

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE *ex rel.*
RANDY RAYBURN et al

Petitioners,

vs.

ROBERT E. COOPER,
JR., TENNESSEE ATTORNEY GENERAL

Defendant.

Civil Action No. 09-1284-I
CHANCELLOR CLAUDIA C.
BONNYMAN

2009 AUG 17 AM 11:28
DAVIDSON COUNTY, TENN.
CLERK OF COURT

BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Come now the Petitioners, by and through the undersigned counsel, and respectfully file this brief in support of their motion for partial summary judgment seeking a declaratory judgment that Public Chapter 339 is unconstitutional.

INTRODUCTION

The Court has already conducted an extensive review of the facts and legal theories at issue in this case in connection with the hearing on Petitioner's motion for a temporary injunction. Petitioners now move for *partial* summary judgment for a declaratory judgment that Public Chapter 339, the recent amendment to T.C.A. § 39-17-1305, is unconstitutional.

Petitioners advance *three* grounds: unconstitutional vagueness; unconstitutional delegation of police powers and pre-emption by virtue of Tennessee's OSHA "general duty" clause. All three of these grounds have been briefed extensively and the issues are ripe for determination by summary judgment. Petitioners rely on the existing (previously submitted) record, briefs

and filings and additional facts and filings submitted herewith that provide further support for a partial summary judgment and are detailed in this supplemental brief.

ARGUMENT

Vagueness. Count Nine of Petitioners' Amended Complaint asserts Public Chapter 339 is unconstitutionally vague. Petitioners submit that the case for void-for-vagueness is exceptionally strong and warrants a declaratory judgment that T.C.A. § 39-17-1305(c) is unconstitutionally vague.

In addition to the arguments, authorities and filings in the record to date, Plaintiffs have submitted amended affidavits of handgun carry permit holder plaintiffs that detail that they "plan to carry" their "handgun into alcohol serving establishments. However, given the uncertain status of many restaurants, bars, and clubs throughout the state, [they are] at risk for criminal prosecution."

Plaintiffs have further submitted verified *photographic* proof of numerous alcohol serving establishments that, even *after* the new law went into effect have not posted "no firearms" notices in compliance with T.C.A. § 39-17-1359. This proof establishes that although licensed as restaurants for liquor-by-the drink licensing purposes, these establishments that serve alcohol have *not posted* "no firearms" notices (or have defectively posted, e.g. Tootsie's) and that these establishments have been fined in the past for not meeting restaurant/meal requirements. *See Exhibits to Affidavit of Christopher Smith* (evidence relating to: *The Red Door Saloon*, Division Street; *Wildhorse Saloon*, located at 120 2nd Ave N; *Hollywood Disco*, located at 1907 Division St.; *Broadway Brewhouse & Mojo Grill*, located at 1900 Broadway; *The Mercy Lounge*, located at 1 Cannery Row,

Nashville, TN 37203-4170; *Tootsie's Orchid Lounge*, located at 422 Broadway; and *Graham Central Station*, located at 128 2nd Ave N). In all of these cases permit holders face real legal jeopardy if they carry their handgun into these establishments – establishments that have not posted and have been cited in the past as not being “restaurants.” T.C.A. § 39-17-1305(c) is thus unconstitutionally vague.

Petitioners also rely upon two newly filed letters:. First a request for an AG opinion letter dated August 3, 2009 from Tennessee Rep. Gary Odom to the Tennessee Attorney General asking the Tennessee Attorney General for an opinion as to the definition of a “restaurant” under the recent amendment to T.C.A. § 39-17-1305 and its application in a variety of contexts (hotel, a premier-type tourist resort, or a private club) (*Exhibit D to Motion for Partial Summary Judgment*). And then secondly, the response letter to representative Odom from the Tennessee Attorney General dated August 7, 2009 wherein the Attorney General refuses to issue an opinion, citing the pendency of this litigation. (*Exhibit E to Motion for Partial Summary Judgment*). As previously argued in a brief and filing from Petitioner’s attorney Will Cheek, the maze of liquor licenses in Tennessee creates a hopeless state of confusion for permit holders as to where they can carry weapons and where they cannot. A permit holder simply cannot tell whether the alcohol serving establishment they go into with their permitted weapon is in fact and law a “restaurant” with the requisite meal sales, number of tables and meals per week that the law sets forth as the safe harbor for non-criminal carry. The prior Attorney General’s opinion, No. 00-020 (Feb. 15, 2000) makes it clear this type of vagueness is constitutionally infirm.

There is a clear danger and chilling effect associated with this new law because the new law does not de-criminalize handgun carry where alcohol is served, but instead creates a narrow and vague "restaurant carry" exception against a backdrop of laws and regulations which make it impossible for a layman permit holder or police officer to determine lawful versus unlawful handgun carry where alcohol is served.

Also, as previously submitted to this Court, on July 10, 2009 Shelby County Attorney Brian Kuhn issued a legal opinion that Public Chapter 339, now T.C.A. § 39-17-105(c) is unconstitutional on void-for-vagueness grounds. A copy of this opinion is filed in the record herein. A news article from the MEMPHIS COMMERCIAL APPEAL summarizes the opinion:

A Shelby County attorney's opinion released today asserts that the state's guns-in-parks and guns-in-restaurants laws are unconstitutional. County Atty. Brian Kuhn, responding to a request from Mayor A C Wharton, issued the 11-page opinion Friday saying that the laws regarding local governments opting out of the guns-in-parks state legislation and restaurants banning guns in their establishments were too vague and diluted a statewide criminal law containing the prohibitions.

In one part of the county legal opinion, Kuhn said confusion over what constitutes a restaurant and uncertainty regarding parks "makes this enactment arbitrary, unreasonable and unconstitutionally void for vagueness."

"Shelby County Attorney's Opinion: New State Gun Laws Unconstitutional", MEMPHIS COMMERCIAL APPEAL (July 10, 2009) available at: <http://bit.ly/3eResF>.

Unlawful Delegation of Police Powers. The new law (Public Chapter 339) in tandem with the general "no firearms" positing law § T.C.A. § 39-17-1359 effectively leaves it to individual restaurant owners to decide whether to ban firearms from premises where alcohol is served. However, given that it is the

law and public policy (as part of police powers) that the presence of firearms is unlawful where alcohol is present (T.C.A. § 39-1-105(a) the state's police power cannot be constitutionally delegated to individuals. Petitioners accordingly have moved for summary judgment that delegating posting to private restaurants based upon *American Chariot v. City of Memphis*, 164 S.W.3d 600 (Tenn. Ct. App. 2004) is unlawful and unconstitutional.

The July 10, 2009 Shelby County Attorney opinion cited *American Chariot v. City of Memphis*, 164 S.W.3d 600 (Tenn. Ct. App. 2004) in support of an unlawful delegation of police powers challenge. In *American Chariot* horse-drawn carriage operators filed a declaratory judgment action challenging the constitutionality of a section of city ordinance that restricted horse drawn carriage stands to a minimum distance of 100 feet from any restaurant. The ordinance contained a section that allowed individual restaurant owners to waive the minimum standing distance requirement. The Court held this was an unconstitutional delegation of the City's police power.

TOSHA. Petitioners also rely on their prior briefing and filings and the newly submitted affidavit from an employee at a non- posted "restaurant" in Nashville to support Petitioner's challenge to Public Chapter 339 on TOSHA grounds.

CONCLUSION

For the foregoing reasons Petitioners ask the Court to grant a partial summary judgment declaring Public Chapter 339 unconstitutional on vagueness grounds and/or alternatively on the grounds of unlawful delegation of police powers and/or TOSHA preemption.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been hand-delivered on this 17 day of Aug, 2009:

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