

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE *ex rel.* )  
RANDY RAYBURN; )  
JOHN (JANE) DOES NOS. 1-9; )  
)  
)  
Petitioners, )  
)  
vs. ) Civil Action No. \_\_\_\_\_  
)  
ROBERT E. COOPER, )  
JR., TENNESSEE ATTORNEY GENERAL )  
)  
)  
Defendant. )

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

I. NATURE OF THE ACTION

1. On July 14, 2009 an act of Tennessee Legislature, HB 0962/SB 1127, "[An Act to amend Tennessee Code Annotated, Title 39, Chapter 17, relative to firearms](#)" (*Exhibit A* hereto) is scheduled to become law (over a veto of Tennessee Governor Phil Bredesen). HB 0962/SB 1127, [which became Public Law 339 on May 14, 2009](#) amends prior [T.C.A. § 39-17-1305\(c\)](#)<sup>1</sup> to make Tennessee the first state in the nation *expressly* to allow carrying a loaded concealed firearm into a bar<sup>2</sup>.

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<sup>1</sup> [Old] § 39-17-1305. Sale of alcoholic beverages; premises; possession of firearms

(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.

2. The challenged law, [Public Chapter 339](#), as passed provides :

SECTION 1. Tennessee Code Annotated, Section 39-17-1305(c), is amended by adding the following language as a new, appropriately designated subdivision: [to section 1305 which makes it a Class A misdemeanor to carry a firearm where liquor, wine or other alcoholic beverages are served for on premises consumption, except for persons such as law enforcement and on one's own property and, now an exception for persons...]

(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), "restaurant" 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.

3. Tennessee's liquor laws do not differentiate between bars and restaurants;

*all* places that that are licensed to serve liquor by the drink are "restaurants." [T.C.A. 57-4-102 \(27\)\(A\)](#).<sup>3</sup> Proponents of the new law misleadingly labeled the law a "restaurant

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<sup>2</sup> A "bar" where firearms may not be carried by persons with firearms permits is variously defined under state liquor laws, as: an area or areas of a restaurant primarily devoted to drinking (the bar area of a restaurant); or a drinking establishment that derives 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption; or a drinking establishment that restricts entry to persons age 21 and above; or an establishment whose primary purpose is drinking. See footnote 3 *infra*. This Complaint's use of the term "bar" encompasses all of these definitions. As will be shown herein, however, in Tennessee *all* "bars" as defined above are considered "restaurants" as Tennessee law does not use any of these definitions, does not define a "bar" for liquor licensing purposes or for firearm restrictions and licenses *all* drinking establishments serving liquor by the drink for on premises consumption as "restaurants." See *infra* ¶ 3 & 4.

<sup>3</sup> "Proponents of the curfew [removed from the final bill and law] said they wanted handgun carry rights to extend to family restaurants that also happen to serve alcohol. The 11 p.m. curfew was meant to differentiate those restaurants from bars, since Tennessee law doesn't make an official distinction between the two." *CBS News website, "Guns In Bars? Tenn. House*

carry” law or “restaurant bill.” In Tennessee, however, *all* nightclubs, clubs, bars, and bar areas of restaurants that presently serve alcohol (until the wee hours of the morning : 3:00 a.m.; [24/7 Memphis](#)) are licensed as “restaurants.”

4. Because the new Tennessee law *expressly permits* bringing firearms into *all* drinking establishments (i.e. bars, nightclubs, or portions of restaurant premises that serve alcohol) Tennessee stands alone in expressly permitting bringing guns into all places in the state that serve liquor by the drink (including bars). Bringing firearms into drinking establishments (i.e. bars, nightclubs, or portions of restaurant premises that serve alcohol) is expressly prohibited by state statute, common law nuisance action or local laws.<sup>4</sup>

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Says OK”

<http://www.cbsnews.com/stories/2009/05/08/national/main5001150.shtml?tag=contentMain;contentBody>

<sup>4</sup> **Ten states** expressly prohibit loaded guns in restaurants and bars (Alaska, Arizona, Louisiana, Maine, Montana, North Carolina, North Dakota, New Mexico, Ohio and South Carolina).

**Virginia** prohibits *concealed* carrying of weapons in bars and restaurants.

**Fourteen** states expressly permit a concealed weapons permit holder to carry a gun into a *restaurant* that serves alcohol (Arkansas, Florida, Georgia, Kansas, Kentucky, Michigan, Missouri, Mississippi, Nebraska, Oklahoma, South Dakota, Texas, Washington, Wyoming). However in none of these states can a concealed loaded weapon be brought into a bar. **Five** of those 14 states expressly *preclude* carrying a loaded weapon into areas of the restaurant primarily devoted to drinking (i.e. the bar) (Arkansas, Florida, Kentucky, Mississippi and Wyoming). **Six** other states prohibit carrying guns in establishments that derive less than 50% of their total annual food and beverage sales from prepared meals (Georgia, Missouri, Nebraska, South Dakota Texas and Kansas (30%). **Washington** prohibits guns in 21 and up establishments. **Oklahoma and Michigan** prohibit carrying guns if the primary purpose of the establishment is drinking.

**Illinois and Wisconsin** prohibit carrying concealed weapons in all places in the state.

**22 other states** (Alabama, California, Colorado Connecticut, Delaware, Hawaii, , Idaho, Iowa Indiana, Maryland, Massachusetts, Minnesota, New Jersey, New Hampshire, New York, Nevada, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia) have no express permission or express prohibition statutes related to carrying a gun where alcohol is served. However, these states take action under public nuisance laws when the state or city becomes aware that guns and/or shootings are occurring in bars.

5. No state, by statute or regulation, *expressly* allows firearms in bars. Because bars, saloons, nightclubs and restaurants with bar areas are notorious for fights, assaults and breaches of the peace, carrying loaded guns is *expressly* prohibited in bars, nightclubs or bar areas serving alcohol in **24 states** ([Alaska](#) (AK ST s 11.61.220) , [Arizona](#) (AZ ST s 4-244), [Arkansas](#) (AR ST s 5-73-306); [Florida](#) (FL ST s 790.06) [Georgia](#) (GA ST s 16-11-127), [Kansas](#) (K.S.A. 75-7c10(12)), [Kentucky](#) (KY ST s 237.110), [Louisiana](#) (LA R.S. 40:1379.3), [Maine](#) (ME ST T. 17-A s 1057), [Michigan](#) (MI ST 28.425o), [Mississippi](#) (MS ST s 45-9-101), [Missouri](#) (MO ST 571.107), [Montana](#) (MT ST 45-8-328), [Nebraska](#) (NE LEGIS 430 (2009), [New Mexico](#) (NM ST s 30-7-3), [North Carolina](#) (NC ST s 14-269.3) , [North Dakota](#) (ND ST 62.1-02-04) , [Ohio](#) (OH ST s 2923.126), [Oklahoma](#) (OK ST T. 21 s 1272.1), [South Carolina](#) (SC Code 1976 § 16-23-465), [South Dakota](#) (SDCL § 23-7-8.1), [Texas](#) (V.T.C.A., Penal Code § 46.03), [Washington](#) (WA ST 9.41.300(1)(d),

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Nuisance bars: Vermont, nuisance bars shut down; <http://bit.ly/LiqSk> (“The City of Burlington has a long history of dealing with issues revolving around bars and alcohol. And in the past, the city has shut down several places that were perceived to be a public nuisance.” California nuisance bar shut down (shooting at bar; public nuisance): <http://bit.ly/GI21t>; Florida nuisance bar shut down (shootings at the bar): <http://bit.ly/wlOrp>; Kansas: nuisance bar shut down: <http://bit.ly/GI21t>; Maryland: nuisance bar shut down: <http://bit.ly/gt5wZ>; Minnesota: nuisance bar closed (gunshots at bar): <http://bit.ly/2qwUus>; Pennsylvania: nuisance bar shut down (shooting): <http://bit.ly/gt0L1>

States also do not issue or restrict permits to not allow carrying in bars or places that serve alcohol. *See e.g.* Connecticut (“The permit to carry handguns allows people to carry them openly or concealed, but mature judgment, says the Board of Firearm Permit Examiners, dictates that (1) “every effort should be made to ensure that no gun is exposed to view or carried in any manner that would tend to alarm people who see it. . . [and] (2) no handgun should be carried unless carrying the gun at the time and place involved is prudent and proper in the circumstances.”

For example, according to the board, handguns should not be carried: 1. *into a bar or other place where alcohol is being consumed*“[www.cga.ct.gov/2007/rpt/2007-R-0369.htm](http://www.cga.ct.gov/2007/rpt/2007-R-0369.htm); California (permit itself prohibits carrying in places where primary purpose is serving alcoholic beverages for on-site consumption) [http://rkba.org/ccw/ca\\_ccw\\_app.pdf](http://rkba.org/ccw/ca_ccw_app.pdf)

The point must simply be stressed: **no** state by act of positive law permits guns in bars and when guns are found in bars or bar shootings occur public nuisance laws are applied or state permits preclude carrying where alcohol is served.

[Wyoming](#) (W.S.1977 § 6-8-104). Two states do not permit carrying weapons permits ([Illinois](#), 720 ILCS 5/24-1 and [Wisconsin](#), W.S.A. 167.31(2)(b)). Virginia expressly prohibits carrying concealed weapons where alcohol is served.<sup>5</sup>

6. Absent an injunction guns can be brought into any bar or restaurant or nightclub that serves alcohol on July 14, 2009 and the law will decriminalize carrying a permitted gun into a *posted* bar or restaurant (where the owner has posted “no firearms”) making the act a fine of “no more than \$500.” Websites for Tennessee Firearms Association members and blogs of the Tennessee Firearms Association are already discussing the topics of what is the penalty for bringing a gun into a bar or restaurant and whether the law prohibits having consumed alcohol prior to entering the bar or restaurant (it does not). See [Tennessee Firearms Association website blog](#).

7. Legislators who supported this law have claimed that “36” or more states have “similar laws” allowing permit holders to go armed in establishments serving alcohol. Legislative proponents [stated 36 states have similar laws](#) and later that “40 states allow citizens that have handguns to carry their handguns where alcohol is served.” <http://www.youtube.com/watch?v=s2pZclaNqi4>.

8. [The National Rifle Association released statistics](#) that “38 states” had laws similar to the new Tennessee law:

“According to Alexa Fritts, media relations associate for the National Rifle Association, the following states already allow similar forms of gun carrying laws in restaurants which serve alcohol: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Idaho, Indiana, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.”

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<sup>5</sup> Virginia law expressly prohibits carrying *concealed* weapons where alcohol is served. [Va. Code Ann. 18.2-308\(I3\) \(2005\)](#). See <http://www.youtube.com/watch?v=aeR9LKDtOws>

9. In fact: *none* of these 38 states identified by the NRA and the law's proponents *expressly* permit guns in bars. Fourteen of these 38 states *expressly prohibit* loaded guns in bars or bar areas (Alaska, Arkansas, Florida, Georgia, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Oklahoma, South Dakota, Texas, Washington and Wyoming). In the remaining 24 states cited by the NRA these states have *no statutes that expressly permit* (or prohibit) guns where alcohol is served. However these states in fact take action to close nuisance bars where guns are present or shootings occur. *See supra* fn. 4.

10. Tennessee will also be the first state in the nation to *decriminalize* bringing a permitted firearm into a drinking establishment that posts a notice (forbidding guns on the premises). Under prior law, [T.C.A. § 39-17-1305](#) carrying a concealed weapon into a drinking establishment was a criminal offense, Class A misdemeanor (“(b) A violation of this section is a Class A misdemeanor”—meaning the person carrying a gun into a drinking establishment, licensed to carry or not, could be arrested, detained, taken to jail, dispossessed of the gun by police officers, and faced a criminal penalty-- Class A misdemeanor – “of not greater than eleven (11) months, twenty-nine (29) days or a fine not to exceed two thousand five hundred dollars (\$2,500), or both.” [T. C. A. § 40-35-302](#); [T. C. A. § 40-35-111](#)).

11. The newly passed law removes the specific Class A misdemeanor criminal penalty for carrying a firearm into a drinking establishment by permit holders, and [over 220,000 permitted gun owners](#) (and permit holders in 19 reciprocity states) can carry a firearm *even on the premises of a posted drinking establishment that serves alcohol* and will face a mere fine (a ticket) of up to \$500. [T.C.A. § 39-17-1359](#). Carrying a gun into a drinking establishment is no longer a criminal offense or an incarcerative offense and

there is no forfeiture of the firearm.<sup>6</sup> Compare e.g., [Kansas law, K.S.A. 75-7c11](#), (criminal Class B misdemeanor to bring a gun onto *posted* property). Imposing small fines or penalties for illegally carrying a gun into at or near drinking establishment causes more firearms at bars and presents a risk to public safety. See “*Mayor [of Lawrence, Kansas] seeks stricter gun law: Amyx wants jail time for carrying firearms near bars*” [local ordinance prohibits Kansas permit holders to carry firearm within 200 feet of any bar in Lawrence, KS but imposed no mandatory jail time; mayor called for stiffer law].<sup>7</sup>

12. A permit owner, under the new law, although not permitted to consume alcohol on the premises, can enter the premises of a drinking establishment, having *previously* consumed alcohol (if not “intoxicated”). [T.C.A. § 39-17-1321](#).<sup>8</sup>

13. *Public Nuisance*. Petitioners challenge the legality of [T.C.A. § 39-17-1305\(c\)\(3\)](#) as an unlawful public nuisance that unreasonably threatens the life, health and safety of the public.

14. *Due Process/Taking*. Petitioners aver that the law violates due process and amounts to a taking of property that exposes bars and restaurants that serve alcohol to guns with no effective deterrent to carrying guns on posted premises and increases civil liability for shootings.

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<sup>6</sup> Although the general right of an individual or property owner to post a notice that firearms are not allowed on the premises under [T.C.A. § 39-17-1359](#) is described as a “criminal act” the penalty is limited to a fine of not more than five hundred dollars. The mere labeling of an act as criminal or civil is not dispositive of whether the act in fact criminal or civil and the lack of an incarcerative penalty (and small fine) effectively removes criminal status from this offense as well as constitutional protections such as right to trial by jury. See [State v. Anton, 463 A.2d 703, 706 \(Me.,1983\)](#) (“...[T]his Court has stated that the label “civil” or “criminal” is not dispositive of the nature of a proceeding. [State v. Gleason, 404 A.2d 573, 583 \(Me.1979\)](#)).

<sup>7</sup> [http://www2.ljworld.com/news/2007/feb/22/mayor\\_seeks\\_stricter\\_gun\\_law/](http://www2.ljworld.com/news/2007/feb/22/mayor_seeks_stricter_gun_law/)

<sup>8</sup> “The rules [new law] say they may not drink when they’re in here, but who’s to say they’re not drunk when they walk in, or been doing drugs before they walk in?” “*Guns in bars debate rages on following Bredesen veto*,” <http://www.wmctv.com/global/story.asp?s=10447876>

15. *Due Process/Arbitrary and Capricious Exercise of Police Power.* Petitioners challenge the law and on the grounds that the law is an unconstitutional deprivation of due process because it is an unreasonable, arbitrary and capricious exercise of the police power.

16. *Tennessee Occupational Safety and Health Act of 1972.* Petitioners challenge the guns in bar law as in violation the general duty clause of the Tennessee Occupational Safety and Health Act of 1972, [T.C.A. § 50-3-105\(1\)](#).<sup>9</sup>

17. *Tennessee Constitution.* Petitioners aver the guns in bar law violates due process and the rights guaranteed by [Art. I, Secs. 1<sup>10</sup>, 8<sup>11</sup>, 17<sup>12</sup>, 23<sup>13</sup> of the Tennessee Constitution](#). Petitioners further challenge the law as in violation [of Art. XI, Sec. 8 of the Tennessee Constitution](#): “The Legislature shall have no power to suspend any general law for the benefit of any particular individual, *nor to pass any law for the benefit of individuals inconsistent with the general laws of the land.*” (emphasis supplied).

18. *42 U.S.C. § 1983 State-Created Danger and State-Created Vigilantism.* Petitioners challenge the law as an unconstitutional deprivation of civil and

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<sup>9</sup> [T.C.A. § 50-3-105\(1\)](#) provides that “[e]ach employer shall furnish to each of their employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm to their employees.”

<sup>10</sup> “That all power is inherent in the people, and all free governments are founded on their authority, and instituted *for their peace, safety, and happiness;*”

<sup>11</sup> “That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.”

<sup>12</sup> “Suits may be brought against the state in such manner and in such courts as the Legislature may by law direct.”

<sup>13</sup> “That the citizens have a right, in a peaceable manner, to assemble together for their common good”

constitutional rights under the “state-created danger” doctrine recognized under cases and law construing 42 U.S.C. 1983.<sup>14</sup>

19. *Due Process and the Fundamental Right to be Free from Gun Violence in “Sensitive Places”*. Petitioners challenge the law on the ground that the law is an unconstitutional deprivation of due process because it violates a fundamental right to be free from gun violence in sensitive public places.

20. The Second Amendment right to keep and bear arms is not implicated in this case. Just as there is no First Amendment right falsely to cry “fire” in a crowded theater<sup>15</sup> : “There is nothing in the language of our state constitution or in the history of the right to ‘bear arms’, as protected by the federal and various state constitutions, which lends any credence whatsoever to the claim that there is a constitutional right to carry a firearm into a drinking establishment.” [Second Amendment Foundation v. City of Renton, 35 Wash.App. 583, 588, 668 P.2d 596, 599 \(Wash. Ct. App. 1983\)](#). The U.S. Supreme Court has recently recognized in [District of Columbia v. Heller, 128 S.Ct. 2783, 2817 \(2008\)](#) that the right of an individual to bear arms is not unlimited and that firearms may not be carried “in sensitive places”<sup>16</sup>

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<sup>14</sup> [Henderson v. City of Chattanooga, 133 S.W.3d 192, 211 \(Tenn.Ct.App.,2003\)](#): “The next issue addressed in *Kallstrom I* [*Kallstrom v. City of Columbus, 136 F.3d 1055 C.A.6 (Ohio),1998*] was whether a state could be held liable for private acts of violence under 42 U.S.C. § 1983. Relying on the state-created-danger theory, the Sixth Circuit concluded that a state can be held liable for the actions of a private individual, such as a gang member, when the state's action places the individual victim “specifically at risk, as distinguished from a risk that affects the public at large.” *Id.* at 1066. Owners and employees (wait staff, bartenders, servers, etc) are placed at direct and grave risk of guns in drinking establishments.

<sup>15</sup> “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.” [Schneck v. U.S. 249 U.S. 47, 39 S.Ct. 247, 249 \(U.S. 1919\)](#).

<sup>16</sup> “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places

21. Tennessee law has long recognized that guns in the presence of alcohol is a dangerous and volatile combination. “It has been stated in several opinions of this Court that alcohol and firearms are a volatile combination as someone will likely be hurt.” [State v. Parker, 932 S.W.2d 945, 957 \(Tenn.Cr.App.,1996\)](#); see also [United States v. Prescott, 599 F.2d 103 \(5<sup>th</sup> Cir. 1979\)](#) (discussing the “volatile mixture” of alcohol and firearms.”

22. Petitioners seek a temporary and permanent injunction to enjoin the guns in bars law from taking effect. Simply put, guns and alcohol don’t mix. The combination of guns and alcohol on the premises of drinking establishments is a state-created danger and threat to public safety that violates common law, statutory and constitutional rights of the public and persons who own and work at drinking establishments. Courts have the power and duty to strike down state-created nuisances and laws that unreasonably or unconstitutionally threaten the health, safety and welfare of the public.

## II. FACTUAL AND LEGAL BASIS FOR CLAIMS

23. Although a state legislature may pass laws in pursuit of its regulation and police powers, judicial review is necessary and appropriate “[i]f the means employed have no real, substantial relation to public objects which government may legally accomplish, [or] if they are arbitrary and unreasonable . . . the judiciary will . . . interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt.” [Chicago, B. & Q. Ry. Co. v. People of State of Illinois, 200 U.S. 561, 593 26 S.Ct. 341 U.S. \(1906\)](#).

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such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” [District of Columbia v. Heller, 128 S.Ct. 2783, 2817 \(2008\)](#)

24. A legislative enactment will be deemed invalid if it bears no real or substantial relationship to the public's health, safety, morals or general welfare or if it is unreasonable or arbitrary. [See Nashville, C & L. Ry. v. Walters, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949 \(1935\); Estrin v. Moss, 221 Tenn. 657, 430 S.W.2d 345, 348 \(Tenn.1968\), cert. dismissed, 393 U.S. 318, 89 S.Ct. 554 \(1969\); First Tennessee Bank Nat. Ass'n v. Jones, 732 S.W.2d 281 \(Tenn.App.,1987\)](#) (statute is an invalid exercise of the police power burden if “the statute is arbitrary, capricious and unreasonable, and has no real tendency to effectuate the legislative purpose.” [Templeton v. Metropolitan Government of Nashville and Davidson Co., 650 S.W.2d 743 \(Tenn.App.1983\).](#)

25. The Attorney General of the State of Tennessee is the proper defendant in this action. [T.C.A. § 8-6-109. 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). Petitioners aver that pursuant to [T.C.A. § 8-6-109](#) the Attorney General should exercise his discretion and *not* defend the validity and constitutionality and give notice to the speakers of each house of the general assembly of his decision.

26. *Public Nuisance.* Petitioners bring this challenge to Tennessee’s “guns in bar law” on the grounds that the law *creates* and abets an unlawful public nuisance: loaded weapons (concealed or carried openly) on premises where alcoholic beverages, wine or beer is served.

27. The “guns in bar law” is a public nuisance under RESTATEMENT OF TORTS (SECOND) § 834 in that it is an unreasonable interference with a right common to the general public and creates a significant threat to the public health, public safety, and public peace.

28. The “guns in bar law” permits concealed (and openly carried) loaded firearms to be carried by gun permit holders into bars, nightclubs and restaurants serving alcohol. Petitioners aver the law itself creates a public nuisance (public nuisances) and threatens the health, safety, welfare and the very lives of the Petitioners.<sup>17</sup>

29. “In Tennessee, a public nuisance is defined as “an act or omission that unreasonably interferes with or obstructs rights common to the public.” [Wayne County v. Tennessee Solid Waste Disposal Control Bd.](#), 756 S.W.2d 274, 283 (Tenn. Ct. App. 1988) (citing [Restatement \(Second\) of Torts § 821B \(1977\)](#)), cited in [North Carolina ex rel. Cooper v. Tennessee Valley Authority](#), 549 F.Supp.2d 725 , 735 (W.D.N.C.2008).

30. A public nuisance may be enjoined “even though it has not yet resulted in any significant harm” if “harm is *threatened*” where “harm is threatened that would be significant.” [Restatement Second of Torts § 821F \(comment b\)](#).

31. *Shootings* that occur in a bar or nightclub are evidence of a public nuisance which Tennessee courts may abate. [State ex rel. Gibbons v. Club Universe](#), 2005 WL 175035 (Tenn.Ct.App.,2005) (Memphis nightclub declared a public nuisance and Court enjoined the nightclub from further operation based upon, inter alia, evidence of “shootings” “in the nightclub”). Id. at \* 1. [See also People ex rel. Gallo v. Acuna](#), 14 Cal.4th 1090, 929 P.2d 596 (Cal.,1997) (“shootings” supported finding of public nuisance.”).

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<sup>17</sup> The Tennessee statute defines nuisance as: any place in or upon which lewdness, assignation, promotion of prostitution, patronizing prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, and sale, exhibition or possession of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver, or distribute matter or materials, ... quarreling, drunkenness, fighting or *breaches of the peace are carried on or permitted*, and personal property, contents, furniture, fixtures, equipment and stock used in or in connection with the conducting and maintaining any such place for any such purpose. [Tenn.Code Ann. § 29-3-101\(2\) \(2000\)](#) (emphasis supplied).

32. The Court should take judicial notice pursuant to Tenn. R. Evid. 201 that shootings in bars, nightclubs and restaurants that serve alcohol is a “recognized hazard” to life, public health and public safety--whether the shooter has a permit or not:

- shooting by a Tennessee permit holder outside restaurant that served alcohol in Memphis Tennessee<sup>18</sup>,
- [Violent crimes and gun offenses by permit holders](#)<sup>19</sup>
- [That Tennessee’s “shall issue” gun permit law forces officials to give permits to “almost everyone,” including persons with a violent criminal history.](#)
- bar shooting in Nashville: 4/2009:  
<http://www.wkrn.com/Global/story.asp?S=10124657>
- bar shooting Knoxville: 6/2008  
<http://www.wbir.com/news/local/story.aspx?storyid=59690>
- bar shooting Millington:12/2008  
<http://www.myeyewitnessnews.com/news/local/story/2-Charged-in-Millington-Bar-Shooting/arFbGrqg00GMqAr4gp7dmg.csp>
- bar shooting Jackson: 12/2008  
<http://www.wmctv.com/global/story.asp?s=9472549>
- Numerous shootings in bars reported in Tennessee cases.<sup>20</sup>

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<sup>18</sup> <http://www.commercialappeal.com/news/2009/jun/04/grand-jury-indicts-man-second-degree-murder-cordov/>

<sup>19</sup> “Sims is among dozens of Shelby Countians with violent histories who have received permits to carry handguns in Tennessee, according to an investigation by The Commercial Appeal. The newspaper identified as many as 70 county residents who were issued permits despite arrest histories, some with charges that include robbery, assault, domestic violence and other serious offenses.” <http://bit.ly/6TYnm>

<sup>20</sup> [Chattanooga-Hamilton County Hosp. Authority v. Bradley County](#), 249 S.W.3d 361 (Tenn., March 10, 2008)(“ suspect injured in a shooting at a bar in Cleveland”; [State v. Snow](#), 2002 WL 1256142 (Tenn.Crim.App., June 07, 2002) (“The shooting occurred in a bar in Nashville”; [State v. Baldwin](#), 1998 WL 426199 (Tenn.Crim.App., July 29, 1998) (“Martin stated that the only other person in the bar when the shooting took place”); [State v. Bolden](#), 1996 WL 417673, Tenn.Crim.App., July 26, 1996 (“ Raymond Davis, and Charles Belk met in Tiptonville and proceeded to a “bar” where they practiced shooting a nine millimeter, semi-automatic pistol belonging to the appellant. The pistol was a “Tec-DC9,” manufactured by Intratec, commonly referred to as a Tec-nine. The appellant testified that he had bought the gun earlier that month. After shooting at the “bar”); [State v. Sinclair](#), 1996 WL 181432, (Tenn.Crim.App., April 17, 1996) (Mary Hall testified that she was sitting beside the victim at the bar immediately before the shooting and that the victim had no weapon in his hand when the Defendant approached.”; [State v. Richardson](#), 1993 WL 523630, (Tenn.Crim.App., December 16, 1993) \_\_\_\_\_; (“Mr. Jones, who knew the appellant, saw him return to the bar and start shooting”); [Kelton v. Park Place Center](#), 1993 WL 415637, Tenn.Ct.App., October 12, 1993 (“...an increase in crime during the evening hours in the east Memphis area. In the six months prior to the shooting at bar”; [State v. Bates](#), 1990 WL 39698, Tenn.Crim.App., March 30, 1990 (“ The appellant was indicted for murder by use of a firearm after a shooting incident at a bar

- Cases of shootings at bars by persons licensed to carry permits.<sup>21</sup>

33. In supporting the new law, legislative proponents and the NRA cited examples to demonstrate the new law would expressly allow gun permit holders to carry their guns into bars and engage in vigilante *shooting* at drinking establishments:

- [Nashville bar shooting fatality involving the death of Benjamin Goeser.](#)
- [http://blogs.nashvillescene.com/pitw/2009/05/lawmakers\\_vote\\_to\\_drop\\_curfew.php](http://blogs.nashvillescene.com/pitw/2009/05/lawmakers_vote_to_drop_curfew.php)
- <http://blogs.tennessean.com/politics/2009/nra-says-bredesen-broke-2006-pledge-to-support-guns-in-restaurants-bill/>

34. “[O]therwise lawful actions may be the subject of nuisance lawsuits [under Tennessee law],” [North Carolina ex rel. Cooper v. Tennessee Valley Authority, 549 F.Supp.2d 725, 735 \(W.D.N.C., 2008\), citing Sherrod v. Dutton, 635 S.W.2d 117, 121 \(Tenn. App. 1982\).](#)

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in which an employee was shot in the head.”); [State v. Wray, 1987 WL 7990 \(Tenn.Crim.App., March 17, 1987\)](#)(“Tommy’s After Hours Bar, where the shooting occurred”).

<sup>21</sup> Bartlett, TN: permit holder shoots in parking lot of restaurant that served alcohol. <http://www.commercialappeal.com/news/2009/jun/04/grand-jury-indicts-man-second-degree-murder-cordov/>;

Memphis, TN: permit holder off duty police officer shoots at a bar. <http://www.commercialappeal.com/news/2009/may/19/former-deputy-had-alcohol-and-demons-shooting/>.

St. Louis, MO: permit holder off duty police officer shoots at a bar. <http://www.ksdk.com/news/local/story.aspx?storyid=159746>;

Sturgis, SD: permit holder off duty police officer shoots at a bar. [http://www.seattlepi.com/local/376865\\_sturgis29.html](http://www.seattlepi.com/local/376865_sturgis29.html)

Minnesota: “Consider Zachary Ourada, who was proud of his newly obtained permit to carry a concealed handgun. A local bartender commented that the twenty-seven year old ‘felt like somebody because he had a permit.’ Ourada had met the requirements of Minnesota’s Personal Protection Act, which, among other things, requires a background check, and completion of a gun safety course. On the night of May 13, 2005, however, Ourada had a little too much to drink. He does not clearly remember what happened that night, but does remember being asked to leave a popular supper-club and being escorted out by Billy Walsh, the doorman. A few moments later, Walsh was dead with four gunshot wounds in his back. “I’m sorry,” Ourada told the court.” [Comment A Survey of State Conceal and Carry Statutes: Can Small Changes Help Reduce Controversy?](#), 29 *HAMLIN L. REV.* 638-639 (2006).

35. “The definition of ‘nuisance’ is marked by flexibility and reasonable breadth, rather than meticulous specificity.” [State ex rel. Woodall v. D&L Co., Inc., 2001 WL 524279 \(Tenn. Ct. App., 2001\) citing, Grayned City of Rockford, 408 U.S. 104, 110 \(1972\)](#). Liability for public nuisance “is based on interference with the public's use and enjoyment of a public place or with other common rights of the public.” [Metro. Gov't of Nashville & Davidson County v. Counts, 541 S.W.2d 133, 138 \(Tenn. 1976\)](#) (An individual may maintain an action based on public nuisance if that individual has sustained some special injury as a result of the nuisance; and a public nuisance is the interference with the public's use and enjoyment of a public place); [66 C.J.S. Nuisances § 65 \(1998\)](#); [Hale v. Ostrow, 2004 WL 1563230 \(Tenn.Ct.App.,2004\), rev'd on other grounds, Hale v. Ostrow, 166 S.W.3d 713 \(Tenn. 2005\)](#). A state or governmental entity that *creates* a public nuisance is not entitled to immunity and may be sued for creating a public nuisance. [Johnson v. Tennessean Newspaper, Inc. 28 Beeler 287, 241 S.W.2d 399 \(Tenn. 1951\)](#); [Jones v. Knox County, 9 McCanless 561, 327 S.W.2d 473 \(Tenn. 1959\)](#).

36. Where a governmental entity maintains or aids and abets a public nuisance, although it does so while in the discharge of a public duty, or in the performance of a governmental function, it cannot claim immunity. [Bobo v. City of Kenton, 22 Beeler 515, 212 S.W.2d 363 \(Tenn. 1948\)](#); [Knoxville v. Lively, 1918, 141 Tenn. 22, 206 S.W. 180 \(1918\)](#).

37. [T.C.A. § 6-2-201\(23\)](#) empowers municipalities in Tennessee to “prescribe limits within which business occupations and practices liable to be nuisances or detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted or maintained.”

38. It is the law and public policy of the State of Tennessee for local governments to control and abate public nuisances. *See e.g.* [T.C.A. § 6-54-127\(g\)](#) (graffiti

as nuisance) “Nothing in this section shall be construed to impair or limit the power of the municipality to define and declare nuisances and to cause their removal or abatement under any procedure now provided by law for the abatement of any public nuisances.” *To the same effect:* [T.C.A. § 13-21-103\(6\)](#)

39. It is the law and public policy of the State of Tennessee that governmental power may not be used to create, maintain or abet public nuisances. *See e.g.,* [T.C.A. § 7-54-103\(j\),\(k\)](#):

“(j) Any municipality or county exercising, whether jointly or severally, any authority conferred upon it by this chapter, as amended, is hereby declared to be acting in furtherance of a public or governmental purpose. (k) Provided, that such separation and disposition neither creates a public nuisance nor is otherwise injurious to the public health, welfare, and safety.”

40. It is the law and public policy of the State of Tennessee that the Courts have the power and jurisdiction to “abate nuisances.” *See* [T.C.A. § 16-10-110](#).

41. It is the law and public policy of the State of Tennessee that aiding and abetting a public nuisance is unlawful. *See* [T.C.A. § 29-3-101\(b\)](#): “Any person who uses, occupies, establishes or conducts a nuisance, or aids or abets therein, and the owner, agent or lessee of any interest in any such nuisance, together with the persons employed in or in control of any such nuisance by any such owner, agent or lessee, is guilty of maintaining a nuisance and such nuisance shall be abated as provided hereinafter.”

42. It is the law and public policy of the State of Tennessee that the state may be sued for creating or maintaining nuisances.” *See e.g.,* [T.C.A. § 9-8-307\(a\)\(1\)\(b\)](#) (State may be sued for monetary damages for “(B) Nuisances created or maintained.”).

43. It is the law and public policy of the State of Tennessee that buildings that are dangerous to human life are declared “public nuisances.” *See* [T.C.A. § 13-6-102\(8\)](#):

“Public nuisance’ means any vacant building that is a menace to the public health, welfare, or safety; structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, dangerous to human life, or no longer fit and habitable; a nuisance as defined in § 29-3- 101(a); or is otherwise determined by the local municipal corporation or code enforcement entity to be as such.”

44. It is the law and public policy of the State of Tennessee that citizens affected by nuisances may bring a civil action to abate a nuisance in their community.

See [T.C.A. § 13-6-106\(a\)](#):

“...[A]ny interested party or neighbor, may bring a civil action” to abate a public nuisance”; T.C.A. § 29-3-102: “The jurisdiction is hereby conferred upon the chancery, circuit, and criminal courts and any court designated as an environmental court pursuant to Chapter 426 of the Public Acts of 1991 to abate the public nuisances defined in § 29-3-101, upon petition in the name of the state, upon relation of the attorney general and reporter, or any district attorney general, or any city or county attorney, or without the concurrence of any such officers, upon the relation of ten (10) or more citizens and freeholders of the county wherein such nuisances may exist, in the manner herein provided.”

45. It is the law and public policy of the State of Tennessee that citizens may sue “all aiders and abettors” of a public nuisance. [T.C.A. § 29-3-103](#).

46. It is the law and public policy of the State of Tennessee that a temporary injunction to abate a public nuisance should issue upon presentation of a proper bill or petition for public nuisance. [T.C.A. § 29-3-105](#). Temporary injunction (a) In such proceeding, the court, or a judge or chancellor in vacation, shall, upon the presentation of a bill or petition therefore, alleging that the nuisance complained of exists, award a temporary writ of injunction, enjoining and restraining the further continuance of such nuisance, and the closing of the building or place wherein the same is conducted until the further order of the court, judge, or chancellor. (b) The award of a temporary writ of injunction shall be accompanied by such bond as is required by law in such cases, in case the bill is filed by citizens and freeholders; but no bond shall be required when such is filed by the officers provided for, if it shall be made to appear to the satisfaction

of the court, judge or chancellor, by evidence in the form of a due and proper verification of the bill or petition under oath, or of affidavits, depositions, oral testimony, or otherwise, as the complaints or petitioners may elect, that the allegations of such bill or petition are true.”

47. It is the law and public policy of the State of Tennessee that fighting, drunkenness, breaches of the peace and property used in breaches of the peace constitute public nuisances. See [T.C.A. § 29-3-101\(a\)\(2\)](#):

“‘Nuisance’ means that which is declared to be such by other statutes, and, in addition thereto, means any place in or upon which lewdness, prostitution, promotion of prostitution, patronizing prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, any sale, exhibition or possession of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver or distribute matter or materials in violation of §§ 39-17-901 – 39-17-908, § 39-17-911, § 39-17-914, § 39-17-918, or §§ 39-17-1003 – 39-17-1005, quarreling, *drunkenness, fighting or breaches of the peace* are carried on or permitted, *and personal property, contents, furniture, fixtures, equipment and stock used in or in connection with the conducting and maintaining any such place for any such purpose.*”

48. It is the law and public policy of the State of Tennessee that courts may abate nuisances and order that “all means, appliances, fixtures, appurtenances, materials, supplies, and instrumentalities used for the purpose of conducting, maintaining, or carrying on the unlawful business, occupation, game, practice or device constituting such nuisance” be removed. [T.C.A. § 29-3-110](#).

49. It is the law and public policy of the State of Tennessee that the trial of public nuisance cases be “given precedence over all other causes.” [T.C.A. § 29-3-108](#).

50. It is the law and public policy of the State of Tennessee that “Any person who is visibly intoxicated and who is disorderly” creates a public nuisance. [T.C.A. § 68-14-602](#); [T.C.A. § 68-14-605](#).

51. “A nuisance has been defined as anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable.” [Pate v. City of Martin, 614 S.W.2d 46 at 47 \(Tenn. 1981\)](#). “The key element of any nuisance is the reasonableness” of the “conduct under the circumstances.” [Sadler v. State, 56 S.W.3d 508 \(Tenn.Ct.App.2001\)](#), *citing*, [58 AM.JUR.2D NUISANCES § 76](#).

52. When the Petitioners’ theory of liability is public nuisance, the pleading requirements are not exacting because the concept of common law public nuisance elude[s] precise definition. The existence of a nuisance depends on the peculiar facts presented by each case. [Young v. Bryco Arms, 213 Ill.2d 433, 821 N.E.2d 1078 \(Ill.,2004\)](#).

53. Petitioners allege a cause of action for public nuisance: a right common to the general public for life and safety at public places including places that serve alcohol, the transgression of that right by the “guns in bars law” and resulting injury.

54. Petitioners aver the “guns in bar law” creates and abets a public nuisance because, under public nuisance law, even assuming *arguendo* the mere presence of permitted guns in bars is not *per se* harmful, the guns may become harmful by the *intervention and acts of other persons and patrons* and thus a public nuisance exists. [See RESTATEMENT OF TORTS \(SECOND\) § 834<sup>22</sup>, and comment f<sup>23</sup>](#). The mere presence of guns on the premises can establish proof and evidence of a public nuisance because by actions of

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<sup>22</sup> “One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on.” RESTATEMENT OF TORTS (SECOND) § 834.

<sup>23</sup> f. *Causation*. In some cases the physical condition created is not of itself harmful, but becomes so upon the intervention of some other force, the act of another person or force of nature. In these cases the liability of the person whose activity created the physical condition depends upon the determination that his activity was a substantial factor in causing the harm, and that the intervening force was not a superseding cause. RESTATEMENT OF TORTS (SECOND) § 834, *comment f*.

patrons, shootings and fights with guns may occur, which would make the premises a nuisance.

55. Because bars, saloons and nightclubs are notorious for fights, assaults and breaches of the peace, carrying loaded guns is *expressly* prohibited in bars and nightclubs serving alcohol in 24 states. *See supra* ¶ 2. No state by statute or case law *expressly* permits a gun permit holder to take a concealed loaded gun into a bar or nightclub that serves alcohol for consumption.

56. In states where there is no express prohibition against bringing guns into bars or nightclubs, courts in such states (and historically Tennessee) treat guns and alcohol as a “volatile combination” and routinely declare bars or nightclubs where guns are found to be present as public nuisances, particularly when shootings occur. *See supra* footnote 4. [See e.g. Spitzer v. Sturm Ruger & Co., Inc., 309 A.D.2d 91, 98; 761 N.Y.S.2d 192 \(N.Y. Sup. Ct. 2003\)](#) (unlike true public nuisance cases where “firearms” together with “the character of the premises as a nightclub serving alcoholic beverages” supports public nuisance; mere manufacture of guns did not cause/constitute public nuisance); [Suleiman v. City of Memphis Alcohol Com’n, 2008 WL 2894679 \(Tenn.Ct.App.,2008\)](#) (beer permit denied on public nuisance grounds because shootings had occurred at the market); [Kingsport v. Club 229](#)<sup>24</sup> (City of Kingsport filed public nuisance action to close bar where shooting and breaches of the peace had occurred); [Philadelphia v. Franchise Bar & Grille](#)<sup>25</sup> (“A North Philadelphia bar that police say is at the center of a wild shootout for the second time in two years was shut down yesterday for being a “public nuisance.”); [State of Tennessee v. Joseph Patrick Patton,](#)

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<sup>24</sup> <http://www.timesnews.net/article.php?id=3640427>

<sup>25</sup> <http://www.metro.us/us/article/2009/06/16/01/5110-85/index.xml>



















