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, vs. CITY AND BOROUGH OF JUNEAU, a municipal corporation, Appellee.	Supreme Court Case No. S13748 Case No. 1JU-08-0730 CI

APPEAL FROM THE SUPERIOR COURT,
FIRST JUDICIAL DISTRICT AT JUNEAU,
THE HONORABLE PHILIP M. PALLENBERG, PRESIDING

BRIEF OF AMICUS CURIAE AMERICAN CANCER SOCIETY CANCER ACTION NETWORK

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Alaska Constitution

Alaska Const. art. I, § 22. Right of Privacy.

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section

Alaska Cost. art. X, § 1 - Purpose and Construction.

The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

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 no 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, gymnasia, 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.

INTRODUCTION

The American Cancer Society Cancer Action Network ("ACS CAN"), as *amicus curiae*, files this brief in support of the position of Appellee City and Borough of Juneau that the challenged no-smoking ordinance, CBJ 36.60.005 *et seq.*, is constitutional.

ACS CAN accepts Appellants' Jurisdictional Statement and their description of the Issues Presented for Review. *See* Appellants' Brief at 1. ACS CAN adopts by reference the Statement of the Case presented by the City and Borough of Juneau and adds the brief summary below of facts pertinent to ACS CAN's involvement in this appeal.

STATEMENT OF THE CASE

Ordinance 36.60.005 *et seq.* ("the Ordinance"), adopted on March 10, 2008, prohibits smoking in workplaces within the City and Borough of Juneau, including private clubs. Exc. 4-9. The Fraternal Order of Eagles, Juneau-Douglas Aerie 4200, and its individual members Mark Page, Brian Turner, R. D. Truax, and Larry Paul sued CBJ shortly after the Ordinance's adoption, contending that the Ordinance violated their constitutional rights of association and privacy, among other claims. Exc. 11-15.

The American Cancer Society ("the Society") moved for leave to participate as an *amicus* in any motion practice on the merits. R. 238. The Society is a nonprofit public health organization with a membership of over three million volunteers nationwide, including over 50,000 physicians. R. 244, ¶ 2. The Society's mission is "to eliminate cancer as a major health problem, using research, education, advocacy, and service to prevent cancer and reduce suffering from cancer." R. 243, ¶ 2. Active for nearly a

hundred years, "the Society has conducted groundbreaking research in identifying the use of tobacco products as a major cause of cancer." *Id.*

Consistent with its mission and its historical knowledge base, the Society actively supported the passage of the Ordinance at issue here. R. 244, ¶ 3. "The Society mobilized its own volunteers in support of the ordinance" and provided "technical assistance to the ordinance's primary backers, the Juneau Clean Air Coalition, in the form of medical and scientific research and fact-based responses to counter-arguments" that the Society had been called upon to address in other communities. *Id.*

The Society's efforts extend statewide. It has been involved in the drafting, passage, and implementation of similar workplace smoking laws in Anchorage, Soldotna, Kenai, Barrow, Sitka, and Haines. R. 244, ¶ 4. Its interest in the Ordinance at issue here "is thus not merely local." *Id.* "It has a very strong interest, consistent with its mission, in ensuring that [the Ordinance] is not struck down on constitutional grounds that could be applied elsewhere in the state to the serious detriment of the Society's primary goal of eradicating cancer." *Id.* The Society also has unparalleled "access to medical and scientific research," and it accordingly suggested to the trial court that "its involvement in litigation like this in other parts of the country . . . will prove to be helpful to the court" in evaluating the legislative justifications for the Ordinance and deciding the constitutional issues that the Eagles raised. R. 244-45, ¶ 5.

The trial court granted the Society's motion for leave to participate as *amicus* in briefing on the merits. R. 224-25; *see* Exc. 29. In its eventual order disposing of the Eagle's claims, the trial court cited to the Society's *amicus* brief to show "the long history

of regulation of tobacco, and the well established record of harm to the public health which results from its use." Exc. 41.

Since the time the case was decided below, the Society's advocacy role has been assumed by its 501(c)(4) affiliate, ACS CAN, which is therefore the entity filing this *amicus* brief. *See* Affidavit of Emily Nenon, filed in support of Motion for Leave to File Amicus Brief, July 14, 2010.

ARGUMENT

A. Standard of Review

The trial court's ruling on summary judgment is reviewed *de novo* to determine whether CBJ was entitled to judgment as a matter of law. *Safeway, Inc. v. State, Dep't of Transportation*, 34 P.3d 336, 339 (Alaska 2001).

B. Rules of Construction

Several rules of construction govern a court's review of a local ordinance for constitutionality, and they strongly favor CBJ. First, the Alaska Constitution, Article X, section 1, states: "A liberal construction shall be given to the powers of local government units." *See also* AS 29.35.400 (same rule codified); *Kotzebue Lions Club v. City of Kotzebue,* 955 P.2d 921, 923 (Alaska 1998).

Second, as with all laws passed by legislative bodies, "[a] duly enacted municipal ordinance is presumed to be constitutional, and [courts] will construe an ordinance to avoid, to the extent possible, a finding of unconstitutionality." *Haggblom v. City of*

Dillingham, 191 P.3d 991, 997 (Alaska 2008); *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 259 (Alaska 2004). This Court is thus obliged to liberally construe CBJ's power to legislate in the area of public welfare, and it must construe the Ordinance, if at all possible, to avoid a finding of unconstitutionality.

C. A Smoking Ban in Private Clubs Does Not Directly Burden the Right of Association

The Alaska and United States Constitutions protect the right of association, both "intimate" (the freedom to choose and maintain one's own close personal relationships) and "expressive" (the freedom to associate for purposes of engaging in activities protected by the First Amendment, *e.g.*, speech, petitioning the government, and the exercise of religion).[1] This Court has discussed the right of association almost exclusively in the "expressive" context, *i.e.*, associations for the advancement of political beliefs, *see, e.g.*, *State v. Green Party of Alaska*, 118 P.3d 1054, 1059-60 (Alaska 2005). *But see also Mendel*, 897 P.2d at 76 (advocacy of child-custody issues); *Kenai Peninsula Borough School District v. Kenai Peninsula Borough School District Classified Ass'n*, 590 P.2d 437, 440-41 (Alaska 1979) (union affiliation).[2]

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[1] *See Matter of Mendel*, 897 P.2d 68, 76 and n. 15 (Alaska 1995), citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), and *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

[2] *Cf. Morgan v. State*, 943 P.2d 1208, 1211-12 (Alaska App. 1997) (law prohibiting felons from residing in home with concealable handgun does not infringe rights of association with family members, who could keep guns elsewhere); *Morrow v. State*, 704 P.2d 226, 232 (Alaska App. 1985) (law restricting sale of controlled substances regulates conduct, "not speech or association").

The Eagles begin their discussion of this issue by arguing vigorously that they are among the "most intimate" of organizations and therefore are entitled to "the fullest protection of their right of private association," relying primarily on *Rotary Club of Duarte*[3] and *Louisiana Debating and Literary Association.*[4] *See* Appellants' Brief at 14-18. But both *Rotary Club* and *Louisiana Debating* involved government regulation of *club membership* -- the actual selection of those individuals with whom club members would associate.[5] As the trial court recognized in this case, there is a major distinction between laws governing "people's choices of whom to associate with" and laws that govern "what people can choose to do while associating." Exc. 30. The CBJ Ordinance does not purport to affect the Eagles' choices of "whom to associate with," nor can it be reasonably construed as doing so inadvertently. In fact, the Eagles concede that they continue to associate with one another despite the Ordinance,[6] and their membership criteria remain rigorous and wholly club-directed. *See* Appellants' Brief at 5.

The Eagles nonetheless contend that the CBJ Ordinance is subject to strict scrutiny because it burdens their fundamental right "of private, intimate association," and they argue that CBJ must therefore show that the ordinance "furthers a compelling

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[3] *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537 (1987).
[4] *Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1498 (5th Cir. 1995), *cert. denied,* 515 U.S. 1145 (1995).
[5] In *Rotary Club,* the Supreme Court affirmed application of a California non-discrimination statute to the Rotary Clubs' exclusion of women from membership. In *Louisiana Debating,* the 5th Circuit refused to apply a New Orleans ordinance prohibiting discrimination in public accommodations to private clubs with primarily social purposes.
[6] *See* Exc. 24 (Affidavit of Larry Paul, ¶ 7) (current membership is "262 full Aerie members and 134 Ladies' Auxiliary members," with a core group of about 46).

governmental interest" and that there are no "significantly less restrictive" alternatives. Appellants' Brief at 21. But courts that have considered these issues in similar circumstances have concluded that there is no fundamental right to smoke, and the fundamental right that *is* at issue – association – is not directly infringed upon by a ban on smoking in a group's meeting place; therefore heightened scrutiny is not required. *See American Legion Post No. 149 v. Dep't of Health*, 192 P.3d 306, 323-24 (Wash. 2008) ("Even if the post were deemed to facilitate intimate human relationships, the ban does not directly interfere with such relationships or a person's ability to join the Post"); *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F.Supp.2d 461, 476 (S.D.N.Y. 2004) ("the Court concludes that the Smoking Bans do not implicate First Amendment protections with regard to assembly and association and thus, would not merit a heightened level of scrutiny for these claims").[7]

A federal court in New York expressed obvious skepticism of the claim by a bar and restaurant lobby that smoking was an integral part of their members' associational rights:

> Without summarily dismissing all possibility that smoking may contain some scintilla of associational value for some people, there is nothing to say that smoking is a prerequisite to the full exercise of association and speech under the First Amendment. . . . At best, smoking, where permitted, is but a single component of the entire realm of associational interactions that a bar or restaurant patron could experience. Other aspects include dining, drinking, conversing, viewing or listening to entertainment, and meeting other people. While the Smoking Bans restrict where a person may

[7] *See also Players, Inc. v. City of New York,* 371 F.Supp.2d 522, 542 (S.D.N.Y. 2005); *City of Tucson v. Grezaffi*, 23 P.3d 675 (Ariz.App. 2001); *Taverns for Tots, Inc. v. City of Toledo*, 341 F.Supp.2d 844, 849-53 (N.D. Ohio 2004).

> smoke, it is a far cry to allege that such restrictions unduly interfere with smokers' right to associate freely with whomever they choose in the pursuit of any protected First Amendment activity. . . .
>
> The First Amendment guarantees the fundamental freedoms it enumerates, but not necessarily every purpose or form that exercise of the specific rights may take. Nothing in the Constitution engrafts upon First Amendment protections any other collateral social interaction, whether eating, drinking, dancing, gambling, fighting, or smoking – the list may be endless. While in some circles and events these social enhancements, by custom or practice, may be associated with and perhaps even augment the enjoyment of protected endeavors, it does not follow that they are indispensable conditions to the exercise of particular constitutional rights. The effect of [the plaintiffs'] "association PLUS" theory would be to embellish the First Amendment with extra-constitutional protection for any ancillary practice adherents may seek to entwine around fundamental freedoms, as a consequence of which the government's power to regulate socially or physically harmful activities may be unduly curtailed.

NYC C.L.A.S.H., 315 F.Supp.2d at 473-74. The trial court in this case pointed out that the United States Supreme Court has similarly rejected what could analogously be called a "religion plus" standard in freedom of religion cases, holding that while freedom of religion is afforded the highest constitutional protection, that protection is not given to "ancillary conduct carried out during observance of that freedom against prohibition by laws of general applicability," like the criminalization of peyote. Exc. 32-33, citing *Employment Div., Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990).

Another case from New York applied similar reasoning in the context of a private social club for actors and other theatrical professionals, who claimed that the city's smoking ban violated their freedom of intimate association. *Players,* 371 F.Supp.2d at 544-47. Much like the Eagles here, the club claimed that its members shared intimate

human relationships protected by the First Amendment because it was a small, "private, exclusive, and secretive club." *Id.* at 544. The court held that even if club membership did foster intimate human relationships, the smoking ban affected the members' interactions only minimally:

> It is difficult to see how the social intercourse, and social intimacy, that the club seeks to facilitate could be unconstitutionally infringed merely because the meeting place provided by the club can no longer allow indoor smoking.

Id. at 545.

A recent Washington case, *American Legion Post No. 149,* 192 P.3d 306, is similar. The Post's membership was selective, being limited to military veterans who were either active-duty or had been honorably discharged. *Id.* at 312-13. The Post operated a facility in Bremerton "open only to members and guests" and "maintained, in part, to provide a social atmosphere for the members." *Id.* at 313. The Post employed seven people, but all of them were members of the Auxiliary, which in turn was limited to women who were directly related to members. *Id.* The facility was open only to members and their guests; unlike the Eagles' Aerie here, there was no evidence that the Post was ever open to the public. *Id.* at n. 3.

The Post asserted, among other things, that a state-wide ban on smoking in places of employment interfered with its members' rights of association, an argument almost identical to that of the Eagles here.

> The Post . . . repeatedly asserts that the Act will interfere with its members' right of association. Essentially, the Post seems to be arguing that as a social meeting place for veterans, the associations formed at the Post constitute intimate human relationships. The Post

> asserts one of its primary purposes is to provide a social atmosphere for its members and one of the essential attributes of this social atmosphere is smoking. Thus, the Post argues, a ban on smoking will impinge on these associations because the members, the majority of whom are smokers, will simply leave the Post and patronize tribal establishments, where smoking is allegedly allowed.

American Legion Post No. 149, 192 P.3d at 323. The Washington Supreme Court, however, reviewed the decisions of other courts that "have universally rejected challenges to smoking bans on the grounds they interfere with freedom of association;" rejected the claim that the Post, "with 591 members, is an intimate association;" and then held that "[e]ven if the Post were deemed to facilitate intimate human relationships, the ban does not directly interfere with such relationships or a person's ability to join the Post."

> Instead, it merely prohibits smoking in the Post's building when employees are present. Thus, the Post's claim that it has a fundamental right to allow smoking under freedom of association must fail.

American Legion Post No. 149, 192 P.3d at 323-24.

The Massachusetts Supreme Judicial Court reached the same conclusion in *American Lithuanian Naturalization Club v. Board of Health*, 844 N.E.2d 231 (Mass. 2006), in which three private membership associations – two ethnic clubs and an American Legion post – challenged a town's no-smoking regulation. The court's description of the three plaintiffs shows how closely they resemble the Eagles here:

> Each plaintiff is organized as a charitable corporation under *G.L.c. 180,* and owns its building. Each has been licensed to serve alcoholic beverages. Only adults are permitted to become members; guests are permitted in each club at any time if accompanied by a member. Members perform all labor at the clubs, including

> bartending. Although the clubs are "private," all three "regularly" conduct fund raising activities for local charities, consistent with their charters and their mission statements. The premises of all three are also open to the public during "sanctioned" social events. At such times each club prohibits all smoking in all parts of its premises. At all other times the doors to the buildings are locked and signs posted to indicate that only members may enter.

American Lithuanian Naturalization Club, 844 N.E.2d at 237 (footnotes omitted). On these facts, the Massachusetts court found no infringement upon the club members' rights of association:

> The plaintiffs asserted, and we accept as undisputed, that "at their events and social gatherings, [the plaintiff associations] foster and communicate a common system of beliefs and values for members and others to follow, and engage to some extent in religious activities." The regulation does not prevent members from assembling for these purposes. There is no claim that smoking, or the promotion of tobacco products, is central to any expressive activities.
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> * * *
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> Although some members "have threatened that they will no longer socialize at the clubs if smoking is not permitted," there has been no showing that enforcement of the town regulation will infringe the members' right to maintain relationships with each other or to engage in *First Amendment* activities.

Id. at 242 and n. 26.

There is nothing about Alaska's jurisprudence in this area that should lead to a result different from those reached in New York, Washington, Massachusetts, and the other jurisdictions that have considered the issue. The CBJ Ordinance does not prevent the Eagles' members from maintaining close personal relationships with each other or

from engaging in protected First Amendment activities while associating; and it therefore does not unconstitutionally burden their rights of association.

D. Alaska's Right of Privacy Does Not Prevent the Regulation of Smoking in Private Clubs

Article I, section 22 of the Alaska Constitution provides that "[t]he right of the people to privacy is recognized and shall not be infringed." This Court has described the right to privacy as protecting "'fundamental rights of personal autonomy,' including a person's right to control his appearance, a patient's 'privacy interest in protecting sensitive personal information from public disclosure,' and a woman's reproductive rights." *Ranney v. Whitewater Engineering*, 122 P.3d 214, 222 (Alaska 2005). Also, "directly linked to a notion of individual autonomy" is "the right to privacy in the home." *Sampson v. State,* 31 P.3d 88, 94 (Alaska 2001). The Eagles contend that "ingest[ing] a legal substance – tobacco – in a private club facility" should be viewed as another "part of [adults'] personal autonomy" for purposes of the right of privacy, in large part because it occurs in what the Eagles characterize as an extension of their home. Appellants' Brief at 30.

The home is undoubtedly unique for purposes of Alaska's right of privacy. "The home . . . carries with it associations and meanings which make it particularly important as the situs of privacy." *Ravin v. State,* 537 P.2d 494 (Alaska 1975). Discussing *Ravin* 25 years later, this Court again emphasized the importance of *location* to the holding:

> [In *Ravin* we recognized] the fundamental right of privacy within the home. We noted the "distinctive nature of the home" in Alaska's statutory and jurisprudential history in finding that the

> privacy amendment "was intended to give recognition and protection to the home." We also recounted the importance of individual autonomy in Alaskan history and concluded that the right to privacy in the home is directly linked to a notion of individual autonomy. And privacy within the home, we emphasized, is vital: "If there is any area of human activity to which a right of privacy retains *more than any other,* it is the home." Based on these considerations, we ultimately concluded that the right of privacy within the home protected personal possession and consumption of small quantities of marijuana in the home.

Sampson v. State, 31 P.3d 88, 94 (Alaska 2001) (emphasis added).[8] Accordingly, in their brief, the Eagles stress those aspects of their club that, to them, make it *much like* a home. *See* Appellants' Brief at 32-34.

As the trial court observed, however, the Eagles' Aerie is not a home; it is a facility owned and operated by a nonprofit corporation, organized under the laws of Alaska, holding a liquor license, where people congregate for social purposes outside the parameters of their close family relationships. Members legally cannot live at the Aerie, since, under its liquor license, it must be closed during the early morning hours. *See* Exc. 39-40 and n. 41. When the members leave the Aerie they presumably return to their *real* homes, the places where, under *Ravin,* their personal autonomy enjoys the height of constitutional protection. *Ravin,* 537 P.2d at 504.

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[8] The Alaska Court of Appeals, addressing issues of marijuana possession following *Ravin v. State*, 537 P.2d 494 (Alaska 1975), has repeatedly noted that "people . . . have a heightened expectation of privacy with respect to their personal activities *within their home.*" *Walker v. State*, 991 P.2d 799, 801 (Alaska App. 1999) (emphasis added); *Garhart v. State*, 147 P.3d 746, 750-51 (Alaska App. 2006) ("the *Ravin* decision rested on a person's heightened right of privacy with respect to their conduct within their own home").

The Eagles necessarily recognize the uniqueness of the home for purposes of constitutional analysis, and they therefore contend not that the Aerie *is* a home, but only that it shares enough characteristics of a home to be close to the same end of a spectrum of locations for purposes of analyzing the privacy right. *See* Appellants' Brief at 33. But even the home itself is not outside the reach of health and safety regulation. "[T]his right [of privacy] must yield when it interferes in a serious manner with the health, safety, rights and privileges of others[,] or with the public welfare."[9] The right to privacy is not absolute.[10] This Court has repeatedly observed, most recently when upholding a law that criminalized physician-assisted suicide, that "[n]o one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely."[11]

Again, other courts that have considered the issue have uniformly rejected the claim that smoking laws unconstitutionally infringe upon the right of privacy. In *American Legion Post No. 149,* the Washington Supreme Court addressed the Post's assertion, also made by the Eagles here, that as a private club it had "a historical right to be free from government interference" – a "right to be let alone." In rejecting this argument, the court noted first that everyone, private clubs included, holds property "subject to a reasonable exercise of the police power." 192 P.3d at 321. It explained that "government regulation of smoking and tobacco products is not a recent phenomenon," as "States have regulated smoking since the 1800s," and "as such, there is no traditional

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[9] *Walker,* 991 P.2d at 801, quoting *Ravin,* 537 P.2d at 504.
[10] *Noffke v. Perez,* 178 P.3d 1141, 1150 (Alaska 2008), quoting *Denardo v. ABC Inc. RVs Motorhomes,* 51 P.3d 919, 928 (Alaska 2002).
[11] *Sampson,* 31 P.3d at 95, quoting *State v. Erickson,* 574 P.2d 1, 21 (Alaska 1978), and *Ravin,* 537 P.2d at 504.

expectation of privacy in this context." *Id.* The court concluded, based on a great deal of case authority, that "[s]moking is not a fundamental right," and "[b]ecause there is not a fundamental right to smoke, there is no privacy interest in smoking in a private facility." *Id.* at 321-22.[12]

The uniqueness of the Last Frontier notwithstanding, the trial court was correct to follow the precedents from other states and reject the Eagles' privacy claims. The limitations of *Ravin,* and this Court's repeated admonition that even the fundamental right of privacy in the home must yield to reasonable regulation of health and safety (*see, e.g., Sampson,* 31 P.3d at 95, and *Erickson*, 574 P.2d at 21), confirm the correctness of the trial court's holding.

E. Even If Rights Are Burdened by the Ordinance, CBJ Can Show a Legitimate Interest and a Close and Substantial Relationship Between Its Interest and the Means Chosen to Advance That Interest

If the Ordinance does interfere with individual freedom "in an area that is not characterized as fundamental," all CBJ needs to do to support the Ordinance is "show a

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[12] *See also Giordano v. Connecticut Valley Hospital*, 588 F.Supp.2d 306, 322 (D.Conn. 2008) (no privacy right to smoke in state-run psychiatric facility); *American Lithuanian Naturalization Club*, 844 N.E.2d at 242 (right of privacy protects "some personal aspect of an individual, not a location," and therefore cannot be construed to protect smoking in private club); *Foundation for Independent Living, Inc. v. Cabell-Huntington Board of Health*, 591 S.E.2d 744, 754-55 (W.Va. 2003) ("no constitutional or legislative bar to [private clubs] being subject to the provisions of smoking regulations, or any other type of health or safety regulation," where "these establishments 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 or compliance with fire code requirements"); *Operation Badlaw, Inc. v. Licking County,* 866 F.Supp. 1059 (S.D.Ohio 1992), *aff'd,* 991 F.2d 796 (6th Cir. 1993); *Fagan v. Axelrod*, 550 N.Y.S.2d 552 (N.Y.Sup.Ct. 1990).

legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest." *Ranney*, 122 P.3d at 222, quoting *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001). On the other hand, if a fundamental right is infringed upon, the Ordinance still withstands constitutional scrutiny if its supporters can "articulate a compelling interest and . . . demonstrate the absence of a less restrictive alternative." *Id.* Under either standard – a "legitimate interest" combined with a "close and substantial relationship" or a "compelling interest" combined with "the absence of a less restrictive alternative" – the Ordinance should be upheld.

Courts routinely acknowledge that "[t]he dangers and health care costs attributed to smoking and its effects are well documented."[13] Also not subject to serious question is that a legislative body like the Juneau Assembly is better equipped to amass and evaluate the data relevant to a health and safety issue than is a court; the courts should therefore defer to the Assembly's finding of public purpose unless "such finding is arbitrary and without any reasonable basis in fact."[14]

The Juneau Assembly's action in enacting the Ordinance is clearly well grounded in the realities of health and social welfare. Clinical studies continue to show both the harmful effects of exposure to second-hand smoke and the beneficial impact of smoke-free legislation. For example, "[t]here is a significant drop in the rate of acute myocardial

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[13] *Curious Theater Co. v. Dep't of Public Health & Environment*, 216 P.3d 71, 81 (Colo.App. 2008), *affirmed,* 220 P.3d 544 (Colo. 2009), *cert. denied,* 2010 WL 978682 (2010); *NYC C.L.A.S.H.*, 315 F.Supp.2d at 487; *American Legion Post No. 149,* 192 P.3d at 324.

[14] *See Comtec, Inc. v. Municipality of Anchorage*, 710 P.2d 1004, 1005 (Alaska 1985), quoting *DeArmond v. Alaska State Development Corp.*, 376 P.2d 717, 721 (Alaska 1962).

infarction hospital admissions associated with the implementation of strong smoke-free legislation."[15] The cited article references a number of studies including a recent one in Helena, Montana, that found a 40 percent decline in hospital admissions for heart attacks during the time that a comprehensive clean-air ordinance was in effect; when the ordinance was suspended, admissions rebounded.[16] A similar study conducted in Pueblo, Colorado, found that heart attack rates declined nearly 30% at two Pueblo hospitals following the enactment of a clean-air ordinance.[17] The Pueblo study was recently updated with another 18 months of data, showing that the decline in heart attack rates becomes even more dramatic the longer the ordinance is in effect, while comparison areas show no significant change.[18] Independent studies from Massachusetts, Ireland, France, and Piedmont, Italy, provide similar results.[19]

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[15] James M. Lightwood and Stanton A. Glantz, "Declines in Acute Myocardial Infarction after Smoke-Free Laws and Individual Risk Attributable to Secondhand Smoke," *Circulation*, September 21, 2009, at 1373. The article can be found online at http://circ.ahajournals.org.cgi/content/full/120/14/1373. *Circulation* is the peer-reviewed journal of the American Heart Association.

[16] *See* Lightwood and Glantz at 1374; *see also* Richard P. Sargent *et al.*, *Reduced Incidence of Admissions for Myocardial Infarction Associated with Public Smoking Ban: Before and After Study*, 328 BMJ 977-80 (2004).

[17] *See* Carl Bartecchi *et al.*, "Reduction in the Incidence of Acute Myocardial Infarction Associated with a Citywide Smoking Ordinance," *Circulation* (Sept. 20, 2006). The article is available on-line at http://circ.ahajournals.org/cgi/content/full/114/14/1490.

[18] *See* R.N. Alsever *et al.*, "Reduced hospitalizations for acute myocardial infarction after implementation of a smoke-free ordinance – City of Pueblo, Colorado, 2002-2006," *Morbidity and Mortality Weekly Report* 57(51 & 52): 1373-1377, January 2, 2009.

[19] *See* Lightwood and Glantz at 1374.

The United States Surgeon General published a definitive report on the harmful effects of exposure to second-hand smoke over 20 years ago.[20] Hundreds of other studies of the same subject have been published since then, and many are collected in on-line bibliographies, *e.g.*, The Involuntary Smoking SGR Bibliography[21] and the American Nonsmokers' Rights Foundation, Bibliography of Secondhand Smoke Studies.[22]

In 2006 the Surgeon General published another comprehensive report on the health effects of exposure to second-hand smoke.[23] The Surgeon General Report constitutes a thorough review of the large body of research findings, and it confirms the serious health effects of exposure to second-hand smoke.[24]

Second-hand smoke is a complex mixture of gases and particles that includes both smoke released from the burning end of a tobacco product (sidestream smoke) and the

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[20] *See* Office on Smoking and Health, U.S. Dep't of Health & Human Services, *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General*, DHHS Pub.No.(CDC) 87-8398 (1986).

[21] *See* http://apps.nccd.cdc.gov/sgri.

[22] *See* http://www.no-smoke.org/pdf/SHSBibliography.pdf.

[23] Office on Smoking and Health, U.S. Dep't of Health & Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006) (hereinafter "the Surgeon General Report"). The article is available on-line at http://www.surgeongeneral.gov/library/secondhandsmoke.

[24] The Surgeon General Report was prepared jointly by the Office on Smoking and Health, National Center for Chronic Disease Prevention & Health Promotion, Coordinating Center for Health Promotion, Centers for Disease Control and Prevention, and U.S. Department of Health and Human Services. The Report was written by 22 experts in the field and reviewed by more than 40 peer reviewers. The entire manuscript was then sent to over 30 more scientists and researchers for further review for scientific integrity. *See* Surgeon General Report at 9. One court has referred to the Report as "a source of indisputably reliable scientific facts." *In re Perra,* 827 N.Y.S.2d 587, 592 (Sup.Ct. 2006).

mainstream smoke exhaled by the smoker.[25] The smoke that contaminates indoor environments and is inhaled by non-smokers is a combination of the sidestream smoke released by the smoldering cigarette and the exhaled mainstream smoke.[26]

The U.S. Environmental Protection Agency, the National Toxicology Program, and the International Agency for Research on Cancer have all designated second-hand smoke as a known human carcinogen (or cancer-causing agent).[27] Second-hand smoke is estimated to contain at least 250 chemicals known to be toxic or carcinogenic.[28]

Among these toxic substances are hydrogen cyanide (used in chemical weapons), butane (used in lighter fluid), toluene (found in paint thinners), and cadmium (used to make batteries), as well as arsenic, lead, ammonia, and carbon monoxide.[29] The Surgeon General Report, as well as the substantial number of studies upon which it relies, confirms that non-smokers who are exposed to second-hand smoke inhale many of the same toxins as smokers. Even more troubling, because sidestream smoke is released at lower temperatures and under different conditions than mainstream smoke, it contains higher concentrations of many of the smoke's toxic and carcinogenic chemical components.[30]

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[25] *See* Surgeon General Report at 9, 64.
[26] *Id.*
[27] *See* Surgeon General Report at 6, 29-33, 576.
[28] *Id.* at 29, citing the National Toxicology Program, U.S. Dep't of Health & Human Services, *9th Report on Carcinogens* (2000).
[29] *Id.* at 29-33, 100-01; *see also* U.S. Dep't of Health & Human Services, *Secondhand Smoke is Toxic and Poisonous*; http://surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet9.html.
[30] *See* Surgeon General Report at 9.

Exposure to second-hand smoke is a known cause of cancer in adults. According to the studies, tens of thousands of non-smokers in the United States die annually from lung cancer and heart disease because of such exposure.[31] Non-smokers' risk of developing heart disease is increased 25 to 30 percent and their risk of lung cancer by 20 to 30 percent, depending on the level and duration of exposure to second-hand smoke.[32]

Put simply, there is no safe level of exposure.[33] Brief exposure to second-hand smoke has immediate adverse effects on the cardiovascular system and interferes with the normal functioning of the heart, blood, and vascular system.[34] Even a few minutes of exposure can damage arterial linings, reduce heart-rate variability, and cause blood platelets to become stickier, increasing the likelihood of clots.[35]

Courts uniformly recognize that the enactment of no-smoking regulations for workplaces, bars, and private clubs is a rational legislative reaction to these well-documented dangers to health.[36] In a discussion particularly pertinent to the Eagles' claims here, the Massachusetts Supreme Judicial Court addressed the reach of public health regulation beyond spaces that are typically public:

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[31] *See* Air Resources Board, Cal.EPA, *Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant* (June 24, 2005); available at http://www.arb.ca.gov/toxics/ets/finalreport/finalreport.htm; *see also* Surgeon General Report at 576; J.M. Lightwood *et al.*, "Coronary heart disease attributable to passive smoking: CHD policy model," *American Journal of Preventive Medicine* 36(1): 13-20 (January 2009) (estimating that second-hand smoke causes annually between 21,800 and 75,100 deaths due to coronary heart disease and between 38,100 and 128,900 myocardial infarctions).

[32] *See* Surgeon General Report at 423-45, 509-32.

[33] *Id.* at 65.

[34] *Id.* at 64.

[35] *Id.* at 53-57, 63.

[36] *American Legion Post No. 149*, 191 P.3d at 324.

> The focus of public health is to protect the health of every member of a community. See, e.g., *Service v. Newburyport Hous. Auth.*, 63 Mass.App.Ct. 278, 283-284, 825 N.E.2d 567 (2005), quoting Black's Law Dictionary 737 (8th ed. 2004) (public health is "the health of the community at large. . .; the healthful or sanitary condition of the general body of people or the community en masse; especially the methods of maintaining the health of the community. . .") Nothing in [the ordinance at issue] or our prior case law warrants a conclusion that members of a community may be protected by health regulations only when they are in a location to which the public has access. [Citations omitted.] The plaintiffs acknowledge that their premises are open to members of the public during fundraisers or when they are rented, and members of the [town] community (among others) are invited as guests to the premises even when the general public is not invited. Even if smoking members choose to disregard the overwhelming evidence of the serious health consequences of smoking, the board rationally could be concerned about the exposure of nonsmokers to a "known human carcinogen."

American Lithuanian Naturalization Club, 844 N.E.2d at 238-39. The court also rejected the notion that its decision about private clubs placed it on the verge of a slippery slope that could end up in the sanctity of the private home:

> We need not consider in this case whether smoking may be prohibited in a private residence. These membership associations are incorporated in, and receive the benefit of, Massachusetts law and licenses. The general public has access to the premises from time to time and nonsmoking members and their guests have access all of the time. Because there is a "rational connection between the regulation and the public purpose to be achieved," the board acted well within its authority . . . in promulgating the town regulation.

Id. at 239 (citations omitted).

Here, likewise, the Eagles "are incorporated in, and receive the benefit of, [Alaska] law and licenses." Furthermore, the "general public has access to the [Eagles'] premises from time to time and nonsmoking members and their guests have access all of the time." Apparently 15% of the Eagles' membership (59 out of the total of 396) are

non-smokers. *See* Exc. 24 (Affidavit of Larry Paul, ¶ 7). The Eagles currently employ five people (a business manager and four bartenders), who are required, as a condition of their employment, to be members of the organization and subscribe to its rules. Exc. 25 (Affidavit of Larry Paul, ¶ 9). While the Eagles assert that all five current employees are smokers (*id.*), that may not always be the case. Moreover, just like other workplace-safety laws, smoking laws do not exempt employees who are willing to accept some level of risk by smoking themselves. Exposure to cigarette smoke is not a zero-sum hazard; everyone, smokers and non-smokers alike, suffers a manifold increase in health risks by exposure to the second-hand smoke of others.[37]

The law recognizes the legitimacy of CBJ's interest in protecting the health of its citizens under these circumstances. Liberally construing CBJ's exercise of its police powers, as the Court is constitutionally required to do, and construing the Ordinance to avoid constitutional infirmity, as the Court is also required to do, the Eagles' claims of unconstitutionality must fail.

CONCLUSION

CBJ has a compelling interest in regulating its citizens' exposure to the carcinogenic and toxic chemicals contained in second-hand tobacco smoke, even in

[37] *See, e.g.*, Mark Eisner *et al.*, "Bartenders' Respiratory Health After Establishment of Smoke-Free Bars and Taverns," JAMA, December 9, 1998 – Vol. 280, No. 22, at 1909 (available at http://tobaccoscam.ucsf.edu/pdf/9.1-Eisner.pdf) (even bartenders who smoked reported fewer respiratory and sensory irritation symptoms after implementation of no-smoking law).

private clubs like the Eagles' Aerie. The trial court's decision to uphold the Ordinance's constitutionality should be affirmed.