No. 31396-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TACOMA-PIERCE COUNTY BOARD OF HEALTH AND TACOMA-PIERCE COUNTY HEALTH DEPARTMENT,

Appellants,

v.

ENTERTAINMENT INDUSTRY COALITION,

Respondent.

[PROPOSED] AMICUS CURIAE BRIEF OF AMERICAN MEDICAL ASSOCIATION, WASHINGTON STATE MEDICAL ASSOCIATION, AMERICANS FOR NONSMOKERS' RIGHTS, CAMPAIGN FOR TOBACCO-FREE KIDS, NATIONAL ASSOCIATION OF COUNTY AND CITY HEALTH OFFICIALS, NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH AND TOBACCO CONTROL LEGAL CONSORTIUM

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INTERESTS OF AMICI CURIAE

Amici are several groups with substantial histories of combating tobacco-related death and illness. They have also opposed efforts to preempt local ordinances in other States.

Americans for Nonsmokers' Rights is a national advocacy organization with over 8,000 members consisting of both individuals and organizations working to protect employees and the public from the harmful effects of SHS and challenging the tobacco industry at all levels of government. The organization was incorporated in 1976 and is based in Berkeley, California.

With approximately 250,000 members, the American Medical Association (AMA) is the nation's largest professional organization of physicians and medical students.[1] Founded in 1847, the AMA's purpose is to promote the science and art of medicine and the betterment of public health. Members of the AMA practice in all fields of medical specialization and in every state, including the State of Washington.

[1] The AMA and WSMA join this brief individually and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies (the "Litigation Center"). The Litigation Center, a coalition of the AMA and 51 state medical societies (each state plus the District of Columbia), was established to present the views of the medical profession to the courts.

The Washington State Medical Association (WSMA) is a not-for-profit organization of approximately 9,000 physicians, residents, and medical students residing in the State of Washington. The purpose of the WSMA is to promote the art and science of medicine, to protect and improve the health of the public, and to serve and provide leadership for the membership of the organization, allied health professionals and the public.

The AMA and WSMA strongly oppose the use of tobacco products and seek to reduce the health hazards inherent in smoking, including the hazards arising from second-hand smoke. The AMA and WSMA support state and local legislation that prohibits indoor smoking in areas open to the public, and in and around entrances to such areas.

The Campaign for Tobacco-Free Kids works to protect minors from tobacco by raising awareness that tobacco use and exposure to SHS have caused a pediatric epidemic, by changing public policies to limit the marketing and sales of tobacco to children, and by altering the environment in which tobacco use and policy decisions are made. The Campaign is a program of the National Center for Tobacco-Free Kids, which has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use

of tobacco products. The Campaign has stated that "Local control should be viewed as a public health tool to be protected and encouraged." The Campaign has an additional interest in this case because children suffer more serious effects from SHS exposure than adults.

The National Association of County and City Health Officials (NACCHO) is the national nonprofit organization representing the nearly 3000 local governmental public health agencies (including city, county, metro, district, and tribal agencies.) NACCHO provides education, information, research, and technical assistance to local public health agencies and facilitates partnerships among local, state, and federal agencies in order to promote and strengthen public health. NACCHO engages actively in tobacco prevention and control policy and has a long history of supporting local public health agencies in implementing local smokefree workplace ordinances and advocating autonomy for local governments in protecting their communities from public health hazards associated with tobacco use.

The National Association of Local Boards of Health (NALBOH) represents the interests of local boards of health in the United States. There are over 3,200 local boards of health across the United States with over 20,000 citizen volunteers working to improve the health of their

communities. NALBOH's mission is to strengthen local boards of health, enabling them to promote and protect the health of their communities. NALBOH is dedicated to the development of effective public health policy at the community level.

The Tobacco Control Legal Consortium (TCLC) is a national network of legal resource centers dedicated to advancing tobacco control policy change in the United States and providing technical legal assistance in tobacco control. TCLC, organized in 2003, grew out of a network of existing legal resource centers on tobacco control in California, Maryland, Massachusetts, Michigan, Minnesota, New Jersey and, most recently, Arkansas. TCLC's initial funding was provided by the Tobacco Technical Assistance Consortium, located in the Rollins School of Public Health at Emory University in Atlanta. TCLC's coordinating office is located at the William Mitchell College of Law in St. Paul, Minnesota. TCLC has engaged in tobacco-related litigation in numerous states..

STATEMENT OF THE CASE

The Entertainment Industry Coalition ("EIC"), which tells this Court that it is a "grassroots lobbying organization," Brief of Respondent at 3, represents gambling interests and is funded in part by the tobacco industry. CP 662-691. It brought a motion for a temporary restraining

order and then a preliminary injunction to prevent enforcement of the Tacoma-Pierce County Board of Health and the Tacoma-Pierce County Health Department ("the Board")'s Resolution No. 2003-3527 ("the Resolution"), that bans smoking in most indoor public places and places of employment. The TRO was denied, CP 837-838, but the preliminary injunction was granted on the ground that the Resolution directly conflicted with Washington's Clean Indoor Air Act.

ARGUMENT

I.. THE BOARD WAS WELL WITHIN ITS POWERS IN DEEMING SHS WORTHY OF PROHIBITION

A. The Public Health Threat of Environmental Tobacco Smoke Is Manifest.

Secondhand smoke ("SHS") is a combination of smoke from the lit end of a cigarette and smoke exhaled by the smoker. The medical evidence on the deadly effects of SHS is now so conclusive that the 192 countries that negotiated the Framework Convention on Tobacco Control included a unanimous declaration within that Convention that "scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability." Framework Convention on Tobacco

Control, Preamble, *available at*

http://www.who.int/tobacco/fctc/text/en/fctc_en.pdf.[2]

The global consensus regarding SHS was based on evidence summarized in U.S. Dept. of Health & Human Services, National Institutes of Health, National Cancer Institute, *Health Effects of Exposure to Environmental Tobacco Smoke: The Report of the California Environmental Protection Agency, Smoking and Tobacco Control Monograph No. 10,* NIH Pub. No. 99-4645 (1999) (hereafter, "*Cal EPA Report*"). SHS contains many of the same chemical compounds inhaled by smokers and some that may be worse, including 69 that are known to cause cancer. *See* National Cancer Institute, *Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine,* Smoking and Tobacco Control Monograph No. 13, U.S. Dept. of Health and Human Services, National Institutes of Health, NIH Pub. No. 02-5074 (2001), *available at* http://dccps.nci.nih.gov/tcrb/monographs/13/m13_5.pdf. U.S. Dept. of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress, A Report of the Surgeon General (1989)*

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[2] The United States is signatory to the Convention. See http://www.who.int/tobacco/areas/framework/signing_ceremony/countrylist/en/.

("1989 Surgeon General's Report"). *See also* U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, Office of Smoking and Health, *Reducing Tobacco Use: A Report of the Surgeon General*, 193 (2000) (*"2000 Surgeon General's Report"*);[3] *Cal EPA Report*; U.S. Dept. of Health and Human Services, *Report of the Surgeon General: The Health Consequences of Involuntary Smoking* (1986). World Health Organization Int'l Agency for Research on Cancer ("IARC"), Tobacco Smoke and Involuntary Smoking, 83 IARC Monographs (2004).

Diluting tobacco smoke, whether by separating smokers from nonsmokers, or by increasing ventilation, does not make the smoke safe. As with asbestos, science has been unable to find *any* level of exposure at which SHS does not cause cancer. *See 1989 Surgeon General's Report.* The United States Environmental Protection Agency ("EPA") reported as long ago as 1992 that SHS causes lung cancer in healthy adult nonsmokers. U.S. EPA, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* (1992). SHS causes cardiovascular disease, childhood asthma, lower respiratory tract infections and other

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[3] The *2000 Surgeon General's Report* also cites studies showing that controlling SHS has a significant beneficial impact on people trying to quit smoking. *Id.*

respiratory illnesses. *See Cal EPA Report*. The *Cal EPA Report* estimates that, in the United States, SHS kills 1,900 to 2,700 infants each year by inducing Sudden Infant Death Syndrome and another 136 to 212 children each year from respiratory effects such as asthma. *Cal EPA Report* at ES-4. The same report estimates that SHS kills an astonishing 35,000 to 62,000 American adults each year from heart attacks and other heart disease, and another 3,000 from lung cancer. *Id.* In short, it is a matter of accepted scientific fact that SHS exposure is not a mere annoyance – it is one of the leading causes of death and disease in the United States.

Lastly, the United States Surgeon General recently published its most comprehensive report on the adverse effects of smoking in forty years, and identified a substantially greater number of cancers and diseases with a causal connection to active smoking than what was previously known to exist.[4] Similarly, new research on the danger of SHS suggests that the effects of SHS on both coronary heart disease[5] and

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[4] UNITED STATES SURGEON GENERAL, *The Health Consequences of Smoking* (May 27, 2004). A summary is available to: http://www.cdc.gov/tobacco/sgr/sgr_2004/.

[5] Peter H. Whincup, Julie A. Gilg, Jonathan R. Emberson, Marin J. Jarvis, Colin Feyerabend, Andrew Bryant, Mary Walker, and Derek G. Cook, *Passive smoking and risk of coronary heart disease and stroke: prospective study with cotinine measurement,* BRITISH MEDICAL JOURNAL, ONELINE FIRST (BMJ, doi:10.1136/bmj.38146.427188.55) June 30, 2004).

sudden infant death syndrome (SIDS)[6] are much worse than what was previously estimated. Thus, although the science available today reveals significant harm to public health, as scientific knowledge expands, it is likely that the health impacts of ETA will prove to be even more devastating to human health and well-being than medical science currently can measure.

As the *2000 Surgeon General's Report* stated, "[t]he public health necessity of regulating SHS is manifest." *2000 Surgeon General's Report at* 193.

B. Substantial Authority Recognizes the Importance of Local Tobacco Control Initiatives.

Amici, and indeed *all* major health and tobacco control organizations, oppose preemption of local tobacco control initiatives. Local control over public health decision making is entirely consistent with the long-established role of local governments. Public health protection is a core attribute of the "police power" commonly delegated to municipalities. *See* 6A McQuillin, *Municipal Corporations* §§24-44 (3d ed. 1997). There is no question that local authorities everywhere have a

[6] Joseph R. DiFranza, MD, C. Andrew Aligne, MD, MPH, and Michael Weitzman, MD, *Prenatal and Postnatal Environmental Tobacco Smoke Exposure and Children's Health,* 113 PEDIATRICS, No. 4, April 2004.

compelling basis for regulating SHS exposure, because tobacco smoke is poisonous, no matter which end of the cigarette one breathes.

In 1997, a bipartisan Congressional group asked former Surgeon General Everett Koop and Food and Drug Administration Administrator David Kessler to convene a blue ribbon committee on national tobacco policy. The Advisory Committee on Tobacco Policy and Public Health produced a report which remains a preeminent authority on tobacco control policy. The *Final Report of the Advisory Committee on Tobacco Policy and Public Health* (the "*Koop-Kessler Report*") made comprehensive tobacco control policy recommendations. *See id., available at* http://ash.org/areport.html. The Report was based on the work of five task forces on subjects including SHS, youth, and the future of tobacco control. With respect to SHS regulation, the Report noted that "Local governments have usually led the way in these efforts." *Id.* at 11.

The Task Force went on to note that all levels of government, and the courts, had provided some protections for nonsmokers, but specifically recommended that "[i]n those statutes where preemption exists, states should act to remove the preemptive clauses." *Id.* The Full Committee's first recommendation on Regulatory Policy states:

> Any Federal or State regulation of tobacco products should contain unambiguous provisions expressly clarifying that higher standards of public health protection imposed by State and Local governments are preserved.

Koop-Kessler Report, App. 3D, "Report of the Task Force on Environmental Tobacco Smoke."[7]

II. <u>CONSTITUTION ARTICLE XI, SECTION 11 SUPPORTS THE BOARD'S REGULATION</u>

A. <u>Article XI, Section 11 Grants Local Entities Such as the Board Broad Police Powers "Beyond Judicial Control"</u>.

1. <u>State Law Grants the Board Extensive Powers to Protect Public Health</u>.

EIC repeatedly concedes that this is an Article XI, Section 11 case. Brief of Respondent at 16, 25. As this Court recognized in *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 147, 839 P.2d 324, 328 (1992), Article XI Section 11:

> is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself. It

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[7] The Centers for Disease Control and Prevention have elaborated on the Koop-Kessler Report Recommendations. The CDC's *Best Practices for Comprehensive Tobacco Control Programs,* USDHHS National Center for Chronic Disease Prevention and Health Promotion, Office of Smoking and Health (August 1999), lists "Community Programs to Reduce Tobacco Use" as the first of nine components of a comprehensive tobacco control program. According to CDC:

> Local community programs cover a wide range of prevention activities including engaging youth in developing and implementing tobacco control interventions; developing partnerships with local organizations; conducting educational programs . . . and promoting governmental and voluntary policies to promote clean indoor air.

CDC *Best Practices* at 3, <u>http://www.cdc.gov/tobacco/research_data/stat_nat_data/bestprac</u>). Protection from SHS is one of the four recommended goals for community programs. *Id.* at 12.

> requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with general laws.

(quoting *Lenci v. Seattle*, 63 Wn.2d 664, 667, 388 P.2d 926 (1964)) (internal quotation omitted).

Just as in *Brockett*, the Board here was acting not only in pursuance of Article XI, Section 11 but also RCW 70.05.060(4), which now provides that a local board of health

> shall have supervision over all matters pertaining to the preservation of life and health of the people within its jurisdiction and shall:
> . . .
> (3) [e]nact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof, [and]
> (4) [p]rovide for the control and prevention of any dangerous, contagious or infectious disease within the jurisdiction of the local health department;

RCW 70.05.060. As the Court recognized in *Brockett*,

> Use of the word 'shall' mandates that officials perform these duties.

120 Wn.2d at 149, 839 P.2d 329, *citing State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 82, 605 P.2d 1265 (1980). Accordingly, "public health statutes and the actions of local health boards implementing those statutes are liberally construed," *Brockett*, 120 Wn.2d at 149, 839 P.2d 329, *citing,*

inter alia, Snohomish Cy. Builders Ass'n v. Snohomish Health Dist., 8 Wn.App. 589, 595, 508 P.2d 617 (1973), and

> [t]he legislatively delegated power to cities and health boards to control contagious diseases gives them extraordinary power which might be unreasonable in another context.
> Indeed, [this Court has] said the subject matter and expediency of public health disease prevention measures 'are beyond judicial control, except as they may violate some constitutional right guaranteed to [the challenging party].'

Id., *citing State ex rel. McBride v. Superior Court*, 103 Wn. 409, 420, 174 P. 973 (1918), *and quoting Kaul v. Chehalis*, 45 Wn.2d 616, 621, 277 P.2d 352 (1954).[8]

2. <u>State Law Reflects the General Trend to Protect Against The Dangers of Environmental Tobacco Smoke Nationwide</u>.

The powers the Board has under Article XI, Section 11 are in keeping with the extensive grant of local police powers in the regulation

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[8] In *Kaul,* this Court upheld the right of Cities to fluoridate their water supply. In the recent case of *Parkland Light & Water Co. v. Tacoma Pierce Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004), the Court recognized that that authority also resides in the hands of the state's water districts pursuant to the newly enacted RCW 57.08.012. Under that statute the water districts "may cause the proposition of fluoridation of the water supply to be submitted to the electors of the water district," and if it is so submitted, the proposition "must be approved by a majority of the electorate voting." In this situation, the Court found that the "broad powers" of RCW 70.05.060 "do not authorize the Board to act in areas where the legislature has made a more specific delegation of authority to another agency." There has been no more specific delegation here – rather, there has been a delegation to the Boards to implement the purposes of the Clean Indoor Air Act. RCW 70.160.080.

of SHS nationwide. *See Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't,* 131 S.W.3d 745, 749, 750 (Ky. 2004),[9] *Tri-Nel Mgmt., Inc. v. Board of Health*, 433 Mass. 217, 220, 741 N.E.2d 37, 41 (2001),[10] *City of Tucson v. Grezaffi*, 23 P.3d 675, 680 (Ariz. App. 2001).[11] *See also Oregon Restaurant Ass'n v. City of Corvallis*, 166 Or.App. 506, 510, 999 P.2d 518, 520 (Or. App. 2000).[12]

EIC argues that these cases are unpersuasive because "the statutes in those cases did not contain [the] grant of a right to designate smoking areas." Brief of Respondent at 24. In the one case that directly discusses the issue, this is plainly incorrect. In *Oregon Restaurant Ass'n,* the statute prohibited smoking in public places "except in smoking areas designated according to rules that the Oregon Health Division adopt[ed]." 166 Or. App. 509, 999 P.2d 519. In other words, there *was* a putative "right" that

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9 ("[A] prohibition on smoking and the accompanying result of SHS, is well within the traditionally recognized authority of local government as a health matter," "Protecting the public from exposure to environmental tobacco smoke . . . can be the proper object of the police power of local government.")

10 ("Health regulations have a strong presumption of validity, and, when assessing a regulation's 'reasonableness,' all rational presumptions are made in favor of the validity of the regulation.")

11 ("[S]afeguarding the general health, safety, and welfare of the community has long been considered a proper goal for municipal government'") (internal citation omitted).

12 ("Nothing in the Act is inconsistent with a local jurisdiction's decision to impose greater limits on public smoking.")

could be granted by a state agency which the City's ordinance chose not to grant. So EIC's argument that rulings from other States rejecting the preemption of local ordinances are inapposite is simply incorrect.

B. The Cornerstone for Any Preemption Analysis is Legislative Intent.

EIC makes much of the fact that their claim is one of "conflict" rather than "field" or "express" preemption. Brief of Respondent at 17 n.11. However, regardless of what type of preemption is claimed, the central question is "what the Legislature intended." *City of Seattle v. Williams*, 128 Wn.2d 341, 348, 908 P.2d 359, 362 (1995). *See also Cherry v. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746, 749 ("A court interprSHS a statute so as to give effect to the Legislature's intent in creating the statute.") In other words, the Court

> will not interpret a statute to deprive a municipality of the power to legislate on a particular subject unless that clearly is the legislative intent.

HJS Development, Inc., v. Pierce County, 148 Wn.2d 451, 480, 61 P.3d 1141, 1156 (2003).[13]

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[13] *HJS* was a “conflict” preemption case. *See Parkland Light & Water Co.,* 151 Wn.2d 428, 433, 90 P.3d 37, 39.

Where, as here, the Legislature's intent is not clear from the face of the statute, the Court should resort to legislative history. *Cherry*, 116 Wn.2d 800, 808 P.2d 749.[14]

C. <u>Respondent Cannot Obscure Evidence of the Legislature's Intent to Allow Local Regulation of SHS</u>.

As Appellants have noted, the Legislature specifically considered and refused to include in the Clean Indoor Air Act language that would have prohibited political subdivisions from enacting laws on SHS. Brief of Appellants at 20-21. EIC would have this Court refuse to consider this fact, and instead have it focus on an amendment to the Act which the Legislature considered and rejected *later*. Brief of Respondent at 20-21 (arguing against Court's consideration of Act's legislative history), 6 (citing proposed 2003 amendment to statute which did not pass).

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[14] In *Cherry*, a City employee sought to convince the Court that a statute regulating firearms in which the Legislature "preempt[ed] the entire field of firearms regulation within the boundaries of the state," 116 Wn.2d 800, 808 P.2d 748, barred Seattle from adopting a no-weapons policy as to employees. The Court found that it was

> not clear from the language of the statute alone whether the Legislature intended [the statute] to preempt and invalidate the authority of municipal employers to regulate or otherwise prohibit a municipal employee's possession of firearms while on the job.

116 Wn.2d 800, 808 P.2d 749, and accordingly reviewed the Legislature's materials to determine its intent. Similarly, here the scope of authority which the Legislature intended to leave to the Board is not clear, making review of legislative history equally appropriate.

It is clear that some authority was granted – the authority to "adopt regulations as required to implement [the Clean Indoor Air Act]." RCW 70.160.080. Thus, review of the legislative history is warranted.

This is exactly backwards. As this Court has recognized, legislative debate regarding subsequent proposed amendments "is not truly 'legislative history,'" and should not be considered. *Brockett*, 120 Wn.2d 154, 839 P.2d 332. On the other hand, the legislature's actions regarding the statute in question are plainly relevant. The debate on the proposed preemption provision in the original statute clearly shows that the legislators wanted to allow communities to "establish standards which meet their community needs." CP 154. Unlike a situation which the Respondent cites in *Brockett*, 120 Wn.2d 153, 839 P.2d at 331, where there might have been any number of reasons why the legislature changed the language of RCW 70.24.400(12), the reasons for the rejection of the preemption provision here are obvious on the face of the legislative history. Therefore, there is no reason why the Court would need to "speculate as to the reason for the rejection" of the amendment cited by Petitioners.

Respondent further argues that the Legislature's rejection of an "express" preemption clause does not "reveal an intent by the Legislature to permit a local regulation that conflicts with [a] state statute." Brief of Respondent at 21. For this proposition it cites *City of Seattle v. Williams,* 128 Wn.2d 341, 354 n.14, 908 P.2d 359, 365 n.14 (1995). However, in

Williams, the Legislature plainly *did* intend to preempt conflicting ordinances, because it provided, *inter alia*, that traffic laws be "applicable and uniform throughout this state," *Williams*, 128 Wn.2d 342-343, 908 P.2d 360, *quoting* RCW 46.08.020 *and* RCW 46.08.030. There is no such uniformity requirement in the Clean Indoor Air Act.

D. Where, As Here, a Local Regulation Merely Goes Further Than State Law in Its Prohibition, There is No Preemption.

This Court has "repeatedly stated" that where a local regulation simply goes further than a state enactment, no preemption exists. *Rabon v. City of Seattle*, 135 Wn.2d 228, 292, 957 P.2d 621, 627 (1998);[15] *Brown v. City of Yakima*, 116 Wn.2d 556, 562, 807 P.2d 353, 356 (1991).[16]

EIC argues that cases involving statutes providing for licensing are distinguishable "because the Act grants an express right to business owners to designate smoking areas." Brief of Respondent at 28. As noted above, in *Brockett*, this Court made clear that public health disease prevention measures are "'beyond judicial control except as they may violate [a] *constitutional* right,'" 120 Wn.2d 149, 839 P.2d 329 (emphasis

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15 ("A local ordinance may require more than state law requires where the laws are prohibitive.")

16 ("[T]his court has repeatedly stated that a local ordinance does not conflict with a state statute in the constitutional sense merely because the ordinance prohibits a wider scope of activity.") (citations omitted.)

added), and EIC does not even attempt to explain how the "right" to designate smoking areas is constitutional. Moreover, in *Rabon* the authority to license was with the state, not the local entity, 135 Wn.2d 292, 957 P.2d 627, so whether any putative authority was with the state or a business owner was irrelevant to the question of whether a more stringent local regulation was preempted.

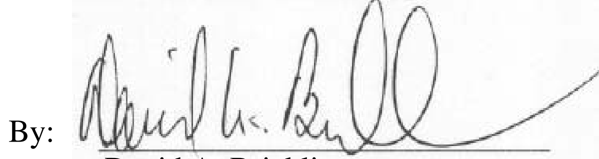
CONCLUSION

Faced with a globally recognized public health crisis and a mandate that it "shall" enact local rules to protect and promote public health and prevent the spread of “dangerous . . . disease,” the Tacoma-Pierce County Board of Health and Health Department did what many local boards of health have done across the country – it enacted a Regulation banning smoking in enclosed public areas. EIC ignores clear case law that local regulations going further in their prohibitions should be upheld. The Court should uphold the Board's regulation.

Dated this 29 day of September, 2004.

Respectfully submitted,

BRICKLIN NEWMAN DOLD, LLP

By: 

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