IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

219 L.P. d/b/a 219 WEST, PAUL SILVER, DEI GRATIA, INC. d/b/a THE ELYSIUM, JOHN WICKHAM, BOCART, INC. d/b/a HILLS CAFÉ, BOB COLE, PUB DRAUGHT, INC. d/b/a LOVEJOYS TAP ROOM AND BREWERY, JOSEPH (CHIP) TAIT, KEEP AUSTIN FREE PAC **Plaintiffs,**	)	
	)	**CASE NO. _____**
5.	)	
CITY OF AUSTIN Defendant	)	

COMPLAINT FOR DECLARATORY JUDGMENT, TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF

Individual plaintiffs Paul Silver, owner/operator of 219 West; John Wickham, owner/operator of The Elysium; Bob Cole, owner/operator of Hills Café; Joseph (Chip) Tait, owner/operator of Lovejoys Tap Room and Brewery, and corporate and organizational plaintiffs 219 L.P. d/b/a 219 West; Dei Gratia, Inc. d/b/a The Elysium; Bocart, Inc. d/b/a Hills Café; Pub Draught, Inc. d/b/a Lovejoys Tap Room and Brewery; and Keep Austin Free PAC complain against the City of Austin concerning a proposed anti-smoking initiative and would respectfully show and represent unto the Court the following:

I. JURISDICTION AND VENUE

1.1 This is an action for declaratory and injunctive relief that is brought pursuant to the First, Fifth and Fourteenth Amendments of the United States Constitution, **U.S. Const., U.S. CONST. art. VI, cl. 2**, 28 U.S.C. § 2201, **15 U.S.C. § 1331**, federal common law, TEX. CONST. art. I, § 8,

TEX. CONST. art. I, § 10, TEX. CONST. art. I, § 19, TEX. CONST. art. XI, § 5, TEX. CIV. PRAC. REM. CODE § 37.001, TEX. PENAL CODE § 6.01(a), TEX. PENAL CODE § 12.23, TEX. PENAL CODE § 48, TEX. TAX CODE § 154 and state common law.

1.2 The Court has jurisdiction to hear this case under 28 U.S.C. § 1331 and 28 U.S.C. § 1343 because there are federal questions at issue. The Court has supplemental jurisdiction over the state law claims herein pursuant to 28 U.S.C. § 1367 because the state law claims arise out of the same case or controversy and involve a common nucleus of operative facts. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). The factors of judicial economy and convenience and fairness to litigants set forth in *Gibbs* weigh in favor of exercising pendant jurisdiction. *Gibbs*, 383 U.S. at 726.

1.3 Venue is proper under 28 U.S.C. § 1391 (b) because the defendants reside in this judicial district and a substantial part of the events or omissions giving rise to the claims in this lawsuit occurred in this judicial district.

II. PARTIES

2.1 The individual plaintiffs are Paul Silver, in his personal capacity and as owner/operator of 219 West; John Wickham, in his personal capacity and as owner/operator of The Elysium; Bob Cole in his personal capacity and as owner/operator of Hills Café; Joseph (Chip) Tait, in his personal capacity and as owner/operator of Lovejoys Tap Room and Brewery. The corporate plaintiffs are the following for-profit Texas corporations: 219 L.P. d/b/a 219 West; Dei Gratia, Inc. d/b/a The Elysium; Bocart, Inc. d/b/a Hills Café; and Pub Draught, Inc. d/b/a Lovejoys Tap Room and Brewery. The final plaintiff, Keep Austin Free PAC, is a political association which is a special-purpose political committee under state law. The Keep Austin Free PAC consists of bars and

restaurants that hold smoking permits under the existing City of Austin smoking ordinance **(No. 031030-35)**, their owners and operators, and other businesses, business leaders, and community leaders who oppose the proposed initiative. "Plaintiffs" herein refers collectively to both the individual and corporate/organizational plaintiffs.

2.2 The Defendant is the City of Austin. The City of Austin may be served in person or by mail through Austin City Attorney David Smith, 301 W. 2nd St., Austin, Texas 78701.

III. STANDING

3.1 The individual plaintiffs have standing as citizens and voters in the City of Austin, as owners/operators of their respective venues, each of which hold smoking permits under the current City of Austin smoking ordinance, and as customers of both their venues and other venues that hold smoking permits.[1] (*See* Exhibit 4, 219 West Smoking Permit). The current ordinance and these permits would be eliminated by the proposed initiative. The corporate plaintiffs have standing because they own venues that hold smoking permits under the current City of Austin smoking ordinance. Keep Austin Free PAC has standing because it is an association of businesses, including the corporate plaintiffs, that hold said smoking permits and because it opposes, and is spending money to defeat, the proposed initiative. Furthermore, Mr. Silver, Mr. Wickham, and Mr. Cole have additional standing because they served as members of the City of Austin Air Quality Task Force, whose recommendations were largely adopted and are reflected in the existing ordinance that the

[1] Mr. Wickham's standing is further buttressed by the statement in his affidavit that he is a smoker and that he smokes in both The Elysium, the bar that he owns and operates, and in other bars that hold smoking permits issued pursuant to the existing ordinance.

initiative would repeal and replace.

3.2 Under Texas law, standing is established in cases involving a distinct injury to the plaintiff and "a real controversy between the parties, which . . . will be actually determined by the judicial declaration sought." *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 517-18 (Tex. 1995). The United States Supreme Court requires that a plaintiff's complaint establish that he has a personal stake in the alleged dispute and that the injury suffered is "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The controversy between the parties to be adjudicated is whether the initiative at issue complies with U.S. and Texas Constitutions, applicable federal and state laws, and the City of Austin Charter (*See* Exhibit 5 Relevant Portion of City Charter) and, therefore, whether it may legally appear on the May 7 ballot. As customers, and as owner/operators of venues whose smoking permits will be nullified by this initiative, the Plaintiffs have a personal stake in this dispute and will suffer a "concrete and particularized" injury through both economic losses and the incalculable loss of private property rights and individual freedom should this initiative become law.

3.3 Standing also exists because the Austin City Clerk has officially determined that supporters of the initiative at issue have apparently gathered the requisite signatures to qualify the initiative for the ballot and therefore placed the measure on the City Council's March 3 agenda. (*See* Exhibit 6 Austin City Council Agenda for Thursday, March 3 and Exhibit #7 City of Austin Public Information Office News Release dated February 28, 2005 entitled "Anti-smoking petition meets signature requirement for May 7 ballot"). Accordingly, Article IV, Section 5 of the City Charter requires that the City Council either pass the ordinance within ten days or submit it without

amendment to the voters at the next allowable election date, which is May 7, 2005.[2] Therefore, the City Clerk's certification of the signatures has set a process in motion that, without legal intervention, will lead to the initiative either being submitted to the voters or passed into law with no changes in its wording.

3.4 Early voting will begin April 20. Travis County is conducting the election for the City of Austin and Gail Fisher, the elections division manager for Travis County, has advised that March 21, 2005 is the last possible date when the ballot can be changed. Brad Norton, an attorney with the City of Austin, has advised that the law requires that early ballots be sent out no later than the 38th day before the election, which would be March 30, 2005.

IV. FACTS

4.1 *The facts in this case are largely undisputed. Pursuant to Article VI of the Austin City* Charter, Onward Austin has sought to place on the May 7 ballot an initiative (Exhibit 1) captioned as follows: An Ordinance Repealing and Replacing City Code Chapter 10-6 Relating to Smoking in Public Places, Creating Offenses, and Providing Penalties. The **existing smoking ordinance (No.**

[2] The City Charter also requires that all ballot initiatives comply with the Charter. Because Article IV, Section I of the City Charter states, "The people of the city reserve the power of direct legislation by initiative, and in the exercise of such power may propose any ordinance, not in conflict with this Charter, the state constitution, or the state laws except an ordinance appropriating money or authorizing the levy of taxes.," the Plaintiffs maintain that the City Charter at the least must be read to mean that the City Council would not be obligated to place on the ballot or pass into law an initiative that, despite having the requisite signatures, has been determined by a court of law to be unconstitutional or otherwise illegal. Indeed, this language could be construed to mean that the Council is obligated not to place an unconstitutional or otherwise illegal measure on the ballot or attempt to pass it into law.

031030-35) (Exhibit 2) bans smoking in establishments where less than 70% of revenues come from alcohol sales, except for restaurants that obtain a permit indicating that they have an entirely separate smoking section with a separate HVAC system (there are approximately ten such permit holders). The existing ordinance permits smoking in establishments that obtain 70% or more of their revenues from alcohol sales if they obtain a $300 permit and meet other criteria. Approximately 211 venues hold such permits.

As a result of the existing ordinance and state regulations, 99% of Austin workplaces are smoke free. Over 2,000 Austin restaurants are smoke free while only six have obtained the restricted permit that requires a separate HVAC system[3]. Also, there are over 400 bars where smoking is not allowed. The existing ordinance also prohibits smoking in any public places where children under 18 are permitted.

V. INITIATIVE IS UNCONSTITUTIONALLY VAGUE

5.1 The wording of the initiative is so indefinite that it fails the U.S. Supreme Court's test for vagueness because it does not give fair notice as to what conduct is prohibited and lacks explicit standards.

5.2 In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the U.S. Supreme Court explained the importance of ensuring laws are not vague and adopted a two part test for vagueness:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person

[3]The initiative would grandfather these six restaurants for ten years, although it makes no allowance of any kind for bars who have paid for and received smoking permits under the existing ordinance that will extend past September 2005, the date when the initiative would go into effect.

> of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. *Id.* at 108-09.

In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the U.S. Supreme Court held a vagrancy statute was void for vagueness because it did not meet this standard. In *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983), the U.S. Supreme Court explained:

> The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." (citations omitted).

5.3 The initiative at issue is unconstitutionally vague in several respects. First, Section 10-6-2 entitled Smoking Prohibited states, in part, "(E) The owner or operator of a public place commits an offense if the person fails to take necessary steps to prevent or stop another person from smoking in an enclosed area in a public place." The phrase "necessary steps" is never defined in the ordinance and there is no requirement that these "necessary steps" otherwise be legal. As a result, it

is entirely unclear whether simply posting a "no smoking" sign is sufficient or whether a smoker must be forcibly removed from the premises, perhaps forcing the owner or operator to choose between complying with this ordinance and committing an assault. The "necessary steps" standard is, in fact, no standard at all. It is a tautology, because the mere fact that someone on the premises is smoking in violation of the ordinance inescapably leads to the conclusion that the "necessary steps" were not taken by the owner or operator.

5.4 The initiative is also overly vague because it is unclear which substances can and cannot be smoked. Section 10-6-1 entitled Definitions states, in part, that "(8) Smoking means inhaling, exhaling, burning, or carrying any lighted cigar, cigarette, pipe, weed, plant, or other combustible substance in any manner or in any form." In no place does the initiative either limit its scope to tobacco products or define tobacco products. Rather, this laundry list of substances indicates the intent of the initiative is to cover the smoking of many items other than tobacco products. Additionally, the phrase "inhaling, exhaling, burning, or carrying..." indicates that the initiative covers items that are smoked while not being held or carried by a person. The phrase "combustible substance" is overly vague, as there are countless substances that are capable of being lit. Various courts have recognized the following substances as being "combustible substances": grass (*Senn v. Lindsey Mercantile Co.*, 2 La. App. 239 (1925)); wood (***Coukoulis v. Schwartz*, 17 N.E.2d 601, (Ill. App. Ct. 1938))**; **and gasoline and kerosene (*People v. Andrews*, 234 Cal. App. 2d 69 (Cal. App. 3d Dist. 1965)). Thus, the proposed initiative is unconstitutionally vague as to whether restaurants' use of indoor wood burning or barbecue pits would constitute "smoking" in violation of the ordinance. Similarly, restaurants and bars that have candles on the tables or hanging lanterns cannot determine whether they are in violation because of this**

excessive vagueness. Even churches where candles are lit as part of religious ceremonies may face criminal prosecution under this fatally vague initiative. The initiative is also unconstitutionally vague as to whether stores where incense is burnt are subject to prosecution.

5.5 In light of the above authorities and analysis, the initiative at issue clearly lacks the "sufficient definiteness" that the U.S. Supreme Court has required in criminal statutes and must therefore be voided for vagueness.[4]

VI. INITIATIVE VIOLATES DUE PROCESS CLAUSES OF U.S. AND TEXAS CONSTITUTIONS BY CREATING A CRIMINAL OFFENSE FOR WHICH ANY CULPABILITY REQUIREMENT IS EXPRESSLY DISAVOWED

6.1 Section 10-6-11 entitled Violation and Penalty states, in part, "A person who violates the provisions of this chapter commits a Class C misdemeanor, punishable under Section 1-1-99 (*Offenses; General Penalty*) by a fine not to exceed $2,000. A culpable mental state is not required for a violation of this chapter, and need not be proved." As such, this initiative would create a strict liability criminal offense because it expressly dispenses with the traditional mens rea or scienter requirement. In doing so, it would violate the due process guarantees in the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 10 and 19 of the Texas Constitution. It has long been recognized that "[T]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature

[4] *See Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980) (ordinance lacked mens rea element, applied equally to tobacco smoking accessories, and contained vague characteristics purporting but failing to distinguish legal from illegal pipes).

systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). The constitutional importance of the concept of mens rea in ensuring due process is deeply rooted in the Western legal tradition and the American founding.[5]

6.2 "By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, we have avoided construing criminal statutes to impose a rigorous form of strict liability. *See, e. g., United States v. International*

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[5] In *Cordoba-Hincapie*, the court noted:

> On either an historically based or a more fluid view of the content of the due process clause, the mens rea principle must be given constitutional effect. The various doctrines of culpability encompassed by the principle of mens rea are as deeply rooted as any fundamental rules of law still operative today. As already noted, the concept of mens rea can be traced to Plato and, since the Middle Ages, has been an integral part of the fabric of the English common law from which we have drawn our own criminal and constitutional analysis. The legal framework against which the Framers of the United States Constitution operated included a strong commitment to individual blameworthiness as the chief determinant of criminal liability. See Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 401, 423 (1958) ("In the tradition of Anglo-American law, guilt of crime is personal. The main body of the criminal law, from the Constitution on down, makes sense on no other assumption."); *id.* at 434 (It is nonsensical to assume that "the views of Blackstone should be . . . cavalierly overridden in interpreting a Constitution written by men who accepted his pronouncements as something approaching gospel.").
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> *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 515-16 (E.D.N.Y. 1993).

Minerals & Chemical Corp., 402 U.S. 558 (1971) (suggesting that if a person shipping acid mistakenly thought that he was shipping distilled water, he would not violate a statute criminalizing undocumented shipping of acids)." *Staples v. United States*, 511 U.S. 600, 617 (1994). The Supreme Court has further emphasized that "[W]hile strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) (citations omitted).

6.3 The Fifth Circuit has followed the U.S. Supreme Court in disfavoring strict liability for criminal offenses. In *United States v. Delahoussaye*, 573 F.2d 910 (5th Cir. 1978), defendants were convicted of duck hunting in violation of federal regulations promulgated pursuant to the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq. These regulations, 50 C.F.R. § 20.21(i), prohibited the shooting of migratory game birds over a baited field. Reasoning that hunters might innocently violate these regulations by hunting over a field without knowledge that it was baited, the Fifth Circuit held that "a minimum form of scienter – the 'should have known' form – is a necessary element of the offense." *Id.* at 912. Similarly, in *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989)(en banc), defendant was convicted of violating the National Firearms Act, 26 U.S.C. § 5681 et seq. Concluding that this Court's "precedent permitting conviction of certain felonies without proof of mens rea . . . is aberrational in our jurisprudence," the Fifth Circuit reversed his conviction on the ground that the government had failed to prove that he knew that the guns were automatic weapons and hence prohibited by the Act.

6.4 The Texas Court of Criminal Appeals recently noted that Class C misdemeanors "are

still crimes, and the fact is that the person charged can be arrested on warrant like any ordinary criminal, forced to travel a long distance to attend the court, remanded in custody and imprisoned in default of payment of the fine. The choice of the legislative and executive branches of our government to classify all offenses as crimes, and to subject offenders to such procedural consequences, supports the general presumption against strict liability." *Aguirre v. State*, 22 S.W.3d 463, 472 (Tex. Crim. App. 1999)(citation omitted).

6.5 In *Liparota v. United States*, 471 U.S. 419 (1985), the Supreme Court overturned a conviction under a statute banning food stamp fraud, concluding that specific intent must be proven, meaning the defendant must have knowingly violated the law.[6]

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[6] In *Liparota*, the Court explained:

> Second, the Government contends that the § 2024(b)(1) offense is a "public welfare" offense, which the Court defined in *Morissette v. United States*, 342 U.S., at 252-253, to "depend on no mental element but consist only of forbidden acts or omissions." Yet the offense at issue here differs substantially from those "public welfare offenses" we have previously recognized. In most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety. Thus, in *United States v. Freed*, 401 U.S. 601 (1971), we examined

the federal statute making it illegal to receive or possess an unregistered firearm. In holding that the Government did not have to prove that the recipient of unregistered hand grenades knew that they were unregistered, we noted that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.*, at 609. See also *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565 (1971). Similarly, in *United States v. Dotterweich*, 320 U.S. 277, 284 (1943), the Court held that a corporate officer could violate the Food, Drug, and Cosmetic Act when his firm shipped adulterated and misbranded drugs, even "though consciousness of wrongdoing be totally wanting." *See also United States v. Balint*, 258 U.S. 250 (1922). The distinctions between these cases and the instant case are clear. A food stamp can hardly be compared to a hand grenade, *see Freed*, nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in *Dotterweich*.

Liparota, 471 U.S. at 432-33.

6.6 The initiative at issue goes well beyond the narrow instances where strict criminal liability has been upheld, particularly as it applies to owners and operators. First, unlike the public welfare statutes that have been upheld, it does not require even general intent on the part of owners and operators. "Even statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct." *Posters 'N' Things v. United States*, 511 U.S. 513, 522 (1994). The Court noted in *Liparota* that both parties agreed that at least general intent is required such that the accused must know he possesses food stamps. Here, however, while a smoker would ostensibly at least know he is smoking, an owner or operator could be entirely unaware that someone is smoking on his premises, but nonetheless be committing a crime under the initiative, as no state of mind is required and the mere fact that smoking is occurring demonstrates the owner or operator did not take the "necessary steps" to prevent it. This contravenes the test set forth in *United States v. Freed*, 401 U.S. 601, 608 (1971), *Lambert v. California*, 355 U.S. 225, 228 (1957), and *United States v. Engler*, 806 F.2d 425, 435 (3d Cir. 1986), which establishes that subjecting passive conduct to strict liability violates due process. In striking down as violative of due process a law imposing strict criminal liability on convicted felons who fail to register when remaining in Los Angeles for more than five days, the U.S. Supreme Court in *Freed* held that because passive conduct is not "per se blameworthy," due process does not permit it to be subject to strict liability. *Freed*, 401 U.S. at 608. While a person carrying grenades might "hardly be surprised to learn that possession of hand grenades is not an innocent act," an owner or operator of a bar who may not even be on the premises at the time would be surprised to learn that, because someone came on his premises and smoked unbeknownst to him, he will have committed a crime even though he took no affirmative act, and

may have even taken all reasonable steps, but evidently not all "necessary steps," to prevent smoking. Thus, the entire rationale used by courts to uphold strict liability for some public welfare offenses - that a defendant who carries out some affirmative act with a dangerous and illegal product can be presumed to know what he is doing is illegal - collapses when it is applied to such passive conduct as that of owners and operators subject to strict criminal liability under this initiative.

6.7 Remarkably, even if a burglar broke into a bar while no one was there and smoked during the commission of this crime, the owner or operator could nonetheless be guilty of a crime under the initiative. Such an eventuality demonstrates that, by dispensing with any state of mind requirement even for owners and operators who are committing no affirmative act, the initiative extends far behind the narrow breadth of permissible public welfare statutes that do not require specific criminal intent, which themselves are exceptions to traditional criminal law. In *Staples*, the Supreme Court imposed a mens rea requirement on a statute that made it a crime to possess a firearm without a proper permit because the absence of such a requirement would "criminalize a broad range of innocent conduct." As the above example illustrates, this serious constitutional infirmity is even more clearly present in the initiative at issue in this case.

6.8 Second, legal tobacco products are more analogous to food stamps than grenades or illegal adulterated drugs, precisely because tobacco remains a legal product. Indeed, tobacco is not even regulated by the Food and Drug Administration. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Therefore, it cannot be assumed that tobacco users, let alone owners and operators of premises, are automatically on notice that they are violating the law. To the contrary, one provision of the initiative makes it nearly impossible for smokers, who can ordinarily smoke legally when outside, to determine when they are violating this initiative, even if they are

aware of its existence. Section 10-6-2 (D) states, "A person commits an offense if the person smokes within 15 feet from an entrance or openable window of an enclosed area in which smoking is prohibited." It is virtually impossible for pedestrians to determine whether a window to a bar or other enclosed area in which smoking is prohibited is "openable." There are countless types of windows and some windows have been painted over so that they are permanently shut, although they could ostensibly be rendered "openable" again through further remodeling. As a result, many windows that appear "openable" may not be and vice versa. Furthermore, people who live next to or above venues where smoking is prohibited under the initiative may unknowingly be banned from smoking in their own home, or on their porch or deck, if it is within 15 feet of an entrance or "openable window" of such a venue. Because the statute makes venue owners and operators strictly criminally liable for mere passive conduct, tobacco is a legal product, and smokers cannot be expected to monitor all windows on a street to determine which ones are "openable," the presumption of knowledge of lawbreaking that is required to justify the narrow public welfare exception to the general rule against strict criminal liability is inapplicable here.

6.9 The vagueness of the initiative's provisions, as set forth above, is another factor that militates against it being a permissible exception to the general rule that criminal statutes must contain an element of intent. In *United States Gypsum*, the Supreme Court cited the fact that the Sherman Act "does not, in clear and categorical terms, precisely identify the conduct which it proscribes" as one reason for its holding that criminal intent is required to obtain a conviction. *United States Gypsum*, 438 U.S. at 438. Similarly, the vagueness as to "necessary steps" and "combustible substance" discussed earlier, as well as the "openable window" ambiguity, weigh in favor of rejecting this initiative's imposition of strict criminal liability as a violation of due process.

6.10 Clearly, this initiative violates due process by imposing a criminal penalty while expressly dispensing with any culpability requirement. Even if the portion regulating smokers themselves fell within the public welfare law exception that permits strict criminal liability in certain narrowly defined and exceptional circumstances, the portion applying to the passive conduct of bar owners and operators would nonetheless remain unconstitutional.

VII. INITIATIVE VIOLATES CITY CHARTER PROHIBITION ON INITIATIVES CONCERNING APPROPRIATIONS AND TAXES AND CHARTER REQUIREMENT THAT ALL EXPENDITURES BE AUTHORIZED BY THE CITY COUNCIL AS PART OF THE ANNUAL BUDGET PROCESS

7.1 The initiative constitutes an appropriations measure for at least three different reasons and therefore violates Austin City Charter Article IV, Section 1 and Article VII, Section 8.

7.2 The Austin City Charter Article IV entitled Initiative, Referendum, and Recall, §1 Power of Initiative states, "The people of the city reserve the power of direct legislation by initiative, and in the exercise of such power may propose any ordinance, not in conflict with this Charter, the state constitution, or the state laws except an ordinance appropriating money or authorizing the levy of taxes." Additionally, Article VII entitled Finance, § 8 Appropriations, states, "No funds of the city shall be expended nor shall any obligation for the expenditure of money be incurred, except in pursuance of the annual or interim period appropriation ordinance provided by this Charter." This latter provision further reinforces the principle that appropriations must only occur through the Council's budget process. Such provisions are found in many city charters in recognition of the fact that the initiative process is ill-suited for making decisions that affect the budget while a deliberative body, such as the City Council, is better situated to weigh the trade-offs involved in decisions that

affect revenues and outlays. The Alaska Supreme Court recognized:

> The danger with direct legislation relating to appropriations is that it "tempt[s] the voter to [prefer] . . . his immediate financial welfare at the expense of vital government activities. The lure of an immediate grant of land poses the same temptation as an immediate grant of money. Both decisions are the kind that require the reasoned deliberation characteristic of legislative actions.
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> *Pullen v. Ulmer*, 923 P.2d 54, 61 (Alaska 1996) (*citing Thomas v. Bailey*, 595 P.2d 1, 4 (Alaska 1979); Note, Referendum: The Appropriations Exception in Nebraska, 54 NEB. L. REV. 393, 394 (1975).

7.3 It is well established that, in this context, courts should broadly define an appropriations law to fully vindicate the purpose of these charter restrictions on the initiative process. In *Dorsey v. District of Columbia Board of Elections and Ethics*, 648 A.2d 675, 677 (D.C.1994), the D.C. Court of Appeals concluded that the "laws appropriating funds" limitation should be construed "very broadly, holding that it 'extend[s] ... to the full measure of the Council's role in the District's budget process ..'." The court further stated, "The word 'appropriations' when used in connection with the functions of the Mayor and the Council in the District's budget process refers to the discretionary process by which revenues are identified and allocated among competing programs and activities." *(quoting Hessey v. District of Columbia Bd. of Elections & Ethics*, 601 A.2d 3, 20 (D.C. 1991). **In *Dorsey*, the court rejected a proposed initiative because the amnesty and anti-impoundment provisions interfered with the collection of revenues on booted cars and "would intrude upon the discretion of the Council to allocate District government revenues in the budget process." *Id.* at 675. Similarly, in *County Road Ass'n v. Board of State Canvassers*, 282 N.W.2d 774 (1979), the Michigan Supreme Court disqualified a ballot measure that would have repealed measures passed by the Legislature increasing the gas tax and motor vehicle registration tax. The Court ruled that the issuance of such bonds would involve the**

expenditure of money because these revenues are dedicated to the highway fund, reasoning that even though the legislature did not explicitly link or "tie-bar" the taxes to the highway fund, they should be read together because they share a common purpose. *Id.* at 780. The Court noted that "[A]ny bill requiring an appropriation to carry out its purpose shall be considered an appropriation bill." In *City of Richmond v. Allred*, 71 S.W.2d 233 (1934), the Texas Supreme Court upheld the exclusion of an initiative from the ballot that would have issued bonds to pay for the purchase of a water plant, because it determined that the issuance of such bonds would involve the expenditure of money.

7.4 In light of these precedents, there are three separate ways in which the initiative at issue violates both Section 1 of Article IV and Section 8 of Article VIII of the Austin City Charter, each of which clearly disallows initiatives affecting the budget. First, Section 10-6-12 of the Initiative entitled "Public Education" states:

> **(A) The City Manager shall:**
> **(1) obtain or develop a comprehensive tobacco education program to educate the public about the harmful effect of tobacco and its addictive qualities.**
> **(2) conduct informational activities to notify and educate business and the public about this chapter; and**
> **(3) coordinate the City's tobacco education program with other civic or volunteer groups organized to promote smoking prevention and tobacco education.**
> **(B) To implement this section, the city manager may publish and distribute educational materials relating to this chapter to businesses, their employees, and the public.**

The creation, implementation, and administration of this tobacco education program will cost money. Labor will be required by the city manager and her staff to direct this new program, which will either require hiring additional staff or increasing the hours worked by part-time staff, resulting in a higher salary and/or overtime pay. Furthermore, the language of this

provision calls for the publication and distribution of educational materials and other "informational activities" to implement this program. This cannot be accomplished without the use of funds to pay for the printing and dissemination of said materials, and the other "informational activities" that are required by this initiative. Thus, as in *County Road Ass'n*, even if this initiative is not a direct appropriation, the fact that it requires an appropriation for its implementation is enough to render it in violation of the Charter's prohibition of initiatives relating to appropriations.

7.5 Moreover, the Alaska Supreme Court has ruled that, even if only state assets other than money are expended, such as land in *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153 (Alaska 1991) and salmon in *Pullen*, the initiative constitutes an appropriation. Likewise, even aside from the new funds that will be necessary to create and implement the tobacco education program, the reallocation of existing labor, equipment, and supplies for this purpose that will be required is sufficient to bring the initiative within the broad definition of an appropriation. The initiative at issue will also impose substantial enforcement costs on the City, requiring additional resources or the reallocation of existing resources to respond to citizen complaints about smoking which, under Section 10-6-10 of the initiative, are to be reported to the director of the Health and Human Services Department. For all these reasons, the initiative's creation of the tobacco education program clearly violates both Section 1 of Article IV of the City Charter because it requires the appropriation of money and Section 8 of Article VIII of the City Charter because it would incur an "obligation for the expenditure of money" outside of the City Council's budget process.

7.6 The initiative at issue not only entails an appropriation and incurs an obligation

for the expenditure of funds because it creates a new tobacco education program, but also because it eliminates the current permit system that is part of the existing smoking ordinance approved by the Austin City Council. The initiative at issue is entitled "An Ordinance Repealing and Replacing Code Chapter 10-6 Relating to Smoking in Public Places, Creating Offenses, and Providing Penalties." Article 3 of the existing ordinance sets up a permit regime whereby bars which obtain more than 70 percent of their revenues through alcohol sales can apply for a permit to allow smoking if they meet certain criteria. The annual fee for these permits is $300. Currently, 211 bars have obtained said permits, resulting in approximately $63,300.00 in annual revenues to the City. By invalidating these permits and failing to replace them with another source of revenue, the initiative would directly produce a revenue shortfall in this amount for the next annual budget. Furthermore, the initiative at issue states that it will become effective on September 1, 2005. The initiative does not specify how the City is to deal with permit holders whose existing permits expire after this time. Each permit expires exactly twelve months from the date of issuance, meaning that many existing permits and permits that may be issued prior to the effective date of the initiative would likely not expire until many months after September 1, 2005. Because permits are essentially a contractual agreement between the City and the holders to allow for certain activity in exchange for a fee, the City will be legally required to reimburse permit holders on a pro-rated basis for the remaining time on their permit, since smoking would no longer be permissible.[7] If the initiative

[7]The North Carolina Supreme Court has held that holders of local permits relating to land use acquire a vested, constitutionally protected interest in such permits after they have acted in reliance upon them. *Hillsborough v. Smith*, 170 S.E.2d 904, 909-11 (N.C. 1969). The U.S. Court of Appeals for the First Circuit noted that holders of permits issued by the government may have a property interest in their renewal. *See Roy v. Augusta*, 712 F.2d 1517, 1522 (1st Cir. 1983).

at issue passed, the funds lost from permit fees not received going forward and from pro-rated refunds on permit fees would come directly from appropriations to the Austin-Travis County Health and Human Services Department, as permit fees are currently remitted to their Public Health and Community Services Division Environmental and Consumer Health Unit.

7.7 Because of its effect on the existing permit regime, in both subtracting revenues from the next budget cycle and requiring partial reimbursement of permit fees for the remainder of this fiscal year, the initiative at issue entails an appropriation in violation of City Charter Article IV, Initiative, Referendum, and Recall, §1 Power of Initiative and an obligation to expend funds in contravention of Article VII, Finance, § 8 Appropriations.

7.8 Finally, the initiative at issue constitutes an appropriations law and a law expending

funds because of the sales tax revenue the City will lose as a result of the decline in business at bars that are no longer able to permit smoking. In *Restaurant Association of Metropolitan Washington v. D.C. Board of Elections and Ethics*, (2004 WL 2102203), the D.C. Superior Court held that a proposed smoking ban nearly identical to the one at issue here could not be placed on the ballot because it would produce this negative effect on sales tax revenues.[8] The same

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[8] In *Restaurant Association of Metropolitan Washington*, 2004 WL 2102203.,the court explained in its memorandum decision:

> While it may appear that Initiative 66 is neutral on its face, this Court must adhere to the broad interpretation of the "law appropriating funds" limitation stated in *Hessey*, which is that the limitation extends to the full measure of the Council's role in the District's budget process. Therefore, this Court must examine what the ultimate affect Initiative 66 would have on the Council's ability to identify tax revenues, specifically restaurant revenues when preparing the Budget Request Act. *Hessey*, 601 A.2d at 16....This Court concludes that the restaurant tax revenues would be affected since it was undisputed that prospective patrons would more than likely elect to patronize restaurants in Maryland or Virginia, thus causing a negative fiscal impact on restaurant tax revenue assumptions heavily relied on by the Council....The intent of the "law appropriating funds" limitation was to ensure that any matters pertaining to the local budget process would remain within the control of the Mayor and Council, and

analysis applies to the initiative at issue here. Just as the D.C. Superior Court recognized that D.C. smokers would have frequented bars in Maryland and Virginia, Austin smokers who now patronize bars in Austin will instead visit such establishments in Pflugerville, Sunset Valley, Dripping Springs, Manor, Buda, San Marcos, Round Rock, and other surrounding cities. An October 2004 study by University of North Texas Economics Professors Terry Clower and Bernard Weinstein (Exhibit 3) found that, during the first 12 months of the Dallas smoking ban being in effect, Dallas suffered a $11.4 million decline in alcoholic beverage sales while the surrounding cities of Richardson, Addison, Plano, Frisco, Grand Prairie, and Grapevine all showed increases. Adjusting for the difference in population between Austin and Dallas[9] and not accounting for Austin's more vibrant nightlife, based on the 10.7% of the 14% alcoholic beverages tax that is received by both the City of Austin and Travis County, each of these

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the initiatives would not create deficits or interfere with the elected officials' decisions. *Dorsey*, 648 A.2d at 677. For the reasons stated above, Initiative 66 would constitute an improper intrusion upon the discretion of the Mayor and the Council in the District's budget process, because it would have a direct impact on the revenues identified and allocated by the Mayor and the Council as part of the budget process.

[9] According to the 2000 census, Austin had 656,562 people while Dallas had 1,188,580 people. It is believed that the City of Austin's population has increased relative to the City of Dallas since that time.

governmental entities will lose approximately $94,333.07 in annual tax revenues if the initiative is passed.[10]

7.9 For the three reasons stated above, the City of Austin's tax revenue and budget will be negatively impacted, and accordingly, the initiative at issue violates both City Charter Article IV, Initiative, Referendum, and Recall, §1 Power of Initiative and Article VII, Finance, § 8 Appropriations.

VIII. INITIATIVE VIOLATES TEXAS LOCAL GOVERNMENT CODE PROVISIONS CONFERRING SOLE MANAGEMENT AND CONTROL OVER MUNICIPALITY'S FINANCES ON GOVERNING BODY

8.1 Because it relates to appropriations, the initiative violates Texas Local Government Code Sections 101.002 and 101.003, which specify that authority over municipalities' finances rests with their governing bodies.

8.2 Texas Local Government Code Section 101.002 entitled Control of Finances provides, "[T]he governing body of the municipality may manage and control the finances of the municipality." Texas Local Government Code Section 101.003 entitled Appropriations, Payments further states, "The governing body of the municipality may appropriate money and

[10] Significantly, for all three of the above arguments relating to appropriations, the actual amount of the budgetary impact is irrelevant. In *Dorsey*, the court held, "[T]hat these funds [impoundment fees] are only a tiny part of the District's annual revenue projections is beside the point; the electorate may no more eliminate them by initiative than it could abolish or lower the sales tax or local income tax-- matters integral to the "power of the purse" which Congress and the Council reserved exclusively to the elected government ... Because [the proposed] initiative would affect or "relate to" ... the budget process in the broad manner defined by *Hessey*, it constitutes a law appropriating funds...." *Dorsey*, 648 A.2d at 677.

provide for the payment of municipal debts and expenses." Because these statutes confer sole authority over decisions involving money on a municipality's city council or aldermanic body, they imply that voters do not share the same authority to make decisions that impact a municipality's finances through the initiative process. Under Article 11, Section 5 of the Texas Constitution, when in conflict, state laws prevail over local laws. Consequently, because the initiative at issue will cost the City of Austin money in at least the three different ways discussed above, it is in violation of these provisions of the Local Government Code.

IX. INITIATIVE'S RESTRICTIONS ON PROMOTION AND MARKETING OF TOBACCO PRODUCTS PREEMPTED BY FEDERAL LAW COMPREHENSIVELY REGULATING THIS AREA

9.1 The Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C.S. § 1331,

preempts the initiative because it is a comprehensive scheme regulating the marketing and promotion of tobacco products that forecloses additional state and local regulations in this area.

9.2 The Supremacy Clause of the U.S. Constitution, U.S. Const., Art. VI, cl. 2, establishes that, where there is a conflict, federal law takes precedence over state and local law. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the U.S. Supreme Court held that virtually all state regulation concerning the promotion and marketing of tobacco products is preempted by the FCLAA. The Court reversed the district court's ruling that state restrictions on the location of cigarette advertising can be distinguished from restrictions on the content, noting that Congress specifically banned the promotion of tobacco products in the

electronic media while allowing such promotion in all other forums. *Id.* at 538-39.

9.3 The proposed initiative is preempted by the FCLAA for several reasons. First, the initiative in Section 10-6-8(c) requires that "[T]he operator of a public place and an employer shall remove any ashtray or other smoking accessory from a place where smoking is prohibited." Many bars and stores, including plaintiff The Elysium, have promotional agreements with tobacco companies to display branded ashtrays and other branded smoking accessories, as well as signs, posters, and other forms of advertising. Plaintiff John Wickham attests that The Elysium exhibits such paid tobacco advertising, including lights and posters with various cigarette brand names on them and ashtrays on its tables branded with the Camel cigarette logo.

9.4 Branded ashtrays are a form of tobacco advertising displayed at the Elysium and other public places that would be expressly prohibited by this initiative in violation of the U.S. Supreme Court's holding in *Lorillard.* Although the initiative would exempt retail tobacco stores, it defines such stores in Section 10-6-1(8) as stores "used primarily for the sale of tobacco products and accessories and in which the sale of other non-tobacco products is incidental." Consequently, not only bars, but also supermarkets, convenience stores, and department stores would unquestionably be banned from selling and exhibiting in-store advertising displays of tobacco accessories, including but not limited to lighters, key chains, and apparel. Such in-store advertising is allowed under the FCLAA, a statute which, under Court's holding in *Lorillard*, clearly preempts this initiative. In addition to banning in-store advertising displays for such products, by requiring the removal of ashtrays and other smoking accessories from public places where smoking is prohibited, the initiative would apparently even

criminalize the actual sale of cigarette lighters, matches, and ashtrays in supermarkets and convenience stores.[11]

[11]This ambiguity strengthens the Plaintiffs arguments concerning vagueness and strict criminal liability. Indeed, it is entirely unclear whether cigarettes, cigars, and pipes would themselves be considered "smoking accessories" under this initiative. If so, only the small number of establishments that fall within the initiative's narrow definition of a "retail tobacco store" could legally sell cigarettes, cigars, and pipes. Such an interpretation would further bolster Plaintiffs' federal and state preemption claims and, at the least, this additional ambiguity strengthens the Plaintiffs vagueness and strict criminal liability claims.

9.5 Second, federal preemption is triggered not only as a result of this explicit ban on the display of ashtrays and smoking accessories in the initiative, but also by the initiative's broad requirement that owners and operators of public places take all "necessary steps" to prevent and stop smoking. While this provision should be void for vagueness because it is unclear what affirmative steps it requires owners and operators to take in order to prevent and stop smoking, it must at the least be interpreted as requiring owners and operators to refrain from promoting smoking. Accordingly, this provision effectively mandates that bars, supermarkets, convenience stores, and all other public places, except tobacco retail stores, bingo parlors, and the few other exempted public places, remove all cigarette-branded signs, posters, displays, clocks, and other forms of advertising, as such tobacco advertising is precisely designed to promote smoking and, furthermore, might reasonably give patrons the impression that smoking is permitted on the premises.[12] This implicit requirement that all tobacco advertising be removed from public places, and no such new advertising be posted there, directly contravenes Congress' intent as embodied in the FCLAA and the initiative is therefore federally preempted and invalid.

X. INITIATIVE'S RESTRICTIONS ON PROMOTION AND MARKETING OF TOBACCO PRODUCTS VIOLATE FIRST AMENDMENT AND FREE SPEECH GUARANTEE IN TEXAS CONSTITUTION

10.1 The initiative violates the First Amendment of the U.S. Constitution and Article I, Section 8 of the Texas Constitution by expressly banning certain forms of tobacco

[12]The U.S. Surgeon General's reports of 1994 and 1996 concluded that the advertising of tobacco products encourages smoking.

advertising and implicitly banning all such advertising in public places.

10.2 Because the advertising of smokeless tobacco products is not covered by the FCLAA, the Court in *Lorillard* considered whether state restrictions on such advertising violate the First Amendment of the U.S. Constitution under the test for commercial speech regulations set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980). Under the *Central Hudson* four-part test for analyzing regulations of commercial speech, a court must determine (1) whether the expression is protected by the First Amendment, (2) whether the asserted governmental interest is substantial, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest. *Id.* at 566. The Court in *Lorillard* struck down state point-of-sale restrictions on the promotion of smokeless tobacco products, finding that they violate the third and fourth steps of the *Central Hudson* analysis. *Lorillard,* 533 U.S. at 579-584. The restrictions at issue here also fail the *Central Hudson* test, particularly the fourth prong, and therefore violate the First Amendment.

10.3 Article I, Section 8 of the Texas Constitution also guarantees the right of free speech. In *Commission for Lawyer Discipline v. Benton,* 980 S.W.2d 425, 434 (Tex. 1998), the Texas Supreme Court noted that "[T]his Court has recognized that 'in some aspects our free speech provision is broader than the First Amendment.'" In *Ex parte Tucci,* 859 S.W.2d 1, 5 (Tex. 1993), the Texas Supreme Court noted "article one, section eight . . . provides greater rights of free expression than its federal equivalent." Finally, in *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 402 (Tex. 1988), the Texas Supreme Court observed that it "is quite obvious that the Texas Constitution's affirmative grant of free speech is more broadly worded than the

first amendment's proscription of Congress from abridging freedom of speech."

10.4 For the same reasons that the initiative restricts tobacco marketing and promotion and therefore is preempted by the FCLAA, it also violates the free speech guarantee in the U.S. Constitution and its even more robust counterpart in the Texas Constitution.

XI. INITIATIVE'S RESTRICTIONS ON SALE OF TOBACCO PRODUCTS PREEMPTED BY STATE LAW EXCLUSIVELY REGULATING TOBACCO RETAILING

11.1 The initiative is preempted by Chapter 154 of the Texas Tax Code that authorizes the issuance of state tobacco retailer permits and provides that the rules governing said permits in the Tax Code are to the exclusion of all other regulations. Article XI, Section 5 of the Texas Constitution provides that no local ordinance shall contain any provision inconsistent with the state constitution or with the general laws enacted by the legislature. Because the initiative contravenes state law, it violates the Texas Constitution and must be invalidated.

11.2 The Elysium holds a tobacco retailer permit issued by the State of Texas pursuant to Chapter 154 of the Texas Tax Code. Plaintiff John Wickham states in his affidavit that The Elysium sells cigarettes under this permit for which it pays a monthly fee. Many other bars, as well as supermarkets and convenience stores, hold such permits, and all are among the public places to which the initiative applies, because their business does not primarily consist of selling tobacco products.

11.3 Chapter 154.101 provides, in part, "(h) Permits for engaging in business as a distributor, wholesaler, bonded agent, manufacturer, importer, or retailer shall be governed

exclusively by the provisions of this code." This language expressly preempts local regulations relating to the sale of cigarettes by businesses holding state tobacco retailer permits. The initiative explicitly prohibits the presence of "tobacco accessories" at the Elysium and all other non-exempt public places.[13] Furthermore, by requiring that owners and operators of public places take all "necessary steps" to prevent and stop smoking, the initiative implicitly bans the sale of cigarettes, especially in bars like The Elysium where the sale of cigarettes would undoubtedly encourage, rather than discourage, smoking at The Elysium and in other public places.[14]

XII. INITIATIVE PREEMPTED BY STATE LAW REGULATING SMOKING IN PUBLIC PLACES

12.1 Section 48 of the Texas Penal Code preempts the City of Austin's authority to ban smoking in public places, including the plaintiffs' establishments, that the Legislature chose to exclude from its policy in this area. The initiative is therefore preempted and in violation of Article XI, Section 5 of the Texas Constitution.

12.2 In *Dallas Merchant's & Concessionaire's Ass'n v. Dallas*, 852 S.W.2d 489 (Tex. 1993), the Texas Supreme Court decided that state alcohol laws preempt a Dallas city ordinance prohibiting the location of businesses selling or serving alcoholic beverages within 300 feet of

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[13] **Because the initiative does not define "smoking accessories," it is unclear whether cigarettes themselves constitute smoking accessories.**

residentially zoned property in certain areas of the city without a special use permit. **Texas Penal Code Section 48.01(a) entitled Smoking Tobacco states,** "A person commits an offense if he is in possession of a burning tobacco product or smokes tobacco in a facility of a public primary or secondary school or an elevator, enclosed theater or movie house, library, museum, hospital, transit system bus, or intrastate bus, as defined by Section 541.201, Transportation Code, plane, or train which is a public place." The Legislature declined to include bars and restaurants in this list of places where smoking is prohibited, signaling that they did not wish to extend this prohibition to such venues.

12.3 Texas Penal Code Section 1.08 entitled Preemption states, "No governmental subdivision or agency may enact or enforce a law that makes any conduct covered by this code an offense subject to a criminal penalty. This section shall apply only as long as the law governing the conduct proscribed by this code is legally enforceable." Smoking in public places is covered by Section 48 of the Texas Penal Code. Allowing the City to override the Legislature's prerogative where the Legislature has specifically occupied this area of law would thus contravene Penal Code Section 1.08 and the constitutionally established hierarchy in which cities are subdivisions of the state and state laws trump local laws.

XIII. INITIATIVE VIOLATES CITY CHARTER BY INFRINGING UPON CITY COUNCIL'S POWER TO REMIT FINES, FORFEITURES, AND PENALTIES AND GRANT REPRIEVES AND PARDONS

13.1 The initiative violates City Charter City Charter Article VI, Section 4 by entirely delegating enforcement to the director of the Health and Human Services Department without providing for any appeals process, thereby preventing the City Council from discharging its authority

under the City Charter to decide whether to remit fines, forfeitures, and penalties and grant reprieves and pardons.

13.2 City Charter Article VI entitled Municipal Court, Section 4 Fines and Forfeitures - Power of Council provides, "[T]he city council shall have the power to remit fines, forfeitures and penalties for the violation of penal ordinances of the city, and to grant reprieves and pardons for all offenses arising under the penal ordinances of the city." The initiative in Section 10-6-10 entitled Enforcement states, in part, "(D) The director of the Health and Human Services Department may enforce this chapter and may seek injunctive relief." The initiative does not anywhere allow for the City Council to have any influence or role in the enforcement process. Rather, the Health and Human Services Department is authorized to unilaterally take enforcement action, including levying fines of up to $2,000 for each day a violation occurs, without consulting or even informing the City Council. Furthermore, the initiative provides for no administrative appeals process through the City Council or otherwise, implying that the decision of the Health and Human Services Department is final and cannot be administratively challenged or reversed. As such, this initiative is in conflict with the above provision in the City Charter giving the City Council final authority over all fines and penalties. Under the Charter, initiatives may not be proposed that are "in conflict with this Charter." Therefore, the initiative at issue must be disqualified from the ballot on this basis.

XIV. INITIATIVE VIOLATES STATE LAW BY ATTEMPTING TO WAIVE TEXAS ELECTION CODE PROVISIONS

14.1 The initiative attempts to waive state law governing elections, a violation of **Article 11, Section 5 of the Texas Constitution.**

14.2 Section 10-6-14, Part 2 of the initiative at issue states that "[T]he Council waives the

requirements of Section 2-2-3 and 2-2-7 of the City Code for this ordinance." Section 2-2-3 of the City Code states:

> CONFORMITY WITH TEXAS ELECTION CODE
> Terms not defined in this chapter but defined in the Texas Election Code shall have the meanings assigned to them in the Texas Election Code. The starting and ending dates of reporting periods and the due dates of contribution and expenditure reports for City elections shall continue to be governed by the Texas Election Code. Pursuant to this chapter, candidates, officeholders and political committees participating in City elections may be required to make additional disclosures, to file additional notices, and to comply with certain restrictions not set out in the Texas Election Code. It is not the intent of the City to enact any provision in conflict with or in derogation of the Texas Election Code. The requirements set out in this chapter are cumulative of those in the Texas Election Code, and nothing in this chapter shall be construed to limit obligations imposed by the Texas Election Code. Any offense for violation of a criminal provision of this chapter shall be separate from and in addition to any criminal offense under the Texas Election Code.

By waiving this City Code provision, the proponents of this initiative are apparently seeking to avoid complying with state election laws during their campaign. More importantly, even if this provision in the City Code was unnecessary in the first place because it might be presumed city laws are cumulative of state election laws and are not intended to limit state laws, explicitly waiving this provision gives rise to the opposite presumption. Thus, the initiative violates **Article 11, Section 5 of the Texas Constitution because it attempts to override state election law through local fiat.**

XV. INITIATIVE VIOLATES TEXAS PENAL CODE REQUIREMENT OF VOLUNTARY ACT OR OMISSION

15.1 The initiative establishes a crime without identifying a specific voluntary act or omission that is a prerequisite for conviction, thereby violating Texas Penal Code Section 6.01(a).

15.2 Texas Penal Code Section 6.01(a) provides that "[A] person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession." The Texas Court

of Criminal Appeals recently explained:

> Our present Section 6.01(a) was modeled after the corresponding Model Penal Code provision and its commentary distinguishes "voluntary" conduct from "accidental or unintended" results. Voluntary conduct "focuses upon conduct that is within the control of the actor....Thus, before criminal responsibility may be imposed, the actor's conduct must include either a voluntary act or an omission when the defendant was capable of action.
>
> *Rogers v. State*, 105 S.W.3d 630, 637 (Tex. Crim. App. 2003)

By expressly allowing a defendant to be convicted without any level of culpability, the initiative would violate this voluntariness requirement. Bar owners may be unable to take the "necessary steps" to prevent smoking because they may lack the financial resources needed to deploy a sufficient number of employees or video monitoring systems to verify that no one is smoking. Similarly, patrons who are smoking may refuse to leave the premises and bar owners may be legally and/or physically unable to remove them. In these instances, the bar owner or operator cannot be said to have committed a voluntary act or omission. The initiative fails to meet the Texas Court of Criminal Appeal's requirement in *Rogers* that the defendant must have been capable of action in order for criminal responsibility to be imposed, and indeed by explicitly dispensing with any culpability requirement and creating the "necessary steps" standard, the initiative expressly disavows this requirement. Furthermore, the vacuous and tautological phrase "necessary steps" is itself so vague that it fails to put owners and operators on notice regarding any specific type of omission for which they are strictly criminally liable. Thus, the initiative does not even contain a minimally adequate definition to establish a specific criminal omission as required by Section 6.01. Texas Constitution **Article 11, Section 5** provides that, where there is a conflict, state laws prevail over local laws. Therefore, because the initiative contravenes the Penal Code voluntariness requirement,

it must be invalidated.

XVII. INITIATIVE WOULD RESULT IN TAKINGS OF PRIVATE PROPERTY IN VIOLATION OF U.S. AND TEXAS CONSTITUTIONS

16.1 By confiscating the indoor air space in all private businesses that are public places, failing to provide compensation for said confiscation, and forcing private businesses into bankruptcy due to lost sales, the initiative would result in takings of private property in violation of Article XVII, Section 1 of the Texas Constitution and the Fifth Amendment of the U.S. Constitution.

16.2 The Texas Constitution, Article XVII, Section 1 states:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

Although diminution in value without physical invasion is generally not sufficient to invoke the federal takings clause, the Texas Supreme Court has held it is sufficient to invoke the state constitutional takings clause. *Felts v. Harris County*, 915 S.W.2d 482, 484 (Tex. 1996). The elements of a takings claim under the Texas Constitution are that: (1) the governmental unit intentionally performed certain acts, (2) the acts resulted in a taking, damaging, or destruction of the property; and (3) the taking was for public use. *Id.* Under the initiative, the City of Austin will intentionally enforce a ban on smoking in the affected private venues, thereby confiscating control over the indoor air in these venues for an alleged public use. The economic damage of this invasion of private property will be severe, as many of the affected venues will lose substantial revenue and some will likely be forced out of business.

16.3 The Plaintiffs further allege that the proposed initiative would also result in unconstitutional takings under both the Texas and U.S. Constitutions because control over the indoor air space in private businesses is not, in fact, being confiscated for a "public use." Rather, control over the indoor air space is being seized for the private use of non-smokers and, more specifically, anti-smoking activists. Governmental takings of private property for private use are per se unconstitutional. *See Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998); *Earth Management, Inc. v. Heard County*, 283 S.E.2d 455 (Ga. 1981).

XVIII. INITIATIVE VIOLATES TEXAS CONSTITUTION'S BAN ON RETROACTIVE LAWS AND LAWS IMPAIRING CONTRACTS

18.1 The initiative applies retroactively and impairs existing contracts, violating Article I, Section 16 of the Texas Constitution.

18.2 Article I, Section 16 of the Texas Constitution states, "[N]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." A statute is retroactive if it takes away or impairs a party's vested rights acquired under existing law. *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997). Retroactive laws affecting vested rights that are legally recognized or secured are invalid. *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648-49 (Tex. 1971). The initiative at issue is retroactive in two ways. First, it impairs the rights of property owners who, upon purchasing their property, were permitted to smoke and allow others to smoke on the premises. Second, it further impairs the vested rights of property owners who obtained permits under the existing ordinance, as the initiative will go into effect in September 2005 while many of the annual smoking permits remain valid with the permit fee having already been paid in full. These permits constitute contractual obligations, with the applicable fee serving as

consideration for the activity being permitted.[15] Similarly, by interfering with the use of tobacco retailer permits issued under Chapter 154 of the Texas Tax Code, the initiative would also unconstitutionally impair contractual obligations between the Plaintiffs and the State of Texas. For these reasons, the initiative violates the Texas Constitution by impairing the obligation of contracts.

XIX. INITIATIVE'S PENALTY OF FINE UP TO $2,000 VIOLATES TEXAS PENAL CODE LIMIT OF $500 FINE FOR CLASS C MISDEMEANORS

19.1 The initiative imposes a fine of up to $2,000 for a Class C Misdemeanor in contravention of Texas Penal Code Section 12.23, which limits fines for this class of offense to $500.

19.2 The initiative in Section 10-6-11 Violation and Penalty states, in part, that "(A) A person who violates the provisions of this chapter commits a Class C Misdemeanor, punishable under Section 1-1-99 (Offenses; General Penalty) by a fine not to exceed $2,000." Section 1-1-99 of the Austin City Code states in relevant part:

> (B) An offense is a Class C misdemeanor, and if the Code does not state a penalty for an offense:
> (1) except as provided by Subsection (B)(2), the offense is punishable by a fine not to exceed $500; or
> (2) if the offense is a violation of an ordinance that governs fire safety, zoning, or public health and sanitation, including dumping of refuse, the offense is punishable by a fine not to exceed $2,000.

However, Texas Penal Code Section 12.23 entitled Class C Misdemeanor declares, "An individual adjudged guilty of a Class C misdemeanor shall be punished by a fine not to exceed $500." No exception to this limit is included for ordinances governing particular subjects. Texas Penal Code

[15] *See* cases cited *supra* note 4.

Section 12.01 entitled Punishment in Accordance With Code provides, in part, "(b) Penal laws enacted after the effective date of this code shall be classified for punishment purposes in accordance with this chapter." Texas Penal Code Section 1.03 further provides, in part, that "[T]he punishment affixed to an offense defined outside this code shall be applicable unless the punishment is classified in accordance with this code."

19.3 Therefore, while it may be permissible for a city to create a new category of offense and then define the punishment, if a city classifies a new offense as one of the existing types of offenses for which punishment is defined under the Penal Code, the Penal Code's maximum limits on the punishment remain applicable. Such is the case here because the initiative explicitly purports to create a Class C misdemeanor while exceeding the permissible fine under the Penal Code. Consequently, both the initiative and City Code Section 1-1-99 are in violation of the Texas Penal Code and must be enjoined pursuant to Texas Constitution **Article 11, Section 5, under which local laws must give way to state laws when a conflict arises.**

XX. REQUEST FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

20.1 For all of the reasons stated in this complaint, the Plaintiffs request that the Court enter a temporary restraining order and a preliminary injunction enjoining the Austin City Council from placing the initiative on the May 7 ballot until its legality can be conclusively determined, or if the Council has already placed the initiative on the ballot, order that the May 7 election not be allowed to go forward with this initiative on the ballot. To obtain a temporary restraining order and preliminary injunction, it must be shown: (1) there is a substantial likelihood that the movant will prevail on the merits; (2) there is a substantial threat that irreparable harm will result if the injunction

is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the preliminary injunction will not disserve the public interest. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir.1987). However, a reasonable probability of success, not an overwhelming likelihood, is all that need be shown for preliminary injunctive relief. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991). Moreover, if the party seeking the preliminary injunction can establish the last three factors listed above, then the first factor becomes less strict - i.e., instead of showing a substantial likelihood of success, the party need only prove that there are "questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999).

20.2 The Plaintiffs believe they have demonstrated that they have a substantial likelihood of prevailing on the merits. Furthermore, if the initiative is allowed to be placed on the ballot and the merits of the Plaintiffs' claims not decided until after the election, the Plaintiffs are threatened with irreparable harm for several reasons. First, there is a high burden that plaintiffs must overcome to persuade a court to reverse the results of an election. Second, the Plaintiffs would be unable to recover the money they have spent and will continue to spend from now until May 7 to defeat an illegal initiative that should not appear on the ballot. Finally, while the initiative would not go into effect until September, many customers of the Plaintiffs' venues will be unaware of the enforcement date and assume that the initiative takes effect immediately, thereby depressing Plaintiffs' business revenues prior to the earliest possible post-election adjudication of the merits. This loss of revenues may force Plaintiffs to downsize their workforces, irreparably harming both Plaintiffs through the loss of experienced workers whose replacements would require costly training to achieve the same

level of competence, and harming the workers themselves who will likely suffer a loss of income between jobs.

20.3 The City of Austin will suffer no harm as a result of injunctive relief. To the contrary, the City will benefit because the existing smoking ordinance approved by the Austin City Council in a 5-2 vote, which has been proven to be effective, will remain in place and the City will not be forced to present voters with an illegal initiative that, should it pass, they will then be obligated make preparations for its implementation, even while defend it in court, all at taxpayer expense. Onward Austin, the group advocating passage of this initiative, will also benefit from injunctive relief, as they will be informed as to the legal defects in the language they have proposed and can act accordingly in the future without incurring the substantial expense of this entire campaign through May 7 only to later discover that their proposal, as currently drafted, is illegal.[16] Therefore, the threatened injury not only outweighs the harm to the defendant, but the defendant as well as the entity proposing the initiative stand to gain from the rapid resolution of this matter.

20.4 Finally, it is clear that injunctive relief is strongly in the public interest. The City Council, elected by the people, overwhelmingly passed the current ordinance sharply restricting smoking that this initiative would repeal. Thus, the public's concerns on this issue have already been addressed by their elected officials. Moreover, the public has a strong interest in the enforcement of the provisions in the Austin City Charter and Texas Constitution that specify that the City Council, not the voters directly, shall make decisions affecting the budget. Because of the existence of these provisions, voters are assured that money will not be spent and taxes will not be

[16]Onward Austin is reportedly planning to spend up to one-half million dollars on this campaign.

raised through initiatives, but that these decisions will be entrusted to the City Council where, unlike the initiative process, the incurrence of additional liabilities can be offset with additional revenues or reductions in other appropriations so that balanced fiscal management is maintained. Finally, because Article IV, Section 5 of the City Charter requires a two year delay before an initiative can be presented to the voters on the same subject as a defeated initiative, there is a strong public interest in ensuring that each proposal that appears on the ballot is legal, as the voters may have to wait two years thereafter to vote on a legal version of the same proposal or another proposal dealing with the same subject.

20.5 Therefore, all relevant factors favor the issuance of a temporary restraining order and preliminary injunction in this case.

XXI. REQUEST FOR PERMANENT INJUNCTION

21.1 For all of the reasons stated in this complaint, the Plaintiffs also request and believe they are entitled to a permanent injunction. To justify entry of a permanent injunction, the plaintiff must prove that he has no adequate legal remedy. *Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d 273, 274 (7th Cir. 1992); 11 C. Wright & A. Miller, Federal Practice & Procedure § 2944 at 392 (1973). The plaintiff need not, however, show irreparable injury. *Walgreen Co.*, 966 F.2d at 275. Although it is a necessary element for a temporary restraining order or a preliminary injunction, "irreparable injury is not an independent requirement for obtaining a permanent injunction; it is only one basis for showing the inadequacy of the legal remedy." *Jennings Water, Inc. v. City of North Vernon*, 895 F.2d 311, 318 n.6 (7th Cir. 1989) (quoting Wright & Miller § 2944 at 401). The plaintiff can also show the inadequacy of the legal remedy "by demonstrating that damages would not adequately compensate him." 11 Wright & Miller § 2944 at 398.

21.2 The Plaintiffs lack an adequate legal remedy after the election for several reasons. First, if the initiative passes, they will be forced to meet the high legal burden of showing that the results of an election should be judicially overturned. Furthermore, under Article IV, Section 6 of the City Charter, the City Council is prohibited from making changes to an ordinance for two years after it has been approved by the voters, which could prevent a court from ordering the Council to make changes to the ordinance. Additionally, whether or not the initiative passes, the Plaintiffs will incur substantial expenses in waging a campaign against an illegal initiative that should not be on the ballot in the first place. Such losses are probably not recoverable as damages should the initiative be invalidated after the election. Finally, the Plaintiffs' establishments will lose substantial business after the election if the initiative passes, as smoking customers will assume that the law goes into effect immediately and discontinue frequenting the Plaintiffs' establishments. The extent of such losses may be difficult to prove, making them unrecoverable even should the Plaintiffs prevail after the election.

21.3 There is no doubt that federal courts are empowered to enjoin state elections. "It cannot be gainsaid that federal courts have the power to enjoin state elections." *Chisom v. Roemer*, 853 F.2d 1186,1189 (5th Cir. 1988) (*citing Watson v. Commissioners Court of Harrison County*, 616 F.2d 105 (5th Cir.1980); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir.), cert. denied, 385 U.S. 851 (1966)). Federal courts are empowered to enjoin local initiatives from being placed on the ballot that violate the U.S. Constitution, federal law, and the applicable state constitution. *Otey v. Common Council of Milwaukee*, 281 F. Supp. 264 (E.D. Wis. 1968) (enjoining initiative from going on the ballot that would effectively allow housing discrimination against minorities).

21.4 In light of these arguments and authorities, the Plaintiffs are entitled to a permanent

injunction.

XXII. REQUEST FOR DECLARATORY JUDGMENT

22.1 For all of the reasons stated in this complaint, the Plaintiffs request and believe they are entitled to declaratory relief under both the federal Declaratory Judgment Act, 28 U.S.C. § 2201, and the Texas Uniform Declaratory Judgment Act, TEX. CIV. PRAC. REM. CODE § 37.001.

22.2 The federal Declaratory Judgment Act provides, in relevant part, that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). In view of the onerous burden cast on the party requesting injunctive relief, the federal Declaratory Judgment Act was created to enable a federal court to determine constitutionality of a statute without issuing preliminary injunction with its coercive effect. *United States v. Dorgan*, 522 F.2d 969, 973 (8th Cir. 1975). If a plaintiff in a federal court action under the federal Declaratory Judgment Act challenging the constitutionality of state criminal statute or ordinance has a vital interest in enforcement of challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling violation of statute or ordinance as condition precedent to challenging its unconstitutionality. *Steffel v Thompson*, 415 U.S. 452, 468 (1974). Regardless of whether injunctive relief against enforcement of state criminal statute may be appropriate, federal declaratory relief under 28 U.S.C. § 2201 is not precluded when no state prosecution against plaintiff is pending and plaintiff demonstrates a genuine threat of enforcement of disputed state statute; whether an attack is made on constitutionality of statute on its face or as applied, state's interest in unencumbered enforcement of its criminal laws not outweighing federal interest in protecting constitutional rights of individual. *Id.* In this case, the balance tips even more

strongly in favor of declaratory relief because there is no state interest in the proposed initiative's creation of a new criminal offense until it is passed into law by the voters.

22.3 The Texas Uniform Declaratory Judgment Act provides that "a court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." The Texas Uniform Declaratory Judgment Act is a remedial statute designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). A trial court has discretion to enter a declaratory judgment so long as it will serve a useful purpose or will terminate the controversy between the parties. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 468 (Tex. 1995); *James v. Hitchcock Indep. Sch. Dist.*, 742 S.W.2d 701, 704 (Tex. App.--Houston [1st Dist.] 1987, writ denied). A declaratory judgment in this case will remove uncertainty given that similar initiatives have been struck down in Washington D.C. and other jurisdictions and serve the useful purpose of providing all parties with an expeditious and definitive ruling as to the legality of the proposed initiative. Declaratory relief will also serve the useful purpose of enabling Austin voters to have the benefit of a judicial declaration as to the legality of the initiative when they cast their vote on it, if the initiative is not also enjoined. The Plaintiffs request that, if possible, declaratory relief be issued prior to the Austin City Council's deadline of March 3 to place the initiative on the ballot, as it would provide the additional benefit of advising the City Council as to the legality of the initiative so they can make a similarly informed decision.[17]

22.4 Both injunctive and declaratory relief are especially appropriate in this case because

[17] The Thursday, March 4 City Council meeting is the last meeting prior to 60 days before the May 7 election.

the essential facts - the wording of the initiative and the election timetable - cannot be disputed.

XXIII. INITIATIVE'S ILLEGAL AND UNCONSTITUTIONAL PROVISIONS REQUIRE ENTIRE INITIATIVE BE STRICKEN

23.1 The initiative contains no severability provision expressing an intent that, if one portion is invalidated, the rest shall remain. Furthermore, because, unlike legislation, the determination of whether the initiative can be on the ballot depends on gathering a sufficient number of signatures, if the language of the initiative must be changed to comply with the law, the initiative's ultimate language will differ from what voters signed onto, undermining the integrity of the initiative process.[18] Thus, if any portion of the initiative is declared illegal and/or enjoined, the entire initiative must be invalidated.

XXIV. PLAINTIFFS REQUEST AND ARE ENTITLED TO ATTORNEYS' FEES

24.1 The Plaintiffs request that they be awarded attorneys' fees under the applicable statutes and in the interest of equity. The award of attorneys' fees to the prevailing party has been upheld when it is equitable, even if no there is no statutory basis for such fees. *See Nationwide Mutual Insurance Company v. Holmes*, 842 S.W.2d 335 (Tex. App.--San Antonio 1992, writ denied).

24.2 The Texas Uniform Declaratory Judgments Act expressly empowers trial courts with the discretion to award attorneys' fees. TEX. CIV. PRAC. & REM CODE § 37.009; *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985). "[T]he Declaratory Judgments Act entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional

[18] For this reason, the City Charter forbids the City Council from altering the language of an initiative.

requirements that fees be equitable and just, which are matters of law." *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). The Texas Supreme Court has concluded "that by authorizing declaratory judgment actions to construe the legislative enactments of governmental entities and authorizing awards of attorney fees, the DJA necessarily waives governmental immunity for such awards." *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1995).

XXV. PRAYER

25.1 For all the reasons set forth above, the Plaintiffs request that the Court issue a temporary restraining order, preliminary injunction and/or permanent injunction prohibiting the Austin City Council from placing the initiative at issue on the May 7 ballot, or if it has already done so, enjoining the May 7 election from being held with this initiative on the ballot. Alternatively or in addition, the Plaintiffs request that the Court issue a declaratory judgment stating that the initiative at issue is illegal for one or more of the reasons set forth above. In the event that the Court determines that it cannot grant injunctive or declaratory relief prior to the May 7 election due to the short time to consider the merits, the posture of the case, or for other reasons that do not constitute a final determination on the merits of all of the Plaintiffs' claims, the Plaintiffs request that the Court not dismiss this suit, but rather allow it to remain pending until following the election.

Respectfully submitted,

POTTS & REILLY, L.L.P.
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_____

Michael C. Crowley

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was sent to the following on this ___ day of February, 2005 as follows:

David Smith
City Attorney
City of Austin
P.O. Box 1088
Austin, TX 78767

MICHAEL C. CROWLEY

ORDINANCE NO. 050303-04

AN ORDINANCE REPEALING AND REPLACING CODE CHAPTER 10-6 RELATING TO SMOKING IN PUBLIC PLACES, CREATING OFFENSES, AND PROVIDING PENALTIES.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Chapter 10-6 of the City Code is repealed and replaced with a new Chapter 10-6 to read:

CHAPTER 10-6. SMOKING IN PUBLIC PLACES.

§ 10-6-1 DEFINITIONS.

In this chapter:

(1) EMPLOYEE means a person who is employed by an employer in consideration for direct or indirect monetary wages or profit, and a person who volunteers his or her services for a non-profit entity.

(2) EMPLOYER means a person who employs the services of one or more individuals.

(3) ENCLOSED AREA means a space that is enclosed on all sides by solid walls that extend from the floor to the ceiling, exclusive of windows and doors.

(4) FRATERNAL ORGANIZATION means a non-profit organization that:

(a) is chartered by a national organization in existence since 1953;

(b) is tax exempt under Section 501(c)(8), (10), or (19) of the Internal Revenue Code;

(c) operates under a lodge system with a representative form of government; and

(d) is organized for the exclusive benefit of the members of the organization and their dependents.

(5) OPERATOR means the owner or person in charge of a public place or workplace, including an employer.

(6) PUBLIC PLACE means an enclosed area to which the public is invited or in which the public is permitted, including but not limited to, banks, bars, educational facilities, health care facilities, laundromats, public transportation facilities, reception areas, restaurants, retail food production and marketing establishments, retail service establishments, retail stores, shopping malls, sports arenas, theaters, and waiting rooms. A private residence is not a "public place" unless it is used as a child care, adult day care, or health care facility.

(7) RETAIL TOBACCO STORE means a retail store used primarily for the sale of tobacco products and accessories and in which the sale of other non-tobacco products is incidental.

(8) SMOKING means inhaling, exhaling, burning, or carrying any lighted cigar, cigarette, pipe, weed, plant, or other combustible substance in any manner or in any form.

(9) WORKPLACE means an enclosed area in which employees work or have access during the course of their employment.

§ 10-6-2 SMOKING PROHITED.

(A) A person commits an offense if the person smokes in a public place.

(B) A person commits an offense if the person smokes in an enclosed area in a building or facility owned, leased, or operated by the City.

(C) A person commits an offense if the person smokes in an enclosed area of a workplace.

(D) A person commits an offense if the person smokes within 15 feet from an entrance or openable window of an enclosed area in which smoking is prohibited.

(E) The owner or operator of a public place commits an offense if the person fails to take necessary steps to prevent or stop another person from smoking in an enclosed area in a public place.

§ 10-6-3 EXCEPTIONS.

This chapter does not apply to:

(1) a dwelling unit, as defined in Section 25-1-2(35), that is used exclusively for a residential use, as defined in Section 25-2-3 (*Residential Uses Described*);

(2) a hotel or motel room designated as a smoking room and rented to a person, provided that the hotel or motel complies with Section 10-6-4 (*Designation of Smoking Rooms by Hotel and Motel Restricted*);

(3) a retail tobacco store;

(4) a private or semi-private room in a nursing home or long-term care facility that is occupied by individuals who smoke and have requested in writing to be placed in a room where smoking is permitted;

(5) an outdoor area of a workplace that is not in the area described by Section 10-6-2(D)(Smoking Prohibited);

(6) a bingo facility operated under the Bingo Enabling Act, Chapter 2001 of the Occupations Code, if:

(a) an enclosed non-smoking area is provided;

(b) the smoking area is mechanically ventilated to prevent smoke from entering a non-smoking area; and

(c) no one under the age of 18 is admitted to the smoking area;

(7) a facility operated by a fraternal organization for a charitable, benevolent, or educational function if the premises is controlled by the organization; and

(8) a business premise that was issued a restricted permit by the city on or before November 2, 2004.

§ 10-6-4 DESIGNATION OF SMOKING ROOMS BY HOTEL AND MOTEL RESTRICTED.

A hotel and motel may not designate more than 25 percent of its rooms that are rented for temporary overnight occupation by the public as smoking rooms.

§ 10-6-5 EMPLOYER RESPONSIBILITIES.

(A) Except as provide in Subsection (B), an employer shall provide a smoke-free workplace for employees.

(B) If an employer requires employees to work in an area described in Subsection 10-6-3(2) through (8) (Exceptions), the employer shall make reasonable accommodations for an employee who requests assignment to a smoke-free area.

(C) An employer shall notify each employee and applicant for employment in writing that:

(1) smoking in the workplace is prohibited; or

(2) smoking is permitted in an area in the workplace under Section 10-6-3 (Exceptions).

§ 10-6-6 VOLUNTARY DESIGNATION OF A NON-SMOKING FACILITY.

Nothing in this chapter implies that the operator of an enclosed or outdoor public place is prohibited from designated the entire facility as non-smoking.

§ 10-6-7 DESIGNATION OF SMOKING OR NON-SMOKING TAXICABS.

(A) The holder of a taxicab service franchise may designate one or more of the taxicabs operated under the franchise as non-smoking.

(B) The holder of a taxicab service franchise shall conspicuously post a sign in each taxicab that indicates if smoking is permitted or prohibited in the taxicab.

§ 10-6-8 SIGNS REQUIRED.

(A) The operator of a public place shall conspicuously post a "No Smoking" sign, the international "No Smoking" symbol (depiction of a burning cigarette enclosed in a red circle with a red bar across it), or other sign containing words or pictures that reasonably prohibit smoking:

(1) in each public place and workplace where smoking is prohibited by this chapter; and

(2) at each entrance to a public place or workplace.

(B) The operator of a public place shall conspicuously post signs in areas where smoking is permitted under Section 10-6-3 (Exceptions).

(C) The operator of a public place and an employer shall remove any ashtray or other smoking accessory from a place where smoking is prohibited.

(D) It is not a defense to prosecution under this chapter that an operator failed to post a sign required under this section.

§ 10-6-9 RETALIATION PROHIBITED.

A person commits an offense if the person discharges, refuses to hire, or retaliates against a customer, employee, or applicant for employment because the customer, employee or applicant for employment reports a violation of this chapter.

§ 10-6-10 ENFORCEMENT.

(A) This section is cumulative of other laws providing enforcement authority.

(B) A person may report a violation of this chapter to the director of the Health and Human Services Department.

(C) The city manager may authorize a City employee conducting an inspection under any provision of the Code to also inspect for compliance with this chapter and issue a citation for a violation of this chapter.

(D) The director of the Health and Human Services Department may enforce this chapter and may seek injunctive relief.

§ 10-6-11 VIOLATION AND PENALTY.

(A) A person who violates the provisions of this chapter commits a Class C misdemeanor, punishable under Section 1-1-99 (*Offenses; General Penalty*) by a fine not to exceed $2,000. A culpable mental state is not required for a violation of this chapter, and need not be proved.

(B) The city manager may suspend or revoke a permit or license issued to the operator of a public place or workplace where a violation of this chapter occurs.

(C) Each day an offense occurs is a separate violation.

§ 10-6-12 PUBLIC EDUCATION.

(A) The city manager shall:

(1) obtain or develop a comprehensive tobacco education program to educate the public about the harmful effect of tobacco and its addictive qualities.

(2) conduct informational activities to notify and educate businesses and the public about this chapter; and

(3) coordinate the City's tobacco education program with other civic or volunteer groups organized to promote smoking prevention and tobacco education.

(B) To implement this section, the city manager may publish and distribute educational materials relating to this chapter to businesses, their employees, and the public.

§ 10-6-13 GOVERNMENTAL AGENCY COOPERATION.

The city manager shall annually request that each federal, state, county, and school district agency with a facility in the City adopt local operating procedures and update its existing smoking control regulation in compliance with this chapter.

§ 10-6-14 APPLICATION OF OTHER LAW.

This chapter is cumulative of other laws that regulate smoking.

PART 2. The Council waives the requirements of Chapter 2-2-3 and 2-2-7 of the City Code for this ordinance.

PART 3. This ordinance takes effect on September 1, 2005. The exception listed in Section 10-6-3(8) will terminate September 1, 2012.

PASSED AND APPROVED

March 3, 2005

§

§

§

Will Wynn
Mayor

APPROVED: _____
David Allan Smith
City Attorney

ATTEST: _____
Shirley A. Brown
City Clerk