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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 7

Downtown Bar and Grill, LLC,
Plaintiff

Vs. Case No. 10 C 822

State of Kansas,
Defendant

Marvin Andrews dba Bingo Palace,
Phoenician Room, Inc. bda HEAT,
Paul Weigand dba Shooters,
Bingo Royale, LLC,
Intervenors.

MOTION TO INTERVENE

Comes now, Marvin Andrews dba Bingo Palace, Phoenician Room, Inc. bda HEAT, Paul Weigand dba Shooters, Bingo Royale, LLC by and through their counsel Robert E. Duncan II attorney and move for leave to intervene pursuant to K.S.A. 60-224 to assert the claims set forth in the attached pleading on grounds that there are sufficient grounds for intervention of right as set forth in K.S.A. 60-224(a) or (b). Plaintiff has indicated to counsel they have no objection.

The statute provides for two forms of intervention. First, a person can intervene of right when (1) a statute confers an unconditional right to intervene, or (2) an applicant claims an interest relating to the property or transaction which is the subject of the action that may be substantially impaired or the disposition of which may substantially impair or impede the applicant's ability to protect the interest and the applicant's interest is not adequately represented by existing parties. K.S.A. 60-224(a). Thus, to intervene of right under K.S.A. 60-224(a), three factors must be present: (1) timely application; (2) substantial interest in the subject matter; and (3) inadequate representation of the applicant-intervenor's interest.

Second, a court may exercise its discretion to grant permissive intervention upon timely application (1) when a statute confers a conditional right to intervene, or (2) an applicant's claim or defense has a question of law or fact in common with the main action. When exercising its discretion, the court shall consider whether intervention will unduly delay or prejudice the adjudication of rights of the original parties. K.S.A. 60-224(b).

(1) Timely application; This application is made before the Court's first conference onthis case, thus no delay is had by its making.

(2) Substantial interest in the subject matter: The Intervenors have similar interests in staying the implementation of the law in question and likewise seek an injunction.

(3) Inadequate representation of the applicant-intervenor's interest: The interests of the Plaintiff are mere those as they relate to the exemption for Class B clubs, 41-K.S.A. The Interests of the Intervenors relate to the exemptions for gaming/drinking establishements vis a vi all other drinking establishments and/or gaming parlors (bingo establishments licensed by the state) vis a vi the state's owned and operated gaming facility. Similar constitutional issues but differing

Provisions of K.S.A. 60-224(a) allowing intervention of right should be liberally construed in favor of intervention. *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 11, 687 P.2d 603 (1984). An order denying an application to intervene is a final, appealable order. *Campbell American Legion v. Wade*, 210 Kan. 537, Syl. ¶¶ 6,7, 502 P.2d 773 (1972).

WHEREFORE, Intervenors pray that be allowed to intervene in order to join in one action all the issues regarding

Robert E. Duncan, II
Attorney for Intervenors

CERTIFICATE OF SERVICE

The undersigned personally served a copy of the foregoing Motion and Brief on the Office of Plaintiff's attorney and at the Office of Attorney General.

R.E. Duncan, II.

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Brief in support of Injunctive Relief

SMOKING IS A LEGAL ACTIVITY.

Intervenors seek injunctive relief against enforcement of HB 2221, Laws 2010 Kansas Legislature, in relation to the prohibition of smoking in privately owned places open to the public, specifically but not exclusively in relation to such places devoted to drinking, dining and recreation, and gaming (bingo). This law become effective on July 1, 2010. Intervenors further seeks a declaratory judgment that HB 2221 is null and void and may not be enforced because it violates the United States Constitution, particukarly inasmuch as it allows without a rationale basis certain gaming establishments to allow smoking and others not; and the law allows certain drinking establishments to allow smoking but others not..

Two of the Intervenors are drinking establishments licensed as under the Kansas Club and Drinking Establishment Act, K.S.A. 41-2601, et seq. Two of the Intervenors operate establishments that provide bingo under the bingo laws of Kansas. All Intervenors currently allow smoking in their establishments. Those in Wichita are governed by a local ordinance and are licensed for such activity.

Intervenors challenge the constitutionality of the HB 2221, enacted by the Kansas Legislature. A copy of the law is attached as Appendix _A__. Appendix _B__ provides a description and outline of the provisions of said enactement.

Intervenors assert that their customers have a constitutional right of association on private property at a place open to the general public. Unquestionably that right exists for private clubs, *Louisiana Debating and Literary Association* v. *The City of New Orleans, et al,* 42 F.3d 1483 (1995). The private clubs were resisting an ordinance prohibiting discrimination in places of public accommodation. The United States District Court for the Eastern District of Louisiana declared the ordinance violated the private clubs' constitutionally protected right of private association and appeal was taken. The Fifth Circuit Court of Appeals affirmed the lower court's grant of summary judgment and held that (I) federal court was not required to abstain, to allow discrimination claim against clubs to proceed as provided under ordinance; (2) clubs were social in nature, as opposed to having a business purpose, and were entitled to fullest protection of their associational rights under First Amendment; and (3) ordinance procedures governing administrative adjudication of claims, although they furthered compelling state interest in eradicating discrimination, were not the least intrusive means to accomplish objective, as they impermissibly infringed upon privacy rights of members. *See id*

In determining whether a particular association is sufficiently private to warrant constitutional protection, as well as the scope of that protection, the Supreme Court has considered several factors, including (1) the organization's size; (2) its purposes; (3) the selectivity in choosing its members; (4) the congeniality among its members; (5) whether others are excluded from critical aspects of the relationship; and (6) other characteristics that in a particular case may be pertinent. *Rotary Club of Duarte,* 487 U.S. 537, 544 (1987). Intervenors in support of Plaintiff contend that based on the factors set out in *Rotary Club of Duarte,* the Kansas' class B clubs, 41 K.S.A., are sufficiently private to warrant constitutional protection. First, the size of the organization is based solely on the number of eligible citizens of age who make application for membership.

The membership is a selective process. An individual is only eligible for membership if he/she follows the statutory prescription of waiting ten(10) days and tendering a minimum fee. Privacy of the United States citizens was foremost among rights protected by our forefathers, which can be noted from the First, Second, Fourth, and Fourteenth Amendments to the United States Constitution and the First, Second and Third Amendments to the Kansas Bill of Rights.

The history of privacy can be fortified by two Nelson Timothy Stephens lectures delivered at

the University of Kansas School of Law, in 1974, by the Honorable William H. Rehnquist, Associate Justice of the U.S. Supreme Court, after the President established a Domestic Council Committee in February 1974 to examine governmental collection, storage, and use of personal data. Counsel has some possible guilt of plagiarizing Mr. Justice Rehnquist as he presents a discussion on rights of privacy .

> *. . . Calling the right to privacy "the most basic of all individual rights, " the President directed the Committee to formulate policy directives, regulations, and legislative reforms so that the twin . duties of enlightened government, and the securing of the public good and private rights, could be assured in these times of unparalleled technological sophistication. ..*
>
> *"Privacy" in today's lexicon is a "good" word; that which increases privacy is considered desirable, and that which decreases it is considered undesirable. It is a "positive" value ...*
>
> *Throughout the long history of political theory and the development of constitutional law in our country, the most difficult cases to decide have been those in which two competing values, each able to marshal respectable claims on its behalf, meet in a contest in which one must prevail over the other. The classical case is probably the recurring paradox of a government that prides itself both on being responsive to the public will and on its concern for individual liberty: the conflict between freedom and order. Unregulated freedom is anarchy, and absolute order is despotism. A free society seeks to achieve a compromise between these two extremes in which substantial amounts of individual liberty may subsist in a society in which public order is preserved.*
>
> *...Privacy is a value that competes with other values. Increased privacy of the individual may mean less effective enforcement of the laws or a less well-informed citizenry. (Komes vs. Cooper. 336 US. 53). Recognizing that claims for increased privacy might produce these results does not by any means suggest that the claims should be rejected, but it does suggest that they should be carefully analyzed not only in terms of the values they would advance, but in terms of the values they would displace.*
>
> *But before any sort of meaningful analysis can be undertaken, we need to know precisely what is meant by the concept of "privacy." The most familiar definition of that terms appears in Justice Brandeis' dissenting opinion in* Olmstead v. United States, *(277 Us. 438, 471) although, interestingly enough, the word "privacy" was not used there. In* Olmstead *Justice Brandeis wrote, "The makers of our Constitution ... conferred, against the Government, the right to be let alone~the most comprehensive of rights and the right most valued by civilized men. "* (277 *Us. 438,* 478). ..

The concept was not new to Justice Brandeis. He hadfirst used the term thirty-eight years earlier in the famous Harvard Law Review article on privacy he co-authored with Samuel D. Warren. (Warren & Brandeis, The Right To Privacy), 4 *Harv. L Rev 193, 195 (1890). As Justice Brandeis acknowledged in that article, however, the phrase "to be let alone" was first coined by Thomas M Cooley in his famous treatise on torts, although Judge Cooley's work employed the phrase to connote bodily integrity. Cooley wrote, "The right to one's person may be said to be a right of complete immunity: to be let alone." (T. Cooley, Law of Torts,* 29 *(2d ed 1888).*

... In his Harvard Law Review *article, Brandeis advocated an enlargement of the notion of "privacy" to include the right to exclude public observers from basically private events ...* , 4 Harv. L Rev 193, (1890)

When Justice Brandeis employed similar language in Olmstead, he was addressing the right of a criminal suspect to be free from government interception of conversations intended to be private, even though the government had made no physical intrusion on his person or premises and did not seek to publicize generally the content of conversations. The Olmstead decision involved what I would somewhat loosely refer to as the "core area" of privacy: the restraint on governmental action embodied in the fourth amendment to the Constitution. The familiar language of that amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, ... " (emphasis supplied)

... The limitations on this fourth amendment right of privacy bear out the notion that only items for which there is a reasonable expectation of privacy, or at least that the owner or possessor intended to be private, are within the amendment's protection. .. This "core" concept of privacy largely embraces the meaning of the term "privacy" as it has been defined traditionally. Webster defines privacy as "the quality or state ofbeing apartfrom the company or observation of others" and "freedom form unauthorized oversight 'or observation." It seems to me that this dictionary definition of privacy tracks rather closely the notion commonly understood to be embodied in the fourth amendment.

For purposes of clarity and analysis it would be far better to recognize that this second category of "privacy" claims involves a series of relationships thought to be sufficiently intimate that the government is prohibited from substantively regulating them. We may be confident that the courts, including our Court, have not spoken the last word on this subject, to predict the contours of future developments.

William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcment?,* 23 Kan. L. Rev. p.l (1974).

Plaintiffs have and enjoy private promises and grants special beyond privacy granted to the general public. Thus it is clear to the Intervenors that Neither Class B clubs nor Class A Clubs should be subjected to a smoking ban as same violates their constitutional rights of privacyand association.

With respect to the Intervenors' claims and interest in this matter, The Fourteenth Amendment forbids "the government to infringe .. .'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington* v. *Glucksberg, 521* u.S. 702, 721 (1997).

The United States District Court for the District of Connecticut was faced with a similar substantive due process argument in *Giordano, et al* v. *Connecticut Valley Hospital* where long-term residents of state-operated psychiatric facility brought an action against the' facility challenging the planned implementation of a complete ban against smoking and tobacco products. *See* 588 F.Supp.2d 306 (2008). Appellants therein claimed that appellee's complete ban against smoking and use of tobacco products violates their fundamental right to refuse unwanted medical treatment and that the ban is not narrowly tailored to serve a compelling state interest. *See id* at 318.

The *Giordano* appellants cite *Cruzan* v. *Director, Missouri Department of Health* in support of their argument. 497 U.S. 261 (1990). In *Cruzan,* the Supreme Court considered whether petitioners, a female in a persistent vegetative state and her parent-guardians asserted a constitutionally-protected right to refuse life-sustaining treatment. *See id (citing Cruzan,* 497 U.S. at 269). In reviewing their claim of a protected liberty interest in refusing unwanted medical treatment, the Supreme Court traced the history of the concept of bodily integrity and informed consent and concluded that the "logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is to refuse treatment." *See id.* (quoting *Cruzan,* 397 U.S. at 270). The Supreme Court stated that the "principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *See id.* (quoting *Cruzan,* 497 U.S. at 278). However, *Cruzan* made clear that identifying a constitutionally-protected liberty interest does not end the inquiry; rather, "whether [an individual's] constitutional rights have been violated must be determined by balancing [the individual's] liberty interests against the relevant state interests." *See id.* (quoting *Cruzan,* 497 U.S. at 279). In her concurrence in *Cruzan,* Justice O'Connor clarified the underlying rationale of recognizing a protected liberty interest in refusing unwanted medical treatment:

[The liberty interest in refusing medical treatment flows from decisions involving the

> State's invasions into the body .... Because our notions of liberty are inextricably entwined with our ideal of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interest protected by the Due Process Clause .... Our Fourth Amendment jurisprudence has echoed this same concern .... The State's imposition of medical treatment on an unwilling competent adult necessarily involves some form of restrain and intrusion.... Such forced treatment may burden that individual's liberty interest as much as any state coercion.

See id. (quoting *Cruzan,* 497 U.S. at 287-88).

The Second Circuit has relied on *Cruzan* in recognizing a protected liberty interest in refusing unwanted medical treatment. *See Green* v. *City of New York,* 465 F.3d 65,8485 (2d Cir. 2006). The Second Circuit further held that such a protected liberty interest "carries with it a concomitant right to such information as a reasonable patient would deem necessary to make an informed decision regarding medical treatment." *Pabon* v. *Wright,* 459 F.3d 241,246 (2d Cir. 2006).

There has been a reluctance to expand the doctrine of substantive due process, in large part because guideposts for responsible decision making in this unchartered area are scarce and open ended. The Court, in *Washington* v. *Glucksberg* noted that its substantive due process analysis consists of two main features: (1) determining whether the fundamental right or liberty interest is deeply rooted in history and tradition; and (2) requiring a careful description of the asserted fundamental liberty interest. *See* 521 U.S. 702, 720-21 (1997).

The point is that the individual has their own right to determine whether or not to smoke. The act of smoking may or may not be a fundamental right, for purposes of our analysis it is immaterial because the individual's right to make a decision as whether or not to smoke is a fundamental right. "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." Ninth Amendment to the U.S. Constitution.

The 9th Amendment means that any Rights that were not specifically mentioned and/or written into the Constitution were still considered to be held by individual people at large. To many this means that even if one of your God-given natural Rights was never mentioned in either the Constitution or the Bill of Rights that you still have that Right, and also that this Right cannot be diminished by contradictory laws and/or regulations. Even if the Constitution or the Bill of Rights does not specifically mention rights which are held by the people, the people still have those rights, and those rights shall not be denied or watered down.

"The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. . . . To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment. . . . Nor do I mean to state that the Ninth Amendment constitutes an independent source of right protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." *Griswold v. Connecticut* 381 U.S. 479 (1965).

Chief Justice Warren and Justice Brennan joined this opinion. Justices Harlan and White concurred id. at 499, 502, without alluding to the Ninth Amendment, but instead basing their conclusions on substantive due process, finding that the state statute "violates basic values implicit in the concept of ordered liberty," (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Id. At 500. It would appear that the source of the fundamental rights to which Justices Douglas and Goldberg referred must be found in a concept of substantive due process, despite the former's express rejection of this ground. Id. at 481–82. Justices Black and Stewart dissented. Justice Black viewed the Ninth Amendment ground as essentially a variation of the due process argument under which Justices claimed the right to void legislation as irrational, unreasonable, or offensive, without finding any violation of an express constitutional provision.

Nonetheless a fundamental right can exist even if it not be specifically denoted in the other Amendments to the U.S.constitution.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer v. Union Free School District,* 395 U.S. 621, 627 (1969); *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969), *Sherbert v. Verner,* 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold v. Connecticut,* 381 U.S. at 485; *Aptheker v. Secretary of State,* 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut,* 310 U.S. 296, 307-308 (1940); *see* [p156] *Eisenstadt v. Baird,* 405 U.S. at 460, 463-464 (WHITE, J., concurring in result).

The enactment of the State Law, dissuades customers of Intervenors and other similar citizens from enjoying the pleasures and benefits of privately owned places that are open to the public, particularly those places where they previously engaged in either social or business discourse while enjoying the right to smoke. Thus, the law will substantially impinged on their and the public's rights to freedom of assembly, freedom of association, and free speech, and further abridged their customary privileges as equal citizens to partake of the public life.

There is neither rational basis nor a compelling state interest to support the unequal and adverse treatment afforded to Casinos and not to Bingo Halls. The unequal and adverse treatment afforded the state operated drinking establishment at the Casino as compared to other drinking establishments violates Intervenors' rights to equal protection under the laws as guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

A review of Kansas' statutes for Bingo and Casinos reveals they are two sides of the same coin, each a gaming operation, licensed and regulated by Kansas law.

Bingo and State Gaming Operations and Statutes, Regulations Until 1974, the Kansas Constitution (Section 3 of Article 15) prohibited all lotteries, of which bingo is one type. Recognizing the existing practice of many churches and other charitable organizations of raising money through the conduct of bingo games, the 1974 Kansas Legislature overwhelmingly passed Senate Concurrent Resolution No. 72 authorizing a vote of the people on the issue of whether to amend the Kansas Constitution to permit bingo for charitable purposes. The people approved the amendment, which reads as follows:

> Section 3a. Notwithstanding the provisions of section 3 of article 15 of the constitution of the state of Kansas the legislature may regulate, license and tax the operation or conduct of games of "bingo," as defined by law, by bona fide nonprofit religious, charitable, fraternal, educational and veterans organizations.

The 1975 Legislature Session passed Senate Bill 116, which defined bingo and adopted restrictions on how, when and where bingo games could be conducted. Regulation of bingo

games and collection of the bingo enforcement tax was delegated to the Director of Taxation, Kansas Department of Revenue.

Since 1975, the Kansas Legislature has fine-tuned the regulation of bingo with amendments passed in 1977, 1980, 1982, 1984, 1989 and 1993. In 1995, the Legislature passed Senate Concurrent Resolution No. 1602 authorizing a vote of the people on the issue of whether to amend Section 3a of Article 15 of the Kansas Constitution to legalize the sale of "instant bingo" or pull tabs by bingo licensees. The people approved the amendment and the Legislature subsequently passed amendments to the bingo statutes defining instant bingo and the related regulatory provisions.

A bingo "premises" is any room, hall, building, enclosure or outdoor area used for the management, operation or conduct of a game of bingo. [K.S.A. 79-4701(u)] A single premises may consist of more than one room, building or area. However, a room, building or area cannot be subdivided into more than one bingo premises with multiple bingo sessions conducted on the same day. [K.S.A. 79-4706(s)]

A bingo premises which charges a fee for leasing space to one or more licensed organizations to conduct bingo games must first apply for and be issued a certificate of registration. [K.S.A. 79-4703(e)]

A Registration Certificate will not be issued if any person who is connected in any way, directly or indirectly, with the owner or lessor of the premises has, within the five (5) years prior to application, been convicted of a felony or illegal gambling activity or purchased a tax stamp for wagering or gambling activity. [K.S.A. 79-4703(g)]

No owner, employee, officer or shareholder of a leased premises shall play any game of bingo on that leased premises. None of these people may assist in the conduct of bingo games on the premises they are involved with. Employees may not play bingo at the premises where they work, even on days when they are not working as employees. [K.S.A. 79-4706(c)]

No game of bingo may be conducted on a leased premises until at least 44 hours has transpired since the last bingo game was completed on that premises or on any other leased premises located within 1000 feet. [K.S.A. 79-4706(t)] Since the statute does not define how the measurement is to be made, the Administrator has interpreted the word "premises" as the building or part of a building or other area where the bingo games are being conducted as

indicated on the premises registration applications and the measurement should be made of the shortest distance between the two leased premises.

Each premises may be used to conduct bingo games up to 3 days in any calendar week. Since each licensee is limited to a maximum of 2 days per week, it would require at least two licensees using the same premises to reach the maximum of 3 days per week. [K.S.A. 79-4706(r)]

This brief review demonstrates that Bingo gaming operations are much akin to the operations of state owned and operated casinos, which are exempted from HB 2221.

K.S.A. 74-8702 was amended to read as follows to provide for state operated casinos.: 74-8702. As used in the Kansas lottery act, unless the context otherwise requires:

(a) ''Ancillary lottery gaming facility operations'' means additional non-lottery facility game products and services not owned and operated by the state which may be included in the overall development associated with the lottery gaming facility. Such operations may include, but are not limited to, restaurants, hotels, motels, museums or entertainment facilities.

(a) *(b)* ''Commission'' means the Kansas lottery commission.

(c) ''Electronic gaming machine'' means any electronic, electromechanical, video or computerized device, contrivance or machine author ized by the Kansas lottery which, upon insertion of cash, tokens, electronic cards or any consideration, is available to play, operate or simulate the play of a game authorized by the Kansas lottery pursuant to the Kansas expanded lottery act, including, but not limited to, bingo, poker, blackjack, keno and slot machines, and which may deliver or entitle the player operating the machine to receive cash, tokens, merchandise or credits that may be redeemed for cash. Electronic gaming machines may use bill validators and may be single-position reel-type, single or multi-game video and single-position multi-game video electronic game, including, but not limited to, poker, blackjack and slot machines. Electronic gaming machines shall be directly linked to a central computer at a location determined by the executive director for purposes of security, monitoring and auditing.

The Kansas Department of Revenue licenses and regulates bingo. The Kansas Lottery Commission would be responsible for ownership, and operational control of all provisions of the Act and would be authorized to enter into contracts with the gaming managers for gaming at the exclusive and nonexclusive gaming zones. The Kansas Racing and Gaming Commission (KRGC) would be responsible for oversight and regulation of lottery gaming facility operations.

Rules and Regulations for state gaming can be found at:

http://www.kslottery.com/ExpandedLotteryAct/Expanded%20Gaming%20Rules--1-18.pdf

They are K.A.R. 111-101-1 through 111-101-18 (Racetrack Gaming Facility Regulations.

The bingo statutes may be found at K.S.A. 79-4701 et seq. and the bingo regulations may be found at K.A.R. 92-23-9 et seq Rules and Regulations for bingo can be found at: http://www.ksrevenue.org/pdf/forms/BingoHandbook-AppendixD.pdf

The enactment and enforcement (or imminent enforcement) of HB2221 improperly abridges the privileges and immunities of citizens of the United States in violation of the Privileges or Immunities Clause of the Fourteenth Amendment to the United States. Among the implicit Fourteenth Amendment privileges that its drafters sought to protect were the customary rights to enter into contracts and to acquire and maintain property free of government interference.

HB 2221 abridges the rights of Intervenors and similar citizens to enter into contracts with owners of private property which is open to the public who of their own volition wish to permit smoking. Such contracts have been made - either explicitly or implicitly - and have long been in effect; and, except for the intrusions of the state and municipal Laws, would have remained in effect to the benefit of all willing parties to the contract. Indeed Intervenors and members of the public have been denied by Kansas the opportunity to exercise their rights to enter into contracts, to freely assemble and freely associate in an unabridged manner when in privately owned places that are open to the public.

HB 2221 improperly impinges on the rights of Intervenors' customers and members of the public and citizens of Kansas to enter into contracts, to freely assemble and freely associate, and abridge their rights and the rights of others to travel in violation of the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution. A predominant consideration in determining whether a State's legislative enactment constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. The decision to smoke is individual and personal.

> Before the ratification of the Fourteenth Amendment, substantive constitutional review resting on a theory of unenumerated rights occurred largely in the state courts applying state constitutions that commonly contained either due process clauses like that of the Fifth Amendment (and later the Fourteenth) or the textual antecedents of such clauses, repeating Magna Carta's guarantee of "the law of the land." [n.5] On the basis of such clauses, or of general principles

> untethered to specific constitutional language, state courts evaluated the constitutionality of a wide range of statutes. WASHINGTON V. GLUCKSBERG, 117 S.CT. 2258, 138 L.ED.2D 772 (1997).

After the ratification of the Fourteenth Amendment, with its guarantee of due process protection against the States, interpretation of the words "liberty" and "property" as used in due process clauses became a sustained enterprise, with the Court generally describing the due process criterion in converse terms of reasonableness or arbitrariness. That standard is fairly traceable to Justice Bradley's dissent in the *Slaughter House Cases,* 16 Wall. 36 (1873), in which he said that a person's right to choose a calling was an element of liberty (as the calling, once chosen, was an aspect of property) and declared that the liberty and property protected by due process are not truly recognized if such rights may be "arbitrarily assailed," *id.,* at 116. http://www.law.cornell.edu/supct/search/display.html?terms=strict%20scrutiny%20ninth%20amendment&url=/supct/html/96-110.ZC2.html - FN6

The theory became serious, however, beginning with Allgeyer v. Louisiana, 165 U.S. 578 (1897), where the Court invalidated a Louisiana statute for excessive interference with Fourteenth Amendment liberty to contract, id., at 588-593, and offered a substantive interpretation of "liberty," that in the aftermath of the so called Lochner Era has been scaled back in some respects, but expanded in others, and never repudiated in principle. The Court said that Fourteenth Amendment liberty includes "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." Id., at 589. "[W]e do not intend to hold that in no such case can the State exercise its police power," the Court added, but "[w]hen and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises." Id., at 590. WASHINGTON V. GLUCKSBERG, 117 S.CT. 2258, 138 L.ED.2D 772 (1997).

Two further opinions took the major steps that lead to the modern law. The first was not even in a due process case but one about equal protection, *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942), where the Court emphasized the "fundamental" nature of individual choice about procreation and so foreshadowed not only the later prominence of procreation as a subject of liberty protection, but the corresponding standard of "strict scrutiny,"

in this Court's Fourteenth Amendment law. See *id.*, at 541. *Skinner*, that is, added decisions regarding procreation to the list of liberties recognized in *Meyer* and *Pierce* and loosely suggested, as a gloss on their standard of arbitrariness, a judicial obligation to scrutinize any impingement on such an important interest with heightened care. In so doing, it suggested a point that Justice Harlan would develop, that the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual. *Poe*, 367 U. S., at 543.

> The second major opinion leading to the modern doctrine was Justice Harlan's *Poe* dissent just cited, the conclusion of which was adopted in *Griswold* v. *Connecticut*, 381 U.S. 478 (1965), and the authority of which was acknowledged in *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833 (1992). See also n. 4, *supra*. The dissent is important for three things that point to our responsibilities today. The first is Justice Harlan's respect for the tradition of substantive due process review itself, and his acknowledgement of the Judiciary's obligation to carry it on. For two centuries American courts, and for much of that time this Court, have thought it necessary to provide some degree of review over the substantive content of legislation under constitutional standards of textual breadth. The obligation was understood before *Dred Scott* and has continued after the repudiation of *Lochner*'s progeny, most notably on the subjects of segregation in public education, *Bolling* v. *Sharpe,* 347 U.S. 497, 500 (1954), interracial marriage, *Loving* v. *Virginia,* 388 U.S. 1, 12 (1967), marital privacy and contraception, *Carey* v. *Population Services Int'l,* 431 U.S. 678, 684-691 (1977), *Griswold* v. *Connecticut, supra,* at 481-486, abortion, *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833, 849, 869-879 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.), *Roe* v. *Wade,* 410 U.S. 113, 152-166 (1973), personal control of medical treatment, *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U.S. 261, 287-289 (1990) (O'Connor, J., concurring); *id.*, at 302 (Brennan, J., dissenting); *id.*, at 331 (Stevens, J., dissenting); see also *id.*, at 278 (majority opinion), and physical confinement, *Foucha* v. *Louisiana,* 504 U.S. 71, 80-83 (1992). This enduring tradition of American constitutional practice is, in Justice Harlan's view, nothing more than what is required by the judicial authority and obligation to construe constitutional text and review legislation for conformity to that text. See *Marbury* v. *Madison,* 1 Cranch 137 (1803). Like many judges who preceded him and many who followed, he found it impossible to construe the text of due process without recognizing substantive, and not merely procedural, limitations. "Were due process merely a procedural safeguard it would fail to reach those situations where the

> deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three." *Poe*, 367 U. S., at 541. [n.7] The text of the Due Process Clause thus imposes nothing less than an obligation to give substantive content to the words "liberty" and "due process of law." WASHINGTON V. GLUCKSBERG, 117 S.CT. 2258, 138 L.ED.2D 772 (1997).

Since we are dealing with issues of personal liberty, the right to make a choice about how to conduct one's business on private proerty as well as the choice of the individual as to what to introduce within their body, the strict scrutiny standard should apply.

This approach calls for a court to assess the relative "weights" or dignities of the contending interests, and to this extent the judicial method is familiar to the common law. Common law method is subject, however, to two important constraints in the hands of a court engaged in substantive due process review. First, such a court is bound to confine the values that it recognizes to those truly deserving constitutional stature, either to those expressed in constitutional text, or those exemplified by "the traditions from which [the Nation] developed," or revealed by contrast with "the traditions from which it broke." *Poe,* 367 U. S., at 542 (Harlan, J., dissenting). " `We may not draw on our merely personal and private notions and disregard the limits . . . derived from considerations that are fused in the whole nature of our judicial process . . .[,] considerations deeply rooted in reason and in the compelling traditions of the legal profession.' " *Id.*, at 544-545 (quoting *Rochin* v. *California,* 342 U.S. 165, 170-171 (1952)); see also *Palko* v. *Connecticut,* 302 U. S., at 325 (looking to " `principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' ") (quoting *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934)).

The U.S. Supreme court has : " repeatedly recognized the constitutionality of reasonable "time, place and manner" regulations which are applied in an evenhanded fashion. *See, e.g., Police Department of Chicago v. Mosley,* **408 U.S. 92, 9**8 (1972); *Grayned v. City of Rockford,* **408 U.S. 104**, 115 (1972); *Cox v. Louisiana, supra,* at 554-555; *Poulos v. New Hampshire,* **345 U.S. 395**, 398 (1953); *Cox v. New Hampshire,* **312 U.S. 569**, 575-576 (1941); *Schneider v. State,* **308 U.S. 147**, 160 (1939). **[p312]** Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)

Police Powers: Kansas Courts have commented on the exercise of its police powers as follows:

"If a statute falls within the exercise of the police power of the State, those subject to that statute must submit to its provisions, whatever the effect may be upon property or business. [Citation omitted.] However, there are limits to the scope and permissible exercise of the State's police power. The court described those limits in *Grigsby v. Mitchum*, 191 Kan. 293, 302, 380 P.2d 363 (1963), cert. denied 375 U.S. 966 (1964), stating:

'Almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, or involve an injury to a person, or deprive a person of property within the meaning of the Fourteenth Amendment to the Constitution of the United States. Nevertheless, it is well settled that 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."

Thus the issue is, is it arbitrary for one type of drinking establishment to be allowed to have smoking on its premises and another not? Is it arbitrary that one type of regulated gaming facility can have smoking and another cannot? Any reasonable person wouild conclude YES to both questions. No matter what the bearing on the general welfare, that in and ofitself cannot overcome the arbitrary nature of the exercise of the states police powers.

It seems to Intervenors that the "least restrictive means," or "less drastic means," test is a standard imposed by the courts when considering the validity of legislation that touches upon constitutional interests, should be applied as well. If the government enacts a law that restricts a fundamental personal liberty, it must employ the least restrictive measures possible to achieve its goal. This test applies even when the government has a legitimate purpose in adopting the particular law. The Least Restrictive Means Test has been applied primarily to the regulation of speech. It can also be applied to other types of regulations, such as legislation affecting interstate commerce. In *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960), the U.S. Supreme Court applied the least restrictive means test to an Arkansas statute that required teachers to file annually an Affidavit listing all the organizations to which they belonged and the

amount of money they had contributed to each organization in the previous five years. B. T. Shelton was one of a group of teachers who refused to file the affidavit and who as a result did not have their teaching contract renewed. Upon reviewing the statute, the Court found that the state had a legitimate interest in investigating the fitness and competence of its teachers, and that the information requested in the affidavit could help the state in that investigation. However, according to the Court, the statute went far beyond its legitimate purpose because it required information that bore no relationship to a teacher's occupational fitness. The Court also found that the information revealed by the affidavits was not kept confidential. The Court struck down the law because its "unlimited and indiscriminate sweep" went well beyond the state's legitimate interest in the qualifications of its teachers.

Even if the state has an interest in regulating smoking, then the approach in Wichita whereby Businesses with appropriate signage may permit smoking: • In any unenclosed, outdoor area which is at least 10 feet from any building entrance; • In a designated smoking room which is permitted and inspected by the City of Wichita and in which people under the age of 18 are prohibited; • At smoker-friendly businesses which are permitted and inspected by the City of Wichita and which do not allow any people under the age of 18 to enter; • In hotel rooms, motel rooms, apartment residences and rental dwellings and subject to certain ventilation requirements is less restrictive and accomplished the goal without walking on the constitutional rights of individuals.. (In fact, Wichita businesses have already paid a fee for 2010 which will now go for naught).

Injunctive Relief: Intervenors understand that there are four elements that a movant must prove to obtain injunctive relief: (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

"The movant has the burden of proof in an injunction action. In order to receive temporary injunctive relief, the movant must show a substantial likelihood of prevailing on the merits; there is a reasonable probability of irreparable future injury to the movant; an action at law will not provide an adequate remedy; the threatened injury to the movant outweighs whatever damage the

proposed injunction may cause the opposing party; and the injunction, if issued, will not be adverse to the public interest." *Steffes v. City of Lawrence*, 284 Kan. 380, 394-95, 160 P.3d 843 (2007).

> In that regard, (1) There is a substantial likelihood that the movant will eventually prevail on the merits as the analysis of law heretofore demonstrates that the fubndamental rights of the Intervenors are being denied by the enactment of HB 2221 and that the exercise of the state's police power is arbitrary. Even the Press noted same: February 28, 2010 , Salina Journal, The (KS) :
> "*The good news is the Kansas Legislature passed a statewide smoking ban and Gov. Mark Parkinson has said he will sign it. The bad news is the bill is laden with outrageous hypocrisy: A special exemption for gambling areas of casinos or dog- or horse-racing tracks with slot machines operated under contract with the Kansas Lottery. With that exemption, lawmakers are saying the smoking ban is good for the public, except where the ban might hurt state revenue...*"

(2) In the Appendix we have attached a series of articles demonstrating that there will be irreparable injury unless the injunction issues;

(3) The proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties (the state) is that as the attachments demonstrate the livelihood of Intervenors is threatened until the instant action is resolved favorably to them. For example, it was reported, consistent with the attachments:

Salina (KS) Journal, 2009-11-08 uthor: DUANE SCHRAG/Salina Journal Summary: But has the ban, which went into effect May 1, hurt Salina's bar business? It may be too early to tell from sales data, but many bar owners and managers are ready to declare that it has. "The customers don't come in like they used to," said Marlene Best, bartender at Ringers Tavern, 433 S. Broadway. "It's not been good." "I've lost a lot of business," said Barbara Walter, owner of the Koyotee Lounge, 501 N. Fifth. "I've had to lay off people."

In Emporia it was reported in December 2009 after that ban became effective: S.C. Dixon of The Noose says his business took a "precipitous" drop, largely because of the business's focus

on live music. He also says local purchases were affected." This Kansas reduction in business is consistent with the Baltimore Md.- area 2005 experience: "The number of bars and restaurants with liquor licenses dropped from 39 in November 2003 to 29 at the end of 2004. Talbot County went smoke-free in April 2004" (Source: Study: Smoking ban hurt bar business - Baltimore Business Journal)

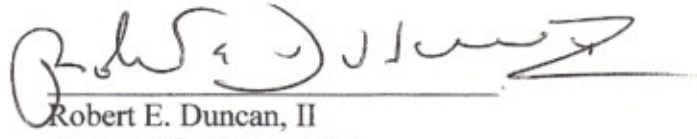
And (4) It is in the public interest to protect their fundamental rights and not allow government to interfere with same.

WHEREFORE, Intervenors for reasons set forth herein and as expanded at the time of hearing, respectfully request:

A judgment declaring that HB2221 is unconstitutional as violative of rights as guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution; and a judgment declaring HB 2221 unconstitutional as violative of rights as guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and a judgment declaring HB 2221 as violative of rights as guaranteed by the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution; and as an excessive use of the state's police powers.

Issue an Order permanently enjoining Defendant STATE OF KANSAS, and its agents, employees and political subdivisions, from enforcing said State Law, and for any further relief as this Court may deem just, proper or necessary.

Respectfully submitted,



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