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IN THE SUPREME COURT OF THE STATE OF ALASKA

Fraternal Order of Eagles, Juneau-Douglas)
 Aerie 4200, Mark Page, Brian Turner,)
 R.D. Truax and Larry Paul,)
)
 Appellants,)
)
 v.)
)
 City and Borough of Juneau,)
)
 Appellee.)

S13748

Superior Court Case No. 1JU-08-730 CI



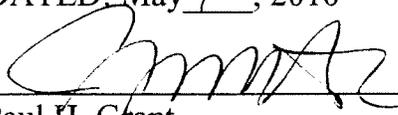
BRIEF OF APPELLANTS

FRATERNAL ORDER OF EAGLES, JUNEAU-DOUGLAS AERIE 4200, MARK PAGE, BRIAN TURNER, R.D. TRUAX AND LARRY PAUL

APPEAL FROM THE SUPERIOR COURT
FOR THE STATE OF ALASKA, FIRST JUDICIAL DISTRICT,
JUDGE PHILIP M. PALLENGBERG

Respectfully Submitted,
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DATED: May 4th, 2010


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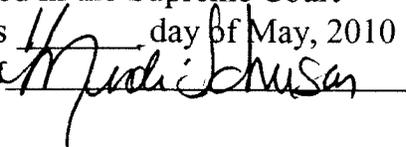
Filed in the Supreme Court
 this 11th day of May, 2010
 By 

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STATUTES, CIVIL RULES, REGULATIONS, and
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TEXT

Alaska Appellate Rule 202(a)

Judgments from Which Appeal May Be Taken.

(a) An appeal may be taken to the supreme court from a final judgment entered by the superior court, in the circumstances specified in AS 22.05.010, or from a final decision entered by the Alaska Workers' Compensation Appeals Commission in the circumstances specified in AS 23.30.129.

AS 22.05.010

Jurisdiction.

(a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.

(b) Appeal to the supreme court is a matter of right only in those actions and proceedings from which there is no right of appeal to the court of appeals under AS 22.07.020 or to the superior court under AS 22.10.020 or AS 22.15.240 .

(c) A decision of the superior court on an appeal from an administrative agency decision may be appealed to the supreme court as a matter of right.

(d) The supreme court may in its discretion review a final decision of the court of appeals on application of a party under AS 22.07.030. The supreme court may in its discretion review a final decision of the superior court on an appeal of a civil case commenced in the district court. In this subsection, "final decision" means a decision or order, other than a dismissal by consent of all parties, that closes a matter in the court of appeals or the superior court, as applicable.

(e) The supreme court may issue injunctions, writs, and all other process necessary to the complete exercise of its jurisdiction.

CBJ Ordinance 36.60.005

Definitions. In this chapter:

Bar means a business, other than a restaurant, licensed by the State of Alaska to sell alcoholic beverages.

Business means any sole proprietorship, partnership, joint venture, corporation, nonprofit corporation, or other business entity.

Employee means any person who is employed by any employer for compensation or profit or who works for an employer as a volunteer without compensation.

Employer means any person, partnership, corporation, including a municipal corporation, or nonprofit entity, but not including the state or federal government, who employs the services of one or more individual persons.

Enclosed area means all interior space within a building or other facility between a floor and a ceiling that is enclosed on all sides by temporary or permanent walls, windows, or doors extending from the floor to the ceiling.

Enclosed public place means an enclosed area or portion thereof to which the public is invited or into which the public is permitted, including:

- (1) Retail stores, shops, banks, laundromats, garages, salons, or any other business selling goods or services;
- (2) The waiting rooms and offices of businesses providing legal, medical, dental, engineering, accounting, or other professional services;
- (3) Hotels, motels, boardinghouses, hostels, and bed and breakfast facilities, provided that the owner may designate by a permanently affixed sign a maximum of 25 percent of the rooms as exempt from this definition;
- (4) Universities, colleges, schools, and commercial training facilities;
- (5) Arcades, bingo halls, pull-tab parlors, and other places of entertainment;
- (6) Health clubs, dance studios, aerobics clubs, and other exercise facilities;
- (7) Hospitals, clinics, physical therapy facilities;

(8) Any facility which is primarily used for exhibiting any motion picture, stage, drama, lecture, musical recital, or similar performance;

(9) Public areas of fish hatcheries, galleries, libraries and museums;

(10) Polling places;

(11) Elevators, restrooms, lobbies, reception areas, waiting rooms, hallways and other common-use areas, including those in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple-unit residential facilities;

(12) Restaurants, coffee shops, cafeterias, sandwich stands, private or public schools cafeteria, and any other eating establishment which offers food for sale, and including any kitchen or catering facility in which food is prepared for serving off the premises;

(13) Sports and exercise facilities, including sports pavilions, gymnasias, health spas, boxing arenas, swimming pools, pool halls, billiard parlors, roller and ice rinks, bowling alleys, and similar places where members of the public assemble to engage in physical exercise, participate in athletic competition, or witness sports events;

(14) Any line in which two or more persons are waiting for or receiving goods or services of any kind, whether or not in exchange for money;

(15) Areas used for and during the course of meetings subject to the Alaska Open Meetings Act; and

(16) Bars, private clubs, and any other enclosed place, where alcoholic beverages are sold, or food is offered for sale.

Place of employment means an area or a vehicle under the control of an employer normally used by employees in the course of employment, including work areas, private offices, employee lounges, restrooms, conference rooms, classrooms, cafeterias, elevators, stairways, and hallways.

Private club means an organization, whether incorporated or not, that is the owner, lessee, or occupant of a building or portion thereof used for club purposes, which is operated for a recreational, fraternal, social, patriotic, political, benevolent, athletic, or other purpose.

Smoking means inhaling or exhaling tobacco smoke, or carrying any lighted tobacco product.

CBJ Ordinance 36.60.010(a)

Smoking prohibited.

(a) Smoking is prohibited in:

- (1) Enclosed public places;
- (2) Enclosed areas that are places of employment;
- (3) Vehicles and enclosed areas owned by the City and Borough of Juneau, including the Juneau School District;
- (4) Commercial passenger vehicles regulated by the City and Borough under CBJ 20.40;
- (5) Bus passenger shelters; and
- (6) Private clubs that are licensed by the State of Alaska to sell alcoholic beverages, or that offer food for sale, regardless of the number of employees.

Kenai City Ordinance 12.40.030

Where smoking not regulated.

Notwithstanding any other provision of this chapter, the following areas shall not be subject to the smoking restrictions of this chapter (unless declared non-smoking by owner or operator):

- (a) Bars; and
- (b) Eating establishments while in use in their entirety for private functions; and
- (c) Any patio or other area of an eating establishment which is entirely open to the sky.

Sitka City Ordinance 9.20.030 (G) and (H)

9.20.030 Where smoking is not regulated.

Notwithstanding any other provision of this chapter to the contrary, the following areas shall be exempt from the provisions of Sections 9.20.015 and 9.20.020:

- A. Private residences, except when used as a licensed child care, adult day care, or health care facility.
- B. Private vehicles.
- C. Marine vessels, except vessels inspected by the U.S. Coast Guard which are day boats with no overnight accommodations and are larger in capacity than a "six-pack" but have a capacity of less than one hundred fifty passengers.
- D. Hotel and motel rooms that are rented to guests and are designated as smoking rooms; provided, however, that not more than twenty percent of rooms rented to guests in a hotel or motel may be so designated.
- E. Private and semiprivate rooms in nursing homes and long-term care facilities that are occupied by one or more persons, all of whom are smokers and have requested in writing to be placed in a room where smoking is permitted.
- F. Outdoor areas of places of employment except those covered by the provisions of Section 9.20.025.
- G. Any bar, defined as an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages, as long as such bar is in a "stand-alone building" and the bar shares no common entries, exits, or internal doors with any public places subject to Sections 9.20.015 and 9.20.020.
- H. Private clubs, including but not limited to the Elks, Moose, and American Legion, as long as each such private club is in a "stand-alone building" and the private club shares no common entries, exits, or internal doors with any public places subject to Sections 9.20.015 and 9.20.020.

Soldotna City Ordinance 8.20.020

Regulation of smoking in eating establishments.

Smoking is prohibited and is unlawful within all indoor eating establishments

I. JURISDICTIONAL STATEMENT

This is an appeal from a December 11, 2009, final judgment (Exc. 047-048) entered after an October 14, 2009, Decision on Motions for Summary Judgment. Exc. 028-046. The superior court held that an ordinance of the City and Borough of Juneau ("CBJ") banning smoking in private clubs does not violate either the freedom of association clause of the United States Constitution or the right to privacy contained in the Alaska Constitution. This court has jurisdiction of this appeal under Alaska Appellate Rule 202(a) and AS 22.05.010.

II. ISSUES PRESENTED FOR REVIEW

1. A CBJ ordinance prohibits smoking in the Eagles Aerie Home, a private facility where admittance is dependent on membership in the Fraternal Order of Eagles ("Eagles"). The Eagles assert that smoking is an important aspect of their personal interactions with each other. They believe that they, not the government, should determine what legal activities to allow in their club. **Does the ban violate the right of freedom of association protected by the United States Constitution?**

2. A CBJ ordinance prohibits smoking of tobacco -- a legal substance -- in the membership club's private facility, the Eagles Aerie Home. In relation to their social activities, the Eagles view the Aerie Home as an extension of their personal residences. **Does the ban violate the privacy rights protected by the Alaska Constitution?**

III. STATEMENT OF THE CASE

The Fraternal Order of Eagles asks this court to establish two important constitutional principles. First, they ask the court to hold that the Eagles associational freedoms include the right that they, not the government, may determine what lawful activities are allowed inside the Aerie Home. Secondly, they ask the court to hold that their privacy rights bar the government from interfering in their personal choices about what legal substances they may ingest inside their private club. In the unique factual setting presented by this case, both of these principles are believed to be issues of first impression in Alaska. Both principals go to the very heart of the personal autonomy and freedom from unwarranted governmental intrusion that Alaskans treasure.

A. Statement of Facts¹

The rituals and operations of the Fraternal Order of Eagles are controlled by a detailed set of policies entitled "The Official Ritual of the Local Aeries, Fraternal Order of Eagles" ("the Ritual"). The Ritual is issued by the Grand Aerie, which is the international governing body of the Fraternal Order of Eagles. That document sets out in great detail the procedures to be followed by all local Aeries, controlling membership practices, dues, guests, meeting rituals, elections, governance, and so forth. In addition to the written Official Ritual, some observances are not written but are passed down from President to President and member to member. This includes various signs and signals related to

¹ These facts are drawn from the Affidavit of Larry Paul, Exc. 021-027.

greeting other members and to the conduct of meetings. Aerie 4200 is very faithful to the Ritual. Exc. 021-022.

In many ways the Ritual is the equivalent of a church liturgy, in that it is a strictly prescribed set of observances which bind the members together in fellowship. The Ritual has in common with church practice the fact that members must believe in a Supreme Being, and the Ritual reflects that belief. There is also a strong component of patriotism and of an obligation to render service to the community. The Ritual differs from a church liturgy, however, in that it is only intended for members of the Aerie, and is only performed in the Aerie Home. The public is not allowed to observe the ritual, as they are in many churches. Exc. 022.

There are Articles and Bylaws, both state and local, which set out the legal duties of officers and trustees. Aerie 4200 is incorporated as a not-for-profit charitable corporation under the laws of Alaska. Its activities are intended to produce a financial base from which the Aerie makes contributions each year to various worthy causes that it supports. For instance in 2007 it contributed in excess of \$24,686 to various charities. Among these were Special Olympics, college scholarship funds, Southeast Alaska Independent Living (SAIL), and others. It also donates to individual members who go through difficult times such as illness or family tragedies. In 2008 (following the adoption of the ordinance) Aerie 4200 was only able to contribute \$16,203 to its various causes, which in that year included the new playground at Twin Lakes. Since the adoption of the CBJ smoking ordinance revenues

in the club have decreased about 25%. Some of this is probably due to external economic influences, while some may be due to decreased member use of the club because of the smoking ban. Whatever the cause, this will negatively impact Aerie's ability to carry out its charitable mission. Exc. 022-023.

One of the facets of the Ritual is a requirement that the Aerie (which means "the Nest") be treated as an extension of the members' homes. It is expected that members will maintain privacy about things that occur in the Aerie Home, just as they would in their own home. This expectation is stated in the Official Ritual, the House Rules, and in the unwritten rituals that bind members together. The privilege of inviting guests is jealously guarded, just as it is in the members' own homes. Guests are not permitted to participate in or observe any of the Ritual, which is reserved for members only. Exc. 023.

There are four times per year when the Eagles are permitted to have fund-raising events for their charitable causes. When the Aerie is open to the public for these fundraising events, they do not allow smoking. Exc. 023.

Membership is divided into full Aerie members and Ladies' Auxiliary members. At the time of filing of the Motion for Summary Judgment below, there were 262 full Aerie members and 134 Ladies' Auxiliary members. Of these, there are approximately 46 people who provide the main base of support for Aerie 4200. Approximately 85% of the members are smokers. The cost of membership is \$50 to join (\$35 plus a \$15 initiation fee) and \$35 per year after that. Exc. 024.

New membership applications must be approved by unanimous vote of the Aerie members. Applicants are required to be of good character, committed to the objectives and rituals of the Order, profess belief in a Supreme Being, and not have been expelled from any other organization. Any application for membership can be vetoed ("blackballed") by a single Aerie member. There is also a tribunal and a complex set of procedures for disciplining members who violate the rules or rituals of the Fraternal Order of Eagles. New members are installed according to a strictly prescribed set of rituals conducted by the Worthy President and other officers at a secret meeting. The induction ceremony (like most of the rituals) includes proper identification of members present; presentation of credentials; proper placement of the altar, flags, and other regalia; proper placement and movements of the participants; use of correct signs, gestures and terminology; and recitation of the words of observance precisely as set out in the Official Ritual. Exc. 024.

The policies and procedures of the local Aerie are controlled by the Trustees and ultimately the membership, while day-to-day operations are controlled by the Business Manager. At the time of the filing of the summary judgment motion below, the Business Manager was required to be a member of the Eagles, which means he or she subscribes to the club rules. The business manager is one of the club bartenders, as well. In addition to the business manager there were four other part-time bartenders². They are required to be members of the club and are required to accept the club rules as a condition of their

² This number may vary from time to time.

employment. All of them are smokers and are allowed under club rules to smoke while on duty. The current CBJ ordinance deprives them of a benefit of employment (the ability to smoke during work) by requiring them to stop work to go outside to have a cigarette. Exc. 025.

The current House Rules were proposed by the Trustees and adopted by the full Aerie membership in April of 2008. Prior to that time, the rules did not address smoking since it was not an issue, and the members never imagined it could become an issue because they assumed government would respect their privacy. The current "smoking permitted" policy was adopted in response to the CBJ's attempt to control what goes on inside of the Aerie Home. It was passed unanimously by the 46 members present and voting at the meeting. Exc. 025.

The policy for inviting guests into the Aerie Home is that they must be sponsored by a member who is present. The number of times that a guest can visit is three; after that they are expected to apply for membership. All guests are signed into the Aerie Home's guest book. Strictly speaking, guests should be admitted only if they are previously known to a member who is on the premises. In certain instances this rule was relaxed somewhat to allow for providing assistance to people in distress or allowing prospective members to evaluate the club. Exc. 026.

Aerie 4200 of the Fraternal Order of Eagles is, by design and practice, a private extension of the members' homes. Anyone who joins is required to acknowledge and abide

by the House Rules. Those rules allow members to smoke in the club. The Eagles believe it is an egregious violation of their rights for the CBJ to tell them what they can or cannot do in the Aerie Home. Exc. 027.

B. Course of Proceedings Below

On March 10, 2008 the CBJ passed a restrictive smoking ordinance, CBJ Ordinance 2008-05(b), which has been codified in the CBJ Code of Ordinances as CBJ Ordinance 36.60.005. Exc. 004. The ordinance bans smoking in private clubs such as the Fraternal Order of Eagles Aerie 4200. Exc. 006; CBJ Ordinance 36.60.010(a)(6). Believing that their constitutional rights are violated by the ordinance, the Eagles and several individual members filed suit against the CBJ seeking to set aside the ordinance as applied to private clubs. The parties briefed cross-motions for summary judgment. On October 14, 2009 the Superior Court issued its Decision on Motions for Summary Judgment (Exc. 028-046), noting that the parties agreed that there were no genuine issues of material fact and that summary judgment was appropriate to resolve the case. Exc. 029. The Decision denied the Eagles request for a finding of unconstitutionality, and granted the CBJ's cross-motion seeking dismissal of the complaint. Exc. 045. This appeal follows.

IV. ARGUMENT

A. Summary of Argument

The constitutional rights of free association and privacy are uniquely important to residents of the Last Frontier. The personal autonomy and freedom from unwarranted

government intrusion secured by the constitution are undoubtedly the rights most cherished by Alaskans. It is in furtherance of those rights that the Eagles ask this court to go where Alaskan jurisprudence has not yet gone. Indeed, this court has said it is:³

"under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage."

First, the Eagles ask for a ruling that the right of intimate association includes a right to engage in any lawful activities the participants may choose, so long as they do not impinge on members of the general public. Second, the Eagles ask this court to hold that the right of privacy covers legal activities by adult members of private clubs in private venues, where no member of the general public is present.

There is no question of the important link between freedom of association and privacy. This court has acknowledged that the "right to associate is a fundamental right protected by the First Amendment and the due process clause of the Fourteenth Amendment" and that the "United States Supreme Court has recognized 'the vital relationship between freedom to associate and privacy in one's associations....'"⁴

This court has also forcefully affirmed the key role of both privacy and freedom of

³*Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970)

⁴*In the Matter of Mendel*, 897 P.2d 68, 76 (Alaska 1995)

association with respect to people's homes:⁵

If there is any area of human activity to which a right to privacy pertains more than any other, it is the home. The importance of the home has been amply demonstrated in constitutional law.... The First Amendment has been held to protect the right to 'privacy and freedom of association in the home.

The location at issue here - the Eagles' private club facility which is referred to in Eagles ritual as the "Aerie Home" - is akin to a home, for purposes of both intimate association and privacy analysis. These two key rights are closely intertwined and cannot be invaded by government lightly. The analysis of whether intrusions on both rights are justified is similar.

This court has embraced the idea that "the First Amendment is designed to ensure that individuals are able to ... associate ... free from unnecessary government restraint."⁶

Applicable federal law dictates that an impingement of this right is examined under strict scrutiny, and will be upheld only in cases of a compelling governmental interest, where there are no means "significantly less restrictive of ... associational freedom" to promote the goal.⁷

Central to both privacy and free association rights is the constitutional respect for

⁵ *Ravin v. State of Alaska*, 537 P.2d 494, 503 (Alaska 1975)

⁶ *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951, 960 (Alaska 1978)

⁷ *Louisiana Debating and Literary Association v. The City of New Orleans*, 42 F.3d. 1483, 1498 (5th Cir. 1995), cert. denied, 515 U.S. 1145 (1995)

personal autonomy⁸ -- very much at issue here, since the activity in question is legal tobacco smoking. The court has rigorously established a "framework for recognizing fundamental rights of personal autonomy implicit in our constitution"⁹ that includes determining whether an intrusion is a "public health and welfare" measure,¹⁰ and is supported by "a close and substantial relationship between" the government's ends and the means chosen.¹¹

For neither privacy nor free association is there a sufficient governmental interest to justify trampling on the personal autonomy of Eagles members. The public health and welfare is not promoted by a smoking ban in a place where members of the public are never present. It is not surprising that for neither prong of the analyses is there any fit between the ban and the ordinance's legitimate goals, let alone the least restrictive alternative to accomplish those goals. Banning smoking in a location where no members of the public can go does not promote public health.

The Eagles urge this court to strike down the ban on the smoking of tobacco by and in the presence of consenting adults, all of whom are Eagles, in their private club.

⁸ *State v. Erickson*, 574 P.2d 1, 22 n 144 (Alaska 1978)

⁹ *Sampson v. State*, 31 P.3d 88, 94 (Alaska 2001)

¹⁰ *Ravin*, 497 P.2d at 509

¹¹ *Id.* at 511.

B. Standard of Review

Grants of summary judgment are reviewed de novo and will be upheld only if there are "no genuine issues of material fact and the moving party is entitled to judgment as a matter of law."¹²

This court applies its independent judgment to decide constitutional questions¹³, giving "no deference ... to the lower court's decision,"¹⁴ and adopting the rule "most persuasive in light of precedent, reason, and policy."¹⁵

C. Freedom of Association

No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friends or of thine own were; any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.

John Donne, Meditation XVII

The right of free association is not only important because, as Alaskans, we are privileged to open our manor doors to relationships with friends and family of our own choosing. It is also important because, as free citizens, we can determine the nature and quality of those

¹² *Industrial Comm. Elec., Inc. v. McLees*, 101 P.3d 593, 597 (Alaska 2004)

¹³ *Alaska Trademark Shellfish, LLC v. State, Alaska Dep't of Fish and Game*, 91 P.3d 953, 956 (Alaska 2004)

¹⁴ *Tesoro Alaska Pet. Co. v. Kenai Pipeline Co.*, 746 P.2d 896, 903 (Alaska 1987)

¹⁵ *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979); *Progressive Ins. Co. v. Simmons*, 953 P.2d 510, 512 (Alaska 1998)

interpersonal connections; we can celebrate being "part of the main" through our close bonds with like minded friends. This connection to others takes whatever shape each group autonomously and democratically decides it should have. The Eagles ask this court to protect not only the opening of the manor door, but also the choices of legal activities that free adults make once they walk through the door. The Constitution protects the right to freely associate. The Eagles suggest that their right of free association as members of a private, intimate club in a members-only facility does not mean much if the people who gather there cannot carry out the traditional legal activities that brought them together in the first place (including having a smoke of tobacco with their cocktail).

1. Constitutional Underpinnings of Freedom of Association

While the First Amendment does not in terms protect a "right of association," courts have recognized that it embraces such a right in appropriate circumstances. The Constitution accords special protection to two different forms of association: "intimate" and "expressive."¹⁶ *Roberts v. United States Jaycees* established that the right of intimate association - the freedom to choose to enter into and maintain certain intimate human relationships - is protected from undue governmental intrusion as a fundamental right of personal liberty.¹⁷ Expressive association is understood as the right to associate for the purposes of engaging in "those activities protected by the First Amendment - speech,

¹⁶ See, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *City of Dallas v. Stanglin*, 490 U.S. 19 (1989)

¹⁷ *Roberts*, 469 U.S. at 617-620

assembly, petition for the redress of grievances and the exercise of religion."¹⁸

2. The Eagles Aerie Home Qualifies For Associational Protection¹⁹

The CBJ's anti-tobacco ordinance eviscerates the rights of the members of the Eagles to make their own personal choices about what legal conduct is part of their intimate associations in the privacy of the Aerie Home. Based on the specific and unique characteristics of the Aerie Home, the Constitution affords the Eagles a right of intimate association that protects against government interference.

The closest human relationships are, of course, family bonds. However, the United States Supreme Court expressly did not limit constitutional protection to familial situations. Rather, it recognized that protected relationships possess those qualities that "are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty."²⁰ The right of intimate association may extend to other private, non-familial relationships based on the "size, purpose, policies, selectivity

¹⁸ *Roberts, 469 U.S. at 618.*

¹⁹ Aerie members also engage in the sort of expressive association that the First Amendment has been held to protect. Both internationally and locally, the Eagles have a long history of charitable, civic, and political activism. Furthermore, there is a strong component of religious belief and constitutional awareness associated with membership. These are values that fall squarely within the "expressive association" prong of First Amendment protection. The Eagles believe that their exercise of these First Amendment rights are hampered by the ordinance because members have been made to feel unwelcome and have been discouraged from attendance. However because all evidence on this point is anecdotal and the sample size of members is so small, any attempt to conclusively link the ordinance with a chilling of the Eagles' expressive associational rights is difficult at best. Exc. 022-023.

²⁰ *Roberts, 469 U.S. at 620*

[and] congeniality of the group among which the relationships occur."²¹ In order to determine the limits of government authority over an entity's associative rights, it is necessary to assess "where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."²²

The factors to be considered by a court when deciding where an organization fits on that spectrum were set out in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, ("*Rotary Club*") and in *Louisiana Debating and Literary Association v. The City of New Orleans* ("*Louisiana*")²³. They include: (1) the organization's size, (2) its purposes, (3) the selectivity in choosing its members, (4) the congeniality among its members, (5) whether others are excluded from critical aspects of the relationship, and (6) other characteristics that in a particular case may be pertinent²⁴. The *Louisiana* court noted that the "other characteristics" category may include such factors as (1) the history of the organization, (2) the use of any association facilities by nonmembers, (3) whether the association advertises for members, and (4) whether the association is nonprofit or for profit²⁵.

The Eagles' characteristics readily establish it as a club whose location on the

²¹ *Id.*

²² *Id.*

²³ *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 at 486, (1987)

²⁴ *Id.* at 1494, citing *Welsh v. Boy Scouts of Am.*, 993 F.3d 1267, 1276 (7th Cir. 1993).

²⁵ *Id.*

spectrum of personal attachments is near those that are "most intimate." While the international Eagles association is a large organization with local chapters around the world, the autonomous local Juneau Aerie membership is small; during proceedings below there were only 262 full Aerie members and 134 members of the Ladies' Auxiliary. Of those, fewer than 50 are regular attendees or participate in club activities or governance. There is no general advertising for members. Becoming an Eagle is a highly selective process. Requirements include being nominated by two members in good standing, being 21 years of age, having good moral character, not being connected to the communist party in any way, not having any wish to overthrow the government, and professing a belief in a Supreme Being. Exc. 024.

There are only four occasions per year when the public is offered admission to the Eagles' premises, and these are fund-raiser events for charitable purposes. Offering some limited public events does not make the Eagles a public organization. Indeed, the Eagles recognize the city's interest in making truly public events non-smoking, and on those occasions they do not allow tobacco use. Exc. 023. On the other hand, the private, selective nature of the club is confirmed by its highly ritualized ceremonies and initiation practices, which are expressly adopted to foster the strong bonds of fraternal brotherhood that are central to the ethos of the Eagles, bonds which are also central to the constitutional protection of free association.

Indeed, the Eagles' selective membership process and low number of members

differs starkly from a fraternity that was determined not to meet the criteria for freedom of association protection articulated in *Louisiana. The Second Circuit, in Chi Iota Colony, Fraternity v. City Univ. of N.Y. ("Chi Iota")*²⁶ explained why the *Louisiana* clubs qualified for associational rights protection, while *Chi Iota* did not. The reasons included that they had only "between 325 and 600 members" (substantially more than the Eagles Aerie here) and that they "employed a 'very restrictive' admissions process in which only existing members could propose a new member" (comparable to Juneau's Aerie). The court contrasted that with the fraternity at issue in *Chi Iota*:

[I]t recruits more widely and aggressively, and it has no limit on total membership. Whereas the Louisiana Debating social clubs made no attempt to interact with the outside world - going so far as to keep their facilities unmarked, and substantially barring admission to non-members - the Fraternity regularly incorporates non-members into its activities.... The clubs in Louisiana Debating shunned publicity, while the Fraternity makes its presence on campus visible and advertises its parties, from which it financially benefits. Based on its size, level of selectivity, purpose, and inclusion of non-members, the Fraternity lacks the characteristics that typify groups with strong claims to intimate association.²⁷

Clearly, the Eagles are very much like the clubs described by *Louisiana*, and unlike the fraternity the court distinguished them from. For example, the Eagles do not recruit "widely and aggressively." They bar non-members from admission to their facility, except during four annual charitable fundraisers, or under a strict guest policy. It is not a group that "regularly incorporates non-members into" its activities. In fact non-members are

²⁶ *Chi Iota Colony, Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 147 (2nd Cir. 2007).

²⁷ *Id.*

excluded from the Aerie Home during meetings and observances of the Ritual. Exc. 022.

Another case demonstrates vividly why Juneau's Aerie qualifies for freedom of association protections. Comparing it to the organization in *Taverns for Tots*²⁸ a clear line of demarcation appears. The court found the plaintiff there "to be a sham corporation, the primary purpose of which was provide a putative legal basis under exemptions in the ordinance for 'membership associations' and 'private social functions' to enable patrons of Toledo bars and restaurants to smoke." The court explained:²⁹

Plaintiff organization is not small in size: for several weeks before the injunction issued, all the patrons at thirty-five bars and restaurants were "members." There is nothing "selective" about becoming a member: all that is required is payment of the one dollar lifetime "membership fee."

The real purpose of Taverns for Tots is to evade Toledo's anti-smoking ordinance under the guise of raising money for needy children.... This is not the kind of intimate associational activity that either enjoys or deserves protection under the First Amendment.

On the other hand, in contrast to these non-intimate organizations, it is evident that the description of the private clubs in *Louisiana* could readily have been about the Eagles:³⁰

Relatively small in size, they seek to maintain an atmosphere in which their members can enjoy the comradery and congeniality of one another. Employing very restrictive guest and admission policies, they seek to remain isolated....

²⁸ *Taverns for Tots, Inc. v. City of Toledo*, 341 F.Supp.2d 844, 848 (N.D. Ohio 2004)

²⁹ *Id.* at 850 (footnote and citation omitted).

³⁰ *Louisiana* at 1497, contrasting the Clubs in the case there to the plaintiff clubs in *Roberts v. Jaycees*, 468 U.S. 609 (1984); and in *Rotary Club*.

The Eagles contend that the same conclusion that was drawn in *Louisiana* should be made with respect to them.³¹

We conclude...that the Clubs constitute organizations whose location on the spectrum of personal attachments places them near those that are "most intimate." Accordingly, they enjoy the fullest protection of their right of private association.

The question then before the court is "what are the contours or limits of that protection?"

3. The Smoking Ban Violates Eagles' Free Association Rights

The CBJ's smoking ban has far-reaching consequences for members of the Eagles. In a club where an estimated 85% of the members are smokers (Exc. 024), prohibiting one of the most universally enjoyed activities is tantamount to telling members to "go elsewhere." Members have enjoyed gathering at the club and sharing activities, including smoking, in some cases for decades. The club provides a relaxed, intimate place for members to meet, drink, socialize, play various games, and, yes, smoke a cigarette or two. The Aerie Home is considered an extension of members' personal residences; they have an expectation that they can enjoy their personal freedoms as if they were at home. That includes enjoying a cigarette if that is their personal choice. The expectation has been developed and affirmed over the years, and by unanimous vote, the active members re-affirmed the expectation when they adopted the House Rule permitting smoking in April 2008. Exc. 025. By intruding upon those personal choices and regulating what types of

³¹ *Louisiana* at 1497-1498

legal behaviors are or are not acceptable, the city is burdening a fundamental right, interfering with how, when, and where club members choose to partake of their intimate associations. The Eagles submit this is very much akin to interfering with family living arrangements.

The Eagles reject the argument that although the ordinance restricts where a person may smoke it does not unduly interfere with smokers' right to associate freely with whomever they choose. It ignores the realities of Alaska's inclement weather as well as the social atmosphere in the Aerie.

Such an argument was raised in *CLASH, Inc. v. City of New York*³². In that case, the court rejected the plaintiffs' argument that smoking was part and parcel of the smokers' First Amendment Rights. However, that case can be distinguished from the facts here since in *CLASH* the claimed associational rights were being exercised in public restaurants and bars. In this case the right of association is in a private members club setting which, the Eagles submit, makes all the difference in the world.

Presenting a similar contrast, *Players Inc. v. City of New York*³³, stated that to conclude that a club's associational rights were unconstitutionally infringed by no longer allowing indoor smoking would be "to embellish the First Amendment with extra-constitutional protection for any ancillary practice adherents seek to entwine around

³² *CLASH, Inc. v. City of New York*, 315 F. Supp.2d 461, 474 (S.D.N.Y. 2004)

³³ *Players. Inc. v. City of New York*, 371 F. Supp. 2d 522, 545 (S.D.N.Y. 2005)

fundamental freedoms, as a consequence of which government's power to regulate socially or physically harmful activities may be unduly curtailed." However, that conclusion also incorrectly transposes the reasoning from a case concerning associational rights in public and applies it to a private club setting. Of utmost concern, it elevates governmental power above personal autonomy based on mere speculation that government's ability to regulate "may be curtailed." Further, it disregards the cogent assessment in *Louisiana*³⁴ that "associational rights ... can be abridged even by government actions that do not directly restrict individuals' ability to associate freely." This court is now asked to adopt a standard which strikes a proper balance between personal autonomy and actual demonstrated (as opposed to speculative) government interests. This requires not a reflexive acceptance of the government's asserted rationale for infringing the Eagles personal freedoms, but a serious look at the proffered health and welfare justifications. As the court emphasized in *Louisiana*.³⁵

[A]ssociational rights are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference ... and ... can be abridged even by government actions that do not directly restrict individuals' ability to associate freely.

A right to associate freely does not exist in a vacuum; it is only meaningful if it is understood and protected in the context in which it is exercised. A right to associate with

³⁴ *Louisiana at 1498* (quotation marks and citations omitted) (emphasis added).

³⁵ *Id.* (quotation marks and citations omitted) (emphasis added).

whomever one chooses cannot be truly free if one is prohibited from engaging in legal activities that are directly and closely connected with that intimate association.

4. No Sufficient Justification Supports This Smoking Ban

The constitutional right of private, intimate association is fundamental³⁶, but not absolute.³⁷ Under the strict scrutiny analysis, this right may be impinged upon only if the city can demonstrate that the action furthers a compelling governmental interest, and that no means "significantly less restrictive of ... associational freedom" are available to promote that goal.³⁸

Neither of these criteria is met here. First, a ban on smoking among consenting adults in an entirely private situation does not promote the health of the general public, since no members of the general public are present to be harmed. Second, the goal of promoting public health can be achieved by a much less restrictive alternative - banning smoking where members of the general public may be present.

A. No Compelling Governmental Interest

It appears that the city's ostensible overriding concern in passing the ban was to protect the general public and employees from second-hand smoke. Certainly, there is a strong government interest in the broad goal of protecting public health. However, that

³⁶ *Roberts at 617-620*

³⁷ *Louisiana at 1498.*

³⁸ *Id.*

interest does not automatically trump the individual's interest in free, intimate association, just because the government says so. Here, the ban as applied to private clubs such as the Eagles does not do anything to promote the city's interest in public health. For instance, the CBJ has provided no evidence that prohibiting individual Eagles from smoking during the few hours when they are in the Aerie is going to cause them to quit smoking. Nor is there any evidence that forcing Eagles to go outside behind the club to smoke is going to have any impact whatsoever on their, or the general public's, tobacco-related behavior. There is no evidence that this narrow discriminatory ban is going to impact the cost or availability of healthcare to the public generally; or that it will cause anyone to quit smoking or smoke less. There simply is no demonstrated nexus between public health and whether the Eagles are able to smoke inside the Aerie. In short, the CBJ is not regulating public health; it is trying to make health decisions for private individuals in a purely private setting. In reality, all it accomplishes is to harass and annoy law abiding citizens who are seeking to relax and socialize in their private club.

In addition to its ostensible public health goal, the CBJ attempts to support this ban with a second totally unpersuasive justification: to "ensure a 'level playing field' in the competitive restaurant and bar economy. According to the city attorney, one purpose of the ban was to "close any gaps in the [previous] smoking ban ordinance so as to clearly prohibit smoking in all places where either alcoholic beverages or food are offered for sale." It intended that the ban specifically should include private clubs so as to "ensure a 'level

playing field." Exc. 001. This rationale amounts to a decision by the city that for-profit corporations are entitled to more profit, while charities supported by the Eagles are entitled to less support. In other words, the city seeks to protect public bars from some speculative competitive disadvantage. Not only is there no factual support for this speculation, but deciding who should have a competitive advantage or disadvantage -- and attempting to foster that - is not a compelling city interest. It is certainly not sufficient justification for the city to intrude on the intimate associational rights of the Eagles.

There is no evidence in the record that supports the CBJ's assumption that smoking in private clubs harms commercial restaurants or bars. Rather, the assumption appears to be based on nothing more than the self-serving testimony of bar owners who "expressed concern" Exc. 001. The assumption is not logical because it does not take into account the Eagles' restrictive membership policies, small active membership, and the decidedly privacy-based motivation for Eagles membership. For example, the Eagles is nothing like the organization described in *Taverns for Tots*³⁹, whose purpose was "to evade [an] anti-smoking ordinance" and whose "members" included "all the patrons at thirty-five bars and restaurants," who had joined upon "payment of the one dollar lifetime 'membership fee.'"

There is no credible argument that the Aerie does enough business to impact public establishments. They do not serve food so they cannot impact restaurants. The active

³⁹ *Tavern for Tots* at ____.

Eagles membership is less than 50 members. There is no showing in the record that members of the Eagles would patronize public bars if smoking were allowed there, or that they stay away from public bars because smoking is banned there. Rather, the evidence is that they are loyal Eagles bound together by common interests and rituals, and that they would go to the Eagles Aerie regardless of whether smoking was legal in public bars or not. Further, there is no study showing what the impact of a small number of additional customers spread out over all the bars in town would be, but basic common sense says it is nil. Indeed, the very notion of head-to-head competition is a false construct. The Fraternal Order of Eagles is a private non-profit corporation. All of its profits, if any, go to charity, which is a key motivation of Eagles members. They have no comparable motivation to patronize for-profit public bars. The reasons that people patronize one or the other are entirely different, which negates any claim that the bars will suffer economically if the ban on private clubs is rescinded.

There is no compelling governmental interest fostered by a ban on smoking by consenting adults in a totally private situation. Thus, the first step of the strict scrutiny test⁴⁰ provides no support for an action by the CBJ that impinges on the Eagles' right to intimate association.

B. Not the "Least Restrictive" Alternative

The smoking ban also fails under the second step of the analysis, whether the

⁴⁰*Louisiana at 1498.*

compelling governmental interest can "be achieved through means significantly less restrictive of one's associational freedom."⁴¹ Putting aside the fact that there is no compelling interest underlying the smoking ban in question here (because it does not implicate the health of the general public), there certainly are less restrictive ways the city could provide protection for public health.

In fact, the overbroad reach of the ban demonstrates that not only is it not the least restrictive way to promote public health, but that the city has unjustifiably singled out private clubs (and the Eagles in particular) for harsher treatment than other private entities, such as certain private businesses. The ordinance prohibits smoking in "enclosed public places"⁴² ("Bars, private clubs, and any other enclosed place, where alcoholic beverages are sold, or food is offered for sale")⁴³. It also singles out those "private clubs that are licensed by the State of Alaska to sell alcoholic beverages, or that offer food for sale, regardless of the number of employees."⁴⁴ Both of these prohibitory sections apply to the Aerie Home.

However, the ordinance also lists areas where smoking is not prohibited. These include: "Places of employment with a total of four or fewer employees, *provided that this*

⁴¹ Id.

⁴² CBJ Ordinance 36.60.010(a)(1).

⁴³ CBJ Ordinance 36.60.005(16)

⁴⁴ CBJ Ordinance 36.60.010(a)(6)

exception does not apply to a place of employment that is an enclosed public place or a private club."⁴⁵ Significantly, the definition of "private club" does not restrict this category to clubs that sell alcohol or food.⁴⁶ Exc. 006. Thus, any private club that has any number of employees is subject to the smoking ban, regardless of whether or not it sells alcohol or food.

The city cannot justify treating private clubs even more harshly than other similarly situated businesses. For instance, private businesses that have three employees are not subject to the ban. This is true even if, unlike the Eagles, their employees do not consent to smoke exposure. There is no justification for forcing second-hand smoke on three non-consenting employees while enforcing a total ban on the Eagles regardless of the number of employees, and regardless of whether they consent by virtue of their membership in the organization. Even more egregious is the fact that the ordinance may have targeted the Eagles specifically; at least the Eagles are the only organization mentioned by name in the City Attorney's memorandum of justification for the ordinance. Exc. 001. This uneven and overbroad ordinance is simply not narrowly tailored to advance the city's interest in protecting public health - that could be achieved by addressing smoking in public places.

Not all smoking ordinances suffer from this over-reaching. Evidencing the less intrusive approaches used in other Alaskan communities, none of the smoking ordinances

⁴⁵ CBJ Ordinance 36.60.030(a)(2) (emphasis added)

⁴⁶ CBJ Ordinance 36.60.005(16)

in Soldotna, Kenai, or Sitka imposes a total ban on smoking in a private clubs such as the Eagles' Aerie. Soldotna prohibits smoking only in eating establishments⁴⁷. Kenai prohibits smoking only in eating establishments and bowling alleys.⁴⁸ Sitka's code contains a specific exemption from its smoking ban for bars and private clubs (including a specific list of exempt fraternal organizations such as the Eagles).⁴⁹

Precedent from other jurisdictions also shows that when considering the permissible scope of anti-smoking legislation a distinction can be drawn between public commercial restaurants and bars, and truly private members clubs. Drawing that distinction is important in ensuring that the intrusion into constitutional rights is minimal.

In a statutory construction case the Connecticut Supreme Court concluded that because private clubs hold a different legal status from restaurants and cafes, and because "members possess an expectation of privacy and control over their club," there was a basis for the legislature to determine that established private clubs should be treated differently from restaurants, cafes and other public facilities. The court found that they should be exempted from smoking ban legislation.⁵⁰ In Wisconsin, a court held that a smoking ban

⁴⁷ Soldotna Municipal Code 8.20.020

⁴⁸ Kenai Municipal Code 12.40.030

⁴⁹ Sitka General Code 9.20.030 (G) and (H).

⁵⁰ *Batte-Holmgren v. Commissioner of Public Health*, 914 A.2d 996 (Conn. 2007)

in public places that does not apply to private clubs does not violate equal protection.⁵¹ An ordinance banning smoking in Kentucky was interpreted as exempting the facilities of private organizations, even if the public is invited inside occasionally⁵². A court in Ohio made a similar determination upholding a similar municipal ordinance, noting: "The classification between public and private clubs is not arbitrary or invidious, but is a reasonable distinction made in the furtherance of promoting public health"⁵³ (emphasis added).

The federal district court in Ohio denied a vagueness challenge to an ordinance prohibiting smoking in "places of public accommodations," where the ordinance contained an exception for "membership associations" and "private social functions."⁵⁴ The court pointed out that the "stated legislative purpose of the ordinance is 'to further restrict smoking in public places.'"⁵⁵ It went on to discuss the exception for "private social functions," explaining:⁵⁶

The word "private," as used in the ordinance means the opposite of "public." Arguably, the type of function is irrelevant; whether the function is a wedding

⁵¹ *City of Wausau v. Jusufi*, 763 N.W.2d 201 (Wis. App. 2009)

⁵² *Lafayette Football Boosters, Inc. v. Com.*, 232 S.W.3d 550 (Ky.App. 2007)

⁵³ *Traditions Tavern v. Columbus*, 870 N.E.2d 1197, 1206 (Ohio App. 2006)

⁵⁴ *Taverns for Tots, Inc. v. City of Toledo*, 341 F.Supp.2d 844, 848 n. 1 (N.D. Ohio 2004)

⁵⁵ *Id.* at 586

⁵⁶ *Id.* at 587

reception, a graduation celebration, or a meeting of a common interest group, the event may only be exempted from the ordinance provided the event is private (i.e., under the control of the sponsor and is not held open to the general public).

When considering a preliminary injunction, a federal district court in Texas evaluated an ordinance that was unclear whether it applied to private clubs.⁵⁷ The court said that if it did, it might well be unconstitutional.⁵⁸

All of these cases make the assumption that private places merit exception from smoking bans designed for the general public. Here, if the city had tailored its ordinance to fit its presumed purpose - protecting public health - it could have provided for a "private club" or "private function" exception that would still prevent exposure of non-consenting members of the public to unwanted smoke. That ordinance would meet the "least restrictive alternative" requirement by protecting the health of the general public without trampling on the rights to private, intimate association the Eagles exercise in the Aerie Home.

5. Summary

The United States Constitution protects the right to free association. CBJ's restriction on smoking legal tobacco in private club facilities such as the Eagles' Aerie violates that right. There is no legally sufficient justification for impinging on the Eagles' decision, as a group of consenting adults, to allow smoking in the Aerie when only members are present. The general public is not affected by the Eagles smoking in their

⁵⁷ *Houston Ass'n of Alcoholic v. City of Houston*, 508 F.Supp.2d 576, 581 (S.D. Tex. 2007)

⁵⁸ *Id.* at 585

private space, and thus there is no relationship between the ban and any promotion of the public good.

This court should hold that the CBJ's ordinance banning smoking in private clubs where only members are present is invalid as a violation of the Eagles' right to free association. To parallel the reasoning in *Louisiana*, it may be true that people should not, without their consent, be subject to second-hand smoke in public places. And whether it is a good thing for consenting adults in private clubs to choose to smoke may be debatable. "But, the Constitution trumps"; the Eagles have a right of private association under the First Amendment with which this city ordinance interferes impermissibly.

D. Privacy⁵⁹

The privacy question presented here has not been addressed before by this court. Do adults, as part of their personal autonomy, have the right to ingest a legal substance -- tobacco -- in a private club facility, where only members of the club are ever present when smoking occurs?

The Eagles firmly believe that they do have that right, under the Alaska Constitution and the privacy principles articulated in *Ravin v. State of Alaska*⁶⁰.

⁵⁹ It is sadly ironic, but fitting that this brief is being completed two days after Irwin Ravin's death. <http://www.adn.com/2010/04/12/1223213/attorney-who-forced-marijuana.html>

⁶⁰ *Ravin v. State of Alaska*, 537 P.2d 494 (Alaska 1975)

1. Constitutional Underpinnings of Privacy Rights in Alaska

Alaska protects the privacy of its citizens more vigorously than perhaps any other state. Article 1, section 22 of the Alaska Constitution (added by voter initiative in 1972) states that the "right of the people to privacy is recognized and shall not be infringed." Article 1, section 1, provides that "all persons have a natural right to life, liberty, [and] the pursuit of happiness."

This court articulated the bedrock underpinnings of personal autonomy when it said "at the core of this concept [of liberty] is the notion of total personal immunity from governmental control: the right 'to be let alone.'"⁶¹ The "right 'to be let alone'" is at the top of the pantheon of rights protected by our Constitution:⁶²

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."

This fundamental protection is stronger than privacy guaranties found in the United

⁶¹ *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972)

⁶¹ *Id.* at 168 (citing *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). This interpretation of "liberty" was amplified in *Oloff v. East Side Union High School Dist.*, 404, U.S. 1042, 1144 (1972): "The word 'liberty' is not defined in the Constitution. But...it includes at least the fundamental rights 'retained by the people'...One's hair style, like one's taste for food, or one's liking for certain kinds of music, art, reading, recreation, is certainly fundamental in our constitutional scheme - a scheme designed to keep government off the backs of people."

States Constitution⁶³ :

Alaska's guaranty of privacy is broader than the protection found in the federal constitution, which contains no express privacy provision. "Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that the right is broader in scope than that of the Federal Constitution."

This court has a long and proud history of providing expansive protection for individual rights under Alaska's Constitution. In no area has this been truer than with respect to an individual's right to privacy: that is, the right to make intensely personal decisions free from unwarranted government interference. *Ravin* is the key case laying out what this protection means. There, the court explained the importance of personal autonomy to Alaskans.⁶⁴

Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.

As will be shown below, if the state seeks to restrict an activity, under *Ravin* the relevant inquiries revolve around (a) the place the activity occurs, (b) what kind of activity is involved, (c) whether the health and welfare of the general public is implicated, and (d) whether the restriction bears a sufficient relationship to promoting the public good.

⁶³ *Anchorage Police Department Employee's Association v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001) (quoting and citing *Ravin*, 537 P.2d at 514-15 (Alaska 1975)).

⁶⁴ *Ravin*, 537 P.2d at 504

2. The Place the Activity Occurs

First, regarding where the activity in question occurs, *Ravin* does not set up a dichotomy between "homes" and "everywhere else." Rather, it speaks of "the relevancy of where the right [to privacy] is exercised,"⁶⁵ and of a spectrum of locations: "At one end of the scale of the scope of the right to privacy is possession or ingestion in the individual's home."⁶⁶

Two Justices of the *Ravin* court wrote separately to emphasize this point. Justices Boochever and Connor, in concurring opinions, both made clear that the right of privacy may have its situs anywhere. Justice Connor put it this way:⁶⁷

It is certain that the right to privacy does not vanish when one leaves the home. There are certain aspects of personal autonomy which one carries with him even when he ventures out of the home, though the claim to privacy diminishes in proportion to the extent that one's person and activities impinge upon other persons.

The inquiry here, then, is not whether the Eagles Aerie is a home. Rather, it is whether smoking by Eagles which occurs entirely in the presence of other consenting adults impermissibly impinges on other persons. For reasons which will be discussed below, it does not.

As set out extensively in the fact section, the Eagles' private facility (the Aerie

⁶⁵ *Id.* at 502-503 (emphasis added).

⁶⁶ *Id.* (emphasis added).

⁶⁷ *Id.* at 516 (*Connor, J. concurring*)

Home) has many attributes of a home, and is viewed by the members as a place of comfort and of relaxation, very much akin to a home. It is not a place where people other than members can gather, except on particular charitable occasions each year (occasions where the Eagles do not allow smoking by members or non-members). In this it is also much like a home, where only very occasionally are guests invited, and where at all other times the Eagles can rest in the assurance that only members will be present, members who have demonstrated common values and agreed jointly to what constitutes acceptable behavior - including smoking tobacco.

That Eagles consider the Aerie to be an extension of their homes is not only the members' feelings about the matter, but is expressly mandated in the organization's organic documents. In its Decision below, the trial court dismissively drew the following analogy: "Calling the Eagles lodge the 'Aerie Home' does not make it the members' home any more than the Home Depot is a railroad station." Exc. 039. The trial court, of course, was setting up a straw man to knock down; the Eagles have never argued that the Aerie is their home. What they have pointed out is that they consider it (indeed, are required by their rules to treat it as) an extension of their homes. Factually, this is not just a written rule, but a guiding moral principle that speaks to how members wish to be treated, and how they promise to treat each other. It is, so to speak, the "Golden Rule" for Eagles members. To the extent that the Aerie shares characteristics of a home, privacy protection attaches.

What does this mean for privacy analysis? It should have engendered some serious

discussion by the court below of the place that the Aerie Home has in the social lives of its members, and perhaps some thoughtful consideration of the dignity that should be afforded to the members aspirations about how they want to treat each other. Instead, the trial court avoided a central issue in the case, which is whether a private club merits privacy protections, by using a clever rhetorical flourish.

The *Ravin* case did not confine its analysis to privacy in the home, and this court has not hesitated to find privacy protection in many other settings. For instance, in *State v. Planned Parenthood of Alaska*⁶⁸, striking down a parental consent law, the court applied privacy protections to the decision of teenage girls to have an abortion over parental objections (a decision which necessarily occurs outside the home). And in *Valley Hospital Assoc. v. Mat-Su Coalition*⁶⁹, the court applied a *Ravin*-based analysis to reproductive choices of women concerning services offered in a publicly funded hospital. The court's decision in *Anchorage Police Department Employee's Association v. Municipality of Anchorage*⁷⁰, while decided on search and seizure grounds, discussed the right of privacy in the workplace while striking down a mandatory drug-testing program for police officers. Even before *Ravin* and before the voters adopted a Constitutional right to privacy, in *Breese*

⁶⁸ *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007)

⁶⁹ *Valley Hospital Assoc. v. Mat-Su Coalition*, 948 P.2d 963 (Alaska 1997)

⁷⁰ *Anchorage Police Department Employees Association v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001)

*v. Smith*⁷¹ this court found that "the right to be left alone" under the Alaskan Constitutional protected a student's choice about hair length - not only in the home but in public schools as well.⁷²

An Alaska case about illegal gambling in a public bar helps establish the contours of the privacy issue raised by this case. In *McKenzie v. Municipality of Anchorage*⁷³, the Court of Appeals considered whether "a person has a privacy right which would allow him to gamble socially" in a public bar. The court found that there is no "reasonable expectation of privacy in conducting a gambling operation in a public bar."⁷⁴ It also found that the city had "a right to regulate gambling activity much as it has a right to regulate massage parlors and prostitution. It may be that the municipality cannot constitutionally regulate gambling activities such as a small social bet in the privacy of one's home," (emphasis added) but the "gambling involved in this case was not social betting."⁷⁵ There are significant lessons to be learned in relation to the Eagles' situation. First, in *McKenzie*, the activity in question was held to fall outside privacy considerations because it was conducted in a public bar - a venue quite different from a private club such as the Eagles' Aerie. Second, the court

⁷¹ *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972)

⁷² *Id.*

⁷³ *McKenzie v. Municipality of Anchorage*, 631 P.2d 514 (Alaska App. 1981)

⁷⁴ *Id.* at 518

⁷⁵ *Id.* at 518

acknowledged that the gambling would very likely have been protected by privacy considerations if it had amounted to "social betting" of the sort that would occur in a person's home. Smoking by Eagles, in their private facility, is much more akin to what the Court of Appeals would have classified as "social betting" than to gambling in a public bar.

As noted, in Alaska the constitutional privacy inquiry has not drawn a bright line between "home" and "places other than home." For example, in *Harrison v. State*⁷⁶, the Court of Appeals examined a prohibition on bringing alcohol into a community through the lens of privacy protection. The court conducted a *Ravin* analysis even though it noted that "the right to consume alcohol in the home is not directly at issue in this case."⁷⁷ It explained that the statute at issue there "merely prohibits a person from ... bringing alcoholic beverages into the community. It does not prohibit the use of alcoholic beverages in the home."⁷⁸ However, the court concluded that because "the privacy amendment of the Alaska Constitution clearly 'shields the ingestion of food, beverages or other substances,' ... we must more closely examine the right to privacy asserted in this case."⁷⁹

The court's subsequent analysis acknowledged that a ban on bringing alcohol into the community of St. Mary's could impact the "consumption of alcoholic beverages in the

⁷⁶ *Harrison v. State*, 687 P.2d 332 (Alaska App. 1984)

⁷⁷ *Id.* at 338

⁷⁸ *Id.* at 338

⁷⁹ *Id.* at 338.

home," which, "while not a fundamental right, touches on a privacy interest that is 'more squarely within personal autonomy.'"⁸⁰ It proceeded to apply the *Ravin* balancing test to the prohibition on bringing alcohol into the community -- ultimately not deciding the issue of consumption in the home, since the prohibition was community-wide. The Eagles here urge this court to extend Alaska's Constitutional privacy protection to their private space, which is more analogous to their homes than was the community at large looked at by *Harrison*.

This court has not had occasion to rule upon whether the right of privacy for smoking activities extends to private spaces such as the Eagles Aerie, which, while not a family home, has many of the same attributes. Based on the court's expansive view of personal liberty, the Eagles submit that it should afford protection to the Aerie Home on these facts.

3. The Kind of Activity Involved

It is important to the privacy analysis that the kind of activity the city seeks to restrict here is perfectly legal: adults smoking tobacco in the company of other adults who have chosen to be present. Not only is it legal, but it falls under Alaska's privacy protections. As explained in *Ravin*, "the right of privacy amendment of the Alaska Constitution 'clearly . . . shields the ingestion of food, beverages or other substances.'"⁸¹

It is notable that at the time of the *Ravin* decision, marijuana possession was illegal

⁸⁰ *Id.* at ____.

⁸¹ *Ravin* at 502.

in all respects. Since Alaska's privacy rights extend to the possession and smoking of an illegal substance like marijuana, privacy protection clearly would extend to smoking a legal substance like tobacco.

In *Harrison* the Court of Appeals explained that because "the privacy amendment of the Alaska Constitution clearly 'shields the ingestion of food, beverages or other substances, "' it needed to "more closely examine the right to privacy asserted" in a case involving restrictions on alcohol⁸². It also noted that "consumption of alcoholic beverages in the home," "touches on a privacy interest that is 'more squarely within personal autonomy.'"⁸³ So too does consumption of legal tobacco smoke in a private place by adults in the company of other adults who have chosen to be there.

This court has repeatedly affirmed that ingestion of substances into a person's body falls into the category of personal autonomy, and calls for a rigorous privacy analysis. *Gray v. State*⁸⁴ noted that the Constitutional privacy amendment "clearly ... shields the ingestion of food, beverages or other substances." This acknowledgment was quoted with approval in *Anchorage Police Department Employees Association v. Municipality of Anchorage*⁸⁵ in striking down the intimate intrusion of mandatory drug testing. This court has reinforced

⁸² *Harrison*, 687 P.2d at 338.

⁸³ *Id.* at 338.

⁸⁴ *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974)

⁸⁵ *Anchorage Police Department Employees Association v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001)

this right in the context of psychiatric treatment, noting "that 'few things [are] more personal than one's own body,' and ... held that Alaska's constitutional right to privacy 'clearly . . . shields the ingestion of food, beverages or other substances.'"⁸⁶ Even while rejecting a privacy right to use cocaine at home, this court in *Erickson* acknowledged "the right to ingest a particular substance" as being a key part of the privacy analysis.⁸⁷

Here, the Eagles choose to exercise their personal autonomy as Alaskan adults by ingesting legal tobacco smoke in a private facility in the company of other adults who have chosen to be there. This clearly calls for the application of full privacy analysis under Alaska's Constitution.

4. Public Health and Welfare Implications

The defects in the CBJ's proffered public health rationale have been fully discussed in regard to the right of association argument. The analysis here is similar. Under *Ravin*, privacy rights for personal ingestion " may be held to be subordinate to public health and welfare measures."⁸⁸ Thus the question arises whether the city's smoking ban amounts to a legitimate "public health and welfare" measure. If it does not - and it does not, any more than banning the smoking of marijuana in the home did - there is nothing to which the right to legally smoke tobacco must be subordinate.

⁸⁶ *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 246 (AK 2006)

⁸⁷ *State v. Erickson*, 574 P.2d 1, 22 n 144 (Alaska 1978)

⁸⁸ *Ravin*, 537 P.2d at 504.

As discussed above, in *Harrison v. State*⁸⁹ the Court of Appeals was addressing a restriction that impinged indirectly on drinking alcohol in homes even though the actual prohibition was community-wide. The court explained that when restricting "a privacy interest that is '... squarely within personal autonomy'" the state "bears a heavy burden of justifying the regulation as a legitimate health and welfare measure."⁹⁰ This is in accord with *Ravin*, which held that protection for personal ingestion may be limited by the legitimate needs of the State to protect the health and welfare of its citizens.

Ravin explained that the right to autonomy through personal ingestion:

must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.

In the Eagles situation, the public is not affected, "directly or indirectly," by the conduct prohibited by the city. The required "legitimate health and welfare" justification for the ban is totally lacking. The public is simply not impacted by smoking in the Aerie. The only people exposed to smoking in the Aerie are adult members who have consented to this and who view it as part of the home-like atmosphere of their facility.

To put it another way, allowing smoking in the Aerie does not harm the public's health or welfare, because only members (who consent to the smoking when they become

⁸⁹ *Harrison v. State*, 687 P.2d 332 (Alaska App. 1984)

⁹⁰ *Id.* at 338

Eagles) are physically present in the Aerie when smoking is allowed there. That contrasts with, say, smoking in a public bar or restaurant or airplane or government office, where the public (some of whom may not wish to be near smokers) may be present. Factually, it also contrasts with those small businesses with unconsenting employees where smoking is allowed under the ordinance.

This distinction provides a bright line to use when examining whether an ordinance or statute is a "a legitimate health and welfare measure." On one side of the line would be a broad smoking ban in places where the public may be found, such as bars and restaurants. Such a restriction would pass that part of the privacy test as being "a legitimate health and welfare measure" because it is targeted at preventing non-consensual exposure by members of the general public to second-hand smoke.

On the other side of the line - not being "a legitimate health and welfare measure" - would be a ban such as the one at issue here, that applies only to private and consenting adults engaging in a legal activity in a private setting. Since this restriction does not at all affect the general public, but only private people in a private place engaging in an otherwise private legal activity (smoking tobacco), there is no need to even go to the second part of the evaluation that looks at the means-to-ends relation.

5. Sufficient Means-to-Ends Relationship

If the means-to-ends relation of the city's smoking ban as it applies to the Eagles is examined, however, it is clear that there is not a sufficient relationship between the smoking

ban and the public good. As discussed above, the public is not affected by the activities of the Eagles in the Aerie Home.

This court explained in *Ravin* that part of the privacy analysis is to examine "whether the State has met the greater burden of showing a close and substantial relationship between" the government's ends and the means chosen⁹¹:

Indeed, one aspect of a private matter is that it is private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.

The converse also follows. When a matter does not affect the public, it retains its wholly private character, and cannot be made to yield.

The ban at issue here on smoking in private clubs only impacts individuals who are exercising their constitutionally protected autonomy, and does not impact the public at large. Thus, it is not sufficiently supported to be upheld under the test articulated by Alaska courts. Here the city has made -- and can make -- no showing this ban protects the public at large, and so the ordinance must fall.

6. Summary

The Eagles are not asking this court to step out on a slippery slope. The facts make this a simple case to decide that Alaska's Constitutional privacy protection applies to the Eagles Aerie Home. The activity takes place inside of a private club, which members

⁹¹ *Id.* at 504.

believe shares the distinctive nature of their homes. The activity falls fully under the umbrella of personal autonomy of Alaskan adults, which protects the ingestion of substances both legal and illegal. No member of the general public is affected by the Eagles smoking in Aerie, since no one but club members are allowed to be there when smoking is permitted. Finally, since no member of the general public is exposed to the Eagles engaging in this activity, there is no relationship between the ban and any promotion of the public good.

This court is asked to decide whether, in light of Alaska's strong constitutional protection for personal privacy and autonomy, the right to smoke legal tobacco extends to a private club facility, such as the Eagles' Aerie Home. Because Alaska is a place where adults are free to make personal health and lifestyle choices in private matters, particularly concerning what substances to put into their bodies, the answer must be yes.

V. CONCLUSION

At stake in this case is whether Alaska will remain a place where adults are free to make private personal decisions without interference by the government. The CBJ's ordinance is premised on the notion that government knows best how people should conduct their private lives, what activities they should be allowed to engage in, and what substances they should be allowed to ingest. The ordinance is fundamentally un-Alaskan. It tramples the Eagles' rights of free association, privacy, and personal autonomy, while providing no discernible benefit to the general public health or welfare. The court should

reverse the lower court, and hold the ordinance unconstitutional to the extent that it purports to regulate smoking by members of the Eagles within their private club.

Dated May 17, 2010 at Juneau, Alaska.

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