

NO. 06-51670

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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ROARK & HARDEE, L.P., doing business as Warehouse Saloon & Billiards; PUB DRAUGHT INC, doing business as Lovejoys Tap Room & Brewery; JOSEPH CHIP TAIT; GMC INVESTMENT INC, doing business as Ego's; CANARY ROOST INC; CANARY HUT INC; GAIL E JOHNSON; KEEP AUSTIN FREE PAC; TONY SIRGO; EDWARD CHECK; BILL HARDEE

*Plaintiffs-Appellees,*

v.

CITY OF AUSTIN,

*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Western District of Texas, Austin Division  
No. 1:05-CV-837

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**BRIEF OF *AMICI CURIAE* TOBACCO CONTROL LEGAL CONSORTIUM,  
AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION,  
AMERICAN LUNG ASSOCIATION, CAMPAIGN FOR TOBACCO-FREE KIDS,  
AND AMERICANS FOR NONSMOKERS' RIGHTS IN SUPPORT OF  
DEFENDANT-APPELLANT**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule of Appellate Procedure 26.1, the undersigned hereby certify that the Tobacco Control Legal Consortium is a program of the Tobacco Law Center, Inc., a non-profit, non-stock corporation with no parents or subsidiaries and that the American Cancer Society, the American Heart Association, the American Lung Association, the Campaign for Tobacco-Free Kids, and Americans for Nonsmokers' Rights are non-profit, non-stock corporations with no parents or subsidiaries.

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TREATISES:

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M.L. Nixon, L. Mahmoud and S.A. Glantz, *Tobacco Industry Litigation to Deter Local Public Health Ordinances: The Tobacco Industry Usually Loses in Court*, 13 *Tobacco Control* 65 (2004), <http://tc.bmjournals.com/cgi/reprint/13/1/65> ..... 1

U.S. Dep't of Health & Human Servs., *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006), <http://www.surgeongeneral.gov/library/secondhandsmoke/report> ..... 12, 13

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Austin/Travis County Health and Human Services Department, *Smoking in Public Places Ordinance No. 050303-05 – Frequently Asked Questions*,  
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**STATEMENT PURSUANT TO FEDERAL RULE 29(C)(3)  
REGARDING THE IDENTITY AND INTEREST OF  
*AMICI CURIAE***

The Tobacco Control Legal Consortium (“TCLC”) 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 policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy organizations, voluntary health organizations and others.<sup>1</sup> In addition, TCLC prepares legal briefs as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted amicus

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<sup>1</sup> TCLC’s coordinating office is located at the Tobacco Law Center, Inc. at William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center, a division of the Public Health Advocacy Institute, at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project at the Center for Social Gerontology in Ann Arbor, Michigan; the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey; and the Tobacco Public Policy Center at Capital University Law School in Columbus, Ohio. Legally, TCLC is operated as a program of the Tobacco Law Center, Inc., a non-profit corporation.

briefs in recent cases before the U.S. Supreme Court, the Supreme Courts of California, Florida, Kentucky, Montana, and Washington, and the U.S. District Court for the District of Columbia.

The American Cancer Society, Inc. (“ACS”) has over three million volunteers nationwide, including 50,000 physicians. The organization’s mission is to eliminate cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer, through research, education, advocacy, and service. The organization was founded in 1913, and since that time it has conducted groundbreaking research in identifying the use of tobacco products as a major cause of cancer and educated the public about its deadly effects. ACS strongly advocates for tobacco regulation at all levels of government, including trying to ensure that children do not have access to this lethal product.

The American Heart Association (“AHA”), representing 22.5 million volunteers and supporters, is a nonprofit, voluntary health organization funded by private contributions. AHA’s mission is to reduce disability and death from cardiovascular diseases, including heart attack and stroke. Heart disease is the nation’s leading cause of death. Stroke is the number three killer. Both are leading causes of significant long-term disability. More than 61 million Americans – about one in five – suffer from some form of

cardiovascular disease. Much of this death and disability is tobacco-related. It is estimated that heart disease, stroke and other cardiovascular disease cost the nation \$351.8 billion in 2003, including \$209.3 billion in direct medical costs.

The American Lung Association (“ALA”) is one of the nation’s oldest voluntary health organizations, with volunteers and regions representing all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

ALA has nearly 400,000 volunteers. The American Lung Association of the Central States serves Kansas, Missouri, Nebraska, Oklahoma, and Texas.

Since cigarette smoking is a major cause of chronic obstructive lung disease, ALA has long been active in research, education, and public policy advocacy on the adverse health effects of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades.

The Campaign for Tobacco-Free Kids (“CTFK”) is a 501(c)(3) nonprofit education and advocacy organization that works to promote public and private policies to prevent and reduce tobacco use and its harms (including secondhand smoke harms), especially among children. CTFK has more than 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products and reducing tobacco use harms.

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.

## INTRODUCTION

The City of Austin’s “Smoking in Public Places” ordinance is a critical public health law that was enacted to protect the health and lives of that city’s roughly 700,000 people. Austin City Code Chapter 10-6. The creation and adoption of the Austin ordinance follows the enactment of a long line of similar measures in Texas and throughout the United States.

There are 2,507 municipalities in the U.S. – 23 of them in Texas – with laws restricting smoking.<sup>2</sup> More than 280 require – as do Austin and 11 other Texas municipalities from Abilene to Woodway – that both restaurants and bars be smoke-free.<sup>3</sup>

The adoption of smoke-free laws has met with vigorous opposition from the tobacco industry and its allies, who often seek to derail such measures in courts of law.<sup>4</sup> Austin’s ordinance now faces a similar attack.

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<sup>2</sup> Americans for Nonsmokers’ Rights, *Overview List – How Many Smokefree Laws?*, <http://www.no-smoke.org/pdf/mediaordlist.pdf>.

<sup>3</sup> Americans for Nonsmokers’ Rights, *Municipalities with Local 100% Smokefree Laws*, <http://www.no-smoke.org/pdf/100ordlisttabs.pdf>.

<sup>4</sup> M.L. Nixon, L. Mahmoud and S.A. Glantz, *Tobacco Industry Litigation to Deter Local Public Health Ordinances: The Tobacco Industry Usually Loses in Court*, 13 *Tobacco Control* 65 (2004), available at <http://tc.bmjournals.com/cgi/reprint/13/1/65> (follow “Begin manual download” hyperlink). See Gabrielle Banks, *R.J. Reynolds Helps Restaurants Sue Allegheny County*, *Pitts. Post-Gazette*, Dec. 13, 2006, <http://www.post-gazette.com/pg/06347/745661-85.stm> (accessed Jan. 19, 2007).

The smoke-free trend has grown with the recognition that secondhand smoke causes severe injury. Even brief exposure can cause a heart attack in a vulnerable individual. In Texas:

- 24,200 adults die annually from their own smoking, and between 2,660 and 4,720 adults, children and babies die each year from others' smoking (from secondhand smoke and smoking during pregnancy).
- Smoking directly causes annual health care costs of \$5.83 billion, in addition to \$6.44 billion in productivity losses.<sup>5</sup>

Indeed, *cigarette smoking kills more people than alcohol, AIDS, car crashes, illegal drugs, homicides, and suicides combined.*<sup>6</sup>

The district court's permanent injunction against certain provisions in the Austin ordinance should be reversed because: 1) the term "necessary steps" in Austin City Code §10-6-2(E), is not impermissibly vague; and 2) the district court's order barring Austin from holding the owner or operator of a public place liable for failure to take "necessary steps" beyond the two steps prescribed by §10-6-8 of the ordinance – *i.e.*, posting no-smoking signs and removing ashtrays and other smoking accessories – will cause the city and its residents irreparable harm and disserve the public interest.

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<sup>5</sup> See Campaign for Tobacco-Free Kids, *The Toll of Tobacco in Texas*, citing extensive U.S. Government and other peer-reviewed studies, <http://www.tobaccofreekids.org/reports/settlements/tollprint.php?StateID=TX> (accessed Jan. 18, 2007).

<sup>6</sup> *Id.*

## ARGUMENT

### I. The District Court Applied the Incorrect Standard for Evaluating Vagueness

The City’s brief defends the constitutionality of the ordinance’s dictate that “[t]he owner or operator of a public place commits an offense if the person fails to take necessary steps to prevent or stop another person from smoking in an enclosed area in a public place.” §10-6-2(E). The City also argues the validity of the guidelines issued by the Austin/Travis County Health and Human Services Department to foster compliance. The guidelines prescribed steps that proprietors could take to enforce the ordinance.<sup>7</sup>

The district court upheld most of Austin’s ordinance, but held the term “necessary steps” unconstitutionally vague on its face and disallowed several of the guidelines. Order, *Roark & Hardee L.P. v. City of Austin*, Case No. A-05-CA-837-SS (W.D. Tex., Dec. 7, 2006). The court wrongly found that the Austin ordinance is, without qualification, a criminal law, and imposed a stricter vagueness standard than it should have. *Id.* Amici incorporate by reference the City’s arguments relating to the “necessary steps” language and the related guidelines, and supplement them as follows.

The correct analytical approach was applied in a case involving a

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<sup>7</sup> See Austin/Travis County Health and Human Services Department, *Smoking in Public Places Ordinance No. 050303-05 – Frequently Asked Questions*, <http://www.ci.austin.tx.us/health/downloads/smokefaqs.pdf>.

challenge to a statute passed by a Nevada state ballot initiative. Order Granting Preliminary Injunction in Part, Denying Preliminary Injunction in Part, *Fame Operating Co., Inc. v. Chanos*, Case No. A532434 (Dist. Clark County, NV, Jan. 12, 2007).<sup>8</sup> That law prohibits smoking in all restaurants and bars that serve food, and requires all affected establishments to post no-smoking signs and remove ashtrays and other smoking paraphernalia. 15 Nev. R.S. Chapt. 202. In a facial challenge to the constitutionality of the law, plaintiffs alleged that terms and phrases contained in the law were impermissibly vague, as were the law’s enforcement standards and the targets of the law’s penalties. *Fame Operating Co., Inc., supra*, at 3.<sup>9</sup>

The court found that Nevada’s law “operates as both a criminal statute and a civil regulatory scheme.” When considering the preliminary injunction and summary judgment motions, the court reviewed the law separately as a criminal statute and again as a civil regulatory scheme, applying a different legal analysis to each, recognizing that the courts tolerate less vagueness and imprecision in criminal laws than they do in civil regulatory schemes. *Fame Operating Co., Inc., supra*, at 3-4.

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<sup>8</sup> Clark County (Nevada) Courts, <http://lvcourtsblog.com/2007/01/23/question-5-summary-judgment> (emphasis added) (accessed Jan. 26, 2007). A written order has not yet been issued.

<sup>9</sup> The law enforcement standards provide that, “Health authorities, police officers of cities or towns, sheriffs and their deputies shall ... enforce the provisions of this Act and shall issue citations for violations of this Act ...” 15 Nev. R.S. Chapt. 202 §7.

In granting summary judgment on Jan. 23, 2007, the court:

determined ... that a portion of the Nevada Clean Indoor Air Act is constitutional, upholding the civil side of the statute, while at the same time declaring the criminal portion of the statute failed to meet a constitutional standard. Under the judge's ruling, civil penalties will remain, with smokers facing a \$100 fine for smoking .... However, with the criminal penalties removed, no one will go to jail for smoking. *In announcing his ruling, Judge Herndon said he chose to side with voters who chose to make indoor areas smoke free by "allowing the measure to go forward with its full operation and purpose, which is to ban smoking."*<sup>10</sup>

The court did not void the law's language. It simply removed the onus of potential criminal penalties and "allow[ed] the measure to go forward with its full operation and purpose, which is to ban smoking."<sup>11</sup> This Court similarly should find that Austin's ordinance is both a criminal statute and a civil regulatory scheme, and then apply the correct respective standards to determine constitutionality.

## **II. The Term "Necessary Steps" is Not Impermissibly Vague**

The term "reasonable steps," which the district court found to be interchangeable with "necessary steps," often is used by courts themselves in a manner that underscores the ordinary, unambiguous meaning of the term.

For instance, in *American Airlines v. Allied Pilots Ass'n*, 228 F.3d 574 (5<sup>th</sup>

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<sup>10</sup> Clark County (Nevada) Courts, <http://lvcourtsblog.com/2007/01/23/question-5-summary-judgment> (emphasis added) (accessed Jan. 26, 2007). A written order has not yet been issued.

<sup>11</sup> *Id.*

Cir. 2000), a case involving a dispute under the Railway Labor Act, this Court found that the district court's temporary restraining order required defendants to take "all reasonable steps within their power" to prevent continuation or encouragement of the pilots' illegal "sick-out," which cost plaintiff millions of dollars and affected hundreds of thousands of passengers. *Id.* at 577. This Court noted that, "[t]he TRO *also* contained [seven] specific requirements" - *e.g.*, that defendants instruct all pilots to resume their normal working schedule and notify all pilots by the most expeditious means possible of the contents and meaning of the TRO. *Id.* (emphasis added). This Court's use of "also" shows that the TRO's mandate that defendants take "all reasonable steps" was *mutually exclusive* from the specific mandates of the order, much as Austin's mandate that proprietors take "necessary steps" is *in addition to* the ordinance's specific mandates.

In *American Airlines*, this Court upheld compensatory damages based on e-mail messages sent by union officers that violated the "all reasonable steps" mandate. *Id.* at 583. Nowhere did the TRO spell out which actions would constitute "all reasonable steps." Defendants were expected to understand the ordinary meaning of such language, just as Appellees here should be required to understand the ordinary meaning of "necessary steps."

Many smoke-free ordinances contain similar language, and have

functioned effectively without experiencing problems due to alleged vagueness.<sup>12</sup> While some smoke-free laws have been challenged, few challenges have even alleged that the enforcement provisions of the challenged laws were unconstitutionally vague. Austin’s enforcement mandates are as clear as those found, and upheld, elsewhere.

In a challenge to the Lawrence, Kansas smoke-free ordinance, a bar owner unsuccessfully sought a preliminary injunction and a declaratory judgment that the ordinance is unconstitutionally vague. *Steffes v. City of Lawrence*, Case No. 05CV-344 (Dist. Ct. Douglas County, Dec. 20, 2005).<sup>13</sup>

In addition to requiring no-smoking signs,<sup>14</sup> the ordinance provides that:

It shall be unlawful for any person who owns, manages, operates or otherwise controls any premises subject to regulation under this Article to allow smoking to occur where prohibited by this Article. Any such person allows smoking to occur under this section if he or

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<sup>12</sup> See, e.g., Philadelphia (Pennsylvania) Code, Chapt. 10-600 (providing that “[t]he owner, operator, manager, employer or other person in control in every place where smoking is regulated ... shall ... [t]ake reasonable measures to see to it that no person smokes in such place in violation of this [ordinance].); West Lafayette (Indiana) City Code, Chapt. 64 (requiring that proprietors “act in a reasonable and timely manner to personally inform the violator of the prohibition [against smoking] and request that he or she refrain from smoking”); Madison (Wisconsin) Municipal Code, §23.05(9) (mandating that proprietors “make reasonable efforts to prevent smoking in prohibited areas”); *Mr. Cinders Oshkosh West v. City of Oshkosh*, Case No. 04-CV-632 (Cir. Ct. Winnebago County, WI, May 23, 2005) (dismissing case where restaurants claimed that smoking ordinance was, *inter alia*, excessively vague, and finding that, “[s]imply because enforcement may be problematic ... does not render the Ordinance vague.... The Ordinance ... may have portions which can be subject to more than one interpretation. However, the Court must review the legislation to give it validity, if possible.”).

<sup>13</sup> *Steffes* currently is on appeal to the Kansas Supreme Court.

<sup>14</sup> Lawrence (Kansas) City Code, Chapt. 9, Art. 8, §§9-808, 9-810(B).

she:

1. has knowledge that smoking is occurring, and;
2. acquiesces to the smoking under the totality of the circumstances.<sup>15</sup>

Plaintiff argued that legal minds could differ about what was meant by “acquiesc[ing] under the totality of the circumstances.” The court observed that the ordinance “do[es] not limit constitutionally protected conduct and therefore should be upheld unless it is impermissibly vague in all of its applications.” *Steffes, supra*. The court enunciated the common standard for determining whether a penal statute is vague – *i.e.*, “whether the statute ‘define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’” *Id.* (citation omitted). The court denied plaintiff’s motion, concluding: “The City’s laws are clear in what conduct is prohibited: smoking is prohibited in most enclosed places and places of employment.” *Id.*

Austin’s ordinance likewise informs proprietors with sufficient definiteness of their responsibilities: they are to take necessary steps to prevent or stop smoking from taking place in their establishments.

The city of Lawrence also issued guidelines not unlike Austin’s.<sup>16</sup>

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<sup>15</sup> *Id.* at §9-812(B) (citation omitted).

Lawrence’s guidelines provide that business owners and employers must “[i]nform any person who is smoking in a nonsmoking area that he/she is in violation of the ordinance.” Lawrence’s guidelines were not challenged, *even though they do not mirror the mandate of the ordinance itself*, which states that, “[a]ny owner, manager, operator or employee of any premises regulated by [the ordinance] shall be responsible for informing persons violating [the ordinance] of the provisions *through appropriate signage*.”<sup>17</sup> Lawrence’s guidelines, like Austin’s, impose responsibility on proprietors that supplement the black letter of the ordinance in order to effectuate the intent of the ordinance: to ensure no smoking in covered establishments.

The language and intent of the Austin and Lawrence ordinances are fundamentally similar, both are constitutional, their implementation has been facilitated by guidelines, and those guidelines do not through some mysterious alchemy render the ordinances themselves less constitutional.

In another case, a bar owner challenged a county health board’s enforcement (authorized by state statute) of the New York State Clean Indoor Air Act, which prohibits smoking in bars and restaurants. *Allen v.*

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<sup>16</sup> Douglas County Community Health Improvement Project, *Lawrence Public and Workplace Smoking Restriction Brochure*, <http://www.lawrenceks.org/policies/smokingrestriction/brochure.shtml> (accessed Jan. 24, 2007).

<sup>17</sup> Lawrence City Code at §9-810(E) (emphasis added).

*Cattaraugus County Bd. of Health*, 777 N.Y.S.2d 886 (N.Y. Sup. Ct. 2004).

The bar owner claimed that the board of health had exceeded its authority by imposing liability on him where his patrons were smoking and he was allegedly powerless to stop them, and that the law was unconstitutional as implemented. *Id.* at 887-88.

Observing that plaintiff and his patrons repeatedly had been found to be smoking, the *Allen* court memorably stated: “[Plaintiff] claims to have complied with the act by posting ‘no smoking’ signs and advising smokers who lit up that they were violating the law (wink, wink).” *Id.* at 888.

In light of the sufficiently clear dictates of the Austin ordinance and the issuance of guidelines to help restaurant and bar proprietors comply, Appellees will not be found to have violated the law in the event they make good faith efforts to enforce the law by following said guidelines. Here, as in *Allen*, the district court “suspect[ed] that there are some bar owners and operators purposely flouting the ordinance and/or enforcing it with a wink and a smile.” Findings of Fact and Conclusions of Law, Oct. 4, 2006, at 11. The district court’s injunction constitutes an open invitation to violate the ordinance’s clear intent to prevent secondhand smoke exposure. *See U.S. v. Tansley*, 986 F.2d 880, 885 (5<sup>th</sup> Cir. 1993) (mandating that statutes give fair

notice cannot be used as shield by someone already intent on wrongdoing).<sup>18</sup>

Because the ordinance language is facially constitutional, the district court's injunction should be reversed.

### **III. The District Court's Permanent Injunction Will Cause Irreparable Injury and Disserve the Public Interest**

This Court enunciated the standard for permanent injunctive relief in *VRC LLC v. City of Dallas*, 460 F.3d 607 (5<sup>th</sup> Cir. 2006):

The party seeking a permanent injunction must meet a four-part test. It must establish (1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; *and* (4) that the injunction will not disserve the public interest.

*Id.* at 611, *citing Dresser-Rand, Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 847-48 (5<sup>th</sup> Cir. 2004) (emphasis added).

Appellees cannot satisfy the *VRC LLC* test. Thus, the district court's permanent injunction prohibiting Austin from holding the owner or operator of a public place liable for failure to take 'necessary steps' beyond posting no smoking signs and removing ashtrays and other smoking accessories must be reversed. The district court's injunction threatens the health of thousands of individuals because the City's ability to prevent exposure to

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<sup>18</sup> *Amici* incorporate by reference Appellant's discussion relating to the error committed by the district court in considering Appellees' constitutional vagueness arguments, since the ordinance is not vague *as applied* to Appellees. *See* Brief of Appellant, 9-12, 18-19.

secondhand smoke in covered locations is gutted by the injunction. The injunction overwhelmingly fails part 4 of the *VRC LLC* test.<sup>19</sup>

*Amici* have supported the passage and enforcement of hundreds of local smoke-free ordinances. We know that competent enforcement in restaurants and bars relies heavily on the ability of government to hold accountable proprietors who fail to prevent smoking; hence the City health department's emphasis on rigorous enforcement by proprietors.

If Austin cannot effectively enforce its law, vulnerable persons will suffer immediate harm. The district court guessed that the enforcement steps it left intact will accomplish the ordinance's intent. It guessed wrong, and the landmark 2006 U.S. Surgeon General's report details the harm that will result.<sup>20</sup> That report is the most up-to-date, scientific statement on secondhand smoke. It summarizes the evidence that led all major scientific authorities to find that secondhand smoke causes death and injury.<sup>21</sup>

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<sup>19</sup> It also is uncontraverted that significant city resources will be required to enforce the ordinance against individuals rather than businesses, which is the practical effect of the injunction. Thus, Appellees fail part 3 of the *VRC LLC* test. *Amici* incorporate by reference Appellant's discussion relating to the harm that the city, as distinguished from individuals who reside and work in the city, will suffer as a result of the district court's order. See Brief of Appellant, 7-9, 39-42.

<sup>20</sup> U.S. Dep't of Health & Human Servs., *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006), <http://www.surgeongeneral.gov/library/secondhandsmoke/report> (*hereinafter* Surgeon General, 2006).

<sup>21</sup> *Id.* See, e.g., Air Resources Board, Cal. Env'tl. Prot. Agency, *Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant*, June 24, 2005, <ftp://ftp.arb.ca.gov/carbis/regact/ets2006/app3part%20b.pdf> (secondhand smoke causes

The Surgeon General's report confirms: There is no safe exposure level for secondhand smoke.<sup>22</sup> The only effective way to protect non-smokers is to effectively enforce a complete ban on smoking.<sup>23</sup> Compared with the general population, waiters and waitresses have a 50 percent greater risk of developing lung cancer caused by exposure to secondhand smoke at work.<sup>24</sup> Further, exposure to secondhand smoke increases the risk of fatal and non-fatal coronary heart disease in non-smokers by about 30 percent.<sup>25</sup>

The experience of Helena, Montana, is illustrative. Helena required workplaces and public places, including restaurants and bars, to be smoke-free. During the six months that the law was enforced,<sup>26</sup> hospital admissions for acute myocardial infarction ("AMI") – *i.e.*, heart attacks – among persons working or living in Helena *fell by 40 percent*.<sup>27</sup> There was no

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3,400 lung cancer deaths and 22,700 – 69,600 heart disease deaths among adult non-smokers in the United States every year).

<sup>22</sup> Surgeon General, 2006, *supra*, at 65.

<sup>23</sup> *Id.* at 641-42.

<sup>24</sup> *Id.* at 602, 604. Overall, non-smokers exposed to secondhand smoke increase their risk of developing lung cancer by 20 to 30 percent, and their risk of developing heart disease by 25 to 30 percent, depending on the level and duration of exposure. *Id.* at 423-45, 509-32.

<sup>25</sup> Surgeon General, 2006, *supra*.

<sup>26</sup> The ordinance was rescinded by the Montana State Legislature as the result of pressure from the Montana Tavern Association and tobacco industry lobbyists. Rosemary Ellis, *The Secondhand Smoking Gun*, N.Y. Times, Oct. 15, 2003, <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9A0CE3DA1E3FF936A25753C1A9659C8B63> (accessed Jan. 17, 2007).

<sup>27</sup> R.P. Sargent, R.M. Shepard and S.A. Glantz, *Reduced Incidence of Admissions for Myocardial Infarction Associated with Public Smoking Ban: Before and After Study*, 328

statistically significant change in such rates for persons living outside the city.<sup>28</sup> After the ordinance was rescinded, admissions for AMI rebounded.<sup>29</sup>

Experts at the University of Texas at Austin evaluated indoor air quality in bars before and after Austin’s ordinance was implemented. Their study found no statistically significant decrease in occupancy after the law took effect, but found that secondhand smoke decreased significantly<sup>30</sup> before the district court’s injunction. The authors concluded: “Owing to the reduction in ETS [environmental tobacco smoke] indicators due to the smoking ban, Austin’s comprehensive ban on indoor smoking reduced exposure to ETS of both workers of and the public who visit hospitality venues.”<sup>31</sup>

## CONCLUSION

Appellees knew that the ordinance and its guidelines applied to them, yet refused to comply with certain of the guidelines. One to whose conduct

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Brit. Med. J. 977-80 (2004), *available at* <http://www.bmj.com/cgi/reprint/328/7446/977> (follow “Begin manual download” hyperlink).

<sup>28</sup> *Id.* See Carl Bartecchi, Robert N. Alsever, Christine Nevin-Woods *et al.*, *Reduction in the Incidence of Acute Myocardial Infarction Associated with a Citywide Smoking Ordinance*, 114 *Circulation* 1490-96 (2006), which echoes the Helena study by finding that heart attack rates declined nearly 30 percent at two Pueblo, Colorado, hospitals following the enactment of a citywide smoke-free ordinance.

<sup>29</sup> Sargent, *supra*.

<sup>30</sup> Michael S. Waring and Jeffrey A. Siegel, *An Evaluation of the Indoor Air Quality in Bars Before and After a Smoking Ban in Austin, Texas*, *J. Expo. Sci. Environ. Epidemiol.* 1-9 (2006).

<sup>31</sup> *Id.* at 8.

a statute clearly applies cannot successfully challenge it for vagueness. *Parker v. Levy*, 417 U.S. 733, 756 (1974); *see Tansley*, 986 F.2d at 885 (stating that statutes give fair notice cannot be used as shield by someone already intent on wrongdoing). The district court’s injunction invites scofflaws to violate the ordinance’s intent to protect the city’s residents and workers against exposure to secondhand smoke. *See Allen*, 777 N.Y.S.2d at 888 (noting that bar owner “claims to have complied with the act by posting ‘no smoking’ signs and advising smokers who lit up that they were violating the law (wink, wink).”). Failure to reverse the injunction will result in irreparable harm to the health of Austin’s citizens and visitors.

For the foregoing reasons, this Court should reverse the district court’s permanent injunction.

Date: March 7, 2007

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I, Craig Deats, counsel of record for *Amici Curiae*, do hereby certify that I have this 7<sup>th</sup> day of March 2007 served two copies of the foregoing Brief upon the below-listed counsels of record, by first class mail, postage prepaid.

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