# IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| AMERICAN LEGION POST #149,<br><br>Appellant,<br><br>v.<br><br>WASHINGTON STATE DEPARTMENT OF HEALTH and the KITSAP COUNTY HEALTH DISTRICT,<br><br>Respondents. | ) | NO. 79839-7<br><br><br><br>EN BANC<br><br><br><br>Filed September 11, 2008 |

FAIRHURST, J. – Appellant, American Legion Post No. 149 (Post) seeks review of a Thurston County Superior Court decision granting the respondents', Department of Health (DOH) and Kitsap County Health District (KCHD), motions for summary judgment and dismissing the case with prejudice. The questions presented in this case are whether the smoking in public places act (Act), chapter 70.160 RCW, prohibits smoking in the Post and, if it does, whether the prohibition

is constitutional. We hold smoking is prohibited in the Post under the Act because it is a "place of employment" and the prohibition, as applied to the Post, is constitutional.

## I. STATEMENT OF THE CASE

In 1985, the legislature adopted the clean indoor air act, which limited smoking in some public places. Laws of 1985, ch. 236. The 1985 act exempted "private facilities" and "private enclosed workplace[s], within a public place" from the smoking ban. Former RCW 70.160.020(2) (1985), *amended by* Laws of 2006, ch. 2, § 2; RCW 70.160.060.

In 2006, Washington voters enacted Initiative Measure 901. Laws of 2006, ch. 2. Chapter 70.160 RCW is now entitled "Smoking in Public Places." Initiative 901 expanded the prohibition on smoking in public places by amending the definition of a "'[p]ublic place'" to include facilities such as schools, bars, bowling alleys, and casinos. *Compare* former RCW 70.160.020(2), *with* RCW 70.160.020(2). Initiative 901 also added a prohibition against smoking "in any place of employment." RCW 70.160.030, .020(3) (defining a "'[p]lace of employment'"). A civil fine of up to $100 may be imposed for an intentional infraction of the Act. RCW 70.160.070(1). Enforcement authority is vested in local health departments and local law enforcement. RCW 70.160.070(3), .080. Local

health departments may adopt regulations to implement the Act. RCW 70.160.080.

In April 2006, the Kitsap County Board of Health adopted Ordinance 2006-2, the clean indoor air ordinance (Ordinance), which adopted and implemented chapter 70.160 RCW as amended by Initiative 901. The Ordinance mirrors the Act[1] and delegates enforcement authority to the KCHD.

The Post is a nonprofit, private fraternal organization whose membership of 591 people is limited to those who served in the military or the Merchant Marine during specific time periods. Members must either be on active military duty or be honorably discharged. The Post's primary purpose is to provide services and benefits to veterans and their families. It seeks to unite its membership "in the bonds of fraternity, benevolence, and charity." Clerk's Papers (CP) at 103.

The Post owns and operates a facility in Bremerton, Washington, that is open only to members and guests. The facility is maintained, in part, to provide a social atmosphere for the members. The Post employs seven people to run the facility.[2] The Post permits members and guests to smoke tobacco products in its facility when

[1]The only relevant substantive difference between the Ordinance and the Act is that the Ordinance allows the KCHD to suspend and revoke food permits if a business fails to comply with the Ordinance. *Compare* Clerk's Papers at 237, *with* RCW 70.160.070. Because the Ordinance mirrors the Act in its prohibitions and exemptions, the Ordinance and Act will collectively be referred to hereinafter as the Act.

[2]All seven employees are members of the American Legion Auxiliary (Auxiliary). Membership in the Auxiliary is limited to women who are directly related to either current members of the American Legion or deceased veterans who, if they were alive, would be entitled to membership. There are approximately 100 Auxiliary members at the Post in addition to the 591 American Legion members.

it is not open to the public.[3] Smoking occurs in a lounge where employees are required to work.

In May 2006, the KCHD issued a notice that the Post was violating the Act by allowing individuals to smoke inside the Post and demanded immediate compliance. The Post refused and filed an action in the Thurston County Superior Court seeking a declaratory judgment and injunctive relief under the Administrative Procedure Act (APA),[4] chapter 34.05 RCW, and the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, to preclude KCHD and the DOH from prohibiting smoking in the Post.

The parties filed cross motions for summary judgment. Following oral argument, the trial court judge issued an order granting KCHD's and DOH's motions for summary judgment, denying the Post's motion for summary judgment, and dismissing the Post's complaint with prejudice. We granted direct review.

## II. ISSUES

1. Whether smoking is prohibited under the Act in private facilities that are places of employment.

2. Whether the Post has standing to challenge the Act as it applies to its members' constitutional rights.

3. Whether the Act violates article I, section 7 of the Washington Constitution.

[3]No evidence was presented that the Post is ever open to the public.

[4]The trial court ruled that the Post was not entitled to judicial relief under the APA. This ruling was not appealed.

4. Whether the Act violates article I, section 12 of the Washington Constitution.

5. Whether the Act violates the equal protection clause of the United States Constitution.

6. Whether the Act is void for vagueness under the due process clauses of the Washington Constitution and United States Constitution.

7. Whether any party is entitled to attorney fees.

## III. ANALYSIS

### A. Standard of review

The trial court granted summary judgment for KCHD and DOH. This court is asked to interpret RCW 70.160.011, .020, .030, and .060. We review rulings on summary judgment and issues of statutory interpretation de novo. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 908, 154 P.3d 882 (2007). 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).

### B. Whether smoking is prohibited under the Act in private facilities that are places of employment

The first issue raised is whether the Act prohibits smoking in a private facility, such as the Post, that is also a place of employment. Standard rules of

statutory construction apply to initiatives. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2000). "[I]n determining the meaning of a statute enacted through the initiative process, the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure." *Id.* "Where the language of an initiative enactment is 'plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation.'" *Id.* (quoting *State v. Thorne*, 129 Wn.2d 736, 762-63, 921 P.2d 514 (1996)); *Brown v. State*, 155 Wn.2d 254, 267, 119 P.3d 341 (2005) (noting that an initiative must be read as written, not as a court would like it to be written). "'In construing the meaning of an initiative, the language of the enactment is to be read as the average informed lay voter would read it.'" *State v. Brown*, 139 Wn.2d 20, 28, 983 P.2d 608 (1999) (quoting *W. Petroleum Imp., Inc. v. Friedt*, 127 Wn.2d 420, 424, 899 P.2d 792 (1995)).

An initiative must be read in light of its various provisions, rather than in a piecemeal approach, *McGowan v. State*, 148 Wn.2d 278, 288, 60 P.3d 67 (2002), and in relation to the surrounding statutory scheme, *Brown*, 155 Wn.2d at 268. A court must, when possible, "give effect to every word, clause and sentence of a statute." *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). The "goal is

to avoid interpreting statutes to create conflicts between different provisions so that we achieve a harmonious statutory scheme." *Echo Bay Cmty. Ass'n v. Dep't of Natural Res.*, 139 Wn. App. 321, 327, 160 P.3d 1083 (2007), *review denied,* 163 Wn.2d 1016 (2008) . If there is an apparent conflict between two provisions, the more specific and more recently enacted statute is preferred. *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000). Only if the language is ambiguous may the court examine extrinsic sources such as a voter's pamphlet. *Brown*, 155 Wn.2d at 267.

Finally, this court will not substitute its judgment for that of the electorate unless the initiative contravenes state or federal constitutional provisions.[5] *Amalgamated Transit*, 142 Wn.2d at 206. Conversely, the court will not "declare laws passed in violation of the constitution valid based upon considerations of public policy." *Id.*

The Act prohibits smoking "in a public place or in any place of employment."[6] RCW 70.160.030. "'Public place'" is defined as "that portion of

[5]The people have reserved to themselves the power to legislate directly through the initiative process. Wash. Const. art. II, § 1(a). "In approving an initiative measure, the people exercise the same power of sovereignty as the Legislature does when enacting a statute." *Amalgamated Transit*, 142 Wn.2d at 204. Thus, the same constitutional mandate applicable to legislation applies to initiatives. *Id.*

[6]Former RCW 70.160.030 (1985), *amended by* Laws of 2006, ch. 2, § 3, prohibited smoking in public places except in designated smoking areas. Smoking in places of employment was not prohibited.

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." RCW 70.160.020(2). The final sentence of the definition of a "'[p]ublic place'" provides "[t]his 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."[7] RCW 70.160.020(2). Smoking is not prohibited in a private enclosed workplace within a "public place." RCW 70.160.060. All parties agree that the Post is not a "public place."

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[7]RCW 70.160.020(2) defines a "'[p]ublic place'" as:

> [T]hat 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.
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> 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.

Smoking is also prohibited in "any place of employment."[8] RCW 70.160.030. A "'[p]lace 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."[9] RCW 70.160.020(3).

1. RCW 70.160.020(2)

The Post's first argument is that smoking is not prohibited in its facility because RCW 70.160.020(2) explicitly states, "[t]his 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." The Post argues "chapter" refers to the entire Act and if the voters wanted the exception to apply only to the definition of a "public place," the initiative should have modified this sentence.[10] Thus, the Post argues, the plain language of the statute exempts private

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[8]RCW 70.160.020(3) defines a "'[p]lace of employment'" as:

> [A]ny area under the control of a public or private employer which employees are required to pass through during the course of employment, including, but not limited to: Entrances and exits to the places of employment, and including 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; work areas; restrooms; conference and classrooms; break rooms and cafeterias; and other common areas. A private residence or home-based business, unless used to provide licensed child care, foster care, adult care, or other similar social service care on the premises, is not a place of employment.

[9]Contrary to the dissent's assertion, dissent (Sanders, J.) at 4, RCW 70.160.020(3) is a definition, not an exception.

[10]The sentence excluding private facilities was in the former Act and was not amended by Initiative 901. *Compare* former RCW 70.160.020(2), *with* RCW 70.160.020(2).

facilities from the smoking ban.

The Post's reading of RCW 70.160.020(2) is inconsistent with the surrounding statutory scheme, the intent of the voters, and the relevant principles of statutory construction. This court assumes the legislature does not intend to create inconsistent statutes. *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000). "Statutes are to be read together, whenever possible, to achieve a 'harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.'" *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Employco Pers. Servs., Inc. v. City of Seattle*, 117 Wn.2d 606, 614, 817 P.2d 1373 (1991)).

The exception for private facilities is part of the definition of a "public place." The exception is not repeated under the definition of a "place of employment" (unlike the exception for private residences not used to provide social service care), nor is it a separate statutory provision. The private facilities exception was part of the former Act, *see* former RCW 70.160.020(2), and before Initiative 901 its meaning was clear--smoking was generally prohibited in public places and a private facility was not to be considered a public place if it was occasionally open to the public, except for the occasions when the facility was open to the public. The problem is Initiative 901 broadened the prohibition against smoking to include "any

place of employment," RCW 70.160.030, and the interrelationship between the private facilities exception and prohibition against smoking in any place of employment is unclear.

Arguably, the phrase "[t]his chapter" could be read to exempt all private facilities from the smoking ban. However, such a reading would eviscerate much of the Act and interfere with the express intent of the voters, which was to protect employees regardless of whether their place of employment is a public place. *See* RCW 70.160.011. A private facility is the antithesis of a public place under this statute,[11] which defines a "'[p]ublic place'" as the "portion of any building or vehicle used by and open to the public" regardless of who owns the building or vehicle. RCW 70.160.020(2). The private facilities exemption acts as a temporal limitation on the definition of a public place--if a facility is occasionally open to the public, smoking is prohibited only during the time that it is open to the public.

In enacting Initiative 901, voters intended to enlarge the smoking ban because of increased concerns with the effects of secondhand smoke.[12]

> 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,

[11]The term "private facility" is not defined by the Act. It is used throughout the Act to indicate a place that falls outside of the definition of a "public place."

[12]The former Act merely stated that "tobacco smoke in closely confined spaces *may* create a danger to the health of some citizens of this state." Former RCW 70.160.010 (1985) (emphasis added), *repealed by* Laws of 2006, ch. 2, § 7. The new intent section states, "second-hand smoke is known to cause cancer in humans." RCW 70.160.011.

> 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.*

RCW 70.160.011 (emphasis added). Unlike the former clean indoor air act, the voters in Initiative 901 recognized the importance of protecting workers in their places of employment from harmful exposure to secondhand smoke. *Compare* former RCW 70.160.010 (1985), *repealed by* Laws of 2006, ch. 2, § 7, *with* RCW 70.160.011. To this end, the initiative added a new prohibition against smoking in any place of employment, which was clearly explained to the voters.[13] Initiative 901's official ballot title explained, "[t]his 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." CP at 251 (*State of Washington Voters' Pamphlet*, *General Election* 9 (Nov. 8, 2005)). The explanatory statement in the voters' pamphlet also made the effect of the initiative clear to the voters--it explained that Initiative 901 would expand the term "public place" and "[s]moking would also be prohibited in 'places of employment.'" CP at 252 (*State of Washington Voters' Pamphlet, General*

[13]The dissent's claim that Initiative 901 was a compromise and should be construed so as to not apply to the Post because similar groups were not listed as opponents in the voters' pamphlet is based on speculation and conjecture. Dissent (J.M. Johnson, J.) at 1-4. We refuse to speculate as to why the initiative passed in the absence of any relevant information in the record.

*Election* 10 (Nov. 8, 2005)).

Finally, the statute itself plainly prohibits smoking "in a public place *or* in any place of employment." RCW 70.160.030 (emphasis added). The exclusion of private facilities from the entire Act, as proposed by the Post, creates a discordant statutory scheme. The exclusion of all private facilities conflicts with the intent of the voters and the plain language of RCW 70.160.030. For example, an office building that is not open to the public is a private facility.[14] Under the Post's reading of RCW 70.160.020(2), smoking would be allowed in the building even though hundreds of employees may be involuntarily subjected to the dangers of secondhand smoke. Using the Post's analysis, it would follow that any place of employment that is not a public place may be considered a private facility and, thus, the only places of employment where smoking would be prohibited would be in public places. This clearly was not the intent of the voters when they enacted Initiative 901, and our purpose is to ascertain the collective intent of the voters who enacted Initiative 901, *Amalgamated Transit*, 142 Wn.2d at 205. "[A] 'fundamental guide to statutory construction is that the spirit or intention of the law prevails over the letter of the law.'" *Janovich v. Herron*, 91 Wn.2d 767, 772, 592 P.2d 1096

[14]Contrary to the dissent's assertions, dissent (J.M. Johnson, J.) at 5-6, the Act is not intended to prohibit smoking in office buildings. An office building is simply an example of a possible place of employment in a private place. In some circumstances, an office building may be a public place. However, if the building is not used by and open to the public, it is not a public place. *See* RCW 70.160.020(2).

(1979) (quoting *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508, 546 P.2d 75 (1976)).

Thus, we construe the Act in such a way as to achieve a harmonious statutory scheme and give effect to the will of the voters by preferring the more specific and more recently enacted prohibition of smoking in any place of employment.[15] If a facility is a "public place," smoking is prohibited. If a facility is a "place of employment," regardless of whether it is a "public place," smoking is prohibited.[16] Thus, the exception for private facilities is an exception to the definition of a "public place" and does not apply to the prohibition against smoking in "any place of employment."

2. RCW 70.160.060

The Post's second argument is that it is exempt from the smoking prohibition

[15]Contrary to the dissent's claims, dissent (J.M. Johnson, J.) at 3, this reading of the Act does not create a violation of article II, section 37 of the Washington Constitution. "'Nearly every legislative act of a general nature changes or modifies some existing statute, either directly or by implication,' but this, alone, does not inexorably violate the purposes of section 37." *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 640, 71 P.3d 644 (2003) (quoting *Holzman v. City of Spokane*, 91 Wash. 418, 426, 157 P. 1086 (1916)). Thus, article II, section 37 does not require an amendatory act to set forth all of the sections of an original act, but only those sections that are actually being amended. *State v. Lawson*, 40 Wash. 455, 457-58, 82 P. 750 (1905). Initiative 901 did not actually amend the exception for "private facilities which are occasionally open to the public," RCW 70.160.020(2), and, consequently, there is no article II, section 37 violation. The effect of the place of employment prohibition on the private facilities exception is a matter of statutory interpretation and not an amendment to the actual exception.

[16]The Post argues if smoking is banned in public places *or* places of employment, then smoking should be completely banned in all sleeping quarters within a hotel or motel that are rented to guests. We decline to address this argument because the facts for making such a determination are not properly before this court.

under RCW 70.160.060 ("[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 nonsmokers"). The impact of Initiative 901 on RCW 70.160.060 is unclear. RCW 70.160.060 was not explicitly amended by Initiative 901. When viewed in terms of the former clean indoor air act, the purpose of RCW 70.160.060 was clear--even though smoking was prohibited in public places except for designated smoking areas, former RCW 70.160.030 (1985), smoking within a private enclosed workplace within a public place was allowed, RCW 70.160.060. The question is what impact, if any, the expansion of the smoking ban to places of employment had on the exception for smoking in private enclosed workplaces within public places.

The Post argues the phrase "private enclosed workplace" is synonymous with a "place of employment," such that smoking in a place of employment is not prohibited. This argument ignores the semantic differences between a "private enclosed workplace" and "place of employment." The term "private enclosed workplace" is used in the Act only in RCW 70.160.060 and is undefined. Because "workplace" is undefined, we look to its ordinary meaning.[17] The ordinary meaning

[17]A "workplace" is a place where work is done. *See* Webster's Third New International Dictionary 2635 (2002) (defining "workplace" as "a place (as a shop or factory) where work is done"). "Enclosed" indicates that the area is separated for individual use or closed in by some barrier. *Id.* at 746 (defining "enclose" as "to close in <~ a porch with glass > **:** surround <~ a yard with a fence>; *specif* **:** to fence off or in (common land) in order to appropriate to individual

of a "private enclosed workplace" is an area where work is done that is closed in by some barrier and is not open to the public. In contrast, a "'[p]lace of employment'" is statutorily 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." RCW 70.160.020(3). The terms "private enclosed workplace" and "place of employment" are not interchangeable.

RCW 70.160.060 exempts "a private enclosed workplace, within a public place" from the smoking prohibition. "'Public place'" is defined in RCW 70.160.020(2). RCW 70.160.060 exempts areas such as an enclosed manager's office in the back of a retail store. It does not, by its terms, apply to private enclosed workplaces in private places. Thus, the Post is not exempt from the smoking ban under RCW 70.160.060 because it is not a public place.

In short, smoking is prohibited in a private facility when it meets the statutory definition of a "place of employment." The exception for private facilities applies to the definition of a "public place," not a "place of employment," and RCW 70.160.060 does not apply when a place does not meet the definition of a "public place." We affirm the trial court's ruling.

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use"). Finally, in this context, the term "private" means that it is either intended for individual use or not open to the public. *Id.* at 1804-05 (defining "private" as "intended for or restricted to the use of a particular person or group or class of persons **:** not freely available to the public <a ~ park> <a ~ party> **b :** belonging to or concerning an individual person, company, or interest <our ~ goods> <~ property> <a ~ house> <~ means>").

C. Whether the Post has standing to challenge the Act as it applies to its members' constitutional rights

The Post raises several constitutional claims on its own behalf and on behalf of its members.[18] KCHD asserts the Post lacks standing to argue that the Act violates its members' constitutional rights.[19] Standing requirements tend to overlap the requirements for justiciability under the UDJA. *Amalgamated Transit*, 142 Wn.2d at 203. There is a two-part test for standing under the UDJA. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (*Grant County* II). First, a party must be within the "'zone of interests to be protected or regulated by the statute'" in question. *Id.* (internal quotation marks omitted) (quoting *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978)). Second, the party must have suffered an "injury in fact." *Id.* (internal quotation marks omitted). In this case, the Post clearly has standing on its own behalf because it is within the zone of interests regulated by the Act and the Post was cited by KCHD for noncompliance with the Act. However, the Post, as a nonprofit corporation, is limited in the types of constitutional claims it can raise.

[18]The Post asserts constitutional violations of substantive due process under the Washington and United States Constitutions, the privileges and immunities clause of the Washington Constitution, and the equal protection clause of the United States Constitution, and that the Act is unconstitutionally vague in violation of the due process clauses of the Washington and United States Constitutions. The Post does not identify which claims are based upon its own rights and which claims are asserted on behalf of its members.

[19]Both KCHD and DOH challenged the Post's standing to raise the constitutional rights of its members at the trial court.

Thus, it is necessary to distinguish which of the constitutional claims asserted by the Post can be brought on its own behalf.

"[A] corporation is a 'person' within the meaning of the equal protection and due process of law clauses." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 80 L. Ed. 660 (1936); *see Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 424, 511 P.2d 1002 (1973). However, while a corporation's property rights are protected by the due process clause, the liberty guaranteed by the due process clause applies only to natural persons. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 527, 59 S. Ct. 954, 83 L. Ed. 1423 (1939). A corporation cannot bring a claim on its own behalf on the basis it was denied a liberty interest without due process of law. *Id.* Thus, the Post cannot claim the Act interferes with its liberty interests in violation of due process, but it can claim the ban denies it a property interest without due process, violates equal protection, or is void for vagueness.

The Post also claims the ban violates its right to privacy under article I, section 7 of the Washington Constitution.[20] The pivotal question is whether a corporation is considered a "person" for the purposes of article I, section 7. Washington courts have recognized that corporations are protected by article I,

[20]"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7.

section 7, albeit in the search and seizure context. *See, e.g., Centimark Corp. v. Dep't of Labor & Indus.*, 129 Wn. App. 368, 375, 119 P.3d 865 (2005) (analyzing inspection of corporation under both the Fourth Amendment and article I, section 7); *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 184-87, 931 P.2d 208 (1997) (analyzing association's claim that fees, permits, and inspections of on-site septic systems were unconstitutional invasions of privacy under article I, section 7). We assume for the preliminary purposes of standing, without holding, that the Post may claim that the Act violates its rights under article I, section 7.

In addition to personal standing, a party may have standing in a representational capacity. *Grant County* II, 150 Wn.2d at 803. An organization "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n.*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). This court has adopted a more liberal approach to standing "when a controversy is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce,

finance, labor, industry, or agriculture." *Grant County* II, 150 Wn.2d at 803.

In a similar case, an organization brought a suit challenging a smoking ban on behalf of its members. *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 465 (S.D.N.Y. 2004). The purpose of C.L.A.S.H. was "to promote the interests of smokers and defend smoker's rights." *Id.* at 469. The court determined that C.L.A.S.H. met all three prongs of the *Hunt* representational standing test because the individual members had standing, smoking was germane to the purpose of the organization, and individual member participation was not required for a declaratory judgment. *Id.*

After considering *C.L.A.S.H.*, the trial court in this case determined that, unlike C.L.A.S.H., smoking was not germane to the Post's purpose and, consequently, the Post lacked representational standing. The Post argues the trial court erred because smoking is germane to the Post's purpose of providing a social center for veterans and their families. The Post also argues its members have individual standing because the smoking ban "impinge[s] on their existing privacy, associations and social relationships at the Post causing them irreparable harm and is likely to result in a loss of membership." CP at 104.

We affirm the trial court's ruling. The American Legion is a corporation established by federal statute, 36 U.S.C. § 21701(a), for the purposes of upholding

and defending the constitution, promoting peace and goodwill throughout the world, "preserv[ing] the memories and incidents of the 2 World Wars and the other great hostilities fought to uphold democracy," "cement[ing] the ties and comradeship born of service," and "consecrat[ing] the efforts of its members to mutual helpfulness and service to their country." 36 U.S.C. § 21702(3)-(5). The Post's primary purpose, as a local chapter, is to provide services and benefits to veterans and their families. It seeks to unite its membership "in the bonds of fraternity, benevolence, and charity." CP at 103.

Smoking is not germane to any of the American Legion's or local Post's purposes. Consequently, the Post lacks representational standing under the *Hunt* test and is precluded from asserting that the Act violates its members' liberty interests without due process of law.

D. Whether the Act violates article I, section 7 of the Washington Constitution

The Post claims the Act interferes with its privacy rights under the state constitution. The state constitution provides, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. When considering whether the state constitution provides greater protection than the federal constitution, this court engages in a two-step inquiry. *Madison v. State*, 161 Wn.2d 85, 93, 163 P.3d 757 (2007) (plurality opinion). First, the court

must determine "whether 'a provision of the state constitution should be given an interpretation independent from that given to the corresponding federal constitutional provision.'" *Id.* (quoting *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). Normally, this first step involves an analysis of the six nonexclusive *Gunwall*[21] factors. However, "[o]nce this court has established that a state constitutional provision warrants an analysis independent of a particular federal provision," a *Gunwall* analysis is unnecessary. *Id.* at 94. It is well-settled law that article I, section 7 may provide greater protection than the federal constitution, especially in cases of governmental searches and seizures. *McKinney*, 148 Wn.2d at 26. Thus, it is not necessary for this court to reconsider the factors outlined in *Gunwall* to determine whether to apply a constitutional analysis under article I, section 7 in a new context. *Id.*; *Andersen v. King County*, 158 Wn.2d 1, 44, 138 P.3d 963 (2006) (plurality opinion).

The second step is to determine "'whether the provision in question extends greater protections for the citizens of this state.'" *Madison*, 161 Wn.2d at 93 (quoting *McKinney*, 148 Wn.2d at 26). This step focuses on the state constitutional provision as applied to the alleged right in a particular context. *Id.* at 93-94. Thus, the pivotal question is whether article I, section 7 provides greater protection than

[21] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

the federal constitution in the context of smoking inside a private facility.

Whether article I, section 7 provides enhanced protection depends on whether there has been an intrusion into a person's "private affairs." *McKinney*, 148 Wn.2d at 27. "Private affairs" are generally defined as "'those privacy interests which citizens of [Washington] have held, and should be entitled to hold, safe from governmental trespass.'" *Id.* (alteration in original) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). Whether an intrusion into private affairs exists depends upon a two-step analysis: (1) what privacy interests citizens have historically held and (2) whether the expectation of privacy is one that citizens should be entitled to hold. *Andersen*, 158 Wn.2d at 44.

The Post asserts that as a private facility it has a historical right to be free from government interference.[22] It argues that, historically, distinctly private clubs were protected from government interference in their private affairs. This claim is without merit. "[I]t is a universally sustained principle that persons within a state . . . hold their property and are entitled to enjoy and use it subject to a reasonable exercise of the police power . . . even though it affects adversely the property rights of some individuals." *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 712, 558 P.2d 821 (1977); *see also Bowes v. City of Aberdeen*, 58

[22]The Post also argues its members have historically held a privacy interest in smoking in private facilities. The Post lacks representational standing to make this argument on behalf of its members, so we decline to address this argument.

Wash. 535, 541-42, 109 P. 369 (1910) (noting the right to property is a legal right that must be measured in reference to the rights of others and the public); *Shepard v. City of Seattle*, 59 Wash. 363, 375, 109 P. 1067 (1910) (noting the right to property is subject to a reasonable exercise of the state's police powers, including the preservation of health).

Furthermore, contrary to the Post's assertions, government regulation of smoking and tobacco products is not a recent phenomenon and, as such, there is no traditional expectation of privacy in this context. States have regulated smoking since the 1800s. *See C.L.A.S.H.*, 315 F. Supp. 2d at 487 n.20 (upholding the constitutionality of a statewide ban on the sale of cigarettes) (citing *Austin v. State*, 101 Tenn. 563, 48 S.W. 305, 309 (1898)); *State v. Heidenhain*, 42 La. Ann. 483, 485-86, 7 So. 621 (1890) (upholding a state criminal ordinance prohibiting smoking on street cars); *Commonwealth v. Thompson*, 53 Mass. 231, 232-33 (1847) (upholding a criminal statute prohibiting smoking on public streets in Boston). In 1900, the Supreme Court determined a state may completely prohibit cigarette sales without violating the Fourteenth Amendment. *Austin v. Tennessee*, 179 U.S. 343, 348-50, 21 S. Ct. 132, 45 L. Ed. 224 (1900). Today, "over 40 states have enacted laws restricting smoking in public places and approximately half of all the states have laws restricting smoking in private work locations." *C.L.A.S.H.*, 315 F. Supp.

2d at 489. In short, there is no historical privacy interest in smoking.

The Post has not demonstrated that article I, section 7 provides greater protection in the context of smoking inside a private facility and, consequently, the Post's claim should be analyzed under the federal constitution's implicit right to privacy.[23] The federal constitution protects two types of privacy interests: the right to autonomous decision making (including issues relating to marriage, procreation, family relationships, child rearing, and education) and the right to confidentiality, or nondisclosure of personal information.[24] *O'Hartigan v. Dep't of Pers.*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991) (citing *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977)). The interest in autonomy is a recognized fundamental right, but the interest in confidentiality is not.[25] *Id.* The

[23]As noted above, the Post, as a corporation, cannot claim the Act violates its fundamental liberties. The Post also lacks standing to assert the Act violates the fundamental rights of its members. *See supra* at 16-20. However, a determination of the scope of fundamental rights or liberties is necessary for analyzing the Post's claims under article I, section 7. Thus, this section includes an analysis of whether there is a fundamental right to smoke despite the Post's inability to directly assert this claim.

[24]The federal constitution does not explicitly guarantee a right of privacy. The rights of liberty and privacy under the United States Constitution have been described as "penumbras" emanating from the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), "zones of privacy" implicit in the Fourteenth Amendment's concept of liberty, *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1937), or as "the right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

[25]Under the federal due process clause, a law that interferes with certain fundamental rights and liberty interests is subject to strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). Strict scrutiny requires that the infringement be narrowly tailored to serve a compelling state interest. *Id.* at 721. A law that does not interfere with fundamental rights and liberty interests is subject to rational basis review. *Id.* at

limits of the autonomy interest are circumscribed by the Supreme Court's fundamental rights jurisprudence. *Bedford v. Sugarman*, 112 Wn.2d 500, 513, 772 P.2d 486 (1989).

Under the federal constitution, the existence of fundamental rights or liberties depends on whether they are "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.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (citation omitted) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 82 L. Ed. 288 (1937), *overruled on other grounds, Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). "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 at 25 (citing *Glucksberg*, 521 U.S. at 720). A court should be reluctant to identify new fundamental rights because, in doing so, a matter is effectively placed "outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720.

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Smoking is not a fundamental right. *See Batte-Holmgren v. Comm'r of Pub. Health*, 281 Conn. 277, 295, 914 A.2d 996 (2007) (prohibition against smoking in restaurants and other public facilities does not implicate a fundamental right); *Coal. for Equal Rights, Inc. v. Owens*, 458 F. Supp. 2d 1251, 1263 (D. Colo. 2006) (right of bar owners to allow smoking in their establishments is not a fundamental right), *aff'd*, 517 F.3d 1195 (10th Cir. 2008); *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 542 (S.D.N.Y. 2005) (people do not have a fundamental right to smoke); *Roark & Hardee LP v. City of Austin*, 394 F. Supp. 2d 911, 918 (W.D. Tex. 2005) ("it is clear that there is no constitutional right to smoke in a public place"); *Fagan v. Axelrod*, 146 Misc. 2d 286, 297, 550 N.Y.S.2d 552 (Sup. Ct. 1990) ("[t]here is no more a fundamental right to smoke cigarettes than there is to shoot up or snort heroin or cocaine or run a red light" (citation omitted)). Because there is not a fundamental right to smoke, there is no privacy interest in smoking in a private facility.

The Post also asserts the Act violates a fundamental right to smoke in private facilities arising from the right of association. There are "two types of associational rights protected by the Constitution: the freedom of 'expressive association' and freedom of 'intimate association.'" *City of Bremerton v. Widell*, 146 Wn.2d 561, 575, 51 P.3d 733 (2002). Freedom of expressive association derives from the First

Amendment and applies to government interference with speech, assembly, redress of grievances, and exercise of religion.[26] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Freedom of intimate association derives from the due process clause and principles of liberty and privacy. *Id.* Freedom of intimate association protects the "choices to enter into and maintain certain intimate human relationships." *Id.* at 617. These relationships are protected because they "have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." *Id.* at 618-19. Such relationships are those "that attend the creation and sustenance of a family," including marriage, childbirth, the raising and education of children, and cohabitation with one's relatives. *Id.* at 619.

In determining whether a nonfamilial relationship qualifies as an intimate human relationship, courts consider a number of factors. A broad continuum of relationships exists and a court must look at the size, degree of selectivity in beginning and maintaining the group, and seclusion from others to determine whether the relationship qualifies as an intimate human relationship. *Id.*; *Widell*, 146 Wn.2d at 576-77. The Supreme Court determined the United States Jaycees

[26]The Post does not argue the ban interferes with its members' expressive activities, such as speech or assembly. Thus, the issue of whether the Act interferes with First Amendment rights is not addressed.

was not an intimate human relationship because local chapters were large (400-430 people), not selective (membership was denied only on the basis of age or sex), and nonexclusive. *U.S. Jaycees*, 468 U.S. at 621-22; *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 546, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987) (Rotary Club is not an intimate human relationship). Similarly, a thousand teenagers at a dance hall are not an intimate human relationship. *City of Dallas v. Stanglin*, 490 U.S. 19, 24, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989). This court has determined an engaged couple who is not cohabitating does not qualify as an intimate human relationship. *Widell*, 146 Wn.2d at 577. While the possibility of a nonfamilial relationship qualifying as an intimate human relationship has not been foreclosed, this court has not expanded the right because it "stems from the right of privacy, which normally applies only to familial relationships and 'extend[s] only so far as the principles of substantive due process permit.'" *Id.* (alteration in original) (quoting *Bedford*, 112 Wn.2d at 517).

The Post does not specify which type of associational right it is relying on. Instead, it simply repeatedly asserts that the Act will interfere with its members' right of association.[27] Essentially, the Post seems to be arguing that as a social

[27]The Post lacks standing to argue that the Act interferes with its members' constitutional rights. *See supra* at 16-20. However, we choose to address the issue as a subset of the Post's claim that the Act violates article I, section 7 of the Washington Constitution. Because we have determined that the state constitution is not more protective than the federal constitution in the context of smoking in private facilities, the proper analysis of the article I, section 7 claim is under

meeting place for veterans, the associations formed at the Post constitute intimate human relationships. The Post asserts one of its primary purposes is to provide a social atmosphere for its members and one of the essential attributes of this social atmosphere is smoking. Thus, the Post argues, a ban on smoking will impinge on these associations because the members, the majority of whom are smokers, will simply leave the Post and patronize tribal establishments, where smoking is allegedly allowed.

Other courts have universally rejected challenges to smoking bans on the grounds they interfere with freedom of association. *See, e.g., Players*, 371 F. Supp. 2d at 544-45 (rejecting social club's claim that a smoking ordinance violated freedom of association of intimate relationships); *City of Tucson v. Grezaffi*, 200 Ariz. 130, 136, 23 P.3d 675 (Ct. App. 2001) (rejecting a restaurant owner's claim that a smoking ordinance violated freedom of association after analyzing both freedom of expressive association and freedom of association of intimate human relationships); *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 844, 849-53 (N.D. Ohio 2004) (rejecting organization's claim that a smoking ban interfered with freedom of expressive association or freedom of association of intimate human relationships).

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the federal constitution. The federal counterpart of article I, section 7 in the context of privacy rights is substantive due process, which is the foundation of a claim that a law interferes with an intimate human relationship.

In one case, a private social club for actors and members of the theatrical profession claimed a smoking ban violated its freedom of intimate association. *Players,* 371 F. Supp. 2d at 525, 544-47. The club claimed that by joining, club members entered into intimate human relationships because it is "a relatively small, private, exclusive and secretive club." *Id.* at 544. The court rejected this claim, noting the club had 750 members and "would have a difficult time demonstrating that its members all share the 'distinctively personal aspects' of their lives necessary for their rights of intimate association to be implicated by their membership in the organization." *Id.* at 544 n.16. Even if the club were an intimate human relationship, the smoking ban only incidentally affected interaction among club members. *Id.* at 545. Although the club asserted that its mission was to promote social intercourse among its members, the court noted, "It is difficult to see how the social intercourse, and social intimacy, that the club seeks to facilitate could be unconstitutionally infringed merely because the meeting place provided by the club can no longer allow indoor smoking." *Id.*

Similarly, the Post cannot show that its club, with 591 members, is an intimate association, though all of the members share the common characteristic of military service. Even if the Post were deemed to facilitate intimate human relationships, the ban does not directly interfere with such relationships or a

person's ability to join the Post. Instead, it merely prohibits smoking in the Post's building when employees are present. Thus, the Post's claim that it has a fundamental right to allow smoking under freedom of association must fail.

Consequently, no fundamental rights are implicated in this case by prohibiting smoking in a private facility that is a place of employment. A law that does not interfere with fundamental rights and liberty interests is subject to rational basis review. *Glucksberg*, 521 U.S. at 728. Rational basis review requires a law to be rationally related to a legitimate government interest. *Id.* The State has a legitimate interest in protecting public health. "'Regulating and restricting the use of private property in the interest of the public is [the state's] chief business.'" *Manufactured Hous. Cmtys. of Wash. v. State*, 142 Wn.2d 347, 355, 13 P.3d 183 (2000) (quoting *Conger v. Pierce County*, 116 Wash. 27, 36, 198 P. 377 (1921)). The purpose of the Act is to protect the health and welfare of all citizens, which is a legitimate government interest. RCW 70.160.011.

Prohibiting smoking in places of employment is rationally related to protecting the public health. The hazardous nature of secondhand smoke is well known.[28] *McCarthy v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 812, 819, 759

[28]While the dissent questions whether undisputed scientific proof exists as to the harmful effects of secondhand smoke, dissent (Sanders, J.) at 19-26, absolute scientific proof has never been required under rational basis review. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a

P.2d 351 (1988) (holding an employer has a common law duty to provide a working environment reasonably free from tobacco smoke); *see also Grezaffi*, 200 Ariz. at 137; *C.L.A.S.H.*, 315 F. Supp. 2d at 486-89 (setting out the evolution of smoking research and regulation); *Fagan*, 146 Misc. 2d at 293-95 (noting the weight of scientific evidence overwhelmingly supports the assertion that secondhand smoke is a significant health hazard to nonsmokers). "[A] person who smokes in an enclosed area endangers the health of nonsmokers in the area." *McCarthy*, 110 Wn.2d at 820. It was rational for the voters, acting as the legislature, to determine that prohibiting smoking in places of employment would protect workers from the dangers of secondhand smoke. Thus, the Act does not violate due process or article I, section 7 of the state constitution.

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particular school of thought." *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955).

E. Whether the Act violates article I, section 12 of the Washington Constitution

The Post contends the Act violates the state privileges and immunities clause and the federal equal protection clause. When presented with claims under both the state and federal constitutions, we review the state constitutional arguments first. *State v. Reece*, 110 Wn.2d 766, 770, 757 P.2d 947 (1988).

As discussed previously, when considering whether the state constitution provides greater protection than the federal constitution, this court engages in a two-step inquiry. *Madison*, 161 Wn.2d at 93. First, the court must determine "whether 'a provision of the state constitution should be given an interpretation independent from that given to the corresponding federal constitutional provision.'" *Id.* (quoting *McKinney*, 148 Wn.2d at 26). Normally, this first step involves an analysis of the six nonexclusive *Gunwall* factors. However, "[o]nce this court has established that a state constitutional provision warrants an analysis independent of a particular federal provision," a *Gunwall* analysis is unnecessary. *Id.* at 94. The privileges and immunities clause warrants a separate constitutional analysis. *Id.*

The second step is to determine "'whether the provision in question extends greater protections for the citizens of this state.'" *Id.* at 93 (quoting *McKinney*, 148 Wn.2d at 26). This step focuses on the state constitutional provision as applied to the alleged right in a particular context. *Id.* at 93-94. The court should look at the

language of the constitutional provision in question and the historical context surrounding its adoption. *Id.* at 94.

We must determine whether the right to smoke in a private facility is a privilege or immunity protected by article I, section 12 of the Washington Constitution.[29] The privileges and immunities clause is concerned both with "'avoiding favoritism'" and "'preventing discrimination,'" the latter being the primary purpose of the federal equal protection clause.[30] *Andersen*, 158 Wn.2d at 14 (quoting *Grant County* II, 150 Wn.2d at 808). A privilege is not necessarily created every time a statute allows a particular group to do or obtain something. *Grant County* II, 150 Wn.2d at 812-13. Instead, the terms "'privileges and immunities'"

> "pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms . . . secure . . . the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from."

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[29]Article I, section 12 of the state constitution provides, "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

[30]"[W]hen determining whether the Washington privileges and immunities clause provides more protection than the United States Constitution, this court has always compared it with the federal equal protection clause rather than the federal privileges and immunities clause." *Grant County* II, 150 Wn.2d at 805 n.10. However, the term "privileges and immunities" under the state constitution is defined in accordance with the federal constitution's privileges and immunities clause. *Id.* at 813; *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902).

*Id.* (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902).

The foundation of the Post's argument is that a privilege is created when smoking is allowed in one facility and prohibited in another. The privilege is, arguably, the fundamental right "to remove to and carry on business therein." Br. of Appellant at 21. The Post notes the privileges and immunities clause is violated if a statute treats two businesses that are selling the same product differently. *See State v. W.W. Robinson Co.*, 84 Wash. 246, 249-50, 146 P. 628 (1915) (invalidating statute that exempted cereal and flour mills from act imposing onerous conditions on other similarly situated businesses). The Post asserts it is similarly situated to a hotel, where smoking is allowed in some rooms, because they are both "private facilities" and "places of employment."

The Post misconstrues the meaning of a privilege. Our jurisprudence indicates that a "privilege" normally relates to an exemption from a regulatory law that has the effect of benefiting certain businesses at the expense of others. *See* Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1268 (1996). For example, a municipal ordinance requiring licenses for nonresident photographers, but not residents, violated article I, section 12. *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 641, 209

P.2d 270 (1949). The court also struck down another part of the same ordinance that effectively prohibited nonresidents from engaging in the photography business, noting the primary purpose of the law was to insulate local photographers from competition. *Id.* at 644. The court reasoned that when the State's police power is manipulated to serve private interests at the expense of the common good, such legislation must be condemned as unreasonable and unlawful. *Id.*

Unlike the photographers in *Ralph*, the Act does not prevent any entity from engaging in business, which is a privilege for purposes of article I, section 12. Instead, the Act merely prohibits smoking within a place of employment. RCW 70.160.030. Smoking inside a place of employment is not a fundamental right of citizenship and, therefore, is not a privilege. Because there is no privilege involved, we hold there is no violation of article I, section 12. *See Grant County* II, 150 Wn.2d at 812.

F. Whether the Act violates the equal protection clause of the United States Constitution

Equal protection under the law is required by both the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution. *O'Hartigan*, 118 Wn.2d at 121. Equal protection requires that "'all persons similarly situated should be treated alike.'" *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313

(1985)). The equal protection clause is aimed at "securing equality of treatment by prohibiting hostile discrimination." *Andersen*, 158 Wn.2d at 15. Under the equal protection clause, the appropriate level of scrutiny depends on the nature of the classification or rights involved. *Id.* at 18. Suspect classifications are subject to strict scrutiny. *Id.* at 19 (citing *City of Cleburne*, 473 U.S. at 440). Race, alienage, and national origin are examples of suspect classifications.[31] *Id.* Strict scrutiny also applies to laws burdening fundamental rights or liberties. *Id.* at 24. Intermediate scrutiny applies only "'if the statute implicates both an important right and a semi-suspect class not accountable for its status.'" *Madison*, 161 Wn.2d at 103 (quoting *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 448, 853 P.2d 424 (1993)). The Post does not argue smokers or private facilities constitute suspect classes, and we already determined no fundamental rights are involved.

If a suspect classification or fundamental right is not involved, rational basis review applies. *Andersen*, 158 Wn.2d at 18. A classification passes rational basis review "'so long as it bears a rational relation to some legitimate end.'" *Id.* at 23 (quoting *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)). Social and economic legislation that does not implicate a suspect class or

[31]To qualify as a suspect class, "the class must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society, and show that it is a minority or politically powerless class." *Andersen*, 158 Wn.2d at 19.

fundamental right is presumed to be rational; this presumption may be overcome by a clear showing that the law is arbitrary and irrational. *Hodel v. Indiana*, 452 U.S. 314, 331-32, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981). "A legislative distinction will withstand a minimum scrutiny analysis if, first, all members of the class are treated alike; second, there is a rational basis for treating differently those within and without the class; and third, the classification is rationally related to the purpose of the legislation." *O'Hartigan*, 118 Wn.2d at 122. In reviewing the statute, "the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification." *Andersen*, 158 Wn.2d at 31. The classification need not be made with "'mathematical nicety,'" and its application may "'result[] in some inequality.'" *Id.* at 32 (internal quotation marks omitted) (quoting *Heller v. Doe*, 509 U.S. 312, 321, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)). "'It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.'" *O'Hartigan*, 118 Wn.2d at 124 (quoting *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110, 69 S. Ct. 463, 93 L. Ed. 533 (1949)).

In a recent case, an association of businesses argued Colorado's smoking ban violated the equal protection clause because smoking was banned in businesses such as bars and bingo halls, but allowed in casinos. *Coal. for Equal Rights*, 458 F. Supp. 2d at 1257-61. The association argued the exceptions for casinos and airport

smoking lounges were not rationally related to the smoking ban's articulated purpose. *Id.* at 1259. The court rejected this claim, noting it is the province of the legislature to make such classifications and such a classification must be upheld as long as there is "'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* at 1260 (quoting *Heller*, 509 U.S. at 320). Furthermore, although the association argued casinos were exempted solely for financial reasons, there was no support for the proposition that the state could not consider the fiscal impact of legislation under rational basis review. *Id.*

Like the association in *Coalition for Equal Rights*, the Post argues the smoking ban exemption for hotel rooms is based upon economic concerns.[32] The Post argues prohibiting smoking in some private facilities that are places of employment, such as the Post, while allowing smoking in hotel rooms is discriminatory treatment. The Post argues this treatment is irrational because it is based upon economic concerns. However, the cases cited by the Post do not support its assertion that the legislature may not consider factors other than public health in determining where smoking should be banned.[33]

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[32]The dissent argues the Act violates equal protection because a private place of employment is treated differently than a public place of employment. Dissent (Sanders, J.) at 26-28. This argument was not raised by the parties. We will not consider this issue in the absence of any briefing by the parties. *Amalgamated Transit*, 142 Wn.2d at 203.

[33]In the first case proffered by the Post, a state court upheld a smoking ban that applied to enclosed state buildings, while excluding other areas, such as bowling alleys and small restaurants. *Rossie v. Dep't of Revenue*, 133 Wis. 2d 341, 354-56, 395 N.W.2d 801 (Ct. App. 1986). The

The Post's claim must fail because it has not established it is treated differently than a similarly situated entity in its class. The Post fails to offer any evidence that hotels are being treated differently than the Post. The Post produced a document from the DOH entitled "More Frequently Asked Questions" from December 2005 opining that smoking is allowed in up to 25 percent of hotel rooms. CP at 126-27. This opinion is not evidence of discriminatory treatment.

Even if discriminatory treatment existed, the legislative distinctions are rational. First, all private facilities that are places of employment are treated the same. The Post is not similarly situated to a hotel because it is not in the business of providing sleeping quarters. Second, there is a rational basis for treating hotels differently than private facilities. For example, the legislature could have determined hotel employees have limited access to the rooms while guests are present, whereas employees at facilities such as the Post may be required to spend their entire work shift in secondhand smoke. This conceivable argument serves as a rational basis for treating the two facilities differently and it is rationally related to

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classification was sustained on the basis that the exempted places could easily be avoided by nonsmokers. *Id.* at 355. In the second case, restaurant and bowling alley owners challenged smoking regulations promulgated by a county department of health. *Leonard v. Dutchess County Dep't of Health*, 105 F. Supp. 2d 258, 259 (S.D.N.Y. 2000). The court determined the department violated New York's separation of powers doctrine when it exceeded the powers delegated to the department. *Id.* at 262-63, 268. Similarly, in the final case proffered by the Post, a court determined a county health board acted outside of its rule making authority when it made distinctions reserved for the legislature. *City of Roanoke Rapids v. Peedin*, 124 N.C. App. 578, 589-90, 478 S.E.2d 528 (1996). It is unclear how this relates to the Post's claim that the legislature did not have a rational basis in its statutory classifications.

the purpose of the Act, which is to protect employees from secondhand smoke in their workplaces.

G. Whether the Act is void for vagueness under the due process clauses of the Washington Constitution and the United States Constitution

The Post's final argument is the Act violates the void-for-vagueness doctrine embodied in the due process clause. Under this doctrine, "'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"[34] *U.S. Jaycees*, 468 U.S. at 629 (alteration in original) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).

The first step in analyzing a vagueness challenge is to determine whether the challenge to the statute in question is to the face of the statute or as applied in a particular case. *City of Spokane v. Douglass*, 115 Wn.2d 171, 181-82, 795 P.2d 693 (1990). A vagueness challenge to a statute that does not implicate First Amendment rights must be considered in light of the facts of the specific case before

[34]The United States Supreme Court has indicated that if a statute imposes only a civil penalty, the standards for vagueness are relaxed. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) ("[t]he Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe"); *see also Winters v. New York*, 333 U.S. 507, 515, 68 S. Ct. 665, 92 L. Ed. 840 (1948). We choose not to apply a more relaxed standard in this case.

the court. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); *Douglass*, 115 Wn.2d at 182. Thus, a statute must be "tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the [statute's] scope." *Douglass*, 115 Wn.2d at 182-83.

Due process does not require "impossible standards of specificity or absolute agreement." *Id.* at 179. Vagueness is not simply uncertainty as to the meaning of a statute. *Id.* In determining whether a statute is sufficiently definite, the provision in question must be considered within the context of the entire enactment and the language used must be "afforded a sensible, meaningful, and practical interpretation." *Id.* at 180. A court should not invalidate a statute simply because it could have been drafted with greater precision. *Id.* at 179.

The Post argues the Act is void for vagueness because an ordinary person cannot understand whether smoking is proscribed in private, nonprofit fraternal clubs. The Act specifically exempts "private . . . workplace[s], within a public place" under RCW 70.160.060. The Post argues an ordinary person would not understand, in light of RCW 70.160.060, that smoking is banned in places of employment within private facilities. Furthermore, the Post argues, the definition of

"place of employment" is vague as to which "private facilities" are exempt. The Post relies on a case where part of a smoking ban was struck down as being void for vagueness because it failed to adequately define "smoking paraphernalia." *Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745, 756 (Ky. 2004). *But cf. Roark & Hardee*, 394 F. Supp. 2d at 916-18 (determining the terms "smoking" and "smoking accessory" are not unconstitutionally vague); *Taverns for Tots*, 341 F. Supp. 2d at 849-53 (finding a smoking ban exemption for a "private social function" was not unconstitutionally vague); *Coal. for Equal Rights*, 458 F. Supp. 2d at 1262 (finding a smoking ban exception for small employers was not unconstitutionally vague).

The Act clearly prohibits smoking "in a public place or in any place of employment." RCW 70.160.030. An ordinary person would understand that if an area constitutes a "place of employment," smoking is prohibited. The phrase "place of employment" clearly applies to the Post because it is an area under the control of a private employer which employees are required to pass through during the course of employment. RCW 70.160.020(3). The Post concedes it is an employer, it has employees, and the employees are required to work in the lounge. Thus, an ordinary person would believe smoking is prohibited at the Post. The Post's argument centers on the exceptions for private facilities and privately enclosed

workplaces within public places. Although the interplay between these exceptions and their application in other situations (such as hotel rooms) may not be entirely clear, these matters are not before the court because the Post is asserting only an as-applied vagueness challenge. The Act is sufficiently definite to overcome the Post's void-for-vagueness challenge.

H. Whether any party is entitled to attorney fees

Attorney fees and expenses are available on appeal if provided by law. RAP 18.1(a). The Post requests attorney fees pursuant to 42 U.S.C. § 1988. Attorney fees may be available under 42 U.S.C. § 1988 when a plaintiff brings a lawsuit under 42 U.S.C. § 1983 to redress a violation of a person's constitutional rights. 42 U.S.C. § 1988. The Post did not file a § 1983 claim and is not entitled to attorney fees under § 1988.

Both KCHD and DOH request statutory attorney fees and costs pursuant to RCW 4.84.030. A prevailing party is entitled to costs and disbursements in any action in superior court. RCW 4.84.030. Costs include statutory attorney fees. RCW 4.84.010(6). KCHD and DOH are prevailing parties, so they are awarded costs, including statutory attorney fees.

## IV. CONCLUSION

We affirm the trial court. The Act clearly prohibits smoking in any "place of

employment," the Post is a "place of employment," and none of the exceptions in question apply to places of employment. Furthermore, we affirm the trial court's ruling that the Post does not have representational standing and, as such, decline to address whether the Act violates the constitutional rights of the Post's members. As to the other constitutional claims, we hold the Act does not violate article I, section 7 of the Washington Constitution; article I, section 12 of the Washington Constitution; equal protection; or due process. KCHD and DOH are the prevailing parties and are entitled to costs, including statutory attorney fees.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Gerry L. Alexander
Justice Susan Owens
Bobbe J. Bridge, Justice Pro Tem.
Justice Barbara A. Madsen