HB46,HD2,SD1

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

LORETTA J. FUDDY, A.C.S.W., M.P.H.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. Box 3378
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In reply, please refer to:
File:

SENATE COMMITTEE ON JUDICIARY AND LABOR

HB0046, HD2, SD1 RELATING TO PUBLIC HOUSING

Testimony of Loretta J. Fuddy, A.C.S.W., M.P.H.
Director of Health

April 2, 2012
10:00AM, Rm. 016

Department's Position: The Department of Health (DOH) supports the intent of HB 46, HD2, SD1 to protect residents in public housing from exposure to secondhand smoke although this bill offers no greater protections than are guaranteed under the current smoke-free workplace and public places law, chapter 328J, Hawaii Revised Statutes.

Fiscal Implications: No appropriations requested.

Purpose and Justification: This measure provides the Hawaii Public Housing Authority with the discretion to adopt rules to prohibit smoking throughout any public housing project and state low-income project. DOH supports the scientific findings and recommendations of the U.S. Surgeon General regarding the involuntary exposure of tobacco smoke to nonsmokers. Those findings disclosed that: 1) There is no safe level or amount of secondhand smoke (SHS) and that breathing even a little SHS can be dangerous; 2) Breathing SHS is a known cause of sudden infant death syndrome (SIDS) and that children are more likely to have lung problems, ear infections, and severe asthma from being around tobacco smoke; SHS causes heart disease and lung cancer; separate "no smoke" sections do not provide protection from SHS, and neither does are filtration.

Hawaii's current smokefree workplace and public places law, enacted in 2006, does not cover, and excludes private residences. The federal Housing and Urban Development authority, (HUD) now actively supports the creation of smoke free residential public housing properties governed under that authority.

The DOH looks forward to collaborating with the HPHA on their recommendation to implement smoke free housing as an issue that will become a priority item and can successfully be accomplished through internal policy. Further, DOH is willing to work closely with HPHA on the policy development, implementation and on smoking cessation efforts to help current smokers link up with the many available cessation services to help smokers to quit.

Thank you for the opportunity to testify.

COALITION FOR A TOBACCO-FREE HAWAI'I

To: The Honorable Clayton Hee, Chair
The Honorable Maile Shimabukuro., Vice Chair
Members, Senate Committee on Judiciary and Labor
From: Deborah Zysman, MPH; Executive Director
Hrg: Senate Committee on Judiciary and Labor, 4/2/2012, 10:00 am, Rm 016
Re: **Comments on HB 46 HD2, SD1 Relating to Public Housing**

Thank you for the opportunity to offer comment in support of the intent of HB 46 HD2, SD1 which grants the Hawaii public housing authority (HPHA) the ability to adopt smoke-free policies in public housing complexes.

The Coalition for a Tobacco Free Hawaii (Coalition) is the only independent organization in Hawaii whose sole mission is to reduce tobacco use through education, policy and advocacy. Our organization is a small nonprofit organization of over 100 member organizations and 2,000 advocates that works to create a healthy Hawaii through comprehensive tobacco prevention and control efforts.

The current version of this bill grants the HPHA the power to adopt smoke-free policies in public housing. HPHA currently has this authority and is able to provide smoke-free housing for residents without legislative action. The bill in its original form made all public housing smoke-free which would guarantee safe housing. HPHA is under new leadership and is supportive of this initiative. The Coalition looks forward to partnering with the HPHA on this initiative.

Smoke-free housing is legal and the only way to prevent second-hand smoke exposure.
A 2007 letter from the Honolulu HUD office indicates that "[r]egulating smoking in public housing units or in common areas is a local decision. In addition, according to the Fair Housing and Equal Opportunity Civil Rights analyst, smokers are not a protected class under the Fair Housing Act." Going smoke-free is lawful and promotes health. Housing units can already adopt their own rules to prohibit smoking.

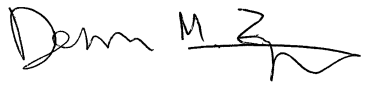
Secondhand smoke is dangerous; the **U.S. Surgeon General in 2010 notes that any level of exposure to secondhand smoke is dangerous and can be harmful.** The International Agency for Research on Cancer and the U.S. Environmental Protection Agency both note that environmental tobacco smoke (or secondhand smoke) is carcinogenic to humans. Secondhand smoke contains 7,000 identifiable chemicals, 69 of which are known or probable carcinogens.

The Coalition receives calls from residents who reside in public housing units and who have asthma and other health issues affected by secondhand smoke exposure. There is little assistance the Coalition can provide them. It is clear, however, that all residents—regardless if they have asthma, COPD or other health issues—are impacted by the hazards of secondhand smoke.

All families deserve to live free of second-hand smoke. The only way to ensure this is to prohibit smoking in units. The American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) adopted a position that states, "[a]t present, the only means of effectively eliminating health risks associated with indoor exposure is to ban smoking activity. . . No other engineering approaching, including current and advanced dilution ventilation or air

cleaning technologies, have demonstrated or should be relied upon to control health risks from ETS [environmental tobacco smoke] exposure in spaces where smoking occurs."

Thank you for the opportunity to testify on this matter.



Deborah Zysman, MPH
Executive Director

Hearing Date: April 2, 2012

To: The Senate Committee on Judiciary and Labor, and the Honorable Senator Hee, Chair

Subject: HB46 SD1

Position: Support with qualifications

I urge you to pass a stronger version of this measure than SD1, one that mandates non-smoking everywhere on Public Housing premises for the following reasons:

1. It is the province of the law to protect civil rights, not only of individuals and minorities against "the tyranny of the majority," but indeed of the majority itself from the hazards of second-hand smoke in Public Housing. While it is an open question as to whether smokers have the right to commit slow suicide, the law cannot permit them to commit slow homicide.

2. The Law will strengthen the Hawaii Public Housing Authority's administration, especially now that the new Director is committed to implementing a broadened non-smoking policy. He will be supported in two ways:

> a. by the "carrot" of educating his tenants on the scientific and judicial reasons behind the law for their health, safety, and economic benefits, which, in turn, will
>
> b. minimize the ***necessary*** "stick" behind the law so that the threat of eviction is rarely, if ever, carried out.

It is particularly timely to pass such a law now, while the momentum is in his hands, and not wait for some future director who may not be truly committed to creating a new climate in Public Housing here.

3. The public will support the law since non-smoking in public places is already legal and widely understood and accepted. For example, an informal poll by KITV4 News on October 25, 2011 found that 59% of viewers supported total non-smoking in Public Housing here, with only 7% opposed. Taxpayers will appreciate cutting down medical, emergency, and maintenance costs in Public Housing, especially in this budget-cutting cycle. Further, the passage of this law will set a precedent for Public Housing all over the country.

Therefore, for reasons of justice, science, and economy, now it the time to enact a total smoking ban in Hawaii Public Housing.

Thank you for your serious consideration.

Roxanne J. Fand
Retired UH Faculty Member

April 1, 2012
Prepared for Hearing Date April 2, 2012

To:
Senate Committee on Judiciary and Labor
Senator Clayton Hee, Committee Chair

Subject: HB46 HD2 SD1

Dear Senator Hee and Members of the Committee,

As one who is following the evolution of this bill very closely, I overall support its passing. However, I strongly urge you to add back many of the provisions contained in the original form of HB46. As it stands, this bill does not guarantee anything beneficial will be done by the Hawaii Public Housing Authority.

As a life-long asthma sufferer and a close friend of someone living in public housing, who is strongly affected by second hand smoke, I feel it is the government's duty to insure that the health and well being of all its tenants are protected. As one who has experience managing public property, I also know that strict rules are necessary to insure the safety of the public and the property. However, rules are useless unless there are consequences to back them up. The HPHA already has policies in place for offenses far less threatening to public safety than smoking, which, if violated, can result in a harsh penalty like eviction. I do not understand why the HPHA should not be *required* to create policies that will protect its tenants from a proven danger.

I have heard arguments made that those with mental instabilities would be adversely affected by the banning of smoking in individual units, so it should be allowed to continue. Why is banning the use of a toxic substance, such as cigarettes, any different than banning the use of illegal substances on government funded property? If a mentally unstable person required the use of crack or ice to remain calm, in a government funded room, should it be overlooked? Should acts of drunken and disorderly conduct on government property also be tolerated? These acts are banned on to protect the public and the place and I believe smoking should be treated the same way.

As a taxpayer I believe the state should assist those who are in need, however I also believe it should not tolerate any behavior that endangers others, especially one that I consider to be a luxury and not a necessity.

I strongly urge you to pass HB46 HD2 SD1 *with* revisions, to insure that HPHA is *required* to do all that is necessary to protect the well being of all tenants of public housing.

Mahalo for your time,
Scott Goto

From:	Daria Alma Fand
To:	JDLTestimony
Subject:	Testimony Submission for HB46 HD2 SD1 (Hearing on 4/2/12)
Date:	Saturday, March 31, 2012 4:38:34 PM
Attachments:	talc-memo-0051(2).pdf

NOTE TO STAFF: Please note that I may have sent a duplicate of this testimony through the Legislative website. Please be sure to print out the attached PDF document for the Committee's review, along with this message body. Thank you.

For Hearing Date: Monday, April 2, 2012
10:00 a.m., Conference room 016

To:
Senate Committee on Judiciary and Labor
The Honorable Senator Hee, Chair

Subject: HB46 HD2 SD1

Position: Support, with amendments

Honorable Senator Hee and Members of this Committee, thank you for allowing me to submit testimony regarding the measure HB46 HD2 SD1.

This bill originated jointly as SB908 and HB46 as a strong, clearly-delineated mandate to prohibit smoking in public and low-income housing, including in individual units, and to consider violation grounds for eviction. This was a bold but very much-needed initiative for public housing to protect the lives, health, and safety of residents. In its evolution, the bill has been diluted to the point that all stipulations as crucial safeguards have been removed, leaving the matter in the hands of the Hawaii Public Housing Authority (HPHA) to legislate their course of action, according to their broad discretion.

The reason I believe you, as the Judiciary, must amend this measure as it stands (as SD1) is because it is a matter of JUSTICE that the most vulnerable of citizens -- who cannot move or escape their habitation, by virtue of living in public housing -- be afforded the same protections under existing anti-smoking Hawaii law that people in workplaces and other areas of public accommodation have been given. It has been recognized by our Legislature through these laws that the well-established dangers of secondhand smoke are pervasive and inescapable inside closed buildings. Given that there is a very high population of elderly, disabled, health-compromised, and children in public housing who are victims daily of secondhand smoke exposure, it is a grievous oversight that these laws have so far not been extended to them.

These people have no choice but to endure the slow jeopardy to their health and longevity that smoking neighbors or even family impose on them -- which is to say neighbors and family are given the tacit right to endanger others' lives in public housing.

I ask you if this should be considered the province of any given Housing administration, or if this is a matter for state law. It is, in fact, a CIVIL RIGHT to be able to live without the fear of another citizen jeopardizing one's life, health, and wellbeing. It is not lawful to intrude on others' rights by making loud noise at night, even if from the "privacy" of your own home, for example. So even though smoking in one's home is a thorny issue with much controversy, the fact of the matter is that legal precedent states that there is NO RIGHT TO SMOKE, and the science soundly shows that smoking DOES INTRUDE on the health and safety -- and therefore RIGHTS -- of everyone in a building and housing complex.

As deliberations over HB46 have evolved, the Legislature has returned the policy-making authority to

HPHA, since the latter has testified that they are in the process of crafting no-smoking rules. I understand that this is their current intent for some unspecified and non-committal point in the future. I believe their intent is sincere.

However, the nature of this matter far supercedes the questions and difficulties of how and when this particular HPHA administration will manage their implementation and adoption strategies. This is a fundamental question concerning how and when citizens must be protected IN PERPETUITY above and beyond the dictates and prerogatives of any particular public housing administration, and how the RIGHT TO BE PHYSICALLY SAFE FROM THE TRESPASS OF HAZARDOUS AGENTS IN ONE'S HOME must be recognized, especially in an environment where people have no choices or recourse.

I ask you to consider the responsibility you have in this matter as a governing body that must acknowledge the need for consistency in applying current no-smoking law to our public domiciles, where people often spend more than an average workday involuntarily breathing the toxic air contaminant that is secondhand smoke.

From my attached document, disseminated by the Public Health Institute, Technical Legal Center (2004), I quote:

> Laws that limit how and where people may smoke should survive a legal challenge claiming that smoking is protected by the state or federal constitution. Smoking is not mentioned anywhere in either constitution. Nevertheless, some people may claim that there is a fundamental right to smoke.[2] These claims are usually made in one of two ways: (1) that the fundamental right to privacy in the state or federal constitution includes the right to smoke, or (2) that clauses in the state and federal constitutions granting equal protection provide special protection for smokers. Neither of these claims has any legal basis. Therefore, a state or local law limiting smoking usually will be judged only on whether the law is rational, or even plausibly justified, rather than the higher legal standard applied to laws that limit special constitutionally protected rights.
>
> The argument that someone has a fundamental right to smoke fails because only certain rights are protected by the Constitution as fundamental, and smoking is not one of them. The U.S. Supreme Court has held that only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in the guarantee of personal liberty.[3] These rights are related to an individual's bodily privacy and autonomy within the home. Proponents of smokers rights often claim that smoking falls within the fundamental right to privacy, by arguing that the act of smoking is an individual and private act that government cannot invade. Courts consistently reject this argument. The privacy interest protected by the U.S. Constitution includes only marriage, contraception, family relationships, and the rearing and educating of children.[4] Very few private acts by individuals qualify as fundamental privacy interests, and smoking is not one of them.[5]

Please see the attachment for the full document, “There is No Constitutional Right to Smoke”.

An article in the June 17, 2010 issue of the *New England Journal of Medicine*, "Regulation of Smoking in Public Housing,” filed under, "Health, Ethics, and Human Rights" authored by Jonathan P. Winickoff, M.D., M.P.H., Mark Gottlieb, J.D., and Michelle M. Mello, J.D., Ph.D. concludes:

> The use of [government regulation] to ensure that PHAs implement no-smoking policies in public housing raises ethical concerns and practical challenges; however, it is justified in light of the harms resulting from exposure to tobacco smoke, the lack of other avenues of legal redress for nonsmoking residents of public housing, and the languid pace at which PHAs have voluntarily implemented no-smoking policies. The same legal, practical, and health issues that have driven successful efforts to

> make workplaces, private vehicles, and private housing smoke-free militate in favor of extending similar protection to the vulnerable public-housing population.

Finally, at the end of this testimony, I have included for reference a tiny sample of the voluminous, incontrovertible scientific expert citations about the deadly hazards of secondhand smoke, particularly in indoor environments.

Given all of the aforementioned data and legal precedent, I believe it is your duty to pass HB46, but amended with language that reflects what is both medically and judicially imperative in the public interest. I strongly urge this Committee to reintroduce/revert to the original language of the bill, which does take into account all the provisions necessary to make the law effective, particularly by banning smoking in individual units.

The only revision I strongly request be made to the original version is to remove all language specifying a permissible distance to smoke from buildings, and instead specify that the smoking prohibition extend grounds-wide. Specifying an outside distance regulation in feet from a building runs the risk of exposing residents indoors – particularly those on the lower floors, where many of the disabled are placed -- to drifting smoke from nearby outdoor lots on a chronic basis. Given that in Hawaii (unlike in some Mainland models), outdoor lanais and patios are the norm in public housing structures, it is important to have a uniform policy that would protect everyone equally, regardless of property layout.

I ask that you return HB46 to its rightful and original form with the above caveat, and pass this measure on the principles and facts I have presented.

As Martin Luther King said, “Justice delayed is justice denied.”

Sincerely yours,
Daria A. Fand
Resident of Kalakaua Homes

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Further References:

-- According to an abstract compiled by authors James Repace (Biophysicist and Owner of Repace Associates, Inc., Secondhand Smoke Consultants), Ichiro Kawachi, Ph.D. (Associate Professor, Department of Health and Social Behavior, Harvard School of Public Health) and Stanton Glantz (Professor, Department of Cardiology, University of California, San Francisco):

> Breathing secondhand-smoke causes morbidity and mortality from cancer, heart disease, and respiratory disease, as well as acute sensory irritation. It causes the premature death of hundreds of thousands of nonsmokers worldwide. **Smoke-free buildings are the only remedy. Secondhand smoke cannot be controlled by ventilation, air cleaning, or spatial separation of smokers from nonsmokers.**

-- In a 2010 Press Release, “Puffing in Public Housing Poses Serious Health Risks to Tenants,” The Harvard School of Public Health summarizes an article appearing in the June 17, 2010 issue of the *New England Journal of Medicine*, in the following excerpts:

> “Research shows that those living in multiple-unit housing are being exposed to toxins from tobacco smoke,” says Jonathan Winickoff, MD, MPH, lead author and pediatrician at MassGeneral Hospital *for* Children (MGH*f*C). “Even if you are not a smoker and don’t smoke inside of your own apartment, if you have a neighbor who is smoking inside of his, the entire building is contaminated…The National Toxicology

Program has identified more than 250 poisonous gases, chemicals, and metals in tobacco smoke, 11 of which are class A carcinogens **[the same category asbestos is in]**. Numerous epidemiologic studies show that exposure to tobacco smoke can cause lung cancer and cardiac disease in nonsmokers, and **the Surgeon General's report on involuntary smoking concluded that there is no safe level of exposure. Even brief exposures to tobacco smoke can adversely affect nonsmokers**, especially children, who experience increased rates and severity of asthma and other respiratory illnesses, as well as higher risk of sudden infant death syndrome.

Smoking in a single unit within a multiunit residential building puts other residents of the building at risk. Tobacco smoke can move along air ducts, through cracks in the walls and floors, through elevator shafts, and along plumbing and electrical lines to affect units on other floors. Mitigation measures like fans and air filters are not effective in preventing exposure. High levels of tobacco toxins can persist in the indoor environment long after the period of active smoking — a phenomenon known as third-hand smoke. Tobacco toxins from smoke are deposited on indoor surfaces and reemitted in the air over a period of days to years, and are found on rugs, furniture, clothing, and floors – all surfaces that children crawl and play on…Creating and maintaining smoke-free living space that encourages smoking cessation not only provides a healthy environment for children as they grow, it discourages them from picking up the habit. "When children see smoking in and around their homes, it normalizes the behavior for them," …"**Research shows that no-smoking policies in the home lead to lower smoking initiation rates by teens**. Americans living below the poverty level are 1.6 times more likely to smoke; **adopting a smoke-free policy in public housing units encourages inhabitants to "fight back" against the intense tobacco marketing that exists in low-income neighborhoods."**

PUBLIC HEALTH INSTITUTE

Technical Assistance Legal Center

There Is No Constitutional Right to Smoke[1]

February 2004

I. INTRODUCTION

Laws that limit how and where people may smoke should survive a legal challenge claiming that smoking is protected by the state or federal constitution. Smoking is not mentioned anywhere in either constitution. Nevertheless, some people may claim that there is a fundamental "right to smoke."[2] These claims are usually made in one of two ways: (1) that the fundamental right to privacy in the state or federal constitution includes the right to smoke, or (2) that clauses in the state and federal constitutions granting "equal protection" provide special protection for smokers. Neither of these claims has any legal basis. Therefore, a state or local law limiting smoking usually will be judged only on whether the law is rational, or even plausibly justified, rather than the higher legal standard applied to laws that limit special constitutionally protected rights.

II. THERE IS NO FUNDAMENTAL RIGHT TO SMOKE

The argument that someone has a fundamental right to smoke fails because only certain rights are protected by the constitution as fundamental, and smoking is not one of them. The U.S. Supreme Court has held that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in the guarantee of personal liberty."[3] These rights are related to an individual's bodily privacy and autonomy within the home.

Proponents of smokers' rights often claim that smoking falls within the fundamental right to privacy, by arguing that the act of smoking is an individual and private act that government cannot invade. Courts consistently reject this argument. The privacy interest protected by the U.S. Constitution includes only marriage, contraception, family relationships, and the rearing and educating of children.[4] Very few private acts by individuals qualify as fundamental privacy interests, and smoking is not one of them.[5]

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[1] This material was made possible by funds received from the California Department of Health Services, under contract # 99-85069. This fact sheet was created to provide general information only and is not offered or intended as legal advice.

[2] Common usage of the term "rights" conflates two distinct legal meanings: those rights that are specially provided for or protected by law (e.g., free speech); and those rights that exist simply because no law has been passed restricting them (e.g., the right to use a cell phone while driving). The latter type of right is always subject to potential regulation. Therefore, this memo addresses only those rights provided for or protected by law. This memo also does not address whether an employer may refuse to employ someone who smokes. While prohibiting smoking at work is permissible, Cal. Labor Code §96(k) protects employees from discrimination based on off-work conduct, though one court held that this statute does not create new rights for employees but allows the state to assert an employee's independently recognized rights. *Barbee v. Household Auto. Finance Corp*., 113 Cal. App. 4th 525 (2003).

[3] *Roe v. Wade*, 410 U.S. 113, 152 (1973).

[4] See, for example, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1964) (recognizing the right of married couples to use contraceptives); *Meyers v. Nebraska*, 262 U.S. 390 (1923) (recognizing the right of parents to educate children

Example: A firefighter trainee challenged a city fire department requirement that trainees must refrain from cigarette smoking at all times, by arguing that "although there is no specific constitutional right to smoke, [there is an] implicit . . . right of liberty or privacy in the conduct of [ ] private life, a right to be let alone, which includes the right to smoke."[6] The court, however, disagreed and distinguished smoking from the recognized fundamental privacy rights.[7] The court went on to find that the city regulation met the fairly low standard for regulating non-fundamental rights because there was a perfectly rational reason for the regulation, namely the need for a healthy firefighting force.

III. SMOKERS ARE NOT A PROTECTED GROUP OF PERSONS

The second common constitutional claim made by proponents of smokers' rights is that laws regulating smoking discriminate against smokers as a particular group and thus violate the equal protection clause of the U.S. or the California constitutions. No court has been persuaded by these claims.

The equal protection clauses of the United States and California constitutions, similar in scope and effect,[8] guarantee that the government will not treat similar groups of people differently without a good reason.[9] Certain groups of people – such as groups based on race, national origin and gender – receive greater protection against discriminatory government acts under the U.S. and California constitutions than do other groups of people.[10] Smokers have never been identified as one of these protected groups.[11] Generally, the Supreme Court requires a protected group to have "an immutable characteristic determined solely by the accident of birth."[12] Smoking is not an "immutable characteristic" because people are not born as smokers and smoking is a behavior that people can stop. Because smokers are not a protected group, laws limiting smoking must only be rationally related to a legitimate government purpose.[13]

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as they see fit); and *Moore v. East Cleveland*, 431 U.S. 494 (1977) (protecting the sanctity of family relationships).

[5] *City of North Miami v. Kurtz*, 653 So.2d 1025, 1028 (Fla. 1995) (city requirement that job applicants affirm that they had not used tobacco in preceding year upheld because "the 'right to smoke' is not included within the penumbra of fundamental rights protected under [the federal constitution's privacy provisions]").

[6] *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 541 (10th Cir. 1987).

[7] *Id*. The court relied heavily on the U.S. Supreme Court decision *Kelley v. Johnson*, 425 U.S. 238 (1976). In *Kelley*, the Court held that a regulation governing hair grooming for male police officers did not violate rights guaranteed under the Due Process Clause even assuming there was a liberty interest in personal appearance.

[8] U.S. Const. amend. XIV, Cal. Const. art.1 §7. See *Serrano v. Priest*, 5 Cal. 3d 584, 597 n.11 (1971) (plaintiff's equal protection claims under Article 1 §11 and §21 of state constitution are "substantially equivalent" to claims under equal protection clause of Fourteenth Amendment of U.S. Constitution, and so the legal analysis of federal claim applies to state claim).

[9] Equal protection provisions generally permit legislation that singles out a class for distinctive treatment "if such classification bears a rational relation to the purposes of the legislation." *Brown v. Merlo*, 8 Cal. 3d 855, 861 (1973).

[10] See, for example, *Brown v. Board of Education*, 347 U.S. 483 (1954) (race); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (exclusion of aliens from a state's competitive civil service violated equal protection clause); *Craig v. Boran,* 429 U.S. 190 (1976) (classifications by gender must serve important governmental objectives and must be substantially related to the achievement).

[11] Even some potentially damaging classifications, such as those based upon age, mental disability and wealth, do not receive any special protections. See, for example, *City of Cleburne v. Cleburne Living Center, Inc*., 473 U.S. 432 (1985) (mentally disabled adults are not protected under Equal Protection Clause); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education and income classifications are not protected).

[12] *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

[13] *Fagan v. Axelrod*, 550 N.Y.S. 2d 552, 560 (1990) (rejecting the argument that a state statute regulating tobacco

The equal protection clause not only protects certain groups of people, the clause also prohibits discrimination against certain fundamental "interests" that inherently require equal treatment. The fundamental interests protected by the equal protection clause include the right to vote, the right to be a political candidate, the right to have access to the courts for certain kinds of proceedings, and the right to migrate interstate.[14] Smoking is not one of these recognized rights.

> **Example:** In upholding a high school campus ban on smoking, a North Carolina court stated that "[t]he right to smoke in public places is not a protected right, even for adults."[15] The court upheld a school regulation that permitted smoking by teachers in the teachers' lounge but prohibited students from smoking. The smoking students claimed they were a discrete group suffering from discrimination (since teachers, another group, could smoke under the ban but students could not). The court found that the rule did not violate equal protection principles because of rational, reasonable differences in prohibiting smoking by minors and not by adults.

If a government classification affects an individual right that is not constitutionally protected, the classification will be upheld if there is any reasonably conceivable set of facts that could provide a rational basis for it.[16] So long as secondhand smoke regulations are enacted to further the government goal of protecting the public's health from the dangers of tobacco smoke, the regulation should withstand judicial scrutiny if challenged.[17]

IV. CONCLUSION

There is no constitutional right to smoke. Claims to the contrary have no legal basis. The U.S. and California constitutions guarantee certain fundamental rights and protect certain classes of persons from all but the most compelling government regulation. However, no court has ever recognized smoking as a protected fundamental right nor has any court ever found smokers to be a protected class. To the contrary, every court that has considered the issue has declared that no fundamental "right to smoke" exists. So long as a smoking regulation is rationally related to a legitimate government objective such as protecting public health or the environment, the regulation will be upheld as constitutional.

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smoking in public areas discriminated against members of a subordinate class of smokers on the basis of nicotine addiction by holding that "the equal protection clause does not prevent state legislatures from drawing lines that treat one class of individuals or entities differently from others, unless the difference in treatment is 'palpably arbitrary' "). Note, too, that nonsmokers also are not recognized as a protected class, so equal protection claims brought by nonsmokers exposed to smoke in a place where smoking is permitted by law are unlikely to succeed.

[14] See, for example, *Baker v. Carr*, 369 U.S. 186 (1962) (improper congressional redistricting violates voters' rights under equal protection); *Turner v. Fouche*, 396 U.S. 346 (1970) (all persons have a constitutional right to be considered for public service); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (residency requirement for receipt of state benefits violates equal protection).

[15] *Craig v. Buncombe County Bd. of Educ.,* 80 N.C.App. 683, 685 (1986).

[16] *People v. Leung*, 5 Cal. App. 4th 482, 494 (1992).

[17] *Dutchess/Putnam Restaurant & Tavern Ass'n, Inc. v. Putnam County Dep't of Health*, 178 F. Supp. 2d 396, 405 (N.Y. 2001) (holding that County code regulating smoking in public places does not violate equal protection rights); *City of Tuscon v. Grezaffi*, 23 P.3d 675 (2001) (upholding ordinance prohibiting smoking in bars but not in bowling alleys because it is rationally related to legitimate government interest); *Operation Badlaw v. Licking County Gen. Health Dist. Bd. of Health*, 866 F.Supp. 1059, 1064-5 (Ohio 1992) (upholding ordinance prohibiting smoking except in bars and pool halls); *Rossie v. State*, 395 N.W.2d 801, 807 (Wis. 1986) (rejecting equal protection challenge to statute that banned smoking in government buildings but allowed it in certain restaurants).