

IN THE SUPREME COURT OF OHIO

11-0019

BARTEC, INC. *et al.*,  
  
Defendants-Appellants,  
  
v.

ALVIN JACKSON,  
OHIO DEPARTMENT OF HEALTH  
  
Defendant-Appellee

RICHARD CORDRAY,  
ATTORNEY GENERAL  
  
Defendant-Appellee

: ON APPEAL FROM THE  
: FRANKLIN COUNTY COURT  
: OF APPEALS, TENTH  
: APPELLATE DISTRICT  
:  
: COURT OF APPEALS  
: CASE NO. 10AP-173  
:  
: TRIAL COURT  
: CASE NO. 09CVH08-12197  
:  
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**REPLY BRIEF OF APPELLANTS BARTEC, INC AND RICHARD M. ALLEN**

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## ARGUMENT IN REPLY TO APPELLEES BRIEF

**Proposition of Law No. 1: The Health Department’s method of enforcing the smoking ban violates separation of powers, and must be discontinued.**

ODH defends its conduct by (1) attempting to misrepresent Zeno’s separation of powers challenge as as-applied rather than facial; (2) urging that it has no enforcement policy; (3) arguing that the its enforcement policy, which it claims elsewhere not to have, is consistent with the statute; and (4) proclaiming that its institutionalization of a policy inconsistent with the statute immunizes it from challenge. Meanwhile, ODH claims that Zeno’s is not aggrieved even if its policy has been unlawful. Each of these positions is insufficient to defend ODH policy.

**A. Zeno’s separation of powers challenge is a proper facial challenge to an unwritten policy.**

ODH argues that Zeno’s only “now tries to recast this claim as a facial challenge.”<sup>1</sup> However, as Zeno’s chronicles in its brief, it has, from the outset of this litigation, maintained that ODH has unlawfully maintained and employed an unwritten enforcement policy that violates separation of powers and agency rulemaking authority.<sup>2</sup>

Next, ODH argues that this is an as-applied claim because “Zeno’s draws solely on its own experiences with ODH’s enforcement.”<sup>3</sup> This assertion is clearly false. Zeno’s relies on (1) the uncontroverted fact, unaddressed and unexplained by ODH, that ODH has made use of the division of the law addressing proprietor liability over 33,000 times, while never making use of the co-equal and mutually exclusive division of the law addressing patron liability; ODH’s own enforcement documentation, which articulate and prompts and reflect the use of an overly-broad standard for proprietor liability; (3) the statements of various ODH authorities demonstrating an unwritten policy that differs from the statute; and (4) ODH’s own arguments in favor of an unwritten policy of strict liability, made in *Pour House v. Ohio Department of Health*, which it made as it was imposing fines and litigation on Zeno’s. Only after offering

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<sup>1</sup> ODH Merit Brief, p. 25.

<sup>2</sup> Zeno’s Merit Brief, pp. 5-6; see further, Zeno’s Answer and Counterclaim.

<sup>3</sup> ODH Merit Brief, p. 25.

this evidence does Zeno's offer its own experiences to confirm and corroborate that this unwritten ODH policy was implemented, both against Zeno's and otherwise. Thus, evidence of an unwritten enforcement policy stretches *well beyond* Zeno's own experiences.

ODH fails to address, much less contravene, the principle of law that a litigant may lodge a valid facial challenge to an unwritten policy. Zeno's separation of powers challenge is properly before this Court as a facial challenge to an unwritten policy; and ODH should not gain from failing to properly promulgate its policy in writing.

**B. ODH maintains a uniform enforcement policy.**

First, ODH claims that it has no enforcement policy because it "investigates every alleged violation reported on the tip line," and "encourages its local designees to perform a case-by-case analysis."<sup>4</sup> In doing so, ODH implicitly demonstrates that it has institutionalized (1) complete abstention from imposing patron liability; and (2) complete strict liability for Ohio's business owners. As ODH explains, pursuant to OAC 3701-52-08(D), which it, and not the legislature, promulgated, it "investigates only after receiving a complaint on the ODH tip line," at which point it mails notice of the complaint to the *proprietor* and conducts an on-site investigation of the *proprietor*.<sup>5</sup> ODH then elsewhere complains that Ohio business owners, including Zeno's "do not use the ODH tip line to report smoking patrons."<sup>6</sup> But why would they? First, ODH only responds by investigating the proprietor upon any tip line report. Second, ODH conducts its on-site investigation weeks, if not months, after a tip line complaint has been lodged,<sup>7</sup> meaning that the chances of that same smoking proprietor being at the establishment when ODH makes an unannounced visit or slim to none. Thus, ODH regulations have discriminately twisted the plain language of the ban.

This policy is further institutionalized in ODH Enforcement letters, drafted by ODH and used in enforcement, which apply the unlawful standard for R.C. 3794.02(A) of "smoking present," or "smoking in

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<sup>4</sup> ODH Merit Brief, p. 30.

<sup>5</sup> ODH Merit Brief, pp. 6, 7.

<sup>6</sup> ODH Merit Brief, Footnote 12, on pp. 28,29.

<sup>7</sup> This timeline for each complaint and investigation is specified on each of Zeno's fine letters. See Zeno's Trial Exhibits M and N.

prohibited area.” Meanwhile, ODH and applicable designee website pages, also introduced as exhibits at trial, featuring smoking ban “FAQs,” state that it is the proprietor’s duty “to prohibit smoking.”<sup>8</sup>

ODH’s legal counsel, proffered enforcement expert,<sup>9</sup> and enforcement documents demonstrate that ODH and its designees interpret and enforce the ban so as to require proprietors like Zeno’s to *prohibit* smoking,<sup>10</sup> meaning that proprietors are liable at the instant when smoking is “present” on premises.<sup>11</sup> ODH concedes that this renders a property owner liable any time that smoking is merely present at his establishment.<sup>12</sup> ODH also interprets R.C. 3794.02(A) so as to fine proprietors whenever there is “smoking in a prohibited area,” and it substitutes this phrase for the language of R.C. 3794.02(A), which prohibits *permission* of smoking.<sup>13</sup>

Consequently, whether ODH investigations are *nominally* “case by case” is beside the point, if these investigations take place within a context that imposes proprietor liability upon the presence of smoke - - in each case, those charged with enforcing the ban *never investigate* whether proprietors ask the patrons to discontinue smoking prior to issuing a fine.<sup>14</sup> Instead they maintain “if there’s smoking in the establishment in an enclosed area, that’s a violation [by the proprietor].”<sup>15</sup> Thus, ODH does not enforce R.C. 3794.02 (A) as written, so as to only fine proprietors when they actually permit smoking; nor does it acknowledge R.C. 3794.02(D). In conclusion, while ODH could be correct in its contention that the strict liability policy of a single smoking ban enforcer, such as Cal Collins, may not be demonstrative of a statewide policy, its argument fails to recognize that Mr. Collins’ enforcement policy is merely *emblematic and corroborative* of a universal policy expressed within and beyond ODH, both formally and informally.

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<sup>8</sup> See Zeno’s Trial Exhibits M and N.

<sup>9</sup> Zeno’s attempt to depose then-Director Alvin Jackson; ODH refused, and instead pursuant to Civ. R. 30(B)(5), chose Mary Clifton to represent ODH as to its enforcement policies.

<sup>10</sup> Tr. 44. October 27, 2009 Deposition of Lance Himes, pp. 32-33, 24, 17; Tr. 72-76.

<sup>11</sup> See “Ohio Smoking Ban Frequently Asked Questions,” and also Tr. 74-75; Lance Himes Deposition, p.

10. Mary Clifton Deposition, pp. 34, 37.

<sup>12</sup> See “Ohio Smoking Ban Frequently Asked Questions,” and also Tr. 74-75; Lance Himes Deposition, p.

10. Mary Clifton Deposition, pp. 34, 37.

<sup>13</sup> Tr. 53-60; See Trial Exhibits M and N.

<sup>14</sup> *Id.* at 69. Similarly, investigators never speak to the smoking patrons, or even attempt to obtain their information, such as their name and address. See Tr. at 71.

<sup>15</sup> *Id.* at 71.

**C. The ODH policy equates “prohibit” and “not permit;” however they are not equal.**

Next, ODH attempts to justify its policy as no different from what is demanded by statute. Specifically, it contends that requiring Ohio’s business owners to “prohibit” smoking rather than “not permit” it is a “distinction without a difference.”<sup>16</sup> However, the distinction between these two words is dramatically different: enforcing the law so as to require a proprietor to prohibit smoking results in strict liability for the proprietor anytime smoking is present within the establishment. Conversely, tracking the language of the statute and requiring that the proprietor “not permit” smoking implies that the proprietor is not liable where he has taken the statutorily required steps to prevent smoking, specifically (1) posting no-smoking signs; (2) removing traditional ashtrays; and (3) informing smoking patrons of the ban and/or requesting that they discontinue.

Thus, between these two standards of liability is a wide chasm: scenarios where business owners have posted signs, pulled ashtrays, and informed smoking patrons of the ban, but where patrons continue to smoke. Under the “shall prohibit” standard, ODH immediately imposes \$5,000 fines on Ohio business owners upon observing the presence of smoke, *without investigation*. Indeed, ODH concludes that “[a]fter ODH proved that *smoking occurred in a prohibited area, in violation of R.C. 3794.02(A)*, the burden shifted to Appellant to set forth an affirmative defense.”<sup>17</sup> ODH pursued and continues to pursue this policy even though its own administrative rule, OAC 3701-52-08(E) affixes the burden of proving smoking ban violations upon the Health Department (stating “[a]ll findings of violation by the department, including continuing violations, shall be supported by a preponderance of the evidence”). Thus, ODH policy requiring business owners to prohibit smoking, fining them for the presences of smoke, and refusing to fine patrons, discriminates against Ohio business owners in a way that the statute does not. This departure from the statute for enforcement ease violates separation of powers.

**D. R.C. 3794.02(A) and (D) are not redundant.**

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<sup>16</sup> ODH Merit Brief, at p. 27.

<sup>17</sup> ODH’s Merit Brief in *Pour House*, at p. 14.

ODH further contends that the division of law providing for patron liability is mere truism and overlap, proclaiming “the proprietor’s responsibilities are independent of any individual patron’s obligations under the law.”<sup>18</sup> This astonishing reading of the statute invites absurd results: if a patron continues to smoke, irrespective of the extent of efforts undertaken by the proprietor, the proprietor is *still* liable.

First, the Health Department’s interpretation is inconsistent with the axiom that parts of a statute must be interpreted so as to render the entire statute effective. R.C. 1.47(B) states “[i]n enacting a statute, it is presumed that the entire statute is intended to be effective.” But if R.C. 3794.02(A) is interpreted to mean that a liability is to be imposed upon the proprietor any time smoking is present within its establishment, then when is R.C. 3794.02(D) effective? The answer: never.

Under R.C. 1.47(C), “[i]n enacting a statute, it is presumed that a just and equitable result is intended.” The notion that liability should be strictly imposed upon the proprietor whenever smoking is present, irrespective of whether (1) the proprietor has tried to stop the smoking; or (2) the proprietor has not yet had an opportunity to stop the smoking, is unjust and inequitable. Yet this is the ostensible results of treating division (D) as a nullity, and not surprisingly, Zeno’s evidence chronicles several incidents where it was fined despite the attempts to stop the smoking.

As a further illustration, consider a scenario where a tavern owner, in protest, walks into a courtroom, lights up a cigarette, and refused to extinguish it. Under the Health Department’s policy, the court would have permitted smoking. This defies the principle that courts should interpret statutes so as to avoid absurd and ridiculous results.<sup>19</sup> For these reasons, ODH’s avowed policy of giving no effect to R.C. 3794.02(D) is an unlawful usurpation of legislative power.

#### **E. ODH’s policy ignores R.C. 3794.07.**

ODH has no explanation for the discrepancy between its policy and R.C. 3794.07, which requires that “[the smoking ban] *shall be enforced by the department of health and its designees,*” rather than by business

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<sup>18</sup> ODH Merit Brief, p. 28.

<sup>19</sup> *State ex rel. Haines v. Rhodes* (1958), 168 Ohio St. 165, 151 N.E.2d 716 (holding that “if it is reasonably possible, courts should construe statutes so as to avoid ridiculous or absurd results \* \* \*”).

owners. This provision signifies the deliberate rejection of ODH's position that business owners are entirely responsible for enforcement of the ban.

Thus, ODH's policy of imposing the burden of enforcement upon proprietors would violate the tenants of R.C. 1.47(B), expressed above. Moreover, it violates R.C. 1.42, which commands that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." Any common usage of the phrase "[t]his chapter shall be enforced by the department of health and its designees" would require ODH, and not Ohio's business owners, to enforce the smoking ban. In applying a policy that cuts corners for the convenience of enforcement, ODH reads this provision out of the legislation, thus taking policymaking into its own hands.

**F. ODH's intentional-unintentional distinction is irrelevant.**

Further, ODH predicates its strict liability approach on an erroneous and previously-rejected statutory interpretation. Specifically, ODH tries to cast the debate as one between "intentional" and "unintentional" violations, opining "intent is irrelevant to proprietor liability," and accusing Zeno's of arguing that "an unintentional violation if not sufficient for liability."<sup>20</sup> However, Zeno's does not make this argument.

More importantly, irrespective of the proprietor's intent, ODH must still, at minimum *investigate whether the proprietor permitted smoking, and collect facts* demonstrating the same prior to issuing a citation. Put another way, an Ohio business owner does not permit smoking every time that smoking is present, simply because the business need not be shown to have intended to permit smoking. Thus, if smoking ensues on the premises, but the proprietor has not permitted it, there is no violation of R.C. 3794.02(A). Intent is simply not relevant to the inquiry, except to the extent that it is probative of the element of permission. The Court of appeals for the Tenth District of Ohio succinctly refuted ODH's argument with the following explanation:

"Without evidence that the proprietor permitted smoking, there is no basis for finding the proprietor violated the statute. Unless there is violative conduct, the strict liability nature of the statute is irrelevant."<sup>21</sup>

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<sup>20</sup> ODH Merit Brief, pp. 26, 27.

<sup>21</sup> *Pour House*, supra.

The Court added that ODH or its designee “must prove each of the elements of a smoking violation,” including permission.<sup>22</sup> Thus *Pour House* invalidated the ODH policy of refusing to investigate the facts of the matter, and simply levying a \$5,000 fine under the extra-legal premise that “smoking is present.” However, it did not do so until several months after ODH had filed its Complaint against Zeno’s. The option of an administrative review hearing is not a sufficient substitute for responsible enforcement or a cure for irresponsible enforcement. A policy of strict liability that cites business owners first, without investigation, and shifts the burden to them to appeal, exceeds ODH’s limited administrative authority.

**G. ODH’s interpretation is an objection to the legislation itself.**

Next, ODH complains that “a warning alone 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.” First, ODH seems to have forgotten that *it* is the party responsible for “ensuring a smoke free environment,” by enforcing the entire act. Moreover, notification, alongside, removal of ashtrays and posting of “no smoking” signs is all that the law clearly requires. The notion that there are a series of amorphous steps beyond this that enforcement agents, without guidance, will judge on a case by case basis, interjects a level of vagueness into the statute that may render it unconstitutionally void. This ODH’s circular, tautological enforcement position is that “a proprietor can be cited for permitting smoking if he is not taking reasonable steps to prohibit it,” and that he is not taking reasonable steps anytime smoking is present. To this end, ODH opines “when a proprietor fails to discourage smoking in his establishment, it is more than fair to conclude that he ‘permits’ smoking.”<sup>23</sup> Yet ODH admits that it never investigates whether a proprietor has attempted to discourage smoking prior to issuing a fine. Instead, a fine is imposed upon observation of the presence of smoking, because the proprietor was required to “prohibit” smoking, and in ODH’s eyes, obviously hasn’t done so. ODH cannot simply assume a lack of discouragement by the business

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<sup>22</sup> Id.

<sup>23</sup> ODH’s Merit Brief, p. 27.

owner: its solution is to rewrite the statute, rather than to enforce language that is not expressed therein. ODH must be enjoined from such future enforcement.

**H. Neither Zeno’s ashtray nor “intentional” violations alter separation of powers analysis.**

Finally, ODH asserts that Zeno’s has no standing to defend itself with the Ohio Constitution because “Zeno’s is an intentional violator and therefore has no basis to object,” and ashtray violations mean that fines could stand even if Zeno’s is successful in its challenge. However, the trial court properly accounted for the evidence that ODH enforces the law in such a way that a fine for “smoking in prohibited area” can automatically yields an ashtray violation, if the smoking ban investigator so desires, because any place where the smoker is disposing of ashes is considered an ashtray.<sup>24</sup> Likewise with intent, the central issue remains whether ODH actually investigated whether Zeno’s and others were permitting smoking prior to issuing fines to them: any determination, without investigation, that Zeno’s *intentionally* permitted smoking is contingent on a finding that Zeno’s *actually* permitting smoking. Moreover, these arguments from ODH fail to provide any guidance as to Zeno’s prospective claim for declaratory and injunctive relief - - unlawful enforcement must be enjoined, irrespective of the particularities of Zeno’s fines (however, the only evidence at trial demonstrates that Zeno’s complies with the law).

**Proposition of Law No. 2: Inclusion of Zeno’s, and bars, as proprietors subject to R.C. 3794 exceeds the outer limits of the state police power, and unreasonably extinguishes property rights.**

**A. The Smoking Ban’s application to bars is not entitled to deference.**

ODH invests considerable effort attempting to demonstrate, through the usual boilerplate language, that the entirety of the ban, as a “legislative enactment,” enjoys a “presumption of constitutionality,” and must be proven unconstitutional “beyond a reasonable doubt.”<sup>25</sup> However, the ban’s application to bars, including Zeno’s, is not entitled to this usual presumption.

**i. The rationale for the presumption only applies to acts of the legislature.**

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<sup>24</sup> See Tr. 65.

<sup>25</sup> ODH Merit Brief, p. 12.

Ohio's rationale for the presumption in favor of constitutionality was initially expressed in 1852, just after the 1851 constitution was passed. It is as follows: "*The Legislature* is, of necessity, in the first instance, to be the judge of its own constitutional powers. *Its members act under an oath to support the constitution, and in every way, are under responsibilities as great as judicial officers.* \* \* \* This being their duty, we are bound, in all cases, to presume they have regarded it; and that they are clearly convinced of their power to pass a law before they put it in the statute book."<sup>26</sup>

Thus, the rationale for the presumption in favor of an enactment's constitutionality only applies to legislators who have taken an oath to support the constitution, and taken that oath into account in enacting the measure. No such oath was taken by Ohio voters before voting upon the smoking ban. Consequently, the rationale underlying the presumption in favor of the statute, or any particular application of the statute, does not apply. As Justice Thomas Cooley, the foremost expert on this topic, explained, where legislators have not taken an oath and then taken it into account when weighing the constitutionality of an enactment, no presumption of constitutionality or burden of proof exists.<sup>27</sup> That is the case here.

**ii. Majority tyranny must be restrained.**

Moreover, the procurement of benefits for some at the expense of others, through a simple majority vote, warrants special scrutiny. This state's authority to regulate property "was never meant to be a vehicle to enforce the personal taste of one on another."<sup>28</sup> To that end, it "is not to be inferred \* \* \* whenever a momentary inclination happens to lay hold of a majority of [the people], incompatible with the provisions of the existing Constitution, [the people or the Court] would on that account, be justified in a violation of those provisions."<sup>29</sup> Put more strongly:

[W]ritten Constitutions have heretofore been framed chiefly to protect the weak from the strong, and to secure to all the people "equal protection and benefit." They have been constructed upon the theory that *majorities can and will take care of themselves; but that the*

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<sup>26</sup> *Cincinnati W. & Z. R. Co. v. Comm'rs of Clinton County*, (1852), 1 Ohio St. 77, 83.

<sup>27</sup> Thomas Cooley, *Constitutional Limitations* 184 (1868).

<sup>28</sup> *Village of Hudson v. Albrecht* (1984) 9 Ohio St.3d 69 (Brown, dissenting).

<sup>29</sup> *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062, at 502, citing Hamilton, *The Federalist No. 78*.

*safety and happiness of individuals and minorities need to be secured by guaranties and limitations in the social compact, called a "constitution."*<sup>30</sup>

Thus, special care must be taken to ensure that the momentary passions of voters in November of 2006 are compatible with Zeno's longstanding and sacrosanct property rights.

Here, it cannot be ignored that those passions do indeed appear to have been momentary: recent polling indicates that a majority of Ohioans now do not believe that the smoking ban should apply in Ohio's bars.<sup>31</sup> However, this apparent shift in positions may not be a shift at all. Instead, it may reflect another reason why no presumption in favor of the ban's application to bars is appropriate: Ohioans' lack of clarity over whether the ban would so apply. The November 2006 ballot language that initiated the passage of R.C. 3794 purported to exempt "private clubs" and "family-owned and operated places of businesses," such as Zeno's.<sup>32</sup> It was only after the fact that these terms were given broad, counter-intuitive definitions, so as to exclude essentially every bar. Consequently, it may well be the case that Ohioans never intended to impose a smoking ban on bars, and particularly on truly family-owned and operated businesses such as Zeno's. Consequently, this Court should afford no deference or presumption in favor of the application of R.C. 3794 to bars such as Zeno's.

### **iii. Principles favoring deference to local land use regulations do not apply.**

The higher standards of deference applicable to *local* land use regulations, which ODH claims this Court should employ, do not apply here. This Court specifically noted in *Hudson v. Albrecht*, relied upon by ODH, that "the 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." (relying exclusively on Section 3, Article XVIII of the

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<sup>30</sup> *Sogg v. Zurz* (2009), 121 Ohio St.3d 449, 905 N.E.2d 187, citing *Kiser*, 85 Ohio St. at 132-133, 97 N.E. 52. (Emphasis added).

<sup>31</sup> Poll: *Smoking should be allowed in Ohio bars*, Cincinnati Enquirer, August 3, 2010; *New Poll Shows Ohioans Interested In Allowing Smoking In Bars, Just Over Half Support A Change In State Smoking Ban*, NBC 4, Columbus, August 6, 2010. See <http://www2.nbc4i.com/news/2010/aug/06/4/new-poll-shows-ohioans-interested-allowing-smoking-ar-181759/>. Last checked on December 20, 2010.

<sup>32</sup> "2006 Ballot Language: Initiated Law, 'Smoke Free Workplace Act,' certified on August 24, 2006."

Ohio Constitution).<sup>33</sup> And the *only* rationale for this “is that the local legislative body is familiar with local conditions and is therefore better able than the courts to determine the character and degree of the regulation required.”<sup>34</sup> The smoking ban is not a local land use regulation, but a centralized one.

**iv. No deference is due in this “as-applied” context.**

While ODH continuously stresses that “the act” or “the enactment” is entitled to a presumption of constitutionality, this is not a “facial” challenge that the law is “invalid *in toto* -and therefore incapable of any valid application.”<sup>35</sup> It is an as-applied challenge which contends that the law is unconstitutional as applied to a particular class of activity, i.e. operation of a purely private bar that is driven by liquor sales and not open to those under the age of 21, even though the law may be capable of valid application to others, such as government buildings, or property where children are permitted. “Each holding carries an important difference in terms of outcome: if a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances.”<sup>36</sup>

This leaves the plaintiff’s burden in an as-applied challenge as different from that in a facial challenge. In an as-applied challenge, “the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.”<sup>37</sup> Thus, when weighing as-applied challenged implicating property rights, this Court must ascertain whether a regulation is “unduly oppressive against an individual owner.”<sup>38</sup> Moreover, this Court must narrow applications of a statute that may otherwise render it unconstitutional.<sup>39</sup>

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<sup>33</sup> *Hudson*, supra, at 72.

<sup>34</sup> *Id.*

<sup>35</sup> *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505 (1974).

<sup>36</sup> *Id.*

<sup>37</sup> *Ada v. Guam Soc’y of Obstetricians and Gynecologists*, 506 U.S. 1011, 1012, 113 S.Ct. 633, 634, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting), *denying cert. to* 962 F.2d 1366 (9th Cir.1992).

<sup>38</sup> *Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, 702 N.E.2d 81, 1998 -Ohio- 313.

<sup>39</sup> See *Burt et al., Assignes, v. Rattle*, 31 Ohio St. 116; *Toledo Commercial Co. v. Glen Mfg. Co.*, 55 Ohio St. 217, 45 N.E. 197; (“Courts should, if possible, give a statute such construction as will avoid conflict with constitutional requirements and will permit it to operate lawfully and constitutionally.”)

## B. Heightened Scrutiny of the ban's inclusion of bars is required.

Next, ODH contends that “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 this is not the law.”<sup>40</sup> ODH is plainly mistaken: this Court applies stricter scrutiny to laws violating fundamental rights. In *Sorrell v. Thevenier*, this Court, in holding a statute to be violative of the Ohio Constitution’s Due Process Clause, stated “in our view, [the statute] has not been shown to be *necessary to promote a compelling state interest* that requires undermining the fundamental and inviolate right.”<sup>41</sup> Also, in *Desenco v. Akron*, which ODH heavily relies on, this Court explicitly stated that the standard ODH relies on, i.e. that an enactment is 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,” only applies “when a fundamental right is not involved.”<sup>42</sup>

Meanwhile, in *Norwood v. Horney*, this Court expressly stated “Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, *no matter how great the weight of other forces*.”<sup>43</sup> This statement was not limited to the context of eminent domain, as ODH contends - - the Court added that these “venerable rights associated with property” include “[t]he rights [to] use, [and] enjoy.”<sup>44</sup>

After denying these principles, ODH attempts to avoid them, stake out the preposterous claim that R.C. 3794 is a “general public health law” and “occupational safety law.” However, as Zeno’s chronicles in its Merit Brief, the ban contains a myriad of arbitrary property-specific exemptions, leaving its more akin to a slice of swiss cheese than a “general” law: the triggering mechanism for this regulation is the type of

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<sup>40</sup> ODH Merit Brief, at p. 13.

<sup>41</sup> *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062, citing *Sorrell v. Thevenier* (1994), 69 Ohio St.3d 415, 633 N.E.2d 504.

<sup>42</sup> *Desenco, Inc. v. City of Akron* (1999), 84 Ohio St.3d 535, 706 N.E.2d 323.

<sup>43</sup> *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1129 (internal citations omitted).

property at issue.<sup>45</sup> Finally, these are not occupational safety laws: neither the Ohio Department of Commerce, nor the Occupational Health and Safety Administration ever passed, or saw a need to pass, complete smoking bans in bars. Thus, the ban is clearly a land use regulation, and property rights, through fines, seizure, and free use, are at stake. Thus, this Court must scrutinize the ban's incursion of the property rights of bar owners, such as Zeno's.

Finally, ODH urges that the caveat "subservient to the public welfare" trumps the protection of private property rights expressed in the primary clause of Section 19, Article I, i.e. "Private property shall ever be held inviolate."<sup>46</sup> However, the right to own property is hollow and meaningless if one does not have considerable autonomy to gainfully use that property. This Court has implicitly acknowledged as much, affirming in *Norwood* that the Ohio Constitution's protection of private property contains "Lockean notions."<sup>47</sup> As to the police power and property rights, Locke was clear that government, and the police power in particular, were instituted to *secure, rather than to imperil*, property rights: the power exists to secure rights rather than to provide public goods, and its use is only legitimate insofar as it does so, while leaving citizens with the enjoyment of "their properties in peace and safety."<sup>48</sup>

Further, just two years ago, this Court observed "while it is declared in Article 1, § 19, of our Constitution, that private property shall be held 'subservient to the public welfare,' it is also declared that it shall ever be held inviolate, and shall not be taken for the public use without compensation, in most cases compensation *first* to be made in money."<sup>49</sup> As to this exact issue, this Court added "there seems to be a growing disposition to legislate, by ordinance and by general statute, regardless of constitutional limitations,

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<sup>45</sup> See R.C. 3794.03; R.C. 3794.01.

<sup>46</sup> ODH Merit Brief, p. 2.

<sup>47</sup> See *Norwood v. Horney* (2006), 110 Ohio St.3d 353, 853 N.E.2d 1115, at 363, 1129.

<sup>48</sup> See John Locke, *Two Treatises on Government*, Peter Laslett, ed. (New York, 1988), 269, 271, 288, 304, 350.

<sup>49</sup> *Sogg v. Zurz* (2009), 121 Ohio St.3d 449, 905 N.E.2d 187, citing *Kiser v. Board of County Commissioners*, 85 Ohio St. at 132-133, 97 N.E. 52.

thus imposing upon the courts the odium of declaring them to be unconstitutional.”<sup>50</sup> Consequently, this Court is bound to meticulously guard Zeno’s property rights.

**C. Application of the smoking ban to bars fails to withstand scrutiny.**

After invoking *federal* precedent in a case solely concerned with the Ohio Constitution, ODH blankly recites the standard expressed in *Benjamin v. City of Columbus*, i.e. that a regulation must bear a real and substantial relationship to the public health, and not be unreasonable or arbitrary. But ODH then finds need to alter even this more-permissive first half of the standard, and fails meritoriously make its case under it: ODH removes the important word “substantial” from of the test, claiming “as long as the law is not arbitrary and bears a reasonable relationship to the public health or safety . . . then it is a valid law.”<sup>51</sup> But this “rational relationship” or “rational basis” test has no place in Ohio property rights jurisprudence. And the word “substantial” has considerable meaning that cannot be ignored.<sup>52</sup> But more importantly, ODH omits the other half of the test, to be used when property rights are on the line, and directly applicable here: “the state may limit private property rights through the exercise of its police power only when ‘the interests of the *general public require* its exercise and the means of restriction [are not] *unduly oppressive upon individuals,*” and in doing so, it “must not interfere with private rights *beyond the necessities of the situation.*”<sup>53</sup> In light of the harm to rights, there is no justification for imposing the ban on bars.

**i. ODH produces no evidence that applying the ban to bars *substantially* advances public health.**

ODH has produced no evidence banning smoking in bars is necessary to substantially advance public health. For instance, ODH has presented no evidence that banning all bar owners from permitting smoking indoors results in less harmful exposure to secondhand smoke: although a linkage may seem intuitive at first blush, prohibiting smoking at certain properties merely moves it elsewhere, when smoking rates do not

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<sup>50</sup> Id.

<sup>51</sup> ODH Merit Brief, p. 13.

<sup>52</sup> See *Village of Hudson*, supra (Brown, dissenting); see also *City of Cincinnati v. Correll*, supra.

<sup>53</sup> *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, 131, 702 N.E.2d 81, citing *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 391, 124 N.E. 212.

decline. And smoking rates amongst Ohioans have risen each full year that the ban has been in effect, even though they have declined nationally.<sup>54</sup>

The only evidence in this case, from Zeno's tobacco policy expert, is that *indoor smoking bans at bars* have never been demonstrated to improve "public health for nonsmokers."<sup>55</sup> Moreover, in the absence of smoking bans, bars cater to their clients, with some bars being smoking bars, some being non-smoking bars, and others offering accommodations to both.<sup>56</sup> Finally, the record demonstrates that brief, acute, transient exposure to secondhand smoke - the type experienced by bar patrons and employees - do not cause increased health risks.<sup>57</sup> This is reflected in the fact that workers' compensation premiums have not decreased since the ban was implemented;<sup>58</sup> and only one claim for secondhand smoke related occupational disease has ever been filed: it was denied.<sup>59</sup> Finally, many other states, even without Ohio's stricter protection of property rights, adequately "protect the public health" by making distinctions between liquor-oriented establishments and other businesses.<sup>60</sup> Thus Ohio's all-out ban in bars, even in separately ventilated rooms, is not narrowly-tailored, and there is no evidence before the Court that the ban *substantially* advances public health, if at all.

**ii. Imposition of the ban on bars is not reasonable.**

Further, ODH likens imposition of the ban on bars to legitimate child labor laws, minimum wage laws, and "laws affecting occupational safety." However, to analogize the curtailment of smoking a cigar in a bar environment to child labor laws is incredulous - - the coercion of children into factory labor bears no

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<sup>54</sup> *Unpaid smoking fines grow as state funds cut*, Toledo Blade, June 20, 2011. See also TR. 131.

<sup>55</sup> T.R. 158.

<sup>56</sup> Tr. 128, D's Exhibit I at 4.

<sup>57</sup> Tr. 156. See also Tr. 162: jurisdictions around the country are as likely to see an increase in hospital admissions for tobacco-related illnesses as they were to see a decrease.

<sup>58</sup> Tr. 188

<sup>59</sup> Tr. 185.

<sup>60</sup> Arkansas exempts 21 years of age and over bars and restaurants. Louisiana's smoking ban does not apply to bars. Pennsylvania's ban contains an exception for "drinking establishments," which includes liquor establishments that admit only those persons over the age of 18 years and derives 20% or less of gross sales from food. Nevada allows a business operator to designate his establishment as a smoking area in its entirety if more than 50% of the businesses gross receipts are derived from the sale of alcohol. North Dakota's smoking ban exempts bars. Tennessee exempts age-restricted venues from its smoking ban. See, respectively, A.C.A. § 20-27-1805(8); LSA-R.S. 40:1300.256(B)(5); 35 P.S. § 637.3(b)(10); 35 P.S. § 637.2; N.R.S. 202.2491; NDCC, 23-12-10(2)(f); T. C. A. § 39-17-1804(1).

resemblance to the privilege of dictating to the owner of Ohio businesses how they must use their property, so that one may consume alcohol in tranquility therein. Meanwhile, minimum wage and worker's compensation laws are *in the Ohio Constitution*. To claim the mantle of necessary industrial era reforms in this case is as Chief Justice Taft once put it "running the police power argument into the ground."

Next, ODH cites the longstanding evidence, not in the record, that secondhand smoke can have harmful effects on health, particularly with respect to children - - evidence which it claims stems back to 1972.<sup>61</sup> In the same breath, ODH attempts to justify such regulation as akin to R.C. 3717 regulations pertaining to preparation and storage of food for public consumption. However, there is a common strand between these arguments that obviates the need for prohibition, and demonstrates the ban's unreasonableness as to bars: the putative danger is well-known, open and obvious to all, and easily avoidable.

This Court, in assessing the reasonableness of this regulation, should apply a legal principle frequently applied in negligence actions: "a premises owner owes no duty to persons entering the premises regarding dangers that are *open and obvious*."<sup>62</sup> This Court has explained that "the open and obvious nature of the hazard itself is the warning, and an owner or occupier may reasonably expect persons entering the premises will discover the dangers and take appropriate measures to protect themselves."<sup>63</sup> This contrasts with an owner or occupier's affirmative duty to its business invitees to exercise ordinary care to warn the invitees of hidden or latent dangers.<sup>64</sup> Simply put, as opposed to regulation of the preparation of meat, a hidden danger, a patron can plainly observe whether smoking is occurring in an establishment. Concomitantly, as opposed to numerous other types of property, no Ohio is compelled to enter a bar.<sup>65</sup> In fact, a great segment of society, for religious, cultural, or other reasons, manages to abstain entirely.

The notion that the police power must obviate private property rights so as to prohibit voluntary exposure to a danger that ODH admits is open and obvious is a quintessential example of unreasonableness,

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<sup>61</sup> ODH Merit Brief, pp. 2, 17.

<sup>62</sup> *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45,233 N.E.2d 589, paragraph 1 of the syllabus by the court.

<sup>63</sup> Id.

<sup>64</sup> Id., citing *Pascal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474.

<sup>65</sup> Everyone who enters Zeno's does so voluntarily. See Tr. 92-93.

as well as a regulation of private property that “goes beyond the necessities of the situation.” Under ODH’s theory of government power, the police power could be used not just to ban smoking in private homes, but also to prohibit the use of certain types of property, by consenting adults, for the sale of fried foods or playing of urban music. This Court cannot reasonably apply the ban to bars, through ODH’s expansive view of the police power, without creating legislative power that knows no limit as against property rights.

**iii. Imposition of the ban on bars is arbitrary.**

Next, ODH argues that the ban, which only regulates smoking on certain types of property, is reasonable and not arbitrary because bars “are open to all members of the public.”<sup>66</sup> This is patently, false. First and foremost, the evidence in the record demonstrates that Zeno’s, like most bars, is not open to children, or for that matter, anyone under the age of 21, and is truly only open to paying customers, who implicitly approve of the atmosphere within the bar. Hotels, nursing homes, and cigar stores, all exempt, are open to the public on the same basis. In fact, one can certainly envision more scenarios where he or she feels more *compelled* to choose a certain hotel, nursing home, or hospital, than a certain bar. Further, ODH contends that the ban applies in places where people are “least able to control their exposure to secondhand smoke.”<sup>67</sup> For the reasons stated above, it is very easy to control exposure to secondhand smoke at bars: one may simply abstain from insisting on consuming alcohol in public, at the venue of one’s unfettered choice.

**iv. All cases relied upon by ODH feature outcome-determinative distinctions.**

Finally, each case that ODH cites to support its expansive view of the police power has a limitation that renders it irrelevant to this case. Specifically, each case features a use of the police power that is either (1) not at odds with property rights; (2) a local municipal use of the police power; (3) a regulation oriented toward preventing imminent harm to the property of another or criminal behavior; or (4) an injunction of a declared nuisance.<sup>68</sup> Imposition of the state smoking ban on bars features none of these characteristics:

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<sup>66</sup> ODH Merit Brief, p. 16.

<sup>67</sup> ODH Merit Brief, at p. 16.

<sup>68</sup> See *Benjamin*, supra; *Desenco*, supra; *Albrecht*, supra; *Kraus v. Cleveland* (1955), 163 Ohio St.3d 535.

property rights are in dispute, the regulation is not local or municipal in character, there is no threat of imminent harm or criminal behavior, and neither smoking nor smoking in bars has been declared a nuisance.

**D. Unlawful seizure of property is at issue.**

ODH makes that claim that “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. \* \* \* These laws regulate the *use* of property; they are *not* a government seizure of property.”<sup>69</sup> What ODH ignores is that its unwritten enforcement policy and the ban’s application to bars have precipitates not just an incursion on Zeno’s control over its indoor air r, in violation of the principles articulated in *Hageman v. Board of Trustees of Wayne Township*,<sup>70</sup> but also in this action, ODH seeks a monetary charge of over \$30,000, or in the alternative, forfeiture of Zeno’s property: in the record as a trail exhibit is a letter from the Ohio Attorney General to Zeno’s, threatening, as a result of smoking ban regulations, that “a sheriff’s sale of your personal property may be held, and a foreclosure action against any real estate owned by you may be initiated.”<sup>71</sup>

In *Sogg v. Zurz*, this Court held that monetary charges can constitute a taking of property (interest on unclaimed funds); while in *Pizza v. Rezallah*, this Court prohibited certain seizures of property, stating, “the closure provisions also fail for being unduly oppressive against an individual owner. Where an owner is subject to closure of property against all purposes for a year solely on the basis of the illegal acts of a third party over whom the owner has no legal means of control, the closure order is unduly oppressive \* \* \* [and] an improper exercise of police power under Section 19, Article I of the Ohio Constitution when it is imposed and enforced against a property owner who lacks any culpability in the creation or perpetuation of a nuisance on the property.”<sup>72</sup>

Here, Zeno’s faces the type of forfeiture, defined in *Pizza* as “a divestiture of specific property without compensation; it imposes a loss by the taking away of some preexisting valid right without

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<sup>69</sup> ODH Merit Brief, p. 21.

<sup>70</sup> (1970), 20 Ohio App.2d 12, 251 N.E.2d 507, 49 O.O.2d 7.

<sup>71</sup> Zeno’s Trial Exhibit B.

<sup>72</sup> *Pizza*, supra., at 94

compensation,<sup>73</sup> that this Court confronted in *Pizza*: Zeno's has been fined without a finding of culpability, pursuant to ODH's unwritten strict liability policy, and moreover, had the preexisting valid right to permit smoking on its property. By no triggering action of its own, it is now faced with loss of a bar that has been in the family for nearly 30 years, since it cannot pay the fine imposed. This is precisely the type of imposition upon property that this Court has sought to prevent in its past police power and property rights jurisprudence.

**Proposition of Law No. 3: Ohio's declaratory judgment statute enables previously-cited Ohioans to challenge the constitutionality of a statute or rule.**

Finally, ODH contends that Zeno's abstention from engaging in ten costly and futile administrative appeals prohibits it from later challenging the constitutionality of (1) ODH's unwritten enforcement policy; or (2) application of the smoking ban to bars, even as an affirmative defense, once ODH sues to "enforce" the act and seize Zeno's property. Its arguments on this front are without merit.

First, ODH now, quite remarkably, claims that the trial court did not admit exhaustive facts on these claims because *it* may have liked to introduce more evidence. However, ODH was free to introduce any evidence it liked, including any evidence as to Zeno's citations, given that the person who issued all such citations testified for ODH. But even then, such evidence is not central to the issue of ODH's enforcement policy or the application of the ban to bars - - this is not a case re-litigating what happened in those circumstances, but rather a wholesale challenge to the policy that resulted in *all* ODH citations, including those against Zeno's. And awkwardly, ODH admits that it did not have information about Zeno's citations because Zeno's did not appeal: *but this is the entire point of Zeno's separation of powers claim* - - ODH and its designees had the duty to acquire this information *before* imposing \$5,000 fines on Zeno's, rather than upon Zeno's appeal.

Secondly, ODH misses the point in mischaracterizing Zeno's arguments as as-applied to its own citations." This is not Zeno's case: Zeno's is challenging the constitutionality of an unwritten enforcement policy and the ban's inclusion of bars. Whether fines issued under that policy, if found to be unlawful, should

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<sup>73</sup> Black's Law Dictionary (6 Ed.1990) 650.

be abrogated, is only a second-order consideration. Thus, ODH's protests that as-applied challenges are waived if not raised upon administrative review are irrelevant.

Third, ODH ignores this Court's precedent on the expense of administrative remedies. While an administrative remedy was found to not be too expensive in *Whitehall ex rel. Wolfe v. State Civil Rights Commission*, this Court's general principle, since *Karches v. Cincinnati*, still shields Ohio's business owners where the available administrative remedy is unusually expensive. And if that principle does not apply here, then it is a dead letter: ODH asserts that the remedy of its administrative review hearing, which under OAC 3701-52-08(F)(2) are limited to "review" of "*the evidence* forming the basis for the proposed violations," are not futile only because Zeno's could have continued to appeal these *evidentiary* issues, *not central to its claims or defenses*, up through the Court of Appeals. But that proves Zeno's point: ODH has a policy that requires Zeno's and others to sit through futile hearings, and invest thousands, if not tens of thousands of dollars, to prove something that ODH should have considered before imposing the fine.

Finally, ODH grossly misrepresent the transcript in this case when it asserts "nor does the records contend that Zeno's made any effort \* \* \* to "not permit" smoking in the situations triggering the ten violations."<sup>74</sup> The trail transcript is replete with evidence that Zeno's enforced the ban by posting signs, removing all traditional ashtrays, and asking smoking patrons to stop or leave.<sup>75</sup>

### CONCLUSION

Application of the smoking ban to Zeno's property must be declared to exceed the state's police power, and unreasonably extinguish property rights. In the absence of such relief, ODH's enforcement policy of strict liability for Ohio's business owners must still be declared unlawful and enjoined. For the foregoing reasons, the Appellate Court's ruling must be reversed.

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<sup>74</sup> ODH Merit Brief, p. 36.

<sup>75</sup> Tr. 96, 97, 99, 100, 101, 195, 201.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellees

on 9/6 2011.



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