DANIEL S. SULLIVAN, ATTORNEY GENERAL
Margaret Paton-Walsh, Assistant Attorney General
Alaska Department of Law, Office of the Attorney General
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501
Phone: (907) 269-6612, Fax: (907) 258-4978
Margaret.paton-walsh@alaska.gov

Jeffrey M. Feldman
Susan Orlansky
Alexander O. Bryner
FELDMAN ORLANSKY & SANDERS
500 L Street, Fourth Floor
Anchorage, Alaska 99501
Phone: (907) 272-3538; Fax: (907) 274-0819
feldman@frozenlaw.com
orlansky@frozenlaw.com
bryner@frozenlaw.com

Attorneys for Defendants

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' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs have filed a motion for a preliminary injunction asking this Court to prevent the Alaska Judicial Council from following the State of Alaska's constitutionally prescribed method for merit-based selection of the judiciary. They allege that Alaska's system, adopted after extensive debate at the state's constitutional convention, endorsed by the citizens of Alaska and approved by Congress, violates the Equal Protection Clause of the Fourteenth Amendment to the federal constitution by denying them their right to vote. Specifically, they claim that the appointment of the three attorney members of Alaska's Judicial Council violates the Fourteenth Amendment because those appointments are made by the Board of Governors of the Alaska Bar Association and because non-attorneys in Alaska may not participate in the election of nine of the twelve members of the Board of Governors.[1] To remedy this alleged violation of their rights, Plaintiffs ask this Court to enjoin the Alaska Judicial Council from following the commands of the Alaska Constitution as it nominates candidates to fill the upcoming vacancy on the Alaska Supreme Court.

Defendants, members of the Alaska Judicial Council ("the Council"), respectfully request that this Court deny Plaintiffs' motion because they have failed to establish any of the four

1 The other three members of the Board of Governors are lay members appointed by the Governor of Alaska and confirmed by a joint session of the legislature. AS 08.08.040(b), 08.08.050(a).

elements required for injunctive relief: they cannot demonstrate a probability of success on the merits; they have not shown that they will suffer irreparable harm absent an injunction; the balance of harms tips strongly against them; and an injunction would be contrary to the public interest.

II. FACTS

The State of Alaska's system for making judicial appointments was adopted after extensive debate at the constitutional convention in Fairbanks in 1955-56. The system is based on the "Missouri Plan," created by the State of Missouri in the 1940s. Article IV of the Alaska Constitution provides for merit-based selection of judges, who are appointed by the Governor from a list of qualified candidates nominated by the Alaska Judicial Council. Alaska Const. art. IV, § 5. The Alaska Constitution prescribes the make-up of the Judicial Council, providing that three attorney members will be appointed by the Board of Governors of the state bar association; three lay members will be appointed by the Governor; and the Chief Justice of the Alaska Supreme Court will serve *ex officio* as the seventh member and chairperson. *Id.* § 8. The composition of the Judicial Council is designed to ensure that qualified judicial candidates are nominated for appointment by the Governor; attorneys are given a significant role because they bring professional experience and knowledge of the candidates to the table. 1 ALASKA CONSTITUTIONAL CONVENTION PROCEEDINGS 694 (1955).

Plaintiffs allege that this system violates their right to equal protection under the Fourteenth Amendment to the federal constitution by denying them the right to vote. They have moved for a preliminary injunction and seek to prevent the attorney members of the Judicial Council from participating in the review of applications for the seat on the Alaska Supreme Court that will become vacant upon the retirement of Justice Robert Eastaugh. Plaintiffs also

seek to require the other four members of the Council to ignore the constitutional requirement that they act only with the concurrence of four Council members. *See* PI Mtn at 4, 24; Alaska Const. art. IV, § 8.

III. STANDARD FOR A PRELIMINARY INJUNCTION

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, --- U.S. ---, 129 S. Ct. 365, 376 (2008). Indeed, the United States Supreme Court recently emphasized that a grant of injunctive relief might be an abuse of discretion in some cases "*even if plaintiffs are correct on the underlying merits*." *Id*. at 381, n. 5 (emphasis added); *see also id*. at 381 ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.").

The burden to establish the need for a preliminary injunction lies squarely with the party requesting it. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("'It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'") (quoting 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948, at 129-30 (2d ed. 1995) (emphasis added by the Court)).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter,* 129 S. Ct. at 374; *see also Stormans, Inc. v. Selecky*, --- F.3d ---, 2009 WL 1941550 at *13 (9th Cir. 2009). The Supreme Court has explained that each of these elements must be carefully

examined and weighed by a trial court before granting an injunction. *Winter,* 129 S. Ct. at 378.[2] Because Plaintiffs fail to satisfy any of the four elements of the test for a preliminary injunction, Defendants respectfully ask this Court to deny Plaintiffs' motion.

IV. ARGUMENT

A. Plaintiffs Have Not Made A Clear Showing That They Are Likely To Succeed On The Merits.

Plaintiffs are unable to cite any case that directly supports their challenge to Alaska's merit-based judicial selection process, and this is not because no court has been presented with a comparable challenge. Courts have considered and rejected the equal protection claims that Plaintiffs advance here.

Specifically, federal courts in Indiana and Missouri have considered and rejected analogous Fourteenth Amendment challenges to the composition of judicial nominating commissions in those states. *See African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105, 1127-29 (E.D. Mo. 1997), *aff'd*, 133 F.3d 921 (8th Cir. 1998) (unpublished decision); *Bradley v. Work*, 916 F. Supp. 1446, 1455-58 (S.D. Ind. 1996), *aff'd*, 154 F.3d 704 (7th Cir. 1998). As in Alaska, both Indiana and Missouri rely on a judicial council or commission to screen and nominate judicial applicants. Similarly, those states permit only attorneys to participate in selecting the attorney members of the state's nominating commission, albeit through direct election by members of the bar rather than through appointment by the bar's

[2] In *Winter*, the Supreme Court explicitly criticized the District Court for paying only "cursory" attention to the balance of the equities and the public interest. *Winter,* 129 S. Ct. at 378 ("Despite the importance of assessing the balance of equities and the public interest in determining must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.")whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion.") *See also, e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987) ("In each case, courts.").

governing body as is the case in Alaska. *See African-American Voting Rights Legal Defense Fund*, 994 F. Supp. at 1127; *Bradley*, 916 F. Supp. at 1456. Both federal courts upheld these states' selection processes and rejected the plaintiffs' claims that bar members had too much voice as compared to lay persons in the seating of attorney members of the state's judicial council. *Id.* Plaintiffs in this case offer no authority to support a different result in this case.

Plaintiffs here attempt to distinguish the only relevant precedent and instead focus their equal protection challenge to Alaska's merit-based judicial selection process exclusively on a line of U.S. Supreme Court decisions applying the one person, one vote principle in election cases. Pl Mtn *passim*. But those cases do not apply to Alaska's merit-based judicial selection process.

The one person, one vote cases relied on by Plaintiffs all involve elections. Judges in Alaska are not elected. Instead, under the Alaska Constitution, the Governor appoints judges and justices from nominees presented by the Judicial Council. None of the Judicial Council members is elected either. Alaska Const. art. IV, §§ 5, 8. This appointive system is entirely permissible because non-legislative officials, such as judges and justices and members of nominating commissions, may "be chosen by the governor, by the legislature, or by some other appointive means rather than by an election." *Sailors v. Bd. of Education of the County of Kent*, 387 U.S. 105, 108 (1967). *See also Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 629 (1969). Where a non-legislative position is filled without election, the "principle of 'one man, one vote' has no relevancy." *Sailors*, 387 U.S. at 111. *See also id*. at 109 (system where delegates chose county school board was "basically appointive rather than elective" though delegates were chosen by elected local school boards).

The only election at any point in the attenuated chain of events leading to a judicial appointment in Alaska, besides the one for Governor, is for the nine attorney-members of the twelve-person Board of Governors of the Alaska Bar Association. AS 08.08.040(b). That election is a proper special purpose election and need not be open to a popular vote. *See 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 one person, one vote rule does not apply to an entity such as the bar Board of Governors because it exercises only narrow, limited governmental powers; and its activities disproportionately affect the bar members permitted to vote. *Id*. This conclusion is driven by the essential character of the Board as the governing body of a professional organization dedicated to advancing the standards of the profession. *See* AS 08.08.080.

Plaintiffs' only argument that the Board election should not be treated as a special purpose election exempt from the one person, one vote rule rests on the Board's role in appointing the three attorney members of the Judicial Council and Plaintiffs' claimed interest in who gets appointed to the bench. But that generalized and abstract interest is not enough to displace the central focus and impact that the Board's functions have on bar members. More than other citizens, bar members are directly affected by the standards set for the profession and by the qualifications the appointed Council members will insist upon for any seated judges they will appear before.

Because the Board of Governors is properly constituted, no cognizable harm flows from the Board's appointment of three attorney members to the Judicial Council, who serve alongside the chief justice and the three non-attorney members whom the Governor appoints. Plaintiffs' failure to state a claim upon which relief may be granted is discussed more extensively in the

Council's motion to dismiss, also filed today. But even the short discussion here is sufficient to highlight Plaintiffs' failure to demonstrate a likelihood of success on the merits. No court agrees with their position and they offer no reason for that to change.

B. Plaintiffs Have Not Demonstrated That They Will Likely Suffer Irreparable Harm Absent The Issuance Of A Preliminary Injunction.

Plaintiffs allege that they have demonstrated that they will suffer irreparable harm if an injunction does not issue, because a "state supreme court justice will be chosen without Plaintiffs having an equal voice in the process [as] mandated by the Fourteenth Amendment." Pl Mtn at 24. Defendants deny that Alaska's merit selection system violates Plaintiffs' Fourteenth Amendment rights in any way. Moreover, Plaintiffs' characterization of their alleged harm is inconsistent with the fundamental role played by the Governor of the State of Alaska, because all Alaskan voters have an "equal voice" in the election of the Governor and it is the Governor who will choose the next justice of the Alaska Supreme Court.

Plaintiffs' characterization of their alleged harm -- and the relief they request -- is also inconsistent with their legal theory. They focus only on the impending Supreme Court vacancy, ignoring the other three current judicial vacancies,[3] despite the absence of any apparent constitutional distinction between the Council's role in nominating candidates for the Supreme Court and its role in nominating candidates for the state's lower courts. Similarly, they do not explain why this most recent vacancy threatens a harm that is distinguishable from the harm that they presumably believe they have suffered each time an allegedly unconstitutional appointment to the bench is made. Their claim, if it were viable, would call into question the legitimacy of <u>all</u> of Alaska's sitting judges.

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3 There are currently vacancies on the Anchorage Superior Court and the District Courts in Anchorage and Palmer. See http://www.ajc.state.ak.us/Selection/vacancygen.htm

Moreover, the imminence of the alleged harm -- and the supposed urgency it creates -- is entirely of the Plaintiffs' making. Their claim that they "only became aware of this injury to their constitutional rights when the impending [Supreme Court] vacancy was announced on April 15, 2009," Pls' Mtn to Expedite at 3, is belied both by the fact that Alaska has employed the same system for selecting judges throughout its 50-year history as a state and because this is, in fact, the third vacancy on the Supreme Court in the past two years, not to mention numerous lower court vacancies.[4] Further, one of the plaintiffs is a member of the bar Board of Governors and another has applied more than once for appointment as a judge; they have presumably known for quite some time how Judicial Council appointments are made.

Finally, Defendants note that even Plaintiffs apparently believe that their harm is not irreparable. Although under their theory Chief Justice Carpeneti's appointment to the bench was constitutionally infirm, they nevertheless accept him as a legitimate member of the Council. *See* Amended Complaint at ¶¶ 57-58, Pl Mtn. at 24-25. His legitimacy appears to be tied to the fact that Plaintiffs, like all eligible voters, voted in a retention election for the Chief Justice and, as they acknowledge in their complaint, "this vote [wa]s not diluted." *See* Amended Complaint at ¶ 57. Thus, Plaintiffs appear to see retention elections as a "cure" for the alleged constitutional violation underlying their complaint. Because, even under Plaintiffs' own theory of the case, they have not demonstrated that they will suffer an irreparable harm, this Court should deny their request for a preliminary injunction.

[4] Defendants note that there was a ten-year gap between the appointments to the Supreme Court of current Chief Justice Carpeneti in 1998 and Justice Winfree in 2008, during which Plaintiffs could have launched this constitutional challenge without allegedly needing to interfere with the process for appointment to the state's highest court.

C. The Balance Of Harms Tips Clearly In Favor Of Denying The Injunction.

Plaintiffs claim that the balance of the harms "tips decidedly" in their favor, suggesting that the injunction they request "will not harm Defendants because the Council may continue to function in the absence of the three Attorney Members." Pl Mtn at 24. Plaintiffs apparently believe that the only interest of the Council members is that some candidates are nominated for the Supreme Court, and that the process by which appointments are made is not important. Plaintiffs are mistaken. As noted above, the framers of the Alaska Constitution considered the role of the attorney members of the Judicial Council vital to a merit-based selection process as opposed to a political one. The non-attorney Council members would violate the oath they took to uphold the Constitution of the State of Alaska if they were to nominate candidates without the participation of the attorney members and without requiring a concurrence of four members.[5]

Additionally, the Council is a creation of the Alaska Constitution and an arm of the State; and the State has a compelling interest in defending and implementing the constitution that was adopted by the people of Alaska. In particular, the State has a powerful interest in preventing the rewriting of part of its constitution by a self-appointed committee of three, which is effectively what Plaintiffs' requested injunction would accomplish. Ironically, although Plaintiffs' complaint is that they are allegedly not equally represented in the judicial selection process, they seek to impose a new, extra-constitutional system for selecting judicial candidates on the people of Alaska without any democratic process whatsoever.

Plaintiffs also ignore the likely harm of their injunction to the candidates for the current vacancy on the Supreme Court, particularly to whichever candidate is appointed pursuant to their

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[5] Plaintiffs offer no constitutional basis for their request that the four Council members not appointed by the Alaska Bar Association's Board of Governors be enjoined to abandon the state constitutional requirement that the Council can act only with the concurrence of four of its members; they simply assert that this requirement is "not severable." *See* Pl Mtn at 4.

proposed selection process. That new justice will be significantly harmed by virtue of enjoying his/her position as a result of a process without any legitimacy under the Alaska Constitution.

Although, if Plaintiffs' federal constitutional theory is correct, which the Council strongly disputes, there would be some harm resulting from the appointment of a new justice under the current fifty-year-old system, it is difficult to see how this particular appointment so dramatically increases the harm to Plaintiffs, given that all other judges in the Alaska court system were selected under this process. In contrast, facing a federal court injunction instructing them to ignore their constitutional duties would be a very significant harm to Defendants and any injunction interfering with the merit-based selection process for judges would impose significant harms also on the citizens of Alaska. The balance of harms, therefore, tips strongly against an injunction.

D. An Injunction Is Contrary To The Public Interest.

Finally, Plaintiffs claim that it is in the public interest to enjoin the involvement of the attorney members of the Council in the selection process for the next Alaska Supreme Court justice, but to do this would undermine the entire theory of the judicial selection process created by the framers of the Alaska Constitution. The attorney members are on the Council for a very specific reason -- to apply their own particular and more personal knowledge of the legal profession to assessing the qualifications of the candidates. The framers clearly and explicitly intended to utilize the professional knowledge and experience of the bar to ensure that candidates with the highest integrity and the greatest legal skills are appointed to the bench. The public interest lies in maintaining the system created by the Alaska Constitution, endorsed by Alaska voters and by Congress, and by the state statutes implementing that system. "[I]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard

for the rightful independence of state governments in carrying out their domestic policy." *Stormans, Inc. v. Selecky*, --- F.3d ---, 2009 WL 1941550 at *25 (9th Cir. 2009) (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943)); *see also id.* ("The public interest may be declared in the form of a statute," quoting 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.4, at 207 (2d ed. 1995)).

Plaintiffs blithely ignore the likely impact of their requested injunction, focusing narrowly on a single judicial vacancy and assuming that the selection process for that one position may be modified to their liking without wider repercussions. But not only would such an injunction interfere with the established process for selecting judges in Alaska, compromising multiple judicial searches, it also would cast a cloud over the legitimacy of all judges currently on the Alaskan bench; and indeed, in states across the nation which employ analogous merit selection systems.[6]

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[6] *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 one lawyer and one 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).

Although Plaintiffs seek to downplay the enormity of the relief they request, essentially they are asking this Court to strike down a central component of the Alaska Constitution, without the support of a single legal authority that endorses their position, and allow them to refashion a constitutionally-prescribed process to suit their own agenda. Nothing could be further from the public interest and the Court should decline to do this.

V. CONCLUSION

Because Plaintiffs have failed to demonstrate any of the four elements necessary for preliminary injunctive relief, Defendants respectfully request that the Court deny Plaintiffs' motion.

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

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: /s/Margaret Paton-Walsh
Assistant Attorney General
Attorney for the State of Alaska
Alaska Judicial Council
Alaska Bar No. 0411074
1031 West Fourth Avenue, Suite 200
Anchorage, Alaska 99501-1994
Phone: 907-269-6612
Facsimile: 907-258-4978
E-mail: margaret.paton-walsh@alaska.gov

Jeffrey M. Feldman
Susan Orlansky
Alexander O. Bryner
FELDMAN ORLANSKY & SANDERS
500 L Street, Fourth Floor
Anchorage, Alaska 99501
Phone: (907) 272-3538
Fax: (907) 274-0819
feldman@frozenlaw.com
orlansky@frozenlaw.com
bryner@frozenlaw.com

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