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**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; 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,

Defendants

Civil Action Number 3:09-cv-00136-JWS

REPLY TO DEFENDANTS' OPPOSITION
TO MOTION FOR PRELIMINARY
INJUNCTION

Introduction

Plaintiffs Michael Miller, Kenneth Kirk, and Carl Ekstrom have respectfully moved for a preliminary injunction from this court as part of a facial and as-applied challenge to certain provisions of Alaska's constitution and statutes. Plaintiffs allege that the manner in which the Attorney Members of the Alaska Judicial Council are placed on that entity violates the Equal Protection Clause of the Fourteenth Amendment. Fundamentally, the members of the Alaska Bar Association have a greater voice in who becomes a justice or judge on Alaska's courts, while the ordinary voice of Alaska voters is significantly inferior. The source of this inequality is an election in which only attorneys are permitted to vote. This inequality, which Defendants do not and cannot deny exists, must be justified before the Fourteenth Amendment.

Defendants have portrayed Plaintiffs' claim as an attempt to undermine a "central component of the Alaska Constitution" and refashion the process for selecting justices and judges in Alaska "to suit their own agenda." Doc. 34 at 13. Defendants primarily rely on the assumption that the guarantee of Equal Protection under the federal Constitution has no relevance here because judges in Alaska are appointed. *Id.* at 6. But this lawsuit is about the fact that, no matter how attenuated Alaska has contrived its system, *id.* at 7, the Members of the Alaska Judicial Council decide who will sit on Alaska's courts. The Council, and no one else, decides the composition of the third branch of government in Alaska. Alaska Const. art. IV, § 5. The members of the Alaska Bar Association have a greater say in who is on the Council than do ordinary Alaska voters. Plaintiffs simply contend that their right to Equal Protection under the law is infringed by this arrangement. And Plaintiffs simply request that this court enjoin those elements of the Alaska Judicial Selection Plan that violate Plaintiffs' rights.

Argument

A. Plaintiffs Have Shown That They Are Likely to Succeed on the Merits.

The Fourteenth Amendment does not permit exclusive voting when all citizens are substantially affected by and directly interested in the result of an election. *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 631 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Phoenix v. Kolodziejcki*, 399 U.S. 204, 209 (1970). Defendants offer no argument as to why the guarantee of Equal Protection established in the *Reynolds v. Sims*, 377 U.S. 533 (1964), line of cases does not apply to the electoral elements of the Alaska judicial selection process. See Doc. 34 at 5-8. All citizens must be given an equal vote in elections that result in the appointment of government officials, no matter how attenuated the state chooses to make that appointive process.

African-American Voting Rights Legal Defense Fund, Inc. v. Missouri, 994 F. Supp. 1105 (E.D. Mo. 1997) (“AAVRLDF”), and *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996), are not binding precedent on this court and were not decided in accord with the relevant United States Supreme Court precedents. Even if these two cases were binding precedent upon this court, Plaintiffs have illustrated that they did not treat the same issues as are before this court and were not correctly reasoned. Doc. 4 at 21-23.

First, in *AAVRLDF*, the plaintiffs had alleged that they were being excluded from voting as African-Americans and as a suspect class based on race. 994 F. Supp. at 1127 (“[P]laintiffs must demonstrate that defendants’ purpose . . . was ‘invidiously to minimize or cancel out the voting potential’ of African-Americans.”). The court pointed out that if anyone had been singled out for discrimination, it was the entire non-lawyer population of Missouri, which the court correctly concluded could not be a “suspect class” for purposes of Equal Protection. *Id.* The court then

discussed whether a fundamental right to vote was implicated. *Id.* The court concluded that there was no violation of the Equal Protection because no fundamental right to vote had been infringed and the election was not one of general interest. *Id.* This conclusion was incorrect.

The Supreme Court has stated that Equal Protection is implicated when “some resident citizens are permitted to participate [in an election] and some are not.” *Kramer*, 395 U.S. at 629. The case cited by *AAVRLDF*, *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), was not a voting rights case, and did not stand for the idea that there is no fundamental right to vote in every election. Otherwise, the entire line of cases following *Reynolds*, including *Kramer*, would be wrong, because these cases dealt with instances where the plaintiffs were *excluded* entirely from participating in an election. The Fourteenth Amendment assures that the fundamental right to vote may not be “wrongfully *denied*, debased or diluted.” *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50, 52 (1970). Therefore, the fundamental right to vote *is* implicated when some citizens are permitted to vote in an election and others are not. The court in *AAVRLDF* was therefore incorrect when it concluded that no right to vote had been infringed because the plaintiffs were excluded from taking part in the election altogether.

Furthermore, the court in *AAVRLDF* erred in concluding that the election of lawyers to commissions is not an election of general interest. *AAVRLDF*, 994 F. Supp. at 1128. The court did not give any reasoning or analysis for this conclusion. *Id.* Instead, citing *Kramer*, the court simply stated an election of general interest, such as for a legislator, would have implicated the Fourteenth Amendment. *Id.* But *Kramer* is not so limited and itself involved an election for a school board that specifically did not have “legislative powers.” *Kramer*, 395 U.S. at 629. When an election is for a government official or entity, citizens cannot be excluded unless the special limited purpose

exception is satisfied. It is difficult to see how the selection of the members of a commission who have absolute power to determine the composition of an entire branch of a state government is somehow not of general interest, while the selection of members of a local school board is. *Id.* Compare *id.* with *AAVRLDF*, 994 F. Supp. at 1128.

Second, *Bradley* dealt primarily with Voting Rights Act issues and claims of racial discrimination, but did address Equal Protection issues. *Bradley*, 916 F. Supp. at 1453, 1456. The court arrived at similar erroneous conclusions as did the court in *AAVRLDF*. Most significantly, the court concluded that Equal Protection was not implicated because the state had decided not to select the officials by means of a popular election. According to the court, a popular election is an election “in which all registered voters meeting the age and residency requirements may vote.” *Id.* at 1456. But the fact that the state did not open the election beyond a certain class, and excluded all qualified voters not in that class, is precisely what implicates Equal Protection. *Kramer*, 395 U.S. at 629. Under *Bradley*’s reasoning, *Kramer* and following cases could not have been brought because they all involved challenges to a state’s determination of who could vote in a given election.

2. The Supreme Court Equal Protection Cases Do Apply.

The guarantees of Equal Protection as applied by the U.S. Supreme Court apply to the judicial selection process in Alaska. In fact, the very cases that Defendants claim authoritatively reject and preclude Plaintiffs challenge, *AAVRLDF* and *Bradley*, specifically applied and relied upon these cases in their reasoning. *AAVRLDF*, 994 F. Supp. at 1128 (“[I]f an election of general interest . . . were at issue, plaintiffs’ statement of the law could not be faulted.”) (citing *Kramer*, 395 U.S. at 627 and *Ball v. James*, 451 U.S. 355, 361-62 (1981)); *Bradley*, 916 F. Supp. at 1455-59 (citing and quoting *Kramer*, *Hadley*, *Reynolds*, *Sayler*, and *Ball* as the controlling and applicable precedents

governing the outcome of the Equal Protection claims presented). Therefore, because an election is involved in Alaska's judicial selection process, and that election results in the selection of government officials, in fact, ultimately the entire composition of the third branch of government in Alaska, Equal Protection is implicated.

It is entirely inapposite that Alaska's judges are not directly elected and that none of the members of the Alaska Judicial Council are elected. Doc. 34 at 6. None of the cases relied upon by the Plaintiffs here involved an official or entity that exercised legislative power. *Hadley*, 397 U.S. at 51; *Kramer*, 395 U.S. at 622; *Phoenix v. Kolodziejski*, 399 U.S. 204, 205 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 702 (1969); *Ball v. James*, 451 U.S. 355, 357 (1981); *Sayler Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 720 (1973). While it is true that the Supreme Court has found that only legislative officials must be elected, Equal Protection is still implicated whenever there is an election involving government officials, regardless of whether that official exercises legislative power. *See San Antonio*, 411 U.S. at 34, n.74. If this were not so, then none of the above Supreme Court cases would have existed. If it would be unconstitutional for Alaska's judges to be selected through a direct election in which only resident attorneys are permitted to vote, or even in which the vote of attorneys is given more weight than that of other citizens, then the current process must also be unconstitutional.

Defendants rely upon *Sailors v. Bd. of Educ. of Kent County*, 387 U.S. 105 (1967), for the argument that the appointment of non-legislative officials is permissible and that when such officials are selected by appointment, Equal Protection "has no relevancy." *Id.* at 111. But *Sailors* does not stand for this proposition. Plaintiffs do not challenge or call into question the constitutionality of selecting certain government officials by appointment rather than election. But appointments must

be made by officials or entities that were selected in accord with Equal Protection. In *Sailor*, the Court found no Equal Protection violation specifically because there was no constitutional flaw in the election involved in the system before the court. *Id.* at 111 (“For while there was an election here for the local school board, no constitutional complaint is raised respecting that election.”). But this is precisely what Plaintiffs are alleging here—the underlying election that determines the composition of the appointing body excludes all but a select group and therefore violates Equal Protection. *See also Kramer*, 395 U.S. at 629 (“For example, a city charter might well provide that the elected city council might well appoint a mayor who would have broad administrative powers. *Assuming that the council were elected consistent with the commands of the Equal Protection Clause*, the [appointment] would not call for this Court’s exacting review.”) (emphasis added). The inequality present in the underlying election here requires strict scrutiny.

Alaska cannot avoid the commands of the Equal Protection Clause by burying the offending election in “an attenuated chain of events.” Doc. 34 at 7; *contra. Sailors*, 387 U.S. at 108 (“A State cannot of course manipulate its political subdivisions so as to defeat a federally protected right.”). Plaintiffs contend that, while the election to the Board of Governors of the Alaska Bar Association might not ordinarily be an election of general interest, because the Board is given the power to appoint members of the Alaska Judicial Council, that election must comport with Equal Protection. *Id.* at 109, n.5 (“Nor can the restraints imposed by the Constitution on the States be circumvented by local bodies to whom the State delegates authority.”).

3. The Election of Members of the Board of Governors, In So Far As the Board Appoints Members of the Judicial Council, Violates Equal Protection.

Plaintiffs contend that the Alaska Judicial Council is a government entity that does not satisfy the requirements for a “special purpose” election. Doc. 4 at 17-18. If it would violate the one person, one vote command of the Equal Protection Clause for the election of Members of the Council to be exclusively limited to a certain group of voters, then it would also violate this command to entrust the appointment of these members to another entity that was elected by an exclusive group. Therefore, in so far as the Board of Governors is given the power to appoint Council Members, the election of members of the Board violates Equal Protection because it excludes all qualified Alaska citizens except for attorneys.

Contrary to Defendants dismissive arguments, Plaintiffs have a real and substantial interest in the composition of the Alaska judiciary. It is the *clients* of attorneys, not the attorneys themselves, whose rights and duties, and even lives, are ruled upon by those who sit on the bench in Alaska. *See, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002). This is particularly true with regard to justices of Alaska’s supreme court, who are the final interpreters of Alaska’s constitution. Whatever the merits of having the expertise of attorneys involved in selecting judges, it is not enough under current Supreme Court precedent for the group permitted the vote to have a greater interest or a different interest. Doc. 34 at 7. The included group must be disproportionately affected and the excluded group must be substantially less affected or interested. *Cipriano*, 395 U.S. at 704.

B. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief

Alaska’s judicial selection process violates Plaintiffs’ Fourteenth Amendment rights, which goes to the likelihood of success on the merits. And if this court finds that there is a violation of

Equal Protection in Alaska's system, it is difficult to conceive how Plaintiffs will not be irrevocably harmed if the process is permitted to continue with respect to the current vacancy.

Plaintiffs' claim of harm is not inconsistent with the Governor's role in the selection process. The Governor is only permitted to choose between as few as two nominees forwarded by the Council. Therefore, it is the Council who decides who may become a justice or judge in Alaska.

Neither is Plaintiffs' request for injunctive relief inconsistent with their legal theory. Defendants cite no legal authority requiring that Plaintiffs seek injunctive relief with respect to all current judicial vacancies. Plaintiffs agree that there is no constitutional distinction between the nomination of candidates for the Supreme Court and the nomination of candidates for lower courts. In their verified complaint, Plaintiffs' challenge all of these nomination provisions facially and as-applied to them, which challenge has been consolidated in this case. Doc. 31. There is no legal reason why Plaintiffs cannot request injunctive relief for this particular harm, even though they might be harmed in other ways.

The imminence of the harm to Plaintiffs is not of their own making. According to Defendants reasoning, the fact that the Alaska judicial selection system has been in place for years and has appointed many judges means that its constitutionality may never be called into question and injunctive relief may never be obtained. Doc. 34 at 9. The constitutional defect in the process has existed from its adoption, but Plaintiffs have decided to attempt to vindicate their rights now and at this juncture. Defendants cite no legal authority for the proposition that there is some relevance to when Plaintiffs choose to attempt to vindicate their rights and challenge a constitutional violation. The harm lies in the ultimate appointment of judges and justices by an unconstitutionally composed entity.

Finally, the fact that Plaintiffs accept Chief Justice Carpeneti as a legitimate member of the Council does not mean that they believe that their harm is reparable. The harm consists in the violation of their right to Equal Protection. Plaintiffs are seeking redress in the form of enjoining those elements of the system that violate their right to an equal vote. The Chief Justice is on the Council *ex officio* and the legitimacy of his appointment is entirely irrelevant and not at issue in this case. Furthermore, the constitutional elements of Alaska's judicial selection process do not correct the violations of Equal Protection rights that are present.

C. The Balance of Harms

Whatever harm the lack of participation on the part of attorney members in the current vacancy might be, it cannot compare with the violation of a fundamental right guaranteed by the United States Constitution. Plaintiffs do not propose an alternative process for selecting justices and judges in Alaska, but simply request that this court enjoin those aspects of the process that violate their rights under the Equal Protection Clause. Furthermore, if these provisions are found to violate the Fourteenth Amendment, then the non-attorney members would not be violating their oath to uphold the Constitution of Alaska because the offending provisions would be void due to the Supremacy Clause and the Privileges or Immunities Clause. U.S. Const. art VI, para. 2; amend. XIV, § 1.

Alaska certainly does have an interest in defending its constitution and laws. But the fact that these laws can be challenged before the United States Constitution, and can be found to be in violation of the supreme law of the land, is not a harm that tips the balance in favor of the State. Alaska has no interest in maintaining an unconstitutional process for nominating and appointing judges. The arguments put forward by Defendants go towards the zeal with which Alaska is

defending its current system, but it says nothing regarding the balance of harms that must be weighed by this court if it finds that this system violates the Fourteenth Amendment.

Finally, it is entirely inapposite that all justices and judges to date in Alaska have been selected through the process with the challenged provisions. Plaintiffs are not, and have never been, required to vindicate their rights under the Fourteenth Amendment. And the fact that they are now, and not at some other time and juncture, does not lessen the harm caused by the violation of their right to an equal vote. If that were the case, then no constitutional violation could ever be enjoined if it was endured for a given period of time before those who were subjected to the unconstitutional law finally decided to vindicate their rights. The fact that Plaintiffs only request this specific injunction, rather than suspending the entire Alaska judiciary as Defendants suggest, further tips the balance in Plaintiffs favor.

The balance of harms tips strongly in favor of granting Plaintiffs request for an injunction.

D. An Injunction Is in the Public Interest

This court has consolidated the hearing on Plaintiffs' Motion for a Preliminary Injunction with the trial on the merits. Doc. 31. Also, the first consideration in determining whether an injunction should issue is whether the plaintiffs have established a likelihood of success on the merits. Because of consolidation, these issues will be decided at the same time. Therefore, if this court finds that there is a violation of the Fourteenth Amendment, it can only be in the public's interest that the violating provisions be enjoined as well as declared unconstitutional. Whatever the merits of having attorneys participate in the nomination and selection process for judges and justices, this theory is not at issue in this case. The United States Constitution is the supreme law of the land and guarantees certain rights to each citizen of Alaska—rights that are violated by the manner in

which the attorney members of the Council have been selected. The public interest would not be served by permitting the effects of this violation to continue.

Conclusion

Plaintiffs have demonstrated the four elements necessary for preliminary injunctive relief and respectfully request that this court grant their motion for a preliminary injunction.

Dated August 5, 2009.

Respectfully submitted,

/s/ Joseph A. Vanderhulst

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 2009, a copy of the foregoing REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION was served electronically on:

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