DOCKET NO. 09-35860

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH KIRK, CARL ANDERS 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
No. 09-CV-00136 JWS

BRIEF FOR AMERICAN JUDICATURE SOCIETY, *AMICUS CURIAE*, IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE JUDGMENT OF THE DISTRICT COURT

MICHAEL MADDIGAN (S.B. #163450)
CHAD GEVING (S.B. #233648)
TAMAR MALINEK (S.B. #264080)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407
Amicus Curiae Counsel on Behalf of American Judicature Society

CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure. The American Judicature Society is a non-profit corporate entity that has no parent corporation, and no publicly held corporation holds ten percent or more of its stock.

DATED: March 5, 2010

Respectfully submitted,

MICHAEL MADDIGAN
CHAD GEVING
TAMAR MALINEK
O'MELVENY & MYERS LLP

By /s/ Michael Maddigan
Michael Maddigan
Counsel for American Judicature Society

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

LEGISLATIVE MATERIALS

REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page

EXECUTIVE ORDERS

OTHER AUTHORITIES

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Judicature Society ("AJS") is a national, non-partisan, non-profit organization dedicated to improving the administration of justice.[1] AJS's members include judges, lawyers, and members of the public.[2] AJS utilizes a collaborative approach to solving problems in the justice system and works with many other organizations, including the American Bar Association ("ABA"), state courts, and state legislatures, to achieve its goals of promoting an independent and qualified judiciary.

AJS was founded in 1913 by Roscoe Pound, Albert M. Kales, and Herbert Harley, among others, because they believed that judicial elections infused the judiciary with politics and special interests and that there was a better way to select members of the judiciary. Kales, a law professor at Northwestern University, accepted the position of "Director of Drafting," and, over time, he and others developed the first commission-based and merit-focused judicial selection process. This became known as the "Missouri Plan," after the first state to adopt it. The Missouri Plan is the model for the Alaska judicial selection system at issue in this

[1] All parties have consented to AJS's filing of this amicus curiae brief.

[2] As a matter of policy and procedure, no judicial member of the American Judicature Society participated in the decision to file this brief or in its preparation, and this brief was not circulated to any judge-member of the Board of Directors, Executive Committee, or National Advisory Council prior to filing. No inference should be drawn that any judge member of the Society's Board of Directors has

case. In fact, the Alaska Constitutional Convention noted AJS's long-standing support for merit-based selection systems when it discussed the adoption of its selection system.

Since its founding, AJS consistently has been the leading proponent of merit-based systems for the selection of judges. Moreover, AJS is dedicated to educating the public about judicial selection and the importance of judicial independence. In 1991, AJS created the Hunter Center for Judicial Selection, a nationally recognized research center that conducts, synthesizes, and disseminates empirical research on judicial selection issues. AJS also has developed model judicial selection provisions, which are the basis for many of the merit-based selection plans adopted throughout the United States.

Because of its historical and continuing commitment to merit-based selection of judges, as well as its specific connection to Alaska's judicial selection process, AJS has closely followed the developments in this case and wishes to share its views with the Court. AJS is uniquely qualified to assist the Court in its decision in this case, and respectfully requests that the Court consider the following arguments in support of the Alaska Judicial Council (the "Council").

---

participated in the adoption or endorsement of the positions in this brief.

II. NOTICE OF ADDENDUM

Pursuant to Federal Rule of Appellate Procedure 28(f) and Ninth Circuit Local Rule 28-2.7, pertinent constitutional provisions, statutes, and rules are set forth verbatim in a separate addendum introduced by a table of contents.

III. ARGUMENT SUMMARY

An independent judiciary is one of the hallmarks of American democracy. For our judicial system to function independently and effectively, it is imperative that qualified judges be free to make appropriate decisions under the law. To achieve the goal of an independent and highly qualified judiciary, states have tried different methods of selecting judges. These methods range from executive or legislative appointments to partisan or non-partisan elections. Over the past seventy years, the trend among the states, and to a certain degree in the federal system, for ensuring a qualified and independent judiciary is to have some form of merit-based selection in which a non-partisan commission screens judicial applicants and recommends the best qualified candidates for appointment.

Alaska chose a merit-based judicial selection system that is consistent with these principles and has served the state well for over fifty years by creating a qualified, independent, and well respected judiciary. Appellants in this case have challenged Alaska's system, and the Appellees will put forward the arguments they believe are most directly relevant to this dispute. AJS will not repeat the

Appellees' arguments. Instead, AJS asks this Court to consider the historical development of judicial selection in the United States, the benefits of Alaska's judicial selection system, and the implications that a decision in favor of the Appellants in this case could have on judicial selection in both the fourteen states whose systems are most similar to the Alaska system and the additional seventeen states that have other forms of merit-based selection of judges. AJS believes that these considerations compel the conclusion that Alaska's judicial selection system is constitutionally permissible and that the judgment of the District Court should be affirmed.

IV. ARGUMENT

A. The Modern Trend In The United States Has Favored The Adoption of Merit-Based Judicial Selection Systems.

1. Judicial Selection By Appointment And Election.

In the American Colonies, the King of England selected judges. These judges served at the pleasure of the King, which ensured that they were anything but fair, impartial, and apolitical. *See* DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) ("[The King] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."). This experience under the Crown led the original thirteen states to adopt judicial selection methods that limited the Chief Executive's powers to control the judiciary through appointments by utilizing appointment by the legislature, by the

governor with the consent of an executive council, or by the governor and the legislature jointly. *See* Kurt E. Scheuerman, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 464-465 (1993).

Toward the middle of the 1800s, some of the original states as well as newly-entering states began to adopt popular elections as the primary means of selecting judges. *Id.* at 465. Some scholars attribute this change to the concept of "Jacksonian Democracy" that spread across the nation during that time. *See* Glenn R. Winters, *Selection of Judges - An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1965-1966) ("There had never been an elected judiciary, but with the new concept of sovereignty in the populace as a whole, it was inevitable that someone would propose popular election of judges, since governors and legislators were already being elected. This was not particularly designed for improving justice but was simply another manifestation of the populism movement. However, there is some indication that it was inspired in part by a feeling that judges were being appointed too frequently from the ranks of the wealthy and privileged."); *see also* Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990). Others have argued that this change was sparked by the influence of lawyers at the constitutional conventions and the perception that an elective system was less corrupt. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM.

J. OF LEGAL. HISTORY 199, 199-203 (1993) ("The reformers' watchword was that power corrupts, whether the power is legislative, executive, or judicial. The rise of the elective judiciary marked not a mere transfer of power from one branch of government to another, but an effort to decrease official power as a whole. It arose from the people's profound distrust of their own government, whose officials could not be counted upon to act in the citizenry's best interests."); Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345, 346-348 (1984) (discussing the role of lawyers and judges in adopting judicial elections).

Whatever the cause, by the time of the Civil War, approximately 70% of the states (24 out of 34) were choosing judges in partisan judicial elections rather than through appointive systems. Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, AMERICAN JUDICATURE SOCIETY (2004). Moreover, every *new* state admitted to the Union from after the Civil War until 1959 used an elective system[3] to select at least some of their judges. *Id.*; Winters, *supra*, at 1082.[4]

[3] It should be noted that some of these states used non-partisan elections to select their judiciary. Non-partisan elections are discussed later in this section of the brief.

[4] Alaska ended this trend by adopting the judicial selection method at issue in this

Over time, however, many states found that partisan elections were not an effective method of achieving a qualified and independent judiciary. Not surprisingly, these states discovered that when judges were chosen in partisan elections, political parties and special interests began to insert themselves into the judicial branch of government, which affected both the quality of judges and their decision making. *See* Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 450 (June 2004) ("The experience with partisan elections had shown that an elected court, instead of being rendered independent of incumbent politicians, simply became responsive to the same political forces that dominated legislatures."); Scheuerman, *supra*, at 466 ("The innovation of electing judges soon proved to contain its share of problems. Political machines began to control the selection of judges through the nomination process, and elections became rubber stamps of the machine's selections. This led to the creation of a politically responsive, yet at times incompetent, judiciary.").

A number of states addressed concerns about the politicization of the judiciary by adopting non-partisan elections.[5] These states believed that

---

case when it became a state in 1959. *See* discussion *infra*.

[5] The following states adopted non-partisan elections to address their concerns about the politicization of the judiciary: Washington (1907); Montana (1909); Nebraska (1909); California (1911); Minnesota (1912); Pennsylvania (1913);

prohibiting candidates from identifying themselves with a political party would rid the system of corruption and incompetence, and also help control special interests (including political parties). Winters, *supra*, at 1083 (noting that "states which retained the elective system became increasingly concerned about the adverse effects of political selection on the quality of judicial personnel and developed the nonpartisan ballot as a means of 'taking the judges out of politics'"). Many reformers, however, perceived the move from partisan to non-partisan elections to be an inadequate means of ensuring that the judiciary was free from the pressure and taint of political influence and corruption.

2. A Better Way: The Shift Towards Merit-Based Judicial Selection Systems.

The desire to create and protect an independent and high-quality judiciary prompted legal scholars such as Roscoe Pound, Albert M. Kales, and Herbert Harley to start a movement in the early 1900s to develop a judicial selection system based on the qualifications and experience of the candidates. This movement toward merit-based selection of judges continues to this day -- carried on by AJS and others, such as the ABA, state and local bar associations, judges, and public interest groups -- and has become the preferred approach for states that

---

South Dakota (1921); Oregon (1931); Idaho (1934); Michigan (1939). American Judicature Society, *History of Reform Efforts*, AMERICAN JUDICATURE SOCIETY (2009), *available at* http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state

wish to change their formal methods of selecting judges. *See* Hanssen, *supra*, at 452 ("There is today a strong consensus that, of all the procedures, the merit plan best insulates the state judiciary from partisan political pressure"); Scheuerman, *supra*, at 463 (By the early 1990s, "[t]he merit plan [was] the plan most favored; most states recently revising their judicial systems have adopted merit selection.").

The merit-based approach for judicial selection developed by AJS and others in the early part of the 1900s picked up steam in the 1930s, and the ABA endorsed a merit-based approach in 1937. Berkson, *supra*. In 1940, Missouri became the first state to adopt a merit-based approach to judicial selection. A wave of jurisdictions followed Missouri's lead and adopted merit-based selection for some or all of their judges: Alabama (1950),[6] Kansas (1958), Alaska (1959), Iowa (1962), Nebraska (1962), Colorado (1966), Idaho (1967), Oklahoma (1967), Utah (1967), Vermont (1967), Indiana (1970), Maryland (1970), Massachusetts (1970), Tennessee (1971), Florida (1972), Georgia (1972), Wyoming (1972), District of Columbia (1973), Montana (1973), Arizona (1974), Kentucky (1976), Nevada (1976), North Dakota (1976), Delaware (1977), New York (1977), Hawaii (1978), South Dakota (1980), Minnesota (1983), Connecticut (1986), New Mexico (1988),

[6] This is the year that the first system was established in Jefferson County, Alabama. Since that time, judicial nominating commissions have been established in seven other Alabama counties, including two counties (Lauderdale and Shelby) in 2008. Ala. Const. amend. 804, 819.

Rhode Island (1994), and New Hampshire (2006).[7] *See id*.; American Judicature Society, *Judicial Merit Selection: Current Status* ("Current Status"), AMERICAN JUDICATURE SOCIETY (2009), *available at* http://www.judicialselection.us/uploads/documents/Judicial _Merit_Charts_ 0FC 20225EC6C2. pdf.

Alaska's judicial selection system is modeled on Missouri's and was adopted when Alaska became a state in 1959. Alaska's merit-based judicial selection system was established in its original constitution. *See* Alaska Const., art. IV, §§ 1-8. This is significant because that state constitution was determined by Congress to be consistent with the Constitution of the United States. Alaska Statehood Act, Pub. L. No. 85-508, § 1, 72 Stat. 339, 339 (1958) (finding the Alaska Constitution to be "in conformity with the Constitution of the United States"). Congress's approval of the Alaska constitution demonstrates that it did not believe that Alaska's procedure for selecting judges violated the Equal Protection Clause of the Fourteenth Amendment.

Moreover, the merit-based judicial selection process chosen by Alaska voters differed from the Presidential appointment process that existed in territorial Alaska. John S. Hellenthal, *The Forty-Ninth State Sets an Example*, A.B.A. J.

[7] It should be noted that Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and Tennessee implemented a merit-based plan for selecting some, but not all, of their judges. In addition, the merit-based approaches adopted by Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, and North Dakota apply only to interim vacancies.

(December 1958), *available at* http://www.alaska.edu/creatingalaska/statehood-files/49th-state-sets-example/. Thus, knowing the history of Presidential appointments and having the benefit of observing the start of the movement towards merit-based selection in other states, Alaska voters chose a merit-based method as the way to best ensure a qualified and independent judiciary. The movement in this country towards the use of merit-based approaches since the time of Alaska's decision confirms the wisdom of that choice. No state that has adopted a merit-based selection system by constitution or statute has moved away from this decision and chosen an alternative selection method.[8]

B. Alaska Voters Have Chosen An Effective And Appropriate Judicial Selection System.

This Court must decide whether the merit-based judicial selection system Alaska adopted at the time of its admission into the Union violates the Equal Protection Clause of the Constitution of the United States. In considering that question, the Court should appreciate that Alaska's system has created a qualified, respected, independent, and non-partisan judiciary. Alaska's system has accomplished this, in part, by minimizing the role of politics and political considerations in the judicial selection process. For example, because judges do

[8] Legislation to eliminate merit-based systems occasionally has been proposed in some jurisdictions, but none of this legislation has passed. *See, e.g.*, S. Con. Res. 1002, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

not run in partisan elections, the Alaska system minimizes the potential influences of campaign contributions and special interest group activities. Similarly, because the governor cannot simply hand out judgeships as a reward for political support, Alaska's system reduces the effect of political patronage on the judicial selection process.

Beyond simply eliminating these negative influences, however, Alaska's system is effective because it provides a meaningful opportunity for a variety of individuals and groups, including the Appellants in this case, to participate in the judicial selection process. For example, the governor actively participates in the process by appointing the non-attorney members of both the Alaska State Bar Board of Governors and the Alaska Judicial Council (with legislative confirmation) and by *actually appointing the judges* from the Council's list of nominees. Similarly, the citizens of Alaska participate in the process both directly by voting for or against judges in non-partisan retention elections[9] and indirectly

[9] Based on their claims in this case, the Appellants appear to have admitted that the retention election is enough to bar their Equal Protection Claim. Their request for an injunction did not prohibit the Chief Justice from exercising his duties and, to the contrary, affirmatively sought to allow him and the non-attorney members of the Council to perform their duties by a majority vote. Appellants' Excerpt of Record ("ER") 217. Moreover, the Amended Complaint states "[t]he Chief Justice sits as an *ex officio* member of the Council, ***having been subject to retention in an election in which no qualified citizen's vote is denied or diluted***." ER 213 (emphasis added). If the Appellants agree that they do not have an Equal Protection claim against the Chief Justice based on the retention election, they, by implication, must also agree that they do not have a claim against the selection of

through their votes for governor and their legislators. Moreover, the public may submit comments about applicants in response to the Council's solicitation of public comments through its website and may testify at the public hearing the Council holds for each vacancy. Finally, Alaska's lawyers likewise participate in the process as attorney members of the Council and in voting for the members of State Bar Board of Governors.

Appellants challenge the role of lawyers in Alaska's judicial selection process. But giving lawyers a unique role in the process is a reasonable means of helping to achieve a highly qualified and effective judiciary. Members of the legal profession have the opportunity to directly observe the professional skills of their colleagues and have unique insight into the temperament, impartiality, and fairness of attorneys with whom they have contact in their practice. Therefore, attorneys are in an ideal position to evaluate who amongst their peers is most likely to be an effective judge.

Although Alaska's system affords lawyers the opportunity to contribute their expertise to the judicial selection process, it does not give lawyers (or any of the other participants in the process) unchecked authority. Instead, Alaska's system prevents any one group from having too much power and influence by making the

---

any other judge since they are all subject to initial and periodic retention elections. Alaska Const., art. IV, § 6.

various parts of the system interdependent. This balance is reflected in many facets of the system, including the governor's ability to select some, but not all, of the Council members; the legislature's power to confirm the governor's selections for the non-attorney members of the Council; the independence of the Council members who are not directly subject to political influences and pressures; the requirement that a nominee receive four votes before being recommended to the governor (*i.e.*, no one group on the Council can advance or defeat potential nominees); and the governor's authority to appoint the judge based on the candidates selected by the Council.

Alaska's system is also a fundamentally fair method of selecting judges because every qualified person who applies has an opportunity to be selected as a nominee. This increases public confidence in the courts and the judicial system in general. A recent study examining Alaska's selection process from 1984 to 2007 confirms that Alaska's judicial selection system is fair and effective:

- 38% of all applicants were nominated.
- Male and female applicants were nominated at very similar rates (36% of women in 2003 to 2007 compared to 38% of men).
- 75% of the time the governor had three or more candidates to choose from for each vacancy.

- For the period 2003 to 2007, judicial applicants averaged 20 years of legal practice experience in Alaska.
- 76% of nominees and 72% of appointees had worked in both the public and private sector.
- 68% of all applicants, nominees, and appointees had substantial trial experiences (defined as six or more trials) in the five years that preceded their application.
- Higher writing sample scores correlated with a greater likelihood of nomination and appointment.

Teresa White Carns, *The Alaska Merit Selection System at Work, 1984-2007*, 93 JUDICATURE (November-December 2009).

C. Striking Down Alaska's Judicial Selection System Would Raise Questions About The Legitimacy of Merit-Based Judicial Selection Systems In At least *Fourteen* Other States

Thirty-two states and the District of Columbia utilize some form of merit-based selection for at least some of their judges.[10] *See* Berkson, *supra*. Although there is no uniform approach to merit-based selection, there are characteristics common to the systems utilized by Alaska and other states. These characteristics include, among others: vesting responsibility for screening the applicants and

[10] It should also be noted that the governors of Maine, Ohio, and Wisconsin utilize advisory panels for judicial nominations. Current Status, *supra*.

recommending well-qualified candidates in an independent, non-partisan or bi-partisan nominating commission (in Alaska, the Council); specifying that the nominating commission be composed of both lay people and lawyers; and requiring the governor to make an appointment from a list of nominees submitted by the commission.[11]

Alaska and ***fourteen*** other states have systems in which 1) the nominating commission includes attorney members who are not chosen through popular election or by a popularly elected government official and 2) the governor of the state must select a candidate nominated by the commission.[12] If this Court were to declare Alaska's system unconstitutional because of those two characteristics, it would, at a minimum, raise questions about the legitimacy of the fourteen other similar systems.

---

[11] In most of the thirty-two states with a merit-based selection process, the governor must select candidates nominated by the commission either from the initial list (Alaska, for example) or from an initial or second list if requested by the governor (New Mexico, for example). Alaska Const., art. IV, § 4; N.M. Const., art. VI, §§ 35, 36, 37. In a small number of states the governor is free to select candidates who were not nominated by the commission (Georgia, for example). Ga. Const., art. VI, § 7; Ga. Code § 15-7-23; Ga. Exec. Order No. 06.11.03.01 (June 11, 2003).

[12] This is also true of the merit-based judicial selection system in the District of Columbia, except that appointments are made by the President with Senate confirmation. *See* Addendum.

Table 1 below notes the fourteen states whose merit-based judicial selection systems have characteristics that resemble Alaska's and could be affected by the decision in this case. The table lists the state, the number of attorney members of the nominating commission, and how the attorney members are selected. For each state in Table 1, the governor must make a selection from the nominees of the commission.

Table 1

State	**Lawyer Members**	**Selection**
Alabama*[13]	*One* to *five* members of nominating commissions ranging in size from *five* to *nine* members.[14]	County bar member elections or nominations or selection by the state bar commissioner.
Alaska	*Four* of the *seven* members of the nominating commission.	State bar board of governors.
Hawaii	*Two* of the *nine* members of the nominating commission.	Elected by the state bar.
Indiana	*Three* of the *seven* members of the nominating commission.	Elected by the state bar.
Iowa	*Seven* of the *fifteen* members of the nominating commission.	Elected by the state bar.

[13] States with a "*" use a merit-based system to fill interim judicial vacancies. The judges selected under these systems are subject to their states' elective systems following the expiration of their initial terms.

[14] Eight counties in Alabama have chosen to use a nominating commission in filling interim judicial vacancies on their trial courts of general jurisdiction. In the 59 other counties in Alabama, the governor fills interim judicial vacancies through appointment without input from a nominating commission.

Kansas	*Five* of the *nine* members of the nominating commission.	Elected by the state bar.
Kentucky*	*Two* of the *seven* members of the nominating commission.	Elected by the state bar.
Missouri	*Three* of the *seven* members of the nominating commission.	Elected by the state bar.
Nebraska	*Four* of the *nine* members of the nominating commission.	Elected by the state bar.
Nevada*	*Three* of the *seven* members of the nominating commission.	Appointed by the bar board of governors.
New Mexico	*Four* of the *fourteen* members of the nominating commission.	Joint decision between the president of the state bar and the judicial members of the commission.
Oklahoma	*Six* of the *thirteen* members of the nominating commission.	Elected by the state bar.
South Dakota	*Three* of the *seven* members of the nominating commission.	Appointed by the president of the state bar.
Vermont	*Three* of the *eleven* members of the nominating commission.	Elected by state bar.
Wyoming	*Three* of the *seven* members of the nominating commission.	Elected by state bar.

As Table 1 illustrates, in most of these fourteen states, attorneys comprise a substantial minority or simple majority of the commission, and the most common method of selecting these attorney members is through state bar elections. *See* Addendum. The general public does not vote in these state bar elections. *See id*. Similarly, the general public does not participate directly in the selection of the bar

board of governors or other attorney member selection bodies used in some states. *See id*. Thus, Equal Protection-based claims like those put forward by the Appellants could also be asserted to challenge the systems in all of the states listed in Table 1. The Indiana and Missouri systems already have withstood similar challenges, and this Court should be mindful of the potential impact of its decision in this case on the twelve other states that are similar to Alaska that have not faced this type of challenge. *See African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997), *aff'd*, 133 F.3d 921 (8th Cir. 1998); *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996), *aff'd*, 154 F.3d 704 (7th Cir. 1998).

Two states in Table 1, Hawaii and Nevada, are within this Circuit and would be impacted directly by a decision of this Court because it would be controlling precedent. The arguments that Appellants have advanced here against Alaska's system could also be directed against the two attorney members of the Hawaii nominating commission and the three attorney members of the Nevada nominating commission and would, if successful, potentially mean that those members also had been chosen in violation of the Equal Protection Clause. In addition, Nevada voters will decide in the November 2010 election whether to expand their merit-based system to cover all judicial appointments, not just interim vacancies. S. J. Res. 2, 2009 Leg., 74th Sess. (Nev. 2009); S. J. Res. 9, 2009 Leg., 74th Sess. (Nev.

2009). If adopted, this change also potentially could be impacted by the decision in this case, as a result of the method Nevada uses to select attorney members of the nominating commission.

Alabama and Pennsylvania also have pending legislation related to merit-based selection. The proposed Alabama bill would create "judicial vacancy commissions" (i.e., judicial nominating commissions) in the counties that do not already have such commissions under the state constitution and create a commission to fill vacancies on the three appellate courts. H.R. 443, Reg. Sess. (Ala. 2010). Pennsylvania has pending legislation to create a merit-based judicial selection system that, like Alaska's, will include a nominating commission with at least some members who are neither elected by the public nor selected by an elected official and will require the governor to be bound by the recommendations of the nominating commission. *See* S. 860; S. 861 (Pa. 2009). A decision invalidating Alaska's system could potentially impact these proposed changes in Alabama and Pennsylvania.

In addition, as previously noted, a total of ***thirty-two*** states have adopted merit-based selection for all or some of their judges. Berkson, *supra*. Seventeen of these thirty-two merit-based states are not included in Table 1 because they do not share the two characteristics of Alaska's system that Appellants have focused on in this case. Nevertheless, determining that Alaska's system is unconstitutional

would also have indirect effects, at a minimum, on these ***seventeen*** states because the general validity of merit-based selection systems would be undermined. AJS respectfully asks that this Court be mindful of these broader implications when it makes its decision in this case.

D. Examples Of Merit-Based Approaches In The Federal System.

Merit-based approaches have been used in the federal judicial system for the past thirty years to assist in the selection of certain federal judicial officers. As a general matter, these approaches have utilized selection panels with lawyer members that are similar to the nominating commissions used in the various state systems. More specifically, some form of a merit selection panel is currently used in the process of appointing federal magistrate and bankruptcy judges and in identifying potential nominees for some Article III judgeships.

1. Federal Magistrate Judges.

Under the Federal Magistrates Act of 1968 ("the Act"), magistrate judges are appointed by a majority vote of the district court judges in the district. 28 U.S.C. § 631(a). Like the judges in Alaska, magistrates must be selected from a list of candidates nominated by a "merit selection panel" composed of "lawyers and community members." 28 U.S.C. § 631(b)(5); Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges ("Magistrate

Appointment Regulations") §§ 3.02(a), 3.02(c), 4.01.

The history of the Act is particularly instructive regarding the relationship between the use of merit-based panels and improved judicial quality. In 1979, Congress expressed concern about the "unfettered discretion" of district court judges in selecting magistrate judges and the resulting incompetence of some magistrates. H.R. CONF. REP. NO. 96-444, at 9 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1487, 1489-90; S. REP. NO. 96-74, at 9 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1477-78. To improve the quality of magistrate judges, the Act was amended to require that all magistrates be appointed using "merit selection panels." Federal Magistrate Act of 1979, Pub. L. No. 96-82 § 3(c)(2), 93 Stat. 643 (1979), *codified at* 28 U.S.C. § 631(b)(5); *see also* Magistrate Appointment Regulations § 4.01 (mandating that a magistrate judge be ultimately selected from a list prepared by the merit selection panel).

2. Federal Bankruptcy Judges.

Bankruptcy judges are appointed by a majority vote of the judges of the United States Court of Appeals for the Circuit where they serve. 28 U.S.C. § 152(a)(1). When selecting bankruptcy judges, each Circuit's Judicial Council assists the court by evaluating potential nominees and making recommendations. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 § 120(b) (1984), 98 Stat. 333, *appearing at* 28 U.S.C. § 152 note. Judicial

Conference Regulations permit Judicial Councils to appoint "merit selection panels" that, in turn, make recommendations to the Council. Regulations of the Judicial Conference for Selection and Appointment of Bankruptcy Judges § 3.02.

In crafting its bankruptcy appointment procedures, the Judicial Council of this Circuit has adopted more restrictive regulations and *requires* the establishment of "Local Merit Screening Committees." Judicial Council of the Ninth Circuit, Regulations Governing the Appointment of U.S. Bankruptcy Judges, § 3.01. Moreover, the Local Merit Screening Committee must be composed of three judges, the dean of a local law school, the president of the state bar association, and the president of a local bar association, or one of their designees. *Id*. § 3.02(a). Thus, as this Court knows through the actions and directives of the Circuit, merit-based selection of judges is critical to creating an impartial and independent judiciary. Moreover, this Circuit recognizes the importance of having attorneys and local leaders in the legal community as members of these screening committees and as a part of the selection process.

3. Article III Judges.

Article III judges are appointed by the President of the United States with the advice and consent of the Senate. In practice, however, the President frequently receives recommendations of potential nominees from United States Senators. American Judicature Society, *Federal Judicial Selection, Federal*

Judicial Nominating Commissions ("FJNC"), AMERICAN JUDICATURE SOCIETY (2009), *available at* http://www.judicialselection.us/ federal_judicial_selection. An increasing number of senators have voluntarily created selection panels to screen for well-qualified, knowledgeable, and experienced candidates. *Id*.

Senators in seventeen states currently use merit-based advisory committees for their recommendations to the President.[15] *Id*. A number of these committees are composed of attorneys or individuals nominated by the state bar. *See id*. For example, at least one member of the Hawaii Federal Judicial Selection Commission is always selected by the Hawaii State Bar Association Board of Directors. Hawaii Federal Judicial Selection Commission Charter, Sec. 2, 1(b), 2(b), 3(b), *available at* http://www.judicialselection.us/uploads/documents /HI_FJSC_ charter_ DFA1FE5BF22BE.pdf. Similarly, two members of Wisconsin's eleven-member commission are appointed by the State Bar, and one is the dean of a local law school. Wisconsin Federal Nominating Commission Charter, Sec. IV(a), (b)(2), (c)(3),(d)(3), *available at* http://www.judicialselection, us/uploads/ documents/WI_charter_D88C3BA6A5469.pdf. Finally, in Connecticut, Georgia, Illinois, and Massachusetts, the committees are composed of at least a majority of attorneys. FJNC.

[15] The states include California, Colorado, Connecticut, Florida, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Vermont, Washington, and Wisconsin. FJNC.

The widespread use of selection panels by various federal actors -- including Congress, the Judicial Conference, the Ninth Circuit Judicial Council, and many United States Senators -- demonstrates that merit selection panels with unelected attorney members are a well-established method for selecting qualified and independent judges and do not raise Constitutional concerns.

V. CONCLUSION

States have taken different approaches to the selection of their judges. Over time, they have changed their approach in light of both experience and evolving conceptions of the best way to select a qualified and independent judiciary. Because it was the forty-ninth state to enter the Union, Alaska received the benefit of other states' historical struggles and experience. Alaska voters made an informed decision about how they wanted to select their judges when they adopted their constitution. They chose a system that they believed would lead to the selection of high quality and independent candidates who were not tied to political parties or special interests. This system has proven to be effective and fair for more than fifty years.

Over half of the states have chosen to use some form of merit-based selection for choosing at least some members of their judiciary. Fourteen of these states share the two characteristics of Alaska's system that Appellants challenge, and a decision in this case in favor of the Appellants would call the legitimacy of

these systems into question. The other seventeen states that use a merit-based system could also be affected by a decision in this case in favor of the Appellants. Alaska's judicial selection system is not unconstitutional, and AJS respectfully urges this Court to take into account the considerations discussed in this brief when making its decision in this case.

Dated: March 5, 2010

Respectfully Submitted,

By /s/ Michael Maddigan
MICHAEL MADDIGAN
CHAD GEVING
TAMAR MALINEK
O'MELVENY & MYERS LLP
Amicus Curiae Counsel on Behalf of
American Judicature Society

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached *amicus curiae* brief uses a proportionally spaced, 14-point typeface, and consists of 5,767 words. This word count does not include the Corporate Disclosure Statement, Table of Contents, the Table of Authorities, this Certificate of Compliance, or the Certificate of Service. In preparing this certificate, I relied on the word count function of Microsoft Word 2003, used to prepare this brief.

DATED: March 5, 2010

MICHAEL MADDIGAN
CHAD GEVING
TAMAR MALINEK
O'MELVENY & MYERS LLP

By /s/ Michael Maddigan
Michael Maddigan
Counsel for American Judicature Society

9th Circuit Case Number(s) 09-35860

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 appellate CM/ECF system on (date) March 5, 2010 .

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.

Signature (use "s/" format) /s/ Michael Maddigan

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)