ex rel. Cooper v. Tennessee Valley Authority, 549 F.Supp.2d 725, 735 (W.D.N.C., 2008) (TVA, a governmental entity, could not pollute North Carolina's air).

71. Petitioners re-allege and re-aver all of the allegations contained in the previous paragraphs.

72. Petitioner Rayburn's right of private property is a sacred, natural and inherent right, which is protected by the United States and Tennessee Constitutions. The guns in bar law will impose added unreasonable burdens on Rayburn and other employers, property owners, tenants, or business entities who will be required to monitor the lawful and unlawful uses of firearms brought to the premises, especially since the new law decriminalizes bringing guns into bars and restaurants serving alcohol. The responsibility for monitoring who can legally enter and who cannot, who is armed and who is not, who can be served alcohol and who cannot, who needs police protection and who does not, rests entirely on the shoulders of the restaurant/bar owner.

73. The law will provide no effective deterrent or protection to carrying licensed guns into bars and will promote confrontations with patrons who seek to bring weapons into the bar and restaurant areas serving alcohol. Patrons will have to be monitored for guns and drinking and/or screened and identified for gun possession.[29] Signs will have to be posted which will deter patrons, tourism and the ambience of Petitioner's businesses. "Bar and restaurant owners are preparing for gun owners who want to pack heat everywhere they go."[30] The law will increase liability insurance rates and the legal risk and exposure for gun shootings as the law increases the probability of

[29] http://www.myeyewitnessnews.com/news/local/story/Guns-Not-Allowed-On-Beale-Street/PtxXy9GMJESnOuKirw4J3w.cspx ("Signs prohibiting guns will be posted inside every bar and restaurant on Beale Street. In addition to signs, metal detector wands will be used at every entrance. The move comes after state lawmakers passed the "Guns In Bars" bill, allowing gun permit holders to bring their weapons inside places that serve alcohol. It's a move Performa says will ensure the safety of patrons like Ray Rials.").

[30] http://www.wkrn.com/global/story.asp?s=10615468

the presence of guns at premises that serve alcohol and expressly contemplates gun shootings by Tennessee's 220,000 gun permit holders and permit holders in 19 reciprocity states. Bar owners who post notices will have no reasonable assurance thousands of permit holders will not brings guns to their premises as the law has decriminalized carrying guns into restaurants and bars that serve alcoholic beverages. Nor will bar owners who are operating at near or below 50% meal sales know whether their patrons are legally of illegally carrying firearms as the law only permits carrying firearms into restaurants who principal business is the service of meals.

VII. THIRD COUNT: SUBSTANTIVE DUE PROCESS VIOLATION

74. Petitioners re-allege and re-aver all of the allegations contained in the previous paragraphs.

75. Petitioners seek an injunction against the enforcement of the guns in bar law because it "is fundamentally arbitrary or irrational." *Lingle v. Chevron U.S.A. Inc.* 544 U.S. 528, 544 125 S.Ct. 2074 (U.S.,2005.). A government regulation "that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Id.* at 542. The guns in bar law has no reasonable or rational basis (fails rationality review) and fails strict, mid-level or heightened scrutiny required by the fundamental right to a workplace safe from recognized hazards to health and safety and the fundamental right to be free from gun violence and vigilante shootings in sensitive public places.

VIII. FOURTH COUNT: TOSHA & OSHA PREEMPTION

76. Petitioners hereby incorporates by reference the preceding paragraphs above.

77. The guns in bars law is preempted by OSHA's rules and regulations, and is therefore unenforceable under the Supremacy Clause contained in the United States Constitution. Article VI of the United States Constitution.

78. Congress imposed upon employers a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1).

79. OSHA developed an enforcement policy with regard to workplace violence as early as 1992 in a letter of interpretation that stated: "In a workplace where the risk of violence and serious personal injury are significant enough to be "recognized hazards," the general duty clause [specified by Section 5(a)(1) of the Occupational Safety and Health Act (OSH Act)] would require the employer to take feasible steps to minimize those risks [from guns]. Failure of an employer to implement feasible means of abatement of these hazards could result in the finding of an OSH Act violation." *See Standards Interpretations Letter,* September 13, 2006, available at 2006 WL 4093048.

80. OSHA has stated that employers may be cited for a general duty clause violation "[i]n a workplace where the risk of violence and serious personal injury are significant enough to be 'recognized hazards.'" Standard Interpretations Letter, December 10, 1992, available at:
http://www.osha.gov/SLTC/workplaceviolence/standards.html

81. Guns in bars and restaurants that serve alcohol are a "recognized hazard" to health, life and safety. The law is preempted and/or rendered unconstitutional by its conflict with the general duty safe place to work law mandated by state and federal law.

82. Petitioners aver that guns in work places that serve alcohol is a distinct, recognized hazard to wait staff, bartenders, employees, security staff and owners that is distinguishable from the general hazards of guns in, for example a parking lot at a factory workplace. *Contrast*: *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 C.A.10 (Okla ,2009).

IX. Fifth Count: Tennessee Constitution

83. Petitioners hereby incorporate by reference the preceding paragraphs above.

84. Petitioners aver the guns in bar law violates due process and the rights guaranteed by Art. I ,Secs. 1[31], 8[32], 17[33], 23[34] of the Tennessee Constintution. Petitioners further challenge the law as in violation of Art. XI, Sec. 8 of the Tennessee Constitution: "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, *nor to pass any law for the benefit of individuals inconsistent with the general laws of the land.*"

IX. Sixth Count: 42 U.S.C. § 1983: State-Created Danger

85. Petitioners hereby incorporate by reference the preceding paragraphs above.

---

[31] "That all power is inherent in the people, and all free governments are founded on their authority, and instituted *for their peace, safety,* and happiness;"

[32] "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges"or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

[33] "Suits may be brought against the state in such manner and in such courts as the Legislature may by law direct."

[34] "That the citizens have a right, in a peaceable manner, to assemble together for their common good"

86. Petitioners challenge the law as an unconstitutional deprivation of civil and constitutional rights under the "state-created danger" doctrine recognized under cases and law construing 42 U.S.C. § 1983.[35]

87. Petitioners have and will suffer injury, fear, emotional distress and a lack of job mobility or employment prospects by laws that place guns in Tennessee bars and restaurants that serve alcohol.

X. SEVENTH COUNT: 42 U.S.C. § 1983: STATE-CREATED VIGILANTISM

88. Black's Law Dictionary defines vigilantism as: "The act of a citizen who takes the law into his or her own hands by apprehending and punishing suspected criminals."[36]

89. The Tennessee guns in bar law encourages breaches of the peace and unlawful vigilantism. The statute was actually intended by lawmakers to justify vigilante use of deadly force. This subjects Petitioners, employees, patrons and members of the public to the clear and present danger of vigilante shootings in contravention to law and the rights guaranteed by the U.S. and Tennessee Constitutions. "[When private citizens are encouraged to act as "police agents," official lawlessness thrives and the liberties of all are put in jeopardy. Surely we should not now repeat the mistakes of a discredited era of our frontier past." *People v. Superior Court (Meyers)* 25 Cal.3d 67, 88, 598 P.2d 877 (Cal., 1979)

---

[35] *Henderson v. City of Chattanooga*, 133 S.W.3d 192, 211 (Tenn.Ct.App.,2003): "The next issue addressed in *Kallstrom I* [*Kallstrom v. City of Columbus*, 136 F.3d 1055 C.A.6 (Ohio),1998] was whether a state could be held liable for private acts of violence under 42 U.S.C. § 1983. Relying on the state-created-danger theory, the Sixth Circuit concluded that a state can be held liable for the actions of a private individual, such as a gang member, when the state's action places the individual victim "specifically at risk, as distinguished from a risk that affects the public at large." *Id.* at 1066. Owners and employees (wait staff, bartenders, servers, etc) are placed at direct and grave risk of guns in drinking establishments).

[36] BLACK'S LAW DICTIONARY, 1599 (8th ed.2004).

X. EIGHTH COUNT: FUNDAMENTAL DUE PROCESS RIGHT TO BE FREE FROM STATE-CREATED GUN VIOLENCE IN PUBLIC PLACES AT HIGH RISK FOR VIOLENCE FROM GUNS—GUNS WHERE ALCOHOL IS SERVED

90. Courts possess the inherent power to recognize *new* fundamental rights of liberty, life, safety or property so as to subject legislative acts to strict scrutiny judicial review. *See e.g.* Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (U.S.,2003) (recognizing new fundamental right of sexual privacy). Now that the U. S. Supreme Court has given recognition to an individual right to bear arms District of Columbia v. Heller, 128 S.Ct. 2783, 2817 (2008) the legal question arises as to the rights of *other citizens* to be free from guns at least in "sensitive places" especially where the presence of guns creates a high risk to public safety. Guns in bars is such a "sensitive places" situation warranting strict scrutiny.

91. "The mixture of firearms and alcohol is volatile. The danger does not necessarily arise from any evil intent on the part of the person possessing the firearm. The state's interest in keeping firearms out of establishments dispensing liquor is independent of any designs by the possessor of the weapon. *Cf.* State v. Soto, 95 N.M. 81, 82, 619 P.2d 185, 186 (1980) (purpose of § 30-7-3 is to protect innocent patrons); United States v. Margraf, 483 F.2d 708, 710 (3d Cir.1973) ("[M]ere presence of a weapon on board a plane creates a hazard because it may be seized and used by a potential hijacker."), vacated, 414 U.S. 1106, 94 S.Ct. 833, 38 L.Ed.2d 734 (1973)." State v. Powell, 115 N.M. 188, 848 P.2d 1115, (N.M.App.,1993)

92. The Constitution of South Africa, for example, recently recognized in Article 12 that "everyone has the right to be free from all forms of violence, from either private, or public sources."[37]

[37] Adrien Katherine Wing, *The South African Transition to Democratic Rule: Lessons for International and Comparative Law*, 94 AM. SOC'Y INT'L L. PROC. 254,259 (2000)(" Could such a clause be added

XI. NINTH COUNT: UNCONSTITUTIONAL VAGUENESS

93. The new law is unconstitutionally vague because the statute's definition of a restaurant, "the serving of such meals shall be the principal business conducted" provides no notice or opportunity to know what establishments are, or are not, covered by the statute.

94. The Tennessee Attorney General has *already* opined that such a principal or principal purpose limitation is unconstitutionally vague as applied to firearms carry by handgun owners. Tenn. Atty. Gen Op. 00-020 (February 15, 2000) (attached as Exhibit B)[38].

95. Under the new law criminal penalties (Class A misdemeanor) apply unless the firearm is carried by a permit holder into a "restaurant." Legislative proponents of the bill, including the Speaker of the House, have repeatedly asserted the new law is a "restaurant carry" law and not a "guns in bar bill", stating that the law

---

to the U.S. Constitution in some future era? Could it ever be expanded to cover guns, to ban the violence that plagues American society?).

[38] "2. It is the opinion of this office that there is no basis for limiting the statute's purview to places where alcohol is the sole or primary product sold. The primary rule of statutory interpretation is to give effect to the plain language of the statute. See Metropolitan Government of Nashville & Davidson County v. Motel Systems, Inc., 525 S.W.2d 840 (Tenn. 1975). Here, the statute is not unclear or contradictory, and its plain language permits no such limitation. Further, such a limitation could create vagueness and open the statute to constitutional challenge.

Applying the statute to establishments in which alcohol is the predominate product creates vagueness and ambiguity. How would one know whether alcohol is the establishment's sole or primary product so that he or she may temper his or her conduct accordingly? Ordinary people would be unable to understand where certain conduct is prohibited. See Kolender, 461 U.S. at 358, 103 S.Ct. at 1858.

In addition, law enforcement would face the same problem. It would be difficult for an officer to distinguish between legal and illegal conduct. This would, in turn, encourage arbitrary and discriminatory enforcement. It is the opinion of this office that the statute survives constitutional muster as it is written, and that the limitation proposed in question 2 might render the statute vulnerable to attack on vagueness grounds." by permitted handgun owners. Tenn. Atty. Gen Op. 00-020 (February 15, 2000)

only applies to restaurants and *not* bars. *See "Williams Blasts Media for 'Guns in Bars' Portrayal"* available at: http://bit.ly/yyBWT"*Guns-in-restaurants bill a vote for safety*", available at: http://bit.ly/T4LIY[39]

96. Senator Doug Jackson also stated on WAMB radio on July 2, 2009 that HCP (hand gun permit) holders should not take their weapons into establishments that do not serve meals as their principal purpose (51%) http://bit.ly/DFUCn; http://www.bobpopegunshows.com/

97. On July 14, 2009, however, HCP (handgun permit holders) holders will have no way of knowing whether the establishment they are entering serves meals as its "principal business." The new law is therefore unconstitutionally vague because it is a Class A misdemeanor for a permit holder to carry a gun into a place that serves alcohol that is not exempted as a restaurant. Permit holders will have no notice or way to determine if an establishment is a restaurant or a bar (whether its principal purpose is serving meals) as there is no distinction by licensing laws law or notice. *Compare* Tex. Govt. Code § 411.204.[40]

---

[39] "When this bill takes effect on July 14, law-abiding citizens who undergo a safety course and criminal background check to obtain a handgun carry permit will be allowed to carry in restaurants like Chili's that happen to serve alcohol. . . . Contrary to popular belief, the bill does not allow firearms into bars. The principal business conducted by the establishment must be to serve meals, not to serve alcohol." : http://bit.ly/T4LIY

[40] Tex. Govt. Code § 411.204. **Notice Required on Certain Premises**

(a) A business that has a permit or license issued under Chapter 25, 28, 32, 69, or 74, Alcoholic Beverage Code, and that derives 51 percent or more of its income from the sale of alcoholic beverages for on-premises consumption as determined by the Texas Alcoholic Beverage Commission under Section 104.06, Alcoholic Beverage Code, shall prominently display at each entrance to the business premises a sign that complies with the requirements of Subsection (c).

(c) The sign required under Subsections (a) and (b) must give notice in both English and Spanish that it is unlawful for a person licensed under this subchapter to carry a handgun on the premises. The sign must appear in contrasting colors with block

98. This is a criminal statute and the fear of enforcement in a vague manner is unconstitutional. The law is unconstitutional on its face *and* as it is likely to be applied.

99. As a penal statute it must be strictly construed against the state. The permit holder acts at his or her peril with the mere armed entry into an "alcohol-serving, non-restaurant." The permit holder simply cannot know if it is a restaurant or a non-restaurant and the risk of a sanction is high.

100. The law is vague and unconstitutional in three distinct ways: a) a permit holder's threat of criminal prosecution; b) a business owner's loss of business if prospective customers guess wrong, and 3) the public who enter establishments at their unknown peril.

101. Petitioners reiterate that by law in Tennessee in order to serve liquor for on premises consumption (including establishments such as Tootsies Orchid Lounge, Graham Central Station, bars on 2nd Ave, Broadway and Beale Street) they must be licensed as "restaurants" under T.C.A. 57-4-102 (27)(A) . The clear (in fact strident) statements by lawmakers that the new law does not permit permitted handgun owners to carry firearms in "bars" (a term undefined under the law or any Tennessee statute or regulation) creates unconstitutional vagueness.

102. The due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution additionally requires that a statute be sufficiently precise to provide both fair notice to citizens of prohibited activities and minimal guidelines for enforcement to police officers and the

---

letters at least one inch in height and must include on its face the number "51" printed in solid red at least five inches in height. The sign shall be displayed in a conspicuous manner clearly visible to the public.

courts. Due process of law requires, among other things, notice of what the law prohibits. Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, (1972). Criminal statutes "must 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited ....'" *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). A statute is unconstitutionally **vague**, therefore, if it does not serve sufficient notice of what is prohibited, forcing "'men of common intelligence [to] necessarily guess at its meaning.'" *Davis-Kidd*, 866 S.W.2d at 532 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973)); *see also Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 746 (Tenn. 1979). Here police officers may arrest permit holders who carry in "bars" (according to the legislators who passed and advocated the law) if the police believe the establishment's principal business is not to serve meals. How is the officer to know? This is unconstitutional vagueness. *See* Tenn. Atty. Gen. Op. No. 09-69 (May 04, 2009).[41]

XI. Attorneys' Fees

103. Petitioners request and are entitled to an award of attorneys' fees and litigation-related costs pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1920. 42 U.S.C. § 1983 prohibits the State of Tennessee from depriving Petitioners of "rights, privileges and immunities secured by the constitutional laws" in the United States.

XII. Request for Relief

[41] "HB 1120 [prohibiting "loitering" "for a period of time" where minors congregate] if enacted, would be subject to challenge because it would leave the question of whether a violation has occurred to the subjective judgment of the officer on the scene and would thus allow or invite arbitrary conduct by police officers."

104. Based upon existing precedent and law, Petitioners have a substantial likelihood of success on the merits. Furthermore, there will be an immediate and irreparable harm, loss, injury and threat of injury and breaches of public safety should the guns in bar law take effect on July 14, 2009 with over 220,000 gun permit holders and permit holders in 19 reciprocity states bringing guns into drinking establishments. Petitioners seek, pursuant to Rule 65 of the Tennessee Rules of Civil Procedure, an immediate restraining order and in due course a temporary and permanent injunction to enjoin the enforcement or application of Public Law 339 and an order that the law be declared, pursuant to Rule 57 of the Tennessee Rules of Civil Procedure, a state-created public nuisance, unlawful, in violation of and preempted by the general duty safe-place-to work law, unconstitutional, void and unenforceable. Petitioners request after all the proceedings are completed that there be judgment rendered in their favor and against Robert Cooper, Jr., in his official capacity as Tennessee Attorney General ordering him to refrain from applying or enforcing Public Chapter 339. Petitioners further seek attorneys' fees and litigation costs pursuant to 42 U.S.C. § 1998 and 28 U.S.C § 1920 and the award of any other relief as this Court deems just and proper.

Respectfully Submitted,

LAW OFFICES OF DAVID RANDOLPH SMITH
& EDMUND J. SCHMIDT III

By: _____
David Randolph Smith, TN Bar #011905
1913 21st Avenue South
Nashville, Tennessee 37212
Phone: (615) 742-1775
Fax: (615) 742-1223
Web: http://www.drslawfirm.com
e-mail: drs@drslawfirm.com

OF COUNSEL:

By: Adam Dread (BPR)

Adam Dread , TN Bar #023604
Durham & Dread, PLC
1709 19th Avenue South
Nashville, TN 37212
(615) 252-9937 phone
(615) 277-2277 fax

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been hand-delivered on 6th July 2009:

Michael Meyer, Esq.
Assistant Attorney General
Tennessee Attorney General Office
425 5th Ave N # 2
Nashville, TN 37243-3400

David Randolph Smith

STATE OF TENNESSEE

PUBLIC CHAPTER NO. 339

VETOED BY THE GOVERNOR

HOUSE BILL NO. 962

By Representatives Todd, McCord, Tindell, Evans, Fincher, Watson, Faulkner, Eldridge, Rowland, McCormick, Bass, Hackworth, Curt Cobb, Carr, Matheny, Mumpower, Floyd, Bell, Lollar, Casada, Rich, Lynn, Harrison, Shipley, Dean, Curtis Johnson, Phillip Johnson, Niceley, Tidwell, Shepard, Hill, Ramsey, Halford, Haynes, Swafford, Maggart, Hensley, West, Montgomery, Dennis, Harry Brooks, Matlock, Dunn, Hawk, Lundberg, Weaver, Roach, Ford, Moore, Fraley

Substituted for: Senate Bill No. 1127

By Senators Jackson, Norris, Gresham

AN ACT to amend Tennessee Code Annotated, Title 39, Chapter 17, relative to firearms.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 39-17-1305(c), is amended by adding the following language as a new, appropriately designated subdivision:

(3)

(A) Authorized to carry a firearm under § 39-17-1351 who is not consuming beer, wine or any alcoholic beverage, and is within the confines of a restaurant that is open to the public and serves alcoholic beverages, wine or beer.

(B) As used in this subdivision (c)(3), "restaurant" means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served and where meals are actually and regularly served, such place being provided with adequate and sanitary kitchen and dining room equipment, having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests. At least one (1) meal per day shall be served at least five (5) days a week, with the exception of holidays, vacations and periods of redecorating, and the serving of such meals shall be the principal business conducted.

SECTION 2. This act shall take effect on June 1, 2009, the public welfare requiring it.

PASSED: May 14, 2009

EXHIBIT

A

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

February 15, 2000

Opinion No. 00-020

Constitutionality of Tenn. Code Ann. § 39-17-1305.

QUESTIONS

1. Is Tenn. Code Ann. § 39-17-1305, which prohibits the possession of firearms where alcoholic beverages are served or sold, constitutional?

2. Should the statute's purview be limited to places where alcohol is the sole or primary product?

OPINIONS

1. Yes, Tenn. Code Ann. § 39-17-1305 is constitutional.

2. No, limiting the statute's purview to places where alcohol is the sole or primary product would likely create vagueness and thus open the statute to constitutional attack.

ANALYSIS

1. A fundamental component of both the Due Process Clause of the United States Constitution and the law of the land clause of the Tennessee Constitution is that a law is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294 (1972); *State v. Wilkins*, 655 S.W.2d 914, 915 (Tenn. 1983). The Supreme Court has explained that vague laws offend several important values:

> First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Grayned, 408 U.S. at 108, 92 S.Ct. at 2294. The more important of these two factors is the presence of minimal guidelines to direct law enforcement. *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1858 (1983). Nevertheless, the Supreme Court has warned:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Colton v. Kentucky, 407 U.S. 104, 111, 93 S.Ct. 1953, 1957 (1972); *State v. Strickland*, S.W.2d 912, 921 (Tenn. 1975).

Tenn. Code Ann. § 39-17-1305 makes it "an offense to possess a firearm on the premises of a place open to the public where alcoholic beverages are served or in the confines of a building where alcoholic beverages are sold."[1] Further, the Sentencing Commission's comment on the statute provides that this section "prohibits possession of weapons in areas adjacent to where alcoholic beverages are served, such as parking lots." Tenn. Code Ann. § 39-17-1305 Sentencing Commission Cmts. (1997). The phrases "premises of a place" and "confines of a building" are not vague. The terms, "sold" and "served," are also self-explanatory. The premises of a place open to the public, including its parking lot, where alcohol is served, or in the confines of a building where alcoholic beverages are sold are off limits to those carrying firearms.

An ordinary citizen could understand that the above conduct constitutes an illegal offense. Anyone not conducting themselves accordingly, outside of the few exceptions enumerated in the statute, would be subject to the penalties prescribed in the statute.

Furthermore, if a law enforcement officer came upon one possessing a firearm at any premises open to the public, including a parking lot, where alcohol is served, or in the confines of a building where alcoholic beverages are sold, the statute would enable such officer to make an arrest. No discretion or arbitrary enforcement is involved in interpreting and administering the statute; all persons violating the statute would be treated the same. In addition, all establishments serving or selling alcohol would be treated the same. It is the opinion of this office that the statute is not void for vagueness and is, thus, constitutional.

---

[1]Tenn. Code Ann. § 39-17-1305 (1997) is entitled "Possession of firearm where alcoholic beverages are served or sold" and provides as follows:

> (a) It is an offense for a person to possess a firearm on the premises of a place open to the public where alcoholic beverages are served or in the confines of a building where alcoholic beverages are sold.
> (b) A violation of this section is a Class A misdemeanor.
> (c) The provisions of subsection (a) shall not apply to a person who is:
> (1) In the actual discharge of official duties as a law enforcement officer, or is employed in the army, air force, navy, coast guard, or marine service of the United States or any member of the Tennessee national guard in the line of duty and pursuant to military regulations, or is in the actual discharge of duties as a correctional officer employed by a penal institution; or
> (2) On the person's own premises or premises under the person's control or who is the employee or agent of the owner of the premises with responsibility for protecting persons or property.

Requested by:

Honorable Roy Herron
State Senator
P.O. Box 5
Dresden, TN 38225

EXHIBIT "55"

77536

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESEE *ex rel.* RANDY RAYBURN; JOHN (JANE) DOES NOS. 1-13; *et al.*,	)	
Petitioners,	)	
vs.	)	**Civil Action No. 09-1284-I**
ROBERT E. COOPER, JR., TENNESSEE ATTORNEY GENERAL and THE STATE OF TENNESSEE	)	**CHANCELLOR CLAUDIA BONNYMAN**
Defendants.	)	

ORDER

This cause came to be heard on November 20, 2009 on *Petitioners' Motion for Partial Summary Judgment* and on *Defendant's Cross- Motion for Judgment on the Pleadings and/or for Summary Judgment.*

The Court heard oral argument on the motions and considered the briefs, affidavits and other filings submitted to the Court by the parties.

After oral arguments the parties agreed that The State of Tennessee should be added as a party-defendant to this action.

Accordingly it is **ORDERED** that the State of Tennessee is added as a party-defendant in this case.

For the reasons set forth in the Excerpt of the Proceedings, attached hereto and fully incorporated herein, the Court **GRANTS** *Petitioners' Motion for Partial Summary Judgment* as to the Ninth Count in *Petitioners' Second Amended Complaint* and finds T.C.A. § 39-17-1305(c)(3) unconstitutional because the language in T.C.A. § 39-17-

1305(c)(3)(B) "and the serving of such meals shall be the principal business conducted" is void for vagueness.

For the reasons set forth in the Excerpt of the Proceedings, attached hereto and fully incorporated herein, the Court **DENIES** *Petitioners' Motion for Partial Summary Judgment* on the two other grounds sought by Plaintiffs: TOSHA and OSHA preemption (Fourth Count) and unconstitutional delegation of police and legislative power (Tenth Count) and correspondingly **GRANTS** *Defendant's Cross- Motion for Judgment on the Pleadings and/or for Summary Judgment* as to grounds seven (unconstitutional delegation of police and legislative power) and eight (TOSHA and OSHA preemption). The Court **DENIES** *Defendant's Cross- Motion for Judgment on the Pleadings and/or for Summary Judgment* as to all other grounds.

Pursuant to Tenn. R. Civ. P. 54.02 the Court **ORDERS**, determines and finds that there is no just reason for delay and directs that this judgment is a final judgment.

I HEREBY CERTIFY THAT THIS IS A TRUE COPY
OF ORIGINAL INSTRUMENT FILED IN MY OFFICE
THIS 5th DAY OF October 2010
CRISTI SCOTT, CLERK & MASTER
BY B. Welch
DEPUTY

CHANCELLOR CLAUDIA C. BONNYMAN

On page 12 of the bench ruling the Court addressed four issues, not two. The third issue (numbered as 3) was a [illegible] [illegible] omitted. CB

The Court has made corrections in the bench ruling transcript.

The issue of which parties have standing is not of paramount concern today since the questions are of law. Further, this order does not dispose of all issues in the case and certain parties have standing for some counts and not for others. CB

*see p?

APPROVED FOR ENTRY:

LAW OFFICES OF DAVID RANDOLPH SMITH & EDMUND J. SCHMIDT III

By: David R. Smith

David Randolph Smith
TN Bar #011905
1913 21st Avenue South
Nashville, Tennessee 37212
Phone: (615) 742-1775
Fax: (615) 742-1223

TENNESSEE ATTORNEY GENERAL

By: Michael Meyer (w/ agreement by DRR)

Michael Meyer, TN Bar #
Steven A. Hart, TN Bar #
Assistant Attorney General
425 5th Avenue North # 2
Nashville, TN 37243-3400
Phone: (615) 741-3505
Fax: (615) 741-2009

Attorneys for Robert E. Cooper, Jr., Tennessee Attorney General, and State of Tennessee

Adam Dread , Esq.
DURHAM & DREAD, PLC
1709 19th Avenue South
Nashville, TN 37212

William T. Cheek, III, Esq.
BONE MCALLESTER NORTON PLLC
511 Union Street, Suite 1600
Nashville, TN 37219

David L. Raybin, TN Bar #03385
HOLLINS, WAGSTER, WEATHERLY & RAYBIN, P.C.
Suite 2200 . Fifth Third Center
424 Church Street
Nashville, Tennessee 37219

Attorneys for Petitioners

* The Court does not have to remove a portion of the amendment and at the same time, effectuate the intent of the legislature. C. Bivens

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been mailed by first-class mail on this 24th day of November, 2009:

Michael Meyer, Esq.
Steven A. Hart, Esq.
Assistant Attorney General
Tennessee Attorney General Office
425 5th Ave N # 2
Nashville, TN 37243-3400

Larry D. Woods, Esq.
WOODS & WOODS
P.O. Box 128498
Nashville, TN 37212

Patricia Head Moskal, Esq.
Bradley Arant Boult Cummings
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, TN 37203

Jonathan C. Stewart, Esq.
1812 Broadway
Nashville, TN 37203

David Randolph Smith

In The Matter Of:

State of Tennessee, ex rel., Randy Rayburn, et al v. Robert E. Cooper, Jr., Tennessee Attorney General

---

Bench Ruling of Chancellor Claudia Bonnyman
November 20, 2009

Vowell & Jennings, Inc.
214 Second Avenue North
Suite 207
Nashville, Tennessee 37201
615-256-1935

VJ VOWELL AND JENNINGS

Original File MELROSE.TXT

With Word Index

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE, ex rel., RANDY RAYBURN, JOHN (JANE) DOES NOS. 1-13, AUSTIN RAY, and FLANEUR LLC d/b/a MELROSE, Plaintiffs,	)	
vs.	)	CIVIL NO. 09-1284-I
ROBERT E. COOPER, JR., TENNESSEE ATTORNEY GENERAL, Defendant.	)	

BENCH RULING OF:

CHANCELLOR CLAUDIA BONNYMAN

November 20, 2009

VOWELL & JENNINGS, INC.
Court Reporting Services
214 Second Avenue North
207 Washington Square Building
Nashville, Tennessee 37201
(615) 256-1935

APPEARANCES:

For the Plaintiffs:

DAVID RANDOLPH SMITH, ESQ.
Smith & Schmidt
193 21st Avenue South
Nashville, Tennessee 37212
Phone: 615-742-1775
Fax: 615-742-1223
drs@drslawfirm.com

and

DAVID L. RAYBIN, ESQ.
Hollins, Wagster, Weatherly & Raybin, PC
Suite 2200, Fifth Third Center
424 Church Street
Nashville, Tennessee 37219
Phone: 615-256-6666
Fax: 615-254-4254
draybin@hwylaw.com

and

ADAM DREAD, ESQ.
Durham & Dread, PLC
1709 19th Avenue South
Nashville, Tennessee 37212
Phone: 615-252-9937
Fax: 615-277-2277
durhamandddread.com

and

WILLIAM T. CHEEK, III, Esq.
BONE, McALLESTER, NORTON, PLLC
Nashville City Center, Suite 1600
511 Union Street
Nashville, Tennessee 37219
Telephone: 615-238-6300
Fax: 615-238-6301
www.bonelaw.com

and

ALLEN N. WOODS, ESQ.
Law Office of Allen N. Woods
1600 Division Street
Nashville, Tennessee 37203
Telephone: 615-252-2315

For the Defendant:

MICHAEL A. MEYER, ESQ.
Assistant Attorney General
Law Enforcement & Special Prosecution Division
2nd Floor, CHB
425 5th Avenue North
Nashville, Tennessee
Telephone: 615-741-4082
Fax: 615-532-4892
michael.meyer@ag.tn.gov

and

LYNDSAY FULLER SANDERS, ESQ.
Assistant Attorney General
Law Enforcement & Special Prosecution Division
2nd Floor, CHB
425 5th Avenue North
Nashville, Tennessee
Telephone: 615-741-4087
Fax: 615-532-4892

For the Amicus Curiae:

PATRICIA HEAD MOSKAL, ESQ.
Bradley, Arant, Boult, Cummings
Rounabout Plaza
1600 Division Street, Suite 700
Nashville, Tennessee 37203
Telephone: 615-244-2582
Fax: 615-252-6369
pmoskal@babc.com

and

JONATHAN C. STEWART, ESQ.
1812 Broadway
Nashville, Tennessee 37202

INDEX OF EXHIBITS

PROCEEDINGS

THE COURT: Lawyers and parties, this is a bench ruling, and it will include all my definitions and judgment of the law. But when cases were clear as that, in case that it's probably going to go to the Court of Appeals, then we make every effort we can to render a bench ruling rather than taking things under guidelines.

This lawsuit was brought by the plaintiffs seeking a declaratory judgment that legislation passed in 2009, and codified at TCA Section 39-17-1305(c), is unconstitutional or otherwise illegal. The plaintiffs -- some of the plaintiffs are citizens who are gun permit holders. Other plaintiffs are restaurant owners and wait staff at restaurants. All the plaintiffs moved for a a partial summary judgment that the statute or the section of the statute was unconstitutional because it's void for vagueness. And the Attorney General filed a cross motion to dismiss the void for vagueness claims brought by these plaintiffs. The plaintiffs and the State agree there are no material facts in dispute, and the question is one of law. There are other

issues in the overall case, but these other issues are not the subject of summary judgment.

Because the question is one of law, the Attorney General by intent did not file a statement of undisputed facts to support his cross judgment, and also the State, who's been added as a defendant in this general comment or statement of the case.

I don't want the Court of Appeals to be looking for -- to do what I did, which was to look for statements of undisputed facts from all the parties because they're just not there. There is a reason why they're not there. The Attorney General responded to the plaintiffs' statement of undisputed facts that the statements were either opinions, and not fact; or were an interpretation of the law, and not fact; or were a legal argument policy statement, and not fact.

The first plaintiffs and the intervening plaintiffs advanced an identical statement; that is, they advanced a statement of undisputed fact that were the same statements. So the time spent by the Court in understanding the facts in the case are limited to facts which

set the context or the background for the lawsuit.

Now the Rayburn plaintiffs, which included Mr. Randy Rayburn and John Doe plaintiffs, also moved for summary judgment based on their theory that there's been an unconstitutional delegation of police power; that is, that the statute creates an unconstitutional delegation of police power in that the restaurants can opt out by -- in part opt out by placing signs in their -- on their private properties. And the Rayburn plaintiffs and intervening plaintiffs -- I'm sorry -- the Rayburn plaintiffs and the John Doe plaintiffs also take the position that there is a preemption, that OSHA preempts this statute under its general duty clause.

The issues in the case: The plaintiffs, that is the John Doe plaintiffs 10 and 11, state that the statute is so vague, that it offends due process guarantees in the federal and statute constitutions.

First, the plaintiff gun permit holders contend because they cannot know which places serving alcohol, wine, or beer, meet

the definition of restaurant under the act, there's no fair warning about what is prohibited, so that people carrying guns lawfully may act accordingly.

Second, say the plaintiffs, the State's failure to provide a definition of "restaurant," which can be known, invites the arbitrary and discriminatory enforcement of a criminal law. In other words, the police cannot know what place is a restaurant under the act.

The Melrose plaintiffs contend that they meet the definition of restaurant under TCA 39-17-1305; and they face the possibility that police may charge them with aiding and abetting if they serve alcohol to a permit holder who carries a gun. The Melrose plaintiffs contend the option of posting a sign, which is found at TCA 39-17-1359, may not protect them from prosecution. The Melrose plaintiffs adopt the John Doe plaintiffs' arguments of vagueness.

The remaining plaintiffs, Mr. Rayburn and the other John Does, first raise the void for vagueness issues from the perspective of wait staff and restaurant owners. They move for a partial summary judgment based upon the

unconstitutional delegation of police powers and preemption by virtue of Tennessee's OSHA's general duty clause.

The Rayburn plaintiffs contend there's no fair warning to their customers, to them, or to customers; and they're exposed to arbitrary prosecution by law enforcement.

The Rayburn plaintiffs advance ~~that~~ the idea that no-gun postings option leaves it to restaurant owners whether to ban guns where alcohol is served, even though in general, firearms are not allowed where alcohol is served.

Last, the Rayburn plaintiffs contend that, as I've stated before, that OSHA requires a safe work environment, and it trumps TCA 39-17-1305.

The Attorney General seeks dismissal of the plaintiffs' claims on summary judgment because Chancery Court does not have subject matter jurisdiction over declaratory judgment cases which challenge validity of a criminal law. Only the -- according to the State, only the Criminal Courts or Circuit Courts with the criminal jurisdiction have

subject matter jurisdiction, and that these courts of equity do not.

The Attorney General also asserts that the plaintiffs' lawsuit is not justiciable because the entire controversy depends upon hypothetical situations in theory rather than actual legal issues. The restaurant owners, according to the State, may avoid any possible problem by opting for a no-weapons policy on their private properties. The owners' fear of prosecution, according to the State and the Attorney General, is not a real fear because if the owner does not reasonably know a gun permit holder has a gun, a charge of aiding and abetting is not proper or appropriate.

The plaintiffs who wish to carry weapons into restaurants selling alcohol will invalidate a law and therefore, be unable to carry at all times where alcohol is served. And the State makes the argument that this is an illogical conclusion if you believe that the plaintiffs have a true motivation.

The Attorney General seeks dismissal for another reason. The district attorney generals are not parties; and the

declaratory judgment statute
declaration of statement provides that all persons who have an interest must be made parties.

The Attorney General and the State have no authority to enforce TCA 37-17-1305; nor to interfere with the district attorney generals' prosecutorial discretion. The Attorney General and the State also take the position that 39-17-1305 is not vague. All the criteria for a restaurant in the definition as the statute are knowable by the ordinary citizen. If a permit holder has a doubt, he should not carry his weapon. As a practical matter, a mistake by a permit holder is not criminal intent; and the gun carrier would not be prosecuted.

Now the Attorney General also -- and the State also assert that TCA 39-17-1305 is not preempted by OSHA. There's no authority otherwise. The Attorney General and the State contend the option to post "no weapons" at TCA 39-17-1305(9) is proper because it only addresses private property, and not ~~a~~ public thoroughfares.

And last, the State contends that

if any part of the restaurant definition is unconstitutionally vague, and it violates due process; and here the Attorney General and the State were looking specifically at the last criteria for a restaurant; that is that the restaurant be primarily in the business of serving food, or getting its income from food — then the Court can remove that offending provision without altering the intent of the state legislature.

Now, of all of those issues that the Court has summarized that the parties are advancing, the issues that the Court will decide today are: (1) Is there subject matter jurisdiction? (2) Is TCA 39-17-1305(c) unconstitutional because it's void for vagueness; and therefore, it violates the due process clauses of the constitution? Or four: does OSHA preempt the state statute? Five: Does the statute allow the unconstitutional delegation of state police powers?

And the Court summarizes its decision here that the Court finds it does have subject matter jurisdiction in the case. The Court finds that TCA 39-17-1305(c) does violate

the due process rights of the plaintiffs, generally, the plaintiffs, gun permit holders because the language, "the serving of such meals shall be the principal business conducted," cannot be known to the ordinary citizen. Inquiry would not be satisfactory or helpful.

The Court finds the plaintiffs' other theories are not supported by authority such that the theories have merit; and the motion for summary judgment or a partial summary judgment is denied as to the other plaintiffs' theories.

As to the findings of fact, there are no material facts in dispute. The facts available to the Court which bear upon the legal issues are whether the definition of "restaurant" in TCA-39-17-1305 can be easily known or can be known at all. In addition, certain of the plaintiffs have shown -- and these are the ~~general~~ permit holders -- have shown that they intend to carry a gun into restaurants which serve alcohol. And the officials charged with the regulations' enforcement, that is a police chief or sheriff, has threatened to use sanctions against persons

who violate TCA 39-17-1305.

As to the principles of law in the case, rather than read legislation into the record, the Court will attach to a bench ruling a copy of TCA 39-17-1305 and TCA 39-17-1359 as Collective Exhibit 1; and I'll make those available to the court reporter.

And then as to the principles of law, as a fundamental component of both the due process clause of the United State Constitution and the Law of the Land clause of the Tennessee Constitution is that a law is void for vagueness if its prohibitions are not clearly defined. Gray Med vs. City of Rockford, 408 US 104, a 1972 U.S. Supreme Court case. And the Court also cites State vs. Wilkins, 655 SW 2nd, 914, a Tennessee Supreme Court case, 1983.

The Supreme Court has explained that vague laws offend several important values. First, because we assume when a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may ~~attract~~ trap the

innocent by not providing fair warning.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. And this is the citation from Gray Med at page 108.

The more important of these two factors is the presence of minimal guidelines to direct law enforcement. And here the Court is citing Collinder vs. Lawson, 461 US 352, a 1983 U.S. Supreme Court case. Nevertheless, the Supreme Court has warned the root of the vagueness doctrine is a rough idea of fairness. It's not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes, both general enough to take into account a variety of human conduct, and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. This is from Colton vs. Kentucky, 407, US 104, a U.S. Supreme Court case decided in 1972. And the language is also stated or quoted in State vs. Stricklin, a southwest -- a Tennessee Supreme Court case in 1975.

As to the subject matter jurisdiction, which I really should have evaluated first because if the Court doesn't have subject matter jurisdiction, the void for vagueness analysis doesn't matter. But going slightly backwards, I did do some work, like all the parties did, to find enough cases -- reported cases in Tennessee that set a pattern, which we would like to have a case that just sets out like a law that says that a Chancery Court sitting as a ~~board~~ Court of equity, which it does, has subject matter jurisdiction over declaratory ~~action~~ judgment actions which evaluate criminal laws. There are plenty of cases in Tennessee which say that the Chancery Court must not enjoin the enforcement of criminal statutes; and I think all the lawyers in the room realize that that's the case, but looking for and finding a case which just says, "Yes, Chancery Court does have jurisdiction on declaratory judgment actions to evaluate criminal laws," the way this Court came to its conclusion that it has subject matter jurisdiction is by looking at four cases and the ALR. And those cases are Parlor vs. Buckner, in

which the Chancery Court entertained a lawsuit which looked at whether it can determine the constitutionality of laws declaring the operation of poolrooms as unlawful under the declaratory judgment act. And although there's some language in this case, which discusses whether there were property rights involved, which would be a special case; the general language in the case seems to indicate that the property rights are not the real issue; that the real issue is whether the plaintiffs have a special interest in the question of the constitutionality of a penal statute distinct from the interest of the public generally. And the Court stated in that case: "We are of the opinion that a person so situated is entitled to bring and maintain an action for the determination of the proper construction or constitutionality of such statutes under the provisions of a declaratory judgment act." And the bill in the present case, which this Court must resolve in Chancery Court, was properly filed against the sheriff in view of the development of the bill, that the sheriff had given notice of his intent to proceed against

the complainant. And then this Court goes on to say that the Chancery Court cannot issue an injunction, but it does appear that the Supreme Court in this case held that the lawsuit was properly brought in the Chancery Court; and that was a 1927 case.

And then the next case is -- that this Court is relying on to find subject matter B jurisdiction is Clinton Books vs. City of Memphis, in which Justice Janice Holder held that the Circuit Court acting as a court of equity, lacked jurisdiction to enjoin enforcement of the criminal statute, but she sent the case back for the Circuit Court to rule on the merits of the business' constitutional claims. And I don't know why she would have sent it back to Circuit Court, or that the Supreme Court would have sent it back to Circuit Court, if the Circuit Court had not had jurisdiction over the question. And what the record needs to show is that in Clinton Books vs. City of Memphis, which is a 2006 Supreme Court case -- a state Supreme Court case, the Circuit Court was -- did not have original jurisdiction over criminal cases. And the

Circuit Court in many ways exercised in Clinton Books the same jurisdiction that this Chancery Court is exercising today. It has to be noted that the city of Memphis and Shelby County has a separate criminal court. So now we see that a civil court of record has subject matter jurisdiction for purposes of getting the case sent back to them to ~~the~~ CB rule on the merits of a declaratory judgment addressing a criminal statute.

The next case the Court looked at to determine subject matter jurisdiction is Campbell vs. Sundquist. And in that case, the Circuit Court in Davidson County addressed a criminal ~~case~~ statute CB; did not issue an injunction. And I think he was -- I don't believe Judge ~~Kirtz~~ Kurtz CB was asked to issue an injunction, but in that case, the Court of Appeals said that -- addressed the merits of a declaratory judgment action. And Appeals Court Judge ~~Howell~~ Cantrell CB did not believe -- did not necessarily say that the Circuit Court had subject matter jurisdiction, but the other judges did; and that's the law of the land.

And then the last case is Grubb

vs. Mayor and Alderman of Morrison. This is a 1947 case. And you'll see if I didn't have it in here. Well, this says Chancery Court had jurisdiction of a suit by the holders of their permit for a declaratory judgment as to the ~~validity~~ legality of a city ordinance prohibiting the sale of beer, and which did not involve a property right in 1947, because the property right was not recognized at that time. It's been recognized since. But at that time, the chancellor was found to have jurisdiction over that particular declaratory judgment. And those are the cases on which the Court is relying.

In ~~re~~ ALR, 10 ALR 3rd, 727, throws some light on why it is that Tennessee doesn't have maybe a bright-line case addressing this subject. And that ALR article analysis is: "It now seems reasonably well settled that in an otherwise proper case, declaratory relief may be granted notwithstanding the fact that the declaration is as to validity of a statute having criminal ~~and~~ or penal provisions. And it seems ~~have~~ clear under the modern practice in most courts that declaratory relief will not denied merely because the petitioner, by

violating the statute or ordinance in question, to have the issue of guilt tried out in a criminal prosecution. In the earlier cases following general attitudes through the equity courts, the view seemed to be that a declaration would be readily given where property rights were threatened than where purely personal rights were involved. But modern trend seems to be toward the protection of the personal, as well as property rights. Accordingly, where the petitioner is threatened with an unconstitutional deprivation of either property or personal rights and to remit him to the ordinary processes of criminal law would, under the circumstances, deprive him of a speedy and an effective remedy. And it seems that the courts will now readily entertain an action for declaratory relief. However, the petition must present actual and justiable controversy, the case must be one in which the declaration will be effective to settle the question, and terminate the controversy, and all the parties whose rights are substantially and directly affected by the declaration must be before the court." So it's not that it's free-for-all, but

it does appear that Chancery has subject matter jurisdiction of this case.

As to the arguments and applying the law to the case, under current law, firearms are prohibited where alcohol is served. And this is at 39-17-1305(a). As currently written, the law is clear and unambiguous as "currently" meaning before the exception was presented. It's easily understood and easily applied by business owners and authorized owners of firearms. This statute in its section (a) makes it a criminal offense for a patron to carry a firearm into any establishment that serves alcohol. While it remains unlawful in Tennessee to carry firearms into establishments that serve alcohol, the new provisions of section (c) of this same statute creates a new exception that allows persons who are authorized to carry firearms into restaurants so long as that person is not consuming alcohol, beer, or wine. The exception, which is section (c) of the statute, replaces what historically has been a bright-line rule with the new exception fraught with ambiguity. The new exception of the prohibition against firearms where alcohol is served creates

ambiguity where none existed before, and is vague on its face in that it fails to satisfy the constitutional standards of fair warning and fair enforcement.

Law enforcement officials are no better suited to make the difficult judgment call as to whether the serving of meals constitutes the principal business of an establishment, such that the presence of a handgun on the premises would be legal or illegal. The lack of clarity, an explicit standard, specifically directed to whether the restaurant is in the business of primarily serving of meals -- the principal business of serving meals, fails to discuss either fair enforcement standards as well.

And as further analysis, the Court finds that the other criteria in the statute, which have to do with determining whether the restaurant is open for serving meals five days a week, or serving one meal a day, it's not difficult for the ordinary person or patron to discern because most restaurants, which serve food, want the public to know that they serve food; and advertise the service of food in

writing on the walls, in writing on the menus, in writing in ads. And the Court finds and believes that the ordinary citizen can make inquiry of restaurant workers -- or excuse me -- restaurant worker -- entity workers as to the service of meals, and the frequency of the service of meals; and that this information can be fairly, easily known to the patron. However, the language that the Court has pointed out as being unfairly vague cannot be easily known, and may never be known by a patron as a matter of fact.

And going back now to the issues in this case: Does the Chancery Court have subject matter jurisdiction over this declaratory judgment act which addresses a criminal statute? And the Court has found that, yes, the Chancery Court does have subject matter jurisdiction.

Is TCA 39-17-1305 unconstitutional because it's void for vagueness? And the Court finds here that the specific language that the Court has focused upon; that is that the business is in "the principal business of the serving of meals or food" is void for vagueness.

The next issue, does OSHA preempt this state statute? And the Court finds here that there is a failure of authority for such a theory.

Number five: Does the statute allow the unconstutitonal delegation of the state police power? And here the Court agrees with the State and the Attorney General that there is a distinction between the facts in this case, which allow the private property owner to regulate its own private -- exclusively private space; and that the cases cited by the plaintiffs raise the issue of private owners regulating and managing public space when, in fact, the law at issue in those cases was that -- was there to enhance the public welfare, and to protect the public.

And lawyers, I'm just asking the plaintiffs to order just the bench ruling; to file that bench ruling; and then please submit a judgment. And I think this should be a -- I think probably all of you will agree, it would be a Rule 54. Do you think? I sort of got the impression because you filed a partial summary judgment motion, and the State responded; that

you would want this issue to be examined ~~for~~ before the rest of the case.

MR. SMITH: Yes, your Honor. We can respond in the final order.

THE COURT: Okay. I think maybe one of you mentioned that to me at the injunction hearing, but I don't want to make that decision for you.

MR. SMITH: Thank you.

THE COURT: Okay. So if you include that in the order, and then incorporate the bench ruling, I think that will get it.

MR. SMITH: And we will add the State as parties also because that's by agreement.

THE COURT: Okay. Because that's by agreement.

MR. SMITH: Thank you.

THE COURT: Okay. I think that's it. We're in adjournment.

COURT OFFICER: All rise.

(The proceedings were adjourned at 12:45 p.m.)

REPORTER'S CERTIFICATE

I, VICKI S. GANNO, Registered Professional Reporter, Certified Court Reporter, and Notary Public for the State of Tennessee, hereby certify that I reported foregoing proceedings; that the proceedings were stenographically reported by me; and that the foregoing proceedings constitute a true and correct transcript of said proceedings to the best of my ability.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in events of this action.

Signed this 24th day of November, 2009.

_____

VICKI S. GANNO, RPR, CCR, Notary Public
State of Tennessee at Large
My Commission expires January 7, 2013

West's Tennessee Code Annotated Currentness
Title 39. Criminal Offenses
Chapter 17. Offenses Against Public Health, Safety and Welfare
Part 13. Weapons (Refs & Annos)

§ 39-17-1359. Authorization by individual, corporation, business entity to government entity to prohibit possession of weapons; posted notice; exceptions

(a) An individual, corporation, business entity or local, state or federal government entity or agent thereof is authorized to prohibit the possession of weapons by any person otherwise authorized by §§ 39-17-1351--39-17-1360, at meetings conducted by, or on property owned, operated, or managed or under the control of the individual, corporation, business entity or government entity. Notice of the prohibition shall be posted. Posted notices shall be displayed in prominent locations, including all entrances primarily used by persons entering the building, portion of the building or buildings where weapon possession is prohibited. If the possession of weapons is also prohibited on the premises of the property as well as within the confines of a building located on the property, the notice shall be posted at all entrances to the premises that are primarily used by persons entering the property. The notice shall be in English but a notice may also be posted in any language used by patrons, customers or persons who frequent the place where weapon possession is prohibited. In addition to the sign, notice may also include the international circle and slash symbolizing the prohibition of the item within the circle. The sign shall be of a size that is plainly visible to the average person entering the building, premises or property and shall contain language substantially similar to the following:

PURSUANT TO § 39-17-1359, THE OWNER/OPERATOR OF THIS PROPERTY HAS BANNED WEAPONS ON THIS PROPERTY, OR WITHIN THIS BUILDING OR THIS PORTION OF THIS BUILDING. FAILURE TO COMPLY WITH THIS PROHIBITION IS PUNISHABLE AS A CRIMINAL ACT UNDER STATE LAW AND MAY SUBJECT THE VIOLATOR TO A FINE OF NOT MORE THAN FIVE HUNDRED DOLLARS ($500).

(b) Nothing in this section shall be construed to alter, reduce or eliminate any civil or criminal liability that a property owner or manager may have for injuries arising on their property.

(c) Any posted notice being used by a local, state or federal governmental entity on July 1, 2000, that is in substantial compliance with the provisions of subsection (a) of this section may continue to be used by the governmental entity.

(d) The provisions of this section shall not apply to title 70 regarding wildlife laws, rules and regulations.

(e) The provisions of this section shall not apply to the grounds of any public park, natural area, historic park, nature trail, campground, forest, greenway, waterway or other similar public place that is owned or operated by

the state, a county, a municipality or instrumentality thereof. The carrying of firearms in such areas shall be governed by § 39-17-1311.

CREDIT(S)

1996 Pub.Acts, c. 905, § 11, eff. Oct. 1, 1996; 2000 Pub.Acts, c. 929, § 1, eff. July 1, 2000; 2009 Pub.Acts, c. 428, § 4.

HISTORICAL AND STATUTORY NOTES

For effective date provisions of 1996 Pub.Acts, c. 905, see the Historical and Statutory Notes following § 39-17-1351.

2000 Pub.Acts, c. 929, § 1 rewrote the section, which formerly provided:

"An individual, corporation, business entity or local, state or federal government entity or agent thereof is authorized to prohibit possession of weapons by any person otherwise authorized by §§ 39-17-1351--39-17-1360, at meetings conducted by, or on premises owned, operated, managed or under control of such individual, corporation, business entity or government entity. Notice of such prohibition shall be posted or announced."

2009 Pub.Acts, c. 428, § 4, added subsec. (e), relating to provisions of section not applicable to public parks, etc. owned or operated by the state, county, municipality or instrument thereof.

2009 Pub.Acts, c. 428, § 5, provides:

"(a) For purposes of permitting municipalities or counties to elect to prohibit the carrying of handguns in parks pursuant to § 39-17-1311(d), this act shall take effect upon becoming a law [June 12, 2009], the public welfare requiring it.

"(b) For purposes of it being lawful for persons authorized to carry a handgun pursuant to § 39-17-1351, to carry in places owned or operated by the state or federal government that are designated in Section 1 of this act, this act shall take effect upon becoming a law, the public welfare requiring it.

"(c) For purposes of it being lawful for persons authorized to carry a handgun pursuant to § 39-17-1351, to carry in places owned or operated by municipalities or counties that are designated in Section 1 of this act, this act shall take effect on September 1, 2009."

LIBRARY REFERENCES

Key Numbers

Weapons ⚿ 4.

Westlaw Key Number Search: 406k4.

Corpus Juris Secundum

C.J.S. Weapons § 3.

NOTES OF DECISIONS

Local regulation 1
Posting of notice 2

1. Local regulation

A county can prohibit everyone, except a certified law enforcement officer, from carrying a gun into a county building, including those who have a permit to carry a handgun, if the appropriate notices are provided. Op.Atty.Gen. No. 00-161, Oct. 17, 2000.

2. Posting of notice

Section 39-17-1359(a) requires the posting of a notice which uses language that is "substantially similar" to the language provided in the statute; the international circle and slash symbol may not be used in lieu of such language. Op.Atty.Gen. No. 07-043, April 9, 2007.

Section 39-17-1359 requires the posting of notices at the entrances of each individual business that prohibits weapons on its property if possession of handguns has not been prohibited on the entire property. Op.Atty.Gen. No. 07-043, April 9, 2007.

T. C. A. § 39-17-1359, TN ST § 39-17-1359
Current through end of 2009 First Reg. Sess.

END OF DOCUMENT

West's Tennessee Code Annotated Currentness
Title 39. Criminal Offenses
Chapter 17. Offenses Against Public Health, Safety and Welfare
Part 13. Weapons (Refs & Annos)

§ 39-17-1305. Sale of alcoholic beverages; premises; possession of firearms; discrimination

(a) It is an offense for a person to possess a firearm within the confines of a building open to the public where liquor, wine or other alcoholic beverages, as defined in § 57-3-101(a)(1)(A), or beer, as defined in § 57-6-102(1), are served for on premises consumption.

(b) A violation of this section is a Class A misdemeanor.

(c) The provisions of subsection (a) shall not apply to a person who is:

(1) In the actual discharge of official duties as a law enforcement officer, or is employed in the army, air force, navy, coast guard or marine service of the United States or any member of the Tennessee national guard in the line of duty and pursuant to military regulations, or is in the actual discharge of duties as a correctional officer employed by a penal institution; or

(2) On the person's own premises or premises under the person's control or who is the employee or agent of the owner of the premises with responsibility for protecting persons or property.

(3)(A) Authorized to carry a firearm under § 39-17-1351 who is not consuming beer, wine or any alcoholic beverage, and is within the confines of a restaurant that is open to the public and serves alcoholic beverages, wine or beer.

(B) As used in this subdivision (c)(3), "restaurant" means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served and where meals are actually and regularly served, such place being provided with adequate and sanitary kitchen and dining room equipment, having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests. At least one (1) meal per day shall be served at least five (5) days a week, with the exception of holidays, vacations and periods of redecorating, and the serving of such meals shall be the principal business conducted.

(d)(1) Notwithstanding any provision of title 57 or any other law to the contrary, no entity of state or local government is authorized to:

(A) Refuse the issuance or renewal of any permit or license to sell beer, wine, or alcoholic beverages;

(B) Suspend or revoke any such permit or license; or

(C) Otherwise discriminate against the holder of, or applicant for, any such permit or license;

based solely upon conduct or activity that is lawful under this section or § 39-17-1359.

(2) As used in this subsection "discriminate against" includes, but is not limited to, requiring additional information in the permit or license application, charging a higher fee, requiring additional inspections, or restricting otherwise available locations.

CREDIT(S)

1989 Pub.Acts, c. 591, § 1; 1990 Pub.Acts, c. 1029, § 4; 2001 Pub.Acts, c. 345, § 1, eff. July 1, 2001; 2009 Pub.Acts, c. 339, § 1, eff. July 14, 2009; 2009 Pub.Acts, c. 605, § 2.

COMMENTS OF THE TENNESSEE SENTENCING COMMISSION

This section prohibits possession of weapons in areas adjacent to where alcoholic beverages are served, such as parking lots.

HISTORICAL AND STATUTORY NOTES

2001 Pub.Acts, c. 345, § 2, provides:

"This act shall take effect July 1, 2001, the public welfare requiring it."

Article 3, § 18, of the Tennessee Constitution provides, in part:

"If the Governor shall fail to return any Bill with his objections in writing within ten calendar days (Sundays excepted) after it shall have been presented to him, the same shall become a law without his signature."

2001 Pub.Acts, c. 345, became law without the governor's signature.

2009 Pub.Acts, c. 339, § 1, added subsec. (c)(3), relating to authorization to carry firearm in a restaurant.

2009 Pub.Acts, c. 339, was vetoed by the governor on May 28, 2009. The House repassed the bill on June 3,

2009, and the Senate repassed the bill on June 4, 2009. Article 3, § 18 of the Tennessee Constitution provides, in part:

"If after such reconsideration, a majority of all the members elected to that House shall agree to pass the Bill, notwithstanding the objections of the Executive, it shall be sent with said objections, to the other House, by which it shall likewise be reconsidered. If approved by a majority of the whole number elected to that House, it shall become a law."

2009 Pub.Acts, c. 605, § 2, added subsec. (d), relating to refusal to issue or renew any permit or license to sell alcoholic beverages based upon conduct or activity that is lawful.

CROSS REFERENCES

Accessories before the fact, principals, and aiders and abettors, see §§ 39-11-401 and 39-11-402.
Alternative sentencing for misdemeanor convictions, see § 40-35-104.
Attempt, solicitation and conspiracy offenses, classification and penalties, see § 39-12-107.
Classification of misdemeanors, see § 40-35-110.
Penalties for designated classes of misdemeanors, see § 40-35-111.
Sentencing for misdemeanors, see § 40-35-302.

LAW REVIEW AND JOURNAL COMMENTARIES

Alcohol, Firearms, and Constitutions. Glenn Harlan Reynolds, Mike Roberts and Larry D. Soderquist, 28 U. Mem. L. Rev. 335 (1998).

LIBRARY REFERENCES

Key Numbers

Weapons ⚿ 4.

Westlaw Key Number Search: 406k4.

Corpus Juris Secundum

C.J.S. Weapons § 3.

RESEARCH REFERENCES

Treatises and Practice Aids

Tenn. Prac., Pattern Jury Instr. - Criminal 36.09, T.P.I.--Crim. 36.09. Unlawful Possession of Firearm Where Alcoholic Beverages Are Served.

NOTES OF DECISIONS

In general 2
Validity 1

1. Validity

Section 39-17-1305 is constitutional; however, limiting the statute's purview to places where alcohol is the sole or primary product would likely create vagueness and thus open the statute to constitutional attack. Op.Atty.Gen. No. 00-020, Feb. 15, 2000.

Section 39-17-1307(a), making it an offense to carry a firearm with the intent to go armed; § 39-17-1309, making it an offense to carry a firearm on school property; § 39-17-1311, making it an offense to possess or carry a firearm with the intent to go armed in a public park or recreational facility; and § 39-17-1305, making it an offense to possess a firearm on any premises where alcoholic beverages are sold; are all a valid exercise of the state's regulatory authority under Article 1, Section 26 of the Tennessee Constitution and are therefore constitutional. Op.Atty.Gen. No. 96-080 April 25, 1996.

2. In general

Sale of beer from establishment wherein guns are sold and repaired would interfere with public health, safety and morals within meaning of statute prohibiting carrying dangerous weapons into establishment licensed to sell alcoholic beverages. T.C.A. § 39-6-1717. Gibbs v. Blount County Beer Bd., 1984, 664 S.W.2d 68. Intoxicating Liquors ⇐ 71

A court would most likely interpret the term "alcoholic beverages" in § 39-17-1305(a) to exclude beer, thereby permitting the carrying of a weapon into an establishment that sells beer with an alcohol content of 5% by weight or less. Op.Atty.Gen. No. 00-031, Feb. 22, 2000.

An off duty law enforcement officer not actually discharging his or her official duties is not permitted to carry a weapon on premises that sell or serve alcohol, on school property, nor on recreational grounds. An off duty law enforcement officer not actually discharging his or her official duties during a judicial proceeding or who has not been subpoenaed to be a witness in the judicial proceeding is not permitted to carry a weapon during that judicial proceeding. Op.Atty.Gen. No. 99-024, Feb. 16, 1999.

T. C. A. § 39-17-1305, TN ST § 39-17-1305
Current through end of 2009 First Reg. Sess.

END OF DOCUMENT