SUPERIOR COURT OF 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.: IJU-06-793 CI

ORDER ON STATE'S MOTION TO DISMISS AND CROSS-MOTIONS FOR SUMMARY JUDGMENT

FILED IN CHAMBERS
STATE OF ALASKA
FIRST JUDICIAL DISTRICT
AT JUNEAU
JUL 10 2006
BY:

I. INTRODUCTION

This case challenges 2006 legislation that criminalizes possession of small amounts of marijuana for personal use by adults in the privacy of the home, conduct found otherwise constitutionally protected in *Ravin v. State*.[1] In *Ravin*, the Alaska Supreme Court held that although there is no constitutional right to possess, ingest, purchase or sell marijuana, the Alaska Constitution's express right to privacy includes, as a fundamental right, a right to privacy in one's home without fear of unwarranted government interference.[2] The court held that this heightened expectation of privacy includes the possession and ingestion of small amounts of marijuana in a purely personal,

[1] 537 P.2d 494, 511 (Alaska 1975).

[2] Article I, section 22 of the Alaska Constitution provides:

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

non-commercial context within the home.[3] To the extent that the challenged legislation criminalizes possession of small amounts of marijuana in the home by consenting adults for purely personal, non-commercial use, it conflicts with *Ravin*, a decision of the Alaska Supreme Court that this court is bound to follow.

II. LEGISLATION AT ISSUE

The legislation at issue includes the 2006 amendments to AS 11.71.060(a)(1) and (2), to the extent that the amended statute, which makes it a Class B misdemeanor to use or display any amount of marijuana and/or to possess less than one ounce of marijuana, conflicts with *Ravin*. This decision is limited to the narrow issue presented.

Amendments to AS 11.71.050(a)(2)(E), criminalizing possession of more than one ounce of marijuana, are referenced in the complaint and motions as being implicated in this case. However, plaintiffs asserted at oral argument that the only issue in this case involves the legislature's power to regulate possession of *small* amounts of marijuana for personal use in the privacy of the home in light of the *Ravin* decision. *Ravin* does not set out any specific upper limit on the amount of marijuana that an adult can lawfully possess in the home for personal consumption but expressly excludes possession of "amounts of marijuana indicative of intent to sell" from constitutional protection.[4]

The Alaska Court of Appeals has held that the legislature has the power to set reasonable limits on the amount of marijuana that people can possess for personal use in their homes and that such regulation does not conflict with *Ravin*.[5] No specific argument has been advanced in this case that possession of *more* than one ounce of marijuana, even

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[3] *Ravin*, 537 P.2d at 511. *See also Noy v. State*, 83 P.3d 538, 548 (Alaska App. 2003)(finding that *Ravin* imposes a constitutional limitation on the government's authority to enact legislation prohibiting the possession of marijuana in the privacy of one's home).

[4] Ravin, 537 P.2d at 511.

[5] *Walker v. State*, 991 P.2d 799, 802 (Alaska App. 1999). *See also Hotrum v. State*, 130 P.3d 965 (Alaska App. 2006).

within the privacy of the home, is constitutionally protected conduct under *Ravin* or that any plaintiff or ACLU of Alaska member actually possesses more than one ounce of marijuana in their homes. As such, this decision is limited to those claims implicating the amendments to AS 11.71.060(a).

III. STANDING

The state seeks dismissal of the claims by Jane Doe and the American Civil Liberties Union (ACLU) of Alaska, asserting that they lack standing to bring this action. The state conceded at oral argument that Jane Roe has standing to bring this action.

A. The ACLU Has Standing to Challenge the Statutory Amendments to Alaska Statute 11.71.060

The State argues that the ACLU of Alaska does not have standing to sue in its own right or on behalf of its members. The ACLU of Alaska does not dispute that the organization lacks standing to sue in its own right. Instead, it argues that it has standing to sue on behalf of its members.

In *Alaskans for a Common Language, Inc. v. Kritz*,[6] the Alaska Supreme Court adopted the United States Supreme Court test for associational standing. An association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[7]

Alaska has only fairly recently adopted the federal associational standing test and therefore little Alaska case law is available to clarify the test. Federal law is instructive. In *NYC C.L.A.S.H., Inc. v. City of New York*,[8] a group dedicated to advancing the interests

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[6] 3 P.3d 906 (Alaska 2000).
[7] *Id.* at 915 (adopting test set forth in *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).
[8] 315 F. Supp. 2d 461 (S.D.N.Y. 2004).

of smokers brought suit to challenge the constitutionality of statutory smoking bans. The government first asserted that the organization, C.L.A.S.H., lacked standing because no individual member of the group was identified.[9] The court rejected this argument and stated that in cases "involving a facial challenge to a statute on First Amendment grounds, the prudential limitations of organizational standing are generally relaxed in light of the societal interests that are implicated."[10] The government next argued that the group did not have sufficient interest in the litigation. The court found that the group's stated purpose, defending smoker's rights, was germane to the interests it sought to protect.[11] Finally, the government alleged that individual participation by C.L.A.S.H. members was necessary because a constitutional challenge was involved.[12] The court found that individual participation was *not* required because only prospective declaratory relief was sought.[13] The court concluded that C.L.A.S.H. had associational standing.[14]

In *Roe No. 2 v. Ogden*,[15] an ACLU chapter at the University of Denver College of Law sued the Colorado State Board of Law Examiners on behalf of one of its members, John Roe No. 2, over bar application questions that inquired into an applicant's past drug use and mental health.[16] The group asserted that such an inquiry was discriminatory and violated an applicant's constitutional right to privacy.[17] The lower court dismissed the ACLU chapter for lack of standing. The Tenth Circuit held that the group had standing

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[9] Although the court used the phrase "organizational standing," it applied the federal test for associational standing. *See NYC C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 468.
[10] *Id.*
[11] *Id.* at 469.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 470.
[15] 253 F.3d 1225 (10th Cir. 2001).
[16] *Id.* at 1227.
[17] *Id.* at 1228.

to sue on behalf of John Roe No. 2 because Roe faced imminent injury due to his disclosure of past drug use on his application.[18]

Here, although the state contests both "organizational standing" and "associational standing," it does not discuss the test adopted in *Kritz*. The State argues that the ACLU of Alaska's interest is less than someone who is personally affected by the law. However, the associational standing test contemplates members having a greater interest than the representative organization in pursuing suit. The State also argues that there is no evidence that marijuana users must rely on an organization like the ACLU of Alaska to protect their identities. However, this is not the test. The three-prong test set forth in *Kritz* does not require that members of a group prove that protection by a group is necessary.

Here, at least some members of the ACLU of Alaska have standing to sue in their own right because they are exposed to potential criminal prosecution for possession of small amounts of marijuana in their homes.[19] Additionally, the interests the ACLU of Alaska seeks to protect are germane to the organization's purpose. The ACLU of Alaska's stated purpose is to advance and defend the cause of civil liberties and the rights of Alaskans under the United States and Alaska Constitutions, including the right to privacy.[20] Finally, the constitutionality of the statute in question is a question of law and

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[18] *Id.* at 1229.

[19] *See State v. Planned Parenthood of Alaska*, 35 P.3d 30, 34 (Alaska 2001)(holding that exposure to civil or criminal liability suffices to establish standing). Plaintiffs' affidavits indicate that the individual plaintiffs and ACLU members are at risk of potential prosecution for violation of AS 11.71.060(a)(2)(prohibiting possession of less than one ounce of marijuana). No plaintiff has asserted that they possess more than one ounce of marijuana in their homes for personal consumption. As such, there is an insufficient factual basis to find standing by the individual plaintiffs or the ACLU of Alaska to challenge the amendments to AS 11.71.050 (criminalizing possession of more than one ounce of marijuana) and, as previously noted, consideration of that statute is not undertaken here.

[20] Macleod-Ball Aff. ¶ 3, 5. *See generally Cal. Rural Legal Assistance, Inc. v. Legal Services Corp.*, 917 F.2d 1171, 1174 (9th Cir. 1990)(institutional goals of protecting a broad range of rights for workers as set forth in union constitution sufficient to meet requirement). *But see*

does not require direct testimony or other participation by the ACLU of Alaska's members, specifically John Doe 2 and Jane Doe 2.[21] Notably, the ACLU of Alaska is seeking declaratory judgment and not damages. Also, the Alaska Supreme Court has questioned whether the associational standing requirement even needs to be met outside of voting-rights cases.[22] The ACLU of Alaska has standing in this matter.

B. Jane Doe Has Standing to Challenge the Statutory Amendments To AS 11.71.060

Jane Doe is a 54-year-old Alaska resident who uses marijuana for purely personal use in the home to treat symptoms associated with Reflex Sympathetic Dystrophy. The state argues that Doe does not have standing to challenge the legislation because she might otherwise qualify for use of medical marijuana and/or defend any criminal charges on medical grounds under existing law protecting the use of medical marijuana in certain circumstances. Doe responds that she is not currently registered as an Alaska medical marijuana patient and thus not entitled to those protections from prosecution.

The risk of enforcement of a law against the plaintiff suffices for standing. In 2001, the Alaska Supreme Court decided *State v. Planned Parenthood of Alaska*.[23] In that case, an abortion provider, Planned Parenthood, and two physicians brought a civil action seeking to have a statute requiring minors to obtain parental consent before obtaining abortions declared void. The State of Alaska argued that the plaintiffs lacked standing to bring suit because, among other reasons, they did not face a specific threat of

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Local 186, Int'l Board of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Brock, 812 F.2d 1235, 1238-39 (9th Cir. 1987)(asserted right of a convicted felon to serve in union employment not an interest germane to the union's purpose).

[21] *See Kritz*, 3 P.3d at 915-16 (granting associational standing on behalf of two of organization's members where constitutionality of initiative was in question; issue was pure question of law and did not require participation from members; broader question of representation for all members not decided).

[22] *Interior Trails Preservation Coalition v. Swope*, 115 P.3d 527, 529 n.1 (Alaska 2005)(questioning whether associational standing was even required in prescriptive easement case; issue not addressed because court concluded test was met).

[23] 35 P.3d 30 (Alaska 2001).

prosecution.[24] The court held that the clinic and physicians had standing, stating that "we have long interpreted Alaska's standing requirement leniently in order to facilitate access to the courts."[25] The court further held that standing did not require a specific threat of prosecution, stating that "the doctors need not allege such drastic harm to meet Alaska's lenient test of standing."[26]

In *Thomas v. Anchorage Equal Rights Commission*,[27] landlords challenged a statute prohibiting landlords from refusing to rent property based upon the renters' marital status. The court found that the landlords had standing to challenge the statute, even if they had not been prosecuted.[28] The court explained: "[I]t seems obvious that the landlords stand to suffer actual prejudice if the state or municipality enforces the challenged laws against them."[29]

In this case, Jane Doe and the other plaintiffs must change current practices or face potential prosecution, at least under AS 11.71.060(a), for possession of less than one ounce of marijuana. Like *Planned Parenthood*, Jane Doe is challenging a criminal statute in a civil proceeding. Like *Thomas*, the state concedes the likelihood of enforcement of the law as it relates to home consumption of marijuana. Ms. Doe has standing to contest the constitutionality of the amendments to AS 11.71.060.

IV. CROSS-MOTIONS FOR SUMMARY JUDGMENT – DISCUSSION

A. Standard for Summary Judgment

The cross-motions for summary judgment raise constitutional issues of law. Constitutional interpretation requires "a reasonable and practical interpretation in accordance with common sense based upon the plain meaning and purpose of the

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[24] *Id.* at 34.
[25] *Id.*
[26] *Id.*
[27] 102 P.3d 937 (Alaska 2004).
[28] *Id.* at 942-943.
[29] *Id.* at 942.

provision and the intent of the framers."[30] Because the issues presented are questions of law, the court also considers precedent, reason and policy.[31]

B. The Doctrine of *Stare Decisis*

Lower courts do not have discretion to review or reverse decisions by higher courts.[32] This concept, derived from the common law doctrine of *stare decisis*, is based on practical considerations; any contrary rule would result in chaotic interpretation of state and federal statutes and constitutions, with no clear rule of law to guide the courts, legislatures or the public.[33] Appellate courts alone have the prerogative of overruling their own decisions, requiring that lower courts "follow the case that directly controls."[34] *Ravin* controls the decision in this case.

In recognizing the importance of the *stare decisis* doctrine, the Alaska Supreme Court has held that a party raising a claim controlled by an existing decision bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling: "[The supreme court] will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent."[35] This analysis, whether to reconsider or overrule a prior supreme court decision, is necessarily one for the supreme court.

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[30] *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 370 (Alaska 2001)(internal quotations and citations omitted).
[31] *Id.*
[32] *See Noy v. State*, 83 P.2d 538, 542 (Alaska App. 2003).
[33] *See Thomas*, 102 P.3d at 943 (Alaska 2004)("[t]he stare decisis doctrine rests on a solid bedrock of practicality").
[34] *Agostini v. Felton*, 521 U.S. 203, 237 (1997).
[35] *See Thomas*, 102 P.3d at 943 (quoting *State, Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 859 (Alaska 2003))(internal quotations omitted).

In *Thomas v. Anchorage Equal Rights Commission*, the Alaska Supreme Court examined the basis for overruling its own precedent.[36] In their superior court action, the *Thomas* plaintiffs asked the trial court judge to overrule the Alaska Supreme Court's decision in an earlier controlling case.[37] The trial court declined, finding that the supreme court decision was still controlling law in Alaska and was binding on the superior court.[38] On appeal, the landlords urged the Alaska Supreme Court to overrule the earlier decision.[39] The court declined. Significantly, the analysis of whether the existing precedent should be overruled was carried out by the Alaska Supreme Court and not the trial court.

Federal courts also respect and follow the doctrine of *stare decisis*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[40] the United States Supreme Court revisited the landmark abortion decision of *Roe v. Wade*. In *Casey*, the United States Supreme Court considered constitutional challenges to statutes imposing abortion reporting and consent requirements. The court stated that the State of Pennsylvania's arguments in support of the requirements were "arguments which in their ultimate formulation conclude that *Roe* should be overruled."[41]

The *Casey* court acknowledged that some of *Roe*'s factual assumptions had changed but declined to overrule it.[42] The court outlined considerations used to reexamine a prior holding, including, "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[43]

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[36] 102 P.3d 937 (Alaska 2004).
[37] *Id.* at 941.
[38] *Id.*
[39] *Id.* at 943.
[40] 505 U.S. 833 (1992).
[41] *Id.* at 853.
[42] *Id.* at 860.
[43] *Id.* at 855.

Although the Court acknowledged that time had overtaken some of *Roe*'s factual assumptions, it held such factual changes had no bearing on the central holding of *Roe*.[44]

Casey originated in the District Court for the Eastern District of Pennsylvania, where the lower court declared portions of statutes that restricted a woman's ability to terminate her pregnancy unconstitutional.[45] The lower court stated that although the legislation in question purported to regulate abortion in Pennsylvania, the legislative history clearly showed that the real challenge was to the foundation of *Roe* and the cases that followed it.[46] The district court explained that its function was not to debate the highly contentious issue of abortion but was instead to "uphold the law even when its content gives rise to bitter dispute."[47] The court stated:

> Whatever the Supreme Court may decide to do with this issue in the future, one thing is presently clear-many of the challenged provisions of the Act are unconstitutional under *Roe v. Wade* and its progeny, including *Thornburgh*. "[O]nly [the Supreme] Court may overrule one of its precedents"...for "unless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by lower federal courts no matter how misguided the judges of those courts think it to be."[48]

C. *Ravin* Controls the Decision by this Court

The important decision here, whether to reexamine and/or reverse *Ravin*, must rest with the appellate court that initially decided the issue. The state argues that new, although disputed, data justifies revisiting *Ravin*. The question of whether the findings of the legislature or the research considered is sufficient to warrant reexamination or

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[44] *Id.* at 860.
[45] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F. Supp. 1323 (E.D. Pa. 1990), *rev'd on other grounds*, 947 F.2d 682 (3d. Cir. 1991), *rev'd on other grounds* 505 U.S. 833 (1992).
[46] *Id.* at 1372-73.
[47] *Id.* at 1373.
[48] *Id.* (citations omitted).

reversal of *Ravin* is uniquely within the province of the Alaska Supreme Court.[49] Unless and until the supreme court directs otherwise, *Ravin* is the law in this state and this court is duty bound to follow that law.

The state suggests that, in effect, *Ravin* does not extend constitutional protection to the personal use of small quantities of marijuana by adults in the privacy of the home but, rather, provides a framework for trial courts to determine, apparently on a case-by-case basis, whether current data about marijuana establishes that the government has a sufficient interest in prohibiting possession of small amounts of marijuana by adults in the home. As did the Alaska Court of Appeals in its opinion on rehearing in *Noy v. State*,[50] this court rejects that interpretation of *Ravin*. In *Belgarde v. State*, the supreme court referred to *Ravin* as "[a] case [in which] we held that the state may not prohibit possession of [marijuana] by an adult in [their] home for personal consumption."[51] In *Luedtke v. Nabors Alaska Drilling, Inc.*, the supreme court stated that "*Ravin* addressed the issue of whether the state could prohibit the use of marijuana in the home. We held that it could not."[52] As the court of appeals found in *Noy*, "both in the *Ravin* opinion itself and in the supreme court's later descriptions of *Ravin*, the Alaska Supreme Court has repeatedly and consistently characterized the *Ravin* decision as announcing a constitutional limitation on the government's authority to enact legislation prohibiting the possession of marijuana in the privacy of one's home."[53]

Ravin is a decision by this state's highest court on the government's authority to enact legislation prohibiting the possession of small amounts of marijuana in the privacy of one's home. That decision is the law until and unless the supreme court takes contrary action.

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[49] The legislative record regarding the contested statutes are part of the record in this case.
[50] 83 P.3d 545, 546-47 (Alaska App. 2003)("*Noy II*").
[51] 543 P.2d 206, 207 (Alaska 1975).
[52] 768 P.2d 1123, 1135 (Alaska 1989).
[53] *Noy II*, 83 P.3d at 547-548.

V. MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Ravin is current controlling constitutional law on the question of possession of small amounts of marijuana for purely personal use by adults in the privacy of their homes. As recognized by the state, the 2006 statutory amendments "do not and can not automatically change the constitutional protections afforded by *Ravin, Noy I, Noy II and Crocker* . . . ."[54] Given the declaratory judgment entered here and other arguments advanced by the state, the motions for temporary restraining order and preliminary injunction are denied.

VI. CONCLUSION

Plaintiffs' motion for summary declaratory judgment is GRANTED to the extent set forth in this decision. Plaintiffs' motion for temporary restraining order and motion for preliminary injunction are DENIED. Defendants' motion to dismiss and motion for summary judgment are DENIED.

DATED at Juneau, Alaska this 10th day of July 2006.

[signature]
Patricia Collins
Superior Court Judge

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[54] State's Opposition to TRO and Preliminary Injunction at 8.

SUPERIOR COURT OF 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.: IJU-06-793 CI **ORDER ON MOTION TO PROCEED UNDER FICTITIOUS NAMES**

...D IN CHAMBERS
STATE OF ALASKA
FIRST JUDICIAL DISTRICT
AT JUNEAU
JUL 10 2006
BY: T Kay

Plaintiffs' motion to allow Jane Doe and Jane Roe to proceed using fictitious names is granted, subject to the conditions included in the state's conditional non-opposition.

DATED at Juneau, Alaska this 10th day of July 2006.

Patricia Collins
Superior Court Judge

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