

NO. 79839-7

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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AMERICAN LEGION POST NO. 149,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH and KITSAP  
COUNTY HEALTH DISTRICT,

Respondents.

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**CORRECTED BRIEF OF RESPONDENT WASHINGTON STATE  
DEPARTMENT OF HEALTH**

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## I. INTRODUCTION

American Legion Post No. 149 (“the Post”) challenges Initiative 901 (I-901), adopted by the people of Washington in 2006 and codified as amendments to RCW 70.160. The Post claims that, as a private club, it is not subject to the prohibition on smoking in a place of employment. It also claims that application of the statute to a private club that is also an employer violates the constitutional rights of the Post and its members. These arguments are based on a misinterpretation of the plain language of the statute and on constitutional claims that have no factual or legal basis.

Contrary to the Post’s claims, the Post is expressly covered by the prohibition against smoking in a place of employment. The Post’s constitutional claims fail because smoking is not a fundamental right and because the law at issue is a legitimate exercise of police power intended to protect the health of employees.

For the reasons explained in this brief, the Washington State Department of Health (“the Department”) asks this Court to affirm the judgment of the Superior Court and dismiss this appeal.

## II. STATEMENT OF THE CASE

In 1985, the Washington Legislature adopted the law codified as RCW 70.160, formerly titled the Clean Indoor Air Act. The Clean Indoor Air Act limited smoking in some, but not all, public places. Laws of 1985, ch. 236. In 2006, in light of mounting scientific evidence that exposure to second-hand smoke has harmful effects on human health, the people of the State of Washington voted to enact Initiative 901, imposing broader limits on smoking. In addition to expanding the existing prohibitions on smoking in public places, Initiative 901 included a prohibition on smoking in “any place of employment.” Laws of 2006, ch. 2. “Place of employment” is defined as “any area under the control of a public or private employer which employees are required to pass through during the course of employment....” It expressly includes, but is not limited to, work areas, restrooms, conference and classrooms, break rooms, cafeterias and other common areas under the control of the employer. RCW 70.160.020(3). These amendments took effect December 8, 2005. CP 247-253.

Initiative 901 vests enforcement authority in local health departments and local law enforcement. RCW 70.160.070, .080. Consistent with this authority, the Kitsap County Board of Health adopted Ordinance 2006-02, effective April 4, 2006, to enable the Kitsap County

Health District (the "District") to implement RCW 70.160 as amended by Initiative 901. CP 232-240. Using this authority, the District issued a "Notice and Order to Correct Violation" to the Post dated May 18, 2006. CP 241-242.

The Post then filed an action in Thurston County Superior Court seeking declaratory judgment and injunctive relief under the Administrative Procedure Act and the Uniform Declaratory Judgment Act to preclude the Department and the District from prohibiting smoking in the Post under the authority in RCW 70.160 and the District's Ordinance. The Post alleged that Initiative 901 and the implementing legislation exempt private clubs such as the Post from the smoking prohibition even when they are places of employment, that the Post is a "private enclosed workplace," and thus exempt from the smoking prohibition, and that the Post should be entitled to the same exemption that applies to hotels and motels. The Post alleged constitutional violations including a violation of substantive due process under the Washington and United States Constitutions, a violation of the privileges and immunities clause of the United States Constitution and art. I, § 12 of the Washington Constitution, a violation of the right to privacy and freedom of association under the Washington Constitution and the United States Constitution, and a

violation of equal protection. The Post also alleged that legislation implementing Initiative 901 amounted to a regulatory taking.

The parties filed cross motions for summary judgment. CP 63-445. Following oral argument, Thurston County Superior Court Judge Gary R. Tabor issued an order granting the Department's and the District's motions for summary judgment, denying the Post's motion for summary judgment, and dismissing the Post's complaint with prejudice. CP 446-448. The Post appealed and requested direct review under RAP 4.2(a)(4). The Department and the District oppose direct review.

This appeal is limited to the Post's statutory construction and constitutional claims. The Post has not appealed the dismissal of its petition for review under the Administrative Procedure Act and its regulatory takings claim.

### **III. SUMMARY JUDGMENT STANDARD OF REVIEW**

On appeal of a grant of summary judgment, the appellate court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c); *Vasquez v.*

*Hawthorne*, 145 Wn.2d 103,106, 33 P.3d 735 (2001). The court reviews “rulings on summary judgment and issues of statutory interpretation de novo.” *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 908, 154 P.3d 882 (2007), citing *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

#### IV. ARGUMENT

##### A. Summary of Argument

Two issues are before the court in this appeal: 1) whether the “place of employment” smoking prohibition (RCW 70.160.030) added by Initiative 901 is applicable to the Post; and 2) whether, under the proper standard of review, the “place of employment” smoking prohibition violates the Washington or United States Constitution for any of the many reasons suggested by the Post.

In its brief the Post makes three statutory arguments: a) that under RCW 70.160.020(2) 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” (Post Brief at p. 8); b) that, even after the amendments, RCW 70.160.060 permits smoking in an “private enclosed workplace within a public place” so, therefore, the legislature must have intended to allow smoking in private places of employment such as the Post; and c) that the exception under the public

place definition for up to twenty-five percent of sleeping quarters in hotels and motels supports, in some manner, finding a similar exception for places of employment like the Post.

The Post's constitutional claims are premised on an alleged fundamental right to smoke or associate with people who are smoking. The Post alleges that application of the smoking prohibition to the Post impinges upon this fundamental right and violates due process or in the alternative, equal protection, the privileges and immunities provisions in the Washington and United States Constitutions, or the right to privacy and freedom of association. The Post also claims that RCW 70.160, or provisions thereof, is void for vagueness.

This Court should reject all of the Post's arguments and affirm the Superior Court. First, the Post's attempt to graft language from the definition of "public place" in RCW 70.160.020(2) onto the definition of "place of employment" in RCW 70.160.020(3) is not consistent with the plain language of Initiative 901, the codified statute or the intent of the voters or legislature; and is contrary to relevant principles of statutory construction. CP 250-253. Under the plain language of the statutes, the Post is a "place of employment" (RCW 70.160.020(3)) where smoking is prohibited (RCW 70.160.030 and District Ordinance).

Second, although the Post attempts to cast its constitutional net broadly, the only activity prohibited by the challenged initiative is smoking. The legislation that implemented Initiative 901 is a clear example of police power legislation aimed at protecting the health and welfare of “all citizens, including workers in their places of employment” from the known harmful health effects caused by exposure to second-hand smoke. RCW 70.160.011. The law is presumed constitutional and the burden is on the Post to prove it is unconstitutional beyond a reasonable doubt. The Post cannot do so. Finally, because the Post’s as-applied challenge implicates no fundamental right and no protected class, this Court should consider and reject the Post’s constitutional claims under the “rational basis” standard of review.

**B. In Order to Protect Employees From the Harmful Effects of Second-Hand Smoke, Initiative 901 Amended RCW 70.160 to Prohibit Smoking in “Any Place Of Employment.” This Regulation Applies to the Post Because it is an Employer.**

- 1. The overarching purpose of Initiative 901 was protection of persons, including employees, from the effects of second-hand smoke.**

Courts should consider the intent of an initiative “as the average informed voter voting on the initiative would read it.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2001). In interpreting statutes courts should read the law “in its entirety,

not piecemeal, and interpret the various provisions...in light of one another.” *McGowan v. State*, 148 Wn.2d 278, 288, 60 P.3d 67 (2006), citing *Western Petroleum Importers, Inc. v. Friedt*, 127 Wn.2d 420, 428, 889 P.2d 792 (1995).<sup>1</sup> As a primary objective, the court should interpret statutes “to determine and implement legislative intent.” *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 832, 74 P.3d 115 (2003) (internal citation omitted).

Former RCW 70.160.010 stated:

The legislature recognizes the increasing evidence that tobacco smoke in closely confined spaces *may* create a danger to the health of *some* citizens of this state. In order to protect the health and welfare of those citizens, it is necessary to prohibit smoking in public places except in areas designated as smoking areas.

RCW 70.160.010 (emphasis added).

Twenty-one years later, Initiative 901 articulated unequivocal findings in RCW 70.160.011 regarding the “known” health risks of exposure to second-hand smoke and the purpose of protecting citizens from exposure:

The people of the state of Washington recognize that exposure to second-hand smoke is *known* to cause cancer in humans. Second-hand smoke is a *known* cause of other diseases including pneumonia, asthma, bronchitis, and heart disease. Citizens are *often* exposed to second-hand

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<sup>1</sup> Citizen initiatives represent the “same power of sovereignty as the legislature” and “initiatives are interpreted according to the same rules of statutory construction” as legislative enactments...” *McGowan* at 288 (internal citations omitted).

smoke in the workplace, and are likely to develop chronic, potentially fatal diseases as a *result* of such exposure. In order to protect the health and welfare of all citizens, *including workers in their places of employment*, it is necessary to prohibit smoking in public places and workplaces.

Section 1 of Initiative 901; RCW 70.160.011 (emphasis added).

A comparison of those two intent sections shows a pronounced change from RCW 70.160.010's characterization of "increasing evidence" that second-hand smoke "may" create a health danger to RCW 70.160.011's clear confirmation that such exposure is "a known cause" of identified life-threatening diseases for persons exposed to second-hand smoke, including "workers in their places of employment." Whereas RCW 70.160.010 did not expressly address protecting employees, RCW 70.160.011 expressly recognized the necessity of protecting workers in places of employment, including public and private facilities.

The ballot title to Initiative 901 provided a clear explanation to voters. The ballot title read: "Initiative Measure No. 901 concerns amending the Clean Indoor Air Act by expanding smoking prohibitions. This measure would prohibit smoking in buildings and vehicles open to the public and places of employment, including areas within 25 feet of doorways and ventilation openings unless a lesser distance is approved."

The Ballot Measure Summary stated:

This measure would prohibit smoking in public places and in places of employment. Current laws allowing designation of certain smoking areas would be repealed, including current provisions allowing designation of an entire restaurant, bar, tavern, bowling alley, skating rink, or tobacco shop as a smoking area. The prohibition would include areas within 25 feet of entrances, exits, opening windows and ventilation intakes, unless shorter distances are approved by the director of the local health department.

The ballot title as well as the explanatory statement left no doubt that the smoking prohibition would extend to places of employment if the voters passed the initiative. CP 251-252. The Initiative 901 statements for and against provided further information regarding the expanded scope of the proposed law on “private property owners.” CP 253.

Consistent with this intention, Initiative 901 expanded the definition of public places where smoking must be prohibited, RCW 70.160.020(2); added a new “place of employment” definition in RCW 70.160.020(3); amended RCW 70.160.030 and RCW 70.160.070 to include the “place of employment” smoking prohibition; repealed RCW 70.160.040, which had allowed designated smoking areas in public places in prescribed circumstances; and established a presumptive 25 foot smoke-free safety boundary around the perimeters of public places and places of employment. The Initiative provided succinctly that “no person may smoke in a public place or any place of employment.” Section 3 of

Initiative 901; RCW 70.160.030 (emphasis added). Protection of employees was the focal point for the initiative and voters understood and endorsed this concept.

**2. The exception for “private facilities” does not apply to an employer such as the Post.**

The Post’s status as an employer is not disputed. It “employs a number of people.” CP 9. In its summary judgment motion the Post stated that “[t]he Post allows smoking in private areas of the Post Home where there are employees.” CP 65. An officer of the Post stated, “[t]o support the operation of the Post Home and its lounge, the Post employees a total of seven individuals....” CP 106.

The Post nonetheless argues that its status as a private facility trumps its status as an employer, rendering the smoking ban inapplicable to it. The Post’s argument is premised on a sentence in the definition of public place which provides: “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).

The Post’s reliance on this “exception” ignores the entire structure of I-901 and its implementing legislation, seeking to graft provisions of the public place definition into the place of employment prohibition. The

initiative consisted of two main parts—an expanded prohibition on smoking in public places and a prohibition on smoking in places of employment. Each of the two facets of the initiative contained a few exceptions within a broad prohibition. “Public place” excluded private facilities only occasionally open to the public (unless the public was present) and excluded private residences. In addition, a certain number of hotel or motel rooms were allowed to be excluded. The place of employment definition contained its own duo of limited exceptions. Private residences were excluded. Certain home-based businesses also were exempted from the definition and smoking prohibition. RCW 70.160.020(3).

Smoking is, with some exceptions, prohibited in public places. It is also prohibited, separately and distinctly, in any place of employment. The dichotomy between public place and private facility is important in determining whether there is an exception to the definition of public place. It is irrelevant to whether a place is a “place of employment.” Thus the exceptions for private facilities are meaningless in the context of a place of employment.

The Post’s interpretation would eviscerate a primary purpose of Initiative 901, i.e., the protection of employees. RCW 70.160.020(2). Courts must avoid constructions that yield unlikely, absurd, or strained

consequences. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) (internal citations omitted). When read “in its entirety”, RCW 70.160 as amended by I-901 reveals that the Post is subject to a smoking restriction when it is “open to the public” or when it meets the definition of a “place of employment” under RCW 70.160.020(3).

**3. The Post is not a “private enclosed workplace.”**

RCW 70.160.060 provides:

[t]his chapter is not intended to regulate smoking in a private enclosed workplace, within a public place, even though such workplace may be visited by non-smokers, except in 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.

This provision is a vestige from the prior Clean Indoor Air Act.

Once again, the Post attempts to graft a portion of the public place smoking restrictions onto the provisions related to place of employment. RCW 70.160.060 relates to the “public place” facet of the smoking prohibition. It has no bearing on the “place of employment” provision. The Post claims that RCW 70.160.060 creates an exception for smoking in a place of employment, as long as the smoking occurs in a “private enclosed workplace.” The Post apparently seeks to equate “workplace” with “place of employment.” This violates the tenets of statutory construction because “place of employment” is carefully defined; it is not synonymous with the generic term “workplace.” “When the legislature

uses different language in the same statute to deal with related matters, we presume the legislature intended those words to have different meanings.” *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn.App. 411, 419, 12 P.3d 1022 (2000), citing *State v. Jackson*, 65 Wn.App. 856, 860, 829 P.2d 1136 (1992).

Accepting the Post’s argument also would yield an absurd result because every privately owned “place of employment” would become a “private workplace,” where smoking is allowed. This would fly in the face of the clearly expressed intent to regulate all places of employment, whether under the control of a public or private employer. RCW 70.160.020(3). The Court should avoid a construction that would render the prohibition on smoking in a privately owned workplace meaningless. *See Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). By its express terms, RCW 70.160.060 relates only to an exception for a “private enclosed workplace, within a public space.” This exemption does not apply to the Post as an employer. CP 6.

On this issue, the Court can be guided by a 2006 Attorney General Office’s opinion letter discussing RCW 70.160.060’s interpretation in light of Initiative 901 and concluding that: “[t]o the extent a private enclosed workplace *is not anyone’s place of employment* ... smoking could still occur in such an area without regard to whether the building

around the space is a “public place” as defined in RCW 70.160.” CP 39 (emphasis added). In other words, RCW 70.160 permits smoking in a situation where a public place contains a private enclosed workplace, which is not open to the general public and which employees are not required to enter as part of their job requirements. This common sense interpretation distinguishes and gives effect to both provisions of the statute. It is not the scenario presented to this Court by the Post’s challenge.

**4. The exception for certain public places that are “sleeping quarters” does not apply to the Post and is not before this Court.**

The “public place” definition, RCW 70.160.020(2), removes up to twenty-five percent of “the sleeping quarters within a hotel or motel that are rented to guests” from the non-exclusive definition of public places and exempts them from RCW 70.160.030’s “public place” smoking prohibition.

There is no corollary exemption for a place of employment. The Post essentially seems to be arguing that it is not fair that hotels and motels can allow smoking in up to 25% of their rooms since they also are employers. The Post invites the Court to analogize to the explicit hotel or motel “sleeping quarters” exception found in the public place definition (RCW 70.160.020(2)) and establish a “place of employment” exception

for private facilities by judicial interpretation. In essence, the Post is asking the court to rewrite the law to achieve its preferred policy.

As discussed above, the law as applied to the Post clearly prohibits smoking in the Post under the “place of employment” provisions. Only two exceptions apply to the “place of employment” prohibition. Private residences are exempt. Home based businesses are exempt. Consistent with the focus on employee health and safety, the initiative writers and the legislature chose to create these two exemptions, and no others.

The extent to which I-901 protects hotel or motel employees from secondhand smoke is not before this court. This Court should decline the Post’s invitation to address that issue in the context of the Post’s challenge.

**C. Prohibiting Smoking in a Place of Employment Such as the Post is a Constitutional Exercise of Police Power**

**1. RCW 70.160 and the district’s ordinance are valid exercises of state and local police power entitled to a presumption of validity**

RCW 70.160 as amended by I-901 is prototypic “police power” legislation. “[The police power] has been defined as an inherent power in the state which permits it to prevent all things harmful to the comfort, welfare and safety of society. It is exercised for the benefit of the public health, peace and welfare.” *Manufactured Housing Communities of*

*Washington v. State*, 142 Wn.2d 347, 354, 13 P.3d 183 (2000), citing *Conger v. Pierce County*, 116 Wash. 27, 36, 198 P. 377 (1921). The finding and intent section of RCW 70.160.011, and those sections of RCW 70.160 defining and implementing the “place of employment” smoking prohibitions, contain a strong expression of the people’s and legislature’s intent to protect employees from harmful secondhand smoke.

“[A] statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.” *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998) (internal citations omitted). The “beyond a reasonable doubt standard” refers to the fact that the one challenging the statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution.” *Id.* at 147 (internal citations omitted). This high burden is derived from deference to the legislative branch, which is presumed to “consider the constitutionality of its enactments.” *Id.* The court’s deference is also related to the role of the legislature as speaking “for the people”—a principle evident in the instant case where the challenged laws were enacted by the people’s initiative.

Prohibiting smoking in places of employment, regardless of whether they are privately owned or publicly owned, is a legitimate and rational expression of the police power. The Post has not formulated any plausible argument that the legislation violates the Washington or United States Constitution. The Superior Court correctly dismissed the Post's claims.

## **2. Smoking is not a fundamental right**

Smoking is not a fundamental right afforded enhanced protection under this state's constitution or under the federal constitution. As stated in *Andersen v. King County*, 158 Wn.2d 1, 25, 138 P.3d 963 (2006): “[u]nder a federal constitutional analysis, for a fundamental right to exist it must be ‘objectively, ‘deeply rooted in this Nation’s history and tradition’... and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed,’” (internal citations omitted).

The Post relies on three out-of-state decisions as supporting authority for the proposition that RCW 70.160 impermissibly restricts smoking in places of employment. Post Brief at p. 34-36. However, each of those decisions recognized smoking regulations as a valid exercise of power police which may reasonably restrict personal and property rights.

In each case, the court used a rational relationship analysis to examine the challenged legislation.

In *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 541 (10<sup>th</sup> Cir. 1987), the court upheld a city fire department's absolute ban on smoking by firefighter trainees. The court held that "cigarette smoking may be distinguished from the activities involving liberty or privacy that the Supreme Court has thus far recognized as fundamental rights...." In upholding the smoking prohibition, the court applied a presumption of validity to the regulation and used a rational basis standard of review. *Id.* at 543.

"Rational basis" review was determined appropriate in *Grusendorf* given the fire department's interest in "the promotion of the health and safety of firefighter trainees." *Id.* Similarly, RCW 70.160.011 establishes an express nexus between the serious health risks caused by exposure to second-hand smoke and the purpose of protecting the health and welfare of employees by eliminating that exposure in any place of employment.

In *Fagan v. Axelrod*, 146 Misc.2d 286, 550 N.Y.S.2d 552, 555 (1990), the court considered a challenge to New York's 1975 "Clean Indoor Air Act." The act included "place of employment" provisions under which employers were required to "provide nonsmokers with a smoke-free work area." *Id.* at 555. In upholding the validity of the

legislation, the court stated that “[t]he legislation deprives no one of a fundamental interest, nor does it discriminate along suspect lines—therefore, this Court may not sit in review of its wisdom, propriety, or efficacy. Having a basis in reason, the enactment is a valid exercise of the police power.” *Id.* at 561.

In *Alford v. City of Newport News*, 220 Va. 584, 260 S.E.2d 241 (1979), the Supreme Court of Virginia reversed a restaurant owner’s conviction for violating a city no smoking ordinance. The court reversed the conviction upon finding that the “no smoking area” restrictions in the ordinance were not “reasonably suited to the achievement of the legislative goal” of protecting non-smokers from “the toxic effect of smoke.” *Id.* at 586. The city’s ordinance was found to be an unreasonable exercise of otherwise valid police power, not because the ordinance imposed smoking restrictions, but because the smoking restrictions were too ineffectual to achieve the legislative purpose. *Id.*

In reaching this conclusion the court articulated its standard for review:

The due process guarantee does not forbid reasonable regulation of the use of private property. ‘The legislature may, in the exercise of the police power, restrict personal and property rights in the interest of public health, public safety, and for the promotion of the general welfare.’ ...it is clearly within the police power of the legislature to abate what it finds to be injurious to the public health.

*Id.* at 585 – 586 (internal citations omitted).

Each of the cases cited by the Post stands for the proposition that smoking restrictions are valid if they are rationally related to a state interest in promoting health. There is no dispute that Washington’s smoking restriction directly and effectively addresses documented health concerns.

**3. RCW 70.160 clearly defines “place of employment”; it is not unconstitutionally vague.**

“[D]ue process does not require impossible standards of specificity or mathematical certainty. Some degree of vagueness is inherent in the use of our language.” *State v. Smith*, 130 Wn. App. 721, 727, 123 P.3d 896 (2005) citing *State v. Riles*, 135 Wn.2d 326, 348, 957 P.2d 655 (1998), citing *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). A statute is void for vagueness only if it is framed in terms that are so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 352, 75 P.3d 1003 (2003). It is not impermissibly vague because there can be theoretical disagreement as to its meaning. Impossible standards of specificity are not required. *Id.* “A statute or condition is presumed to be

constitutional unless the party challenging it proves that it is unconstitutional beyond a reasonable doubt.” *Id.*

Under any standard, the RCW 70.160 prohibition on smoking in a place of employment easily passes constitutional muster. The prohibition on smoking is clear and succinct. “No person may smoke in ...any place of employment.” RCW 70.160.030. The key terms and conditions are clearly defined so that an employer can see the provisions apply to it and can determine what is required to comply with the law.

In support of its argument that RCW 70.160 violates the Post’s right to due process under the vagueness doctrine, the Post relies on citation to general principles under state and federal case law and a series of assertions that it fails to fully develop or support with relevant and persuasive authority.

First, the Post relies heavily on *Lexington Fayette County Food and Beverage Ass’n v. Lexington Fayette Urban County Gov’t*, 131 S.W.3d 745, 752-754 (Ky. 2004). Post Brief, pp. 23-24. A challenge to a Kentucky statute is not particularly helpful to the analysis of RCW 70.160. Nonetheless it is noteworthy that while the Kentucky court found the definition of “smoking paraphernalia” to be constitutionally infirm, it found that a provision prohibiting smoking within a “reasonable distance” of a building gave adequate notice. The court stated: “[s]urely,

individuals can reasonably understand that if their tobacco smoke is entering the building they are not at a reasonable or required distance.” *Id.* at 753.

In support of its vagueness doctrine argument, the Post also argues that RCW 70.160.020(3) is vague “as to what ‘private facilities’ are exempt.” Post Brief, pp. 24-25. As discussed above, the Initiative added the new “place of employment” definition to RCW 70.160.020 and, with those amendments, I-901 provides only two narrow exceptions to the prohibition on smoking in a place of employment. Only private residences and home based businesses are exempt. This is not vague or unclear. The exceptions for “private facilities” do not apply to the Post in its status as an employer.<sup>2</sup>

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<sup>2</sup> The Post refers to a declaration by a person unaffiliated with the Post: “Based on our reading of the law we believed we were exempt because the law specifically exempts private facilities....especially since no language was added to cover private non profit fraternal clubs...” Post Brief at p. 23. Declaration of Richard Deditius. CP 322.

Mr. Deditius’s conclusion that “no language was added” is in conflict with I-901’s new definition at RCW 70.160.020(3) of “place of employment” which includes a “private employer” and I-901’s amendment to RCW 70.160.030 to prohibit smoking in a “place of employment.” A statutory scheme cannot be characterized as “vague” or as failing to provide clear notice because a person who may be subject to its provisions has failed to read or who has ignored all of its related parts.

**4. The place of employment smoking prohibition does not violate equal protection or the privileges and immunities provision of the Washington or United States' constitutions.**

As discussed above, Initiative 901 amended RCW 70.160 to add a new “place of employment” smoking prohibition and to expand the definition of “public place.” For hotels and motels the initiative provided a limited exception for up to 25% of the rooms rented to guests.

The Post argues that this exception results in a violation of the privileges and immunities provisions of art. I, § 12 of the Washington state constitution and the “privileges and immunities” and “equal protection” provisions of the 14<sup>th</sup> amendment of the United States Constitution. The Post appears to contend that it is similarly situated to hotels and motels. This analysis again conflates the “public place” and “private facility” categories in contradiction with the law as enacted because the hotel or motel “sleeping quarters” exception applies to those facilities as public facilities, not as employers.<sup>3</sup>

In *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006), the court reviewed and stated the standard for review under art. I, § 12 and the equal protection provisions of the 14<sup>th</sup> amendment equal protection clause. The court held that

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<sup>3</sup> As noted above, the applicability of I-901’s place of employment provisions to hotels and motels is not before this court.

...the concern underlying the state privileges and immunities clause is undue favoritism, not discrimination, and the concern about favoritism arises where a privilege or immunity is granted to a minority class ('a few'). Therefore an independent state analysis is not appropriate under the privileges and immunities clause unless the challenged law is a grant of positive favoritism to a minority class.

*Id.* at 28.

The Post cannot claim that it is the victim of favoritism. Under RCW 70.160.020(2), the public place smoking exception is expressly limited to a limited percent of hotel or motel "sleeping quarters" that are rented to guests. This exemption does not confer a privilege on hotels or motels that is not available to the Post. The Post is not in the business of provided sleeping quarters to its members or guests. Hotels and motels are subject to the same general place of employment prohibition smoking that applies to the Post.

Absent a claim of favoritism, the courts apply the same analysis that applies under the federal equal protection clause." *Andersen*, 158 Wn.2d at 16. "The level of scrutiny to be applied under an equal protection analysis depends on whether a suspect or semi-suspect classification has been drawn or a fundamental right is implicated; if neither is involved, rational basis review is appropriate." *Id.* at 18 (internal citations omitted).

As discussed above, the application of the place of employment smoking prohibition to the Post has not affected any fundamental right. As affirmed in *Andersen*, a party challenging classifications has the burden of proving “that the classification drawn by the law is not rationally related to a legitimate state interest.” *Id.* at 31. When considering such a challenge and when determining whether the Post has met its burden, “...the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification.” *Id.* at 31 (internal citations omitted).

Logical assumptions justify a distinction between hotel rooms and the Post under the “any conceivable facts” principle cited in *Andersen*. The legislature could have been mindful of the fact that hotel guests have a primary expectation of privacy in their rooms. In addition, hotel employees have fairly limited access to the rooms while guests are present and have corresponding less exposure to the smoke in those rooms.<sup>4</sup> These distinctions are consistent with the fact that the exception does not extend to hotel or motel facilities made available to the public for other purposes, such as meeting rooms or conference facilities. In those parts of the hotel, the smoking prohibition applies.

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<sup>4</sup> Contrast this with the Post employees who might be required to spend their entire work shift around members who are smoking at the facility.

While it could be argued that employees would have received even greater protection had smoking been banned in all hotels and motels, the legislature acted rationally in exempting hotel and motel rooms from the absolute prohibition. As affirmed in *Andersen*, "...a statute generally does not fail rational basis review on the grounds of over- or under-inclusiveness; [a] classification does not fail rational-basis review because ....in practice it results in some inequity." *Id.* at 31-32 (internal citations omitted).

**5. The place of employment smoking prohibition does not violate any applicable privacy or liberty rights or interests asserted by the Post.**

The Post argues that it has liberty or privacy rights and interests that are violated by the application of the place of employment smoking prohibition. Post Brief at pp. 30-37. Since the Post provides scant analysis of these claims, it is difficult to provide a detailed response. This argument appears to rest on the premise that it has a constitutionally protected right to allow its members and guests to exercise their privacy and association rights by smoking at the Post facility. The Post asserts that this right arises under the Washington Constitution art. I, §§ 1, 2, 7, 30 and 32, and under the United States Constitution's 14<sup>th</sup> amendment due process clause: "No State shall...deprive any person of life, liberty, or property, without due process of law." Post Brief at pp. 31-32.

To support this argument, the Post refers to *Alford v. City of Newport News*, 220 Va. 584, 260 S.E.2d 241 (1979), *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10<sup>th</sup> Cir. 1987), and *Fagan v. Axelrod*, 146 Misc.2d 286, 550 N.Y.S.2d 552 (1990), three out-of-state decisions discussed above. When read as a whole and read in context, these decisions refute the Post's argument that a private facility or club has any constitutionally protected privacy or liberty right or interest that is violated by RCW 70.160.

The Post refers to *Alford* for the proposition that "smokers have privacy rights" and "a municipal ordinance prohibiting smoking was unconstitutional as applied to the owner of a private restaurant." Post Brief at p. 34. In contrast to the Post's characterization of this case, *Alford* said nothing about smoker's privacy rights. *Alford* clearly reiterates that police power legislation includes the "reasonable regulation of private property." *Alford*, 220 Va. at 585.

Next, the Post refers to *Grusendorf* for the proposition that an individual may have a liberty or privacy interest in smoking and quotes from the decision for the proposition that "...the outer limits of this aspect of privacy have not yet been marked by the court..." Post Brief at p. 35. *Grusendorf*, 816 F.2d at 541 (internal citation omitted). The Post fails to reconcile this dictum in the case from the court's holding as applicable to

its claims. As with *Alford*, *Grusendorf* affirms the use of police power to enact smoking prohibitions. Finally, the Post argues that the *Fagan* decision “drew an important distinction between smoking bans in public and private areas...” Post Brief at p. 36. In contrast to the Post’s characterization of the *Fagan* analysis, the court affirmed the law at issue as constitutional:

The regulation of indoor smoking in public areas and work places, so as to minimize the deleterious effects of environmental tobacco smoke upon non-smokers therein, is a proper subject for legislative action, and a legitimate state objective, since it concerns a subject (public health) traditionally reserved to the police power....The legislation deprives no one of a fundamental interest, nor does it discriminate along suspect lines—therefore, this Court may not sit in review of its wisdom, propriety or efficacy. Having a basis in reason, the enactment is a valid exercise of the police.

*Fagan*, 550 N.Y.S.2d at 561.

Similar conclusions were reached in two constitutional challenges to 2003 amendments to New York State’s “Clean Indoor Air Act.” *NYC C.L.A.S.H. v. City of New York*, 315 F.Supp.2d 461 (S.D.N.Y. 2004) and *Players, Inc. v. City of New York*, 371 F.Supp.2d 522 (S.D.N.Y. 2005). These amendments prohibited smoking “in virtually all indoor areas in New York State where people work or socialize.” *C.L.A.S.H.* at 466. The court rejected all constitutional challenges, including the claim that the smoking ban implicated constitutional protections “with regard to

assembly and association and thus, would not merit a heightened level of scrutiny for these claims.” *Id* at 476. In *Players* the court rejected constitutional challenges, including the claim that the smoking ban violated any rights of association for the private club plaintiff:

No...significant, direct, or substantial interference with associational rights can be found in this case. As stated in *C.L.A.S.H.*, while smoking bans restrict where a person may smoke, they do not ‘unduly interfere with smokers’ right to associate freely with whomever they choose in the pursuit of any protected First Amendment activity.

*Id.* at 546, citing *C.L.A.S.H.*, 315 F.Supp.2d at 473.

Under the place of employment smoking prohibition, the Post’s members and guests are not prohibited from freely and privately meeting or associating or any other lawful activity. Only smoking is prohibited, while employees are present. The Post cannot show that there is no rational relationship between protecting the health of employees from the known risks of exposure to second-hand smoke and the protection afforded such employees under RCW 70.160.030 and the District’s ordinance. Absent such a showing, the smoking prohibition cannot be branded arbitrary and therefore does not result in an unlawful deprivation of any liberty interests the Post may have in allowing its members to smoke. *See Kelley v. Johnson*, 425 U.S. 238, 248, 96 S.Ct. 1440 (1976).

## V. ATTORNEY FEES

The Department requests that the Court grant the Department its costs, including its statutory attorney fees as allowed under RAP 18.1 and RCW 4.84.030.

The Department requests that the court deny the Post's request for an award of costs and attorney fees under 42 U.S.C. § 1988 and 42 U.S.C. § 1983. The Post's original complaint (CP 7) and its motion for summary judgment (CP 64) did not seek attorney fees or costs under these federal provisions. The Post has failed to support its argument that any established constitutional rights applicable to the Post have been violated under 42 U.S.C. § 1983.

## VI. CONCLUSION

The Department respectfully requests that the Court affirm the superior court order granting summary judgment to the Department and the District and dismissing the Post's challenge to RCW 70.160. The "place of employment" smoking prohibition is applicable to the Post under the Initiative 901 amendments to RCW 70.160 and under the Kitsap County Board of Health Ordinance as implemented by the Kitsap County Health District. These laws, as applied

to the Post, are rationally related to prevention of the known health risks to  
Post employees from exposure to second-hand smoke.

RESPECTFULLY SUBMITTED this 3rd day of August, 2007.

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A handwritten signature in black ink, appearing to read "Pamela H. Anderson", with a long horizontal flourish extending to the right.

PAMELA H. ANDERSON  
WSBA #21835

Attorneys for Respondent  
Washington State  
Department of Health

NO. 79839-7

SUPREME COURT OF THE STATE OF WASHINGTON

AMERICAN LEGION POST NO. 149,

Appellant,

v.

WASHINGTON STATE  
DEPARTMENT OF HEALTH and  
KITSAP COUNTY HEALTH  
DISTRICT,

Respondents.

CERTIFICATE  
OF SERVICE

CLERK

BY RONALD R. CARPENTER

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I, Linda Humphrey, do hereby certify:

That I am a citizen of the United States, over 18 years of age, and competent to testify herein. That on the 3<sup>rd</sup> day of August, 2007, I served true and correct copies of the *Corrected Brief of Respondent Washington State Department of Health* and this *Certificate of Service* upon the below-listed parties in the manner indicated:

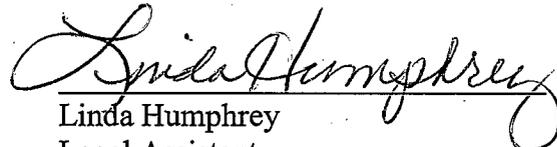
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