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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE *ex rel.*
RANDY RAYBURN;
JOHN (JANE) DOES NOS. 1-13;

Petitioners,

vs.

ROBERT E. COOPER,
JR., TENNESSEE ATTORNEY GENERAL

Defendant.

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

FILED
2009 JUL -6 PM 4:15
CLERK OF COURT
DAVIDSON COUNTY, TENN.

BRIEF IN SUPPORT OF FOR TEMPORARY INJUNCTION AND
DECLARATORY RELIEF ON COUNT IX: VOID FOR VAGUENESS

The Law Is Unconstitutionally Vague

After filing the initial Complaint, Petitioners have filed an Amended Complaint that sets forth a Ninth Count: *unconstitutional vagueness*. The new law permits and limits licensed handgun carry to "restaurants" "where the serving of such meals shall be the principal business conducted." The Tennessee Attorney General has *already* opined that such a principal or primary purpose limitation is unconstitutionally vague as applied to firearms carry by handgun owners. Tenn. Atty. Gen Op. 00-020 (February 15, 2000) (attached as Exhibit A)¹.

¹ "2. It is the opinion of this office that there is no basis for limiting the statute's purview to places where alcohol is the sole or primary product sold. The primary rule of statutory interpretation is to give effect to the plain language of the statute. See *Metropolitan Government of Nashville & Davidson County v. Motel Systems, Inc.*, 525 S.W.2d 840 (Tenn. 1975). Here, the statute is not unclear or contradictory, and its plain language permits no such limitation. Further, such a limitation could create vagueness and open the statute to constitutional challenge.

This defect in the law is fatal to the application or enforcement of the new law on July 14, 2009. The new Ninth Count is as follows:

XI. NINTH COUNT: UNCONSTITUTIONAL VAGUENESS

91. The new law is unconstitutionally vague because the statute's definition of a restaurant, "the serving of such meals shall be the principal business conducted" provides no notice or opportunity to know what establishments are, or are not, covered by the statute.
92. Under the new law criminal penalties (Class A misdemeanor) apply unless the firearm is carried by a permit holder into a "restaurant." Legislative proponents of the bill, including the Speaker of the House, have repeatedly asserted the new law is a "restaurant carry" law and not a "guns in bar bill", stating that the law only applies to restaurants and not bars. See *"Williams Blasts Media for 'Guns in Bars' Portrayal"* available at: <http://bit.ly/yyBWT> "*Guns-in-restaurants bill a vote for safety*", available at: <http://bit.ly/T4LIY>²
93. Senator Doug Jackson also stated on WAMB radio on July 2, 2009 that HCP (hand gun permit) holders should not take their weapons into establishments that do not serve meals as their primary purpose (51%) <http://bit.ly/DFUCn>; <http://www.bobpopegunshows.com/>

Applying the statute to establishments in which alcohol is the predominate product creates vagueness and ambiguity. How would one know whether alcohol is the establishment's sole or primary product so that he or she may temper his or her conduct accordingly? Ordinary people would be unable to understand where certain conduct is prohibited. See *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1858.

In addition, law enforcement would face the same problem. It would be difficult for an officer to distinguish between legal and illegal conduct. This would, in turn, encourage arbitrary and discriminatory enforcement. It is the opinion of this office that the statute survives constitutional muster as it is written, and that the limitation proposed in question 2 might render the statute vulnerable to attack on vagueness grounds." by permitted handgun owners. Tenn. [Atty. Gen. Op. 00-020 \(February 15, 2000\)](#)

² "When this bill takes effect on July 14, law-abiding citizens who undergo a safety course and criminal background check to obtain a handgun carry permit will be allowed to carry in restaurants like Chili's that happen to serve alcohol. . . . Contrary to popular belief, the bill does not allow firearms into bars. The principal business conducted by the establishment must be to serve meals, not to serve alcohol." : <http://bit.ly/T4LIY>

94. On July 14, 2009, however, HCP (handgun permit holders) holders will have no way of knowing whether the establishment they are entering serves meals as its “principal business.” The new law is therefore unconstitutionally vague because it is a Class A misdemeanor for a permit holder to carry a gun into a place that serves alcohol that is not exempted as a restaurant. Permit holders will have no notice or way to determine if an establishment is a restaurant or a bar (whether its primary purpose is serving meals) as there is no distinction by licensing laws law or notice. Compare [Tex. Govt. Code § 411.204](#).³
95. This is a criminal statute and the fear of enforcement in a vague manner is unconstitutional. The law is unconstitutional on its face *and* as it is likely to be applied.
96. As a penal statute it must be strictly construed against the state. The permit holder acts at his or her peril with the mere armed entry into an “alcohol-serving, non-restaurant. The permit holders simply cannot know if it is a restaurant or a non-restaurant and the risk of a sanction is high.
97. The law is vague and unconstitutional in three distinct ways: a) a permit holder’s threat of criminal prosecution; b) a business owner’s loss of business if prospective customers guess wrong, and 3) the public who enter establishments at their unknown peril.

³ [Tex. Govt. Code § 411.204](#). **Notice Required on Certain Premises**

(a) A business that has a permit or license issued under Chapter 25, 28, 32, 69, or 74, Alcoholic Beverage Code, and that derives 51 percent or more of its income from the sale of alcoholic beverages for on-premises consumption as determined by the Texas Alcoholic Beverage Commission under Section 104.06, Alcoholic Beverage Code, shall prominently display at each entrance to the business premises a sign that complies with the requirements of Subsection (c).

(c) The sign required under Subsections (a) and (b) must give notice in both English and Spanish that it is unlawful for a person licensed under this subchapter to carry a handgun on the premises. The sign must appear in contrasting colors with block letters at least one inch in height and must include on its face the number “51” printed in solid red at least five inches in height. The sign shall be displayed in a conspicuous manner clearly visible to the public.

98. Petitioners reiterate that by law in Tennessee in order to serve liquor for on premises consumption (including establishments such as [Tootsies Orchid Lounge](#), [Graham Central Station](#), bars on 2nd Ave, Broadway and Beale Street) they must be licensed as “restaurants” under [T.C.A. 57-4-102 \(27\)\(A\)](#) . The clear (in fact strident) statements by lawmakers that the new law does not permit permitted handgun owners to carry firearms in “bars” (a term undefined under the law or any Tennessee statute or regulation) creates unconstitutional vagueness.
99. The due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 8 of the Tennessee Constitution additionally requires that a statute be sufficiently precise to provide both fair notice to citizens of prohibited activities and minimal guidelines for enforcement to police officers and the courts. Due process of law requires, among other things, notice of what the law prohibits. Laws must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” [Grayned v. City of Rockford](#), 408 U.S. 104, 108, (1972). Criminal statutes “must ‘define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited’” [Davis-Kidd Booksellers, Inc. v. McWherter](#), 866 S.W.2d 520, 532 (Tenn. 1993) (quoting [Kolender v. Lawson](#), 461 U.S. 352, 358 (1983)). A statute is unconstitutionally **vague**, therefore, if it does not serve sufficient notice of what is prohibited, forcing “‘men of common intelligence [to] necessarily guess at its meaning.’” [Davis-Kidd](#), 866 S.W.2d at 532 (quoting [Broadrick v. Oklahoma](#), 413 U.S. 601, 607 (1973)); see also [Leech v. Am. Booksellers Ass’n, Inc.](#), 582 S.W.2d 738, 746 (Tenn. 1979). Here police officers may arrest permit holders who carry in “bars” (according to the legislators who passed and advocated the law) if the police believe the establishment’s principal business is not to serve meals. How is the officer to know? This is unconstitutional vagueness. See Tenn. Atty. Gen. Op. No. 09-69 (May 04, 2009).⁴

⁴ “HB 1120 [prohibiting “loitering” “for a period of time” where minors congregate] if enacted, would be subject to challenge because it would leave the question of whether a violation has occurred to the subjective judgment of the officer on the scene and would thus allow or invite arbitrary conduct by police officers.”

ARGUMENT

The Fourteenth Amendment's guarantee of due process prohibits laws so vague that persons "of common intelligence must necessarily guess at their meaning and differ as to [their] application." [*Smith v. Goguen*, 415 U.S. 566, 572 n.8 \(1914\) \(quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 \(1926\)\)](#). "It is a basic *principle* of due process that an enactment is void-for-vagueness if its prohibitions are not clearly defined." [*Grayned v. City of Rockford*, 408 U.S. 104, 108 \(1972\)](#).

The "restaurant carry" or "guns in bars" law not only prevents Petitioners from effectively excluding guns from their businesses and workplaces, the law provides no way for citizens, business owners or handgun permit holders to differentiate between a "restaurant" and a "bar" and there is no way to know whether a permit holder is lawfully carrying or committing a crime.

On July 14th will permitted handguns be lawful at "bars" such as Tootsies or Losers Bar & Grill? Neither police, permit holders nor the public (including permit holders or persons who wish to avoid guns in bars or restaurants) will have *any way* of knowing where carrying is or is not permitted when it comes to places that serve alcohol because there is no way to know what is a restaurant (primary purpose service of meals) versus a bar. This defect in the law is constitutionally *fatal*⁵.

The law offends due process in two ways. First, it fails to provide the

⁵ The vagueness constitutional defect exists *even if a drinking establishment posts* that firearms are not permitted. Carrying with a handgun carry permit in to a posted business is no longer criminal under the new law (maximum \$500 under separate no firearms posting statute, [T.C.A. § 39-17-1359](#)) fine; whereas carrying with a permit where alcohol is served is criminal (Class A misdemeanor, up to 11 months 29 days in jail and up to \$2,500 fine or both) if the establishment is not a "restaurant".

persons exempted by the statute from criminal prosecution for carrying handguns into places that serve alcohol with a "reasonable opportunity to know what is prohibited, so that [they] may act accordingly." [*Grayned*, 408 U.S. at 108](#); [*Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 \(Tenn. 1993\)](#) (quoting [*Kolender v. Lawson*, 461 U.S. 352, 358 \(1983\)](#)) ("one of the basic tenets of due process jurisprudence is that citizens be afforded fair notice of precisely what conduct is prohibited").

Second, by failing to provide explicit definitions, standards or notice by which to define a restaurant as opposed to bar the law invites arbitrary and discriminatory enforcement. [*See Grayned*, 408 U.S. at 108-09](#) (vague laws "impermissibly delegate basic policy matters ... for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement."); [*Kolender v. Lawson*, 461 U.S. 352, 357 \(1983\)](#); [*Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 \(1972\)](#) (same). "[T]he degree of vagueness that the Constitution tolerates .. , depends in part on the nature of the enactment" [*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 \(1982\)](#). The law imposes criminal penalties if guns are carried into places that serve alcohol that are not restaurants and the legislative history of the Act is clear that the Legislature intended "restaurant carry" but not bars. If the Legislature had intended to allow handgun permit holders to carry firearms in any establishment that served alcohol, wine or beer the exemption would have been simply for permit holders without qualification as to the inherently vague exemption of carrying a firearm only in a "restaurant".

The Constitution demands the greatest clarity from a statute where, as here, "the certainty induced by the statute threatens to inhibit the exercise of

constitutionally protected rights." [*Coluatli v. Franklin*, 439 U.S. 379, 391 \(1979\)](#) (citations omitted); [*see also Baggett v. Bullitt*, 377 U.S. 360, 372 \(1964\)](#) ("the vice of constitutional vagueness is further aggravated" where the statute inhibits the exercise of constitutionally protected freedoms). Even assuming, *arguendo* there is a Second Amendment right to carry permitted handguns in a restaurant, the vague definition of the "restaurant" under the law, coupled with the fact that all bars and restaurants are licensed as "restaurants" for the purpose of liquor by the drink licensing laws, means there is no effective way to avoid criminal prosecution for permit holders who carry firearms to places, such as on Second Avenue and Broadway in Nashville, that have been traditionally viewed as honky-tonks, beer joints or bars. Inevitably this will unconstitutionally cause persons to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked." [*Baggett*, 377 U.S. at 372 \(quoting *Speiser v. Randall*, 357 U.S. 513, 526., \(1958\)\)](#).

In addition, preventing arbitrary and discriminatory enforcement of a law is particularly important where the law relates to a matter as to which there are deep divisions in society, such as, the control of, and right to bear, firearms. That some persons will be politically or philosophically motivated to enforce unclear laws in a capricious fashion is an unfortunate but foreseeable fact. [*Cf Goguen* 415 U.S. at 575](#) (striking down statute forbidding "contemptuous" treatment of flag because "[s]tatutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections").

The meaning of "restaurant" under the law is unclear in several ways, thus rendering it unconstitutionally vague for permit holders and police. Clearly if a drinking establishment has less than 50% of its sales from meals,

possession of a handgun by a permit holder at a place that serves alcoholic beverages for on premises consumption is unlawful. Yet how is the permit holder, or citizens who wish to avoid guns at restaurants that serve alcohol, or police to know? Since the law did not require restaurants to post whether they have > 50% sales from alcohol (51%) as do other states that differentiate between bars and restaurants, *see e.g.* Texas [Tex. Govt. Code § 411.204](#)⁶ and because the law did not change the licensing laws, a permit holder carries at his or her own risk and is subject to arrest and prosecution if a restaurant is serving too much alcohol. Because bars that violate the “primary purpose” meals test are usually fined (and not shut down) the new carry law creates absolute disarray for restaurants, bars and handgun permit holders. As demonstrated, it is unclear what constitutional rights permit holders and business owners would be able to exercise, and what actions would expose the permit holder to criminal penalties. If the permit holder owner guesses wrong (and Tootsies is a bar and not a restaurant for example in some months or at the particular time a permit holder carried a gun into Tootsies) and engages in -conduct prohibited by the law, criminal penalties and potential civil liabilities can result. If the permit holder

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owner guesses wrong the risk of other substantial civil liabilities could arise for the property owner, such as when the unlawful carry by the permit holder causes injury or someone is killed by the use of a firearm which was illegal because the restaurant fell below 50% in meal sales. The law effectively requires the property owner to install metal detectors, screen customers and forbid firearms. Either way, increased risks to permit holders and property owners because of the new law are quite substantial.

The serious nature of these risks and the fundamental nature of the constitutional rights being restricted, dictate that the law must be clear to the public, police and business owners. None of these groups will be able to conduct themselves consistent with the new law, and their countervailing duties.

Plaintiffs John Does 10-13 are Tennessee handgun permit holders who fear actual or the substantial threat of actual prosecution from the law on its face or as applied. In short, due to the vagueness of the “guns in bars law” permit holders and owners of establishments that serve alcohol are faced with a catch-22. For these reasons, the law should be found to be unconstitutionally vague.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon the following via facsimile and postage prepaid U.S. Mail on this ____ day of _____, 2009:

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