IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT
AT JUNEAU

AMERICAN CIVIL LIBERTIES UNION OF ALASKA, JANE DOE, AND JANE ROE, Plaintiffs, v. STATE OF ALASKA; DAVID W. MARQUEZ, Attorney General for the State of Alaska, in his official capacity, Defendants.	Case No. _____

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

This case concerns the fundamental right to privacy held by the residents of Alaska. Alaska is a state "that has traditionally been the home of people who prize their individuality and who have chosen to settle or continue living here in order to achieve a measure of control over

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their own lifestyles."[1] Yet Sections 8 and 9 of CCS HB 149 erode this fundamental right to privacy by empowering the government to enter into the privacy of the home and punish individuals for the purely personal, and constitutionally-protected, conduct they engage in there.

A direct conflict exists between the right to privacy guaranteed under the Alaska Constitution and AS 11.71.050(a)(2)(E), AS 11.71.060(a)(1) and AS 11.71.060(a)(2), as amended, that criminalize the personal use of marijuana by an adult in the privacy of the home. Ignoring the clear limitations set by the courts, the amended statutes harm Alaskans throughout the state.

The issue here is one of process: Whether the legislature is required to respect the Constitution and comply with the Supreme Court's interpretation of its provisions before unreasonably restricting conduct in which individuals hold an expectation of privacy. *Ravin* leaves no room for the legislature to circumvent section 22; rather, it demands absolute fidelity to the Constitution, which includes an explicit protection for the right of privacy. Plaintiffs seek only the enforcement of the constitutional imperative contained in article I, section 22 that the legislature "shall implement this provision."[2]

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[1] *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).
[2] Alaska Const. Art. I, sec. 22.

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Relief from the legislature's unconstitutional action is urgently needed to prevent real and irreparable harm to plaintiffs. The right to privacy is not just violated when the government actually enters the home, but also when, as here, the government is given the power to do so. Courts have a duty to protect plaintiffs' constitutional right to privacy. The Supreme Court did so in *Ravin*. And this Court, bound by *Ravin*, should do so here.

Plaintiffs respectfully request this Court to enjoin enforcement of AS 11.71.050(a)(2)(E), AS 11.71.060(a)(1) and AS 11.71.060(a), as amended by CCS HB 149, while the Court considers the merits of the case.

FACTUAL BACKGROUND

In 1975, the Alaska Supreme Court held that the explicit guarantee of the right to privacy included in the Alaska Constitution[3] encompasses the possession and use of marijuana in a purely personal, non-commercial context.[4] Since *Ravin* was decided, the Alaska Supreme Court has "repeatedly and consistently recognized a constitutional limitation on the government's authority to enact legislation prohibiting the possession of marijuana in the privacy of one's home."[5]

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[3] Alaska Const. Art. I sec. 22.
[4] *Ravin*, 537 P.2d at 504.
[5] *Noy v. State*, 83 P.3d 545, 547-48 (Alaska App. 2003) ("*Noy I*").

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The legislature previously has recognized that the Constitution protects the privacy of Alaska homes based on the possession of less than four ounces of marijuana.[6] Yet CCS HB 149 abandons the constitutionally-required distinction between personal possession and use in the home and other marijuana use. By criminalizing all possession and use of marijuana, the amended statutes dramatically erode Alaskans' constitutionally-protected right to privacy.

ARGUMENT

This Court should grant plaintiffs' request for a temporary restraining order and preliminary injunction to restrain enforcement of AS 11.71.050(2)(E), AS 11.71.060(a)(1) and AS 11.71.060(a)(2), as amended by CCS HB 149. The balance of hardships in this action strongly favors plaintiffs. The amended statutes violate Alaskans' constitutional right to privacy, which is a grave and irreparable harm.[7] Moreover, as shown below, absent

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[6] *See* Commentary & Sectional Analysis for the 1982 Revision of Alaska's Controlled Substances Laws, *Conference Committee Substitute for Senate Bill No. 190* at 19.

[7] *See State v. Norene*, 457 P.2d 926, 929 (Alaska 1969)(allegation that statutes unconstitutionally discriminated against plaintiffs provided valid basis for preliminary injunction); *see also Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2948.1 (2d ed. 2004) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

Numerous state and federal courts have held that government's interference with the right to privacy constitutes irreparable injury. *See, e.g., Deerfield Med. Ctr. V. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Circuit Unit B 1981) (violation of a constitutional right "mandates a finding of irreparable harm"); *Haynes v. Office of Atty Gen. Phill Kline*, 298 F.Supp. 1154, 1159 (D.Kan. 2003) (enjoining search of plaintiff's computer because irreparable harm caused by invasion of

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injunctive relief, the amended statutes would require plaintiffs to change their current conduct and would expose them to civil and criminal liability if they failed to comply. In addition, absent injunctive relief, the amended statutes would have grave consequences on plaintiffs' health and well-being. Because no burden would be placed on defendants if injunctive relief were granted pending resolution of plaintiffs' constitutional claims, greater harm would be done by refusing than by granting an injunction. Finally, although such showing is not required to obtain injunctive relief,[8] plaintiffs can demonstrate a clear showing of probable success on the merits of their claims. Accordingly, plaintiffs respectfully request that this Court grant plaintiffs' application for a temporary restraining order and preliminary injunction.

I. THE BALANCE OF HARDSHIPS STRONGLY FAVORS PLAINTIFFS.

To prevail on the motion for temporary restraining order or preliminary injunction, plaintiffs must show: (1)

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plaintiff's privacy); *Hirschfield v. Stone*, 193 F.R.D. 175, 187 (S.D.N.Y. 2000) (Irreparable harm requirement for injunction was satisfied in action by incapacitated criminal defendants alleging violation of constitutional privacy rights); *St. James Comm. Hosp., Inc. v. Dist. Ct.*, 317 Mont. 419, 421 (Mont. 2003) (Patients have constitutionally protected right of privacy of information contained in medical records and disclosure of those records would cause irreparable harm.); *Friedman v. Heart Inst. of Port St. Lucie, Inc.*, 863 So.2d 189, 194 (Fla. 2003) (noting that the disclosure of personal financial information implicates a person's privacy rights and cause irreparable harm if disclosed).

[8] *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 456 (Alaska 2006) (Plaintiffs bear the burden of satisfying a heightened standard of success on the merits only if plaintiffs' threatened harm is less than irreparable or if the opposing party cannot be adequately protected.).

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plaintiffs are faced with irreparable harm; (2) the opposing party is adequately protected; and (3) the plaintiffs have raised serious and substantial questions going to the merits of the case; that is, the issues raised are not frivolous or obviously without merit.[9] A party seeking a temporary restraining order carries the same burden as a party seeking a preliminary injunction.[10]

A. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.

AS 11.71.050(a)(2)(E), AS 11.71.060(a)(1) and AS 11.71.060(a)(2), as amended by CCS HB 149 infringe on the constitutionally-protected right to privacy and immediately and irreparably harm plaintiffs and, indeed, Alaskans throughout the State. This alone requires a finding of irreparable injury.[11]

Moreover, the amended statutes cause plaintiffs to suffer serious and immediate harm.[12] Plaintiffs are adults who use or possess small amounts of marijuana in the privacy of their homes.[13] The amended statutes require them to change their current practices and expose them to civil and

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[9] *See Stute v. Kluti Kaah Native Village of Copper Ctr.*, 831 P.2d 1270, 1273 (Alaska 1992).
[10] *See Alaska v. United Cook Inlet Drift Association*, 815 P.2d 378 (Alaska 1991); *see also State v. Norene*, 457 P.2d 926, 934 n.5 (Moody, J. dissenting).
[11] *See supra* n. 6.
[12] *See* Decl. of Jane Doe at ¶¶ 12, 13 ("Jane Doe Decl.") (attached hereto as Ex. 1); Decl. of John Doe at ¶¶ 9, 10 ("John Doe Decl.") (attached hereto as Ex. 2); Decl. of Jane Roe at ¶ 4 ("Roe Decl.") (attached hereto as Ex. 3); Decl. of John Doe 2 at ¶ 9 ("John Doe 2 Decl.") (attached hereto as Ex. 4); Decl. of Jane Doe 2 at ¶¶ 8-9 ("Jane Doe 2 Decl.") (attached hereto as Ex. 5); Affidavit of Michael Macleod-Ball at ¶¶ 8-9 ("Macleod-Ball Aff.") (attached hereto as Ex. 6).
[13] *See* Jane Doe Decl. at ¶ 13; Jane Roe Decl. at ¶ 3; Macleod-Ball Aff. at ¶ 8.

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criminal liability if they fail to comply. They face the prospect of police surveillance, searches of their homes, criminal sanctions and even jail time, all because they engage in purely personal conduct within the privacy of their homes.

Finally, the amended statutes make no exception for individuals, like plaintiff Doe, who depend on the medicinal properties of marijuana.[14] These patients face the impossible choice between protecting their privacy and protecting their health. Moreover, the medical marijuana statutes[15] were enacted in a legal context that presupposed legal use of marijuana in the home, and thus established protections that are significantly weaker than those in states where home-use is not already protected.[16] By rescinding home-use protection, the legislature is undermining the structure and intended protections for medical marijuana patients, their caregivers and doctors, around the state.[17]

B. The Defendants Will Suffer No Injury If This Court Enjoins Enforcement Of AS 11.71.050(a)(2)(E), AS 11.71.060(a)(1) and AS 11.71.060(a)(2), As Amended By CCS HB 149.

The State, in contrast, will not suffer serious injury if an injunction is granted. An injunction would place no

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[14] Jane Doe Decl. at ¶¶ 12, 13; *see* John Doe Decl. at ¶¶ 9, 10.
[15] AS 17.37.010 et seq.
[16] *Cf.* Wash. Rev. Code §§ 69.51A.005 - 69.51A.902.
[17] *See* John Doe Decl. at ¶¶ 7-10 ; Jane Doe Decl. at ¶¶ 8-9, 13; Affidavit of Dr. Robert D. Wald at ¶¶ 7-8, 11 ("Wald Aff.")(attached hereto as Ex. 7).

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administrative or financial burden on the State.[18] In *Ravin*, the Alaska Supreme Court recognized the constitutional right of adults to use and possess marijuana in the privacy of their home. The Alaska Supreme Court has consistently affirmed that right, repeatedly rejecting outright prohibitions on marijuana possession and use.[19] The proper resolution of this motion will not deny law enforcement any power to which it is entitled. An injunction in this case merely preserves the longstanding recognition and protection of Alaskans' fundamental right to privacy.

C. Plaintiffs Raise Serious And Substantial Questions Going To The Merits Of The Case.

Plaintiffs' request for an injunction raises serious and substantial questions going to the merits of the case; namely whether the legislature, in direct contravention of the Alaska Constitution and *Ravin*, can immediately and unilaterally overrule judicial precedent and criminalize adults' personal possession and use of marijuana in the privacy of the home. This question requires an interpretation of the Alaska Constitution. Such a question is indisputably serious and substantial, and thus satisfies the standard required under the balance-of-hardships test.[20]

II. PLAINTIFFS CAN ESTABLISH A CLEAR LIKELIHOOD OF SUCCESS ON THE MERITS.

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[18] *See Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 36 (Alaska 1980) (noting that the government's interest includes fiscal and administrative burdens).
[19] *Noy I*, 83 P.3d at 547-48.
[20] *See Stute*, 831 P.2d at 1273.

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Because the harm to plaintiffs is great if the injunction is denied and defendants are adequately protected if the injunction is granted, "it is no longer necessary to demonstrate that there is a clear probability of success on the merits."[21] However, even if this Court determined it necessary to evaluate the likelihood of success on the merits, plaintiffs can establish that they likely would prevail on the merits of their claims.

A. AS 11.71.050(a)(2)(E), AS 11.71.060(a)(1) and AS 11.71.060(a)(2), As Amended By CCS HB 149, Are Void.

Alaska has a long and proud history of providing expansive protection for individual rights under its Constitution.[22] In no arena has this been more true than with respect to an individual's right to privacy;[23] that is, the right to make intensely personal decisions free from unwarranted government interference. An individual's right to decide what to do in the privacy of his or her own home lies at the core of that right.[24]

In *Ravin*, the Supreme Court of Alaska recognized that this broad constitutional right of privacy encompasses the right to possess and use small amounts of marijuana in the

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[21] *Alaska Pub. Utils. Com'n v. Greater Anchorage Area Borough*, 534 P.2d 549, 553-554 (Alaska 1975), (citing *Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929)).
[22] *See, e.g., State v. Anthony,* 810 P.2d 155, 157 (Alaska 1991); *Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997)
[23] *Alaska v. Glass*, 583 P.2d 872 (Alaska 1978); *see also Messerli v. Alaska*, 626 P.2d 81, 83 (1980) .
[24] *Ravin*, 537 P.2d at 503-04.

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privacy of the home.[25] The trial courts, Court of Appeals and the Supreme Court of Alaska have consistently affirmed this interpretation of the state Constitution.[26] These cases have left no doubt that there exists "a constitutional limitation on the government's authority to enact legislation prohibiting the possession of marijuana in the privacy of one's home."[27]

CCS HB 149, however, does exactly what the Constitution and the Alaska Supreme Court have forbid: By amending AS 11.71.050(a)(2)(E), AS 11.71.060(a)(1) and 11.71.060(a)(2) to impose criminal penalties for the possession of any and all marijuana, CCS HB 149 prohibits adult possession of marijuana in the privacy of one's home. The privacy erosion provisions directly conflict with Article I, section 22 of the Alaska Constitution and the courts' rulings regarding the fundamental right to privacy protected by that section. These statutes cannot stand: A statute that conflicts with the Constitution is void.[28]

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[25] 537 P.2d at 503.

[26] *See*, *e.g.*, *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1135 (Alaska 1989) (the "fundamental right" of privacy protects the personal use of marijuana by adults in the home); *Noy I*, 83 P.3d at 544 (invalidating a statute that purported to criminalize any and all marijuana possession); *Noy v. State*, 83 P.3d 545, 549 (Alaska App. 2003) ("*Noy II*") (declining rehearing *Noy I* because that case rightfully "implement[ed] the Supreme Court's constitutional ruling in *Ravin*"); Order Denying Pet. For Hrg., *State v. Noy*, Supreme Court No. S-11297 (Sept. 7, 2004); *Crocker v. State*, 97 P.3d 93, 95-96 (Alaska App. 2004) ("Not all marijuana possession is a crime in Alaska . . ."); Order Denying Pet. For Hrg., *State v. Crocker*, Supreme Court No. S-11651 (Dec. 30, 2004); *Alaska v. MvNeil*, Case No. 1KE-93-947 CR (Alaska Sup. Ct. 1993) (rejecting application of AS 11.71.060 and AS 11.71.070 that criminalized all possession of marijuana).

[27] *Noy I*, 83 P.3d at 547-48.

[28] *Id.* at 542 ("A statute that purports to attach criminal penalties to constitutionally protected conduct is void.")(citing *Falcon v. Alaska*

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B. The Legislature Cannot Unilaterally Decide That It Has A Legitimate Justification For Infringing on a Fundamental Right.

In *Ravin*, the Alaska Supreme Court held that the fundamental right of privacy enunciated in Article I, section 22 of the Constitution encompasses the right of adults to use and possess a small amount of marijuana in their home.[29] It further held that the state could not meet "its substantial burden to show that the proscription of marijuana in the home is supportable by achievement of legitimate state interest."[30]

The legislature cannot perform the quintessentially judicial function of deciding whether an asserted state interest justifies abrogating the constitutional right of privacy.[31] Only the court can determine what constitutes a legal reason sufficient to trump the constitutional right of privacy—especially in a case where, as here, the Alaska Supreme Court has already addressed, and ruled definitively on, precisely that issue. Unless and until the Supreme Court holds otherwise, or the Constitution is amended, the Supreme Court's holding that there is no legitimate

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Public Offices Comm'n, 570 P.2d 469, 480 (Alaska 1977); *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979) (Legislative enactment may not authorize infringement of constitutional rights.) (citing *Marbury v. Madison*, 1 Cranch 137 (1803)); *Macauley v. Hildebrand*, 491 P.2d 120,122 (Alaska 1971) (blocking enforcement of Juneau ordinance that conflicted with state education statute because ordinance conflicted with state law on matter of statewide concern).

[29] *Ravin*, 537 P.2d at 504.

[30] *Id.*

[31] *See City of Boerne v. Flores*, 521 U.S. 508, 519-20 (1997)(Congress has been given power to "enforce," not power to determine what constitutes constitutional violation.); *Bonjour*, 592 P.2d at 1237 (citing *Marbury v. Madison*, 1 Cranch 137).

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justification for prohibiting small amounts of marijuana possessed by adults in their homes controls here.[32]

C. This Court Is Bound By The Supreme Court's Ruling in *Ravin*.

The *Ravin* decision has never been overturned—on the contrary, it has been repeatedly affirmed.[33] This Court is bound to follow the holding in *Ravin*, which permits the possession of a small amount of marijuana by adults in their homes.[34]

1. The Alaska Supreme Court Has Twice Refused To Grant A Petition For Hearing In Cases Involving Challenges To Ravin.

In *Noy I*, the Court of Appeals held that under the right to privacy established in *Ravin* adults in Alaska could possess up to four ounces of marijuana in their homes for personal use.[35] Noy had been convicted under a legislative statute codifying a voter initiative which made possession of any amount of marijuana a Class B misdemeanor.[36] Noy argued that his conduct was protected by the privacy clause of the Alaska Constitution, as interpreted by the Supreme Court in *Ravin*. The Court of Appeals reversed Noy's conviction, concluding that section 22 of the Alaska

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[32] *See McNeil*, Case No. 1KE-93-947 CR ("The legislature - nor for that matter the people through the initiative - cannot 'fix' what it disliked in an interpretation of that document by legislation. The only way to 'fix' the Constitution is by the amendment process or a new convention.")
[33] *Noy II*, 83 P.3d at 549.
[34] 537 P.2d at 504.
[35] 83 P.3d at 544.
[36] *Id.* at 542 (discussing 1990 Initiative Proposal No. 2, §§ 1-2 and AS 11.71.070).

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Constitution protected adult possession of less than four ounces of marijuana.[37]

In reaching this conclusion, the court reviewed the constitutionality of the statute that had made Noy's conduct a criminal act in the first place.[38] Noting that "the people of this state, through the ballot initiative process, may exercise the law making powers assigned to the legislature,"[39] the Court of Appeals held that the statute under which Noy had been convicted was "unconstitutional to the extent that it proscribes marijuana possession that, under the *Ravin* decision, is protected under article I, section 22 of the Alaska Constitution."[40]

On November 14, 2003, the Alaska Court of Appeals denied the State's petition for rehearing.[41] The State filed a petition for hearing in the Supreme Court.[42] In its petition for hearing, the State not only repeated its earlier rejected arguments, but also argued that the Supreme Court should overrule *Ravin* because new studies demonstrated that marijuana is now more dangerous than suggested by the scientific evidence presented to the Alaska Supreme Court in *Ravin*.[43] The arguments submitted in the petition and the "studies" attached to that petition are substantially similar, if not identical, to the findings made in CCS HB

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[37] *Noy I*, 83 P.3d at 540-542.
[38] *Id.* at 542.
[39] *Id.* (internal quotation omitted).
[40] *Id.*
[41] *Noy II*, 83 P.3d 545 (Alaska App. 2003).
[42] Pet. For Hrg., State v. Noy, Supreme Court No. S-11297 (Jan. 5, 2004)
[43] *Id.* at 4-11.

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149. Despite these arguments and the allegedly new evidence, the Supreme Court denied the State's petition for hearing.[44]

In *Crocker*, the State again challenged a Court of Appeals decision applying *Ravin* to prohibit an unwarranted government intrusion into the home.[45] In *Crocker*, the Court of Appeals invalidated a search warrant where the police had failed to establish probable cause that the marijuana in the home they searched fell outside the amount protected under the constitutional right to privacy.[46]

The State filed a petition for a hearing in the Supreme Court, challenging the Court of Appeals opinion. Once again, the Alaska Supreme Court refused to grant a hearing.[47]

2. This Court Is Required To Follow Ravin.

Like the trial courts and the Court of Appeals in *Noy* and *Crocker*, this Court is bound to follow *Ravin*. It is well settled that decisions of higher courts take precedence over the decisions of lower courts.[48] The Alaska Supreme Court's very recent refusals to review the *Noy* and *Crocker* decisions establish to a virtual certainty that the Court is not willing to revisit its holding in *Ravin* and is not

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[44] *Id.* at 542 (discussing 1990 Initiative Proposal No. 2, §§ 1-2 and AS 11.71.070).
[45] 97 P.3d at 98.
[46] *Id.* at 94.
[47] Order Denying Pet. For Hrg., *State v. Crocker*, Supreme Court No. S-11651 (Dec.30, 2004).
[48] *Klumb v. State*, 712 P.2d 909, 913 (Alaska App. 1986); *State v. Souter*, 606 P.2d 399, 400 (Alaska 1980).

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persuaded by the argument that new evidence requires reconsideration of that decision.

Moreover, respect for precedent is imperative here because of the important historical value of the *Ravin* decision. *Ravin* is the most important decision in the Supreme Court's privacy jurisprudence; any decision to overrule it must therefore meet a very exacting standard.[49]

Ravin remains good law and it is binding on both this Court and the legislature. For this reason alone, plaintiffs will prevail on the merits of their claims.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court grant their motion for a temporary restraining order and/or a preliminary injunction to enjoin enforcement of AS 11.71.050(a)(2)(E), AS 11.71.060(a)(1) and AS 11.71.060(a), as amended by CCS HB 149.

Dated this ____ day of June 2006.

Respectfully Submitted,

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[49] *See State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986) (courts "do not lightly overrule [their] past decisions"); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 867 (1992) ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

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