No. 79839-7

J.M. JOHNSON, J. (dissenting)—Washington has twice adopted smoking restrictions with a clear exemption for private facilities like the American Legion Post. "This chapter is not intended to restrict smoking in private facilities which are occasionally open to the public except upon the occasions when the facility is open to the public." RCW 70.160.020(2). "This chapter" is the "Smoking in Public Places Act" (Act). This language is clear and should be enforced by courts as understood by the voters.[1]

Legislators who passed the original smoking law in 1985 knew of private organizations with their own private facilities like the American Legion, the Veterans of Foreign Wars, and numerous others, and included an exemption from the anti-smoking laws, without which the law may not have passed.

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[1] An important but unbriefed constitutional issue arises under article I, section 7 of the state constitution because of the entry of enforcement agents into private facilities without warrant or informing of the right to refuse entry. *State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927 (1998). Are the rights of suspected felons to be better respected and protected than the rights of military veterans?

Sponsors of Initiative 901 left this exemption in place, reflecting similar political considerations that an initiative campaign against smokers in bars is easy; one against private clubs like the Legionnaires is less likely to succeed. The job of the courts is to enforce this compromise, not to allow bureaucrats to extend the law beyond what was adopted through the democratic process. I respectfully dissent.

The legislature first passed the Act as a whole in 1985, Laws of 1985, ch. 236, and Initiative 901 amended only parts. Originally, people were restricted from smoking in public places, and the legislature made clear that private facilities occasionally open to the public—the American Legion Post, for example—were exempt. Initiative 901 added a provision forbidding smoking in places of employment. Laws of 2006, ch. 2, § 3; RCW 70.160.030. This initiative explicitly left the exemption in place; it remains in law and should be enforced by courts.

The materials explaining Initiative 901 for voters made clear the private facility exemption would remain in force. The voters' pamphlet for initiatives provides the constitutionally required explanation of an initiative and its effects. Wash. Const. art. II, § 1(e). The voters' pamphlet for Initiative 901

made no mention that it was making any change to the exemption for private facilities. Neither the attorney general's explanation of Initiative 901 nor the statements for and against in the voter's guide even mentioned this exemption. *State of Washington Voters' Pamphlet, General Election* 10-11 (Nov. 8, 2005). Without specifying amendments to a prior law, the law is not changed, provided it does not conflict with another law. *In re Det. of R.S.*, 124 Wn.2d 766, 774, 881 P.2d 972 (1994). This rule is based both on our constitution and on common sense.

Washington Constitution article II, section 37 expressly requires, "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." Initiative 901 certainly set forth the law in full, but explicitly did not revise, but rather left the exemption in place. *State of Washington Voters' Pamphlet, General Election* 30 (Nov. 8, 2005).

Further, the "no change without express reference" rule has a strong logical rationale behind it: most proposed changes in the law will draw opposition from interested groups of citizens and voters. Those groups who might oppose must be given clear notice that their interests are affected and

be given a chance to object or vote no. Having sympathetic backers and villainous opponents is one key to initiative victory. Thus, the voters' pamphlet statement in favor of Initiative 901 cited the support of the American Cancer Society, the American Lung Association, the American Heart Association, Washington's nurses, and the AARP. *State of Washington Voters' Pamphlet, General Election* 11 (Nov. 8, 2005). The initiative opponents did not include private organizations such as the American Legion because Initiative 901 was understood not to affect them. We should hold that some new restriction affected the American Legion only if the private facilities exemption irreconcilably conflicts with the prohibition on smoking in places of employment.

The two provisions do not conflict. The prohibition on smoking in places of employment is a general rule. The rule about private facilities is simply an exemption from this general rule. The law contains other exemptions from the place of employment ban, RCW 70.160.020(2) (exempting 25 percent of rooms in a hotel, even though they fall under the definition of "place of employment"), RCW 70.160.020(3) (exempting most home-based businesses), RCW 70.160.060 (exempting private enclosed

workplaces in public buildings). The private facilities exception is similar. Since they do not conflict, the exemption for private facilities should be enforced. If the initiative backers chose to eradicate the exemption, they could and should have done so explicitly.

The majority holds that the exemption and initiative conflict, but to do so must give the law a cramped reading. The law reads: "This chapter is not intended to restrict smoking in private facilities . . . ." RCW 70.160.020(2). The majority holds that "this chapter" really means only "this subsection." Majority at 9-12. This is a judicial rewrite of the clear language applying the exemption to all of "this chapter." Further, this construction disregards this court's rule that initiatives must be interpreted as the average, informed lay voter would read them. *W. Petroleum Imps., Inc. v. Friedt*, 127 Wn.2d 420, 424, 899 P.2d 792 (1995). I strongly doubt that any average voter would think "this chapter" meant "this subsection."

The majority's major premise for its construction is that Initiative 901 was intended to prohibit smoking in office buildings where people work. Majority at 12. I agree. But I disagree with the minor premise that public office buildings include "private facilities occasionally open to the public."

This is an unnatural reading. A private facility occasionally open to the public applies to an American Legion Post (and similar facilities), and clearly does not apply to office buildings. At some point on the continuum from Elks lodge to the Columbia Tower the line is crossed from private facility to public buildings, but I do not think this stands as an argument for limiting or disregarding the statute's language. Our job is to apply the law as the average informed voter understood the exemption in RCW 70.160.020(2). Since the majority unnaturally restricts the clear meaning of that provision, I respectfully dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR:

Justice Charles W. Johnson