

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE <i>ex rel.</i>	)	
RANDY RAYBURN;	)	
JOHN (JANE) DOES NOS. 1-13;	)	
	)	
	)	
<b>Petitioners,</b>	)	
	)	
vs.	)	<b>Civil Action No. 09-1284 -I</b>
	)	<b>CHANCELLOR CLAUDIA C.</b>
	)	<b>BONNYMAN</b>
ROBERT E. COOPER,	)	
JR., TENNESSEE ATTORNEY GENERAL	)	
	)	
	)	
<b>Defendant.</b>	)	

**PETITIONERS' BRIEF IN REPLY TO DEFENDANT'S REPOSE BRIEF**

**I. Justiciability & Jurisdiction**

As a preliminary matter the Court may quickly dispose of the State's arguments that this case is not justiciable or that the court lacks jurisdiction to enjoin prospective criminal prosecutions (Defendant's brief at pp. 25-26). Petitioners are seeking a *declaratory judgment* pursuant to Tenn. R. Civ. P. 57 that Public Chapter 339 is unconstitutional. *See* Amended Complaint ¶ 104. This Court has jurisdiction in a declaratory judgment action and has jurisdiction to declare a statute unconstitutional and enjoin state actors from enforcing the unconstitutional statute. T. C. A. § 29-14-102; *Colonial Pipeline Co. v. Morgan* 263 S.W.3d 827 (Tenn.,2008)

The Attorney General of the State of Tennessee is the proper defendant in this action. As the Court explained in *American Civil Liberties Union of Tennessee v. State of Tenn.*, 496 F.Supp. 218, 221 (M.D. Tenn., 1980).

The Attorney General further argues that he is not a proper party to this action because he is only a “nominal” defendant and he has not enforced the barratry statute against plaintiffs.[FN2] This argument is patently frivolous in light of T.C.A. s 8-6-109 (1980), which states that the Attorney General “shall” defend the constitutionality\*221 of all legislation of statewide applicability, unless he is of the opinion that the legislation is not constitutional. See also *Peters v. O'Brien*, 152 Tenn. 466, 278 S.W. 660 (1925) (Attorney General is proper party in a declaratory judgment action to determine validity of a state statute). Moreover, it is well-established that a plaintiff does not have to wait until he is threatened with a prosecution before he may challenge a criminal statute that directly operates against him. *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973); *NAACP v. Button*, supra, 371 U.S. at 428, 83 S.Ct. at 335. Accordingly, the Court finds that the Attorney General is a proper defendant in this attack on the validity of Tennessee's barratry statute.

*American Civil Liberties Union of Tennessee v. State of Tenn.*, 496 F.Supp. 218, 221 (M.D. Tenn., 1980).

## II. Counts One Through Seven

The State devotes most of its argument addressing owners of establishments who sell alcohol for on-premises consumption. Plaintiffs rely on the argument and authorities presented in their *Amended Complaint* and the affidavits to support Counts One through Seven and will respond by oral argument at the hearing on July 13<sup>th</sup> as to Petitioner Rayburn's (and John[Jane] Does 1-9) challenges to Public Chapter 339 and the State's arguments raised in the State's brief.

## III. Count Eight: Public Chapter 339 is Unconstitutionally Vague.

Petitioners do wish, however, to provide the Court with further briefing on *Count Eight*—the vagueness defect in Public Chapter 339. The State virtually ignores the real constitutional defect in Public Chapter 339-- those plaintiffs (John Does 10-13) who have firearm carry permits and are in danger of arbitrary

arrests if they go armed into “unposted” premises which sell alcohol for on-premises consumption or carry onto posted premises (not seeing the posted sign or forgetting firearm in purse or on their person for example).

The clear vagueness defect is so since the permit holder could never know with reasonable certainty if the principal business of the premises is the serving of meals conducted on at least 5 days a week as the recent amendment to § 39-17-1305 requires. Thus, this vague and uncertain law subjects otherwise law-abiding citizens to the danger of arbitrary arrests and prosecution if they “guess wrongly” and enter a prohibited establishment with their firearms.

The State suggests that the new law is not vague and there is no danger of erroneous prosecution:

To the extent that the plaintiff gun carry permit holders (Does Nos. 10-13) complain that Chapter 339 renders Tenn. Code Ann. §39-17-1305 unconstitutionally vague because they cannot know with certainty whether serving meals is the —principal business<sup>ll</sup> of restaurants where they intend to carry their weapons, their concern is misplaced. Under Tennessee’s criminal code, —[i]f the definition of an offense within . . . [Title 39] does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state<sup>ll</sup> for the offense. Tenn. Code Ann. § 39-11-301(c). The statute at issue here, Tenn. Code Ann. § 39-17-1305, does not —plainly dispense with a mental element.<sup>ll</sup> Thus, the definition of restaurant in Chapter 339 is almost identical to the definition that is used in the alcoholic beverage laws. See, Tenn. Code Ann. § 57-4-102 (27)(A). The rest of the definition provides guidance to enable a reasonable person to understand what the law requires. Under the definition, a restaurant must have a kitchen, dining room and cooking staff. All of these items are readily ascertainable by simply asking an employee of the business or from personal observation. Thus, despite their unfounded fears, plaintiffs could not be prosecuted for bringing a gun into an establishment serving alcoholic beverages where it was not legal to do so under circumstances where they were merely mistaken as to whether the —principal business<sup>ll</sup> of the establishment was serving meals within the meaning of Chapter 339. A prosecution under section 1305 would require, at

the very least, proof that plaintiffs were —recklessll with regard to the status of the establishment, in other words, that they —consciously disregarded a substantial and unjustifiable riskll that the establishment did not qualify as a —restaurantll under the exemption described in Chapter 339. Tenn. Code Ann. § 39-11-302(c).

*State's Brief* pages 21-22.

The State's understanding of Tennessee criminal law is seriously misplaced and misinterprets the new statute. A prosecutor need not establish that the permit holder was aware that the premises did not fall within the definition of a "restaurant" to obtain a conviction. It is instead the burden of the accused permit holder to show that he or she fell within the ambit of the exception contained in the new law which, in its relevant context, provides:

(a) It is an offense for a person to possess a firearm within the confines of a building open to the public where liquor, wine or other alcoholic beverages, as defined in § 57-3-101(a)(1)(A), or beer, as defined in § 57-6-102(1), are served for on premises consumption.

(b) A violation of this section is a Class A misdemeanor.

(c) The provisions of subsection (a) shall not apply to a person who is:

(1) In the actual discharge of official duties as a law enforcement officer, or is employed in the army, air force, navy, coast guard or marine service of the United States or any member of the Tennessee national guard in the line of duty and pursuant to military regulations, or is in the actual discharge of duties as a correctional officer employed by a penal institution; or

(2) On the person's own premises or premises under the person's control or who is the employee or agent of the owner of the premises with responsibility for protecting persons or property [;or]

(3) (A) Authorized to carry a firearm under § 39-17-1351 who is not consuming beer, wine or any alcoholic beverage, and is within the confines of a restaurant that is open to the public and

serves alcoholic beverages, wine or beer, (B) As used in this subdivision (c)(3), —restaurantll means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served and where meals are actually and regularly served, such place being provided with adequate and sanitary kitchen and dining room equipment, having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests. At least one (1) meal per day shall be served at least five (5) days a week, with the exception of holidays, vacations and periods of redecorating, and the serving of such meals shall be the principal business conducted.

The general law, sub-section (a), makes it a criminal offense to possess a firearm within the confines of a building open to the public where alcoholic beverages are served for on-premises consumption. The “nature of the criminal conduct” is possession of a firearm. The “circumstances surrounding the conduct” is that the person is in possession of the firearm in a building which permits on-premises consumption.

Because the statutory definition of this offense does not plainly dispense with a mental element, “intentional”, “knowing”, or “reckless” conduct usually, but not always, suffices to establish the culpable mental state. T.C.A. § 39-11-301(c) . This is so because Tenn. Code Ann. ' 39-11-301(a)(1) provides that a person commits an offense who acts intentionally, knowingly, recklessly or with criminal negligence, as the definition of the offense requires, with respect to each element of the offense. T.C.A. § 39-11-302 defines the four mental states: intentional, knowledge, reckless and criminal negligence. The definition of the four mental states are different depending on whether one is modifying the “nature of conduct,” the “result of conduct,” or the “circumstances surrounding the conduct” elements. Thus, one must inquire as to the description of the elements of the offense and the definitions of the various *mens rea* terms to

ascertain which *mens rea* element applies to the elements of the crime. Divining the *mens rea* elements and the appropriate *mens rea* definitions requires an analysis of the elements of the offense. See the extensive discussion in *State v. Page*, 81 S.W.3d 781 (Tenn. Crim. App. 2002). See also, *State v. Howard*, 926 S.W.2d 579 (Tenn. Crim. App. 1996) (holding that reckless conduct applies to the age element of aggravated sexual battery if the victim is less than thirteen).

Recklessness, T.C.A. § 39-11-302(c), contains a definition for the result of conduct: “a person ... acts recklessly with respect to ....the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that ..... the result will occur.” The reckless *mens rea* also contains a definition for circumstance surrounding the conduct: a person ... acts recklessly with respect to circumstances surrounding the conduct .... when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist ... .” However, recklessness contains no definition for the nature of conduct element which is why only intentional or knowing conduct is permitted for nature of conduct elements since only the intentional and knowing *mens rea* have definitions for the nature of conduct elements.

Returning to the general law we observe that it a criminal offense to possess a firearm within the confines of a building open to the public where alcoholic beverages are served for on-premises consumption. The “nature of the criminal conduct” is possession of a firearm. The “circumstances surrounding the conduct” is that the person is in possession of the firearm in a building which permits on-premises consumption. Thus, one must intentionally or knowingly possess a firearm and be at least recklessly indifferent as to whether the premises permits the on-site consumption of alcohol.

There are three “non-application” provisions to the general law: 1. the law enforcement officer who may be armed where alcohol is served, 2. the owner or employee of the premises who may be armed on premises where alcohol is served, and, now, 3, the firearm permit holder who may be armed in a “restaurant” that serves alcohol. These three provisions are what is known as “exceptions” to the general law. *See e.g. State v. Stoddard*, 909 S.W.2d 454 (Tenn. Crim. App. 1994) (police officer charged with possession of drugs located in his police car was entitled to an instruction concerning the exception as to when it was lawful for a police officer to possess controlled substances; the exemption provided a lawful explanation for the defendant's conduct and without a jury instruction to this effect, the jury was left with little choice but to convict; conviction reversed for a new trial).

The legislature has the authority to exempt individuals and institutions from the provisions of criminal statutes as long as it has a rational basis of doing so and if the exemptions are not arbitrarily imposed. *State v. Hunt*, 660 S.W.2d 513 (Tenn. Crim. App. 1983) (exemptions to pornography law do not violate equal protection). Criminal exemptions by county or locality are also found to be valid. *Williams v. State*, 155 Tenn. 364, 293 S.W. 757 (1927). Exemptions may also be reflected in the punishment. *State v. Murphy*, 678 S.W.2d 913 (Tenn. Crim. App. 1983).

T.C.A. § 39-11-202 codifies the application of “exceptions” to criminal offenses. The state need not negate the existence of an exception unless the statute defining the offense states to contrary. Where the defense relies upon an exception, such must be proved by the defense by a preponderance of the evidence similar to affirmative defenses.

The non-application of the law assailed here is clearly *an exception* as the State itself agrees: “Chapter 339 simply permits a narrow class of persons to engage in conduct that would otherwise be forbidden under Tenn. Code Ann. § 39-17-1305.” *State’s Brief* page 22-23. Thus, *contrary* to the State’s elucidation of the law, there is no burden on the State to prove that the permit holder was recklessly indifferent as to whether the premises fell within the definition of a “restaurant.” Instead, the burden falls on the permit holder to bring himself or herself within the ambit of the exception when sitting in front of a petit jury of twelve citizens.

In contrast to the vague exception assailed here the other two exceptions contained in the general law are clear and objective since they are based on one’s status as a law enforcement officer, or an owner or employee of the establishment. The plaintiffs here who have permits have a right to exercise their Second Amendment right to possess firearms without fear of arbitrary arrests and without the unconstitutional burden of proving their innocence if they mistakenly think that Tootsies serves meals at the required times.

The legislature has the authority to create reasonable exceptions to criminal conduct. However, there must be fair notice of not only what conduct is prohibited but what conduct is allowed. A statute is overbroad when, based upon its text in actual fact there are a substantial number of instances where the law cannot be applied constitutionally. *New York State Club Assoc., v. City of New York*, 487 U.S.1 14 108 S.Ct. 22-25, 22-34, 101 L.Ed.1 (1988). *State v. Lyons*, 802 S.W.2d 590-593 (Tenn.1990). The overbreadth doctrine not only prohibits a statute from criminalizing constitutionally protected activity, but may also render a statute unconstitutional, if its sweep has a chilling effect upon

constitutionally protected conduct, even though the statute does not directly forbid protected activity. See *United States v. McKinnin Bridge Co., Inc.*, 514 F.Supp. 546-548 (M.D.Tenn (1981), (citing *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 927 (6th Cir.1980).

The State's brief asserts that the 2000 Tenn. Att'y Gen. opinion 00-020 construing Tenn. Code Ann. § 39-17-1305 was in the context of a "proposed statute," and "proposed legislation" concerning "an entirely new statutory scheme." *State's brief* at page 24.

The State's assertion is contrary to fact. Tenn. Code Ann. § 39-17-1305 was passed into law in 1989. Its constitutionality was questioned in a law review article in 1998. Reynolds, Roberts & Soderquist, *Alcohol, Firearms & Constitutions*, 28 U. Memphis L. Rev. 335 (1998). In 2000 State Senator Roy Herron queried the Attorney General as to whether the *existing* statute Tenn. Code Ann. § 39-17-1305 was constitutional and should "the statute's purview be limited to places where alcohol is the sole or primary product." The AG opined the statute was constitutional, there was no basis to limit the existing statute to places where alcohol was the primary product sold and that "[a]pplying the statute to establishments in which alcohol is the predominate product creates vagueness and ambiguity.":

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

**Applying the statute to establishments in which alcohol is the predominate product creates vagueness and ambiguity.** How would one know whether alcohol is the establishment's sole or primary product so that he or she may temper his or her conduct accordingly? **Ordinary people would be unable to understand**

**where certain conduct is prohibited.** See *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1858.

In addition, law enforcement would face the same problem. It would be difficult for an officer to distinguish between legal and illegal conduct. This would, in turn, encourage arbitrary and discriminatory enforcement. It is the opinion of this office that the statute survives constitutional muster as it is written, and that the limitation proposed in question 2 might render the statute vulnerable to attack on vagueness grounds.

*Tenn. Op. Atty. Gen. Op. No. 00-020* (February 15, 2000) (emphasis supplied).

The State further contends that the 2000 AG opinion “arose in a different context” and was a review of “an entirely new statutory scheme.” Petitioners respectfully disagree. Senator Herron was asking the AG, directly, whether the firearms carry prohibition in the *existing* statute, Tenn. Code Ann. § 39-17-1305, could be limited to places “where alcohol is the sole or primary product.” The AG’s analysis: “How would one know whether alcohol is the establishment’s sole or primary product so that he or she may temper his or her conduct accordingly?” applies with equal logic and force here. How would one know whether meals is the establishment’s principal business so that he or she may temper his or her conduct accordingly?”

The State also argues (errantly) that the law is not vague because permit holders “will be able to recognize that an establishment is a restaurant based on its advertising.” *State’s brief* at p. 21. Petitioners counter with the filed affidavit of Shari Danielle Elks, the Executive Director of the Tennessee Alcoholic Beverage Commission (TABC) with verified records attached for food sales below 50% for past 5 years (Exhibit C) and copies of reports for violations for food sales below 50% for the past two years (Exhibit D). These records also detail if meals are not

served five days a week. These records detail a large number of “restaurants” that *call themselves* restaurants. Although *licensed* as “restaurants” they do not meet the *definition* of a “restaurant” under Public Chapter 339 because their “primary business” is not the service of meals or they do not serve meals five days a week. A few examples:

- *Caribbean Hut Restaurant*, Nashville, TN (food 17%, beer 43%, liquor 40%; failing to maintain the requirements of a “restaurant” liquor by the drink license”).
- *A Taste of Terry’s Restaurant*, Dyersburg, TN (meals not served 5 days a week; failing to maintain the requirements of a “restaurant” liquor by the drink license”).
- *Los Margaritas Mexican Restaurant*, Chattanooga (failing to maintain the requirements of a “restaurant” liquor by the drink license”).
- *Bucco’s Bistro*, Cookeville, TN (meals not served five days a week; (meals not served 5 days a week; failing to maintain the requirements of a “restaurant” liquor by the drink license”).
- *Big Tony’s Pizza Pub*, Hermitage, TN (food 36%, liquor 36%, beer 27%)
- *Rumors Restaurant*, Chattanooga, TN (meals not served 5 days a week; failing to maintain the requirements of a “restaurant” liquor by the drink license”).
- *Fuel*, Nashville, TN (no food served; failing to maintain the requirements of a “restaurant” liquor by the drink license).
- *The Palms at Hamilton*, Chattanooga, TN (food 15%, liquor 60%, beer 25%).
- *Calvin’s*, Nashville, TN (food 1.8%, beer 36%, liquor 61%; failing to maintain the requirements of a “restaurant” liquor by the drink license”).
- *Mac’s Restaurant and Lounge*, Chattanooga, TN (food sales 24%; liquor 34%, beer 42%).
- *About Time Sports Bar & Grille*, Hermitage (5.7% food; 69% beer; 25% liquor).
- *Sputniks Grill*, Hendersonville, TN (food 19.45%; liquor 32%; 34%).
- *Chattanooga Food & Drink*, Chattanooga, TN (not selling food).
- *JD’s Sandwich Shop*, Cookeville, TN (food 24%).
- *Knoxville Food & Drink*, Knoxville (“restaurant” not open requisite number of days in vio. of TCA § 57-4-102(27)(A)
- *Plaza Sports Grill*, Knoxville, TN (“restaurant” not open requisite number of days in vio. of TCA § 57-4-102(27)(A)
- *Whole Note Restaurant*, Chattanooga (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Rajaes Café*, Chattanooga (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Broadway Brew House & Mojo Grill*, Nashville (failing to maintain the

- requirements of a “restaurant” liquor by the drink license.”
- *El Chico*, Knoxville (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Tootsies*, Nashville (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Chattanooga Food*, Chattanooga (food audit; failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Lil Easy Restaurant and Wine Bar*, Jackson (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Exit Inn*, Nashville (food audit; failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Ken’s Karaoke Box*, Nashville (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Bellevue Restaurant and Pub*, Nashville (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Wolfy’s at the Arena*, Nashville (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Murfreesboro Food and Drink*, Murfreesboro (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Graham Central Station*, Nashville (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *End Zone Restaurant*, Nashville (failing to maintain the requirements of a “restaurant” liquor by the drink license.”
- *Magnolia Café*, Knoxville (failing to maintain the requirements of a “restaurant” liquor by the drink license.”

The record proof establishes that licensed “restaurants” throughout the state hold themselves out to the public as “restaurants” but are *routinely cited in large numbers* for “failure to maintain the requirements of a restaurant liquor-by-the-drink license in violation of TCA 57-4-102(27)(A).” See Citations, Exhibit D and Exhibit C.

### **Conclusion**

Permit holders, absent a declaratory judgment, on July 14, 2009 will simply have to guess where they can carry permitted weapons when they dine in alcohol serving establishments. Because of the statutory and regulatory framework in Tennessee *all* establishments that sell liquor-by-the-drink are licensed as “restaurants.” However, many places that *call* themselves restaurants and serve meals are *not* in fact restaurants under the statutory

definition in TCA § 57-4-102(27)(A) and Public Chapter 339 because they sell too little food (<50%) or do not serve meals 5 days a week.

The public and permit holders have no way to know when they go out to a “restaurant” that serves alcohol whether or not firearms carry is lawful because of the vague definition of a restaurant in Public Chapter 339. Tennessee law fails to differentiate between a restaurant and a bar yet criminal penalties apply to firearms carry by a permit holder in an alcohol-serving establishment that is not a restaurant as defined in Public Chapter 339.<sup>1</sup> Accordingly, the defective statute, Public Chapter 339, is void for vagueness and a declaratory judgment order should issue.

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<sup>1</sup> THE TENNESSEAN newspaper noted on July 12, 2009: “On one of the key issues during the last state legislative session, allowing concealed weapon permit holders to carry their guns into parks and establishments where alcohol is served, Wamp said he would have signed the bill as governor *but preferred language that would differentiate between a restaurant and a bar*. A strip club that serves alcohol is “the kind of place where you don’t want a fight,” he said.” Ron Ramsey, *Zach Wamp tie in Nashville GOP poll*. THE TENNESSEAN (July 12, 2009), available at: <http://bit.ly/14g0j8>

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document has been served upon the following via hand delivery on this \_\_\_ day of \_\_\_\_\_, 2009:

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