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

REPLY 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: August____, 2010

Filed in the Supreme Court
this _____ day of August, 2010
By:_____

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STATUTES, CIVIL RULES, REGULATIONS, and OTHER AUTHORITIES RELIED UPON

TEXT

AS 11.41.120 (a) (2) Manslaughter.

(a) A person commits the crime of manslaughter if the person ... (2) intentionally aids another person to commit suicide; or

ARGUMENT

I. THE SMOKING CASES CBJ CITES ARE NOT APROPOS

The CBJ makes the sweeping statement that "Challenges to smoking bans on the grounds that they violate the freedom of association have been rejected by courts all over the country."[1] By and large, the citations do not apply because they are factually unlike this case. For example, *Players*[2] involves a smoking ban in places already subject to comprehensive and regular government inspection under extensive food service regulations. The Eagles do not offer food for sale, and are not subject to such inspections or regulations[3].

Similarly, *Cabell-Huntington*[4] involved "establishments that are subject to regular inspections for other purposes deemed necessary for the safety and health of the public, such as inspections for the cleanliness of kitchens and the proper handling of food sold on the premises." The bars at issue there had only been "legislatively designated private rather than public places" for purposes of the state's alcohol laws, not pursuant to any analysis of freedom of association or privacy.[5] Significantly, the *Cabell-Huntington* court explained:[6]

> The key here is whether a particular [location] is truly private. Where members of the public--including employees--are compelled to enter for the conduct of business or

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[1] CBJ brief, page 11.

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

[3] Exc. 025; Brief of Appellees at 11; 20; 29; 38; 43.

[4] *Foundation For Independent Living, Inc. v. The Cabell-Huntington Bd. of Health*, 591 S.E.2d 744, 755 (W.Va. 2003).

[5] *Id.*

[6] *Id.* at 754 (emphasis added).

> the performance of duties of employment, we have no difficulty in finding that [an] area is indeed an enclosed public area to which a clean indoor air regulation may be applied. Likewise we recognize that a truly and exclusively private office, like one's own home, is beyond the scope of such a regulation. (emphasis added)

It is important to note that the court's privacy analysis was not limited to the home, but is applied to private settings outside the home. With regard to the Eagle's Aerie Home, where only Eagles are admitted and no members of the public "are compelled to enter for the conduct of business,"[7] it is quite probable the *Cabell-Huntington* court would have struck down a smoking ban on privacy grounds.

Other cases relate to smoking in places of public accommodation like commercial restaurants and bars. For example, *C.L.A.S.H*,[8] *Tucson*[9], and *Taverns for Tots*[10] all involved attempts to ban smoking in commercial restaurants and bars that are open to the general public. In fact, *Taverns for Tots* actually supports the Eagles here, as the law upheld in that case contained an explicit exception for private clubs.[11]

This case is not about smoking in a commercial bar or restaurant. While CBJ repeatedly characterizes the Aerie Home as a "bar," it is not that. It is a private club. It is unnecessary to argue whether the CBJ may validly regulate smoking in places where the public might encounter tobacco smoke as a condition of patronizing a public eating or drinking establishment. Cases standing for that proposition do not advance the CBJ's

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[7] Exc. 215 – 221.
[8] *CLASH, Inc. v. City of New York,* 315 F. Supp.2d 461, 474 (S.D.N.Y. 2004).
[9] *Tucson. v. Grezaffi,* 23 P. 3d 675 (Ariz. Ct. App. 2001).
[10] *Taverns Tots, Inc. v. City of Toledo*, 341 F.Supp.2d 844 (N.D. Ohio 2004).
[11] *Id.* at 856 - 857.

cause, and may actually hurt it. Here, a very different analysis applies to the private space of the Aerie Home because the members have affirmatively chosen to socialize in a smoking environment by virtue of their acceptance of membership under the rules that govern this private setting.

Only two cases cited by the CBJ actually stand for the proposition that privacy analysis does not protect members' activities in a private club.[12] The Eagles submit that *American Lithuanian* and *American Legion* are unacceptably restrictive of privacy. Significantly, those cases did not directly address the argument that is central to this appeal, which is the right of the individual to absolute control over his or her body, including decisions about what legal substances to consume. Given the overwhelming importance placed on personal autonomy by the Alaska court, the Eagles submit that the better reasoned approach is one suggested here: personal autonomy in Alaska includes the right of individuals in a private club setting to consume tobacco.

II. EAGLES AERIE 4200 IS A QUALIFYING ASSOCIATION

The CBJ contends that Eagles Aerie 4200 is not a qualifying association under the criteria articulated by the United States Supreme Court[13] with respect to the scope of constitutional freedom of association protections. It supports its contention by selectively considering the facts of several cases, and ignoring those of others.

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[12] *American Lithuanian Naturalization Club v. Board of Heath of Athol*, 844 N.E. 2d 231 (Mass. 2006) ; *American Legion Post No. 149 v. Washington State Dep't of Health*, 192 P. 3d 306 (Wash. 2008).

[13] *Board of Directors of Rotary Intl v. Rotary Club of Duarte*, 481 U.S. 537, 486, (1987).

As described in detail in the Eagles' opening brief,[14] an examination and contrast of two cases, *Louisiana* and *Chi Iota,*[15] demonstrates why the Eagles association is entitled to qualify for these constitutional protections. Simply because other courts on other facts have found other associations not to qualify does not determine the outcome of this court's analysis of the facts here. Exc. 218

One example is *Tenino,* from Washington state.[16] The Washington Supreme Court held there that the national organization of the Eagles was not "distinctly private," a term of art key to an exception under Washington's state law against discrimination. One key factor considered by the lower court (and upheld by the decision) was overall membership size of the nationwide organization of the Eagles: "Local Aeries in Washington average over 600 members. The state aeries have over 66,000. Nationally or internationally, they are approaching a million to over a million."[17] Partly because of this, the court concluded that "the Fraternal Order of Eagles, almost a million strong across this country" is not 'distinctly private.'[18]

But this case does not involve "the Fraternal Order of Eagles, almost a million strong across this country." It calls for an examination of only the local Juneau Aerie Home. The

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[14] Eagles' opening brief, 18 – 21.
[15] *Louisiana Debating and Literary Association v. The City of New Orleans*, 42 F.3d. 1483 (5th Cir. 1995), cert. denied, 515 U.S. 1145 (1995) and *Chi Iota Colony, Fraternity v. City Univ. of N.Y.*, 502 F. 3d 136 (2nd Cir. 2007).
[16] *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P. 3d 655 (Wash. 2002) (en banc).
[17] *Id.* at 659, 671.
[18] *Id.* at 661, 671.

scale of membership described by the court in *Tenino* contrasts sharply and determinatively with the Juneau Aerie; at the time of filing of the Motion for Summary Judgment below, it had only 262 members (and 134 auxiliary members), with about 46 people providing the main base of support for the local Aerie. Exc. 218.

Another example the CBJ misuses is *Roberts,*[19] where the United States Supreme Court:

> found that two local chapters of the Jaycees, a nonprofit membership organization, lacked the characteristic of a distinctively private organization. In determining that Jaycees was neither small nor selective, the court considered that the two local chapters had 400 or more members; that apart from age and sex, they did not employ any criteria for judging applicants for membership; that members were routinely recruited and rarely denied membership; that although women were prohibited from voting and holding office, they attended meetings and participated in various organizational functions; and non-members of both genders regularly participated in activities, programs and recruitment meetings.[20]

The Jaycees organizations described by the court are significantly different from the local Juneau Aerie, where – as described in the Eagles' opening brief -- there are very specific criteria for membership, where membership is clearly selective, and where non-members are strictly excluded from club activities, except in a very limited and proscribed guest capacity.

A final example of a similar flawed CBJ contention is that *Rotary Club* [21]offers no support to the Eagles here. That case about the Rotary organization:

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[19] *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).
[20] *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P. 3d 655, 669. (Wash. 2002) (en banc) (emphasis added).
[21] *Board of Directors of Rotary Intl v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

> concluded that Rotary membership practices lacked the selectiveness necessary to claim constitutional protection as an organization based upon a private, intimate relationship. In determining that Rotary was public and not private in nature, the Court considered that club policy directed clubs to recruit a steady stream of prospects to offset attrition and to increase membership; that the purpose of Rotary was "'to produce an inclusive, not exclusive, membership,' providing the club with a cross section of the business and professional community; that service projects were undertaken to improve the standards of members' businesses and professions; and that meetings and functions were generally open to nonmembers. [22]

Again, this organization starkly differs from the Juneau Aerie. The Aerie's membership practices have been described to this court, and are not only selective, but also dependent on the approval of the existing members. The Aerie's goal is not to develop a large membership that is "a cross-section of the business and professional community," but instead to bring together like-minded, compatible adults who can comfortably socialize with each other. And the Aerie's meetings are not "generally open to nonmembers."

Contrary to the CBJ's assertions, the Juneau Aerie here is a qualifying association eligible for freedom of association protection.

III. ALASKA'S PRIVACY PROTECTIONS ARE UNIQUE, AND IN ALASKA, PERSONAL AUTONOMY IS A FUNDAMENTAL RIGHT

In discussing the privacy issue here the CBJ emphasizes two cases[23] that are simply not useful in evaluating the scope of Alaska's privacy protections with respect to this ordinance, *American Lithuanian* and *American Legion*[24].

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[22] *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P. 3d 655, 669-670. (Wash. 2002) (en banc) (emphasis added).

[23] CBJ brief, pages 34 - 37.

[24] *American Lithuanian Naturalization Club v. Board of Heath of Athol*, 844 N.E. 2d 231 (Mass. 2006) and *American Legion Post No. 149 v. Washington State Dep't of Health*, 192 P. 3d 306 (Wash. 2008)

American Lithuanian is a Massachusetts case. The analysis by the Supreme Court of Massachusetts is not instructive about how this court should rule on a similar ban. Unlike Alaska, the Massachusetts Constitution does not have an explicit privacy protection,[25] and neither does the United States Constitution. As this court explained in an analogous inquiry:[26]

> Although a number of other jurisdictions have considered the privacy issue as it applies to marijuana prosecutions, they provide little help in defining the scope of article I, section 22 of Alaska's constitution.

The Massachusetts case arises in a highly distinguishable legal context; the constitutional foundation on which the Alaska decision will rest is missing altogether.

American Legion is a Washington state case. It too arises under a constitutional framework that is less protective than Alaska's. The Washington Constitution provides in Article I, Section 7: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." (Emphasis added.) The closing caveat contrasts strikingly with the unlimited language of Article I, Section 22, of the Alaska Constitution: "The right of the people to privacy is recognized and shall not be infringed." (Emphasis added.)

Thus, the respective constitutional provisions of the two states distinguish *American Legion.* Indeed, this court has often made clear that it will chart its own course in these

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[25] An online search of the Massachusetts Constitution for the terms "private" and "privacy" identified no relevant provisions.

[26] *Ravin v. State of Alaska,* 537 P.2d 494, 501 (Alaska 1975).

matters. For example, it upheld the privacy right to smoke marijuana in one's own home, even though the state of Hawaii, "whose constitution also contains an express guarantee of the right to privacy," had not done so.[27]

The distinction between Washington's approach and Alaska's philosophy is all the more vivid when one contrasts the ways the two state supreme courts have discussed and applied their respective privacy provisions. In *American Legion,* the Washington Supreme Court determined that the state privacy provision offered no more protection to the facility in question there than the United States Constitution did. It noted: "the pivotal question is whether article I, section 7 provides greater protection than the federal constitution in the context of smoking inside a private facility."[28] It concluded: "The Post has not demonstrated that article I, section 7 provides greater protection in the context of smoking inside a private facility and, consequently, the Post's claim should be analyzed under the federal constitution's implicit right to privacy."[29]

In contrast, *Ravin* and all subsequent Alaska cases treat the Alaska Constitution's explicit privacy provision as offering broader protection than any implicit privacy guarantees in the United States Constitution. For example, this court noted that the "Supreme Court cases [it had examined] indicate ... that the federal right to privacy arises only in connection with other fundamental rights." [30] In examining Alaska's provision, the

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[27] *Ravin v. State of Alaska,* 537 P.2d 494, 501 (Alaska 1975).
[28] 192 P. 3d at 320.
[29] *Id.* at 321
[30] 537 P.2d at 500.

court held that while it "cannot be read so as to make the possession or ingestion of marijuana itself a fundamental right,"[31] it does, however, convey to Alaskans "a basic right to privacy in their homes [which] would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context."[32]

The issue of whether the ordinance at issue here runs afoul of Alaska's privacy protections has been thoroughly briefed by the parties. This court has set out the required framework for analyzing whether this ordinance unjustifiably tramples a fundamental right of the Eagles. This court has explicitly "recogniz[ed that there are] fundamental rights of personal autonomy implicit in our constitution".[33] The ingestion of substances into a person's own body in a private place exemplifies personal autonomy, as Alaskan courts have repeatedly held. [34]

CBJ cites the *Sampson* case as providing a limit on the scope of personal autonomy under a privacy analysis.[35] However careful reading of the decision shows that it does not help the CBJ's argument. The plaintiffs sought to establish a right to have the assistance of a physician to commit suicide. Consequently, the court examined the claimed right to assisted suicide in the context of the history of Alaska's manslaughter statute, AS 11.41.120

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[31] *Id* at 502.
[32] *Id* at 504.
[33] *Sampson v. State,* 31 P.3d 88, 94 (Alaska 2001); *Gray v. State,* 525 P.2d 524, 528 (Alaska 1974); *Anchorage Police Department Employees Association v. Municipality of Anchorage,* 24 P.3d 547, 550 (Alaska 2001); *Harrison v. State*, 687 P.2d 332, 338 (Alaska App. 1984).
[34] *Ravin v. State of Alaska,* 537 P.2d 494, 503 (Alaska 1975).
[35] *Sampson v. State,* 31 P.3d 88 (Alaska 2001)

(a) (2). It determined that assisted suicide was not a fundamental right, and as a result was able to conclude that the statute passed constitutional muster. However there are important distinctions from the Eagles case.

In *Sampson* the actor being constrained by the challenged law was a third party, the physician. The essence of the case was to prevent prosecution of any physician who assisted the plaintiffs to commit suicide. There is no prohibition on committing suicide; there is only a prohibition on helping someone commit suicide. In the case of assisted suicide, the law controls the conduct of a third party desiring to perform an act (providing lethal drugs) to the individual asserting the right. Here, the only actor is the individual who wishes to consume tobacco; no third party is involved. The Eagles assert that this fundamental difference distinguishes the two cases.

Further distinction is provided by the interest advanced by Alaska as a counterweight to the individual's autonomous choice to end life. The court found compelling the State's interest in protecting vulnerable individuals from being pressured into prematurely ending their lives; this interest was found to outweigh the claimed privacy interest. Here, there is no claim by the CBJ that any vulnerable group needs protection. The actors are competent adults making autonomous choices about what substances to consume, which is precisely the type of personal decision that this court has protected on numerous occasions.

IV. CONCLUSION

The Eagles ask this court to 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 August ____, 2010 at Juneau, Alaska.

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