

ALASKA SUPREME COURT
September 17, 2010—**Constitution Day**
Oral Argument Case Summary

CASE #1

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.
Supreme Court No. S-13748

***Disclaimer:** This summary of the case was prepared for educational purposes only by the Supreme Court LIVE program coordinator and does not reflect the views of any member of the court.*

ATTORNEYS

- *Attorneys for the Appellants [“Eagles”]:*

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- *Attorneys for Appellee [“CBJ”]:*

John W. Hartle, City Attorney, City and Borough of Juneau
- *Attorney for Amicus Curiae, American Cancer Society Cancer Action Network:*

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QUESTIONS PRESENTED ON APPEAL

- ✓ Does a CBJ ordinance banning smoking in private clubs, which prohibits smoking in the Eagles’ private club facility, violate the rights of Eagles members to freedom of association under the United States Constitution?
- ✓ Does the same CBJ ordinance violate the privacy rights of Eagles members under the Alaska Constitution?

MAJOR AUTHORITIES TO CONSIDER

U.S. Constitution, Amendment I—Freedom of Association

Alaska Constitution, Article 1, section 22—Right of Privacy

Alaska Constitution, Article X, section 11—Home Rule Powers

CBJ Ordinance 36.60.010(a)—Smoking prohibitions, Second-Hand Smoke Control Code

Roberts v. United States Jaycees, 468 U.S. 609 (1984)—U.S. Supreme Court decision on the right of association under the U.S. Constitution.

Ravin v. State of Alaska, 537 P.2d 494 (Alaska 1975)—Alaska Supreme Court decision on the right of privacy.

Norene v. Municipality of Anchorage, 704 P.2d 199 (Alaska 1985)—Alaska Supreme Court decision on local government powers.

SUMMARY OF THE CASE

In March 2008, CBJ adopted an ordinance that prohibits smoking in “[p]rivate clubs that are licensed to sell alcoholic beverages, or that offer food for sale...” The ordinance was one of several enacted since 2001 to address the health impacts of smoking and to protect non-smokers from second-hand smoke. The Eagles operate a private facility that is licensed by the state to sell alcohol and consequently falls under the smoking ban. The Eagles filed a lawsuit against CBJ in July 2008 challenging the constitutionality of the smoking ban. They claimed that governmental prohibition of smoking within the confines of their private facility violates their right to freedom of association under the U.S. Constitution and their privacy rights under the Alaska Constitution.

Summary Judgment. In most circumstances, parties to a lawsuit have the right to trial by a jury of their peers on the factual disputes in their case. The jury hears the testimony of witnesses and other evidence presented and renders a decision on what they believe occurred. However, sometimes a lawsuit can be resolved without a trial—an outcome known as “summary judgment.” To be granted summary judgment, the party seeking it (the “movant”) must demonstrate that there are no “genuine issues of material fact” in the case, and that it can be resolved as a matter of law. Because granting summary judgment prevents the non-moving party from having their day in court on the factual issues, the trial court must “draw all reasonable inferences of fact from the proffered materials *against* the movant and *in favor* of the non-moving party.”

The Eagles filed a motion for summary judgment on their constitutional claims--freedom of association under the U.S. Constitution and right of privacy under the Alaska Constitution. CBJ filed a cross-motion for summary judgment alleging that the Eagles' constitutional claims should fail. Both parties agreed that there were no genuine issues of material fact that would preclude summary judgment, and that the issues could be resolved as matters of law. In October 2009, Juneau Superior Court Judge Phillip M. Pallenberg issued a decision denying the Eagles' motion for summary judgment and granting CBJ's cross-motion. This appeal followed.

THE TRIAL COURT'S DECISION.

In denying the Eagles' motion for summary judgment, Judge Pallenberg rejected their constitutional claims.

First, Judge Pallenberg ruled that the ordinance "does not infringe upon its members' right to associate with whomever they choose." Citing cases from other jurisdictions, he concluded that the constitutional right to freedom of association protects the choice of *whom to associate with*, not the *activities engaged in while associating*.

Second, Judge Pallenberg ruled that the smoking ban did not violate the Eagles' right to privacy. He observed that in Alaska, a fundamental right to privacy has been recognized in two areas: "activities conducted in the home, and activities infringing upon 'personal autonomy.'" He then concluded that the Eagles' private facility—while considered an extension of their homes by Eagles members—is not truly a home where people live, but a premises licensed for the sale of alcohol that is not entitled to the same protections. Further, he ruled that smoking cannot be viewed as a fundamental right because the right to personal autonomy has never been interpreted to all people to ingest whatever substances they choose, wherever they choose. Since CBJ's ordinance doesn't infringe on a fundamental right, it can be upheld if it is enacted to address a valid issue of public health and welfare, and the means chosen to address the issue (a smoking ban) bears a close and substantial relationship to the purpose for which it is enacted. Because of the serious public health consequences of second-hand smoke and the clear connection between banning indoor smoking in places that sell alcohol and diminishing these consequences, the judge concluded that the ordinance was a legitimate exercise of governmental authority. To find the ordinance unconstitutional would be to extend the fundamental right of privacy to an activity that is not constitutionally protected, is harmful to the public health, and occurs outside the home—a result that in Judge Pallenberg's view would unduly expand the scope of our state's privacy protections.

LEGAL ISSUES GENERALLY

On appeal, the supreme court is faced with the same issues presented to Judge Pallenberg—whether as a matter of law the Eagles’ rights to freedom of association and privacy were infringed by CBJ’s smoking ban. Because the issues involve questions of law, and there are no material facts in dispute, the supreme court will hear the case *de novo*. This means that the supreme court will exercise its independent judgment and adopt the rule of law that is most persuasive in light of “precedent, reason, and policy.” The parties have submitted “briefs” to the supreme court describing their respective positions in detail and offering the legal authorities (constitutional provisions, statutory laws, and case law, etc.) that they believe support their positions. The main arguments raised in their briefs are summarized below. For more detail, you are encouraged to read the briefs directly, which are available online at the Supreme Court LIVE website: www.courts.alaska.gov/outreach.htm#scl. The American Cancer Society Cancer Action Network was allowed to participate as *amicus curiae* (“friend of the court”) in the appeal and filed a brief in support of CBJ’s position. The ACS CAN *amicus* brief is also available on the website.

Freedom of Association. The Eagles assert that the constitutional right to intimate association grants their organization’s members the right “to engage in any lawful activities the participants may choose, so long as they do not impinge on members of the general public.” The Eagles recognize that such a right has not been recognized before in Alaska, but they believe it is warranted given how important personal autonomy and freedom from governmental intrusion are to Alaska’s citizens. They argue that the U.S. Supreme Court, in the case of *Roberts v. United States Jaycees*, established a right of intimate association—“the freedom to choose to enter into and maintain certain intimate human relationships”—that can extend to private, non-familial relationships such as theirs. They further argue that they satisfy the factors the U.S. Supreme Court has established to determine whether the right of intimate association exists, which include: (1) the small size of their local group, (2) their common purpose, as shown by their highly ritualized ceremonies and initiation practices, (3) their highly selective process for choosing members, (4) their exclusion of non-members from critical aspects of the relationship, and (5) other characteristics such as the very limited use of their facilities by the public (only four times annually, for fundraising) and their lack of advertising for members. From the Eagles’ perspective, all of these circumstances show that their relationships with each other are intimate, private ones that are entitled to protection from intrusive public laws. The smoking ban violates their protected relationships because an estimated 85% of Eagles members are smokers, and prohibiting one of their most universally enjoyed activities” interferes with their ability to spend time together, effectively compelling them to go elsewhere for companionship. In the Eagles’ view, “[a] right to associate with 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.”

CBJ counters that as a home rule municipality under Alaska’s constitution, it has broad authority to enact laws that further the public health and welfare. In CBJ’s view, the ordinance in question is a duly enacted public health measure, designed to minimize the harmful effects of smoking and second-hand smoke on all residents of the municipality. CBJ argues that courts across the country have rejected claims that smoking ban laws infringe upon the right to freedom of association. Most have found that the right to enter into intimate relationships should not be interpreted to protect activities in intimate relationships that are not constitutionally protected—like smoking—from government regulation. As one case cited by CBJ states, “[t]he First Amendment guarantees the fundamental freedoms it enumerates, but not necessarily every purpose or form that exercise of the specific rights may take.” Concluding otherwise would cloak a range of activities with unintended constitutional protections and unduly curtail a municipality’s legitimate authority to regulate socially or physically harmful activities in the interest of public health and welfare.

Right of Privacy.

The Eagles assert that Alaska’s constitutional right of privacy should be interpreted to allow adults, as part of their personal autonomy, to ingest a legal substance—tobacco—in a private club facility, where “only members of the club are ever present when smoking occurs.” The Alaska Supreme Court has ruled that Alaska’s right of privacy “is broader in scope than that of the Federal Constitution.” In the landmark 1972 privacy case, *Ravin v. State of Alaska*, the court articulated a four-part test for determining whether a government interest in restricting an activity can overcome an individual’s privacy interest in engaging in the activity. Factors in the test included: (1) where the activity occurs; (2) the type of activity involved; (3) whether the health and welfare of the general public is implicated; and (4) whether the government restriction bears a sufficient relationship to promoting the public good.

Under the *Ravin* test, the Eagles claim that their interest in smoking in their private facility outweighs the government’s interest in regulating smoking there. First, their facility is considered an extension of members’ homes and is treated as such, so it should be granted the same privacy protections as a home. Second, the activity in question—smoking—is completely legal. If privacy rights can protect the smoking of marijuana—an illegal substance—in a person’s home, they should protect a legal activity in a home-like facility. Third, the health and welfare of the general public is not implicated because visits by members of the public are allowed only four times a year, for fundraising events, and smoking is not allowed at these times. Fourth, the public good is not promoted by restricting smoking at the private Eagles facility because the public is never in the facility

when smoking occurs. In the Eagles' view, smoking in private clubs "only impacts individuals who are exercising their constitutionally protected autonomy, and does not impact the public at large."

CBJ counters that the right of privacy cannot be so broadly interpreted, and that the Eagles' privacy claims fail the *Ravin* test. First, the Eagles' facility "is not anyone's home," even though members may "feel at home" there. It is instead a "bar" that holds a state liquor license and must conform to state laws governing the sale of alcohol—laws that would be inapplicable in someone's home. Second, the activity involved—smoking—has an adverse affect on both smokers and non-smokers, even though it's legal. Alcohol is also completely legal for adults in most of Alaska, but Alaska law has long recognized that local governments may limit or even ban its use, based on its detrimental impact on a community's health and welfare. The fact that a substance is legal does not make its use a fundamental right of personal autonomy warranting privacy protection. Third, second-hand smoke causes severe medical problems that affect the public health and welfare. Members of a private club who consent to exposure to second-hand smoke still face the adverse health effects. Also, the right to privacy does not give Alaskans the right to engage in harmful conduct, even if the only victims are themselves. Fourth and finally, a smoking ban that extends to private clubs that sell alcohol bears a strong relationship to the public good by protecting nonsmokers in the club from second-hand smoke. According to CBJ, "[t]he social and monetary cost of health problems associated with smoking and exposure to smoke is staggering," and CBJ's strong interest in addressing these costs outweighs any interest Eagles members may have in smoking together privately.

QUESTIONS FOR STUDENTS TO CONSIDER

1. Read the case of *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). How are the facts in that case similar to the facts here? How do they differ? Do you think *Roberts* supports the Eagles' freedom of association claim? Why or why not?
2. Read the case of *Ravin v. State of Alaska*, 537 P.2d 494 (Alaska 1975). How are the facts in *Ravin* similar to the facts in this case? How do they differ? Do you think *Ravin* supports the Eagles' privacy claim? Why or why not?
3. Read Judge Pallenberg's decision in full. Do you agree with his conclusions? Why or why not? How would you have ruled differently?
4. The U.S. Constitution and many state constitutions do not have an explicit privacy provision. Can you think of reasons why Alaska added an explicit right of privacy to its constitution? In our opinion, what are the advantages of the strong privacy provision in Alaska's constitution? What are the

disadvantages? Can you give other examples of situations where privacy interests and public interests may collide?