

NORTH CAROLINA COURT OF APPEALS

IN RE:

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Appeal of Civil Penalty:

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DON LIEBES, GATE CITY

)

BILLIARDS COUNTRY CLUB,

)

Appellants,

)

)

v.

)

)

GUILFORD COUNTY DEPARTMENT

)

OF PUBLIC HEALTH,

)

)

Appellee.

)

From Guilford County

10 CVD 6496

10 CVD 7256

CLERK OF SUPERIOR COURT
OF NORTH CAROLINA

2010 DEC -8 P 2:18

FILED

AMICI CURIAE BRIEF ON BEHALF OF AMERICAN HEART ASSOCIATION,
AMERICAN LUNG ASSOCIATION, AMERICAN CANCER SOCIETY and AMERICAN
CANCER SOCIETY CANCER ACTION NETWORK, AMERICANS FOR NONSMOKERS'
RIGHTS, TOBACCO CONTROL LEGAL CONSORTIUM AND CAMPAIGN FOR
TOBACCO-FREE KIDS

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TOBACCO CONTROL LEGAL CONSORTIUM AND CAMPAIGN FOR TOBACCO-FREE
KIDS *****

The American Heart Association, the American Lung Association, the American Cancer Society and American Cancer Society Cancer Action Network, Americans for Nonsmokers' Rights, the Tobacco Control Legal Consortium, and the Campaign for Tobacco-Free Kids submit this *amici curiae* brief in support of Appellee. This brief describes the national trend on Equal Protection challenges to various states' smoke-free legislation and explains why the private club exemption set forth in An Act to Prohibit Smoking in Certain Public Places and Certain Places

of Employment ("the Act"), as applied, does not violate Appellants' Equal Protection rights under the Fourteenth Amendment of the United States Constitution or the Law of the Land Clause under Article I, section 19 of the North Carolina Constitution.

ARGUMENT

I. EQUAL PROTECTION CHALLENGES TO SMOKE-FREE LEGISLATION ENACTED AROUND THE COUNTRY HAVE CONSISTENTLY FAILED.

Legislation providing smoke-free workplaces, restaurants, and bars is a growing trend throughout the United States. As of 1 October 2010, over twenty states or commonwealths had enacted laws prohibiting smoking in all workplaces, restaurants, and bars; with more than 400 municipalities enacting similar local ordinances. American Nonsmokers' Rights Foundation, U.S. 100% Smoke-free Laws in Workplaces and Restaurants and Bars, <http://www.no-smoke.org/pdf/WRBLawsMap.pdf>. These laws usually only prohibit smoking in certain public places. See id. Because of this, Equal Protection challenges have been common. City of Wausau v. Jusufi, 763 N.W.2d 201 (Wis. Ct. App. 2008); Batte-Holmgren v. Comm'r of Pub. Health, 914 A.2d 996, 1006 (Conn. 2007); City of Tucson v. Grezaffi, 23 P.3d 675, 681 (Ariz. Ct. App. 2001); Justiana v. Niagara Cty. Dep't of Health, 45 F. Supp. 2d 236, 242 (W.D.N.Y. 1999); Rossie v. State Dep't of Revenue, 395 N.W.2d 801, 806 (Wis. Ct. App. 1986). These

challenges have consistently failed, as courts have repeatedly found the laws meet the liberal requirements of the Equal Protection Clause. Jusufi, 763 N.W.2d 201; Batte-Holmgren, 914 A.2d at 1011, 1015; Grezaffi, 23 P.3d at 682; Justiana, 45 F. Supp. 2d at 242-43; Rossie, 395 N.W.2d at 807.

In Rossie v. State Department of Revenue, for example, the plaintiff was a state employee who was not allowed to smoke at work under the state's smoke-free law and the state Department of Revenue's rules. Rossie, 395 N.W.2d at 804. Among other challenges, the plaintiff argued "the statutory classifications that include him . . . while excluding [smokers who frequent bowling alleys and certain restaurants], deny him the equal protection of the laws." Id. at 806. The Wisconsin Court of Appeals disagreed, holding because "[t]hese distinctions are both substantial and germane to the purpose of the statute," there was "a reasonable basis for the statutory classifications." Id. at 807.

In Justinana v. Niagara County Department of Health, the plaintiffs argued their Equal Protection rights were violated because the regulations "arbitrarily exempt[ed] certain businesses from compliance with the smoking restrictions." 45 F. Supp. 2d at 242. The district court noted "[l]egislative classifications do not have to be a 'perfect fit' for the problem they are intended to address." Id. at 242. Based on this

reasoning, it held "restricting smoking in [certain] public places is clearly rationally related to the goal of protecting the public from [secondhand smoke]." Id.

More recently, in City of Tucson v. Grezaffi, the Arizona Appellate court was asked to determine whether a smoke-free law applicable only to restaurants, while exempting bars and bowling alleys, violated the Equal Protection clause. Grezaffi, 23 P.3d at 681. The Arizona Appellate Court emphasized the government's authority to take an incremental approach when enacting smoke-free legislation, stating, "[A]bsolute equality and complete conformity of legislative classifications are not constitutionally required." Id. at 682-683 (alterations in original) (internal quotation marks omitted). Consequently, the court held "[t]he ordinance unquestionably is a reasonable, legitimate means of safeguarding the general health, safety, and welfare of the community" and well within the parameters of the Equal Protection Clause. Id. at 682.

Equal Protection challenges to smoke-free legislation around the country demonstrate courts rarely find these challenges persuasive. Batte-Holmgren, 914 A.2d at 1011, 1015; Grezaffi, 23 P.3d at 682; Justiana, 45 F. Supp. 2d at 242-43; Rossie, 395 N.W.2d at 807. Even when the laws only prohibit smoking in certain public places, the courts, under the deferential review they are required to give this type of

legislation, see Dallas v. Stanglin, 490 U.S. 19, 26, 109 S.Ct. 1591, 1596 (1989), consistently find a rational relationship between the legislation and a legitimate governmental purpose. Batte-Holmgren, 914 A.2d at 1011, 1015; Grezaffi, 23 P.3d at 682; Justiana, 45 F. Supp. 2d at 242-43; Rossie, 395 N.W.2d at 807.¹

II. THE PRIVATE CLUB EXEMPTION IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST AND DOES NOT VIOLATE EQUAL PROTECTION.

"The principle of equal protection of the law is explicit in both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina." Richardson v. North Carolina Dep't. of Correction, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). Appellants have conceded this case should be reviewed under the rational basis standard of review. (Appellant's Br. at 10). "[I]f a law neither burdens a fundamental right nor targets a suspect class, . . . the legislative classification [will be upheld] so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627 (1996). Under this rational basis standard, "[s]tate legislatures are presumed

¹ Notably, in one instance, the Nebraska Supreme Court did hold a temporary exemption to a non-smoking ordinance was unconstitutional under the Nebraska state constitution's Special Legislation prohibition. Hug v. City of Omaha, 749 N.W.2d 884 (Neb. 2008). The Court did not strike down the non-smoking ordinance, but rather struck down the exemption.

to have acted within their constitutional power." McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1105 (1961). This standard is "the most relaxed and tolerant form of judicial scrutiny." Stanglin, 490 U.S. at 26. A law will only be overturned under this standard if it is "clearly wrong, a display of arbitrary power, [or] not an exercise of judgment." Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 434 (1976) (internal quotation marks omitted). Thus, "a law will be sustained . . . even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." Romer, 517 U.S. at 632. Only after "those attacking the rationality of the legislative classification have . . . negat[ed] every conceivable basis which might support [the law]" will the law be held unconstitutional. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315, 113 S.Ct. 2096, 2102 (1993) (internal quotation marks omitted). In the present case, Appellant has failed to meet this burden. The Act, and the private club exemption contained therein, are supported by a legitimate governmental interest and are rationally related to this interest.

- A. Protecting the health of North Carolinians by reducing exposure to secondhand smoke is a legitimate governmental purpose.

The North Carolina General Assembly was motivated by a legitimate purpose when it chose to protect the health of North

Carolina citizens by reducing their exposure to secondhand smoke. The Fourteenth Amendment rational basis test first requires a classification be supported by a legitimate state interest. Romer, 517 U.S. at 631. However, "because [the Court] has never require[d] a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." FCC, 508 U.S. at 315. The Supreme Court has, thus, stated "any reasonably conceivable state of facts that could provide a rational basis" is sufficient. FCC, 508 U.S. at 313; see also Hodel v. Indiana, 452 U.S. 314, 332, 101 S.Ct. 2376, 2387 (1981) ("social and economic legislation is valid unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes" (internal quotation marks omitted)).

In the present case, the North Carolina General Assembly's stated purpose for enacting the Act was to "protect the health of individuals in public places and places of employment and riding in State government vehicles from the risks related to secondhand smoke." N.C. Gen. Stat. § 130A-491(b) (2010). The government's interest in protecting the health of its citizens is a legitimate governmental purpose. See Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102 (1954). Moreover, regulating

exposure to secondhand smoke is an effective way to improve the health of all North Carolinians. See U.S. Dep't of Health and Human Servs., *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 13-16 (2006).²

It is well documented secondhand tobacco smoke is a known human carcinogen. Id. at 12. Exposure to secondhand smoke can cause cancer, heart disease, and asthma attacks in both smokers and nonsmokers. Id. at 14-16. Tobacco use and secondhand smoke exposure are leading preventable causes of illness and premature death in North Carolina and the nation, resulting in nearly 450,000 deaths and health-related costs and productivity losses of approximately \$193 billion each year in the United States. Centers for Disease Control and Prevention, *Smoking-Attributable Mortality, Years of Potential Life, Lost, and Productivity Losses-United States, 2000-2004*, Morbidity and Mortality Weekly Report, Nov. 14, 2008, at 1226-28.³ Even brief exposure to secondhand smoke can cause serious harm to individuals, making it clear there is no safe level of exposure to secondhand smoke. U.S. Dep't of Health and Human Servs., *supra*, at 11, 65.

In 2006, the effects of secondhand smoke had grave health consequences for North Carolinians. Two hundred and fourteen (214) cases of lung cancer among North Carolinians age 18-64

²<http://www.surgeongeneral.gov/library/secondhandsmoke/report/index.html>.

³<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>

were attributable to secondhand smoke, while 7,332 cases of coronary heart disease in members of this age group were related to secondhand smoke. M. Plescia, D. Wansink, H.R. Waters, and S.P. Herndon, Medical Costs of Second Hand Smoke Exposure in North Carolina, 72 N.C. Med. J. (forthcoming Jan./Feb. 2011). Among North Carolinians age 65 or older, 344 cases of lung cancer and 2,551 cases of coronary heart disease were attributable to secondhand smoke. Id. These illnesses, along with other respiratory, reproductive, and related health problems associated with secondhand smoke, resulted in North Carolina health care costs of \$274,116,177 in 2006. Id. Clearly, preventing exposure to secondhand smoke is an effective way to protect the health of North Carolinians, and the legislature, in enacting a regulation to address this issue, was expressly motivated by this very legitimate purpose.

B. The Act and the private club exemption are rationally related to a legitimate governmental purpose.

The Act and its private club exemption pass scrutiny under Equal Protection analysis as they are rationally related to North Carolina's legitimate state interest of protecting the public and employees from the harmful effects of secondhand smoke. Under the rational basis test, the line between the State action and the State's legitimate purpose need not be perfectly drawn. Vance v. Bradley, 440 U.S. 93, 108, 99 S.Ct. 939, 948

(1979); see also McGowan, 366 U.S. at 425-26 (a law is presumed constitutional "despite the fact that in practice, [it may] result in some inequality").

This is especially true when a legislature approaches a perceived problem in an incremental fashion. In this situation, the legislature must make certain classifications based on its judgment of "the nature of the problem perceived, . . . [the need to] accommodate competing concerns both public and private, and [the] limitations on the practical ability . . . to remedy every ill." Plyer v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394 (1982). When reviewing such classifications under the Equal Protection clause, a court must afford the legislature "leeway to approach a perceived problem incrementally" as it sees fit. See FCC, 508 U.S. at 316. Thus, even if the classifications made by the legislature result in unequal treatment to different groups, the law will still be held constitutional if it bears some relationship to a legitimate governmental purpose. See Plyer, 457 U.S. at 216.

In North Carolina, the General Assembly chose to approach the health issues related to secondhand smoke incrementally, beginning with restaurants and bars. N.C. Gen. Stat. § 130A-496. From the scientific evidence cited above, it is clear secondhand smoke is a health hazard to all people in all public places. U.S. Dep't of Health and Human Servs., *supra*, at 11, 135.

However, patrons and particularly employees in restaurants and bars are often exposed to heightened levels of secondhand smoke. Id. at 602. In North Carolina, from 2005-2007, particulate matter concentrations in restaurants and bars in six counties throughout the state in which smoking was permitted averaged between 143 and 459_{pm2.5}. (Proescholdbell S, Steiner J, Goldstein A, et al. "Using Indoor Air Quality Monitoring in 6 Counties to Change Policy in North Carolina." *Preventing Chronic Disease* 6(3); July 2009). According to the United States Air Quality Index, this level indicates an unhealthy air quality. U.S. Env'tl. Prot. Agency, Air Quality Index, <http://www.airnow.gov/index.cfm?action=aqibasics.aqi#unh>. Faced with this evidence, it was perfectly reasonable for the North Carolina General Assembly to begin its regulation of smoking in public places with restaurants and bars. Thus, restricting smoking in restaurants and bars is rationally related to the state's stated purpose of protecting the public and employees from the harms associated with secondhand smoke, even if it is a "one step at a time" approach. Justiana, 45 F. Supp. 2d at 243; see also Grezaffi, 23 P.3d at 682 (stating that "the ordinance [restricting smoking in restaurants only] is a reasonable, legitimate means of safeguarding the general health, safety, and welfare of the community").

Moreover, the private club exemption set forth in the Act is consistent with the General Assembly's goal to regulate smoking in certain public places and certain places of employment. In restricting smoking in restaurants and bars, the General Assembly was not only concerned with the health risk to patrons who enter these establishments but also to the employees of these establishments. N.C. Gen. Stat. § 130A-491. Consistent with this narrow focus, private clubs were exempted from the provisions of the law. For purposes of the Act, a private club is defined as:

a country club or an organization that maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or member's guest, and is either incorporated as a non-profit corporation in accordance with Chapter 55 A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105-130.2(1).

N.C. Gen. Stat. § 130A-492(11).⁴ Thus, in order to meet this exemption, a club or organization must qualify as a non-profit organization. See id. Nonprofit organizations meeting this definition are generally fraternal organizations. These organizations do not operate for pecuniary gain, only sell food

⁴ There is also a practical purpose for the exemption. The language of the exemption is almost identical to the "private club" exemption from Food and Lodging regulations. See N.C. Gen. Stat. §§ 130A-247(2), 130A-250(5). Since both statutes are to be enforced by the local health department it was reasonable to keep the private club exemptions similar. See N.C. Admin. Code tit. 15A, r. 18A.2601; see N.C. Gen. Stat. § 130A-22(h1).

or alcohol incident to their operation, and are operated by their membership.

Appellants suggest the private club distinction is arbitrary and unconstitutional because there is no "rational basis for treating employees of private, nonprofit country clubs and fraternal organizations differently from employees of private, for-profit billiards clubs." (Appellant Br. 16-17). In support of its argument, Appellant contends employees of a for-profit private country club and must comply with the law, are protected from the effects of secondhand smoke while employees of a non-profit country club, which does not have to comply with the law, are not protected under the law (Appellant Br. 17). Based on this example, they argue the private club exemption, as a whole, is unconstitutional (Appellant Br. at 17). However, a law is constitutional "despite the fact that, in practice, [it] may result in some inequality." McGowan, 366 U.S. at 425-26.

The narrow private club exemption contained in the Act, which only exempts non-profit private clubs, provides a legitimate way for the General Assembly to protect the greatest number of citizens from exposure to secondhand smoke in restaurants and bars while allowing members of truly private clubs to freely associate. Indeed, in City of Wausau v. Jusufi, the Wisconsin Court of Appeals, in upholding a private club exemption to a non-smoking law, addressed this balance holding

the desire to recognize the right of certain organizations to associate while balancing the need to protect as much of the population as possible from the health hazards associated with secondhand smoke, provides a rational basis for exempting only non-profit private clubs from the requirements of a smoke-free law. Jusufi, 763 N.W.2d 201, 205. In rejecting the argument no basis existed for treating "virtually identical" organizations differently, the Court explained:

Absent the ordinance's narrow definition of private club as non-profit organizations controlled by their members, ordinary for-profit restaurants seeking the public's patronage would be able to avoid enforcement of the smoking ban by instituting a few formalities. Restaurants could create the illusion of private clubs by creating memberships with no meaningful membership criteria. The memberships would essentially be shams, with members having no control over, or stake in, the restaurant's operations. As such, the restaurants could identify themselves as private clubs, while remaining open to the public.

Id. The Court concluded there was a rational basis for treating non-profit private clubs differently, making the classification constitutionally valid. Id.

In this case, North Carolina's statute strikes the same balance between truly non-profit private clubs and for-profit restaurants and bars. Thus, this exemption, like the private club exemption in Jusufi, provides the greatest protection from secondhand smoke for the greatest number of North Carolinians while recognizing the unique nature of truly private clubs

existing primarily to serve their membership. Id. Reducing the exposure of employees - and customers - to secondhand smoke in the workplace and other public places is a legitimate governmental interest. To combat this issue, the General Assembly chose an incremental approach, focusing on for-profit restaurants and bars, while exempting non-profit clubs with private memberships. Thus, the Act and the private club exemption are rationally related to a legitimate governmental purpose.

CONCLUSION

For the foregoing reasons, and those stated in Appellee's brief, this Court should affirm the decision of the Guilford County District Court. Alternatively, in the event this Court finds an equal protection violation, this Court should hold only the private club exemption unconstitutional, while upholding the remainder of the statute in order to effectuate the intent of the General Assembly to protect North Carolina residents from harmful secondhand smoke exposure.

Respectfully submitted, this the 8th day of December, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing Amici Curiae Brief was served upon the attorneys and parties below by United States Mail postage, pre-paid, addressed as follows:

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