



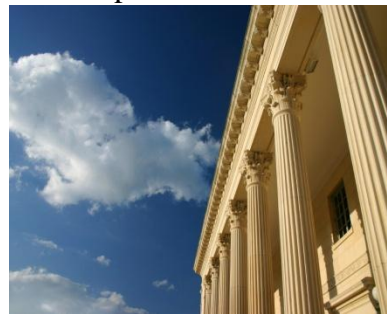
## Tobacco Control and the “Void for Vagueness” Doctrine

The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.<sup>1</sup> For more details about these policy considerations, please contact the Consortium.

Efforts to promote tobacco control can implicate many areas of the law, including constitutional issues involving the First Amendment, the Dormant Commerce Clause, the Fifth Amendment’s Takings Clause, the Equal Protection Clause, preemption, and the subject of this guide – the “void for vagueness” doctrine. Understanding these constitutional issues and how they can apply to tobacco control laws can help communities draft legislation to avoid possible legal challenges.

### “Void for Vagueness” Doctrine

The “void for vagueness” doctrine is derived from the Due Process Clauses of the [Fifth](#) and [Fourteenth Amendments](#). The purpose of the doctrine is to encourage policy makers to draft laws in language clear enough for the average reasonable person to understand. Vague laws can “trap the innocent” by not giving fair warning about what the laws require or sufficient guidance to those applying them.<sup>2</sup> The courts determine facial vagueness (that is, vagueness that is void on its face) on a case-by-case basis. In determining whether an ordinance is unconstitutionally vague, a court considers (1) whether the law “give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,” and (2) whether the law provides explicit standards for those applying them to avoid arbitrary and discriminatory enforcement.<sup>3</sup>



Tobacco control laws are sometimes challenged on the ground that some language in the text – a word, phrase, provision, or requirement, for example – is unconstitutionally vague. Although the vast majority of these claims fail, the frequency with which they are raised points to the need for clarity and precision in the drafting of laws. This guide provides an overview of several vagueness claims, as well as pointers that communities

might want to keep in mind when drafting tobacco control policies to be as defensible as possible against such legal challenges.

**Potential Challenges**

Vagueness challenges most often occur when a law or policy contains language and provisions that are open to multiple interpretations. In smoke-free policies, for example, definitions of bars, restaurants, and indoor areas are sometimes vulnerable to challenges, as are phrases that contain smoking prohibitions. Provisions prohibiting the “inhaling, exhaling, burning or carrying of any lighted cigar, cigarette, or *other combustible substance* in any manner or form” have been challenged.<sup>4</sup> Opponents have argued that the phrase “other combustible substance” is vague and could mean that people are prohibited from using candles, lighting incense in church, or even barbecuing.<sup>5</sup> In another challenge to a smoke-free law, a court found a provision unconstitutionally vague when it required businesses to remove “all ashtrays and other smoking paraphernalia” from smoke-free areas.<sup>6</sup> The court said the undefined phrase “smoking paraphernalia” flunked “the so-called ‘man-on-the-street’” test by not providing sufficient guidance about what items the phrase included.<sup>7</sup>

**Policy Elements**

Carefully written tobacco control policies are generally likely to withstand legal challenges based on vagueness claims. Drafters should clearly define all words that have more than one meaning. Make sure that provisions are explicit in the type of conduct prohibited, the requisite intent for committing a violation, and the way the policy should be enforced. If a law has criminal penalties for violations, work with a local attorney to ensure that the enforcement and penalty provisions are clear and succinct enough to survive heightened scrutiny.

**Select Vagueness Challenges to Tobacco Control Laws**

Below are a few examples of legal challenges to smoke-free laws on the grounds that the language was unconstitutionally vague. We have included these examples to illustrate various ways in which opponents of the laws have targeted specific words or phrases as unclear, overbroad, or otherwise confusing – thus claiming the laws are void for vagueness. This chart includes an overview of each vagueness challenge and a summary of the court’s ruling on the issue.<sup>8</sup>

State	Case	Overview & Ruling
Kansas	<i>Steffes v. City of Lawrence</i> , 160 P.3d 843 (Kan. 2007)	<b>Overview:</b> The plaintiffs challenged a City of Lawrence smoke-free ordinance on the ground that the ordinance was unconstitutionally vague and preempted by state law. Plaintiff complained that the ordinance failed to specify: (1) the requisite intent for committing a violation, (2) the type of conduct prohibited,

and (3) the requisite level of enforcement by a club owner. The court disagreed.

**Ruling:** The court held that although the ordinance did not provide a comprehensive “how to” guide, the ordinance conveyed sufficiently definite warning and fair notice as to the prohibited conduct. The court also found that the ordinance conveyed enough clarity to prevent arbitrary and discriminatory enforcement.

**Kentucky**     *Lexington Fayette County Food & Beverage Association v. Lexington-Fayette Urban County Government*, 131 S.W. 3d 745 (Ky. 2004)

**Overview:** The primary issue in this case was whether the local government’s authority to regulate smoking in public places was preempted by state law; however, the court also addressed vagueness issues in a smoke-free ordinance. The plaintiffs alleged that the ordinance was vague because it required smokers to maintain a “reasonable distance from the outside entrance of any building.” They argued this required enforcement was based on a subjective determination of compliance. In reviewing the language of the ordinance, the court used a “man on the street” approach.

**Ruling:** The court held that the ordinance was not unconstitutionally vague and stated that “[s]urely, individuals can reasonably understand that if their tobacco smoke is entering the building they are not at a reasonable or required distance.”

**Nevada**     *Fame Operating Company v. Nevada aka Flamingo Paradise Gaming v. Chanos*, 217 P.3d 546 (Nev. 2009)

**Overview:** Various businesses challenged the constitutionality of Nevada’s Clear Indoor Air Act, which prohibited smoking in schools and “indoor places of employment,” but provided exceptions for gaming areas in casinos, stand-alone bars, and strip clubs. They argued that the statute was unconstitutionally vague, violated the equal protection clause, and constituted a government taking.

**Ruling:** Concentrating on the vagueness issue, the court determined *two approaches exist in analyzing a facial vagueness challenge*. Under a facial challenge to a civil statute, the plaintiff must show that the statute is impermissibly vague in all its applications. If the statute provides sufficient

guidance as to at least some conduct that is prohibited and standards for enforcement of that conduct, it will survive a facial challenge. If, however, the statute involves criminal penalties or constitutionally protected rights, courts will use a second approach, which involves a higher standard - whether “vagueness permeates the text.”

In this case, the Nevada Supreme Court found that the statute was unconstitutionally vague for criminal enforcement because it failed to provide guidelines as to what actions were prohibited and how the statute would be enforced as a criminal matter. Since the statute did not pass the heightened vagueness standard, the court concluded that the lower court properly severed the criminal enforcement provisions from the statute. The state supreme court, however, also stated that as a *civil* rather than a criminal statute, the statute was sufficiently clear to meet a facial vagueness challenge, and that no one could reasonably question whether a particular act would violate the statute. Because of this, the supreme court affirmed the lower court’s ruling upholding civil enforcement of the statute.

**Texas** *Roark & Hardee LP v. City of Austin*, 522 F.3d 533(5th Cir. 2008)

**Overview:** Plaintiffs, owners of stand-alone bars, challenged the enforcement of an Austin ordinance prohibiting smoking in enclosed places. Plaintiffs primarily argued that the ordinance was unconstitutionally vague on its face because language requiring business owners to take “necessary steps” to prevent people from smoking in an enclosed area in a public place was so indefinite that it did not give fair notice as to what conduct was prohibited and lacked explicit standards for enforcement.

**Ruling:** The court found the ordinance to be “quasi-criminal” for enforcement purposes, and thus applied the heightened test for vagueness of criminal statutes. To survive a vagueness challenge, the criminal statute must “define the criminal offense with *sufficient definiteness* that ordinary people can understand what conduct is prohibited.” In finding that the ordinance provided adequate

---

notice of the actions required, as well as an ascertainable standard of guilt for inspectors, the Fifth Circuit Court of Appeals held that the ordinance did not have to identify the exact actions an owner would have to take to meet the requirement of taking “necessary steps.”

---

## Other Helpful Resources

The Tobacco Control Legal Consortium’s synopsis, [Legal Authority to Regulate Smoking and Common Threats and Challenges](#), provides additional information about vagueness arguments and other common constitutional challenges to tobacco control laws. The Consortium’s parent organization, the [Public Health Law Center](#), features on its website a page on [common legal issues](#) in public health, which includes constitutional challenges. The Center’s website also includes [checklists and guidelines](#) that can help drafters of public health policies avoid vagueness challenges.

## Contact Us

Please feel free to contact the [Tobacco Control Legal Consortium](#) with any questions about the information included in this guide or about drafting a strong tobacco control policy.

---

<sup>1</sup> The information contained in this document is not intended to constitute or replace legal advice.

<sup>2</sup> *Grayned v. City of Rockland*, 408 U.S. 104, 109 (1972).

<sup>3</sup> *Id.*

<sup>4</sup> Complaint for Declaratory Judgment, Temporary Restraining Order and Injunctive Relief at 8, *Roark & Hardee, L.P. d/b/a The Warehouse Saloon and Billiards, et alv. City of Austin*, No. A-05-CA-837SS (W.D. Tx. Austin, Feb. 1, 2006).

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t et al.*, 131 S.W.3d 745, 754 (Ky. 2004).

<sup>7</sup> *Id.* The court reasoned that the term “smoking paraphernalia” could include anything from cigarettes, cigars and the tools to make them, to air freshener and breath mints, and stated that “lying between those extremes . . . is a vast middle ground which is subject to characterization as lawful or unlawful in the discretion of the enforcing authorities.” *Id.* at 755-56.

<sup>8</sup> Other tobacco cases that have addressed vagueness issues include: *Coalition for Equal Rights, Inc., v. Owens*, 517 F.3d 1195 (10<sup>th</sup> Cir. 2008) (finding that the standard that proprietors may not “allow” smoking was not unconstitutionally vague); *Traditions Tavern v. City of Columbus*, No. 06AP-367, 2006 Westlaw 3703699 (Ohio Ct. App. Dec. 14, 2006) (finding that the requirement that proprietors refrain from “permitting smoking in their establishments” was not unconstitutionally vague); *Empire State Restaurant & Tavern Ass’n, Inc. v. New York*, 360 F. Supp. 2d 454 (N.D.N.Y. 2005) (rejecting the argument that business people of ordinary intelligence cannot understand whether their food sales are “incidental” to their liquor sales and finding that enforcement officers could use their experience and common sense in interpreting and applying the law’s language); *Mr. Cinders Oshkosh West. V. City of Oshkosh*, Case No. 04-CV-632 (Wis. Cir. Ct. Branch 3 May 23, 2005) (granting summary judgment and indicating that

---

an ordinance is not vague just because figuring out how to enforce it might be hard for a city, especially when it is first implemented); *Taverns for Tots v. City of Toledo*, 341 F. Supp. 2d 844 (N.D. Ohio 2004) (finding that, given the “the clear language and legislative purpose of the ordinance . . . the ordinance informs people of ordinary intelligence as to what they need to do to comply with the law”); and *Fogle v. H. & G. Restaurant*, 654 A.2d 449 (Md. 1995) (finding that Maryland workplace smoking regulations were not too vague for businesses to know which buildings were covered and at what times, and stating that the standard is whether persons of ordinary intelligence will be capable of understanding the regulation without having to guess what conduct on their part is affected).