UAW, REGION 9 OF THE UAW, and C.E.A.S.E. N.J.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000057-24
Appellants,	Civil Action
v.	On Appeal from the 8/30/24 Order of the Superior Court of New Jersey
NEW JERSEY GOVERNOR PHILIP MURPHY, and ACTING NEW JERSEY HEALTH COMMISSIONER DR. KAITLIN BASTON,	Chancery Division, Mercer County Docket No.: MER-C-26-24 Sat Below: Hon. Patrick J. Bartels
Respondents.	Submission Date: 9/11/24

APPELLANTS' BRIEF AND APPENDIX IN SUPPORT OF APPEAL (PA1-73)

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PRELIMINARY STATEMENT

Appellants, approximately 6000 casino workers represented by either the UAW Region 9 or the grassroots organization C.E.A.S.E. N.J., seek emergent relief in order to stop their constant exposure to deadly poison in violation of their right to a safe workplace and to enjoin enforcement of their exclusion from the protections of the Smoke-Free Air Act. Their exclusion from a legal protection afforded to all other workers constitutes an unconstitutional special law favoring corporate interests and violates their Constitutional right to a safe workplace and equal protection.

Although the Court below found that Appellants will likely experience irreparable harm without the issuance of an injunction, it found that Appellants have no Constitutional right to safety and that their exclusion from the law's protections is not unconstitutional special legislation or a denial of equal protection.

PROCEDURAL HISTORY

Appellants filed an Order to Show Cause and Verified Complaint in the Mercer County Chancery Division on April 5, 2024. The Honorable Patrick J. Bartels signed the Order on that same date.

On April 29, 2024, the Casino Association of New Jersey and certain Unions filed a motion to intervene. (Pa66-70).

Appellants opposed the intervention on May 7, 2024.

A hearing on the Order to Show Cause was held on May 13, 2024.

On August 30, 2024, the trial court ruled that although Appellants had shown irreparable harm caused by exposure to secondhand smoke in their workplace, there was no Constitutional right to safety, their exclusion from the protection of the Smoke-Free Air Act was not unconstitutional special legislation, and they were not denied equal protection. (Pa12-32). The Court also allowed the interventions. (Pa33-44).

STATEMENT OF FACTS

In 2006, New Jersey passed the Smoke-Free Air Act (N.J.S.A. 26:3-55, *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. (Pa3, ¶ 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;
- Even brief exposure to secondhand smoke can damage the body's cells in ways that set the cancer process in motion;
- 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 that 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;

- Since 1964, about 2,500,000 people who did not smoke **died** from health problems caused by secondhand smoke exposure.

(Pa71-73)[1].

Not surprisingly, having to work in smoke-filled casinos has resulted in Appellants' members developing serious health problems, including cancer, asthma, respiratory illnesses and heart disease. Some of these diseases have proven fatal. (Pa2, 7, ¶¶ 2, 4, 17)

Recognizing the danger created by secondhand smoke, during the Covid pandemic, Governor Murphy banned smoking in casinos in June 2020. (Exec . Order No. 158, 52 N.J.R. 1458(a)(June 29, 2020); (Pa5,¶ 11).

The Governor revoked that Executive Order two months later, on September 1, 2020, again allowing smoking in casinos. (Exec. Order No. 183, 52 N.J.R. 1714(b)(September 1, 2020); (Pa5, ¶ 13). However, due to protests 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**

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[1] Because the Court does not allow hyperlinks, Appellants have provided hard copies of these documents in the Appendix.

allowing smoking is too big a risk to take[2]." Governor Phil Murphy, *Coronavirus Press Briefing* (Sept. 4, 2020) (Pa45-54) (Pa 5-6, ¶ 13).

That same day, the Department of Law and Public Safety issued a statement from the Commissioner of Health regarding smoking in casinos in which she admitted that "casino workers are at a greater risk for lung and heart disease because of long-term secondhand smoke exposure" and provided:

> 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
>
> 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); (Pa6, ¶¶ 14, 15).

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[2] 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, 169-170 (Chan. Div. 1976).

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 July 4, 2021, Governor Murphy allowed smoking to resume in casinos. (Exec. Order 244, 53 N.J.R. 1131(a)(June 4, 2021); (Pa 6, ¶ 16).

In fact, "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) (Pa55-58).

In fact, there has recently been a spike in Covid cases. In the week ending April 20, 2024, there were 625 lab confirmed PCR cases of Covid in New Jersey, 9 of which were in Atlantic County. In the week ending August 3, 2024, there were **3,041** lab confirmed PCR cases, **71** of which were in Atlantic County. (Pa59-62).

POINT I

THE EXCLUSION OF CASINO WORKERS FROM THE SMOKE-FREE AIR ACT IS AN UNCONSTITUTIONAL SPECIAL LAW (Pa25)

The Court below found that the exclusion of casino workers from the Smoke-Free Air Act was not an unconstitutional special law "granting any corporation, association or individual any exclusive privilege, immunity or franchise . . ." because "Atlantic City is a special case given the unique Constitutional status of the city."

Appellants submit that the State's decision to allow gambling in Atlantic City did not make it a "law free" zone or render its workers and residents unprotected by New Jersey's Constitution and laws. (Pa28).

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

The New Jersey Constitution provides:

> No general law shall embrace any provision of a private, special or local character.
>
> * * *
>
> 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, ¶ 7; 9(8).

It is obvious that the exclusion of casino workers from the Smoke-Free Air Act is a "special" or "local" law which grants several corporations "exclusive privileges and immunities."

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 all other New Jersey workers[3].

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 powers to dispense special favors. Over the course 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

---

[3] The only other exclusions in the Act 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).

> 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) (emphasis added).

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). The exclusion of casinos from the Smoke-Free Air Act 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, supra at 9) (emphasis supplied).

In this case, exclusion of casino workers from safety protections given to other workers is 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 A01[4]

[4] Newspaper articles can provide relevant evidence in discerning legislative intent. Raybestos-Manhattan, Inc. v. Glaser, 144 supra, at 170.

B. The Exclusion of Casino Workers From the Smoke-Free Air Act is Unconstitutional

1. Appellants Met the First Prong of the Test

The Court below found that Appellants have met the first two prongs of the test laid out in Vreeland v. Byrne, 72 N.J. 292 (1977), to determine whether a special law is unconstitutional. (Pa28). First, Appellants have shown that the purpose of the Smoke-Free Air Act is to protect workers from poisonous secondhand smoke. The Legislature clearly laid out the purpose of the Act, which specifically banned smoking in workplaces (N.J.S.A. 26:3D-58):

> 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.

Without explanation – or any statement of "purpose" – the Legislature excluded casinos from all other workplaces whose workers were protected. N.J.S.A. 26:3D-59.

2. Appellants Met the Second Prong of the Test

The trial court determined that Appellants also met the second prong of the test "whether there are persons similarly situated to those embraced within the act, who, by the terms of the act, are excluded from its operation. Id." (Pa28). Workers in casinos are the same as workers in any other workplace – they will become ill and possibly die as a result of exposure to toxic secondhand smoke.

3. The Third Prong of the Test

The Court below found that Appellants did not meet the third prong, applying this test: "whether the classification is reasonable, not arbitrary, and can be said to rest

upon some rational basis justifying the distinction," citing Vreeland v. Byrne, supra. (Pa27, p. 14). But the Vreeland court clarified the third prong:

> Briefly restated, the method of analysis is this: we first discern the purpose and object of the enactment. We then undertake to apply it to the factual situation presented. Finally we decide whether, as so applied, the resulting classification can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act. Since, in this case, it quite obviously cannot, we reach the conclusion that the statute constitutes special legislation. (emphasis added).

Id. at 494.

4. The Supreme Court in Secaucus Supports Appellants' Arguments

Although the trial court repeats the case cites delineating the requirement that the **purpose** of the legislation is the first consideration, it erroneously concludes that "any conceivable rational basis will suffice," citing Town of Secaucus v. Hudson County Bd. of Taxation, 133 N.J. 482, 495 (1993). (Pa27, p. 14). However, the Supreme Court did not abandon the "purpose of the legislation" analysis in Secaucus. It cited the Vreeland test:

> [w]e first discern the purpose and object of the enactment. We then undertake to apply it to the factual situation presented. Finally we decide whether, *as so applied*, the resulting classification can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act.

[72 *N.J.* at 300-01, 370 *A.2d* 825 (emphasis added).] Id. at 494.

The Supreme Court in that case also noted that "No statute . . . can authorize an unconstitutional practice . . . Wherever a statute and the Constitution come into conflict, the statute must give way." Id. at 493.

The statute at issue in Secaucus, which created criteria which exempted Bayonne from a tax to support vocational schools, was stricken as an unconstitutional special law. The Court repeatedly analyzed the law by referring to its purpose:

> Accordingly, we must first discern the purpose of [the law]; then apply that purpose to the specific facts of the case before us.

Id. at 494 (emphasis added).

Although the Court notes that the analysis is "not limited to the *stated* purpose," it goes on to analyze whether there is a "**legitimate** legislative purpose." Id. at 495. The Court found two legitimate purposes to the tax legislation at issue in Secaucus: (1) tax relief to municipalities that maintained their own vocational schools; and (2) the development of high-quality vocational schools. Id. The Court found that the statute which excluded Bayonne from the vocational school tax did not "realize[] either of those purposes." Id. at 495. The Court's analysis is instructive here, because it clearly looks to whether legitimate legislative purposes are met by the statute, even after

finding that Hudson County is "unique" as the Court below found Atlantic City to be a "special case":

> In this case, we are cognizant of the fact that Hudson County is unique in terms of the density and urbanization of its population, having almost twice as many residents per square mile (12,108.1) as the next most densely-populated county, Essex County (6,701.7). From that fact, it is possible to conjecture that the Legislature had a special interest in encouraging the development of local vocational education programs in the State's most densely populated areas. Nevertheless, that possibility seems remote, if not illusory. That concern has never been advanced as a possible legislative purpose or concern. Further, from the perspective of making educational services available to as many students as feasible, the encouragement of excellent vocational schools by individual school districts would make as much sense for less densely-populated areas as those more densely-populated. However, as already noted, the particular limitations embodied in *N.J.S.A.* 18A:54-37 go well beyond population size and density.
>
> The requirement that the local vocational program be in operation for at least twenty years – the so-called 'longevity' requirement works to exclude other municipalities, in areas just as densely populated as Bayonne, from the benefit of the statute. To accept the classifications contained in *N.J.S.A.* 18A:54-37 as having a rational basis, one must imagine that the Legislature had some reasonable ground for encouraging the development of local vocational programs only in the most-densely-populated county in the state with a total population below 700,000, *and* that the Legislature had reasonable grounds for concluding that only those programs in existence for at least twenty years were of sufficient quality to be worthy

> of financial encouragement through tax relief. Those conclusions seem to us to stretch credulity beyond reasonable limits. (Emphasis added).

Id. at 497-498.

In striking down the law as unconstitutional special legislation, the Supreme Court in Secaucus again noted:

> The test, in every case, is whether the classifications embodied in a particular statute 'rest upon a reasonable or rational basis relevant to the purpose and object' of the statute. *Vreeland, supra*, 72 *N.J.* at 301, 370 *A.2d* 825.

Id. at 502 (emphasis added).

Thus, the Court below erred in asserting that the law requires just "any" rational basis. As shown above, the Supreme Court has made clear that the rational basis must be "legitimate" and "relevant to the purpose and object of the statute." The exclusion of casino workers from health and safety legislation is neither. It cannot be "legitimate" because the Constitution specifically prohibits the "granting to any corporation . . . any exclusive privilege, immunity or franchise." N.J. Const. Art. IV, § VII, ¶ 9(8). It cannot be legitimate to violate the specific prohibition on giving favors to corporations.

Similarly, excluding workers from health and safety laws so that the casino industry can make more money is not a rational basis "relevant to the purpose of the statute," which clearly is keeping New Jersey residents and workers safe and healthy.

POINT II

NEW JERSEY CASINO WORKERS HAVE BEEN DENIED THE RIGHT TO SAFETY GUARANTEED BY THE NEW JERSEY CONSTITUTION (Pa23)

Plaintiffs, thousands of workers in New Jersey casinos, have been deprived of their right to **safety** in violation of the New Jersey Constitution, which 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).

A. New Jersey Recognizes Workers' Right to a Safe Workplace

The Court below found that "case law has not derived a right to safety from the text of Article 1, Paragraph 1. Furthermore, Appellants provide no case law or statute to support the argument that a stand-alone right to safety exists within the language of Article 1, Paragraph 1." (Pa24).

This is error. Our Constitution itself provides the basis for an "unalienable right" to "pursue and obtain safety." "[S]tate Constitutions are separate sources of

individual freedoms, State v. Schmid, 84 N.J. 535, 553 (1980), and restrictions on the exercise of power by the Legislature. State v. Saunders, 75 N.J. 200, 225-26 (1977)." Right to Choose v. Byrne, 91 N.J. 287, 300 (1982).

In fact, the New Jersey Supreme Court has recognized the "high priority" placed on the preservation of health in New Jersey:

> Although we decline to proceed as far as the Chancery Division in declaring that the New Jersey Constitution guarantees a fundamental right to health, *Right to Choose II, supra*, 169 *N.J. Super.* at 551, 405 *A.2d* 427, we recognize that New Jersey accords a high priority to the preservation of health. More than 70 years ago, Chancellor Pitney recognized that
>
> [a]mong the most [important] of personal rights, without which man could not live in a state of society, is the right of personal security, including 'the preservation of a man's health from such practices as may prejudice or annoy it,' a right recognized, needless to say, in almost the first words of our written Constitution. (citations omitted).

Right to Choose v. Byrne, supra at 304 (1982).

Despite this, the Court below found that if a right to safety exists at all, it is only the right to "pursue" safety. (Pa24).

> If the right to safety does exist under the New Jersey Constitution, the text of the article is more accurately interpreted as providing a right to *pursue* safety.

> This language implies that the Constitution guarantees individuals the right to make decisions regarding their own safety or alternatively, the ability to decide to take certain risks regarding their safety, such as the ability of individuals to choose work in dangerous jobs despite the known safety risks in that line of work. (emphasis in original)

That analysis ignores the actual words of the Constitution which protects the right to "pursue **and obtain** safety."

While the Court noted that Appellants did not cite cases which specifically referred to the *constitutional* right to safety, the right to a safe workplace is well-established in New Jersey law, perhaps growing out of our Constitution. For example, N.J.S.A. 34:6A-3 provides:

> Safe and healthful place of employment
>
> Every employer shall furnish a place of employment which shall be reasonably safe and healthful for employees. Every employer shall install, maintain and use such employee protective devices and safeguards including methods of sanitation and hygiene and where a substantial risk of physical injury is inherent in the nature of a specific work operation shall also with respect to such work operation establish and enforce such work methods, as are reasonably necessary to protect the life, health and safety of employees, with due regard for the nature of the work required.

The Appellate Division has ruled that "[i]t is clear to us that there is a strong public policy in New Jersey favoring safety in the workplace." Cerracchio v. Alden Leeds, Inc., 223 N.J. Super. 435, 445 (App. Div. 1988).

The right to a safe workplace – specifically a workplace free from secondhand smoke – was found in Shimp v. New Jersey Bell Telephone Company, 145 N.J. Super. 516 (Chancery Div., 1976):

> It is clearly the law in this State that an employee has a right to work in a safe environment. An employer is under an affirmative duty to provide a work area that is free from unsafe conditions. *McDonald v. Standard Oil Co.*, 69 *N.J.L.* 445, 55 *A.* 289 (E. & A. 1903); *Burns v. Delaware and Atlantic Tel. and Tel. Co.*, 70 *N.J.L.* 745, 59 *A.* 220 (E. & A. 1904); *Clayton v. Ainsworth*, 122 *N.J.L.* 160, 4 *A.2d* 274 (E. & A. 1939); *Davis v. N.J. Zinc Co.*, 116 *N.J.L.* 103, 182 *A.* 850 (E. & A. 1936); *Canonico v. Celanese Corp. of America*, 11 *N.J. Super.* 445, 78 *A.2d* 411 (App. Div. 1951), *certif. den.* 7 *N.J.* 77, 80 *A.2d* 494 (1951). This right to safe and healthful working conditions is protected not only by the duty imposed by common law upon employers, but has also been the subject of federal legislation. In 1970 Congress enacted the Occupational Safety and Health Act (OSHA) 29 *U.S.C.A.* § 651. Under the general duty clause 29 *U.S.C.A.* § 654(a)(1), Congress imposed upon the employer a duty to eliminate all foreseeable and preventable hazards. *Cal. Stevedore & Ballast Co. v. O.S.H.R.C.*, 517 *F.2D* 986, 988 (9th Cir. 1975); *Nat'l. Realty & Constr. Co. v. O.S.H.R.C.*, 160 *U.S. App. D.C.* 133, 489 *F.2d* 1257, 1265-67 (D.C. Cir. 1973). OSHA in no way preempted the field of occupational safety. Specifically, 29 *U.S.C.A.* § 653(b)(4) recognizes concurrent state power to act either

> legislatively or judicially under the common law with regard to occupational safety. (emphasis added).

Id. at 521-522.

The Court in Shimp found that "where an employer is under a common law duty" to provide a safe workplace, "a court of equity may enforce an employee's rights by ordering the employer to eliminate any preventable hazardous condition . . . [t]he courts of New Jersey have long been open to protect basic employees' rights by injunction." Id. at 524.

Finding that secondhand smoke was a toxic and dangerous preventable hazard, the court ordered the employer to restrict smoking in the workplace:

> The company already has in effect a rule that cigarettes may not be smoked around the telephone equipment. The rationale behind the rule is that the machines are extremely sensitive and can be damaged by the smoke. Human beings are also very sensitive and can be damaged by cigarette smoke. Unlike a piece of machinery, the damage to a human is all to [sic] often irreparable. If a circuit or wiring goes bad, the company can install a replacement part. It is not so simple in the case of a human lung, eye or heart. The parts are hard to come by, if indeed they can be found at all.

Id. at 531.

The obligation of employers to provide workers with a safe workplace is well-settled and long-standing. Davis v. New Jersey Zinc Co., 116 N.J.L. 103 (1936) (employer liable for failing to use reasonable care to provide an employee with

reasonably safe work conditions); McDonald v. Standard Oil Co., 69 N.J.L. 445 (1903) (it is an employer's duty to take reasonable care to provide a proper and safe workplace); Canonico v. Celanese Corp. of America, Plastics Division, 11 N.J. Super. 445 (App. Div. 1951) (it is settled law in New Jersey that employers must use reasonable care to provide a proper and safe place for workers); Clayton v. Ainsworth, 122 N.J.L. 160 (1939) (employers have a primary and non-delegable duty to provide a safe place of employment); Burns v. Delaware & A. Telegraph & Telephone Co., 70 N.J.L. 745 (1904).

B. In Excluding Casino Workers from the Smoke-Free Air Act, the State Created a Danger for Them

The Court below went further than finding no support for a Constitutional right to safety. In rejecting Appellants' argument that the State cannot take affirmative action which endangers the health and safety of residents, the Court held that the State can take "any affirmative legislative or executive actions which endanger[] the health or safety of its residents," rejecting the "state-created danger doctrine," finding "it does not apply." (Pa25).

But the State-created danger doctrine does apply. The State cannot take affirmative action which endangers our health and safety. 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."

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

Excluding casino workers from the Smoke-Free Air Act subjects them to life-threatening diseases – certainly a danger.

The state-created danger doctrine was applied to an action for injunctive relief pursuant to the New Jersey Civil Rights Act and the federal Civil Rights Act in Gormley v. Wood-El, 218 N.J. 72 (2014). In that case, a public defender assigned to represent patients at a state psychiatric hospital was brutally attacked by her client in an atmosphere so frequently violent that the Court found the attack to be foreseeable. The test to evaluate whether a plaintiff meets the state-created danger doctrine is whether:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) a state actor acted with a degree of culpability that shocks the conscience;
>
> (3) a relationship between the state and the plaintiff existed such that 'the plaintiff was a foreseeable

> victim of the defendant's acts,' or 'a member of a discrete class of persons subjected to the potential harm brought about by the state's actions,' as opposed to a member of the public in general; and
>
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Id. at 101.

Here, there is no question that exposure to toxic secondhand smoke caused dangerous illness – sometimes fatal – that is direct and foreseeable.

Second, the State has acted in willful disregard of the safety of Appellants both by enforcing the exclusion of casino workers, "a discrete class of persons," from the Smoke-Free Air Act and by the Governor intentionally reinstating that exclusion after providing a safe environment for casino workers for 16 months. In subjecting Appellants to potential harm, he had "time to make unhurried judgments, upon the chance for repeated reflection and chose to expose Appellants to danger." Id. at 103.

The Commissioner of Health is responsible for implementing and enforcing the Smoke-Free Air Act, and intentionally enforces the exclusion despite her obligation to protect New Jersey residents' health and safety and despite the clear and foreseeable deleterious health effects of secondhand smoke. The disregard of the health and safety of casino workers certainly shocks the conscience.

Third, Appellants are foreseeable victims of Respondents' acts. They are clearly "member[s] of a discrete class of persons subjected to the potential harm brought about by the State's actions." Id. at 102. Every other worker in New Jersey is protected from dangerous toxic secondhand smoke[5].

Finally, the Governor and Commissioner of Health have acted affirmatively to single out casino workers for exposure to poison in their workplace. They rendered Appellants "substantially more vulnerable to injury" than they would have been had the Governor not reinstated the exclusion of casino workers from health and safety protections and had the Commissioner of Health not enforced the exclusion. "Accordingly, liability may attach when an official exercises his authority and creates a dangerous situation for a citizen or makes the citizen more vulnerable to danger than had he not intervened." Id. at 103.

The Supreme Court has held that a person can raise a state-created danger claim, and seek injunctive relief, regardless of whether there is an employment relationship. "If the State puts a man in a position of danger from private persons . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." Id. at 108-109.

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[5] Except for those few who work in actual tobacco establishments or conduct medical research on tobacco.

Here, Appellants do not seek damages from the State. They seek only what every other worker in New Jersey enjoys, a workplace free of toxic cigarette smoke.

POINT III

THE NEW JERSEY CONSTITUTION GUARANTEES CITIZENS EQUAL PROTECTION UNDER THE LAW (Pa30)

> In New Jersey, equal protection of the laws is assured not only by the Fourteenth Amendment to the United States Constitution, but also by Art., I, par. 1 of the state Constitution. *Levine v. Dep't of Insts. & Agencies*, 84 *N.J.* 234, 257, 418 *A.2d* 229 (1980); *Jersey Shore Medical Center v. Estate of Baum*, 84 *N.J.* 137, 148, 417 *A.2d* 1003 (1980).
>
> * * *
>
> Conventional equal protection analysis employs 'two tiers' of judicial review. Briefly stated, if a fundamental right or suspect class is involved, the legislative classification is subject to strict scrutiny; the state must establish that a compelling state interest supports the classification and that no less restrictive alternative is available. With other rights and classes, however, the legislative classification need be only rationally related to a legitimate state interest. *United States Chamber of Commerce v. State*, 89 *N.J.* 131, 157-58, 445 *A.2d* 353 (1982).

Right to Choose v. Byrne, supra, at 304-305.

Although the Supreme Court declined to find that enjoyment of one's health is a fundamental right, it is a "high priority." Id. at 304. The right to "pursue and obtain safety" is actually listed as an "unalienable" right in the Constitution, however.

Appellants here have been denied their right to obtain safety in the workplace, a right granted to all other workers in New Jersey. One fundamental Constitutional right – safety – and one "high priority" corollary right – health – are at issue here. The State should be required to show a compelling state interest supporting the classification of casino workers as unworthy of the protections afforded to all other workers under the Smoke-Free Air Act. The State cannot begin to meet that burden.

Contrary to the standard set by the Supreme Court, the Court below used a "less rigid balancing approach in which we consider 'the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." (Pa30). Applying this standard, the Court found that **if** any constitutional right to safety exists, it is only the right to "pursue" safety. (Pa31). In this way, the Court erases the word "obtain" from the Constitution. By eliminating the right to "obtain" safety from the Constitution, the Court below found that casino workers' rights are not being violated because they can pursue safety by quitting their jobs: "[t]he [Smoke-Free Air Act] places no parameters on a casino worker's ability to seek work in a smoke-free environment." (Pa31). All worker safety requirements can be abrogated under this analysis. Coal miners should not seek safety regulations in order to work in coal mines. Workers on oil rigs should not expect the highest possible safety procedures. Casino workers who want safety should quit their jobs,

give up their medical benefits, seniority and retirement benefits. They should simply "find other work" maybe by leaving their homes (if they don't suffer eviction or foreclosure). They should move if necessary – taking their children away from their schools, friends and family. Perhaps casino workers should wait until they get sick to quit – but then they lose their health insurance.

As shown in Point II, supra, workers in New Jersey have a right to a safe workplace. They do not have to quit their jobs if the State violates their right to a safe workplace – they can enforce their Constitutional rights in court.

The Supreme Court has determined that enjoying one's health is a High priority right. Right to Choose, supra at 304. It also found that the State has a legitimate interest in "the protection of potential life." Id. at 306. The State undermines that interest by exposing pregnant casino workers to toxic secondhand smoke, depriving those workers of their right "to control [their own bodies] and destiny." Id. at 306. Not only do the poisons in secondhand smoke threaten the health of pregnant workers, secondhand smoke causes lower birth weight and can cause premature delivery. Fetuses exposed to secondhand smoke have a higher risk of Sudden Infant Death Syndrome, lung infections, ear infections and decreased lung function. (Pa63-65).

The analysis of an equal protection challenge may also require an analysis of the public interest. "[W]here an important personal right is affected by government action,

the Court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal Constitution." Id. at 309.

The public interest in this case corresponds to the Appellants' interest. Diseases caused by smoking cost taxpayer dollars through Medicaid, Medicare and free hospital care for indigents. 89% of Americans do not smoke. Unlike casino workers, although members of the public can avoid going to casinos, many lawyers who are members of the New Jersey Bar Association or the New Jersey Association for Justice who want to attend bar events, or public workers who want to attend League of Municipality events, and numerous others whose work requires attending conventions and meetings in Atlantic City, are all forced to breathe toxins in order to attend. While the Court below acknowledged that in evaluating a request for an injunction it must "consider the public's interest," it does not appear to have done so. It cannot be in the public interest to allow toxic secondhand smoke in public places – the Smoke-Free Air Act makes that clear.

The public does not have an interest in casino profits – although the Court below found that "tax revenues support other programs." (Pa29). All corporations pay taxes. Restaurants and bars argued vociferously against the Smoke-Free Air Act, claiming that it would destroy their businesses and limit their profits, and therefore, the taxes

they pay. Public health won that battle – and New Jersey still has plenty of bars and restaurants.

More significantly, our Constitution prohibits special favors for corporations. It prohibits excluding people from a class of people protected by our laws. It prohibits unequal protection.

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.' (emphasis added).

Raybestos-Manhattan, Inc. v. Glaser, 144 N.J. Super. 152 at 176-7 (Chan. Div. 1976).

POINT IV

APPELLANTS ARE ENTITLED TO A DECLARATORY JUDGMENT THAT THE EXCLUSION OF CASINO WORKERS FROM THE SMOKE-FREE AIR ACT IS UNCONSTITUTIONAL AND TO AN INJUNCTION BANNING THE EXCLUSION (Pa21)

The New Jersey Civil Rights Act 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, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection. (emphasis added).

N.J.S.A. 10:6(a).

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. Appellants Will Suffer Irreparable Harm if Relief is Not Granted

The Court below found that Appellants will likely suffer irreparable harm if they are exposed to secondhand smoke. (Pa21-22). 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 and 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." (Pa4-5,¶ 9; Pa71-73).

B. Appellants' Claims are Based on Legally Settled Rights

As argued above, the New Jersey Constitution and the common law give workers the right to safety in the workplace. Casino workers have been deprived of that right for eighteen (18) years, and, specifically, by Governor Murphy reinstating the exclusion of casino workers from the Smoke-Free Air Act in July 2021. Appellants 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, the Constitution and the common law.

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 which favors corporate interests.

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

Based on the law outlined above, Appellants have shown a significant probability that they will succeed on the merits and are entitled to injunctive relief.

D. There is No Hardship to Respondents if Appellants 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 Commissioner of Health has the duty to protect – not endanger – the health of New Jersey residents. There is no hardship to counter balance Appellants' request for equitable relief.

CONCLUSION

Appellants have shown by clear and convincing evidence that the exclusion of casino workers from the Smoke-Free Air Act violates the New Jersey Constitution. 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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Dated: 9/13/24

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UAW, REGION 9 OF THE UAW, and C.E.A.S.E. N.J.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000057-24
Appellants,	Civil Action
v.	On Appeal from the 8/30/24 Order of the Superior Court of New Jersey
NEW JERSEY GOVERNOR PHILIP MURPHY, and ACTING NEW JERSEY HEALTH COMMISSIONER DR. KAITLIN BASTON,	Chancery Division, Mercer County Docket No.: MER-C-26-24 Sat Below: Hon. Patrick J. Bartels
Respondents.	Submission Date: 09/24/24 Resubmission Date: 09/25/24

BRIEF OF *AMICUS CURIAE* AMERICANS FOR NONSMOKERS' RIGHTS IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION TO ACCELERATE AND IN SUPPORT OF THE APPEAL

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Americans for Nonsmokers' Rights (ANR) has a compelling interest in the outcome of this matter and is able to offer a perspective supportive but distinct from Plaintiffs-Appellants.

ANR has an interest in providing relevant evidence and arguments regarding the health effects of tobacco smoke as this Court considers this important case concerning the exposure of casino workers to the dangerous effects of secondhand smoke.

ANR is the leading national lobbying organization (501(c)(4)) dedicated to nonsmokers' rights, focused on taking on the tobacco industry at all levels of government, protecting nonsmokers from exposure to secondhand smoke, and preventing tobacco addiction among youth. ANR pursues an action-oriented program of policy and legislation.

ANR has a compelling interest in the enforcement of the Smoke-Free Air Act without excluding casino workers. It works to end the public health crisis of sickness and death caused by tobacco.

PRELIMINARY STATEMENT

Amicus Americans for Nonsmokers' Rights (ANR) has worked on research, education and advocacy on behalf of people exposed to toxic secondhand smoke.

Based on scientific findings, ANR has specifically advocated for smoke-free casinos in order to protect casino workers and the public, and to help those addicted to smoking. The public also has an interest in protecting all humans from secondhand smoke, helping smokers stop or decrease their use of tobacco, and decreasing the costs to the public caused by the illness and death it causes.

ANR urges this Court to act with urgency because it is undisputable that every day at work casino workers are exposed to the dangerous, life threatening health effects of secondhand smoke.

LEGAL ARGUMENT

POINT I

CASINO WORKERS DESERVE AN ACCELERATED APPEAL AND IMMEDIATE COURT ACTION (Pa20-22)

This case is literally a matter of life and death. Even a short time breathing secondhand smoke can cause premature death and disease in people who do not smoke.[1] The court below found that casino workers may suffer irreparable harm if they must continue to work in smoke-filled casinos. Appellants' Appendix (Pa 21).

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[1] U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health

Appellants have not been lackadaisical in asserting their right to health and safety. They have formed an organization with thousands of members (C.E.A.S.E.) and the Union representing thousands of other workers have worked with ANR and other health organizations for years in trying to close the legislative loophole that allows them to be excluded from an important health and safety law. They were justifiably encouraged that it would pass after it was shown that casino revenue was healthy when smoking was banned for a year from June 2020 until July 2021.[2] Governor Murphy reinstated smoking in July 2021, after a year of smoke-free casinos. It was not until February 2024 that it was revealed that casino industry lobbyists had prevented legislative action.[3] Appellants then filed an Order to Show Cause asserting their constitutional rights weeks later, on April 5, 2024. The State should not benefit from the fact that appellants have had their constitutional rights violated for years.

This Court can and should prevent the next heart attack, stroke, premature birth, or development of the cancer cell that will result in death.

Promotion, Office on Smoking and Health, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006).

[2] Wayne Parry, *Atlantic City 1st quarter earning more than triple,* AP News (May 24, 2021).

[3] Wayne Parry, *Bill Would Let Atlantic City Casinos Keep Smoking with Some More Restrictions,* AP News (February 14, 2024).

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.[4]

According to the Surgeon General, there is no safe level of exposure to secondhand smoke.[5] 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 to secondhand smoke at home or at work increase their risk of developing heart disease by 25 to 30 percent

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[4] See footnote 1 above.

[5] 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 Diseases: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General* (2010).

and lung cancer by 20 to 30 percent.[6] Babies exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS).

> There is no safe level of exposure to tobacco smoke. The only way to protect people from secondhand smoke exposure is to prohibit smoking in ALL indoor areas, including all areas of restaurants, bars, and casinos.
>
> Casino workers are at higher risk for secondhand-smoke related illnesses compared to other workers. Surely, casino workers deserve the same health protections as other workers in New Jersey. According to the CDC, 'When smoking is allowed in indoor areas of casinos, millions of nonsmoking casino visitors and hundreds of thousands of employees can be involuntarily exposed to secondhand smoke and related toxicants.' Fortunately there is resounding support for casinos to go smoke-free. A CDC survey of regular casino goers found that 3 out of 4 patrons want smokefree casinos. (internal footnotes omitted).

Tynan, M.A., Wang T.W., Marynak, K.L., Lemos, P., & Babb, S.D., *Attitudes Toward Smoke-Free Casino Policies Among US Adults*, Public Health Reports, (2019).

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[6] 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).

Ten years ago, the Surgeon General's report clearly showed that only 100% smokefree workplaces can fully protect people from secondhand smoke.[7] The New Jersey Commissioner of Health, a defendant in this case, similarly has called for "100% Tobacco Free Work Sites."[8]

ANR urges this Court to expedite this appeal, or to order a ban on smoking while this appeal is pending, because the damage caused to casino workers who must breathe secondhand smoke is, indeed, irreparable.

POINT II

EXCLUDING CASINO WORKERS FROM A HEALTH AND SAFETY LAW VIOLATES THEIR CONSTITUTIONAL RIGHTS (Pa25-32)

A. Corporate Profits Are Not a Legitimate Reason to Exclude Casino Workers From Health and Safety Laws

The New Jersey Supreme Court has repeatedly held that in determining whether a law is an unconstitutional special law, the Court should analyze whether a

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[7] U.S. Department of Health and Human Services, The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General, Atlanta, GA: 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, 2014 http://www.surgeongeneral.gov/library/reports/50-years-of-progress/index. html.

[8] Website of N.J. Department of Health. https://www.nj.gov/health/fhs/tobacco/prevention.

subset of people are excluded who are naturally in the class of people covered by legislation. In this analysis, the Court should look at the purpose of the legislation. Vreeland v. Byrne, 72 N.J. 292 (1977). The court below acknowledged that the purpose of the Smoke Free Air Act is clearly laid out in the law itself. It is to protect the health and safety of the public, including workers. Appellants' Appendix (Pa 16). But the court below found that any legitimate rational basis can defeat a challenge to a special law, citing Town of Secaucus v. Hudson County Bd. of Taxation, 133 N.J. 482, 495 (1993). Appellants' Appendix (Pa 27). On the contrary, the Supreme Court in Secaucus did not abandon the requirement that the exclusion relate to the purpose of the law:

> The test, in every case, is whether the classifications embodied in a particular statute 'rest upon a reasonable or rational basis relevant to the purpose and object' of the statute.

Id. at 502 (emphasis added).

Removing the purpose of the law from the equation, the court below found that an acceptable reason to exclude casino workers is the protection of casino industry profits and the taxes they pay on those profits. Appellants' Appendix (Pa 29).

The Constitution itself prohibits doing corporations favors in special legislation:

> No general law shall embrace any provision of a private, special or local character.
>
> * * *
>
> 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, ¶ 7; 9(8).

The impact of an exclusion on the State's economy was specifically rejected as a basis for a special law in Raybestos-Manhattan, Inc. v. Glaser, 144 N.J. Super. 152, 180 (Chan. Div. 1976):

> 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.

Thus, poisoning workers to increase corporate profits cannot be a legitimate basis to exclude some workers from health and safety laws, and it certainly is not related to the purpose of the law.

B. The Data Does Not Support the Claim that Banning Smoking Will Cause a Dramatic Drop in Gaming Revenue

When Atlantic City casinos were smoke-free due to Governor Murphy's Executive Order, "profits soared." Wayne Parry, *Atlantic City 1st quarter casino earnings more than triple*, Apnews.com, (May 24, 2021, 3:23 PM), https://apnewscom/article/atlantic-city-health-coronavirus-pandemic-earnings-business-27daa681a9ae8b6822fa9dc679c5e1d7. The New Jersey Casino Control Commission compared the 2021 performance to the first quarter of 2019 in order to avoid comparing it to COVID-related closures. Id.

This is not surprising in light of the fact that attitudes toward smoking have continued to move toward smoke-free public spaces. A comprehensive study, *"Evaluation of Post-Pandemic Non-Smoking Trends in U.S. Casinos,"* was conducted by C3 Gaming Casino Consultants Consortium, a consortium of consultants in the gaming and hospitality industry including "independent casino consultants, architectural firms, market research providers, marketing and advertising firms, business intelligence/data/technology firms, and financial professionals with heigh levels of expertise in the casino and hospitality industry." C3 Gaming, *Evaluation of Post-Pandemic Non-Smoking Trends in U.S. Casinos*, P.29 (2022). That study found that "Data from multiple jurisdictions clearly

indicates that banning smoking no longer causes a dramatic drop in gaming revenue." Id., p. 28.

The C3 study also found that casinos realize cost savings when smoking is banned, including:

Reduced Costs Related to HVAC/Air Handling/Mechanical/Energy

- Reduction in maintenance call volume from staff to ramp up air handling systems to clear smoke.
- New ability to ramp systems down and maintain temperature and air quality, whereas before systems had to work extra hard to clear smoke and maintain comfortable temperatures and suitable air quality.
- Reduction in filter costs and maintenance due to less frequent filter changes and filters staying cleaner longer.
- Lower stress on mechanical systems (motors, belts, heat wheels, etc.).
- Coils stay cleaner longer; ionization systems are running more efficiently.

Furniture, Fixtures and Equipment

- Chairs, games, and other equipment/furniture are no longer covered in cigarette burns.
- No longer having to spend money on repairing chairs, table bumpers/rails/felts.
- Significant decrease in the tar/buildup/soot that deposits on ledges and inside gaming machines.
- Machine function and longevity is better as a result, especially on older games where parts can be limited.
- Overall, the property is cleaner because staff is not bogged down spending time and effort wiping down soot and dealing with ashtrays.
- No carpet burns, carpet will last longer now.
- Less maintenance expense in hotel rooms and floors that had smoking.

Id., pp. 26-27.

Defendant and Intervenors both submitted below, and rely on, a 2021 analysis they paid for by Spectrum Gaming Group, which provides services – including litigation support – to the casino industry. The report makes a plethora of "extrapolations," "assumptions," "presumptions," and "estimates" which lead to an idea that maybe the ability to smoke is a factor encouraging smokers to go to Atlantic City casinos. Spectrum Gaming Group, *Gaming Industry Analysis: Potential Impacts of an Atlantic City Casino Smoking Ban on Gross Gaming Revenue*, Prepared for Casino Association of New Jersey, November 3, 2021, Id. at pp. 28-29. It cites one unnamed person who is "an independent junket operator" who opined that "if a smoking casino and a non- smoking casino are equidistant – or even if the smoking casino is slightly farther away – they (smokers) will choose the smoking casino." Id. at pp. 29-30.

The relevant revenue figures on which the report relies are from Delaware from 2000 to 2006; Chicagoland from 2007 to 2012; the St. Louis area from 2007 to 2012; Peoria from 2006 to 2010; and New Orleans from 2014 to 2018. The subsequent revenue figures, also noted in the report, show that the initial revenue figures did not predict the long-term effect of going smoke-free:

- The Illinois smoking ban had a limited impact after a new easily accessible casino opened. (Id. at p. 10).

- Casino revenue increased at Jumer's Rock Island Casino in Illinois "despite – *or perhaps because of* – the smoking ban." "It is notable that some players chose the new casino over casinos where smoking is permitted." Id. at p. 11.

- In the New Orleans market, non-smoking casinos consistently out-perform smoking casinos. Id. at p. 15.

The authors of the report relied upon below did not advocate for smoking:

> It is beyond the scope of this study to consider other impacts that may be associated with a casino smoking ban. Further, Spectrum offers no opinion or recommendation whether smoking should be allowed on casino floors.

Id. at ii.

Relying on data from 2019, Spectrum stated that 14% of U.S. adults smoked cigarettes. Id. at p. 3. But by 2021, the date of the report, that percentage was already only 11.5%, and the report correctly notes that "the prevalence of adult cigarette smoking has steadily declined through the years." https://www.cdc.gov>>cigarette-smokingin-united-states.

Thus, there is no reliable data supporting the view that if casino workers are covered by the Smoke Free Air Act casinos will have a drastic long-term reduction in revenue – so large that it will result in the loss of jobs.

C. By Continuing to Allow Smoking, Casinos are Transparently Appealing to Problem Gamblers – Who They are Supposed to Help

One of the main reasons casinos want to keep smoking is to prevent problem gamblers from taking a break. The C3 study notes that casino operators know that breaks from gambling help those who are addicted to it. The casinos' own websites have links for problem gamblers that state:

> Take Frequent Breaks: Every once in a while, it is a good idea to walk away from the game you're playing. Taking a break can help you make smarter decisions, so gambling stays what it should be – a fun activity.

C3 Report, supra at p. 25.

The Spectrum report reveals that "Casino operators fear that a smoking ban would not only put them at a disadvantage to their competitors in Pennsylvania and Connecticut **but also would result in lower GGR because of smoking breaks.**" Spectrum Report, supra at p. 31. Thus, the report casinos paid for notes the casino executives' concern that "a player's desire or need to smoke would impel them to leave their seat at a slot machine or gaming table and walk outside to smoke." Id. at p. 31. Although casino executives know that breaks are an essential tool in harm-minimization for problem gamblers, they fear that "the smoker [may] during the

first or second break [] cut his or her losses and leave the casino," only losing $83.38 instead of $100. Id. at p. 32.

The truth is in Intervenors' own report. It cannot be a legitimate and rational State interest to make casinos richer by not only subjecting their non-smoking workers to breathing poison every day, but also by discouraging harm minimization for problem gamblers and actually encouraging them to smoke and gamble more.

The independent C3 report notes this concern of casino executives:

> Casino operators fear that a smoking ban would not only put them at a disadvantage to their competitors in Pennsylvania and Connecticut, but also would result in lower GGR [gross gaming revenue] because of smoking breaks.
>
> * * *
>
> It is also possible that the smoker during the first or second break would cut his or her losses and leave the casino. . . .

C3 Report, supra at p. 26.

The C3 report notes that the Spectrum report contains an admission by casino executives to an improper motive for wanting smoking in their casinos:

> What the authors of that report unwittingly acknowledge is that a casino that prohibits smoking risks losing gaming revenue because a certain portion of players who smoke decide during their smoke break to walk away. In other words, **they chose to play responsibly**, and taking a periodic smoke break allowed them to do so. **Their argument that a casino will make more money if**

> **smokers remain at their games is the antithesis of one of the principles of responsible gaming.** (Emphasis added).

Id., p. 26.

The State and Intervenors argued below that Atlantic City is a special, unique place. But if the economy of Atlantic City was dependent on smokers being allowed to smoke in public places, why is smoking not allowed in restaurants or bars? One would assume that helping local, family-owned hospitality entities would benefit if smokers were such a key demographic. Instead, the State does not even allow smoking in casino restaurants. Every other workplace in New Jersey is smoke-free, and, despite the claims 18 years ago by the restaurant, bar, and hospitality industries, those businesses still thrive smoke-free.

Additionally, the claim that smokers will go to Pennsylvania instead of New Jersey casinos if smoking is banned also fails. New York, Delaware, Maine, Maryland and Massachusetts ban smoking. In fact, New Jersey gamblers may be going to Pennsylvania for the opposite reason. The most successful casino in Pennsylvania (Parx) is smoke-free. The latest Pennsylvania Gaming Control Board report shows that in July 2024 Parx was number 1 (out of 15 casinos) in slot revenue and number 2 in table game revenue. Pennsylvania Gaming Control Board Monthly Report, July, 2024.

POINT III

IT IS IN THE PUBLIC INTEREST TO HAVE 100% SMOKE FREE WORKPLACES (Pa29)

Defendant Commissioner of Health Dr. Kaitlin Baston notes on her website that, "Tobacco use is the leading cause of preventable death in the United States. Every year, tobacco claims more lives than AIDS, alcohol, drug abuse, car crashes, murders, suicides, and fires combined." She acknowledges what cannot be debated, secondhand smoke causes cancer, heart disease, stroke, diabetes and Chronic Obstructive Pulmonary Disease (COPD)." State of New Jersey, Department of Health, Tobacco Control, https://www.nj.gov/health/fhs/tobacco/.

That is why she says she is working for "100% Tobacco Free Worksites." Id. This makes sense, because the CDC notes the positive public impact of comprehensive smokefree laws:

> Communities that enact comprehensive smokefree laws report up to a 17% reduction in hospital heart attack admissions compared with communities without such laws. Smokefree laws have a high level of public support and compliance, and research has shown that smokefree laws do not negatively affect sales or employment in the hospitality industry. Scientific evidence has demonstrated that statewide smokefree laws are also effective, high-impact strategies for helping individuals quit smoking, as well as reducing tobacco consumption by those who smoke.

CDC, State System Gaming Facilities Fact Sheet.

The public interest is overwhelmingly supported by ending the exclusion of casino workers from the Smoke Free Air Act. Not only will it stop poisoning casino workers, it will stop poisoning patrons of casinos. It will reduce smoking by smokers. It will reduce the medical costs to the public for tobacco-related diseases. Ending the exclusion will also help problem gamblers who smoke – who may take a break to smoke and – as the casino executives fear – "cut their losses," both financially and in terms of their health.

CONCLUSION

For all of the foregoing reasons, ANR supports an immediate ban on smoking in casinos. There is simply no valid reason to allow casinos to poison their workers with secondhand smoke. Casino workers must be protected by the Smoke Free Air Act as soon as possible.

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BY: /s/ *Kathryn K. McClure*

Dated: September 25, 2024

KATHRYN K. McCLURE
(Atty. ID #037462004)

UAW, REGION 9 OF THE UAW, and C.E.A.S.E. N.J., Appellants, v. NEW JERSEY GOVERNOR PHILIP MURPHY, and ACTING NEW JERSEY HEALTH COMMISSIONER DR. KAITLIN BASTON, Respondents,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO.: A-000057-24 (M-000194-24) Civil Action On Appeal from an Order of the Superior Court of New Jersey Chancery Division, Mercer County Docket No.: MER-C-26-24 Sat Below: Hon. Patrick J. Bartels DATE SUBMITTED: November 14, 2024

INTERVENOR CASINO ASSOCIATION OF NEW JERSEY'S BRIEF AND APPENDIX IN RESPONSE TO APPELLANTS' BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

In the early- to mid-2000s, elected representatives in the New Jersey Legislature and the Atlantic City Council engaged in a careful balancing of public policies concerning the state's casinos. Inhaling tobacco smoke has negative health consequences. But many casino patrons like to smoke tobacco while wagering, and casinos are a major economic driver of the state. An outright smoking ban would drive those patrons to neighboring states, thereby causing the loss of thousands of jobs and many millions in tax revenue. Trying to achieve the goal of lessening indoor smoking while avoiding undue harm to the gaming industry, the state legislators and municipal councilmembers came up with a collective compromise: smoking could occur on up to 25% of the gaming floor but would be barred elsewhere.

Plaintiffs represent some casino workers (a minority) who disagree with that decades-old policy choice. They would rather that all smoking cease no matter the economic consequences. Unable to achieve legislative reform, Plaintiffs rushed to the courthouse claiming constitutional violations and seeking emergent relief. Every level of the Judicial Branch—including the Supreme Court of New Jersey—has already rejected their requests for immediate relief of pendente lite restraints. And so lacking are the substantive

merits that the trial court dismissed the complaint for failure to state a claim upon which relief can be granted. It was correct to do so.

Contrary to Plaintiffs' claims, the exemption for smoking on casino floors, which is just one exemption in the no-smoking law, is not "special legislation." Special legislation describes a narrow category of laws that irrationally carve up an otherwise indistinguishable class to create winners and losers for no legitimate purpose. Such is not the case here, where an entire industry (casinos) is legislated a certain way for a rational reason (the documented connectivity between smoking and gaming revenue). Exempting casinos from the smoking ban is no less rational than many other exemptions in this challenged law, e.g., cigar lounges, personal homes, personal cars, designated hotel rooms, golf courses, and the like. For the same reasons, Plaintiffs' "equal protection" claims fall flat because that test too merely looks to see whether the law has a rational basis, and it does.

Plaintiffs likewise err when they claim that permitting limited smoking on the gaming floors violates the constitutional right to "safety." As Plaintiffs admit, no court has ever found a constitutional right to "safety" in the way Plaintiffs claim. The reason is simple. The Constitution gives every person the "unalienable right" to "pursue[]" both "safety and happiness." But there is an important difference between giving an individual the right to pursue safety and

happiness, which the Constitution guarantees, and imposing on the government the obligation to guarantee safety and happiness, which it does not. The Legislature has no more an obligation to guarantee safety by statute than it does to ensure happiness. Plaintiffs' arguments have no constitutional legs—or precedents—to stand on.

The choice of whether to allow or ban indoor smoking in United States casinos has been subject to lively debate, including in the halls of our Legislature, which is the preeminent expositor of public policy for the state. In many instances where a state legislature has allowed it, litigation followed. In every single one of those lawsuits, however, courts across the country have rejected constitution-based challenges to the exemption. The trial court was correct to adhere to that precedent. This Court should affirm.

PROCEDURAL HISTORY

Plaintiffs are the UAW (International United Automobile Aerospace and Agricultural Implement Workers of America), Region 9 of the UAW, and C.E.A.S.E. N.J. (Casino Employees Against Smoking's (Harmful) Effects) (collectively "Plaintiffs"). (Ja1.) Together, they represent approximately 764

of the many thousands of employees who work in Atlantic City's casinos. (Ja174.)[1]

On April 5, 2024, Plaintiffs filed a Verified Complaint ("Complaint") against New Jersey Governor Philip Murphy and Acting New Jersey Health Commissioner Dr. Kaitlin Baston (collectively the "State Defendants"). (Pa1–11.) The Complaint alleged that the exemption for casinos in N.J.S.A. 26:3D-55 to -66, New Jersey's Smoke Free Air Act, is unconstitutional special legislation, that it violates Plaintiffs' constitutional right to safety, and that it violates their rights to equal protection. (Ibid.) Plaintiffs sought an injunction against smoking in casinos by order to show cause and requested summary adjudication of their Complaint under Rule 4:67-1. (Ibid.)

On April 29, 2024, the State Defendants opposed Plaintiffs' Order to Show Cause and moved to dismiss the Complaint in its entirety. (Ja319–20.) The same day, the Casino Association of New Jersey ("CANJ") and several unions representing many other employees who work in the casinos ("Unions")

[1] "Ja" denotes the Joint Appendix filed on November 14, 2024. "Pa" denotes Plaintiffs' amended appendix filed on September 13, 2024. "Ca" denotes the appendix of the Casino Association of New Jersey, included with this submission on November 14, 2024. "Pb" denotes Plaintiffs' amended opening merits brief filed on September 13, 2024. "Ab" denotes the brief filed by amicus curiae Americans for Nonsmokers' Rights on September 24, 2024.

moved to intervene in the case and to dismiss the Complaint. (Ja5–6; Ja178–79.) The trial court held argument on May 13, 2024. (Pa15.)

On August 30, 2024, the trial court entered orders granting the Motions to Intervene and Motions to Dismiss Plaintiffs' Complaint in full. (Pa12–13.) In its decision, the trial court noted that Plaintiffs erred in attempting to proceed summarily under Rule 4:67-1. (Pa17–20.)

Plaintiffs filed their notice of Appeal on September 6, 2024. (See Ca1–5.) Plaintiffs did not challenge the trial court's decision granting the CANJ's and Unions' Motions to Intervene. (Pb6–34.) Plaintiffs instead limited the appeal to the Smoke-Free Air Act's constitutionality as upheld by the trial court in its dismissal order. (Ibid.)

That same day, Plaintiffs applied to the Appellate Division for permission to file an emergent motion. (Ja525.) The Hon. Joseph L. Marczyk, J.A.D. denied that application on September 6, 2024. (Ibid.) On September 11, 2024, Plaintiffs applied to the New Jersey Supreme Court for permission to file an emergent motion. (Ja526.) The next day, the Supreme Court denied Plaintiffs' application. (Ibid.)

On September 13, Plaintiffs moved to accelerate this appeal. (Ca6–7.) The CANJ, the Unions, and the State Defendants opposed the Motion to Accelerate on September 24, 2024. On October 11, 2024, the Court denied Plaintiffs'

Motion to Accelerate. (Ca8.) The same day, the Court also permitted an organization named Americans for Nonsmokers' Rights to participate in this matter as amicus curiae. (Ca9.)

The CANJ now submits the within merits brief.

STATEMENT OF FACTS

Relationship Between Smoking and Casino Gambling

Up through the 1970s, casino gambling was legally prohibited throughout most of the country. (Ja136.) The only exception at the time was Nevada, which long had a destination gambling resort in Las Vegas. (Ibid.) Through a constitutional amendment approved at the 1976 general election, New Jersey determined to allow casino gambling in the city of Atlantic City, Atlantic County. (Ibid.) The first New Jersey casino opened in Atlantic City in 1978. (Ja19.) Smoking inside the facility was permitted at that time. (Ibid.)

While Las Vegas and Atlantic City then had a virtual monopoly on the legal gaming industry in the United States, over the years competition increased with new market participants. State after state amended their laws to allow legalized casino gaming, making competition for the pool of casino patrons more and more demanding. Currently, casino gaming is permitted throughout the Northeast, with legalized gaming in Connecticut, Delaware, Maine,

Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, and West Virginia. (Ja20.)

Both market studies and historical examples demonstrate the integral connection of smoking and casino gambling, and thus the economic importance of the former on the latter. (Ja23; Ja154–55.) According to a November 2021 Gaming Industry Analysis, while only 13% of the New Jersey population are smokers, smokers make up 21% of Atlantic City casino players. (Ja14–15.) What is more, smokers have a significantly higher value as a consumer (in the range of 25% to 50% higher) than non-smokers at the casinos they frequent. (Ja15; see also Ja48–49.) Competition for these patrons is thus a significant factor among casinos in the Northeast. (Ja20.)

At various times in recent years, individual casinos have voluntarily chosen to bar smoking within their facilities. (Ja154–55.) The result has been economically disastrous. (Ja142–44; Ja146–48.)

For example, in the history of Atlantic City, only one casino tried to have a completely smoke-free environment: Revel Atlantic City ("Revel"). (Ja154–55.) Revel opened its doors on April 2, 2012, but was forced to file for Chapter 11 bankruptcy protection less than one year later in March 2013. (Ja142–44.) One of the key reasons cited for the quick financial demise of the casino was the facility-wide smoking ban. (Ja146–48.) It was only after lifting the ban that

Revel (now Ocean Casino Resort) was able to compete adequately in the gaming marketplace and remain in business. (Ja150–52.) Something very similar happened even more recently with one of Atlantic City's competitor casinos, Rivers Casino in Philadelphia. (Ja157–61.) In April 2022 that Philadelphia casino voluntarily banned smoking within its premises, only to reverse course in January 2023 because continuing the prohibition was not economically feasible. (Ibid.)

Despite the economic reliance of casinos on smoking, some state legislatures throughout the Northeast have nevertheless made the policy judgment to ban indoor smoking at their states' casinos. (Ja20.) These include Delaware, Maine, Maryland, and Massachusetts. (Ibid.) But smoking is currently permitted in neighboring Pennsylvania, as well as certain casinos in New York. (Ibid.) Studies show (and common sense supports) that if a smoker casino patron has the choice between playing at a casino that allows smoking versus one that does not, the smoker will choose the smoking casino. (Ja47–48.)

Put plainly, unless and until all surrounding states ban smoking in their casinos, it is not economically feasible for New Jersey to ban smoking in its casinos.

Casino gambling has been, and continues to be, a major economic driver for the State of New Jersey in general and the Atlantic City region specifically. Of all gross gaming revenue generated (i.e., the amount the casinos retain after paying all winning wagers), 8.00% is deposited into the Casino Revenue Fund to benefit programs for senior citizens and persons with disabilities. See N.J.S.A. 5:12-144. Another 1.25% is deposited into the Casino Reinvestment Development Authority, which funds various economic programs in Atlantic City for the betterment of the community. See N.J.S.A. 5:12-144.1(a)(2). The success or failure of these important programs, and the economic livelihood of the many thousands of people and businesses who rely on the state's gaming economy, is directly tied to the economic success of Atlantic City's casinos.

New Jersey's Smoke-Free Air Act

Against this backdrop, on October 14, 2004, Senate Bill No. 1926 was introduced into the New Jersey Legislature. See S. 1926, 211th Leg., 2004–2005 Sess. (2004). At that time, New Jersey had a patchwork of laws prohibiting indoor smoking in certain enumerated areas, e.g., passenger elevators, government buildings, restaurants, and childcare centers. See Senate Health, Hum. Servs. & Senior Citizens Comm. Statement to S. 1926 3 (Mar. 14, 2005) ("Committee Statement"). That is, smoking indoors was permissible unless a specific proscription existed. Ibid. The 2004 bill, dubbed the New Jersey

Smoke-Free Air Act, proposed to invert the standard—once passed, smoking indoors would be presumptively impermissible unless a specific exception existed. Ibid.

As originally introduced, the bill proposed exemptions for (among others) cigar bars, tobacco retail establishments, certain other tobacco businesses, certain hotels, fraternal organizations, and (relevant here) anywhere inside "any casino." S. 1926, § 5(d). After introduction the bill was referred to committee. On March 14, 2005, the Senate Health, Human Services and Senior Citizens Committee proposed to delete the exemption for casinos entirely. Committee Statement, at 3. In the committee's view at that time, casinos should thus be entirely smokefree. Ibid.

On December 8, 2005, the full Senate disagreed with the committee's proposal and reversed course. It adopted floor amendments to add back in an exception for casinos, albeit a more confined one. Sen. Adler's Statement to S. 1926 1 (Dec. 8, 2005). Smoking would only be permitted in "the area within the perimeter of any casino . . . and . . . any casino simulcasting facility." Ibid. As the accompanying Senate statement reflected, the purpose of the amendment was "to exempt only those areas in a casino and simulcasting facility that are completely surrounded by the applicable wagering area." Ibid.; accord N.J.A.C. 8:6-5.1 (further defining the limited area where smoking may occur in casinos).

Following approval by the New Jersey General Assembly, Acting Governor Richard Codey signed the bill into law on January 15, 2006. See L. 2005, c. 383. While the Smoke-Free Air Act has undergone numerous revisions over the years, the exemption for certain areas within casinos has remained unaltered throughout that time. Compare L. 2005, c. 383, § 5, with N.J.S.A. 26:3D-59.

Although the Smoke-Free Air Act superseded any inconsistent statutes, ordinances, or regulations, it did allow municipalities further to restrict indoor smoking pursuant to their general powers to enact ordinances. See N.J.S.A. 26:3D-63 (cross-referencing N.J.S.A. 40:48-1, -2); L. 2005, c. 383, § 9. The Legislature thus deferred to the city of Atlantic City—which is most directly impacted by the success or failure of the state's casinos—the policy judgment of whether to ban smoking inside New Jersey casinos. L. 2005, c. 383, § 9.

In accordance with that legislative permission, Section 221-6(A)(6) of the Atlantic City municipal code currently provides that gaming floors of casinos are smoke-free, except that the casino license operator may designate "not more than 25% of [its] gaming floor" as smoking areas. Atl. City Mun. Code, Art. I, § 221-6(A)(6). That is, the Atlantic City Council has decided that most floor space in the casinos should be smoke-free, with smoking only allowed on at most one quarter of the gaming floor portion of the property. Ibid.

This 75% - 25% allocation was the result of numerous rounds of considered public testimony, passed ordinances, and exercised judgment by the Atlantic City Council. (Ja63–81.) Indeed, at one-point Atlantic City essentially banned indoor smoking only to reverse course less than one month later. (Ja63–73) (Atlantic City Ordinance No. 86 (Feb. 8, 2007) (establishing the 75% - 25% allocation on gaming floors)); (Ja75–78) (Atlantic City Ordinance No. 27 (Apr. 9, 2008) (barring all smoking except in certain non-staffed areas effective October 15, 2008)); (Ja80–81) (Atlantic City Ordinance No. 95 (Oct. 27, 2008) (reinstating the 75% - 25% allocation on gaming floors)).

After the Legislature deferred to the Atlantic City Council the authority to determine its own destiny through local ordinance, some individual legislators continued to push for a statutorily mandated smoking ban in the state's casinos. Every single legislative term since the law's enactment, at least one elected representative has proposed legislation to excise that casino exemption from the Smoke-Free Air Act.[2] But every single term the Legislature has determined not to do so. The Legislature has made this repeated policy judgment after

[2] See, e.g., S. 1493, 221st Leg., 2024–2025 Sess. (2024); S. 264, 220th Leg., 2022–2023 Sess. (2022); S. 1878, 219th Leg., 2020–2021 Sess. (2020); S. 1237, 218th Leg., 2018–2019 Sess. (2018); S. 1517, 217th Leg., 2016–2017 Sess. (2016); S. 1639, 216th Leg., 2014–2015 Sess. (2014); S. 1795, 215th Leg., 2012–2013 Sess. (2012); S. 423, 214th Leg., 2010–2011 Sess. (2010); S. 236, 213th Leg., 2008–2009 Sess. (2008); S. 1089, 212th Leg., 2006–2007 Sess. (2006).

considering extensive submission from the public concerning the economic interdependence of casino gaming and smoking, as well as information concerning the extensive casino ventilation systems that are multiple times better than typical "big box" stores. (Ja177.)

As the above history makes clear, whether to allow smoking in New Jersey's casinos has been, and continues to be, a hot-button political question with which both state and local elected officials have grappled for years. The collective policy judgment made by those democratically elected representatives over many years is that 75% of the gaming floor should be smoke-free, but 25% should be smoking-permitted given the economic importance of smokers to the industry's economic success. (Ja63–81.)

On the heels of that decades-long policy judgment made by the New Jersey Legislature and the Atlantic City Council, Plaintiffs asked the trial court effectively to overrule the legislation on an expedited basis. (Pa1–11.) The trial court correctly rejected Plaintiffs' Complaint. (Pa12–32.) For the reasons set forth in the following pages, this Court should affirm that decision.

LEGAL ARGUMENT

STANDARD OF REVIEW

While the trial court entered numerous orders below, the only one at issue on appeal is the dismissal of Plaintiffs' constitutional challenges for failure to state a claim. This Court reviews that determination de novo. See Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 349 (App. Div. 2012).

Legislative enactments "are presumed constitutional." Whirlpool Props. Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 175 (2011). Courts "will thus not strike a statute as unconstitutional 'unless its repugnancy to the Constitution is clear beyond a reasonable doubt.'" State v. Higginbotham, 257 N.J. 260, 280 (2024) (quoting State v. Smith, 251 N.J. 244, 263 (2022)).

POINT ONE

THE SMOKE-FREE AIR ACT IS A RATIONAL LEGISLATIVE ENACTMENT, NOT SPECIAL LEGISLATION.

As they did below, Plaintiffs argue on appeal that when the Legislature exempted casino floors from the Smoke Free Air Act, it created a constitutionally infirm classification. (Pb6–13.) This is so, Plaintiffs contend, because the goal of the Smoke Free Air Act is to help mitigate the negative health consequences of smoking, and the exemption for casinos (and perhaps other exempted places) is inconsistent with that goal. (Pb13–16.) In so arguing, Plaintiffs not only seek to supplant the legislative compromises reached by

democratically elected representatives, but also fundamentally misconstrue what the Constitution means by "special legislation."

The New Jersey Constitution provides, "[n]o general law shall embrace any provision of a private, special or local character." N.J. Const. art. IV, § 7, ¶ 7. That restriction dates back to 1875 and has remained largely unchanged since its inception. See Vreeland v. Byrne, 72 N.J. 292, 298 (1977). As New Jersey's courts explained shortly after the provision's adoption:

> [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 (Sup. Ct. 1878).]

A century and a half later, the focus remains the same under the Constitution:

> Whether a law is special or general depends on the class of persons affected by the law. General legislation includes all those who should be included in the class, but unconstitutional special legislation excludes some who should be included in the class. The essence of unconstitutional special legislation is the arbitrary exclusion of someone from the class.

[Jordan v. Horsemen's Benevolent & Protective Ass'n, 90 N.J. 422, 432 (1982) (internal citations omitted).[3]]

Accord Town of Secaucus v. Hudson Cnty. Bd. of Tax'n, 133 N.J. 482, 494 (1993) ("Special legislation [exists] 'when, by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate.'" (quoting Town of Morristown v. Woman's Club of Morristown, 124 N.J. 605, 622 (1991) (Clifford, J., dissenting))).

Courts examine three factors to determine if legislation is general or special: "(1) the purpose and subject matter of the statute; (2) whether any persons are excluded who should be included; and (3) whether the classification is reasonable, given the purpose of the statute." Jordan, 90 N.J. at 432–33 (citing Vreeland, 72 N.J. at 298–301). Because statutes are presumed constitutional, courts analyze these factors with extreme deference to the Legislature. Indeed, "'the Legislature has wide discretion in determining the perimeters of a classification' and 'an adequate factual basis for the legislative judgment is presumed to exist.'" N.J. State Bar Ass'n v. State, 387 N.J. Super. 24, 52 (App.

[3] Plaintiffs claim that in Jordan "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 the fix the Constitutional defects." (Pb9). That is not accurate. See Jordan, 90 N.J. at 437 (concluding that, as properly interpreted, "the statute does not violate Art. IV, § 7, par. 7 or par. 9(8) of the N.J. Const").

Div. 2006) (quoting Camden City Bd. of Educ. v. McGreevey, 369 N.J. Super. 592, 605 (App. Div. 2004)).

The inquiry is essentially one of rational-basis review, with courts surveying whether "any conceivable state of facts bearing a reasonable relation to the object of the act which affords a basis for the classification." Jordan, 90 N.J. at 433 (quoting Robson v. Rodriquez, 26 N.J. 517, 524 (1958)); accord Town of Secaucus, 133 N.J. at 494–95 ("In seeking a rational purpose for a statute under constitutional challenge, the court is not limited to the stated purpose of the legislation, but should seek *any* conceivable rationale basis." (emphasis in original, quotation omitted)); Vreeland, 72 N.J. at 299 (same); In re Hunterdon Cnty., 369 N.J. Super. 572, 589 (App. Div. 2004) (same); Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212, 227 (1985) (same).

In applying the Special Legislation Clause test, courts must be careful not to "act as a super-legislature." Newark Superior Officers Ass'n, 98 N.J. at 222. Judicial review of legislation "has always been exercised with extreme self restraint, and with a deep awareness that the challenged enactment represents the considered action of a body composed of popularly elected representatives." N. J. Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972). Indeed, statutory policy decisions "are the exclusive concern of the legislative branch," and a statute "may not be stricken because a court thinks it unwise." Ibid.

Courts presume a statute is constitutional and must not declare it "void unless its repugnancy to the constitution is clear beyond reasonable doubt." Gangemi v. Berry, 25 N.J. 1, 10 (1957); accord Trautmann ex rel. Trautmann v. Christie, 211 N.J. 300, 307 (2012) (same).

That a statute affects only one person or entity does not make it "special" in a constitutional sense. As the Supreme Court has emphasized, "[i]f [a challenged] act is special only in the sense that its object is single, the question of its special character in a legal sense does not arise." Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 86 N.J. 429, 448–49 (1981) (quoting Budd v. Hancock, 66 N.J.L. 133, 136 (Sup. Ct. 1901)). For that reason, "a class of one is constitutionally permissible." Id. at 448; accord Camden City Bd. of Educ., 369 N.J. Super. at 606 (same); City of Bayonne v. Palmer, 90 N.J. Super. 245, 284 (Ch. Div.), aff'd 47 N.J. 520 (1966) (same); Van Cleve v. Passaic Valley Sewerage Comm'rs., 71 N.J.L. 183, 207 (Sup. Ct. 1904) (same), rev'd on other grounds, 71 N.J.L. 574 (E & A 1905).

Courts thus routinely uphold statutes where there is only one industry, municipality, corporation, or other entity affected. See, e.g., Paul Kimball Hosp., 86 N.J. at 449 (upholding law affecting only one private hospital); Camden City Bd. of Educ., 369 N.J. Super. at 607 (upholding law affecting only the City of Camden); Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J.

Super. 1, 20 (App. Div. 2012) (upholding law affecting one health service corporation); City of Jersey City v. Farmer, 329 N.J. Super. 27, 46 (App. Div. 2000) (upholding law affecting only the City of Newark).

In enacting the Smoke Free Air Act, the Legislature stated that there are negative health consequences associated with tobacco smoke even if the inhalation is "secondhand." N.J.S.A. 26:3D-56. The Legislature then set forth the purpose of its new enactment: "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(f) (emphasis added).

The purpose was not to "ban[] smoking in workplaces" anywhere in the state. (Pb11.) The purpose was instead to *lessen* the negative effects of smoke inhalation with a baseline prohibition to which there would be "certain specified exceptions." In many instances over the years, both with the law's initial enactment and subsequent legislation, the Legislature has carefully carved out exemptions where it deemed it rational and logical to allow for indoor smoking. Casinos are not "special" by any means.

One example is "any cigar bar or cigar lounge." N.J.S.A. 26:3D-59(a). That is rational because cigar lounges are, by their very nature, a place where

people voluntarily go to smoke indoors. Others are "any tobacco retail establishment," certain "research laboratories," or "any tobacco business" involved in the testing of tobacco products, wherein smoking is essential to the operation. N.J.S.A. 26:3D-59(b), (c), (f). Some other exceptions respect personal autonomy in one's own space, such as in "private homes, private residences and private automobiles," which are exempt. N.J.S.A. 26:3D-59(d). Others are designed to accommodate the desire of some people to smoke in public, such as the exemption for designated portions of "a municipal or county beach" and "a golf course." N.J.S.A. 26:3D-59(g), (h). And there are more.

By statute "[t]he person having control of a hotel, motel or other lodging establishment may permit smoking in up to 20% of its guest rooms." N.J.S.A. 26:3D-60(a). That is, despite the health risk associated with smoking, the Legislature determined that it could be appropriate for some hotel rooms to accommodate tobacco users.

Even outside the four corners of the Smoke-Free Air Act are yet more exemptions. For instance, by both legislation and regulation, persons are permitted to smoke cannabis in duly licensed cannabis consumption areas. See N.J.S.A. 24:6I-21; N.J.A.C. 17:30-14.10. This is a logical exemption because, by definition, the purpose of a cannabis consumption lounge is to consume cannabis, and smoke inhalation is a popular means of consuming cannabis.

All of these many exceptions meet the rational-basis test. Each is tied to the realities of the business operation, questions of personal autonomy, or some other like justification. Yet Plaintiffs do not challenge any of them, choosing instead to focus on the narrow exemption for certain areas within casinos. But the exemption for casinos is no less rational than any other exemption in the Smoke-Free Air Act, and thus the law is not "special legislation."

Under the first Jordan factor, the Court should consider "the purpose and subject matter of the statute." Jordan, 90 N.J. at 432. As stated above, the purpose was not to ban all indoor smoking in the state—the purpose was to limit it subject to certain rational exceptions.

The second Jordan factor inquires "whether any persons are excluded who should be included." Jordan, 90 N.J. at 432–33. The law does not pick and choose among the state's casinos by name, allowing for indoor smoking in some but not in others. It instead applies to "any casino" licensed by the Casino Control Commission with requisite amenities "available to the public for wagering," i.e., all casinos in the state. N.J.S.A. 26:3D-59(e)(1). Viewed from the lens of the casinos themselves, every possible business is included in the classification.[4]

[4] Given that Atlantic City casinos are, by constitutional mandate, a special class unto themselves subject to unique laws affecting no other business in the state, it is hard to understand how any law affecting the entire class equally is "special." See N.J.

Seeking to reframe the issue, Plaintiffs submit that the real classification is "casino workers" as compared to "all other workers." (Pb8.) That is without merit. The exemption does not say, for instance, that persons who work in casinos may smoke indoors (or be subject to others smoking indoors) wherever they travel in the state, but that employees of other businesses are not so treated. Instead, the casinos themselves are the regulated entities and thus comprise the classification at issue under Jordan. As the Supreme Court has held, the "special legislation" inquiry focuses on the class that is directly regulated, not those persons who might feel downstream effects from the regulation. See, e.g., Paul Kimball Hosp., 86 N.J. at 448–49 (focus was on hospital as the class, not its employees or patients). Indeed, elsewhere Plaintiff seem to recognize that the real classification is instead "casinos" as compared to "all other workplaces." (Pb12.)

In any event, the distinction makes no difference. Regardless of whether the classification is "casinos" or "casino workers," the end result is the same under the third Jordan factor, "whether the classification is reasonable, given the purpose of the statute." Jordan, 90 N.J. at 433. So long as the Court "can

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Const. art. IV, § 7, ¶ 2(D) (casinos are constitutionally recognized class); N.J.S.A. 5:12-144 (unique casino taxes); N.J.S.A. 5:12-84 (unique casino licensing requirements); N.J.S.A. 52:13D-17.2 (unique casino ethical restrictions).

conceive of any reason to justify the classification, the statute will be upheld." See Newark Superior Officers Ass'n, 98 N.J. at 227.

As the Legislature declared in the Casino Control Act, N.J.S.A. 5:12-1 to -233, "the city of Atlantic City and its resort, tourist and convention industry represent a critically important and valuable asset in the continued viability and economic strength of the tourist, convention and resort industry of the State of New Jersey." N.J.S.A. 5:12-1(b)(2). "[T]he public has a vital interest in casino operations in Atlantic City," which includes supporting "[t]he ability of the legalized casino gaming industry in New Jersey to compete in an ever-expanding national gaming market." N.J.S.A. 5:12-1(b)(8), (19).

One of the allures of gambling for many people is the ability to enjoy the act of wagering while smoking tobacco. Studies indicate that smokers make up a substantially higher percentage of casino gamblers than the general public, and that casino patrons that smoke tend to wager more money over longer periods of time. (Ja14–15.) For better or for worse, smokers are a key economic driver for Atlantic City and the state generally. If the New Jersey Legislature were to prohibit smoking in the state's casinos, studies indicate that large numbers of casino patrons would go to competing resorts in Pennsylvania. (Ja56–57.) Studies also indicate that even for those smoking patrons who choose nevertheless to travel to Atlantic City, revenue associated with their patronage

would decrease significantly due to (among other things) time spent taking routine smoking breaks outside. (Ibid.) That would also mean a loss of jobs for the workers that Plaintiffs are purportedly seeking to protect.

The immediate economic losses to Atlantic City casinos in the first year alone are potentially staggering: up to a 10.9% decline in gross gaming revenue realized by the casinos, up to a 6.5% decline in non-gaming revenue, up to $44 million in lost casino taxes, and up to 2,512 jobs lost at casino properties. (Ja16.) Indeed, history has shown that the only Atlantic City casino to attempt a smoking ban was forced into bankruptcy less than one year after implementing the ban. (Ja142.) That Amicus wants to advance a counternarrative, suggesting that the economic fallout from a complete smoking ban would be less dire (Ab9–15), does nothing to undermine the rationality of the Legislature's concern for the industry.

Contrary to Amicus's claim, (Ab8), legislating to prevent economic distress in a municipality or industry is "rational." See Camden City Bd. of Educ., 369 N.J. Super. at 607 (law designed specifically for the City of Camden to address its dire economic situation was not "special"); City of Jersey City, 329 N.J. Super. at 42, 46 (law designed to address Newark's "unique financial problems" was constitutional).

For this reason, courts have consistently rejected claims that casino exemptions to smoking bans are unconstitutional, including specifically with respect to New Jersey's Smoke-Free Air Act. See Amiriantz v. New Jersey, No. 06-1743(FLW), 2006 WL 3486814, at *5 (D.N.J. Nov. 30, 2006) (Ja104) ("[T]he same economic concerns that prompted the Legislature to restrict gaming to Atlantic City in order to promote the City's redevelopment and provide meaningful and permanent contribution to the economic viability of the resort, convention, and tourist industry of New Jersey provide rational bases for the different treatment accorded to casino gaming areas under the [Smoke-Free Air] Act.") aff'd, 251 F. App'x. 787 (3d Cir. 2007) (per curiam); see also Coal. for Equal Rts., Inc. v. Owens, 458 F. Supp. 2d 1251, 1263–64 (D. Colo. 2006) (rejecting "special legislation" challenge to Colorado law that exempted casinos from indoor-smoking ban, concluding that the exemption was rational), aff'd, 517 F.3d 1195 (10th Cir. 2008).

Perhaps recognizing that they cannot dispute the economic rationality of exempting casino floors from the Smoke-Free Air Act, Plaintiffs instead attempt to answer a different question. Stating that the law's purpose is "keeping New Jersey residents and workers safe and healthy," Plaintiffs contend that an exemption for casino floors is not "'legitimate" and "relevant to the purpose and object of the statute." (Pb16–17.) But as previously stated, the legislative

purpose was not to *ban* all indoor smoking—it was to *reduce* indoor smoking while allowing it under "certain specified exceptions." N.J.S.A. 26:3D-56(f). The statute with its various carveouts—including for certain areas within casinos—rationally supports that objective.

The Supreme Court's decision in Town of Secaucus, 133 N.J. 482, is of no help to Plaintiffs. (Pb13–16.) There the Legislature passed a law whereby the City of Bayonne would be the only municipality in the state to pay less in taxes to support vocational schools. Town of Secaucus, 133 N.J. at 486. The Court began by emphasizing, "[i]n seeking a rational purpose for a statute under constitutional challenge, the court is not limited to the stated purpose of the legislation, but should seek *any* conceivable rational basis." Id. at 494–95 (emphasis in original, quotation omitted). But in trying to think of any rational reason why Bayonne should receive such special tax treatment as compared to all other municipalities in the state, the Court came up blank. Ibid. Such is not the case here, where an entire *sui generis* class (casinos) receives an exemption necessary to prevent economic ruin to that industry and the many thousands who rely on it.

Plaintiffs and Amicus, (Ab16–17), may well disagree with the policy judgment made by the New Jersey Legislature and the Atlantic City Council to allow smoking on 25% of the gaming floors in New Jersey casinos, just as they

allowed smoking in 20% of hotels and motel rooms, in cigar bars, and in private residences and cars. But such judgments are for the duly elected representatives to make, not the courts. Provided their justification is rational (and it is here), the Judiciary is obligated to respect those decisions.

POINT TWO

THE SMOKE-FREE AIR ACT DOES NOT VIOLATE ANY CONSTITUTIONAL RIGHT TO SAFETY.

Pointing to the negative health consequences associated with tobacco smoke, Plaintiffs allege that legislation authorizing smoking in portions of a casino floor violates Article I, Paragraph 1 of the New Jersey Constitution. That paragraph provides in full as follows:

> 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).]

As Plaintiffs concede, they "did not cite cases which specifically referred to the constitutional right to safety." (Pb19) (emphasis removed). That is because there are no such cases. Indeed, the case law is directly contrary to Plaintiffs' argument.

Article I, Paragraph 1 was "intended to establish 'a limitation upon the capacity of the sovereign' and to make clear that 'the people are the master, and the sovereign the servant.'" Franklin v. N.J. Dep't of Hum. Servs., 225 N.J. Super. 504, 524 (App. Div. 1988) (quoting C.W. Heckel, "The Bill of Rights" (Monograph), II Proceedings of the New Jersey Constitutional Convention of 1947, 1336)). "These principles of democratic government, rooted in eighteenth century political philosophy, are *fundamentally different from any concept of a government obligation* . . . ." Ibid. (emphasis added). For that reason, Article I, Paragraph 1 does not "impose an affirmative obligation upon the government" to do anything. Id. at 526; accord Right to Choose v. Byrne, 91 N.J. 287, 304 (1982) (rejecting that the New Jersey Constitution "guarantees a fundamental right to health").

Case law interpreting the federal Constitution is in accord. As the United States Supreme Court has explained, the United States Constitution does "not [act] as a guarantee of certain minimal levels of safety and security." DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989). For that reason, the Constitution "does *not* impose an independent [] obligation upon [government] to provide certain minimal levels of *safety and security in the workplace*." Collins v. City of Harker Heights, 503 U.S. 115, 130 (1992) (emphasis added).

Unable to refute any of that case law, Plaintiffs instead observe that in other instances legislation or common law have imposed upon employers the duty to maintain certain levels of safety in a workplace. (Pb19–22.) That observation is of no moment. Plaintiffs did not sue their employers alleging violation of any statutory or common law duty. They instead sued the Governor and the Commissioner of the New Jersey Department of Health claiming a violation of a constitutional right to safety. Because there is no such constitutional right, other statutes concerning workplace conduct are irrelevant.

Plaintiffs likewise err when they claim that the "state-created danger doctrine" applies to the circumstances here. (Pb22.) "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." DeShaney, 489 U.S. at 200. Thus, when the government runs a hospital where mentally ill people are civilly committed and fails to take reasonable precautions to protect visitors from predictable, violent resident attacks, under the right circumstances the government can be liable to a victim for such attacks. See, e.g., Gormley v. Wood-El, 218 N.J. 72, 83 (2024).

Contrary to Plaintiffs' claim, (Pb23–24), the doctrine is inapplicable here. The Legislature does not mandate that any person work at a casino. Plaintiffs

all chose to work at private casinos knowing that smoking is permissible on 25% of the gaming floor. The same can be said of employees at cigar lounges or cannabis consumption lounges, or persons who voluntarily stay in a house or car where another person is smoking. The government has no more of an affirmative obligation to protect their "safety" than it does any other citizen with free will. It is improper to change that well-established rule. See Proske v. St. Barnabas Med. Cntr., 313 N.J. Super. 311, 316 (App. Div. 1998) ("[A] new cause of action should be created by legislative enactment or by the Supreme Court rather than by an intermediate court"), certif. denied, 158 N.J. 685 (1999).

Accepting Plaintiffs' broad-based claims for "safety" would not only run afoul of existing jurisprudence, but would also invite a host of problems under separation of powers. See N.J. Const. art. III ("[n]o person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others"). If the Court were to impose an affirmative constitutional obligation on the Legislature to pass laws to protect citizens' safety, then the Judiciary would quickly evolve into some sort of "super legislature" for the general welfare. Courts could declare unconstitutional the Legislature's failure to pass a law necessary to make someone "safe," and invalidate a law if it made someone "unsafe."

What then would prevent a judicial examination of whether the speed limit is too high on the public roadways? Whether the blood alcohol limit for driving while intoxicated should be lowered? Whether certain vehicles should be banned because their emissions are too high? Whether government must hire more police officers to patrol the streets? Such policy choices and judgment calls are reserved not for the courts, but instead for the duly elected representatives of the New Jersey Legislature, "the preeminent expositor of public policy in our democratic society." See N.J. Div. of Child Prot. & Permanency v. J.R.-R., 248 N.J. 353, 373 (2021).

It is one thing to recognize the interest of the citizenry in "pursuing and obtaining safety and happiness." It is quite another to mandate that legislation make people "safe" or "happy." Plaintiffs' contrary claims must be rejected.

POINT THREE

THE SMOKE-FREE AIR ACT DOES NOT VIOLATE ANYONE'S RIGHT TO EQUAL PROTECTION UNDER THE LAWS.

In its third and final constitutional attack on the Smoke-Free Air Act, Plaintiffs claim that they are being denied their rights to equal protection under the laws. As with the prior challenges, this last one fails to allege a cognizable violation.

The Constitution "prohibits the State from adopting statutory classifications that treat similarly situated people differently." Stubaus v. Whitman, 339 N.J. Super. 38, 57 (App. Div. 2001). The "crucial issue" to be decided in an equal-protection challenge is "whether there is an appropriate governmental interest suitably furthered by the differential treatment involved." Barone v. Dep't of Hum. Servs., Div. of Med. Assistance & Health Servs., 107 N.J. 355, 368 (1987) (quotation omitted). Thus, the analysis is similar to the special legislation analysis. Horizon Blue Cross Blue Shield of N.J., 425 N.J. Super. at 17; accord (Pb17) (agreeing that the two provisions apply "the same test").

Courts must evaluate "the nature of the right affected, the extent to which the government action interferes with that right, and the public need for such interference." Trautmann ex rel. Trautmann v. Christie, 418 N.J. Super. 559, 571 (App. Div. 2011), aff'd, 211 N.J. at 300. It is Plaintiffs' burden to demonstrate that the challenged law "lacks a rational basis," with the statute enjoying a strong presumption of constitutionality. Caviglia v. Royal Tours of Am., 178 N.J. 460, 477–78 (2004); accord Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 285 (1998) ("The strong presumption of constitutionality that attaches to a statute can be rebutted only upon a showing

that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt.") (quotation omitted).

Just as with their flawed "special legislation" argument, Plaintiffs claim that the classification for equal-protection purposes is their voluntary status as casino employees. (Pb27.) That is not how courts view such issues. When, for instance, a student voluntarily enrolls in a charter school, she is not "similarly situated" to a student who enrolls in traditional public schools. See J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 396 (App. Div. 2010) (rejecting students' status as enrollees in charter school as the proper classification for equal-protection analysis because those students "too can attend the same traditional public schools" as other children). Plaintiffs are not "similarly situated" to every other employee in the state—Plaintiffs made a conscious decision to work in casinos knowing that smoking was permitted on up to 25% of the gaming floor and have remained there of their own free will.

But regardless of whether the lens should be "casino workers" versus all other people in the state, or "casinos" versus all other businesses in the state, the question remains whether the distinction is rational. For the reasons expressed above, there are clear economic reasons to treat casinos differently than other businesses in the state. That is why courts repeatedly reject equal-protection challenges to laws that permit smoking in casinos. See, e.g., Amiriantz, 2006

WL 3486814, at *5 (rejecting equal protection challenge to casino exemption in Smoke-Free Air Act based on unique economic situation of New Jersey casinos) (Ja104); Coal. for Equal Rts., 458 F. Supp. 2d at 1260 (rejecting equal protection challenge to law that exempted Colorado casinos from indoor-smoking ban, concluding that economic considerations alone justified different treatment of casinos); Flamingo Paradise Gaming, LLC v. Chanos, 217 P.3d 546, 560 (Nev. 2009) (rejecting equal protection challenge to smoking ban that exempted businesses with "unrestricted gaming licenses" in part because "a business operating under a nonrestricted license contributes substantially more to the state's economy"); Goodpaster v. City of Indianapolis, No. 1:12-cv-669-RLY-DML, 2013 WL 838208, at *12 (S.D. Ind. Mar. 6, 2013) (upholding Indianapolis' smoking ban that exempted "satellite gaming facilities" because the city had "a legitimate interest in obtaining the tax revenue generated from such facilities"), aff'd, 736 F.3d 1060 (7th Cir. 2013) (Ja110); Batte-Holmgren v. Galvin, No. CV044000287, 2004 WL 2896485, at *6 (Conn. Super. Ct. Nov. 5, 2004) (rejecting equal protection challenge to law that exempted Connecticut casinos from indoor-smoking ban) (Ja124.)

As the United States Supreme Court made clear long ago, "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all." Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949).

Through their prerogative to write the law, the New Jersey Legislature and Atlantic City Council have determined to ban smoking in many indoor venues, but not for (among other exemptions) 25% of the gaming floor in casinos. The desire to avoid the dramatic economic fallout from an outright ban was a logical choice that was for the elected officials to make. This Court should respect that choice.

POINT FOUR

PLAINTIFFS ARE NOT ENTITLED TO ANY INJUNCTIVE RELIEF.

Citing to alleged (but non-existent, see supra) constitutional violations, Plaintiffs finally contend that they are entitled to declaratory and injunctive relief effectively banning smoking in all Atlantic City casinos. (Pb31–34.) Looking to the standards "regarding Orders to Show Cause and Preliminary Injunctions," Plaintiffs, (Pb31), contend that there is a "significant probability" of ultimate success on the merits warranting injunctive relief, (Pb33.)

These arguments appear to be a vestige of the already-rejected requests for temporary restraints pending appeal and/or accelerated treatment. Regardless, the prerequisite to any relief at this stage—declaratory or otherwise—is the presence of a constitutional violation. As explained above, there is none. The Court should thus deny Plaintiffs' requests.

CONCLUSION

For the foregoing reasons the Court should reject Plaintiffs various arguments and affirm the judgment entered below.

Respectfully submitted,

Dated: November 14, 2024

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UAW, REGION 9 OF THE UAW, and C.E.A.S.E. N.J., Plaintiffs-Appellants, v. NEW JERSEY GOVERNOR PHILIP MURPHY, and ACTING NEW JERSEY HEALTH COMMISSIONER DR. KAITLIN BASTON, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NOS.: A-0057-24; AM-0194-24 Civil Action On Appeal from an Order of the Superior Court of New Jersey Chancery Division, Mercer County Docket No.: MER-C-26-24 Sat Below: Hon. Patrick J. Bartels

RESPONSE BRIEF OF DEFENDANTS-APPELLEES GOVERNOR PHILIP MURPHY AND NEW JERSEY HEALTH COMMISSIONER DR. KAITLAN BASTON

Date Submitted: November 14, 2024

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PRELIMINARY STATEMENT

This appeal concerns whether this court should override the Legislature's rational decision on a difficult public-policy issue—here, how to balance health concerns related to smoking in public places against the potential substantial loss of jobs in a vital New Jersey industry and loss of tax revenues that benefit the State's disabled and senior citizens. As the trial court correctly found based on settled law, it should not. Instead, as the court below held, the Legislature cannot be found to have acted irrationally in exempting limited parts of casinos from the State's indoor-smoking ban, thus disposing of these challenges and the request for an injunction that would invalidate the statutory exemption.

Whether and how best to protect nonsmokers from smoke in public places and at work is a public-policy question that belongs in the democratic process. Indeed, policymakers in New Jersey and nationwide have debated and adjusted the proper indoor smoking policies in the decades since the health risks posed by secondhand smoke were established. The Legislature has enacted more than a dozen laws on the topic since the 1980s, increasing protections for nonsmokers repeatedly, and again reexamining this issue over the years. And the Legislature took a particularly significant step towards protecting nonsmokers in passing the Smoke-Free Air Act 18 years ago, which has prohibited smoking in most indoor public places since 2006. Legislators have also continued to amend and debate

additional changes to the law in recent years, including by considering whether to eliminate or amend the subsection, N.J.S.A. 26:3D-59(e), that allows smoking in a subset of indoor areas in casinos. Indeed, Governor Murphy has consistently and repeatedly stated that he would sign a bill prohibiting indoor smoking in casinos should it reach his desk. But until then, the policy choices made by our elected representatives to date in the Smoke-Free Air Act and its reticulated exceptions, including Section 3D-59(e), remain our law.

Appellants—organizations representing a subset of casino workers—seek to upend the longstanding status quo. Advancing several novel constitutional theories, Appellants maintain that N.J.S.A. 26:3D-59(e) is invalid and that the constitution obligates the Legislature to prohibit smoking in casinos. Appellants thus seek to remove this issue from the ongoing public debate within our elected branches, and instead require the courts to weigh in and ultimately decide the competing arguments about public health and economics implicated by N.J.S.A. 26:3D-59(e). And they seek this result even though representatives of thousands of other casino workers and persons whose employment depends on a robust casino industry oppose their efforts both below and in this court.

The trial court instead properly left this choice on this issue to our elected representatives, who are entrusted to make policy decisions and are accountable to the citizenry. The trial court correctly and thoroughly examined Appellants'

multiple challenges, which contended that the statute was special legislation, a violation of a right to safety, and/or an equal-protection violation. As the trial court noted, however, well-established law bars courts from undoing legislative action unless the law lacks any potential rational basis. But here, the Legislature could rationally fear that lifting the exemption can impact jobs in the casinos and the businesses that depend on casinos, and millions in state tax dollars (from casino revenue) that fund programs assisting disabled residents and senior citizens. The trial court also correctly rejected Appellants' effort to create a new right to safety—noting the absence of any textual or judicial support for such a right. The trial court ultimately correctly found that Appellants have the right to disagree with the law as it has long stood, but have no right to an injunction or other judicial order short-circuiting the democratic process. This court should affirm.

COUNTERSTATEMENT OF FACTS & PROCEDURAL HISTORY[1]

A. New Jersey's Ongoing Efforts to Address Tobacco Use and Smoking

That tobacco smoke poses risks to human health, including the health of nonsmokers, is indisputable. The causal link between smoking and disease in active smokers has been recognized by federal health authorities for at least six

[1] The procedural history and counterstatement of facts are combined to avoid repetition and for the convenience of the court.

decades. See C. Everett Koop, Surgeon General, Preface to the Health Consequences of Involuntary Smoking: A Report of the Surgeon General ix (1986) ("1986 Surgeon General Report") ("By 1964, . . . a substantial body of evidence had accumulated upon which a judgment could be made that smoking was a cause of disease in active smokers").[2] And by the 1980s, federal authorities acknowledged that secondhand smoke is itself a clear cause of chronic disease in nonsmokers. See ibid. ("It is now clear that disease risk due to the inhalation of tobacco smoke is not limited to the individual who is smoking, but can extend to those who inhale tobacco smoke emitted into the air.").

New Jersey has deployed a vast array of strategies to address the health risks of tobacco smoking. For example, the State prohibits tobacco sales to young people and in 2017 increased the minimum age for purchase to twenty-one. See P.L.2017, c.118 (raising minimum age for purchase and sale of tobacco products and electronic smoking devices from nineteen to twenty-one); see also Dorie E. Apollonio & Stanton A. Glantz, Minimum Ages of Legal Access for Tobacco in the United States From 1863 to 2015, 106 Am. J. Pub. Health 1200, 1201 (2016) (noting that State in 1883 set minimum age of legal access at

[2] https://stacks.cdc.gov/view/cdc/20799/cdc_20799_DS1.pdf (last visited Nov. 12, 2024).

sixteen). Sales of tobacco products to individuals of legal age are regulated and taxed, in part to deter smoking. See N.J.S.A. 54:40A-1 to -66 (Cigarette Tax Act with supplements); N.J.S.A. 54:40B-1 to -14 (Tobacco and Vapor Products Act). And the State funds public education on the health risks of smoking and resources for smokers who want to quit. See, e.g., N.J. Dep't of Health, Office of Tobacco Control & Prevention, https://www.nj.gov/health/fhs/tobacco (last visited Nov. 12, 2024); New Jersey Quitline, https://www.njquitline.org (last visited Nov. 12, 2024). These efforts to reduce smoking in New Jersey broadly benefit non-smokers, who are less likely to be exposed to secondhand smoke as a result.

Most relevant here, New Jersey has gradually emerged as a national leader in restricting smoking in public places, which has significantly reduced nonsmokers' involuntary exposure to tobacco smoke. The details of those ongoing efforts—including New Jersey's place-based restrictions on smoking in the 1980s and 1990s; the Smoke-Free Air Act of 2006; and more recent policy developments and legislative deliberations—are summarized below.

1. Restrictions on Smoking in Public Places in the 1980s and 1990s

State legislatures first began restricting smoking in public places as a means of protecting the health of nonsmokers in the 1970s, reflecting emerging concerns about secondhand smoke. See 1986 Surgeon General Report at 267.

New Jersey joined them in 1981. Citing a "conflict between the right of the smoker to smoke and the right of the nonsmoker to breathe clean air," our Legislature passed a trio of laws identifying specific locations where "the right of the nonsmoker to breathe clean air should supersede the right of the smoker to smoke." See L. 1981, c. 318, §§ 1-6 (codified at N.J.S.A. 26:3D-1 to -6; repealed 2006); L. 1981, c. 319, §§ 1-8 (codified at N.J.S.A. 26:3D-7 to -14; repealed 2006); L. 1981, c. 320, §§ 1-8 (codified at N.J.S.A. 26:3D-15 to -22; repealed 2006). Those laws prohibited smoking tobacco products in public elevators, L. 1981, c. 318, § 3; in health care facilities and waiting rooms of the offices of persons licensed to practice the healing arts, except in certain designated smoking areas, L. 1981, c. 319, § 3; and in schools, colleges, universities, and professional training schools, except in smoking areas designated by the educational institution, L. 1981, c. 320, § 3.

The State has repeatedly updated its smoking restrictions in the years that followed. In 1985, the Legislature enacted five additional bills to curb exposure to secondhand smoke. First, employers were required to designate nonsmoking areas in structurally enclosed places of employment of at least fifty workers—if smoking was permitted at all—but this requirement did not apply to locations frequented by members of the public. L. 1985, c. 184, §§ 1-9 (codified at N.J.S.A. 26:3D-23 to -31; repealed 2006). Second, restaurants (but not bars)

were "encourage[d]" to establish nonsmoking areas and required to post signage reflecting whether or not a nonsmoking area was offered. L. 1985, c. 185, §§ 1-7 (codified at N.J.S.A. 26:3E-7 to -13; repealed 2006). Third, smoking was prohibited in large grocery stores. L. 1985, c. 186, §§ 1-6 (codified at N.J.S.A. 26:3D-32 to -37; repealed 2006). Fourth, the Legislature addressed smoking on government property by generally prohibiting smoking in public meetings and in offices open to the public, libraries, indoor theatres, museums, lecture or concert halls, and gymnasiums (with exceptions for special occasions); requiring nonsmoking areas in certain restaurants in government buildings; and mandating nonsmoking areas in places of government employment (except the Legislature). L. 1985, c. 381, §§ 1-9 (codified at N.J.S.A. 26:3D-46 to -54; repealed 2006). Government facilities used for sporting events or recreational activities like ice and roller skating were exempt from the bill's requirements. Id. § 2(a).

The final bill enacted in 1985 restricted smoking in a variety of indoor public places. L. 1985, c. 318, §§ 1-8 (codified at N.J.S.A. 26:3D-38 to -45; repealed 2006). Smoking was prohibited in pharmacies, drug stores, and other places where drugs could be dispensed or hearing aids sold. Id. § 3(b). Other indoor public places—defined to mean a structurally enclosed area generally accessible to the public in theatres, gymnasiums, libraries, museums, concert halls, auditoriums, and similar facilities not covered by other smoking laws—

were required to establish designated nonsmoking areas. Id. §§ 2(a), 3(a). Significantly, however, the bill's definition of public places explicitly excluded "[r]ace track facilities, casinos . . . , facilities used for the holding of boxing and wrestling exhibitions or performances, football, baseball, and other sporting event facilities, bowling alleys, dance halls, ice and roller skating rinks and other establishments providing ambulatory recreation." Id. § 2(a).

The Legislature modestly expanded upon these restrictions on smoking in public places in the two decades that followed, including by enacting a 1998 law to prohibit smoking in child care centers. L. 1998, c. 35, (repealed in part 2006).

2. The New Jersey Smoke-Free Air Act

Enacted on January 15, 2006, the New Jersey Smoke-Free Air Act was a sea change from the State's past policy on indoor smoking. See L. 2005, c. 383, §§ 1-10 (codified as amended at N.J.S.A. 26:3D-55 to -64) ("the Act"). Finding that "tobacco is the leading cause of preventable disease and death in the State and the nation," that "tobacco smoke constitutes a substantial health hazard to the nonsmoking majority of the public," and that "the separation of smoking and nonsmoking areas in indoor public places and workplaces [as mandated in the 1980s] does not eliminate the hazard to nonsmokers if these areas share a common ventilation system," the Legislature declared that "subject to certain specified exceptions," it is clearly in the public interest to prohibit smoking in

all enclosed indoor places of public access and workplaces. Id. § 1 (codified as amended at N.J.S.A. 26:3D-56(f)).

The Act repealed the prior legislation imposing piecemeal regulations on smoking in designated places, id. § 11, and replaced those laws with a general prohibition on smoking in any indoor public place or workplace, "except as otherwise provided" in the Act, and at elementary and secondary schools, including both indoor and outdoor areas, id. § 4 (codified as amended at N.J.S.A. 26:3D-58). "Indoor public place" was defined to mean "a structurally enclosed place of business, commerce or other service-related activity, whether publicly or privately owned or operated on a for-profit or nonprofit basis, which is generally accessible to the public." Id. § 3 (codified as amended at N.J.S.A. 26:3D-57). The definition explicitly includes, but is not limited to, a list of specific indoor public places, including many that were specifically addressed in prior legislation on smoking in designated places. Ibid. "Workplace" was defined to mean "a structurally enclosed location or portion thereof at which a person performs any type of service or labor." Ibid.

The Act included several exemptions. See id. §§ 5–6 (codified as amended at N.J.S.A. 26:3D-59 to -60). By its terms, the Act did not apply to certain cigar bars or cigar lounges; tobacco retail establishments and any area a tobacco retail establishment provides for the purposes of smoking; and certain

other tobacco businesses. Id. § 5(a)-(c). Private homes, private residences, and private automobiles were explicitly exempt to the extent that the Act might otherwise apply (e.g., a private residence on the grounds of a school). Id. § 5(d). And hotels, motels, and lodging establishments were permitted to allow smoking in up to twenty percent of their guest rooms. Id. § 6(a).

Finally, in a provision codified at N.J.S.A. 26:3D-59(e), the Act specified that its provisions did not apply to "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.
>
> [Id. § 5(e).[3]]

[3] Casino simulcasting is the simultaneous transmission by picture of running or harness horse races conducted at racetracks to casino licensees and pari-mutuel wagering at casino simulcasting facilities operated by casino licensees on the results of those races. N.J.A.C. 13:69M-1.1. Casino simulcasting facilities must be located in an approved hotel operated by a casino licensee. Ibid.

Section 59(e) of the Act was the subject of explicit legislative debate and amendment. As introduced, the Senate bill that eventually became the Smoke-Free Air Act would have more broadly exempted from the smoking prohibition any casino, any casino simulcasting facility, and any bar located in a casino or simulcasting facility. See S. 1926 (2004). In the Senate Health, Human Services and Senior Citizens Committee, the bill was amended to eliminate that exemption entirely, along with another exemption that covered social and fraternal organizations. See S. Comm. on Health, Human Servs. & Senior Citizens, Statement to S. 1926 (Mar. 14, 2005). Before passage, however, the bill was further amended on the floor of the Senate to include the narrower casino-related exemption contained in the enacted version of the Act. See S. 1926 (2005). An accompanying statement indicated that the purpose of this amendment, with its reference to "the area within the perimeter of a casino and simulcasting facility," was "to exempt only those areas in a casino and simulcasting facility that are completely surrounded by the applicable wagering area." See Statement to S. 1926, (2005) (statement of Sen. Adler). (Ja325).

3. Post-2006 Legal Developments

Policymakers have continued to evaluate and refine the scope of the State's place-based smoking restrictions in the years since the passage of the Smoke-Free Air Act. Among other changes, the Act's definition of "smoking"

was amended to include use of electronic smoking devices or vapes. L. 2009, c. 182, § 2 (2010). The Act's smoking ban also was amended to apply to public parks and beaches, L. 2018, c. 64, and new exemptions were established for golf courses, N.J.S.A. 26:3D-59(g), designated smoking areas not to exceed fifteen percent of municipal or county beaches, N.J.S.A. 26:3D-59(h), and research laboratories and facilities conducting research on the health effects of smoking, N.J.S.A. 26:3D-59(f).

DOH and its predecessor, the Department of Health and Senior Services, promulgated regulations to implement the Smoke-Free Air Act. See N.J.A.C. 8:6-1.1 to -10.1; see, e.g., N.J.A.C. 8:6-5.3 (requiring signage to designate smoking and nonsmoking areas in casinos). In response to comments on the initial rulemaking under the Act, the Department of Health and Senior Services indicated its support for legislative repeal of the Act's casino provision and rejected comments arguing that the Act was meant to permit smoking in restaurants, bars, and walkways abutting or adjacent to the wagering area within the perimeter specified in the Act. See 39 N.J.R. 2027(a) (May 21, 2007) (responding to comments 43-76).

Atlantic City also has exercised its discretion under section 9 of the Smoke-Free Air Act, N.J.S.A. 26:3D-63, to impose smoking restrictions greater than those contained in the Act. In 2007, the City enacted an ordinance that

effectively limited smoking in casinos and casino simulcasting facilities to 25% of the area within the perimeter where smoking was permitted under the Act itself. See Atlantic City, N.J. Ordinance No. 86-2006 (2007). In 2008, the City went further, banning smoking on all employee-staffed portions of the casino floor effective October 15, 2008, and limiting smoking in casinos to non-staffed, separately exhausted, and enclosed smoking lounges. See Atlantic City, N.J. Ordinance No. 27 (2008).

Shortly after the ban went into effect, Atlantic City reconsidered the smoking ban. Citing the deterioration of the national and regional economy, declining casino industry performance, and "the consequences of similar restrictions placed on casino patrons' smoking in other jurisdictions around the country," the City found that banning smoking on the casino floor "would likely cause a significant, immediate and further decline in the Atlantic City casino industry." See City of Atlantic City Ordinance No. 95 (approved Oct. 27, 2008; effective November 16, 2008). Accordingly, the City (1) readopted its prior policy limiting smoking to 25% of the wagering floor and (2) required local officials to annually review the policy to assess "whether the factors then impacting the general welfare of Atlantic City residents and the Atlantic City casino industry and the employment, development, competitive and other

economic conditions which affect them warrant[ed]" a smoking ban. Ibid. (codified at Atlantic City, N.J. Municipal Code §§ 221-6A(6) and 221-6B).

Atlantic City's ban on smoking on the casino floor was in effect for a month. The ban has not been reinstated since.

4. Pending Legislation

Legislation has been introduced in every session since 2006 to eliminate the Smoke-Free Air Act's casino provision. See S. 1493/A. 2143 (2024-2025); S. 264/A. 2151 (2022-2023); S. 1878/A. 4541 (2020-2021); S. 1237 (2018-2019); S. 1517/A. 2936 (2016-2017); S. 1639/A. 2133 (2014-2015); S. 1795/A. 343 (2012-2013); S. 423/A. 1062 (2010-2011); S. 236/A. 806 (2008-2009); S. 1089/A. 2067 (2006-2007).

In the current legislative session, on January 29, 2024, Senate Bill 1493 was reported out of the Senate Health, Human Services and Senior Citizens Committee with amendments after the Committee heard from both supporters and opponents of the bill. (Ja327-Ja454).[4] Those submitting written opposition to eliminating the casino-related provision—some of whom invited amendments

[4] "Ja" denotes the Joint Appendix filed on November 14, 2024, by the Casino Association of New Jersey, containing materials from the record that Appellants did not include in their appendix in this court. "Pa" denotes Plaintiffs' amended appendix filed on September 13, 2024. "Ca" denotes the appendix of the Casino Association of New Jersey, filed on November 14, 2024. "Pb" denotes Plaintiffs' amended opening merits brief filed on September 13, 2024. "Ab" denotes the brief filed by amicus curiae Americans for Nonsmokers' Rights.

that would have narrowed but not eliminated the prior exception—included the Atlantic City Branch of the NAACP; Teamsters Local Union #331; UNITE HERE Local 54; the Greater Atlantic City Chamber; Atlantic City Mayor Marty Small, Sr.; the International Union of Operating Engineers Local 68; the New Jersey Association of Area Agencies on Aging; the Eastern Atlantic States Regional Council of Carpenters Local Union 255; District Council 21 of the International Union of Painters & Allied Trades; and the Casino Association of New Jersey ("Casino Association"). (Ja327-Ja376). Those submitting written support for the bill included the American Heart Association, the Robert Wood Johnson Foundation, the American Cancer Society Cancer Action Network, ASHRAE, the American Lung Association, and a number of individuals. Generally speaking, supporters of the bill emphasized the health impacts of smoking, including impacts on casino workers. (Ja330-Ja360). Opponents generally emphasized the anticipated economic impacts of a complete ban on smoking in casinos, including significant revenue losses for the casino industry and ancillary businesses and the job losses they expect to follow. (Ja361-Ja454).

In addition to its written submission, the Casino Association offered an analysis by Spectrum Gaming Group ("Spectrum"), which provided one forecast of the short-term consequences of repealing the full exemption outright. (Ja13-Ja61). Spectrum estimated that Atlantic City casinos would experience,

in the first year of implementation, a net decline of between $113.8 million and $293.1 million in gross gaming revenue (Ja58); an annual loss of total tax revenue between $17.2 million and $44.6 million (Ja60); and potentially 1,021 to 2,512 lost jobs (Ja61).

Separately, other pending legislation would amend the Act to further restrict (but not ban) smoking at casinos. See S2651, 221st Leg. (introduced Feb. 12, 2024). That bill would: (1) limit smoking to not more than twenty-five percent of the area of the casino floor and casino simulcasting facility, which must be designated by signage; (2) require that interior designated smoking areas be either enclosed and separately exhausted or, if unenclosed, located in areas containing slot machines and other electronic games that are more than fifteen feet from any casino pit offering table games with live dealers; and (3) provide that no stationary employee may be involuntarily assigned to work in an enclosed interior designated smoking area. That bill has not received a hearing or a vote in any committee, and thus has not been subject to comment.

In short, the issue of whether to repeal or revise section 3D-59(e), and the potential impact of doing so on New Jerseyans, is a public policy issue under active and ongoing debate—one that involves a complex consideration of many factors, with advocates on both sides of the issue contending that their position has the greatest overall positive impact on the State. At least at present, those

advocating for legislative change have been unable to persuade the Legislature to undo the eighteen-year-old casino exception under section 3D-59(e).

B. This Litigation

Appellants—the UAW (International United Automobile Aerospace and Agricultural Implement Workers of America), Region 9 of the UAW, and C.E.A.S.E. N.J. (Casino Employees Against Smoking's (Harmful) Effects), who represent a subset of New Jersey casino workers—commenced this action on April 5, 2024, with a verified complaint and order to show cause seeking preliminary and permanent injunctive relief that would void section 59(e).

In their three-count complaint, Appellants, who state that their members are or were exposed to secondhand smoke while working as New Jersey casino employees, (Pa2, ¶¶ 2-4), advance claims under the New Jersey Civil Rights Act ("NJCRA"), N.J.S.A. 10:6-1 to -2 , alleging that section 59(e) violates the State Constitution because it: violates a constitutional "right to safety" (Count One); constitutes an unconstitutional "special law" (Count Two); and denies Plaintiffs equal protection under the State Constitution (Count Three).

The Casino Association and nine unions representing thousands of casino workers (together "Intervenors") intervened to defend section 59(e). State Respondents opposed the order to show cause and moved to dismiss the verified complaint, as did the Intervenors.

Following argument, the trial court denied preliminary injunctive relief and granted the motions to dismiss. (Pa12-32). The court found that each of Appellants' claims failed as a matter of law.

As to Count I (the "right to safety" claim), the court concluded that even a "generous reading" of the verified complaint "does not establish a cause of action," because "no case law, statute or otherwise" supports the existence of a standalone constitutional right requiring the Legislature to affirmatively pursue specific safety measures (including health) whatever the interests on the other side. (Pa25). The court observed that "Plaintiffs cite to no legal authority of any kind to support their argument that safety is a stand-alone constitutional right." Ibid.

Turning to Count II (the "special legislation" claim), the court analyzed the significant body of case law explaining what is required before a court can strike down a statute as "special legislation," and identified that the ultimate question is whether a legislative distinction "can be said to rest upon some rational basis." (Pa27, Pa29). The trial court concluded that movants had amply demonstrated a rational basis, because "Defendants supplied ample support for a rational basis for the Smoke-Free Air Act casino exception, namely, the plentiful economic benefits that the casinos provide to the state of New Jersey through tax revenues to support other programs." (Pa29). Pertinent to that

conclusion, State Defendants had noted at oral argument that the 2024 proposed New Jersey budget alone included $526,654,000 to be spent on such programs from the Casino Revenue Fund. See State of New Jersey, "Budget in Brief," https://www.nj.gov/treasury/omb/publications/24bib/BIB.pdf (last visited Nov. 13, 2024) at 85. The trial court further found that it was rational to treat casinos differently because our State Constitution contains special provisions directly related to Atlantic City and to casino operations, and that "Atlantic City's special constitutional status allows the legislature to create classifications in law where the classification is directly connected to the operation of casinos in Atlantic City." (Pa29).

Finally, the court dismissed Count III (equal protection claim), holding that neither "the New Jersey Constitution nor any case law supports Plaintiffs' argument" that the statute affected a fundamental constitutional right. (Pa3l). To the extent that Appellants had a right to "pursue and obtain" safety, the trial court found the Act did not violate such a right because the risks of exposure to secondhand smoke were known; smoking has never been banned in casinos except for a short time during COVID-19; the Act's exceptions only affect a few industries; and the Act does not hinder or affect a person's ability to seek work in a smoke free-environment. (Pa32). Thus, as before in its evaluation of

Appellant's special-legislation challenge, the court found the distinctions were rational.

Appellants filed this appeal on September 6, 2024, challenging only the aspects of the trial court's rulings rejecting their constitutional challenges to section 59(e). That same day, Plaintiffs applied to the Appellate Division for permission to file an emergent motion. (Ja542). This court denied the application on September 6, 2024. (Ibid.)

On September 11, 2024, Plaintiffs sought but was denied leave by the New Jersey Supreme Court for permission to file an emergent motion. (Ja526). Appellants then moved to accelerate this appeal, which this court denied on October 11, 2024. The same day, this court also permitted an organization named Americans for Nonsmokers' Rights to participate in this matter as amicus curiae.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY HELD THAT SECTION 59(e) IS NOT UNCONSTITUTIONAL SPECIAL LEGISLATION.

The trial court correctly dismissed Appellants' constitutional challenges to a legislative enactment. This court should affirm the trial court's conclusions

that section 59(e) does not constitute a prohibited "special law" because its treatment of the casinos rests on rational distinctions.

Although this court reviews dismissals under Rule 4:6-2 on a plenary basis, Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 349 (App. Div. 2012), a challenger faces an extremely high bar in seeking to invalidate a legislative enactment. Such enactments "are presumed constitutional," Whirlpool Props. Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 175 (2011), and our Supreme Court has directed that a statute should not be struck as unconstitutional "unless its repugnancy to the Constitution is clear beyond a reasonable doubt." State v. Higginbotham, 257 N.J. 260, 280 (2024). That is especially true where claims implicate the reasonableness of economic and social legislation. Edgewater Inv. Assocs. v. Borough of Edgewater, 103 N.J. 227, 235 (1986).

The presumption of validity "can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest." Hutton Park Gardens v. Town Council of W. Orange, 68 N.J. 543, 565 (N.J. 1975). Appellants cannot meet that exacting standard on any of their

three challenges to section 3D-59(e)—namely, that the provision is special legislation; violates equal protection; or violates a right to safety.

Begin with the law governing special legislation. The two constitutional provisions governing special legislation state that "[n]o general law shall embrace any provision of a private, special or local character," N.J. Const. art. IV, § 7, ¶ 7, and that "[t]he Legislature shall not pass any private, special or local laws . . . [g]ranting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever," Id. at ¶ 9(8). But those provisions neither limit the Legislature's authority to draw reasonable classifications that are rationally related to the government interest, nor require the Legislature to adopt the most "expansive classification" that would "fully achieve[]" "the legislative objective" if the Legislature reasonably prefers to proceed incrementally. Mahwah Twp. v. Bergen Cnty. Bd. of Tax'n, 98 N.J. 268, 289 (1985).

Precedent teaches how to distinguish between permissible "general" laws and impermissible "special" ones. See, e.g., Jordan v. Horsemen's Benevolent & Protective Assoc., 90 N.J. 422, 432 (1982). A law is general, as opposed to special, when it affects "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 Cnty. Bd. of

Freeholders, 30 N.J. 381, 389 (1959). On the other hand, courts consider a law "special legislation" when it excludes "any appropriate person . . . to which the law, but for its limitations, would apply." Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 86 N.J. 429, 446 (1981). Simply put, unconstitutional special legislation arbitrarily fails to "encompass[] all of the subjects which reasonably belong within the classification" and thus excludes "any which naturally belong therein." Id. at 445 (quoting Roe v. Kervick, 42 N.J. 191, 233 (1964)).

To decide whether challenged legislation is an impermissible special law, courts apply a three-part test that: (1) "consider[s] the purpose and object of the legislation"; (2) "appl[ies] it to the factual situation to determine whether any one thing is excluded that should be included"; and (3) "determine[s] whether, as so applied, the resulting classification can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act." Newark Superior Officers, 98 N.J. at 223 (citing Vreeland v. Byrne, 72 N.J. 292, 300-01 (1977)). And courts apply this three-part test deferentially, repeatedly cautioning that the mere disagreement with the precise boundaries of a classification is not a basis to invalidate a law. See, e,g., Mahwah Twp., 98 N.J. at 289 (noting government is not required to "adopt the most expansive classification" if Legislature prefers to proceed incrementally); Caviglia v. Royal Tours of Am., 178 N.J. 460, 476 (2004) (noting Court would not "second-guess" Legislature's rational reasoning

for statute). Instead, in applying this test, courts consider whether a law affords differential treatment to those "persons, things or places which are not dissimilar" with respect to the precise "qualities or situations" upon which the classification is purportedly based. Harvey, 30 N.J. at 389; see Paul Kimball Hosp., Inc., 86 N.J. at 446 (noting New Jersey courts "utilize[e] the principles generally applicable to equal protection" to analyze whether statutory exclusions amount to impermissible special laws). In other words, a "strong presumption in favor of constitutionality" again attaches; "the Legislature has wide discretion in determining the perimeters of a classification" and "an adequate factual basis for the legislative judgment is presumed to exist." Id. at 446-47.

Under that deferential three-part test, the Smoke-Free Air Act is a general law that embodies a reasonable classification to advance the public interest in broadly prohibiting smoking in "enclosed indoor places of public access and workplaces," N.J.S.A. 26:3D-56, while excluding certain places (such as casino floors) whose particular characteristics provide a rational basis for their unique treatment, N.J.S.A. 26:3D-59, -60. Begin with the initial step—where the court considers the purpose and object of the Smoke-Free Air Act and its treatment of casinos. Recognizing the negative health and safety effects associated with smoking, the Legislature determined that, "subject to certain specific exceptions," it was "in the public interest to prohibit the smoking of tobacco

products" in several settings, including most "enclosed indoor places of public access and workplaces." N.J.S.A. 26:3D-56(f) (emphasis added). By implication, then, the Legislature concluded that it was not in the public interest, for other reasons, to prohibit smoking in certain "areas and businesses" that were specifically carved out, including (but not limited to) designated areas of casinos. N.J.S.A. 26:3D-59. That plain text makes the Legislature's purpose plain: to advance the goal of promoting public health across the State by reducing exposure to secondhand smoke, but specifically while also taking into account a series of countervailing considerations, rather than focusing on one goal alone.

The substantive provisions of the law confirm that express finding. After all, the Smoke-Free Air Act does not exempt limited portions of casinos alone, but also adopts specific exceptions tailored to other indoor places or industries. See supra at 10 (discussing exceptions for cigar bars or cigar lounges; tobacco retail establishments and any area a tobacco retail establishment provides for the purposes of smoking; and certain other tobacco businesses) and 12 (discussing exceptions for portions of public beaches and golf courses). That further confirms the Legislature's goal was to balance the crucial health benefits of eliminating smoking with other targeted policy interests implicated by specific places or industries.

Appellants therefore err right out of the gate in describing the legislative goal of this statute. Without citation to any pertinent statutory language or legislative history, Appellants contend that the purpose of the statute is to "protect workers from poisonous second hand [sic] smoke," see Pb11, which would ban smoking in all indoor spaces. Appellants are undone by the plain language of the Act, however, in which the Legislature specifically eschewed holding one single goal. Indeed, the legislative process often does not seek one single end, but instead reflects a balancing of competing policy interests—all of which play into the Legislature's objectives. The Legislature, in the plain text of this law, made clear that the Smoke-Free Air Act is one such example.

With the Legislature's aim to balance the reduction of exposure to smoke with other countervailing considerations in mind, this court then proceeds to the second step to consider whether, under the challenged legislation, any person or entity "is excluded that should be included." Newark Superior Officers, 98 N.J. at 223. Here, the classification the Legislature drew in the Smoke-Free Air Act is rational because the casinos covered by section 3D-59(e) are not similarly situated to the indoor places of public access and workplaces that are subject to the smoking prohibition.

As an initial matter, the Constitution itself recognizes that casinos occupy a unique place in the economic life of the State. The same Article that Plaintiffs

invoke in their suit authorizes legalized gambling establishments only in Atlantic City, and provides specifically for the casinos' licensing and taxation, without establishing a similar geographical limit or regulatory apparatus for other industries. See N.J. Const. art. IV, § 7, ¶ 2(D). Implicit in that express constitutional treatment is the recognition that casinos may require specialized, industry-specific regulatory regimes, uniquely applicable in Atlantic City where they are exclusively located, that would not be appropriate for other industries and workplaces in New Jersey. Reading the provisions of Article IV in harmony indicates the Legislature's differential treatment of casinos does not (or at least should rarely) offend the Constitution and is instead consistent with it.

Unsurprisingly, then, a range of state laws reinforce that otherwise generally applicable statutory regimes are not applicable to casinos. See, e.g., N.J.S.A. 2C:37-9 (excluding licensed casinos in Atlantic City from the gambling criminalization across the State); N.J.S.A. 5:12-70a(18) (exempting casinos from generally applicable alcohol regulations under N.J.S.A. 33:1-1 to 33:5-5 "because of the unique character of the hotel casino premises and operations" and tasking Casino Control Commission with promulgating casino-specific regulations); see also Parking Auth. of Atl. City v. Bd. of Chosen Freeholders of Atl. County, 180 N.J. Super. 282, 294 (Law Div. 1981) (recognizing "New Jersey's casino industry depends substantially upon Atlantic City's ability to

attract large numbers of nonresident visitors" and that while transportation is tangentially related to legalization of gambling, a sufficient nexus justified a standalone transportation statute giving Atlantic County and Atlantic City differential treatment).

Unable to quarrel with casinos' special status, Appellants simply ignore it in their two-sentence argument on the second part of the special-legislation test, which asks whether "an act excludes persons that should be included under a statute." See Newark Superior Officers, 98 N.J. at 223. Appellants contend that "workers in casinos are the same as the workers in any other workplace," since they will suffer the same type of adverse health consequences from secondhand smoke as workers in other businesses. (Pb12). This argument misses the mark.

The Smoke-Free Air Act plainly differentiates between places where the Legislature has concluded it to be in the public interest to ban smoking, and other places where it is not. Similarly, it is not unusual to subject different workplaces to different safety regulations depending on the characteristics of the premises and the activities carried out there, and that can be done without raising constitutional concerns. See, e.g., N.J.S.A. 34.5-168 (construction sites); N.J.A.C. 7:18-7.2 (laboratories conducting toxicity tests); N.J.A.C. 8:24-2.4 (food-service). Said another way, that the workplaces are so different across industries—and that the casino workplace presents unique and unusual

circumstances—means that these casinos and other indoor workplaces are not similarly situated in the constitutional sense.

The legislative decision to treat casinos and casino simulcasting facilities differently from other businesses is also consistent with other laws that are specific to casinos and casino simulcasting facilities. For instance, notwithstanding its general prohibitions on private, special, or local laws, N.J. Const. art. IV, § VII, ¶¶ 7–10, and on legislation authorizing gambling of any kind without a special election, N.J. Const. art. IV, § VII, ¶ 2, New Jersey's Constitution permits the Legislature to authorize the establishment of casinos and casino simulcasting facilities in—and only in—Atlantic City, and to license and tax their operations, N.J. Const. art. IV, § VII, ¶ 2(D)–(E). The Legislature has done so through the Casino Control Act, N.J.S.A. 5:12-1 to -233, and has exempted activities authorized by the Casino Control Act from otherwise applicable laws that, for example, criminalize gambling-related activity and regulate sales of alcohol. See N.J.S.A. 2C:37-9 (stating that certain criminal laws shall not "be construed to prohibit any activity authorized by the" Casino Control Act), N.J.S.A. 5:12-70(a)(18) (stating that the Casino Control Commission shall endeavor to promulgate regulations consistent with the alcohol beverage laws, under N.J.S.A. 33:1 to -5-5 and shall only "deviate only insofar as necessary").

In other instances, the Legislature has seen fit to impose more stringent restrictions on activity at casinos than on the same activity at other locations. For example, state law does not prohibit individuals who are too young to purchase or consume alcoholic beverages from entering bars, see generally N.J.S.A. 33:1-1 to 33:5-5, but it does prohibit them from entering a licensed casino or simulcasting facility, except by way of passage to another room, without being licensed or registered under the Casino Control Act, N.J.S.A. 5:12-119.

Such distinctions in established law between casinos and other locations provide relevant background for distinctions drawn in the Smoke-Free Air Act, including particularly its distinctions between locations where young people are likely to be present and exposed to secondhand smoke. Cf. N.J.S.A. 26:3D-58(b) (prohibiting smoking even in outdoor areas on school grounds).

But Appellants' greatest problem comes at the third step of the special-legislation analysis which considers whether the Legislature that adopted the Smoke-Free Air Act in 2006 could have had reasonable grounds for distinguishing between casinos (and establishing multiple other exceptions) and other premises otherwise subject to the categorical ban on indoor smoking. At this step, "the generality or speciality of a statute becomes a question of reasonableness"—a deferential standard that is dictated by "practical

[considerations] varying with the facts in each case." Newark Superior Officers Ass'n, 98 N.J. at 227. A challenged classification will thus be upheld if it "can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act." Id. at 223 (emphasis added). Under that standard, if the court "can conceive of any reason to justify the classification" or if "the question of reasonableness is fairly debatable," the statute will survive the challenge. Mahwah Twp., 98 N.J. at 290. The Smoke Free-Fair Act and section 3D-59(e) satisfy that test.

The first conceivable rational justification is economic, even if reasonable policymakers could (and do) disagree with which policy interests to privilege. In enacting the Casino Control Act, the Legislature underscored the need for a "sufficiently flexible" "regulatory system" to support "the ability of the legalized casino gaming industry in New Jersey to compete in an ever-expanding national gaming market." N.J.S.A. 5:12-1b(19). The Legislature found that the public has a "vital interest in casino operations in Atlantic City" because—"[b]y reason of its location, natural resources and worldwide prominence and reputation"—Atlantic City's hospitality sector is "a critically important and valuable asset in the continued viability and economic strength of the tourist, convention and resort industry" in the state as a whole. N.J.S.A. 5:12-1b(2), (8).

The unique position of Atlantic City's casinos—and the legislative interest in supporting their ability to compete and thrive in the national marketplace—can thus reasonably warrant a different balancing of the interests affected by indoor smoking bans at casinos than at other indoor places of public access and workplaces. And as noted previously, the State dedicates substantial funds each year from taxes on casino revenue ($526 million in the 2024 budget alone); the Legislature has been provided with credible information in opposition to pending legislation to suggest amending the statute to completely ban smoking will cause a substantial loss of casino jobs and revenue; and Intervenors observed that the only Atlantic City casino to attempt a smoking ban was forced into bankruptcy less than one year after implementing the ban. (Ja142.) Section 3D-59(e), like the casino-specific laws noted above, reasonably advances the constitutionally sanctioned legislative goals of bolstering the casino industry and the continued economic revitalization of Atlantic City. See, e.g., N.J.S.A. 5:12-1b(4), (13); see also N.J. Const. art. IV, § 7, ¶ 2(D).

Appellants and amicus incorrectly assume that the goal of the Act to benefit casinos. See (Pb29) ("The public does not have an interest in casino profits"); (Ab6) ("Corporate profits are not a legitimate reason to exclude casino workers from health and safety laws"). But that characterization fails,

because—as the trial court recognized—the real economic interests pursued include the generation of public funds for public-assistance programs to benefit New Jersey citizens, including senior citizens and disabled residents. (Pa29). Likewise, it is undeniable that having profitable casinos means New Jerseyans can remain employed in that industry and will therefore be able to provide for themselves and their families. Economic goals can serve the public too.

In any event, even beyond the economic and employment interests the Legislature sought to balance in 2006, the economic profile of casinos is not the only rational basis for distinguishing between casino floors and other places subject to the smoking bans. Another reason—also related to the unique constitutional status of casinos and casino simulcasting facilities—is that they are geographically limited to a single municipality, Atlantic City, which is uniquely affected by laws applicable to casinos. The Smoke-Free Air Act thus struck a balance to specially preserve the authority of that municipality to weigh the costs and benefits of a smoking ban for itself—authority that Atlantic City has in fact exercised since 2006 by adopting casino smoking policies that are more restrictive than state law. Thus, as was the case of Parking Authority of City of Atlantic City, 180 N.J. Super. 282, the unique nature of Atlantic City and the unique role of casinos in its economy provide a reasonable basis for a legislative distinction. There is no other industry in the State that could be

similarly regulated by granting regulatory authority to one single municipality, because no other state industry is regulated by our Constitution to be housed in one geographic location alone.

Finally, the Legislature could reasonably conclude that casino floors are distinct from other places where smoking is banned because individuals under the age of twenty-one are not permitted there. Young people face particularly negative health risks from secondhand smoke, see Ctrs. for Disease Control & Prevention, Smoking & Tobacco Use, Secondhand Smoke, https://www.cdc.gov/tobacco/secondhand-smoke/health.html (last visited Nov. 12, 2024), which New Jersey has recognized by imposing more significant restrictions on smoking in locations where children are most likely to be present. See, e.g., N.J.S.A. 26:3D-58(b) (outdoors on school grounds); P.L.1998, c.35 (child care centers). Conversely, the Legislature could reasonably determine that less restrictive measures are warranted where children are not likely to be present. That, too, makes casinos fairly unique among other industries.

Appellants' responses to these rational and reasonable distinctions miss the mark. Appellants erroneously contend that the court below misapplied Town of Secaucus v. Hudson County Board of Taxation, 133 N.J. 482, 494, 497-98, 504 (1993), in evaluating whether the exclusion of casinos from the Act was rational. See Pb13-16 (arguing that Town of Secaucus requires that legislation

have a "rational" and "legitimate" legislative purpose and contends that Appellant's view of the legislative goal here—"giving favors to corporations"—was not "legitimate").

But that argument simply reflects the same misunderstanding of the Act's purposes. Appellants assert that allowing smoking in limited areas of casinos was necessarily not "relevant to the purpose and object of the act," Pb13, because the sole "purpose and object" of the Smoke-Free Air Act according to Appellants is to protect all workers from secondhand smoke. As previously noted, however, the Act explicitly disavowed such a singular position in favor of allowing the Legislature to balance that laudatory goal with other policy interests that are especially implicated by the series of reticulated exceptions it chose. And when the Legislature's goal of maintaining a balance comes into focus, Appellants' basic argument that the exceptions are necessarily improper falls away.

Amicus gets no further in fighting the facts that underlie the Legislature's and trial court's conclusions. Amicus contends that this court should reverse because it believes banning smoking entirely will increase casino profits without harming jobs. (Ab9-13.) But, of course, Intervenors have offered evidence (including studies and historical data regarding a downturn in casino business after imposition of a smoking ban) suggesting just the opposite. See Ja7-167,

Ja181-318. These are precisely the sorts of public-policy questions our Constitution leaves to the Legislature to resolve, because that body is both authorized and better equipped than the courts to consider and synthesize large amounts of conflicting input, including material on economic impacts, rather than the courts.[5]

At bottom, the Legislature's current choice to address the problems of smoking indoors incrementally is not unconstitutional just because Plaintiffs assert that a more expansive classification would better serve the underlying health policy goals. See Mahwah, 98 N.J. at 289–90 (recognizing that in special-legislation challenge, Legislature may "recognize degrees of harm" and "limits its actions" based on "practical exigencies" or competing "considerations of public policy"). Reasonable minds may and do differ on whether the unique role and circumstances of casinos favor a different legislative approach to indoor smoking on casino floors than in other locations. Because that policy question is debatable—and in fact under debate in the Legislature—injunctive relief

[5] Amicus ventures even farther afield when it claims that Section 3D-59(e) is unconstitutional because allowing smoking in limited areas of casinos "transparently appeals to problem gamblers" that the State seeks to help. Ab13-15. Nothing in the Act suggests that the Legislature enacted the Smoke-Free Air Act to target or assist such individuals, but instead to serve a series of other policy goals. And in any event, "as a general rule, an amicus curiae must accept the case before the court as presented by the parties and cannot raise issues not raised by the parties." State v. O'Driscoll, 215 N.J. 461, 479 (2013).

should be denied. Id. at 290 ("[W]here the question of reasonableness is fairly debatable, courts will uphold the classification.").

POINT II

THE TRIAL COURT PROPERLY HELD THAT THIS LAW DOES NOT VIOLATE A RIGHT TO SAFETY.

The trial court likewise correctly rejected Appellants' argument that section 3D-59(e) violates a purported "right to safety" supposedly enshrined in the first paragraph of the New Jersey Constitution. That provision lists several "natural and unalienable rights" of all persons, including the right "of pursuing and obtaining safety and happiness." N.J. Const. art. I, ¶ 1. By its own terms, that language recognizes the principle that citizens are entitled to "pursue" and "obtain" safety and happiness for themselves without undue governmental interference—but it stops short of imposing a general obligation on the State to proactively take specific action to provide safety and happiness to New Jerseyans.

Unsurprisingly, New Jersey courts have previously declined to read Article I, ¶ 1, as imposing a free-standing State duty to take affirmative steps to provide for the public's welfare. See Franklin v. N.J. Dep't of Human Servs., 225 N.J. Super. 504, 522 (App. Div.) ("Appellants' theory is that [Article I, paragraphs 1 and 2] impose an affirmative obligation upon state government to

provide certain necessities of life for indigent persons, including shelter. However, this theory is not supported by the history of these constitutional provisions, their language, or the prior decisions of the Supreme Court of New Jersey."), aff'd, 111 N.J. 1 (1988); L.T. v. N.J. Dep't of Human Servs., Div. of Family Dev., 264 N.J. Super. 334, 340-42 (App. Div. 1993) (rejecting argument that Article I, paragraph 1 imposes "an affirmative obligation on the government to finance social services" including "government-funded housing"), rev'd on other grounds, 134 N.J. 304 (1993). Appellants' invitation to read into the provision an analogous obligation for the State to take action to prohibit smoking in casinos, when the Legislature has so far chosen to strike a different balance, should similarly be rejected.

Appellants' alleged right to safety carries an especially high potential for intrusion into the policymaking realm reserved for the political branches because it lacks any limiting principle. If the State in fact had an affirmative constitutional obligation to protect Appellants' members from health risks flowing from exposure to tobacco smoke in the limited areas where smoking is allowed, it is not clear why that obligation would be limited to casinos and their employees. The State would have been compelled to ban smoking by anyone in any place as of the moment that the health risks of smoking were established as a matter of public record. Nor would there be any reason to stop with smoking;

the State would universally be bound to take action to protect the public from any known risks to their health and wellbeing, which may well mean the State has to supply the kind of welfare-maximizing assistance that courts have held is not constitutionally required. See Franklin, 225 N.J. Super. at 522; L.T., 264 N.J. Super. at 340-42. Under this regime, any incremental policymaking would automatically be suspect. This cannot be the law, and tellingly, Appellants did not cite to any authority—below or before this court—that recognizes a constitutional right to safety. Instead, they would have the court infer support for their claim from a patchwork of workplace safety statutes and case law. Those pieces do not add up to a viable constitutional theory, however.

With revealing hesitation, Appellants begin by asserting that "the right to a safe workplace is well-established in New Jersey law, perhaps growing out of our Constitution." Pb19. But the evidence they cite for that proposition (Pb 19-20) only confirms that the Legislature and the courts know how to provide and enforce workplace-safety protections in specific circumstances; nothing in those authorities suggests that the State Constitution itself provides a backstop cause of action against the State when the Legislature makes a choice not to extend a particular workplace protection to a certain type of workplace. See N.J.S.A. 34:6A-3 (statutorily requiring employers, not State, to provide "reasonably safe and healthful" place of employment); Cerracchio v. Alden Leeds, Inc., 223 N.J.

Super. 435, 445 (App. Div. 1988) (discussing specific common-law cause of action available to challenge discharge in violation of "public policy . . . favoring safety in the workplace"); Shimp v. New Jersey Bell Telephone Company, 145 N.J. Super. 516, 524 (Ch. Div. 1976) (noting that court may order elimination of workplace hazardous condition "where an employer is under a common law duty" to provide safe workplace).

Appellants' attempt to shoehorn this case into the narrow exception for state liability for a state-created danger (Pb 22-25) does not fare any better. That doctrine provides a remedy when a claimant can show that a state actor "affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all." Gormley v. Wood-El, 218 N.J. 72, 101 (2014). Here, the Legislature's inaction on the proposed changes to the casino exception in the Act cannot give rise to liability because it does not involve an affirmative exercise of state authority. Id. In leaving it up to the employers and Atlantic City to decide whether to permit smoking on casino floors, the State did not itself create any danger. Id. at 103 (explaining that liability attaches only to affirmative state action "and not just failure to protect" from harm resulting from conduct of others). And because smoking was allowed in casinos prior to the

passage of the Smoke-Free Air Act, casino employees were not made "more vulnerable" by its enactment.

Finally, to the extent Appellants quarrel with the return of smoking to casino floors after the COVID-19 pandemic, once the emergency circumstances justifying universal restrictions had passed, the State had a duty to enforce the Smoke-Free Air Act as enacted once the public health emergency the Governor declared in Executive Order 244 ended in New Jersey. More fundamentally, the constitutional argument Appellants have advanced in this case is that the enactment of 3D:59-3(f) was what allegedly violated a "right to safety," not the expiration, by operation of law, of the Governor's power to impose temporary measures related to COVID-19 during a public health crisis pursuant to the Emergency Health Powers Act, N.J.S.A. 26:13-1 to -36. Thus, this court should affirm the dismissal of Plaintiffs' right-to-safety claim.

POINT III

THE TRIAL COURT PROPERLY HELD THAT THE ACT DOES NOT VIOLATE APPELLANTS' EQUAL-PROTECTION RIGHTS.

Appellants' equal protection challenge fails for many of the same reasons that their other claims fall short: the law is subject only to rational basis review because it infringes no fundamental right (Point II, supra) and survives review because it rests on rational explanations and distinctions (Point I, supra).

To evaluate an equal-protection challenges under the New Jersey Constitution, courts apply a balancing test that weighs the "nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985). Legislation withstands such a challenge if the means selected "bear a real and substantial relationship to a permissible legislative purpose." Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 44 (1976). The "crucial issue" to be decided in an equal-protection challenge is "whether there is an appropriate governmental interest suitably furthered by the differential treatment involved." And, in a challenge such as this, the plaintiff bears the burden to demonstrate that the challenged law "lacks a rational basis," with the statute enjoying a strong presumption of constitutionality. Caviglia, 178 N.J. at 477–78.

The trial court properly rejected Appellants' equal-protection challenge. At the outset, Appellants' challenge is only subject to rational basis review because there is no protected constitutional right to safety as explained in Point II, and Appellants' complaint does not identify any other fundamental right upon which the Act purportedly infringes.[6] (Pa22). And under that deferential

[6] In their equal-protection argument, Appellants appear to be attempting to amend their verified complaint on the fly by advancing a claim that the Act violated equal protection by violating a right to "enjoyment of health." See Pb26-27. Appellants

standard, as the trial court noted, the State supplied "ample support" to show the Legislature had a rational basis to believe that section 3D:59-3(f) serves a permissible legislative purpose and to treat casinos (and certain other businesses) differently on the issue of public smoking. (Pa29). As described in Point I, those reasonable justifications include the interests in bolstering the State economy, generating revenue to support State programs that benefit our disabled and elderly residents, and creating jobs; the interest in preserving Atlantic City's local authority to choose how to address the effects on the casino industry that is uniquely located in its jurisdiction; and the interest in tailoring regulation of public spaces based on children's access to such spaces. See supra at 30-34.

Appellants' only direct response to these justifications is to downplay the economic benefits insofar as "[t]he public does not have an interest in casino profits" and other corporations subject to the smoking ban pay taxes (Pb 29-30). Those assertions do not undercut the trial court's conclusion, supported by the record, that an adequate rational basis supports the Smoke Free-Air Act and its classifications.

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forfeited that argument when they failed to raise it below, and cannot in any event amend their pleadings through their appellate briefing.

And though not binding upon this Court, it bears noting that federal courts have already rejected an equal-protection challenge directed against section 3D-59(e) relying on the government's assertion of broad economic interests. See Amiriantz v. New Jersey, 251 F. App'x 787, 788 (3d Cir. 2007).[7] In Amiriantz, a transportation company challenged the exclusion of casinos from the Smoke-Free Air Act on equal-protection grounds. Amiriantz v. New Jersey, Civil Action No. 06-1743 (FLW), 2006 WL 3486814, at *4 (D.N.J. Nov. 30, 2006). The Third Circuit affirmed the dismissal of the complaint, agreeing with the district court that the State's economic concerns as articulated in the Casino Control Act provided a rational basis for the differential treatment accorded by Section 3D-59(e). 251 F. App'x at 789; 2006 WL 3486814, at *5-6. Likewise, courts in other states have upheld their respective state's casino exceptions to smoking bans on similar grounds. See Batte-Holmgren v. Galvin, No. CV044000287, 2004 WL 2896485 (Conn. Super. Ct. Nov. 5, 2004) (finding legislature's concern regarding inability to enforce smoking ban at casinos provided rational basis for exemption); Coalition for Equal Rights, Inc. v. Owens, 458 F. Supp. 2d 1251 (D. Colo. Oct. 19, 2006) (holding economic considerations constituted proper basis for casino exemption).

[7] Pursuant to Rule 1:36-3, a copy of this unpublished decision is provided at Ja106. Counsel is not aware of any contrary unpublished authority.

POINT IV

APPELLANTS' DEMAND FOR INJUNCTIVE RELIEF IS MOOT AND UNWARRANTED.

Appellants' brief in this court demands a preliminary injunction, but that request fails for two independent reasons. First, the court below already went beyond the request for preliminary relief and concluded that Appellants' claims failed as a matter of law, resulting in their outright dismissal. If this court holds that the trial court correctly dismissed these claims, it follows necessarily that the request for injunctive relief was properly dismissed as moot.

Second, to the degree that this court believes the claims should proceed beyond the motion-to-dismiss stage and that the question of relief is therefore live, it can remand to the trial court to consider the other equitable factors that govern such relief. After all, as this court has emphasized, to secure permanent injunctive relief, it is necessary—but not, by itself, sufficient—for the plaintiff to "establish the liability of the other party." Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006); see also, e.g., Verna v. Links at Valleybrook Neighborhood Ass'n, Inc., 371 N.J. Super. 77, 89 (App. Div. 2004) (plaintiff must prove "a legal right to the relief sought" to obtain a permanent injunction). To the contrary, Appellants must satisfy a series of other equitable factors, including a showing of irreparable harm and the balance of the equities and the public interest. See Waste Mgmt. of New Jersey, Inc. v. Union Cnty.

Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008); Crowe v. De Gioia, 90 N.J. 126, 134 (1982). Although these are questions left for remand (if this court does not simply affirm, as it should), it bears note that Appellants' delay in seeking relief bears heavily on their claims of irreparable harm. See, e.g., Pharmacia Corp. v. Alcon Labs., 201 F.Supp.2d 335, 382-83 (D.N.J. 2002); Nazare v. Bd. of Embalmers & Funeral Dirs., 4 N.J. Super. 567, 569 (Ch. Div. 1949) ("It is elementary that one who seeks the drastic remedy of injunction must not only present a clear case entitling him to relief but he must move with dispatch to secure it."). But this court need not reach these factors or remand this matter because Appellants' novel constitutional theories ultimately lack merit, and the trial court's thorough analysis correctly led to their dismissal.

CONCLUSION

This court should affirm the dismissal of Appellant's verified complaint in its entirety.

Respectfully submitted,

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UAW, REGION 9 OF THE UAW, and C.E.A.S.E. N.J., Appellants, v. NEW JERSEY GOVERNOR PHILIP MURPHY, and ACTING NEW JERSEY HEALTH COMMISSIONER DR. KAITLIN BASTON, Respondents,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO.: A-000057-24 (M-000194-24) Civil Action On Appeal from an Order of the Superior Court of New Jersey Chancery Division, Mercer County Docket No.: MER-C-26-24 Sat Below: Hon. Patrick J. Bartels DATE SUBMITTED: November 14, 2024

RESPONDENTS-INTERVENORS UNITE HERE LOCAL 54, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, EASTERN ATLANTIC STATES REGIONAL COUNCIL OF CARPENTERS, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 21, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 331, AND ATLANTIC AND CAPE MAY COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL'S BRIEF AND APPENDIX IN RESPONSE TO APPELLANTS' BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

This litigation was commenced by a relatively small group of casino workers, totaling less than 800 workers, seeking on an emergent basis, to overturn a 2006 law permitting limited smoking in Atlantic City casinos. Appellants assert a novel (and unsupported by any caselaw) constitutional challenge, while vigorously opposing any efforts to be heard from any other affected constituents, including the Unions representing more than 12,000 casino workers, whose livelihoods could be jeopardized should the Court grant Appellants' requested relief.

While no one takes issue with the public policy concerns regarding exposure to second hand smoke, Appellants' use of the judicial system to advance that cause is designed to circumvent the democratically elected legislature's considered policy judgments. This is an inappropriate use of the Court's limited resources. Nor does it trump all other interests, including the Unions' in avoiding a repeat of the economic dislocation resulting from shuttered casinos. In considering Appellants' constitutional challenge, the trial court properly recognized that the underlying issues impact diverse stakeholders, including not only the casino workers represented by Appellants, but also the more than 12,000 casino workers represented by the Unions as well as the regional economy. The trial court also correctly found that Appellants'

constitutional challenges were created out of whole cloth, untethered to any interpretation of the New Jersey State Constitution that could justify the Courts overturning duly enacted legislation.

The Unions are responsible for protecting workers' rights, including advancing their constituent members' economic, health, and safety concerns, and responding to those members' priorities as employees in the casino industry. In balancing those interests, the Unions are quite rightly concerned that a complete smoking ban, as demanded by Appellants, would endanger their members' well-paying jobs, and their associated health, welfare, and retirement benefits. The economic headwinds facing the Unions' hardworking members have not abated since the enactment of the New Jersey Smoke-Free Air Act, N.J.S.A. 26:3D-55, et seq. ("the Act") in 2006; if anything, their implications are even more dire today. A slow recovery from the impact of COVID-19 and the increase in regional competition and online gambling pose ongoing challenges for New Jersey's casino industry; compounding this with the potentially devastating economic impact of a complete smoking ban could further jeopardize the livelihoods of over 12,000 casino workers whose interests Appellants do not represent.

Appellants categorically dismiss any balancing of economic considerations as pandering to the greedy casinos. Unable to achieve legislative

reform in the eighteen years since the enactment of the Act, and unable – or unwilling – to bargain for concessions from casino employers, Appellants filed suit, alleging constitutional violations and seeking emergent relief. The New Jersey Supreme Court, this Court, as well as the trial court, have all already found that emergent relief is unwarranted. After extensive briefing and oral argument, the trial court issued a cogent opinion, correctly dismissing the Verified Complaint, finding that none of the Appellants' purported constitutional claims had merit, and as such failed to state a claim upon which relief can be granted; and further finding that the injunctive relief sought by Appellants must likewise be denied.

The trial court correctly found that the subject exemption for smoking on casino floors ("Casino Exemption") does not constitute special legislation and the Casino Exemption does not violate Appellants' right to pursue safety or equal protection under the law. Simply put, there is no legal support for Appellants' constitutional arguments in the text of the New Jersey Constitution or New Jersey's history and traditions, to say nothing of the text of the Act itself. The underlying issues are public policy questions, properly resolved through the legislative and collective bargaining processes. As such, the trial court's decision dismissing the Verified Complaint and denying the injunctive relief should be affirmed in its entirety.

PROCEDURAL HISTORY

In 2006, the Act was passed, prohibiting smoking in most indoor public places or workplaces, and in any area inside or on the grounds of a public or nonpublic elementary or secondary school. N.J.S.A. 26:3D-58. As relevant here, the Act contains a few narrowly tailored exemptions: (1) cigar bars and cigar lounges; (2) tobacco retail establishments; (3) tobacco testing businesses; (4) private homes, residences and automobiles; (5) the Casino Exemption; (6) approved research facilities, *see* N.J.S.A. 26:3D-59, and certain (7) guest rooms in hotels, motels, or lodging establishments, *see* N.J.S.A. 26:3D-60.

On April 5, 2024, Appellants filed an Order to Show Cause and Verified Complaint, challenging the Casino Exemption under the Act. As against the Defendants/Respondents Governor Philip Murphy and New Jersey Health Commissioner Dr. Kaitlin Batson ("Respondents"), Appellants allege that the Act is unconstitutional special legislation and violates their constitutional rights to safety and equal protection. (Pa1-11)[1].

On April 29, 2024, Respondents opposed Appellant's Order to Show Cause and moved to dismiss the Complaint. The Unions and the Casino Association of New Jersey ("CANJ") filed motions to intervene and opposition

[1] "Ja" denotes the Joint Appendix filed on November 14, 2024. "Pa" denotes Appellants' amended appendix filed on September 13, 2024. "Pb" denotes Appellants' amended opening merits brief filed on September 13, 2024.

to Appellants' Order to Show Cause. (Pa15).

On May 7, 2024, Appellants filed opposition to both motions to intervene and further support for their Order to Show Cause application. On May 13, 2024, the parties appeared for oral argument before the Honorable Patrick J. Bartels, P.J.Ch. (Pa15). On August 30, 2024, the Court entered an Order granting the Motions to Intervene and a separate Order denying Appellants' Order to Show Cause and dismissing their Complaint. (Pa12 - 13). The Court also denied Appellants' request to proceed in a summary manner under R. 4:67-1. (Pa17 - 20).

On September 6, 2024, Appellants filed their notice of appeal, as well as an application for permission to file an emergent motion. The Hon. Joseph L. Marczyk, J.A.D. denied that application on September 6, 2024. (Ja542). On September 11, 2024, Appellants applied to the New Jersey Supreme Court for permission to file an emergent motion. (Ja526). On September 12, 2024, the Supreme Court denied Appellants' application. Id.

On September 13, 2024, Appellants moved to accelerate their appeal. Respondents, the CANJ, and the Unions opposed the motion to accelerate. On October 11, 2024, the Court denied Appellants' motion to accelerate and permitted the Americans for Nonsmokers' Rights to participate in this matter as amicus curiae.

The Unions now submit this merits brief.

STATEMENT OF FACTS

Longstanding economic considerations have informed the development of the gaming industry in New Jersey, and more specifically, the regulation of casinos in Atlantic City. See Casino Control Act, N.J.S.A. 5:12-1, et seq. The Legislature has made public policy decisions regarding Atlantic City's redevelopment to "provide meaningful and permanent contribution to the economic viability of the resort, convention, and tourist industry of New Jersey." N.J.S.A. 5:12-1(b)(13). One of those public policy questions was whether to adopt a complete smoking ban at the Atlantic City casinos. In considering a smoking ban, the Legislature recognized that the impact of a smoking ban on New Jersey's gaming industry could be substantial.

Available research at the time examining the effect of a smoking ban on nearby Delaware's gaming industry provided a cautionary tale. (See Ja200 - 16). Following the implementation of a smoke-free law in Delaware, revenues were found to have declined significantly, relative to the availability of alternative gaming venues in the region. (See Ja210). Three of the studied gaming venues saw revenues decrease by an estimated $94 million per year, corresponding to a decrease in state revenues of an estimated $33 million per year. (Id.) The New Jersey Casino Control Commission Chair at the time recognized that casinos in

New Jersey are "the economic engine that drives much of the industry in southern New Jersey." (See Ja218 – 19). Casino revenues in New Jersey topped $5 billion in 2005; the $401.5 million tax revenue was dedicated to support programs for the aged and disabled. (Id.); see N.J.S.A. 5:12-145(c).

Subsequent studies provide context for discussion and analysis of smoking bans. After the Illinois state smoking ban took effect in 2008, estimates suggest that revenue and admissions at Illinois casinos declined by more than 20% (about $400 million) and 12%, respectively. (See Ja225 - 68). A 2021 study estimated that a smoking ban in Atlantic City casinos would result in: decline in New Jersey gaming-tax receipts of between $10.7 million and $25.7 million to the Casino Revenue Fund, and between $1.7 million and $4 million to the Casino Reinvestment Development Authority; decline in total taxes of between $17.2 million and $44 million; decline in non-gaming revenue of between 3% and 6.5%; and potential job losses of between 1,021 and 2,512. (See Ja270 - 318).

To inform its members and the public, Local 54 – whose more than 10,000 members work in all of the currently operating Atlantic City casinos – prepared an economic and policy analysis, published on April 1, 2024, "Policy Implications of a Total Smoking Ban in Atlantic City Casinos". (See Ja195 – 98). Local 54's analysis provides the perspective of Local 54 and its membership on the economic challenges facing its members in an era of heightened

competition in the casino industry, and of the projected impact of a complete smoking ban. As noted in the report, a total smoking ban would place thousands of jobs at risk, endangering the wages, health and welfare benefits and retirement benefits of Local 54 members and their families. With alternatives for smoking casino patrons in Pennsylvania, New York, and Connecticut, Local 54 projects that the imposition of a complete smoking ban would lead to a loss of 3,000 jobs in Atlantic City. (See Ja195). Local 54's members suffered massive job losses as various casinos shuttered over the past several years; they are rightly concerned about associated job loss should a complete smoking ban be imposed.

The economic impact of smoking bans on revenue and employment in the industry has figured prominently in the current balance of interests obtained in the legislative process. Under the Act, municipalities are permitted to further restrict indoor smoking. See N.J.S.A. 26:3D-63 (cross-referencing N.J.S.A. 40:48-1, -2); L. 2005, c. 383, § 9. In 2008, when the Atlantic City Council imposed a total smoking ban, casino revenues fell by 19.5%, within the first week. (See Ja195). The decline in revenues led to the enactment of the current 25% limitation on smoking areas on the casino floors. (Ja75-78) (Atlantic City Ordinance No. 27 (Apr. 9, 2008) (barring all smoking except in certain non-staffed areas effective October 15, 2008)); (Ja80-81) (Atlantic City Ordinance

No. 95 (Oct. 27, 2008) (reinstating the 75% - 25% allocation on gaming floors))).

Since then, the legislative judgment has been to retain the 75% - 25% allocation on gaming floors; this decades-old policy decision has been reached after public hearing, spirited debate, and proposed legislation to eliminate the exemption. See, e.g., S. 1493, 221st Leg., 2024–2025 Sess. (2024); S. 264, 220th Leg., 2022–2023 Sess. (2022); S. 1878, 219th Leg., 2020–2021 Sess. (2020); S. 1237, 218th Leg., 2018–2019 Sess. (2018); S. 1517, 217th Leg., 2016–2017 Sess. (2016); S. 1639, 216th Leg., 2014–2015 Sess. (2014); S. 1795, 215th Leg., 2012–2013 Sess. (2012); S. 423, 214th Leg., 2010–2011 Sess. (2010); S. 236, 213th Leg., 2008–2009 Sess. (2008); S. 1089, 212th Leg., 2006–2007 Sess. (2006). Appellants now ask the courts to supplant the legislative judgment with their own, on an expedited basis. The trial court correctly dismissed the Verified Complaint. It is respectfully submitted that this Court should affirm.

ARGUMENT[2]

STANDARD OF REVIEW

"Our standard of review in determining the constitutionality of a statute is de novo." State v. Hemenway, 239 N.J. 111, 125 (2019). "[S]tatutes are presumed to be constitutional." In re M.U.'s Application for a Handgun Purchase Permit, 475 N.J. Super. 148, 190 (App. Div. 2023). When considering a facial challenge to the constitutionality of a statute, courts "afford every possible presumption in favor of an act of the Legislature." Mack-Cali Realty Corp. v. State, 466 N.J. Super. 402, 423-24 (App. Div. 2021) (quoting Town of Secaucus v. Hudson Cnty. Bd. of Tax'n, 133 N.J. 482, 492 (1993)), aff'd o.b., 250 N.J. 550 (2022). Reviewing courts are "not limited to the stated purpose of the legislation, but should seek any conceivable rational basis." Secaucus, 133 N.J. 495 (citation omitted) (emphasis in original). "Simply put, 'the courts do not act as a super-legislature.'" Ibid. (quoting Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212, 222 (1985)).

"[T]he burden is on the party challenging the constitutionality of the statute to demonstrate clearly that it violates a constitutional provision." Newark Superior Officers, 98 N.J. at 222 (citation omitted). "That burden is onerous."

[2] The Unions join in the legal arguments by the Respondents and the CANJ in their merits briefs.

Mack-Cali Realty Corp., 466 N.J. Super. 424 (citation omitted). "[A]ny act of the Legislature will not be ruled void unless its repugnancy to the Constitution is clear beyond a reasonable doubt." State v. Muhammad, 145 N.J. 23, 41 (1996)). Even where a statute's constitutionality is "fairly debatable, courts will uphold" the law. Newark Superior Officers, 98 N.J. at 227.

POINT ONE

The Trial Court Correctly Found that the Casino Exemption Does Not Constitute Special Legislation.

In passing the Casino Control Act, N.J.S.A. 5:12-1 to - 233, the Legislature found legalized casino gambling was "a unique tool of urban redevelopment for Atlantic City" that would "facilitate the redevelopment of existing blighted areas" and "attract new investment capital to New Jersey in general and to Atlantic City in particular." N.J.S.A. 5:12-1(b)(4). The Legislature also found Atlantic City's tourism industry was "a critically important and valuable asset" to the State and that "the economic stability of casino operations [was] in the public interest." N.J.S.A. 5:12-1(b)(2), (12). This Court recently examined the historical background of the Atlantic City casino-gaming business, and cautioned against considering legislative acts "in isolation, rather than considering them as a 'cohesive whole'" and "part of a decades-long comprehensive legislative scheme." Liberty & Prosperity 1776, Inc. v. State, No. A-0487-22, 2024 BL 374371, at *2 (App. Div. Oct. 21, 2024).

The Court noted that the motion court had erred by failing to "consider the decades of legislative and judicial findings recognizing the symbiotic and deep-rooted connection between Atlantic City, the casino industry, and the State as a whole." Id. at *10. Here, Appellants urge the Court to do just that – consider the Act untethered from any historical context and ignore the Legislature's determination that the 75% - 25% allocation is an appropriate way to mitigate the negative health effects of smoking.

Appellants essentially ask this Court to question the Legislature's motivations in passing the Act – that is, whether it acted with noble intentions. Respectfully, this is not the applicable standard when considering the constitutionality of a legislative act. The New Jersey Constitution provides in relevant part that "[t]he Legislature shall not pass any private, special or local laws . . . [g]ranting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever." N.J. Const., Art. IV, § 7, ¶ 9 (8). "[T]he test of whether a law constitutes special legislation is essentially the same as that which determines whether it affords equal protection of the laws." Phillips v. Curiale, 128 N.J. 608, 627 (1992) (quoting Township of Mahwah v. Bergen County Bd. of Taxation, 98 N.J. 268, 285(1985)). "The test for whether legislation is general or special involves examining the purpose and object of the enactment, as applied to the facts of the case, and determining whether the

resulting classification rests upon any rational or reasonable basis relevant to the purpose and object of the legislation." Horizon Blue Cross Blue Shield of New Jersey v. State, 425 N.J. Super. 1, 17 (App. Div. 2012) (citing Vreeland v. Byrne, 72 N.J. 292, 300-01 (1977). "The essence of unconstitutional special legislation is the arbitrary exclusion of someone from the class." Jordan v. Horsemen's Benevolent and Protective Ass'n, 90 N.J. 422, 432 (1982).

The New Jersey Supreme Court established a three-part test to determine whether a law violates the prohibition against special laws. A court must examine: "(1) the purpose and subject matter of the statute; (2) whether any persons are excluded who should be included; and (3) whether the classification is reasonable, given the purpose of the statute." Jordan, 90 N.J. at 432-33 (citing Vreeland, 72 N.J. 292, 298-301). As in an equal protection analysis, legislation carries a presumption of validity. "A statute must 'clearly and irremediably violate[]' the ban on special legislation to be invalidated." City of Jersey City v. Farmer, 329 N.J.Super. 27, 38 (App. Div. 2000) (quotation omitted). Moreover, "[t]he propriety of exclusions must be examined utilizing the principles generally applicable to equal protection." Paul Kimball Hosp. v. Brick Twp. Hosp., 86 N.J. 429, 446 (1981).

Here, as the trial court correctly held, there are multiple rational bases justifying the Casino Exemption. (See Pa27 - 29). No intended beneficiary is

excluded irrationally from the benefits of the statute and no undue or exclusive privilege is granted to the casinos. See N.J.S.A. 26:3D-59, -60. The "Legislature has wide discretion in determining the perimeters of a classification ... and an adequate factual basis for the legislative judgment is presumed to exist." Paul Kimball Hospital, 86 N.J. at 446-47 (citations omitted). As the Supreme Court said in Paul Kimball Hospital:

> The fact that only one entity that meets the specific provisions of the amendment has been identified thus far does not render legislation special.
>
> The test is, as we have seen, whether any health care facilities have been excluded that should have been included. Irrespective of whether any other hospital fits into the category, it is settled that a class of one is constitutionally permissible. Bayonne v. Palmer, 90 N.J.Super. 245, 284, 217 A.2d 141 (Ch.Div.1966), aff'd, 47 N.J. 520, 221 A.2d 741 (1966) ("The mere fact that a class will embrace but one entity which is distinct from all others, does not in itself mean that legislation affecting the one entity must be regarded as a special, private or local law"); Budd v. Hancock, 66 N.J.L. at 136, 48 A. 1023 ("If ... this act is special only in the sense that its object is single, the question of its special character in a legal sense does not arise").
>
> [86 N.J. at 448-49, 432 A.2d 36 (footnote omitted).]

See also Mahwah Tp. v. Bergen County Bd. of Taxation, 98 N.J. 268, 285 (1985). The real test is not who the classification includes, but whether it excludes some who should be included. See id., 98 N.J. at 292-94, Secaucus, 133 N.J. at 497-99.

In Secaucus, the city challenged a statute that originally exempted any municipality that maintained its own vocational education system from contributing to that portion of the county tax used to maintain the county's vocational school. 133 N.J. at 487-89. However, by amendment, the benefit was limited to municipalities in a county with a population of no more than 700,000, making Hudson County municipalities alone eligible, and further limited the benefit to municipalities whose vocational program had been in existence for at least twenty years – a longevity requirement that meant only Bayonne could qualify. Id.

The Court found "two possible interpretations of [the statute that] on their face reveal a legitimate legislative purpose." Id. at 495. One was "to address the problem of double contributions by municipalities that have their own vocational programs...."; the other "may be to promote the development of local, high quality vocational educational programs within densely-populated communities." Id. The Court found it "difficult to see" how the population-density and longevity requirements rationally served either purpose because the prospect of double contributions was faced by "[a]t least twenty municipalities within the state, and at least one other municipality within Hudson County ..." and because "if the goal [of the statute] is to encourage the development of high-quality vocational educational programs within densely-populated

municipalities, ... to exclude municipalities either in the most-populous counties, i.e., Essex and Bergen, or in less but densely-populated counties like Union and Middlesex, does not seem reasonable." Id. at 495-96. The Court found no rational relationship between the challenged longevity provision and the underlying purpose of the statue:

> [t]o accept the classifications contained in [the statute] as having a rational basis, one must imagine that the Legislature had some reasonable ground for encouraging the development of local vocational programs only in the most-densely-populated county in the state with a total population below 700,000, and that the Legislature had reasonable grounds for concluding that only those programs in existence for at least twenty years were of sufficient quality to be worthy of financial encouragement through tax relief.
>
> Those conclusions seem to us to stretch credulity beyond reasonable limits.
>
> [Id. at 498.]

By contrast, here, exemptions in the Act are not based on some arbitrary criteria, i.e., how many employees a particular employer has, or how long the employer has been in existence, but rather, the employer's inherent characteristics. The exempt businesses are in the tobacco, hospitality, or casino industry, industries which the Legislature reasonably believed would have been adversely affected by a complete smoking ban; or touch on issues of personal preference, i.e., whether to smoke in one's private home or on a public beach or golf course. Moreover, the exemptions clearly bear a rational relationship to the

legislative interest in minimizing economic disruption to businesses and workers from the smoking ban, and in minimizing the impact on the State.

A. Minimizing the impact of the smoking ban on businesses and workers in the state

The exceptions to the Act reasonably suggest the legislative objective of mitigating the risks associated with smoking, with the least disruption to businesses and workers. Other than casinos and casino simulcasting facilities as defined under the Act, other businesses exempt from its prohibitions are businesses who sell or test tobacco products, see N.J.S.A. 26:3D-59; and hotels, motels, or lodging establishments, which "may permit smoking in up to 20% of its guest rooms." N.J.S.A. 26:3D-60. Obviously, the smoking ban would have had an adverse economic impact on a cigar bar or cigar lounge and hotel or motel. The hotel/motel exception, which applies to New Jersey casinos, clearly is intended to prevent economic disruption, notwithstanding that some housekeeping employees, at any particular establishment, might prefer to work in non-smoking rooms.

As the "economic stability of casino operations is in the public interest", N.J.S.A. 5:12-1(b)(12), it was rational for the Legislature to consider potential economic disruptions to casinos and displacement of their workers. Atlantic City's beaches, boardwalks, casinos resorts and hotels, restaurants, concert venues, and other attractions generate revenue for local businesses. These

businesses employ thousands of housekeepers, bartenders, food servers, cooks, bellmen, doormen, valets, and other service jobs in the casinos and hospitality industry. Thousands of skilled construction trades workers also build, renovate, operate, and maintain casino buildings and facilities. In this regard, it would have been reasonable for the Legislature to consider research available at the time regarding the impact of smoking bans on various industries in different states. For example, the Legislature may have rationally believed that a smoking ban would have a positive economic impact on the restaurant industry and a negative impact on the gaming industry and tailored the narrow exemptions to the Act accordingly. The Legislature could have concluded, as a matter of public policy, that efforts to protect employees and others from secondhand smoke at casinos are best pursued through voluntary efforts on the part of individual casinos, a targeted municipal ordinance, see N.J.S.A. 26:3D-63, or negotiation between the casino employers and their employees' bargaining representatives. "The Legislature may thus limit its action upon a decision to proceed cautiously, step by step, or because of practical exigencies, including administrative convenience and expense." New Jersey Restaurant Assn. v. Holderman, 24 N.J. 295, 300 (1957).

B. Minimizing the impact of the smoking ban on the State

Atlantic City hosts over 27 million visitors a year, making it one of the most popular tourist destinations in the United States. In addition to non-gaming revenues, casino visitors also generate substantial monies which benefit all inhabitants of the State. The State assesses an annual eight percent gambling tax as against all of the casinos' gross revenues, N.J.S.A. 5:12-144, which money is allocated exclusively for the benefit of eligible senior citizens and disabled residents, N.J.S.A. 5:12-145. Casino revenues in New Jersey topped $5 billion in 2005; the $401.5 million tax revenue was dedicated to support programs for the aged and disabled. Consideration of fiscal impacts and cost benefit analysis is proper under rational basis review, and the Casino Exemption is rationally related to the legislative objective of minimizing the adverse economic impact a smoking ban would have on the State. See, e.g., Amiriantz v. New Jersey, 251 F. App'x 787, 789 (3d Cir. 2007) (affirming District Court's finding that economic considerations provide a rational basis for New Jersey's Casino Exemption from the smoking ban); Batte-Holmgren v. Comm'r of Pub. Health, 281 Conn. 277 (Conn. 2007) (equal protection clause was not violated by a law which banned smoking in restaurants and cafes but allowed smoking in casinos and private clubs); NYC C.L.A.S.H., Inc. v. City of New York, 315 F. Supp. 2d 462 (S.D.N.Y. 2004) (state law prohibiting smoking in privately-owned

premises that are open to the public is a valid exercise of state police powers over the health and welfare of its citizens); Coal. for Equal Rights, Inc. v. Bill Owens, State of Colorado, 517 F.3d 1195 (10th Cir. 2008) (in exempting airport smoking concessions from the smoking ban, the legislature rationally distinguished those concessions from the majority of other indoor facilities in the state that are open to the public); Justiana v. Niagra County Dept. of Health, 45 F. Supp. 2d 236, 242-243 (W.D.N.Y. 1999) (regulation prohibiting smoking in restaurants of a certain size, while allowing smoking in others, does not offend the Fourteenth Amendment); Coalition for Equal Rights, Inc. v. Owens, 458 F. Supp. 2d 1251, 1260-61 (D. Colo. 2006) (no equal protection violation where exemption of casinos from smoking ban based on concerns about loss of revenue to state and economic impact on small towns in which casinos located); Rossie v. Wisconsin, 395 N.W.2d 801 (Wis. Ct. App. 1986)(statute prohibiting smoking in [a]ny enclosed, indoor area of a state ... building, but allows smoking in bowling alleys, restaurants, and other areas does not violate the equal protection clause of the Fourteenth Amendment); City of Tucson v. Grezaffi, 23 P.3d 675 (Ariz. Ct. App. 2001) (ordinance prohibiting smoking in restaurants but allowing smoking in bars and bowling alleys did not offend equal protection guaranty).

As the trial court correctly held, Appellants failed to show the "means selected by the Legislature to achieve its purposes … are so irrelevant as to be irrational." In re C.V.S. Pharmacy Wayne, 116 N.J. at 498 (citation omitted); see Fitzgerald v. Racing Association of Central Iowa, 539 U.S. 103, 109 (2003) (a law "might predominantly serve one general objective . . . while containing subsidiary provisions that seek to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balances objectives but still serves the general objective when seen as a whole.")(quotation omitted). "[N]o legislation pursues its purposes at all costs." Rodriguez v. United States, 480 U.S. 522, 525-26 (1987). Balancing competing values in the "achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." Id. at 526.

As there are multiple rational bases for the 75% - 25% allocation, Appellants cannot meet their "burden of demonstrating clearly the constitutional violation." Secaucus, 133 N.J. at 509-10. Although reasonable people might disagree on how this thorny public policy question should be resolved, the Supreme Court has emphasized "the long established principle of deference to the will of the lawmakers whenever reasonable men might differ as to whether the means devised to meet the public need conform to the Constitution .... [and]

the equally-settled doctrine that the means are presumptively valid, and that reasonably conflicting doubts should be resolved in favor of validity." Roe v. Kervick, 42 N.J. 191, 229 (1964).

POINT TWO

The Trial Court Correctly Found that the Casino Exemption Does Not Violate Appellants' Right to Pursue Safety.

"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. (1947), Art. I, par. 1. Appellants attempted to use this language to create an affirmative obligation on the State to provide certain necessities of life, including safety. (See Pb17 - 19). However, this theory is not supported by the history of this constitutional provision, its language, or the prior decisions of the Supreme Court of New Jersey. "A prohibition against the government interfering with a citizen's "acquiring, possessing, and protecting property," secured by Article I, paragraph 1, of the New Jersey Constitution, does not imply any governmental obligation to provide [safety] or other necessities". Franklin v. New Jersey Dept. of Human Servs., 225 N.J. Super. 504, 524 (App. Div. 1988); see Right to Choose v. Byrne,

91 N.J. 287, 304 (1982) (rejecting claim that the New Jersey Constitution "guarantees a fundamental right to health").

In Franklin, 225 N.J.Super. at 507-11, appellants were recipients of emergency shelter assistance from the State, and they sought to invalidate an administrative rule that limited such assistance to a maximum duration of five months. Among other things, the appellants contended that the time limitation on emergency shelter assistance violated Article I, paragraphs 1 and 2, of the New Jersey Constitution. Id. at 522. The court rejected the argument, finding that the provisions created no affirmative obligation on state government to provide necessities of life such as shelter. Ibid. The court observed that "the common consensus that government is obligated to address the problems of homelessness does not mean that this obligation is enshrined in the Constitution." Id. at 529.

While the New Jersey courts have never ruled on whether there is a constitutional right to a smoke-free environment, generally speaking, there is no right to a healthful environment, and other courts that have considered the issue before this Court have found that there is no constitutional right to be free from secondhand smoke. See Gasper v. Louisiana Stadium and Exposition District, 418 F. Supp. 716, 721-22 (E.D. La. 1976); Kensell v. State of Okl., 716 F.2d 1350 (10th Cir. 1983); Caldwell v. Quinlan, 729 F. Supp. 4, 7 (D.D.C. 1990);

Fed. Emps. for Nonsmokers' Rights v. United States, 446 F. Supp. 181, 184-85 (D.D.C. 1978).

In Gasper, plaintiff nonsmokers sought to enjoin the defendant from continuing to allow tobacco-smoking in the Louisiana Superdome, claiming that the defendant's "permissive attitude" toward smoking violated their constitutional right "to breathe smoke-free air while in a State building." Gasper, 418 F.Supp. at 717. Noting that "the Constitution does not provide judicial remedies for every social and economic ill[,]" Lindsey v. Normet, 405 U.S. 56 (1972), the Gasper Court rejected plaintiffs' arguments:

> [I]f this Court were to recognize that the Fifth and Fourteenth Amendments provide the judicial means to prohibit smoking, it would be creating a legal avenue, heretofore unavailable, through which an individual could attempt to regulate the social habits of his neighbor. This Court is not prepared to accept the proposition that life-tenured members of the federal judiciary should engage in such basic adjustments of individual behavior and liberties.
>
> ***
>
> For the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of, and to engage in that type of adjustment of individual liberties better left to the people acting through legislative processes.
>
> [Id., 418 F.Supp. at 721-22.]

Absent definitive differences in the text of the state and federal provisions, or common law history that dictates different treatment, courts should reject the

unprincipled creation of state constitutional rights that exceed their federal counterparts. See King v. S. Jersey Nat'l Bank, 66 N.J. 161, 178(1974); Doe v. Poritz, 142 N.J. at 119-20 (1995) (although practice "followed by a large number of states is not conclusive[,] . . . it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (internal quotation marks omitted)); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (the United States Constitution does "not [act] as a guarantee of certain minimal levels of safety and security."); Collins v. City of Harker Heights, 503 U.S. 115, 130 (1992) (the Constitution "does not impose an independent [] obligation upon [government] to provide certain minimal levels of safety and security in the workplace."). Appellants provide no authority for the proposition that the claimed right to be free from secondhand smoke "has historical roots in the traditions or collective conscience of the people of New Jersey to give it the ranking of a fundamental right", Lewis v. Harris, 118 N.J. 415, 432 (2006). This is because those roots are nonexistent.

While an employer may be responsible for its employees' working conditions, including safety in certain circumstances, this does not mean that any such obligation is enshrined in the Constitution. Nor can it compel the State to take any affirmative steps to make a worker's environment 100% free from

any purported health and safety issues. In any event, here, Appellants have not sued their employers, they have sued the State. As the trial court correctly noted, the "state-created danger" doctrine does not apply here. (See Pa25). New Jersey courts follow the Third Circuit's application of the "state-created danger doctrine." Gonzales v. City of Camden, 357 N.J. Super. 339, 347 (App. Div. 2003). Under that approach, "[a] 'state-created danger' may exist where a state actor either creates a harmful situation or increases a citizen's exposure or vulnerability to an already-present danger." Haberle v. Troxell, 885 F.3d 171, 175 n.5 (3d Cir. 2018). The test requires that the state action shocks the conscience as analyzed under a deliberate indifference standard. Gormley v. Wood-El, 218 N.J. 72, 102 (2014). The standard is "higher than the negligence, or even gross negligence, standard under which public officials and employees may be found liable in Tort Claims Act cases." Id. at 112. Notably, Appellants "do[] not enjoy a constitutional right to work in a casino." Greenberg v. Kimmelman, 99 N.J. 552, 576 (1985). Regardless, they are "free to pursue [their] vocation in Atlantic City or elsewhere with other employers." Id. At most, Appellants' state-created danger claim is duplicative of their other claims and fails to meet the requisite enhanced deliberate indifference standard.

While no one is minimizing Appellants' safety and health concerns, such matters, as they have been consistently considered since the Act was passed, are

appropriately left to the legislative or administrative process, where a proper balancing of interests can be made in a forum where such policy decisions can appropriately be made; as well as to the employees' duly designated collective bargaining representatives to negotiate health and safety policies that best address their members' concerns, as the Unions have done and continue to do herein. This is consistent with how Courts have analyzed claims of deprivation of substantive due process. In those situations, courts "must resist the temptation of seeing in the majesty of that word ["liberty"] only a mirror image of our own strongly felt opinions and beliefs." Lewis, 188 N.J. at 441. Courts "must be careful not to impose [] personal value system[s] on eight-and-one-half million people, thus bypassing the democratic process as the primary means of effecting social change in [New Jersey]." Id.; see Kensell, 716 F.2d at 1351 (to hold that the Constitution empowers the courts to regulate second-hand smoke "would support the most extreme expectations of the critics who fear the federal judiciary as a super-legislature promulgating social change under the guise of securing constitutional rights.") (citations omitted).

Appellants by their submissions are directly asking this Court to act as a super-legislature, second guessing the policy decisions of the duly elected legislature in enacting the law and counterbalancing the various interests of

workers, employers, the public, and the State. Such a request is inconsistent with the law and should be rejected.

POINT THREE

The Trial Court Correctly Found that Appellants Failed to State an Equal Protection Claim.

Like the Fourteenth Amendment of the United States Constitution, Article I, Paragraph 1 of the New Jersey Constitution protects "against the unequal treatment of those who should be treated alike." Greenberg, 99 N.J. at 568. "In analyzing equal protection challenges, New Jersey courts have rejected the rigid, multi-tiered approach followed by the federal courts, instead relying on a flexible balancing test." Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super., 442, 452 (App. Div. 1997) (quoting Barone v. Dep't of Human Services, 107 N.J. 355, 368 (1987)). The critical issue is "whether there is an appropriate governmental interest suitably furthered by the differential treatment" involved. Borough of Collingswood v. Ringgold, 66 N.J. 350, 370 (1975) (citation omitted). Three factors considered under this balancing test are "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg, 99 N.J. at 567. There must be "'a real and substantial relationship between the classification and the governmental purpose which it purportedly serves.'" Barone, 107 N.J. at 368

(quoting Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 80 N.J. 6, 43 (1976)).

A. The Act Does Not Implicate any Suspect Classification or Fundamental Right.

Where a statute is facially neutral, as is the case here, even if it has a disparate impact on a class of individuals, an equal protection challenge based on the New Jersey Constitution will succeed only if the Legislature "intended to discriminate" against the class. Greenberg, 99 N.J. at 580. In Greenberg, the Court found that the Legislature did not intend to discriminate against women when enacting a casino ethics amendment that prohibited spouses of judges from working in the casino industry. Id. at 579-80. The Greenberg Court relied in part upon Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 257 (1979), in which the United States Supreme Court held that a veteran preference statute comported with the Equal Protection Clause despite its disparate impact on women as there was not showing of discriminatory legislative purpose. Id. at 274-54.

New Jersey courts will examine a classification closely if it discriminates on an invidious basis – that is, if the class is "suspect." Robinson v. Cahill, 62 N.J. 473 (1973). New Jersey courts "have not created suspect classifications where the federal courts have refused to do so[.]" Rutgers Council of AAUP Chapters, 298 N.J. Super. at 453. As casino workers, Appellants' members do

not fall within a suspect classification, such as gender, race, religion, or national origin. Nor, as discussed above, is there a fundamental right to safety as articulated by Appellants.

B. As the Casino Exemption bears a Rational Relationship to a Legitimate State Objective, it must be Upheld.

It follows that if Appellants "do[] not enjoy a constitutional right to work in a casino[,]" Greenberg, 99 N.J. at 576, then they do not enjoy a constitutional right to work in a casino under conditions of their individual choosing. Accordingly, analysis of their equal protection claim turns on whether "the means selected by the Legislature 'bear a real and substantial relationship to a permissible legislative purpose.'" Caviglia v. Royal Tours of Am., 178 N.J. 460, 473 (2004) (citations omitted). Such analysis "[b]egin[s] with the fundamental principle that a presumption of validity attaches to every legislative enactment." Board of Educ. v. Caffiero, 86 N.J. 308, 318 (1981); Fried v. Kervick, 34 N.J. 68, 74 (1961). That presumption is "particularly daunting when a statute attempts to protect the public health, safety, or welfare." In re C.V.S. Pharmacy Wayne, 116 N.J. 490, 497 (1989). In short, public health and safety legislation has been "consistently sustained if it 'is not arbitrary, capricious, or unreasonable, and the means selected bear a rational relationship to the legislative objective.'" Id. (quoting Brown v. City of Newark, 113 N.J. 565, 572 (1989); see also Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88

(1955) (statute that does not implicate fundamental constitutional right or liberty interest will be upheld if it bears rational relationship to legitimate legislative purpose and is neither arbitrary nor discriminatory).

As the legislature is not required to articulate its reasons for enacting a statute, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (citations omitted); see Nordlinger v. Hahn, 505 U.S. 1, 15 (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). "Legislative bodies are presumed to act on the basis of adequate factual support and, absent a sufficient showing to the contrary, it will be assumed that their enactments rest upon some rational basis within their knowledge and experience." Hutton Park Gardens v. Town Council of West Orange, 68 N.J. 543, 564 - 65 (1975) (citing Burton v. Sills, 53 N.J. 86, 95 (1968)). This presumption of validity "can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public

interest." Hutton Park Gardens, 68 N.J. at 565 (citing Reingold v. Harper, 6 N.J. 182, 196 (1951)) (citation omitted).

Moreover, "[t]he judiciary will not evaluate the weight of the evidence for and against the enactment nor review the wisdom of any determination of policy which the legislative body might have made." Ibid.; see Bd. of Educ. Of Piscataway Twp., 86 N.J. at 318 ("If the statute does not violate the Constitution but is merely unwise or based on bad policy, then ... it is for the Legislature rather than this Court to deliver a finishing blow to it.") (citations omitted); Beach Communications, Inc., 508 U.S. at 315 (a statute "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data[]"); Price v. Cohen, 715 F.2d 87, 95 (3d Cir. 1983) (the court "may not compel the state to verify its logical assumptions with statistical evidence"). The means chosen by the Legislature need not be precise, or even the best way to achieve the state objective, Williamson, 348 U.S. at 487-88; the question is simply whether the statute is rationally related to the public health, safety, or welfare. Brown, 113 N.J. at 571. As long as there is a conceivable basis for finding a rational relationship, the law will be upheld. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

That the Legislature recognized the health risks of smoking but chose not to ban smoking in all public places does not mean that the law denies equal

protection. Equal protection "does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." Dandridge v. Williams, 397 U.S. 471, 486-87 (1970). "[E]vils in the same field may be of different dimensions and proportions, and the reform may therefore take one step at a time, attacking the evil where it seems most acute to the legislative mind." Williamson, 348 U.S. at 489. A legislature "may select one phase of one field and apply a remedy there, neglecting the others." Id. (citation omitted); see Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.").

As discussed above, courts that have considered equal protection challenges based on exemptions in a smoking ban have concluded that economic considerations were sufficient to satisfy rational basis review. See, e.g., Amiriantz, 251 F. App'x 787. Appellants, as "those attacking the . . . [Casino Exemption] have the burden 'to negative every conceivable basis which might support it.'" Beach Communications, Inc., 508 U.S. at 307. Appellants have wholly failed to meet their burden of proof and as such their equal protection claim fails as well.

POINT FOUR

The Trial Court Correctly Found that Appellants Fail to Show they are Entitled to Injunctive Relief.

Finally, Appellants contend that they are entitled to declaratory and injunctive relief effectively banning smoking in all Atlantic City casinos, based on these purported constitutional rights. (Pb31-34). Citing the standards "regarding Orders to Show Cause and Preliminary Injunctions," Appellants, (Pb31), argue that there is a "significant probability" of ultimate success on the merits warranting injunctive relief, (Pb33).

To the extent that these arguments rehash Appellants' requests for emergent relief, all courts have already rejected requests for temporary restraints and/or accelerated treatment. In any event, in the absence of a constitutional violation, any relief, declaratory or otherwise, is unwarranted. Accordingly, the Court should deny Appellants' requests. Even if the Court is inclined to entertain Appellants' application for injunctive relief, the application fails on the law.

"[T]emporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe v. De Gioia, 90 N.J. 126, 133 (1982). As noted by the trial court, (Pa24 - 25), Appellants cannot show that the underlying law is well-settled – there is simply no support in the text of the New Jersey Constitution or New Jersey's history and traditions for the proposition that freedom from secondhand smoke is a fundamental right. See Reno v. Flores, 507

U.S. 292, 303 ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it") (quotations omitted). As discussed above, consideration of fiscal impacts and cost benefit analysis is proper under rational basis review. Accordingly, Appellants fail to demonstrate the likelihood of success on the merits by clear and convincing evidence. See Dolan v. DeCapua, 16 N.J. 599, 614 (1954); Subcarrier Communications, Inc. v. Day, 299 N.J. Super 634, 639 (App. Div. 1997) (citations omitted).

Finally, the purpose of a preliminary injunction "is to maintain the parties in substantially the same condition 'when the final decree is entered as they were when the litigation began.'" Crowe, 90 N.J. at 134 (citation omitted). Here, Appellants have asked and continue to ask the Courts to do the opposite – summarily dictate terms and conditions of employment, regardless of policy implications and the potential impact on all affected casino workers, including the Unions' members. As the duly designated bargaining representatives for the overwhelming majority of all potentially affected casino workers, the Unions are tasked with protecting workers' rights, including advancing and responding to their economic, health, and safety concerns. In balancing those interests, the Unions are quite rightly concerned about potential disruptions to casino employers and resulting job losses.

Granting Appellants' requested relief would foreclose the possibility of any tailored, collaborative decision-making regarding each bargaining unit's specific interests and areas of expertise, possible options to address those interests, and the efficacy and acceptability of such options to the affected casino workers. It is respectfully submitted that this Court should decline Appellants' free-ranging invitation to act as a super-legislature promulgating social change. That is the province of our elected representatives.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment entered below.

Respectfully submitted,

Dated: November 14, 2024

By: /s/ Seth Ptasiewicz

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Re: *UAW et al. v. Murphy et al.*
Appellate Division Docket No. A-000057-24

Honorable Judges of the Appellate Division:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of amicus curiae the American Civil Liberties Union of New Jersey ("ACLU-NJ") in the above-captioned matter.

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PRELIMINARY STATEMENT

This appeal raises an issue of immense public importance: the preservation and proper interpretation of New Jersey's 1947 Constitution. Specifically, at stake is the state constitutional guarantee of equal protection under Article 1, Paragraph 1, of the New Jersey Constitution, which New Jersey courts have long emphasized is neither derivative of, nor cabined, by federal equal protection doctrine. Despite the clear state constitutional doctrine, the trial court wrongly dismissed the Complaint based upon federal equal protection standards. Proposed amicus ACLU-NJ writes to explain how proper application of New Jersey's equal protection doctrine mandated denial of the Motion to Dismiss, and the importance of applying the State's distinct and well-settled constitutional standards.

Over the past 180 years, the New Jersey Supreme Court has been clear: our state equal protection doctrine is both more flexible and more expansive than parallel federal law. That difference is outcome-determinative of this appeal. First, contrary to the trial court's reasoning, whether the right denied to the challengers through unequal treatment is deemed "fundamental" does not drive the balancing test used for state equal protection analysis. Rather, New Jersey rejects rigid tiers of scrutiny in favor of a more functional approach to ensuring equal treatment with respect to important individual interests. Thus,

when analyzing whether government unconstitutionally classifies, courts are not limited to assessing only those constitutional rights deemed fundamental and should also look to statutory and common law as sources of evolving state rights and interests. Here, for example, the trial court should have considered evolving state norms regarding workplace safety when assessing whether the State may constitutionally deny these rights to a subset of workers. Indeed, the trial court erred by failing to treat the equal protection violation in this case as a distinct constitutional claim. The Plaintiffs' right to equal protection does not hinge upon whether the Court separately vindicates a constitutional right to "obtaining safety" also enshrined in our State Constitution.

Finally, the Court must reject the lower court's approach to "rational basis" review, echoed in the State's brief. This approach impermissibly imported federal standards in place of settled state constitutional analysis. Failing to rectify this error would impermissibly accord New Jerseyans a lower level of protection than required by the State Constitution, in contravention of decades of state constitutional precedent.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies on the procedural history and statement of facts contained in Appellants' Appellate Division brief.

ARGUMENT

The court below erred in granting the Motions to Dismiss filed by Appellees and Intervenors. Amicus supports Appellants' position on all three claims in the Complaint, but this brief focuses solely on the Equal Protection analysis.

I. The New Jersey Constitution Created Affirmative Rights that are Often More Expansive than their Federal Counterparts.

New Jersey's Constitution is more than a repository of negative restraints upon the government; it is source of affirmative rights and liberties that courts must effectuate to the fullest. When New Jersey's framers convened to redraft the State Constitution in 1844, they made this intent absolutely clear by protecting individual rights and liberties in the very first clause: "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."[1] *N.J. Const. of 1844*, art. I, cl. 1; *see* Robert F. Williams & Ronald K. Chen, *New Jersey State Constitution* 15 (3d ed. 2022) (noting placement of the declaration of rights at the beginning of the Constitution "is intended to announce that the protection of rights is the first

[1] This clause was subsequently amended to clarify it applies to all "persons," not only "men." Williams & Chen at 52.

task of government, indeed, its raison d'être") (quoting Daniel Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 Publius: The J. Federalism 11, 15 (1982)). It is now well-settled that the "expansive language" of Article 1, Clause 1 gives rise to a "fundamental guarantee" of Equal Protection. *Lewis v. Harris*, 188 N.J. 415, 442 (2006); *see also* Williams & Chen, *supra*, at 59-63.

New Jersey's 1844 Constitution contained a declaration of rights, which, similar to those of Virginia and Massachusetts, created affirmative rights that are not limited by the scope of the federal Bill of Rights. Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 Tex. L. Rev. 1195, 1204 (1985). New Jersey jurists have long recognized New Jersey's Constitution as "a source of fundamental rights independent of the United States Constitution." *State v. Melvin*, 248 N.J. 321, 347 (2021). New Jersey's "history and traditions," among other factors, provide a basis for "the independent application of its constitution." *State v. Hunt*, 91 N.J. 338, 366 (1982) (Handler, J., concurring).

Individual rights created by the New Jersey Constitution are often more protective than their federal counterparts even when the underlying constitutional language is "identical" or "analogous." *State v. Novembrino*, 105 N.J. 95, 145 (1987) (citing *State v. Williams*, 93 N.J. 39 (1983); *Right to*

Choose v. Byrne, 91 N.J. 287, 300 (1982); *Hunt*, 91 N.J. at 345; *State v. Alston*, 88 N.J. 211 (1981); *State v. Schmid*, 84 N.J. 535 (1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982); *State v. Johnson*, 68 N.J. 349 (1975)). Properly construed, the "Federal Constitution provides the floor for constitutional protections, and our own Constitution affords greater protection for individual rights than its federal counterpart." *Melvin*, 248 N.J. at 347; *see Right to Choose*, 91 N.J. at 300 ("[T]his Court has recognized that our State Constitution may provide greater protection than the federal Constitution.").

Accordingly, when the New Jersey Supreme Court sets out to define the contours of individual rights, it regularly finds that the State Constitution affords litigants greater protection than they would receive under the U.S. Constitution. For example, the Court has recognized state constitutional protections to be more robust than parallel federal protections with respect to unreasonable searches and seizures. *See State v. Pierce*, 136 N.J. 184, 209-10 (1994) (collecting cases and declining to apply federal rule permitting "vehicular searches indiscriminately based only on contemporaneous arrests for motor-vehicle violations"); *Novembrino*, 105 N.J. at 146 (holding that New Jersey Constitution, unlike the United States Constitution, permits no "good faith" exception to the exclusionary rule). It has reached a similar conclusion

with regard to cruel and unusual punishment, *State v. Comer*, 249 N.J. 359, 383-84 (2022) (holding state right to be more protective despite use of the same legal standard as federal right) (citing *State v. Zuber*, 229 N.J. 422, 438 (2017)), due process and fundamental fairness, *Melvin*, 248 N.J. at 346-52 (holding that sentencing may not be based on acquitted conduct), and freedom of speech, *Usachenok v. Dep't of the Treasury*, 257 N.J. 184, 195-96 (2024) (explaining that "[t]he State Constitution provides broader protection for free expression than the Federal Constitution does" and collecting citations).

New Jersey's Equal Protection guarantee similarly provides protections significantly broader than those of its federal counterpart. *See, e.g.*, *Right to Choose*, 91 N.J. at 300, 303; *see also State v. Gilmore*, 103 N.J. 508, 522-23 (1986) (construing our "state constitution as providing greater protection to our citizens' individual rights than accorded them under the federal constitution" and relying on state Due Process and Equal Protection guarantees to invalidate peremptory challenge of all Black potential jurors). In fact, the New Jersey Supreme Court has found violations of our state Equal Protection guarantee even where the U.S. Supreme Court found no federal equal protection violation for the equivalent government action. In *Right to Choose v. Byrne*, the Court rejected the U.S. Supreme Court's reasoning in *Harris v. McRae*, 448 U.S. 297 (1980), and held that terminating funding for medically

necessary abortions violated state Equal Protection guarantee. 91 N.J. at 292-93. And in *Planned Parenthood of Central New Jersey v. Farmer*, the New Jersey Supreme Court struck down a law requiring parental notification for minors to access abortions, even though the U.S. Supreme Court had upheld similar laws based upon their judicial bypass provisions. 165 N.J. 609, 643 (2000).

This settled New Jersey law makes clear that New Jersey's Constitution is neither derivative of, nor cabined, by federal equal protection doctrine. Courts must thus effectuate the guarantees of state Equal Protection independently of the Federal Constitution, which as explained below, the trial court failed to do.

II. To Properly Assess State Equal Protection Guarantees, the Court Must Weigh the Nature of the Burdened Right Against the Government Interest Asserted by the State, Regardless of Whether the Right is Fundamental.

A. The First Prong of the Balancing Test Requires Consideration of All Relevant Rights, Not Only Fundamental Rights.

State Equal Protection claims require applying a functional balancing test, rather than the tiers of scrutiny analysis used for federal Equal Protection claims. *Planned Parenthood of Cent. N.J.*, 165 N.J. at 630 (2000) (citing *Right to Choose*, 91 N.J. at 305-06). New Jersey's balancing test, in contrast to the federal analysis, does not require a finding of a fundamental right or suspect classification in order to conduct a meaningful analysis of the stated justification for a government action. Indeed, the New Jersey Supreme Court has rejected the "rigid, three-tiered federal equal protection methodology" in favor of a flexible, multi-factored standard that allows for consideration of our state's evolving constitutional norms. *Lewis*, 188 N.J. at 443 n.13 (applying the state's flexible balancing test to find that denying the benefits of marriage to same-sex couples violated state Equal Protection even without finding a fundamental right to same-sex marriage).

Under New Jersey's balancing test, a court must consider "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg v. Kimmelman*, 99

N.J. 552, 567 (1985). A court first weighs the nature of the affected right against the importance of the governmental restriction at issue. *See Lewis*, 188 N.J. at 443 (explaining that courts examine each claim "on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction"). "[T]he more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right." *Id.* (quoting *George Harms Constr. Co. v. N.J. Tpk. Auth.*, 137 N.J. 8, 29 (1994)). A court must then ask whether "the public need justifies statutorily limiting the exercise of a claimed right." *Id.* at 444. In analyzing the nature of the rights at stake, the Court has "not hesitated, in an appropriate case, to read the broad language of Article I, paragraph 1, to provide greater rights than its federal counterpart." *Planned Parenthood of Cent. N.J.*, 165 N.J. at 632.

Regardless of whether a right is deemed fundamental in nature, or whether the class of people burdened by the state action is deemed "suspect," New Jersey courts must fully analyze the importance and personal nature of the right as part of the first factor in the balancing test. Indeed, the New Jersey Supreme Court has long rejected the idea of requiring a fundamental right or suspect class to access a robust review of state Equal Protection claims. Williams & Chen, *supra*, at 58 (explaining that "a right need not be labeled

'fundamental' or a classification deemed 'suspect' or 'protected' to trigger searching judicial review"). As the Court first explained in *Robinson v. Cahill*, it has "not found helpful the concept of a 'fundamental' right" and "[n]o one has successfully defined the term for this purpose." 62 N.J. 473, 491, *on reargument*, 63 N.J. 196 (1973), *and on reh'g*, 69 N.J. 133 (1975). This is because "[m]echanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert a court from the meritorious issue or delay consideration of it." *Id.* at 491-92; *see also Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp.*, 80 N.J. 6, 42-43 (1976).

These bedrock principles are evident in *Lewis v. Harris*, the 2006 decision from the New Jersey Supreme Court that found no fundamental right to same-sex marriage enshrined in the New Jersey Constitution but nevertheless declared the State's exclusion of same-sex couples from the equivalent benefits of marriage to violate the State Equal Protection guarantees. 188 N.J. at 423. Even without deeming access to same-sex marriage fundamental, the Court recognized the importance and personal nature of this right. Citing the evolution of societal norms demanding equal treatment, benefits, and dignity for same-sex couples, the Court deemed the right at issue to be weighty and ultimately held that a statutory scheme that

made the benefits of marriage available only to opposite-sex couples violated state Equal Protection guarantees. *Id.* at 462-63. To define the rights at issue, the Court looked not only to judicial decisions but also to state statutes. *Id.* at 444 (citing N.J.S.A. 10:5-4), 445-46 (discussing amendment to the Law Against Discrimination), 448 ("Aside from federal decisions such as *Romer* and *Lawrence,* this State's decisional law and sweeping legislative enactments, which protect gays and lesbians from sexual orientation discrimination in all its virulent forms, provide committed same-sex couples with a strong interest in equality of treatment relative to comparable heterosexual couples.").

In the instant matter, the court below ignored this precedent and wholly deviated from this accepted methodology. It erroneously restricted its Equal Protection analysis to a right it deemed potentially fundamental. Instead, for the first prong of the balancing test, it should have considered all relevant sources of rights and societal norms. In its de novo review of the trial court's dismissal of the action, *see Wreden v. Twp. of Lafayette*, 436 N.J. Super. 117, 124 (App. Div. 2014), this Court must consider these sources.

B. The Court Below Should Have Considered Societal Norms Requiring a Safe Workplace.

Separate and apart from the contours of the state constitutional right to safety, New Jersey's public policy of ensuring a safe workplace for workers, as

evinced in its statutory law and construed by its courts, shows that New Jersey workers have more than a "strong interest" in safe working conditions, which the court should have considered in the equal protection balancing test. *Lewis*, 188 N.J. at 448. They have the right "to work in a safe environment," including a workplace free from secondhand smoke. *Shimp v. N.J. Bell Tel. Co.*, 145 N.J. Super. 516, 521 (Ch. Div. 1976). *See also Cerracchio v. Alden Leeds, Inc.*, 223 N.J. Super. 435, 445 (App. Div. 1988) (recognizing "a strong public policy in New Jersey favoring safety in the workplace"). To that end, New Jersey statutes require employers to provide a safe workplace. *See, e.g.*, N.J.S.A. 34:6A-3.[2] At their core, *Cerracchio*, *Shimp*, and various state statutes evince a common understanding – one that might reasonably be shared by any New Jerseyan heading in for a day of work – that an employee has the right to expect a safe workplace.[3]

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[2] "Every employer shall furnish a place of employment which shall be reasonably safe and healthful for employees. Every employer shall install, maintain and use such employee protective devices and safeguards including methods of sanitation and hygiene and where a substantial risk of physical injury is inherent in the nature of a specific work operation shall also with respect to such work operation establish and enforce such work methods, as are reasonably necessary to protect the life, health and safety of employees, with due regard for the nature of the work required."

[3] Appellants advance this public policy argument in their appellate brief in the context of the constitutional right to safety, but it applies with full force to the state Equal Protection claim, which Appellants have always argued as broader than its federal counterpart.

III. The Court Below Erred by Finding No Interference with the Right to Pursue Safety, and By Treating this Finding as Dispositive of the Equal Protection Claim.

The decision below also erred by cutting short the Equal Protection balancing analysis based upon the erroneous conclusion that exempting casino floors from the New Jersey Smoke-Free Air Act does not interfere with casino workers' right to pursue safety. This conclusion rested on the erroneous theory that all but a few workplaces in New Jersey have smoking bans, and that the Act does not restrict casino workers from pursuing work elsewhere. Tr. Ct. Order at 18.[4] This reasoning raises serious concerns. The unsupported assumption that workers can reasonably seek new jobs in workplaces covered by the state's smoking ban creates inferences in favor of the proponent of the motion to dismiss, inverting the rule that on a *Rule* 4:6–2(e) motion to dismiss, a court must afford plaintiffs "every reasonable inference of fact." *Major v. Maguire*, 224 N.J. 1, 26 (2016) (holding that a reviewing court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.") (citation omitted).

[4] Tr. Ct. Order refers to the Order signed by Hon. Patrick J. Bartels, P.J. Ch., on August 30, 2024.

Constitutional claims focusing on workplace conditions should not hinge on a trial court's speculation that the worker can find a job elsewhere.

Moreover, in denying the Equal Protection claim on the faulty theory above, the lower court echoed an approach already rejected by the New Jersey Supreme Court in *Planned Parenthood of Central New Jersey v. Farmer*. There, Justice O'Hern argued in dissent that New Jersey's parental notification law for abortions should be subject to rational basis review because it did not burden minors' rights, since the law included an option to seek a court order to bypass parental notification. 165 N.J. at 651-52. The majority decisively rejected this rational basis approach in favor of the more flexible balancing test described above. *Id.* at 631. The Court noted that their dissenting colleague erroneously applied rational basis review

> because he believes the "essence of the right to choose" is not "substantially interfered with." In our view, Justice O'Hern improperly uses the degree of interference with the right as the basis for choosing the level of scrutiny to apply. Under New Jersey law, we apply the *Right to Choose* balancing test, wherein we weigh the degree of interference against the state's asserted need for the interference. Indeed, where an important personal right is affected by government action, our Court often requires the public authority to demonstrate a greater public need than is traditionally required in construing the federal constitution.
>
> [*Id.* at 631 n.6 (citations and alterations omitted).]

Similarly, here the lower court misapplied New Jersey's equal protection balancing test by misconstruing the nature of the infringement on Plaintiffs' right to safety while not requiring the State to "demonstrate a greater public need than is traditionally required in construing the federal constitution." *Id.*

IV. The Court Should Reject the State's Baseless Rational Basis Analysis, Which Repeats and Expands the Errors Below.

Just like the flawed decision below, the State's argument that the law is subject to rational basis review ignores New Jersey's settled equal protection doctrine. *See Lewis*, 188 N.J. at 443 (describing New Jersey's functional analysis that rejects tiers of scrutiny). Indeed, the State's reliance on the unpublished federal court decision *Amiriantz v. New Jersey*, 251 F. App'x 787, 788 (3d Cir. 2007)[5], exposes its misguided attempt to import federal Equal Protection standards to this New Jersey case arising under the New Jersey Constitution. While in a federal tiers of scrutiny analysis, courts must identify a suspect class or fundamental right in order to apply a more searching review than "rational basis," that is not the case in New Jersey. *See Lewis*, 188 N.J. at 443.

[5] *Amiriantz v. New Jersey*, an unpublished case, is included in an Appendix to this brief at Aa1. *R.* 1:36-3.

Critically, even where it has declined to deem a right "fundamental,"[6] New Jersey's analysis does not employ the type of rational basis review employed in federal equal protection cases. In *Lewis*, the Court explained that in asking whether a challenged government action is "arbitrary," it must ask whether "the public need justifies statutorily limiting the exercise of a claimed right." 188 N.J. at 444. And in *Caviglia v. Royal Tours of Am.*, the court explained, "We require that the means selected by the Legislature 'bear a real

[6] Intervenors UNITE HERE and others make an even more sweeping claim by distorting inapposite language in *Greenberg v. Kimmelman*, 99 N.J. 552, 580 (1985), to erroneously argue that an Equal Protection claim must fail unless the challengers shows that the Legislature intended to invidiously discriminate against a protected class. But the cited passage in *Greenberg* was referring to the showing of discriminatory intent that courts have required when facially neutral laws that treat similarly situated groups equally are alleged to have a discriminatory impact upon a suspect or quasi-suspect class. *Id.* (citing, *e.g.*, *Massachusetts v. Feeney*, 442 U.S. 256, 274-75 (1979); *Washington v. Davis*, 426 U.S. 229, 241-42 (1976)). That body of law has no bearing upon the law at issue here. This case involves a challenge to a law that facially classifies; it singles out and excludes one group of workers from the protection of the law while extending those rights to other similarly situated workers. The New Jersey Supreme Court has regularly applied its equal protection balancing test in circumstances like these, even when the law does not burden a fundamental right and there is no allegation of invidious discrimination against a protected class. *See Caviglia v. Royal Tours of Am.*, 178 N.J. 460, 479 (2004) ("Under the Federal Constitution, if a statute does not burden a 'fundamental right' or differentiate between a 'suspect' or 'semi-suspect' class, it is evaluated under the less stringent rational basis review. . . . As we previously stated, under our State Constitution, we apply a flexible balancing test that weighs the nature of the right, the extent of the governmental restriction on the right, and whether the restriction is in the public interest.") (citations omitted).

and substantial relationship to a permissible legislative purpose.'" 178 N.J. 460, 473 (2004).

While our courts have sometimes used the term "rational basis" – as the Court did in *Lewis* – the balancing test functions differently than federal rational basis review: when important interest are at stake, courts do not defer to the State even when a suspect class or fundamental right is not at issue. In *Lewis*, even though the Court did not question the factual accuracy of the State's proffered rationale – that the discriminatory law being challenged kept New Jersey's laws in conformity with those of most other states – the Court nevertheless rejected this rationale as insufficient to override the personal rights the law burdened. 188 N.J. at 456-57 (reasoning that the "majority approach [of other states] is incompatible with the unique interests, values, customs, and concerns of our people").

Right to Choose v. Byrne further illustrates how analysis of equal protection under the New Jersey Constitution contrasts with federal rational basis review. In *Harris v. McRae*, the U.S. Supreme Court applied rational basis review to hold that the Hyde Amendment, which severely limited use of federal Medicaid funds for abortion care, was "rationally related to the legitimate governmental objective of protecting potential life" since it would "encourage[e] childbirth except in the most urgent circumstances." 448 U.S.

297, 325 (1980). The New Jersey Supreme Court rejected this reasoning for purposes of the state constitutional analysis, reasoning that "the funding restriction gives priority to potential life at the expense of maternal health." *Right to Choose*, 91 N.J. at 306.

While a few New Jersey Supreme Court cases have referenced federal standards, since the 1980s, New Jersey courts have repeatedly disavowed applying the federal tiers of scrutiny to state Equal Protection claims. *See, e.g.*, *Right to Choose*, 91 N.J. at 308-09 ("Although [it has] employed the conventional two-tiered equal protection analysis" in the past, the Court has since "rejected a rigid equal protection test based either on mere rationality or strict scrutiny" in favor of "a balancing test [when] analyzing Equal Protection claims under the state Constitution."). For these reasons, New Jersey does not apply the equivalent of federal rational basis review. Instead, the Court must consider all factors in the balancing test together, and determine whether the public need for the law in question justifies the restriction of Appellants' rights to safety in the workplace.

CONCLUSION

Considering the arguments above along with those set forth by the Appellants, the Court should reverse the dismissal of the Equal Protection claim. The Court must weigh the right to workplace safety against the exceptionally heavy burden of increased risk of death caused by second-hand smoke exposure, along with the lack of any legitimate justification for this exception.[7] Affirming the decision below despite the errors would contravene well-settled New Jersey Supreme Court precedent and deprive casino workers of the full protection of our State Constitution.

Respectfully submitted,

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[7] The Appellees and Intervenors argue that economic factors justify exempting casinos from the Smoke-Free Air Act. Not only do these arguments rest on factual allegations outside the Complaint, but economic factors would not outweigh the increased mortality risk caused by second-hand smoke exposure.

UAW, REGION 9 OF THE UAW, and C.E.A.S.E. N.J.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000057-24
Appellants,	
v.	Civil Action
NEW JERSEY GOVERNOR PHILIP MURPHY, and ACTING NEW JERSEY HEALTH COMMISSIONER DR. KAITLIN BASTON,	On Appeal from an Order of the Superior Court of New Jersey Chancery Division, Mercer County
	Docket No.: MER-C-26-24
Respondents.	Sat Below: Hon. Patrick J. Bartels

DATE SUBMITTED: 12/2/24

APPELLANTS' REPLY BRIEF IN RESPONSE TO THE BRIEFS OF RESPONDENTS AND INTERVENORS

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PRELIMINARY STATEMENT

The State's position that the State can take affirmative action to allow one industry to knowingly sicken and kill its workers is shocking. Its argument shows complete disregard for our Constitution, which requires that all citizens be treated equally, and gives our citizens the "unalienable" "right to pursue and obtain safety and happiness," and the role of the Courts. Opponents do not dispute that casino workers get life-threatening illnesses, have miscarriages, and die because of their exposure to secondhand smoke at work. They argue that casino profits are more important than the health, safety and lives of that sole group of workers, and even their children. In doing so, they make several main arguments which are contrary to the law and provide no actual authority to support their position.

First, Opponents contend that the courts should not intervene in challenges to the constitutionality of a legislative act. But it is the courts' duty to act when the legislature violates the Constitution. The Constitution and the courts are a check on "the propensities of legislatures to indulge in favoritism through special legislation." Vreeland, infra. Deference to the Legislature "cannot be permitted to deter the judiciary from the performance of its obligation to insure the constitutionality of all legislative action." Raybestos-Manhattan, Inc., infra.

Second, Opponents argue that any reason at all will suffice to uphold an exclusion from an otherwise universal law. That is false. The Supreme Court has never wavered from the test requiring that the analysis of a challenge to a special law focuses on the purpose of the law. The purpose of the Smoke Free Air Act is clearly to protect the health of workers and the public.

Third, Opponents argue that smokers are particularly valuable casino patrons, so casinos should be able to gain maximum profits from them. As shown by scientific studies, there is a strong comorbidity between addiction to gambling and addiction to smoking. It is against the law for casinos to encourage problem gambling and it is the clear public policy of this State to discourage smoking. So, encouraging both cannot be a legitimate excuse, related to the purpose of the Smoke Free Air Act, for excluding casino workers from its protections.

Finally, Opponents argue that smokers will go to Pennsylvania casinos and, therefore, Atlantic City casino revenue will decline so much that "thousands" of jobs will be lost and the elderly and disabled will lose services paid for by casino taxes. This argument based on a house of cards (see pp. 15-22, infra), and its cynicism is shown by two facts:

1. Five of the nine casino members of Intervenor CANJ are seeking licenses to open smoke-free casinos in New York, which will clearly compete with Atlantic City casinos, and where the tax rate is higher.

2. All New Jerseyans pay taxes. Amazingly, many of us pay more taxes (which help the disabled and elderly) than Atlantic City casinos. In fact, casinos in Atlantic City pay the lowest taxes of any regional competitors.

If Atlantic City casinos paid the same tax rate as Pennsylvania and Delaware they would have paid $2.5 BILLION in taxes, not $526 million. (R, p. 32). That fact alone exemplifies the hold the casino industry has on the Legislature.

Opponents all rely on the same casino-bought 2021 report to support the claim that workers will lose jobs if casinos are smoke-free and, therefore, "livelihoods could be jeopardized." That report has been thoroughly refuted by the U.S. Surgeon General and independent researchers. More importantly, Respondents and Intervenors ignore what is undisputed: lives (and livelihoods) are actually jeopardized and lost due to illnesses caused by secondhand smoke.

COUNTERSTATEMENT OF FACTS

Appellants represent thousands of casino workers who are subjected to secondhand smoke. The very first sentence of the brief filed by Intervenor UNITE is false. It claims that "less than 800 workers" seek the protections of the Smoke Free

Air Act. Intervenor UNITE brief (IU, p. 1).[1] In fact, Appellants represent thousands of workers who work on the smoke-filled casino floors, unlike most union intervenors, who don't work anywhere near the smoke.

Plaintiff UAW Region 9 has 3000 members. The Region represents workers who actually work on the smoke-filled casino floors. They work on gaming tables where customers blow poisonous smoke directly in their faces. They work near slot machines where patrons chain smoke. They are not the drivers, bellmen, doormen, dishwashers, cooks, valets, servers, painters, carpenters, housekeepers, construction workers, electricians and plumbers who are intervening to prevent their fellow workers from having the same safe workplace they already have. (Ja 182-189). To be clear – there is no smoking in the casino restaurants. Housekeepers are not in hotel rooms with smokers. Construction and repair workers do not work on the

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[1] Despite the fact that the Respondents and Intervenors make the same arguments, the court below allowed intervention. (Pa 36). Clearly, the Intervenors' interests are "adequately represented" by the State. R. 4:31-1; City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1 (App. Div. 2006). The Intervenors instead "triple team" Appellants and create cumulative submissions. Rather than spend time and effort appealing the grant of intervention, Appellants will respond to all three briefs in this one omnibus Reply Brief. For brevity, when referring to Respondents and both Intervenors, Appellants will use the term "Opponents." "R" refers to Respondents' brief. "IU" refers to Intervenor Unions' brief. "CANJ" refers to Intervenor casino association's brief.

casino floor while the casino is open. Valets, doormen and drivers do not work around smoking.

The few workers who are members of UNITE HERE Local 54, who actually work on the casino floor, are actually represented by Appellant C.E.A.S.E. – not by the Union to which they pay dues. Appellant C.E.A.S.E. is a grassroots organization of workers who get sick from secondhand smoke – some of whom are members of the Union fighting AGAINST health and safety measures for its own members. C.E.A.S.E. has over 3100 members. Many of its members had to join C.E.A.S.E. in order to try to protect their health, because their Union is actually working against its own members' health and safety. Intervenor UNITE includes C.E.A.S.E. members in its tally of who UNITE "represents." That is misleading use of the word "represents," to say the least.

It is sad that Intervenor UNITE HERE Local 54 has succumbed to a decades-long targeted campaign designed by tobacco companies to use third-parties, like unions, to oppose smoking bans with fear tactics about the loss of jobs. The Surgeon General has found that:

> The tobacco industry routinely works through a 'plurality of third-party voices,' including those of business owners and concerned citizens, to argue that tobacco control laws, including smokefree laws, will harm other businesses - for instance, from revenue loss. **However, numerous**

> **economic studies have found that smokefree laws do not adversely impact business revenue.**
>
> Surgeon General's Report, infra, at 555.

Tobacco industry documents reveal that as early as 1993, Intervenor UNITE-HERE was targeted by tobacco company operatives to oppose smoking bans. The University of California, San Francisco, created "Truth Tobacco Industry Documents" to house and provide access to industry documents produced during litigation between U.S. States (including New Jersey) and the seven major tobacco companies. A memorandum by a tobacco company public relations firm noted:

> As you requested, Ogilvy Adams & Rinehart and Savarese and Associates have developed the following strategic approach to the restaurant smoking ban issue.
>
> We hope that the strategies and tactics which we have proposed constitute a good starting point for a more substantive and specific discussion on building support for the **tobacco industry's efforts to prevent smoking bans** in the restaurants nationwide.
>
> * * *
>
> II. Goal
>
> • Build effective support through **third-party allies for the tobacco industry's efforts to prevent smoking bans** in the restaurant and hospitality industry.
>
> * * *
>
> **Cultivate HERE and other potential labor community organizations** as powerful allies against the enactment of restaurant smoking bans. In addition to representing the political views of their members, HERE is

> viewed by decisionmakers as a credible authority on restaurant worker health and safety issues and employee rights.

Ogilvy Adams & Rinehart, *Memorandum*, U.C.S.F. TRUTH TOBACCO INDUS. DOC., (Aug. 23, 1993), at 1, 5, https://www.industrydocuments.ucsf.edu/tobacco/docs/#d=nmkp0059.

Intervenor Unions, including UNITE HERE, were "cultivated" by the tobacco industry, which, in concert with the casino industry in New Jersey, made unions believe falsified and misleading information about the dire consequences of smoking bans. Unfortunately, decades later, some New Jersey unions are still doing the tobacco companies' bidding.

POINT I

THE SPECIAL LEGISLATION ALLOWING CASINOS TO POISON THEIR WORKERS IS UNCONSTITUTIONAL (Pa 25)

A. Respondents and Intervenors Acknowledge the Applicable Test, But Then Ignore It

Opponents use many standards – except the applicable one – because under the applicable standard, the exclusion of casino workers from a health and a safety law that protects all other workers must be stricken as unconstitutional. Intervenors pretend it is a "rational basis" test; a "balancing test"; a test that analyzes subsidiary (and perhaps contrary) objectives; a test that requires Appellants to show the

Legislature was "irrational"; and various equal protection analyses. (IU, pp. 19-21; R, pp. 30-37; CANJ, p. 17).

Opponents prefer tests that do not relate to the purpose of the law, although they all concede at some point in their submissions that the test requires it:

> A court must examine: '(1) the purpose and subject matter of the statute; (2) whether any persons are excluded who should be included; and (3) whether the classification is reasonable, **given the purpose of the statute**. Jordan, 90 N.J. at 432-33 (citing Vreeland, 72 N.J. 292, 298-301). (Emphasis supplied).

(See, IU, p. 13; R, p. 23; CANJ, p. 16).

The purpose of the Smoke Free Air Act is made clear in the Act itself:

> 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 [ ];
>
> 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; (Emphasis supplied).

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

The argument that, because the Legislature allowed "certain specified objections," the purpose of the law is not to protect workers' "workplaces" from "a substantial health hazard" is absurd. The law states:

> 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.
>
> N.J.S.A. 26:3D-58.

CANJ actually argues that protecting casino profits is a purpose of the Smoke Free Air Act and claims, citing the statute, that "the legislative purpose was not to *ban* all indoor smoking – it was to *reduce* indoor smoking . . ." (CANJ, pp. 25-26). In fact, the word "reduce" is nowhere in the statute - the word "prohibit" is.

> 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.** (Emphasis added).
>
> Id. at f.

Similarly, the State substitutes the word "most" for the word "all" in the provision above. (R, pp. 24-25). If it is in the public interest to *prohibit* smoking in all workplaces, it is, *a fortiari*, against the public interest to allow it in any workplaces. The exception is an unconstitutional special law.

These sleights of hand are necessary because the New Jersey Constitution provides:

> No general law shall embrace any provision of a private, special or local character.
>
> * * *
>
> 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, ¶ 7; 9(8).

It is obvious that the exclusion of casino workers from the Smoke-Free Air Act is a "special" or "local" law which grants several corporations "exclusive privileges and immunities."

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:

- the State clearly has 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 all other New Jersey workers[2].

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 powers to dispense special favors. Over the course 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) (emphasis added).

Opponents argue that the courts should wait for the Legislature to act on this issue. (IU, pp. 27-28; CANJ, pp. 17-18, 26-27, 30; R, pp. 2-3, 14). But "waiting for

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[2] 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). CANJ makes much of this because Appellants do not challenge these other minimal exceptions. (CANJ, pp. 19-21). Simply put – we do not represent medical researchers or cigar bar employees.

the Legislature to act" in the face of a Constitutional challenge has been specifically rejected by our Supreme Court.

> We would have preferred to wait for the Legislature to act, but courts cannot decline to review a serious constitutional challenge on that basis. Trop v. Dulles, 356 U.S. 86, 104, 78 S.Ct. 490, 2 L.Ed.2d 630 (1958) noting that when a statute appears to conflict with the Constitution, 'we have no choice but to enforce the paramount commands of the Constitution; and cannot 'shirk[]' that task); see also Comm. to Recall Menendez v. Wells, 204 N.J. 79, 95-96, 7A.3d 720 (2010).
>
> * * *
>
> The judiciary, in turn, has long had the authority and responsibility to determine whether laws are Constitutional.
>
> * * *
>
> Despite good faith arguments to the contrary, we cannot elide a question because the Legislature may act in the future.
>
> State v. Comer, 249 N.J. 359, 404-405 (2022).

This longstanding principle rejects Opponents' argument that the Legislature's "policy" choices are sacrosanct and cannot be disturbed by the courts. The Supreme Court has acknowledged the role of the courts as a limit on legislative power:

> 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. 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.

Jordan v. Horsemen's Benevolent and Protective Association, 90 N.J. 422, 433 (1982)[3].

In fact the Courts have stricken or modified numerous laws that violated the constitutional prohibition of special legislation. Jordan v. Horsemen's Benevolent and Protective Association, 90 N.J. 422 (1982); Mahwah Tp. V. Bergen County Bd. of Taxation, 98 N.J. 268 (1985); Town of Secaucus v. Hudson County Bd. of Taxation, 133 N.J. 482 (1993); Vreeland v. Byrne, 72 N.J. 292 (1977); Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212 (1985); Raybestos-Manhattan, Inc. v. Glaser, 144 N.J. Super. 152 (1976); Alfred Vail Mut. Ass'n v. Halpin, 107 N.J. Super. 517 (1969); Allendale Nursing Home, Inc. v. Borough of Allendale, 141 N.J. Super. 155 (1976); Mason v. City of Paterson, 120 N.J. Super. 184 (1972); Sherwood v. Bergen-Hackensack Sanitary Sewer Authority, 24 N.J. Misc. 48 (1946).

Respondents and Intervenors repeatedly note the deference courts give to the Legislature "in the field of taxation," citing Secaucus v. Hudson Cty. Bd. of Taxation, 133 N.J. 482, 493 (1993). This case is not about tax legislation. It is about worker safety and health. But even in Secaucus, which was about tax legislation, the court

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[3] CANJ argues that Appellants misstate the ruling in Jordan. CANJ fn. 3. In fact, the Supreme Court removed the special law provision and, therefore, upheld the underlying law. Appellants seek the same result. They do not want to invalidate the Smoke Free Air Act. They want to remove the unconstitutional exclusion of casino workers.

struck down a tax law which it found to be an unconstitutional special law. Although, like Atlantic City, the court found Hudson County to be "unique," the purpose put forth in the courts to uphold the special law was found to be "remote, if not illusory." Id. at 497. The court reiterated:

> The test, in every case, is whether the classifications embodied in a particular statute 'rest upon a reasonable or rational basis relevant to the purpose and object' of the statute. *Vreeland, supra*, 72 *N.J.* at 301, 370 *A.2d* 825.
>
> Id. at 502 (emphasis added).

Opponents also argue that casinos are special. (CANJ fn. 4). The State argues that "generally applicable statutory regimes are not applicable to casinos," citing laws prohibiting gambling and alcohol regulations. (R, p. 27). Of course casinos are exempted from those laws. But casinos are not exempt from any other laws and, specifically, not laws which protect workers. Contrary to the State's claim, the decision in Parking Authority of City of Atlantic City v. Board of Freeholders of Atlantic County, 180 N.J. Super. 282 (Law Div. 1981), does not support their argument, it holds the opposite. Rejecting the argument that casinos are law-free zones, the court held that "the mere authorization of casino gaming in Atlantic City does not in and of itself justify the legislative classification contained in the County Transportation Authorities Act." Id. at 293.

It is clear that casinos are not law-free zones. Casinos cannot hire child labor, or pay less than minimum wage, or deny employees' overtime, or violate the LAD or CEPA. Those worker protection laws cut into casino profits, but they have been applied and enforced in casinos. The claim that a health and safety law, literally designed to prevent grave illnesses and death, is exempted because of the "special status of casinos," is false.

B. The Dire Economic Disaster Predicted by Respondents and Intervenors is a House of Cards

With varying degrees of hyperbole, the State and Intervenors claim that the economic benefit casinos (and the State) derive from excluding casino workers from health and safety legislation is in the State's interest, claiming:

> State: "the Legislature has been provided with credible information in opposition to pending legislation to suggest amending the statute to completely ban smoking will cause a substantial loss of casino jobs and revenue . . ." (R, p. 32).
>
> Unions: "A complete smoking ban, as demanded by Appellants, would endanger their members' well-paying jobs, and their associated health, welfare, and retirement benefits." (IU, p. 2).
>
> CANJ: "The casino 'exemption' [is] necessary to prevent economic ruin to that industry and the many thousands who rely on it." (CANJ, p. 26).

1. The Casino-bought Spectrum Report is Discredited

Respondents and Intervenors rely on the 2021 Spectrum Report, paid for by Intervenor CANJ, for their dire economic analyses. (Ja 12, repeated at 270, again at 377). Spectrum's "clients," in addition to CANJ, include the individual casino members of CANJ and "gaming companies and associations."[4] *Amicus* Americans for Nonsmokers Rights has thoroughly debunked the report CANJ paid for, and Appellants rely on and incorporate those arguments. (*Amicus* brief, pp. 9-12).

The Surgeon General specifically addressed smoking in casinos in his recent report, "*Eliminating Tobacco-Related Disease and Death*":

> Casinos are also important venues for smokefree policy efforts because workers and patrons in casinos are exposed to high levels of secondhand tobacco smoke.
>
> * * *
>
> Studies of air quality in casinos and of biomarkers in casino workers and patrons show that smoking in casinos is a public health problem, as documented by dangerous levels of secondhand tobacco smoke in these venues and elevated levels of tobacco smoke biomarkers in the blood, urine, and saliva of casino employees and patrons who do not smoke.
>
> * * *
>
> The tobacco industry routinely works through a 'plurality of third-party voices,' including those of business owners and concerned citizens, to argue that tobacco control laws, including smokefree laws, will harm other businesses – for instance, from revenue loss.

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[4] *Clients*, SPECTRUM GAMING GROUP, www.spectrumgaming.com (last visited December 2, 2024).

> **However, numerous economic studies have found that smokefree laws do not adversely impact business revenue.**[5]
> (internal citations omitted, emphasis added).

In 2022, Gaming Casino Consultants Consortium ("C3") conducted an independent analysis and produced a research brief regarding the economic effects of smoking bans in casinos. C3 includes independent casino consultants, architectural firms, market research providers, marketing and advertising firms, business intelligence/data/technology firms, and financial professionals with high levels of expertise in the casino and hospitality industry. The research brief, "*Evaluation of Post-Pandemic Non-Smoking Trends in U.S. Casinos*," concludes at Page 29 that "**Data from multiple jurisdictions clearly indicates that banning smoking no longer causes a dramatic drop in gaming revenue. In fact, non-smoking properties appear to be performing better than their counterparts that continue to allow smoking.**" (emphasis added).[6]

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[5] *Eliminating Tobacco-Related Disease and Death: Addressing Disparities*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, OFFICE OF THE SURGEON GENERAL (2024) at 555.

[6] *Evaluation of Post-Pandemic Non-Smoking Trends in U.S. Casinos,* CASINO CONSULTANTS CONSORTIUM (June 2022), https://www.c3gg.com/post/evaluation-of-post-pandemic-non-smoking-trends-in-u-s-casinos.

The findings in the independent 2022 3C report, as well as concerns for public and worker health, have resulted in 21 states, Puerto Rico and the U.S. Virgin Islands banning smoking in casinos. Our neighbors New York, Delaware and Maryland ban smoking. Opponents argue that they are protecting the economic well-being of Atlantic City – and casino workers – by eliminating the possibility that smokers will go to Connecticut or Pennsylvania to gamble if smoking is banned in New Jersey. At the same time, the five casino companies which are members of Intervenor CANJ are vying for casino licenses in smoke-free nearby New York, which will certainly draw business from Atlantic City.[7] Thus, the casinos actually admit by their actions that smokefree casinos are economically viable.

In fact, the Surgeon General has noted: "A recent cross-sectional survey of adults found that 75% of adults favored smoke free casinos, with similar favorability among respondents who visited casinos (75.1%), including those who visit casinos about once a year (74.1%), several times a year (75.3%), and at least once a month (74.2%).[8]

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[7] Carl Campanile, *Bet on it: Complete guide to who's game for NYC area's next casinos*, NEW YORK POST (September 22, 2024, 2:21 PM), https://nypost.com/2024/09/22/us-news/complete-guide-to-whos-game-for-nyc-areas-next-casinos/.

[8] Surgeon General's Report, supra, at p. 556.

Opponents rely on the revenue decline in 2006 when Delaware racetrack casinos became smoke free. In fact, Delaware casinos are thriving with revenue growing every year over the last 10 years except for 2020 during COVID.[9] Id. at 44. Closer to home, in Pennsylvania, the Parx Casino, one of only two smoke free casinos in Pennsylvania, consistently leads the 16 other brick and mortar properties in revenue:

> Parx's primary property has dominated the Pennsylvania gaming industry, the third-richest gaming state in the country behind Nevada and New Jersey, for years. The trend has continued in 2024, as players in the Philly metro seeking a clean indoor air environment patronize the tobacco-free gaming floor.[10]

2. The Arguments Regarding the Revel Bankruptcy are Misleading

The State and CANJ claim that the Revel Casino went bankrupt because it banned smoking. (CANJ, p. 24; R, p. 32). What neither CANJ nor Respondents tell this Court is that Revel reopened three months after declaring bankruptcy in 2013 and

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[9] *State of the States: 2024 the AGA Analysis of the Commercial Casino Industry*, AMERICAN GAMING ASSOCIATION, (May 2024) at p. 39, www.americangaming.org/wp-content/uploads/2024/05/AGA-State-of-the-States-2024.

[10] Devin O'Connor, *Pennsylvania Casino Revenue Dips, In-Person Losses Offset Online Gains*, CASINO.ORG, (Oct. 18, 2024, 9:42 AM), https://www.casino.org/news/pennsylvania-casino-revenue-dips-in-person-losses-offset/#:~:text=The%20roughly%20%244.7%20million%20decline,poker%20rake%20%E2%80%94%20totaled%20%24174.5%20million.

allowed smoking. Thirteen months later – despite allowing smoking – it filed for bankruptcy again, and ultimately closed in 2014[11].

In fact, according to a casino analyst, "the substantial construction cost of Revel, the loss of 1,900 of their rooms, the general collapse of the economy, the U.S. unemployment problem and new gaming options in Pennsylvania and New York – all causing a 40 percent decline in casino revenues – are the primary reasons for Revel's failure."[12]

Dennis Stogsdill, Revel's Chief Restructuring Officer, attributed Revel's bankruptcy to "a $100 million cost overrun it blamed on a contractor; the casino's failure to connect with day-trippers, too expensive food and drinks, and the lack of a player's club. Closing for six days last fall for super storm Sandy didn't help either."[13]

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[11] *A Timeline of Atlantic City's Revel Casino Hotel*, DAILY TIMES, (Aug. 12, 2014, 8:17 AM), https://www.delcotimes.com/2014/08/12/atlantic-citys-revel-casino-to-close-its-doors-on-sept-10/.

[12] *Revel Casino to Allow Smoking as Part of Bankruptcy Filing*, CBS NEW YORK, (Mar. 26, 2013, 8:00 PM), https://www.cbsnews.com/newyork/news/revel-casino-to-allow-smoking-as-part-of-bankruptcy-filing/.

[13] Id.

The State and CANJ also fail to tell this Court that three other casinos, *which always allowed smoking*, also closed in 2014. These closings were attributed by Wall Street analysts to the fact that Atlantic City had too many casinos[14].

Similarly, CANJ leads the court to believe that the Rivers Casino Philadelphia reinstated smoking in January 2023, because of revenue losses, (CANJ, p. 8) when the General Manager stated that reinstating smoking was "a final step in our process to return the property to pre-COVID operations." (Ja 198, fn 13).

3. Opponents Ignore the Real Reason for Atlantic City Repealing its Smoking Ban in 2008

Opponents support their dire economic predictions by noting that more than sixteen years ago, in April of 2008, Atlantic City passed an ordinance banning smoking in casinos effective October 15, 2008, which was repealed shortly after taking effect.

Deliberately ignoring the crash of the economy in the fall of 2008, the Unions claim that, "[i]n 2008, when the Atlantic City Council imposed a total smoking ban, casino revenues fell by 19.5% within the first week." (IU, p. 8). Obviously, the dire economic outlook during October of 2008 affected casino revenues. In fact, "[t]he

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[14] Wayne Parry, *2014 Timeline of Atlantic City's Battered Casinos*, AP, (Dec. 28, 2014), https://apnews.com/general-news-b1681ed624594d56b73c730e3dc4aa43.

decline in overall economic activity . . . steepened sharply in the fall of 2008 . . . making [it] the deepest recession since World War II."[15] The State acknowledges that the City cited the "deterioration of the national and regional economy and declining casino industry performance" during the recession for the fear – 16 years ago – that a smoking ban would add to the financial woes of that time.

In 2023, recognizing the changed attitudes and health risks of secondhand smoke, Atlantic City banned smoking on the boardwalk. Ordinance of the City of Atlantic City, N.J. No. 32, May 31, 2023. Since smoking has been banned on beaches since 2006, this ordinance actually forces smokers from the outside into the casinos.

C. No Case Finds Workers Are Not Entitled To Be Included in a Health and Safety Law

Opponents claim that "similar" challenges have failed because of the adverse impact a smoking ban would have on the economy. (IU, p. 19; CANJ, pp. 33-34; R, p. 44). They do not cite one case brought by workers challenging the constitutionality of their exclusion from smoke-free laws. Almost all of the cases cited by Opponents concern businesses who want to be excluded from them. In Amiriantz v. New Jersey, 2006 WL 3486814 (D.N.J. Nov. 30, 2006) (Ja 107), *aff'd* 251 F.App'x 787 (3d Cir.

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[15] John Weinberg, *The Great Recession and its Aftermath*, FED. RESERVE HISTORY, (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath.

2007), the owner/operator of a transportation company bought a claim in federal court under the Fourteenth Amendment to the United States Constitution. The opinion indicates that a different result would have occurred in this case:

> Obviously, it would constitute an irrational act – and hence would offend the Constitution's promise of 'equal protection of the laws' – were a state to impose differing burdens upon individuals who are, in all relevant respects indistinguishable. Murillo v. Bambrick, 681 F.2d 898, 906 (3d Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982).

Id. at *4.

Thus, the court indicated that it would be unconstitutional to pass laws which treat some workers differently than other works "who are, in all relevant respects, indistinguishable."

Batte-Holmgren v. Galvin, 38 Conn.L.Rptr. 215, 2004 WL 2896485 (Conn. Super. Ct. Nov. 5, 2004), (Ja 124) *aff'd* Batte-Holmgren v. Comm. of Public Health, et al., 281 Conn.277 (Supreme Court, 2007), was the same – a challenge by restaurants to a ban on smoking. The court held that the restaurants could "not meet the heavy burden they carry in asking the court to enjoin the operation of a law designed to protect the health of a large number of employees, and citizens, throughout the state...[i]t is uncontested that second hand smoke, also referred to as Environmental Tobacco Smoke (ETS), presents serious health risks to those exposed to it. Clearly, there is a rational basis for the state to protect the health of its citizens

– more particularly, employees who run the risk of exposure to ETS." Id. at *2,*3. (Ja 493).

Coalition for Equal Rights, Inc. v. Owens, 458 F.Supp.2d. 1251 (2006), was the same challenge with the same result.

The State has determined that secondhand smoke "constitutes a substantial health hazard" to nonsmokers. No case – anywhere – holds that Appellants are not entitled to equal treatment under the New Jersey Constitution.

D. Allowing Smoking in Casinos is Based on an Illegitimate Purpose

In light of the real data showing that non-smoking policies are popular with the public and do not result in drastic drops in revenue, but result in more revenue (like Parx in Pennsylvania), why are the Respondents and Intervenors fighting to keep smoking? The answer is in the CANJ brief and Spectrum Report on which Respondents and Intervenors heavily rely.

Casinos know that there is a comorbidity between smoking and gambling. **Nicotine actually encourages problem gambling**[16]. In fact, the casinos' own "study" and the CANJ brief note that smokers have more "value." (Ja 305; CANJ,

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[16] Andersland, M. D. et al., *Expectations of the Effects of Nicotine on Gambling Behavior*, INT'L GAMBLING STUDIES, (Sept. 11, 2024), https://www.tandfonline.com/doi/full/10.1080/14459795.2024.2409449#:~:text=Within%20a%20gambling%20context%2C%20individuals,a%20broader%20range%20of%20situations.

p. 7)[17]. "Casino patrons that smoke tend to wager money over longer periods of time." (CANJ, p. 23). That is because "[t]here is a clear link between gambling disorder and addictive-related substance abuse . . . gambling has been especially associated with the use of alcohol **and tobacco**...."[18] "Smokers have been identified as contributing a disproportionate level of revenue in gambling. Studies found that the likelihood of co-occurrence from smoking and gambling disorder is high."[19] Studies link "cigarette smoking with increased gambling disorder severity....gamblers with daily smoking had more severe obsessive and compulsive behaviors .. . ."[20] "The co-occurrence of gambling disorder with tobacco use disorder (60.4%) suggests a common mechanism for their pathology . . ."[21]

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[17] The State objects to arguments about why smokers are "high value" gamblers arguing that this issue was not raised below. (R fn5). It is actually in the Spectrum Report filed and relied upon by all Opponents below (Ja 305, 61) and on appeal. (R, pp. 15-16; CANJ, p. 7; IU, p. 7). Clearly, why smokers are "high value" is subject to analysis since it is the basis on which Respondents and Intervenors rely for their arguments.

[18] Jimenez-Murcia et al., *Gambling Disorder Seeking Treatment Patients and Tobacco Use in Relation to Clinical Profiles*, ADDICTIVE BEHAVIORS, Vol. 114, pp. 2-3 (2021), https://pubmed.ncbi.nlm.nih.gov/33203595/.
2-3 (2021).

[19] Id.

[20] Id.

[21] Russell & Robinson, *Effects of Nicotine Exposure and Anxiety on Motivation for Reward and Gambling-Like Cues Under Reward Uncertainty*,

"In its most severe form, gambling leads to extreme personal, social and economic ramifications, a condition known as gambling disorder. (GD). GD is defined by the Diagnostic and Statistical Manual, Fifth Edition (DSM-5) as a behavioral addiction characterized by persistent and recurrent betting that is problematic or impairs quality of life."[22] "[U]p to 63% of pathological gamblers qualify for a substance abuse disorder. Compared with other drugs of abuse, **nicotine use disorder is one of the most frequently reported addictions among disordered gamblers. (60.4% comorbidity rate) . .. [i]ndividuals with nicotine use disorder are seven times more likely to bear the diagnosis of gambling disorder compared with non smokers.**"[23]

The policy and law of the State of New Jersey is clear: casinos are supposed to discourage gambling disorders. "Responsible gaming refers to a set of policies and practices that aim to promote safe and enjoyable gambling experiences while minimizing the risk of harm to individuals and society as a whole. The Attorney General's website states that [t]he New Jersey Division of Gaming Enforcement

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BEHAVIORAL NEUROSCIENCE, Vol. 133, No. 4, pp. 361-377 (2019), https://pubmed.ncbi.nlm.nih.gov/30869950/.

[22] Id. at 361.

[23] Id.

works closely with licensed casinos and online gambling operators to promote responsible gaming and protect players."[20] People with gambling disorder make casinos rich while poisoning casino workers and harming themselves and their families.

Casinos specifically want to prevent people with gambling disorder from taking a break from gambling, despite their own (required) advice on their websites:

> **Take Frequent Breaks**: Every once in a while, it is a good idea to walk away from the game you're playing. Taking a break can help you make smarter decisions, so gambling stays what it should be – a fun activity.

C3 report, supra, at p. 25.

The C3 report notes "[c]asino operators fear that a smoking ban would not only put them at a disadvantage to their competitors in Pennsylvania and Connecticut but also would result in lower gross gaming revenue (GGR) *because of smoking breaks . . . A player's desire or need to smoke would impel them to leave their seat at a slot machine or gaming table and walk outside to smoke."* (Spectrum Report, Ja 306) (emphasis added).

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[20] *Responsible Gaming,* OFFICE OF THE ATTORNEY GENERAL, www.njoag.gov/about/divisions-and-offices-/division-of-gaming-enforcement-home/responsible-gaming-main.

That truth comes out in the casino-bought "study" which relies upon a "trove of internal analytics" and "player tracking" not shared in this lawsuit:

> [i]f a player "planned a two-hour casino session and took two 10-minute breaks (including walking time) during that period, the player's time on device could potentially decline by 17% . . .
>
> It is also possible that the smoker during the first or second break would cut his or her losses and leave the casino, thus losing $83.38 [instead of $100].
>
> Spectrum Report, (Ja 305-306).

As noted in the C3 independent report:

> What the authors of that [Spectrum] report unwittingly acknowledge is that a casino that prohibits smoking risks losing gaming revenue because a certain portion of players who smoke decide during their smoke break to walk away. In other words, they chose to play responsibly, and taking a periodic smoke break allowed them to do so. Their argument that a casino will make more money if smokers remain at their games is the antithesis of one of the principles of responsible gaming. (Emphasis added).
>
> C3 Report, supra, at 26.

The most successful casino in Pennsylvania, Parx, has an outdoor smoking area where no workers are present. Atlantic City casinos could easily provide that solution for smokers, who would still be welcome in Atlantic City. They refuse because disordered gamblers would then take breaks – which is suggested to help them. The

State of New Jersey should not condone this clearly illegitimate purpose for a special law.

E. Smoking Costs the State More Money Than the Limited Taxes Paid by Casinos

Opponents claim that the illness and death of casino workers is worth it because casino taxes help the disabled and elderly. A similar economic argument was rejected in Raybestos-Manhattan, Inc. v. Glaser, 144 N.J. Super. 152, 180 (Chan. Div. 1976).

In reality, the rest of us pay taxes to support the millions of dollars the State pays for smoking prevention.[21] The casinos do not pay death benefits to the families of workers who die from diseases caused by secondhand smoke – or continue the health benefits for workers who become disabled.

In the United States, smoking-related illnesses cost an estimated $15-$30 billion annually for medical care. In 2018, lost productivity due to smoking-related illnesses cost the U.S. nearly $180 billion and due to premature death cost $185

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[21] *Broken Promises to Our Children*, Campaign for Tobacco-Free Kids, p. 1, (last visited Dec. 2, 2024) https://www.tobaccofreekids.org/what-we-do/us/statereport.

billion. In that one year, secondhand smoke exposure cost about $7 billion in lost productivity.[22]

In New Jersey, 11,800 deaths are caused by smoking each year[23]. Annual healthcare costs in New Jersey directly caused by smoking are $4.72 billion.[24] Residents of New Jersey pay almost $1,000 per household in taxes to pay for smoking-caused government expenditures.[25]

The taxes casinos pay cannot begin to offset the costs in life, health and taxes to New Jersey residents caused by smoking. In fact, New Jersey's casinos pay a shockingly low tax rate compared to other casinos in our region according to the American Gaming Association:[26] In 2023, area casinos paid the following:

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[22] *Economic Trends in Tobacco/Smoking and Tobacco Use*, CDC, (September 17, 2024), cdc.gov/tobacco/php/data-statistics/economictrends.

[23] *The Toll of Tobacco in New Jersey,* Campaign for Tobacco-Free Kids, (last visited Dec. 2, 2024), https://www.tobaccofreekids.org/problem/toll-us/new_jersey

[24] Id.

[25] Id.

[26] *State of the States 2024*, AMERICAN GAMING ASSOCIATION, www.americangaming.org/wp-content/uploads/2024/05/AGA-State-of-the-States-2024.pdf, pp. 87-88.

STATE	**GROSS GAMING REVENUE**	**TAX REVENUE**
New Jersey	$5.78 billion	$691.8 million
Pennsylvania	$5.86 billion	$2.32 billion
Delaware	$507 million	$235.5 million
New York	$4.7 billion	$2.07 billion
Maryland	$2.5 billion	$883 million

Atlantic City casinos make slightly less than Pennsylvania, the highest-revenue state in the region, but pay $1.6 billion less in taxes. Casinos in every nearby state except Delaware pay a much higher tax rate than New Jersey casinos. Casinos in New Jersey aren't saving Atlantic City or the State with their taxes. At a 9.25% tax rate, they aren't even paying their fair share. Individuals who make over $1,000,000 a year pay 10.75%. Casinos make billions. Their paltry tax payments certainly don't excuse poisoning their workers.

The threat of job losses should also be examined in light of the salaries paid to casino executives, who work in smoke-free offices:

> The CEO of the corporation which owns Caesars in Atlantic City had total compensation of $11,277,678.00 in 2023 (Ja 457).
>
> The CEO of the company that operates the Caesars and Tropicana casinos had total compensation of $18,610,359.00 in 2023 (Ja 461).
>
> The CEO of the company that owns the Tropicana had total compensation in 2023 of $15,947,667.00 (Ja 461).
>
> The CEO of Bally's had total compensation in 2023 of $4,537,197 (Ja 471).

If revenue actually dropped because casinos were no longer allowed to poison their workers, perhaps the casino CEOs would have to take a pay cut to keep workers on the job.

The virtue washing that Opponents use to excuse greedy corporate casinos poisoning their workers is epitomized by the casinos supporting Breast Cancer Awareness Month,[27] while subjecting their employees to secondhand smoke which a recent peer-reviewed study shows presents "a statistically significant excess risk of breast cancer in women."[28] The casino-bought report on which they all rely states it clearly the actual goal of casino executives:"[c]asino managers are under continuous, intense pressure to achieve the **highest profits** possible . . ." (Ja 48).

F. The Claim that Casinos Should be Allowed to Poison Their Workers Because Children are not Allowed in Casinos is Absurd.

The State claims that casinos are "distinct" from all other workplaces because children are not allowed on casino floors, noting that "young people face particularly

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[27] Tom Bergeron, *AC Casino industry offering numerous promotions to support breast cancer awareness month*, R01-NJ.com, (October 7, 2024), https://www.roi-nj.com/2024/10/07/lifestyle/ac-casino-industry-offering-numerous-promotions-to-support-breast-cancer-awareness-month/.

[28] Possenti et al., *Exposure to second-hand smoke and breast cancer risk in non-smoking women: a comprehensive systematic review and meta-analysis*, BRITISH JOURNAL OF CANCER, (2024) Vol. 131, https://pubmed.ncbi.nlm.nih.gov/38942988/

negative health risks from secondhand smoke." (R, p. 34). First, children are not in our offices, courthouses, factories, warehouses, garages, strip clubs, gyms, adult movie houses, adult bookstores, or other workplaces on a regular basis – if at all. But pregnant women are.

Secondhand smoke exposure during pregnancy is associated with miscarriage, low birth weight and pre-term birth, which have lasting effects. Babies exposed to secondhand smoke are at a higher risk for sudden infant death syndrome, ear infections, lung infections, and decreased lung function.[29] Under the State's reasoning, only children who can breathe on their own should be protected from poisonous smoke and pregnant workers can suffer miscarriages for casino profits.

G. New Jersey's Smoke-Free Restaurants Contribute Much More to the New Jersey Economy than Casinos

Despite fierce opposition from the tobacco, restaurant and bar industries, restaurants and bars have been smoke-free since 2006. "In New Jersey, the effort to impose the ban encountered fierce opposition from bar owners and restauranteurs

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[29] *Health Effects of Cigarettes: Reproductive Health,* CDC, (last visited Dec. 2, 2024), https://www.cdc.gov/tobacco/about/cigarettes-and-reproductive-health.html#:~:text=Secondhand%20smoke%20exposure%20and%20pregnancy&text=Secondhand%20smoke%20exposure%20during%20pregnancy,infections%2C%20and%20decreased%20lung%20function.

who said the restrictions would hurt their businesses."[30] Owners of restaurants and bars sued the State over the ban.[31] But those two industries were not powerful enough, or savvy enough with their campaign contributions or co-opting of Unions, for their economic fears to overcome the public health goals of the Smoke Free Air Act. The opposition proved wrong. The restaurant and bar industries are thriving in New Jersey. Instead of losing jobs, the New Jersey restaurant industry constitutes 9% of the total jobs in the State, making restaurants the third largest private employer in New Jersey.[32] Based on prior years, smoke-free restaurants and bars are expected to continue to pay significantly more in State taxes than casinos, $964.20 million in 2024.[33]

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[30] Richard G. Jones and John Holl, *New Jersey Joins 10 States in Banning Indoor Smoking*, THE NEW YORK TIMES, (Apr. 14, 2006).

[31] Id.

[32] *New Jersey Restaurant Industry Impact*, NAT'L RESTAURANT ASSOC., https://restaurant.org/getmedia/974c1f75-e139-482a-a908-5cb45cde8679/new-jersey.pdf.

[33] *Economic Contributions of the Restaurant & Foodservice Industry Summer 2024,* NAT'L RESTAURANT ASSOC., https://restaurant.org/getmedia/e42c3908-b564-44bb-a1bd-1b7dca941395/nj_econ_impact_study.pdf

POINT II

THE NEW JERSEY CONSTITUTION, STATUTES, CASELAW, AND PUBLIC POLICY PROTECT NEW JERSEY WORKERS BY REQUIRING SAFE WORKPLACES (Pa 23)

Analyzing the guarantee of the right to pursue and obtain safety and happiness, our Supreme Court held: "Quite simply, that first paragraph of our State Constitution 'protects against injustice and against the unequal treatment of those who should be treated alike." Lewis v. Harris, 188 N.J. 415, 442 (2006).

Using the same editing of the Constitution used by the court below, Intervenors deliberately leave the word "obtain" out of the provision regarding safety, IU, p. 22; CANJ, p. 2. They also argue that the thousands of casino workers seeking to "pursue" a safe workplace – like all other New Jersey workers – should simply quit their jobs if they don't like being excluded from a health and safety law.

This "let them eat cake" attitude, taken to its logical conclusion, argues against all worker protections. Under this theory, New Jersey residents can simply choose to work only at places that voluntarily pay minimum wage, contribute to unemployment and abide by and are subject to discrimination prohibitions. However, history has taught us that employers do not voluntarily protect workers from all sorts of wrongs and that laws and structures to protect workers are necessary. That is why New Jersey passed the Smoke Free Air Act. The argument that casino workers

should simply quit their jobs – and have no income – if they do not want to be poisoned at work cannot be condoned by the courts.

The Intervenor Unions – historically advocates for worker health and safety – claim that "[g]enerally speaking, there is no right to a healthful environment." (IU, p. 23). Luckily, the drafters of our Constitution, the Legislature, and the courts disagree. See, Appellants' main Br., pp. 17-22.

CANJ argues that the federal courts have not found a "right to safety" in the federal Constitution. They did not find it because – unlike the New Jersey Constitution – the United States Constitution does not mention the word safety. The first sentence in our state Constitution does and it is a "natural and unalienable" right. N.J. Const. Art. I, ¶ 1. "[T]he New Jersey Constitution is not a mirror of the United States Constitution," the courts have "the ultimate responsibility for interpreting the N.J. Constitution." Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985). Opponents' citations finding no support for a *federal* right to safety are a red herring that reveals the weakness of their arguments. See, e.g., Kensell v. State of Oklahoma, 716 F.2d 1350, 1351 (1983) (the federal Constitution doesn't mention health or safety, and, therefore, does not confer a right to a smoke-free workplace).

Opponents do not address the significant body of law providing that workers are entitled to a safe workplace. They simply ignore it. Instead, Opponents seek to

distract the court with totally irrelevant arguments. The State does an analysis as if casino workers were seeking money damages from the State. (R, p. 40). The Intervenor Unions pretend that Appellants are asking the State "to provide certain *necessities of life*, including safety" (falsely citing Appellants' brief which says no such thing). (IU, p. 22).

The Intervenor Unions seek to explain their reliance on irrelevant federal cases by stating that "courts should reject the unprincipled creation of state constitutional rights that exceed their federal counterparts," citing King v. S. Jersey Nat'l Bank, 66 N.J. 161, 178 (1974), and Doe v. Poritz, 142 N.J. 1, 119-20 (1995). King says no such thing at page 178 or elsewhere. It does recognize that the rights enumerated in Art. 1, Par. 1 are "*fundamental*" and a "general recognition of those *absolute rights* of the citizen ..." while upholding an automobile sales contract. King, at 178. Nor does the cite the Unions provide to Doe, at 119-120 – or anywhere – support their proposition.

In Lewis, supra, the court determined that the provision at issue here – the "right to pursue and obtain safety and happiness" required giving same-sex couples the "rights and benefits comparable to those of married couples," **"[u]ltimately, we have the responsibility of ensuring that every New Jersey citizen receives the full protection of our State Constitution."** Id. at 457.

The court in Lewis found that "the economic and financial inequities that are borne by same-sex domestic partners are borne by their children too." Id. at 450. Here, the health and safety inequities borne by casino workers result in economic and financial inequities when they become sick and disabled – or die. And their children obviously suffer those financial harms, and the unborn children of casino workers also suffer the inequities of an unsafe environment.

The obligation of employers to provide workers with a safe workplace is well-settled and long-standing. Davis v. New Jersey Zinc Co., 116 N.J.L. 103 (1936) (employer liable for failing to use reasonable care to provide an employee with reasonably safe work conditions); McDonald v. Standard Oil Co., 69 N.J.L. 445 (1903) (it is an employer's duty to take reasonable care to provide a proper and safe workplace); Canonico v. Celanese Corp. of America, Plastics Division, 11 N.J. Super. 445 (App. Div. 1951) (it is settled law in New Jersey that employers must use reasonable care to provide a proper and safe place for workers); Clayton v. Ainsworth, 122 N.J.L. 160 (1939) (employers have a primary and non-delegable duty to provide a safe place of employment); Burns v. Delaware & A. Telegraph & Telephone Co., 70 N.J.L. 745 (1904) (employers have a duty to exercise reasonable care to ensure that the workplace is reasonably safe for employees).

In fact, one New Jersey Court has specifically ruled that workers are entitled to a smoke free workplace. Shimp v. New Jersey Bell Telephone Company, 145 N.J. Super. 516 (Chan. Div. 1976). Intervenors also ignore the fact that the Legislature has determined that workers are entitled to a safe workplace. "Every employer shall furnish a place of employment which shall be reasonably safe and healthful for employees . . ." N.J.S.A. 34:6A-3.

The State and Unions cite L.T. v. N.J. Dep't of Human Services, Div. of Family Dev., 264 N.J. Super. 334, 340-42 (App. Div. 1993) and Franklin v. Dep't of Human Services, 225 N.J. Super. 504 (App. Div.), *aff'd* 111 N.J. 1 (1988) for the proposition that the government has no constitutional obligation to provide certain "necessities of life, including safety." (IU, p. 22). Those cases involved rental and emergency shelter assistance. The word "safety" is not included in the courts' analyses at all.

Intervenor Unions argue that "A prohibition against the government interfering with a citizen's 'acquiring, possessing, and protecting property,' secured by Article I, Paragraph 1 of the New Jersey Constitution, does not imply any governmental obligation to provide [safety] or other necessities." Citing, Franklin at 524. (IU, p. 22). In fact, the word "safety is nowhere in that quote – the Unions have substituted the word "safety" for the word "shelter."

Opponents would not have to provide fake citations and quotes if they had strong legal arguments. It is not a stretch to say the State cannot affirmatively give certain employers the right to violate the constitutionally-protected right to safety, by subjecting their workers to "a substantial health hazard." N.J.S.A. 26:3D-56b.

CANJ claims that the Supreme Court held that "Article I, Paragraph 1 does not 'impose an affirmative obligation upon the government' **to do anything**," citing, Franklin and Right to Choose v. Byrne, 91 N.J. 287, 304 (1982). Franklin says no such thing. Neither does Right to Choose, which held that a statute which prohibited Medicaid from funding abortions for medically-necessary abortions was unconstitutional, finding "New Jersey accords a high priority to the preservation of health." Id. at 304.[34] The State has created a danger by increasing Appellants' exposure to toxic air. Haberle v. Troxell, 885 F.3d 170, 175 n. 5 (3d Cir. 2018).

The New Jersey Constitution is the ultimate law of the State. It is not a superfluous document to be ignored. It's provisions are not meaningless. Our court has specifically ruled that the first sentence of our Constitution – the one at issue here

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[34] Respondents state at footnote 6 that Appellants are arguing something "new" when they quote the New Jersey Supreme Court finding that enjoyment of health is a "high priority." That is absurd. The Verified Complaint mentions the right to health three times and the briefs that Appellants have filed below argue the right to have their health protected innumerable times.

– "protects against injustice and the unequal treatment of those who should be treated alike." Lewis at 442. That is all Appellants ask.

POINT III

APPELLANTS HAVE BEEN DENIED THEIR CONSTITUTIONAL RIGHT TO EQUAL PROTECTION (Pa 30)

The constitutional guarantee of equal protection under the law dictates that casino workers must be *treated equally*. Lewis v. Harris, 188 N.J. 415 (2006). The Court below and Opponents cannot argue that Appellants are being treated *equally* by being excluded from a health and safety law that protects all other workers, so they analyze a claim that Appellants seek a "governmental guarantee of safety for all New Jersey residents." (Pa 12-32[p.11]; CANJ p. 28; R. p. 37; IU p. 23). That is false. Appellants simply want safety protections *equal to* those afforded to *all other workers* – and members of the public. They do not seek more, extended, or new constitutional rights – they seek only the *same* protections and rights.

Ignoring the words of Article 1, Paragraph 1 of the Constitution, Opponents fail to address the clearly delineated fundamental right to "pursue and obtain safety." The Legislature has recognized that secondhand smoke is dangerous to the health and safety of non-smokers, finding that "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***." N.J.S.A. 26:3-55, *et seq.* (emphasis added). Appellants' workplaces are casinos.

Opponents argue that Appellants can simply quit their jobs if they do not want to endanger their health. The Legislature could have left the decision regarding whether New Jersey residents had to endanger their health at work by exposure to secondhand smoke to the free market. It could have decided that workers and employers could make up their own minds – and if workers did not want to endanger their health, they could simply not work at establishments that allow smoking, and perhaps become homeless or starve. Aware of the realities of our profit-driven economy, the Legislature chose to tell employers that they *cannot* poison their workers with secondhand smoke. Just like casinos cannot say "if you don't like being discriminated against – go work someplace else"; or, "if you want overtime pay – go work someplace else"; or, "if you want to collect workers compensation benefits – go work someplace else"; they should not be able to tell casino workers that if they want to be protected from toxic air, they should go work someplace else. Casino workers have to eat just like everyone else.

Rather than address the plain language of the Constitution and Smoke Free Air Act, Opponents claim that Greenberg v. Kimmelman, 99 N.J. 552 (1985), is relevant by contorting Appellants' argument as if they were claiming "the constitutional right

to work in a casino." (IU, p.30). In Greenberg, the wife of a Superior Court Judge challenged the constitutionality of an ethics law preventing family members of judges from working for casinos. The purpose of the law was to ensure that "casinos, with their enormous economic power" do not, nor appear to, "infiltrate the judiciary." Id. at 561. The plaintiff challenged the law claiming the restriction interfered with her rights to employment opportunity, to marry, and to familial association. These rights are not expressly recognized in the State Constitution. Id. at 571.

This case is not about one person's desire to work in a casino in spite of a State Ethics statute which prohibits such employment. This case is about the thousands of casino workers who want to be protected by the same workplace safety law that protects everybody else.

The Supreme Court in Greenberg noted that Article I, Paragraph 1 – the provision at issue here – "like the fourteenth amendment, seeks to protect against injustice and against *unequal treatment* of those who should be treated alike." Id. at 568. The Court upheld the statute as constitutional because the State's interest in preserving the integrity of the judiciary is compelling. Id. at 574.

Here, Appellants are not asserting the "right to work in a casino," but rather, the fundamental right under the State Constitution to "pursue and obtain safety." Moreover, the State's interest in the present matter is not comparable to the statute

at issue in Greenberg. The ethics of the judiciary are not at issue. If the Court takes as true the casino-bought 2021 report claiming that casinos will suffer financially if they are not exempted from the Smoke Free Air Act, the balancing of interests is straightforward. The Court must balance the State's interest in potentially collecting more money in tax dollars (which is disputed), against the casino workers' and patrons' interest in not being exposed to deadly carcinogens that are proven to cause premature death (which is not disputed). When considering the fact that any tax dollars hypothetically collected due to the casino exception is offset by the costs in life, health and taxes to New Jersey residents caused by smoking (See **Point I E**, supra), the State's interest disappears and leaves only the casinos' interest in profits.

Perhaps recognizing the weakness of asserting the State's "compelling" or even "rational" interest in casino profit-making, the State argues that the exemption is further justified in its interest in "reserving Atlantic City's local authority" to decide whether to expose its workers to secondhand smoke, and the State's interest in "tailoring regulation of public spaces based on children's access" to secondhand smoke. (R, p. 43). No municipality in New Jersey has the authority to allow smoking. The State is simply giving another unconstitutional reason to violate the Appellants' rights.

The claim that children are present in all other workplaces (despite laws against child labor) and public spaces – so casinos are different, is absurd. Children are not protected by the State allowing their parents to be poisoned. Children are not protected if their parents are sick, disabled or dead. Children are not protected if their mothers have to inhale toxic smoke while they are developing in their mother's bodies (provided that secondhand smoke does not cause a miscarriage). These arguments deserve almost no attention at all.

Whether the court evaluates Appellants' claims under strict scrutiny, rational basis, or compelling interest, the result is the same. The casino exception in the Smoke Free Air Act violates Appellants' right to equal protection under the law.

CONCLUSION

Appellants have shown by clear and convincing evidence that the exclusion of casino workers from the Smoke-Free Air Act violates the New Jersey Constitution. For all of the foregoing reasons, the Court should declare that the exclusion of casino workers from the Smoke-Free Air Act is unconstitutional.

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Dated: December 2, 2024