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. 1JU-06-793 CI_____

PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, MOTION FOR PRELIMINARY INJUNCTION
AND
PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs submit this consolidated reply brief in support of their motion for summary judgment, or in the alternative, motion for preliminary injunction, and in opposition to Defendants' motion for summary judgment.[1]

The parties agree on several key points, considerably narrowing the issues before this Court:

First, Plaintiffs have claimed, and Defendants now agree, that "only the Alaska Supreme Court can overrule one of its case law precedents that is based on interpretation of the state constitution."[2] The parties thus agree that the legislature lacks the power to overturn or reverse *Ravin v. State*.[3] Defendants maintain, however, that the State may substitute its own judgment for that of the judiciary in interpreting the Constitution and determining the validity of *Ravin*. In submitting the legislation that gave rise to this controversy, the Governor stated:

> In 1975, the Alaska Supreme Court studied marijuana and concluded, in *Ravin v. State*, that the scientific evidence on its effects did not justify making it a crime for adults to possess small amounts in private. More recently, the Alaska Supreme Court has shown an unwillingness to reconsider the latest scientific evidence on the harmful effects of marijuana.

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[1] At a scheduling hearing on June 8, 2006, Plaintiffs agreed that their motion for a temporary restraining order and preliminary injunction could be construed, in the alternative, as a motion also seeking summary judgment. In the event that summary judgment is entered, the requests for preliminary relief will be rendered moot. On the other hand, if the Court carries this matter forward to trial, Plaintiffs seek a preliminary injunction to maintain the status quo pending resolution of the case.

[2] Def.'s Opp.'n TRO Prelim. Inj. 43 n.24.

[3] 537 P.2d 494 (Alaska 1975).

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> A rational evaluation of marijuana's harmful effects must occur, and the Legislature should do that – not the courts.[4]

The Governor's statement highlights the tension between Defendants' apparent frustration that "the Alaska Supreme Court has shown an unwillingness to reconsider the latest scientific evidence" and their admission that only the Alaska Supreme Court can reconsider its prior ruling. In short, Defendants seek to legislatively overrule *Ravin*, while acknowledging that it is improper to do so.

Second, as a result of 2006 Alaska Sess. Laws 53, Defendants acknowledge that "there is no doubt that at some point there will be charges filed in a case involving someone with under four ounces of marijuana in their home."[5] This admission decides the issue of irreparable harm. Where citizens face arrest and prosecution solely for conduct that has already been held to be constitutionally protected, an injunction to preserve the status quo should issue.

Finally, the medical and scientific evidence concerning marijuana, as cited by the parties, is deeply in dispute. According to Defendants, "[t]his case depends to a large extent on scientific evidence about today's marijuana,"[6] yet that evidence points in conflicting directions on many facts. The question for this Court on summary judgment is whether this factual dispute is material. Plaintiffs urge that the factual dispute is immaterial because the Supreme Court retains the sole prerogative to reconsider *Ravin*. Accordingly, summary judgment should

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[4] House Journal Text for 01-21-2005–24th Legislature at 127-28 (Pls. Ex. N).
[5] Def.'s Opp.'n TRO Prelim. Inj. 26.
[6] *Id.* at 5

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enter in Plaintiffs' favor, leaving the Supreme Court to decide whether to authorize the evidentiary evaluation proposed by Defendants.

ARGUMENT

I. THE STATUTORY AMENDMENT PROHIBITS CONDUCT THAT IS PROTECTED UNDER BINDING JUDICIAL PRECEDENT.

Despite recognizing that *Ravin* provides constitutional protection against arrest for adults' personal possession of marijuana in the home, and in the face of the basic proposition that the legislature lacks the power to overturn *Ravin*, Defendants stand on the argument that the recent statutory amendments do not "alter any constitutional rights under *Ravin*"[7] because they merely reclassify offenses. Looking to the text of the criminal statutes, Defendants observe that all marijuana use has been nominally a crime since 1990, ignoring the fact that enforcement of the 1990 statute was ruled unconstitutional in *Noy v. State*.[8]

Semantics aside, the statutory amendments cause a shift of great legal and factual significance: Prior to June 3, 2006, the State recognized and abided by the constitutional rulings that protect privacy rights to possess marijuana in the home; after that date, the State claims the power to arrest and prosecute individuals for this same conduct, making clear that "there is no doubt that at some point there will be charges filed in a case involving someone with under four ounces of

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[7] Def.'s Opp.'n TRO Prelim. Inj. 4.
[8] *Noy v. State*, 83 P.3d 538 (Alaska 2003) ("*Noy I*").

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marijuana in their home."[9] What was once constitutionally protected is now subject to criminal sanction. This Court can and must enjoin the enforcement of the current legislation, just as the Court of Appeals in *Noy* invalidated the portions of a substantially similar provision[10] that purported to make home marijuana use a crime.

A. The Parties Agree that *Ravin* and *Noy* Must Be Respected Unless Overruled by the Alaska Supreme Court.

Defendants recognize that "only the Alaska Supreme Court can overrule one of its case law precedents that is based on interpretation of the state constitution."[11] Plaintiffs agree. As stated by the Court of Appeals: "We are bound to follow the decisions of our supreme court."[12] An appellate court alone has "the prerogative of overruling its own decisions," requiring that lower courts "follow the case which directly controls."[13] As much as Defendants disagree with the result in *Ravin* and its progeny, the legislature, the executive branch and the lower courts are all bound to follow *Ravin* unless and until the Supreme Court directs otherwise.

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[9] Def.'s Opp.'n TRO Prelim. Inj. 26.
[10] Alaska Stat. § 11.71.060 (2005), *invalidated in relevant part by Noy I*, 83 P.3d 538.
[11] Def.'s Opp.'n TRO Prelim. Inj. 43 n.24.
[12] *Blank v. State*, 3 P.3d 359, 370 (Alaska App. 2000) (overruled on other grounds) (citing *Harrison v. State*, 791 P.2d 359, 363 (Alaska App. 1990)).
[13] *Agostini v. Felton*, 521 U.S. 203, 237 (1997), cited with approval by *Tyler v. State*, 133 P.3d 686, 690 (Alaska App. 2006).

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The controlling nature of *Ravin* upon the present case is made all the more apparent by the *Noy* ruling,[14] where the Court of Appeals held unconstitutional a statute virtually identical to the statutes challenged here.[15] The Court of Appeals recognized the straightforward nature of its task: "When a statute conflicts with a provision of our state constitution, the statute must give way. Thus, a statute which purports to attach criminal penalties to constitutionally protected conduct is void."[16] As in the present litigation, the State urged the Supreme Court in 2003 to review *Noy* in light of evidence that, according to the State, showed that circumstances had changed to make *Ravin* no longer applicable.[17] Declining that invitation, the Court let *Ravin* stand and left in place the ruling in *Noy*. Recognizing its "duty to construe [statutes] to avoid constitutional infirmity where possible,"[18] the court did not invalidate the entire statute (and did not draft an alternative statute), but rather voided only that part that it found unconstitutional: the criminalization of possession in the home of less than four ounces of marijuana.[19] This methodology, reasoning and result are both applicable to, and controlling of, the present case.

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[14] *Noy I*, 83 P.3d 538.
[15] *See* Alaska Stat. § 11.71.060 (2005), *invalidated in relevant part by Noy I*, 83 P.3d 538.
[16] *Noy I*, 83 P.3d at 542 & n.15.
[17] *See* Plaintiffs' Opening Br. 14-17 (and authorities cited therein).
[18] *Municipality of Anchorage v. Anchorage Police Dep't Employees Ass'n*, 839 P.2d 1080, 1083 (Alaska 1992) (internal citation omitted).
[19] *Noy I*, 83 P.3d at 543.

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B. Defendants May Not Avoid Judicial Precedent By Re-Enacting a Statutory Provision Previously Held to be Unconstitutional.

Faced with *Ravin* and *Noy*, Defendants claim that its new marijuana legislation does not contravene those rulings because the criminal code has included a broad ban on marijuana since 1990 – a prohibition that does not, by its own terms, provide an exception for possession in the home.

The concept of liberty has witnessed numerous examples of statutory enactments remaining "on the books" as dead letters, even after a court has ruled the provisions unconstitutional. The United States Supreme Court, in *Loving v. Virginia*, made clear the unconstitutionality of statutes forbidding marriage between individuals of different races,[20] yet Alabama retained its anti-miscegenation statute until repealed by voter initiative in November 2000.[21] More recently, the Supreme Court struck down a Texas sodomy statute,[22] though the statute itself remains on the books with the annotation: "This section was declared unconstitutional."[23] The Colorado Supreme Court held unconstitutional a state law making it a crime to deface the American flag,[24] yet the statute remains on the books over 30 years later, lacking a legislator to sponsor its repeal.[25] In precisely the same manner, the Alaska criminal code retains a blanket prohibition on all

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[20] 388 U.S. 1 (1967).
[21] Ala. Const. art. IV, § 102.
[22] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[23] Tex. Penal Code Ann. § 21.06 (2006).
[24] *People v. Vaughan*, 514 P.2d 1318, 1324 (Colo. 1973).
[25] Colo. Rev. Stat. § 18-11-204 (2006).

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marijuana use,[26] yet the annotations to that statute duly note that the provision is "unconstitutional to the extent that it violated the constitutional right to privacy as articulated in the *Ravin* decision; the appellate court upheld the statute to the extent possible by reinstating a dividing line between private personal possession and illegal possession of four ounces."[27]

In all of the above examples, state officials dutifully refrain from enforcing a statute to the extent that it has been adjudicated unconstitutional. No one has been arrested in recent years for miscegenation in Alabama; Texas no longer enforces its sodomy statute; Colorado treats its flag-desecration statute as a dead letter; and Alaska officials have long understood that home use of marijuana cannot be the basis for arrest or prosecution. By the same token, it is unimaginable that any state would think it could re-enact and begin enforcing a statute criminalizing miscegenation, sodomy, flag desecration, or, in the case of Alaska, home use of marijuana. If state officials sincerely believe that circumstances have sufficiently changed to give rise to a compelling enough governmental interest to justify such laws, they must seek and obtain authoritative judicial approval *before* enforcing laws that fly in the face of clear judicial precedent. To pretend that this legislation has no impact is, at best, semantic sophistry.

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[26] Alaska Stat. § 11.71.060 (2005), *invalidated in relevant part by Noy I*, 83 P.3d 538.
[27] Alaska Stat. § 11.71.060 (ann.) (2005), *invalidated in relevant part by Noy I*, 83 P.3d 538.

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II. THE COURT'S EQUITABLE POWER INCLUDES THE ABILITY TO ENJOIN ENFORCEMENT OF AN UNCONSTITUTIONAL CRIMINAL LAW.

Privacy is a fundamental right protected explicitly by the Alaska Constitution.[28] Yet Defendants contend that this Court is virtually powerless to hold the challenged statutes unconstitutional. If the totality of Defendants' arguments were accepted, a person could never challenge an unconstitutional law until he was arrested, charged and convicted. Courts have consistently refused to abandon the Constitution – including, specifically, the fundamental right to privacy – to the threats of law enforcement and have repeatedly issued injunctive and declaratory relief prohibiting a statute's unconstitutional application.[29]

Defendants invoke a smattering of out-of-state authority (cases from Colorado, Oklahoma, Louisiana, Indiana and Pennsylvania) for the broad and unexceptional proposition that courts generally are careful in considering requests to enjoin criminal statutes.[30] With one exception, none of Defendants' cases found that the challenged statute posed constitutional problems at all, and thus the issue of

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[28] *Ravin*, 537 P.2d at 503-04.

[29] *See, e.g.*, *Ayotte v. Planned Parenthood*, 126 S.Ct. 961, 969 (2006) (finding appropriate an injunction of statute restricting access to medically necessary abortions that imposed criminal sanctions on doctors who violated the act); *Colautti v. Franklin*, 439 U.S. 379, 393-94 (1979) (upholding injunction of criminal statute that presented "serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights"); *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (upholding injunction against statute limiting right to marry and also imposing criminal penalties on those who violated it); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (holding criminal prohibition against abortion unconstitutional and remanding for entry of a permanent injunction enjoining enforcement of the statutes).

[30] Def.'s Opp.'n TRO Prelim. Inj. 13-14.

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injunctive relief was not reached.[31] In the only one of Defendants' cases to reach the question, the court of appeals actually *affirmed* a trial court's preliminary injunction.[32] This should be unsurprising, as courts across the nation have imposed injunctions against enforcement of unconstitutional criminal statutes.[33]

Honing in on Alaska law, Defendants are able to cite only *Jurco v. State*, No. 3AN-91-121 Civ.(Alaska Sup. Ct. 1991), State's Exs. S-2 and S-3, an unpublished, trial court decision that is not binding on this Court. Moreover, the *Jurco* ruling relies on cases discussing the abstention doctrine, which is unique to situations where the federal courts seek to enjoin a pending state criminal prosecution, and does not apply to the case here. It does not provide a persuasive argument for the proposition that a provision adjudicated as unconstitutional is impervious to injunctive relief.

Finally, Defendants posit the radical proposition that, based on the independence of the grand jury and out of respect for the executive branch, the

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[31] *See Edmondson v. Pearce*, 91 P.3d 605, 614 and n.10 (Okla. 2004) (finding no violation of constitutional right, but recognizing that protection of constitutional rights "may also appropriately call into play the equitable authority of a court to enjoin enforcement of a criminal enactment"); *Rathke v. MacFarlane*, 648 P.2d 648, 652 (Colo. 1982) (finding no constitutional violation, but recognizing that injunctions of criminal statutes may be appropriate when fundamental rights are implicated); *Golden Triangle News, Inc. v. Corbett*, 689 A.2d 974, 978 (Pa. Commw. Ct. 1997) (finding no constitutional violation); *Vonderhaar v. Parish of St. Tammany*, 633 So.2d 217, 220 (La. Ct. App. 1993) (finding no constitutional violation).

[32] *Barlow v. Sipes*, 744 N.E.2d 1, 5 (Ind. App. 2001), *cited in* Def.'s Opp.'n TRO Prelim. Inj.14.

[33] *See* cases cited *supra* note 29.

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judiciary can *never* hinder the bringing of criminal actions.[34] Of course, Plaintiffs here are not seeking to enjoin a *pending* criminal case; rather Plaintiffs seek to prevent Defendants from embarking on their promised course of "testing" *Ravin* by bringing criminal prosecutions. Defendants can point to no authority for their view that when the legislature criminalizes conduct that is constitutionally protected, the only remedy is to await the State's prosecution and then move to dismiss the indictment.

Even in the very different context of a *pending* criminal prosecution, Defendants recognize that "injunctions of prosecutions could occur in extraordinary circumstances," for instance prosecutions that cause injury to free speech rights, property rights, and physical injury or death.[35] These rights are no more or less fundamental under the State Constitution than is the right to privacy.[36]

As a matter of constitutional law, respect for individual privacy rights makes null and void any law criminalizing marijuana possession in the home. Just as Alaskans have not been subject to prosecutions for acts committed in violation of that statute in its previous incarnations, this Court is empowered to ensure that the same status quo continues in the future. Further, this course ensures that no

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[34] Def.'s Opp.'n TRO Prelim. Inj.15-16.
[35] Def.'s Opp.'n TRO Prelim. Inj. 17-18 & n.8.
[36] *See Ravin*, 537 P.2d at 504-05.

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controversies are required to be settled by a criminal court, obviating any possible conflict between the equity court and the criminal court.

Defendants' narrow view of the judiciary's power violates separation of powers principles because it encroaches on the important role of the judiciary. Courts are assigned the task of determining what the law is and ensuring that it is, and will be, followed.[37] Courts of equity have the power—indeed, the obligation—to enjoin the enforcement of a criminal statute that seriously threatens an individual's personal or property rights.[38] This is precisely what the Supreme Court did in *Ravin*, what the Court of Appeals did in *Noy*, and what Plaintiffs ask this Court to do here.

III. GRANTING PLAINTIFFS' REQUESTED RELIEF PRESERVES THE STATUS QUO, PREVENTS IRREPARABLE HARM, AND DOES NOT IMPOSE ANY HARDSHIP UPON DEFENDANTS.

Defendants are correct that an important factor to consider before issuing injunctive relief is whether an injunction will alter the status quo.[39] But

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[37] *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979) ("[W]e must determine if the higher principles embodied in the constitution have been violated, for it is well-established that a legislative enactment may not authorize infringement of constitutional rights.") (citing *Marbury v. Madison*, 1 Cranch 137 (1803); *State v. Campbell*, 536 P.2d 105 (Alaska 1975)).

[38] *See Joint Anti-Fascist Refugee Committtee v. McGrath*, 341 U.S. 123, 156 (1951); *Alaskans for Privacy v. State*, 3AN-91-1746 Civ. at 6 (Alaska Sup. Ct. 1992).

[39] *Beluga Mining Co. v. State Dep't of Natural Res.*, 973 P.2d 570, 576 (Alaska 1999) (holding that superior court properly issued an injunction because, among other reasons, the injunction was "a necessary and appropriate act of judicial discretion intended to maintain the status quo"); *see also, e.g.*, *Dep't of Parks & Rec for State of Cal. v. Bazaar del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006) ("While the basic function of a preliminary injunction is to preserve the status quo pending a determination of the action

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Defendants fundamentally misunderstand the meaning of status quo. After the Court of Appeals invalidated former Alaska Stat. § 11.71.060 (2003) to the extent it prohibited adults' personal possession of marijuana in the home, Alaskan adults rested secure in the privacy of their home and faced no threat of criminal investigation or sanction for their purely possession of marijuana in their homes. Such was the status quo that existed before the challenged act was passed.[40] Thus, in this case, preservation of the status quo mandates that the Court continue to permit adults' possession of small amounts of marijuana in their homes. Contrary to Defendants' assertions, an injunction would not be "a step backwards in the state's ability to test the validity of *Ravin*"; it would merely preserve the status quo and protect Plaintiffs' constitutional rights unless and until the Supreme Court determines that such right no longer exists.

Defendants incorrectly argue that an injunction in this case will prevent the State from enforcing lawful prohibitions against a variety of criminal conduct.[41] Defendants apparently misunderstand Plaintiffs' requested relief. To be clear: Plaintiffs ask this court to enjoin enforcement of the amended statutes, to the extent those statutes infringe on the right to privacy recognized in *Ravin* – that is, to the extent they criminalize adults' personal possession of small amounts of

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on the merits, the status quo is not simply any situation before the filing of the lawsuit, but rather the last uncontested status that preceded the parties' controversy.") (internal quotation marks and citation omitted).

[40] *Bazaar del Mundo*, 448 F.3d at 1124.

[41] Def.'s Opp.'n TRO Prelim. Inj. 29.

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marijuana in the home. Plaintiffs do not ask the Court to enjoin enforcement of any lawful government activity.

Thus, law enforcement still has the power to investigate and arrest, just as prosecutors still have the power to prosecute, those who grow marijuana for commercial purposes, those who drive under the influence, and those who engage in a host of other activity that is not constitutionally protected. Moreover, there is no question that grand juries will continue to have the power to issue indictments in these cases.

Finally, Defendants assert, as their main claim to hardship posed by an injunction, that they are entitled to "test the validity" of *Ravin*. A preliminary injunction would not foreclose Defendants' ability to test *Ravin* or to argue that it should be overruled. This litigation would proceed as with any other case. A preliminary injunction would merely preserve the status quo in the interim during which the Court would consider the merits of Plaintiffs' claims.

Defendants would clearly prefer to litigate the constitutionality of the challenged statutes in a criminal case of their choosing. However, Defendants cannot claim hardship merely because the claims are not asserted in the context they find most pleasing.

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IV. THIS COURT SHOULD ASSESS THE FACTUAL RECORD ONLY IF AUTHORIZED BY THE SUPREME COURT AND ONLY BY WEIGHING OF FACTUAL EVIDENCE *DE NOVO*.

Plaintiffs and Defendants alike maintain that this case can be resolved on summary judgment, but for very different reasons.[42] As explained above and in our opening brief, Plaintiffs maintain that this Court is bound to follow *Ravin*, deferring any assessment of evidence concerning marijuana unless and until authorized by the Supreme Court. Defendants, by contrast, maintain that this Court should adopt wholesale the legislative findings about marijuana, and so should uphold the new legislation notwithstanding *Ravin*. A third course, advocated by neither party, would have this Court deny summary judgment on both sides and hold a trial to assess the voluminous evidence concerning marijuana. We discuss each of these approaches in detail below, and then briefly address the standard of review that should be applied in assessing legislative findings.

A. This Court Should Grant Summary Judgment in Plaintiffs' Favor, Deferring Assessment of Factual Disputes Unless and Until Authorized by the Supreme Court.

Defendants insist upon their prerogative to "test the validity" of *Ravin*, but they scarcely acknowledge the gravity of asking this Court to undertake the weighty task of assessing Supreme Court precedent without giving the Supreme

[42] If summary judgment is denied and the case moves forward to trial, Plaintiffs urge that a preliminary injunction be entered to maintain the status quo. *See also supra* nn.39-40.

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Court the opportunity to do so in the first instance. Whatever judgment this Court enters, it will surely be reviewed by the Supreme Court. Plaintiffs' position is simply that this Court should not, and cannot, put even a preliminary stamp of judicial approval upon a legislative enactment that contravenes *Ravin* until the Supreme Court gives it leave to do so. Judgment should enter for Plaintiffs, irrespective of the significant factual and scientific disputes concerning marijuana.

Defendants, by contrast, insist that this Court should uphold the disputed legislation as if the legislature were writing on a blank slate. Indeed, this case would be very different if no legislation about marijuana had ever existed, if the legislature had enacted a prohibition on its use and possession generally, and if a litigant had then challenged the constitutionality of applying that statute to adult home use of marijuana. In such a case, the trial court would likely assess evidence concerning marijuana, and the appellate court would make its own assessments about the factual basis for the asserted governmental interest. In fact, this is precisely what happened in the *Ravin* litigation some thirty years ago, where the trial court and the Supreme Court both made extensive factual findings concerning the government's asserted interests. This methodology of trial court fact finding, followed by appellate court fact finding, applies equally to any number of first-impression constitutional challenges.[43]

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[43] *See, e.g.,American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 824-26 (Cal. 1997) (upholding trial court's fact finding over legislative fact finding in challenge to statute under the California Constitution's privacy clause); *Sable Communications of*

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Far more unusual is the circumstance present here, where the State has repeatedly sought to overturn settled judicial precedent, based largely on assertions of changed circumstances. Where the government is seeking to impose a restriction upon a fundamental right that has *already been rejected on constitutional grounds*, it must proceed carefully and with proper regard for the institutional prerogatives of the Court whose ruling it seeks to overturn.[44] Where, as here, the government has already had its regulation deemed unconstitutional (in *Ravin*), and then had its first attempt to re-enact the restriction also deemed unconstitutional (in *Noy*), a third bite at the apple should go forward with utmost caution.

As with the examples given above concerning miscegenation, sodomy or flag desecration, one might imagine some hypothetical legislature seeking to re-enact a once-discredited law by advancing governmental interests not considered in the original litigation or might point to changed circumstances that make the governmental interests now appear more weighty. But, it is hard to imagine that a trial court would take these legislative assertions as presumptively true or even that the trial court would take evidence on these issues. In reviewing *Noy*, the Supreme Court declined the State's invitation to reassess the evidence on marijuana or reconsider *Ravin*. While declining to review a case is not, strictly

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Cal., Inc. v. F.C.C., 492 U.S. 115, 129 (1989) (requiring judicial scrutiny of legislative fact finding); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) (same).

[44] *See City of Boerne v. Flores*, 521 U.S. 507, 531-32 (1997) (rejecting statute intended to overturn prior Supreme Court ruling, noting "lack of support in the legislative record" to justify enactment).

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speaking, precedent, it certainly sends a powerful signal concerning the Court's receptivity to political tinkering with a constitutional precedent. This Court should not adjudicate factual issues concerning marijuana until the Supreme Court so directs.

B. Summary Judgment for Defendants Is Inappropriate.

Defendants do not argue that there are any genuine issues of material fact that would defeat Plaintiffs' motion for summary judgment.[45] Instead, they argue that this Court should simply rubber-stamp the findings of the Legislature, thereby concluding—without any analysis or scrutiny—that the legislature had a sufficient justification for infringing on the constitutional right to privacy. Only by following this extraordinary suggestion could this Court enter summary judgment for Defendants, because an examination of the facts (even under the relatively deferential standards proposed by Defendants and discussed below) would have to account for significant scientific and medical evidence disputing the findings adopted by the Legislature.[46] In other words, the Court would have to find disputed material facts, barring entry of summary judgment for Defendants.

Understanding "danger" and evaluating its magnitude and effect on others is no simple task. Serious disputes exist about the validity, methodology and conclusions of hundreds of scientists, researchers and policymakers and the

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[45] Defendants argue only that "if the medical marijuana laws are in issue then there are genuine issues of disputed material fact." As Plaintiffs explain in the Response to Defendants' Motion to Dismiss, the medical marijuana laws are not in issue in this case.

[46] *See* Pls.' Exs. A-O; Pls.' Statement of Disputed Facts In Support Of Pls.' Opp'n to Defs.' Cross-Mot. for Summ. J.

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scientific article, books, reports and statements they have produced. These disputes are already evident in the parties' voluminous submissions to this Court; and more pages and many hours of testimony must be devoted to supplementing, analyzing and explaining what has already been submitted. To give only a few examples of these disputes: Plaintiffs' evidence indicates that marijuana does not cause (and may prevent) lung cancer; marijuana has no role in causing crime; marijuana becomes less dangerous as potency increases; marijuana dependency is relatively rare; there is no causal link between marijuana and birth defects or fetal damage; and marijuana use does not lead to use of other drugs. The legislature made findings, and Defendants submitted evidence to this Court, that reached the contrary conclusions on each of the previously listed points.[47]

Finally, Defendants are not entitled to summary judgment because, even taking the legislative "findings" as true, Defendants have not met their significant burden of demonstrating a sufficiently compelling governmental need based on sound evidence that there is a close and substantial relationship between prohibition of marijuana use in the home and public welfare. *Ravin* held that criminalization of marijuana in the home violates the right to privacy unless "the State has met the greater burden of *showing a close and substantial relationship* between public welfare and control of ingestion or possession of marijuana in the home for personal use."[48] Even accepting all of the State's alleged factual assertions as true, it could not meet this burden. "Here, mere scientific doubts will

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[47] *Compare* State's Ex. S-13, *with* Plaintiffs' Statement of Disputed Facts.
[48] *Ravin*, 537 P.2d at 504 (emphasis added).

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not suffice. Defendants must demonstrate a need based on *proof* that the public health or welfare will suffer if the controls are not applied."[49] Defendants make few assertions that the harms it has identified seriously threaten public welfare. Having failed to present definitive proof that prohibition bears a close and substantial relationship to public welfare, Defendants fail to meet their substantial burden under the *Ravin* framework, even if all legislative "findings" are taken as scientific fact.

C. Assessment of the Factual Record, if Authorized by the Supreme Court, Will Require *De Novo* Review at Trial.

If this Court ultimately assesses the competing evidence concerning marijuana, it will have to face complex, highly contested arguments over the appropriate standard of review. To be clear, there is no need to resolve the standard of review at this juncture. If the Court agrees that *Ravin* and *Noy* are controlling, it will enter summary judgment for Plaintiffs. If the Court sees itself authorized to assess the factual record prior to Supreme Court consideration, then summary judgment will be denied based on the existence of disputed material facts, leaving until the trial itself a determination of the standard of review of factual materials. Nonetheless, Defendants have argued at some length for a deferential standard of review, and we now address those arguments, at least in a preliminary manner.

[49] *Id.* at 511 (emphasis added).

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Full deference to legislative fact finding is impermissible where, as here, legislative action infringes on a fundamental constitutional right, especially the right of privacy.[50] In *Valley Hospital Assoc., Inc. v. Mat-Su Coalition for Choice*, the Alaska Supreme Court explicitly held that courts "cannot defer to the legislature when an infringement of constitutional rights results from legislative action."[51]

Defendants do not address this clear rule, and instead rely on an erroneous interpretation of Alaska Const. art. I, § 22[52] that the Alaska Supreme Court has repeatedly rejected.[53] Indeed, when presented with this very same argument regarding Article I, § 22, the Alaska Supreme Court explicitly recognized the judiciary's role in protecting constitutional rights and noted that to adopt the government's interpretation of section 22 "would necessarily reduce the privacy

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[50] The Supreme Court in *State v. Erickson*, 574 P.2d 1 (Alaska 1978), does not hold otherwise. The *Erickson* Court did not defer to the findings of the Legislature. Rather, it reviewed evidence submitted by both parties. *See id.* at 6-10. The Court recognized that in examining the constitutionality of a statute—that is, whether it was supported by a compelling interest—it should undertake its own review of the evidence. *See id.* at 4-5 (noting that in cases where "the validity of legislation having major social consequences is at stake," the Court would even accept material not submitted to the trial court).

[51] 948 P.2d 963, 972 (Alaska 1997); *see also Erickson*, 574 P.2d at 4 (courts may look beyond the legislative record when "the validity of legislation having major social consequences is at stake."); *City of Boerne*, 521 U.S. at 536 ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies, the Court will treat its precedents with the respect due them . . . .").

[52] Defendants also note, without explaining, that they have a duty under Alaska Const. art. VII, §§ 4 and 5 to promote the public health and welfare. Defs. Opp.'n Pls. Mtn. Summ. J. 7. There is nothing in these constitutional provisions, however, that grants the legislature absolute authority when it is allegedly acting in the interests of public health and welfare.

[53] *See Planned Parenthood v. State*, 35 P.3d 30, 35-36 (Alaska 2001); *Valley Hosp.*, 948 P.2d at 969.

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clause from a basic guarantee of personal freedom to a mere legislative option—a possible protection that each legislature would be free to adopt, alter, or even abrogate."[54]

Defendants' contention that separation of powers principles require deference to legislative findings fails for similar reasons. As explained above, the basic rule of separation of powers requires the judiciary to independently review and consider the evidence. Moreover, the judiciary is plainly competent to review and analyze the evidence presented to it.[55] The Supreme Court in *Ravin* does not hold to the contrary. Indeed, the *Ravin* Court recognizes that it is the judiciary's role to review the evidence and determine whether the government has met its "substantial burden" of demonstrating a significant interest sufficient to justify infringement of a constitutional right.[56]

Seeking to avoid the established standard for judicial review of legislation implicating *fundamental rights*, Defendants next invoke cases that reviewed legislation of a far different sort. For instance, *Ault v. Alaska State Mortgage Association*[57] involved some degree of judicial deference to legislative findings about the need to create an administrative agency. That the Court did not rigorously question this legislative act is not surprising: No court since the New

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[54] *Planned Parenthood*, 35 P.3d at 36.
[55] *See Ravin*, 537 P.2d at 505 (noting that where the outcome turns upon determination of facts, it is "of course correct" to take evidence and allow testimony); *Erickson*, 574 P.2d at 4.
[56] *See also City of Boerne*, 521 U.S. at 518-19.
[57] 387 P.2d 698, 701 (Alaska 1963).

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Deal has seriously impeded the legislature's ability to create government agencies.

The plaintiffs in *Ault* did not challenge the validity of the Legislature's findings and thus the question of deference was not squarely presented to the Court.[58] Nonetheless, the Supreme Court recognized that if such a challenge were raised, the trial court had a duty to consider evidence presented by both parties.[59]

Defendants' invocation of *Turner Broadcasting Inc. v. FCC*[60] fails for similar reasons. Again, *Turner* does not involve infringement of fundamental rights, but rather turns on a complicated regulatory framework in which Congress has special expertise in making " predictive judgments"[61] and concluded that the law in question should be upheld if the pertinent legislative findings were "reasonable inferences based on substantial evidence."[62]

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[58] *Id.* at 700-01.

[59] *Id.* at 701-02 ("We do hold that if summary procedure is employed in cases involving important public issues where any fact is in dispute the trial judge should not attempt to render a decision unless he is satisfied that the evidence, both pro and con, is sufficient to give him the necessary background of knowledge.").

[60] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("Turner I"); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

[61] *Turner II*, 520 U.S. at 195 (quoting *Turner I*, 512 U.S. at 665).

[62] *Turner I*, 512 U.S. at 666. *But see, e.g.*, *United States v. Morrison*, 529 U.S. 598, 614 (2000) (noting that "whether particular operations affect interstate commerce sufficient to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than legislative question, and can be settled finally only by this Court") (internal citations omitted); *see also Kimmel v. Fla. Bd. Of Regents*, 528 U.S. 62, 80, 89-90 (2000) (Eleventh Amendment barred application of Age Discrimination in Employment Act's damages remedy to States because evidence about state age discrimination cited in a "decade's worth of congressional reports and floor debates" fell "well short of the mark"); *Fla. Prepaid Postsec. Educ. Expense Bd. V. College Sav. Bank*, 527 U.S. 627, 646 (1999) (finding that, notwithstanding evidence submitted to Congress about patent infringement by States, the "record at best offers scant support for Congress' conclusion that States were depriving patent owners of property without due process of law"); *City of Boerne*, 521 U.S. at 530 (concluding after thorough review of legislative record of

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Here, by contrast, the legislature has not made a administrative-regulatory decision, an economic prediction, or indeed a prediction of any kind. Under *Ravin*, the only relevant questions are whether adults' personal possession of small amounts of marijuana in the home presents a significant danger to public health and welfare; and, if it does, whether prohibiting that possession bears a close and substantial relationship to protecting public health and welfare.[63] Whether such a body of opinion exists is a demonstrable fact that can, and should, be subject to meaningful judicial review.

CONCLUSION

For the reasons stated herein and in Plaintiffs' opening brief, Plaintiffs respectfully request that this Court enter summary judgment in their favor and deny Defendants' motion for summary judgment. In the alternative, Plaintiffs respectfully request that this court enter preliminary injunctive relief to preserve the status quo pending resolution of this matter.

Religious Freedom Restoration Act ("RFRA") that "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry").

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

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Dated this 29th day of June 2006.

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