

Case No. 11-0019

In The Supreme Court of Ohio

BARTEC, INC., *et al.*,

Defendants-Appellants,

v.

THEODORE WYMSYLO, OHIO DEPARTMENT OF HEALTH, *et al.*,

Plaintiffs-Appellees.

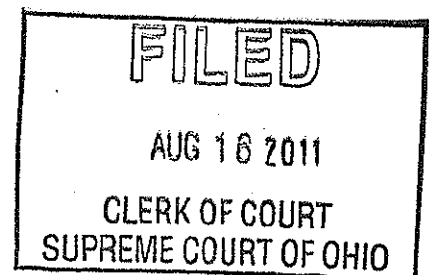
On appeal from the Court of Appeals, Tenth Appellate District, Case No. 10AP-173, and Franklin County Common Pleas Court, Case No. 09CVH08-12197

**BRIEF OF AMICI CURIAE
IN SUPPORT OF PLAINTIFFS-APPELLEES**

SUBMITTED BY:

AMERICAN CANCER SOCIETY, EAST CENTRAL DIVISION
AMERICAN CANCER SOCIETY CANCER ACTION NETWORK
ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO
AMERICAN HEART ASSOCIATION, GREAT RIVERS AFFILIATE
AMERICAN LUNG ASSOCIATION OF THE MIDLAND STATES
AMERICAN MEDICAL ASSOCIATION
AMERICANS FOR NONSMOKERS' RIGHTS
ASSOCIATION OF OHIO HEALTH COMMISSIONERS, INC.
CAMPAIGN FOR TOBACCO-FREE KIDS
CLEVELAND CLINIC
OHIO ASTHMA COALITION
OHIO CHAPTER OF THE AMERICAN COLLEGE OF CARDIOLOGY
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I. STATEMENTS OF INTEREST OF AMICI CURIAE

Amici curiae American Cancer Society, East Central Division, the American Cancer Society Cancer Action Network, the Academy of Medicine of Cleveland & Northern Ohio, the American Heart Association, Great Rivers Affiliate, the American Lung Association of the Midland States, American Medical Association, Americans for Nonsmokers' Rights, the Association of Ohio Health Commissioners, Inc., the Campaign for Tobacco-Free Kids, the Cleveland Clinic, the Ohio Asthma Coalition, the Ohio Chapter of the American College of Cardiology, the Ohio Osteopathic Association, the Ohio State Medical Association, and the Tobacco Control Legal Consortium (collectively "*Amici*" or "*Amici curiae*") have a compelling interest in the outcome of this matter and are able to offer a perspective supportive of but distinct from Appellees Ohio Department of Health ("ODH") and Ohio Attorney General Michael DeWine ("DeWine") in response to the brief filed by Appellant Bartec, Inc. d/b/a Zeno's Victorian Village, *et al.* ("Zeno's").

The *Amici* share a common interest in providing relevant evidence on the health effects of tobacco use to this Court as it considers this important case concerning the exposure of Ohioans to the detrimental effects of secondhand smoke. The *Amici* address health effects, economic impact, and some of the key legal issues regarding secondhand smoke. Herein is a more detailed statement of interest of each *Amici*:

The American Cancer Society, East Central Division, ("ACS") includes the state of Ohio and is dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer, through research, education, advocacy, and service. This includes fighting lung cancer, the number one cancer killer. ACS was responsible, on behalf of the SmokeFreeOhio Coalition, for managing the statewide petition circulation effort of

the initiative petition proposing the Smoke Free Workplace Act (2006 General Election, State Issue 5) that is the subject of this action. ACS has continued to advocate and advise Ohio governmental entities since Ohioans voted in favor of the ballot measure.

The American Cancer Society Cancer Action Network (“ACS CAN”) is the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society, and supports evidence-based policy solutions designed to eliminate cancer as a major health problem. ACS CAN has nearly half a million advocates nationwide, and worked with ACS to help pass the Smoke Free Workplace Act.

The Academy of Medicine of Cleveland & Northern Ohio (“AMCNO”) is a professional medical association serving the Northern Ohio community. AMCNO functions as a non-profit 501(c)(6) professional organization in representing Northern Ohio’s medical community through legislative action and community outreach programs. This professional organization has been in existence since 1824, and became known as The Academy of Medicine in 1902. Now known as the AMCNO, it has a membership of over 5,000 physicians, making it one of the largest regional medical associations in the entire United States. AMCNO strives to provide legislative advocacy for its physician members before the Ohio General Assembly, state medical board, and other state and federal regulatory boards. AMCNO also sponsors numerous community services initiatives, such as physician referrals and Healthlines. AMCNO further works collaboratively with hospitals, chiefs of staffs, and other related organizations, on a myriad of different projects of interest and/or concern to its members. Simply put, AMCNO is the voice of physicians in Northern Ohio, and has been so for over 185 years.

The American Heart Association, Great Rivers Affiliate, is an affiliate of the nation’s oldest and largest voluntary health organization dedicated to building healthier lives, free of heart

disease and stroke. The American Heart Association's involvement in advocacy and education on tobacco prevention and control is longstanding and stems from the fact that smoking is a major cause of cardiovascular disease. The American Heart Association's research shows that smokers' risk of developing coronary heart disease is 2-4 times that of nonsmokers, and an estimated 35,000 nonsmokers die from coronary heart disease each year because of exposure to secondhand smoke.

The American Lung Association of the Midland States, which covers Ohio, is the premiere organization working to save lives by improving lung health, through education, advocacy and research in Ohio. The Lung Association is the oldest voluntary health organization in the United States and has been fighting for the lung health of all Americans since 1904. Today, the Lung Association fights to reduce smoking and exposure to secondhand smoke, find cures for lung disease and clean the air we breathe. The Lung Association was a strong partner in the passage of Ohio's Smoke Free Workplace Act in 2006 as part of the SmokeFreeOhio Coalition, and is dedicated to continuing to defend the initiative from attacks by opponents.

The American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups seated in the AMA House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in the AMA's policy making process. The objects of the AMA are to promote the science and art of medicine and the betterment of public health. The AMA has developed expertise in the pharmacology of nicotine, the toxic effects of cigarette smoke when inhaled by nonsmokers, and the societal effects of tobacco usage. For many years, the AMA has been one of the leading anti-smoking

organizations in the United States. The AMA seeks to appear as amicus curiae in this case on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of each state and the District of Columbia, and was formed to represent the viewpoint of organized medicine in the courts.

Americans for Nonsmokers' Rights ("ANR") is a national advocacy organization with more than 8,000 members consisting of individuals and organizations. ANR promotes the protection of everyone's right to breathe smoke-free air, educates the public and policy-makers regarding the dangers of secondhand smoke, works to prevent youth tobacco addiction, and tracks and reports on the adversarial efforts of the tobacco industry. Founded in 1976 and based in Berkeley, California, ANR began by backing legislation to ban smoking in the workplace and other enclosed public spaces. Since the early 1980s, ANR has supported clean indoor air initiatives in more than 1,500 communities in the United States.

The Association of Ohio Health Commissioners, Inc.'s ("AOHC") mission is to act as the voice of local public health in Ohio, representing the 131 local health districts across the state. The AOHC is working to strengthen Ohio's public health system to protect its citizens against the disease threats of today and to promote a vision for the future of healthy people in healthy Ohio communities. Moreover, the AOHC leads Ohio's health community by collaborating with its stakeholders to provide administrative and legislative leadership in health promotion, disease and injury prevention, protection of the environment and by providing public health professionals with a forum for dialogue and continuing education. The AOHC recognizes the significant and devastating impact that tobacco use has on the lives and health of the citizens of Ohio. Accordingly, the AOHC involves itself in various campaigns to reduce the negative

impact of tobacco use. For example, the AOHC is one of the statewide partners for the SmokeFree Ohio campaign, which successfully advocated for the passage of the Smoke Free Workplace Act to ensure smoke-free public places and workplaces in the state of Ohio. Since its passage, AOHC's member local health districts have been actively involved in the enforcement of this statewide law.

The Campaign for Tobacco-Free Kids is a 501(c)(3) nonprofit organization that works to promote public and private policies to prevent and reduce tobacco use and its harms, especially among children. As an important part of that work, the Campaign tries to ensure that states use their tobacco settlement funds effectively to address smoking-caused disease, prevent tobacco use among youth, and reduce smoking-caused harms and costs. Founded in 1996, the Campaign for Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing tobacco use and its harms among children and others. For more than a decade, the Campaign has played a key role in encouraging states and localities to increase their tobacco tax rates (which directly reduces tobacco use and harms, especially among youth, pregnant women, and lower income communities), implement strong smoke-free laws, support strong state tobacco prevention programs, and take other effective actions to reduce tobacco use and its many harms and costs.

The Cleveland Clinic is a nonprofit multi-specialty academic medical center that integrates clinical and hospital care with research and education. It was founded in 1921 by four renowned physicians with a vision of providing outstanding patient care based upon the principles of cooperation, compassion and innovation. Cleveland Clinic has pioneered many medical breakthroughs, including coronary artery bypass surgery and the first face transplant in the United States. U.S. News & World Report consistently names Cleveland Clinic as one of the

nation's best hospitals in its annual "America's Best Hospitals" survey. About 2,800 full-time salaried physicians and researchers and 11,000 nurses represent 120 medical specialties and subspecialties. Cleveland Clinic Health System includes a main campus near downtown Cleveland and nine community hospitals and 15 Family Health Centers in Northeast Ohio. In 2010, there were 4 million visits throughout the Cleveland Clinic health system and 155,000 hospital admissions. Patients came for treatment from every state and from more than 100 countries.

The Ohio Asthma Coalition ("OAC") is a collaborative group of medical and public health professionals, business leaders, community activists and others dedicated to improving the quality of life for people with asthma through information-sharing, networking and advocacy. The Ohio Asthma Coalition advocates for state and federal laws, policies, and regulations that can improve the lives of individuals affected by asthma. OAC works with policy makers on federal, state, and local initiatives in such areas as medications, clinical guidelines, schools, workplace and public places.

The Ohio Chapter of the American College of Cardiology ("ACC") has 1,512 members, and is the state "arm" of the ACC, a 39,000-member national non-profit professional medical society. The Ohio Chapter of the ACC is the key voice and resource for all concerned with cardiovascular care in Ohio.

The Ohio Osteopathic Association ("OOA") is a non-profit professional association, founded in 1898 that advocates for Ohio's 4,600 licensed physicians (DOs), 18 health-care facilities accredited by the American Osteopathic Association's Healthcare Facilities Accreditation Program (HFAP), and the Ohio University College of Osteopathic Medicine in Athens, Ohio. DOs represent 12 percent of the total physicians practicing in Ohio and 26 percent

of the state's family physicians. OOA's mission includes promoting Ohio's public health and advancing the distinctive philosophy and practice of osteopathic medicine within the state.

The Ohio State Medical Association ("OSMA") is a non-profit professional association of approximately 20,000 physicians, medical residents and medical students in the State of Ohio. The OSMA's membership includes most Ohio physicians engaged in the practice of medicine, in all specialties. The OSMA's purposes are to improve public health through education, to encourage interchange of ideas among members, and to maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The Tobacco Control Legal Consortium ("Consortium") is a national network of legal centers providing technical assistance to public officials, health professionals, and advocates in addressing legal issues related to tobacco and health, and supporting public health policies that will reduce the harm caused by tobacco use in the United States. The Consortium grew out of collaboration among specialized legal resource and public health centers serving six states and is supported by national advocacy organizations, voluntary health organizations, and others. The Consortium has submitted *amicus curiae* briefs in cases before the U.S. Supreme Court and numerous federal and state courts, in which its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance.

As such, the *Amici curiae* have a compelling interest in the outcome of this matter as they have been intimately involved in the creation, advocacy, research for, and implementation of the Smoke Free Workplace Act.

II. STATEMENT OF THE CASE AND FACTS

Amici curiae refer to and accept the procedural and factual background as set forth in the Merit Brief filed by Appellees Ohio Director of Health Theodore Wymyslo and Ohio Attorney General Michael DeWine on August 16, 2011.

III. INTRODUCTION

This case is literally a matter of life and death. Environmental tobacco smoke, more commonly known as secondhand smoke, causes premature death and disease in people who do not smoke.¹ Secondhand smoke contains hundreds of chemicals known to be toxic or carcinogenic (cancer-causing), including formaldehyde, benzene, vinyl chloride, arsenic, ammonia, and hydrogen cyanide, and it has been designated as a known human carcinogen (cancer-causing agent) by the U.S. Environmental Protection Agency, National Toxicology Program and the International Agency for Research on Cancer. The National Institute for Occupational Safety and Health has concluded that secondhand smoke is an occupational carcinogen.²

According to the Surgeon General, there is no safe level of exposure to secondhand smoke.³ Breathing secondhand smoke for even a short time can have immediate adverse effects on the cardiovascular system and interferes with the normal functioning of the heart, blood, and vascular systems in ways that increase the risk of a heart attack. Nonsmokers who are exposed

¹ U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006).

² *Id.*

³ *Id.*; U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General* (2010).

to secondhand smoke at home or at work increase their risk of developing heart disease by 25 to 30 percent and lung cancer by 20 to 30 percent.⁴ Children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, and more severe asthma.⁵

Tobacco use is the leading cause of preventable death in the United States, imposing a terrible toll in health, lives and dollars on families, businesses and government. Indeed, tobacco kills an estimated 443,000 people annually,⁶ and costs the United States more than \$96 billion in health care expenditures and \$97 billion in lost productivity each year.⁷ In Ohio, smoking kills more people than alcohol, AIDS, car crashes, illegal drugs, murders, and suicides combined.⁸ In Ohio, an estimated 18,600 adults die each year from their own smoking,⁹ and a staggering 1,820 adult non-smokers die each year from exposure to secondhand smoke.¹⁰

It was with these drastic health and economic realities that electors in Ohio approved a ballot initiative on November 7, 2006 to implement the Smoke Free Workplace Act, which law took effect on December 7, 2006. The ballot initiative was approved by 2,370,369 votes, or

⁴ U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006).

⁵ *Id.*

⁶ Centers for Disease Control and Prevention. Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004. *Morbidity and Mortality Weekly Report*, 57(45):1226–8 (2008).

⁷ *Id.*

⁸ Campaign for Tobacco-Free Kids, *The Toll of Tobacco in Ohio*, http://www.tobaccofreekids.org/facts_issues/toll_us/ohio (accessed August 9, 2011).

⁹ Centers for Disease Control and Prevention. State-Specific Smoking-Attributable Mortality and Years of Potential Lives Lost – United States, 2000-2004. *Morbidity and Mortality Weekly Report* 2009; 58(2):29-33.

¹⁰ Campaign for Tobacco-Free Kids, *The Toll of Tobacco in Ohio*, http://www.tobaccofreekids.org/facts_issues/toll_us/ohio (accessed August 9, 2011).

58.5% of the total votes cast, to 1,679,956, or 41.5% of the total votes cast.¹¹ In the same 2006 general election, the voters soundly defeated a proposed constitutional amendment by 1,450,231 votes to approve, or 35.9% of the total votes cast, to 2,590,558 votes to reject, or 64.1% of the total votes cast, which would have provided exemptions to allow smoking in certain restaurants and other public places.¹²

R.C. 3794.04 provides the purpose of the Smoke Free Workplace Act, and states:

Because medical studies have conclusively shown that exposure to secondhand smoke from tobacco causes illness and disease, including lung cancer, heart disease, and respiratory illness, smoking in the workplace is a statewide concern and, therefore, it is in the best interests of public health that smoking of tobacco products be prohibited in public places and places of employment and that there be a uniform statewide minimum standard to protect workers and the public from the health hazards associated with exposure to secondhand smoke from tobacco.

Ohio is not alone in its efforts to curb the dramatic effects of secondhand smoke. As of July 1, 2011, approximately 48% of the U.S. population was protected by local or statewide smoke-free laws covering virtually all indoor worksites including bars and restaurants.¹³ A total of 32 U.S. states and territories, including Ohio, have comprehensive smoke free acts that include bars.¹⁴ A total of 3,315 municipalities in the United States have local laws in effect that restrict where smoking is allowed.¹⁵

¹¹ Ohio Secretary of State's Office, 2006 General Election Results for State Issue 5, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2006ElectionsResults/06-1107Issue5.aspx> (accessed August 11, 2011).

¹² Ohio Secretary of State's Office, 2006 General Election Results for State Issue 4, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2006ElectionsResults/06-1107Issue4.aspx> (accessed August 11, 2011).

¹³ American Nonsmokers' Rights Foundation, *Overview List – How Many Smokefree Laws?* (July 1, 2011) <http://www.no-smoke.org/pdf/mediaordlist.pdf> (accessed August 11, 2011).

¹⁴ *Id.*

¹⁵ *Id.*

The scientific evidence clearly shows that smoke-free legislation protects the public from the dangers of secondhand smoke and does not harm business.¹⁶

Amici curiae, members of the medical and public health community in Ohio and the United States, urge the Court to reject Zeno's assignment of errors to protect the health and welfare of Ohio's employees and citizens. A ruling which upholds the state law and ODH's enforcement of the law protects the lives of Ohioans, particularly restaurant, bar and lounge employees and patrons, is consistent with the intent of the voters, and preserves Ohio's economic resources.

Moreover, for the reasons that follow, a ruling upholding the ODH regulations that were promulgated to enforce the Smoke Free Workplace Act is consistent with Ohio law. *Amici curiae* request this Court to affirm the decision of the Tenth District Court of Appeals.

IV. ARGUMENT

Zeno's is a bar that has exhibited a callous disregard of the Smoke Free Workplace Act, codified as R.C. Chapter 3794, on ten different occasions between 2007 and 2009. In the process, it has endangered the health, safety, and welfare of its employees and the patrons that enter its

¹⁶ American Cancer Society Cancer Action Network, *Saving Lives, Saving Money: A State-by-State Report on the Health and Economic Impact of Comprehensive Smoke-Free Laws* (June 2011) www.acscan.org/tobaccocontrol (accessed August 11, 2011); Eisner MD, Smith AK, Blanc PD, *Bartenders' Respiratory Health After Establishment of Smoke-Free Bars and Taverns*, *Journal of the American Medical Association*, 280(22):1909-14 (1998); Goodman P, Agnew M, McCaffrey M, Paul G, Clancy L., *Effects of the Irish Smoking Ban on Respiratory Health of Bar Workers and Air Quality in Dublin Pubs*, *American Journal of Respiratory and Critical Care Medicine*, 175(8):840-5 (2007); Menzies, D., Nair A, Williamson PA, Schembri S, Al-Khairalla MZH, Barnes M, *et al.*, *Respiratory Symptoms, Pulmonary Function, and Markers of Inflammation Among Bar Workers Before and After a Legislative Ban on Smoking in Public Places*, *Journal of the American Medical Association*, 296(14):1742-8 (2006); National Academy of Sciences, Institute of Medicine, *Secondhand Smoke Exposure and Cardiovascular Effects: Making Sense of the Evidence* (2009); Pickett, M.S., Schober S.E., Brody, D.J., Curtin, L.R., and Giovino, G.A., *Smoke-free Laws and Secondhand Smoke Exposure in US Non-Smoking Adults, 1999-2002*, *Tobacco Control*, (15): 302-307 (2006); U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Coordinating Center for Health Promotion, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006).

establishment who are subjected to secondhand smoke. Zeno's, through this court case, has attempted to deflect its willful neglect of the law through a variety of spurious legal arguments.

A. The Ohio Department of Health's Enforcement of the Ohio Smoke Free Workplace Act Does Not Violate Separation of Powers

1. The Ohio Department of Health Follows the Explicit Legislative Mandates Set Forth in the Smoke Free Workplace Act and Has Not Created "Policy" Different Than That Contained in the Law

The Ohio Department of Health does not have "an unwritten policy of strict liability for the presence of smoking upon Ohio's business and property owners" as alleged by Zeno's. [Zeno's June 27, 2011 Merit Brief, p.4.] Zeno's further argues that "[a]n agency exceeds its grant of authority when it creates rules that reflect a public policy not expressed in the governing statute." [*Id.* at 15]. The ODH is merely implementing the policy set forth in R.C. 3794.02(A), which states "No proprietor of a public place or place of employment . . . shall permit smoking in the public place or place of employment or in the areas directly or indirectly under the control of the proprietor immediately adjacent to locations of ingress or egress to the public place or place of employment." Under R.C. 3794.02(E), "[l]ack of intent to violate a provision of this chapter shall not be a defense to a violation."

The Court of Appeals has described the procedures that ODH follows upon a receipt of a reported violation of R.C. 3794.02:

ODH or its designee provides the proprietor of an establishment with a written notice of the reported violation; the proprietor may submit in writing statements or evidence to contest the report. Ohio Adm. Code 3701-52-08(D). ODH reviews the report, the evidence the proprietor submitted to contest the report, as well as other information the investigation yielded, such as interviews and on-site investigations, to determine whether a violation occurred. Ohio Adm. Code 3701-52-08(F)(1)(a). If the violator has no previous violations within the past two years, ODH issues the

warning letter contemplated under R.C. 3794.09(A). Ohio Adm. Code 3701-52-08(F)(1)(a). If however, the alleged violator has a prior violation in the past two years, a fine may issue pursuant to R.C. 3794.09(B) and a more comprehensive administrative review commences, including a hearing that provides the alleged violator with the opportunity to present its case and cross-examine any adverse witnesses. Ohio Adm. Code 3701-52-08(F)(2).

[Court of Appeals Decision, p. 7].

The procedures in place, as promulgated in Administrative Code 3701-52-08, demonstrate that the ODH is carrying out the dictates of R.C. 3794.02 through an investigatory process, which allows alleged violators to contest the findings, present their own evidence, and refute the evidence of the ODH investigators.

In the pending matter, the investigations by public health representatives illustrate that enforcement coordinators conducted thorough investigations on a case-by-case basis. A Columbus Public Health investigator sent ten violation letters to Zeno's on July 31, 2007, October 12, 2007, December 3, 2007, May 2, 2008, July 30, 2008, November 10, 2008, December 19, 2008, April 10, 2009, June 1, 2009, and July 23, 2009. [August 13, 2011 Complaint, Exhibit 2 A-J]. In each of these letters, the investigator detailed why a violation of R.C. 3794 was found, the date the investigation occurred, provided his contact information, and explained how Zeno's could file a notice of appeal with the ODH. For example, the December 3, 2007 letter stated that the investigator observed that "[n]umerous patrons were smoking using partially filled plastic cups to ash in and dispose of their cigarette butts;" the July 30, 2008 letter stated that the investigator observed "[t]hree patrons smoking at the time of investigation[.] [S]mall plastic cups with liquid [were] being used as ashtrays;" and the November 10, 2008 letter stated that the investigator observed "[a]t least 8 patrons smoking using small plastic cups partially filled with liquid as ashtrays." [*Id.*, Exhibit 2-C, 2-E, and 2-F]. Zeno's chose not to

appeal eight of the violations. Zeno's did appeal two of the adverse administrative decisions, which were affirmed by the Franklin County Court of Common Pleas, and Zeno's pursued no further appeals from those two violations. [Court of Appeals Decision, p. 11].

Other recent Court opinions illustrate that investigators conduct a thorough investigation before issuing a violation against the proprietor of the bar. In *Trish's Café & Catering, Inc. v. Ohio Dept. of Health* (10th Dist.), 2011-Ohio-3304, a public health investigator observed three patrons and a bartender smoking cigarettes for 15-20 minutes. The investigator went over his report with the owner, who told him to get out and threatened to call the police. *Id.* at *3. In *Parker's Tavern v. Ohio Dept. of Health* (10th Dist. July 21, 2011), two investigators witnessed several patrons smoking at a table in the bar. For a period of five minutes, they did not observe any bar employee ask the patrons to stop smoking or to take their cigarettes outside. *Id.* at *2. The incidents in these cases, as well as in the pending matter, show that investigators observe activity in the bar first-hand before issuing a violation.

2. The Ohio Department of Health's Lack of Citations to Smokers Does Not Diminish the Violations that Have Occurred by Zeno's

Zeno's takes great exception to the fact that ODH has enforced actions against proprietors pursuant to R.C. §3794.02(A), but has not enforced actions against smokers pursuant to R.C. §3794.02(D). [Zeno's Merit Brief, p. 4]. Beyond the irrelevance of this argument to Zeno's separation of powers proposition, the fact that smokers may not have issued violations does not in any way diminish the culpability of proprietors pursuant to R.C. §3794.02(A).

Further, there are a variety of logical explanations for why proprietors instead of smokers have been cited. Logically, the complaints received by the health department would be in terms of the proprietor violating the law and not individual smokers. Unlike smokers, proprietors would have been previously issued a warning letter and been put on notice of the repercussions

that will occur for violating the law. Proprietors would have greater familiarity of the laws compared to, for example, out-of-state persons or young adults who may not be aware that Ohio has a smoke-free law. Finally, proprietors are in the best position to protect their employees and patrons from the dangers of secondhand smoke. After all, Ohio Revised Code Chapter 3794 is a workplace health, safety, and welfare measure. As is the case with other business establishments, proprietors have a responsibility to maintain control over their own establishments. Proprietors have a variety of tools at their disposal to prohibit smoking in their establishments, including asking a patron to leave, not serving the patron with any alcohol or food, or calling the health department investigator to report the violation.

3. Zeno's "Permitted" Smoking In Violation of R.C. §3794.02(A)

3794.02(A) states that "[n]o proprietor of a public place or place of employment . . . shall permit smoking in the public place or place of employment or in the areas directly or indirectly under the control of the proprietor immediately adjacent to locations of ingress or egress to the public place or place of employment." Zeno's alleges that the ODH "requires proprietors like Zeno's to *prohibit* smoking." [Zeno's Merit Brief, p. 11]. This interpretation mischaracterizes ODH's actions. ODH has not gone beyond the legislative mandates of the statute to create any new policy.

Zeno's would have this Court believe that their "hands are tied," and they do not have the ability to "not permit" smoking since it already has posted "no smoking" signs, pulled ashtrays, and has a policy of informing patrons of the smoking ban and asking smokers to discontinue smoking. [*Id.* at 12-13]. Zeno's has exhibited a lengthy track record of tacitly allowing smokers to smoke cigarettes in its establishment.

Zeno's approach would allow proprietors to avoid the Act by allowing them to give smokers a "wink and a nod" when asking them to stop smoking. O.A.C. 3701-52-02(B) requires proprietors to take reasonable steps to enforce the smoking ban which includes, but is not limited to, requesting individuals to stop smoking. The Court must give due deference to ODH in its reasonable administration and enforcement of the Act.

O.A.C. 3701-52-02 indicates that more reasonable steps should be taken beyond merely asking an individual to stop smoking. For example, the proprietor could contact the local health department that enforces the ban to let them know that they have a person in their establishment who is smoking despite warnings to stop. The proprietor could refuse to serve the smoker with any more food or beverages. Most importantly, the proprietor should respond in the same manner s/he would if a customer were violating any other law.

Lower courts have reached a similar conclusion. In *Deer Park Inn v. Ohio Dept. of Health* (10th Dist.), the Court of Appeals held that the testimony of the investigators can establish a violation when there is "nothing less than ***willful blindness on the part of the proprietor and his agents***, and some measure of contempt for, let alone non-compliance with, the Ohio Smoke Free Act." 2010-Ohio-1392, at *13 (with emphasis added). In *Parker's Tavern*, the Tenth District Court of Appeals held that "[a] proprietor permits smoking when the proprietor affirmatively allows smoking or ***implicitly allows smoking by failing to take reasonable measures*** to prevent patrons from smoking. . ." No. 10AP-968 at *5. The Court cited to *Pour House, Inc. v. Ohio Dept. of Health* (10th Dist. 2009), 185 Ohio App.3d 680, in which the Court had provided some examples of reasonable measures that could be taken. In *Parker's Tavern*, the Court held:

While the [proprietor] did take the measures mentioned in *Pour House*, compliance with those measures is not, by itself, sufficient

to prove that an owner did not permit smoking in every case. The preventative measures mentioned in Pour House were only examples of measures an owner could take to demonstrate a reasonable attempt to prevent smoking in the establishment. *We did not indicate that implementation of those specific measures created a "safe harbor."* Whether the owner took reasonable measures to prevent its patrons from smoking depends on the particular circumstances and must be assessed on a case-by-case basis.

* * *

[O]ne request to the patrons to stop smoking in an hour may not constitute reasonable measures to prevent smoking.

[*Parker's Tavern* at 5-6 (with emphasis added)].

In an analogous 2008 federal case, the Fifth Circuit Court held that a bar can not use reasonable "steps" as a loophole to the avoid enforcement of the law. See *Roark Hardee LP GMC PAC v. City of Austin* (5th Cir. 2008), Case No. 06-51670. The Court stated:

Although no smoking signs were posted there, the operators either failed to remove ashtrays or instead provided candle holders to be used as substitutes. . . From this evidence, we find it apparent that, most of the time, the only "steps" taken were in trying to find a loop-hole to avoid enforcing the ordinance. Such behavior is a clear violation of the "necessary steps" provision. See *Tansley*, 986 F.2d at 885 ("The requirement that statutes give fair notice can not be used as a shield by someone who is already intent on wrongdoing.")(citing *United States v. Brewer*, 835 F.2d 550, 553 (5th Cir. 1987)).

Similarly in this case, Zeno's skirting of the law by taking actions such as allowing patrons to use cups with water instead of traditional ashtrays and having policies for warning smokers should not be deemed "reasonable steps" to comply with the law.

B. The Ohio Department of Health's Enforcement of The Ohio Smoke Free Workplace Act Against Workplaces, Including Zeno's, Is A Proper Use of Police Powers

The Smoke Free Workplace Act, and its enforcement by the Ohio Department of Health, is a proper use of the police powers because the relation to the public interest and the common good is substantial and the terms of the law are reasonable and not arbitrary in character. *Olds v. Klotz* (1936), 131 Ohio St. 447. Zeno's correctly asserts that "the free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power only when the restriction thereof bears a substantial relationship to the public health, morals and safety." [Zeno's Merit Brief, p. 32 (*citing Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116)]. The Act undeniably bears a substantial relationship and targets one of the greatest health concerns of our time, exposure to secondhand smoke.

Zeno's downplays the public health, safety, and welfare impacts of the state smoking ban, and states, ". . .the Court cannot simply permit ODH to without more, waive the banner of 'public health,' and rely on unsupported conjecture and theory." [Zeno's Merit Brief, p. 32]. However, the statistics speak for themselves. In Ohio, smoking kills more people than alcohol, AIDS, car crashes, illegal drugs, murders, and suicides combined. In Ohio, 18,600 adults die each year from their own smoking,¹⁷ and *1,820 adult non-smokers die each year from exposure to secondhand smoke.*¹⁸

Indeed, Zeno's only proof that the Smoke Free Workplace Act is not rationally related to health relies on the medical opinions espoused by Zeno's expert, Michael Marlow. Mr. Marlow's opinions on medical evidence are utterly irrelevant, however, because Mr. Marlow is

¹⁷ Centers for Disease Control and Prevention, *State-Specific Smoking-Attributable Mortality and Years of Potential Lives Lost – United States, 2000-2004*, Morbidity and Mortality Weekly Report, 58(2):29-33 (2009).

¹⁸ See Campaign for Tobacco-Free Kids, *The Toll of Tobacco in Ohio*, http://www.tobaccofreekids.org/facts_issues/toll_us/ohio (accessed August 9, 2011).

an economist, not a medical doctor or epidemiologist. Tr. at 167:13-22. Mr. Marlow possesses no scientific training of any kind, and he is not competent to testify about his opinions regarding the medical effects of exposure to secondhand smoke. See e.g. *New York City C.L.A.S.H. v. City of New York* (S.D.N.Y. 2004), 315 F. Supp.2d 461, 492-493 (in rejecting the purported expert's opinion regarding the health effect of secondhand smoke, the Court noted that the expert was a freelance writer, who was not qualified to opine on matters of the reliability and accuracy of scientific research.).

Further, Zeno's overemphasizes the property rights of bar proprietors and draws dubious parallels to the rights a landowner would have in an eminent domain matter. [Zeno's Merit Brief, p. 41]. However, the comparison of the rights of a proprietor that runs a bar and a private landowner are an "apples to oranges" comparison. Bars and restaurants employ people to work there, and the Smoke Free Workplace Act targets places of employment, not where people reside. The employees that work in bars may not have the option to find employment elsewhere especially in today's economy. Bars are further open to the general public. And children do in fact accompany parents into bars and restaurants and would be subjected to secondhand smoke against their will. For these reasons, Zeno's oversimplifies the health, safety, and welfare purposes behind the Act when it claimed that a patron or employee can freely enter or exit and "vote with his feet" to punish or reward the establishment. [Zeno's Merit Brief, p. 35]. Some health, safety, and welfare laws, including the Smoke Free Workplace Act, should not give people the option to "vote with their feet" due to the grave public health threats of secondhand smoke.

Bars are also different than other types of property in that the State has subjected these establishments to restrictions due to the nature of the business. For example, bars must close at

2:00 AM. Bars may only serve alcohol to those over twenty-one years old. Bars must obtain a liquor permit to serve various types of alcohol. The State's smoke-free law is more comparable to these types of health, safety, and welfare restrictions than to the laws regarding eminent domain when the government takes private property for public use.

Zeno's also attributes a loss in revenue to the state smoke-free law. [Zeno's Merit Brief, p. 38]. However, any decreased revenue in recent years could just as well be attributed to a sluggish economy and increased competition, especially given that Zeno's was required to ban smoking under the Columbus ordinance two years prior to the enactment of the state smoke-free law. As discussed above, a very recent June 20, 2011 study of smoke-free laws in Ohio and Kentucky added to the already large body of scientific evidence showing that smoke-free legislation protects public health¹⁹ and does not harm business.²⁰ While the issue of economic impact of smoke-free legislation is sometimes a hotly debated topic, the existing evidence is overwhelming in finding no economic harm from smoke-free laws or regulations. Numerous empirical studies have examined the influence of smoke-free legislation on economic activity, with most finding either a null or positive effect.²¹ In fact, in Ohio, there is no evidence that total

¹⁹ See studies referenced in footnote 16.

²⁰ Pyles, Mark K., Ph.D., & Ellen J. Hahn, Ph.D., RN, *Economic Effects of Smoke-Free Laws on Rural and Urban Counties in Kentucky and Ohio*, Brief Report, p. 1 (June 20, 2011).

²¹ *Id.*; See also Alpert HR, Carpenter CM, Travers MJ, Connolly GN, *Environmental and economic evaluation of the Massachusetts Smoke-Free Workplace Law*, Journal of Community Health, 32(4): 269-81 (2007); Centers for Disease Control and Prevention, *Impact of a Smoking Ban on Restaurant and Bar Revenues—El Paso, Texas, 2002*, Morbidity and Mortality Weekly Report, 53(7):150-2 (2004); Cowling DW, Bond P., *Smoke-Free Laws and Bar Revenues in California—The Last Call*, Health Economics, 14(12):1273-81 (2005); Glantz SA, Smith LRA, *The Effect of Ordinances Requiring Smoke-Free Restaurants and Bars on Revenues: A Follow-Up*, American Journal of Public Health, 87(10):1687-93 (1997); Glantz SA and Charlesworth A., *Tourism and Hotel Revenues Before and After Passage of Smoke-free Restaurant Ordinances*, Journal of the American Medical Association, 281(20): 1911-1918 (1999); New York City Department of Finance, New York City Department of Health and Mental Hygiene, New York City Department of Small Business Services, New York City Economic Development Corporation, *The State of Smoke-Free New York: A One-Year Review* (2004); New York State Department of Health, *Second Annual Independent Evaluation of New York's Tobacco Control Program, 2005*. (2005); Scollo M, Lal A, Hyland A, Glantz S, *Review of the Quality of Studies on the Economic Effects of Smoke-Free Policies on the Hospitality Industry*. Tobacco Control, 12(1):13-20 (2003); U.S. Department of Health and Human Services, Centers for

employment or the number of establishments were impacted by the Smoke Free Workplace Act. Instead, wages increased following the implementation of the law.²² Furthermore, there is no evidence that either rural or urban counties experienced a loss of economic activity following smoke-free legislation.²³ In addition, given that approximately 80 percent of U.S. adults are non-smokers,²⁴ people are more likely to patronize restaurants and bars that are covered by a smoke-free law.²⁵ Public support for Ohio's smoke-free law is strong. A September 2010 poll of 1,000 Ohio voters found that 85 percent of those surveyed agree that all workers should be protected from secondhand smoke in the workplace. Across all party, age, and gender lines more voters supported the law in 2010 than voted for it in 2006. Specifically, 73 percent of the people surveyed agreed that business owners need to stop fighting the law and start abiding by it by keeping their businesses smoke-free and welcoming nonsmokers.²⁶

Further, the Act and its enforcement are not arbitrary as suggested by Zeno's. [Zeno's Merit, Brief, p. 37]. The Act does have logical exemptions for places where people permanently

Disease Control and Prevention, Coordinating Center for Health Promotion, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006).

²² Pyles, Mark K., Ph.D., & Ellen J. Hahn, Ph.D., RN, *Economic Effects of Smoke-Free Laws on Rural and Urban Counties in Kentucky and Ohio*, Brief Report, p. 1 (June 20, 2011).

²³ *Id.*

²⁴ Centers for Disease Control and Prevention. *Vital Signs: Current Cigarette Smoking Among Adults Aged > 18 Years - - - United States, 2009*, Morbidity and Mortality Weekly Report, 59(35):1135-1140 (2010).

²⁵ Montana Tobacco Use Prevention Program. *Tobacco Surveillance Report: High Support for the Montana Clean Indoor Air Act* (October 2009) http://tobaccofree.mt.gov/publications/documents/CIAAsupport_Oct09_FINAL.pdf (accessed June 6, 2011); Nebraska Department of Health and Human Services. *Six Months of Smoke-Free Air: The Nebraska Clean Indoor Air Act* (January 2010) http://smokefree.ne.gov/SixMonthReport_SFAirLaw.pdf (accessed June 6, 2011); Selzer & Company on behalf of the Iowa Tobacco Prevention Alliance, *Iowa Tobacco Prevention Alliance Announces Results of Statewide Survey* (February 20, 2011) <http://www.iowatpa.org/Resources/Documents/TTPA%20Survey%20Key%20Findings%20Feb%202011.pdf> (accessed June 6, 2011).

²⁶ Fallon Research on behalf of SmokeFreeOhio. *SmokeFreeOhio Survey Results* (September 2010).

or temporarily reside, which are not open to the general public, or are not enclosed. This includes private residences, hotel or motel rooms, nursing homes, family-owned places of employment where all employees are related to the owner, tobacco stores in operation prior to the Act, private clubs that have no employees, and outdoor patios. *See* R.C. §3794.03.

In short, the Smoke Free Workplace Act, and ODH's enforcement is a reasonable exercise of the state's police power, is necessary to promote essential health, safety, and welfare considerations, and does not unnecessarily infringe on the rights of landowners.

C. Zeno's Can Not Utilize Declaratory Judgment Action to Collaterally Attack Ten Final Orders of the Ohio Smoke Free Workplace Act

The Tenth District Court of Appeals correctly held that "Because the ten orders finding violations are final, the trial court should not have entertained Bartec's [Zeno's] collateral attack on them." [Court of Appeals Decision, p. 11]. In reaching this determination, the Court explained that of the ten underlying Smoke Free Act violations, Zeno's did not request an administrative hearing or otherwise pursue administrative remedies for eight. Zeno's did appeal two of the adverse administrative decisions, which determinations were affirmed by the Franklin County Court of Common Pleas, and Zeno's pursued no further appeals from those two violations. [*Id.*] The Court stated "Bartec [Zeno's] attempted to reargue the merits of ten underlying violations that already were final orders. On this record, *the evidence is overwhelming that Bartec [Zeno's] repeatedly and intentionally violated the Smoke Free Act, failed to comply with its provisions as R.C. 3794.09(D) requires, and in so doing exposed patrons and employees to the very harm the statute is designed to prevent.*" [*Id.* at 14 (emphasis added)].

Zeno's is now claiming that it was "without information to challenge ODH's enforcement policy until its opportunity to challenge individual fines had already elapsed." [Zeno's Merit Brief, p. 48]. This interpretation ignores that ODH's information regarding violations are public records. Surely, Zeno's could have obtained information regarding ODH enforcement in conjunction with any of its ten violations. A Columbus Public Health investigator sent ten violation letters to Zeno's on July 31, 2007, October 12, 2007, December 3, 2007, May 2, 2008, July 30, 2008, November 10, 2008, December 19, 2008, April 10, 2009, June 1, 2009, and July 23, 2009. [August 13, 2011 Complaint, Exhibit 2 A-J]. Zeno's had numerous opportunities to request administrative reviews, and put forth its evidence, but chose not to do so, and chose to continue to permit smoking in violation of the law. Zeno's cannot now claim that it was prevented from contesting its violations.

The Court of Appeals correctly decided that Zeno's could not collaterally attack the ten final orders.

V. CONCLUSION

The Smoke Free Workplace Act is a vital law that saves numerous lives each year and provides for a healthier work environment. ODH must not be restrained from exercising reasonable authority to protect the health and welfare of its citizens. Because secondhand smoke plays such a significant role in the incidence of tobacco related cancer, cardiovascular disease, lung disease and other respiratory maladies, ODH is uniquely situated to adopt regulations to protect its citizens from its devastating impact. Secondhand smoke related illnesses drain the State and local economy through premature deaths and rising healthcare and insurance costs. Reducing the incidence of the illnesses caused by secondhand smoke will save thousands of lives each year and improves the economic landscape of Ohio.

ODH's enforcement of the Ohio Smoke Free Workplace Act does not violate separation of powers principles and does not unreasonably impede property rights. Further, the Court of Appeals correctly ruled that that it was improper for Zeno's to utilize a declaratory judgment action in their counter-claims to collaterally attack the ten final orders finding violations. For the reasons above, this Court should affirm the decision of the Tenth District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via regular U.S. mail upon the following
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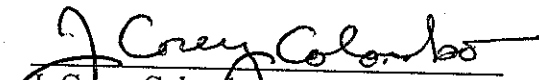
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APPENDIX OF CITED STATUTORY AUTHORITY

3794.02 Smoking prohibitions.

- (A) No proprietor of a public place or place of employment, except as permitted in section 3794.03 of this chapter, shall permit smoking in the public place or place of employment or in the areas directly or indirectly under the control of the proprietor immediately adjacent to locations of ingress or egress to the public place or place of employment.
- (B) A proprietor of a public place or place of employment shall ensure that tobacco smoke does not enter any area in which smoking is prohibited under this chapter through entrances, windows, ventilation systems, or other means.
- (C) No person or employer shall discharge, refuse to hire, or in any manner retaliate against an individual for exercising any right, including reporting a violation, or performing any obligation under this chapter.
- (D) No person shall refuse to immediately discontinue smoking in a public place, place of employment, or establishment, facility or outdoor area declared nonsmoking under section 3794.05 of this chapter when requested to do so by the proprietor or any employee of an employer of the public place, place of employment or establishment, facility or outdoor area.
- (E) Lack of intent to violate a provision of this chapter shall not be a defense to a violation.

Effective Date: 12-07-2006

3794.03 Areas where smoking is not regulated by this chapter.

The following shall be exempt from the provisions of this chapter:

- (A) Private residences, except during the hours of operation as a child care or adult care facility for compensation, during the hours of operation as a business by a person other than a person residing in the private residence, or during the hours of operation as a business, when employees of the business, who are not residents of the private residence or are not related to the owner, are present.
- (B) Rooms for sleeping in hotels, motels and other lodging facilities designated as smoking rooms; provided, however, that not more than twenty percent of sleeping rooms may be so designated.
- (C) Family-owned and operated places of employment in which all employees are related to the owner, but only if the enclosed areas of the place of employment are not open to the public, are in a free standing structure occupied solely by the place of employment, and smoke from the place of employment does not migrate into an enclosed area where smoking is prohibited under the provisions of this chapter.
- (D) Any nursing home, as defined in section 3721.10 of the Revised Code, but only to the extent necessary to comply with section 3721.13 of the Revised Code. If indoor smoking area is provided by a nursing home for residents of the nursing home, the designated indoor smoking area shall be separately enclosed and separately ventilated so that tobacco smoke does not enter, through entrances, windows, ventilation systems, or other means, any areas where smoking is otherwise prohibited under this chapter. Only residents of the nursing home may utilize the designated indoor smoking area for smoking. A nursing home may designate specific times when the indoor smoking area may be used for such purpose. No employee of a nursing shall be required to accompany a resident into a designated indoor smoking area or perform services in such area when being used for smoking.
- (E) Retail tobacco stores as defined in section 3794.01 of this chapter in operation prior to the effective date of this section. The retail tobacco store shall annually file with the department of health by January thirty first an affidavit stating the percentage of its gross income during the prior calendar year that was derived from the sale of cigars, cigarettes, pipes, or other smoking devices for smoking tobacco and related smoking accessories. Any retail tobacco store that begins operation after the effective date of this section or any existing retail tobacco store that relocates to another location after the effective date of this section may only qualify for this exemption if located in a freestanding structure occupied solely by the business and smoke from the business does not migrate into an enclosed area where smoking is prohibited under the provisions of this chapter.
- (F) Outdoor patios as defined in Section 3794.01 of this chapter. All outdoor patios shall be physically separated from an enclosed area. If windows or doors form any part of the partition between an enclosed area and the outdoor patio, the openings shall be closed to prevent the migration of smoke into the enclosed area. If windows or doors do not prevent the migration of smoke into the enclosed area, the outdoor patio shall be considered an extension of the enclosed area and subject to the prohibitions of this chapter.
- (G) Private clubs as defined in section 4301.01 of the Revised Code, provided all of the following apply: the club has no employees; the club is organized as a not for profit entity; only members of the club are present in the club's building; no persons under the age of eighteen are present in the club's building; the club is located in a freestanding structure occupied solely by the club; smoke from the club does not

migrate into an enclosed area where smoking is prohibited under the provisions of this chapter; and, if the club serves alcohol, it holds a valid D4 liquor permit.

Effective Date: 12-07-2006

3794.04 Construction; other applicable laws.

Because medical studies have conclusively shown that exposure to secondhand smoke from tobacco causes illness and disease, including lung cancer, heart disease, and respiratory illness, smoking in the workplace is a statewide concern and, therefore, it is in the best interests of public health that smoking of tobacco products be prohibited in public places and places of employment and that there be a uniform statewide minimum standard to protect workers and the public from the health hazards associated with exposure to secondhand smoke from tobacco. The provisions of this chapter shall be liberally construed so as to further its purposes of protecting public health and the health of employees and shall prevail over any less restrictive state or local laws or regulations. Nothing in this chapter shall be construed to permit smoking where it is otherwise restricted by other laws or regulations.

Effective Date: 12-07-2006

3794.09 Enforcement; penalties.

(A) Upon the receipt of a first report that a proprietor of a public place or place of employment or an individual has violated any provision of this chapter, the department of health or its designee shall investigate the report and, if it concludes that there was a violation, issue a warning letter to the proprietor or individual.

(B) Upon a report of a second or subsequent violation of any provision of this chapter by a proprietor of a public place or place of employment or an individual, the department of health or its designee shall investigate the report. If the director of health or director's designee concludes, based on all of the information before him or her, that there was a violation, he or she shall impose a civil fine upon the proprietor or individual in accordance with the schedule of fines required to be promulgated under section 3794.07 of this chapter.

(C) Any proprietor or individual against whom a finding of a violation is made under this chapter may appeal the finding to the Franklin County Court of Common Pleas. Such appeal shall be governed by the provisions of section 119.12 of the Revised Code.

(D) The director of health may institute an action in the court of common pleas seeking an order in equity against a proprietor or individual that has repeatedly violated the provisions of this chapter or fails to comply with its provisions.

Effective Date: 12-07-2006