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IN THE 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 SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION / TRIAL** Date: January 18, 2011 Time: 8:30 a.m. Location: Dept. 402 Judge: Hon. Jeff Hamilton Date Action Filed: June 17, 2010

PLEASE TAKE NOTICE THAT Plaintiffs Sheriff Clay Parker, et al., by and through their attorneys of record, request the Court take judicial notice pursuant to California Evidence Code section 452 and California Rules of Court, rules 3.1113(l) and 3.1306(c), of the following documents in support of their Motion for Summary Judgment or in the Alternative for Summary Adjudication / Trial:

Exhibit	Document Description
Exhibit "A"	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 "B"	Certified Copy of Defendant's Response in Opposition to Plaintiffs' Motions for Partial Summary Judgment in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed October 2, 2009;
Exhibit "C"	Certified Copy of Defendant's Cross-Motion for Judgment on the Pleadings and/or for Summary Judgment in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed October 5, 2009;
Exhibit "D"	Certified Copy of Order of Chancellor Claudia Bonnyman in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed November 25, 2009;
Exhibit "E"	California Department of Fish and Game, Certified Nonlead Ammunition Information, http://www.dfg.ca.gov/wildlife/hunting/condor/certifiedammo.html (last visited Nov. 29, 2010);
Exhibit "F"	California Assembly Bill 2358 (2010) as Amended in Senate on August 19, 2010;
Exhibit "G"	California Assembly Bill 2358 (2010) as Amended on in Senate August 30, 2010;
Exhibit "H"	California Senate Bill 1276 (1994) as Amended in Senate on May 26, 1994;
Exhibit "I"	Certified Copy of Consolidated Memorandum of Law of Defendant Attorney General Cooper in Opposition to Plaintiffs' Motions for Partial Summary Judgment and in Support of Defendant's Cross-Motion for Judgment on the Pleadings and/or for Summary Judgment in *Tennessee ex rel. Rayburn v. Cooper*, Case No. 09-1284-I, filed October 2, 2009.

The relevance of each court record requested to be noticed is set forth in Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment or in the Alternative for Summary Adjudication / Trial Brief.

Dated: December 6, 2010

Respectfully Submitted,
MICHEL & ASSOCIATES, PC

Clinton Monfort
Attorney for Plaintiffs

EXHIBIT A

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

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.	)	

COPY

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF ORIGINAL FILED AND LODGED IN MY OFFICE THIS 5TH DAY OF October 2010
CAROL SOTT, 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]

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[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/Gl21t; Florida nuisance bar shut down (shootings at the bar): http://bit.ly/wlOrp; Kansas: nuisance bar shut down: http://bit.ly/Gl21t; 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.

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[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.").

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[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]

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[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).

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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 *may 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

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[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/19JWXk; *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.

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[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)

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[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

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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]

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[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

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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

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OF COUNSEL:

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been hand-delivered on _____, 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:

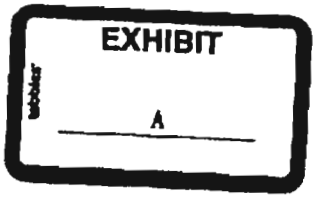
(3)

(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



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.

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[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 B

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

2009 OCT -2 PM 4:16

STATE OF TENNESSEE *ex rel* RANDY RAYBURN; JOHN (JANE) DOES NOS. 1-13, Plaintiffs, v. ROBERT E. COOPER, JR., TENNESSEE ATTORNEY GENERAL, Defendant.	)	**Civil No. 09-1284-I**

RESPONSE OF ATTORNEY GENERAL AND REPORTER ROBERT E. COOPER, JR IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Attorney General and Reporter Robert E. Cooper, Jr., hereby opposes the Plaintiffs' motions for partial summary judgment and summary judgment respectively, in which the they seek a declaratory judgment that 2009 Public Chapter 339 is facially unconstitutional because it is vague, unlawfully delegates state police powers to private citizens and is preempted by federal law.

As more fully set forth in the memorandum of law that the Attorney General and Reporter has filed in opposition to Plaintiffs' motion, Plaintiffs have failed to establish that they are entitled to judgment as a matter of law and their motion ought to be denied.

Furthermore, as also more fully set forth in the Attorney General and Reporter's memorandum, this case ought to be dismissed because chancery courts do not have the authority to render declaratory rulings in criminal matters. Furthermore, Plaintiffs have failed to present a

justiciable issue and have failed to establish that they have standing to bring suit.

Finally, the Attorney General and Reporter submits that the case ought to be dismissed because Plaintiffs have failed to establish that Chapter 339 is facially invalid. They have not alleged, and cannot show, that Chapter 339 would be unconstitutional regardless of how it is applied.

The case that has been presented can be resolved solely as a matter of law; without the need to consider any facts. Accordingly, the Attorney General and Reporter relies upon the memorandum of law in opposition to Plaintiffs' Motion for Partial Summary Judgment, and the Response and Memorandum that were filed in opposition to Plaintiffs' Motion for a Temporary Injunction.

Respectfully submitted,

ROBERT E. COOPER, JR.
ATTORNEY GENERAL and REPORTER

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Response has been delivered by hand, united states mail, postage prepaid, and/or e-mail, to:

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Patricia Head Moskal, Esq.
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Jonathan C. Stewart, Esq.
1812 Broadway
Nashville, TN 37203

this 2nd day of October, 2009.

Lyndsay F. Sanders
LYNDSAY FULLER SANDERS
Assistant Attorney General

EXHIBIT C

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/ MELSROSE	)	
Plaintiffs,	)	
v.	)	**Civil No. 09-1284-I**
ROBERT E. COOPER, JR., TENNESSEE ATTORNEY GENERAL,	)	
Defendant.	)	

FILED
2009 OCT -5 PM 3:34
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.
D.C.&M.

CROSS-MOTION OF
ATTORNEY GENERAL AND REPORTER ROBERT E. COOPER, JR
FOR JUDGMENT ON THE PLEADINGS AND/OR FOR SUMMARY JUDGMENT

Attorney General and Reporter Robert E. Cooper, Jr., pursuant to Tenn. R. Civ. P. 12.03 and 56.02, hereby moves for judgment on the pleadings and/or for summary judgment respectively, asking this Court to dismiss this declaratory judgment action regarding the validity of 2009 Public Chapter 339. In support of these cross-motions, the Attorney General relies upon the memorandum of law that he has filed in opposition to Plaintiffs' motions for summary judgment.

As more fully set forth in the Attorney General's memorandum, judgment on the pleadings and/or summary judgment should be granted in favor of the Attorney General dismissing this action, as follows:

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF ORIGINAL INSTRUMENT FILED IN MY OFFICE
THIS 29th DAY OF Nov 2010
PAUL G. SUMMERS, CLERK & MASTER
BY: D.C.

(1) This case ought to be dismissed because chancery courts do not have the authority to render declaratory rulings in criminal matters such as this law.

(2) Plaintiffs have failed to present a justiciable issue, therefore this case must be dismissed.

(3) Plaintiffs have failed to establish standing, therefore this case must be dismissed.

(4) Plaintiffs have failed to name and include necessary parties, the appropriate District Attorneys General.

(5) Plaintiffs have failed to establish tha,t as a matter of law, Chapter 339 is facially invalid due to unconstitutional vagueness. Plaintiffs have not alleged, and cannot show, that Chapter 339 would be unconstitutional regardless of how it is applied. This Court should declare that Chapter 339 is facially valid.

(6) Plaintiffs have failed to establish that, as a matter of law, Chapter 339 is fundamentally arbitrary or irrational in violation of substantive due process. This Court should declare that Chapter 339 complies with substantive due process.

(7) Plaintiffs have failed to establish that, as a matter of law, Chapter 339 is an unconstitutional delegation of police power by the legislature. This Court should declare that Chapter 339 is facially valid and does not constitute an invalid delegation of police power.

(8) This Court should declare that, as a matter of law, Chapter 339 is not preempted by the OSHA laws.

(9) Should this Court find that any particular phrase or portion of Chapter 339 is constitutionally invalid, elision should be applied to preserve the remainder of the law.

The case that has been presented can be resolved solely as a matter of law; without the need to consider any facts. Accordingly, the Attorney General and Reporter relies upon the

memorandum of law in opposition to Plaintiffs' Motion for Partial Summary Judgment, and the Response and Memorandum that were filed in opposition to Plaintiffs' Motion for a Temporary Injunction, in support of its pending motions. The Attorney General submits that even if this Court considers the affidavits presented by both parties, as a matter of law, this case should be dismissed and/or Chapter 339 be declared constitutionally valid.

THE ATTORNEY GENERAL'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT IS HEREBY AMENDED TO SPECIFICALLY INCLUDE ALL OF THE GROUNDS ASSERTED IN THESE MOTIONS (WHICH WERE INCLUDED IN HIS MEMORANDUM OF LAW).

NOTICE OF HEARING

THE ATTORNEY GENERAL'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR FOR SUMMARY JUDGEMNT WILL BE HEAR AT THE SAME TIME AS THE PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT, ON FRIDAY, NOVEMBER 6, 2009, AT 9:00 A.M., AT THE DAVIDSON COUNTY HISTORIC COURTHOUSE, CHANCERY COURT, PART I.

Respectfully submitted,

ROBERT E. COOPER, JR.
ATTORNEY GENERAL and REPORTER

Steven A. Hart

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Motion has been delivered by hand, united states mail, postage prepaid, and/or e-mail, to:

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Attorney at Law
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Patricia Head Moskal, Esq.
Attorney at law
1600 Division Street
Suite 700
Nashville, TN 37203

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

this 5th day of October, 2009.

Lyndsay F. Sanders
LYNDSAY FULLER SANDERS
Assistant Attorney General

EXHIBIT D

135364

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 29th DAY OF Nov 2010
KEITH SCOTT, CLERK & MASTER
BY: D.C.

CHANCELLOR CLAUDIA C. BONNYMAN

On page 12 of the bench ruling, the Court announced four issues, not five. A third issue (numbered as 3) was intentionally omitted. CB
The Court has made corrections on the bench ruling transcript.
The issue of third parties have standing is not of paramount concern today since the Question is one of law. Further, this order does not dispose of all issues in the case and certain parties have standing for some causes and not for others. CB
*See p 3.

APPROVED FOR ENTRY:

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* The Court sees no way to remove a portion of the Amendment and at the same time, effectuate the intent of the legislature. C. Bourgeois

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:

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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

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Nashville, Tennessee 37201
615-256-1935

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[illegible] 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

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INDEX OF EXHIBITS

P R O C E E D I N G S

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 the case taking things under guidelines. CS

This lawsuit was brought by the plaintiffs ~~in part of~~ seeking a declaratory judgment that legislation passed in 2009, and codified at TCA Section 39-17-1305(c), ~~this~~ 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 ~~the~~ cross motion to dismiss the void ~~of~~ 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 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 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. 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~~ 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 ~~Hensel~~ 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 ~~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 ~~later~~ 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 is 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

EXHIBIT E

DEPARTMENT OF FISH AND GAME

Certified Nonlead Ammunition Information

1. Certified list (choose a link to go to the manufacturer's specific information):

Name	Date Application Received	Date Application Approved
Ammo Brothers	September 22, 2008	September 25, 2008
Barnes Bullets, Inc.	April 16, 2008	April 28, 2008
Black Hills Ammunition	June 10, 2008	July 2, 2008
CCI	April 15, 2008	April 28, 2008
Cutting Edge Bullets	February 26, 2010	April 12, 2010
Custom Cartridge, Inc.	March 14, 2008	April 28, 2008
Dakota Ammo (COR-BON/Glaser)	April 16, 2008	April 28, 2008
D Dupleks Ltd.	March 2, 2010	March 16, 2010
Dynamic Research Technologies (DRT)	July 29, 2009	September 8, 2009
Federal Cartridge Company	April 15, 2008	April 28, 2008
Hornady Mfg. Co	December 8, 2008	December 29, 2008
International Cartridge Company	August 12, 2008	September 4, 2008
Magtech Ammunition Company	September 11, 2008	October 20, 2008
Miwall Corporation	September 23, 2008	October 20, 2008
North Fork Bullets	January, 27 2009	February 23, 2009
Nosler, Inc.	March 25, 2008	April 28, 2008
P-Bar Co., LLC	November 30, 2009	January 4, 2010
Remington Arms Co., Inc.	March 25, 2008	April 28, 2008
Sinterfire, Inc	May 29, 2008	July 2, 2008
Snake River Ammunition	August 31, 2009	September 14, 2009
Stars & Stripes Ammunition	August 15, 2008	September 11, 2008
TomBob Outdoors, LLC	March 15, 2010	April 21, 2010
Weatherby, Inc.	May 29, 2008	July 2, 2008
Winchester Ammunition	April 7, 2008	April 28, 2008

2. Non-toxic shot approved by the U.S. Fish and Wildlife Service for use in waterfowl hunting (Section 507.1,

Title 14, California Code of Regulations) is certified to take appropriate nongame species within the nonlead zone. **NOTE: The U.S. Fish and Wildlife Service reviews and may approve applications for other types of non-toxic shot throughout the year. A full list of approved shot types can be found at** http://migratorybirds.fws.gov/issues/nontoxic_shot/nontoxic.htm.

3. Frangible bullets are **not** certified for use to take any big-game species (as defined in Section 350, T14, CCR) and/or fallow deer, sambar deer, axis deer, sika deer, aoudad, mouflon, tahr, and feral goats (Section 475(c), T14, CCR) in any area of the state, including the nonlead zone.

4. This certified list will be updated as new applications are received and approved.

EXHIBIT F

AMENDED IN SENATE AUGUST 19, 2010

AMENDED IN SENATE JUNE 22, 2010

AMENDED IN SENATE JUNE 3, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL No. 2358

Introduced by Assembly Member De León

February 19, 2010

An act to amend Sections 12061 ~~and 12318~~, *12318, and 12323* of the Penal Code, relating to ammunition.

LEGISLATIVE COUNSEL'S DIGEST

AB 2358, as amended, De León. Ammunition.

Existing law provides that commencing February 1, 2011, a vendor shall not sell or otherwise transfer ownership of any handgun ammunition without, at the time of delivery, legibly recording specified information regarding the purchaser or transferee, and maintaining the record for a period of not less than 5 years, as specified. Existing law provides that violation of these provisions is a misdemeanor. Existing law also provides that the records shall be subject to inspection by any peace officer and certain others, as specified, for purposes of an investigation where access to those records is or may be relevant to that investigation, when seeking information about persons prohibited from owning a firearm or ammunition, or when engaged in ensuring compliance with laws pertaining to firearms or ammunition, as specified.

This bill would require the information described above in connection with the transfer of handgun ammunition be legibly or electronically recorded. The bill would provide that commencing February 1, 2011, except for investigatory and enforcement purposes described above, no

ammunition vendor shall provide the required information to any 3rd party without the written consent of the purchaser or transferee. The bill would also provide that records may be copied for investigatory or enforcement purposes by any person authorized to inspect those records, as specified, and that copies shall be transmitted to local law enforcement if required by local law. The bill would also provide that any required ammunition records that are no longer required to be maintained shall be destroyed in a manner that protects the privacy of the purchaser or transferee who is the subject of the record. The bill would provide that violation of these provisions is a misdemeanor.

By expanding the scope of an existing crime, this bill would impose a state-mandated local program.

The bill would require ammunition vendors, commencing February 1, 2011, to provide written notice to the local police chief, or if the vendor is in an unincorporated area, to the county sheriff, of the vendor's intent to conduct business in the jurisdiction, and to obtain any regulatory or business license required by the jurisdiction for ammunition sellers.

Existing law provides that commencing February 1, 2011, the delivery or transfer of ownership of handgun ammunition may only occur in a face-to-face transaction with the deliverer or transferor being provided bona fide evidence of identity from the purchaser or other transferee.

This bill would also provide that handgun ammunition may be purchased over the Internet or through other means of remote ordering if a handgun ammunition vendor in California initially receives the ammunition and processes the transfer, as specified.

Existing law defines "handgun ammunition" for most purposes as ammunition principally for use in handguns, notwithstanding that the ammunition may also be used in some rifles.

This bill would instead define "handgun ammunition" for those purposes as any variety of ammunition of a caliber specified in a list added by this bill, notwithstanding that the ammunition may also be used in some rifles, and would provide that "handgun ammunition" does not include blanks or ammunition designed and intended to be used in an "antique firearm," as defined.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 12061 of the Penal Code is amended to read:

12061. (a) A vendor shall comply with all of the following conditions, requirements and prohibitions:

(1) A vendor shall not permit any employee who the vendor knows or reasonably should know is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code to handle, sell, or deliver handgun ammunition in the course and scope of his or her employment.

(2) A vendor shall not sell or otherwise transfer ownership of, offer for sale or otherwise offer to transfer ownership of, or display for sale or display for transfer of ownership of any handgun ammunition in a manner that allows that ammunition to be accessible to a purchaser or transferee without the assistance of the vendor or employee thereof.

(3) Commencing February 1, 2011, a vendor shall not sell or otherwise transfer ownership of any handgun ammunition without, at the time of delivery, legibly or electronically recording the following information:

(A) The date of the sale or other transaction.

(B) The purchaser's or transferee's driver's license or other identification number and the state in which it was issued.

(C) The brand, type, and amount of ammunition sold or otherwise transferred.

(D) The purchaser's or transferee's signature.

(E) The name of the salesperson who processed the sale or other transaction.

(F) The right thumbprint of the purchaser or transferee on the above form.

(G) The purchaser's or transferee's full residential address and telephone number.

(H) The purchaser's or transferee's date of birth.

(4) Commencing February 1, 2011, the records required by this section shall be maintained on the premises of the vendor for a period of not less than five years from the date of the recorded

transfer. Commencing February 1, 2011, except for the purposes set forth in paragraph (5), no vendor shall provide the information specified in paragraph (3) to any third party without the written consent of the purchaser or transferee. Any records required by this section that are no longer required to be maintained shall be destroyed in a manner that protects the privacy of the purchaser or transferee who is the subject of the record.

(5) Commencing February 1, 2011, the records referred to in paragraph (3) shall be subject to inspection at any time during normal business hours by any peace officer employed by a sheriff, city police department, or district attorney as provided in subdivision (a) of Section 830.1, or employed by the department as provided in subdivision (b) of Section 830.1, provided the officer is conducting an investigation where access to those records is or may be relevant to that investigation, is seeking information about persons prohibited from owning a firearm or ammunition, or is engaged in ensuring compliance with the Dangerous Weapons Control Law (Chapter 1 (commencing with Section 12000) of Title 2 of Part 4), or any other laws pertaining to firearms or ammunition. The records shall also be subject to inspection at any time during normal business hours by any other employee of the department, provided that employee is conducting an investigation where access to those records is or may be relevant to that investigation, is seeking information about persons prohibited from owning a firearm or ammunition, or is engaged in ensuring compliance with the Dangerous Weapons Control Law (Chapter 1 (commencing with Section 12000) of Title 2 of Part 4), or any other laws pertaining to firearms or ammunition. Records may be copied for investigatory or enforcement purposes by any person authorized to inspect those records pursuant to this subdivision.

(6) Commencing February 1, 2011, the vendor shall not knowingly make a false entry in, fail to make a required entry in, fail to obtain the required thumbprint, or otherwise fail to maintain in the required manner records prepared in accordance with paragraph (2). If the right thumbprint is not available, then the vendor shall have the purchaser or transferee use his or her left thumb, or any available finger, and shall so indicate on the form. If the purchaser or transferee is physically unable to provide a thumbprint or fingerprint, the vendor shall so indicate on the form.

(7) Commencing February 1, 2011, no vendor shall refuse to permit a person authorized under paragraph (5) to examine any record prepared in accordance with this section during any inspection conducted pursuant to this section, or refuse to permit the use of any record or information by those persons.

(8) Commencing February 1, 2011, a vendor shall provide written notice to the local police chief, or if the vendor is in an unincorporated area, to the county sheriff, of the vendor's intent to conduct business in the jurisdiction, and shall obtain any regulatory or business license required by the jurisdiction for ammunition sellers. Copies of the ammunition sales records required by this section shall be transmitted to the county sheriff or chief of police if required by local law.

(b) Paragraph (3) of subdivision (a) shall not apply to or affect sales or other transfers of ownership of handgun ammunition by handgun ammunition vendors to any of the following, if properly identified:

(1) A person licensed pursuant to Section 12071.

(2) A handgun ammunition vendor.

(3) A person who is on the centralized list maintained by the department pursuant to Section 12083.

(4) A target facility which holds a business or regulatory license.

(5) Gunsmiths.

(6) Wholesalers.

(7) Manufacturers or importers of firearms licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code, and the regulations issued pursuant thereto.

(8) Sales or other transfers of ownership made to authorized law enforcement representatives of cities, counties, cities and counties, or state or federal governments for exclusive use by those government agencies if, prior to the delivery, transfer, or sale of handgun ammunition, written authorization from the head of the agency authorizing the transaction is presented to the person from whom the purchase, delivery, or transfer is being made. Proper written authorization is defined as verifiable written certification from the head of the agency by which the purchaser, transferee, or person otherwise acquiring ownership is employed, identifying the employee as an individual authorized to conduct the transaction, and authorizing the transaction for the exclusive use of the agency by which he or she is employed.

(c) (1) A violation of paragraph (3), (4), (6), or (7) of subdivision (a) is a misdemeanor.

(2) The provisions of this subdivision are cumulative, and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

SEC. 2. Section 12318 of the Penal Code is amended to read:

12318. (a) Commencing February 1, 2011, the delivery or transfer of ownership of handgun ammunition *in this state* may only occur in a face-to-face transaction with the deliverer or transferor being provided bona fide evidence of identity from the purchaser or other transferee, provided, however, that handgun ammunition may be purchased over the Internet or through other means of remote ordering if a handgun ammunition vendor in California initially receives the ammunition and processes the transfer in compliance with this section and Section 12061. A violation of this section is a misdemeanor.

(b) For purposes of this section:

(1) "Bona fide evidence of identity" means a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, state identification card, identification card issued to a member of the Armed Forces, or other form of identification that bears the name, date of birth, description, and picture of the person.

(2) "Handgun ammunition" means handgun ammunition as defined in subdivision (a) of Section ~~12323, but excluding ammunition designed and intended to be used in an "antique firearm" as defined in Section 921(a)(16) of Title 18 of the United States Code. Handgun ammunition does not include blanks.~~ *12323.*

(3) "Handgun ammunition vendor" has the same meaning as set forth in Section 12060.

(c) Subdivision (a) shall not apply to or affect the deliveries, transfers, or sales of, handgun ammunition to any of the following:

(1) Authorized law enforcement representatives of cities, counties, cities and counties, or state and federal governments for exclusive use by those government agencies if, prior to the delivery, transfer, or sale of the handgun ammunition, written authorization from the head of the agency employing the purchaser or transferee,

is obtained identifying the employee as an individual authorized to conduct the transaction, and authorizing the transaction for the exclusive use of the agency employing the individual.

(2) Sworn peace officers, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 who are authorized to carry a firearm in the course and scope of their duties.

(3) Importers and manufacturers of handgun ammunition or firearms licensed to engage in business pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(4) Persons who are on the centralized list maintained by the Department of Justice pursuant to Section 12083.

~~(5) Persons whose licensed premises are outside this state who are licensed as dealers or collectors of firearms pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.~~

~~(6)~~

(5) Persons licensed as *dealers or* collectors of firearms pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto ~~whose licensed premises are within this state who has a~~ *who have* current ~~certificate~~ *certificates* of eligibility issued to ~~him or her~~ *them* by the Department of Justice pursuant to Section 12071.

~~(7)~~

(6) A handgun ammunition vendor.

~~(8)~~

(7) A consultant-evaluator, as defined in subdivision (s) of Section 12001.

SEC. 3. Section 12323 of the Penal Code is amended to read:

12323. As used in this chapter, the following definitions shall apply:

(a) "Handgun ~~ammunition"~~ *ammunition," which does not include blanks and ammunition designed and intended to be used in an "antique firearm" as defined in Section 921(a)(16) of Title 18 of the United States Code,* means ~~ammunition principally for use in pistols, revolvers, and other firearms capable of being concealed upon the person, as defined in subdivision (a) of Section 12001, notwithstanding that the ammunition may also be used in some rifles.~~ *any variety of ammunition in the following calibers,*

notwithstanding that the ammunition may also be used in some rifles:

(1) .22.
(2) .25.
(3) .32.
(4) .38.
(5) .9mm.
(6) .10mm.
(7) .40.
(8) .41.
(9) .44.
(10) .45.
(11) 5.7x28mm.
(12) .223.
(13) .357.
(14) .454.
(15) 5.56x45mm.
(16) 7.62x39.
(17) 7.63mm.
(18) 7.65mm.
(19) .50.

(b) "Handgun ammunition designed primarily to penetrate metal or armor" means any ammunition, except a shotgun shell or ammunition primarily designed for use in rifles, that is designed primarily to penetrate a body vest or body shield, and has either of the following characteristics:

(1) Has projectile or projectile core constructed entirely, excluding the presence of traces of other substances, from one or a combination of tungsten alloys, steel, iron, brass, beryllium copper, or depleted uranium, or any equivalent material of similar density or hardness.

(2) Is primarily manufactured or designed, by virtue of its shape, cross-sectional density, or any coating applied thereto, including, but not limited to, ammunition commonly known as "KTW ammunition," to breach or penetrate a body vest or body shield when fired from a pistol, revolver, or other firearm capable of being concealed upon the person.

(c) "Body vest or shield" means any bullet-resistant material intended to provide ballistic and trauma protection for the wearer or holder.

(d) "Rifle" shall have the same meaning as defined in paragraph (20) of subdivision (c) of Section 12020.

~~SEC. 3.~~

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

EXHIBIT G

AMENDED IN SENATE AUGUST 30, 2010

AMENDED IN SENATE AUGUST 19, 2010

AMENDED IN SENATE JUNE 22, 2010

AMENDED IN SENATE JUNE 3, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL No. 2358

Introduced by Assembly Member De León

February 19, 2010

An act to amend Sections 12061, *12077*, 12318, and 12323 of the Penal Code, relating to ammunition.

LEGISLATIVE COUNSEL'S DIGEST

AB 2358, as amended, De León. Ammunition.

Existing law provides that commencing February 1, 2011, a vendor shall not sell or otherwise transfer ownership of any handgun ammunition without, at the time of delivery, legibly recording specified information regarding the purchaser or transferee, and maintaining the record for a period of not less than 5 years, as specified. Existing law provides that violation of these provisions is a misdemeanor. Existing law also provides that the records shall be subject to inspection by any peace officer and certain others, as specified, for purposes of an investigation where access to those records is or may be relevant to that investigation, when seeking information about persons prohibited from owning a firearm or ammunition, or when engaged in ensuring compliance with laws pertaining to firearms or ammunition, as specified.

This bill would require the information described above in connection with the transfer of handgun ammunition be legibly or electronically

recorded. The bill would provide that commencing February 1, 2011, except for investigatory and enforcement purposes described above, no ammunition vendor shall provide the required information to any 3rd party without the written consent of the purchaser or transferee. The bill would also provide that records may be copied for investigatory or enforcement purposes by any person authorized to inspect those records, as specified, and that copies shall be transmitted to local law enforcement if required by local law. The bill would also provide that any required ammunition records that are no longer required to be maintained shall be destroyed in a manner that protects the privacy of the purchaser or transferee who is the subject of the record. The bill would provide that violation of these provisions is a misdemeanor. *This bill would provide that commencing February 1, 2011, except for investigatory and enforcement purposes described above, no ammunition vendor shall provide the required information to any 3rd party, or use the information for any purpose other than as is required or authorized by statute or regulation, without the written consent of the purchaser or transferee. The bill would also provide that any required ammunition records that are no longer required to be maintained shall be destroyed in a specified manner. The bill would provide that violation of these provisions is a misdemeanor.*

By expanding the scope of an existing crime, this bill would impose a state-mandated local program.

The bill would require ammunition vendors, commencing February 1, 2011, to provide written notice to the local police chief, or if the vendor is in an unincorporated area, to the county sheriff, of the vendor's intent to conduct business in the jurisdiction, and to obtain any regulatory or business license required by the jurisdiction for ammunition sellers. *A violation of this provision would be a misdemeanor. The bill would also provide that no public agency may make public the information obtained from the record of the ammunition transaction.*

Existing law requires certain information to be collected by firearms dealers in connection with the transfer of firearms and submitted to the Department of Justice, as specified.

This bill would provide that no firearms dealer shall provide the information required by those provisions to any 3rd party, or use the information for any purpose other than as is required or authorized by statute or regulation, without the written consent of the purchaser or transferee, except for purposes of 3rd-party electronic submission to

the department. The bill would also provide that any of these records that are no longer required to be maintained, if destroyed, shall be destroyed in a specified manner.

Existing law provides that commencing February 1, 2011, the delivery or transfer of ownership of handgun ammunition may only occur in a face-to-face transaction with the deliverer or transferor being provided bona fide evidence of identity from the purchaser or other transferee.

This bill would also provide that handgun ammunition may be purchased over the Internet or through other means of remote ordering if a handgun ammunition vendor in California initially receives the ammunition and processes the transfer, as specified.

Existing law defines "handgun ammunition" for most purposes as ammunition principally for use in handguns, notwithstanding that the ammunition may also be used in some rifles.

This bill would instead define "handgun ammunition" for those purposes as any variety of ammunition of a caliber specified in a list added by this bill, notwithstanding that the ammunition may also be used in some rifles, and would provide that "handgun ammunition" does not include blanks or ammunition designed and intended to be used in an "antique firearm," as defined.

This bill would incorporate additional amendments to Section 12077 of the Penal Code proposed by AB 1810, contingent on the prior enactment of that bill.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 12061 of the Penal Code is amended to read:

12061. (a) A vendor shall comply with all of the following conditions, requirements, and prohibitions:

(1) A vendor shall not permit any employee who the vendor knows or reasonably should know is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the

Welfare and Institutions Code to handle, sell, or deliver handgun ammunition in the course and scope of his or her employment.

(2) A vendor shall not sell or otherwise transfer ownership of, offer for sale or otherwise offer to transfer ownership of, or display for sale or display for transfer of ownership of any handgun ammunition in a manner that allows that ammunition to be accessible to a purchaser or transferee without the assistance of the vendor or employee thereof.

(3) Commencing February 1, 2011, a vendor shall not sell or otherwise transfer ownership of any handgun ammunition without, at the time of delivery, legibly or electronically recording the following information:

(A) The date of the sale or other transaction.

(B) The purchaser's or transferee's driver's license or other identification number and the state in which it was issued.

(C) The brand, type, and amount of ammunition sold or otherwise transferred.

(D) The purchaser's or transferee's signature.

(E) The name of the salesperson who processed the sale or other transaction.

(F) The right thumbprint of the purchaser or transferee on the above form.

(G) The purchaser's or transferee's full residential address and telephone number.

(H) The purchaser's or transferee's date of birth.

(4) *(A)* Commencing February 1, 2011, the records required by this section shall be maintained on the premises of the vendor for a period of not less than five years from the date of the recorded transfer. Commencing February 1, 2011, except for the purposes set forth in paragraph (5), no vendor shall provide the information ~~specified in paragraph (3) to any third party without the written consent of the purchaser or transferee. Any records required by this section that are no longer required to be maintained shall be destroyed in a manner that protects the privacy of the purchaser or transferee who is the subject of the record.~~ *specified in paragraph (3) to any third party, or use the information for any purpose other than as is required or authorized by statute or regulation, without the written consent of the purchaser or transferee of the handgun ammunition who is the subject of the record.*

(B) Any records generated pursuant to this section that are no longer required to be maintained shall be destroyed pursuant to Section 1798.81 of the Civil Code.

(5) Commencing February 1, 2011, the records referred to in paragraph (3) shall be subject to inspection at any time during normal business hours by any peace officer employed by a sheriff, city police department, or district attorney as provided in subdivision (a) of Section 830.1, or employed by the department as provided in subdivision (b) of Section 830.1, provided the officer is conducting an investigation where access to those records is or may be relevant to that investigation, is seeking information about persons prohibited from owning a firearm or ammunition, or is engaged in ensuring compliance with the Dangerous Weapons Control Law (Chapter 1 (commencing with Section 12000) of Title 2 of Part 4), or any other laws pertaining to firearms or ammunition. The records shall also be subject to inspection at any time during normal business hours by any other employee of the department, provided that employee is conducting an investigation where access to those records is or may be relevant to that investigation, is seeking information about persons prohibited from owning a firearm or ammunition, or is engaged in ensuring compliance with the Dangerous Weapons Control Law (Chapter 1 (commencing with Section 12000) of Title 2 of Part 4), or any other laws pertaining to firearms or ammunition. Records may be copied for investigatory or enforcement purposes by any person authorized to inspect those records pursuant to this subdivision.

(6) Commencing February 1, 2011, the vendor shall not knowingly make a false entry in, fail to make a required entry in, fail to obtain the required thumbprint, or otherwise fail to maintain in the required manner records prepared in accordance with paragraph (2). If the right thumbprint is not available, then the vendor shall have the purchaser or transferee use his or her left thumb, or any available finger, and shall so indicate on the form. If the purchaser or transferee is physically unable to provide a thumbprint or fingerprint, the vendor shall so indicate on the form.

(7) Commencing February 1, 2011, no vendor shall refuse to permit a person authorized under paragraph (5) to examine any record prepared in accordance with this section during any inspection conducted pursuant to this section, or refuse to permit the use of any record or information by those persons.

(8) Commencing February 1, 2011, a vendor shall provide written notice to the local police chief, or if the vendor is in an unincorporated area, to the county sheriff, of the vendor's intent to conduct business in the jurisdiction, and shall obtain any regulatory or business license required by the jurisdiction for ammunition sellers. Copies of the ammunition sales records required by this section shall be transmitted to the county sheriff or chief of police if required by local law.

(b) Paragraph (3) of subdivision (a) shall not apply to or affect sales or other transfers of ownership of handgun ammunition by handgun ammunition vendors to any of the following, if properly identified:

(1) A person licensed pursuant to Section 12071.

(2) A handgun ammunition vendor.

(3) A person who is on the centralized list maintained by the department pursuant to Section 12083.

(4) A target facility which holds a business or regulatory license.

(5) Gunsmiths.

(6) Wholesalers.

(7) Manufacturers or importers of firearms licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code, and the regulations issued pursuant thereto.

(8) Sales or other transfers of ownership made to authorized law enforcement representatives of cities, counties, cities and counties, or state or federal governments for exclusive use by those government agencies if, prior to the delivery, transfer, or sale of handgun ammunition, written authorization from the head of the agency authorizing the transaction is presented to the person from whom the purchase, delivery, or transfer is being made. Proper written authorization is defined as verifiable written certification from the head of the agency by which the purchaser, transferee, or person otherwise acquiring ownership is employed, identifying the employee as an individual authorized to conduct the transaction, and authorizing the transaction for the exclusive use of the agency by which he or she is employed.

(c) No public agency may make public the information obtained from the record made pursuant to paragraph (3) of subdivision (a).

~~(c)~~

(d) (1) A violation of paragraph (3), (4), (6), ~~or (7)~~ *(7), or (8)* of subdivision (a) is a misdemeanor.

(2) The provisions of this subdivision are cumulative, and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

SEC. 2. Section 12077 of the Penal Code is amended to read:

12077. (a) The Department of Justice shall prescribe the form of the register and the record of electronic transfer pursuant to Section 12074.

(b) (1) For handguns, information contained in the register or record of electronic transfer shall be the date and time of sale, make of firearm, peace officer exemption status pursuant to subdivision (a) of Section 12078 and the agency name, dealer waiting period exemption pursuant to subdivision (n) of Section 12078, dangerous weapons permitholder waiting period exemption pursuant to subdivision (r) of Section 12078, curio and relic waiting period exemption pursuant to subdivision (t) of Section 12078, California Firearms Dealer number issued pursuant to Section 12071, for transactions occurring prior to January 1, 2003, the purchaser's basic firearms safety certificate number issued pursuant to Sections 12805 and 12809, for transactions occurring on or after January 1, 2003, the purchaser's handgun safety certificate number issued pursuant to Article 8 (commencing with Section 12800), manufacturer's name if stamped on the firearm, model name or number, if stamped on the firearm, if applicable, serial number, other number (if more than one serial number is stamped on the firearm), any identification number or mark assigned to the firearm pursuant to Section 12092, caliber, type of firearm, if the firearm is new or used, barrel length, color of the firearm, full name of purchaser, purchaser's complete date of birth, purchaser's local address, if current address is temporary, complete permanent address of purchaser, identification of purchaser, purchaser's place of birth (state or country), purchaser's complete telephone number, purchaser's occupation, purchaser's sex, purchaser's physical description, all legal names and aliases ever used by the purchaser, yes or no answer to questions that prohibit purchase including, but not limited to, conviction of a felony as described in Section 12021 or an offense described in Section 12021.1, the purchaser's status

as a person described in Section 8100 of the Welfare and Institutions Code, whether the purchaser is a person who has been adjudicated by a court to be a danger to others or found not guilty by reason of insanity, whether the purchaser is a person who has been found incompetent to stand trial or placed under conservatorship by a court pursuant to Section 8103 of the Welfare and Institutions Code, signature of purchaser, signature of salesperson (as a witness to the purchaser's signature), salesperson's certificate of eligibility number if he or she has obtained a certificate of eligibility, name and complete address of the dealer or firm selling the firearm as shown on the dealer's license, the establishment number, if assigned, the dealer's complete business telephone number, any information required by Section 12082, any information required to determine whether or not paragraph (6) of subdivision (c) of Section 12072 applies, and a statement of the penalties for any person signing a fictitious name or address or for knowingly furnishing any incorrect information or for knowingly omitting any information required to be provided for the register.

(2) Effective January 1, 2003, the purchaser shall provide his or her right thumbprint on the register in a manner prescribed by the department. No exception to this requirement shall be permitted except by regulations adopted by the department.

(3) The firearms dealer shall record on the register or record of electronic transfer the date that the handgun is delivered.

(c) (1) For firearms other than handguns, information contained in the register or record of electronic transfer shall be the date and time of sale, peace officer exemption status pursuant to subdivision (a) of Section 12078 and the agency name, auction or event waiting period exemption pursuant to subdivision (g) of Section 12078, California Firearms Dealer number issued pursuant to Section 12071, dangerous weapons permitholder waiting period exemption pursuant to subdivision (r) of Section 12078, curio and relic waiting period exemption pursuant to paragraph (1) of subdivision (t) of Section 12078, full name of purchaser, purchaser's complete date of birth, purchaser's local address, if current address is temporary, complete permanent address of purchaser, identification of purchaser, purchaser's place of birth (state or country), purchaser's complete telephone number, purchaser's occupation, purchaser's sex, purchaser's physical description, all legal names and aliases

ever used by the purchaser, yes or no answer to questions that prohibit purchase, including, but not limited to, conviction of a felony as described in Section 12021 or an offense described in Section 12021.1, the purchaser's status as a person described in Section 8100 of the Welfare and Institutions Code, whether the purchaser is a person who has been adjudicated by a court to be a danger to others or found not guilty by reason of insanity, whether the purchaser is a person who has been found incompetent to stand trial or placed under conservatorship by a court pursuant to Section 8103 of the Welfare and Institutions Code, signature of purchaser, signature of salesperson (as a witness to the purchaser's signature), salesperson's certificate of eligibility number if he or she has obtained a certificate of eligibility, name and complete address of the dealer or firm selling the firearm as shown on the dealer's license, the establishment number, if assigned, the dealer's complete business telephone number, any information required by Section 12082, and a statement of the penalties for any person signing a fictitious name or address or for knowingly furnishing any incorrect information or for knowingly omitting any information required to be provided for the register.

(2) Effective January 1, 2003, the purchaser shall provide his or her right thumbprint on the register in a manner prescribed by the department. No exception to this requirement shall be permitted except by regulations adopted by the department.

(3) The firearms dealer shall record on the register or record of electronic transfer the date that the firearm is delivered.

(d) Where the register is used, the following shall apply:

(1) Dealers shall use ink to complete each document.

(2) The dealer or salesperson making a sale shall ensure that all information is provided legibly. The dealer and salespersons shall be informed that incomplete or illegible information will delay sales.

(3) Each dealer shall be provided instructions regarding the procedure for completion of the form and routing of the form. Dealers shall comply with these instructions which shall include the information set forth in this subdivision.

(4) One firearm transaction shall be reported on each record of sale document. For purposes of this subdivision, a "transaction" means a single sale, loan, or transfer of any number of firearms that are not handguns.

(e) The dealer or salesperson making a sale shall ensure that all required information has been obtained from the purchaser. The dealer and all salespersons shall be informed that incomplete information will delay sales.

(f) Effective January 1, 2003, the purchaser's name, date of birth, and driver's license or identification number shall be obtained electronically from the magnetic strip on the purchaser's driver's license or identification and shall not be supplied by any other means except as authorized by the department. This requirement shall not apply in either of the following cases:

(1) The purchaser's identification consists of a military identification card.

(2) Due to technical limitations, the magnetic ~~stripe~~ *strip* reader is unable to obtain the required information from the purchaser's identification. In those circumstances, the firearms dealer shall obtain a photocopy of the identification as proof of compliance.

(3) In the event that the dealer has reported to the department that the dealer's equipment has failed, information pursuant to this subdivision shall be obtained by an alternative method to be determined by the department.

(g) No dealer shall provide the information required by this section to any third party, or use the information for any purpose other than as is required or authorized by statute or regulation, without the written consent of the purchaser or transferee. This subdivision shall not apply to the electronic submission to the department, through a third party authorized by the department, of information required by this section and Section 12076.

(h) Any records generated pursuant to this section by a person licensed pursuant to Section 12071 that are no longer required to be maintained by that licensee, if destroyed, shall be destroyed pursuant to Section 1798.81 of the Civil Code.

~~(g)~~

(i) As used in this section, the following definitions shall control:

(1) "Purchaser" means the purchaser or transferee of a firearm or the person being loaned a firearm.

(2) "Purchase" means the purchase, loan, or transfer of a firearm.

(3) "Sale" means the sale, loan, or transfer of a firearm.

SEC. 2.5. Section 12077 of the Penal Code is amended to read:

12077. (a) The Department of Justice shall prescribe the form of the register and the record of electronic transfer pursuant to Section 12074.

(b) (1) ~~For handguns,~~ *Until July 1, 2012, for handguns, and thereafter for all firearms,* information contained in the register or record of electronic transfer shall be the date and time of sale, make of firearm, peace officer exemption status pursuant to subdivision (a) of Section 12078 and the agency name, *auction or event waiting period exemption pursuant to subdivision (g) of Section 12078,* dealer waiting period exemption pursuant to subdivision (n) of Section 12078, dangerous weapons permitholder waiting period exemption pursuant to subdivision (r) of Section 12078, curio and relic waiting period exemption pursuant to subdivision (t) of Section 12078, California Firearms Dealer number issued pursuant to Section 12071, for transactions occurring prior to January 1, 2003, the purchaser's basic firearms safety certificate number issued pursuant to Sections 12805 and 12809, for transactions occurring on or after January 1, 2003, the purchaser's handgun safety certificate number issued pursuant to Article 8 (commencing with Section 12800), manufacturer's name if stamped on the firearm, model name or number, if stamped on the firearm, if applicable, serial number, other number (if more than one serial number is stamped on the firearm), any identification number or mark assigned to the firearm pursuant to Section 12092, *provided, however, that if the firearm is not a handgun and does not have a serial number, identification number, or mark assigned to it, a notation as to that fact, the* caliber, type of firearm, if the firearm is new or used, barrel length, color of the firearm, full name of purchaser, purchaser's complete date of birth, purchaser's local address, if current address is temporary, complete permanent address of purchaser, identification of purchaser, purchaser's place of birth (state or country), purchaser's complete telephone number, purchaser's occupation, purchaser's sex, purchaser's physical description, all legal names and aliases ever used by the purchaser, yes or no answer to questions that prohibit purchase including, but not limited to, conviction of a felony as described in Section 12021 or an offense described in Section 12021.1, the purchaser's status as a person described in Section 8100 of the Welfare and Institutions Code, whether the purchaser is a person who has been adjudicated by a court to be a danger to

others or found not guilty by reason of insanity, whether the purchaser is a person who has been found incompetent to stand trial or placed under conservatorship by a court pursuant to Section 8103 of the Welfare and Institutions Code, signature of purchaser, signature of salesperson (as a witness to the purchaser's signature), salesperson's certificate of eligibility number if he or she has obtained a certificate of eligibility, name and complete address of the dealer or firm selling the firearm as shown on the dealer's license, the establishment number, if assigned, the dealer's complete business telephone number, any information required by Section 12082, any information required to determine whether or not paragraph (6) of subdivision (c) of Section 12072 applies, and a statement of the penalties for any person signing a fictitious name or address or for knowingly furnishing any incorrect information or for knowingly omitting any information required to be provided for the register.

(2) ~~Effective January 1, 2003, the~~ *The* purchaser shall provide his or her right thumbprint on the register in a manner prescribed by the department. No exception to this requirement shall be permitted except by regulations adopted by the department.

(3) The firearms dealer shall record on the register or record of electronic transfer the date that the ~~handgun~~ *firearm* is delivered.

(c) (1) For firearms other than handguns, information contained in the register or record of electronic transfer shall be the date and time of sale, peace officer exemption status pursuant to subdivision (a) of Section 12078 and the agency name, auction or event waiting period exemption pursuant to subdivision (g) of Section 12078, California Firearms Dealer number issued pursuant to Section 12071, dangerous weapons permitholder waiting period exemption pursuant to subdivision (r) of Section 12078, curio and relic waiting period exemption pursuant to paragraph (1) of subdivision (t) of Section 12078, full name of purchaser, purchaser's complete date of birth, purchaser's local address, if current address is temporary, complete permanent address of purchaser, identification of purchaser, purchaser's place of birth (state or country), purchaser's complete telephone number, purchaser's occupation, purchaser's sex, purchaser's physical description, all legal names and aliases ever used by the purchaser, yes or no answer to questions that prohibit purchase, including, but not limited to, conviction of a felony as described in Section 12021 or an offense described in

Section 12021.1, the purchaser's status as a person described in Section 8100 of the Welfare and Institutions Code, whether the purchaser is a person who has been adjudicated by a court to be a danger to others or found not guilty by reason of insanity, whether the purchaser is a person who has been found incompetent to stand trial or placed under conservatorship by a court pursuant to Section 8103 of the Welfare and Institutions Code, signature of purchaser, signature of salesperson (as a witness to the purchaser's signature), salesperson's certificate of eligibility number if he or she has obtained a certificate of eligibility, name and complete address of the dealer or firm selling the firearm as shown on the dealer's license, the establishment number, if assigned, the dealer's complete business telephone number, any information required by Section 12082, and a statement of the penalties for any person signing a fictitious name or address or for knowingly furnishing any incorrect information or for knowingly omitting any information required to be provided for the register.

(2) ~~Effective January 1, 2003, the~~ *The* purchaser shall provide his or her right thumbprint on the register in a manner prescribed by the department. No exception to this requirement shall be permitted except by regulations adopted by the department.

(3) The firearms dealer shall record on the register or record of electronic transfer the date that the firearm is delivered.

(4) This subdivision shall become inoperative on July 1, 2012.

(d) Where the register is used, the following shall apply:

(1) Dealers shall use ink to complete each document.

(2) The dealer or salesperson making a sale shall ensure that all information is provided legibly. The dealer and salespersons shall be informed that incomplete or illegible information will delay sales.

(3) Each dealer shall be provided instructions regarding the procedure for completion of the form and routing of the form. Dealers shall comply with these instructions which shall include the information set forth in this subdivision.

(4) One firearm transaction shall be reported on each record of sale document. ~~For purposes of this subdivision, a "transaction" means a single sale, loan, or transfer of any number of firearms that are not handguns.~~

(e) The dealer or salesperson making a sale shall ensure that all required information has been obtained from the purchaser. The

dealer and all salespersons shall be informed that incomplete information will delay sales.

(f) ~~Effective January 1, 2003, the~~ *The* purchaser's name, date of birth, and driver's license or identification number shall be obtained electronically from the magnetic strip on the purchaser's driver's license or identification and shall not be supplied by any other means except as authorized by the department. This requirement shall not apply in either of the following cases:

(1) The purchaser's identification consists of a military identification card.

(2) Due to technical limitations, the magnetic ~~stripe~~ *strip* reader is unable to obtain the required information from the purchaser's identification. In those circumstances, the firearms dealer shall obtain a photocopy of the identification as proof of compliance.

(3) In the event that the dealer has reported to the department that the dealer's equipment has failed, information pursuant to this subdivision shall be obtained by an alternative method to be determined by the department.

(g) No dealer shall provide the information required by this section to any third party, or use the information for any purpose other than as is required or authorized by statute or regulation, without the written consent of the purchaser or transferee. This subdivision shall not apply to the electronic submission to the department, through a third party authorized by the department, of information required by this section and Section 12076.

(h) Any records generated pursuant to this section by a person licensed pursuant to Section 12071 that are no longer required to be maintained by that licensee, if destroyed, shall be destroyed pursuant to Section 1798.81 of the Civil Code.

~~(g)~~

(i) As used in this section, the following definitions shall control:

(1) "Purchaser" means the purchaser or transferee of a firearm or the person being loaned a firearm.

(2) "Purchase" means the purchase, loan, or transfer of a firearm.

(3) "Sale" means the sale, loan, or transfer of a firearm.

~~SEC. 2.~~

SEC. 3. Section 12318 of the Penal Code is amended to read:

12318. (a) Commencing February 1, 2011, the delivery or transfer of ownership of handgun ammunition in this state may only occur in a face-to-face transaction with the deliverer or

transferor being provided bona fide evidence of identity from the purchaser or other transferee, provided, however, that handgun ammunition may be purchased over the Internet or through other means of remote ordering if a handgun ammunition vendor in California initially receives the ammunition and processes the transfer in compliance with this section and Section 12061. A violation of this section is a misdemeanor.

(b) For purposes of this section:

(1) "Bona fide evidence of identity" means a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, state identification card, identification card issued to a member of the Armed Forces, or other form of identification that bears the name, date of birth, description, and picture of the person.

(2) "Handgun ammunition" means handgun ammunition as defined in subdivision (a) of Section 12323.

(3) "Handgun ammunition vendor" has the same meaning as set forth in Section 12060.

(c) Subdivision (a) shall not apply to or affect the deliveries, transfers, or sales of, handgun ammunition to any of the following:

(1) Authorized law enforcement representatives of cities, counties, cities and counties, or state and federal governments for exclusive use by those government agencies if, prior to the delivery, transfer, or sale of the handgun ammunition, written authorization from the head of the agency employing the purchaser or transferee, is obtained identifying the employee as an individual authorized to conduct the transaction, and authorizing the transaction for the exclusive use of the agency employing the individual.

(2) Sworn peace officers, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 who are authorized to carry a firearm in the course and scope of their duties.

(3) Importers and manufacturers of handgun ammunition or firearms licensed to engage in business pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(4) Persons who are on the centralized list maintained by the Department of Justice pursuant to Section 12083.

(5) Persons licensed as dealers or collectors of firearms pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the

United States Code and the regulations issued pursuant thereto who have current certificates of eligibility issued to them by the Department of Justice pursuant to Section 12071.

(6) A handgun ammunition vendor.

(7) A consultant-evaluator, as defined in subdivision (s) of Section 12001.

~~SEC. 3.~~

SEC. 4. Section 12323 of the Penal Code is amended to read:

12323. As used in this chapter, the following definitions shall apply:

(a) "Handgun ammunition," which does not include blanks and ammunition designed and intended to be used in an "antique firearm" as defined in Section 921(a)(16) of Title 18 of the United States Code, meansany variety of ammunition in the following calibers, notwithstanding that the ammunition may also be used in some rifles:

(1) .22 *rimfire*.

(2) .25.

(3) .32.

(4) .38.

(5) .9mm.

(6) .10mm.

(7) .40.

(8) .41.

(9) .44.

(10) .45.

(11) 5.7x28mm.

~~(12) .223.~~

~~(13)~~

(12) .357.

~~(14)~~

(13) .454.

~~(15)~~

(14) 5.56x45mm.

~~(16) 7.62x39.~~

~~(17)~~

(15) 7.63mm.

~~(18)~~

(16) 7.65mm.

~~(19) .50.~~

(b) "Handgun ammunition designed primarily to penetrate metal or armor" means any ammunition, except a shotgun shell or ammunition primarily designed for use in rifles, that is designed primarily to penetrate a body vest or body shield, and has either of the following characteristics:

(1) Has projectile or projectile core constructed entirely, excluding the presence of traces of other substances, from one or a combination of tungsten alloys, steel, iron, brass, beryllium copper, or depleted uranium, or any equivalent material of similar density or hardness.

(2) Is primarily manufactured or designed, by virtue of its shape, cross-sectional density, or any coating applied thereto, including, but not limited to, ammunition commonly known as "KTW ammunition," to breach or penetrate a body vest or body shield when fired from a pistol, revolver, or other firearm capable of being concealed upon the person.

(c) "Body vest or shield" means any bullet-resistant material intended to provide ballistic and trauma protection for the wearer or holder.

(d) "Rifle" shall have the same meaning as defined in paragraph (20) of subdivision (c) of Section 12020.

SEC. 5. Section 2.5 of this bill incorporates amendments to Section 12077 of the Penal Code proposed by both this bill and AB 1810. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2011, (2) each bill amends Section 12077 of the Penal Code, and (3) this bill is enacted after AB 1810, in which case Section 2 of this bill shall not become operative.

~~SEC. 4.~~

SEC. 6. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

EXHIBIT H

BILL NUMBER: SB 1276 AMENDED 05/26/94
BILL TEXT

AMENDED IN SENATE MAY 26, 1994
AMENDED IN SENATE MARCH 24, 1994
AMENDED IN SENATE MARCH 15, 1994

INTRODUCED BY Senator Hart

JANUARY 4, 1994

An act to amend Sections 12001, 12020, 12021, {- 12022.4, -} 12070, 12076, 12101, and 12551 of, to amend the heading of Article 4 (commencing with Section 12070) of Chapter 1 of Title 2 of Part 4 of, and to add Sections 12070.5, 12072.3, {- 12326, and 12327 -} {+ and 12326 +} to, the Penal Code, relating to ammunition.

LEGISLATIVE COUNSEL'S DIGEST

SB 1276, as amended, Hart. Ammunition.

(1) Under existing law, any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any of a series of specified weapons, including any ammunition that contains or consists of any flechette dart, shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison.

This bill would, in addition, make the above provision applicable to any firearm ammunition that contains exothermic pyrophoric misch metal as the projectile and that is designed for the sole purpose of throwing or spewing a flame or fireball to simulate a flamethrower, or any firearm ammunition that can be fired in a firearm capable of expelling as projectiles 2 or more metal balls connected by metal wire.

(2) Existing law prohibits specified persons from owning or having possession or control, as specified, of any firearm.

This bill would extend this prohibition to apply to firearm ammunition and to include persons who purchase or receive or attempt to purchase or receive any firearm or firearm ammunition.

(3) {- Existing law provides for an additional term of imprisonment in the state prison of 1, 2, or 3 years for a person convicted of the commission or attempted commission of a felony during which the person furnished or offered to furnish a firearm to another for the purpose of aiding, abetting, or enabling that person or any other person to commit a felony.

This bill would extend this enhancement to apply to furnishing or offering to furnish firearm ammunition under these circumstances.

(4) -} Existing law requires that a person be licensed to sell, lease, or transfer firearms. These provisions define "infrequent" for the purposes of exempting from the licensing requirements the infrequent sale, lease, or transfer of firearms. A violation of the licensing requirements is a misdemeanor.

This bill would extend the licensing provisions to apply to

firearm ammunition, as specified, and would define "infrequent" for the purposes of firearm ammunition. {-

(5) -} {+

(4) +} Existing law makes a person who purchases, sells, manufactures, ships, transports, distributes, or receives, by mail order or in any other manner, an imitation firearm, liable for a civil fine of not more than $10,000 for each violation.

This bill would make it a misdemeanor for a person to knowingly sell handgun ammunition by mail to anyone other than a licensed firearms dealer, punishable as specified. The bill would also make it a misdemeanor for a person who is not a licensed firearm dealer to knowingly receive any handgun ammunition directly through the mail, punishable as specified. The bill would authorize a person to order handgun ammunition through a local firearms dealer and to take possession of the ammunition only after furnishing the dealer with clear evidence of his or her identity and firearm or arsenal license, issued as specified. The bill would provide that these provisions shall become operative on July 1, 1996. {-

(6) -} {+

(5) +} Under existing law, the licensure procedures require a purchaser or transferee of a firearm to present clear evidence of his or her identity and age, including certain documents.

This bill would exempt duly authorized agencies performing law enforcement duties in California or peace officers, as defined, from the foregoing provisions. {-

(7) -} {+

(6) +} Existing law also prohibits a person licensed under (3) above from selling, delivering, or transferring any pistol, revolver, or firearm capable of being concealed upon the person to any person under the age of 21 years or any other firearm to a person under the age of 18 years, punishable as a misdemeanor.

This bill would prohibit any person or dealer licensed to sell firearms from employing any person under the age of 18 years unless the licensee does not sell pistols, revolvers, or other firearms capable of being concealed upon the person. If the licensee sells pistols, revolvers, or other firearms capable of being concealed upon the person, this bill would prohibit him or her from employing any person under the age of 21 years. The bill would require the Department of Justice to perform a background check on any employee of a person or dealer licensed as specified. The bill would provide punishment, as prescribed, for violation of these and other specified hiring provisions. {-

(8) -} {+

(7) +} Existing law provides that a minor may not possess live ammunition, except as specified. A violation of this provision is a misdemeanor.

This bill, instead, would provide that a minor may not possess firearm ammunition, except as specified.

The bill, in addition, would prohibit a person under the age of 21 years from purchasing any handgun ammunition, as defined, and a person under the age of 18 years from purchasing any firearm ammunition, including, but not limited to, handgun ammunition. {-

(9) -} {+

(8) +} Existing law prohibits, except as specified, the possession, manufacture, importation, sale, offer of sale, or knowing transportation of handgun ammunition designed primarily

to penetrate metal or armor, punishable as a felony.
This bill would authorize the Attorney General to ban the sale and manufacture of any type of handgun bullet that tests show is capable of piercing a body vest, as defined. The bill also would require the Attorney General to annually compile a list of these bullets. {-
(10) Existing law provides a definition of handgun ammunition and generally imposes restrictions on the sale, purchase, possession, or use of ammunition.
This bill would provide that every person who possesses or purchases in excess of 1,000 rounds of handgun ammunition without a valid California Arsenal License is guilty of a misdemeanor.
(11) -} {+
(9) +} Existing law provides that it is a misdemeanor for every person to sell to a minor any firearm.
This bill, instead, would provide that this provision shall apply to every person, except those licensed under (4) above, who would be subject to certain other provisions. The bill also would extend these provisions to apply to any firearm ammunition. {-
(12) -} {+
(10) +} Because this bill would create new crimes, it would impose a state-mandated local program. {-
(13) -} {+
(11) +} The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.
This bill would provide that no reimbursement is required by this act for a specified reason.
Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 12001 of the Penal Code is amended to read:

12001. (a) As used in this title, the terms "pistol," "revolver," and "firearm capable of being concealed upon the person" shall apply to and include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and which has a barrel less than 16 inches in length. These terms also include any device which has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length.
(b) As used in this title, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.
(c) As used in Sections 12021, 12021.1, 12070, 12071, 12072, 12073, and 12078 of this code, and Sections 8100 and 8103 of the Welfare and Institutions Code, the term "firearm" includes the frame or receiver of that weapon.
(d) For the purpose of Sections 12025 and 12031, the term "firearm" also shall include any rocket, rocket propelled projectile launcher, or similar device containing any explosive

or incendiary material whether or not the device is designed for emergency or distress signaling purposes.

(e) (1) For purposes of Sections 12070, 12071, and subdivisions (b), (c), and (d) of Section 12072, the term "firearm" does not include an unloaded firearm which is defined as an "antique firearm" in Section 921(a)(16) of Title 18 of the United States Code.

(2) For purposes of Sections 12070, 12071, and subdivisions (b), (c), and (d) of Section 12072, the term "firearm" does not include an unloaded firearm that meets both of the following:

(A) It is not a pistol, revolver, or other firearm capable of being concealed upon the person.

(B) It is a curio or relic, as defined in Section 178.11 of Title 27 of the Code of Federal Regulations.

(f) Nothing shall prevent a device defined as a "pistol," "revolver," or "firearm capable of being concealed upon the person" from also being found to be a short-barreled shotgun or a short-barreled rifle, as defined in Section 12020.

(g) For purposes of Section 12551, the term "firearm" also shall include any instrument which expels a metallic projectile, such as a BB or a pellet, through the force of air pressure, CO2 pressure, or spring action, or any spot marker gun.

(h) As used in this title, "wholesaler" means any person who is licensed as a dealer pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto who sells or transfers or assigns firearms, or parts of firearms, to persons who are licensed as manufacturers, importers, or gunsmiths pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code, or persons licensed pursuant to Section 12071 and includes persons who receive finished parts of firearms and assemble them into completed or partially completed firearms, in furtherance of that purpose.

"Wholesaler" shall not include a manufacturer or importer or a gunsmith who is licensed to engage in those activities pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code or a person licensed pursuant to Section 12071 and the regulations issued pursuant thereto. A wholesaler also does not include those persons dealing exclusively in grips, stocks, and other parts of firearms that are not frames or receivers thereof.

(i) As used in Section 12071, 12072, or 12084, "application to purchase" means either of the following:

(1) The initial completion of the register by the purchaser or transferee as required by subdivision (a) of Section 12076.

(2) The initial completion of the LEFT by the purchaser or transferee as required by subdivision (d) of Section 12084.

(j) For the purpose of this chapter, "firearm ammunition" means any ammunition, including, but not limited to, handgun ammunition, as defined in Section 12323, except "firearm ammunition" shall not include ammunition, as described in Section 12322.

SEC. 2. Section 12020 of the Penal Code is amended to read:

12020. (a) Any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any cane gun or wallet gun, any undetectable firearm, any firearm which is not immediately recognizable as a firearm, any camouflaging firearm container, any firearm ammunition which contains or consists of any flechette dart, any firearm

ammunition that contains exothermic pyrophoric misch metal as the projectile and that is designed for the sole purpose of throwing or spewing a flame or fireball to simulate a flamethrower, any firearm ammunition that can be fired in a firearm capable of expelling as projectiles two or more metal balls connected by solid metal wire, any bullet containing or carrying an explosive agent, any ballistic knife, any multiburst trigger activator, any nunchaku, any short-barreled shotgun, any short-barreled rifle, any metal knuckles, any belt buckle knife, any leaded cane, any zip gun, any shuriken, any unconventional pistol, any lipstick case knife, any cane sword, any shobi-zue, any air gauge knife, any writing pen knife, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag, or who carries concealed upon his or her person any explosive substance, other than fixed ammunition or who carries concealed upon his or her person any dirk or dagger shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison. A bullet containing or carrying an explosive agent is not a destructive device as that term is used in Section 12301.

(b) Subdivision (a) does not apply to any of the following:

(1) The sale to, purchase by, or possession of short-barreled shotguns or short-barreled rifles by police departments, sheriffs' offices, marshals' offices, the California Highway Patrol, the Department of Justice, or the military or naval forces of this state or of the United States for use in the discharge of their official duties or the possession of short-barreled shotguns and short-barreled rifles by regular, salaried, full-time members of a police department, sheriff's office, marshal's office, the California Highway Patrol, or the Department of Justice when on duty and the use is authorized by the agency and is within the course and scope of their duties.

(2) The manufacture, possession, transportation or sale of short-barreled shotguns or short-barreled rifles when authorized by the Department of Justice pursuant to Article 6 (commencing with Section 12095) of this chapter and not in violation of federal law.

(3) The possession of a nunchaku on the premises of a school which holds a regulatory or business license and teaches the arts of self-defense.

(4) The manufacture of a nunchaku for sale to, or the sale of a nunchaku to, a school which holds a regulatory or business license and teaches the arts of self-defense.

(5) Any antique firearm. For purposes of this section, "antique firearm" means any firearm not designed or redesigned for using rimfire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(6) Tracer ammunition manufactured for use in shotguns.

(7) Any firearm or ammunition which is a curio or relic as defined in Section 178.11 of Title 27 of the Code of Federal Regulations and which is in the possession of a person permitted to possess the items pursuant to Chapter 44 (commencing with

Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto. Any person prohibited by Section 12021, 12021.1, or 12101 of this code or Section 8100 or 8103 of the Welfare and Institutions Code from possessing firearms or ammunition who obtains title to these items by bequest or intestate succession may retain title for not more than one year, but actual possession of these items at any time is punishable pursuant to Section 12021, 12021.1, or 12101 of this code or Section 8100 or 8103 of the Welfare and Institutions Code. Within the year the person shall transfer title to the firearms or ammunition by sale, gift, or other disposition. Any person who violates this paragraph is in violation of subdivision (a).

(8) Any other weapon as defined in subsection (e) of Section 5845 of Title 26 of the United States Code and which is in the possession of a person permitted to possess the weapons pursuant to the federal Gun Control Act of 1968 (Public Law 90-618), as amended, and the regulations issued pursuant thereto. Any person prohibited by Section 12021, 12021.1, or 12101 of this code or Section 8100 or 8103 of the Welfare and Institutions Code from possessing these weapons who obtains title to these weapons by bequest or intestate succession may retain title for not more than one year, but actual possession of these weapons at any time is punishable pursuant to Section 12021, 12021.1, or 12101 of this code or Section 8100 or 8103 of the Welfare and Institutions Code. Within the year, the person shall transfer title to the weapons by sale, gift, or other disposition. Any person who violates this paragraph is in violation of subdivision (a). The exemption provided in this subdivision does not apply to pen guns.

(9) Instruments or devices that are possessed by federal, state, and local historical societies, museums, and institutional collections which are open to the public, provided that these instruments or devices are properly housed, secured from unauthorized handling, and, if the instrument or device is a firearm, unloaded.

(10) Instruments or devices, other than short-barreled shotguns or short-barreled rifles, that are possessed or utilized during the course of a motion picture, television, or video production or entertainment event by an authorized participant therein in the course of making that production or event or by an authorized employee or agent of the entity producing that production or event.

(11) Instruments or devices, other than short-barreled shotguns or short-barreled rifles, that are sold by, manufactured by, exposed or kept for sale by, possessed by, imported by, or lent by persons who are in the business of selling instruments or devices listed in subdivision (a) solely to the entities referred in paragraphs (9) and (10) when engaging in transactions with those entities.

(12) The sale to, possession of, or purchase of any weapon, device, or ammunition, other than a short-barreled rifle or short-barreled shotgun, by any federal, state, county, city and county, or city agency that is charged with the enforcement of any law for use in the discharge of their official duties, or the possession of any weapon, device, or ammunition, other than a short-barreled rifle or short-barreled shotgun, by peace officers thereof when on duty and the use is authorized by the agency and is within the course and scope of their duties.

(13) Weapons, devices, and ammunition, other than a

short-barreled short-barreled shotgun, that are sold by, manufactured by, exposed, or kept for sale by, possessed by, imported by, or lent by, persons who are in the business of selling weapons, devices, and ammunition listed in subdivision (a) solely to the entities referred to in paragraph (12) when engaging in transactions with those entities.

(14) The manufacture for, sale to, exposing or keeping for sale to, importation of, or lending of wooden clubs or batons to special police officers or uniformed security guards authorized to carry any wooden club or baton pursuant to Section 12002 by entities that are in the business of selling wooden batons or clubs to special police officers and uniformed security guards when engaging in transactions with those persons.

(c) (1) As used in this section, a "short-barreled shotgun" means any of the following:

(A) A firearm which is designed or redesigned to fire a fixed shotgun shell and having a barrel or barrels of less than 18 inches in length.

(B) A firearm which has an overall length of less than 26 inches and which is designed or redesigned to fire a fixed shotgun shell.

(C) Any weapon made from a shotgun (whether by alteration, modification, or otherwise) if that weapon, as modified, has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length.

(D) Any device which may be readily restored to fire a fixed shotgun shell which, when so restored, is a device defined in subparagraphs (A) to (C), inclusive.

(E) Any part, or combination of parts, designed and intended to convert a device into a device defined in subparagraphs (A) to (C), inclusive, or any combination of parts from which a device defined in subparagraphs (A) to (C), inclusive, can be readily assembled if those parts are in the possession or under the control of the same person.

(2) As used in this section, a "short-barreled rifle" means any of the following:

(A) A rifle having a barrel or barrels of less than 16 inches in length.

(B) A rifle with an overall length of less than 26 inches.

(C) Any weapon made from a rifle (whether by alteration, modification, or otherwise) if that weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length.

(D) Any device which may be readily restored to fire a fixed cartridge which, when so restored, is a device defined in subparagraphs (A) to (C), inclusive.

(E) Any part, or combination of parts, designed and intended to convert a device into a device defined in subparagraphs (A) to (C), inclusive, or any combination of parts from which a device defined in subparagraphs (A) to (C), inclusive, may be readily assembled if those parts are in the possession or under the control of the same person.

(3) As used in this section, a "nunchaku" means an instrument consisting of two or more sticks, clubs, bars or rods to be used as handles, connected by a rope, cord, wire, or chain, in the design of a weapon used in connection with the practice of a system of self-defense such as karate.

(4) As used in this section, a "wallet gun" means any firearm mounted or enclosed in a case, resembling a wallet, designed to be or capable of being carried in a pocket or purse, if the

firearm may be fired while mounted or enclosed in the case.

(5) As used in this section, a "cane gun" means any firearm mounted or enclosed in a stick, staff, rod, crutch, or similar device, designed to be, or capable of being used as, an aid in walking, if the firearm may be fired while mounted or enclosed therein.

(6) As used in this section, a "flechette dart" means a dart, capable of being fired from a firearm, which measures approximately one inch in length, with tail fins which take up five-sixteenths of an inch of the body.

(7) As used in this section, "metal knuckles" means any device or instrument made wholly or partially of metal which is worn for purposes of offense or defense in or on the hand and which either protects the wearer's hand while striking a blow or increases the force of impact from the blow or injury to the individual receiving the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs which would contact the individual receiving a blow.

(8) As used in this section, a "ballistic knife" means a device that propels a knifelike blade as a projectile by means of a coil spring, elastic material, or compressed gas. Ballistic knife does not include any device which propels an arrow or a bolt by means of any common bow, compound bow, crossbow, or underwater spear gun.

(9) As used in this section, a "camouflaging firearm container" means a container which meets all of the following criteria:

(A) It is designed and intended to enclose a firearm.

(B) It is designed and intended to allow the firing of the enclosed firearm by external controls while the firearm is in the container.

(C) It is not readily recognizable as containing a firearm.

"Camouflaging firearm container" does not include any camouflaging covering used while engaged in lawful hunting or while going to or returning from a lawful hunting expedition.

(10) As used in this section, a "zip gun" means any weapon or device which meets all of the following criteria:

(A) It was not imported as a firearm by an importer licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(B) It was not originally designed to be a firearm by a manufacturer licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(C) No tax was paid on the weapon or device nor was an exemption from paying tax on that weapon or device granted under Section 4181 and subchapters F (commencing with Section 4216) and G (commencing with Section 4221) of Chapter 32 of Title 26 of the United States Code, as amended, and the regulations issued pursuant thereto.

(D) It is made or altered to expel a projectile by the force of an explosion or other form of combustion.

(11) As used in this section, a "shuriken" means any instrument, without handles, consisting of a metal plate having three or more radiating points with one or more sharp edges and designed in the shape of a polygon, trefoil, cross, star, diamond, or other geometric shape for use as a weapon for throwing.

(12) As used in this section, an "unconventional pistol" means a firearm that does not have a rifled bore and has a barrel or barrels of less than 18 inches in length or has an overall length of less than 26 inches.

(13) As used in this section, a "belt buckle knife" is a knife which is made an integral part of a belt buckle and consists of a blade with a length of at least 21/2 inches.

(14) As used in this section, a "lipstick case knife" means a knife enclosed within and made an integral part of a lipstick case.

(15) As used in this section, a "cane sword" means a cane, swagger stick, stick, staff, rod, pole, umbrella, or similar device, having concealed within it a blade that may be used as a sword or stiletto.

(16) As used in this section, a "shobi-zue" means a staff, crutch, stick, rod, or pole concealing a knife or blade within it which may be exposed by a flip of the wrist or by a mechanical action.

(17) As used in this section, a "leaded cane" means a staff, crutch, stick, rod, pole, or similar device, unnaturally weighted with lead.

(18) As used in this section, an "air gauge knife" means a device that appears to be an air gauge but has concealed within it a pointed, metallic shaft that is designed to be a stabbing instrument which is exposed by mechanical action or gravity which locks into place when extended.

(19) As used in this section, a "writing pen knife" means a device that appears to be a writing pen but has concealed within it a pointed, metallic shaft that is designed to be a stabbing instrument which is exposed by mechanical action or gravity which locks into place when extended or the pointed, metallic shaft is exposed by the removal of the cap or cover on the device.

(20) As used in this section, a "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

(21) As used in this section, a "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger.

(22) As used in this section, an "undetectable firearm" means any weapon which meets one of the following requirements:

(A) When, after removal of grips, stocks, and magazines, it is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar.

(B) When any major component of which, when subjected to inspection by the types of X-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(C) For purposes of this paragraph, the terms "firearm," "major component," and "Security Exemplar" have the same meanings as those terms are defined in Section 922 of Title 18 of the United States Code.

All firearm detection equipment newly installed in nonfederal public buildings in this state shall be of a type identified by either the United States Attorney General, the Secretary of Transportation, or the Secretary of the Treasury, as appropriate, as available state-of-the-art equipment capable of detecting an undetectable firearm, as defined, while distinguishing innocuous metal objects likely to be carried on one's person sufficient for reasonable passage of the public.

(23) As used in this section, a "multiburst trigger activator" means one of the following devices:

(A) A device designed or redesigned to be attached to a semiautomatic firearm which allows the firearm to discharge two or more shots in a burst by activating the device.

(B) A manual or power-driven trigger activating device constructed and designed so that when attached to a semiautomatic firearm it increases the rate of fire of that firearm.

(24) As used in this section, a "dirk" or "dagger" means a knife or other instrument with or without a handguard that is primarily designed, constructed, or altered to be a stabbing instrument designed to inflict great bodily injury or death.

(d) Knives carried in sheaths which are worn openly suspended from the waist of the wearer are not concealed within the meaning of this section.

SEC. 3. Section 12021 of the Penal Code is amended to read:

12021. (a) (1) Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 12001.6, or who is addicted to the use of any narcotic drug, who purchases or receives or attempts to purchase or receive or owns or has in his or her possession or under his or her custody or control any firearm or firearm ammunition is guilty of a felony.

(2) Any person who has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417 and who owns or has in his or her possession or under his or her custody or control any firearm or firearm ammunition is guilty of a felony.

(b) Notwithstanding subdivision (a), any person who has been convicted of a felony or of an offense enumerated in Section 12001.6, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Section 707 of the Welfare and Institutions Code, who purchases or receives or attempts to purchase or receive or owns or has in his or her possession or under his or her custody or control any firearm or firearm ammunition is guilty of a felony.

(c) (1) Except as provided in subdivision (a) or paragraph (2) of this subdivision, any person who has been convicted of a misdemeanor violation of Section 136.5, 140, 171b, 171c, 171d, 240, 241, 242, 243, 244.5, 245, 245.5, 246.3, 247, 273.5, 273.6, 417, 417.2, 626.9, 646.9, subdivision (b) or (d) of Section 12034, subdivision (a) of Section 12100, 12320, or 12590 and who, within 10 years of the conviction, owns, or has in his or her possession or under his or her custody or control, any firearm or firearm ammunition is guilty of a public offense, which shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars ($1,000), or by both that

imprisonment and fine. The court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this subdivision. However, the prohibition in this paragraph may be reduced, eliminated, or conditioned as provided in paragraph (2) or (3).

(2) Any person employed as a peace officer described in Section 830.1, 830.2, 830.31, 830.32, 830.33, or 830.5 whose employment or livelihood is dependent on the ability to legally possess a firearm or firearm ammunition, who is subject to the prohibition imposed by this subdivision because of a conviction under Section 273.5, 273.6, or 646.9, may petition the court only once for relief from this prohibition. The petition shall be filed with the court in which the petitioner was sentenced. If possible, the matter shall be heard before the same judge that sentenced the petitioner. Upon filing the petition, the clerk of the court shall set the hearing date and shall notify the petitioner and the prosecuting attorney of the date of the hearing. Upon making each of the following findings, the court may reduce or eliminate the prohibition, impose conditions on reduction or elimination of the prohibition, or otherwise grant relief from the prohibition as the court deems appropriate:

(A) Finds by a preponderance of the evidence that the petitioner is likely to use a firearm in a safe and lawful manner.

(B) Finds that the petitioner is not within a prohibited class as specified in subdivision (a), (b), (d), (e), or (g) or Section 12021.1, and the court is not presented with any credible evidence that the petitioner is a person described in Section 8100 or 8103 of the Welfare and Institutions Code.

(C) Finds that the petitioner does not have a previous conviction under subdivision (c) no matter when the prior conviction occurred.

In making its decision, the court shall consider the petitioner's continued employment, the interest of justice, any relevant evidence, and the totality of the circumstances. The court shall require, as a condition of granting relief from the prohibition under this section, that the petitioner agree to participate in counseling as deemed appropriate by the court. Relief from the prohibition shall not relieve any other person or entity from any liability that might otherwise be imposed. It is the intent of the Legislature that courts exercise broad discretion in fashioning appropriate relief under this paragraph in cases in which relief is warranted. However, nothing in this paragraph shall be construed to require courts to grant relief to any particular petitioner. It is the intent of the Legislature to permit persons who were convicted of an offense specified in Section 273.5, 273.6, or 646.9 to seek relief from the prohibition imposed by this subdivision.

(3) Any person who is subject to the prohibition imposed by this subdivision because of a conviction prior to January 1, 1991, may petition the court only once for relief from this prohibition. The petition shall be filed with the court in which the petitioner was sentenced. If possible, the matter shall be heard before the same judge that sentenced the petitioner. Upon filing the petition, the clerk of the court shall set the hearing date and notify the petitioner and the prosecuting attorney of the date of the hearing. Upon making each of the following findings, the court may reduce or eliminate the prohibition, impose conditions on reduction or

elimination of the prohibition, or otherwise grant relief from the prohibition as the court deems appropriate:

(A) Finds by a preponderance of the evidence that the petitioner is likely to use a firearm in a safe and lawful manner.

(B) Finds that the petitioner is not within a prohibited class as specified in subdivision (a), (b), (d), (e), or (g) or Section 12021.1, and the court is not presented with any credible evidence that the petitioner is a person described in Section 8100 or 8103 of the Welfare and Institutions Code.

(C) Finds that the petitioner does not have a previous conviction under this subdivision, no matter when the prior conviction occurred.

In making its decision, the court may consider the interest of justice, any relevant evidence, and the totality of the circumstances. It is the intent of the Legislature that courts exercise broad discretion in fashioning appropriate relief under this paragraph in cases in which relief is warranted. However, nothing in this paragraph shall be construed to require courts to grant relief to any particular petitioner.

(4) Law enforcement officials who enforce the prohibition specified in this subdivision against a person who has been granted relief pursuant to paragraph (2) or (3), shall be immune from any liability for false arrest arising from the enforcement of this subdivision unless the person has in his or her possession a certified copy of the court order that granted the person relief from the prohibition. This immunity from liability shall not relieve any person or entity from any other liability that might otherwise be imposed.

(d) Any person who, as an express condition of probation, is prohibited or restricted from owning, possessing, controlling, receiving, or purchasing a firearm or firearm ammunition and who owns, or has in his or her possession or under his or her custody or control, any firearm or firearm ammunition but who is not subject to subdivision (a) or (c) is guilty of a public offense, which shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine. The court, on forms provided by the Department of Justice, shall notify the department of persons subject to this subdivision. The notice shall include a copy of the order of probation and a copy of any minute order or abstract reflecting the order and conditions of probation.

(e) Any person who (1) is alleged to have committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or an offense described in subdivision (b) of Section 1203.073, (2) is found to be a fit and proper subject to be dealt with under the juvenile court law, and (3) is subsequently adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or an offense described in subdivision (b) of Section 1203.073 shall not purchase or receive or attempt to purchase or receive or own, or have in his or her possession or under his or her custody or control, any firearm or firearm ammunition until the age of 30 years. A violation of this subdivision shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and

fine. The juvenile court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this subdivision. Notwithstanding any other law, the forms required to be submitted to the department pursuant to this subdivision may be used to determine eligibility to acquire a firearm or firearm ammunition.

(f) Subdivision (a) shall not apply to a person who has been convicted of a felony under the laws of the United States unless either of the following criteria is satisfied:

(1) Conviction of a like offense under California law can only result in imposition of felony punishment.

(2) The defendant was sentenced to a federal correctional facility for more than 30 days, or received a fine of more than one thousand dollars ($1,000), or received both punishments.

(g) Every person who purchases or receives, or attempts to purchase or receive, a firearm or firearm ammunition knowing that he or she is subject to a protective order as defined in Section 6218 of the Family Code, is guilty of a public offense, which shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars ($1,000), or both that imprisonment and fine. This subdivision does not apply unless the copy of the restraining order personally served on the person against whom the restraining order is issued contains a notice in bold print stating (1) that the person is prohibited from purchasing or receiving or attempting to purchase or receive a firearm or firearm ammunition and (2) specifying the penalties for violating this subdivision, or a court has provided actual verbal notice of the firearm prohibition and penalty as provided in Section 6304 of the Family Code. However, this subdivision does not apply if the firearm or firearm ammunition is received as part of the disposition of community property pursuant to Division 7 (commencing with Section 2500) of the Family Code. {-

SEC. 4. Section 12022.4 of the Penal Code is amended to read:

12022.4. Any person who, during the commission or attempted commission of a felony, furnishes or offers to furnish a firearm or firearm ammunition to another for the purpose of aiding, abetting, or enabling that person or any other person to commit a felony shall, in addition and consecutive to the punishment prescribed by the felony or attempted felony of which the person has been convicted, be punished by an additional term of one, two, or three years in the state prison. The court shall order the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of the sentence. The additional term provided in this section shall not be imposed unless the fact of the furnishing is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

SEC. 5. -} {+

SEC. 4. +} The heading of Article 4 (commencing with Section 12070) of Chapter 1 of Title 2 of Part 4 of the Penal Code is amended to read:

Article 4. Licenses to Sell Firearms and Firearm Ammunition

{-

SEC. 6. -} {+

SEC. 5. +} Section 12070 of the Penal Code is amended to read:

12070. (a) No person shall sell, lease, or transfer firearms or firearm ammunition unless he or she has been issued a license pursuant to Section 12071. Any person violating this section is guilty of a misdemeanor.

(b) Subdivision (a) does not include any of the following:

(1) The sale, lease, or transfer of any firearm or firearm ammunition by a person acting pursuant to operation of law, a court order, or pursuant to the Enforcement of Judgments Law (Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure), or by a person who liquidates a personal firearm collection to satisfy a court judgment.

(2) A person acting pursuant to subdivision (e) of Section 186.22a or subdivision (c) of Section 12028.

(3) The sale, lease, or transfer of a firearm by a person who obtains title to the firearm by intestate succession or by bequest or as a surviving spouse pursuant to Chapter 1 (commencing with Section 13500) of Part 2 of Division 8 of the Probate Code, provided the person disposes of the firearm within 60 days of receipt of the firearm.

(4) The infrequent sale, lease, or transfer of firearms.

(5) The sale, lease, or transfer of used firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person, at gun shows or events, as specified in subparagraph (B) of paragraph (1) of subdivision (b) of Section 12071, by a person other than a licensee or dealer, provided the person has a valid federal firearms license and a certificate of eligibility issued by the Department of Justice, as specified in Section 12071, and provided all the sales, leases, or transfers fully comply with subdivision (d) of Section 12072. However, the person shall not engage in the sale, lease, or transfer of used firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person at more than 12 gun shows or events in any calendar year and shall not sell, lease, or transfer more than 15 used firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person at any single gun show or event. In no event shall the person sell more than 75 used firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person in any calendar year.

A person described in this paragraph shall be known as a "Gun Show Trader."

The Department of Justice shall adopt regulations to administer this program and shall recover the full costs of administration from fees assessed applicants.

As used in this paragraph, the term "used firearm" means a firearm that has been sold previously at retail and is more than three years old.

(6) The activities of a law enforcement agency pursuant to Section 12084.

(7) Deliveries, sales, or transfers of firearms or firearm ammunition between or to importers and manufacturers of firearms or firearm ammunition licensed to engage in business pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(8) The sale, delivery, or transfer of firearms or firearm ammunition by manufacturers or importers licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the

United States Code and the regulations issued pursuant thereto to dealers or wholesalers.

(9) Deliveries and transfers of firearms or firearm ammunition made pursuant to Section 12028, 12028.5, or 12030.

(10) The loan of a firearm for the purposes of shooting at targets, if the loan occurs on the premises of a target facility which holds a business or regulatory license or on the premises of any club or organization organized for the purposes of practicing shooting at targets upon established ranges, whether public or private, if the firearm is at all times kept within the premises of the target range or on the premises of the club or organization.

(11) Sales, deliveries, or transfers of firearms or firearm ammunition by manufacturers, importers, or wholesalers licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto to persons who reside outside this state who are licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto, if the sale, delivery, or transfer is in accordance with Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(12) Sales, deliveries, or transfers of firearms or firearm ammunition by persons who reside outside this state and are licensed outside this state pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto to wholesalers, manufacturers, or importers, if the sale, delivery, or transfer is in accordance with Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(13) Sales, deliveries, or transfers of firearms or firearm ammunition by wholesalers to dealers.

(14) Sales, deliveries, or transfers of firearms or firearm ammunition by persons who reside outside this state to persons licensed pursuant to Section 12071, if the sale, delivery, or transfer is in accordance with Chapter 44 (commencing with Section 921) of Title 18 of the United States Code, and the regulations issued pursuant thereto.

(15) Sales, deliveries, or transfers of firearms or firearm ammunition by persons who reside outside this state and are licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto to dealers, if the sale, delivery, or transfer is in accordance with Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(16) The delivery, sale, or transfer of an unloaded firearm by one wholesaler to another wholesaler if that firearm is intended as merchandise in the receiving wholesaler's business.

(c) (1) As used in this section, "infrequent" means:

(A) (i) For pistols, revolvers, and other firearms capable of being concealed upon the person, less than six transactions per calendar year. For this purpose, "transaction" means a single sale, lease, or transfer of any number of pistols, revolvers, or other firearms capable of being concealed upon the person.

(ii) For firearm ammunition, less than six transactions per calendar year. For this purpose, "transaction" shall mean a

single sale or transfer of 25 or more bullets or shells.
(B) For firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person, occasional and without regularity.
(2) As used in this section, "operation of law" includes, but is not limited to, any of the following:
(A) The executor or administrator of an estate, if the estate includes firearms.
(B) A secured creditor or an agent or employee thereof when the firearms are possessed as collateral for, or as a result of, a default under a security agreement under the Commercial Code.

(C) A levying officer, as defined in Section 481.140, 511.060, or 680.260 of the Code of Civil Procedure.
(D) A receiver performing his or her functions as a receiver, if the receivership estate includes firearms.
(E) A trustee in bankruptcy performing his or her duties, if the bankruptcy estate includes firearms.
(F) An assignee for the benefit of creditors performing his or her functions as an assignee, if the assignment includes firearms.
(G) A transmutation of property between spouses pursuant to Section 850 of the Family Code. {-
SEC. 7. -} {+
SEC. 6. +} Section 12070.5 is added to the Penal Code, to read:
12070.5. (a) Notwithstanding Section 12070, any person who knowingly sells any handgun ammunition by mail to anyone other than a licensed firearms dealer is guilty of a misdemeanor punishable by imprisonment in a county jail for not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both the fine and imprisonment.
(b) Any person who is not a licensed firearm dealer who knowingly receives any handgun ammunition directly through the mail is guilty of a misdemeanor punishable by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both the fine and imprisonment.

(c) A person may order handgun ammunition through a local firearms dealer and take possession of that ammunition only after furnishing the dealer with clear evidence of his or her identity and a California Handgun License or California Arsenal License issued pursuant to Section 12071 or 12076.
(d) This section shall become operative July 1, 1996. {-
SEC. 8. -} {+
SEC. 7. +} Section 12072.3 is added to the Penal Code, to read:
12072.3. (a) No person, corporation, or dealer licensed under Section 12071, shall, with respect to any activity involving the sale of firearms, employ any of the following:
(1) A person under the age of 18 years, unless the licensee does not sell pistols, revolvers, or other firearms capable of being concealed upon the person.
(2) A person under the age of 21 years if the licensee sells the type of firearms described in paragraph (1).
(3) A person described in Section 12021 or 12021.1.
(4) A person described in Section 8100 or 8103 of the Welfare and Institutions Code.
(b) Prior to employing a person to perform the activity described in subdivision (a), the licensee shall submit the

records necessary for a background check of that person to the Department of Justice. The department shall conduct the background check and, following a 15-day waiting period, the licensee may employ the person for whom the background check is conducted unless the department informs the licensee that the person is a person described in paragraph (3) or (4) of subdivision (a).

(c) Any licensee who employs a person in violation of this section shall be punished by imprisonment in a county jail for a period of one year or by a fine of not exceeding one thousand dollars ($1,000), or by both the fine and imprisonment. {-

SEC. 9. -} {+

SEC. 8. +} Section 12076 of the Penal Code is amended to read:

12076. (a) The purchaser or transferee of any firearm shall be required to present clear evidence of his or her identity and age, as defined in Section 12071, to the dealer, and the dealer shall require him or her to sign his or her current legal name and affix his or her residence address and date of birth to the register in quadruplicate. The salesperson shall affix his or her signature to the register in quadruplicate as a witness to the signature and identification of the purchaser or transferee.

Commencing July 1, 1996, the purchaser or transferee of any handgun ammunition shall also be required to present clear evidence of his or her identity and age, as defined in Section 12071, and a valid California Handgun License, to the dealer, except as provided in subdivision (b). Any person furnishing a fictitious name or address or knowingly furnishing any incorrect information or knowingly omitting any information required to be provided for the purposes of this subdivision and any person violating any provision of this section is guilty of a misdemeanor.

(b) Nothing in subdivision (a) shall apply to any agency duly authorized to perform law enforcement duties in California, or to peace officers, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, who, in the course and scope of their employment are authorized to, and do, carry firearms.

(c) Two copies of the original sheet of the register, on the date of sale or transfer, shall be placed in the mail, postage prepaid, and properly addressed to the Department of Justice in Sacramento. The third copy of the original shall be mailed, postage prepaid, to the chief of police, or other head of the police department, of the city or county wherein the sale or transfer is made. Where the sale or transfer is made in a district where there is no municipal police department, the third copy of the original sheet shall be mailed to the sheriff of the county wherein the sale or transfer is made.

The third copy for firearms, other than pistols, revolvers, or other firearms capable of being concealed upon the person shall be destroyed within five days of receipt and no information shall be compiled therefrom.

(d) The department shall examine its records, as well as those records that it is authorized to request from the State Department of Mental Health pursuant to Section 8104 of the Welfare and Institutions Code, in order to determine if the purchaser or transferee is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code.

If the department determines that the purchaser or transferee is a person described in Section 12021 or 12021.1 of this code

or Section 8100 or 8103 of the Welfare and Institutions Code, it shall immediately notify the dealer and the chief of the police department of the city or county in which the sale or transfer was made, or if the sale or transfer was made in a district in which there is no municipal police department, the sheriff of the county in which the sale or transfer was made, of that fact.

If the department determines that the copies of the register submitted to it pursuant to subdivision (b) contain any blank spaces or inaccurate, illegible, or incomplete information, preventing identification of the purchaser or transferee or the pistol, revolver, or other firearm to be purchased or transferred, or if any fee required pursuant to subdivision (d) is not submitted by the dealer in conjunction with submission of copies of the register, the department may notify the dealer of that fact. Upon notification by the department, the dealer shall submit corrected copies of the register to the department, or shall submit any fee required pursuant to subdivision (d), or both, as appropriate and, if notification by the department is received by the dealer at any time prior to delivery of the firearm to be purchased or transferred, the dealer shall withhold delivery until the conclusion of the waiting period described in Sections 12071 and 12072.

(e) The Department of Justice may charge the dealer a fee sufficient to reimburse all of the following:

(1) (A) The department for the cost of furnishing this information.

(B) The department for the cost of meeting its obligations under paragraph (2) of subdivision (b) of Section 8100 of the Welfare and Institutions Code.

(2) Local mental health facilities for state-mandated local costs resulting from the reporting requirements imposed by the amendments to Section 8103 of the Welfare and Institutions Code, made by the act which also added this paragraph.

(3) The State Department of Mental Health for the costs resulting from the requirements imposed by the amendments to Section 8104 of the Welfare and Institutions Code made by the act which also added this paragraph.

(4) Local mental hospitals, sanitariums, and institutions for state-mandated local costs resulting from the reporting requirements imposed by Section 8105 of the Welfare and Institutions Code.

(5) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code.

(6) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code.

The fee established pursuant to this subdivision shall not exceed the sum of the actual processing costs of the department, the estimated reasonable costs of the local mental health facilities for complying with the reporting requirements imposed by the act which added paragraph (2) to this subdivision, the costs of the State Department of Mental Health for complying with the requirements imposed by the act which added paragraph (3) to this subdivision, the estimated reasonable costs of local mental hospitals, sanitariums, and institutions for complying with the reporting requirements imposed by the act which added paragraph (4) to this subdivision, the estimated reasonable

costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code, and the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code created by the act which added paragraph (6) to this subdivision.

(f) (1) The Department of Justice may charge a fee sufficient to reimburse it for each of the following:

(A) For the actual costs associated with the preparation, sale, processing, and filing of forms or reports required or utilized pursuant to Section 12078 if neither a dealer nor a law enforcement agency acting pursuant to Section 12084 is filing the form or report.

(B) For the actual processing costs associated with the submission of a Dealers' Record of Sale to the department by a dealer or of the submission of a LEFT to the department by a law enforcement agency acting pursuant to Section 12084 if the waiting period described in Sections 12071, 12072, and 12084 does not apply.

(C) For the actual costs associated with the preparation, sale, processing, and filing of reports utilized pursuant to subdivision (l) of Section 12078.

(2) If the department charges a fee pursuant to subparagraph (B) of paragraph (1) of this subdivision, it shall be charged in the same amount to all categories of transaction that are within that subparagraph.

(3) Any costs incurred by the Department of Justice to implement this subdivision shall be reimbursed from fees collected and charged pursuant to this subdivision. No fees shall be charged to the dealer pursuant to subdivision (d) or to a law enforcement agency acting pursuant to paragraph (6) of subdivision (d) of Section 12084 for costs incurred for implementing this subdivision.

(g) All money received by the department pursuant to this section shall be deposited in the Dealers' Record of Sale Special Account of the General Fund, which is hereby created, to be available, upon appropriation by the Legislature, for expenditure by the department to offset the costs incurred pursuant to this section and Sections 12289 and 12809.

(h) (1) Only one fee shall be charged pursuant to this section for a single transaction on the same date for the sale or transfer of any number of firearms that are not pistols, revolvers, or other firearms capable of being concealed upon the person or for the taking of possession of those firearms.

(2) In a single transaction on the same date for the sale or transfer of any number of firearms that are pistols, revolvers, or other firearms capable of being concealed upon the person, the department shall charge a reduced fee pursuant to this section for the second and subsequent firearms that are part of that sale or transfer.

(i) Only one fee shall be charged pursuant to this section for a single transaction on the same date for taking title or possession of any number of firearms pursuant to subdivision (i) of Section 12078.

(j) Whenever the Department of Justice acts pursuant to this section as it pertains to firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person, the department's acts or omissions shall be deemed to

be discretionary within the meaning of the California Tort Claims Act pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code. {-
SEC. 10. -} {+
SEC. 9. +} Section 12101 of the Penal Code is amended to read:

12101. (a) A minor may not possess a pistol, revolver, or other firearm capable of being concealed upon the person or firearm ammunition unless he or she has the written consent of his or her parent or legal guardian or unless he or she is accompanied by his or her parent or legal guardian, while he or she has that firearm or firearm ammunition in his or her possession.

(b) A person under the age of 21 years shall not purchase any handgun ammunition, as defined in Section 12322, and a person under the age of 18 years shall not purchase any firearm ammunition, including, but not limited to, handgun ammunition.

(c) Every person who violates this section is guilty of a misdemeanor. Every person who violates this section shall be punished, upon the second and each subsequent conviction, by imprisonment in the state prison or in a county jail not exceeding one year. Every person who violates this section who has been convicted previously of a crime set forth in subdivision (b) of Section 12021.1 or in Section 12020, 12220, 12520, or 12560, shall be punished by imprisonment in the state prison or in a county jail not exceeding one year. {-
SEC. 11. -} {+
SEC. 10. +} Section 12326 is added to the Penal Code, to read:

12326. (a) The Attorney General may ban the sale and manufacture of any type of handgun bullet that tests show is capable of piercing a body vest, as defined in subdivision (c) of Section 12022.2.

(b) For the purpose of implementing and enforcing this section, the Attorney General, once a year, shall compile a list that includes handgun ammunition that is capable of piercing a body vest, as defined in subdivision (c) of Section 12022.2. {-

SEC. 12. Section 12327 is added to the Penal Code, to read:

12327. Every person who possesses or purchases in excess of 1,000 rounds of handgun ammunition without a valid California Arsenal License is guilty of a misdemeanor.

This section shall become operative on July 1, 1996.
SEC. 13. -} {+
SEC. 11. +} Section 12551 of the Penal Code is amended to read:

12551. Every person who sells to a minor any firearm or firearm ammunition is guilty of a misdemeanor, except a person licensed under Section 12071 shall be subject to subdivisions (c) and (f) of Section 12072. {-
SEC. 14. -} {+
SEC. 12. +} No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same

date that the act takes effect pursuant to the California Constitution. {-
SEC. 15. -} {+
SEC. 13. +} The amendments to Section 12070 of the Penal Code made by Section 6 of this act shall become operative on July 1, 1995. {-
SEC. 16. -} {+
SEC. 14. +}The amendments to Section 12076 of the Penal Code made by Section 9 of this act shall become operative on July 1, 1996.

EXHIBIT “I”

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,	)	
	)	
v.	)	**Civil No. 09-1284-I**
	)	
ROBERT E. COOPER, JR.,	)	
TENNESSEE ATTORNEY GENERAL,	)	
	)	
Defendant.	)	

CONSOLIDATED MEMORANDUM OF LAW OF DEFENDANT ATTORNEY GENERAL COOPER IN OPPOSITION TO PLAINTIFFS MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR FOR SUMMARY JUDGMENT

Defendant Robert E. Cooper, Jr., in his official capacity as Attorney General and Reporter for the State of Tennessee, hereby opposes the Plaintiffs' motions for partial summary judgment, in which the Plaintiffs seek a declaratory judgment finding that 2009 Public Chapter 339, authorizing the limited possession of handguns in restaurants that serve alcoholic beverages, is facially invalid.[1] The Attorney General is also seeking a judgment on the pleadings and/or for summary judgment dismissing this case and/or Plaintiffs' specific claims.

Although overall Plaintiffs have asserted a number of novel constitutional, statutory and common law challenges to Chapter 339, the pending motion for summary judgment by Plaintiffs

[1] The Attorney General also relies upon his previously filed Response in Opposition to Plaintiffs' Motion for Injunctive Relief and the record in this case, including the Affidavit of Attorney General Investigator Trey King,

Randy Rayburn and John (Jane) Does Nos. 1-13 (the "Rayburn Plaintiffs") is limited to allegations that Chapter 339 on its face: (1) is unconstitutionally vague, (2) is an unconstitutional delegation of police powers, and (3) is preempted by virtue of Tennessee's OSHA "general duty" clause. The pending motion for summary judgment by Intervenor Plaintiffs Austin Ray and Flaneur LLC, d/b/a Melrose (the "Melrose Plaintiffs") asserts that Chapter 339 on its face violates due process of law.

As set forth herein, there is no jurisdiction for this Court of equity to address Plaintiffs' claims regarding the validity of a criminal law. Further, the various Plaintiffs lack standing and have not asserted a justiciable issue. Necessary parties, the appropriate District Attorneys General with authority to enforce Chapter 339, have not been joined. Moreover, courts will find that a statute, which does not implicate constitutionally protected First Amendment rights, is facially unconstitutional only if there are no situations in which the statute could be applied in a constitutional manner. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). Plaintiffs have not alleged and cannot show that there are no situations in which Chapter 339 may be applied in a constitutional manner.

This challenge to the statute's constitutionality does not give the Court a license to second-guess the General Assembly's policy judgments or to impart the Court's own personal views onto the statutory text. *See Draper v. Westerfield,* 181 S.W.3d 283, 290 (Tenn. 2005); *State v. Goodman,* 90 S.W.3d 557, 565 (Tenn. 2002). Plaintiffs' policy arguments expressing disagreement with the law should be directed to the General Assembly. This Court may not review the statute's wisdom, expediency, reasonableness, or desirability, as these matters are entrusted to the electorate, not the courts. *See, e.g., State ex rel. Robinson v. Lindsay,* 103 Tenn. 625, 640, 53 S.W. 950, 954 (1899); *Henley v. State,* 98 Tenn. 665, 679-82, 41 S.W. 352, 354-55

(1897).

All Plaintiffs' claims are without legal merit and as a matter of law should be dismissed.

LAW & FACTS

Plaintiff Rayburn is the proprietor of restaurants, bars, and nightclubs within Tennessee, which are allowed to sell alcoholic beverages. (Rayburn Second Amended Complaint, ¶s 59 & 63). Plaintiffs John (Jane) Does Nos. 1-9 are adult Tennesseans who work in unspecified restaurants or bars in this state. (Rayburn Second Amended Complaint, ¶s 60 & 64). Plaintiffs John (Jane) Does Nos. 10-13 are adult Tennesseans who may lawfully carry concealed firearms because they hold Tennessee handgun carry permits issued under Tenn. Code Ann. § 39-17-1351. (Rayburn Second Amended Complaint, ¶s 61 & 65). Intervenor Plaintiffs Austin Ray and Flaneur LLC operate the Melrose, a restaurant which is allowed to sell alcoholic beverages within Tennessee. (Melrose Complaint, ¶s 2 & 3). As a matter of law, these plaintiffs are seeking a declaration that the provisions of 2009 Tenn. Pub. Acts 339 (Chapter 339), to be codified at Tenn. Code Ann. §§ 39-17-1305 (c), are unconstitutional and otherwise unlawful.

In its latest session, the General Assembly enacted Public Chapter 339, which states, in relevant part:

> SECTION 1. Tennessee Code Annotated, Section 39-17-1305(c), is amended by adding the following language as a new, appropriately designated subdivision:[2]
>
> (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,

[2] Tenn. Code Ann. § 39-17-1305 prohibits the carrying of firearms into establishments where alcohol is served. The statute exempts certain classes of persons, including active duty military personnel from its application.

> (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.

As shown by the plain language of the statute, Chapter 339 is not a blanket authorization for any person to bring firearms into restaurants under any circumstance. Such authorization extends to the holders of handgun carry permits only. Furthermore, permit holders may bring their firearms into a restaurant only if they do not consume any alcohol while they are on the premises.[3] Chapter 339 allows proprietors to prohibit the carrying of firearms into their establishments if they choose to do so.[4] Furthermore, there is nothing in Chapter 339 that requires restaurant proprietors take any affirmative steps to enforce the law.[5] In fact, Plaintiff Rayburn has posted that no weapons are permitted in his establishments that serve alcoholic beverages. (Affidavit of Attorney General Investigator Trey King, ¶s 3, 4, & 9).

Permit holders who carry their firearms into restaurants where the owners have decided to prohibit the possession of firearms are subject to criminal prosecution for having violated Tenn. Code Ann. § 39-17-1359. Such an offense is punishable by up to a $500 fine. Tenn. Code Ann. § 39-17-1358(b). In addition, any permit holder who violates Tenn. Code Ann. § 39-17-

[3] Tenn. Code Ann. § 39-17-1321 prohibits possession of a handgun "while under the influence of alcohol or any controlled substance."

[4] Tenn. Code Ann. § 39-17-1359 (Individuals, corporations and businesses may prohibit the carrying of firearms on property they own, operate, manage, or control by posting signs that satisfy the requirements of the statute.)

[5] Likewise, there was nothing in the language of Tenn. Code Ann. § 39-17-1305, prior to the enactment of Chapter 339, to require restaurant owners to take any affirmative steps action to enforce its provisions.

1359 is subject to having his carry permit suspended or revoked. Tenn. Code Ann. § 39-17-1352(a)(6).

Reading Chapter 339 together with the rest of Tenn. Code Ann. § 39-17-1305 and Tenn. Code Ann. §§ 39-17-1351, 1352 and 1359, leads to the conclusion that the legislature intends to vest business owners with control over their private property and the ability to decide whether to permit handgun carry permit holders to bring firearms into their restaurants serving alcohol. With the enactment of Chapter 339, individual business owners are free to decide, based on the wants and desires of their particular customers and other business considerations, whether to allow handgun carry permit holders to bring firearms into their private property. At the same time, Chapter 339 has effectively placed restaurants that serve alcohol on the same footing as other restaurants in deciding whether to allow handgun carry permit holders to bring firearms into their businesses.

Many restaurants that serve alcoholic beverages (including, but not limited to, Plaintiff Rayburn's restaurants, Tootsies Orchid Lounge, B.B. Kings, Cadillac Ranch, Coyote Ugly, Buffalo Billiards, Fuel Bar & Nightclub, Nashville Crossroads, Second Fiddle, and The Stage) have exercised their private property rights under Tenn. Code Ann. § 39-17-1359 and have posted that no weapons are allowed. (*See, e.g.*, Affidavit of Investigator Trey King, ¶s 12, 14, 15, 16, 17, 19, 20, 21, and 22). Furthermore, the Wildhorse Saloon and the Red Door Saloon, establishments which the Plaintiffs noted were once cited by the Alcoholic Beverage Commission for not meeting minimum food service requirements, have posted that no weapons are allowed. (*Compare* Affidavit of Investigator Trey King, ¶s 7 & 18, to Affidavit of Christopher W. Smith (Plaintiffs' Exhibit G), ¶ 2, Exhibits 1 - 5).

The one other establishment, Graham Central Station, which is specified in the Amended

Affidavit of Plaintiff John Doe No. 10, ¶14, as a place where the affiant expresses uncertainty about whether he can carry his firearm, is only open four (4) nights per week and does not qualify as a "restaurant" under Chapter 339. (Affidavit of Investigator Trey King, ¶ 23). The Hollywood Disco, an establishment which the Plaintiffs noted was once cited by the Alcoholic Beverage Commission for not meeting minimum food service requirements, states on its website that it is only open four (4) nights per week and could not qualify as a "restaurant" under Chapter 339. (*Compare* Affidavit of Investigator Trey King, ¶ 6, to Affidavit of Christopher W. Smith (Plaintiffs' Exhibit G), ¶ 2, Exhibit 6).

ARGUMENT

I. PLAINTIFFS HAVE FAILED (A) TO PRESENT A JUSTICIABLE ISSUE OR (B) TO DEMONSTRATE STANDING TO BRING THIS ACTION.

A. Justiciable Issue Required - Although a party seeking declaratory relief is not required to show an actual injury, a plaintiff must still present a live case or controversy. *Colonial Pipeline Co. v. Morgan,* 263 S.W.3d 827, 837-38 (Tenn. 2008). Tenn. Code Ann. § 29-14-102 does not authorize courts to render advisory opinions and the case must present a real, as opposed to a theoretical, issue. *Mills v. Shelby County Election Comm.*, 218 S.W.3d 33 (Tenn. App. 2006).

In *Parks v. Alexander*, 608 S.W.2d 881 (Tenn. App. 1980), the court identified the limits of judicial authority under the Declaratory Judgments Act, Tenn. Code Ann. §§ 29-14-101 through 29-14-113. It said:

> For a controversy to be justiciable a real question rather than a theoretical one must be presented and a real legally protectable interest must be at stake on the part of the plaintiff. . . . If the controversy depends on a future or contingent event or involves a theoretical or hypothetical state of facts, the controversy is not

> justiciable under the Declaratory Judgments Act. . . . The Declaratory Judgments Act does not give the courts jurisdiction to render advisory opinions to assist parties or to allay their fears as to what may occur in the future.

Id., at 891-92. (Internal citations omitted).

B. Parties' Standing Required - The doctrine of standing and its elements were summarized in in *ACLU of Tennessee, Inc., et al. v. Riley C. Darnell, et al.,* 195 S.W.3d 612, 619-20 (Tenn. 2006)(affirmed this Court's dismissal of an action due to lack of standing by the plaintiffs seeking to challenge placement of a proposed constitutional amendment on the November, 2006 ballot) :

> Courts employ the doctrine of standing to determine whether a particular litigant is entitled to have a court decide the merits of a dispute or of particular issues. *Warth v. Seldin,* 422 U.S. 490, 498 (1975); *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976) (holding that courts use the standing doctrine to decide whether a particular plaintiff is "properly situated to prosecute the action."); *City of Brentwood v. Metropolitan Bd. of Zoning Appeals, et al.,* 149 S.W.3d 49, 55 (Tenn. Ct. App. 2004), *perm. app. denied* (Tenn. Sept. 13, 2004). Grounded upon "concern about the proper— and properly limited— role of the courts in a democratic society, *Warth*, 422 U.S. at 498, the doctrine of standing precludes courts from adjudicating an action at the instance of one whose rights have not been invaded or infringed. *Mayhew v. Wilder,* 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001), *perm. app. denied* (Tenn. April 30, 2001). The doctrine of standing restricts [t]he exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, . . . to litigants who can show injury in fact resulting from the action which they seek to have the court adjudicate. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.* 454 U.S. 464, 473 (1982). Without limitations such as standing . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights. *Warth*, 422 U.S. at 500; see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 333, 126 S. Ct. 1854, 1856 (2006) (explaining that standing enforces the constitutional case-or-controversy requirement that is "crucial in maintaining the tripartite allocation of power set forth in the Constitution).
>
> To establish standing, a plaintiff must show three indispensable elements by the same degree of evidence as other matters on which the plaintiff bears the burden of proof. *Petty v. Daimler/Chrysler Corp.,* 91 S.W.3d 765, 767 (Tenn. Ct. App. 2002), *perm. app. denied* (Tenn. Sept. 9, 2002). First, a plaintiff must show a distinct and

palpable injury: conjectural or hypothetical injuries are not sufficient. *City of Brentwood,* 149 S.W.3d at 55-56; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing also may not be predicated upon an injury to an interest that the plaintiff shares in common with all other citizens. *Mayhew*, 46 S.W.3d at 767. Were such injuries sufficient to confer standing, the State would be required to defend against a profusion of lawsuits from taxpayers, and a purpose of the standing doctrine would be frustrated. *See Parks v. Alexander*, 608 S.W.2d 881, 885 (Tenn Ct. App. 1980) (stating that one purpose of standing is to protect the State from a "profusion of lawsuits).

The second essential element of standing is a causal connection between the claimed injury and the challenged conduct. *Mayhew,* 46 S.W.3d at 767. A plaintiff may satisfy this element by establishing the existence of a fairly traceable connection between the alleged injury in fact and the defendant's challenged conduct. *DaimlerChrysler Corp.*, 547 U.S. at 554, 126 S. Ct. at 1861. The third and final element necessary to establish standing is a showing that the alleged injury is capable of being redressed by a favorable decision of the court. *Petty*, 91 S.W.3d at 767; *DaimlerChrysler Corp.*, 547 U.S. at 554, 126 S.Ct. at 1861.

C. No Justiciable Issue Is Presented Nor Is Standing Established -

Plaintiffs have failed to present a justiciable controversy. Plaintiffs lack standing to bring this action as they have failed to demonstrate distinct and palpable injury from the enactment of Chapter 339. The entire controversy depends upon future or contingent events, hypothetical situations and theoretical, as opposed to actual, legal issues. Chapter 339's amendments to the current law only allow a limited exemption for a person permitted to lawfully carry firearms to do so in certain restaurants that are allowed to serve alcoholic beverages provided that person is not consuming any alcoholic beverages.

Business owners are not required to allow handguns on premises and may post appropriate signage that handguns are prohibited – therefore negating any hypothetical injury from implementation of Chapter 339. Tenn. Code Ann. § 39-17-1359 expressly authorizes individuals, corporations, and business entities to prohibit the possession of guns on their premises merely by posting a sign giving notice of the prohibition at the door. The business

owners and employees lack standing to challenge the alleged delegation of authority to businesses to prohibit weapons from being carried onto their private property. If they believe this delegation is unlawful, they may choose not to post any prohibition of weapons.

The plaintiff business owners and employees do not have standing to challenge the alleged vagueness of Chapter 339. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974), quoted in *Village of Hoffman Estates*, 455 U.S. at 495. The plaintiff business owners/operators assert that their establishments are clearly "restaurants" within the definition in Chapter 339. (Affidavit of John Randall Rayburn , ¶s 5 & 6, Melrose Complaint, ¶ 2).

Plaintiffs Rayburn and John (Jane) Does have only alleged conjectural or hypothetical injuries that speculatively may arise from the mere presence of a person lawfully permitted to carry a weapon into a restaurant, who is not consuming alcoholic beverages and does not otherwise use his weapon in an unlawful manner. Chapter 339 does not authorize the use of weapons for criminal purposes. To the extent that the mere presence of an armed gun carry permit holder may hypothetically create some danger or risk to the public safety and welfare, the interest in addressing this risk is shared in common with all other citizens.

The plaintiff restaurant operators and employees hypothesize that they may be charged with aiding and abetting a criminal offense if they serve an alcoholic beverage to a customer who unbeknownst to them is carrying a weapon. The owners and employees assert that there is no way to detect who is carrying a concealed weapon in an establishment selling alcoholic beverages. (See Affidavit of Jane Doe No. 1, ¶ s 17-19; Affidavit of John Randall Rayburn, ¶s 23 & 25). Tennessee's criminal responsibility law regarding aiding and abetting, Tenn. Code Ann § 39-11-402, provides :

> A person is criminally responsible for an offense committed by the conduct of another, if:
>
> (1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or
>
> (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

In the situation where a restaurant operator or server of alcoholic beverages does not reasonably know that a patron is carrying a concealed weapon, a charge of aiding and abetting is not appropriate.

The handgun carry permit holders have based their claim of vagueness upon hypothetical situations. They claim that if they go into an establishment that serves alcoholic beverages; that has either not posted or has improperly posted signs stating that the possession of firearms is prohibited; that regularly serves meals; that has an adequate and sanitary dining room and a qualified staff to prepare and serve meals; that serves at least one meal per day on five (5) days per week; and holds itself out to the public as a restaurant; but if, unbeknownst to the permit holder, the establishment derives less than half of its revenues from the sale of food, and therefore cannot show that selling food is its principal business, the permit holder might then be subject to arrest and possible prosecution for violating Tenn. Code Ann. § 39-17-1305.[6]

[6] The handgun carry permit holders' case becomes even more speculative when the discretion of the district attorneys general is added to the case. District attorneys general possess broad discretion in deciding whether to prosecute or to decline to bring criminal charges. The exercise of that discretion is subject to judicial review only in a narrow set of circumstances. *See, e.g., State v. Housler*, 193 S.W.3d 476 (Tenn. 2006); *State v. Harris*, 33 S.W.3d

The fact that Plaintiffs do not need court intervention to obtain the relief they are seeking provides more evidence of their failure to present a justiciable controversy. Plaintiffs John (Jane) Does Nos. 10-13, the gun carry permit holders, are not required to carry their weapons in any particular locations and may avoid any alleged injury by continuing to carry as they have under the old law. The gun carry permit holders allege that they desire to carry their weapons into restaurants that sell alcoholic beverages. They do not allege that there are not establishments that sell alcoholic beverages that qualify as "restaurants" under Chapter 339. The relief these Plaintiffs are requesting from this Court, the invalidation of Chapter 339's limited exception, does not remedy these Plaintiffs' hypothetical harm, but rather, completely removes their ability to lawfully carry into all "restaurants" that sell alcoholic beverages.

Although the John (Jane) Does Nos. 10-13, the gun carry permit holders, claim that they plan on carrying their handguns into alcohol serving establishments, they do not assert any intention to carry weapons into any establishment that has posted that weapons are prohibited on that private property. Accordingly, these Plaintiffs are not injured by an alleged unlawful delegation of police power under the posting provisions in Tenn. Code Ann. § 39-17-1359, and lack standing to challenge this provision.

II. IT WOULD NOT BE AN APPROPRIATE EXERCISE OF JUDICICIAL POWER FOR THE COURT TO HEAR THIS MATTER.

A. Chancery courts lack the authority to provide declaratory relief in criminal matters, not involving property rights. Subject matter jurisdiction is the authority of a court to

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767 (Tenn. 2000); *State v. Head*, 971 S.W.2d 49 (Tenn. Crim. App. 1997); *State v. Gilliam*, 901 S.W.2d 385 (Tenn. Crim. App. 1995). Before a permit holder could suffer any harm, it must be assumed that a district attorney general, when faced with a close case concerning a restaurant met the statutory definition, would always prosecute the handgun carry permit holder for violating Tenn. Code Ann. § 39-17-1305.

adjudicate matters brought before it. Such authority is conferred either by the constitution or statutes. *Haley v. University of Tennessee*, 188 S.W.3d 518 (Tenn. 2006). Courts are not permitted to exercise jurisdictional powers that have not been directly conferred or do not arise by necessary implication. *Osborn v. Marr*, 127 S.W.3d 737 (Tenn. 2004).

The authority of courts to issue declaratory judgments is conferred by statute. Tenn. Code Ann. § 29-14-102(a) states:

> Courts of record within their respective jurisdictions have the power to declare rights, status, and other legal relations whether or not relief is or could be claimed.

The plain language of the statute indicates that courts do not have unlimited authority to issue declaratory judgments. The power extends to matters within their respective jurisdictions only. In *Zirkle v. City of Kingston,* 217 Tenn. 210, 225, 396 S.W.2d 356, 363 (1965), the Court held that chancery courts may entertain an action for declaratory relief only if the court could have entertained an original action based upon the same subject matter.

Plaintiffs are challenging the constitutionality of a criminal statute. A chancery court would not have the authority to hear a matter brought under that statute if it had been brought as an original action. Tenn. Code Ann. § 16-10-102 confers exclusive jurisdiction over criminal matters upon the circuit courts.

> The circuit court has exclusive jurisdiction of all crimes and misdemeanors, either at common law or by statute, unless otherwise expressly provided by statute or this Code.

Id.[7]

[7] In counties where the legislature has established separate criminal courts, those courts have exclusive jurisdiction over criminal matters. *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 753-54 (Tenn. 2006). In that case, the court addressed the structure of the court system in Shelby County and noted that criminal courts, not circuit courts, had jurisdiction over criminal matters. Davidson County has a similar court structure. With the exception of some DUI and automobile related crimes, which are heard in circuit court, all criminal matters are heard in the criminal courts.

Under the plain meaning of the statute, chancery courts have no authority to hear criminal cases as original actions. Chancery courts therefore have no authority to entertain actions for declaratory relief in criminal matters.[8]

Clinton Books, Inc. v. City of Memphis, 197 S.W.3d 749 (Tenn. 2006), is instructive with respect to the reasons supporting the foregoing rule. In discussing the reasons that prohibit chancery courts from enjoining criminal prosecutions, the Court said:

> The longstanding rule in Tennessee is that state courts of equity lack jurisdiction to enjoin the enforcement of a criminal statute that is alleged to be unconstitutional. . . . A lawsuit seeking injunctive relief due to an allegedly invalid criminal statute asks the chancery court, rather than the court that will enforce the criminal law, to enjoin the officers of the state from prosecuting persons who are conducting a business made unlawful by a criminal statute until the chancery court can determine its validity. . . . Permitting a court of equity to interfere with the administration of this state's criminal laws, which that court is without jurisdiction to enforce, would cause confusion in the preservation of peace and order and the enforcement of the State's general police power.

Id. at 752 (Internal citations omitted).

Plaintiffs are challenging the constitutionality of a criminal statute. In Davidson County, the Criminal Courts are charged with their administration and enforcement. A chancellor's declaratory ruling on a criminal statute could cause interference with a criminal judge's ability to administer and enforce the criminal laws.[9]

Plaintiffs cannot rely upon *Clinton Books, Planned Parenthood of Middle Tenn. v. Sundquist,* 38 S.W.3d 1 (Tenn. 2000), or *Davis-Kidd Booksellers, Inc. v. McWherter, supra,* to

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[8] There is an exception to the general rule. In *Clinton Books*, the Court noted that a chancery court may enjoin the enforcement of a criminal statute if the Supreme Court has ruled that the statute is unconstitutional. That exception is not applicable because the Supreme Court has made no such ruling in this case. *Clinton Books*, 197 S.W.3d at 753.

[9] Declaratory judgments, when issued, have the same effect as other judgments or decrees, Tenn. Code Ann. § 29-14-102(c), and would be likely to cause confusion in the enforcement of the criminal laws.

argue that the court may grant declaratory relief notwithstanding the Court's holding in *Zirkle*. *Clinton Books* involved a constitutional challenge to a criminal statute that was originally brought in the Chancery Court of Shelby County. In that case, the Court disposed of the appeal by remanding the case to the Chancery Court for a hearing on the merits of the petition for declaratory judgment. That action, however, does not mean that the Court overruled its holding in *Zirkle*. The Court did not address or expressly overrule *Zirkle* in any of those cases.

To the contrary, the Court's reasoning in *Clinton Books* indicates that the holding in *Zirkle* is still viable. In *Clinton Books*, plaintiffs argued that, based on the holdings in *Davis Kidd* and *Planned Parenthood of Middle Tennessee*, chancery courts had the authority to enjoin criminal prosecutions. In *Clinton Books*, the Court rejected the argument, stating:

> The plaintiffs in these cases sought injunctive and declaratory relief challenging the constitutionality of statutes that provided for the imposition of criminal penalties if violated. In both cases, this Court addressed the constitutionality of statutes without addressing the trial court's jurisdiction to grant injunctive relief. . . . We have recognized that 'stare decisis only applies with reference to decisions directly upon the point in controversy.' . . . Accordingly, the omission of any discussion of the trial court's jurisdiction in *Planned Parenthood* and *Davis-Kidd* should not be interpreted as altering the general rule prohibiting state equity courts from enjoining enforcement of a criminal statute.

197 S.W.3d at 752-53. (Internal citations omitted).

That reasoning applies to the issue of whether chancellors now have the authority to issue declaratory relief in cases involving constitutional challenges to criminal statutes. Just as the authority of chancellors to enjoin enforcement of criminal statutes was not addressed in *Planned Parenthood of Middle Tennessee* or *Davis-Kidd,* neither was the authority of a chancellor to provide declaratory relief in a case involving a constitutional challenge to a criminal statute. Therefore, the omission of any such discussion in *Clinton Books* ought not be construed as altering or overruling the rule set forth in *Zirkle*, which provided that chancery courts do not

have the authority to issue declaratory judgments in cases where they lack the authority to entertain a case as an original action.

This court does not have the authority to hear and decide criminal cases as original actions. Based on the holding in *Zirkle,* it does not have the authority to issue a declaratory judgments in a case involving a constitutional challenge to a criminal statute and the Attorney General submits that the Complaint ought to be dismissed.

B. The complaint ought to be dismissed because Plaintiff handgun carry permit holders have an adequate remedy at law. In *Clinton Books*, the Court recognized that the denial of injunctive relief did not leave the plaintiffs without a remedy. It noted that if criminal charges were brought, the plaintiffs would have a sufficient remedy. It said:

> Furthermore, the issue of the validity of the statute is not so complex that it cannot be resolved by a court with criminal jurisdiction if raised as a defense in a criminal action brought against the plaintiffs or their employees . . . . If the law is as plaintiffs claim, the statute will be held invalid, and the criminal court will dismiss the prosecution. If the statute is valid and applicable under the circumstances, the plaintiffs' employees will be properly convicted if the evidence establishes beyond a reasonable doubt that the plaintiffs' employees violated the statute.

197 S.W.3d at 754. (Internal citations omitted).

The carry permit holders are in this same position. If someone takes a firearm into an establishment that does not, in fact, meet the definition of a restaurant as set forth in Tenn. Code Ann. § 39-17-1305(c), and if he is arrested and prosecuted for violating Tenn. Code Ann. § 39-17-1305, that person could raise vagueness as a defense. If the criminal court finds that the statute is unconstitutional as applied to the defendant, the charges will be dismissed. On the other hand, if the court finds that the statute is constitutional, as applied, then the case will proceed to a verdict.

III. THE APPROPRIATE DISTRICT ATTORNEYS GENERAL ARE NECESSARY PARTIES.

Plaintiffs have failed to join necessary and/or indispensible parties, the appropriate District Attorneys General, who are the persons with authority to enforce the law in question. Tenn. Code Ann. § 29-14-107(a) specifies that when declaratory relief is sought, *all persons* shall be made parties who have or claim *any interest* which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. The Declaratory Judgments Act has been held to impose stricter requirements than those imposed generally by Tenn. R. Civ. P. 19.01 and 19.02, as joinder of persons having an affected interest is clearly required by Tenn. Code Ann. § 29-14-107(a). *Huntsville Utility District v. General Trust*, 839 S.W.2d 397, 403 (Tenn. App. 1982), *perm. app. denied* (In declaratory judgment action in which the State Attorney General was named as a party regarding the alleged unconstitutionality of a state statute, utility customers and utility bond holders were also found to have an interest and to be necessary parties). The non-joinder of necessary parties is fatal on the question of justiciability, which in a suit for declaratory judgment, is a necessary condition of judicial relief. *Wright v. Nashville Gas & Heating Co.*, 183 Tenn. 594, 598, 194 S.W.2d 459, 461 (1946).

The challenged law provides that violations of that part are punishable by fine and, for certain offenses, by imprisonment and/or a fine. The Tennessee Attorney General has no authority to enforce Chapter 339 (or the statute it amends) and no authority to prevent others from doing so. With limited exceptions not relevant here, the Attorney General and Reporter has no authority to prosecute anyone for violating a criminal statute. *See generally* Tenn. Code Ann. § 8-6-109; Tenn. Const. Art. VI, § 5. Similarly, he has no authority to interfere in any way with the exercise of prosecutorial discretion by the district attorneys general. *State v. Superior Oil,*

875 S.W.2d 658, 659-61 (Tenn. 1994). Thus, if this Court were to issue an order in this case involving only the Tennessee Attorney General, such an order would not bind the appropriate District Attorneys General who have the power to enforce Chapter 339

Without the inclusion of the District Attorney General as necessary interested parties, there presently is not a justiciable issue over which this Court has subject matter jurisdiction, and there is a realistic prospect of duplicative litigation regarding the validity of the Act. *See generally* Tenn. R. Civ. P. 12.02(1), (2), (3), and (7).

IV. TENN. CODE ANN. § 39-17-1305, AS AMENDED BY CHAPTER 339, IS NOT UNCONSTITUTIONALLY VAGUE.

Tenn. Code Ann. § 39-17-1305, as amended by Chapter 339, sufficiently describes the conduct that it prohibits. Chapter 339 is permissive, not prohibitive, and therefore is not subject to attack on grounds of vagueness. In general, the carrying of firearms into establishments that serve alcohol remains unlawful. Violations are still punishable as Class A misdemeanors. Chapter 339 simply permits a narrow class of persons to engage in conduct that would otherwise be forbidden under Tenn. Code Ann. § 39-17-1305. Chapter 339 provides more than minimal guidance for the exception to the general prohibition. Permit holders are not required to carry firearms into restaurants that serve alcohol. If they have any doubts about whether carrying a firearm into a particular establishment would violate Tenn. Code Ann. § 39-17-1305, permit holders can take reasonable steps to determine whether the establishment is, in fact, a restaurant, and, if still in doubt, they can always choose to enter the premises unarmed.

One of the requirements of due process is proper notice of what the law prohibits. A law is unconstitutionally vague if it fails to adequately describe the forbidden conduct. The test is whether the law provides sufficient notice of what is forbidden so that reasonable people of

ordinary intelligence are not left to guess about what the law requires. *City of Knoxville v. Entertainment Resources, LLC.* , 166 S.W.3d 650, 655 (Tenn. 2005); *Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520, 532 (Tenn. 1993).

Under Tennessee law, determining whether a statute is unconstitutionally vague is a two step process. Courts first determine whether a statute is unconstitutionally vague in a general sense and, if not, whether it is vague as applied. *State v. Burkhart,* 58 S.W.3d 694, 699 (Tenn. 2001). A statute is unconstitutionally vague in the general sense only if it is shown to be vague in all possible applications. *Id.* If a statute is not vague in the general sense, the court may proceed to determine whether the statute is vague as applied. There are no as applied challenges pending. None of the Plaintiffs allege that they have been threatened with any enforcement action in regard to carrying a weapon into a particular establishment. Should an as applied challenge arise it may appropriately be addressed upon a proper factual record in a court with jurisdiction over criminal matters.

Determining whether a statute is vague in the general sense is analogous to deciding whether a statute is facially invalid. When a facial challenge to a legislative act is presented to the court, it is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid. The fact that [a legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . ." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). *See also Lynch v. City of Jellico*, 205 S.W.3d at 390 (quoting *Davis-Kidd Booksellers, Inc v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993)). The presumption that a law is constitutional operates with greater force when a facial challenge is made. *Gallaher v. Elam*, 104 S.W. 3d at 455, 459 (Tenn. 2003). When such a facial challenge is successful, the law in question is held

unenforceable under all circumstances, not simply in the specific application to the party in the suit. *Salerno* at 745. Accordingly, the facial challenger must demonstrate that the law cannot be constitutionally applied to anyone. 1 Lawrence H. Tribe, *American Constitutional Law* § 3-31, at 611 (3d ed.2000).

In this case, Plaintiffs have facially challenged Chapter 339 on grounds that it is unconstitutionally vague in a general sense. To prevail, they must show that the statute is vague no matter how it is applied.[10] Plaintiffs cannot do so because Chapter 339 can be applied in situations where it will be plainly understood. The statute defines restaurant in a manner that is readily understood by people of ordinary intelligence. To be a restaurant within the meaning of Chapter 339, the establishment must hold itself out to the public as being engaged in that business. People of ordinary intelligence will understand that to hold itself out to the public as a restaurant, a business will advertise itself as such through various types of advertisements. In fact, in most situations permit holders will be able to recognize that an establishment is a restaurant based on its advertising and appearance.[11] For example, there does not appear to be any dispute that establishments such as O'Charley's, Applebee's, Chili's, Long Horn Steak,

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[10] Courts are reluctant to grant facial challenges for three reasons, which are applicable in this case. First, facial challenges rely on conjecture and thus may result in "premature interpretation of statutes on the basis of factually barebones records." Wash. State Grange v. Wash. State Republican Party, 552 U.S. at ----, 128 S.Ct. at 1191 (quoting *Sabri v. United States,* 541 U.S. 600, 609 (2004)). Second, facial challenges "run contrary to the fundamental principle of judicial restraint" by encourgaging the courts to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. at ----, 128 S.Ct. at 1191; *see also Ashwander v. TVA,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration,* 113 U.S. 33, 39 (1885)). Third, "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. at ----, 128 S.Ct. at 1191; *see also Ayotte v. Planned Parenthood of N. New Eng.,* 546 U.S. 320, 329 (2006) (quoting *Regan v. Time, Inc.,* 468 U.S. 641, 652 (1984) (plurality opinion)).

[11] The rest of the definition provides guidance to enable a reasonable person to understand what the law requires. Under the definition, a restaurant must have a kitchen, dining room and cooking staff. Further, the establishment must serve at least one meal per day for at least five (5) days per week. All of these items are readily ascertainable by simply asking an employee of the business or from personal observation.

Logan's Roadhouse, Outback, P.F. Changs, to name a few, are "restaurants" within Chapter 339. Although the John Doe handgun carry plaintiffs numbers 10, 12, 13 claim that they plan on carrying their handgun into alcohol-serving establishments, they do not assert that they intend to carry into any establishment that has posted that weapons are prohibited. Although these John Doe plaintiffs allege they need protection from Chapter 339 going into effect, they do not allege any requirement in Chapter 339 that these permit holders alter their prior practice and carry into any establishment that serves alcoholic beverages. John Doe Plaintiffs Nos. 10, 12, and 13 do not specify any prohibition against inquiring of an establishment if it qualifies as a "restaurant" under Chapter 339. The only establishments specifically named by John Doe Plaintiff No. 10 as ones where he does not know if he can take a firearm are Tootsies and Graham Central Station. (Amended Affidavit of John Doe No. 10, Rayburn Plaintiffs' Exhibit A, ¶14), However, Tootsies has posted no weapons allowed and Graham Central Station is only open four (4) days a week and therefore does not qualify as a restaurant under Chapter 339.

The definition of restaurant in Chapter 339 is almost identical to the definition that is used in the alcoholic beverage laws, except for the required number of days of operation per week. *See*, Tenn. Code Ann. § 57-4-102 (27)(A). As a matter of public record, it appears that the Alcoholic Beverage Commission has issued over 2200 liquor by the drink licenses to establishments classified as "restaurants." A review of the affidavit of Shari Danielle Elks, Executive Director of the Tennessee Alcoholic Beverage Commission, shows that in the last five years, only an average range of 10 to 20 businesses per year have been issued citations for failing to meet the minimum standards for food service volume. Once a citation has been settled by consent judgment or otherwise, there is no presumption that the establishment continues to be in violation of the food service requirements. An establishment must certify on their applications

(including renewal applications) with the Alcoholic Beverage Commission, that the establishment meets the requirements for a license, including the minimum food service requirements (, i.e., that the service of food is their principal business). (See certified copy of Alcoholic Beverage Commission application for liquor by the drink license for establishments classified as "restaurants"). To the extent pending enforcement actions, wherein establishments have been cited for failing to meet the minimum food service requirements, are relevant, these are matters of public record.

Any ambiguity that might exist in the statute would be cured by the application of the rule of lenity. If a penal statute contains an unresolved ambiguity, courts will limit the statute's reach to the persons or circumstances clearly described by the statute. *State v. Horton,* 880 S.W.2d 732, 734-35 (Tenn. Crim. App. 1994). If a court were to determine that the statute is vague in its application to a particular fact situation, the rule of lenity would prevent an unconstitutional prosecution.

Although the plaintiff gun carry permit holders (John Does Nos. 10-13) complain that Chapter 339 renders Tenn. Code Ann. §39-17-1305 unconstitutionally vague because they cannot know with certainty whether the serving of meals is the "principal business" of restaurants where they intend to carry their weapons, their concern may be misplaced. Under Tennessee's criminal code, "[i]f the definition of an offense within . . . [Title 39] does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state" for the offense. Tenn. Code Ann. § 39-11-301(c). The statute at issue here, Tenn. Code Ann. § 39-17-1305, does not "plainly dispense with a mental element." Thus, Plaintiffs' fears are unfounded because they as a practical matter would not be prosecuted for bringing a gun into an establishment serving alcoholic beverages where it was not legal if they

were merely mistaken as to whether the "principal business" of the establishment was the serving of meals within the meaning of Chapter 339. A prosecution under section 1305 would likely entail, at the very least, proof that plaintiffs were "reckless" with regard to the status of the establishment, in other words, that they "consciously disregarded a substantial and unjustifiable risk" that the establishment did not qualify as a "restaurant" under the exemption described in Chapter 339. Tenn. Code Ann. § 39-11-302(c).

To the extent that Plaintiffs are correct that Tenn. Code Ann § 39-11-202 (b)(2) requires that an exception to a criminal prohibition must be proven by a preponderance of the evidence by the person asserting it, permit holders should tailor their conduct and only carry in establishments in which they are confident they can prove the exception. Nothing in Chapter 339 requires a gun carry permit holder to take a weapon into any establishment that sells alcoholic beverages. Personal observation, common sense, and inquiry of the operators of establishment may be used to reasonably evaluate whether an establishment is a "restaurant" within Chapter 339. There is no constitutional prohibition against a permit holder inquiring of the operators of an establishment if the establishment meets the definition of "restaurant" in Chapter 339.[12] If a gun permit holder is not satisfied that he can establish by a preponderance of the evidence that a particular establishment is within the exception in Chapter 339, he should not carry on that premises. Many establishments are obviously "restaurants", such as O'Charley's, Applebee's, and Chili's, even without having to inquire of the establishment's operators. An act is not unconstitutionally vague when its provisions provide minimal guidelines, even though the statute's application in a particular instance may prove difficult. *State v. Smith*, 48 S.W.3d at 165-66 (Drug-Free School Zone act, which provides enhanced penalties for drug sales within

[12] In fact, some restaurants have taken it upon themselves to give notice to the patrons that if they have questions concerning the why or whether guns are prohibited in their establishment, then the patron should make an inquiry with management. (Investigator King Affidavit, ¶ 20)

1,000 feet of a school, is not unconstitutionally vague due to the alleged difficulty in measuring the requisite distance from school's property, and even though at trial the State presented testimony of a city engineer statute using map overlays and a scale).

Despite the speculative possibility that the statute might be subject to successful challenges in a specific fact situation, that mere possibility does not render the statute facially unconstitutional. Furthermore, any such challenge is more appropriately mounted in the context of actual prosecutions of permit holders who have been charged with violating Tenn. Code Ann. § 39-17-1305.[13]

A statute is also unconstitutionally vague if it places too much discretion in the hands of law enforcement. A law is deemed to be vague if the language is so unclear as to leave the issue of whether it has been violated to the subjective judgment of the officers who enforce it. *Davis-Kidd.* In this case, the law provides sufficient guidance to law enforcement officers and properly limits their discretion and, therefore, ought to be upheld. The term restaurant, as defined in chapter 339 encompasses the term as commonly understood by the public at large. Police officers are not left free to define the term based on the day to day decisions that they make on the streets. Hypothetically officers might apply the term in an ambiguous manner in some cases. However, those matters can be properly addressed in the context of live criminal

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[13] Plaintiffs' argument that the statute is vague rests on the use of the phrase "and the serving of such meals shall be the principal business conducted." Statutes are to be read as a whole and the language is to be construed according to its plain and ordinary meaning. *State v. Alford,* 970 S.W.2d 944 (Tenn. 1998). In situations where an otherwise statute may contain some ambiguous word or phrases, courts apply the doctrine of "noscitur a sociis." That doctrine permits courts to ascertain the meaning of doubtful words by reference to other words and phrases associated with them and to limit and subordinate specific words and phrases to harmonize them with the purpose of the statute. *Sallee v. Barrett,* 171 S.W.3d 822 (Tenn. 2005). Application of that doctrine to the disputed phrase indicates that the intent of the legislature was to define the term restaurant in a manner that is commonly understood by the general public and not to give the term an overly technical meaning.

prosecutions where a due process claim can be raised as a defense.[14]

First Amendment rights are not impeded by the application of Chapter 339. Plaintiffs reference the overbreadth doctrine as authority supporting the invalidation of Chapter 339. The doctrine of overbreadth has only been sparingly applied when the chilling effect of First Amendment rights is both real and substantial. The overbreadth must be real and substantial in relation to the State's plainly legitimate sweep before the law should be invalidated on its face as impermissibly impinging on First Amendment freedoms, and if an ambiguous term has created a constitutional problem which may be solved by construction, courts have a duty to do so. *See, e.g., New York v. Ferber*, 458 U.S. 747, 770 (1982). The cases applying the overbreath doctrine cited by Plaintiffs are ones in which First Amendment violations were asserted. Plaintiffs have not cited any cases in which the overbreath doctrine has been applied in regard to one's ability to carry a weapon, especially into establishments that serve alcoholic beverages.

Plaintiffs have cited some statements that have been made by individual members of the General Assembly and argues that the statements are further proof that Chapter 339 is vague. Such assertions are without merit. When a statute is clear on its face, statements of individual members of the legislature are not relevant. Legislative intent and the meaning of the statute are to be determined from the text. *Saturn Corp. v. Johnson*, 197 S.W.3d 273 (Tenn. App. 2006). The language of Chapter 339 is clear and unambiguous and the court ought to disregard any extraneous statements about the meaning of Chapter 339 which were made by individual members of the legislature.

Finally, Plaintiffs cite Op. Tenn. Att'y Gen. 00-020 apparently for the proposition that the

[14] Plaintiffs also argue that Chapter 339 ought to be invalidated because it puts permit holders, restaurant owners and other patrons in legal jeopardy. That argument is without substance. By its terms, Tenn. Code Ann. § 39-17-1305 punishes only persons who unlawfully carry firearms into establishments that serve alcohol . It does not punish the owners of such establishments or unarmed patrons of those establishments.

Attorney General has already conceded that Chapter 339 is unconstitutionally vague. The opinion is inapplicable and stands for no such proposition. That advisory opinion arose in a different context. The proposed statute that was the subject of the opinion was prohibitive in nature. Chapter 339, on the other hand, is permissive. In addition, the opinion does not concede that the language at issue was unconstitutionally vague. Rather, the Attorney General concluded that the statute might or could be subject to attack. Furthermore, the proposed legislation under review was a proposed new statutory scheme. Chapter 339 is an addition to an existing statute and tracks the preexisting language in the alcoholic beverage commission laws. Any ambiguities that might arise by reading Chapter 339 in isolation can be resolved by reading it in light of the rest of the statute and other related laws.

V. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT CHAPTER 339 IS FUNDAMENTALLY ARBITRARY OR IRRATIONAL IN VIOLATION OF SUBSTANTIVE DUE PROCESS.

The substantive due process provisions of the Tennessee Constitution, Art. I, § 8, are synonymous with the Due Process Clause of the 14th Amendment of the United States Constitution. *See, e.g., Gallaher v. Elam,* 104 S.W. 3d 455, 463 (Tenn. 2003); *Riggs v. Burson*, 941 S.W. 2d 44, 51 (Tenn. 1997), c*ert. denied*, 522 U.S. 982 (1997) "[U]nless a fundamental right is implicated, a statute comports with substantive due process if it bears 'a reasonable relation to a proper legislative purpose' and is 'neither arbitrary nor discriminatory.'" *Gallaher* 104 S.W. 3d at 463, *quoting Riggs*, 941 S.W. 2d at 51, *quoting Newton v. Cox,* 878 S.W. 2d 105, 110 (Tenn. 1994), *cert denied*, 513 U.S. 869 (1994). No provision of the state or federal constitutions imposes a duty upon the government to criminalize the possession of firearms in any particular place or circumstance. Similarly, no provision of either constitution guarantees to

plaintiffs or any other citizen a right to be free from the presence of firearms in any particular place or circumstance. The statute thus comports with substantive due process if a reasonably conceivable rational basis exists to support it.

The burden is on Plaintiffs to demonstrate that there is no conceivable rational basis for Chapter 339 and that the law is so arbitrary or irrational that it fails to serve any governmental objective:

> The courts do not use *Tenn. Const. art. I, § 8* to inquire into the motives of a legislative body or to scrutinize the wisdom of a challenged statute or ordinance. *Braunfeld v. Brown,* 366 U.S. at 608, 81 S.Ct. at 1148; *Fritts v. Wallace,* 723 S.W.2d 948, 949-50 (Tenn.1987); *Brumley v. Town of Greeneville,* 38 Tenn.App. 322, 326, 274 S.W.2d 12, 14 (1954). Our inquiry is more limited. Unless a fundamental right is involved, our task is to review the statute or ordinance to determine whether it bears a reasonable relation to a proper legislative purpose and whether it is neither arbitrary nor discriminatory. *Newton v. Cox,* 878 S.W.2d 105, 110 (Tenn.1994); *Neece v. City of Johnson City,* 767 S.W.2d 638, 639 (Tenn.1989). Thus, it is not our prerogative to superimpose our personal opinions concerning the propriety of [the legislative enactment].
>
> . . .
>
> [T]he only inquiry remaining is whether [the law] is arbitrary and unreasonable. . . . The fact that other [governmental bodies] may have enacted different [laws] has no bearing on our inquiry.
>
> . . .
>
> The courts presume that ordinances enacted in accordance with a . . . government's police power are valid and constitutional. *Rivergate Wine & Liquors, Inc. v. City of Goodlettsville,* 647 S.W.2d at 634. Thus, persons challenging [a law] on substantive due process grounds have the burden of proving that the ordinance is not reasonably related to a valid governmental purpose. *Rivergate Wine & Liquors, Inc. v. City of Goodlettsville,* 647 S.W.2d at 634; *Fritts v. Wallace,* 723 S.W.2d at 950.

Martin v. Beer Board for City of Dixon, 908 S.W.2d 941, 955-56 (Tenn. App. 1995) (rejected substantive due process claim challenging local ordinance prohibiting sale of beer on Sundays).

Chapter 339 is supported by a rational basis. In *Ramsey Winch, Inc. v. Henry,* 555 F.3d 1199 (10th Cir. 2009), the court rejected a substantive due process challenge to an Oklahoma law requiring businesses to allow weapons to be stored in vehicles parked on-premises. The court

stated:

> "[The courts] need not decide the long-running debate as to whether allowing individuals to carry firearms enhance or diminish the overall safety of the community. The very fact that this question is so hotly debated, however, is evidence enough that a rational basis exists for the Amendments [allowing weapons to be stored in vehicles at businesses]. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (noting that if a regulation is fairly debatable, the legislative judgment must control).

Ramsey Winch, Inc. v. Henry, 555 F.3d 1199, 1210 (10th Cir. 2009). "In addition to the [law's] purpose of increasing safety, one could argue that the Amendments are simply meant to expand (or secure) the Second Amendment Right to Bear Arms." *Id., citing PruneYard,* 447 U.S. 74, 81 (1980) (noting that State may exercise its police powers to adopt individual liberties more expansive than those conferred by the Federal Constitution).

The legislative history indicates that the main purposes for Chapter 339 were to allow law-abiding citizens to bear arms and to engage in self-defense. The legislature felt the current prohibitions in the law at restaurants that serve alcoholic beverages infringed upon these interests. Because the Plaintiffs have failed to demonstrate that there is no reasonably conceivable basis for Chapter 339, their substantive due process claim must fail.

VI. CHAPTER 339 DOES NOT IMPEDE AN EMPLOYER'S ABILITY TO PROVIDE A SAFE WORKPLACE AND IS NOT PREEMPTED BY THE OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA).

In *Ramsey Winch*, the plaintiffs also argued that the Oklahoma statute was preempted by OSHA. The district court agreed and issued an injunction against enforcement of the statute. The district court found that gun-related workplace violence was a recognized hazard and held that the Oklahoma statute was in conflict with the federally imposed duty of employers to provide a safe workplace.

The Tenth Circuit rejected the plaintiffs' argument, reversed the district court and vacated the injunction. It noted that the district court's findings concerning guns and workplace violence were unfounded and based on speculation. *Ramsey Winch*, 555 F. 3d at 1207.[15]

The court also found that, in enacting OSHA, Congress did not intend to interfere with the exercise of state police powers. *Id.* It stated that the law was not intended to impose a comprehensive set of standards to govern workplace safety. In concluding that the district court decision interfered with Oklahoma's proper exercise of its police power and therefore ought to be reversed, the Tenth Circuit said:

> Here, the Amendments conflict with no OSHA standard. Moreover, the Oklahoma Court of Criminal Appeals defined the Amendments as "public crimes" of general applicability "concern[ing] protection of the community as a whole rather than individual citizens. . . . Thus, while the Amendments may "have a 'direct and substantial effect' on worker safety, they cannot fairly be characterized as 'occupational' standards, because they regulate workers simply as members of the general public." . . . . The district court's decision interferes with Oklahoma's police powers, . . . and essentially promulgates a court-made safety standard which OSHA has explicitly refrained from implementing on its own.

Id., at 1207-08. (internal cites omitted).

Chapter 339, unlike the Oklahoma law, does not require restaurant owners to take any action with respect to the carrying of firearms by carry permit holders. There is nothing in Chapter 339 that requires business owners to admit armed carry permit holders into their establishments and to provide them with service. To the contrary, owners of such businesses remain free to prohibit the firearms on their premises if they believe that doing so will provide a safer working environment for their employees or for any other reason. Plaintiffs' OSHA claim

[15] The court also noted that OSHA had given no indication that employers should prohibit firearms in locked cars in parking lots and had declined to issue standards related to violence in the workplace. The court also found that in declining to issue such standards, OSHA stated that it intended to rely instead on other federal, state and local law enforcement agencies to handle violence in the workplace.

should therefore be rejected.

VII. ALLOWING RESTAURANT OWNERS TO DECIDE WHETHER TO ALLOW HANDGUN CARRY PERMIT HOLDERS TO CARRY FIREARMS INTO THEIR ESTABLISHMENTS, IS NOT AN UNLAWFUL DELEGATION OF AUTHORITY.

Article II, § 3 of the Tennessee Constitution prohibits the General Assembly from delegating its authority to make law. However, the General Assembly "can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Gamble v. State*, 333 S.W.2d 816, 821 (Tenn.1960). Public Chapter 339 established that the law allows properly permitted persons to carry a firearm into a restaurant as defined in that same chapter. Tenn. Code Ann. § 39-17-1359 also *lawfully* gives to property owners – not just restaurant owners – the discretion to determine whether or not the owner wants to allow handgun carry permit holders to carry firearms onto their property. It is the "state of things," the wishes of the property owner in exercising his property rights, on which the operation of the law depends.[16]

There can be no unlawful delegation unless the matter involves legislative power. The General Assembly may delegate any power that is not legislative in character. *State ex rel. Llewellyn v. Knox Co.*,54 S.W. 2d 973 (Tenn. 1932). What the General Assembly has done with the enactment of Public Chapter 339 does nothing more than to enable individual owners to set rules governing the use of their private property; no delegation of legislative authority has been made. Therefore, there has been no unconstitutional delegation of legislative authority.

Plaintiffs rely on *American Chariot v. City of Memphis,* 164 W.W.3d 600 (Tenn. Ct.

[16] It is important to note that a basic principal of property law that a property owner's right to own, use, and enjoy private property is fundamental. *Massey v. R.W. Graf, Inc.* 277 S.W.3d 902, 908 (Tenn.Ct.App. 2008).

App. 2004) to support their argument that Chapter 339 is an unlawful delegation of police powers to private citizens. (Rayburn Plaintiffs' Second Amended Complaint ¶ 104). In that case, the City of Memphis had enacted an ordinance prohibiting the operators of horse drawn carriages from placing carriage stands on city streets within one hundred feet of a restaurant entrance. The ordinance also contained a provision that allowed operators to place their stands closer to restaurant entrances if they obtained the permission of the restaurant owner. The court held that allowing individual restaurant owners to make such an election was an unconstitutional delegation of legislative authority and struck down the ordinance.

American Chariot is distinguishable. In that case, the election provision in the ordinance permitted private citizens to determine whether a specific use of city owned property, a public thoroughfare, would be detrimental to the public. *American Chariot,* 164 S.W.3d at 605. In this case, the decisions that are made by property owners are limited to matters related to the use of their property only. The Legislature has simply codified in Tenn. Code Ann. § 39-17-1359 long-recognized property rights concerning an owner's right to use and enjoy his property as he deems appropriate.

Davis v. Blount Co. Beer Bd., 621 S.W.2d 149 (Tenn. 1981) is instructive. In *Davis*, the Court upheld an ordinance and the statute which authorized the adoption of the ordinance prohibiting the issuance of a beer license within 300 feet of a residence if the owner of the residence appeared before a beer board and objected, did not unlawfully delegate legislative power to private individuals.

In rejecting the argument that the statute constituted an unlawful delegation of legislative authority, the Court in *Davis* reasoned that upon the passage of the statutory authority, the resident located within the 300 feet of the proposed beer outlet exercised no legislative power;

the resident either formally objected, or chose not to do so. *Davis* at 152. While the effect of an objection is to deny a permit, that "effect is derived from the legislative enactment...not from the residence owner." *Id.* In reaching its conclusion the court cited a passage from *Myers v. Fortunato,* 110 A. 847, 848 (Del. 1920) which states:

> If the existence of the law depends upon the vote or act of the people it is an unconstitutional delegation of legislative power, but if the law is complete in and of itself the fact that it provides for the removal or modification of its prohibition by the act of those most affected thereby, does not make it a delegation of legislative power.

This passage makes clear that there can be no delegation of legislative authority if the law is complete without action of private persons. It this case, the law is complete. Persons or businesses, including restaurants, can prohibit the possession of firearms on their premises because of the existence of the law. Tenn. Code Ann. § 39-17-1359. The fact that individual property owners may decide whether or not to allow firearms on their premises, according to *Davis*, does not make it a delegation of legislative power.

VIII. IF THE COURT FINDS THAT A PORTION OF CHAPTER 339 IS UNCONSTITUTIONALLY VAGUE OR OTHERWISE INVALID, CHAPTER 339 COULD EFFECTIVELY BE ELIDED TO CARRY OUT THE INTENT OF THE GENERAL ASSEMBLY.

Public Chapter 339 makes an addition to the list of exceptions to the general prohibition against the possession of firearms where alcoholic beverages are served. If the court finds that Public Chapter 339 is unconstitutionally vague as enacted, the Attorney General asserts that Chapter 339 could be properly subjected to elision, with the offending provision removed, and the remainder of the statute would be valid and effectively carry out the intent of the General Assembly.

Plaintiffs contend that the new law is constitutionally 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." (Rayburn Plaintiffs' Second Amended Complaint, ¶ 93). The Intervenors also assert that, Chapter 339 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." (Melrose Complaint, ¶ 26). The Attorney General asserts that if the alleged offending phrase, "the serving of such meals shall be the principal business conducted," was elided from the statute, the remainder of the statute would be clear and reflect the intent of the General Assembly.[17]

Under the doctrine of elision, a court may "elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective." *Lowe's Companies, Inc., v. Cardwell,* 813 S.W.2d 428 (Tenn. 1991). The rule of elision applies "if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable ... provided, of course, that there is enough of the act for a complete law capable of enforcement and fairly answering the object of its passage." *Id.* at 430, quoting *Davidson County v. Elrod,* 232 S.W.2d 1 (Tenn. 1950).

The inclusion of a severability clause in the statute is evidence of an intent on the part of the legislature to have the valid parts of the statute enforced if other parts are deemed unconstitutional. *Cartlett v. State,* 336 S.W.2d 1 (Tenn. 1960). Although Chapter 339 does itself not contain a severability clause, Tenn. Code Ann. § 39-17-1305 was enacted as part of the 1989 Criminal Code Revision which did contain a general severability clause, *see* 1989 Tenn. Pub. Acts ch. 591, § 120, and the legislature has elsewhere expressed its general intention that

[17] The Attorney General does not concede that Public Chapter 339 is vague as written.

unconstitutional provisions of the Code may be elided in order to give effect to the remainder of the Code, *see* Tenn. Code Ann. § 1-3-110.

The phrase "the serving of such meals shall be the principal business conducted," is not essential to the definition of restaurant contained in subpart (3)(b) and its elision would not create an incomplete statute. The remainder of the statute, were that provision elided, would still accomplish what the legislature intended, that is, to allow handgun carry permit holders to carry their firearms into restaurants, i.e., facilities that possesses the capability to serve meals, that advertise and hold themselves out to be in the business of serving meals and where such meals are actually served at least once per day, five (5) days per week. Thus, the offending provision could be successfully elided out.

CONCLUSION

Based on the foregoing, the Plaintiffs' Motions for Summary Judgment should be denied. Moreover, the Attorney General's Motion for Judgment on the Pleadings and/or for Summary Judgment should be granted. As a matter of law, this action should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Memorandum has been delivered by hand, united states mail, postage prepaid, and/or e-mail, to:

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this 2nd day of October, 2009.

Lyndsay F. Sanders

LYNDSAY FULLER SANDERS
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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Claudia Ayala, 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 December 6, 2010, I served the foregoing document(s) described as **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION / TRIAL**

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.
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___ (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 December 6, 2010, at Long Beach, California.

___ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on December 6, 2010, at Long Beach, California.

__ (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 December 6, 2010, at Long Beach, California.

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

CLAUDIA AYALA