

Case No.: 79839-7

**SUPREME COURT OF THE STATE OF WASHINGTON**

**American Legion Post #149**

**Appellant**

vs.

**Washington State Department of Health**

**and**

**Kitsap County Health District**

**Respondents**

**OPENING BRIEF OF APPELLANT**

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**A. Introduction**

This is a challenge to the validity, construction and/or application of a local ordinance and state law which bans smoking in a private facility that is also a private workplace, specifically American Legion Post 149's private Home facility. Those laws banning smoking are: Kitsap County Board of Health's Clean Indoor Air Ordinance 2006-02 and Ch. 70.160 RCW "Smoking in Public Places."

CP 13-21

**B. Assignments of Error**

1. The trial court erred in granting summary judgment dismissing American Legion Post 149's complaint that the plain meaning of the smoking ban specifically exempts "private facilities" and "private enclosed workplaces."
2. The trial court erred in granting summary judgment dismissing American Legion Post 149's complaint challenging the constitutionality of the smoking ban as applied to private facilities that are also private enclosed workplaces.

**C. Issues Pertaining to Assignments of Error**

1. Does application of the smoking ban to the American Legion Post 149 Home, a private facility and a private enclosed workplace, violate the plain meaning of the law?  
(Assignment of Error 1)
2. Does the smoking ban, as written and as applied to the American Legion Post 149 Home, a private facility and a private enclosed workplace, violate due process?  
(Assignment of Error 2)
3. Does the smoking ban, as written and as applied to the American Legion Post 149 Home, a private facility and a private enclosed workplace for member-owners, violate equal protection and/or privileges and immunities? (Assignment of Error 2)
4. Does the smoking ban, as written and as applied to the American Legion Post 149 Home, a private facility and a private enclosed workplace for member-owners, interfere with constitutionally protected private affairs, individual rights and liberties? (Assignment of Error 2)

**D. Statement of the Case**

This case involves an issue of first impression concerning the implementation of the state smoking ban. Ch. 70.160 RCW is

entitled “Smoking in public places” and provides in the definition of “public place” that

This chapter is not intended to restrict smoking in private facilities which are occasionally open to the public except upon the occasions when the facility is open to the public.

RCW 70.160.020(2).

RCW 70.160.020(2) also provides:

This chapter is not intended to regulate smoking in a private enclosed workplace, within a public place, even though such workplace may be visited by nonsmokers, excepting places in which smoking is prohibited by the chief of the Washington state patrol, through the director of fire protection, or by other law, ordinance, or regulation.

Although the American Legion Post 149 Home is a “private facility,” DOH and KCHD maintain that smoking is prohibited because it is also a “place of employment” under RCW 70.160.020(3).

Is smoking banned in “private facilities” which are also “private enclosed workplaces”?

Is application of the smoking ban to the Post Home, a private facility and a private enclosed workplace for member-owners, constitutional?

The American Legion Post 149 is a nonprofit private fraternal organization which operates a private facility, the Post Home, in Bremerton, Washington. CP 102-103.

The Post Home is operated as a private facility. The Post Home has signs on its doors clearly indicating that it is a distinctly private facility open only to members and their guests. Key card locks are installed on the doors.

CP 103-104 [Declaration of Robert Kucenski, Adjutant for American Legion Post 149]. The American Legion Post 149 Home is wholly owned and operated by its membership.

Membership in the American Legion is limited to those individuals who have served in the United States Military or Merchant Marine during specific time periods designated by Congress. They must have received an honorable discharge or be still on active duty.

CP 102-103 [Kucenski Declaration].

The member-owners of the American Legion Post 149 Home wish to allow member-owners to smoke. CP 104-106 [Kucenski Declaration].

This includes the few member-owners who are employees.

The Post employs a total of seven individuals, all of which are members of the Auxiliary. All, but one, are currently smokers. All would prefer that smoking be allowed in the Post Home.

CP 106 [Kucenski Declaration].

The Defendant, Washington State Department of Health [DOH], is an executive agency of state government formed and organized under Chapter 43.70 RCW. CP 56; CP 60. The Defendant, Kitsap County Health District [KCHD], is responsible for enforcing Ch. 70.160 RCW regarding the duties of owners or other persons in charge of a “place regulated under this chapter.” RCW 70.160.070(1); RCW 70.160.050. CP 61. On April 4, 2006, the Kitsap County Board of Health [KCBH] adopted the Clean Indoor Air Ordinance 2006-02 to implement Ch. 70.160 RCW. CP 13-21; CP 61

The definition of “public place” found in both the KCBH Ordinance and Chapter 70.160 RCW states that it is:

[N]ot intended to restrict smoking in private facilities which are occasionally open to the public except upon the occasions when the facility is open to the public.

CP 15 [KCBH Ordinance 2006-02 (section 4)]; RCW 70.160.020(2)

On May 18, 2006, the Kitsap County Food Program Manager issued a "Notice and Order to Correct Violation". CP 22-23. The American Legion Post 149 responded on May 31, 2006. CP 24. The County's Food Program Manager replied on that same day. CP 25. Counsel for American Legion Post 149 sent an email on June 16, 2006, challenging applicability of the law to the Post Home citing exemptions for "private facilities" and "private enclosed workplaces." CP 26. The Kitsap County Prosecuting Attorney responded on June 28 stating that the law applied to Post Home:

The Health District recognizes that RCW 70.160.060 excludes the regulation of smoking in privately enclosed workspaces that are within a public place. I understand that persons are being allowed to smoke at a bar that is located as Post #149. As such, the smoking is occurring in a "place of employment" as opposed to a "privately enclosed workspace." Therefore, the Notice and Order to Correct Violation shall remain valid.

CP 27 (emphasis in original). The KCHD never gave American Legion Post 149 “any alternatives other than a complete ban on smoking.” CP 106 [Kucenski Declaration].

American Legion Post 149 filed a Petition for Review and Complaint for Declaratory and Injunctive Relief on July 27, 2006. CP 6-27. The American Legion Post 149 also filed a Motion for Temporary Restraining Order on July 28, 2006. Both DOH and KCHD filed answers and responses. CP 28-59; CP 60-62. The trial court denied the American Legion Post 149’s Motion for Temporary Restraining Order on August 8, 2006.

American Legion Post 149 then filed a Motion for Partial Summary Judgment on December 22, 2006. CP 63-211. DOH and KCHD filed a cross motions for summary judgment on December 29, 2006. CP 215-253; 254-278. The trial court granted the defendants’ motions for summary judgment on January 26, 2007. CP 346-348. American Legion Post 149 filed its notice of appeal to this court on February 23, 2007. CP 449-453

## **E. Summary of Argument**

American Legion Post 149 claims the smoking ban does not apply to the Post Home because the law expressly exempts “private facilities ... except upon the occasions when the facility is open to the public.” RCW 70.160.020(2). DOH and KCHD claim the ban applies whether or not the Post Home is open to the public because it is a “place of employment.” RCW 70.160.020(3). However, that is inconsistent with RCW 70.160.060 which allows smoking in “private workplaces, within a public place.” It is illogical to allow smoking in “private workplaces, within a public place” but ban smoking in private workplaces within “private facilities” when “private facilities” are already exempt from the law. RCW 70.160.020(2).

Moreover, the definition of “public place” includes “no less than seventy-five percent of the sleeping quarters within a hotel or motel that are rented to guests.” RCW 70.160.020(2). Conversely, up to twenty-five percent of hotel and motel rooms are excluded from the definition of “public place.” However, that language is not found in

the definition of “place of employment.” RCW 70.160.020(3). Nevertheless, DOH and KCHD apply this twenty-five percent exemption as if it was from “this chapter.”

Such an arbitrary application of the law impinges on fundamental rights of privacy, liberty, property, association, business, equal protection, privileges and immunities. These inconsistent interpretations and applications of the law can be remedied by reading the law as written and continuing to exempt those “private facilities” not otherwise listed in the definition of “public place.” RCW 70.160.020(2).

**F. Argument**

**1. Statutory Construction:**

**a. Initiative Background:**

The Washington Clean Indoor Air Act, Chapter 70.160 RCW, was amended by Initiative 901 on November 8, 2005. CP 50-54. Initiative 901 was preceded by Initiative 890 in 2004. CP 119-123. Although the I-890 failed to secure enough signatures, both

initiative measures are nearly identical with two notable exceptions. First, I-901 added language exempting 25 percent of hotel and motel rooms from the definition of “public place.” CP 51. Second, I-901 did not include language in its ballot title (or text) that “Tribal establishments are not affected.” CP 50; 125. The trial court added that language to the ballot title for I-890. CP 124-125.

**b. The law does not apply to private facilities.**

Initiative 901 did not amend specific language found in the definition of “public place” that states:

This chapter is not intended to restrict smoking in private facilities which are occasionally open to the public except upon the occasions when the facility is open to the public.

RCW 70.160.020(2)(Emphasis added).

The KCBH Ordinance was adopted after I-901 and states in the definition of “public place” that:

This ordinance is not intended to restrict smoking in private facilities that are occasionally open to the public except upon the occasions when the facility is open to the public.

CP 15

Issues of statutory construction and interpretation are questions of law, reviewed *de novo*. Nelson v. Appleway Chevrolet, Inc., 2007 Wn.2d (77985-6), State v. O'Connor, 155 Wn.2d 335, 343, 119 P.3d 806 (2005). A construction of a statute by the agency charged with enforcing it is not binding on the courts. Walthev v. Dept. of Revenue, 103 Wn.2d 183, 691 P.2d 559(1984). The judiciary has ultimate authority to construe statutes; an administrative interpretation may be only given deference, it is never authoritative. Nelson v. Appleway Chevrolet, Inc., 2007 Wn.2d (77985-6); Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994). Unless the Legislature defines a statutory term or a contrary intent appears in the statute, a term is to be given its plain and ordinary meaning. American Legion Post 32 v. Walla Walla, 116 Wn.2d 1, 8, 802 P.2d 784 (1991). It is a well established rule of statutory construction that an unambiguous statute is not subject to judicial construction. See, e.g. GESA Fed. Credit Union v. Mutual

Life Ins. Co., 105 Wn.2d 248, 252, 713 P.2d 728 (1986) [“We are obliged to apply the language as the Legislature wrote it, rather than amend it by judicial construction.”].

Unambiguous words used, but not defined, in a statute should be given their ordinary meaning. Fred J. Moore, Inc. v. Schinmann, 40 Wn. App. 705 (1985). The term “chapter” refers to the entire Chapter 70.160 RCW. See RCW 1.04.010. Likewise, the term “ordinance” refers to the entire Ordinance 2006-2. If the drafters of I-901 or the Ordinance intended to restrict the exemption for “private facilities” to the definition of “public place” [RCW 70.160.020 (2)] they should have used different language. For example, the drafters should have stated that “this definition” or “this paragraph” does not apply to “private facilities except upon the occasions when the facility is open to the public.” Having left the language stating that “this chapter” and “this ordinance” does not apply to “private facilities,” a reasonable person would assume that private facilities, even those that are private workplaces, remained exempt from the smoking ban. CP

51. For example, Richard Deditius, co-manager of the Fleet Reserve Association Club 170 stated:

Based on our reading of the law, we believed we were exempt because the law specifically exempts private facilities. As set forth in the attached petition, the law states, “this chapter is not intended to restrict smoking in private facilities....”. That sounds pretty clear to us, regardless of whether we have employees or not, and especially since no language was added to cover private, nonprofit fraternal clubs such as Club 170.

CP 322 [Deditius Declaration].

- c. Permitting smoking in a “private workplace, within a public place” but not in private workplaces in “private facilities” is absurd.**

Initiative 901 neither amended nor repealed RCW 70.160.060

which provides that:

This chapter is not intended to regulate smoking in a private workplace, within a public place, even though such workplace may be visited by nonsmokers, excepting places in which smoking is prohibited by the chief of the Washington state patrol, through the director of fire protection, or by other law, ordinance or regulation.

Emphasis added.

“Workplace” means “place of employment.” See Microsoft Encarta Dictionary; see also RCW 49.17.060(1). Although the parties agree that the American Legion Post 149 Home is not a “public place,” KCHD argued that the Post Home is a “place of employment” as opposed to a “privately enclosed workplace” so smoking is banned.

CP 27. The trial court, while expressing some confusion, agreed:

The issue of a private workplace within a public building is another interesting issue, but I don't find that that really is an issue in this particular case. We're not talking about a situation like that. I'm not sure what that means, because in my interpretation of what's been done here, if that so-called private workplace had employees, than this law covers them. So how do you have a private workplace without employees? I guess there may be such circumstances.

RP 40:14-23 (Emphasis added)

However, the trial court misread the law which does not limit private workplaces to those within a “public building” but those “within a public place.” RCW 70.160.060 provides:

This chapter is not intended to regulate smoking in a private enclosed workplace, within a public place, even though such workplace may be visited by nonsmokers, excepting places in which smoking is prohibited by the chief of the Washington state patrol, through the director of fire protection, or by other law, ordinance, or regulation.

Emphasis added.

The term "public place" is broadly defined at RCW

70.160.020(2) as follows:

"Public place" means that portion of any building or vehicle used by and open to the public, regardless of whether the building or vehicle is owned in whole or in part by private persons or entities, the state of Washington, or other public entity, and regardless of whether a fee is charged for admission, and includes a presumptively reasonable minimum distance, as set forth in RCW 70.160.075, of twenty-five feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited. A public place does not include a private residence unless the private residence is used to provide licensed child care, foster care, adult care, or other similar social service care on the premises.

Public places include, but are not limited to:

Schools, elevators, public conveyances or transportation facilities, museums, concert halls, theaters, auditoriums, exhibition halls, indoor sports arenas, hospitals, nursing Homes, health care facilities or clinics, enclosed shopping centers, retail stores, retail service establishments, financial institutions, educational facilities, ticket areas, public hearing facilities, state legislative chambers and immediately adjacent hallways, public restrooms, libraries, restaurants, waiting areas, lobbies, bars, taverns, bowling alleys, skating rinks, casinos, reception areas, and no less than seventy-five percent of the sleeping quarters within a hotel or motel that are rented to guests. A public place does not include a private residence. This chapter is not intended to restrict smoking in private facilities which are occasionally open to the public except upon the occasions when the facility is open to the public.

Emphasis added.

Consequently, as interpreted by DOH and KCHD, public bars may allow smoking in private enclosed workplaces but private bars cannot even though “private facilities” are exempt from the law.

- d. **DOH and KCHD arbitrarily insert the “hotel exemption” found in the definition of “public place” into the definition of “place of**

**employment.” DOH and KCHD should do the same with the “private facilities” exemption since it is found in the same place as the “hotel exemption.”**

Although Initiative 901 added language to the definition of “public place” to exempt up to 25% of hotel rooms, that language is not found in the definition of “place of employment.” RCW 70.160.020(2 & 3); KCBH Ordinance 2006-02 (4) [CP 15]. KCHD and DOH maintain that smoking is banned if an entity falls within either the definition of “public place” or “place of employment.” If correct, then smoking would be completely banned in hotels and motels since they are not exempted from the definition of “place of employment.” RCW 70.160.020(2 & 3); KCBH Ordinance 2006-02 (4) [CP 15]. However, DOH has interpreted the law to exempt up to 25% of the sleeping rooms that are rented to guests in hotels and motels. CP 127 [DOH’s “More Frequently Asked Questions” (December 6, 2005)].

It is a well established rule of statutory construction that “No clause, sentence or word shall be construed as superfluous, void or insignificant if the construction can be found which will give force to and preserve all the words of the statute.” Sutherland Statutes and Statutory Construction, sec. 46:6 (2005) [citing: State ex rel. Peninsula Neighborhood Ass’n v. Washington State Dept. of Transp., 142 Wn.2d 328, 12 P.3d 134 (2000)]. Harmony and consistency within the statutory scheme necessitates continuing the exemption from “this chapter” for “private facilities” other than those specifically listed in the definition of “public facilities.” RCW 70.160.020(2). It would be inconsistent with the language of the two definitions to limit the preexisting and on-going exemption from “this chapter” for “private facilities” to only 25% of hotel rooms. Both exemptions (25% of hotel rooms and other “private facilities”) are found in the definition of “public place” but not “place of employment.”

Initiative 901 specifically added various public facilities to the definition of “public place” (e.g. bars, taverns, bowling alleys, casinos

and 75% of private hotel rooms). CP 51. Initiative 901 left in place the general exemption for “private facilities.” CP 51. Given the government’s interpretation of the hotel exemption and insertion of that exemption into the definition of “place of employment,” this Court should apply the same interpretation and interpolation for the term “private facilities.”

This would be consistent with how similar smoking bans in other jurisdictions are applied. For example, California law “declares that regulation of smoking in the workplace is a matter of statewide interest and concern,” and specifically exempts 65% “of the guest room accommodations in a hotel, motel or similar transient facility” from the definition of “place of employment.” Cal. Lab. Code sec. 6404.5(d)(1)-(3). Here, KCHD and DOH simply read into the definition of “place of employment” language exempting 25% of hotel rooms when that language it is only found in the definition of “public place.” RCW 70.160.020(2&3); KCBH Ordinance 2006-02 (4) [CP 15].

**2. Due Process:**

**a. Constitutional provisions**

Article 1, section 3 of the State Constitution's Declaration of Rights provides that "No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I, § 3. The 14<sup>th</sup> Amendment to the U.S. Constitution provides at section 1 that "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV

**b. Strict scrutiny should apply**

The American Legion Post claims the law does not apply to its Home facility and to do so impinge on fundamental rights of privacy, liberty, property, association, business, equal protection, privileges and immunities. CP 104-105 [Kucenski Declaration]. "Strict scrutiny applies ... when state laws impinge on personal rights protected by the Constitution." State v. Schaaf, 109 Wn.2d 1, 29 (fn 75), 743 P.2d 240 (1987). "When a state's laws impinge on fundamental rights, such as liberty, they are constitutional only if they further compelling

state interests, and are narrowly drawn to serve those interests.”

Personal Restraint of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

The State Constitution, Articles 1-31 “catalog those fundamental rights of our citizens.” John Doe v. Blood Center, 117 Wn.2d 772, 781, 819 P.2d 370 (1991). Liberty, association and privacy are considered fundamental rights both under state and federal law. See Buckley v. Valeo, 424 U.S. 1 (1976). The Washington State Supreme Court has broadly defined fundamental rights to include:

[T]he right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from.

Grant Co. Fire Protection Dist. No. 5 v. City of Moses Lake, 150

Wn.2d 791, 805, 812-813, 820, 83 P.3d 419 (2004) [Emphasis added].

**c. Analysis**

A vague statute violates due process. Haley v. The Med. Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). A statute is vague if it does not give fair notice of the proscribed conduct or clear standards to prevent arbitrary enforcement. State v. Halstien, 122 Wn.2d 109, 117, 857 P.2d 270 (1993). The police power of a state cannot be arbitrarily exercised. Hadacheck v. Sabastian, 239 U.S. 394, 410 (1915). In Grayned v. City of Rockford, 408 U.S. 104 (1972), the U.S. Supreme Court explained the importance of ensuring laws are not vague and adopted a two part test for vagueness:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with

the attendant dangers of arbitrary and discriminatory applications.

Id., at 108-109.

The declaration of Richard Deditius, co-manager of the Fleet Reserve Association Club 170 in Everett, illustrates how the public understood the law:

Based on our reading of the law, we believed we were exempt because the law specifically exempts private facilities. As set for in the attached petition, the law states, “this chapter is not intended to restrict smoking in private facilities ...”. That sounds pretty clear to us, regardless of whether we have employees or not, and especially since no language was added to cover private, nonprofit fraternal clubs such as Club 170.

CP 322 [Declaration of Richard Deditius]

This interpretation is consistent with laws in other states which prohibit smoking in “enclosed places owned and operated by social, fraternal, or religious organizations when made available to the general public ....” N.H. Rev. Stat. Ann. 155:66:II (2007).

In Lexington Fayette County Food & Beverage Ass’n v.

Lexington-Fayette Urban County Gov’t, 131 S.W. 3d 745, 753-56

(Ky 2004) [CP 128-142] the Court declared a provision of a no smoking ordinance void for vagueness because it prohibited the presence of “ashtrays and other smoking paraphernalia” from no-smoking areas, without further defining “smoking paraphernalia.”

Here, the RCW 70.160.060 expressly exempts from the smoking ban “private workplaces, within a public place.” As the trial court noted:

I’m not sure what that means, because in my interpretation of what’s been done here, if that so-called private workplace had employees, than this law covers them. So how do you have a private workplace without employees? I guess there may be such circumstances.

RP 40:14-23 (emphasis added)

Moreover, the statute’s definition of “place of employment” is vague as to what “private facilities” are exempt. RCW 70.160.020(3). Prior to I-901, the law did not specifically exempt hotel rooms or fraternal clubs from the definition of “public place.” Nevertheless, both were apparently exempt as “private facilities” since they were not explicitly identified in the law. *Expressio unius est exclusion*

*alterius* – specific inclusions exclude implication. Washington  
Natural Gas Co. v. PUD 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

After I-901, 75% of hotel rooms were specifically included in the definition of “public places” with the implication being that 25% still being considered exempt as “private facilities.” However, private fraternal clubs that were heretofore exempt were now, by implication, subject to the ban. This is ironic since Ch. 70.160 RCW was renamed after passage of I-901 to “Smoking in Public Places.”

3. **Equal Protection and Privileges and Immunities:**

a. **Constitutional provisions**

Article 1, section 12 of the State Constitution’s Declaration of Rights prohibits “Special Privileges and Immunities” and provides that “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Wash. Const. art. I, § 12

The 14<sup>th</sup> Amendment to the U.S. Constitution provides at section 1 that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend XIV

Comparing the words chosen, it is clear that the state clause seeks to prohibit the favoritism of an individual or small class of citizens over the majority while the federal clause is aimed at unfair discrimination.

Thompson, The Washington Constitution’s Prohibition on Special Privileges and Immunities: Real Bite for “Equal Protection” Review of Regulator Legislation? 69 Temp. L. Rev. 1247, 1251 (1996).

The privileges and immunities clause of the Washington State Constitution provides greater protection and requires an independent constitutional analysis from the equal protection clause of the United States Constitution. Grant Co. Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 805, 811, 83 P.3d 419 (2004). For a violation of article I, section 12 to occur, the law, or its application,

must confer a privilege to a class of citizens. Id., at 812; See State v. Robinson Co., 84 Wash. 246, 249-50, 146 P. 628 (1915) (invalidating statute that exempted cereal and flouring mills from act imposing onerous conditions on other similarly situated persons and corporations). The principles of Article 1, section 12 of our Declaration of Rights, as well as of the Fourteenth Amendment to the United States Constitution, prohibit unequal application of impartial laws. See Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886).

**b. Analysis**

Here the selective application of the law by the government confers privileges on one class of “private facilities” that are “places of employment” (e.g. hotels) but not on other similarly situated and previously exempt private businesses (private club facilities). If the law was intended to further a compelling governmental interest by limiting exposure of employees to second hand smoke, it would ban smoking in all “places of employment”, including hotels in their entirety. RCW 70.160.020(3). Burdening the property of some

“private facilities” with a smoking ban but not others (apparently for economic or political reasons after the failure of I-890), violates equal protection and privileges and immunities.

Private club facilities are exempt from the definition of “public place” and have been exempt from the law because, unlike schools, hospitals, retail stores, etc., citizens can choose whether or not to join and patronize clubs. RCW 70.160.020(2). In Rossie v. State Department of Revenue, 133 Wis. 2d 341, 395 NW2d 801 (1986) [CP 143-154] the Court upheld the statute at issue from an equal protection challenge noting that the law did not apply in areas that nonsmokers could easily avoid, such as privately owned and occupied offices, private halls, small restaurants, and bowling alleys. The Court stated that these distinctions were both substantial and germane to the purpose of regulating smoking. The Court noted that the areas excepted from the ban, for the most part, did not present the same degree of risk to nonsmokers, either because they could be avoided, because nonsmokers were not present, or because the plenary

authority of those in charge made state regulation of smoking unnecessary.

In Leonard v. Dutchess County Dept. of Health, 105 F. Supp. 2d 258, (S.D. N.Y. 2000) [CP 155-168] the Court invalidated a municipal ordinance that restricted smoking in restaurants. The Court held that, in promulgating the regulation, the department had overstepped the bounds of its authority by considering non health-related factors and by exceeding statutory restrictions on smoking.

In City of Roanoke Rapids v. Peedin, 1124 N.C. App. 578, 478 S.E.2d 528 (1996) [CP 169-182] the Court held that even if the county board of health had statutory authority to regulate smoking in public, it exceeded general limitations imposed on rule-making powers by usurping legislative power to make policy-based distinctions when it adopted smoking control rules that distinguished among small and large restaurants, bars, and public places rented for private functions based on factors other than public health, such as economic hardship

and difficulty of enforcement, which resulted in disparate treatment of similarly situated patrons, employees, and commercial establishments.

Here, as the initiative's history and the state's interpretation shows, an accommodation was made to exempt 25% of hotel rooms for economic reasons. The hotel exemption was not found in I-901's predecessor, I-890. If the intent of the law was to protect all workplaces from second hand smoke, exempting 25% of private hotel/motel rooms does not protect hotel workers. It is ironic that a hotel would be forced to ban smoking in a private club on its premises but allow smoking in private suites rented by the same private club and serviced by the same hotel employees.

#### **4. Liberty & Privacy**

##### **a. Constitutional Provisions**

The state constitution is replete with references to individual rights and liberties. It begins with a preamble which states: "We, the people of the State of Washington, grateful to the Supreme Ruler of the

Universe for our liberties, do ordain this constitution.” Emphasis added.

The Declaration of Rights includes the following provisions:

**SECTION 1 POLITICAL POWER.** All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

**SECTION 3 PERSONAL RIGHTS.** No person shall be deprived of life, liberty, or property, without due process of law.

**SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED.** No person shall be disturbed in his private affairs, or his Home invaded, without authority of law.

**SECTION 30 RIGHTS RESERVED.** The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

**SECTION 32 FUNDAMENTAL PRINCIPLES.** A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

Wash. Const. art. I, §§ 1, 3, 7, 30 and 32

The 9<sup>th</sup> Amendment to the U.S. Constitution provides that:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. IX.

The 14<sup>th</sup> Amendment of the U.S. Constitution at section 1 provides that:

No State shall ... deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend XIV.

**b. Analysis**

“When a state's laws impinge on fundamental rights, such as liberty, they are constitutional only if they further compelling state interests, and are narrowly drawn to serve those interests.” In re Pers. Restraint of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). Whether there had been a violation of article I, section 7 depends upon whether there had been an intrusion into private affairs. This question is resolved through a two-step analysis: (1) what interests citizens have historically held, and (2) whether the expectation of privacy is one that citizens should be entitled to hold. State v. McKinney, 148 Wn.2d 20, 27-32, 60 P.3d 46 (2002).

Regarding the “interests citizens have historically held,” the smoking ban as applied to private workplace facilities has a coercive impact on the liberty, association and privacy rights causing members to forgo the exercise of those rights. CP 104-105 [Kucenski Declaration]. Historically, distinctly private clubs have been protected from government interference in their business affairs. See, e.g. RCW 49.60.040(10); San Jacinto Savings & Loan v. Kacal, 928 F.2d 697, 704 (5<sup>th</sup> Cir. 1991) (finding that the owner of an arcade had a protected liberty interest in operating her business.). Prior to passage of I-901, private club facilities (like private hotel rooms) were exempt from the smoking ban as “private facilities.” As detailed in the declarations from Mr. Kucenski, Mr. Deditius and Mr. Steven Jackson, members of private workplace facilities have historically had the expectation of privacy to associate, drink and smoke in their private facilities since those facilities were founded. [CP 102-106; CP 318-348; CP 349-356].

Regarding the “expectation of privacy” prong, a reasonable expectation of privacy is one that citizens should be entitled to hold given how other jurisdictions have acknowledged that smokers have privacy rights. For example, in Alford v. City of Newport News, 270 Va. 584, 260 S.E.2d 241 (1979) [CP 183-186], the Virginia Supreme Court ruled that a municipal ordinance prohibiting smoking was unconstitutional as applied to the owner of a private restaurant. The Court invalidated the ordinance only in its impact upon the regulation of the use of private property. In that case, the Court stated:

But, no matter how legitimate the legislative goal may be, the police power may not be used to regulate property interests unless the means employed are reasonably suited to the achievement of that goal. “The mere power to enact an ordinance ... does not carry with it the right arbitrarily or capriciously to deprive a person of the legitimate use of his property.”

Id., at 586.

In Grusendorf v. Oklahoma City, 816 F.2d 539 (CA 10 Okla 1987) [CP 187-194] the U.S. Court of Appeals sustained the

enforcement of a fire department rule forbidding first-year firefighter trainees from smoking cigarettes either on or off duty. The plaintiff contended that although there is no specific constitutional right to smoke, such a right is included within the right of liberty or privacy in the conduct of one's private life, a right to be let alone that is implicit in the 14<sup>th</sup> Amendment. Although the Court upheld the rule, it assumed that the plaintiff had a liberty interest in one's right to smoke cigarettes off duty. The Court stated:

It can hardly be disputed that the Okalahoma City Fire Department's non-smoking regulation infringes upon the liberty and privacy of the firefighter trainees. The regulation reaches well beyond the work place and well beyond the hours for which they receive pay. It burdens them after their shift has ended, restricts them on weekend and vacations, in their automobiles and backyards and even with the doors closed and the shades drawn in the private sanctuary of their own Homes. Furthermore, while it is true that the Court has thus far recognized a right of liberty or privacy in only a handful of circumstances, it is also true that "the outer limits of this aspect of privacy have not yet been marked by the court ...."

Id., at 541 (Emphasis added).

In Fagan v. Axelrod, 550 N.Y.S.2d 552, 558 (1990) [CP 195-211] the petitioners challenged the constitutionality of New York's Clean Indoor Air Act arguing that it "impermissibly intrudes upon the right of citizens to be 'let alone' in the conduct of his private affairs." Although the Court rejected that argument, it drew an important distinction between smoking bans in public and private areas as follows:

Chapter 244 pertains only to activity of a public dimension. It does not apply to significantly private areas such as ... hotel or motel rooms or to private events, such as private social functions .... If petitioners in fact have a general "right to privacy" to smoke, this legislation merely requires them to exercise it outdoors or in private. ... Under Chapter 244 no person loses any recognizable right or liberty by virtue of being a smoker. It is not a blanket prohibition against smoking, merely a limitation of smoking in public areas where other persons will involuntarily be exposed to secondhand smoke.

Id., at 559-561.

It can hardly be disputed that the law as interpreted by DOH and KCHD banning smoking in private facilities that are also private

workplaces infringes upon the liberty and privacy of club member-owners. Unlike Grusendorf, the total ban on smoking in private facilities at issue here reaches beyond “public places” and public servants to impinge upon fundamental privacy and association rights of the American Legion Post and its member-owners.

**G. Attorneys Fees**

Under 42 USC 1988, a court is authorized to award attorneys’ fees against litigants other than the United States where the plaintiff has sued to enforce a provision of 42 USC 1983. Section 1983 in turn, provides a statutory right of action against “any person who, acting under color of state law, violates the constitutional rights of another.” In Hanrahan v. Hampton, 446 U.S. 754 (1980), the Supreme Court, after reviewing the legislative history of 42 U.S.C. 1983 and 1988, stated that “Congress contemplated the award of fees to a party who has established his entitlement to some relief on his claims, either in the trial court or on appeal.” Id., at 757. Here, the appellant requested attorneys fees in the trial court. CP 12

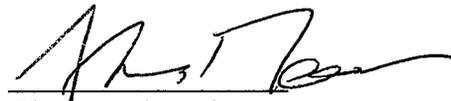
## H. Conclusion

American Legion Post American Legion Post #149 asks the

Court to:

1. Enjoining defendants from enforcing the laws in the American Legion Post's private Home facility.
2. Declaring that the law as applied to private workplaces within private facilities unconstitutional.
3. Awarding costs and attorney fees.

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