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** Pro Hac Vice Motion Pending*

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA**

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| WARD HINGER, KENNETH KIRK, and CARL EKSTROM,<br><br>*Plaintiffs*,<br><br>v.<br><br>CHIEF JUSTICE WALTER CARPENETI, in his official capacity as *ex officio* Member of the Alaska Judicial Council; JAMES H. CANNON, in his official capacity as Attorney Member of the Alaska Judicial Council; KEVIN FITZGERALD, in his official capacity as Attorney Member of the Alaska Judicial Council; and LOUIS JAMES MENENDEZ, in his official capacity as Attorney Member of the Alaska Judicial Council; WILLIAM F. CLARKE, in his official capacity as Non-Attorney Member of the Alaska Judicial Council; KATHLEEN THOMPKINS-MILLER, in her official capacity as Non-Attorney Member of the Alaska Judicial Council; and CHRISTENA WILLIAMS, in her official capacity as Non-Attorney Member of the Alaska Judicial Council,<br><br>*Defendants* | Civil Action Number _____<br><br>MOTION FOR PRELIMINARY INJUNCTION<br>AND<br>MEMORANDUM IN SUPPORT |

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Ward Hinger, Kenneth Kirk, and Carl Ekstrom respectfully move for a preliminary injunction.

With this motion, Plaintiffs have filed their verified complaint requesting declaratory and injunctive relief, motion to expedite, and motion to consolidate.

In Count 1 of their complaint, Plaintiffs pray that the Court declare Alaska Const. art IV, §§ 5 and 8, and Alaska Stat. §§ 22.05.080, 22.07.070, 22.10.100, and 22.15.170 unconstitutional on their face, because they violate the Equal Protection clause of the Fourteenth Amendment of the United States by denying Alaska citizens their right to vote. In the alternative, Plaintiffs pray that the Court declare the above unconstitutional as applied to Plaintiffs.

Because of the unconstitutionality of these provisions of Alaska law, Plaintiffs hereby move this Court to enjoin Defendants Cannon, Fitzgerald, and Menendez from participating in the process of selecting and voting for nominees under Alaska Const. art. IV, § 8 and Alaska Stat. § 22.05.080 for the vacancy created by the impending retirement of Justice Robert L. Eastaugh from the Alaska Supreme Court, which retirement becomes effective November 2, 2009. Plaintiffs respectfully request that this injunctive relief be granted as soon as possible, or at least before the Alaska Judicial Council meets to make their nominations for the position. The earliest this meeting could take place is 90 days before November 2, 2009. Alaska Stat. § 22.05.080(b). The Council has closed the application period and has begun to review and investigate the applications.

Plaintiffs further hereby move this Court to enjoin Defendants Chief Justice, Clarke, Thompkins-Miller, and Williams from observing the four or more concurrence requirement in Alaska Const. art. IV, § 8, on the grounds that it is not severable from the unconstitutional aspects of that section because the remaining four members of the Council cannot be expected to proceed and act unanimously.

Plaintiffs submit they have established likelihood of success on the merits. In the absence of injunctive relief, Plaintiffs will be irreparably harmed because of the inequality inherent in the Alaska

Judicial Selection Plan. Furthermore, the balance of equities is in Plaintiffs' favor and an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374-75 (2008).

**Introduction**

This case presents a constitutional challenge to the provisions of Alaska's constitution and statutes that comprise the system by which Alaska selects justices and judges to fill vacancies on its courts. Alaska Const. art. IV, §§ 5 and 8, Alaska Stat. §§ 08.08.050, 08.08.070, 22.05.080, 22.07.070, 22.10.100, and 22.15.170.

Plaintiffs file this Motion for Preliminary Injunction with their Verified Complaint, which seeks both declaratory and injunctive relief. Specifically, Plaintiffs claim that the above constitutional sections and statutes deny them equal protection as required by the United States Constitution. According to the Alaska Judicial Selection Plan, the Board of Governors of the Alaska Bar Association appoints three of the seven members of the Alaska Judicial Council, who, in turn, nominate judges to Alaska's courts. A three-quarters supermajority of the Board of Governors is elected exclusively by the members of the Alaska Bar Association. Therefore, Alaska has functionally restricted the selection of three of the members of the Judicial Council to an election in which only attorneys may vote.

Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, voters have a "constitutional right to vote in elections without having [their] vote wrongfully denied, debased or diluted." *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50, 52 (1970). Alaska must justify the method it has devised for the selection of the three bar members of the Judicial Council because it excludes all but a certain group from having a voice in that selection. *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969). Alaska has entrusted the selection of three members of its Judicial Council, who select those who will fill vacancies on Alaska's courts, to a body that is virtually exclusively elected by a single profession. This restriction is subject to strict scrutiny under the Fourteenth Amendment because it makes a classification involving the fundamental right to vote. *Id.* Furthermore, the selection of

judges is not "far removed from normal governmental activities" and does not "disproportionately affect" attorneys as a group such that the selection of three of the members of the Judicial Council can be legitimately controlled by an election restricted exclusively to attorneys. *Hadley*, 397 U.S. at 56.

Plaintiffs respectfully request that this Court enjoin Defendants Cannon, Fitzgerald, and Menendez from exercising any powers and duties given to them under Alaska Const. art. IV, §§ 5 and 8, and Alaska Stat. §§ 22.05.080 with respect to the process of reviewing applications and nominating candidates to fill the impending vacancy created by the retirement of Justice Robert L. Eastaugh on November 2, 2009. Plaintiffs request no relief with respect to, nor do they challenge, Defendants other powers and duties under Alaska Const. art. IV, § 9. Plaintiffs request that Defendants Chief Justice, Clarke, Thompkins-Miller, and Williams be enjoined from observing the four or more concurrence requirement in Alaska Const. art. IV, § 8, on the grounds that it is not severable from the unconstitutional aspects of that section because the remaining four members of the Council cannot be expected to proceed and act unanimously.

**Facts**

This case involves the system adopted by Alaska for the nomination and appointment of justices and judges to its courts. According to this system, hereinafter referred to as the Alaska Judicial Plan ("Judicial Plan" or "Plan"), a body called the Alaska Judicial Council ("Judicial Council" or "Council") has the sole authority to review applicants and nominate candidates for judicial vacancies. The Governor then must choose from among the Judicial Council's nominees when making judicial appointments. Alaska Const. art. IV, § 5. This plan is established in the Alaska constitution and is used to fill vacancies on the supreme court, superior court, court of appeals, and district courts. *Id.*; Alaska Stat. §§ 22.05.080, 22.07.070, 22.10.100, 22.15.170.

In Alaska, a justice or judge may voluntarily retire at any time by filing a notice of that intention with the Governor. Alaska Stat. § 22.25.010(d). Once such an impending vacancy is announced, the Alaska Judicial Council begins the process of seeking applications for the position. Alaska Judicial Council,

Procedures for Nominating Judicial Candidates I.A.1. (2007), *available at* http://www.ajc.state.ak.us/selection/Procedures/SelectionProcedures7-24-07.pdf; *see* Alaska Const. art. IV, § 8 ("The judicial council shall act . . . according to rules which it adopts."). After soliciting and reviewing applications, conducting interviews, and discussing the candidates, the Council meets to vote for the candidates who will be sent to the Governor as nominees. *See* Procedures for Nominating Judicial Candidates. Any action of the Council requires the concurrence of four or more members. *See* Alaska Const. art. IV, § 8.

One of the persons nominated by a concurrence of the Council will be confirmed as a justice or judge in Alaska, because the Governor must select one of these nominees for the vacant position. *See* Alaska Const. art. IV, § 5. The nominations cannot be rejected by the Governor or the Legislature of Alaska. The Governor must appoint one of these nominees within 45 days of receiving the nominations. Alaska Stat. § 22.05.080(a). When an impending vacancy is created by an impending retirement, the Council may meet to select nominees and submit the nominations to the governor at any time within the 90-day period prior to the effective date of the vacancy. Alaska Stat. § 22.05.080(b).

The composition of the Judicial Council is set forth in the Alaska Constitution:

> The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State.

Alaska Const. art. IV, § 8.

Therefore, according to the Plan, the Alaska Bar Association ("Alaska Bar" or "Bar") exercises a controlling interest over the selection of justices and judges. The Alaska Bar is an instrumentality of the State created by statute. Alaska Stat. § 08.08.010. All attorneys licensed in the State of Alaska must be members

of this association. *Id.* § 08.08.020. As provided for in Art. IV, § 8, three members of the Judicial Council, Defendants Cannon, Fitzgerald, and Menendez, are appointed to the Council by the Board of Governors of the Alaska Bar. Alaska Stat. § 08.08.020. These members are appointed by a majority consensus of the Board of Governors, without any confirmation by the Legislature or the Governor. *Id.*

The Board of Governors, in turn, is composed of twelve members. *See* Alaska Stat. § 08.08.040(b). Nine of these board members are elected exclusively by the attorneys in Alaska, while the remaining three are appointed by the Governor. *Id.* §§ 08.08.040, 08.08.050(a). Thus, only members of the Alaska Bar, that is, the licenced attorneys in the state, may vote for a three-quarters supermajority of the body that in turn appoints three of the members of the Judicial Council. *Id.* And at all times, a controlling majority of the members of the Council are members of the Bar. *See* Alaska Const. art. IV, § 8 (setting forth three attorney members appointed by the Bar and the Chief Justice).

The Alaska Judicial Council announced an impending vacancy on the Alaska supreme court on April 15, 2009. Justice Robert L. Eastaugh will be retiring from his position effective November 2, 2009. The Council began accepting applications to fill the position on April 15, 2009, which application period closed on May 28, 2009. The applications are then reviewed and the applicants investigated according to the procedures adopted by the Council. *See* Alaska Judicial Council, Procedures for Nominating Judicial Candidates (2007). Shortly after the applications have been received and reviewed, the Council will announce the scheduled date for voting on the nominees and sending the nominations to the governor. A date will then be set for the public interviews, hearing, and vote for the nominees that will be forwarded to the Governor. Those applicants who receive four or more votes from the Members of the Council are nominated and their names forwarded to the Governor for consideration. The earliest date that the public hearing and vote could be held is 90 days before November 2, 2009.

## Argument

Plaintiffs satisfy the requirements for a preliminary injunction. A plaintiff seeking a preliminary injunction must establish that he is (1) likely to succeed on the merits; (2) likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). A preliminary injunction is warranted in this case. Plaintiffs are likely to succeed in showing that the method by which the three Attorney Members of the Alaska Judicial Council cannot survive strict scrutiny. Plaintiffs will suffer irreparable harm if injunctive relief is not granted and the current impending vacancy is permitted to be filled by means of an unconstitutional process. There will be no harm to the rights of Defendants because the four constitutionally selected Council members may proceed and the three Attorney Members were unconstitutionally selected, while Plaintiffs stand to have their Equal Protection rights violated by the continuance of this nomination process. And an injunction is in the public interest because all Alaska citizens are substantially interested in and affected by the appointment of justices and judges in Alaska, while the current Judicial Plan denies them an equal voice in selecting who the justices and judges will be.

### I. Plaintiffs Are Likely to Succeed on the Merits.

Plaintiffs are likely to succeed on the merits because the Alaska Judicial Selection Plan deprives the citizens of Alaska equal participation in the selection of their state officials. "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state elections as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The Fourteenth Amendment to the United States Constitution assures that this fundamental right to vote may not be "wrongfully denied, debased or diluted." *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 52 (1970).

But in Alaska only members of the Bar Association are permitted a vote in selecting three members of the Alaska Judicial Council, which has the exclusive power to nominate state court justices and judges. Thus, Plaintiff Ward Hinger, who is not a member of the Alaska Bar, is excluded from having an equal voice

in the composition of his state judiciary. Similarly, Plaintiff Kenneth Kirk, who has been an applicant for state judicial vacancies in Alaska in the past, and would in the future but for the fact that his applications have been and would be reviewed and considered by a Council that does not equally represent the people of Alaska. Finally, Plaintiff Carl Ekstrom, who is a non-attorney member of the Alaska Bar Board of Governors, is excluded from having an equal voice in the composition of his state judiciary and his vote on the Board is diluted by the bar members who are elected exclusively by attorneys.

As set out below, the Alaska Judicial Selection Plan's "unjustified discrimination in determining who may participate in political affairs [and] in the selection of public officials undermines the legitimacy of representative government." *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969). While camouflaged behind layers of entities, the Plan is no different than if Alaska held direct elections for justices and judges, but permitted only Alaska Bar members to vote or gave their votes greater weight.

### A. When All Citizens Are Affected by a Government Office, the Election of the Office Cannot be Restricted to a Certain Group of Citizens.

#### 1. Equal Protection Requires Equal Voting

The Fourteenth Amendment to the United States Constitution provides that, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. The Equal Protection Clause guarantees qualified citizens the "right to vote in elections without having [their] vote wrongfully denied, debased or diluted." *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50, 52 (1970). This guarantee is not limited to the federal government, but "undeniably . . . protects the right of all qualified citizens to vote, in state elections as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). This is not to say that all state government officials must be elected, but rather that all citizens must be given an equal vote in all elections which result in the selection of government officials.

### 2. Restrictions on Elections are Subject to Strict Scrutiny.

While the Supreme Court has approved basic residency, age, and citizenship requirements to vote, "[p]resumptively, when all citizens are affected [by an election], the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise." *Phoenix v. Kolodziejski,* 399 U.S. 204, 209 (1970). Accordingly, restrictions on who may vote in an election that affects public offices are subject to strict scrutiny. *Kramer*, 395 U.S. at 626 ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.") (citation omitted). Therefore, the "general presumption of constitutionality afforded state statutes" is not applicable and the state must instead demonstrate that the law is narrowly tailored to a compelling state interest. *Id.* at 627 ("[D]eference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials.").

The Supreme Court has applied strict scrutiny to restrictions on who may participate in an election that affects public offices because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Id.* at 626. The citizens of a state are subject to the rulings of the justices and judges of that state, as well as to the laws as interpreted by those justices and judges. Strict scrutiny is therefore warranted because "unjustified discrimination in determining who may participate in political affairs [and] in the selection of public officials undermines the legitimacy of representative government." *Id.* Selectively giving a certain group of citizens more electoral influence and affording the franchise on a selective basis always poses "the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Id.* at 627.

Therefore, a state must demonstrate that the restriction of the franchise is narrowly tailored to achieve a compelling state interest. *Id.* at 626. To do so, the state must show that the group granted the franchise is disproportionately interested in and affected by the powers of the government officials, and that

this disproportion is substantial, such that there is a compelling reason to restrict the franchise to that group. *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Kolodziejski,* 399 U.S. at 209 (holding that the differences between the interest of the included group and the interests of all citizens must be "sufficiently substantial to justify excluding the latter from the franchise.") The included group cannot merely have a *different* interest in the powers of the given government office, rather, their interest must be substantially greater such that there is a compelling reason to limit the franchise to that group. *Kolodziejski*, 399 U.S. at 212 ("[A]lthough owners of real property have interests somewhat different from the interests of nonproperty owners in the issuance of general obligation bonds, there is no basis for concluding that nonproperty owners are substantially less interested in the issuance of these securities than are property owners.").

Then, in order to ensure that the restriction is narrowly tailored to achieve this compelling interest, the state must show that all other qualified citizens are not substantially interested in and significantly affected by the government powers exercised by the officials and that those excluded from voting "are in fact substantially less interested or affected than those . . . included." *Cipriano*, 395 U.S. at 704. Otherwise, the state law is not narrowly tailored to meet the compelling government interest.

**3. Equal Protection Must Be Maintained Whether the Position is Elected or Appointed.**

Under the United States Constitution, state and federal offices are legitimately filled by means of elections or through appointments. *Kramer*, 395 U.S. at 629. But the electoral elements of the an appointment system must preserve the equal right to vote. While the appointment of officials may cause the influence of each voter to be *indirect*, such a system remains constitutional so long as the official(s) making the appointment is "elected consistent with the commands of the Equal Protection Clause," thereby ensuring that each voter's influence is *equal* to that of other citizens. *Id.* at 627 n.7. Ultimately, each citizen must be given an equal voice in the selection of all government officials, no matter how indirect that voice might be.

Under the federal Constitution, for example, justices and judges are appointed by the President and confirmed by the Senate. U.S. Const. art II, § 2. But the President and Senators are selected through an election in which no qualified citizen's vote may be denied, debased, or diluted. U.S. Const. amend. XVII; *id.* art. II, § 1; *Hadley*, 397 U.S. at 52. Even if there were a further level of appointing power in between, such as if the Constitution had established a committee appointed by the President and Senate, which then appointed justices and judges, if an election took place anywhere in the system that resulted in the selection of those judicial officials, who make up the third branch of government, that election must conform with the requirements of equal protection. The addition of layers to an appointment system does not change the Constitutional mandate that an election that ultimately results in the selection of government officials must comport with the Fourteenth Amendment. *Kramer*, 395 U.S. at 629 (finding that the fact that "the offices subject to election [could] have been filled through appointment" did not affect the Equal Protection analysis). "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause." *Id.*

**4. The United States Supreme Court Has Consistently Overturned Laws that Restrict the Right to Vote.**

**(a) *Kramer v. Union Free School District No. 15***

In *Kramer*, the Supreme Court struck down a New York law that permitted only landowners (or lessees) and parents of school children to vote in school district elections. *Kramer*, at 623. New York had argued that it had a legitimate interest in "restricting a voice in school matters to those 'directly affected' by such decisions." *Id.* at 631.[1] The plaintiff-appellant, a resident of the school district, did not own property or have children enrolled in school and was thereby ineligible to vote in school district elections. He argued

[1] The Supreme Court has noted its skepticism of such a government interest stating that such an interest "cannot lightly be accepted" as "[a]ll to often, lack of a 'substantial interest' might mean no more than a different interest . . . ." *Evans v. Cornman*, 398 U.S. 419, 422-23 (1970). And of course, even assuming the validity of such an interest, a state must still demonstrate that the challenged law is narrowly tailored to that interest.

the law denied him his fundamental right to vote and that he was "substantially interested in and significantly affected" by the elections as "[a]ll members of the community have an interest in the quality and structure of public education . . . ." *Id.* at 630.

The Supreme Court agreed and held that the law failed strict scrutiny because, even if the State's asserted interest had been valid, the law was "not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to justify the denial of the franchise to [plaintiff-appellant] and members of his class." *Id*. at 633. In short, because all residents were affected by the outcome of the elections, all residents were entitled to an equal voice.

Furthermore, the Court stated that the strict standard of review was not affected by the fact the school board did not have "'general' legislative powers." *Id*. The Court explained: "Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." *Id.* Equal protection is mandated whenever the office exercises normal functions of government that affect all citizens, such as the appointment of justices and judges.

**(b) *Cipriano v. City of Houma***

In *Cipriano*, the Court again rejected a state's attempt to limit voting to a select portion of the electorate. 395 U.S. 701 (1969). *Cipriano* involved a Louisiana law that permitted only property taxpayers to vote for the approval or issuance of revenue bonds by a municipal utility. The Court first turned to the proper standard of review, stating that when "a challenged state [law] grants the right to vote . . . to some otherwise qualified voters and denies it to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Id*. at 704. And like in *Kramer*, the Court noted that this strict standard of review was not effected by the fact that "'the questions scheduled for the election need not have been submitted to the voters.'" *Id.* at 704 (quoting *Kramer*, 395 U.S. at 629). Rather, because Louisiana submitted the question for an election, the election was required to comport with the requirements of the Fourteenth Amendment.

The Court then turned to the State's proffered defense, which argued that excluding non-property owners was permissible in that property owners had a special pecuniary interest in utility revenue bonds because of the direct correlation between the utility system and property values. *Id.* at 704. The Court responded:

> Assuming, arguendo, that a State might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election, whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded *depends on whether all those excluded are in fact substantially less interested or affected than those the statute includes.*

*Id.* at 704 (quotations and citations omitted) (emphasis added). Applying that principle, the Court found that "virtually every resident" was affected by the bonds in question, "[i]ndeed, the benefits and burdens of the bond issue f[e]ll indiscriminately on property owner and nonproperty owner alike." *Id.* at 705. So the law excluded voters "who [were] as substantially affected and directly interested in the matter voted upon as [] those who [were] permitted to vote." *Id.* at 706. Thus, just as in *Kramer*, the Court concluded the law "clearly" did not pass strict scrutiny. *Id.*

#### (c) *Phoenix v. Kolodziejski*

In *Phoenix*, the Court struck down an Arizona law permitting only property taxpayers to vote on the issuance of general obligation and revenue bonds. 399 U.S. 204. Like in *Kramer*, the Court held that laws excluding otherwise qualified citizens from voting are presumptively invalid, *id.* at 209, and that "[t]he differences between the interests of property owners and the interests of nonproperty owners [were] not sufficiently substantial to justify excluding the latter from the franchise." *Id.* at 29; *see also Hill v. Stone*, 421 U.S. 289 (1975) (striking down law permitting only property taxpayers to vote on bond issues).

### B. Alaska Cannot Show that the Exclusion of Non-Attorney Citizens from the Selection of Members of the Judicial Council is Narrowly Tailored to a Compelling Government Interest.

The Alaska Judicial Selection Plan denies non-attorney Alaska citizens an equal vote in the selection of members of the Alaska Judicial Council. By permitting only members of the Alaska Bar Association to

vote for a supermajority of the Board of Governors, which selects three members of the Council, non-attorneys have been denied equal participation in their representative government. Laws "granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 627. That is precisely the effect of the Alaska Judicial Selection Plan. Alaska cannot demonstrate that this is a narrowly tailored means of achieving a compelling state interest.

**1. The Alaska Judicial Council Affects All Alaskans.**

The Alaska Judicial Selection Plan suffers from the same fundamental defects as the laws at issue in *Kramer*, *Cipriano*, and *Phoenix*. The Plan denies Plaintiffs an equal voice in the selection of their state judiciary. All Alaska residents have a substantial interest in, and are significantly affected by, the composition of the Alaska judiciary. As the Supreme Court has stated, "state court judges possess the power to 'make' common law . . . [and] have immense power to shape the States' constitutions as well." *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002). Judges do not merely affect attorneys, but affect all Alaska residents.

The Alaska supreme court, for example, has the authority to interpret the Alaska constitution and statutes, which all citizens of Alaska are subject to. *Todd v. State of Alaska*, 917 P.2d 674, 677 (Alaska 1996). The supreme court also is entrusted with the duty and power to ensure compliance with the Alaska constitution on the part of the other branches of government, so that the court can strike down unconstitutional activities by the other branches. *State of Alaska v. Murtagh*, 169 P.3d 602, 609 (Alaska 2007). Finally, the Alaska supreme court determines that rights and duties of Alaska's citizens under the constitution and laws of the State. *See State, Dept. of Military and Veterans Affairs v. Bowen*, 953 P.2d 888, 896 n.12 (Alaska 1998).

Under the Plan the Alaska Bar Association Board of Governors votes to select three members of the Council, which considers all applicants for judgeships and has the sole power to nominate applicants for a

judicial vacancy. And the Governor is required to choose for appointment one of the Council's nominees. The Governor cannot appoint any person outside of the Council's nominees. So the Council does not *recommend* judges. Rather, it has exclusive authority to *nominate* judges.

Despite this important role served by the Board and the Council, only Bar members are permitted to vote for a three-quarters supermajority of the Board of Governors. Therefore, non-attorneys do not have an equal voice in determining who their state judges are. Just like in *Kramer, Cipriano*, and *Phoenix*, the class excluded from voting (non-attorneys) are not "substantially less interested or affected than those the statute includes." *Cipriano*, 395 U.S. at 704. "Such unequal application of fundamental rights [is] repugnant to the basic concept of representative government." *Little Thunder v. South Dakota*, 518 F.2d 1253, 1258 (8th Cir. 1975).

Furthermore, that the Board of Governors might serve some other purposes that relate only to Bar Association members does not free Alaska from the strict requirements of the Equal Protection Clause. From the perspective of the voter, "the harm from unequal treatment is the same in any election, regardless of the officials selected." *Hadley*, 397 U.S. at 55. As long as the Board of Governors is charged with selecting Council members, which affects all Alaskans, the election of Board members must comport with the requirements of the Fourteenth Amendment.

Since Alaska cannot show that attorneys are disproportionately interested in and affected by the operations of the Alaska Judicial Council, the State cannot show a compelling interest in reserving the election of the three Attorney Members of the Council to members of the Bar. Furthermore, since Alaska cannot show that all qualified Alaska citizens are not substantially interested in and affected by the operations of the Council, which is entrusted with determining who the justices and judges are in Alaska, the State cannot show that the exclusion of all but Bar members from voting in the selection of the three Attorney Members of the Council is narrowly tailored to a compelling state interest.

### 2. Non-Attorneys' Voices Are Not Equal

Unlike in some states with similar systems of judicial selection,[2] the Plan does not provide for the direct election of Council members by Alaska Bar members. Rather, as noted above, the Board of Governors are directly elected by Bar members, and the Board then selects the Attorney Members of the Council. This structure does not affect the relevant constitutional analysis because "the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes." *Kramer*, 395 U.S. at 627 n.7. Therefore, the relevant question here is the effectiveness of an attorney's voice compared to that of a non-attorney's voice.

While the particularities of the Plan might make attorneys' voices indirect, their influence remains unequal because it is substantially greater than the voices of non-attorneys. As *Kramer* explained:

> [I]f school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies through their votes for the mayor. Each resident's formal influence is perhaps indirect, but it is equal to that of other residents. However, when the school board positions are filled by election and some otherwise qualified city electors are precluded from voting, the excluded residents, when compared to the franchised residents, no longer have an effective voice in school affairs.

*Id*. (citation omitted). Stated differently, while *indirect* voter influence is permissible, *unequal* voter influence is not.

If members of the Council are to be appointed, the appointment must be done by an official who is "elected consistent with the commands of the Equal Protection Clause." *Id*. at 629. This ensures that while a voter's influence might be indirect, it remains equal. The election of the Board of Governors does not comply with the Equal Protection Clause because only attorneys are permitted to vote. *Id.* at 628 ("Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation."). Thus, on its face the Alaska Judicial Selection Plan

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[2] For example, Missouri has a similar process as Alaska for nominating and appointing appellate judges. But unlike Alaska, which provides that the Board of Governors appoints attorney members to the Council, in Missouri attorney members of the nomination commission are directly elected by the members of the Missouri bar. Mo. Const. Art. V, § 25(d).

suffers from the fundamental defect of unequal voter influence. Indeed, non-attorneys are excluded from having *any* effective voice, direct or indirect, in the selection of the three Attorney Members of the Council. As a result, non-attorneys are not fairly represented on the Council and are denied equal participation in the selection of the Alaska judiciary.

Therefore, it is irrelevant that Alaska lawyers elect Board of Governors members who select Council members, rather than attorneys directly electing Council members. Both systems contain the fatal flaw of unequal voter influence. If Alaska is to permit attorneys to vote for the officials charged with appointing Council members, the election must be open to all qualified voters. Absent that, the elected Council members must be disqualified from participating.

### C. The Selection of Council Members Does Not Qualify as a "Special Purpose" Election.

#### 1. The Franchise May Be Limited When the Government Entity Has a Special Limited Purpose and Disproportionately Affects a Specific Group.

In a narrow line of cases, the Supreme Court has recognized a "significant exception" where the selection of government officials can be restricted to a certain group of qualified citizens. *Ball v. James*, 451 U.S. 355, 360 (1981). An election may be restricted to a specific group of voters, while excluding other qualified citizens, when the official or government entity elected has a "special limited purpose" and its activities have a "disproportionate effect" on the specific group. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 727-28 (1973).[3] The election of Board of Governors members and the selection of Council members does not fall under this exception.

[3] A matter of terminology needs be addressed here. In *Sayler*, as well as other cases, the Court employs the term "one person, one vote" to encompass the Equal Protection Clause's protection against *both* vote dilution, i.e. disproportionate districts, *and* vote denial, i.e. excluding a class of voters from the franchise. While in its purest sense "one person, one vote" refers only to protection against vote dilution, it is commonly used by the Court in describing the general fundamental right to vote protected by the Equal Protection Clause.

The duties of certain government officials and entities may be "so far removed and so disproportionately affect different groups that a popular election in compliance with [the Equal Protection Clause] might not be required." *Hadley*, 397 U.S. at 56. But this exception does not apply in situations where the official or entity exercises general government power and performs a vital government function. *Id.*; *Ball*, 451 U.S. at 366. To fall under this special limited purpose exception, the government entity, in this case the Alaska Judicial Council, must serve a peculiarly narrow function and the members of the Alaska Bar Association must be shown to have a special relationship with that function. *Id.* at 357.

A government entity has a narrow function that qualifies for the "special limited purpose" exception when it does not administer normal functions of government, has merely a nominal public character, and its duties are not a traditional element of governmental sovereignty such that it must answer to the people as a whole. *Id.* at 366-68. Thus, when the *entity* has a special limited purpose that only affects a certain group of citizens, then the *election* of that entity may be limited to those so disproportionately affected and interested. The aspect of the limited purpose of the government entity that justifies the restriction is "the disproportionate relationship the [entity's] functions bear to the specific class of people whom the system makes eligible to vote." *Id.* at 370. The question is "whether the effect of the entity's operations . . . [is] disproportionately greater than the effect on those seeking the vote." *Id.* at 371. Not only must the effect of the Council's operations on the members of the Alaska Bar Association be disproportionately greater than upon the Plaintiffs and all other qualified voters, *id.*, but Plaintiffs must be "in fact substantially less interested or affected" than the bar members, *Cipriano*, 395 U.S. at 704.

**2. The Limited Purpose Election is Valid in Only Exceptional Cases**

The facts in this case involving the Alaska Judicial Selection Plan differ substantially and significantly from the cases where the Supreme Court has upheld a restriction of the vote to a certain group of citizens while excluding everyone else.

*Salyer Land Co. v. Tulare Lake Basin Water Storage District* upheld a law permitting only landowners to vote for the board of a water district because (a) the district's sole purpose was to acquire, store, and distribute water for farming in the district; (b) it provided no "general public" services; and (c) the district's "actions disproportionately affect[ed] landowners" as all of the costs for the district's projects were assessed against them.[4] 410 U.S. at 728-29. Relevant here is how *Sayler* distinguished *Kramer*, *Cipriano*, and *Phoenix* by pointing out that in those cases the limited group permitted to vote was *not* disproportionally affected by the outcome of the election. *Id*. at 726-29. Thus, under *Sayler*, when the functions and powers of the government entity are so far removed from normal government and so disproportionately affect a specific group, a popular election might not be required.

Similarly, *Ball v. James* upheld an Arizona law that limited the right to vote in board elections for a power district to only landowners. 451 U.S. at 355-56. Furthermore, the law accorded weight to each vote in proportion to the amount of land owned by the eligible voter. *Id.* The Court stated the issue as whether "the peculiarly narrow function of this local governmental body and the special relationship of one class of citizens to that body releases it from the strict demands of the one-person, one vote principle of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 357. The Court found in the affirmative, as the district was "essentially [a] business enterprise[], created by and chiefly benefitting a specific group of landowners." *Id.* at 368.

Thus, under *Ball*, a restricted election is constitutional when the government entity or office has a peculiarly narrow function and has a special relationship with those allowed to vote. In finding that the facts before it satisfied these requirements, the Court in *Ball* rested its conclusion on the following premises: (a) the district had only a "nominal public character," *id*. at 368, (b) "the provision of electricity is not a

[4] The Court also took note of the fact that while limiting voting to property owners, the law did not require that the voters be residents. This demonstrated that the election in question focused purely on the "land benefitted, rather than the people [sic] as such." *Sayler*, 410 U.S. at 729-30.

traditional element of governmental sovereignty," *id*., and (c) the district had a "disproportionate relationship . . . to the specific class of people whom the system ma[de] eligible to vote," *id.* at 370.

### 3. The Selection of Members of the Alaska Judicial Council Does Not Qualify as a Special Limited Purpose Situation.

Here, Alaska cannot show that the functions of the Alaska Judicial Council are "so far removed" from the normal functions of government and serve such a "peculiarly narrow function" to satisfy the exception to the demands of the Equal Protection Clause. The Members of the Alaska Judicial Council are given the power to select nominees to fill vacant positions on Alaska's courts, including the supreme court. The Governor must select one of the nominees, so that the Council decides who will sit in justice over the citizens of Alaska. The nomination of justices and judges is a traditional function of government. The Alaska Judicial Council has the power and duty to determine the composition of the third branch of government in the State of Alaska. *See* Alaska Const. art. IV, § 5, 8. 71. The Council does not have a "nominal" public character and the nomination and appointment justices and judges is a traditional governmental function.

Furthermore, Alaska cannot show that the functions of the Council "so disproportionately affect" the members of the Alaska Bar so that they have a "special relationship" with the Council to satisfy the requirements of the limited purpose exception. While the members of the Alaska Bar Association may have *different* interests in who the justices and judges are in Alaska, this interest in not substantially *greater* than the interest of all citizens of Alaska. *See Kolodziejski*, 399 U.S. at 212. Plaintiffs are subject to the jurisdiction and decisions of the justices and judges of Alaska's courts. Plaintiffs are subject to the laws and constitution of the State of Alaska, which is interpreted and applied by the justices and judges of Alaska's courts. Plaintiffs are legitimately interested in the composition of the third branch of their own government. The selection and nomination of justices and judges substantially affects all of Alaska's citizens.

Therefore, the narrow Equal Protection exception described in *Sayler* and *Ball* has no application to the selection of members of the Alaska Judicial Council, which is instead governed by the strict Equal Protection review mandated by *Kramer*.

### D. Recent Challenges Are Distinguishable and Not in Keeping with Supreme Court Precedent.

Nonetheless, two district courts have erroneously reached a contrary result. *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997) ("*AAVRLDF*"),[5] involved a multi-faceted challenge to Missouri's judicial selection plan[6] brought by African-American plaintiffs. While *AAVRLDF* focused mostly on the Voting Rights Act and claims of racial discrimination under the Fourteenth Amendment, the court did engage in a brief discussion of the claims made in the present case. Without citation to any authority, *AAVRLDF* asserted that the Missouri Plan did not abridge the challengers fundamental right to vote because unlike "an election for a legislator" "the election of lawyers to commissions is not an election of general interest." *Id.* at 1128.[7] In a footnote *AAVRLDF* also stated that electing Commissioners "represents a 'special unit with narrow functions' exception to the equal protection one man, one vote rule." *Id.* at 1128 n. 49 (citations omitted).

Both of these statements are in contravention of Supreme Court precedent. *Kramer* specifically rejected any notion that the Equal Protection Clause applied only to the election of legislators. 395 U.S. at 629. And to the extent an election of "general interest" is required, the selection of Council members would qualify as all citizens are affected by the Council's work. The narrow exception arising from *Sayler* and *Ball* is only applicable when the an elected entity is "far removed" from normal governmental activities and

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[5] The Eighth Circuit Court of Appeals affirmed in an unpublished per curium decision. *AAVRLDF v. Missouri*, 133 F.3d 921 (Table) (1998). Unpublished decisions in the Eighth Circuit issued prior to January 1, 2007, are not precedential. 8th Cir. R. 32.1A.

[6] *See supra* note 2.

[7] While the Court refused to apply strict scrutiny because it did not believe a fundamental right was implicated, it nonetheless applied rational basis scrutiny. *AAVRLDF*, 994 F. Supp. at 1128.

disproportionally affects the class permitted to vote. *Ball,* 451 U.S. at 363. Neither of these requirements exist in the Alaska Judicial Selection Plan.

In *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996), a district court reached the same erroneous conclusion as the court in *AAVRLDF*. *Bradley* involved a challenge to the Indiana judicial selection plan, which is materially similar to that used in Missouri and Alaska. Like *AAVRLDF*, *Bradley* primarily dealt with issues of racial discrimination. However, in addressing the relevant question presented in this case, the court held that the election of members to a judicial nomination commission qualified for the "'special unit with narrow functions'" exception to the Fourteenth Amendment. *Id.* at 1457 (citing *Ball*, 451 U.S. at 361-62). As described above, however, *Ball* offers no support for this conclusion.

Furthermore, subsequent to both *AAVRLDF* and *Bradley,* the Supreme Court has reiterated the limited reach of the exception described in *Ball* and *Sayler*. *Rice v. Cayetano*, 528 U.S. 495 (2000), involved a Fifteenth Amendment challenge to a Hawaii law permitting only persons with ancestry qualifying them as "Hawaiians" and "Native Hawaiians," as defined by statute, to vote for members of the Office of Hawaiian Affairs ("OHA"). The OHA was established for "[t]he betterment of conditions of native Hawaiians . . . [and] Hawaiians." *Id.* at 508 (quoting Haw. Rev. Stat. § 10-3 (1993)). To this end the OHA was charged with developing and coordinating programs and activities for Hawaiians and Native Hawaiians and administering any money appropriated to it for the benefit of Hawaiians and Native Hawaiians. *Id.* at 509.

Relevant here is the Court's response to Hawaii's argument that the special purpose district exception recognized in the Fourteenth Amendment should apply in the Fifteenth Amendment context as well:

> Hawaii further contends that the limited voting franchise is sustainable under a series of cases holding that the rule of one person, one vote does not pertain to certain special purpose districts such as water or irrigation districts. *See Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). Just as the *Mancari* argument would have involved a *significant extension or new application of that case,* so too it is far from clear that the *Salyer* line of cases would be *at all applicable* to statewide elections for an agency with the powers and responsibilities of OHA.

*Id*. at 522 (emphasis added).

Similarly, "water or irrigation district[]" cases like *Ball* and *Sayler* have no application to the Alaska Judicial Selection Plan. The Council is a statewide agency charged with nominating judges to courts of Alaska. And the Council's affect has no geographic or demographic limitation, but instead affects all Alaska residents on an equal basis.

**E. Conclusion**

Unfortunately, while all citizens are equally affected by the Council they are not equally represented. Because Plaintiffs' Fourteenth Amendment right to equal participation in the selection of their state judiciary has been abridged, Plaintiffs have a strong likelihood of success on the merits. The government cannot show that the restriction of the election of the Board of Governors of the Alaska Bar Association to bar members, when the Board is given the power to appoint the three Attorney Member of the Alaska Judicial Council, which entity determines the composition of the Alaska judiciary, is narrowly tailored to a compelling government interest. Nor does the selection of the Council members qualify for the "special limited purpose" exception, because the Council performs a normal function of government, does not have a merely nominal public character, and does not disproportionately affect the members of the Alaska Bar Association compared to the rest of Alaska's citizens, including Plaintiffs. Therefore, the Alaska Judicial Selection Plan violates Plaintiffs' Equal Protection rights.

**II. Plaintiffs Have Demonstrated Irreparable Harm.**

As set out in the Verified Complaint, ¶¶ 32-39, the Council is currently considering applications for a vacancy on the Alaska Supreme Court. The Council has not yet announced the date for the public hearing and vote to determine what candidates it will nominate. But the Council is currently reviewing the applications and proceeding to narrow the field or most qualified candidates. The meeting could be scheduled anytime within the 90 days before November 2, 2009. Alaska Stat. § 22.05.080. Following the meeting, the Council will then send the exclusive list of nominees to the Governor. So absent the requested preliminary

relief, applications will be reviewed and a state supreme court justice will be chosen without Plaintiffs having an equal voice in the process, which equal voice is mandated by the Fourteenth Amendment.

**III. The Balance of Harms Tips Decidedly in Favor of Plaintiffs.**

A preliminary injunction will not harm Defendants or the State because the Council may continue to function in the absence of the three Attorney Members. Those members constitutionally appointed by the Governor or placed ex-officio may continue the process of nominating candidates. In order to do so, however, this Court must enjoin the four remaining member from observing the four or more concurrence requirement under Alaska Const. art. IV, § 8, because it is not severable from the unconstitutional sections described above. Absent this relief, the Council would be required to act unanimously.

**IV. An Injunction Is in the Public Interest.**

Enjoining the participation of the Council members unconstitutionally selected by only members of the Alaska Bar will benefit the public interest as all citizens will be accorded an equal voice in the selection of their state judiciary. "The effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizen's votes." *Kramer*, 395 U.S. at 627 n.7. Enjoining the other four members from observing the four vote requirement will permit the nomination process to continue without the Attorney Members. A preliminary injunction will ensure that the current vacancy on the Alaska Supreme Court is filled through the equal participation of all citizens in a constitutional manner.

Plaintiffs do not challenge the constitutionality of requiring a certain number of Bar members on the Council. Neither do Plaintiffs challenge the constitutionality of permitting only attorneys to vote for the members of the Board of Governors of the Alaska Bar. But, because of the power exercised by the Alaska Judicial Council, the selection of its members cannot be given to the Board of Governors because of how the Board is elected.

## Conclusion

Accordingly, this Court should enjoin Defendants Cannon, Fitzgerald, and Menendez, the Attorney Members of the Alaska Judicial Council, from exercising any powers under Alaska Const. art. IV, §§ 5 and 8, and Alaska Stat. § 22.05.080 and from taking part in the deliberations and voting for nominees to fill the current impending vacancy created by the retirement of Justice Robert L. Eastaugh.

Furthermore, this Court should enjoin Defendants the Chief Justice, Clarke, Thompkins-Miller, and Williams, the remaining four members of the Alaska Judicial Council, from observing the requirement that they act by the concurrence of four or more members under Alaska Const. art. IV, § 8, so that they may proceed with the nomination procedure acting by majority vote.

Dated: July 2, 2009.

Respectfully submitted,


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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Plaintiffs' Motion to Consolidate will be served upon the following with the complaint and summons on July 2, 2009:

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