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OFFICIAL OPINION 2003-6

The Honorable R. Tiny Adams
Indiana House of Representatives
State House
200 W. Washington Street
Indianapolis, IN. 46204

RE: Smoking bans

Dear Representative Adams:

This letter responds to your request for an advisory opinion on the constitutionality of ordinances that provide exemptions to smoking bans in public places. We note by way of background that efforts to ban smoking in restaurants, bars and workplaces are being proposed throughout Indiana. Advocates cite problems associated with the health effects from secondhand smoke and the related rise in medical costs for treating smoking-related health problems such as emphysema, bronchitis and cancer that plague both privately and publicly funded health care programs.[1] Authors of such bans additionally emphasize children, the elderly and certain other individuals may be especially vulnerable to the effects of secondhand smoke. The State of Indiana is also attempting to address the problems associated with the effects of secondhand smoke through public education and awareness programs.[2]

Recently, local governments exercising their authority under Indiana's Home Rule statute have begun to address the problem by passing ordinances that completely ban smoking in public places such as restaurants, workplaces and other enclosed areas.[3] Questions have arisen regarding the scope of the authority of local governments to enact such legislation, as well as the appropriate language necessary to craft exceptions that do

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[1] M. Scollo, A. Lal, A. Hyland, S. Glantz, *Review of the quality of studies on the economic effects of smoke-free policies on the hospitality industry,* Tobacco Control. 2003 Mar; 12(1):13-20, at http://tc.bmjjournals.com/cgi/content/abstract/12/1/13.

[2] Indiana Tobacco Use Prevention and Cessation Trust Fund at IND. CODE § 4-12-4.

[3] IND. CODE § 36-1-3 *et seq.*

not offend the constitutional guarantees of equal protection and Privileges and Immunities Clause.

The specific ordinance you cite in your question involves a smoking ban ordinance that grants exemptions to restaurants with fully enclosed smoking areas, or bars or taverns that exclusively serve the adult population. That leaves the remainder of owners of restaurants and eateries that are not bars or taverns, or that do not contain fully enclosed smoking areas subject to a smoking ban ordinance. This opinion addresses these questions.

BRIEF ANSWER

It is our opinion that legislation seeking to provide exceptions to a general ban on smoking will likely survive constitutional scrutiny under an equal protection analysis if the classifications created in the ordinance bear a rational relationship to a legitimate government concern. We further believe the legislation would survive constitutional scrutiny under the Privileges and Immunities Clause if the preferential treatment granted by the ordinance is reasonably related to innate characteristics that distinguish the preferentially treated classes, and the preferential treatment granted is uniformly available to all individuals similarly situated.

LEGAL ANALYSIS

Equal protection under the law is a right afforded by the United States Constitution.[4] This right is distinct from that granted by the Indiana Constitution under the Privileges and Immunities Clause.[5] This opinion provides an analysis of both of these distinct rights and privileges afforded to the citizens of Indiana.

Equal Protection

The Equal Protection Clause of the United States Constitution provides "[n]o state shall…deny to any person within its jurisdiction the equal protection of the laws."[6] The provision does not forbid classifications, but forbids the government from treating people differently who are similarly situated.[7] When determining whether an ordinance violates the provisions of the Equal Protection Clause, it is fundamental to note the ordinance will initially be subject to the rules of statutory construction. "When interpreting an ordinance, the Court of Appeals will apply the same rules as those employed for construction of state statutes."[8] One of those generally accepted rules is "legislation under constitutional

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[4] U.S. CONST. Amend. XIV, § 1.

[5] IND. CONST. Art. 1, Section 23.

[6] U.S. CONST. Amend. XIV, § 1.

[7] *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co v. Va.*, 253 U.S. 412, 415 (1920)).

[8] *City of Evansville v. V. Zirkelbach*, 662 N.E.2d 651, 653 (Ind. Ct. App. 1996) (citing *Boyle v. Kosciusko County*, 565 N.E.2d 1157, 1159 (Ind. Ct. App. 1991)).

attack in this court is clothed in a presumption of constitutionality."[9] A challenger has the burden to rebut this presumption.[10] All reasonable doubts will be resolved in favor of the act being deemed constitutional where any construction is found that could support its constitutionality.[11]

To determine if an ordinance violates the Equal Protection Clause, a court will first look to "the applicable level of scrutiny" for the ordinance.[12] If there is a suspect classification, such as race or religion, or a burden on the exercise of a fundamental right, such as freedom of speech, the ordinance will be subject to strict scrutiny.[13] Where the construction of an ordinance is subject to strict scrutiny, "state action must be a necessary means to a compelling governmental purpose and be narrowly tailored to that purpose."[14]

The type of legislation in question involves smoking ban ordinances that grant exemptions to restaurants with fully enclosed smoking areas, or bars or taverns that exclusively serve the adult population. That leaves the remainder of owners of restaurants and eateries that are not bars or taverns, or that do not contain fully enclosed smoking areas subject to a smoking ban ordinance. These are not the distinguishing characteristics or classifications of a suspect class. Suspect classes encompass distinctions based on classifications of "race, alienage, or national origin".[15] This is not the case where the classification created by the government seeks to distinguish restaurant owners that do not have a fully enclosed dining/smoking area and are not considered a bar or tavern. Therefore, not being a suspect classification, the court will not subject the legislation to strict scrutiny.

Equal protection will also be afforded if there is an abridgement of a "fundamental right." A "fundamental right" is defined as a right "explicitly or implicitly guaranteed [to each citizen] by the Constitution."[16] These rights include "rights to travel, rights to vote, rights of access to the courts, and rights of personal privacy."[17]

Again, the right of restaurant ownership and the right to engage in business without regulation does not rise to the level of a "fundamental right" contemplated by the United States Constitution.

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[9] *Matter of Tina T.*, 579 N.E.2d 48, 56 (Ind. 1991).

[10] *Id*.

[11] *Id.*

[12] *Platt v. State*, 664 N.E.2d 357, 364 (Ind. Ct. App. 1996) *trans denied, cert. denied,* 50 U.S. 1187 (1997).

[13] *Id.* (citation omitted).

[14] *Id.*

[15] *City of Cleburne v. Cleburne Living Ctr. Inc*., 473 U.S. 432, 440 (1985).

[16] *Plyer v. Doe*, 457 U.S. 202, 232 (1982) (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, J. concurring)).

[17] *Panhandle E. Pipeline Co. v. Madison County Drainage Bd.*, 898 F. Supp. 1302, 1315 n.6 (S.D. Ind. 1995).

We conclude the ordinance addressed creates no suspect classification, nor results in the abridgement of a fundamental right. Therefore, the standard of review (scrutiny) for equal protection in this instance would be the rational basis test. The ordinance in question will survive a constitutional challenge under the equal protection analysis if the classification created by the ordinance has a rational relationship to the expressed, legitimate government goal.[18]

In analyzing the classifications created by this particular smoking ban ordinance, the rational basis scrutiny appears to be met. If the government interest cited is limiting exposure of secondhand smoke to adults and children in an effort to decrease health related problems, there appears to be a rational basis to not allowing restaurants that cannot severely limit exposure of secondhand smoke to unwilling adults and children to benefit from the exemptions. With an enclosed area for smoking, there are far less incidents of exposure of unwilling adults and children to secondhand smoke. Within a tavern, only adults over the minimum legal age who willingly risk exposure to secondhand smoke will be exposed. By granting the exemption only to restaurants with these types of facilities, or taverns, the articulated, legitimate government interest of minimizing the exposure of its more vulnerable citizens to secondhand smoke for health reasons is still served. Therefore, it is our opinion a smoking ban ordinance that carves out exceptions bearing a rational relationship to a legitimate government interest will survive a constitutional challenge.

Privileges and Immunities

"[T]here is no settled body of Indiana law that compels application of a federal equal protection analytical methodology to claims alleging special privileges or immunities under [the Indiana Constitution]."[19] Indiana courts have held that under this clause there is an "independent interpretation and application" from the equal protection guarantee under the United States Constitution.[20] Although your question does not directly ask about the Privileges and Immunities Clause, it will be addressed here as it provides guarantees that similarly situated individuals will be afforded equal treatment under the Indiana Constitution. Because the challenges appear to address the "preferential treatment" of the exemptions of local smoking ban ordinances, this clause is more likely to be used in a constitutional challenge.

Similar to the equal protection analysis, any ordinance passed will be "clothed in a presumption of constitutionality."[21] The burden is the challenger to show the ordinance does not meet the necessary constitutionality.[22] But there is a different analysis and standard of review for constitutionality under the Privileges and Immunities Clause.

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[18] *Shepler v. State*, 758 N.E.2d 966, 969 (Ind. Ct. App. 2001) (citing *State v. Alcorn*, 638 N.E.2d 1242, 1244 (Ind. 1994)).

[19] *Collins v. Day*, 644 N.E.2d 72, 75.

[20] *Id.*

[21] *Matter of Tina T.*, 579 N.E.2d 48, 56.

[22] *Id.*

Indiana's Privileges and Immunities Clause provides, "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."[23] In interpreting legislation where similarly situated individuals appear to be subject to differing treatment, two requirements must be met to find no violation of the Privileges and Immunities Clause has occurred. First, the distinctive treatment the ordinance mandates must be reasonably related to innate characteristics that distinguish the preferentially treated classes. In other words, in applying that standard, a court will look to whether there are inherent distinctions within the classifications that make the preferential treatment logical.

"Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated."[24] In other words, the preferential treatment must be equally applicable and available to anyone who fits in this distinguishing class. Finally, in determining whether the exceptions created in a similar ordinance is in compliance with Indiana's Privileges and Immunities guarantee, a court will grant a great deal of deference to the discretion of the legislature.[25] "[T]he courts must accord considerable deference to the manner in which the legislature has balanced the competing interests involved."[26] "So long as the classification is based upon substantial distinctions with reference to the subject matter, we will not substitute our judgment for that of the legislature; nor will we inquire into the legislative motives prompting such classification."[27]

In the ordinance questioned, two of the classifications or "distinctions" accorded the "preferential treatment" of being exempt from the smoking ban include restaurants with full enclosures that separate a smoking area from the general dining area, and taverns or bars that only allow entry to individuals of a certain legal age. The classifications appear to have inherent characteristics that call for the distinguishing treatment. Initially, in a restaurant with a fully enclosed area, separate from the main dining area, there is far less chance that an unsuspecting diner, (who incidentally could be asthmatic), or young child will be exposed to secondhand smoke. In a bar or tavern exclusively off-limits to minors, there is no chance of exposure to secondhand smoke for young children, and only a chance of exposure to adults who willingly assume the risk. The stated purpose of such legislation is the protection of children and individuals from the effects of secondhand smoke in an effort to maintain the health of the unit's citizenry. Another stated purpose of the legislation is to control the increasing health costs due to smoke-related illnesses. Therefore because these two specific instances have distinguishing characteristics that give them the ability to limit an individual's exposure

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[23] IND. CONST. Art. I, Section 23.

[24] *Collins*, 644 N.E.2d 72, 80.

[25] *Id*.

[26] *Id.* at 79 - 80 (citations omitted).

[27] *Id.* at 80 (citing *Chaffin v. Nicosia*, 310 N.E.2d 867, 869 (Ind. 1974)).

to secondhand smoke, restaurant owners granted this "preferential treatment" due to their distinguishing characteristic of the ability to limit an unwilling individual's exposure to secondhand smoke have features innately unique that logically call for the exemptions.[28]

CONCLUSION

Therefore, we conclude that legislation that seeks to provide exceptions to a general ban on smoking will likely survive constitutional scrutiny under an equal protection analysis if the classifications created in the ordinance bear a rational relationship to a legitimate government concern. We further believe the legislation would survive constitutional scrutiny under a privileges and immunities analysis if the preferential treatment granted by the ordinance is reasonably related to innate characteristics that distinguish the preferentially treated classes, and the preferential treatment granted is uniformly available to all individuals similarly situated.

This office is prepared to support the legal defense of any local ordinance that seeks to ban smoking in public places based upon the legal rationale provided in this opinion.

Sincerely,

Stephen Carter
Attorney General

Tracy L. Richardson
Deputy Attorney General

[28] *See Hall Drive Ins., Inc. v. City of Fort Wayne*, 773 N.E.2d 255 (Ind. 2002). Restaurant contained a general dining area, and separate but not fully enclosed tavern under one roof. Found: The architectural arrangement did not carry the inherent characteristic of being able to almost eliminate the exposure of secondhand smoke to children and unwilling adults while dining. *Id.* The Court found to grant this business owner the exception "would be contrary to the express purpose of the ordinance to reduce the exposure of children to second-hand smoke." *Id.* at 258.