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STATE OF WASHINGTON

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NO. 79839-7

SUPREME COURT
OF THE STATE OF WASHINGTON

AMERICAN LEGION POST NO. 149,

Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF HEALTH AND THE
KITSAP COUNTY HEALTH DISTRICT,

Respondents.

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Statutory Construction - Whether Washington's Clean Indoor Air Act should be construed in a manner consistent with the legislative intent of protecting employees of private facilities?
2. Whether a private club has standing to argue the fundamental rights of its members?
3. Whether members of a private club have a fundamental right to smoke in places of employment?
4. Whether an Act that protects employees from the harmful effects of second-hand smoke is rationally related to the State's interest in protecting the health and welfare of its citizens and therefore meets the requirements of Due Process and Equal Protection?
5. Whether an Act that prohibits smoking in places of employment interferes with person's private affairs in violation of Article 1, Section 7 of the Washington State Constitution?

II. COUNTERSTATEMENT OF THE CASE

Washington's voters enacted Initiative 901 in November 2005. The Initiative amended Washington's Clean Indoor Air Act (the "Act") and prohibited smoking in public places and places of employment. Included within the Act's provision was a *requirement* that local boards of health enforce the Act against owners or other persons in control of public places or places of employment. RCW 70.160.070(3). To this end, the Kitsap County Board of Health adopted Ordinance 2006-2, the "Clean Indoor Air Ordinance." Cp 279-290. The restrictions enumerated in the

Ordinance mirror and go no further than the requirements of the Act and impose no additional restrictions.¹ CP 279-290. The Kitsap County Health District enforces or implements the policies and regulations of the Kitsap County Board of Health.

Appellant, Bremerton American Legion Post #149, is a nonprofit private fraternal organization that owns and operates its Post facility at 4922 Kitsap Way, Bremerton, Washington. CP 280. Appellant allows private members and guests to smoke tobacco products in its facility when the facility is not open to the public. CP 280. This smoking occurs in areas where employees are required to work. CP 280. On May 18, 2006, Bonnie Latham, the Kitsap County Health District's Food Program Manager, issued a "Notice and Order to Correct Violation" directing Appellant to prohibit smoking within "place of employment" at its facility. CP 280, 292-293. Ms. Latham granted Appellant's initial request for additional time to respond to the Notice and Order. CP 280. Appellant subsequently responded to the Notice, arguing that, as a private facility, it was exempt from the Act. CP 280, 295. On June 28, 2006, the Health District, through its attorney, responded arguing that the Act applied to places of employment within Appellant's private facility. CP 280, 297.

¹ Because the restrictions in the Ordinance mirror the restrictions of the Act, this memorandum will simply refer to the "Act."

III. SUMMARY OF ARGUMENT

Appellant brings this lawsuit challenging the enforcement of Washington's Clean Indoor Act against its facility. Appellant initially claims that the Act does not apply to places of employment located within private facilities. Appellant further argues that if the Act applies to its facility, the Act is unconstitutional. The Appellant fails to provide reasoned support for these claims and the Court should deny this appeal.

Appellant's argument that the Act, on its face, does not apply to its facility ignores the context of the Act as well as the intent and purposes of amending the Act. The Act was specifically amended to protect employees in their workplaces. In arguing that its employees should not receive this protection, Appellant requests that the Court evaluate the Act in a vacuum, looking at a specific phrase included within the definition of a "public place". However, this case involves the enforcement of the Act against a "place of employment". The Act does not exempt private facilities from the prohibitions applicable to place of employment. Therefore, as Appellant has paid employees at its facility, it is subject to the Act's requirements.

Appellant further argues that if the Act applies to its facility then the Act is unconstitutional. In supporting this argument, Appellant wishes to engage in constitutional dart throwing, hoping that something sticks. In

addition, the Appellant attempts to rely upon the constitutional rights of its members. However, the Appellant's does not have this standing because it was not established to protect the rights of smokers. Indeed, Appellant is not entitled to this standing because its club was not established to further the rights of smokers. More importantly, Appellant cannot prove that the Act violates either its own constitutional rights or the rights of its members. The Act was adopted to protect the health and welfare of the citizens of the state of Washington. The Act advances this interest by prohibiting smoking in most public places and places of employment. Thus, Appellant cannot establish that the Act is unconstitutional.

IV. ARGUMENT

A. STATUTORY CONSTRUCTION – THE ACT PROHIBITS SMOKING IN PLACES OF EMPLOYMENT LOCATED WITHIN PRIVATE FACILITIES.

When interpreting a law, a court's primary goal is to give effect to the legislative intent; therefore, the spirit or intent of a law prevails over the letter of the law. *Javonich v. Herron*, 91 Wn.2d 767, 772, 592 P.2d 1096 (1979). "The purpose for which the statute was enacted and the evil at which the statute is aimed are essential stepping-stones on the pathway to the determination of intent." *New Jersey v. Franchetta*, -- A.2d --, 2007 WL 1835964, *3 (N.Y.Supp.A.D. 2007); *see also Giblin v. Pine Ridge Log Home Inc.*, -- N.Y.S.2d --, 2007 WL 2002589, *2 (N.Y.A.D.

2007)(Court ascertains the legislative intent “against the background and purposes of the statute.”). The language used in a particular section should be examined in the context of the entire law and be given a sensible, meaningful and practical interpretation. *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). In making this examination, a court should recognize the inherent uncertainties that exist in most English words and phrases and should “never expect mathematical certainty” from the language used in a law. *Id.* at 180 n.4. In addition, a court should never construe statutory language in a manner that would result in absurd or strained consequences. *In re Custody of Smith*, 137 Wn.2d 1, 8, 969 P.2d 21 (1988). In interpreting a statute, Washington Courts give deference to an agencies interpretation of the statute and will uphold that interpretation “if it reflects a plausible construction of the statutory language and is not contrary to the legislative intent and purposes. *Echo Bay Community Ass’n v. State Dept. of Nat. Resources*, -- Wn. App., 160 P.3d 1083, ¶25 (2007) citing *Roller v. Dept. of Labor & Indus.*, 128 Wn.App. 922, 926-927, 117 P.3d 385 (2005). A court should never construe a law in a manner that would render it unconstitutional. *Douglass*, 155 Wn.2d at 176.

1. The Act prohibits smoking in places of employment located within private facilities.

Appellant claims that the Act does not prohibit smoking in “places of employment” located within private facilities. In making this claim, Appellant relies on the definition of public place which provides:

"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.

RCW 70.160.020(2). Appellant claims that the language at the end of this definition exempts private facilities from the Act, even in places of employment. However, when the Act is considered in its entirety, especially considering the voters intent behind Initiative 901, it is clear that the exemption relates only to regulation as a public place. The exemption appears in the definition of public place, speaks in terms of regulating private facilities as a public place and pre-dates Initiative 901. Initiative 901 amended the Act to provide a separate prohibition against smoking in places of employment. Private facilities are not exempt from this prohibition. Thus, the language Appellant points to simply exempts private facilities from regulation as a “*public place*” except when the facility is open to the public.

2. Construing the Act to prohibit smoking in places of employment located within private facilities furthers the stated purposes of the Act.

The voters’ intent in approving Initiative 901, as well as the express purposes of the initiative, further supports interpreting the Act to prohibit smoking in places of employment. The citizens of the state of Washington approved Initiative 901 to protect the health and welfare of,

among others, workers in their places of employment. As expressly stated in Initiative 901, §1:

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 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 workspaces.

In seeking to provide these protections RCW 70.160.030 was amended to read “No person may smoke in any public place or place of employment.” The phrase “or place of employment” was the new language that was added to the statute by Initiative 901. The initiative further amended RCW 70.16.020 to define a “place of employment” as “any area under the control of public or private employer which employees are required to pass through during the course of employment.” *Id.* Thus, the clear intent of the act was to protect *all* workers in their places of employment. Appellant requests that the Court define the Act so that these protections do not extend to employees of private facilities. Adopting such a definition would nullify the expressed intent of the Act and result in the “absurd” result that the Act did not protect the health and welfare of a designated class of employees. Court’s must construe laws in a sensible, meaningful and practical manner and in a manner that gives effect to the

legislative intent. *Javonich*, 91 Wn.2d at 772; *Douglass*, 115 Wn.2d at 179. Therefore, the Act should be construed so as to protect the health and welfare of employees of private facilities.

3. Exemptions for “private enclosed workspaces” and a small percentage of hotel rooms are consistent with the legislative intent.

Appellant mistakenly claims that it would be absurd to construe the act to allow smoking in 25% of private hotel rooms and private enclosed workspaces. RCW 70.160.060 provides that the Act does not apply to a “private enclosed workspace” *within* a public place. Although this exemption is expressly limited to public places, the Appellant argues that the exemption should apply to places of employment. The Act defines a place of employment as “any area ...which employees are required to pass through during the course of their employment....” Giving the Act a sensible construction, it is clear that an area cannot be classified as a “private enclosed workspace” if employees are required to pass through the area during the course of their employment. Rather, it simply allows an employer to have a designated area, such as a smoke shack, where employees are not required to pass and smoking could therefore occur. Construing the Act to allow a “place of employment” to be exempted as a “private enclosed workspace” would lead to the absurd result that any employer, unless his or her facility was open to the public, could avoid

complying with the Act by designating the job site as a private enclosed workspace. The Act was specifically amended to protect employees working in areas that were not open to the public. The Appellant's interpretation of a private workspace would nullify that amendment. Thus, a "private enclosed workspace," just like a private facility, should not be interpreted to include any areas where employees are required to pass through during the course of their employment.

Appellant claims that, because the Act exempts 25% of hotel and motel rooms from its regulation, private facilities should also be exempt. Even if the Act exempts a small percentage of private hotel rooms from the prohibitions placed on places of employment it would not mean that private facilities were also exempt. The clearly stated intent of the Act is to protect citizens in public places or in places of employment. Therefore, the question the Court must ask is whether it would be consistent with that intent to exempt a small percentage of hotel rooms while not exempting private facilities. Clearly, such a construction would be consistent with the intent of the Act. Private hotel rooms are more akin to a person's private abode. Hotel employees have minimal, if any, exposure to second-hand smoke when these rooms are occupied. At most, an employee might drop some food off at a guest's room while that guest is smoking. In contrast, employees at Appellant's facility are stationed where the

smoking occurs. In short, they are subject to more smoke, more often. A more relevant comparison to Appellant's facility would be a bar or restaurant located within a hotel. As with Appellant's facility, the Act prohibits smoking in these areas. Therefore, it would be consistent with the intent of the Act to prohibit smoking in private facilities while allowing it in some hotel/motel rooms.

In conclusion, the Court should interpret the Act to apply to places of employment that are located in private facilities. In addition, the Court should not construe the exception for private enclosed workspaces to apply, as Appellant requests, to any place of employment.

B. THE APPELLANT FAILS TO PROVIDE ADEQUATE SUPPORT FOR ITS CONSTITUTIONAL ARGUMENTS

Appellant raises several constitutional challenges to the Act's regulation of places of employment located within private clubs. "[C]onstitutional challenges must overcome the heavy presumption in favor of the constitutionality of state laws." *Coalition for Equal Rights, Inc. v. Owens*, 458 F.Supp.2d 1251, 1258 (D.Colo 2006) citing *Hodel v. Indiana*, 452 U.S. 314, 323, 101 S.Ct 2376, 69 L.Ed.2d 40 (1981). A law is presumed constitutional and a party challenging the law must prove it unconstitutional beyond a reasonable doubt. *Amalgamated Transit Union Local 587 v. Wa.*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000). "This

standard is met if argument and research show that there is no reasonable doubt that the [law] violates the constitution.” *Id.* “Passing treatment” or “lack of reasoned argument is insufficient to merit judicial consideration.” *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *Des Moines Marina Ass’n v. Des Moines*, 124 Wn. App. 282, 100 P.3d 310 (2004). Before a court invalidates a law “it must be clear that the legislation cannot reasonably be construed in a manner that comports with constitutional imperatives.” *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 804, 23 P.3d 477 (2001). Here, the Court should reject Appellant’s constitutional arguments for lack of reasoned argument.

C. THE APPELLANT LACKS STANDING TO ARGUE THE RIGHTS OF ITS MEMBERS.

Although Appellant did not allege standing to do so, it attempts to argue the constitutional rights of its members. In order to have this standing, the interests that the Appellant seeks to protect suit must be germane to its organizational purpose. *N.Y.C. C.L.A.S.H. v. City of New York*, 315 F.Supp.2d 461, 468 (S.D.N.W. 2004). Here, Appellant seeks to protect the purported right to smoke. Because Appellant is not an organization formed to protect the rights of smokers, it does not have representative standing to bring suit on behalf of its members. *Id.* Thus, the Court should not allow Appellant to argue the rights of its members.

D. APPELLANT’S CONSTITUTIONAL ARGUMENTS ARE SUBJECT TO RATIONAL BASIS REVIEW BECAUSE THIS CASE DOES NOT IMPINGE UPON ANY FUNDAMENTAL RIGHTS.

There is no more a fundamental right to smoke cigarettes than there is to shoot-up or snort heroin or cocaine or to run a red light.²

If a law impinges upon a fundamental right it is subject to strict scrutiny and must be precisely tailored to further a compelling governmental interest. *Owens*, 458 F.Supp.2d 1251, 1258. Where a statute neither “impinges upon a fundamental right nor involves some suspect classification” it is subject to a rational basis review. *B.G.M. Enterprises v. Harris*, 507 F.Supp.932, 933 (D.Ct.Mont. 1981); *Margolla Associates v. City of Seattle*, 121 Wn.2d 625, 658, 854 P.2d 23 (1993). Here, the Appellant claims that the Act impinges upon fundamental rights.

As the party challenging the Act, Appellant bears the burden to prove that the law unlawfully impinges upon a fundamental right. *Georges v. Carney*, 546 F.Supp. 469, 473 (D.C.Ill. 1982) aff’d 691 F.2d 297 (7th Cir. 1982). Court’s should not declare fundamental rights lightly.

As recognized by the Court in *Andersen v. State of Washington*:

A “careful description” of the asserted fundamental liberty interest is required and the court has noted that ‘by extending constitutional protection to an asserted right or liberty interest, we, to a great

² *Fagan v. Axelrod*, 146 Misc.2d 286, 297, 550 N.Y.S.2d 552 (1990)

extent, place the matter outside the arena of public debate and legislative action. We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field....’

158 Wn.2d 1, 138 P.3d 963, 976 (2006). “[F]or 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.” *Id.* “Purported ornamentations of First Amendment freedoms warrant no constitutional protection when such activities are not essential to the enjoyment of a particular right, or may otherwise be harmful to public health, safety, order or general welfare.” *C.L.A.S.H* at 474. In addition, it is not enough to show simply that the Act will prevent some of its members from exercising those rights in certain areas, such as the Appellant’s facility. *The Players, Inc. v. City of New York*, 371 F.Supp.2d 522 (2005); *C.L.A.S.H*, 315 F.Supp.2d at 466. To be cognizable, the Appellant must show that the Act causes a “direct and substantial or significant” interference with its member’s fundamental rights. *Id.* at 546.

Here, the Act simply prohibits smoking in certain designated places. Clearly, the ability to smoke is not deeply rooted in this nations history or implicit in the concept of ordered liberty. *Craig by Craig v. Buncombe County Bd. of Educ.*, 80 N.C.App. 683, 343 S.E.2d 222 (1986).

Moreover, while the inability to smoke may, to some extent, influence a member's choice to go to the club and "associate" with others, it does not prevent them from associating. Indeed, the only activity or interest that it actually precludes is smoking. Therefore, the Appellant has failed to establish that the Act affects any fundamental rights.

In arguing that the Act impairs fundamental rights, the Appellant attempts to rely upon the rights of its members. However, in order to have this standing the right the Appellant seeks to protect must be germane to its organizational purpose. Because Appellant's club was not established to protect the rights of smokers, it does not have standing to bring suit on behalf of its members. *C.L.A.S.H.*, 315 F.Supp.2d at 473. Therefore, the Court should reject Appellant's due process and equal protection claims.

Even if Appellant could bring this suit on behalf of its members, it cannot show that the Act impinges upon any fundamental freedoms of its members. The Plaintiff claims that the act violates the "fundamental rights of privacy, liberty, property, association, business, equal protection, privileges and immunities." However, the Appellant fails to provide any reasoned argument to establish that any of these interests are involved in this case. Brief of Appellant p. 20. Indeed, the Appellant fails to even define these rights. Where a party fails to provide reasoned support for a claim that a fundamental right is involved the Court will not consider such

a claim. *Campbell v. State, Department of Social and Health Services*, 150 Wn.2d 881, 900, 83 P.3d 999 (2004).

While the Appellant fails to provide any case law or argument defining what fundamental rights it alleges are impinged upon by the act, it appears that the Appellant is primarily relying on its members rights of privacy, liberty and association. Brief of Appellant p30-37. Although the Appellant fails to provide any case law defining the parameters of these rights, none of them are implicated by this case. Moreover, while the Appellant, in discussing due process at pages 30-37 of its brief, presents some argument that constitutionally protected interests are involved in this case, it fails to establish that these interests amount to fundamental rights.

The Appellant argues that the Act impinges upon its members right to privacy. A person's right to privacy encompasses "the right to autonomous decisionmaking and the right to nondisclosure of intimate personal information or confidentiality." *O'Hartigan v. Dept. of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991). The right to nondisclosure does not constitute a fundamental right. *Id.* The right to autonomy is a fundamental right and "involves issues related to marriage, procreation, family relationships, child rearing and education." *Id.* Here, the Act clearly does not impact either of these interests. More importantly, the Appellant has failed to provide any support for the

proposition that “smoking” falls within the rubric of “autonomous decisionmaking” that amounts to a fundamental right. Therefore, the Appellant has failed to establish that the Act impinges upon the fundamental right to privacy.

As with the right to privacy, the Appellant fails to provide any reasoned support for its argument that the Act impinges upon any fundamental liberty interests. “Fundamental liberty interests include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion.” *Andersen*, 158 Wn.2d 1, 25 citing *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Again, the Act clearly does not impact any of these interests and the Appellant fails to cite any case law or arguments to support the proposition that smoking, or allowing persons to smoke in a private club, constitutes a fundamental liberty interest.

As with the rights to privacy and liberty, the Appellant apparently argues that the Act interferes with its members’ freedom of association without providing any support for that argument. To demonstrate that the law impinges upon the freedom of association, Appellant must prove either that the law intrudes “into a persons choice to enter into and maintain certain intimate human relationships” or that the law “interferes

with an organization engaged in activities protected by the First Amendment.” *C.L.A.S.H.*, 315 F.Supp.2d 461, 473. Appellant must show that the law actually impinges upon this right and it is not sufficient to show that the law impinges upon activities that are collateral to exercising the right. *Id.* (“Purported ornamentations of First Amendment freedoms warrant no constitutional protection when such activities are not essential to the enjoyment of a particular right, or may otherwise be harmful to public health, safety, order or general welfare.”). Thus, the Appellant must prove that the Act “directly and substantially” interferes with its member’s freedom of association. *Players*, 371 F.Supp.2d at 546. Here, Appellant can, at most, show that the act impairs activities that are collateral to exercising fundamental rights.

The inability of Appellant’s members to smoke at its facility does not impinge upon their freedom of association. Similar to this case, *C.L.A.S.H.* involved a challenge to a statute that “prohibit[ed] smoking in virtually all indoor places ... where people work[ed] or socialize[d].” *C.L.A.S.H.*, 315 F.Supp.2d at 466. The Appellant challenged the statute arguing that the statute interfered with the freedoms of association, assembly and speech. *Id.* at 472. In recognizing the faulty reasoning of this argument the court noted:

A critical flaw inherent in [Appellant's] First Amendment arguments is the premise that association, speech, and general social interaction cannot occur or cannot be experienced to the fullest without smoking, or, conversely, that unless smokers are allowed to light up on these occasions and at these places, their protected right is somehow fundamentally diminished. Implicit in this premise is that smoking enhances the quality of the social experience and elevates the enjoyment of smokers' First Amendment rights; in other words, that only by being allowed to smoke can smokers contribute fully and enjoy the maximum experience of association, assembly, and speech in public places such as bars and restaurants. [Appellant's] allegation that the Smoking Bans curtail activities for smokers, in essence suggests that smokers cannot fully engage in conversation and other activities in bars and restaurants unless they are permitted to smoke, or that only by being permitted to smoke in these places can they fully exercise their constitutional rights of association and speech.

Id. The Court went on to recognize that:

The First Amendment guarantees the fundamental freedoms it enumerates, but not necessarily every purpose or form that exercise of the specific rights may take. *Nothing in the Constitution engrafts upon First Amendment protections any other collateral social interaction, whether eating, drinking, dancing, gambling, fighting, or smoking—the list may be endless.* While in some circles and events these social enhancements, by custom or practice, may be associated with and perhaps even augment the enjoyment of protected endeavors, it does not follow that they are indispensable conditions to the exercise of particular constitutional rights. The effect of [Appellant's] “association plus” theory would be to embellish the First Amendment with extra-constitutional

protection for any ancillary practice adherents may seek to entwine around fundamental freedoms, as a consequence of which the government's power to regulate socially or physically harmful activities may be unduly curtailed.

Id. at 474. As in *C.L.A.S.H.*, while Washington's Act "restricts where a person can smoke, it is a far cry to allege that such restrictions unduly interfere with smokers' right to associate freely with whomever they choose in the pursuit of any protected First Amendment activity." *Id.* Even if the smoking ban prevents members from going to Appellant's facility, no fundamental rights have been impinged. *Players*, at 544.

Here, the Act simply prohibits smoking in certain designated areas where non-smokers will be subjected to second-hand smoke. Clearly, the ability to smoke is not deeply rooted in this nation's history or implicit in the concept of ordered liberty. *Craig*, 80 N.C.App. 683. Moreover, while the Appellant claims that the Act, in effect, collaterally impacts other constitutionally protected rights, the Appellant fails to provide any support that any fundamental rights are involved in this case.

Courts evaluating clean indoor air acts have uniformly found that those acts do not interfere with any fundamental rights. In *Players, Inc.*, the Court upheld an act that was strikingly similar to the Act at issue in this case. Similar to this matter, *Players* involved a private club's challenge to a statute that banned smoking in bars and food service

establishments. 371 F.Supp.2d 522 (2005). Like Washington's Clean Indoor Air Act, the prohibition applied to private clubs if they had paid employees. *Id.* at 541. *Players* argued that the prohibition prevented it, or its members, "from fully exercising their constitutional rights to freedom of association, freedom of assembly, and freedom of speech and ... caused numerous members of the club to cancel their memberships and to reduce participation in club activities." *Id.* at 541 (internal citation omitted). Notwithstanding these arguments, the Court held that there was no evidence that the smoking ban, in and of itself, infringed upon any fundamental rights. *Id.* at 541. This determination was based upon the recognition that a smoking ban does not prevent a person from engaging in any of those rights, even though they may choose to exercise those rights at a different location. *Id.* See also *C.L.A.S.H.*, 315 F.Supp.2d 461 (holding that there is no fundamental right to smoke and that a law prohibiting smoking in public places and places of employment did not implicate the freedom of association or any other fundamental rights); *City of Tucson v. Grezaffi*, 200 Ariz. 130, 136, 23 P.3d 675 (2001) ("An argument that a law banning smoking in restaurants violates the freedom of association borders on frivolous"); *Owens*, 458 F.Supp.2d 1251, 1258 (finding that a law banning smoking in most indoor areas and places of employment did not interfere with any fundamental rights); *Craig*, 80

N.C.App. 683 (“The right to smoke in public places is not a protected right”). Here, while the Act may impact a member of the American Legion’s decision as to where they will engage in certain fundamental freedoms, it does not prevent or even hinder their ability to engage in those freedoms. The Appellant has failed to establish that the Act impinges upon fundamental freedoms. Therefore, the Act is subject to rational basis review and must be upheld unless the Appellant can prove that no rational basis supports the Act. (*See* section IV(E)(2)).

E. THE ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION OR THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE STATE CONSTITUTION.

The Court should apply the same standard of review to Appellant’s equal protection and privileges and immunities claims. The equal protection clause of the Fourteenth Amendment provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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* deprive any person of life, liberty, or property, without due process of law; nor *deny to any person within its jurisdiction the equal protection of the laws.*

(emphasis added). Article I, section 12 of the Washington State Constitution, provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens, or corporations.

While the language of the equal protection and privileges and immunities clauses are different, the analysis to be applied by the court is the same.

As recognized by the Court in *Andersen*:

As we concluded in *Grant County II*, the concern underlying the state privileges and immunities clause, unlike that of the equal protection 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 unless the challenged law is a grant of positive favoritism to a minority class. In other cases, we will apply the same analysis that applied under the federal equal protection clause.

138 P.2d 963, 972. Therefore, as the Act does not grant any “privilege or immunity” to a minority class the Court should apply federal equal protection analysis. *Id.*

1. The Court should not reach Appellant’s Equal Protection claims because the Appellant fails to establish “disparate treatment.”

The essence of an equal protection claim is that similarly situated persons are treated differently. *See Murphy v. Missouri Dep’t of Corrections*, 372 F.3d 979, 984 (8th Cir. 2004) (“To succeed on an equal protection claim, [Appellant] must show that he is treated differently than

a similarly situated class”); *Schoonover v. State of Washington*, 116 Wn.App. 171, 182, 64 P.3d 677 (2003). The right to equal protection belongs to the individual. *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351, 59 S.Ct. 232, 83 L.Ed.2d 208 (1938); *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 92 L.Ed.2d 1161 (1948). Therefore, an *individual* claiming an equal protection violation must first establish that the *individual* is similarly situated with other individuals. *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). Next, the individual must establish that he or she “received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination.” *Id.*

Appellant cannot establish that the Act violates its rights to equal protection. In making this claim, Appellant argues that the Act allows smoking in tribal casinos, private enclosed workspaces and in a small percentage of hotel or motel rooms. Initially, Appellant is mistaken in its assumption that the exemption for private enclosed workspaces or hotel/motel rooms allows smoking to occur in an area that employees are required to pass through during the course of their employment. Moreover, even if the exemptions allowed smoking in these areas, Appellant cannot establish that it is similarly situated with either of these

entities. Clearly allowing smoking in a hotel room or in a private enclosed workspace is in no way related to prohibiting smoking at Appellant's facility. Indeed, in those areas of hotels that are more akin to Appellant's facility, such as a bar or restaurant, smoking is prohibited. Therefore, Appellant cannot establish that it was treated differently from a similarly situated class.

Even if Appellant had standing to bring this suit on behalf of its members, Appellant cannot make a sufficient showing to warrant an equal protection inquiry. For an equal protection analysis to be warranted, Appellant must first establish that its members are treated differently than a similarly situated class. *Murphy*, 372 F.3d 979, 984; *Schoonover*, 116 Wn.App. 171, 182. In this case, Appellant's members are treated no differently than other "similarly situated" classes. The Act prohibits smoking in all public places or places of employment. RCW 70.160. Its restrictions apply to *any* persons present in the "public place" or "place of employment." Appellant points to the fact that smoking is allowed in privately enclosed workspaces, in a small percentage of hotel rooms, and in tribal casinos. In so doing, the Act simply regulates where persons can smoke, not who can smoke. If a member of the American Legion goes to sovereign tribal land, or to a designated smoking room in a hotel, they can smoke. At the same time, *anyone* who goes to the Appellant's facility will

not be allowed to smoke in any public place or place of employment at the facility. Furthermore, smoking is not allowed in hotel/motel rooms or private enclosed workspaces if employees are required to pass through those areas. RCW 70.160.020(2), 70.160.030. Absent differential treatment, there can be no equal protection violation, *Murphy*, 372 F.2d at 984, and the Court need not engage in any further analysis. *See Osman*, 108 P.3d 1287, 1290 (2005).

2. The State has a rational basis to protect persons from the harmful effects of second-hand smoke.

As this case does not involve a fundamental right or suspect class, any classifications it allegedly creates are subject to minimal scrutiny under the rational basis test. *Margolla Associates*, 121 Wn.2d 625, 650.

Under this test:

The Court will uphold a legislative classification so long as “the relationship of the classification to its [legislative purpose] is not so attenuated as to render the distinction arbitrary or irrational ... Under this test, the challenging party can overcome the strong presumption of constitutionality only by showing the classification is “purely arbitrary.”

Id. at 651 (internal citations omitted); *see also Foley v. Dept. of Fisheries*, 119 Wn.2d 783, 789, 837 P.2d 14 (1992). Review under the rational basis

test is highly deferential to the enacting body. *Schuchman v. Hoehn*, 119 Wn. App. 61, 67, 79 P.3d 6 (2003).

Courts provide legislatures wide latitude in crafting social and economic policies. *C.L.A.S.H.*, 315 F.Supp.2d 461. Statutes enacted to further social or economic policies must be upheld “if there is any rationally conceivable state of facts that could provide a rational basis for the classification.” *Federal Communications Comm’n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)); *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993); *Heller v. Doe by Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). A law is rational “if its distinctions are rationally related to any conceivable government purpose, whether or not stated in the law or contained in the legislative record.” *Owens*, 458 F.Supp.2d 1251, 1259 (rational basis to allow smoking in casinos and airport smoking areas while prohibiting it in most other places of employment). Courts “may assume the existence of any conceivable state of facts that could provide a rational basis for the classification.” *Andersen*, 138 P.3d 963, 980. A rational basis may even exist where the legislative choice is based on rational speculation. *Id.* In addition, the “fit” between the law and its purpose need not be perfect: “A classification does not fail rational-basis review because it is not made with mathematical nicety or because in

practice it results in some inequality.” *Heller*, at 320; *U.S.R.R. Retirement v. Fritz*, 449 U.S. 166, 175, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980). Given this highly deferential level of review, an Appellant “attacking the rationality of the legislative classification ha[s] the burden to negative every conceivable basis which might support it.” *Beach Comm’n*, 508 U.S. at 315.

Appellant cannot “negative every conceivable basis which might support” the Act by claiming that the law does not prohibit smoking in all “public places” or “places of employment.” “Equal protection does not require that the state choose between attacking every aspect of a problem and not attacking the problem at all.” *Crown Zellerbach Corp. v. Dept. of L&I of State of Wa.*, 98 Wn.2d 102, 111, 653 P.2d 626 (1982). Therefore, a statute need not address all phases of a perceived problem to provide a rational basis for a legislative classification. *See Heller*, 509 U.S. at 321. Rather, the legislature may choose to “take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *see also Rossie v. State of Wisconsin*, 133 Wis.2d 341, 354, 395 N.W.2d 801 (1986). As recognized by the Court in *Grezaffi*, “[i]n seeking to protect the life and health of its citizens, the legislature cannot be required to forego an effective prophylactic measure

simply because it may be somewhat imprecise.” 200 Ariz. at 138 *q.t.g.* *State v. Hammond*, 192 Ariz. 528, ¶11, 968 P.2d 601 (1998).

Washington’s Clean Indoor Air Ordinance furthers a legitimate interest. RCW 70.160.011, as amended by Initiative 901, provides:

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 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.

The adverse health effects of second-hand smoke have been well established. *See generally* The Health Consequences of Involuntary Smoking, A Report of the Surgeon General, United States Department of Health and Human Services (1986); *see also* Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders, United States Environmental Protection Agency (1992). As such, the “legitimate purpose” of the Act is to protect the health and welfare of the citizens of the state of Washington from the harmful effects of second hand smoke.

Appellant complains that the Act does not prohibit smoking in privately enclosed workspaces, in tribal casinos and in a small percentage

of hotel rooms. Initially, the fact that the law does not apply to tribal casinos is of no affect. State laws generally do not apply to “tribal Indians on Indian lands except where Congress has expressly provided that state laws shall apply.” *Humes v. Fritz Companies Inc.*, 125 Wn.App. 477, 490, 105 P.3d 1000 (2005). Appellant’s reliance on the exception for privately enclosed workspaces³ and hotels or motels is similarly misplaced. RCW 70.160.020 includes within the definition of a public place “no less than seventy five percent of the sleeping quarters within a hotel or motel.” RCW 70.160.060 says that the chapter is not intended to “regulate smoking in a private enclosed workspace, within a public place.” However, these exceptions do not exempt any area from regulation as a place of employment. Indeed, if employees are required to pass through these areas during the course of their employment smoking must be prohibited. RCW 70.160.020(3), 70.160.030. Therefore, even assuming Appellant could be considered similarly situated to these other facilities, Appellant can establish no disparate treatment.

³ Appellant’s reliance on the “privately enclosed workspace” exception illustrates the straws they are grasping at in order to create the appearance of a constitutional issue. Appellant seems to claim that an employer can designate an area that employees are required to pass through as a “private enclosed workspace.” However, if the Court were to adopt such a construction, it would destroy the legislative purpose behind Initiative 901, which amended the Clean Indoor Air Act.

Even if Appellant could establish some disparate treatment, the Act satisfies the requirements of the equal protection clause. The Act furthers the state's interest in protecting the health and welfare of its citizens by limiting exposure to second-hand smoke. Appellant's equal protection argument basically amounts to a complaint that because the Act does not prohibit smoking in all areas where non-smokers may be subjected to second-hand smoke it receives disparate treatment under the law. However, the State is not required to prevent all exposure to second-hand smoke in order to justify the law. *See Heller*, 509 U.S. 312, 321; *See also Players*, 371 F.Supp.2d 522, 546(2005)(upholding a smoke ban that prohibited smoking in private clubs that had employees but allowed smoking in other locations such as, private clubs without paid employees and tobacco bars). Clearly, prohibiting smoking in "public places" and "places of employment" greatly diminishes a non-smokers exposure to second-hand smoke.

Courts have unanimously upheld the validity of smoking bans that prohibit smoking in certain locations while allowing it in others. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110, 69 S.Ct. 463, 93 L.Ed.2d 533 (1949). *See also Beach Communications Inc.*, 508 U.S. 307, 316 ("Evils in the same field may be of different dimensions and proportions, requiring different remedies.... The legislature may select one

phase of one field and apply a remedy there, neglecting the others.”) See also, *C.L.A.S.H.*, 315 F.Supp.2d 461, 482 (“While it is true that the Smoking Bans do single out a particular class of persons and place some greater burden on their activities, this circumstance alone is insufficient to render the governmental action violative of the Equal Protection Clause); *Justiana v. Niagra County Dept. of Health*, 45 F.Supp.2d 236, 242-43 (W.D.N.Y. 1999) (“Legislative classifications do not have to be a ‘perfect fit’ for the problem they are intended to address in order to survive rational basis review. Accordingly, a legislature can address a perceived problem incrementally if in its judgment that is the best way to address the problem ... [T]he board does not act irrationally by addressing the problems presented by ETS one step at a time—that is, by restricting smoking in some public places rather than others.”); *Rossie*, 133 Wis.2d 341, 353 (“*The basic test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify this classification.*”) (Emphasis in original). Appellant cannot argue that the Act fails to further the State’s interest in protecting the health and welfare of its citizens. Even if the Act does not eliminate all exposures to second hand smoke, its restrictions are rationally related to the State’s interest as it greatly diminishes such exposures. Thus, the Act satisfies equal protection.

F. THE ACT DOES NOT VIOLATE DUE PROCESS.

In its complaint, Appellant alleges that the Act amounts to an unconstitutional interference with “individual rights, liberties and private affairs.” Br. Appellant p. 30. In making this claim, Appellant argues that the Act impinges upon the “fundamental rights” of liberty, association and privacy and therefore violates the Due Process Clauses of the Federal and State Constitutions. The 14th Amendment of the U.S. Constitution, at section 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

(emphasis added). Similarly, Article I, Section 3 of the Washington State Constitution provides:

No person shall be deprived of life, liberty or property, without due process of law.

This Court has previously held that “Washington’s due process clause does not afford a broader due process protection than the Fourteenth Amendment.” *In re the Personal Restraint of Dyer*, 143 Wn.2d 384, 394,

20 P.3d 907 (2001) citing *State v. Ortiz*, 119 Wn.2d 294, 304, 831 P.2d 1060 (1992).

Substantive Due Process protects “those rights that are fundamental, that is rights that are “implicit in the concept of ordered liberty.” *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994). Therefore, a Appellant must establish that he or she was “deprived of a constitutionally protected liberty or property interest” before a court will engage in a substantive due process analysis. *Nieshe v. Concrete School Dist.*, 129 Wn.App. 632, 641, 127 P.3d 713 (2005). A constitutionally protected liberty interest is present “where a person’s good name, reputation, honor or integrity is at stake because of what the government is doing to him.” *Id.* (internal citations omitted). A constitutionally protected property interest exists if a Appellant “has a legitimate claim of entitlement to a specific benefit.” *Id.* (internal citations omitted).

In attempting to argue that the Due Process rights of its members are violated by the Act the Appellant relies upon several cases. However, when those cases are reviewed, in context, they further establish that the Act satisfies the requirements of Due Process.

The Post first cites *Alford v. City of Newport News*, 220 Va. 584, 260 S.E.2d 241 (1979). In *Alford*, the owner of a restaurant was convicted for failing to comply with a no-smoking ordinance. *Id.* at 585. The

ordinance that the owner allegedly violated required that restaurant owner's post "no smoking" signs and designate certain tables in their establishments as non-smoking tables. *Id.* at 586. The Court invalidated the ordinance because it found that the regulation was not reasonably suited to achieve the goal of protecting persons from the harmful effects of second-hand smoke. *Id.* The Courts reached this decision because:

The requirement to designate one of several dining tables located within the same room as a non-smoking area hardly limits the amount of smoke in the air. If smoke exhaled in such an environment is toxic, its harmful effects are ambient. Yet, the ordinance requires posting a sign which leads the non-smoking diner to expect that the place he has chosen to patronize is a wholly protected environment. By relying on the sign, he will be exposed to "the toxic effect" from which the ordinance purports to protect him. Hence, these requirements tend to defeat the very legislative purpose the ordinance is supposed to promote.

Id. at 243. As such, the Court, applying a rational basis test, found that the law was an improper exercise of police power. Importantly, the Court did not find any fundamental rights involved in the case.⁴ Rather, the Court simply recognized that a smoking ban, which regulated the use of private property, needed to be supported by a rational basis. *Id.*

⁴ While the Court did not directly analyze the issue of fundamental rights, its use of the rational basis test, by necessary implication, indicates that the Court did not believe any such rights to be involved.

The Post next cites *Grusendorf v. Oklahoma City*, 816 F.2d 539 (Okl. 1987). In *Grusendorf*, a regulation prohibited fire fighter trainees from smoking during the first year of their employment. *Id.* at 540. The Post argues that *Grusendorf* stands for the proposition that smoking bans impair fundamental rights if they reach into “private places” which the Post apparently assumes includes private facilities that have paid employees. However, this argument ignores the distinction the Court drew between typical smoking bans and the prohibition involved in that case. In “*assuming*” that the prohibition may impair liberty and privacy interests the Court noted that:

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 weekends 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.

Id. at 541. The Post’s arguments further ignores that the Court only “assumed” that the regulation impaired a liberty or privacy interest for purposes of evaluating whether or not the law was constitutional. The Court found that, even if the law interfered with the liberty or privacy interest of the trainees, the law was supported by a rational basis and was therefore constitutional. *Id.* at 543-544. In addition, while the Court did assume that a liberty or privacy interest might be involved it did not

assume that a fundamental liberty or fundamental privacy interest was involved as evidenced by application of the rational basis test. *Id.*

Lastly, the Post cites *Fagan v. Axelrod*, 144 Misc. 286, 550 N.Y.S.2d 552 (1990). In *Fagan* the Court evaluated the constitutionality of a comprehensive smoking ban that extended both into public places and places of employment. *Id.* at 290. The Post argues that, in *Fagan*, the court drew a distinction between prohibitions of smoking in public versus private spaces. Again, the Post assumes that the Court would have included private clubs with paid employees within what it called “private spaces.” However, in making this distinction the court simply noted that the ban did not apply to “*significantly private areas* such as private homes, residences, [and] automobiles...” *Id.* at 297. Furthermore, the law at issue in *Fagan*, just like here, regulated smoking in places of employment whether or not they were open to the public. *Id.* at 291. Even though the act encompassed non-public areas, the Court found that it did not impair any fundamental privacy or liberty interests. *Id.* at 297.

Here, the Act does not deprive Appellant of any constitutionally protected liberty or property interest. The purported right at issue in this case is the right to allow smoking in places of employment located within private facilities. Appellant cannot point to any established liberty or

property interests that would protect this interest and the Court should not find such a right exists.

[T]he court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

McKinney, 20 F.3d 1550, 1556. Therefore, because Appellant cannot establish the deprivation of a constitutionally protected liberty or property interest, the Court need not engage in a Due Process inquiry.

Even if Appellant could establish that the Act deprived its members of a protected liberty or property interest, the Act meets the requirements of the Due Process Clause. Where, as here, a law does not deprive a person of a fundamental right, a due process inquiry turns on whether the law bears a reasonable relationship to a legitimate state interest. *Andersen*, 138 P.3d 963, 986. In making this determination, courts apply the same standards that are used in analyzing equal protection claims. *Id.* Therefore, where a court determines that a law does not violate the equal protection clause, a finding that the law does not violate substantive due process follows. *Id.* As discussed in section IV (E)(2) of this memorandum, the State clearly has a legitimate interest in protecting non-smokers from the effects of second-hand smoke. Prohibiting smoking

in areas where non-smokers are most likely to be exposed to second-hand smoke directly furthers that interest. Therefore, the Act meets the requirements of due process.

G. EVEN IF THE COURT APPLIED STRICT SCRUTINY, THE ACT IS CONSTITUTIONAL.

Court's apply "strict scrutiny" to laws that interfere with a fundamental right. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006). This requires that the infringement be "narrowly tailored to serve a compelling government interest." *Id.* The state has a compelling interest in protecting the health of its citizens. *State v. Balzer*, 91 Wn.App. 44, 64, 954 P.2d 931 (1998)(compelling interest to protect against harmful affects of smoking marijuana). Here, it is beyond any argument that this Act serves a compelling government interest. Namely, the Act protects citizens from the harmful affects of second hand smoke. In addition, the Act is narrowly tailored to serve that interest. The Act simply regulates where people can engage in this activity. It does not prevent them from smoking or from engaging in any protected activities. In short, it reaches no further than necessary in promoting the government's interest in protecting the health of its citizens. Therefore, even if the Court applied strict scrutiny, the Act does not violate Appellant's due process or equal protection rights.

H. THE ACT IS NOT UNCONSTITUTIONALLY VAGUE.

The Appellant argues that the Act is unconstitutionally vague. Vagueness in the constitutional sense requires more than mere uncertainty, and a reviewing court should not invalidate an ordinance because the ordinance could have been written with greater precision. *Douglass*, 115 Wn.2d at 179. Courts presume that a law is valid and, if possible, *must* interpret it in a manner that upholds its constitutionality. *See Douglass*, at 177; *City of Tacoma v. Luvene*, 118 Wn.2d 826, 841, 827 P.2d 1374 (1992). A law “is unconstitutionally vague if it does not provide fair notice, measured by common practice and understanding of the conduct that is prohibited.” *State v. Mather*, 28 Wn. App. 700, 702, 626 P.2d 44 (1981). This does not require “impossible standards of specificity or absolute agreement.” *Douglass*, 115 Wn.2d at 179. Furthermore, a court should not invalidate a law because the court believes that the law could have been written with greater precision.

Washington’s Clean Indoor Air Act became effective after the passage of Initiative 901 in the November, 2005 election. The people have reserved to themselves the power to legislate directly through the initiative process. Wa. Const. art. II § 1(a). The court applies standard rules of statutory construction to interpret initiatives. The voter’s

pamphlet may be used to interpret an initiative. *Brown v. State*, 155 W.2d 254, 119 P.3d 341 (2005).

The 2005 Secretary of State's voters' pamphlet included the official ballot title and explanatory statement, which were written by the Attorney General as required by law. The official ballot title stated in pertinent part "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." Passage of the Initiative by over 63% of the voters statewide simply means that smoking in a public place and place of employment, such as the American Legion, is no longer allowed indoors. In order to comply with the act, a smoker simply goes outside to smoke.

Washington is one of many states that have enacted smoking bans. In nearly all instances these bans have withstood constitutional vagueness scrutiny. One of the leading cases is *Fagen*, 550 N.Y.S.2d 552. In that case, Appellant smokers challenged the Clean Indoor Air Act in New York claiming that the smoking law was irrational and vague and a violation of the state police power. The court held that the enactment of the statute was an appropriate response by the legislature to the unhealthful nature of second-hand smoke. The court cited to the overwhelming amount of scientific evidence that demonstrates the harmful

effects of environmental tobacco smoke. Again, in *Empire State Restaurant & Tavern Ass'n, Inc., v. New York State*, 360 F.Supp.2d 454, (N.D.N.Y. 2005), the court rejected vagueness challenges to two provisions of the New York's no smoking law. A similar law was upheld in Texas in *Ex parte Woodall*, 154 S.W.3d 698 (Tex. 2004).

The U.S. District Court for the Western District of Texas rejected several vagueness challenges to the City of Austin's smoke free ordinance in *Roark and Hardee L.P., v. City of Austin*, 394 F.Supp.2d 911 (W.D. Tex. 2005). There, the Appellants argued that the ordinance was unconstitutionally vague because it did not give fair notice as to what conduct was prohibited and lacked explicit standards for enforcement. In addressing the issue, the District Court relied on the U.S. Supreme Court's decision in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) which points out the difficulties when a few disputed terms are selected as grounds for holding an ordinance void. "It will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of disputed terms will be in nice question." *See Grayned* at 408 U.S. 110. The U.S. District Court was unconvinced that any of the terms were so vague that ordinary people would not understand what was prohibited or that the ordinance would

lead to arbitrary or discriminatory enforcement. The court rejected all of the Appellant's vagueness challenges.

In another case, *Taverns For Tots v. City of Toledo*, 341 F.Supp.2d 844 (N.D. Ohio 2004), the U.S. District Court considered a laundry list of constitutional challenges brought by an organization of taverns including a claim that the no-smoking ordinance was void for vagueness. The court rejected that challenge based on the language and legislative purpose of the ordinance and found that the ordinance informs people of ordinary intelligence as to what they need to do to comply with the law . . . go outside to smoke. Even in tobacco country, the Kentucky Supreme Court considered vagueness issues involving the Lexington, Kentucky no-smoking ordinance in *Lexington-Fayette County Food & Beverage Association v. Lexington-Fayette Urban County Government, et al.*, 131 S.W.3d 745 (Ky 2004). In that case, the court upheld the requirement that smokers must maintain "a reasonable distance" from the entrance to a smoke free establishment. The court upheld this language stating "surely individuals can reasonably understand that if their tobacco smoke is entering the building, they are not at a reasonable or required distance." *Lexington-Fayette County*, 131 S.W.3d at 753.

Finally, in *Fogle v. H & G Restaurant*, 654 A.2d 449, 337 Md. 441 (Md. 1995), the Maryland Supreme Court turned down an attack of the

Maryland no-smoking law on vagueness grounds and held that persons of ordinary intelligence were capable of understanding the regulation without having to guess what conduct was prohibited.

In this case, Appellant alleges that the Act is unconstitutionally vague as to its application to private facilities with paid employees. In making this argument, the Appellant relies simply on the fact that it thought it was exempt from the Act. However, “mere uncertainty” as to the Act’s application is not sufficient to establish that the Act is unconstitutionally vague. Here, the Act provides fair notice of what conduct it prohibits. Namely, the Act prohibits smoking in public places and places of employment. The Act further defines both “public place” and “place of employment.” Thus, Appellant cannot prove beyond a reasonable doubt that the Ordinance is unconstitutionally vague.

I. THE ACT DOES NOT “DISTURB” ANY PERSONS IN THEIR PRIVATE AFFAIRS.

The Appellant claims that the Act constitutes an unlawful intrusion into private affairs in violation of Article 1, Section 7 of the Washington Constitution. Article 1, Section 7 provides:

No person shall be disturbed in his private affairs,
or his home invaded, without authority of law.

The Appellant’s reliance on this provision is greatly misplaced. Indeed, it appears that Appellant’s argument is more akin to an argument under the

Due Process Clause of the Washington Constitution. As discussed at part IV (F) of this brief, Article I Section 3 of the Washington State Constitution protects the rights of liberty and privacy. In contrast, Article 1, Section 7 of the Washington State Constitution is Washington's Search and Seizure law. *State v. Athan*, --Wn.2d--, 158 P.3d 27 (2007); *State v. McKinney*, 148 Wn.2d 20, 60 P.3d 46 (2002); *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). Here, the Appellant is not challenging any search or seizure. Therefore, Article 1, Section 7 is inapplicable to this case.⁵

V. CONCLUSION

This case comes down to whether the protections of Washington's Clean Indoor Air Act extend to persons employed at private facilities. Appellant argues that the Act, on its face, does not apply to such facilities. Appellant further claims that if the Act so applies it is unconstitutional. However, the Act, when considered in its entirety, clearly applies to Appellant. To find otherwise would contravene the Act's intended purpose of protecting employees in their workspaces. The Act seeks to protect the health and welfare of workers in their places of employment.

⁵ In arguing that the Act violates Article 1, Section 7, the Appellant relies on case law focusing on due process rights. Therefore, Respondents have responded to those arguments at part IV(F) of this Brief.

Appellant's constitutional arguments boil down to an argument that because all non-smokers are not protected from the harmful effects of second-hand smoke, the Act is unconstitutional. However, whether or not the Act protects all persons in all circumstances it is rationally related to the government's interest in protecting the health and welfare of its citizens.

VI. ATTORNEYS FEES

Pursuant to RAP 18.1 and RCW 4.84.030, Respondent respectfully requests that this Court grant it costs, including statutory attorneys fees.

The Appellant argues that, if its appeal is successful, it is entitled to attorney's fees pursuant to 42 U.S.C. § 1988. The Appellant is correct that 42 U.S.C. 1988 *may* entitle a party to attorneys fees when that party brings a lawsuit, pursuant to 42 U.S.C. § 1983, to redress the violation of a persons constitutional rights. However, in this Case, the Appellant's did not bring this lawsuit under 42 U.S.C. § 1983 and, even if their arguments are correct, they have not established that any rights were violated. Indeed, the Appellant brought this action to prevent the enforcement of the Act against them. Therefore, even if Appellant's succeeded in this appeal they would not be entitled to attorney's fees.

RESPECTFULLY SUBMITTED this 18th day of July, 2007.

RUSSELL D. HAUGE, KITSAP COUNTY
PROSECUTING ATTORNEY

By 
Philip A. Bacus, WSBA No. 31446
Deputy Prosecuting Attorney
Attorney for Defendant, Kitsap County
Health District

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CERTIFICATE OF SERVICE

I, Tracy L. Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

2007 JUL 19 P 4: 08
BY RONALD N. CARPENTE
CLERK

On July 19, 2007, I caused to be served in the manner noted a copy of the foregoing document upon the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED July 19, 2007, at Port Orchard, Washington.


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