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UAW, REGION 9 OF THE UAW,	: CHANCERY DIVISION: MERCER COUNTY
and C.E.A.S.E. N.J.,	: DOCKET NO.:
	:
Plaintiffs,	:
	:
v.	: Civil Action
	:
NEW JERSEY GOVERNOR PHILIP	:
MURPHY, and ACTING NEW JERSEY	:
HEALTH COMMISSIONER DR.	:
KAITLIN BASTON,	:
	:
Defendants.	:
-----x	

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR REQUEST FOR
A DECLARATORY JUDGMENT AND PERMANENT INJUNCTION**

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STATEMENT OF FACTS

The UAW represents approximately 3000 workers in the Tropicana, Caesars and Bally's casinos, who have suffered, and continue to suffer distress and severe health problems as a result of having to work in second-hand smoke. (Verified Complaint, ¶¶ 2, 3).

C.E.A.S.E. NJ is a grassroots organization of 3000 workers with members in every Atlantic City casino. C.E.A.S.E. NJ members have suffered and continue to suffer severe health problems due to working in smoke-filled casinos. (Verified Complaint, ¶ 4).

At least one casino worker has died as a result of disease which is related to smoking, although he did not smoke. Many casino workers have cancer and other diseases related to smoking, although they do not smoke. (Verified Complaint, ¶ 4).

In 2006, New Jersey passed the Smoke-Free Air Act (N.J.S.A. 26:D-55, et seq.) Despite specifically finding that secondhand smoke is dangerous to the health and safety of non-smokers, and that smoking is the leading cause of preventable disease and death in the State and the nation, the law exempted casino workers from the law's protection. (Verified Complaint, ¶ 8).

The Centers for Disease Control and Prevention's current guidance regarding second-hand smoked is:

- There is no safe level of exposure to secondhand smoke;
- The effects of secondhand smoke exposure on the body are immediate and exposure can produce harmful inflammatory and respiratory effects within 60 minutes of exposure which can last for at least three hours after exposure;
- In adults who do not smoke, secondhand smoke exposure can cause coronary heart disease, stroke, lung cancer, other diseases and premature death;
- Secondhand smoke can cause reproductive health effects in women, including low birth weight. Additionally, women exposed to secondhand smoke during pregnancy

are more likely to have newborns with lower birth weight, increasing the risk of health complications;

- Among adults who do not smoke, secondhand smoke causes nearly 34,000 premature deaths from heart disease each year in the U.S.;
- Adults who do not smoke and are exposed to secondhand smoke increase their risk of developing coronary disease by 25-30%;
- Adults who do not smoke and are exposed to secondhand smoke increase their risk of stroke by 20-30%;
- Exposure to secondhand smoke interferes with the normal functioning of the heart, blood, and vascular systems in ways that increase the risk of having a heart attack;
- Even brief exposure to secondhand smoke can damage the lining of blood vessels and cause blood platelets to become stickier. These changes can cause an increased risk of heart attack;
- Adults who do not smoke and are exposed to secondhand smoke increase their risk of developing lung cancer by 20-30%;
- Secondhand smoke causes more than 7,300 lung cancer deaths each year among U.S. adults who do not smoke;
- People who do not smoke but are exposed to secondhand smoke are inhaling many of the same cancer-causing substances and poisons that are inhaled by people who smoke;
- Even brief exposure to secondhand smoke can damage the body's cells in ways that set the cancer process in motion;
- Since 1964, about 2,500,000 people who did not smoke **died** from health problems caused by secondhand smoke exposure.

(Verified Complaint, ¶ 9, Ex. A).

In March 2020, during the Covid pandemic, defendant Governor Murphy closed the New Jersey casinos. Just before the casinos were allowed to re-open, 105 days later, recognizing the danger of secondhand smoke, Governor Murphy banned smoking in casinos: “[s]moking in the

indoor areas of any retail, recreational, and/or entertainment business, including casinos, is prohibited, even when otherwise permitted by State law.” (Exec. Order No. 158, 52 N.J.R. 1458(a)(June 29, 2020); Verified Complaint, ¶ 11).

That Executive Order was revoked two months later, on September 1, 2020, when the Governor again allowed smoking in casinos: “any retail, recreational, and entertainment business that is authorized to open its indoor premises to the public may allow the consumption of food, beverages, or smoking in those indoor premises, when otherwise permitted by State law.” (Exec. Order No. 183, 52 N.J.R. 1714(b)(September 1, 2020); Verified Complaint, ¶ 12). However, due to push back from health and worker advocates, three days later, on September 4, 2020, Governor Murphy again banned smoking in casinos: “we’re going to switch a modest gear, that **we will take administrative action to prohibit smoking in indoor casinos. We have looked closely at the science and agree with the experts who have concluded that allowing smoking is too big a risk to take**’.” Governor Phil Murphy, *Coronavirus Press Briefing* (Sept. 4, 2020)(transcript available at <https://www.nj.gov/governor/news/news/562020/20200904b.shtml>)(Verified Complaint, ¶ 13).

On September 4, 2020, the Department of Law and Public Safety described the advice of the Commissioner of Health regarding smoking in casinos:

WHEREAS, the Commissioner of DOH advised that smoking on casino floors poses a possible increased risk for the transmission of COVID-19 as smoking can only be done without a mask, involves active exhalation, often results in frequent touching of hands and mouth, and can take place over a prolonged period of time; and

¹ Comments by the Governor regarding legislation – or Executive Orders – can be considered by the courts in determining intent. Raybestos-Manhattan, Inc. v. Glaser, 144 N.J. Super. 152, 170 (Chan. Div. 1976).

WHEREAS, the Commissioner of the Department of Health further advised that **casino workers are at a greater risk for lung and heart disease because of long-term secondhand smoke exposure and casino workers with such underlying diseases are at an increased risk for complications if they become infected with COVID-19**; and

WHEREAS, the Commissioner of the Department of Health has determined that a temporary ban on smoking on casino floors is necessary to protect the large number of individuals on casino floors, including casino patrons and **casino employees**;...

N.J. Admin. Order No. 2020-19 (Sept. 4, 2020); (Verified Complaint, ¶¶ 14, 15).

Despite the clear findings by the Commissioner of Health, *without any contrary science or health advice*, after casino workers had been able to work without breathing secondhand smoke for 16 months, on June 4, 2021, Governor Murphy signed Executive Order No. 244 which allowed smoking to resume in casinos on July 4, 2021. (Exec. Order 244, 53 N.J.R. 1131(a)(June 4, 2021); Verified Complaint, ¶ 16).

Defendant Governor Murphy took an oath of office to uphold the Constitution and provide New Jersey residents with their rights to safety and equal protection of the laws. Governor Murphy has failed to protect the safety and equal protection of casino workers and has personally implemented the unconstitutional special law excluding casino workers from the protections of the Smoke-Free Air Act. (Verified Complaint, ¶ 5).

Defendant Acting New Jersey Health Commissioner Kaitlin Baston is responsible to promote the safety and health of New Jersey residents and for the State's implementation of the Smoke-Free Air Act through the Comprehensive Tobacco Control Program. Acting Commissioner Baston has failed to protect the safety of casino workers and has implemented an unconstitutional special law. (Verified Complaint, ¶ 6).

PRELIMINARY STATEMENT

Plaintiffs bring this action on behalf of all casino workers whose Constitutional rights have been violated by their exclusion from the protections of the Smoke-Free Air Act. Casino workers have been sickened with life-threatening diseases – and died – as a result of defendants’ denying their Constitutional right to safety and equal protection through implementation and enforcement of an illegal special law favoring billion-dollar corporate casinos over New Jersey workers.

Plaintiffs seek a declaratory judgment that their exclusion from the Smoke-Free Air Act is unconstitutional and an injunction voiding the special law excluding them. Plaintiffs bring this action for injunctive relief pursuant to the New Jersey Civil Rights Act, N.J.S.A. 10:6-2, which provides:

c. Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State . . . by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.

POINT I

NEW JERSEY CASINO WORKERS HAVE BEEN DENIED THE RIGHT TO SAFETY GUARANTEED BY THE NEW JERSEY CONSTITUTION

Plaintiffs, workers in New Jersey casinos, have been deprived of their right to **safety** in violation of the New Jersey Constitution. Since the birth of our nation, 1776, the New Jersey Constitution has guaranteed the right to safety. Ironically, on the anniversary of New Jersey’s joining the United States of America, July 4, 2021, Governor Murphy allowed the resumption of

smoking, in violation of the right to safety for casino workers. The first paragraph of the New Jersey Constitution provides:

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining **safety** and happiness.

N.J. Const. art. I, ¶ 1 (emphasis added).

The New Jersey Legislature and Governor took action to protect worker safety when, on January 15, 2006, they banned smoking in workplaces. N.J.S.A. 26:3D-58 provides:

a. Smoking is prohibited at the following locations: an indoor public place, a **workplace**, a public park or beach, and the outdoor passenger pick-up and drop-off area of an airport that is not owned or operated by a federal or military authority, except as otherwise provided in this act.

The Legislature made the purpose of the law clear by outlining how smoking endangers human safety and health:

a. Tobacco is the leading cause of preventable disease and death in the State and the nation;

b. Tobacco smoke constitutes a substantial health hazard to the nonsmoking majority of the public;

c. Electronic smoking devices have not been approved as to the safety and efficacy by the federal Food and Drug Administration, and their use may pose a health risk to persons exposed to their smoke or vapor because of a known irritant contained therein and other substances that may, upon evaluation by that agency, be identified as potentially toxic to those inhaling the smoke or vapor;

d. The separation of smoking and nonsmoking areas in indoor public places and workplaces does not eliminate the hazard to nonsmokers if these areas share a common ventilation system;

e. The prohibition of smoking at public parks and beaches would better preserve and maintain the natural assets of this State by reducing litter and increasing fire safety in those areas, while lessening exposure to secondhand tobacco smoke and providing for a more pleasant park or beach experience for the public; and

f. Therefore, subject to certain specified exceptions, it is clearly in the public interest to prohibit the smoking of tobacco products and the use of electronic smoking devices in all enclosed indoor places of public access and workplaces and at all public parks and beaches.

N.J.S.A. 26:3D-56

Thus, more than eighteen (18) years ago, this State acknowledged that smoking causes disease and death and that it is not alleviated by “non-smoking” areas. Yet, although it even banned smoking outdoors in parks and beaches, without explanation, the law exempts casino workers from its protections:

The provisions of this act shall not apply to:

e. the area within the perimeter of:

(1) any casino as defined in section 6 of P.L. 1977, c. 110 (C. 5:12-6) approved by the Casino Control Commission that contains at least 150 stand-alone slot machines, 10 table games, or some combination thereof approved by the commission, which machines and games are available to the public for wagering; and

(2) any casino simulcasting facility approved by the Casino Control Commission pursuant to section 4 of P.L. 1992, c. 19 (C. 5:12-194) that contains a simulcast counter and dedicated seating for at least 50 simulcast patrons or a simulcast operation and at least 10 table games, which simulcast facilities and games are available to the public for wagering.

N.J.S.A. 26:3D-59.

It is indisputable, in light of the Legislative findings contained in the Smoke-Free Air Act, that “[t]obacco is the leading cause of preventable disease and death in the State and the nation,”

“[t]obacco smoke constitutes a substantial health hazard to the nonsmoking majority” and the “separation of smoking and nonsmoking areas in indoor . . . workplaces does not eliminate the hazard to nonsmokers.” *Id.* at 26:3D-56. The recent guidance from the Centers for Disease Control provides even more evidence of the devastating health effects of secondhand smoke. (See pp. 1-2). Thus, defendants have endangered the **safety** of casino workers in violation of the New Jersey Constitution. Not only is there no “rational” basis for this violation of workers’ rights – there is no basis for it.

POINT II

THE EXCLUSION OF CASINO WORKERS FROM THE SMOKE-FREE AIR ACT IS AN UNCONSTITUTIONAL SPECIAL LAW²

A. The New Jersey Constitution Prohibits Special Laws, Like the Exclusion of Casino Workers from the Smoke-Free Air Act

For the past eighteen (18) years, workers in casinos have experienced preventable diseases – and even death – caused by smoking, even though their exclusion from the Smoke-Free Air Act is unconstitutional.

The New Jersey Constitution provides:

No general law shall embrace any provision of a private, special or local character.

N.J. Const. art. IV, § VII, ¶ 7.

² Plaintiffs acknowledge the excellent analysis contained in Samson, Randy, Atlantic City Special: Whether the Casino Randy, Exception to the New Jersey Smoke-Free Air Act comports with the New Jersey Constitution’s General Prohibition of Special Laws, 38 SETON HALL L. REV. 359 (2008).

The Constitution also provides that:

9. The Legislature shall not pass any private, special or local laws:

* * *

(8) Granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever.

N.J. Const. art. IV, § VII, ¶ 9(8).

The New Jersey Supreme Court has defined special laws as:

[S]pecial laws are all those that rest on a false or deficient classification, their vice is that they do not embrace all the class to which they are naturally related; they create preference and establish inequalities; they apply to persons, things or places possessed of certain qualities or situations, and exclude from their effect other persons, things or places which are not dissimilar in these respects.

State, ex rel. Van Riper v. Parsons, 40 N.J.L. 1, 9 (1878).

Applying the Van Riper analysis here:

- defendants clearly have created a "deficient classification" – casino workers;
- which clearly does not embrace the class to which such workers are "naturally related" – all other workers; and
- the exclusion of casino workers from the law clearly establishes an "inequality" – casino workers must risk death and illness in order to work and provide for their families – unlike almost all other New Jersey workers³.

The reason special laws are unconstitutional, and citizens can seek court intervention to void them, was made clear in Vreeland v. Byrne, 72 N.J. 292 (1977):

The legislative and judicial processes [have] developed along different lines ... the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their posers to dispense special favors. Over the course

³ Also excluded are workers in tobacco-related businesses and those doing medical research regarding smoking. N.J.S.A. 26:3D-59(a) (b) (c) (f) and (i).

of time, as a result, the propensities of legislatures to indulge in favoritism through special legislation developed into a major abuse of governmental power.

As the bulk of special laws grew, demands for reform became insistent, and constitutional prohibitions were enacted to limit the practice of enacting special legislation and to achieve greater universality and uniformity in the operation of statute law in respect to all persons.

72 N.J. 292, 298 (1977).

The exclusion of casinos – rich corporations – from the Smoke-Free Air Act is precisely what the Constitution prohibits – favoritism, the unconstitutional “granting to [several] corporation[s] . . . [an] exclusive privilege and immunity.” N.J. Const. art. IV, § VII, ¶ 9(8). The favoritism granted to corporate casinos, in violation of a very clear provision of the New Jersey Constitution, is not just repugnant – it endangers the lives of workers.

In Jordan v. Horsemen’s Benevolent and Protective Association, the Supreme Court found that a law which gave certain advantages to the horsemen’s association was an unconstitutional special law and ordered changes to fix the Constitutional defects. 90 N.J. 422, 435 (1982). There is no way to fix the exclusion of casinos from the Smoke-Free Air Act. That exclusion is exactly what the Constitution is designed to outlaw, as the court held in Jordan:

The vice in special laws is that they foster favoritism. The purpose of the constitutional prohibitions is to prevent abuse of the legislative process by picking favorites. 2 Sutherland, *Statutory Construction* § 40.01 at 135 (4th ed. 1973). In effect, the prohibitions eliminate the invidious threat of unfair preferences and restrict the legislative power to grant favors to some at the expense of others.

Id. at 433 (citing Van Riper, 40 N.J.L. at 9).

In this case, exclusion of casino workers from safety protections given to other workers is rather blatant favoritism for a powerful industry located in only one municipality in the State, precisely what the New Jersey Constitution prevents. In fact, frustrated legislators who put public health above special interests have recognized the vulgarity of the surrender to monied special interests:

“In a perfect world, the casino floors would be included, but we [the New Jersey Senate and Assembly] just don’t have the votes.”

(Senator Joe Vitale)

* * *

The exception was admittedly a concession to “big business.”

(Assemblyman Richard Merkt)

Kaitlin Gurney, N.J. Ban on Indoor Smoking, PHILA. INQUIRER, Dec. 4, 2005, at A01⁴

B. The Exclusion of Casino Workers From the Smoke-Free Air Act is Antithetical to the Purpose of the Law

Governor Murphy acknowledged the relationship between worker safety and smoking when he issued Executive Order No. 158, which banned smoking in casinos during the initial Covid outbreak.

When Governor Murphy issued another order allowing the resumption of smoking in casinos, workers, health experts and lawmakers complained. Acknowledging that smoking posed a risk to nonsmokers’ health and safety, Governor Murphy reversed that order and again banned smoking in casinos. The Administrative Order banning smoking specifically found that “casino workers are at a greater risk for lung and heart disease because of long-term secondhand smoke

⁴ Newspaper articles can provide relevant evidence in discerning legislative intent. Raybestos-Manhattan, Inc. v. Glaser, 144 N.J. Super. at 170.

exposure and casino workers with such underlying diseases are at an increased risk for complications if they become infected with COVID-19.” (N.J. Admin. Order No. 2020-19 (Sept. 4, 2020)).

In fact, contrary to the claim in the Administrative Order that only “long-term secondhand smoke exposure” is dangerous, the CDC explains that “[t]here is no safe level of exposure to secondhand smoke. People who do not smoke who are exposed to secondhand smoke, **even for a short time**, can suffer harmful health effects.” The CDC also notes that “[t]he effects of secondhand smoke exposure on the body are **immediate**. Secondhand smoke exposure can produce harmful inflammatory and respiratory effects **within 60 minutes** which can last for at least three hours after exposure.” (Verified Complaint, ¶ 9, Ex. A).

Ignoring the science, health concerns, and purpose of the Smoke-Free Air Act, on July 4, 2021, Governor Murphy allowed smoking in casinos. (Exec. Order No. 244, supra.). Long before Covid, defendants acknowledged the significant health risks caused by secondhand smoke. During Covid, defendants openly noted that secondhand smoke posed an additional risk to the deadly Covid virus. Those risks continue today and *every day* threaten the safety and health of casino workers. Covid continues to be a leading cause of *death*, and exposure to smoke contributes to the dangerousness of the virus. “Covid remains one of the leading causes of death as well as a top driver of respiratory virus hospitalizations[.]” (Nirappil, Fenit and Sun, Lena H., *Another covid wave hits U.S. as JN.1 becomes dominant variant*, WASH. POST, (January 4, 2024), <https://www.washingtonpost.com/health/2024/01/04/covid-2024-us-jn1/>).

C. Plaintiffs Clearly Meet the Standard in Showing That the Exclusion of Casino Workers From the Smoke-Free Air Act is an Unconstitutional Special Law

The New Jersey Supreme Court in Vreeland v. Byrne outlined the test to determine whether a law is an unconstitutional special law:

- (1) Discern the purpose of the law;
- (2) Apply the purpose to the exclusions presented; and
- (3) Determine whether the exclusion rests on a rational basis “relevant to the purpose of the act.”

72 N.J. at 299-301.

The focus in the analysis is what is excluded:

In deciding whether an act is general or special, it is *what is excluded* that is the determining factor and not what is included. If no one is excluded who should be encompassed, the law is general. Another requirement of a general law is that it must affect equally all of a group who, bearing in mind the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves.

Harvey v. Essex Cty. Freeholder Bd., 30 N.J. 381, 389 (1959)(internal citations omitted)

Applying this test, the Court in Raybestos-Manhattan, Inc. found that a law taxing only businesses that had more than 500 employees, if they terminated business operations and had unfunded pension obligations, was an unconstitutional special law because it excluded employees of firms with less than 500 employees. 144 N.J. Super. 152 (Chan. Div. 1976). Rejecting an argument that larger firms have a greater economic impact on the State, the court held, “[t]he number of employees in a firm can in no way be logically related to their need for protection of their unvested pension benefits.” Id. at 180:

Defendants argue that this exclusion of small firms from the protections of the act represents a recognition by the Legislature that the closing of such small firms has a less harmful impact on the state economy than the closing of large firms. But this contention, even if true, is without merit, as it is not directed to the standard to be applied. The exclusion must be viewed with reference to the legislative objective, and where the act is designed to protect employees against loss of their pension benefits a consideration relating to the state economy alone will not suffice to justify the exclusion.

Id. (Emphasis added)(citing Kline v. N.J. Racing Comm'n, 38 N.J. 109, 118 (1962))

Here, the exclusion of casino workers must be viewed with reference to the legislative objective, which is clearly outlined in the statute itself – protecting workers’ safety from the “substantial health hazard” of “tobacco . . . the leading cause of preventable disease and death in the State and the nation.” N.J.S.A. 26:3D-56(a-b). As in Raybestos-Manhattan Inc., “[t]he employees protected by the act are not, as required, readily distinguishable from those excluded from protection, and are not ‘distinguished by characteristics sufficiently marked and important to make them a class by themselves.’” 144 N.J. Super. at 180. For example, casinos do not hire only employees who have been genetically modified to be able to breathe smoke almost every day and not become ill.

The subject matter of the Smoke-Free Air Act is protecting the health and safety of workers. The exclusion “has the vice of discrimination against members of a class to which the subject matter of the legislation reasonably and naturally relates” and is, therefore, an “invalid classification, rendering the exclusion an unconstitutional special law.” Id. at 185-6.

D. The Court Must Protect Plaintiffs' Constitutional Rights

Although there is a presumption that a statute is Constitutional, that presumption fails when the Legislature has clearly intruded upon Constitutional rights:

[R]ecognition of this judicial philosophy cannot be permitted to deter the judiciary from the performance of its obligation to insure the constitutionality of all legislative action. '(O)ur coordinate branch of government is a human institution, and the product of its labor will, on occasion, reflect unaccountable departures from the usual high seriousness of its deliberations.' The judicial branch may not shirk its obligation in the name of presumption of constitutionality when beyond a reasonable doubt there has been an intrusion by the Legislature into an area of constitutional protection. The doctrine of separation of powers, a fundamental principle of American government, mandates affirmative remedial action. Thus while 'the court will incline to a construction favoring the validity of a statute,' when invalidity thereof plainly appears it will be invalidated . . . 'while good faith and a knowledge of existing conditions on the part of a legislature are to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed or unknown reason for subjecting certain individuals or corporations to hostile and discriminatory legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action.'

Raybestos-Manhattan, Inc., 144 N.J. Super. at 176-7 (quoting Trainor v. Newark, 137 N.J. Super. 570, 586 (Law Div. 1975); Lynch v. Edgewater, 8 N.J. 279, 290-291 (1951); Gulf Co. & F.S. Ry. Co. v. Ellis, 165 U.S. 150, 154 (1897)).

The ruling in Raybestos-Manhattan is instructive here:

'What we have is a subdivision of a wholly natural class without any reason whatever related to the service of the statutory object or the public interest in any of its diverse manifestations.' The classification is without any demonstrable factual basis which would permit the application of the presumption that the Legislature acted rationally in the establishment thereof. The act is void as special legislation violative of N.J. Const. (1947), Art. IV, s VII, pars. 8, 9.

144 N.J. Super. at 189 (quoting Washington Nat. Ins. Co. v. Bd. of Review, 1 N.J. 545, 64 (1949)(internal citation omitted)

Here, casino workers are in the class of workers entitled not to die or be sickened by smoke in their workplace. Since the purpose of the Smoke-Free Air Act is to protect workers' health and safety, excluding casino workers is an unconstitutional special law.

POINT III

PLAINTIFFS HAVE BEEN DEPRIVED OF EQUAL PROTECTION IN VIOLATION OF THE NEW JERSEY CONSTITUTION

It is clear that, although the words "equal protection" are not included in New Jersey's Constitution, it does guarantee New Jersey citizens equal protection of the laws.

Although our constitution lacks explicit equal protection language, the concept is implicit in Article I, paragraph 1, which provides that '[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.' N.J. Const. art. I, § 1. The expansive language of this constitutional provision is the source for the equal protection guarantee.

Guaman v. Velez, 421 N.J. Super. 239, 267 (App. Div. 2011)(internal citations omitted).

The Court in Guaman outlined the standard to be applied to equal protection claims:

In analyzing equal protection challenges under the state constitution, our courts have rejected the federal multi-tiered analysis (strict scrutiny, intermediate scrutiny, rational basis), and employ a more flexible balancing test that considers three factors: '(1) the nature of the right asserted; (2) the extent to which the statute intrudes upon that right; and (3) the public need for the intrusion.' . Although the federal and state tests are different, they 'weigh the same factors and often produce the same result.'

Id. (quoting State v. O'Hagen, 189 N.J. 140, 164 (2007); Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 333 (2003)).

“The protection afforded by our State Constitution can be broader than that found under the Federal Equal Protection Clause.” Sanchez v. Department of Human Services, 314 N.J. Super. 11, 30-31 (App. Div. 1998)(finding a two-tier system of welfare payments was unconstitutional because the State Constitution “protects against injustice and against the unequal treatment of those who should be treated alike.”)(citing Doe v. Poritz, 142 N.J. 1 (1995)).

The test in analyzing whether a law denies equal protection is the same as the test to determine if a statutory exclusion is an unconstitutional special law.

The test of whether a statute denies equal protection of the laws is essentially the same as that which determines whether it constitutes special legislation.

Raybestos-Manhattan, Inc., 144 N.J. Super. at 190(citing Robson v. Rodriguez, 26 N.J. 517 (1958)).

In Raybestos-Manhattan, the Court struck down as also violating equal protection a law it determined was a special law. 144 N.J. Super. at 194. For the same reasons that the Smoke-Free Air Act violates the prohibition on special laws, it violates plaintiffs’ right to equal protection.

Plaintiffs clearly meet all elements of the standard enunciated in Guaman. First, plaintiffs have a clear Constitutional right to safety and equal protection. Second, the statutory provision excluding plaintiffs from the protections afforded to almost every other worker in the State clearly intrudes upon plaintiffs’ rights. Third, there is clearly no public need to endanger the safety of casino workers. In fact, smoking in casinos actually also endangers the non-smoking customers.

POINT IV

PLAINTIFFS ARE ENTITLED TO AN IMMEDIATE DECLARATORY JUDGMENT THAT THE EXCLUSION OF CASINO WORKERS FROM THE SMOKE-FREE AIR ACT IS UNCONSTITUTIONAL AND TO AN INJUNCTION BANNING THE EXCLUSION

This matter is appropriate for summary action pursuant to R. 4.67-1(b), which provides:

This rule is applicable ...(b) to all other actions in Superior Court other than matrimonial actions and actions in which unliquidated monetary damages are sought, provided it appears to the court, on motion made pursuant to R. 1:6-3 and on notice to the other parties to the action not in default, that it is likely that the matter may be completely disposed of in a summary manner.

R. 4.67-2 allows proceeding by Order to Show Cause.

The seminal case in New Jersey regarding Orders to Show Cause and Preliminary Injunctions is Crowe v. DeGioia, 90 N.J. 126 (1982). Under Crowe, there are four elements moving parties must show for the court to grant the relief:

- A. Irreparable harm would result to the moving party if the relief sought is not granted;
- B. The moving party's claims are based on legally settled rights;
- C. There is a reasonable probability that the moving party will succeed; and
- D. A balancing of the relative hardships to the parties militates in favor of granting the moving party equitable relief.

A. Plaintiffs Will Suffer Irreparable Harm if Relief is Not Granted

Every single day, on every single shift, casino workers are poisoned by smoke. Many workers have been sickened by their smoke-filled workplaces and their diseases are exacerbated every single shift; some have died. The CDC has found that "the effects of secondhand smoke exposure on the body are immediate and exposure can produce harmful inflammatory and

respiratory effects within 60 minutes of exposure which can last for at least three hours after exposure. Even brief exposure to secondhand smoke can damage the lining of blood vessels and cause blood platelets to become stickier. These changes can cause an increased risk of heart attack. Even brief exposure to secondhand smoke can damage the body's cells in ways that set the cancer process in motion." (Verified Complaint, ¶ 9).

B. Plaintiffs' Claims are Based on Legally Settled Rights

The New Jersey Constitution gives every single New Jersey resident the right to safety. Casino workers have been deprived of that right for eighteen (18) years. Plaintiffs have also been deprived of their Constitutional right to equal protection of the laws – specifically they have been left out of the protection of the Smoke-Free Air Act.

Finally, applying the standard established to determine whether a statutory exclusion constitutes an unconstitutional special law, it is clear that the exemption of casinos from the Smoke-Free Air Act is also an unconstitutional special law.

C. There is a Significant Probability that Plaintiffs Will Succeed on the Merits

Based on the clear Constitutional law outlined above, plaintiffs have shown a significant probability that they will succeed on the merits and are entitled to a hearing as soon as possible on their request for injunctive relief.

D. There is No Hardship to Defendants if Plaintiffs Are Granted the Relief Requested

There will be no hardship to the Governor, Acting Health Commissioner Baston or the State of New Jersey if the unconstitutional special law is enjoined because it endangers the safety of casino workers – guaranteed by the Constitution – and violates their right to equal protection.

In fact, the Governor has a duty to enforce the Constitution – it is required by his oath of office. Similarly, the Acting Health Commissioner has the duty to protect – not endanger – the health of New Jersey residents. There is no hardship to counter balance plaintiffs’ request for equitable relief.

POINT V

PLAINTIFFS ARE ENTITLED TO ATTORNEYS’ FEES

The New Jersey Civil Rights Act provides:

In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney’s fees and costs.

N.J.S.A. 10:6-2(f).

Plaintiffs are entitled to attorneys’ fees to compensate the workers forced to sue in order to vindicate their Constitutional rights.

CONCLUSION

Plaintiffs have shown by clear and convincing evidence that the exclusion of casino workers from the Smoke-Free Air Act violates the New Jersey Constitution beyond a reasonable doubt. For all of the foregoing reasons, the Court should declare that the exclusion of casino workers from the Smoke-Free Air Act is unconstitutional and enjoin its enforcement.

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BY: 

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