IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 7

DOWNTOWN BAR AND GRILL, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 10-C-822**
	)	
STATE OF KANSAS,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S AND INTERVENORS' APPLICATIONS FOR TEMPORARY INJUNCTIONS AND BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

Defendant State of Kansas, by Assistant Attorney General Tim J. Riemann, provides the following response to plaintiff's and intervenors' applications for temporary injunctions and brief in support of defendant's motion to dismiss:

OVERVIEW AND BRIEF FACTUAL BACKGROUND

Plaintiff and intervenors ask this Court to do what no other court in any jurisdiction in the United States has done, namely, to overturn a statewide smoking ban and find that individuals have a fundamental right to choose to smoke that prevents the State from prohibiting the act of smoking. Plaintiff and intervenors assert that their smoker customers will stop frequenting their places of business if they are required to take a few steps outside the facility before lighting up. Indeed, plaintiff asserts the dubious position that its customers will drive more than 20 miles to clubs in other cities where they can smoke indoors as opposed to frequenting plaintiff's club and taking those few short steps outside when they wish to smoke.

Plaintiff's and intervenors' claims are completely without merit. Their applications for temporary injunctions should be denied, and defendant's motion to dismiss should be granted.

I. THE SMOKING BAN, THE PARTIES AND THE CLAIMS

On July 1, 2010, House Bill 2221, commonly referred to as the statewide smoking ban, will become law. (Ex. A, HB 2221.) Generally, the ban prohibits smoking in public places. The ban also contains several exemptions, three of which are at issue in this case. First, the ban exempts class A and class B clubs, if the clubs were licensed as of January 1, 2009.[1] HB 2221, § 3(d)(8). Second, the ban exempts "private clubs," which are outdoor facilities separately defined in HB 2221. HB 2221, §§ 3(d)(9) and 2(k). Third, the ban exempts state-owned casinos. HB 2221, § 3(d)(4). Only one such casino exists; it is located in Dodge City, Kansas, which is 150 miles from the nearest intervenor. (Ex. B; Ex. C, Martin Affidavit, ¶ 2.)

Plaintiff Downtown Bar & Grill, LLC, is a licensed class B club located in Tonganoxie, Kansas. (Petition, ¶ 1.) Plaintiff acquired its class B license on May 4, 2009. (Petition, ¶ 1.) Prior to May 4, 2009, plaintiff operated its business as a "drinking establishment." Drinking establishments are not exempt from the ban regardless of when the establishment acquired its license. *See* HB 2221. Plaintiff is unable to apply for an exemption from the ban because it acquired its class B club license after January 1, 2009. Plaintiff claims that the January 1, 2009 "grandfathering" date violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and Section 2 of the Kansas Constitution.[2] (Petition, ¶ 5.)

Intervenors are two Wichita-based drinking establishments and two bingo halls. Intervenors seem to argue that, for a variety of reasons, the entire smoking ban is

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[1] Although not at issue in this lawsuit, in order to be exempt from the ban and in addition to the licensure requirement, a club must "notif[y] the secretary of health and environment in writing, not later than 90 days after the effective date of [the ban], that it wishes to continue to allow smoking on its premises." (Ex. A, HB 2221, § 3(d)(8).)

[2] Section 2 of the Kansas Constitution is given the same effect as the equal protection clause of the Fourteenth Amendment to the United States Constitution. *State v. Limon*, 280 Kan. 275, 283 (2005).

unconstitutional. With respect to the equal protection clause, intervenors seem to argue that the drinking establishments' equal protection rights are violated by the ban's exemption for class A and B clubs, and that the bingo halls' equal protection rights are violated by the ban's exemption for the state-owned casino. In addition, intervenors maintain that the ban is unconstitutional in its entirety as it violates rights guaranteed by the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution as well as the Fourteenth Amendment's privileges or immunities clause. Intervenors also argue the ban is an excessive use of the State's police powers. Intervenors maintain that individuals have a fundamental "God-given" right to choose to smoke and, thus, the State cannot prohibit smoking. That smokers have a fundamental right to smoke or that the State cannot prohibit smoking are positions to which plaintiff does not seem to join, defendant denies, and tens of courts in multiple jurisdictions have flatly rejected.

II. KANSAS LAW REGARDING CLUBS AND DRINKING ESTABLISHMENTS

Under Kansas law, a business that wishes to serve alcoholic beverages may organize itself as a class A club, class B club, or drinking establishment.[3] K.S.A. 41-2601. Each business type is separately defined:

> (e) "Class A club" means a premises which is owned or leased by a corporation, partnership, business trust or association and which is operated thereby as a bona fide nonprofit social, fraternal or war veterans' club, as determined by the director, for the exclusive use of the corporate stockholders, partners, trust beneficiaries or associates (hereinafter referred to as members) and their families and guests accompanying them.
>
> (f) "Class B club" means a premises operated for profit by a corporation, partnership or individual, to which members of such club may resort for the consumption of food or alcoholic beverages and for entertainment.
>
> ...

[3] Caterers may also acquire on-premises liquor licenses, but caterers are not at issue in this lawsuit. (Ex. D, Byrne Affidavit, ¶¶ 3, 10.)

(i) "Drinking establishment" means premises which may be open to the general public, where alcoholic liquor by the individual drink is sold.

K.S.A. 41-2601(e); K.S.A. 41-2601(f); K.S.A. 41-2601(i).

LEGAL ANALYSIS

In order to prevail on an application for temporary injunction, a movant must show that: (1) it is substantially likely to eventually prevail on the merits; (2) there is a reasonable probability of irreparable future injury; (3) an action at law will not provide adequate remedy; (4) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the State; and (5) the injunction, if issued, would not be adverse to the public interest. *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 462 (1986); *Steffes v. City of Lawrence*, 284 Kan. 380, 395-96 (2007).

In this case, the Court need go no further than the first element because plaintiff's and intervenors' claims lack merit and defendant's motion to dismiss should be granted. Even if the Court finds that plaintiff and intervenors are substantially likely to succeed on the merits, the Court should deny their applications for temporary injunctions because neither will be irreparably harmed by the smoking ban, granting the injunction would be adverse to the public interest, and the injury to the public health of the people of Kansas that would result if the injunction is granted exceeds any injury plaintiff or intervenors may suffer.

I. NEITHER PLAINTIFF NOR INTERVENORS IS LIKELY TO EVENTUALLY PREVAIL ON THE MERITS BECAUSE THEY HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

It is well settled that "Kansas statutes are presumed constitutional, and all doubts must be resolved in favor of their validity." *In re Weisgerber*, 285 Kan. 98, 102 (2007). "If there is any reasonable way to construe a statute as constitutionally valid, the court must do so. A statute

must clearly violate the constitution before it may be struck down." *Id.* (citing *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, 243 (1992)).

A. Plaintiff's and intervenors' equal protection claims should be evaluated under the rational basis standard because no suspect class is involved and smoking is not a fundamental right.

The right to smoke is not a constitutionally protected fundamental right, and smokers are not a suspect class; thus, rational basis review is appropriate. *See, e.g., Coalition for Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008) (holding that Colorado's smoking ban "does not jeopardize the exercise of any fundamental rights, and in no way categorizes on the basis of inherently suspect characterizations"); *American Legion Post #149 v. Washington State Dep't of Health*, 164 Wash. 2d 570, 600-01 (2008) ("Smoking is not a fundamental right."); *Batte-Holmgren v. Comm'r of Pub. Health*, 281 Conn. 277, 295 (2007) (holding that ban on smoking in restaurants and other public facilities does not implicate a fundamental right); *Deer Park Inn v. Ohio Dep't of Health*, 185 Ohio App. 3d 524, 531 (2009) (holding that bar's challenge to smoking ban did not involve a suspect class and that "[t]he right to smoke is not a fundamental right, nor is the right to allow smoking in a public place of employment on private property"); *Giordano v. Connecticut Valley Hospital*, 588 F. Supp. 2d 306, 315 (D. Conn. 2008) ("Because smoking is not a fundamental right [and] smokers are not a suspect class . . . [the plaintiffs'] equal protection challenge must be assessed under rational basis review."); *Burnette v. Bredesen*, 566 F. Supp. 2d 738, 746 (E.D. Tenn. 2008) (holding that rational basis analysis is appropriate because smoking is not a fundamental right and smokers are not a suspect class); *Adams v. Mosley*, 2008 WL 4369246, * 12 (M.D. Ala. 2008) (unpublished) (holding that rational basis analysis is appropriate "because smoking is obviously not a fundamental right nor is the classification between smokers and non-smokers a suspect one").

As to the rational basis standard of review, plaintiff is correct that one rational basis for the smoking ban is to promote public health and welfare. Plaintiff, however, seems to suggest that the ban's exemptions are invalid because they are not rationally related to promoting public health and welfare. (Plaintiff's Supplemental Brief, p. 5.) Of course, a statute's exemptions rarely accomplish identical aims as the statute itself, and it is settled law that a statute and its exemptions survive constitutional scrutiny so long as both are rationally based, even if the rational bases differ, as they almost always will. *See Brown v. Hovatter*, 561 F.3d 357, 369 (4th Cir. 2009) (finding different rational bases for statute and exemptions and holding that "[t]he rationality of [the statute] is not undermined by exemptions contained in [the statute], so long as the exemptions too are rationally based").

B. The statewide smoking ban does not violate the equal protection clause because its provisions are rationally related to legitimate state interests.

"The rational basis standard is a 'very lenient standard.'" *Weisgerber*, 285 Kan. at 105 (citing *Peden v. Kansas Dep't of Revenue*, 261 Kan. 239, 252 (1996)). According to the Kansas Supreme Court, the rational basis test "is violated only if the statutory classification rests on grounds wholly irrelevant to the achievement of the State's legitimate objective." *Leiker v. Gafford*, 245 Kan. 325, 363-64 (1989). "The state legislature is presumed to have acted within its constitutional power, even if the statute results in some inequality." *Id.* "[A] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.*

To be clear, defendant need not identify the legislature's actual purpose or motivation in passing the statute:

> [N]o evidence of a particular actual legitimate purpose in legislative history or elsewhere is necessary for a legislative enactment to survive rational basis scrutiny. Courts are free to consider whether any *potential* legitimate purpose exists to support the legislative classification. It is entirely irrelevant for

> constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.

Weisgerber, 285 Kan. at 108-09 (italics in original; citations omitted); *In re CIG Field Servs. Co.*, 279 Kan. 857, 879 (2005) (same); *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."); *see, also*, *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) ("[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification."). Thus, "a plaintiff asserting the unconstitutionality of a statute under the rational basis standard has the burden to negative every conceivable basis which might support the classification." *Peden*, 261 Kan. at 253 (emphasis added; citation and alteration omitted).

Keeping in mind that defendant need not identify the legislature's actual purpose in passing the statewide smoking ban, defendant identifies several rational bases justifying the ban and its exemptions: (1) the rational basis for the ban itself is the State's interest in promoting public health and welfare; (2) the January 1, 2009 cutoff date is rationally related to the fact that clubs licensed prior to January 1, 2009, have significantly greater reliance interest in being able to permit smoking than do clubs licensed after January 1, 2009, and the State has a legitimate interest in preventing drinking establishments and former drinking establishments (like plaintiff) from circumventing the ban by reorganizing as class B clubs; (3) the exemption for clubs, generally, is rational because clubs are private, members-only entities whose members may have joined and paid dues with the expectation that they would be able to smoke at the club and because "private clubs," as defined by HB 2221, are outdoor facilities; and (4) the exemption for

the state-owned casino is rational because the State has an economic interest in the casino's continued success.

1. The statewide smoking ban is rationally related to the State's interest in promoting public health.

It is beyond doubt that smoking and breathing secondhand smoke are harmful to public health.[4] It is also beyond doubt, and has long been established, that the State has a legitimate interest in the health of its citizens. *Atchison, T. & S.F. Ry. Co. v. Fronk*, 74 Kan. 519, 87 P. 698, 700 (1906). Plaintiff and intervenors do not seem to dispute this; they simply argue that prohibiting their establishments from allowing smoking while other establishments continue to allow smoking is unconstitutional. Their constitutional concerns are unfounded, as evidenced by the United States Supreme Court's decision in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), because the Constitution does not require the State to ban all smoking at once.

In *Dukes*, the plaintiff challenged an August 31, 1972, New Orleans ordinance that prohibited vendors from selling foodstuffs from pushcarts in the French Quarter unless the vendor had continuously operated its pushcart business in the French Quarter for at least 8 years prior to January 1, 1972. *Id.*, 427 U.S. at 298. As of August 31, 1972, the plaintiff had operated her pushcart business for only 2 years. *Id.* The court acknowledged New Orleans' legitimate

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[4] Numerous courts have recognized the harmful effects of smoking and secondhand smoke. *See, e.g., Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (noting that premature death caused by tobacco use is "one of the most troubling public health problems facing our Nation today"); *State v. Nossaman*, 107 Kan. 715, 193 P. 347, 348 (1920) (holding that the use of cigarettes was harmful and "deleterious in their effects"); *Tillman v. R.J. Reynolds Tobacco Co.*, 871 So.2d 28, 33 (Ala. 2003) ("[T]here is a 'wealth of judicial precedence' recognizing that the dangers of cigarette smoking are well-known" [and] "[t]he dangers of cigarette smoking have been a matter of public knowledge since at the latest January 1, 1966, when the first government-mandated warning labels appeared on cigarette packages."); *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461 (S.D.N.Y. 2004) (recognizing the overwhelming consensus that smoking is deleterious to public health); *Haglund v. Philip Morris Inc.*, 446 Mass. 741, 743 (2006) ("Philip Morris and the plaintiff agree that cigarette smoking is inherently dangerous and that there is no such thing as a safe cigarette."); *Falise v. American Tobacco Co.*, 94 F. Supp. 2d 316, 326 (E.D.N.Y. 2000) ("The dangers of smoking are now beyond dispute."); *Doughty v. Board of County Commissioners for the County of Weld, State of Colorado*, 731 F.Supp. 423, 424 (D. Colo. 1989) ("It is clear that passive smoke exposure to non-smokers presents a wide range of health problems."); *Lapham v. Commonwealth Unemployment Compensation Bd. of Review*, 519 A.2d 1101, 1102 (Pa. Ct. Ap. 1987) ("The evidence of the toxic nature of [smoking] is very strong, not only to the smokers, but also to the nonsmokers who are exposed to 'secondhand' smoke.").

interest in preserving the attractiveness of the French Quarter and recognized that limiting the number of pushcart vendors in the French Quarter was a rational method for achieving the city's legitimate interest. *Id.*, 427 U.S. at 304-05.

The *Dukes* court rejected the plaintiff's argument that the 8-year "grandfather provision" was a "totally arbitrary and irrational method of achieving the city's purpose." *Id.* 427 U.S. at 305. Using language that is highly applicable to the instant case, the *Dukes* court held that:

> rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible.
>
> . . .
>
> "[W]e are guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

Id., 427 U.S. at 305 (emphasis added) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (internal citations omitted)).

The Kansas statewide smoking ban is an economic regulation that limits a business's freedom to operate as it sees fit. The United States Supreme Court dictates that, with respect to economic regulations challenged as violating the equal protection clause, courts should defer to legislatures as to the wisdom of particular statutory discriminations:

> Unless a classification trammels fundamental personal rights 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. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

Id., 427 U.S. at 303.

In this case, the statewide smoking ban is a rational first step in the State's march towards a complete ban on smoking in public places in Kansas. The ban could have gone farther by disallowing all exemptions, but, as the *Dukes* court held, "a statute is not invalid under the Constitution because it might have gone farther than it did." *Id.*, 427 U.S. at 305. Clearly, in passing the ban, the Kansas Legislature did not "strike at all evils at the same time," but the Constitution makes no such requirement of legislatures. Instead, the courts have held that legislatures, such as ours, may use their own judgment and address reform "one step at a time." The Kansas Legislature did exactly that when it passed the statewide smoking ban.

The State has a legitimate interest in protecting the health of its citizens. The statewide smoking ban seeks to minimize the public's exposure to dangerous smoke and secondhand smoke, both of which are widely recognized as deleterious to an individual's health. Because the ban is rationally related to the State's legitimate public health interest, plaintiff and intervenors cannot prevail on the merits of their equal protection claims. Therefore, plaintiff's and intervenors' applications for temporary injunctions should be denied, and defendant's motion to dismiss should be granted.

2. The exemption for clubs that were licensed prior to January 1, 2009, is justified because newly licensed clubs have less reliance interest in being able to permit smoking than do older clubs, and the January 1, 2009 cutoff date prevents drinking establishments from circumventing the ban.

Plaintiff argues that its equal protection rights are violated by the ban's exemption for clubs that were licensed prior to January 1, 2009. Plaintiff's equal protection claim fails because the Kansas Legislature could have legitimately concluded that a newly licensed club had less reliance interest (and, quite possibly, no interest at all) in being able to permit smoking as part of its business, whereas older clubs could have a substantial reliance interest. In addition, the January 1, 2009 cutoff date prevents drinking establishments from circumventing the ban by reorganizing as class B clubs, which is exactly what plaintiff attempted here.

i. RELIANCE INTEREST

The United States Supreme Court has repeatedly recognized that "classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws." *Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992). For example, in *Nordlinger*, a taxpayer challenged California's system for assessing taxes on real property. Under California's system, "[r]eal property [was] assessed at values related to the value of the property at the time it [was] acquired by the taxpayer rather than to the value it [had] in the current real estate market." *Id.*, 505 U.S. at 5. Predictably, the system resulted in dramatic disparities between the taxes paid by individuals owning similar pieces of property because some individuals purchased years ago when property was relatively inexpensive and others purchased later in time after prices had risen. Thus, the later-in-time purchasers' property was assessed at a higher value than their neighbors with similar properties. *Id.*, 505 U.S. at 5-6.

The United States Supreme Court held that California's system did not violate equal protection principles. The *Nordlinger* court had "no difficulty" finding a rational basis for the disparity in assessment values because "the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Id.*, 505 U.S. at 12. Unlike a new owner of property, "an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase." *Id.*, 505 U.S. at 12-13.

The Supreme Court also recognized reliance interests in rejecting an equal protection claim in *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), and *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980). In *Kadrmas*, "the Court determined that a prohibition on user fees for bus service in 'reorganized' school districts, but not in

'nonreorganized' school districts, does not violate the Equal Protection Clause, because 'the legislature could conceivably have believed that such a policy would serve the legitimate purpose of fulfilling the reasonable expectations of those residing in districts with free busing arrangements imposed by reorganization plans.'" *Nordlinger*, 505 U.S. at 13-14 (quoting *Kadrmas*, 487 U.S. at 465).

Similarly, in *Fritz*, "the Court determined that a denial of dual 'windfall' retirement benefits to some railroad workers, but not others, did not violate the Equal Protection Clause, because 'Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits.'" *Nordlinger*, 505 U.S. at 14 (quoting *Fritz*, 449 U.S. at 178).

The *Dukes* case (introduced in the previous section) is illustrative of the Supreme Court's recognition of the value of reliance interest. The *Dukes* court held that New Orleans' prohibition on pushcart vendors who had operated less than 8 years was rationally related to the city's legitimate interest in preserving the attractiveness of the French Quarter. *Dukes*, 427 U.S. at 304-05. The Court held that "[t]he city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the [French Quarter] . . . We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection." *Id.*, 427 U.S. at 305.

Like the City of New Orleans, in the instant case, the Kansas Legislature could have rationally determined that clubs who acquired their license after January 1, 2009, were less likely to have built up substantial reliance interests in continued operation as smoking facilities. *See Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (holding that the court cannot "overturn

a statute [under rational-basis review] on the basis that no empirical evidence supports the assumptions underlying the legislative choice" or "because it may not succeed in bringing about the result it seeks to accomplish"). Indeed, if a grandfathering clause that stretches back 8 years (such as the one in *Dukes*) is constitutionally permissible, then it strains credulity to argue (as plaintiff does) that a grandfathering clause that stretches back 18 months (such as the one in the instant case) is constitutionally impermissible.

Plaintiff attempts to distinguish *Dukes* by arguing that the reliance interests in that case were of a different nature because, according to plaintiff, the exemption for pushcart vendors was temporary whereas the exemption for clubs in the instant case is permanent. Plaintiff's position finds no support in the *Dukes* opinion. Nowhere in *Dukes* does the Supreme Court indicate that a perceived lack of permanency of pushcarts played any role whatsoever in the Court's determination that the city's grandfathering clause was constitutionally permissible. Indeed, one of the grandfathered vendors in *Dukes* was a corporate vendor (Lucky Dogs, Inc.), which presumably will exist in perpetuity. *See Dukes v. City of New Orleans*, 501 F.2d 706, 709 (5th Cir. 1974). Moreover, nothing in the Supreme Court's decision suggests that the grandfathering clause pertained to specific pushcarts as opposed to business entities that may operate more than one cart. Again, the lower court's opinion makes clear that the ordinance at issue restricted vendors as opposed to the pushcarts themselves. *Dukes*, 501 F.2d at 709. Thus, other courts' speculation as to the meaning of *Dukes*, which plaintiff aptly recounts in its brief, is entirely unsupported by the facts of *Dukes* and the Supreme Court's application of those facts to the law. In sum, *Dukes* is good law, and grandfathering clauses, even permanent ones, are constitutionally permissible because such clauses allow legislatures to recognize that established businesses may hold a significant reliance interest in maintaining business as usual.

Plaintiff's attempt to distinguish *Dukes* with *Brown v. Hovatter*, 516 F. Supp. 2d 547, 559 (D. Md. 2007), is misplaced. In *Hovatter*, the plaintiffs argued that a statute, which barred corporate ownership of mortician's licenses and funeral establishments, but exempted corporations that had been grandfathered into the statute in 1945, violated their equal protection rights. The district court suggested that the plaintiffs' equal protection rights had been violated but invalidated the statute on other grounds. The district court specifically warned that the permanent exemptions in the statute call into question whether the exemptions should be evaluated using the rational basis standard. *Id.*, 516 F. Supp. 2d at 559-60. On appeal, however, the Fourth Circuit rejected the district court's permanency concerns and had no trouble finding the statute constitutionally permissible under the rational basis standard. The court validated the grandfather clause and specifically found that "corporations that historically held licenses in the funeral business were allowed to continue to hold licenses because the General Assembly wanted to protect reliance interests of family members." *Brown v. Hovatter*, 561 F.3d 357, 369 (4th Cir. 2009). As in *Hovatter*, the permanency of the club exemption in Kansas poses no threat to its constitutionality.

As described herein, the Kansas Legislature could have legitimately concluded that a newly-licensed club had less reliance interest in being able to permit smoking as part of its business than would older clubs. Thus, a rational basis exists that justifies the January 1, 2009 cutoff date. Because a rational basis exists for the pre-January 1, 2009 club exemption, plaintiff cannot prevail on the merits of its equal protection claim. Therefore, plaintiff's application for a temporary injunction should be denied, and defendant's motion to dismiss should be granted.

ii. CIRCUMVENTING THE SMOKING BAN

In addition to the older clubs' reliance interest in maintaining their current business model, the Kansas Legislature may have chosen the January 1, 2009 date, as opposed to a later

date, to prevent drinking establishments from circumventing the law by reorganizing as class B clubs prior to the date the ban takes effect. As of June 23, 2010, Kansas had 1,814 drinking establishments. (Ex. D, Byrne Affidavit, ¶ 10.) As of July 1, 2010, all drinking establishments will be smoke-free. By contrast, as of the same date, Kansas had only 295 class A clubs and 127 class B clubs, some of which will be able to elect to continue to allow smoking. (Ex. D, Byrne Affidavit, ¶ 10.) The Kansas Legislature may have chosen the January 1, 2009 date to prevent the 1,814 drinking establishments from reorganizing as class B clubs and, thereby, circumventing the smoking ban. Indeed, it seems that plaintiff is attempting to do just that. From May 4, 2007, until May 3, 2009, plaintiff operated as a licensed drinking establishment. (Ex. D, Byrne Affidavit, ¶ 13.) Plaintiff applied for a class B club license on April 28, 2009, and has operated as a class B club since May 4, 2009. (Ex. D, Byrne Affidavit, ¶ 14.) Presumably, plaintiff reorganized in an attempt to circumvent the smoking ban, which was being debated during the spring of 2009 and which will soon prohibit smoking at all drinking establishments.

Preventing drinking establishments from circumventing the spirit of the law is a rational basis for picking the January 1, 2009 date. Because a rational basis exists for the pre-January 1, 2009 club exemption, plaintiff cannot prevail on the merits of its equal protection claim. Therefore, plaintiff's application for a temporary injunction should be denied, and defendant's motion to dismiss should be granted.

3. The exemption for clubs, generally, is justified because clubs are private, members-only entities and "private clubs" are outdoor facilities.

Plaintiff and intervenors argue that the equal protection rights of drinking establishments are violated by the ban's exemption of some class A and class B clubs and "private clubs." Even assuming that drinking establishments are similarly situated to clubs, intervenors' argument fails because clubs are private organizations with membership requirements. Class A clubs include member-only, nonprofit social, fraternal and war veterans' clubs. K.S.A. 41-2634. Class B clubs