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V

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 7

DOWNTOWN BAR AND GRILL, LLC,
Plaintiff,

v.

STATE OF KANSAS,
Defendant.

Case No. DC822

BRIEF IN SUPPORT OF APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION

In support of its application for temporary and permanent injunction, Plaintiff submits the following brief of arguments and authorities:

1. Injunctive relief:

In an eminent domain action, the Kansas Supreme Court stated the standard for injunctive relief. *See,* ***National Compressed Steel Corp. v. Unified Gov't of Wyandotte County/Kansas City***, 272 Kan. 1239, 38 P.3d 723 (2002).

> To obtain injunctive relief, the [movant] must show: (1) there is a reasonable probability of irreparable future injury to [movant]; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to [movant] outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. *Id.* at 729 (citing ***Sampel v. Balbernie***, 20 Kan. App. 2d 527, 530-31, 889 P.2d 804 (1985)).

In ***National***, the court states that "injunctive relief is equitable in nature and a substantial showing is required before a court is warranted in ordering a party to do or refrain from doing a certain act." *Id.* at 729 (citing ***Kansas East Conf. Of the United Methodist Church, Inc. v.***

Bethany Med. Ctr., 266 Kan. 366, 382-83, 969 P.2d 859 (1998). The court determined that the showing made by the movant in that case was "sufficient for the district court to consider injunctive relief" and reversed the trial court's denial of the permanent injunction. *Id.* at 730, 734.

2. Equal Protection

Plaintiff contends that the Section violates the Equal Protection Clause of the 14th Amendment, and Section 1 of the Kansas Bill of Rights. Section 2 of the Kansas Bill of Rights may also be implicated, but in ***Farley v. Engelken***, 241 Kan. 663, 740 P.2d. 1058 (1987), the court said "when an equal protection challenge is raised involving individual personal or property rights, not political rights, the proper constitutional section to be considered is Section 1 of the Kansas Bill of Rights. ***Stephens v. Snyder Clinic Ass'n,*** 230 Kan. 115, 128, 631 P.2d 222 (1981)."

In ***Manzanares v. Bell***, 214 Kan. 589, 522 P.2d 1291 (1974), a challenge was made to the constitutionality of the Kansas No-Fault Insurance Act, in part, on equal protection grounds. In the opinion the court said:

> "Traditionally, the test utilized in determining if a legislative enactment violates equal protection principles is whether the classification bears a rational relation to the purpose of the legislation. (***Henry v. Bauder***, (213 Kan. 751, 518 P.2d 362); ***Pinkerton v. Schwiethale***, (208 Kan. 596, 493 P.2d 200); ***State v. Consumers Warehouse Market***, 183 Kan. 502, 329 P.2d 638; ***McDonald v. Board of Election***, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739. The Legislature is presumed to act within its constitutional power despite the fact the application of its laws may result in some inequity. (***McGowan v. Maryland,*** 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393.) The equal protection clause goes no further than to prohibit invidious discrimination. (***Williamson v. Lee Optical***, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563.)" p. 609, 522 P.2d 1291.

In ***Pinkerton v. Schwiethale***, 208 Kan. 596, 493 P.2d 200, the court said

> "[R]easonable classifications of persons are permissible, for it is only invidious discrimination which offends. A classification employed in the exercise of police power cannot be made arbitrarily. Any distinctions inherent in a particular classification must furnish a proper and reasonable basis for such a classification. The concept of equality of all citizens under the law is, of course, basic to our free society. We have stated that classifications may not be created arbitrarily, discriminatorily or unreasonably, or the principle of equality would be violated. There must be some difference in character, condition, or situation, to justify distinction, and this difference must bear a just and proper relation to the proposed classification and regulation; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert."

The large body of law on equal protection requires that statutory classification be at leas rationally relevant to the statutory purpose. *See, e.g.* The United States Supreme Court's decision ***in Hodel v. Indiana***, 452 U.S. 314, 332-33, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981), and ***Federa Communications Commission v. Beach Communications, Inc.***, supra, 508 U.S. 313-14, also support a conclusion that statutory classifications must be related to a statutory purpose. The United States Supreme Court specifically found in those cases that the challenged statutory classifications were rationally related to the underlying purposes of the statutes. See ***Hodel v. Indiana***, supra, 332-33 (statutory provision imposing more stringent restoration requirements for farmland mines than for steep slope mines was rationally related to purpose of preserving productive farmlands); ***Federal Communications Commission v. Beach Communications, Inc.***, supra, 318-20 (statutory provision exempting buildings under common ownership or management from cable regulation was rationally related to purpose of promoting competition).

The vast majority of Kansas decisions on equal protection challenges have upheld the statute in question, generally because the rational basis test is by far the most common, particularly when examining economic legislation, and is the least stringent. But there are important exceptions. In ***Matheny v. City of Hutchinnson***, 154 Kan. 682, 121 P.2d. 227 (1942), an arbitrary classification for licensing vending machines was voided because it was based upon the number of machines owned; no rational basis (in an economic case). In ***Harris v. Shanahan***, 192 Kan. 629, 390 P.2d. 772 (1964), in a reverse discussion of equal protection, the court interpreted a statute to prevent a result in which some voters might end up being able to cast votes for more than one representative (non-economic). In the important cases of ***Henry v. Bauder***, 213 Kan. 751, 518 P.2d. 362 (1974) and ***Farley v. Engelken***, 241 Kan. 663, 740 P.2d. 1058 (1987), the court invalidated the guest statute (***Bauder***) and the abrogation of the collateral source rule (***Engelken***) on equal protection grounds. Neither was economic legislation. Some heightened level of scrutiny was applied in ***Engelken***, but the rational basis test controlled ***Bauder***. While Plaintiff is not a member of a "quasi-suspect" class, neither were the affected parties in ***Engelken***, but the court went beyond rational basis anyway to "avoid a toothless remedy."

It is abundantly clear from the legislative history of HB 2221 (which was stripped of its original language and the entirety of SB 25 substituted) that health concerns motivated the legislature to adopt the general statewide smoking ban. This intent is not challenged and is not at issue in this action. However, with respect to the Section, there is no legislative history at all. The Section was inserted into the bill during Committee of the Whole debate on the Senate floor. No minutes, testimony and exhibits are kept for such debates. Legislative intent can only be inferred.

That HB 2221 Section 3(d)(8) and (9) (referred to as the Section, infra) create two distinct classes of class A and B clubs cannot be disputed. It is recognized that legislatures have broad powers to create classifications, but not upon a basis wholly unrelated to the objective of the statute. Simply put, there is no rational basis connected to the general statewide smoking ban that supports allowing some clubs to continue to permit smoking, and prohibiting identically licensed clubs from doing so. The "grandfathering" the Section creates as an equal protection issue is discussed below.

This memorandum concerns two issues. First: Whether the statewide smoking ban, passed by the Kansas Legislature, violates the equal protection clause by grandfathering private clubs licensed on January 1, 2009. Second: If indeed this legislation is unconstitutional, would Kansas courts invalidate the legislation altogether or merely sever the unconstitutional grandfathering clause.

3. Grandfathering Issue

The main case on the issue of grandfathering is ***City of New Orleans v. Dukes***, 427 U.S. 297 (1976) (per curiam), in which the Supreme Court upheld an amended New Orleans ordinance that prohibited pushcart vendors from selling food in the French Quarter unless they had been in operation for at least eight years prior to January 1, 1972.

The Court rejected plaintiffs' equal protection challenges. Although only two pushcart vendors had operated in the French Quarter long enough to be subject to the grandfather clause, Id. at 300, the court affirmed its longstanding belief that it "consistently defers to legislative determinations as to the desirability of particularly statutory discriminations." Id. at 300, 303 (citing ***Lehnhausen v. Lake Shore Auto Parts Co.***, 410 U.S. 356 (1973)).

"Unless a classification trammels fundamental personal rights," continued the Court, "or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume

the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *Id.* at 303. Additionally, the Court observed that states are afforded wide latitude in economic regulations under their police powers, that legislatures may implement programs incrementally to partially ameliorate harms, and that the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations in areas "that neither affect fundamental rights nor proceed along suspect lines." *Id.*

Ultimately, the Court gave rational-basis review to the New Orleans ordinance, and upheld the ordinance in the city's favor. *Id.* at 304-06.

Nonetheless, at least one case has criticized ***Dukes***, and several have distinguished it. According to a Shepard's search, ***Dukes*** has been questioned once, distinguished by 11 courts, and cited about 2,500 times. Most of the cases distinguishing ***Dukes*** come from federal district courts, with only one circuit court coming into play. Further, several of those cases concern First Amendment issues that are not germane to the analysis here.

Delaware River Basin Com. v. Bucks County Water & Sewer Authority, 641 F.2d 1087 (3d Cir. Pa. 1981) is the only circuit case to distinguish ***Dukes***. There, the regulatory commission implemented a system of rates and exemptions for the use of Delaware surface waters. *Id.* at 1089. Pre-1961 water users were grandfathered from the River Basin Commission's charges under a "legal entitlement" provision in the resolution that authorized the rates and exemptions. *Id.* at 1089-90, 1094.

Although ***Delaware River Basin*** ultimately sided in the commission's favor, it distinguished its facts from ***Dukes***. There, the legal entitlement was *permanent* and not merely temporary, whereas in ***Dukes***, the exemption for the pushcart vendors would eventually expire. *Id.* at 1098. Thus,

grandfathered water users received a "permanent immunity." *Id.* at 1099. Rational basis review was not justified in that regard. *Id.*

One critical case provides little analysis in its conclusion. See ***Intercommunity Relations Council v. U.S. Dep't of Health & Human Servs.***, 859 F. Supp. 81, 84 (S.D.N.Y. 1994) (pertaining to retroactive zoning issues and claiming that ***Dukes*** had appeared to have been overruled by other cases—to the extent that equal protection is violated when harmful disparities in state treatment have no legitimate basis—and that issue was "in any event unnecessary to the decision" there).

In furtherance of that equal protection argument, ***Intercommunity Relations*** distinguished dictum in ***Dukes*** as superceded by two subsequent Supreme Court cases that essentially reinstated the rule of law in ***Morey v. Doud***, 354 U.S. 457 (1957). *Id.* Those cases are ***Metropolitan Life Ins. Co. v. Ward***, 470 U.S. 869 (1985), and ***Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County***, 488 U.S. 336 (1989). The footnote to this argument explained, "Duke [sic] upheld the permissibility of grandfather protection for local land uses extant prior to a regulatory action, not only be obviously reasonable but in many circumstances constitutionally required absent compensation." *Id.* at fn. 2.

In ***Brown v. Hovatter***, 516 F. Supp. 2d, 547, 559 (D. Md. 2007), essentially makes the same argument in ***Delaware River Basin***, in that the pushcart licenses in ***Dukes*** were "personal to the existing vendors and consequently limited in duration." ***Brown*** also compared ***Dukes*** to ***Helton v. Hunt***, 330 F.3d 242, 246-47 (4th Cir. 2003), in which the Fourth Circuit held North Carolina could ban operation of video poker machines brought into the state after June 30, 2000, but not video poker machines before that date because the exemption would not be *permanent* because grandfathered poker machines would break down over time. *Id.* at 559.

Thus, as ***Brown and Delaware River Basin*** demonstrate, because the grandfathering exceptions to the smoking ban are permanent, the court should find the ban in violation of the equal protection clause.

4. Kansas Cases

There are a few decisions in Kansas courts on point. The most articulate case cites ***City of New Orleans*** in its treatise of Supreme Court jurisprudence concerning economic and social welfare legislation after 1937. See ***Blue v. McBride***, 252 Kan. 894, 909 (Kan. 1993).

Blue ultimately concluded that a statewide regulation on distribution and sales of automobiles was not an equal protection violation because, "there is no showing of invidious discrimination herein. There are no suspect classifications shown herein involving race, religion, gender, etc. This is purely an economic regulation . . . Under such circumstances, the constitutionality thereof is presumed and must be upheld where, as here, the legislative classifications are rationally related to a state interest." ***Blue***, 252 Kan. at 920.

The Kansas Supreme Court also rejected an equal protection challenge, based both on the national and Kansas constitutions, on the basis that a state tax exemption for industrial-use facilities that began prior to April 1, 1981. See ***State ex rel. Tomasic v. Kansas City***, 230 Kan. 404 (Kan. 1981). The ***Tomasic*** court viewed the tax exemption as "curative amendments" and determined the favorable tax treatment would promote development of new industries within Kansas and retention of old industries, thus bearing a rational relationship to the purpose of the act. ***Tomasic***, 230 Kan. at 427. Hence, no equal protection violation occurred. *Id.* at 428.

5. Severance

Statutes are of course presumed to be constitutional, but if only a portion is not, in some cases the remainder my continue to be upheld, a doctrine called severance. By severing the unconstitutional provision from the statute, the rest may be saved. Regarding severance, Kansas courts use the test established in ***Thompson v. K.F.B. Ins. Co.***, 252 Kan. 1010, 1023, 850 P.2d 773 (1993). The test, cited in ***State ex rel. Tomasic v. Unified Gov't of Wyandotte County***, 264 Kan. 293, 317 (Kan. 1998) [note: this is a different ***Tomasic*** case from the one cited above] states:

> "Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that the act would have been passed without the objectionable portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand. Whether the legislature had provided for a severability clause is of no importance. This court will assume severability if the unconstitutional part can be severed without doing violence to legislative intent.'" (Quoting ***Felten Truck Line v. State Board of Tax Appeals***, 183 Kan. 287, 300, 327 P.2d 836 (1958)).

The ***Tomasic*** court also observed the subsection of the statute in question can be severed from the rest of the statute, and that "[w]here parts of a statute or section of a statute can be readily separated, then the part which is constitutional may stand while the unconstitutional part is rejected. *Id.* at 316 (citing ***Voran v. Wright***, 129 Kan. 601, Syl. P6, 284 P. 807 (1930)).

The severance rule, via ***Thompson*** and subsequently in ***Tomasic***, remains good law.

The test confirmed in ***Tomasic*** and established in ***Thompson***, teaches that the statute would be severed in part rather than completely invalidated because the smoking-ban statute probably would have been passed without the private clubs exemption, especially because the overall intent

of the legislature (presumably to protect the public from second-hand smoke) would remain intact and because Kansas courts seem more apt to sever a statute in part than as a whole.

6. Elements of Proof

Little in the way of facts need be developed at this point. Plaintiff is a licensed class B club which is adversely affected by the classification scheme created by the Section. Because it was licensed on May 4, 2009, it will not be permitted to allow smoking if it so chooses, whereas identically licensed class B clubs in existence as of January 1, 2009 are allowed such a choice.

Plaintiff is situated in close proximity to other class B clubs which will be exempt from the Section due to their licensing dates. Plaintiff will also show that it was forced to change to class B club status because of its percentage of food sales, and now cannot enjoy the choice allotted to other class B clubs by the Section. Likewise, identically licensed class B clubs which are also "private clubs" (a newly defined term, which hitherto was usually associated with licensed class A and class B clubs) within the meaning of HB 2221(2)(k) enjoy such a choice, regardless of the date of licensure. No legislative purpose is served by such a distinction. Plaintiff concedes a legitimate state interest in the general statewide smoking ban and does not challenge it. But how is that interest served by permitting an exception for hundreds of licensed clubs? Then, what is the rational basis for treating other class B clubs differently?

Plaintiff is aware that smoking bans across the nation have survived challenges on equal protection grounds. But the Section's classification scheme appears to be unique. Other states have upheld statutes which create temporary exceptions, and classification schemes in which the distinction was between parties, entities or places that were substantially different from one another. But we can find no cases classifying identical parties differently and permanently. Instead of

fostering a phase-out of smoking, the Section merely creates a permanent privilege for some class B clubs but not for others.

b. Probability of future injury. In this case, this element of proof may well the controlling factor, because the application of the Section, being a statutory obligation, has little to do with relative harm to the parties, or even irreparable harm to the Plaintiff. In short, if Defendant is subject to the equal protection clause - which states the obvious - hardship is irrelevant.

A plaintiff need hardly show irreparable harm in equal protection cases. The Plaintiff will introduce evidence of the industry loss of business and customers to identically licensed clubs which permit smoking, showing both an economic loss and a loss of the freedom of choice permitted to other identically licensed clubs. And, because the legislators have seen fit to exempt eight categories of business and places, including the very same class A and class B clubs, it is not positioned to argue any compelling state interest in the club classification system. This is not an economic regulation, but a health and safety one.

c. Action at law. No action for damages can supplant constitutional rights. The only remedy available to Plaintiff is to attempt to prevent the unconstitutional legislation from becoming effective in the first place.

d. Balancing relative harm to the parties.

The harm to Plaintiff here is that which flows from violating the public policy and constitution of the State of Kansas, depriving Plaintiff of its right to equal protection of the law. Defendant cannot articulate any harm that would result from acknowledging treatment of identically licensed clubs.

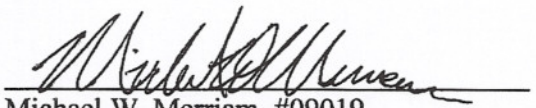
e. Not adverse to the public interest.

Plaintiff concedes the legislature is capable of determining public policy and has a legislative interest in enacting the general statewide smoking ban. But this is not the public interest at issue. It is the public intent in upholding the 14th Amendment and Section 1 of the Kansas Bill of Rights. Doing so cannot by definition be adverse to the public interest because they are seminal law.

7. Conclusion.

The Section is a non-economic regulation that creates *permanent*, not temporary rights for some class A and class B clubs, but not for others. The legislative intent as to the general smoking ban cannot be served by - cannot be rationally related to - depriving certain identically licensed clubs of the same privileges, the same equal protection of the law as that granted to others.

Respectfully submitted,



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