

**In the  
Supreme Court of Ohio**

Theodore E. Wymyslo, M.D.,  
Director of the Ohio Department of Health,

Plaintiff-Appellee,

v.

Bartec Inc. d/b/a  
Zeno's Victorian Village, et al.,

Defendants-Appellants,

v.

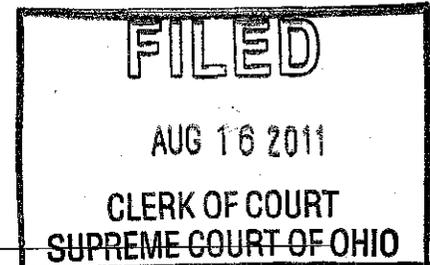
Michael DeWine, Ohio Attorney General,

Cross-Claim  
Defendant-Appellee.

Case No. 2011-0019

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

Court of Appeals Case No. 10AP-173



**MERIT BRIEF OF PLAINTIFF-APPELLEE THEODORE E. WYMYSLO, M.D.,  
DIRECTOR, OHIO DEPARTMENT OF HEALTH AND  
CROSS-CLAIM DEFENDANT-APPELLEE MICHAEL DEWINE,  
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## INTRODUCTION

Zeno's and their amici suggest that democracy is on the line in this case, but their rhetoric rings hollow. "Liberty implies the absence of arbitrary restraint, not *immunity* from reasonable regulations and prohibitions imposed in the interest of the community." *Chicago Burlington & Quincy R.R. Co. v. McGuire* (1911), 219 U.S. 549, 567 (emphasis added). Accordingly, reasonable regulations intended to promote public health and safety may be adopted and enforced under the State's police power without violating the rights of property owners.

In keeping with these well-settled principles, Ohio and thirty-one other states, along with more than 3,000 municipalities, have enacted smoking regulations to protect people from the health dangers of secondhand smoke. Ohio's law, the Smoke Free Workplace Act (R.C. Chapter 3794), was promulgated by the people of Ohio in November 2006, under the State's initiative process. The law is both a general public health law and an occupational-safety law. It restricts smoking inside most public places in Ohio, including restaurants, bars, and bowling alleys, as well as workplaces.

Zeno's, a bar in Columbus and a serial scofflaw of the Act, raises various challenges to the validity of Ohio's law. Cast in their most sympathetic light, even the most lucid of these arguments are disjointed and difficult to follow. But unless the Court chooses to disregard the language of the Ohio Constitution, abandon heaps of its own precedent, and break ranks with every other State, Zeno's attack fails on all counts.

At bottom, Zeno's asks the Court to consider three arguments. For clarity, they are addressed here in a different sequence from their order in Zeno's brief.

First, Zeno's says that the Smoke Free Workplace Act is unconstitutional on its face, arguing that it exceeds the State's police power, impermissibly intrudes on property rights, and constitutes a "taking" of the bar's "indoor air allocation." Br. at 35. (This is Zeno's Proposition

of Law No. 2). Zeno's calls for the Court to apply a type of "strict scrutiny" to this claim. But that is not the law. The legal test the Court applies when a police-power regulation is challenged is well-settled: "Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property . . . an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and if it is not unreasonable or arbitrary." *Benjamin v. Columbus* (1957), 167 Ohio St. 103, syl. ¶ 5.

That framework does no violence to constitutional rights. Rather, it reflects what the Ohio Constitution says plain on its face: "Private property shall ever be held inviolate, *but subservient to the public welfare.*" Ohio Const. art. I, § 19 (emphasis added). And it reflects what this Court has held time and again—that "[t]he personal liberties granted by the Constitution . . . are generally held subject to a valid exercise of the police power." *Kraus v. Cleveland* (1955), 163 Ohio St. 559, 561. Because the Smoke Free Workplace Act is a valid public health and occupational-safety law, and because this Court has never held that such a regulation constitutes a taking, Zeno's facial challenge to the Act should be rejected.

Second, Zeno's maintains that the Ohio Department of Health's ("ODH") application of the Act violates separation of powers. (This is Zeno's Proposition of Law No. 1). Zeno's says that ODH adopted an "unwritten rule" of finding proprietors liable whenever smoking is present on their premises, and that this rule impermissibly exceeds the agency's authority under the statute. As an initial matter, that argument has no place here, because Zeno's needed to—but failed to—pursue any as-applied challenge to ODH's enforcement of the Act on administrative review of its ten violations. In an attempt to dodge this fatal flaw, Zeno's now strains to label this claim a facial challenge. But even if the Court accepted the improper claim in that disguise, the claim

fails. What Zeno's dresses up as a separation-of-powers claim about ODH *enforcement* of the Act is actually a complaint about the Act itself. *The Act* explicitly states that "lack of intent" is irrelevant, as it "shall not be a defense to a violation." R.C. 3794.02(E). Because ODH's enforcement is not the issue, there can be no separation of powers problem. Moreover, there simply is no "unwritten rule" for enforcing the law, and Zeno's does not even come close to proving one.

One more thing dooms this claim: ODH's action for injunctive relief underlying this case is premised on Zeno's repeated *intentional* violations of the Act. Accordingly, Zeno's effort to attack any alleged enforcement covering *unintentional* violations (or "strict liability," as Zeno's calls it) is entirely misplaced. In short, Zeno's Proposition of Law No. 1 is meritless.

Zeno's last proposition of law says that the Declaratory Judgment Act can be used to challenge the constitutionality of a statute or rule. That is elementary, and Appellees have no qualms with that proposition as stated. But that proposition is only half the picture. Zeno's is trying, through its counterclaim, to use the Declaratory Judgment Act not just to facially challenge the Act, but also to collaterally attack and wipe out ten final administrative judgments (and fines) previously levied against it. Zeno's should have developed and appealed its as-applied constitutional challenges in those prior proceedings, but it did not. Accordingly, Zeno's cannot use *this* case to collaterally attack those final orders or to abrogate the fines due under them. Instead, Zeno's declaratory judgment action in this case must be confined to Zeno's facial challenges to the Act.

In short, the Smoke Free Workplace Act, and ODH's implementation of it, are valid and constitutional. The Court should affirm the decision of the Tenth District.

## STATEMENT OF THE CASE AND FACTS

### A. Because exposure to secondhand smoke has been scientifically linked to disease and health dangers, States and localities regulate smoking in public places.

Nearly fifty years have passed since the United States Surgeon General issued a landmark report concluding that cigarette smoking is a public health hazard and urging “remedial action.”<sup>1</sup> Even today, smoking remains “one of the most troubling public health problems facing our Nation.” *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.* (2000), 529 U.S. 120, 125. Tobacco smoke “cause[s] damage to nearly every organ in the human body.”<sup>2</sup>

But smoking is not just a danger to smokers. For the past twenty-five years, the threats of secondhand smoke have also been recognized. It was 1972 when the Surgeon General first announced that secondhand tobacco smoke can harm nonsmokers, and more widespread concern took hold by the mid-1980s, when the Surgeon General verified that secondhand smoke causes disease in otherwise healthy nonsmokers, especially children, and that merely separating smokers and nonsmokers is inadequate to eliminate the ambient dangers.<sup>3</sup> Among other findings, the Surgeon General recognized that “even low levels of exposure to tobacco,” including “exposure to secondhand tobacco smoke” “are sufficient to substantially increase the risk of cardiac events.”<sup>4</sup>

Ambient tobacco smoke has also been declared a human carcinogen by the Environmental Protection Agency, which has found the toxin responsible for about 3,000 lung cancer deaths a

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<sup>1</sup> *Smoking and Health: Report of the Advisory Committee of the Surgeon General of the Public Health Service* 33 (1964), available at [www.surgeongeneral.gov/library/reports](http://www.surgeongeneral.gov/library/reports) (last visited Aug. 15, 2011).

<sup>2</sup> U.S. Dep’t of Health & Human Servs., *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General*, Exec. Summ. at 2 (2010), available at [www.surgeongeneral.gov/library/tobaccosmoke/index.html](http://www.surgeongeneral.gov/library/tobaccosmoke/index.html) (last visited Aug. 15, 2011).

<sup>3</sup> *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General* (1986), available at <http://profiles.nlm.nih.gov/NN/B/C/P/M/> (last visited Aug. 15, 2011).

<sup>4</sup> U.S. Dep’t of Health & Human Servs., *How Tobacco Smoke Causes Disease*, supra n. 2, at 6.

year among nonsmokers in the United States alone.<sup>5</sup> Numerous other studies continue to confirm the health threats posed by secondhand smoke. See Appendix A, “Bibliography of Secondhand Smoking Studies.”

Increasingly concerned about these dangers, States and local governments have sought to regulate smoking in public places. By July 1, 2011, thirty-two states and U.S. territories, and 3,315 municipalities restricted smoking in public places. See Appendix B, “Statewide Smoking Bans”; *Overview List—How Many Smokefree Laws?* (2011), Americans for Non-Smokers’ Rights Foundation, available at <http://www.no-smoke.org/pdf/mediaordlist.pdf> (last visited Aug. 15, 2011).

Ohio is one of thirty-two states and territories that restrict smoking in non-hospitality workplaces, restaurants, and bars.

**B. In 2006, Ohio voters enacted the Smoke Free Workplace Act to impose a statewide ban on smoking in public areas and places of employment.**

Ohio’s efforts to combat secondhand smoke dangers started at the local level, first when several county boards of health sought to limit smoking in public areas, and then when cities began passing ordinances banning smoking in public places. See, e.g., Bowling Green Mun. Code § 139.10 (2002); Toledo Mun. Code § 1779.01 (2003); Columbus City Code § 715 (effective January 31, 2005).

In time, a statewide effort evolved. During the November 2006 election, Ohioans weighed competing ballot initiatives. “Smoke Free Ohio”—a group of health organizations including the American Cancer Society, the American Heart Association, the American Lung Association, the

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<sup>5</sup> *Respiratory Health Effect of Passive Smoking: Lung Cancer and Other Disorders* (1992), available at <http://cfpub.epa.gov/ncea/cfm/recorddisplay.cfm?deid=2835#Download> (last visited Aug. 15, 2011); see also U.S. Dep’t of Health & Human Servs., Pub. Health Serv., Nat’l Toxicology Program, *Report on Carcinogens* (12th ed. 2011), available at <http://ntp.niehs.nih.gov/ntp/roc/twelfth/roc12.pdf> (last visited Aug. 15, 2011) (placing secondhand smoke in the same category as asbestos, mustard gas, radon, and broad spectrum ultraviolet radiation).

Ohio Health Commissioners Association, the Ohio Hospital Association, the Ohio State Medical Association, and the Campaign for Tobacco-Free Kids—sponsored Issue 5, which proposed the Ohio Smoke Free Workplace Act. The Ohio Licensed Beverage Association and R.J. Reynolds Tobacco Company (“Smoke Less Ohio”) sponsored Issue 4, which would have amended the Ohio Constitution to preempt local smoking bans and to constitutionally enshrine a right to smoke in a variety of public places, such as bowling alleys and bars.

More than 58 percent of Ohio voters approved Issue 5 (and more than 64 percent of voters rejected Issue 4). The Ohio Smoke Free Workplace Act was codified as R.C. Chapter 3794 and became effective on December 7, 2006. As soon as the Director of ODH generated administrative rules to implement the Act, see O.A.C. 3701-52-01 et seq., ODH and its designees began enforcing the law.

The Act is designed to combat the harmful health effects of smoking and smoke exposure in public places and places of employment. It prohibits smoking in these venues, R.C. 3794.02(A), and, among other things, requires proprietors to remove ashtrays, R.C. 3794.06(B), and to post “No Smoking” signs, R.C. 3794.06(A).

ODH bears primary responsibility for enforcing the Act, but can designate local health departments to enforce the law in their districts. R.C. 3794.07. Columbus Public Health is ODH’s designee in Columbus, and it investigates complaints against Columbus establishments, such as Zeno’s. O.A.C. 3701-52-07; see also Tr. 48:1-13.

Enforcement of the Act is complaint-driven, meaning that ODH and its designees (collectively “ODH”) investigate only *after* receiving a complaint on the ODH tip-line. O.A.C. 3701-52-08(D)(2). Upon receiving a tip, ODH gives a proprietor notice of the complaint. O.A.C. 3701-52-08(D). ODH then conducts an on-site investigation and interviews the

proprietor or person in charge of the establishment. *Id.* If the investigator observes no violation, the complaint is dismissed. But if a violation is observed, ODH issues either a Letter of Warning (for a proprietor's first violation) or a Fine Letter stating a proposed fine. O.A.C. 3701-52-09(A). Fines are increased for subsequent violations and doubled for intentional violations. R.C. 3794.07(B); see O.A.C. 3701-52-09(A) (permitting fines of up to \$2,500 for fifth or subsequent violations).

**C. Proprietors have numerous opportunities to dispute a violation under the Act.**

After receiving notice of a complaint, a proprietor may contest the complaint in writing before ODH even investigates. O.A.C. 3701-52-08(D). Later, if the establishment has had more than one violation in the previous two years, the proprietor may request an administrative hearing under O.A.C. 3701-52-08(F)(2). At the hearing, both parties may be represented by counsel, and can call and cross-examine witnesses under oath. *Id.* After the Hearing Officer issues a Report and Recommendation, the proprietor may file written objections. *Id.* The ODH Director then issues a final decision approving, disapproving, or modifying the violation. O.A.C. 3701-52-08(F)(2)(b). The proprietor may then appeal that decision to the Franklin County Court of Common Pleas, under R.C. 119.12. R.C. 3794.09(C).

**D. Zeno's violated the Act repeatedly and intentionally.**

Zeno's is a bar in Columbus and its proprietor is Richard Allen, CEO and President of Bartec, Inc. (collectively "Zeno's"). Tr. 105:8-18. As a "public place" and a "place of employment," Zeno's is subject to the Act. See R.C. 3794.01(B)-(C); Tr. 51:20-24-52:1-2.

Zeno's has violated the Act repeatedly. See Tr. 41:5-7 (indicating that, at the time of trial, Zeno's had the second highest number of violations in the State). Calvin Collins, a Registered Sanitarian for Columbus Public Health, investigated Zeno's for reported violations of the Act and the Columbus smoking ordinance approximately thirty times in a five-year period.

Tr. 63:7-9. During some of these investigations, Collins saw Zeno's patrons sitting at the bar in front of a bartender, smoking and ashing into small plastic cups filled with water. Tr. 64:14-23. No Zeno's employee ever indicated to Collins that he or she had asked a patron to stop smoking. Tr. 65:23-25. Collins never had occasion to investigate any individual Zeno's patron for a violation because neither Zeno's nor anyone else filed a patron-based complaint. See Tr. at 76:13-18 (testimony of Cal Collins); Tr. 108:15-17 (testimony of Richard Allen); Tr. 206:20-22 (testimony of Mitch Allen).

As a result of this conduct, Zeno's was issued ten violations for having smoking in a prohibited area between July 2007 and September 2009. Of the ten violations, eight were intentional, nine cited the bar for affirmatively having ashtrays present, and one cited the bar for failing to have required signs posted:

1. July 31, 2007 - Letter of Warning #943 for Smoking in a Prohibited Area, violation of R.C. 3794.02(A), Ashtray Present in violation of R.C. 3794.06(B), and No Signs Posted, in violation of R.C. 3794.06(A). Tr. 52:15-53:10.
2. October 12, 2007 - Fine Letter #6727 and accompanying \$100 Fine for Smoking in Prohibited Area in violation of R.C. 3794.02(A) and Ashtray Present in violation of R.C. 3794.06(B). Tr. 53:17-54:5.
3. December 3, 2007 - Fine Letter #9106 and accompanying \$500 Fine, doubled to \$1,000, for an intentional violation of R.C. 3794.02(A), Smoking in a Prohibited Area, and R.C. 3794.06(B), Ashtray Present. Tr. 55:2-10.
4. May 2, 2008 - Fine Letter #15646 and accompanying \$1,000 Fine, doubled to \$2,000, for an intentional violation of R.C. 3794.02(A), Smoking in Prohibited Area. Tr. 55:22-56:9.
5. July 30, 2008 - Fine Letter #17764 and accompanying \$2,500 Fine, doubled to \$5,000, for an intentional violation of R.C. 3794.02(A), Smoking in Prohibited Area and R.C. 3794.06(B), Ashtray Present. Tr. 56:19-57:3.
6. November 10, 2008 - Fine Letter #19568 and accompanying \$2,500 Fine, doubled to \$5,000, for an intentional violation of Smoking in Prohibited Area in violation of R.C. 3794.02(A) and Ashtray Present, in violation of R.C. 3794.06(B). Tr. 57:11-22.

7. December 19, 2008 - Fine Letter #19841 and accompanying \$2,500 Fine, doubled to \$5,000, for an intentional violation of R.C. 3794.02(A), Smoking in Prohibited Area and R.C. 3794.06(B), Ashtray Present. Tr. 58:6-15.
8. April 10, 2009 - Fine Letter #23894 and accompanying \$2,500 Fine, doubled to \$5,000, for an intentional violation of R.C. 3794.02(A), Smoking in Prohibited Area and R.C. 3794.06(B), Ashtray Present. Tr. 59:1-11.
9. June 1, 2009 - Fine Letter #24215 and accompanying \$2,500 Fine, doubled to \$5,000, for an intentional violation of R.C. 3794.02(A), Smoking in Prohibited Area and R.C. 3794.06(B), Ashtray Present. Tr. 59:20-22.
10. September 3, 2009 - Fine Letter #226481 and accompanying \$2,500 Fine, doubled to \$5,000, for an intentional violation of R.C. 3794.02(A), Smoking in Prohibited Area and R.C. 3794.06(B), Ashtray Present. Tr. 60:5-7.

Although the Act's fine structure is progressive, the fine imposed after any given investigation is not higher when a proprietor violates several provisions of the Act at once, as opposed to just one.

All ten letters became final orders.<sup>6</sup> Zeno's took no action on eight of the orders. See Tr. 53:11-14, 54:6-9, 57:4-6, 57:23-25, 58:16-18, 59:12-14, 59:23-25, 60:8-14. Zeno's did seek administrative review of two of the intentional violations, Fine Letters #9106 and #15646. The violations were affirmed, and Zeno's filed notices appealing both cases to the Franklin County Common Pleas Court under R.C. 119.12. But when Zeno's failed to file briefs or make any arguments to the court, the common pleas court affirmed the two intentional violations and those Fine Letters also became final orders. See *Zeno's Victorian Vill., Inc. v. Ohio Dep't of Health* (Franklin County C.P., Dec. 23, 2008), No. 08CVF07-10887; *Zeno's Victorian Vill., Inc. v. Ohio Dep't of Health* (Franklin County C.P., Mar. 12, 2009), No. 08CVF07-10888; ODH Exs. 1-3; Tr. 37:1-11, 39:1-18, 55:17-18, 56:10-12.

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<sup>6</sup> Nine violations became final orders before the Director filed this action. See Answer (Sept. 16, 2009), at ¶¶ 38-58. The tenth violation occurred while this case was pending and is now a final order.

**E. ODH sought an injunction under R.C. 3794.09(D) to address Zeno's repeated violations, and the trial court denied the injunction.**

The Smoke Free Workplace Act allows the ODH Director to seek injunctions against proprietors who repeatedly violate the Act: "The director of health may institute an action in the court of common pleas seeking an order in equity against a proprietor or individual that has repeatedly violated the provisions of this chapter or fails to comply with its provisions." R.C. 3794.09(D).

Given Zeno's repeated and intentional violations, the Director sought an injunction requiring the bar to abide by the Act and to pay its outstanding fines, totaling over \$33,000. See Compl. (Aug. 13, 2009). Zeno's counterclaimed for declaratory and injunctive relief, cross-claimed for injunctive relief against the Ohio Attorney General (to enjoin collection of the fines), and moved for a preliminary injunction.<sup>7</sup>

The trial court consolidated the preliminary injunction hearing and the trial on the merits, and ruled in Zeno's favor. The court decided that ODH has an unwritten policy of immediately finding proprietors in violation of the Smoke Free Workplace Act when smoking is present. *Ohio Dep't of Health v. Bartec, Inc.* (Franklin County C.P., Feb. 22, 2010), No. 09CV12197 ("Trial Op."), at 8. The trial court said this policy constituted a "rule," and the court invalidated the "rule" because it was not promulgated under R.C. Chapter 119. *Id.* at 9.

The trial court also concluded that ODH's method of enforcement exceeded the agency's authority under the Act. The court said that "[a]sking a person to put out a cigarette or leave discharges the property owner's duty under the Smoke Free Act," and that it is unfair to hold proprietors liable for the actions of patrons in their liquor establishments. *Id.* at 8-9. The court concluded that "evidence shows that Defendants were cited pursuant to this policy and that there

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<sup>7</sup> Zeno's Answer/Counterclaim/Cross-Claim omitted pages 23 and 25, which include its declaratory judgment request. These pages are not in the record.

were never inquired [sic] made as to whether Defendants were actually ‘permitting’ smoking to occur at Zeno’s.” *Id.* at 11.

The court then denied ODH’s request for an injunction. *Id.* at 12; see ODH Exs. 1-3. In addition, the court vacated Zeno’s ten prior violations—*notwithstanding* that all of them were final orders (two having been affirmed by the Franklin County Court of Common Pleas), and nine of them had also cited the bar for other (and uncontested) violations of the Smoke Free Workplace Act. Trial Op. at 12. The court declined to rule on Zeno’s remaining constitutional challenges. *Id.*

**F. The Tenth District reversed, and Zeno’s now appeals.**

The Tenth District Court of Appeals reversed. It rejected Zeno’s attacks on ODH’s enforcement of the Act, holding that the bar’s ten violations were final orders and that the trial court erred in allowing Zeno’s to collaterally attack them. *Jackson v. Bartec, Inc.* (10th Dist.), 2010-Ohio-5558, ¶¶ 24-25 (“App. Op.”). “[Zeno’s] could have requested an administrative hearing to contest the citations issued against it, at which point it could have developed the facts necessary to its as applied constitutional challenge.” *Id.* at ¶ 24. Because Zeno’s failed to raise these issues and failed to exhaust its administrative remedies for any of the violations, “they all are final judgments.” *Id.*

As for ODH’s request for an injunction against Zeno’s, the appeals court ruled that “the evidence is overwhelming that [Zeno’s] repeatedly and intentionally violated the Smoke Free Act,” and directed the trial court to issue the injunction. *Id.* at ¶ 33. Finally, the court rejected Zeno’s claims against ODH and the Attorney General. *Id.* at ¶ 44.

Zeno’s appealed, and this Court accepted jurisdiction of three issues: (1) a separation-of-powers challenge to ODH’s application and enforcement of the Smoke Free Workplace Act; (2)

a facial constitutional challenge to the Act; and (3) whether Zeno's can invoke the Declaratory Judgment Act to collaterally challenge ten final orders.

## ARGUMENT

For clarity, ODH addresses Zeno's propositions of law in a different sequence than Zeno's brief. ODH will first address the Act's facial constitutionality (Zeno's Proposition of Law No. 2), then the claims about ODH's enforcement of the Act (Zeno's Proposition of Law No. 1), and finally, the proper scope of declaratory judgment actions under Ohio law (Zeno's Proposition of Law No. 3).

### **ODH's Response to Proposition of Law No. 2:**

*Ohio's Smoke Free Workplace Act is a valid exercise of the State's police power and does not violate any constitutional property rights.*

Zeno's contends that the Smoke Free Workplace Act is an invalid exercise of Ohio's police power that "unreasonably extinguishes property rights," Br. at 24, and that it constitutes a "taking." Br. at 41.

Zeno's burden is a heavy one three times over. First, this Court has long held that "all legislative enactments enjoy a presumption of constitutionality,"<sup>8</sup> *State ex rel. Taft v. Franklin County Court of Common Pleas*, 81 Ohio St. 3d 480, 481, 1998-Ohio-333, and that a party challenging the constitutionality of a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt, *Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St. 3d 1, 10. On top of that, the State's exercise of its police power enjoys an especially strong presumption of validity. To carry its burden, Zeno's must prove that the Act is "unreasonable or arbitrary" and that it bears no legitimate and substantial relationship to the health, safety, or welfare of Ohio's citizens. *Benjamin*, 167 Ohio St. 103, at syl. ¶ 5; *Cincinnati v. Correll* (1943),

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<sup>8</sup> Courts afford statutes passed by citizen initiative the same deference as laws enacted by a legislative body.

141 Ohio St. 535, 539-40. Last, while courts may be called upon to address these questions, they may not invalidate a police-power law unless the legislating body's initial determination that the law bears a real and substantial relationship to public health is "clearly erroneous." *Benjamin*, 167 Ohio St. 103, at syl. ¶ 6. Zeno's cannot meet its onerous burdens here, and therefore, its facial challenge to the validity of the Act fails.

First, States have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon* (2006), 546 U.S. 243, 270 (quoting *Medtronic, Inc. v. Lohr* (1996), 518 U.S. 470, 575). A State's authority to enact public health laws and occupational-safety laws is at the core of the State's police power. This includes Ohio's Smoke Free Workplace Act, which unquestionably bears a real and substantial relationship to the public health and safety of the public and employees.

Second, Zeno's calls for the Court to apply a type of "strict scrutiny" whenever the State's exercise of its police power inconveniences personal rights. But that is not the law. Rather, the Court has acknowledged that an exercise of the police power . . . will be valid if it bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and if it is not unreasonable or arbitrary." *Benjamin*, 167 Ohio St. 103, at syl. ¶ 5. Meaning, as long as the law is not arbitrary and bears a reasonable relationship to public health or safety—and the Act here easily satisfies that standard—then it is a valid law and does not impermissibly intrude on property rights.

Finally, the Act does not constitute a taking of private property. Whatever incidental effect the Act may have on Zeno's property, it simply does not amount to a physical or regulatory taking.

**A. The Smoke Free Workplace Act is a valid exercise of the State's police power.**

**1. The Act bears a real and substantial relationship to protecting Ohioans from the dangers of secondhand smoke.**

The Smoke Free Workplace Act is explicitly premised on the determination of the people of the State of Ohio that: "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, smoking in the workplace is a statewide concern and, therefore, it is in the best interests of public health that smoking of tobacco products be prohibited in public places and places of employment and that there be a uniform statewide minimum standard to protect workers and the public from the health hazards associated with exposure to secondhand smoke from tobacco." R.C. 3794.04.

By prohibiting smoking in public places and places of employment, the Act is both a general public health law and an occupational-safety law. These goals are at the heart of the State's police power. See, e.g., *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Res.* (1992), 504 U.S. 353, 366 n.6 ("[A] State's power to regulate . . . for the purpose of protecting the health of its citizens . . . is at the core of its police power."); *Metro. Life Ins. Co. v. Massachusetts* (1985), 471 U.S. 724, 756 (States retain "broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, [and] laws affecting occupational safety . . . are only a few examples."); *Arnold v. City of Cleveland* (1993), 67 Ohio St. 3d 35, 47 ("Legislative concern for public safety is not only a proper police power objective—it is a mandate."); *Ohio Edison Co. v. Power Siting Comm'n* (1978), 56 Ohio St. 2d 212, 217 (courts must afford substantial deference to legislation enacted to protect the public health); *Strain v. Southerton* (1947), 148 Ohio St. 153, syl. (Minimum Wage Act is valid under Section 34, Article II of the Ohio Constitution); *State ex*

*rel. Yaple v. Creamer* (1912), 85 Ohio St. 349, 391 (Workmen’s Compensation Act is proper exercise of police power), superseded by statute.

In fact, this Court has specifically recognized (in dicta) that the State has the authority under its police power to enact public smoking bans: “Within its constitutional grant of powers, the General Assembly possesses both the authority to enact smoking legislation such as the regulation at issue [prohibiting smoking in indoor facilities other than private residences, private cars, and private clubs] and the prerogative to delegate that authority.” *D.A.B.E. v. Toledo Bd. of Health* (2002), 96 Ohio St. 3d 250, 264 (county board of health lacked statutory authority to enact such regulations on its own).

Since that pronouncement in 2002, evidence of the dangers of secondhand smoke has only mounted—and thus, so too the justifications for public smoking bans—and ample studies support the people’s legislative choice. See Appendix A.

At trial, Zeno’s expert (Michael Marlow)—an *economist* (not a medical expert, not a scientist, and not an epidemiologist)—read some summaries of studies concluding that brief, episodic exposure to secondhand smoke is not dangerous, and that most bar employees do not need protection because they are unlikely to work in bars their entire lives. Tr. 155-63. At most, those meager offerings suggest some debate about the issue. Recognizing, however, that courts are not suitable referees for these scientific debates, this Court has long recognized that a police-power regulation may not be invalidated unless a court finds that the legislating body’s determination that a law bears a real and substantial relationship to public health is “clearly erroneous.” *Benjamin*, 167 Ohio St. 103, at syl. ¶ 6. Zeno’s falls far short of satisfying that heavy burden here.

## 2. The Act is neither arbitrary nor unreasonable.

Rounding out the second part of the police-power analysis, the Act is neither arbitrary nor unreasonable. The law protects the health of employees and patrons in enclosed public spaces, while permitting smoking in more private venues, such as residences, hotel rooms, nursing homes, and family-owned and operated businesses where the public is not permitted. R.C. 3794.03. Zeno's complains that the law is arbitrary, but none of those efforts withstand scrutiny.<sup>9</sup>

First, by generally restricting smoking in public places and places of employment, the Act protects people in situations where they are arguably least able to control their exposure to secondhand smoke.

Second, although Zeno's contends that bars should get special treatment, there are rational reasons to include bars in the Act. Bars—which are open to all members of the public—differ from more private venues like homes, hotel rooms, nursing homes, and family-owned and operated businesses where the public is not permitted. See R.C. 3794.03. Zeno's also argues that smoking and alcohol consumption go hand-in-hand, and says that this connection justifies an

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<sup>9</sup> Although Zeno's does not raise an equal protection challenge based on these “seemingly arbitrary exemptions,” Br. at 25, the fact that courts have uniformly rejected equal protection challenges to smoking bans confirms that any allegations of arbitrariness are meritless. See, e.g., *Coalition for Equal Rights, Inc. v. Ritter* (10th Cir. 2008), 517 F.3d 1195; *Burnette v. Bredesen* (E.D. Tenn. 2008), 566 F. Supp. 2d 738; *Knight v. City of Tupelo* (N.D. Miss., Dec. 15, 2006), No. 1:06-CV-00274, 2006 U.S. Dist. Lexis 90947; *Amiriantz v. State* (D.N.J., Nov. 16, 2006), No. 06-1743, 2006 U.S. Dist. Lexis 86546; *Castaways Backwater Cafe, Inc. v. Marsteller* (M.D. Fla., Aug. 25, 2006), No. 2:05-cv-273-FtM-29SPC, 2006 U.S. Dist. Lexis 60317; *New York City C.L.A.S.H. v. City of New York* (S.D.N.Y. 2004), 315 F. Supp. 2d 461; *Am. Legion Post 149 v. Washington State Dep't of Health* (Wash. 2008), 192 P.3d 306; *Batte-Holmgren v. Galvin* (Conn. Super. Ct., Nov. 5, 2005), No. CV044000287, 2004 Conn. Super. Lexis 3313; *Operation Badlaw, Inc. v. Licking County Gen. Health Dist. Bd. of Health* (S.D. Ohio 1992), 866 F. Supp. 1059; *Deer Park Inn v. Ohio Dep't of Health* (10th Dist.), 185 Ohio App. 3d 524, 2009-Ohio-6836 (“*Deer Park Inn I*”); *Traditions Tavern v. City of Columbus* (10th Dist.), 171 Ohio App. 3d 383, 2006-Ohio-6655; *Liebes v. Guilford County Dep't of Pub. Health* (N.C. Ct. App., July 19, 2011), No. COA10-979, 2011 N.C. App. Lexis 1479.

exemption for bars—the absence of which makes the Act arbitrary and unreasonable. Br. at 38. But that connection actually provides powerful justification *to regulate* bars, because if smoking is more common there, as Zeno’s maintains, then the health risks of exposure to secondhand smoke are likewise greater there.

Last, Zeno’s seems to quarrel with where Ohioans drew the line between exempt locations and locations subject to the Act. But this is irrelevant. When legislative bodies “choose[] to act to correct a given evil, [they] need not correct all the evil at once but may proceed step by step.” *Porter v. Oberlin* (1965), 1 Ohio St. 2d 143, syl. ¶ 4; see *Pickaway County Skilled Gaming v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908, ¶ 41. A law may be directed “against any evil as it actually exists, without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are not forbidden.” *Benjamin*, 167 Ohio St. at 117; see also *Ry. Express Agency, Inc. v. New York* (1949), 336 U.S. 106, 110 (for a law to be reasonable, it is not the case “that all evils of the same genus be eradicated or none at all”). Simply put, this type of line-drawing is not arbitrary, and the mere fact “that the line might have been drawn differently at some points is a matter for legislative, rather than judicial consideration.” *Pickaway County Skilled Gaming*, 2010-Ohio-4908, at ¶ 41 (internal quotation omitted).

Indeed, if further confirmation were needed that this police-power case is a simple one, Ohio’s lower courts have uniformly rejected constitutional challenges to the Smoke Free Workplace Act, and countless other courts have upheld similar smoking regulations as valid public-health measures. See, e.g., *Deer Park Inn v. Ohio Dep’t of Health* (10th Dist.), 2010-Ohio-1392, ¶ 12 (“*Deer Park Inn II*”); *Deer Park Inn I*, 2009-Ohio-6836, at ¶ 16; *The Boulevard v. Ohio Dep’t of Health* (10th Dist.), 2010-Ohio-1328, ¶ 15; *Roark & Hardee LP v. City of*

*Austin* (5th Cir. 2008), 522 F.3d 533; *Webber v. Smith* (9th Cir. 1998), 158 F.3d 460; *Beattie v. City of New York* (2d Cir. 1997), 123 F.3d 707; *Taverns for Tots, Inc. v. City of Toledo* (N.D. Ohio 2004), 341 F. Supp. 2d 933; *Fraternal Order of Eagles v. City & Juneau* (Alas. July 1, 2011), No. S-13748, 2011 Alas. Lexis 57; *State v. Heidenhain* (La. 1890), 7 So. 621; *New York City C.L.A.S.H.*, 315 F. Supp. 2d at 492.

In short, the Act's sensible, workable principles demonstrate a "rational relationship between [the statutory scheme] and its purpose." *Desenco, Inc. v. Akron* (1999), 84 Ohio St. 3d 535, 545.

### **3. Zeno's efforts to raise the bar for police-power regulations fail.**

Unable to satisfy its heavy burdens, Zeno's argues for a wholesale refashioning of police-power law. Specifically, Zeno's says that the State's police power should be "limited by nuisance theory and public necessity." Br. at 34. Those arguments are meritless. First, this Court has never required the State to declare something a "nuisance" before regulating it under its police power, and none of Zeno's authorities support that far-fetched notion. While some of Zeno's cases recognize, unremarkably, that legislative bodies *can* use their police power to regulate public nuisances, none suggests that the State's police power can *only* be used for this purpose.<sup>10</sup> See *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 125, 1998-Ohio-313; *Kroplin v. Truax* (1929), 119 Ohio St. 610, 621; *Ghaster Props., Inc. v. Preston* (1964), 176 Ohio St. 425, 430. To the contrary, these decisions affirm the longstanding principle that the State's police power is broad and they support the validity of the Smoke Free Workplace Act. Also, the Court has already rejected Zeno's assertion that the State should be allowed to exercise its police

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<sup>10</sup> The zoning cases cited by Zeno's are equally beside the point, as they turn on the zoning-specific question of whether a zoning regulation requiring improved real property may be applied to preexisting uses absent a finding that the use of the property in its present condition is a nuisance. See *Gates Co. v. Hous. Appeals Bd.* (1967), 10 Ohio St. 2d 48; *Sun Oil Co. v. City of Upper Arlington* (10th Dist. 1977), 55 Ohio App. 2d 27.

power only in matters of “public necessity.” See *Kraus*, 163 Ohio St. at 562-63 (rejecting claim that “for a valid exercise of the police power on the basis of public health . . . there must exist an overriding necessity” or “emergency”).

In short, the State’s police power has never been restricted to “nuisances” or “public necessity.”

**B. The Smoke Free Workplace Act does not unconstitutionally interfere with property rights or constitute a taking of private property.**

Unable to present any credible challenge to the Act’s validity, Zeno’s makes several convoluted arguments grounded in property rights. All of these are meritless.

**1. Strict scrutiny does not apply.**

First, Zeno’s contends that the Act restricts the use of its property and should therefore be subject to “strict scrutiny.” Br. at 30. As a preliminary matter, it is entirely unclear what constitutional hook Zeno’s is purporting to hang heightened scrutiny on; Zeno’s has not even appealed on substantive due process or equal protection grounds. Nonetheless, the law is clear that not all limitations on the use of property impair fundamental rights so as to trigger strict scrutiny: “[T]he right of the individual to use and enjoy his private property is not unbridled but is subject to the legitimate exercise of the local police power. . . . Since the object of the police power is the public health, safety and general welfare, its exercise in order to be valid must bear a substantial relationship to that object and must not be unreasonable or arbitrary.” *Vill. of Hudson v. Albrecht, Inc.* (1984), 9 Ohio St. 3d 69, 72.

In other words, the test for assessing the validity of a police-power law is the *same*, whether the law is challenged on its own terms or as being in conflict with personal property rights. In every instance, the law is valid as long as it bears a real and substantial relation to the public health, safety, or welfare of the people, and is not arbitrary or unreasonable: “Although

almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property . . . an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health . . . and if it is not unreasonable or arbitrary.” *Benjamin*, 167 Ohio St. 103, at syl. ¶ 5.

Zeno’s suggestion that this standard contravenes the Ohio Constitution’s concept of property rights is both groundless and contradicted by the plain terms of the Constitution itself, which states that: “Private property shall ever be held inviolate, *but subservient to the public welfare*.” Ohio Const. art. I, § 19 (emphasis added); see also *City of Toledo v. Tellings*, 114 Ohio St. 3d 278; 2007-Ohio-3724, ¶ 23 (noting that the Ohio Constitution “provides for the exercise of state and local police power in derogation of the right to hold private property”); see *Vill. of Hudson*, 9 Ohio St. 3d at 72 (“[T]he right of the individual to use and enjoy his private property is not unbridled but is subject to the legitimate exercise of the local police power.”). Accordingly, courts do not apply heightened scrutiny when reviewing police-power regulations, including smoking bans, regardless of their incidental effect on private property. See, e.g., *The Boulevard*, 2010-Ohio-1328, at ¶ 15; *Deer Park Inn II*, 2010-Ohio-1392, at ¶ 12; *Deer Park Inn I*, 2009-Ohio-6836, at ¶¶ 15-16; *Traditions Tavern*, 2006-Ohio-6655, at ¶ 32; *Operation Badlaw*, 866 F. Supp. at 1064.

Nor should the Court accept Zeno’s fanciful argument that the Court’s decision in *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, somehow eradicated whole swaths of Ohio precedent relating to police-power regulation of conduct having a nexus to property, or that *Norwood* marks Ohio as unique in its analysis of such matters. To the contrary, *Norwood* was based on settled principles of Ohio law regarding the State’s power of eminent domain. In *Norwood*, the Court recognized that Ohio’s Takings Clause affords greater protection against

physical takings of private property than the federal Takings Clause, *id.* at ¶ 36, but it said nothing about government intrusions on private property outside that context. The various police power regulations that apply to proprietors like Zeno's do not generate the same concern as the government's power to *seize* private property, even when they incidentally affect private property rights. And the reason is simple: These laws regulate the *use* of property; they are *not* a government seizure of property. See *Buckeye Liquor Permit Holders Ass'n v. Ohio Dep't of Health* (Hamilton County C.P., Mar. 27, 2008), No. A0610614, at 9-10.

In sum, there is no basis for Zeno's claim that some type of "strict scrutiny" applies here.

**2. The Act does not constitute a physical or regulatory "taking" of property.**

Zeno's also urges the Court to hold that the Act constitutes a "taking" of private property. Br. at 41-42. A taking under the Federal or State Constitution can be physical or regulatory, but the Act is neither. *Lingle v. Chevron U.S.A., Inc.* (2005), 544 U.S. 528, 537-38; *State ex rel. Gilbert v. City of Cincinnati*, 125 Ohio St. 3d 385, 390, 2010-Ohio-1473, ¶¶ 17, 24.

There is no way the Act constitutes an actual physical taking of Zeno's real property. The "paradigmatic" physical taking is a "direct government appropriation or physical invasion of private property." *Lingle*, 544 U.S. at 537; see *State ex rel. Coles v. Granville*, 116 Ohio St. 3d 231, 2007-Ohio-6057, ¶ 22. Plainly, the Act does no such thing. See *Flamingo Paradise Gaming, LLC v. Chanos* (Nev. 2009), 217 P.3d 546, 560 (rejecting argument that the Nevada Clean Indoor Air Act effected a physical taking).

Nor is the Act a regulatory taking, total or partial. Zeno's does not appear to claim, nor does the record support, the proposition that the Act deprives the bar of "*all* economically beneficial uses" of its property, including all theoretical uses, so as to establish the type of "total" regulatory taking addressed in *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 1019.

And Zeno's assertion that the Act constitutes a partial regulatory taking is groundless. As an initial matter, the *Penn Central* type of regulatory taking is not even implicated here. See *Penn Cent. Transp. Co. v. City of New York* (1978), 438 U.S. 104 (holding that historical landmark preservation law prohibiting alteration and expansion of building was not a "taking" of property). That framework applies only to land-use restrictions, *id.* at 130-31, which are restrictions on the *physical* use of real property (including zoning regulations, mineral rights, sewer access, and the like).<sup>11</sup> But the smoking ban is no such thing; rather, it is a public health and occupational-safety law. To be sure, the Act regulates what activities can take place *on* the property, but it is no more a "land use" restriction than the restrictions Zeno's must obey when cooking meat and refrigerating food, R.C. 3717.01 et seq., or deciding how much to pay its employees, R.C. 4111.02.

If Zeno's were correct that the Act is a "land use" restriction, then most police power laws would be subject to the *Penn Central* analysis and susceptible to regulatory takings claims—a proposition neither the U.S. Supreme Court nor this Court has ever endorsed.

Indeed, *Penn Central* itself rejected Zeno's proposition, concluding that a taking of property "may more readily be found when the interference with property can be characterized as a *physical invasion* by government . . . than when interference arises from some *public program* adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at

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<sup>11</sup> See *State ex rel. Gilmour Realty, Inc. v. City of Mayfield Heights*, 119 Ohio St. 3d 11, 2008-Ohio-3181; *State ex rel. Duncan v. Vill. of Middlefield*, 120 Ohio St. 3d 313, 2008-Ohio-6200; *State ex rel. Shelly Materials, Inc. v. Clark County Bd. of Comm'rs*, 115 Ohio St. 3d 337, 2007-Ohio-5022; *Trafalgar Corp. v. Miami County Bd. of Comm'rs*, 104 Ohio St. 3d 350, 2004-Ohio-6406; *State ex rel. Shemo v. City of Mayfield Heights*, 96 Ohio St. 3d 379, 2002-Ohio-4905; *Goldberg Cos. v. Council of City of Richmond Heights*, 81 Ohio St. 3d 207, 1998-Ohio-456; *Gerijo v. City of Fairfield*, 70 Ohio St. 3d 233, 1994-Ohio-432; *Columbia Oldsmobile, Inc. v. City of Montgomery* (1990), 56 Ohio St. 3d 60; *Ketchel v. Bainbridge Twp.* (1990), 52 Ohio St. 3d 239; *Karches v. City of Cincinnati* (1988), 38 Ohio St. 3d 12; *Gilbert*, 2010-Ohio-1473; *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 2002-Ohio-6716.

124 (emphasis added). In short, *Penn Central* governs land-use regulations that amount to a physical taking. It does not apply to the type of public-health and occupational-safety law at issue here.

Moreover, any partial regulatory takings claim fails because Zeno's cannot identify a constitutionally protected property interest. *Gilbert*, 2010-Ohio-1473, at ¶ 19 (for a regulatory takings claim, a party must prove that it possesses a constitutionally protected property interest). Although Zeno's claims a fundamental interest in being able "to allocate its indoor air for private gain," Br. at 40, no court has ever recognized that right or any "property interest" in being able to smoke or in allowing smoking in a publicly-accessible place or place of employment.

Even if Zeno's could identify a constitutionally protected property interest, any regulatory takings claim would still fail the *Penn Central* test. Courts evaluate three factors to determine a regulatory taking under *Penn Central*—(1) the "character of the governmental action," (2) interference with investment-backed expectations, and (3) the economic effect of the regulation on the property. 438 U.S. at 124. Zeno's fails to offer persuasive arguments about any of these variables.

First, the "character" of Ohio's regulation should be no cause for concern. As discussed above, the State retains broad authority under its police power to protect the health of its citizens and the safety of workers within the State. The Act is motivated by serious concerns about public health dangers, and it regulates employers in a minimally invasive way.

Second, the Act does not unreasonably interfere with Zeno's investment-backed expectations. Every proprietor in the restaurant and bar industry is subject to regulations, ranging from food and liquor regulations, to health inspections, to occupational safety requirements. Moreover, as a federal court properly observed, "[w]ith an ever increasing number

of cities and states around the country banning smoking in public places, it is unreasonable for business owners not to recognize the possibility that their businesses could be subjected to the same sort of regulation.” *Knight v. City of Tupelo* (N.D. Miss., Dec. 15, 2006), No. 1:06-CV-00274, 2006 U.S. Dist. Lexis 90947, at \*7.

Last, Zeno’s cannot demonstrate that the Act had a significant economic impact on its business. It is well settled that “mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.” *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust* (1993), 508 U.S. 602, 645; see also *D.A.B.E. v. City of Toledo* (6th Cir. 2005), 393 F.3d 692, 696. At most, diminution in business is what Zeno’s alleges, although the record refutes even that. Zeno’s gross revenues have continued to increase annually, even in 2005, when the Columbus smoking ban first went into effect. See Zeno’s Trial Ex. A. And although there was some evidence that Zeno’s profit growth has slowed at times, there is no evidence meaningfully attributing that to the Smoke Free Workplace Act.

Moreover, other courts have repeatedly rejected the notion that smoking bans constitute a taking of property implicating “strict scrutiny” or compensation under the partial regulatory takings framework. See, e.g., *Coalition for Equal Rights v. Owens* (D. Colo. 2006), 458 F. Supp. 2d 1251, 1263 (“Plaintiffs do not support the startling proposition that all state infringements on property use . . . implicate fundamental rights . . . . ‘The use to which an owner may put his property is subject to a proper exercise of the police power.’”); *Knight*, 2006 U.S. Dist. Lexis 90947; *Flamingo Paradise Gaming*, 217 P.3d at 560 (finding no taking of air because statute merely regulated what could be done with it); *Houston Ass’n of Alcoholic Beverage Permit Holders v. City of Houston* (S.D. Tex. 2007), 508 F. Supp. 2d 576, 586 (holding that the city smoking ban was not a taking even if it prevented the most economically profitable use of the

property); *Found. for Indep. Living, Inc. v. Cabell-Huntington Bd. of Health* (W. Va. 2003), 591 S.E.2d 744, 754 (rejecting argument that smoke free ordinance effected a physical or regulatory taking); *City of Tucson v. Grezaffi* (Ariz. 2001), 23 P.3d 675, ¶ 26 (rejecting argument that city smoking ban was a facial taking).

In sum, even if Zeno's could get past the initial hurdles of proving that *Penn Central's* concept of a partial regulatory taking applies—and it cannot—no taking actually occurred.

### **ODH's Response to Proposition of Law No. 1:**

*The Health Department's method of enforcing the Smoke Free Workplace Act does not violate separation of powers.*

Zeno's next claims that ODH's enforcement of the Act violates separation of powers. It says that ODH adopted an "unwritten rule" of finding proprietors liable whenever smoking is present on their premises, and that this rule exceeds the agency's authority under the statute, in violation of the separation of powers doctrine.

As a preliminary matter, that argument has no place here, because Zeno's needed to—but failed to—pursue any application of the Act by ODH on administrative review. Evidently seeing that this flaw dooms its enforcement claim, Zeno's now tries to recast this claim as a facial challenge. See Br. at 5-6. But Zeno's brief betrays the flimsy disguise. In arguing that ODH's enforcement of the Act was improper, Zeno's draws *solely* on its own experiences with ODH's enforcement relating to the ten violations and it seeks relief from the fines ODH imposed for those very violations. Accordingly, Zeno's enforcement challenge plainly is an as-applied one, and (as detailed further in ODH's response to Zeno's Proposition of Law No. 3) the claim is not properly before the Court as part of Zeno's declaratory judgment counterclaim.

But even if the Court were to consider Zeno's enforcement challenge, the claim fails because Zeno's cannot show any "unwritten rule," let alone an improper one. ODH's

enforcement—as reflected in rule and practice alike—is entirely consistent with the Act and therefore does not violate separation of powers.

Ultimately, Zeno’s is complaining about potential liability under the Act for *unintentional* violations. But that possibility has nothing to do with *ODH’s enforcement*. Rather, *the Act itself* explicitly states that “lack of intent” is irrelevant, as intent “shall not be a defense to a violation.” R.C. 3794.02(E). In other words, ODH’s enforcement is not the issue here, and therefore, there is no separation of powers problem. Accordingly, even if the Court evaluated Zeno’s as-applied argument as a facial claim, it fails.

**A. The Act contemplates proprietor liability for both intentional and unintentional violations.**

The Act requires proprietors to follow the law. R.C. 3794.02(A) (“No proprietor . . . shall permit smoking.”); R.C. 3794.06(B) (proprietors must remove ashtrays); see also O.A.C. 3701-52-02 (titled “Responsibilities of Proprietor”).

Moreover, the Act expressly states that *intent is irrelevant to proprietor liability*: “Lack of intent to violate a provision of [the Act] shall not be a defense to a violation.” R.C. 3794.02(E). Accordingly, as the Tenth District has properly found, “regardless of . . . intent, a proprietor [is] strictly liable under R.C. 3794.02(A) if [he] affirmatively allows smoking *or* implicitly allows smoking by failing to take reasonable measures to prevent it.” *Pour House v. Ohio Dep’t of Health* (10th Dist.), 185 Ohio App. 3d 680, 2009-Ohio-5475, at ¶ 19 (emphasis added).

Zeno’s grumbles that a policy of strict enforcement is unfair because Zeno’s and other proprietors should not have to control what customers do. Br. at 19; see also Trial Op. 10 (“[P]roperty owners can only do so much, especially in regards to third-parties.”). But Ohioans can—and did—decide to hold proprietors responsible for what takes place inside their establishments. As the Tenth District rightly noted:

[I]t is completely reasonable to hold [responsible] proprietors of public places and places of employment, rather than patrons, because the proprietors manage those spaces. The citizenry has no authority to control the actions of patrons inside such establishments; that is the task of proprietors.

*Deer Park Inn I*, 2009-Ohio-6836, at ¶ 16 (quoting *Traditions Tavern*, 2006-Ohio-6655, at ¶ 26) (interpreting analogous provisions of the Columbus Smoking Ban). The Act “clearly gives notice of the conduct it prohibits and does so in comprehensible ordinary language not subject to misinterpretation.” *Deer Park Inn I*, 2009-Ohio-6836, at ¶ 22.

Zeno’s offers two arguments for why an unintentional violation is not sufficient for liability under R.C. 3794.02(A). Of course, the provision expressly rendering intent irrelevant—R.C. 3794.02(E)—defeats both of these arguments, and the arguments fail even on their own terms.

First, Zeno’s argues that the Act requires proprietors to “not permit” smoking, but does not require them to “prohibit” smoking. This is a distinction without a difference, especially since the statute does not require proof of intent. And as courts have rightly, and repeatedly, observed, the Act “clearly prohibits a proprietor from allowing, consenting or expressly assenting to smoking within his or her establishment,” *Deer Park I*, 2009-Ohio-6836, at ¶ 22 (citation omitted), and therefore, when a proprietor fails to discourage smoking in his establishment, it is more than fair to conclude that he “permits” smoking. See, e.g., *Bar D, Inc. v. Ohio Dep’t of Health* (Franklin County C.P., July 5, 2011), No. 10CVF10-15061; *Stan’s Bar & Grill v. Ohio Dep’t of Health* (Franklin County C.P., Jan. 12, 2011), No. 10CVF06-9351; *Westy’s Pub v. Ohio Dep’t of Health* (Franklin County C.P., Nov. 4, 2009), No. 09CVF-05-6634; *Shady O’Grady’s Pub v. Ohio Dep’t of Health* (Franklin County C.P., Mar. 2, 2009), No. 08CV10707; *Orwick Assocs. v. Ohio Dep’t of Health* (Franklin County C.P., Dec. 19, 2008), No. 08CVF04-5312; *Brass Pole v. Ohio Dep’t of Health* (Franklin County C.P., Oct. 7, 2008), No. 08CVF03-4142; *Z & Z Res., LLC v. Ohio Dep’t of Health* (Franklin County C.P., Sept. 24, 2008), No. 08CV-5913.

Zeno's suggests that the Tenth District's decision in *Pour House* instructs that "not permit" imposes a lesser burden on proprietors than requiring them to "prohibit" smoking, Br. at 16, but the case does no such thing. See *Pour House*, 2009-Ohio-5475. In *Pour House*, the Tenth District held that "[a] proprietor permits smoking" when he either affirmatively allows smoking or "*fail[s] to take reasonable measures to prevent patrons from smoking—such as by posting no smoking signs and notifying patrons who attempt to smoke that smoking is not permitted.*" *Id.* at ¶ 18 (emphasis added). In other words, *Pour House* confirms that a proprietor can be cited for *permitting* smoking if he is not taking reasonable measures to *prohibit* it. It does nothing to support Zeno's claim.

Second, Zeno's argues that the Act includes an automatic "safe harbor" for proprietors who warn patrons to stop smoking. Br. at 16-17. The Act includes no such provision, as a warning alone may not be sufficient in many cases and would make it all too easy for proprietors to evade compliance with the Act by providing an empty warning to patrons, but never genuinely ensuring a smoke-free environment. Accordingly, the rules require proprietors to "take reasonable steps including, *but not limited to*, requesting individuals to cease smoking." O.A.C. 3701-52-02(B); see *Westy's Pub v. Ohio Dep't of Health* (Franklin County C.P., Nov. 4, 2009), No. 09CVF-05-6634, at 9 (a proprietor's "lax attitude"—reflected either by a proprietor's silence or failure to take reasonable steps to prevent smoking—"belies a sincere effort to not permit smoking on its premises"). Also, contrary to Zeno's claims, the proprietor's responsibilities are independent of any individual patron's obligations under the law. Indeed, the Act contemplates that both a proprietor and a patron may be in violation based on a single incident.<sup>12</sup>

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<sup>12</sup> Zeno's also objects that ODH refuses to enforce Act's the individual-liability provision against patrons who violate the Act. Br. at 10-11. Patrons are in violation only if they "refuse to immediately discontinue smoking" in a public place or place of employment when asked to do so

If there were any doubt that ODH's interpretation of the Act is correct, there are several additional reasons the Court should defer to ODH's reading. First, R.C. 3792.02(A) must "be liberally construed so as to further its purposes of protecting public health and the health of employees." R.C. 3794.04. Second, courts give due deference to an agency's reasonable interpretation of a statute, see *Nw. Ohio Bldg. & Constr. Trades Council v. Conrad* (2001), 92 Ohio St. 3d 282, 287; *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.* (1984), 467 U.S. 837, 843. Finally, even if this were an administrative "rule," courts choose the constitutional interpretation of any administrative rule that can be interpreted in two ways. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 126 Ohio St. 3d 183, 2010-Ohio-2744, ¶ 27.

In short, the "enforcement policy" Zeno's alleges is not a question of enforcement at all; it is a question of the statute's plain language. Proprietors are liable under R.C. 3794.02(A) for even unintentional violations, R.C. 3794.02(E), and they must take reasonable measures—including warning patrons not to smoke—to ensure that their establishments are smoke free.

**B. ODH's enforcement against proprietors is consistent with the Act.**

As explained, Zeno's issues here are not really about enforcement. Any potential liability for unintentional violations flows directly from the plain language of the Act, not enforcement issues. But in any event, Zeno's hodgepodge of arguments alleging that ODH's enforcement practices are inconsistent with the Act is baseless.

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by the proprietor or his employee. R.C. 3794.02(D). But regardless of whether more patrons should be fined under this provision—which is difficult if proprietors do not use the ODH tip-line to report smoking patrons (and Zeno's admits it does not, see Tr. 108:15-17; 206:20-22)—that does not make a proprietor any less liable under R.C. 3794.02(A). Moreover, any claim about selective enforcement would fall in the realm of equal protection, not separation of powers, and Zeno's has not raised an equal protection challenge here. See *City of Cleveland v. Trzebuckowski*, 85 Ohio St. 3d 524, 534 & n.4, 1999-Ohio-285 (explaining Ohio's approach to selective-enforcement claims in the context of criminal prosecutions).

Zeno's first alleges that ODH has adopted a "stealth policy," Br. at 47, but that is flatly contradicted by administrative rule and practice. Far from automatically citing a proprietor every time smoking is present, ODH investigates every alleged violation reported on the tip-line, as directed by O.A.C. 3701-52-01 et seq. App. Op. ¶ 38; see also Himes Dep. at 14:1-8; 22:19-23; 29:10-17 (ODH encourages its local designees to perform a case-by-case analysis of every reported violation). Cal Collins, the Columbus Public Health Sanitarian who investigated all ten of Zeno's violations, testified that he follows this rule and investigates every complaint through a case-by-case analysis. Tr. at 64:16-18. Collins testified further that he does not automatically find bars in violation of R.C. 3794.02(A) the "instant" smoking is present, as Zeno's alleges. Instead, Collins explained, whether a proprietor is found in violation depends on various factors, including whether a patron is smoking in view of an establishment's staff, or hiding in a corner or the bathroom, where the staff may not have seen him. Tr. 64:16-18; 67:1-5.

As the Tenth District correctly ruled, there is simply no evidence to support Zeno's allegation that ODH finds proprietors in violation "at the instant when smoking is 'present' on the premises," Br. at 11, let alone that it is a policy "intended to have uniform and general application." *Gralewski v. Ohio Bureau of Workers' Comp.* (10th Dist.), 167 Ohio App. 3d 468, 2006-Ohio-1529, ¶ 26; see *Livisay v. Ohio Bd. of Dietetics* (10th Dist. 1991), 73 Ohio App. 3d 288, 290 (a policy may have "general and uniform application" when it is mandatory and does not provide for a case-by-case determination of the facts). In stark contrast to cases where the Court has found evidence of an unwritten administrative "rule,"<sup>13</sup> Zeno's has failed to show that

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<sup>13</sup> See, e.g., *Condee v. Lindley* (1984), 12 Ohio St. 3d 90, 93 (tax commissioner's informal policy that all public utilities apportion property value at certain percentages—instead of engaging in case-by-case analysis was an unlawful rule); *Ohio Nurses Ass'n v. Ohio State Bd. of Nursing Educ. & Nurse Registration* (1989), 44 Ohio St. 3d 73, 75 (board position paper about a procedure was a "rule" because it gave licensed practical nurses new authority and was "intended

ODH has adopted a policy of automatic liability, or that this alleged policy is applied by Columbus Public Health or any other ODH designee.

Grasping at yet another straw, Zeno's points to Collins's statements at a 2009 administrative hearing.<sup>14</sup> Br. at 13. During that hearing, Collins testified: "if I'm in the establishment and smoking is occurring, [and] Mr. Allen doesn't do anything to prevent that, that would be a violation." Admin. Hr'g Tr. at 14:16-24, 15:1. Zeno's questioned Collins about that statement at trial, and Collins clarified that the proprietor would not necessarily be in violation in that scenario: "[A] person could be in a corner somewhere where the proprietor does not see the individual. At that point that would not be a violation." Tr. 66:22-25; 67:1-5. In spite of this clarification, Zeno's says Collins's initial testimony shows that ODH has, through an unwritten rule, expanded its enforcement of the Act beyond its authority. But even as mischaracterized by Zeno's, Collins's testimony could not possibly prove the existence of an unwritten rule that applies statewide. See *Yajnik v. Akron Dep't of Health* (2004), 101 Ohio St. 3d 106, 110 (refusing to hypothesize about circumstances that were not part of the record when analyzing an alleged constitutional violation).

To the extent Zeno's thinks there was more to each alleged situation than met the investigator's eye, the time for developing those facts was through the administrative review process. The Act gives proprietors numerous opportunities to contest a reported violation. See,

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to have a uniform application to all [licensed practical nurses] in the state of Ohio"); *Ohio Dental Hygienists Ass'n v. Ohio State Dental Bd.* (1986), 21 Ohio St. 3d 21, 25 (board letter opining whether auxiliary personnel could remove debris and orthodontic cement from teeth was a rule, and must be promulgated under R.C. Chapter 119).

<sup>14</sup> The trial court did not admit these statements into evidence, but they are in the record because Zeno's, without permission, attached them to one of its trial briefs. See Zeno's Trial Br. (Nov. 5, 2009), attaching Admin. Hr'g Tr. (June 11, 2008), Investigation No. 15646 ("Admin. Hr'g Tr.").

supra, at p. 7. Zeno's chose not to pursue those remedies and its attempt now, instead, to mount a wholesale attack on ODH's enforcement against proprietors statewide fails.

Contrary to Zeno's suggestions, ODH's enforcement is entirely in keeping with the Act.

**C. Zeno's has no basis for objecting to ODH's enforcement of unintentional violations because Zeno's own violations were intentional.**

For all of the reasons above, Zeno's separation-of-powers argument fails—it is an as-applied challenge that is not properly before the Court, it raises not an enforcement issue, but rather a quibble with the Act itself, and, in any event, it challenges ODH enforcement that is entirely consistent with the Act. But one final and fatal flaw is clear. As nine final administrative orders reflect, Zeno's is an *intentional* violator of the Act and therefore has no basis to object to the Act's application to *unintentional* violations. Whatever objections Zeno may purport to raise, the Act certainly does not create a safe harbor for proprietors like Zeno's, who were found to have *intentionally* violated the Act, had ashtrays present, and allowed smoking to continue without ever reporting offending patrons to ODH. Simply put, Zeno's has absolutely no basis for pursuing its enforcement claim.

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

*A party cannot use a declaratory judgment action to collaterally attack final administrative orders where the party failed to raise the challenge on administrative review.*

**A. The Declaratory Judgment Act cannot be used to collaterally attack otherwise final orders.**

Zeno's proposition that "Ohio's declaratory judgment statute enables previously-cited Ohioans to challenge the constitutionality of a statute or rule" is generally correct. Br. at 42. But a plaintiff cannot use a declaratory judgment action to collaterally attack otherwise final judgments. In other words, parties cannot rely on the Declaratory Judgment Act as a substitute for directly appealing administrative orders. 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); *State ex rel. Broadway Petro. 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).

To challenge ODH's application of the Act to Zeno's, Zeno's should have raised an as-applied constitutional challenge to its violations on administrative review. This Court has long required parties to raise any challenge to a statute's application at the first available opportunity, including administrative review. See *Bd. of Educ. v. Kinney* (1986), 24 Ohio St. 3d 184, syl.; *City of Reading v. Pub. Utils. Comm'n*, 109 Ohio St. 3d 193, 2006-Ohio-2181, ¶ 15. 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*, 2006-Ohio-2181, at ¶ 12. In other words, if Zeno's had raised an as-applied challenge on administrative appeal, ODH would have had a chance to "develop[] an evidentiary record sufficient to show that the statute was applied constitutionally" with respect to the ten violations. See *Kinney*, 24 Ohio St. 3d at 186.

In fact, Zeno's failure to challenge its violations on administrative review makes it literally impossible for the Court to relitigate the merits of those violations now. Contrary to Zeno's claims, the trial court did *not* "admit exhaustive facts on Zeno's as-applied cause of action." Br. at 49. (ODH called witnesses in this case to identify the final orders because they are the basis for ODH's action for injunctive relief under R.C. 3794.09(D), see Tr. 52:9-60:14, but it was under no obligation to relitigate those underlying violations.) And Zeno's suggestion that ODH could have introduced evidence about each violation at trial misses the point—ODH did not have this information because an administrative record was never fully developed in response to an as-

applied enforcement challenge. By failing to raise as-applied challenges to its violations, Zeno's failed to exhaust its administrative remedies and waived these arguments. See, e.g., *Dworning v. City of Euclid*, 2008-Ohio-3318, ¶ 9 (Ohio Civil Rights Commission); *Clagg v. Baycliffs Corp.*, 82 Ohio St. 3d 277, 281, 1998-Ohio-414 (Ottawa Regional Planning Commission); *City of Reading*, 2006-Ohio-2181, ¶¶ 13-16 (Public Utilities Commission); *Noernberg v. Brook Park* (1980), 63 Ohio St. 3d 26, 29 (Civil Service Commission); *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St. 3d 109, 111 (privately-owned hospital); *State ex rel. Kingsley v. State Employment Relations Bd.* (10th Dist.), 2011-Ohio-428 (State Employment Relations Board); *Derakhshan v. State Med. Bd.* (10th Dist.), 2007-Ohio-5802 (State Medical Board); *Am. Legion Post 0046 Bellevue v. Liquor Control Comm'n* (6th Dist. 1996), 111 Ohio App. 3d 795 (Liquor Control Commission). Zeno's declaratory judgment action cannot now resurrect the as-applied challenges it should have but failed to raise on administrative review.

Despite these widely accepted principles, Zeno's urges an exception for three reasons. First, Zeno's attempts to cabin the exhaustion rule to the context of administrative tax proceedings. Br. at 49. But the same principle applies with equal force in other administrative contexts, as demonstrated by the cases cited above.

Second, Zeno's complains that it would have been expensive and futile to challenge each separate violation. Br. at 23, 47. But expense is no excuse for failure to exhaust administrative remedies. *Whitehall ex rel. Wolfe v. State Civil Rights Comm'n* (1995), 74 Ohio St. 3d 120, 124 (rejecting the argument that an administrative remedy "would be inadequate due to time and expense"). And it would not have been futile for Zeno's to raise these arguments on administrative review. Dozens of proprietors have raised both facial and as-applied constitutional challenges to the Act in administrative appeals from ODH's finding of a

violation—and the Tenth District Court of Appeals has weighed in on those arguments. See, e.g., *Trish's Café & Catering, Inc. v. Ohio Dep't of Health* (10th Dist.), 2011-Ohio-3304, ¶¶ 13-16; *Boulevard*, 2010-Ohio-1328, ¶ 15; *Deer Park Inn II*, 2010-Ohio-1392; *Deer Park Inn I*, 2009-Ohio-6836. Thus, Zeno's *could* have raised on administrative appeal the exact claims it now presents in its first proposition of law.<sup>15</sup>

Finally, Zeno's contends that exhaustion of administrative remedies is not required "where the constitutionality of a statute is raised as a defense in a proceeding brought to enforce the statute." *Johnson's Island, Inc. v. Bd. of Twp. Trustees of Danbury Twp.* (1982), 69 Ohio St. 2d 241, syl. ¶ 2. That logic applies when a defendant has not been a party to an earlier administrative proceeding and thus has not an opportunity to exhaust his administrative remedies before being sued under a statute. See *id.* But it does not apply here, where Zeno's could have raised the same constitutional challenges on ten prior occasions and did not. In short, Zeno's cannot collaterally attack ten otherwise final orders by now invoking the Declaratory Judgment Act.

Accordingly, the Court should affirm the Tenth District's correct holding that Zeno's cannot use a declaratory judgment action to retroactively challenge ODH's application of the Act to issue the ten violations underlying this separate injunction action. See App. Op. at ¶ 36.

**B. Any collateral attack on Zeno's prior violations fails because the violations are supported on alternative grounds that Zeno's does not contest.**

Even if Zeno's could challenge ODH's enforcement of the Act with respect to its ten violations, Zeno's would not be entitled to relief. Nine of Zeno's violations are unassailable

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<sup>15</sup> In fact, Zeno's announced an intent to raise these very claims in the two notices of administrative appeal it did file. The Franklin County of Common Pleas never analyzed the claims, however, because it upheld the violations when Zeno's failed to file briefs or present arguments. See *Zeno's Victorian Vill., Inc. v. Ohio Dep't of Health* (Franklin County C.P., Dec. 23, 2008), No. 08CVF07-10887; *Zeno's Victorian Vill., Inc. v. Ohio Dep't of Health* (Franklin County C.P., Mar. 12, 2009), No. 08CVF07-10888.

because they cited Zeno's not only for "permitting smoking," the charge Zeno's objects to, but also for violating *another* provision of the Act—having ashtrays present, which Zeno's has never contested. Thus, each of these violations would have resulted in the exact same fine, even if Zeno's had not also "permitted smoking." (Only one violation, Fine Letter #15646, cited Zeno's solely for "permitting smoking," but the record contains no evidence about that particular violation and it was affirmed by a common pleas court on administrative appeal.)

Nor does the record indicate that Zeno's made *any* effort, let alone reasonable efforts, to "not permit" smoking in the situations triggering the ten violations. Zeno's does not claim that it asked patrons to stop smoking or that it ever informed the investigator that it had done so. See Tr. 65:22-25; 66:1-3. Zeno's employees knew that the ODH tip-line exists, but they never called it to complain that a patron was smoking in the bar. Tr. 108:15-17 (testimony of Richard Allen), 206:20-22 (testimony of Mitch Allen), 76:13-19 (testimony of Calvin Collins). In fact, the sanitarian who investigated Zeno's violations reported that he cited Zeno's when he observed "[i]ndividuals . . . smoking at the bar, which normally they were, ashing in the plastic cups." Tr. 64:11-18.

Accordingly, even if Zeno's as-applied challenge were properly before the Court, it would fail.

**C. The Court should not abrogate Zeno's fines under any circumstances.**

Zeno's asks the Court to abrogate its outstanding fines if it holds that the Smoke Free Workplace Act, or ODH's application of it, is unconstitutional. Br. at 43. But even if the Court agrees with Zeno's constitutional arguments, the fines should not be abrogated.

Zeno's first says that the Court should enjoin ODH's collection of Zeno's outstanding fines under R.C. 2723.01. This section empowers courts to "enjoin[] and recover[] illegal taxes and

assessments” under certain circumstances. But it says nothing about civil fines imposed as a result of a violation of the law, and is therefore irrelevant here.

Second, Zeno’s argues that if the Court finds an unlawful ODH rule or policy, it should abrogate the fines under the *Sunburst* doctrine. See *Great N. Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358. But the *Sunburst* doctrine is irrelevant here, because Zeno’s fines became due and payable when the ten underlying violations became final orders.

Finally, Zeno’s asks the Court to permit it to file motions to vacate the ten final orders under Civil Rule 60(B). Br. at 22. But R.C. 119.12—not Rule 60(B)—sets forth the procedures for challenging administrative orders, and accordingly, various courts have recognized that Rule 60(B) “does not apply to administrative proceedings,” let alone as a means to collaterally administrative orders after they have become final. *Buchler v. Ohio DOC, Div. of Real Estate* (8th Dist. 1996), 110 Ohio App. 3d 20, 22 (explaining that a Rule 60(B) motion for relief from judgment is inconsistent with R.C. 119.12, which specifically establishes the required proceedings for administrative appeals); see also *McConnell v. Adm’r* (10th Dist., Sept. 3, 1996), No. 96APE03-360, 1996 Ohio App. Lexis 3889; *Giovanetti v. Ohio State Dental Bd.* (11th Dist. 1990), 66 Ohio App. 3d 381, 383: Moreover, allowing a Rule 60(B) motion here would bless the same impermissible end-run around administrative exhaustion requirements already discussed.

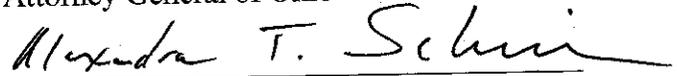
In short, there is no basis for relieving Zeno’s of the outstanding fines levied for its ten prior violations.

## CONCLUSION

For all the reasons above, the Court should affirm the decision of the Tenth District Court of Appeals. Zeno's facial attack on the constitutionality of the Smoke Free Workplace Act has no merit. Zeno's claim about ODH's enforcement of the Act is not properly before the Court, and even if it were, Zeno's could not prevail on the merits of a facial enforcement claim. Finally, the Declaratory Judgment Act does not permit parties to collaterally attack otherwise final administrative orders under the guise of a constitutional challenge.

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I certify that a copy of the foregoing Appellees' Merit Brief was served by U.S. mail this

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# **APPENDIX**

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## STATES AND TERRITORIES WITH INDOOR AIR LAWS THAT COVER WORKPLACES, RESTAURANTS, AND BARS

STATE	STATUTE	YEAR ENACTED	EFFECTIVE DATE
American Samoa	Am. Samoa Code Ann. §§ 13.1301 to .1309	2010	Jan. 2011
Arizona	Ariz. Rev. Stat. § 36-601.01	2006	May 2007
California	Cal. Lab. Code § 6404.5	1994	Jan. 1998
Colorado	Colo. Rev. Stat. §§ 25-14-201 to -209	2006	May 2006
Connecticut	Conn. Gen. Stat. § 19a-342	2003	Non-Hospitality Workplaces & Restaurants - Oct. 2003 Bars - Apr. 2004
Delaware	Del. Code Ann. tit. 16, §§ 2901 to 2908	2002	Nov. 2002
DC	D.C. Code §§ 7-1701 to -1710	2006	Non-Hospitality Workplaces - Apr. 2006 Restaurants & Bars - Jan. 2007
Hawaii	Haw. Rev. Stat. §§ 328J-1 to -17	2006	Nov. 2006
Illinois	410 Ill. Comp. Stat. 82/1 to /75	2007	Jan. 2008
Iowa	Iowa Code §§ 142D.1 to 142D.9	2008	July 2008
Kansas	Kan. Stat. Ann. §§ 21-4009 to 21-4014a	2010	July 2010
Maine	Me. Rev. Stat. Ann. tit. 22, §§ 1541 to 1550	2003; Revised 2009	Non-Hospitality Workplaces - Sept. 2009 Restaurants & Bars - Jan. 2004
Maryland	Md. Code Ann., Health-Gen. §§ 24-501 to -511	2007	Feb. 2008
Massachusetts	Mass. Gen. Laws ch. 270, § 22	2004	July 2004
Michigan	Mich. Comp. Laws §§ 333.12603 to 333.12617	2009	May 2010
Minnesota	Minn. Stat. §§ 144.411 to .417	2007	Oct. 2007
Montana	Mont. Code Ann. §§ 50-40-101 to 50-40-120	2005	Non-Hospitality Workplaces & Restaurants - Oct. 2005 Bars - Oct. 2009
Nebraska	Neb. Rev. Stat. §§ 71-5716 to -5734	2008	June 2009
New Hampshire	N.H. Rev. Stat. Ann. §§ 155:64 to :78	2007	Sept. 2007
New Jersey	N.J. Stat. Ann. §§ C.26:3D-55 to -64	2006	Apr. 2006
New Mexico	N.M. Stat. §§ 24-16-1 to -20	2007	June 2007
New York	N.Y. Pub. Health Law §§ 1399-n to -x	2003	July 2003
Ohio	Ohio Rev. Code Ann. §§ 3794.01 to .09	2006	Dec. 2006
Oregon	Or. Rev. Stat. §§ 433.835 to .875	2007	Jan. 2009
Puerto Rico	P.R. Laws Ann. tit. 24, § 892	-----	Mar. 2007
Rhode Island	R.I. Gen. Laws §§ 23-20.10-1 to -16	2004	Mar. 2005
South Dakota	S.D. Codified Laws §§ 34-46-14 to -15	2002; Revised 2010	Non-Hospitality Workplaces - July 2002 Restaurants & Bars - Nov. 2010
Utah	Utah Code Ann. §§ 26-38-1 to -9	1994; Revised 2006	Non-Hospitality Workplaces - May 2006 Restaurants - Jan. 1995 Bars - Jan. 2009
Vermont	Vt. Stat. Ann. tit. 18, §§ 1741 to 1746	2005; Revised 2009	Non-Hospitality Workplaces - July 2009 Restaurants & Bars - Sept. 2005
U.S. Virgin Islands	V.I. Code Ann. tit. 19, § 1481a	2010	Feb. 2011
Washington	Wash. Rev. Code §§ 70.160.010 to .100	2005	Dec. 2005
Wisconsin	Wis. Stat. § 101.123	2009	July 2010