

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

MICHAEL MILLER, KENNETH KIRK )  
and CARL EKSTROM, )

Plaintiffs, )

vs. )

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 )  
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. )

3:09-cv-00136-JWS

ORDER AND OPINION

[Re: Motions at Dockets 4 and 36]

## **I. MOTIONS PRESENTED**

At docket 4, plaintiffs Michael Miller, Kenneth Kirk, and Carl Ekstrom (“Plaintiffs”) ask the court to enjoin the three attorney members of the Alaska Judicial Council (“Council”), defendants James H. Cannon, Kevin Fitzgerald, and Louis James Menedez (“attorney members”), from exercising their powers under Article IV, §§ 5 and 8 of the Alaska Constitution and AS 22.05.080, which require them to take part in the deliberations and voting for nominees to fill the vacancy on the Alaska Supreme Court created by the retirement of Justice Robert L. Eastaugh. Plaintiffs also ask the court to enjoin the remaining Council members, defendants William F. Clarke, Kathleen Thompkins-Miller, Christena Williams (“non-attorney members”), and Chief Justice Walter Carpeneti (collectively with the attorney members “Defendants”) from observing the requirement of Article IV, § 8, that they act by the concurrence of four or more members in order to enable them to make nominations by majority vote. Defendants oppose the motion, and Plaintiffs reply.<sup>1</sup>

At docket 36, Defendants move to dismiss Plaintiffs’ complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the decisions upon which plaintiffs’ case rests are “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.”<sup>2</sup> Defendants also contend that Plaintiffs “consistently blur the discussion of the entities whose powers and selection processes are at issue.”<sup>3</sup> As Defendants see things, “the only election 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.”<sup>4</sup> Plaintiffs oppose the

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<sup>1</sup>Docs. 34 and 38.

<sup>2</sup>Doc. 35 at 3.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

motion and Defendants reply.<sup>5</sup> Oral argument on both motions was heard on September 11, 2009. At the end of the proceeding, the court ruled from the bench, granting the motion to dismiss and denying the motion for injunctive relief as moot. This order sets forth the rationale for the decision announced on September 11, 2009.

## **II. BACKGROUND**

Michael Miller is a citizen of and registered voter in the State of Alaska. Kenneth Kirk, also a citizen and registered voter, is an active member of the Alaska Bar Association and a former and potentially a future applicant for vacant positions on the Alaska Supreme Court and the Alaska Superior Court. Carl Ekstrom is a non-attorney member of the Alaska Bar Association (“Bar”) Board of Governors (“Board”), as well as a citizen and registered voter. Plaintiffs challenge the process by which supreme court justices, and appellate, superior, and district court judges are selected on Equal Protection grounds.<sup>6</sup>

The Alaska Judicial Selection Plan (“Plan”) empowers the Council to select the nominees for vacancies to the various courts of Alaska. The Governor then appoints a new justice or judge from the Council’s nominees. Periodically thereafter, the justice or judge must stand for a retention election in which all registered voters may participate. The Plan is a merit selection system based on the “Missouri Bar Plan” for judicial appointments.<sup>7</sup> The Plan was crafted by the delegates to Alaska’s Constitutional Convention in 1955-56, adopted by the Convention on February 5, 1956, ratified by the people of the state on April 24, 1956, set forth in Article IV, and used for more than fifty years without any challenge—until now. Every sitting appellate, superior, and district

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<sup>5</sup>Docs. 42 and 43.

<sup>6</sup>See Alaska Const. Art. IV, § 5; AS 22.05.080 (Supreme Court); AS 22.07.070 (Court of Appeals); AS 22.10.100 (Superior Court); and AS 22.15.170 (District Court).

<sup>7</sup>See *generally* Alaska Constitutional Convention Minutes (“ACCM”), Days 32 and 35 (Dec. 9 and 12, 1955), *available at* [http://www.law.state.ak.us/doclibrary/cc\\_minutes.html](http://www.law.state.ak.us/doclibrary/cc_minutes.html) (copy attached as Appendix A). The court takes judicial notice of the ACCM as a matter of public record under Federal Rule of Evidence 201. See *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

court judge, and supreme court justice in the state has been selected pursuant to the Plan.

The composition of the Council is dictated by Alaska Constitution Article IV, § 8, which provides 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. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.”<sup>8</sup>

At Alaska’s Constitutional Convention, the Plan’s chief supporter, George M. McLaughlin, who was Chairman of the Judiciary Committee and a former municipal magistrate judge for the City of Anchorage, said of the Plan:

“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 for one reason. The laymen in the committee insisted upon it so that we would have a broader base and the governor himself would not necessarily be able to nominate to the judicial council, his own house.”<sup>9</sup>

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<sup>8</sup>Alaska Const. art. IV, § 8. Defendants point out that, in addition to Alaska, 17 other states and the District of Columbia vest the election or appointment of judicial selection commission members in the state bar association without legislative or gubernatorial confirmation or approval. Doc. 35 at 3-4 and n.3 (collecting states). Plaintiffs contend that there are only 13 states whose process is akin to that in Alaska because in New York, North Dakota, and Vermont, the governor or legislature may reject the nominations of the nominating commission, while in Maryland, the governor may reject the appointments to the commission made by the bar. Doc. 42 at 21 n.1.

<sup>9</sup>ACCM, Day 32 (Dec. 9, 1955).

In response to critics of the Plan advocating an amendment to provide for legislative confirmation of the attorney members of the Council, McLaughlin responded that the lay members of the Council would adequately “represent the public and . . . the predominant political thought . . . [while] the lawyer members of the council . . . represent the profession . . . [and] the best interests of the profession.”<sup>10</sup> McLaughlin’s fear of legislative confirmation was based on his perception that such a process would favor partisanship over qualifications:

“[i]f political correctness enters into the determination of the selection of those professional members who are to be placed upon the judicial council, the whole system goes out the window. All you have is one other political method of selection of your judges. The theory, and it is the only way it can possibly work, is that the lawyers are put on there to get the best man and not to take a man on the basis of his politics.”<sup>11</sup>

Ultimately, the proposed amendment to provide for legislative confirmation of the attorney members of the Council was defeated 49 to 4, with two members absent.<sup>12</sup> After the Plan was ratified by Alaska voters, it was approved by Congress, which found Alaska’s Constitution to be “in conformity with the Constitution of the United States.”<sup>13</sup>

Under the Plan, the Council is entrusted with evaluating and recommending qualified individuals to vacant seats on the various courts of Alaska. When a vacancy on any court arises, either by departure of a sitting judicial officer or by legislative creation, the Council invites and accepts applications to fill the vacancy.<sup>14</sup> After receiving and verifying the applications, the Council reviews them, interviews the candidates, deliberates, and nominates two or more candidates, whose names are then

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<sup>10</sup>ACCM, Day 35 (Dec. 12, 1955).

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>Alaska Statehood Act § 1, Pub. L. 85-508, 72 Stat. 339 (July 7, 1958).

<sup>14</sup>Alaska Judicial Council Bylaws (“AJC Bylaws”), Article VII, § 1, *available at* <http://www.ajc.state.ak.us/Reference/Bylaws09.pdf> (copy attached as Appendix B). The court takes judicial notice of the AJC Bylaws as a matter of public record under Federal Rule of Evidence 201. *See supra* note 4.

sent to the governor.<sup>15</sup> Each applicant who receives four or more votes by Council members becomes one of the nominees.<sup>16</sup> If fewer than two applicants receive the requisite four votes, the Council will not submit any names to the governor; and typically will re-advertise the position.<sup>17</sup> “The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.”<sup>18</sup> The governor must make the appointment within 45 days of receiving the nominations.<sup>19</sup>

Judicial officers initially obtain their positions by appointment, but to remain on the bench they must be approved by a vote of the people. Alaska Supreme Court justices are subject to retention elections “at the first general election held more than three years after the justice’s appointment. If approved, the justice shall thereafter be subject to approval or rejection in a like manner every tenth year.”<sup>20</sup> Similarly, judges of the Alaska Court of Appeals are subject to an initial election after three years, and subsequent elections every eight years.<sup>21</sup> Judges of the Alaska Superior Court are subject to an initial election after three years, and subsequent elections every six years.<sup>22</sup> Alaska District Court judges are subject to an initial election after two years, and subsequent elections every four years.<sup>23</sup> Unless a justice or judge withdraws his or

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<sup>15</sup>AJC Bylaws, Article VII, § 4.

<sup>16</sup>Alaska Judicial Council Selection Procedures (“AJC Selection Procedures”) § VI(D), *available at* <http://www.ajc.state.ak.us/selection/procedures/selectionprocedures7-24-07.pdf> (copy attached as Appendix C). The court takes judicial notice of the AJC Selection Procedures as a matter of public record under Federal Rule of Evidence 201.

<sup>17</sup>*Id.*

<sup>18</sup>Alaska Const. art. IV, § 5.

<sup>19</sup>AS 22.05.080(a).

<sup>20</sup>AS 15.35.030; *see also* AS 22.05.100.

<sup>21</sup>AS 15.35.053; *see also* AS 22.07.060.

<sup>22</sup>AS 15.35.060; *see also* AS 22.10.150.

<sup>23</sup>AS 15.35.100; *see also* AS 22.15.195.

her candidacy at least 48 days before the general election, the name must appear on the general election ballot.<sup>24</sup> Prior to a general election, the Council conducts an evaluation of each judge or justice and may provide a recommendation regarding retention or rejection, which is made public at least 60 days prior to the election.<sup>25</sup>

As noted above, and of particular relevance to the pending litigation, three of the seven members of the Council are selected by the Board - the "governing body of the organized state bar" - whose powers and duties, in addition to selecting the three attorney Council members, include approving and recommending to the Alaska Supreme Court rules "(1) concerning admission, discipline, licensing, continuing legal education, and defining the practice of law; (2) providing for continuing legal education and for certification of a continuing legal education program; [and] (3) establishing a program for the certification of attorneys as specialists."<sup>26</sup> The Board may also adopt bylaws and regulations "(1) concerning membership and the classification of membership in the Alaska Bar; (2) fixing the annual membership fees; [and] (3) concerning annual and special meetings."<sup>27</sup> Finally, the Board has the power to "(1) provide for employees of the Alaska Bar, the time, place and method of their selection, and their respective powers, duties, terms of office, and compensation; (2) establish, collect, deposit, invest, and disburse membership and admission fees, penalties, and other funds; (3) sue in the name of the Alaska Bar in a court of competent jurisdiction to enjoin a person from doing an act constituting a violation of this chapter; [and] (4) provide for all other matters affecting in any way the organization and functioning of the Alaska Bar."<sup>28</sup>

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<sup>24</sup>AS 15.35.135.

<sup>25</sup>AS 22.15.195.

<sup>26</sup>AS 08.08.080(a)(1)-(3).

<sup>27</sup>AS 08.08.080(b)(1)-(3).

<sup>28</sup>AS 08.08.080(c)(1)-(4).

The Board consists of 12 members - nine attorney members elected by the Bar membership and three non-attorney members appointed by the governor.<sup>29</sup> The Bar is an instrumentality of the government of the State of Alaska.<sup>30</sup> The breakdown of the Board membership and the method of its members' selection is as follows:

Two members of the board shall be elected by and from among the members of the association resident in the first judicial district; four members of the board shall be elected by and from among the members of the association resident in the third judicial district; two members by and from among the members of the association resident in the combined area of the second and fourth judicial districts; and one member at large from the entire state. Three members who are not attorneys shall be appointed by the governor and are subject to confirmation by the legislature in joint session.<sup>31</sup>

Board members serve three-year terms. They are selected in a triennial rotation specified by statute.<sup>32</sup>

After Justice Robert L. Eastaugh announced his retirement from the Alaska Supreme Court effective November 2, 2009, the Council sent an invitation to members of the Bar to apply for Justice Eastaugh's soon-to-be-vacant position on the court.<sup>33</sup> The Council's letter set the deadline for applications as May 15, 2009, which was later extended to May 28, 2009. This lawsuit followed. Plaintiffs ask the court for two injunctions. First, Plaintiffs seek an injunction preventing the three attorney members of the Council that were selected by the Board from engaging in deliberations and voting on the candidates who have applied for the vacant Alaska Supreme Court position. Second, Plaintiffs seek an injunction prohibiting the Chief Justice and the three non-

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<sup>29</sup>See AS 08.08.040.

<sup>30</sup>AS 08.08.010.

<sup>31</sup>AS 08.08.050(b).

<sup>32</sup>AS 08.08.050(c)(1)-(3).

<sup>33</sup>Letter dated April 15, 2009 from the Alaska Judicial Council to Members of the Alaska Bar Association, *available at* <http://www.ajc.state.ak.us/selection/supreme092/annsuprm09.pdf> (copy attached as Appendix D). The court takes judicial notice of the this letter as a matter of public record under Federal Rule of Evidence 201.

attorney members of the Council from observing the requirement that the Council act by a concurrence of four or more members, in order to permit the remaining four members of the Council to proceed with the nomination of a new justice by majority vote.

Plaintiffs contend that because only members of the Bar are permitted to elect some members of the Board, the public's right to vote is deprived in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution.<sup>34</sup> Plaintiffs believe that the Plan excludes non-attorney citizens of Alaska from voting for a controlling majority of the Board, which appoints the three attorney members of the Council, and therefore indirectly excludes the general public from an equal vote in selecting Council members and, ultimately, Alaska's judges and justices. Plaintiffs acknowledge that there are some elections in which the selection of government officials may be restricted to a limited group of citizens when the official or government entity has a "special limited purpose" whose activities have a "disproportionate effect" on the limited group of voters.<sup>35</sup> However, Plaintiffs contend that the election of the Board, and the Board's subsequent selection of the attorney members of the Council, is not such an election and the right to vote for the Board must be extended to all citizens of Alaska.<sup>36</sup>

Defendants argue in their motion to dismiss that because Alaska selects its judges by an appointive, not elective, process, the "one person, one vote" rule announced in *Reynolds v. Sims* and elaborated in its progeny does not implicate Alaska's judicial selection procedure, including the election of the Board and the layered appointment structure of the Council. Specifically, Defendants argue that Plaintiffs "repeatedly disregard the distinctions between the election of Boards members, the

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<sup>34</sup>Doc. 32, ¶¶ 45 and 46 citing *Hadley v. Junior College Dist. Of Metro. Kansas City*, 397 U.S. 50, 52 (1970), and *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)).

<sup>35</sup>*Id.*, ¶¶ 68-69 (quoting *Ball v. James*, 451 U.S. 355, 360 (1981) and *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 727-28 (1973)).

<sup>36</sup>*But see* Docket 4 at 24 ("Neither do Plaintiffs challenge the constitutionality of permitting only attorneys to vote for the members of the Board of Governors of the Alaska Bar.").

appointment of Judicial Council members, and the appointment of judges by the Governor.”<sup>37</sup> Because Plaintiffs concede the election of the Board is a limited purpose election, Defendants continue, their Equal Protection claims are aimed at the appointment of the Council, not the election of the Board. As a result, Defendants argue, the proposition that an election forming part of an appointive process must be one consistent with the “one person, one vote” rule is not supported by any legal authority. Plaintiffs oppose Defendants’ motion on the same grounds advanced in their motion for injunctive relief.

### **III. STANDARD OF REVIEW**

A motion to dismiss for failure to state a claim made pursuant to Rule 12(b)(6) tests the legal sufficiency of the claims in the complaint.<sup>38</sup> In reviewing a Rule 12(b)(6) motion to dismiss, “[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party.”<sup>39</sup> “Conclusory allegations of law, however, are insufficient to defeat a motion to dismiss.”<sup>40</sup> A dismissal for failure to state a claim can be based on either “the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”<sup>41</sup> “To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations; rather, it must plead ‘enough facts to state a claim to relief that is plausible on its face.’”<sup>42</sup> “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

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<sup>37</sup>Docket 35 at 19.

<sup>38</sup>*De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978).

<sup>39</sup>*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

<sup>40</sup>*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

<sup>41</sup>*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

<sup>42</sup>*Weber v. Dept. of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

misconduct alleged.”<sup>43</sup> “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”<sup>44</sup>

In *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court rejected the Ninth Circuit’s long-standing legal standard governing motions for a preliminary injunction.<sup>45</sup> Since *Winter*, “[p]laintiffs seeking a preliminary injunction in a case in which the public interest is involved must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest.”<sup>46</sup> Plaintiffs seeking preliminary relief must demonstrate that irreparable injury is *likely* in the absence of an injunction.<sup>47</sup> “Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”<sup>48</sup>

#### **IV. DISCUSSION**

##### **A. Motion at Docket 36**

The primary issue to be addressed in defendants’ motion is whether the “one person, one vote” rule announced in *Reynolds v. Sims* applies to the Plan. As Plaintiffs frame the issue, this court must decide “whether the incorporation of the election for the Board of Governors into the Alaska judicial selection process can be justified because

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<sup>43</sup>*Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009).

<sup>44</sup>*Id.* (quoting *Twombly*, 550 U.S. at 557).

<sup>45</sup>*Winter v. Natural Res. Def. Council, Inc.*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 365, 376 (2008).

<sup>46</sup>*California Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 849-50 (9th Cir. 2009) (citing *Winter*, 129 S.Ct. at 376)).

<sup>47</sup>*Winter*, 129 S.Ct. at 375.

<sup>48</sup>*Id.* at 375-76.

that election is one of ‘special purpose.’”<sup>49</sup> Plaintiffs contend that “[i]f the entity doing the appointing is not itself elected consistent with Equal Protection, then the court must consider whether the system is ‘necessary to promote a compelling state interest.’”<sup>50</sup> Defendants counter that because the system for selecting Alaska’s justices and judge is appointive, not elective, the “one person, one vote” principle does not apply.<sup>51</sup> Furthermore, Defendants contend that, even if the process were elective in nature, “one person, one vote” does not apply to the judicial branch because judges do not represent people.<sup>52</sup> In the alternative, Defendants argue that the election of the Board falls within the limited purpose election exception to the “one person, one vote” rule.<sup>53</sup>

### 1. Jurisprudential Framework

In *Reynolds v. Sims*, the Supreme Court held that qualified citizens have a right to vote in state and federal elections which is protected by the Constitution of the United States, adding that “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”<sup>54</sup> The Court also recognized that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”<sup>55</sup> As the Court in *Hadley v. Junior College District of Metropolitan Kansas City* summarized, “whenever 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

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<sup>49</sup>Docket 42 at 5.

<sup>50</sup>Docket 42 at 6 (quoting *Kramer*, 395 U.S. at 627).

<sup>51</sup>Docket 35 at 11-18.

<sup>52</sup>*Id.* at 18.

<sup>53</sup>*Id.* at 18-23.

<sup>54</sup>*Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>55</sup>*Id.*

that election.”<sup>56</sup> Since *Reynolds*, the Court has applied the “one person, one vote” principle in a line of cases concerning various types of elections in which the franchise has been selectively distributed, including junior college trustee elections,<sup>57</sup> school district board elections,<sup>58</sup> and revenue bond elections.<sup>59</sup>

One exception to the “one person, one vote” rule - the “limited purpose exception” - dictates that the rule does not apply to the election of a governmental entity that (1) exercises only narrow, limited governmental powers, and (2) conducts activities that disproportionately affect only a specific group of individuals.<sup>60</sup> Accordingly, the Court has said that any classification restricting or limiting the franchise to certain members of the public, except those involving residence, age, or citizenship, is unconstitutional “unless the district or State can demonstrate that the classification serves a compelling state interest.”<sup>61</sup> Such a limitation may only be upheld if it is demonstrated that “all those excluded are in fact substantially less interested or affected than those the (franchise) includes.”<sup>62</sup> Where the governmental entity whose members are subject to the selective franchise performs a vital governmental function that has sufficient impact throughout the state, a limited franchise will not comport with the

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<sup>56</sup>*Hadley v. Junior College Dist. of Metropolitan Kansas City*, 397 U.S. 50, 56 (1970).

<sup>57</sup>*Id.*

<sup>58</sup>*Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-27, 632 (1969).

<sup>59</sup>*Cipriano v. Houma*, 395 U.S. 701, 705-06 (1969).

<sup>60</sup>See *Ball v. James*, 451 U.S. 355, 363-72 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 731 (1973); *Hadley*, 397 U.S. at 56.

<sup>61</sup>*Hill v. Stone*, 421 U.S. 289, 29 (1975) (giving power to property owners alone “can be justified only by some overriding interest of those owners that the State is entitled to recognize”); *Kramer*, 395 U.S. at 626-27 (“if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.”)

<sup>62</sup>*Kramer*, 395 U.S. at 632.

principle set forth in *Reynolds*.<sup>63</sup> On the other hand, where the strictures of *Reynolds* do not apply to a challenged election, the state need only show that the voting scheme bears a reasonable relationship to its statutory objectives.<sup>64</sup>

Of course, Alaska judges are not selected in an election. This forces plaintiffs to contend that *Reynolds* applies even where the state has chosen to select judges by appointment. Moving still further from direct application of the principle announced in *Reynolds*, Plaintiffs also argue that the appointment of the Council members should be governed by the “one person, one vote” rule, relying on *Sailors v. Board of Education of Kent County*<sup>65</sup> and *Kramer v. Union Free School District No. 15*.<sup>66</sup> In *Sailors*, the Court considered the constitutionality of the selection of a county school board chosen, not by the electors of the county, but by delegates from the local school boards.<sup>67</sup> The process by which the county school board was selected was as follows: “Each board sends a delegate to a biennial meeting and those delegates elect a county board of five members, who need not be members of the local boards, from candidates nominated by school electors.”<sup>68</sup> Petitioner argued that the process violated the “one person, one vote” principle, which the Court has held is constitutionally required in state elections.<sup>69</sup> After discussing *Reynolds*, the Court found that there is “no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election.”<sup>70</sup> The Court then held that “[a]t least as respects nonlegislative officers, a

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<sup>63</sup>See *Hadley*, 397 U.S. at 56

<sup>64</sup>*Ball*, 451 U.S. at 364-65.

<sup>65</sup>387 U.S. 105 (1967).

<sup>66</sup>395 U.S. 621 (1969).

<sup>67</sup>387 U.S. at 106.

<sup>68</sup>*Id.*

<sup>69</sup>*Id.*

<sup>70</sup>*Id.* at 108.

State can appoint local officials or elect them or combine the elective and appointive systems as was done here.”<sup>71</sup>

The Court expanded upon *Sailors* in *Kramer*, which involved a New York statute that limited the right to vote in school district elections to individuals who owned or leased taxable real property within the school district and parents of children enrolled in the local public schools.<sup>72</sup> Most pertinent to the case at bar, the Court first recognized that “States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters.”<sup>73</sup> The Court only then went on to explain that the need to scrutinize the manner in which the voting franchise is distributed is not reduced, “simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment.”<sup>74</sup> Of *Sailors*, the *Kramer* Court noted that “each local school board sent one delegate to a biennial meeting at which the members of the county board of education were selected . . . [but that] “no constitutional complaint (was raised respecting [the] election of the local school boards.”<sup>75</sup> Ultimately, the Court concluded that New York had failed to demonstrate a compelling interest that was sufficiently tailored to limit the franchise to owners or lessees of taxable property.<sup>76</sup>

In *Rodriguez v. Popular Democratic Party*, the Court considered whether the principle enunciated in *Kramer* and *Sailors* applied to a Puerto Rico statute, which vested in a political party the power to fill an interim vacancy in the Puerto Rico Legislature.<sup>77</sup> The Court noted that while *Sailors* held that a statute authorizing appointment rather than

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<sup>71</sup>*Id.* at 111.

<sup>72</sup>*Kramer*, 395 U.S. at 622.

<sup>73</sup>*Id.* at 629.

<sup>74</sup>*Id.* at 628-29.

<sup>75</sup>*Id.* at 629 n.12 (quoting *Sailors*, 387 U.S. at 111).

<sup>76</sup>*Kramer*, 395 U.S. at 633.

<sup>77</sup>457 U.S. 1, 3 (1982).

election of a county school board was valid, it left open the question whether a state may constitute a local legislative body through the appointive rather than elective process.<sup>78</sup> The Court reasoned that the statute at issue did not restrict access to the electoral process because “[a]ll voters have an equal opportunity to select a district representative in the general election; and the interim appointment provision applies uniformly to all legislative vacancies, whenever they arise.”<sup>79</sup> Applying rational basis review, the Court ultimately concluded that “[t]he Puerto Rico Legislature could reasonably conclude that appointment by the previous incumbent's political party would more fairly reflect the will of the voters than appointment by the Governor or some other elected official.”<sup>80</sup>

Two district court decisions discussed by the parties have applied the above framework in circumstances similar to the present case. In *Bradley v. Work*, minority voters challenged an Indiana procedure for selecting members of a judicial nominating commission and for electing judges. They alleged violations of the Voting Rights Act, the Equal Protection Clause, and the Fifteenth Amendment.<sup>81</sup> Like Alaska, Indiana limits the election of the attorney members of its judicial nominating commission to attorneys, while the Governor is charged with appointing the commission's non-attorney members.<sup>82</sup> Relying on the limited purpose exception, the district court held that the procedure by which Indiana's judicial nominating commission is selected is constitutional because the commission “does not perform traditional governmental functions,” reasoning that the commission's “sole purpose and reason for existence is to screen candidates as part of the judicial appointment process.”<sup>83</sup> Approving of this arrangement, the district court wrote:

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<sup>78</sup>*Id.* at 9-10 & n.9 (citing *Sailors*, 387 U.S. at 109-10).

<sup>79</sup>*Rodriguez*, 457 U.S. at 10.

<sup>80</sup>*Id.* at 12.

<sup>81</sup>916 F. Supp. 1446 (S.D. Ind. 1996), *aff'd*, 154 F.3d 704 (7th Cir. 1998).

<sup>82</sup>*Id.* at 1456.

<sup>83</sup>*Id.*

The attorney-members of the Commission are selected to represent the interests and reflect the expertise of the local bar when evaluating candidates for a judicial appointment. Their divergent interests uniquely qualify attorneys to advise the governor, for their interests are different in nature and in scope from the interests of the general public in a fair and impartial judiciary.<sup>84</sup>

The district court went on to conclude that “the State's classification represents a reasonable effort to provide representation of both the general populace and the members of the bar on a Commission whose limited function is to advise the governor on the selection of an appropriate candidate for judicial office.”<sup>85</sup> The Seventh Circuit affirmed the district court, but did not reach the Equal Protection issue because it had not been preserved on appeal.<sup>86</sup>

In *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri* (“AAVRLDF”), another district court reached a similar conclusion in a slightly different context.<sup>87</sup> In that case, African-American voters alleged that they were denied the right to vote for lawyer members of Missouri’s judicial selection commission on the ground that African-Americans were, at the time, underrepresented in the Missouri Bar.<sup>88</sup> The court first found that the franchise had not been denied to African-Americans, which would require proof of intentional discrimination, but rather to the entire nonlawyer populace of Missouri, which would only require the State to support the statute by a reasonable basis that was rationally related to a legitimate state interest.<sup>89</sup> Applying rational basis review to uphold the Missouri practice, the district court explained:

Certainly, it is reasonable, if not necessary, to have lawyers on these commissions. There is no one better to evaluate the ability of potential

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<sup>84</sup>*Id.* at 1457.

<sup>85</sup>*Id.* at 1458.

<sup>86</sup>*Bradley*, 154 F.3d at 711.

<sup>87</sup>994 F. Supp. 1105 (E.D. Mo. 1997).

<sup>88</sup>*Id.* at 1126.

<sup>89</sup>*Id.* at 1127.

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. It is therefore quite clear that attorneys must serve on the commissions.”<sup>90</sup>

On appeal, the Eighth Circuit affirmed the decision of the district court without discussion, noting that “the decision of the District Court is correct and that extended discussion would add nothing of substance to the thorough and well-reasoned opinion of that court.”<sup>91</sup> With these principles in mind, the court proceeds to discuss application of “one person, one vote” to the Plan.

## **2. Application of “One Person, One Vote” to the Judiciary**

In *Wells v. Edwards*, a decision of a three-judge panel in the Middle District of Louisiana that was affirmed by the Supreme Court, held, broadly and categorically, that the “one person, one vote” principle does not apply to the judicial elections challenged as denials of equal protection because “judges . . . are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency.”<sup>92</sup> Rather, “[t]he primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents.”<sup>93</sup> This rule has been reiterated by the Supreme Court and at least one notable jurist outside this

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<sup>90</sup>*Id.* at 1128.

<sup>91</sup>*African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 133 F.3d 921 (8th Cir. 1998) (unpublished).

<sup>92</sup>See *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964), *aff'd*, 409 U.S. 1095 (1973)).

<sup>93</sup>Defendants highlight that “Plaintiffs do not contend defendants’ point that the one person, one vote principle does not apply to judicial elections.” Docket 43 at 3. This assertion is incorrect in that it overstates *Wells*’ application and flatly contradicts *Kramer*’s holding that “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” *Kramer*, 395 U.S. at 629 (quoting *Harper*, 383 U.S. at 665)).

circuit.<sup>94</sup> Plaintiffs are correct that *Wells* involved judicial district apportionment, and not a classification on the basis of occupation, but *Wells* also held that an affected voter may only mount a challenge to any judicial election by showing:

“an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. In other words, this Court must find that the State has not only distinguished between citizens and voters, but that such distinctions are arbitrary and capricious or invidious.”<sup>95</sup>

In order to invalidate the Plan under this test, Plaintiffs would have to show an “invidious action” or an “arbitrary or capricious” distinction by the framers of the Alaska Constitution in devising and adopting the Plan during the Constitutional Convention. Plaintiffs have not alleged any such arbitrary, capricious, or invidious action.<sup>96</sup> Plaintiffs’ challenge to the Plan fails on this ground alone.

### **3. Application of the Limited Purpose Exception to the Plan**

#### **a. The Board’s Election**

The “one person, one vote” does not apply to the election of the members of the Board, because the Board’s activities generally fall within the limited purpose exception applicable when a governmental entity (1) exercises only narrow, limited governmental powers, and (2) conducts activities that disproportionately affect only a specific group of individuals.<sup>97</sup> With respect to the first prong, the Board exercises powers that concern the regulation of a specific profession, the practice of law.<sup>98</sup> Thus, the Board approves

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<sup>94</sup>See *Chisom v. Roemer*, 501 U.S. 380, 402-03 (1991) (Stevens, J.); *Smith v. Boyle*, 144 F.3d 1060, 1061 (7th Cir. 1998) (Posner, J.).

<sup>95</sup>*Wells*, 347 F. Supp. at 455 (quoting *Holshouser v. Scott*, 335 F. Supp. 928, 933 (M.D. N.C. 1971)).

<sup>96</sup>Even assuming Plaintiffs alleged an invidious action or arbitrary and capricious distinction, they have not pled any plausible factual allegations supporting such behavior on the part of the Constitutional Convention, the State, or the Council.

<sup>97</sup>See *Ball*, 451 U.S. at 363-72; *Salyer Land Co.*, 410 U.S. at 731.

<sup>98</sup>Traditional governmental functions include the imposition of sales or property taxes, enactment of laws governing the conduct of citizens, selling tax-exempt bonds, condemning property, setting policies that substantially affect all residents, or administering normal functions

and recommends to the Alaska Supreme Court rules concerning admission, discipline, licensing, continuing legal education, specialization, and defining the practice of law.<sup>99</sup> The Board also adopts bylaws and regulations concerning membership, classification, fees, and annual and special meetings.<sup>100</sup> Finally, the Board has the power to hire and sue on behalf of the Bar, as well as establish, collect, deposit, invest, and disburse membership and admission fees, penalties, and other funds from its members.<sup>101</sup> With respect to the second prong, the only individuals who are regulated by the Board's activities are Bar members. For the election of the Board, limiting the franchise to lawyers is therefore logically and legally sound, and it clearly falls within the limited exception to the "one person, one vote" rule.

Having determined that the Board's election falls within the exception, the next question is whether the restriction on those who can vote for Board members violates Equal Protection values. Given that the Board is a limited purpose entity, the franchise may be constitutionally limited to a group of individuals who are disproportionately affected so long as the decision is reasonable and bears a rational relationship to a legitimate state interest.<sup>102</sup> The Plan reflects the entirely rational proposition that lawyers have the experience and expertise needed to select Council members from among the ranks of Alaska's lawyers. Furthermore, the interest in selecting qualified persons to serve on the Board is a legitimate – indeed very important – interest. Absent a clear constitutional limitation, Alaska is free to structure its judicial system to meet special concerns regarding the qualifications of its judges. The court concludes therefore that

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of government such as maintenance of streets, the operation of schools, or sanitation, health or welfare services. *Ball*, 451 U.S. at 366.

<sup>99</sup>AS 08.08.080(a)(1)-(3).

<sup>100</sup>AS 08.08.080(b)(1)-(3).

<sup>101</sup>AS 08.08.080(c)(1)-(4).

<sup>102</sup>*Ball*, 451 U.S. at 371; *Kramer*, 395 U.S. at 627-28.

the limitation on who may vote for members of the Board survives rational basis review.<sup>103</sup>

### **b. The Council's Appointment**

Having concluded that the Board's election passes constitutional muster, the next question is whether the Board's selection of the attorney members of the Council violates Equal Protection principles. Plaintiffs urge that there is a violation, but in doing so, they are necessarily imposing on the process a judgment that a public election is necessary for the appointment of judicial officers. Yet, as noted above, the Court specifically held in *Sailors* that the "one person, one vote" principle does not apply where non-legislative officers are chosen by appointment, rather than by election.<sup>104</sup> Moreover, the delegates to the Alaska Constitutional Convention endorsed and the people of the State of Alaska ratified the proposition that Alaska state judges are to be appointed, rather than elected. Plaintiffs have not cited, nor has this court's research found, any authority in support of the proposition that a state may not appoint, rather than elect, its judiciary.<sup>105</sup> Thus, although "one person, one vote" is not relevant to appointments, this court also finds the analysis by the district judges in *Bradley* and *AAVRLDF*, which found that judicial selection commissions perform non-traditional governmental functions, persuasive. Here, the Council does not "administer normal functions of government" or "enact laws

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<sup>103</sup>Additionally, even if the Board's election did not fall within the limited purpose exception, the Ninth Circuit has held that "the malapportionment of representation on a state bar governing body is not a violation of fourteenth amendment rights." *Brady v. State Bar of California*, 533 F.2d 502, 502-03 (9th Cir. 1976). Thus, assuming the Board were malapportioned, "its acts would not for that reason be invalid, but would be valid as acts of a de facto authority." *Id.* at 503.

<sup>104</sup>See, e.g., *Sailors*, 387 U.S. at 111 ("Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy."); accord *Wells*, 347 F. Supp. at 455 ("one person, one vote" does not apply to the judiciary).

<sup>105</sup>Plaintiffs rely on *Kramer*, but as explained above, that case dealt only with a situation in which the state had decided to use an elective process rather than an appointive process to choose members of a county school district board.

governing the conduct of citizens;<sup>106</sup> rather, among its responsibilities, the Council is charged with evaluating and recommending the most qualified candidates for Alaska's bench based on its assessment of the credentials of members of the bar being considered for vacant judgeships. In this regard, therefore, the Council is a limited purpose entity whose actions disproportionately affect the membership of the Alaska Bar.

For many of the same reasons supporting the limitation on the Board's election, the selection of the Council's attorney members by the Board is rationally related to a legitimate state interest in selecting well-qualified jurists. Moreover, the Alaska Constitution has included checks on the exercise of the appointment powers in the Plan, which save it from defeat under rational basis review. To begin with, some members of the Board are themselves appointed by the Governor. Second, the Board appoints only three of the seven members of the Council. Any candidate for judicial office must therefore secure the vote of at least one other member of the Council in order to be recommended for appointment. Third, the Council's nominations are subject to a final selection by the Governor. Fourth, every person nominated by the Council and selected by the governor must stand for periodic retention elections in which all registered voters participate. These extensive limitations winnow and ultimately defeat the notion central to Plaintiffs' case that it is a select group of citizens – that is, Alaska lawyers – who actually select the Alaska judiciary and in doing so deprive other citizens of equal rights under the law. Rather, the Plan merely allows the public to draw upon the expertise of Alaska's lawyers in the selection of judicial officers, a justification that is rationally related to a legitimate state interest.

#### **B. Motion at Docket 4**

Because the court grants Defendants' motion to dismiss, Plaintiffs' motion for a preliminary injunction is denied as moot.

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<sup>106</sup>*Ball*, 451 U.S. at 366 n.11.

**V. CONCLUSION**

For the foregoing reasons, Defendants' motion at docket 36 is **GRANTED**, and Plaintiffs' motion at docket 4 is **DENIED** as moot.

DATED at Anchorage, Alaska, this 15th day of September 2009.

/s/ JOHN W. SEDWICK  
UNITED STATES DISTRICT JUDGE