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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MICHAEL MILLER, KENNETH KIRK, and CARL EKSTROM, Plaintiffs, v. 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; LOUIS JAMES MENENDEZ, in his official capacity as Attorney Member of the Alaska Judicial Council; WILLIAM F. CLARKE, in his official capacity as Attorney Member of the Alaska Judicial Council; KATHLEEN TOMPKINS-MILLER, in her official capacity as	)	Civil No. 3:09-cv-00136 (JWS)

Attorney Member of the Alaska Judicial Council; and CHRISTENA WILLIAMS, in her official capacity as Attorney Member of the Alaska Judicial Council;

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs have failed to state a claim on which relief may be granted, and therefore, this Court should dismiss Plaintiffs' complaint on the merits under Federal Civil Procedure Rule 12(b)(6). Plaintiffs cite no law that supports their request that this Court declare that a portion of the Alaska Constitution violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Alaska's merit-based appointment system for selecting state judges was adopted after extensive debate at the state's constitutional convention, ratified by the citizens of Alaska, and approved by Congress. After more than 50 years of judicial selection in accordance with the state constitution, plaintiffs now contend that the constitutional selection process denies non-attorneys an equal right to vote for judges. Plaintiffs' claim fails principally because there is no election to select Alaska's judges. Alaska's judges are appointed by the Governor from nominees named by the Judicial Council. Council members themselves are appointed: three lawyers are appointed by the Alaska Bar Association Board of Governors, and three lay persons are appointed by the Governor; the Chief Justice of the Supreme Court serves *ex officio* as the Council's seventh member and chair. The one person, one vote cases that Plaintiffs cite are all

inapposite, because they apply only when a state decides to select officials through elections. They are irrelevant when the state has chosen a non-election method to select certain officials.

To make the cases they cite seem applicable, Plaintiffs consistently blur the discussion of the entities whose powers and selection processes are at issue. It should be clear from the outset that the only election that Plaintiffs address is the election of the attorney members of the bar Board of Governors -- and Plaintiffs expressly do not contest the constitutionality of allowing only lawyers to vote for the lawyer members who serve on the governing board of their association. Pl Mtn at 24. Plaintiffs attempt to apply one person, one vote arguments for selections that do not involve elections at all, including the appointment of judges by the Governor and the appointment of lawyer members of the Judicial Council by the bar Board of Governors.

Alaska's judicial selection system is not unique. Twenty-seven other states and the District of Columbia select at least some of their judges through use of a nominating commission that forwards a list of names from which the Governor must make an appointment.[1] The American Judicature Society recommends that states use a system where attorneys alone select attorney members for the nominating commission.[2] Besides Alaska, in seventeen states and Washington, D.C., members of the bar association appoint or elect some of the members of the

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[1] *See* Larry C. Berkson, *Judicial Selection in the United States: A Special Report* at 2 (noting that a total of 32 states and the District of Columbia use nominating commissions for at least some appointments; in four of those states the commission's recommendations are not binding on the governor), *available at www.judicialselection.us/uploads/documents/Berkson*.

[2] American Judicature Society, *Model Judicial Selection Provisions* at 2 (rev. 2008), *available at www.judicialselection.us/uploads*.

nominating commission without gubernatorial or legislative approval or confirmation.[3] No court has held any of those state systems unconstitutional. Federal District Courts in two of the states where lawyers alone select the lawyer members of the nominating commission have rejected the kind of equal protection challenge that Plaintiffs assert in this case; in the one case where the equal protection issues reached the U.S. Circuit Court of Appeals, the appellate court summarily affirmed, adopting the reasoning of the District Court.[4]

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[3] *See* Ala. Const. amends. 83, 334, 408, 607, 615, 660, 741, 819 (county bar associations select some of the members of the nominating commissions used to fill mid-term vacancies); D.C. Official Code § 1-204.34 (bar board of governors appoints 2 of 7 members of nominating commission); Haw. Const. art. VI, § 4 (state bar elects 2 of 9 members of nominating commission); Ind. Code § 33-27-2-2 (state bar elects 3 of 7 members of nominating commission); Iowa Const. art. V, § 16 and Iowa Code ch. 46 (state bar elects 7 of 15 members of nominating commission); Kan. Const. art. III, § 5 (state bar elects 5 of 9 members of nominating commission); Ky. Const. § 118 (state bar elects 2 of 7 members of nominating commission); Md. Exec. Order No. 01.01.2008.04 (president of state bar association appoints 5 of 12 members of nominating commission); Mo. Const. art. V, § 25(d) (state bar elects 3 of 7 members of nominating commission); Neb. Const. art. V, § 21 (state bar elects 4 of 9 members of nominating commission); Nev. Const. art. 6, § 20 (state bar board of governors appoints 3 of 7 members of nominating commission); N.M. Const. art. VI, § 35 (president of state bar and judges on commission jointly appoint 4 of 14 members of nominating commission); N.Y. Exec. Order No. 4, XXIX N.Y.S. Reg. 90 (president of the state bar selects 1 of 13 members of nominating commission); N.D. Cent. Code. § 27-25-02 (state bar association president appoints 1 lawyer and 1 non-lawyer member of 6-member nominating commission); Okla. Const. art. 7B § 3(2) (state bar elects 6 of 13 members of nominating commission); S.D. Cod. Laws § 16-1A-2 (president of state bar appoints 3 of 7 members of nominating commission); Vt. Stat. Ann. § 601(a)(4) (state bar elects 3 of 11 members of nominating commission); Wyo. Const. art. V, § 4(c) (state bar elects 3 of 7 members of nominating commission).

[4] *See African-American Voting Rights Legal Defense Fund v. State of Missouri*, 994 F. Supp. 1105, 1128-29 (E.D. Mo. 1997), *summarily aff'd*, 133 F.3d 921 (8th Cir. 1998) (unpublished decision); *Bradley v. Work*, 916 F. Supp. 1446, 1448-49, 1456 (S.D. Ind. 1996), *aff'd without addressing equal protection issues*, 154 F.3d 704 (7th Cir. 1998). These cases are discussed *infra* at 14-16.

Defendants, the members of the Alaska Judicial Council, respectfully request that this Court dismiss Plaintiffs' Amended Complaint because it fails to state a claim for which relief may be granted.

II. STATEMENT OF FACTS

For the purposes of this motion to dismiss, the Judicial Council accepts the factual assertions (as distinct from legal conclusions) in Plaintiffs' Amended Complaint.[5] The Council also relies on public records -- principally, the minutes of the Alaska Constitutional Convention. Reliance on these materials from outside the Amended Complaint does not require this Court to treat this motion to dismiss as a summary judgment motion.[6]

Alaska's merit-based selection system for judges was carefully crafted at Alaska's Constitutional Convention. The delegates deliberately chose an appointive system rather than an elective system for selecting judges. George M. McLaughlin, chair of the Committee on the Judiciary Branch, explained to the other delegates that the elective system for judges, which began in the United States in the middle of the Nineteenth Century, "was found inadequate" because the judiciary was "in substance . . . dictated and controlled by a political machine." 1

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[5] The Council notes that some of the facts alleged in the Amended Complaint are wrong, but the errors are not material to this motion. For example, Paragraph 6 alleges that "[m]embers of the Alaska Judicial Council in their official capacities reside in Anchorage, Alaska." In fact, five of the current seven Council members reside outside of Anchorage. Paragraph 26 asserts that "[t]he four bar members of the Council exercise majority control over the selection of nominees for vacant positions on the state courts of Alaska." This is half-true. *Any* four Council members, including any combination of lay and attorney members, can exercise majority control.

[6] *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (court may take notice of matters in the public record without converting a Rule 12(b)(6) motion into a summary judgment motion).

ALASKA CONSTITUTIONAL CONVENTION PROCEEDINGS ("ACCP") 584 (1955).[7] McLaughlin also pointed out that, in an elective system, a judge would consider "whether [his decisions were] popular or unpopular," at the expense of judicial independence:

> If we determine the validity of our laws in terms of popularity[,] . . . we are then not a government of laws . . . . It is not the function of the judge to make the law, it is his function to determine it; and the way to keep them independent is to keep them out of politics.

Id.[8] The trend away from elective systems was clear in 1955; McLaughlin noted that every modern constitution provides for appointive judges. *Id.* at 585.[9]

The system for selecting judges adopted by Alaska's constitutional drafters is based on the Missouri Plan. The involvement of the organized bar association in selecting the members of the Judicial Council is "the very essence" of the Missouri Plan. *Id.* at 687.[10] Delegate

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[7] The Alaska Constitutional Convention minutes are also available online at *www.ajc.state.ak.us/General/akccon.htm*.

[8] *See also New York State Board of Elections v. López Torres*, 128 S. Ct. 791, 803 (2008) ("When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.") (Stevens, J., concurring).

[9] *See also African-American Voting Rights Legal Defense Fund*, 994 F. Supp. at 1114-15 (describing reasons why Missouri selected a non-elective system for selecting judges and noting testimony that "the trend, nationally, for decades, has been away from the partisan election of judges and towards a merit or nonpartisan system"). The trend toward merit selection continues. The American Judicature Society recommends this approach in its Model Judicial Selection Provisions. *See Model Judicial Selection Provisions*, *supra* n.2.

[10] The organized bar association existed in Alaska before statehood. *See* Alaska Integrated Bar Act, ch 196, SLA 1955 (discussed and upheld in *In re Paul*, 17 Alaska 360 (D. Alaska 1957)).

McLaughlin explained why the bar's role in selecting Council members is so critical in devising a system to seat the most qualified judges:

> The whole theory of the Missouri Plan is that in substance, a select and professional group, licensed by the state, can best determine the qualifications of their brothers. The intent of the Missouri Plan was in substance to give a predominance of the vote to professional men who knew the foibles, the defects and the qualifications of their brothers. It is unquestionably true that in every trade and every profession the men who know their brother careerists the best are the men engaged in the same type of occupation. That was the theory of the Missouri Plan. The theory was that the bar association would attempt to select the best men possible for the bench because they had to work under them.

Id. at 694. [11]

When another delegate proposed an amendment that would have provided for legislative confirmation of the attorney members of the Judicial Council, the proposal was rejected after McLaughlin explained that it would undermine the theory of the Missouri Plan to make selection of the attorney members of the Council turn, not on qualifications, but instead on whether the people will "be acceptable in terms of political correctness." *Id*. at 694-95. In McLaughlin's words, if the attorney members of the Judicial Council are chosen based on "political correctness," the "whole system goes out the window" and "[a]ll you have is one other political method of selection of your judges." *Id*. at 695. He explained that the lay members "represent the predominant political thought. The theory on the lawyer members of the council, they represent the profession, they represent the best interests of the profession. They represent a

[11] *See also* ACCP at 687 ("[T]hree who are appointed by the bar . . . best know their brothers, and . . . are there based solely on their professional qualifications [and] selected because they would represent, in theory, the best thinking of the bar."); *id*. at 585 ("The theory is you have a select group. The lawyers know who are good and they know who are bad. The laymen represent in substance the public in order to protect them in substance from the lawyers, but they are confirmed by the senate . . . so that we would have a broader base than the governor himself."); *id*. at 586 ("as craftsmen or professional men [lawyers] know best who is the most desirable").

desire to have the best judges on the benches." *Id.*

The judicial selection plan adopted by the framers is set forth in Article IV of the Alaska Constitution. The Constitution created the state supreme court and superior court. Alaska Const. art. IV, §§ 2-3. It requires that judges selected for these courts be citizens of the United States and of Alaska and licensed to practice law in Alaska. *Id.* § 4. It requires that the Governor appoint a judge from among two or more persons nominated by the Judicial Council, and that each judge thereafter be subject periodically to approval or rejection by voters on a nonpartisan ballot. *Id.* §§ 5-6. It defines the composition and role of the Judicial Council in § 8 as follows:

> 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. . . . 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. . . . The judicial council shall act by concurrence of four or more members and according to rules which it adopts.

The Judicial Council process adopted for Alaska thus differs from the original Missouri Plan because, in Missouri, the attorney members of the nominating commission are elected by the bar association, whereas Alaska's Constitutional Convention delegates chose to reduce the political influence even further by having the attorney members appointed by the bar's governing body. Alaska Const. art. IV, § 8. The Alaska Constitution also assigns the Judicial Council duties to conduct studies to improve the administration of justice and to make reports and recommendations to the supreme court and the legislature at intervals of not more than two years. *Id.* § 9.

After adoption by the constitutional convention, the state constitution was ratified by Alaska voters and approved by Congress, which found Alaska's Constitution to be "in conformity with the Constitution of the United States." Alaska Statehood Act § 1, Pub. L. 85-508, 72 Stat. 339 (July 7, 1958).

As noted above, the organized bar association was defined by Alaska statutes even before statehood. The legislature requires all persons licensed to practice law in Alaska to be members of the state bar association. AS 08.08.020(a). By statute, the "governing body of the organized bar,"[12] the bar Board of Governors, consists of twelve members. Nine are lawyers, elected by the members of the bar association. Three members, who are not attorneys, are appointed by the Governor, subject to confirmation by the legislature. AS 08.08.050(a). The bar association has many functions concerning the operation of the profession. It handles testing and character investigations for admission to the bar; it investigates complaints and convenes disciplinary proceedings against lawyers; and it administers a program of arbitration of fee disputes between lawyers and clients. The bar association recommends to the state supreme court rules concerning admission, discipline, licensing, and continuing legal education. It sponsors continuing legal education programs. It holds membership meetings and collects dues from members to fulfill its functions. AS 08.08.080. In addition, approximately once every two years, it appoints an attorney member to the Judicial Council.[13]

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12 Alaska Const. art. IV, § 8.

13 The six-year Council member terms expire one per year, alternating lawyer and non-lawyer positions. *See* Alaska Const. art. IV, § 8, art. XV, § 16; Alaska Judicial Council Bylaws art. II, § 1. Thus, absent a mid-term vacancy, when an attorney is appointed to serve the remainder of the term, the bar Board of Governors appoints a lawyer member to the Judicial Council once every other year. (The Council's Bylaws are printed in the Alaska Judicial

During the fifty years that the Judicial Council has existed, it has, in accordance with the state constitution, adopted rules by which it announces judicial vacancies, invites applications, and conducts extensive investigations to determine the qualifications of applicants for the judicial positions they seek.[14] The Council interviews judicial applicants and convenes public hearings to receive testimony on applicants' qualifications. It votes in public session on which applicants to nominate.[15] Although some people may believe that lawyers dominate the Council's nomination process, the Council's voting records belie this perception: in only five instances out of more than 700 votes on judicial candidates held during 20-plus years have the three lawyer members voted differently than the three non-lawyer members of the Council, and in three of those five times, the Chief Justice (who votes only when his or her vote would make a difference[16]) voted with the non-lawyers. Thus, only in two of more than 700 votes did the four lawyer members of the Council determine whether or not a candidate would be nominated.[17]

III. STANDARD OF REVIEW

A complaint should be dismissed as a matter of law if it fails to allege sufficient facts to sustain a claim under a cognizable legal theory.[18] "A court may dismiss a complaint only if it is

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Council's Twenty-Fourth Report: 2007-2008 to the Legislature and Supreme Court ("Twenty-Fourth Report"), Appendix B (January 2009). The bylaws and other publications by the Council are also available online at the Judicial Council's website: *www.ajc.state.ak.us*.

[14] *See* Alaska Judicial Council Procedures for Nominating Judicial Candidates, *available in* Twenty-Fourth Report, Appendix D; Alaska Judicial Council Bylaws art. VII.

[15] *See id.*

[16] *See* Alaska Judicial Council Bylaws art. V, § 1.

[17] *See* Alaska Judicial Council, Selecting and Evaluating Alaska's Judges: 1984-2007 at 4 n.12 (Aug. 2008).

[18] *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984).

clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."[19] For purposes of a motion to dismiss for failure to state a claim under Civil Rule 12(b)(6), all allegations of the non-moving party are taken as true, and the court must construe the factual assertions in the complaint in the light most favorable to the non-moving party.[20]

IV. ARGUMENTS

ALASKA'S JUDICIAL SELECTION SYSTEM DOES NOT VIOLATE THE FOURTEENTH AMENDMENT.

A. The Alaska System For Selecting Judges Is Appointive, Not Elective, And Therefore Does Not Implicate The One Person, One Vote Principle.

Plaintiffs' challenge to Alaska's judicial selection system is premised on the Equal Protection Clause's guarantee of one person, one vote developed in a line of Supreme Court election cases. This principle first found expression in *Reynolds v. Sims*, 377 U.S. 533 (1964), and was summarized by the Supreme Court in *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 56 (1970): "[W]henever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election."

Those cases, important as they are in their own realm, have no bearing on Alaska's judicial selection process, because Alaska's judges are not elected. Judges are appointed by the Governor from a list nominated by the Judicial Council. Members of the Council are also

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[19] *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984).

[20] *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 248 (9th Cir. 1997).

appointed -- three lay members are appointed by the Governor; three attorney members are appointed by the state bar association's Board of Governors. The Governor is elected, but the election of the person who makes the appointment does not convert the judicial appointment process into an elective process. Likewise, although members of the bar association elect nine of the twelve members of their own Board of Governors, this voting -- even if it could plausibly be likened to a popular election -- does not convert the judicial appointment process into an elective process.

Plaintiffs do not allege that there is a constitutional requirement to elect either judges or non-legislative officials such as Judicial Council members, and there is no such requirement. States are free to choose members of such bodies "by the governor, by the legislature, or by some other appointive means rather than by an election." *Sailors v. Board of Education of the County of Kent*, 387 U.S. 105, 108 (1967); *see also Kramer v. Union Free School District No. 15*, 395 U.S. 621, 629 (1969). Where a non-legislative position is filled without election, the "principle of 'one man, one vote' ha[s] no relevancy." *Sailors*, 387 U.S. at 111; *see also Hadley*, 397 U.S. at 58. As *Sailors* stated, distinguishing the *Reynolds* line of cases on which Plaintiffs in this case rely, those "were all cases where elections had been provided and [they] cast no light on when a State must provide for the election of local officials." 387 U.S. at 108.

Even the cases that Plaintiffs rely on make the point that the equal protection analysis that underlies the one person, one vote cases applies only in situations where the franchise is granted to the electorate. *See Kramer*, 395 U.S. at 629; *Phoenix v. Kolodziejski*, 399 U.S. 204, 209 (1970). Because the selection of Alaska's judges is not by election, none of Plaintiffs' legal authority is apposite.

Sailors is particularly helpful for understanding why the one person, one vote cases have no bearing here. In *Sailors*, the Court considered a one person, one vote challenge to a Michigan county school board selection process, brought by citizens who complained that voters in smaller school districts got a disproportionate voice. 387 U.S. at 106-07. There, voters in a popular election elected the members of their local school boards. *Id*. Each local school board (regardless of the population of the school district) then selected one delegate to a kind of nominating commission, and those delegates chose the five members of the county school board. *Id*. The Court characterized the system for selecting county school board members as "basically appointive rather than elective," *id*. at 109, even though the selection process began with the election of local school board members; because the process was "basically appointive," the Court rejected the one person, one vote challenge as inapplicable. *Id*. at 111.

As with the system for choosing county school board members in *Sailors*, the merit-based judicial selection process in Alaska is basically appointive. The Governor and the bar Board of Governors appoint the members of the Judicial Council. The Council nominates candidates. The Governor appoints judges from the lists of nominees. Thus, the central premise in all the cases that Plaintiffs rely on is missing. Those cases govern how elections must be conducted. Alaska does not conduct elections to select its judges. Because the State of Alaska deliberately and purposely decided not to fill judicial vacancies through elections, Plaintiffs' authorities are simply inapplicable to Alaska's merit-based judicial selection system.

Two other courts have addressed equal protection challenges to judicial selection systems similar to Alaska's -- and both have upheld the selection processes and given short shrift to the challenges.

In *African-American Voting Rights Legal Defense Fund, Inc. v. State of Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997), plaintiffs challenged the constitutionality of Missouri's judicial selection process, the system on which Alaska's is modeled. In Missouri, as in Alaska, judges are appointed by the Governor, who must select from a list of nominees presented by a non-partisan commission; after appointment, judges periodically are subject to a retention election. In Missouri, the judicial commission is composed of lay persons, lawyers, and judges. *Id.* at 1112. Only lawyers may vote to elect the lawyer members of the commission. *Id.* at 1117.[21] The court noted that the persons who may not vote -- non-lawyers -- are not a suspect class for purposes of equal protection analysis. *Id.* at 1127. Further the court held:

> Missouri's practice of permitting lawyers to elect the lawyers on the nominating commission does not interfere with the exercise of a fundamental right because there is no fundamental right of every citizen to vote in every election which happens to take place in Missouri.

Id. The court specifically rejected the basic claim that Plaintiffs make in the current case -- that the selection process for the nominating commission violates the one person, one vote principle -- saying that the cases on which Plaintiffs rely are inapplicable because the nominating commission is "a special unit with narrow functions" and thus fits within an exception to the one person, one vote rule. *Id.* at 1128 n.49. Applying standard equal protection principles, the court concluded:

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[21] In Alaska, of course, as described above, there is no vote for members of the judicial nominating body, since lawyer members of Alaska's Judicial Council are appointed by the bar Board of Governors. The only voting that Plaintiffs discuss in Alaska is the voting for the bar Board of Governors, a step further removed from judicial selection.

> [B]ecause the practice of lawyers electing lawyers does not operate to the peculiar detriment of any suspect class, and it does not trammel upon a fundamental right, the only issue remaining is whether there is a rational basis for the practice in question.

Id. at 1128. The court readily found that it is reasonable to have lawyers on the nominating commission, and also that it is reasonable to have lawyers select the lawyers who will participate; the court found the system rational because lawyers are particularly well-equipped to evaluate judges and also particularly well-equipped to evaluate their colleagues to determine who are best qualified to participate in the judicial selection process. *Id.*

The district court thus upheld the selection process, including in particular the rule that only lawyers may participate in selecting the lawyer members of the nominating commission. *Id.* at 1129. The Eight Circuit affirmed in an unpublished decision adopting the reasoning of the district court. *African-American Voting Rights Legal Defense Fund, Inc. v. State of Missouri*, 133 F.3d 921 (8th Cir. 1998).

A district court in Indiana considered similar claims and rejected them in *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996). In Lake County, Indiana, the Governor appoints judges from nominees named by a Judicial Nominating Commission. The Commission consists of nine members, including four attorneys who are elected by the county's lawyers. *Id.* at 1450. As in the current case, plaintiffs contended that their equal protection rights were violated because only lawyers could participate in the selection of lawyer members to the Commission. *Id.* at 1455. The district court rejected the claim. First, the court noted the inapplicability of the one person, one vote cases on which plaintiffs relied, since the selection process for Commission members was not a general election and was "more in the category of executive appointments, which does not implicate the Equal Protection clause." *Id.* at 1456. Second, even if the election

were considered a popular, or general, election, the Commission does not perform traditional governmental functions; in fact, the court observed, the Commission "serves no traditional governmental functions at all." *Id.* Consequently, "the Commission satisfies the 'special unit with narrow functions' prong of the exception to the one-man, one-vote rule." *Id.* (quoting *Ball v. James*, 451 U.S. 355, 361-62 (1981)).[22] Thus, as in *African-American Voting Rights Legal Defense Fund*, the court applied a rational basis test to evaluating the selection process, and concluded that the system is rationally related to serving the state's goals and therefore does not violate the federal constitution. *Id.* at 1458.

The Court of Appeals for the Seventh Circuit affirmed on the issues that were raised, noting that plaintiffs did not preserve their equal protection claims for appeal. *Bradley v. Work*, 154 F.3d 704, 711 (7th Cir. 1998).

Those two district court cases appear to represent the only published decisions addressing challenges comparable to those raised in this case. Although eighteen other states also select judges through a process that involves lawyers selecting the lawyer members of a nominating commission,[23] Plaintiffs have cited no case invalidating such a system.

Plaintiffs' attempts to distinguish or criticize the two on-point cases are not persuasive. For the reasons discussed in Section C below, and contrary to Plaintiffs' claims, the district courts in Missouri and Indiana had sound and solid bases for concluding that a judicial nominating commission is an entity with such narrow functions that the one person, one vote principle does not apply. Plaintiffs' criticism, moreover, disregards the fact that in Alaska,

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22 The *Ball* exception is discussed further in Section C *infra.*

23 *See supra* n.3.

unlike Missouri and Indiana, there is no election for members of the judicial nominating council. In Alaska, the only election at issue is the one for attorney members of the bar Board of Governors -- and Plaintiffs explicitly do not challenge the fact that only lawyers may vote in that election. Pl Mtn at 24.

Plaintiffs' citation to *Rice v. Cayetano*, 528 U.S. 495 (2000), does not help them defeat the significance of the decisions upholding judicial selection processes using the Missouri Plan. *Rice* dealt with a statewide election for trustees of the Office of Hawaiian Affairs ("OHA") in which only citizens defined as descendants of people inhabiting the Hawaiian Islands in 1778 were permitted to vote. *Id.* at 499. The Supreme Court, unsurprisingly, found "no room" under the Fifteenth Amendment[24] for allowing only members of one race to vote in a statewide election for the officers of an organization with broad authority to administer state funds and to serve as the principal public agency responsible for the performance, development, and evaluation of a wide spectrum of programs related to native Hawaiians. *Id.* at 523. In passing, the Supreme Court commented that the OHA is not a "special purpose district" exempt from the one person, one vote rule, *id.* at 522, but that does not in any way undermine the conclusion that the Alaska Bar Association is an organization allowed to limit voting to its members -- particularly in a case where Plaintiffs do not challenge that election.[25] Moreover, the Supreme Court observed that the

[24] The Fifteenth Amendment provides that the right of citizens to vote shall not be denied on account of race. It is not the source of the one person, one vote principle.

[25] Plaintiffs erroneously treat the Alaska Judicial Council as the organization for which an election is conducted. Pl Mtn at 21. As discussed above, Judicial Council members are not elected by anyone, so the one person, one vote principle applicable to elections by definition does not apply to the Council member selection process.

"special purpose district" cases were not dispositive in *Rice*, since those are Fourteenth Amendment cases and *Rice* was decided under the Fifteenth Amendment. *Id.* at 522.

Plaintiffs have cited no authority supporting their claim that a judicial selection process based on appointments, not elections, violates Plaintiffs' equal protection rights. This Court should find that their claim fails on the merits.

B. The One Person, One Vote Principle Does Not Apply To Judicial Elections.

Even if this Court were to consider Alaska's judicial selection method as an elective process, Plaintiffs' challenge would still fail, since "the concept of one-man, one-vote apportionment does not apply to the judicial branch of the government." *Wells v. Edwards*, 347 F. Supp. 453, 454 (M.D. La. 1972), *aff'd summarily*, 409 U.S. 1095 (1973). The one person, one vote rule, "which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary," because "[j]udges do not represent people, they serve people." *Id.* at 455.

Other courts also have recognized that the one person, one vote principle of the Fourteenth Amendment does not apply to judicial elections. *E.g.*, *Chisom v. Roemer*, 501 U.S. 380, 402-03 (1991); *Kuhn v. Miller*, No. 98-2012, 1999 WL 1000850 at *4 (6th Cir. Oct. 28, 1999) (unpublished decision); *Smith v. Boyle*, 144 F.3d 1060, 1061 (7th Cir. 1998); *Field v. Michigan*, 255 F. Supp. 2d 708, 711-13 (E.D. Mich. 2003).

This is a second ground for rejecting Plaintiffs' equal protection challenge.

C. The One Person, One Vote Principle Does Not Apply To The Election Of Lawyer Members Of The Bar Board Of Governors.

To attempt to make their case one about an election, Plaintiffs point to the election for attorney members of the bar Board of Governors, and then repeatedly disregard the distinctions

between the election of Board members, the appointment of Judicial Council members, and the appointment of judges by the Governor. When the distinctions are acknowledged, the equal protection principles on which Plaintiffs rely clearly have no application. The election of the bar Board of Governors is unquestionably a limited purpose election, which is not subject to a popular vote and thus not subject to the one person, one vote rule. Plaintiffs concede this.[26] Still, they contend that their equal protection rights are violated by the fact that three Judicial Council members are selected by a board of which nine of twelve members are elected only by lawyers. But Plaintiffs cite no legal authority at all requiring that any election that precedes an appointive process must be a popular election consistent with the one person, one vote rule.

The Supreme Court has held repeatedly that one person, one vote principles do not apply to the election of a board or other entity that (1) exercises only narrow, limited governmental powers and (2) conducts activities that disproportionately affect only a specific group of individuals. *E.g.*, *Ball v. James*, 451 U.S. 355, 364, 366 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973). The Supreme Court summarily affirmed a lower court's holding applying this rule specifically to a state bar association. *Sullivan v. Alabama State Bar*, 394 U.S. 812 (1969), *summarily aff'g*, 295 F. Supp. 1216 (M.D. Ala. 1969). The Ninth Circuit thereafter affirmed a district court decision rejecting a one person, one vote challenge to the selection of the California bar governing board, citing *Sullivan* and stating, "The Supreme Court has held that malapportionment of representation on a state bar governing body is

[26] They write: "Neither do Plaintiffs challenge the constitutionality of permitting only attorneys to vote for the members of the Board of Governors of the Alaska Bar." Pl Mtn at 24.

not a violation of fourteenth amendment rights." *Brady v. State Bar of California*, 533 F.2d 502, 502-03 (9th Cir. 1976).

The Alaska Bar Association's Board of Governors easily passes the two-part test articulated by the Supreme Court for a limited-purpose entity whose elections are not subject to a one person, one vote rule. The bar Board of Governors exercises no "traditional governmental functions," such as imposing sales or property taxes, enacting laws affecting all citizens, or exercising police powers over traditional governmental activities such as schools, public safety, or health and welfare services.[27] Its duties are limited and narrowly focused on the functions of the bar as a professional organization. *See* AS 08.08.080; *see also supra* at 9. The only activity that Plaintiffs claim relates to non-members is the selection of attorney members to the Judicial Council. This activity is, first, too minor a part of the bar Board of Governors' overall activities to convert the Board into a governmental entity whose elections are subject to one person, one vote popular election rules. Second, even considering just that activity, the selection of lawyer members to the Council that will nominate judges is an activity that disproportionately affects lawyers. *See Bradley*, 916 F. Supp. at 1457 ("Attorneys, as officers of the court and as potential candidates for judicial office, are disproportionately affected by the screening process performed by the [judicial nominating] Commission."). Certainly all Alaskans share a common interest in the goal of a highly qualified judiciary. However, the Supreme Court has never required that the group allowed to vote in an election for a special purpose entity be the *only* group affected by the entity's activities. *See Ball*, 451 U.S. at 371; *Sayler*, 410 U.S. at 728. Only lawyers as a

[27] *See Ball*, 451 U.S. at 366 (describing how the board of a water district does not exercise traditional governmental powers); *Bradley*, 916 F. Supp. at 1456-57 (discussing how a judicial nominating commission does not serve any traditional governmental functions).

profession are affected on a day-to-day basis by the choice of who serves on the bench. *See Bradley*, 916 F. Supp. at 1457 (attorneys' interests "are different in nature and in scope from the interests of the general public in a fair and impartial judiciary").[28]

Because the bar Board of Governors is a special purpose entity, the Equal Protection Clause requires simply that the legislature's decision to reserve voting to active members of the bar bears a rational relation to the objectives of the statute. *Ball*, 451 U.S. at 371. Allowing only active bar members to vote for the nine attorney seats on the bar Board of Governors plainly meets that test. Bar members are in the best position to judge who among their peers are best qualified to lead them in their professional organization. *See* ACCP 585-86, 687; *Bradley*, 916 F. Supp. at 1458. Even Plaintiffs acknowledge that this method of selecting the bar Board of Governors is constitutional. Pl Mtn at 24.

Once it is determined that the bar Board of Governors is chosen through a constitutional system, Plaintiffs have no authority for suggesting that, because non-lawyers cannot vote for some of the Board of Governors, it is unconstitutional to assign the Board of Governors the role of appointing the three lawyer members of the Judicial Council. A layered appointment structure -- where a properly elected board selects some members for another entity -- is an example of the "innovation[]" and "combination of old and new devices" that the Supreme Court recognized that governments may use to meet modern challenges. *Sailors*, 387 U.S. at 110-11. In the example of the Judicial Council, the layered system is carefully designed to insulate the judicial selection process from political influence and to allow Alaska to seat impartial and well-qualified

[28] *See also* Alaska Const. art. IV, § 15 (providing that the practice of all in all courts is subject to rules promulgated by the justices of the Alaska Supreme Court).

judges. Bypassing the bar Board of Governors and forcing the popular election of the attorney members of the Judicial Council would frustrate the goal of the framers to keep politics out of the judicial selection process and would inject a layer of politics into the process.

Plaintiffs expressly do not challenge the composition of the Judicial Council, including the fact that four of its seven members (counting the chief justice) are attorneys. Pl Mtn at 24. They challenge only the way that three of the lawyer members are selected. Because there is no election for those seats, no one person, one vote analysis is required. If any equal protection claim is raised concerning the constitutionality of having the bar Board of Governors appoint three attorneys to the Judicial Council -- and it is not clear that it is -- this Court must at most determine whether there is a rational basis for having the bar Board of Governors appoint the lawyer members.[29] Having the governing body of the organized bar select three of the seven members of the Judicial Council is rationally related to the objective of establishing a system to select the most qualified judicial candidates and to reduce the influence of politics unrelated to judicial qualifications. Lawyers are disproportionately affected by the activities of the Judicial Council that are unrelated to the judicial selection process.[30] As discussed above, lawyers are disproportionately affected on a day-to-day basis by the qualifications of state judges. Moreover, since the Alaska Constitution requires that all judge applicants be licensed to practice law, Alaska Const. art. IV, § 4, skill and experience in the practice of law play a vital role in determining a judicial candidate's qualifications. Lawyers are uniquely qualified to evaluate the

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[29] *See African-American Voting Rights Legal Defense Fund*, 994 F. Supp. at 1128; *Bradley*, 916 F. Supp. at 1457-58.

[30] *See* Alaska Const. art. IV, § 9 (requiring the Council to conduct studies and to make recommendations to improve the state judiciary); *see, e.g.*, Twenty-fourth Report to the Legislature and Supreme Court: 2007-2008.

legal skills and experiences of their colleagues in the bar. Finally, given that the Constitution requires that three members of the Council be attorneys -- a requirement that Plaintiffs do not contest[31] -- it is reasonable to assume that the bar Board of Governors knows better than the average citizen who will be the most qualified to serve in that capacity.[32] For much the same reason that courts uphold judicial nominating systems that require participation by lawyers, courts uphold systems allowing lawyers to pick some of the members of the nominating commission or council.[33]

Finally, as other courts have noted, the focus on the role that lawyers have in selecting some members of a judicial nominating commission obscures the fact that non-lawyers have an important role as well.[34] In Alaska's system, three non-lawyers sit on the bar Board of Governors and may participate in the appointment of the lawyer members of the Judicial Council. Three non-lawyers sit on the Judicial Council, and are selected by the popularly-elected Governor and confirmed by the popularly-elected legislature.

For all these reasons, Plaintiffs' claim that the Alaska Constitution's system for selecting judges violates their right of equal protection is wholly without merit.

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31 *See* Pl Mtn at 24.

32 *See African-American Voting Rights Legal Defense Fund*, 994 F. Supp. at 1128 ("Certainly, it is reasonable, if not necessary, to have lawyers on these commissions. There is no one better to evaluate the ability of potential judges than the attorneys who will have to practice before them every day. Attorneys typically will know the judicial aspirants better than the general public. They will know which aspirants have the legal acumen, the intelligence, and the temperament to best serve the people of Missouri.").

33 *See African-American Voting Rights Legal Defense Fund*, 994 F. Supp. at 1128; *Bradley*, 916 F. Supp. at 1457-58.

34 *See African-American Voting Rights Legal Defense Fund,* 994 F. Supp. at 1129 n.51; *Bradley*, 916 F. Supp. at 1458.

V. CONCLUSION

This Court should dismiss Plaintiffs' Amended Complaint for failure to state a claim upon which relief may be granted.

DATED this 31st day of July, 2009, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2009, a copy of the foregoing document was served electronically on Kenneth P. Jacobus, James Bopp, Jr., Joseph A. Vanderhulst, Jeffrey M. Feldman, Susan Orlansky, and Alexander O. Bryner.

s/ Margaret Paton-Walsh