

# WRIGHT v. FISH & GAME COMM'N

Court of Appeal of California, Fourth Appellate District, Division One

August 26, 2003, Filed

D040685

## Reporter

2003 Cal. App. Unpub. LEXIS 8091 \*; 2003 WL 22007258

PAT WRIGHT, Plaintiff and Appellant, v. FISH AND GAME COMMISSION et al., Defendants and Respondents.

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**Prior History:** APPEAL from a judgment of the Superior Court of San Diego County, Super. Ct. No. GIC 777023. E. Mac Amos, Jr., Judge.

**Disposition:** Affirmed.

**Judges:** AARON, J. WE CONCUR: HUFFMAN, Acting P. J., HALLER, J.

**Opinion by:** AARON

## Opinion

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Plaintiff Pat Wright, a ferret owner and former president of Ferrets Anonymous, appeals from a summary judgment order entered against him in his action seeking a declaratory judgment that existing legal restrictions on ferret ownership violate his right to equal protection of the law under article I, section 7 of the California Constitution. We find no equal protection violation and affirm the judgment.

I.

## FACTUAL AND PROCEDURAL BACKGROUND

The domestic or European ferret, *Mustela putorius furo*, is a descendant of the European polecat.<sup>1</sup> It was bred in captivity for hunting and has been used for centuries to control rodents and drive [\*2] rabbits from their burrows. Although ferrets have become popular as cute and playful pets in recent years, "they are frequent biters, sometimes inflicting bites with machine gun rapidity and tenaciously refusing to let go of their victims." (Cal. Dept. of Health Services, *Pet European Ferrets: A Hazard to Public Health, Small Livestock and Wildlife* (1988), p. 1.)

Since 1933, California has included ferrets in the category [\*3] of "wild animals" that are unlawful to import or to possess without a permit. (Stats. 1933, ch. 76, §§ 1, 2, pp. 515-516.) Under existing law, a "wild animal" is defined to include any of a number of specified classes of animals "not normally domesticated in this state as determined by the [Fish and Game] commission." (Fish & G. Code, <sup>2</sup> § 2116.)

Section 2118 makes it unlawful to import, transport, possess, or release any "wild animal" belonging to a number of listed species without a permit. Subdivision (b) specifically provides that animals of the family *Mustelidae* (which includes the ferret) "are restricted because such animals are undesirable and a menace to native wildlife, the agricultural interests of the state, or to the public health or safety." However, subdivision (k) states that animals "listed in this section may be added to or deleted from the above lists from time to time by [Fish and Game] commission [\*4] regulations in cooperation with the Department of Food and Agriculture."

In accordance with this statutory authority, the Fish and Game Commission (Commission) has promulgated a list of animals "not normally domesticated in this state." (Cal. Code Regs., tit. 14, § 671, subd. (b).) Ferrets are included on the list of carnivorous mammals not normally domesticated in California. (Cal. Code Regs., tit. 14, § 671, subd. (c)(2)(K).) In particular, the challenged regulation classifies the family *Mustelidae* as belonging to a group of "detrimental animals" (designated by the letter "D") that "pose a threat to native wildlife, the agricultural interests of the state or to public health and safety." (Cal. Code Regs., tit. 14, § 671, subds. (b), (c)(2)(K)(5).)

At a public meeting held on March 7, 1986, the Commission reevaluated its existing regulation pertaining to ferret ownership. The Commission heard from various individuals who advocated treating ferrets as domesticated animals and allowing them to be kept as pets. However, the Department of Fish and Game, the Department of Health Services, and the [\*5] Department of Food and Agriculture all urged the Commission to retain its existing prohibition on the possession of ferrets as pets. Dr. Denny Constantine, a veterinarian for the Department of Health Services, stated that there had been seven to eight known cases of rabid ferrets in the United States. He also noted that in Arizona, a state which had legalized the possession of ferrets, there were over 12 times the number of ferret bites than in California. A representative of the Department of Food and Agriculture also reported that in New Zealand, ferrets had virtually eliminated ground nesting birds.

The Commission heard evidence that there were problems with feral populations of ferrets in Massachusetts and Washington, and there were reports of wild ferrets living in Placer County, California. The Commission also received a letter from a plastic surgeon in Nevada who had worked on three infants who had been the victims of attacks by ferrets. The surgeon provided the Commission with slides to demonstrate the severe damage done to the face of one of the infants.

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<sup>1</sup> The domestic ferret must be distinguished from the American black-footed ferret, *Mustela nigripes*, an endangered species of the Great Plains. This action involves solely domestic ferrets, and we shall use the word "ferret" to refer to domestic ferrets. "The name 'domestic ferret' is a zoological term, and the name does not indicate that this animal is 'domestic' for legal purposes unless so classified by the relevant regulatory body." (*New York City Friends of Ferrets v. City of New York* (S.D.N.Y. 1995) 876 F. Supp. 529, 532, fn. 3 (*New York City Friends of Ferrets*).)

<sup>2</sup> Unless otherwise specified, all statutory references are to the Fish and Game Code.

At the conclusion of the March 7, 1986 meeting, the Commission voted unanimously to maintain the existing regulations [\*6] prohibiting the possession of ferrets in California.

In December 1988, the Department of Health Services published a lengthy report on pet ferrets. The report documented 452 ferret attacks on humans during a 10-year period from 1978 through 1987, including 64 unprovoked attacks on infants and small children. The vast majority (91 percent) of the attacks on infants and small children occurred when the victims were sleeping or lying down. According to the report, "ferrets sometimes unleash frenzied, rapid-fire bite and slash attacks on infants, usually on their heads and throats, and sometimes inflict hundreds of bites. The animals have been reported to then drink the victim's blood and eat the shredded tissues." In some cases, the bites left "macerated tissues that resembled bloody ground beef." In several cases, ferrets had eaten all or part of the victims' ears. One 29-day-old infant lost her entire nose, most of her eyelids, lips, and other facial tissues, and her hands were also chewed. The report concluded that ferrets may perceive human infants as prey.

The 1988 report also noted that pet ferrets have a propensity for escaping and that escaped ferrets had been known to approach [\*7] wildlife and develop rabies after returning home. Twelve known cases of rabies in pet ferrets had occurred in the United States since 1959. Further, the report found that ferrets can develop feral populations and are especially destructive to poultry and small wild animals, such as rabbits. Although there was "scant evidence" of feral ferret populations in California, there were documented reports of feral ferret populations elsewhere, including San Juan Island, Washington. In New Zealand, ferrets and other introduced predators "now feed on native animals and have contributed to the extinction of 20 species of endemic New Zealand birds and have pushed many others to the brink of extinction."

On November 2, 1995, the Commission again considered amending its regulation in response to a request by the California Domestic Ferret Association to legalize ferrets. Prior to the hearing, the Commission received a packet of materials from proponents of ferret legalization, a packet of materials and a recommendation from the Department of Fish and Game in opposition, a memo from the Department of Health Services along with its report of December 1988, and letters in opposition to any change [\*8] from the California Waterfowl Association, the California Federation for Animal Legislation, and the Agricultural Commissioner for the Department of Agriculture in El Dorado County.<sup>3</sup>

Terry Mansfield, chief of the wildlife management division of the Department of Fish and Game, reported to the Commission that the Department of Fish and Game recommended denial of the request to legalize ferrets. According to Mansfield, the Department of Fish and Game was primarily concerned about the negative effects of ferret predation on native wildlife, particularly small mammals, ground nesting birds, and waterfowl. Mansfield explained that there were known instances of individual ferrets "free-ranging" in the wild and he stated that the potential effect of ferret predation did not warrant [\*9] the risk of legalization, even if there were no reproducing populations of ferrets in the wild. Representatives of the Humane Society and the Fund for Animals also spoke in opposition to legalization of ferrets and expressed concerns about pet overpopulation and the potential impact on native wildlife.

At the hearing, the Commission also heard from speakers who favored legalization of ferrets and did not believe that ferrets posed any threat to native wildlife, agriculture, or human safety. The speakers stressed that ferrets had been legalized in other states; that no state had reported any feral population of domestic ferrets; that the California Department of Food and Agriculture had indicated there was no known feral population of ferrets in California and there were no reports of damage to agriculture by ferrets; that no one in the United States had ever acquired rabies from a rabid ferret; that the poultry industry did not oppose legalization of ferrets; and that dogs were more likely than domestic ferrets to bite humans and to contract rabies.

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<sup>3</sup> The materials submitted to the commission were not provided to the trial court in the summary judgment papers. However, some of the contents of these materials were referred to by the speakers at the public hearing on November 2, 1995.

At the conclusion of the meeting of November 2, 1995, the Commission voted three to two to "go to notice" to change the existing regulation. [\*10] The commissioners acknowledged that "going to notice really . . . means further study, a decision to be made later."

In November 1996, the Attorney General's office rendered an opinion that the Commission did not have the legal authority to adopt regulations to remove restrictions on ferrets. The Commission accepted the Attorney General's decision and abandoned the proposed amendment to the existing regulation.<sup>4</sup>

[\*11] In 1999, the Department of Fish and Game published the results of a 1996-1997 nationwide survey it had conducted of state wildlife agencies to obtain legal and natural history information regarding domestic ferrets. The survey concluded that ferrets had never been prohibited in 36 states, and they had been legalized in eight of the other 14 states. In the six remaining states, ferrets were prohibited except under certain conditions. Permits were required for ferret ownership or breeding in four of these six states, and no ferret permits were issued in California and Hawaii. Five states also reported the existence of local government ordinances prohibiting ownership of ferrets.

Five states in the survey reported that they had documented cases of individual ferrets surviving more than a few days in the wild. No state reported the existence of breeding ferrets in the wild at the time of the survey. However, three states reported that there had been "suspected breeding by ferrets in the wild in the past."

Ronald Jurek, a wildlife biologist for the Department of Fish and Game, submitted a declaration in support of the motion for summary judgment.<sup>5</sup> His declaration stated that ferrets [\*12] are carnivorous predators. According to Jurek, ferrets often escape from captivity and survive in the wild by preying upon birds, waterfowl, reptiles, frogs, and small livestock. Breeding ferret populations have existed in the wild in New Zealand, Great Britain, and San Juan Island, Washington, all in climates similar to parts of California. In Jurek's opinion, a feral ferret population in California could pose an additional threat to vulnerable species of wildlife in California.

[\*13] Pat Wright, Alice Kaiser, and veterinarian Dr. Jeffrey Jenkins, all ferret owners and/or members of Ferrets Anonymous, submitted declarations stating their opinions that ferrets pose no danger to other animals or human health, that domestic ferrets cannot survive in the wild for more than three to five days, that domestic ferrets cannot reproduce in the wild because they are spayed and castrated before entering the pet trade, and that there is a rabies vaccine for ferrets.

Plaintiff Pat Wright filed this lawsuit in October 2001. In his second amended complaint, he requests a declaratory judgment that existing legal restrictions on ferret ownership violate the right to equal protection of the law under article I, section 7 of the California Constitution. Specifically, Wright alleges in his complaint that owners of domestic ferrets "should be allowed to own pets as domestic dog owners are and domestic cat owners are."

The trial court granted summary judgment in favor of the Commission and the individually named members of the Commission. Finding that strict scrutiny of the challenged regulation was not warranted, the trial court concluded

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<sup>4</sup> Proponents of the change subsequently filed suit seeking a petition for writ of mandate to compel the Commission to determine whether the ferret constitutes a "normally domesticated" animal in California. After the trial court granted the petition, this court reversed in an unpublished opinion. This court concluded that the Commission was required to make such a determination, but that it had complied with its duty by adopting California Code of Regulations, title 14, section 671, as amended in 1975. The court further found that the Commission could not be compelled by writ of mandate to undertake the discretionary function of conducting a hearing to consider amending the existing regulation. (*Marshall Farms USA, Inc. v. California State Fish and Game Commission* (Sept. 2, 1999, D030929) [nonpub. opn.] )

<sup>5</sup> The trial court stated that it did not rely upon the Jurek declaration in making its ruling. Contrary to Plaintiff's arguments on appeal, the trial court did not rule that the Jurek declaration was inadmissible; it merely ordered "off calendar" all objections to evidence not relied upon in its written opinion. Because the trial court did not make any evidentiary ruling on the Jurek declaration, "we must view [it] as having been admitted in evidence and therefore as part of the record." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1, 863 P.2d 207.) However, we would reach the same result even without considering the Jurek declaration.

that there were valid safety and environmental [\*14] concerns that provided a rational basis for the Commission's decision to maintain the existing regulation. Thus, the court concluded that the regulation does not violate the equal protection clause.

II.

## DISCUSSION

### A. Standard of Review

Under Code of Civil Procedure section 437c, subdivision (c), summary judgment is proper where the papers submitted establish that no triable issues of material fact exist and the moving party is entitled to judgment as a matter of law. "On appeal, the reviewing court exercises its independent judgment, deciding whether the moving party established undisputed facts that negate the opposing party's claim or state a complete defense." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486-487, 926 P.2d 1114; see also *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531, 976 P.2d 808.)

### B. The Commission's Regulation of Ferret Ownership Does Not Violate Equal Protection

Article I, section 7 of the California Constitution guarantees the right to equal protection of the law. There are two principal tests applied by the courts in reviewing [\*15] classifications that are challenged under the equal protection clause. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 16-17, 112 Cal. Rptr. 786, 520 P.2d 10.) The rational relationship test is "the basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals." (*Id.* at p. 16.) Under the rational relationship test, a legal classification is presumed to be valid and will be sustained if it is rationally related to a legitimate state interest. (*Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 1014, 824 P.2d 632.) The more stringent strict scrutiny test is applied to laws that involve a suspect classification or significantly infringe upon a fundamental right. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 659, 882 P.2d 358.)

Plaintiff does not contend that the regulation at issue here involves a suspect classification or infringes upon a fundamental right. Ferret owners are not a suspect class, and ferret ownership is not a fundamental right. (*New York City Friends of [\*16] Ferrets, supra*, 876 F. Supp. at pp. 533, 534.) We must therefore decide whether the challenged regulation of ferret ownership is rationally related to a legitimate state interest.

Under the rational relationship test, the regulation of ferret ownership must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. (See *Adams v. Shannon* (1970) 7 Cal. App. 3d 427, 434, 86 Cal. Rptr. 641 [rejecting equal protection challenge to Cal. Code Regs., tit. 14, § 671 as applied to piranha].) Where there are plausible reasons for the classification, our inquiry is at an end. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482; *Warden v. State Bar* (1999) 21 Cal.4th 628, 644, 982 P.2d 154.) "Under the rational relationship standard, a court may not strike down a classification simply because the classification may be imperfect [citation] or because it may be 'to some extent both underinclusive and overinclusive.' [Citation.]" (*Warden v. State Bar, supra*, 21 Cal.4th at p. 649, fn. 13.) "It is no requirement of equal protection [\*17] that all evils of the same genus be eradicated or none at all." (*Id.* at p. 649, quoting *Railway Express v. New York* (1949) 336 U.S. 106, 110, 93 L. Ed. 533, 69 S. Ct. 463.)

Applying these general principles, we find that the challenged regulation of ferret ownership is rationally related to legitimate state interests. In *New York City Friends of Ferrets, supra*, 876 F. Supp. 529, the United States District Court for the Southern District of New York found no equal protection violation in a case involving a similar challenge to the legality of the City of New York's prohibition against keeping ferrets within city limits. In a lengthy opinion in which the court exhaustively considered the potential dangers of ferrets, the court concluded that "the challenged regulations constitute a reasonable response to the threat that ferrets pose to the health and safety of

the citizens of New York City." (*Id.* at p. 535.) Specifically, the court found the evidence supported the City's concerns that "ferrets remain prone to vicious, unprovoked attacks on humans, particularly children and infants" (*ibid.*), that legalization [\*18] of ferrets would "risk[] an increase in the spread of rabies in the New York City area" (*id.* at p. 536), and that there was a "potential for ferrets to escape and form feral populations" and cause "the decimation of certain wildlife species as well as excessive competition with other wild natural predators." (*Id.* at p. 537.)

We similarly find that the record here demonstrates a rational basis for the Commission's regulation of ferret ownership. First, the record amply supports a conclusion that ferrets pose a potential danger to humans, particularly infants and young children. None of the evidence produced below refutes the 1988 study conducted by the Department of Health Services documenting unprovoked biting attacks by ferrets on the faces and necks of infants and young children, often while the victims were sleeping or lying down. This study was presented to the Commission when it considered changing the regulation in 1995. At the Commission's hearing on November 2, 1995, the study was characterized as the "latest report" on the subject with "the most up-to-date information that they [the Department of Human Services] have." There is nothing [\*19] in the record that contradicts this study, challenges its findings or methodology, or provides new or updated information on the subject of ferret attacks.

Second, the record also demonstrates a legitimate state interest in preventing the potential spread of rabies. According to the Department of Human Services report of 1988, escaped ferrets "can be infected with rabies transmitted to them by wild animals, and they can expose people and other vertebrates to the virus." Although there is a rabies vaccine for ferrets, "no vaccine is completely efficacious" and "uncertainties regarding the etiology of rabies in ferrets persist." (*New York City Friends of Ferrets, supra*, 876 F. Supp. at p. 537.)

Finally, the regulation is rationally related to the protection of native wildlife. (*New York City Friends of Ferrets, supra*, 876 F. Supp. at p. 537.) The evidence produced in the trial court establishes a well-founded concern by state wildlife experts that escaped domestic ferrets pose a potential danger to birds and other small animals. Although there is disagreement on this and other issues pertaining to the potential dangers posed by ferrets, courts are "ill-advised and ill-equipped [\*20] to intrude upon the legislative and agency decisionmaking process" in this area. (*New York City Friends of Ferrets, supra*, 876 F. Supp. at p. 540.) It is the Commission's function to weigh the credibility of the experts and assess the potential risk to native wildlife. On this record, protection of native wildlife is at least a "plausible reason" for the Commission's decision to continue its prohibition of ferret ownership. (*Warden v. State Bar, supra*, 21 Cal.4th at p. 644.)

We conclude that the challenged regulation of ferret ownership does not violate the equal protection clause. "The Constitution simply does not guarantee owners of ferrets regulatory status precisely equal to the status of owners of other animals, even potentially dangerous animals, but rather mandates only that the decision of the sovereign to regulate them, as well as the nature of that regulation, have a rational basis and not be undertaken and applied arbitrarily and capriciously." (*New York City Friends of Ferrets, supra*, 876 F. Supp. at p. 540.) The regulation at issue here is rationally related to legitimate state interests in protecting human safety and native wildlife, [\*21] and it is neither arbitrary nor capricious. (See also *Gallick v. Barto* (M.D.Pa. 1993) 828 F. Supp. 1168, 1174 [holding "that a ferret is a wild animal"]; *Raynor v. Maryland Dept. of Health & Mental Hygiene* (Md.App. 1996) 110 Md. App. 165, 676 A.2d 978, 986 [upholding classification of ferrets as "wild animals"].) Thus, the trial court properly granted summary judgment in favor of the defendants.<sup>6</sup>

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<sup>6</sup> Plaintiff argues somewhat cryptically that this court has "the authority to issue a writ and direct a regulatory body to do its assigned job, in our case to review the facts submitted and act on the evidence." However, Plaintiff has never sought a writ of mandate, nor has Plaintiff identified any violation of law by the Commission other than the alleged equal protection violation. Accordingly, we see no legal basis for ordering the Commission to conduct another review of the ferret regulation. We also decline to address Plaintiff's argument that domestic pet owners have a right to due process before their animals can be euthanized. The second amended complaint makes no claim regarding euthanization and asserts no due process violation. In addition, the summary judgment papers do not demonstrate that Plaintiff's ferrets are in any danger of being euthanized without due process. Thus, the issue is not before us, and it has no bearing on our resolution of the equal protection claim.

**[\*22] DISPOSITION**

The judgment is affirmed. Respondents are entitled to costs on appeal.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.

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