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INTRODUCTION

For almost four years, Defendants-Appellants Richard Allen and Bartec, Inc. dba Zeno's Victorian Village (collectively "Zeno's"), have disregarded Ohio's Smoke Free Act, R.C. Chapter 3794, by allowing their patrons to smoke and by providing rudimentary ashtrays for patrons. The Ohio Department of Health ("ODH") cited Zeno's with ten violations of the Act, but Zeno's has yet to pay the accompanying fines. In light of these repeated violations, the ODH Director filed the underlying action pursuant to R.C. 3794.09(D) seeking an injunction to ensure Zeno's compliance with the Act.

Faced with a potential injunction, Zeno's decided to collaterally attack its ten earlier violations, all of which had already become final orders. Zeno's sought a declaration that the ten orders were invalid, and that the Act is unconstitutional as applied to Zeno's. The Tenth District Court of Appeals properly rejected this gambit because Zeno's had not raised these challenges on administrative review. The court then granted ODH an injunction against Zeno's.

Zeno's now urges this Court to accept jurisdiction, unreasonably objecting that the Tenth District did not decide the merits of its constitutional claims. But Zeno's umbrage is misplaced. Its lower court pleadings were, at best, ambiguous about whether Zeno's was challenging only ODH's application of the Act to Zeno's or also its facial constitutionality. Zeno's frustration is further groundless given that it forfeited *ten* earlier opportunities to make these claims, raising them *only* when ODH decided to seek injunctive relief because Zeno's had repeatedly violated the Act.

Regardless of Zeno's discontentment, this case is unworthy of review. The Tenth District's holding that Zeno's cannot collaterally attack its violations is an unremarkable application of well-established law governing the exhaustion of administrative remedies and collateral attacks on final orders. And Zeno's facial constitutional challenges do not merit review for two reasons.

First, they are not properly before the Court because the lower courts did not rule on them. Second, even if the Court were willing to consider these claims, they are fanciful, at best, and do not require the Court's attention. For instance, no court has ever analyzed a smoking ban under the strict scrutiny test, as is sought by Zeno's.

For these reasons and the reasons below, the Court should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

In November 2006, Ohio voters enacted the first statewide smoking ban in the Midwest. The Smoke Free Act requires proprietors not to permit smoking in public places and places of employment, R.C. 3794.02(A); to remove ashtrays, R.C. 3794.06(B); and to post "No Smoking" signs, R.C. 3794.06(A).

ODH (or its designee) conducts an on-site investigation of every reported violation of the Act. O.A.C. 3701-52-08(D). If the investigator finds a violation, she issues either a Letter of Warning (for first offenses) or a Fine Letter. R.C. 3794.07(B) (fines may be doubled for intentional violations); O.A.C. 3701-52-09(A)(5) (fines increase with each violation). A proprietor may administratively appeal any finding of a violation, and can appeal adverse determinations to the Franklin County Court of Common Pleas and beyond. O.A.C. 3701-52-08.

Zeno's received ten Fine Letters between July 2007 and September 2009, accruing over \$33,000 in unpaid fines. Plaintiff's Trial Ex. 5-14. Each letter reflected numerous violations of the Act, including smoking in a prohibited area, R.C. 3794.02(A); the presence of ashtrays, R.C. 3794.06(B); and failure to post signs, R.C. 3794.06(A). *Id.*

Zeno's did not seek administrative review for eight of the letters. It did request hearings on the other two Fine Letters, which were affirmed by ODH's local designee. *Jackson v. Bartec, Inc.* (10th Dist.), 2010-Ohio-5558, ¶ 24 ("App. Op."). Zeno's then appealed these

determinations to the common pleas court, but it did not file briefs or make any argument. *Id.* All ten Fine Letters became final orders.

ODH can obtain an “order in equity” against a proprietor who “repeatedly violate[s]” or “fails to comply” with the Act. See R.C. 3794.09(D). In August 2009, ODH filed an action seeking such an injunction against Zeno’s. App. Op. ¶ 2. Zeno’s filed counterclaims raising constitutional and procedural arguments, *id.* at ¶ 3, and a cross-claim against the Ohio Attorney General, to prevent him from collecting the fines against Zeno’s, *id.* at ¶ 4.

The trial court held that Zeno’s ten violations were void *ab initio* and dismissed both the violations and the accompanying fines. *Id.* at ¶ 6. The court denied ODH’s injunction, and it did not address Zeno’s constitutional challenges. *Id.*

The Tenth District Court of Appeals reversed, holding that Zeno’s ten violations were final orders and that the trial court erred by entertaining Zeno’s collateral attack on them. *Id.* at ¶¶ 24-25. According to the court, Zeno’s should have raised any as-applied constitutional challenges on administrative review, and could not raise them in a declaratory judgment action. *Id.* at ¶¶ 23-24. In light of overwhelming evidence that Zeno’s repeatedly and intentionally violated the Act, the court remanded for the trial court to issue an injunction against Zeno’s. *Id.* at ¶ 33. Finally, the court rejected Zeno’s claims against ODH and the Attorney General. *Id.* at ¶ 44.

Zeno’s now urges the Court to accept discretionary review.

THIS CASE IS NOT OF PUBLIC AND GREAT GENERAL INTEREST AND IT DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION

A. This case does not involve a matter of public or great general interest.

This case is not of public or great general interest because the Tenth District’s opinion merely reaffirmed well-established law: A party cannot use the Declaratory Judgment Act to collaterally attack a final order by raising arguments that he did not raise on direct appeal.

Accordingly, Zeno's cannot retroactively attack otherwise final ODH orders by raising new as-applied constitutional challenges. The Tenth District's application of this principle is uncontroversial, and Zeno's efforts to complicate this issue do not justify this Court's review.

This Court has long recognized the importance of administrative process and the need for parties to exhaust administrative remedies before raising as-applied constitutional challenges. See, e.g., *Bd. of Educ. v. Kinney* (1986), 24 Ohio St. 3d 184, syll. (party must raise challenge to the application of a tax before the Board of Tax Appeals or waive it); *Clagg v. Baycliffs Corp.* (1998), 82 Ohio St. 3d 277, 281 (courts should deny declaratory and injunctive relief for plaintiffs who failed to exhaust administrative remedies). Accordingly, as-applied constitutional challenges must be raised before an agency if they arise in context of an administrative order. See *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, 231 (parties must raise as-applied constitutional challenges on administrative review or waive them). This gives the agency an opportunity to develop a full evidentiary record. See *Kinney*, 24 Ohio St. 3d at 186.

Once an administrative order is final, parties cannot collaterally attack it by raising new arguments, even under the guise of a declaratory judgment action. See *Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St. 3d 375, 380, 2007-Ohio-5024 (subject to rare exceptions, parties should challenge orders on direct appeal; collateral attacks are disfavored); see also *State ex rel. Broadway Petroleum Corp. v. Elyria* (1969), 18 Ohio St. 2d 23, 28 (plaintiffs cannot use mandamus to collaterally attack administrative decisions after the time for direct appeal expires).

Because Zeno's did not raise as-applied challenges to its violations before ODH, it waived those arguments and cannot resurrect them in this declaratory judgment action. Zeno's did not even contest eight violations, and did not present as-applied constitutional challenges when it contested the other two violations. App. Op. ¶ 24. It would be inherently unfair to permit

Zeno's to "sit on its rights"—raising no argument or defense to ODH's final orders—only to later challenge the orders in a declaratory judgment action. If such a collateral attack were permitted, ODH would have to prove the violations again, several years after they occurred.

Zeno's claim that the Tenth District did great damage to the Declaratory Judgment Act by applying these well-worn principles is far-fetched. The Tenth District's decision does not mean that "an Ohioan loses his right to raise and vindicate his constitutional rights, as against a statute or regulatory policy, simply because he has been fined under that statute or policy in the past." Memorandum in Support of Jurisdiction ("Jur. Mem.") at 4. It means only that a party cannot collaterally attack final administrative orders by raising as-applied constitutional challenges in a later declaratory judgment action.

B. This case does not involve a substantial constitutional question.

Zeno's facial constitutional challenges to the Smoke Free Act and ODH's enforcement policies do not merit review for two reasons. First, the lower courts did not decide these questions, and so this Court should not undertake to resolve them in the first instance. Second, even if the Court were interested in resolving issues not yet passed upon, Zeno's claims are so meritless—so insubstantial—that they do not warrant review.

Neither the trial court nor the appeals court analyzed Zeno's constitutional claims as facial challenges. The courts' inaction is arguably explained by Zeno's own conduct. In the lower courts, Zeno's focused on its as-applied challenges and invalidating its ten violations. In fact, before the Tenth District, Zeno's asserted that "the central issue in this appeal is [ODH's] application and enforcement of the plain language of the Act, rather than the Act itself." Zeno's Reply Br., *Jackson v. Bartec* (10th Dist. May 17, 2010), No. 10AP-173. Regardless of the

reason, the lower courts did not rule on the facial constitutionality of the Act or ODH's enforcement policy.¹

This Court typically declines to review issues for the first time on discretionary appeal. See *State v. Brooks* (1989), 44 Ohio St. 3d 185, 193 (“We decline to decide this issue before the court of appeals has had an opportunity to address this issue in the first instance.”). Thus, even if the Court accepts review, it should remand the case for resolution of these facial challenges below. See *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, ¶ 16 (“Because the court of appeals’ erroneous disposition of the issue before us led it to hold that CEI’s remaining assignments of error were moot, we remand to the court of appeals for consideration of those issues.”). *This* appeal is not the appropriate time to decide the merits of Zeno’s facial challenges.

Even if the Court were inclined to resolve these claims in the first instance, however, Zeno’s facial challenges are meritless and unworthy of review. Every court to consider similar challenges has held that the Smoke Free Act is constitutional. See e.g. *Deer Park Inn v. Ohio Dep’t of Health* (10th Dist.), 185 Ohio App. 3d 524, 2009-Ohio-6836, ¶ 16 (“*Deer Park Inn I*”) (procedural and substantive due process, equal protection, vagueness); see also *Deer Park Inn v. Ohio Dep’t of Health* (10th Dist.), 2010-Ohio-1392, ¶ 12 (“*Deer Park Inn II*”) (same), *appeal denied*, 126 Ohio St. 3d 1516; *Boulevard v. Ohio Dep’t of Health* (10th Dist.), 2010-Ohio-1328, ¶ 15 (same). Similarly, courts consistently have rejected constitutional challenges to other municipal and statewide smoking bans. See, e.g., *Steele v. County of Beltrami* (8th Cir. 2007), 238 Fed. App’x 180 (unpublished) (no constitutional right to smoke); *D.A.B.E., Inc. v. City of*

¹ The trial court did not mention any facial challenge. By contrast, the Tenth District observed that Zeno’s “argument included an assertion that the statute is unconstitutional on its face,” but that “the trial court refused to decide the issue.” App. Op. ¶ 26. The Tenth District similarly declined to analyze the issue, noting only that remand was unnecessary because it had “previously upheld the facial constitutionality of the Smoke Free Act.” *Id.*

Toledo (6th Cir. 2005), 393 F.3d 692 (regulatory taking); *Operation Badlaw, Inc. v. Licking County Gen. Health Dist. Bd. of Health* (S.D. Ohio 1992), 866 F.Supp. 1059 (equal protection, due process); *Whitesell-Finnel Post No. 971 v. City of Newton* (Kan. 2010), 225 P.3d 735 (freedom of association, privacy, due process); *Batte-Holmgren v. Comm'r of Pub. Health* (Conn. 2006), 914 A.2d 996 (equal protection). Accordingly, the Court need not go out of its way to resolve confusion that simply does not exist.

ARGUMENT

ODH's Response to Propositions of Law Nos. 1 & 2

Zeno's facial constitutional challenges are not properly before the Court, but even if they were, the Smoke Free Act is a valid exercise of the State's police power, the Act does not unconstitutionally infringe on property rights, and ODH's enforcement policy does not violate separation of powers.

Zeno's cannot prevail on its facial constitutional challenges for two reasons. First, these claims are not properly before the Court. Neither lower court ruled on *any* facial constitutional challenge to the Act or ODH's enforcement policies. In fact, it was not even clear that Zeno's objective was to raise facial constitutional challenges, as it continually emphasized the unconstitutionality of the Act and ODH policies *as applied* to Zeno's and similar proprietors. Because the lower courts did not pass on these issues, the Court should decline to resolve them now. Second, even if the Court were to consider these claims for the first time, they fail on the merits.

A. ODH's enforcement of the Smoke Free Act does not violate separation of powers.

Zeno's erroneously argues that ODH adopted an unwritten rule that exceeds its rulemaking authority under the Smoke Free Act, thereby violating separation of powers.² Specifically,

² Zeno's argument again confuses facial and as-applied constitutional challenges. In the context of this supposed facial challenge, Zeno's argues that ODH's alleged "policy was implemented *against Zeno's*." Jur. Mem. 10 (emphasis added).

Zeno's claims that ODH refuses to enforce R.C. 3794.02(D) against *individuals* who violate the Act, and instead improperly makes proprietors strictly liable whenever smoking is present at their establishments, see R.C. 3794.02(A). Jur. Mem. 1-2. But ODH has adopted no such rule, and even if it had, it would not violate separation of powers for at least three reasons.

First, if ODH is enforcing a policy of strict liability for violations of R.C. 3794.02(A), then it is correctly applying the Smoke Free Act, not exceeding its authority. As the Tenth District has explained, R.C. 3794.02(A) is a strict liability provision. *Pour House v. Ohio Dep't of Health* (10th Dist.), 185 Ohio App. 3d 680, 2009-Ohio-5475, ¶ 19. Thus, regardless of intent, a proprietor is strictly liable if it "affirmatively allows smoking or implicitly allows smoking by failing to take reasonable measures to prevent it, such as posting no smoking signs and notifying patrons who attempt to smoke that smoking is not permitted." *Id.* Even under this standard, however, a proprietor is liable only if he affirmatively or implicitly allows smoking. *Id.*

Second, if the Act were at all unclear about the standard for proprietor liability under R.C. 3792.02(A), the provision must "be liberally construed so as to further its purposes of protecting public health and the health of employees." R.C. 3794.04. Further, if there are two alternative ways to interpret an administrative rule, courts will choose the constitutional interpretation. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 126 Ohio St. 3d 183, 2010-Ohio-2744, ¶ 27. Thus, if there were any doubt about whether ODH's alleged enforcement policy is "consistent with the public policy choices of the General Assembly" (and there is not), the Court should "preserve[] the rulemaking role of the agency and avoid[] constitutional conflicts." *Id.* at ¶ 28.

Finally, Zeno's cannot possibly show that ODH exceeded its statutory authority through rulemaking because Zeno's cannot even identify an administrative "rule." R.C. 119.01(C) defines "rule" as "any rule, regulation, or standard, having a general and uniform operation,

adopted, promulgated, and enforced by any agency.” The record includes no evidence that ODH has a policy of automatically finding proprietors in violation with no investigation, much less that it is a policy of “general and uniform application.” To the contrary, “testimony at the trial court indicated ODH investigates claimed violations of the Smoke Free Act on a case-by-case basis.” App. Op. ¶ 38.

For these and other reasons, Zeno’s separation of powers claim must fail.

B. The inclusion of bars as proprietors under the Smoke Free Act does not exceed the State’s police power or unreasonably extinguish property rights.

Zeno’s also argues, without basis, that “[i]nclusion of bars as proprietors subject to R.C. 3794 exceeds the outer limits of the state police power, and unreasonably extinguishes property rights” in violation of Article 1, Section 19 of the Ohio Constitution. Jur Mem. 10. The contours of Zeno’s argument are unclear, but even when interpreted charitably, its argument fails.

Since the end of the *Lochner* era, it has been clear that States can exercise their police power to regulate for the public’s health and safety. The General Assembly, state agencies, and local governments regularly exercise their police power in furtherance of the public health. For example, the Ohio Department of Agriculture and city health districts regulate and inspect places where food is manufactured, sold, or handled. *Johnson’s Markets, Inc. v. New Carlisle Dep’t of Health* (1990), 58 Ohio St. 3d 28. The Board of Health requires pasteurization of all milk to prevent dangers from the presence of bacteria in raw milk. *Schlenker v. Bd. of Health of Auglaize County Gen. Health Dist.* (1960), 171 Ohio St. 23, syll. And localities fluoridate their local water supplies to prevent dental problems. *Kraus v. Cleveland* (1955), 163 Ohio St. 559.

R.C. Chapter 3794 is well within the limits of the State’s police power. The General Assembly enacted the Smoke Free Act to further “the best interests of the public health.” R.C. 3794.04. After reviewing significant evidence, the legislature concluded that “smoking in the

workplace is a statewide concern” because “medical studies have conclusively shown that exposure to secondhand smoke from tobacco causes illness and disease, including lung cancer, heart disease, and respiratory illness.” *Id.* The Act prohibits “smoking of tobacco products . . . in public places and places of employment” and creates “a uniform statewide minimum standard to protect workers and the public from the health hazards associated with exposure to secondhand smoke from tobacco.” *Id.*; see also *Traditions Tavern v. City of Columbus* (10th Dist.), 171 Ohio App. 3d 383, 2006-Ohio-6655, ¶¶ 23-24 (Smoke Free Act furthers the State’s interest in preventing unnecessary public exposure to secondhand smoke (and attendant health risks) “by eliminating the possibility of contact with second hand smoke in enclosed public places”).

Courts give substantial deference to legislation enacted to protect the public health. See *Ohio Edison Co. v. Power Siting Comm’n* (1978), 56 Ohio St. 2d 212, 217; *Matz v. J. L. Curtis Cartage Co.* (1937), 132 Ohio St. 271, syll. ¶ 7. A court will not invalidate an exercise of the police power as long as “it bears a real and substantial relationship to the public health” and “is not unreasonable or arbitrary.” *Canton v. Whitman* (1975), 44 Ohio St. 2d 62, 68. Contrary to Zeno’s claims, this police power is not “limited by nuisance theory and public necessity,” Jur. Mem. 11, and the State need not declare an action a “nuisance” before regulating it. See, e.g., *Ghaster Props., Inc. v. Preston* (1964), 176 Ohio St. 425, syll. (legislation prohibiting billboards along interstate highways is constitutional, even though such billboards had been legal).

The Smoke Free Act (and ODH’s implementing regulations) unquestionably bear a substantial relationship to the General Assembly’s interest in preserving the public health. Zeno’s nevertheless argues that the Act unduly burdens bar owners and unreasonably deprives them of their right to use their property for an otherwise lawful purpose. See Jur. Mem. 11-12.

As Zeno's notes, the Court elsewhere has struck "unduly oppressive statutes," such as a statute mandating closure of a property for all uses if a nuisance is found, even as to innocent owners who had no knowledge of the nuisance. *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St. 3d 116, syll. ¶ 2; but see *Kays v. Schregardus* (11th Dist. 2000), 138 Ohio App. 3d 225, 233 (distinguishing *Rezcallah* where party was not an innocent owner and did nothing to abate a nuisance for twelve years of ownership). But unlike the statute in *Rezcallah*, the Smoke Free Act merely requires proprietors to abide by health regulations—that is, to not permit smoking inside their establishments. This requirement is not "unduly oppressive" and proprietors have significant procedural due process rights to challenge every violation. See O.A.C. 3701-52-08.

To the extent Zeno's invokes a fuzzy equal protection claim by suggesting that bars should be exempt from the Act (like certain other groups), Zeno's offers yet another unpersuasive constitutional challenge. Because bar owners are not a protected class and there is no fundamental right to smoke or allow smoking in public venues, any equal protection challenge would be subject to rational basis review. See *Amiriantz v. State* (D.N.J. Nov. 16, 2006), No. 06-1743, 2006 U.S. Dist. Lexis 86546, at *11-12. Under this deferential standard, courts have consistently upheld exemptions for certain locations in smoking bans. See, e.g., *Coalition for Equal Rights, Inc. v. Ritter* (10th Cir. 2008), 517 F.3d 1195; *Amiriantz*, 2006 U.S. Dist. Lexis 86546; *Deer Park Inn I*, 2009-Ohio-6836, at ¶ 19; *Sayville Inn 1888 Corp. v. County of Suffolk* (E.D.N.Y. Aug. 3, 1998), No. 98-CV-4527, 1998 U.S. Dist. Lexis 23472.

Accordingly, Zeno's cannot prevail on any permutation of its property rights challenge.

ODH's Response to Proposition of Law No. 3:

A party cannot use a declaratory judgment action to raise an as-applied challenge to the constitutionality of final administrative orders where the party failed to raise the challenge on administrative review.

The Tenth District rightly held that Zeno's cannot use a declaratory judgment action to raise as-applied constitutional challenges to ODH's final orders because Zeno's did not initially raise those challenges in the proper administrative forum. But that does not foreclose Zeno's or another proprietor from properly bringing a facial challenge to the Smoke Free Act or ODH's enforcement policies. To the contrary, proprietors like Zeno's can and have filed declaratory judgment actions to determine the Act's facial constitutionality.

A. The appeals court correctly held that Zeno's cannot use a declaratory judgment action to challenge ten final orders finding violations of the Smoke Free Act.

The Tenth District's decision turned on two basic principles of administrative law: (1) a party making an as-applied constitutional challenge must first exhaust its administrative remedies and create an administrative record for the challenges; and (2) a party cannot use declaratory relief as a substitute for direct appeal. See App. Op. ¶¶ 22, 37. Because Zeno's did not exhaust its administrative remedies or raise as-applied constitutional challenges on administrative review, it cannot now raise them in a declaratory judgment action.

A party must raise any challenge to the application of a statute at the first available opportunity, including administrative review. See *Kinney*, 24 Ohio St. 3d 184, syll.; *City of Reading v. Pub. Utils. Comm'n*, 109 Ohio St. 3d 193, 2006-Ohio-2181, ¶ 15; *Cleveland Gear Co.*, 35 Ohio St. 3d at 231. This is true even though an administrative agency lacks jurisdiction to determine a statute's constitutionality, because "[w]here extrinsic facts are required to properly resolve the issue, the error must be specified at the first available opportunity." *City of Reading v. Pub. Utils. Comm'n*, 109 Ohio St. 3d 193, 2006-Ohio-2181, ¶ 12; cf. Jur. Mem. 15 (claiming that it would be futile to raise constitutional arguments before an agency). This allows both the party and the agency to present evidence supporting their positions early on.

In fact, it would be unfair to ODH if Zeno's could bring as-applied constitutional challenges *after* its underlying violations became final orders. This Court elsewhere has observed that had a party raised a constitutional issue during administrative proceedings, the defendant may have been able to "develop[] an evidentiary record sufficient to show that the statute was applied constitutionally." *Kinney*, 24 Ohio St. 3d at 186. Waiting to raise the issue deprived ODH "of an opportunity to develop the record on this point," which "raises due process considerations," and would require ODH to defend final orders issued up to four years ago, long after memories have faded and investigators have retired. *Id.*

Zeno's had ample opportunity to seek administrative review of whether ODH constitutionally applied the Act when it issued the ten violations. Zeno's could have requested administrative hearings and appealed any adverse determinations. See O.A.C. 3701-52-08. But it only sought administrative review of two violations, and it did not preserve its constitutional arguments at those hearings (or make *any* argument at all before the trial court). See *Zeno's Victorian Village v. Ohio Dep't of Health* (Franklin County C.P. Dec. 23, 2008), No. 08CV10887; *Zeno's Victorian Village v. Ohio Dep't of Health* (Franklin County C.P. Jan. 7, 2009), No. 08CV10888. In short, Zeno's did not exhaust its administrative remedies with respect to eight violations, and it did not raise constitutional challenges to the other two.

Because Zeno's failed to exhaust its administrative remedies, its as-applied challenges improperly "attempt[] to use a declaratory judgment action to attack the past methods of the entity charged with proving violations of the statute." App. Op. ¶ 38. A party must exhaust any administrative remedies that could provide the relief he seeks before initiating a declaratory judgment action. See *Driscoll v. Austintown Ass'n* (1975), 42 Ohio St. 2d 263, 273; see also *Clagg*, 82 Ohio St. 3d at 281 (parties who fail to exhaust administrative remedies are not entitled

to declaratory and injunctive relief). Thus, in order to seek a declaratory judgment about the constitutionality of ODH's orders against Zeno's, Zeno's would have had to exhaust its administrative remedies with respect to those violations.

B. Plaintiffs can bring proper declaratory judgment actions to attack the facial validity of the Smoke Free Act, even if they have previously violated the Act.

Although Zeno's is precluded from collaterally attacking ODH's final orders, it (and other proprietors) *can* file proper declaratory judgment actions to adjudicate the facial constitutionality of the Act and ODH's enforcement policies. Zeno's contrary claim that the Tenth District's decision resulted in a "faulty narrowing of the declaratory judgment statute" misunderstands the court's holding. Jur. Mem. 15.

The Declaratory Judgment Act allows "any person whose rights, status, or other legal relations are affected by a constitutional provision, statute" to "have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it." R.C. 2721.03(A). This tool helps parties determine their rights and legal status, but it does not provide a means of retroactively challenging final judgments.

As explained above, Zeno's sought to vacate its *past* violations. (In fact, Zeno's cross-claim sought to enjoin the Attorney General's collection of Zeno's unpaid fines "pending the Ohio judiciary's adjudication of *whether the underlying citations*, which form the bases of these threats, *are constitutional* and/or lawful." Cross-Claim ¶ 182 (emphasis added).) At best, Zeno's pleadings and briefing were ambiguous as to whether Zeno's was raising facial challenges. The lower courts clearly understood Zeno's to be focused on its as-applied challenges, as neither passed on facial constitutionality. But that is not to say Zeno's *could not* use the Declaratory Judgment Act to properly raise a facial challenge.

In fact, others have filed declaratory judgment actions to challenge the Act's facial constitutionality without difficulty. For example, in December 2006, the Buckeye Liquor Permit Holders Association sought a declaratory judgment that the Smoke Free Act suffered from various constitutional infirmities, including violations of the Due Process Clause, the Contracts Clause, the Equal Protection Clause, and the Takings Clause. See *Buckeye Liquor Permit Holders Ass'n v. Ohio Dep't of Health* (Hamilton County C.P. Mar. 7, 2008), No. A0610614. The court entered summary judgment for ODH, rejecting any claim that public smoking is a fundamental right and the argument that any regulation that restricts private property triggers strict scrutiny because it infringes on a fundamental right. *Id.* Zeno's is free to file a declaratory judgment action regarding future enforcement of the Smoke Free Act. What Zeno's cannot do, however, is use declaratory judgment to attempt to vacate past violations of the Act.

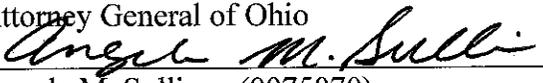
CONCLUSION

For all the reasons above, the Court should decline to accept jurisdiction over this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Memorandum Opposing Appellant's Memorandum in Support of Jurisdiction* was served by U.S. mail this 1st day of February, 2011, upon the following counsel for Defendants-Appellants and *Amici*:

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