

No. 09-35860

United States Court of Appeals for the Ninth Circuit

Kenneth Kirk, Carl Ekstrom, and Michael Miller, *Plaintiffs-Appellants*

v.

**Chief Justice Walter Carpeneti, In His Official Capacity as
Ex Officio Member of the Alaska Judicial Council, et al., *Defendants-Appellees***

Appeal from the United States District Court for the
District of Alaska

Petition for Panel Rehearing and Rehearing En Banc

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Introduction

Appellants Kenneth Kirk, Carl Ekstrom, and Michael Miller petition for rehearing and rehearing en banc of the *Opinion* (Doc. 38-1) of September 30, 2010, entering judgment in favor of Appellees and affirming the decision of the District Court of Alaska. A panel rehearing is appropriate when a material point of law was overlooked in the decision. Fed. R. App. P. 40(a)(2). An en banc rehearing by this Circuit is proper when (1) the panel decision conflicts with a decision of the Supreme Court or a decision of this Circuit so that consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions or (2) the case involves a question of exceptional importance because it conflicts with an opinion of another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity. Fed. R. App. P. 35(b); 9th Cir. R. 35-1.

In the judgment of counsel, the panel's decision in this matter overlooks material points of law and does not address a resulting conflict with another decision of this Court in *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982). Also, because of this conflict, consideration by the full court is necessary to secure and maintain uniformity of the Court's decisions. Furthermore, the panel's decision conflicts with the Supreme Court's decision in *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) and the decisions of other courts of appeal, and

substantially affects a rule of national application in which there is an overriding need for national uniformity.

Argument

I. The Opinion Overlooks a Material Point of Law Resulting in a Conflict with Another Decision of this Court So That Rehearing Is Necessary to Secure Uniformity of This Court's Decisions.

The Court's decision in this case conflicts with the Court's earlier decision in *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982). This conflict was not acknowledged or discussed by the Court in this case or by the district court below. For this reason, the opinion should be reheard so as to resolve this conflict and secure uniformity in this Court's decisions. 9th Cir. R. 35-1.

Appellants challenge the manner in which the attorney members of the Alaska Judicial Council are selected on the basis that non-attorneys are excluded from participating in violation of their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (ER 213-216). Appellants never challenged or questioned the legitimacy of appointing judges rather than electing them. Appellants are excluded from the process of selecting those who decide who their judges will be. And these officials are not judicial officers, but are part of the executive.

The Court premised its entire discussion on the idea that this case does not involve the legislative or executive branches of government, so that the Equal

Protection cases are not directly relevant. *Kirk, et al. v. Carpeneti, et al.*, No. 09-35860, slip op. 16643, 16656 (9th Cir. Sept. 30, 2010). This starting premise directly conflicts with *Richardson*. *Richardson* held that judicial nominating entities, such as the Council, are not “judicial” in nature, because they perform the executive function of nominating government officials. *Richardson*, 693 F.2d at 914 (“Rather, these responsibilities indicate that the Commission’s functions are executive in nature.”). Nominating entities in merit selection systems are merely attached to the judiciary “for purposes of administration,” but are inherently executive in nature. *Id.* Therefore, the decision in this case directly conflicts with a previous decision and the Supreme Court’s Equal Protection jurisprudence applies fully to the selection of the Alaska Judicial Council.

Furthermore, the district court held, and this Court affirmed, that the Alaska Judicial Council satisfies the “limited purpose” exception to the rule that all voter qualifications are unconstitutional unless they are necessary to promote a compelling state interest. (ER 23). This conclusion was premised on a finding that the Council does not “administer normal functions of government,” which is part of the test for whether an entity satisfies the exception. (ER 22). But this finding directly conflicts with *Richardson* as well, because in that case this Court held that judicial nominating entities do indeed perform a government function.

Richardson, 693 F.2d at 914 (finding that a nominating commission performs

“functions that are executive in nature”) (citing *In Re Advisory Opinion to the Governor*, 276 So.2d 25, 29 (Fla. 1973) (“[T]he judicial nominating commissions are part of the executive branch of government performing an executive function”). Therefore, such an entity cannot satisfy the “limited purpose” exception.

In *Richardson*, this Court considered whether the members of a judicial nominating entity can be held liable under 42 U.S.C. § 1983. *Id.* at 912, 915. Liability under Section 1983 only attaches to government officials or to private entities who exercise “traditional governmental functions.” *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543-44 (1987). The Defendants had argued that, despite being government officials, they could not be held liable because they were judicial officers and so performed a government function immune from liability. *Richardson*, 693 F.2d at 913. This Court rejected that argument, finding that immunity for governmental officials derives from the nature of their function and not their position in the government. *Id.* at 914. The Court concluded that the members of the commission could be held liable under Section 1983 because the nomination of judicial officers is an executive function. *Id.* (citing *In Re Advisory*, 276 So.2d at 29). Therefore, this Court has held that the members of judicial nominating entities are government officials who perform an executive function such that they can be liable as state actors under Section 1983.

In *Ball v. James*, 451 U.S. 355 (1981), the Supreme Court held that a water district was a “limited purpose entity” such that the state could limit the franchise for its election to a certain group of citizens. In addition to finding that the district had a “nominal public character,” the Court found that it did not perform a traditional government function in the sense that it could be held liable under Section 1983. *Ball*, 451 U.S. at 368 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)). If the district had performed the kind of function that would have triggered liability under Section 1983, it would have performed “the sort of general or important governmental function that would make the government provider subject to” the commands of Equal Protection. *Id.* The Court in *Ball* explicitly used the term “government function” for purposes of the limited purpose exception in the same sense as in the constitutional liability context. And *Richardson* expressly held that a judicial nominating entity performs such a traditional and normal governmental function.

The binding nomination of judges for appointment is a traditional element of governmental sovereignty, which has been performed by executive government officials throughout this country from its beginning. It has never been performed by private persons or entities and then later coopted by the government, like the provision of electricity or the regulation of a profession. Accordingly, this Court has held that an official who exercises this function can be liable as a state actor

under 42 U.S.C. § 1983. Therefore, the Council also performs the kind of traditional government function that makes it subject to the requirements of *Reynolds* and *Kramer*. See *Ball*, 451 U.S. at 368; *Richardson*, 693 F.2d at 914.

Therefore, the Alaska Judicial Council cannot satisfy the limited purpose exception because it is a government entity that performs a traditional government function. As a result, this Court's decision here stands in direct conflict with its prior decision in *Richardson* and also with the Supreme Court's decision in *Ball*. Consideration by the full Court, therefore, is necessary to secure uniformity in this Court's decisions.

The conflict is material here because *Richardson* establishes that the Alaska Judicial Council cannot satisfy the limited purpose exception. A judicial nominating entity is not part of the judiciary, is not "nominally public," and performs a traditional government function. Therefore, the fundamental premise of the Court's discussion here is mistaken and in direct conflict with *Richardson*. *Kirk*, slip op. at 16556. Because this challenge involved the selection of executive officials, the level of deference given by the Court was inappropriate. The Equal Protection cases cited by Appellants apply fully to the selection of the Council. And at the very least, the Court should have addressed this conflict with *Richardson*.

The district court was in error when it found that the Council was a limited purpose entity and it should not have been affirmed in that respect. The Court here did not explicitly affirm this holding, however. This case should be reheard in order to clarify whether its outcome would be affected by the fact that, according to *Richardson*, the Alaska Judicial Council would not itself satisfy the limited purpose exception of *Salyer* and *Ball*. If this overlooked established law would not affect the outcome, the Court should clarify its holding that an executive official performing a traditional government function can be appointed by a limited purpose entity or even a non-governmental entity, as is the case in those states that do not have an integrated bar. This Court has therefore held that the Council may be appointed by another entity elected exclusively by attorneys, even though it would violate the Equal Protection Clause if the Council itself were directly elected exclusively by attorneys.

II. The Opinion Directly Conflicts with the Decisions of Other Circuits and the Supreme Court and Substantially Affects the Application of Equal Protection Jurisprudence to the Selection of Judges Across the Country.

The Court's decision here is inconsistent with the how the Tenth Circuit has applied the Equal Protection Clause to a similar selection system. *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994). The selection scheme for the Board of Agriculture in *Hellebust* was remarkably similar to the selection of the members of the Alaska Judicial Council in this case. In Alaska, the members of the Alaska Bar

Association elect the members of the Board of Governors of the Bar, a twelve member Board, who in turn “appoint” the attorney members of the Council by majority vote. *Kirk*, slip op. at 16650-51. In *Hellebust*, the members of Kansas agricultural organizations elected delegates, who in turn “elected” the members of the Board of Agriculture. *Hellebust*, 42 F.3d at 1332. The court in *Hellebust* had referred to the selection system as a “hybrid election system.” *Hellebust v. Brownback*, 824 F. Supp. 1511, 1513, 1515 (D. Kan. 1993).

In the present case, this Court held that the appointment of the Alaska Judicial Council by the Board of Governors of the Bar does not implicate the Equal Protection Clause so that the Clause has no bearing upon how those who appoint the members of the Council are chosen. *Kirk*, slip op. at 16659, 16662 (citing *Sailors v Bd. of Educ.*, 387 U.S. 105, 111 (1967)). But *Hellebust* rejected this interpretation of *Sailors*. *Hellebust*, 824 F. Supp. at 1522-23. Similar to the system at issue here, the Board of Agriculture in *Hellebust* was not directly elected by the members of agricultural organizations. Rather, the Board was selected by a delegation of representatives from those organizations, just as the Board of Governors in Alaska represents the members of the Alaska Bar.

The Board of Governors of the Alaska Bar is therefore analogous to the delegation sent by the agricultural organizations in *Hellebust*. But according to this Court’s holding here, the Equal Protection Clause should not have applied to the

selection of the Board of Agriculture in *Hellebust* if the delegation were to have “appointed” the members of the Board. But this is entirely inconsistent with the Court’s reasoning in *Hellebust*. *Hellebust* did not focus on the “appointive” or “elective” nature of the “hybrid” selection scheme. Instead, consistent with *Kramer*, it applied Equal Protection scrutiny because Kansans who were not members of agricultural organizations were excluded from the selection process, however attenuated. *Hellebust*, F.3d at 1334.

The Court here also found that there could be no meaningful violation of Equal Protection because in Alaska the governor ultimately makes the appointments of the judges. *Kirk*, slip op. at 16662. But this conclusion directly conflicts with the Tenth Circuit’s conclusion that the authority exercised by an entity and the need for it to be selected consistent with the commands of Equal Protection are undiminished by whatever effect or check another official might have on the entity. *Hellebust*, 42 F.3d at 1335.

Here, the Court fully acknowledged that the selection system at issue gives attorneys, as an occupation, a greater voice and more influence over the nomination of judges in Alaska than non-attorneys. *Kirk*, slip. op at 16663. As in *Hellebust*, the scheme in Alaska “is not intended to give all [Alaskans] an equal vote in selecting the members of the [Alaska Judicial Council].” *Hellebust*, 824 F. Supp at 1513. But this Court has concluded that this inherent inequality does not

implicate the Equal Protection Clause because there is no constitutional requirement that all participants in the selection of a public official “must either be popularly elected, or be appointed by a popularly elected official.” *Kirk*, slip op. at 16647.

But at no time did the Appellants here ever suggest that every appointing official must be directly popularly elected. Rather, they contended that an appointing official may not be elected subject to the same voter qualifications that would be unconstitutional if placed upon the election of the appointed official. The Equal Protection Clause, of course, does not mandate elections for every public official. *Kramer*, 395 U.S. at 629. But it does forbid *inequality of influence* in the selection of public officials, whether this inequality arises from voter qualifications or malapportionment of districts, appointments or hybrid election systems. *See id.* at 626-27 & n.7. When franchise restrictions on the election of a given official would be unconstitutional, then that official, if appointed instead, must be appointed by an official or entity free of the same franchise restrictions. This principle is clearly recognized in *Kramer* and is universally respected.

Kramer recognized this principle in refuting the very same argument advanced by the State of Alaska here. *Id.* at 629. The state in *Kramer* had argued that it could constitutionally limit the franchise because it could have eliminated the election altogether and had the officials appointed. *Id.* But the Supreme Court rejected this

argument by stressing that the reason why an appointment would not violate Equal Protection is *because with an appointment no one would be excluded and each resident's influence would be equal*. *Id.* at n.7. States do have latitude in determining whether an official will be elected or appointed, but they do not have discretion as to who may do the appointing. *Kramer*, therefore, expressly contemplates that an appointment would implicate the Equal Protection Clause if it resulted in *inequality of formal influence* over the selection of the appointed official. The Supreme Court supported this principle in *Sailors* when it noted that the appointive system at issue did not implicate Equal Protection because *no one was excluded* from the election of the appointing entities. *Sailors*, 387 U.S. at 111.

This decision, therefore, should be reheard by the entire Court because it proposes unprecedented principles regarding the application of the Equal Protection Clause to the appointment of government officials that conflict with the decisions of the Supreme Court and of other courts of appeal. The proper application of the Equal Protection Clause to the selection of judicial nominating officials is of exceptional importance and affects a rule of national application in which there is an overriding need for national uniformity.

Conclusion

For the foregoing reasons, Appellants Kenneth Kirk, Carl Ekstrom, and Michael Miller, by counsel, respectfully request that this Court grant their request for a rehearing and rehearing en banc.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on October 14, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM\ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joseph A. Vanderhulst
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