Docket No. 09-35860

In the

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 a Decision of the United States District Court for the District of Alaska (Anchorage), No. 09-CV-00136 · Honorable John W. Sedwick

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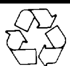

Corporate Disclosure Statement

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None.

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Jurisdictional Statement

This case involves a challenge to the constitutionality of Article IV, Sections 5 and 8 of the Alaska Constitution, and Sections 22.05.080, 22.07.070, 22.10.100, and 22.15.170 of the Alaska Statutes. The action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the Fourteenth Amendment to the Constitution of the United States. The District Court's subject matter jurisdiction in this case rests on 28 U.S.C. § 1331, because this is a civil action alleging that the challenged Alaska constitutional sections and statutes violate the Fourteenth Amendment of the U.S. Constitution. This Court has jurisdiction over this federal question under 28 U.S.C. § 1291 to review the District Court's final order granting the motion to dismiss of the members of the Alaska Judicial Council (collectively "the Council") and denying Michael Miller, Kenneth Kirk, and Carl Ekstrom's (collectively "the Voters") motion for preliminary injunction, which was consolidated with the hearing on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2), entered September 29, 2009, and disposing of all claims in this case. The Voters appealed as of right of that judgment, Fed. R. App. P. 4, filing their notice of appeal on September 28, 2009, Fed. R. App. P. 4(a)(2). The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded upon 28 U.S.C. § 1343(a). The jurisdiction over the

claims arising under the Fourteenth Amendment is founded upon 28 U.S.C. §§ 1331 and 1343(a).

Statement of the Issues

I. Whether the Voters' Challenges to the Provisions of the Alaska Constitution and Statutes State a Cause of Action.

II. Whether the Alaska Judicial Selection Plan Is Unconstitutional Facially and as Applied to the Voters.

Statement of the Case

On July 2, 2009, Kenneth Kirk and Carl Ekstrom filed their Complaint and Motion for Preliminary Injunction in the United States District Court for the District of Alaska alleging that their constitutional rights to equal protection were violated by Alaska Constitution Article IV, Sections 5 and 8, and as implemented by Alaska Statutes Sections 22.05.080, 22.07.070, 22.10.100, and 22.15.170. (ER 216-17, 229). Michael Miller was added as a plaintiff by means of the Amended Complaint filed on July 28, 2009. (ER 227). On July 24, 2009, the District Court granted the Voters' motion to consolidate the hearing on the preliminary injunc-tion with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). (ER 227). A motion to dismiss was filed by the Council on July 31, 2009. (ER 227). A hearing on these motions was held on September 11, 2009. (ER 165-205, 226). On

September 11, 2009, the District Court granted the Council's motion to dismiss for failure to state a claim and denied the Voters' consolidated motion for a preliminary injunction. (ER 204, 226). An opinion and order were issued by the District Court on September 15, 2009, and judgment was entered on September 29, 2009. (ER 1-24, 226). The Voters filed their notice of appeal on September 28, 2009. (ER 162-64, 226).

Statement of Facts

This case involves the system adopted by Alaska for the nomination and appointment of justices and judges to its courts. (ER 207, 209-11). The Alaska constitution establishes an entity called the Alaska Judicial Council as a part of the judicial branch of government. Alaska Const. art. IV, § 8. The public officials who make up this Council are entrusted with the power to determine who will be nominated to fill vacancies on Alaska's courts. *Id.* § 5. The governor must appoint one of nominees selected by Council to fill a vacancy. *Id.* Thus, the members of the Council determine the composition of the judiciary in Alaska.

In Alaska, a justice or judge may voluntarily retire at any time by filing a notice of that intention with the governor. Alaska Stat. § 22.25.010(d). Once such an impending vacancy is announced, the Alaska Judicial Council begins the process of seeking applications for the position. Alaska Judicial Council, Proce-

dures for Nominating Judicial Candidates I.A.1. (2007), *available at* http://www.ajc.state.ak.us/selection/Procedures/SelectionProcedures7-24-07.pdf; *see* Alaska Const. art. IV, § 8 ("The judicial council shall act . . . according to rules which it adopts."). After soliciting and reviewing applications, conducting interviews, and discussing the candidates, the Council meets to vote for the candidates who will be sent to the governor as nominees. *See* Procedures for Nominating Judicial Candidates. Any action of the Council requires the concurrence of four or more members. *See* Alaska Const. art. IV, § 8.

One of the persons nominated by a concurrence of the Council will be confirmed as a justice or judge in Alaska, because the governor must select one of these nominees for the vacant position. *See* Alaska Const. art. IV, § 5. The nominations cannot be rejected by the governor or the legislature of Alaska. (ER 210). The governor must appoint one of these nominees within 45 days of receiving the nominations. Alaska Stat. § 22.05.080(a). When an impending vacancy is created by an upcoming retirement, the Council may meet to select nominees and submit the nominations to the governor at any time within the 90-day period prior to the effective date of the vacancy. Alaska Stat. § 22.05.080(b).

The composition of the Judicial Council is set forth in the Alaska Constitution:

> 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.

Alaska Const. art. IV, § 8.

Therefore, the Alaska Bar Association ("Alaska Bar" or "Bar") exercises a controlling interest over the selection of justices and judges. (ER 209). The Alaska Bar is an instrumentality of the State created by statute. Alaska Stat. § 08.08.010. All attorneys licensed in the State of Alaska must be members of this association. *Id.* § 08.08.020. As provided for in Art. IV, § 8, three members of the Judicial Council, Defendants Cannon, Fitzgerald, and Menendez, are appointed to the Council by the Board of Governors of the Alaska Bar. Alaska Stat. § 08.08.020. These members are appointed by a majority consensus of the Board of Governors, without any confirmation by the legislature or the governor. *Id.*

The Board of Governors, in turn, is composed of twelve members. *See* Alaska Stat. § 08.08.040(b). Nine of these board members are elected exclusively by the attorneys in Alaska, while the remaining three are appointed by the gover-

nor. *Id.* §§ 08.08.040, 08.08.050(a). Thus, only members of the Alaska Bar, that is, the licenced attorneys in the state, may vote for a three-quarters supermajority of the body that in turn appoints three of the members of the Judicial Council. *Id.* Appellants Miller and Ekstrom are excluded from participating in this election because they are not members of the Alaska Bar Association. (ER 213). And at all times, a controlling majority of the members of the Council are members of the Bar. *See* Alaska Const. art. IV, § 8 (setting forth three attorney members appointed by the Bar and the Chief Justice).

The Alaska Judicial Council announced an impending vacancy on the Alaska supreme court on April 15, 2009 created by the retirement of Justice Robert L. Eastaugh, which became effective November 2, 2009. (ER 210). The Council began accepting applications to fill the position on April 15, 2009, which application period closed on May 28, 2009. (ER 210). The applications were then reviewed and the applicants investigated according to the procedures adopted by the Council. *See* Alaska Judicial Council, Procedures for Nominating Judicial Candidates (2007). The Voters sought to enjoin this process because it violated their right to equal participation in the selection of a public official. (ER 207, 216-17, 229). The District Court consolidated their motion for preliminary injunction with a hearing on the merits and dismissed the action before the vacancy was

filled. (ER 226-27). The Voters filed their notice of appeal in September 2009, but there was insufficient time to obtain relief from this Court before the vacancy was filled. (ER 226).

Summary of the Argument

In Alaska, the state judges are not the choice of or "appointed" by, the "great body of the people." The Federalist No. 39, at 209 (James Madison) (Clinton Rossiter ed., 1999). Instead, a favored class of citizens, based on education and occupation, has a disproportionate voice in choosing state judges, including the justices of the Alaska Supreme Court. Alaska Const. art. IV, § 5, 8. This discrimination is inconsistent with the basic concept of representative government and cannot be justified under the Equal Protection Clause. While the people as a whole have some say, a specific class constituting less than one percent of the citizens of Alaska is given a privileged say equal to that of all Alaska citizens combined. This privilege consists of a vote in which only attorneys may participate and all other citizens are excluded. The judicial branch of government is therefore derived from a favored class.

The Alaska constitution establishes the Alaska Judicial Council as part of the judicial branch of government. Alaska Const. art. IV, § 5, 8. This Council selects the justices and judges for Alaska's courts. Alaska currently has a popula-

tion of around 686,000 persons. U.S. Census Bureau, Alaska Quickfacts, http://quickfacts.census.gov/gfd/states/02000.html. The Alaska Bar Association indicates that it has approximately 2450 active resident members. Alaska Bar Association, Member Statistics, *at* www.alaskabar.org/servlet/content/member_statistics.html (last visited January 12, 2010). Of the population of Alaska, all citizens who are otherwise qualified to vote based on age and residency are permitted to vote for the governor of the state, who, in turn, selects three of the seven members of the Alaska Judicial Council. Alaska Const. art. III, § 3; art. IV, § 8. A fourth member sits *ex officio*. Alaska Const. art. IV, § 8. The remaining three members are selected exclusively by the 2450 members of the Alaska Bar Association through their Board of Governors. Alaska Const. art IV, § 8; Alaska Stat. § 08.08.040. Thus, the 2450 attorneys in Alaska have as much influence upon the makeup of the Alaska Judicial Council, and therefore upon who Alaska's judges are, as the 686,000 citizens of Alaska combined.

This arrangement is not in keeping with the commands of the Equal Protection Clause of the U.S. Constitution. In the process of selecting its judges, Alaska holds an election and excludes qualified citizens from participating based on occupation. (ER 210). Appellants Miller and Ekstrom, as qualified citizens of Alaska, are challenging the law that excludes them from participating in the

election of the Board of Governors because that entity appoints members of the Alaska Judicial Council. (ER 207, 213). Appellant Kirk has applied for past openings on Alaska's courts, and would apply in the future but for the fact that his application would be reviewed by an entity that does not reflect the will of the people of Alaska as a whole. (ER 207-08, 214).

When a state holds an election, any qualifications or classifications restricting who may participate in that election must be scrutinized under the Equal Protection Clause of the Fourteenth Amendment. This scrutiny is necessary to ensure that the state is not making arbitrary and invidious distinctions among its citizens. The Supreme Court has consistently held that only qualifications based on age, residence, and citizenship survive constitutional scrutiny. *Hill v. Stone*, 421 U.S. 289, 297 (1975). The only instance in which a qualification other than age, residence, or citizenship has survived scrutiny is where the outcome of the election disproportionately affects a specific group. In this instance, the election may be limited to that group.

The District Court decided below that the Equal Protection Clause is not implicated at all by the way Alaska selects its judges. (ER 19, 20, 22). Thus, the court did not subject the statute to any constitutional scrutiny, but simply determined that the system was exempt from being scrutinized under the U.S. Constitu-

tion. The court gave three reasons for this: first, this is an appointive system for selecting public officials (ER 22-23), and second, this is a system for selecting judges (ER 19-20). So according to the District Court, the Equal Protection Clause cannot be violated in a system for selecting public officials when the system uses appointment or is used to select judges, because equal protection simply "does not apply" in these circumstances. (ER 19, 20, 22). The District Court's third reason for dismissal was that equal protection "does not apply" to this system because it falls within the "limited purpose exception." (ER 20). Again, the court did not subject the system to scrutiny in determining this. The court then found that it was rational for the state to conclude that attorneys would be better qualified to select judges and have a privileged position in the system. (ER 21).

All three of these conclusions are erroneous and not in accord with Supreme Court Equal Protection jurisprudence and precedent. First, the commands of the Equal Protection Clause cannot be evaded simply by having a government official appointed rather than elected. If it would be unconstitutional to exclude citizens from participating in an election for a government official, it must also be unconstitutional for that official to be appointed by an entity selected by an election in which the same citizens are excluded. Second, while the Supreme Court has held that "one person, one vote" apportionment of voter districts does not apply to

judicial elections, there is no support for the idea that voter qualifications in judicial elections do not need to withstand close constitutional scrutiny. Finally, the Supreme Court has explained that the limited purpose exception is itself an application of strict scrutiny, rather than an exemption.

Argument

I. The Voters' Claims Are Not Moot.

The Voters filed their original action in the District Court on July 2, 2009, in anticipation of the vacancy opening on the Alaska Supreme Court on November 2, 2009. (ER 210, 229). The district court dismissed their claims on September 11, 2009, and judgment was entered on September 29, 2009. (ER 226). The Voters filed their notice of appeal with this court on September 28, 2009. (ER 226).

Despite the speed with which the case has been moved forward, there has been insufficient time for a final resolution of all appellate rights before the vacancy on the court was to be filled. On October 24, 2009, the Alaska Judicial Council forwarded the names of seven nominees to the governor. On December 2, 2009, the governor made his selection and filled the vacancy. Alaska Judicial Council, Alaska Supreme Court, *available at* www.ajc.state.ak.us/Selection/vacsp-rm092.htm.

Under Article III of the United States Constitution, federal courts have jurisdiction to hear "only actual, ongoing cases or controversies." *Lewis v. Continental Bank*, 494 U.S. 472, 477 (1990). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003). An exception to the ordinary rules governing mootness exists, however, for cases that are "capable of repetition yet evading review." *See Roe v. Wade*, 410 U.S. 113, 125 (1973). This exception applies when: (1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1992).

"Election cases often fall within [the capable of repetition yet evading review] exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter*, 319 F.3d at 490. This can clearly be seen from the procedural history of this case. The process for filling a vacancy on Alaska's courts follows a determined path, with much less than a year between announcement of the vacancy and final appointment of a replacement. Here, the vacancy was announced April 15, 2009, and filled on

December 2, 2009. The same time frame would almost certainly be true of any future challenges.

Every time there is a vacancy on Alaska's courts, a process of nomination and appointment will commence and Appellants Miller and Ekstrom will be excluded from parts of it because they are not members of the Alaska Bar Association. (ER 207-08, 213). Furthermore, Appellant Kirk has applied for a position on Alaska courts before and plans to do so in the future. (ER 208). Yet none of them can have their rights finally litigation in the matter of months that it takes to fill a vacancy. Therefore, the Voters satisfy the capable of repetition yet evading review exception and their claims here are not moot.

II. The System for Selection of the Judiciary in Alaska Violates the Equal Protection Clause.

A. Representative Government Requires That All Public Officials Be Chosen by the People as a Whole.

In a republic, all government power is derived from the people as a whole. The Federalist No. 39, at 209 (James Madison) (Clinton Rossiter ed., 1999). The powers exercised by each branch of the government, whether to make, execute, or interpret the law, must all come from the people who are subject to that law. And these powers must be derived from the people as a whole, with no group of people excluded or favored.

This is the essence of a republic. "It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it . . . . It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people." *Id.* Therefore, in order to be a republic, the power exercised by each branch of a government cannot be derived from a specific group. To ensure this, those who exercise government power, that is, government officials, must be selected, whether through election or appointment, by the people as a whole. *Id.* at 210 ("Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves."). And it is explicit in the United States Constitution, the Alaska Constitution, and the constitution of every state, that judges exercise government power. U.S. Const. art. III, § 1 ("The judicial power of the United States . . . ."); Alaska Const. art IV, § 1 ("The judicial power of the State . . . .").

This concept lies at the heart of the Supreme Court's jurisprudence regarding what the Equal Protection Clause of the Fourteenth Amendment requires in the selection of public officials. "Any unjustified discrimination in determining who may participate . . . in the selection of public officials undermines the legitimacy of representative government." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S.

621, 626 (1969). Giving a specific class of people a unique and exclusive voice in the selection of public officials is contrary to the basic concept of a republican form of government, which is essentially a representative government. *Little Thunder v. South Dakota*, 518 F.2d 1253, 1258 (8th Cir. 1975) ("Such unequal application of fundamental rights we find repugnant to the basic concept of representative government.").

B. The Equal Protection Clause Prohibits Arbitrary and Invidious Voter Qualifications.

1. The Fourteenth Amendment Protects the Right to Participate in an Election.

The Fourteenth Amendment to the United States Constitution provides that: "No State shall make or enforce any law which shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause guarantees qualified citizens the "right to vote in elections without having [their] vote wrongfully denied, debased or diluted." *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50, 52 (1970). This guarantee is not limited to the federal government, but "undeniably . . . protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

2. Voter Qualifications Are Subject to Strict Scrutiny.

The Court's jurisprudence regarding the denial of the right to vote was developed in a line of cases beginning with *Carrington v. Rash*, 380 U.S. 89, 98 (1965), with *Kramer* as the most prominent case. Under this doctrine, any classification restricting who may participate in an election other than by residence, age, or citizenship, violates the Equal Protection Clause unless the State can show that it is necessary to serve a compelling interest. *Hill*, 421 U.S. at 297. This scrutiny is necessary to ensure that the state is not making arbitrary or invidious distinctions among its citizens. *Avery v. Midland County*, 390 U.S. 474, 484 (1968) ("The Equal Protection Clause does not, of course, require that the State never distinguish between its citizens, but only that the distinctions that are made not be arbitrary or invidious.").

While the Supreme Court has approved basic residency, age, and citizenship requirements to vote, "[p]resumptively, when all citizens are affected [by an election], the Constitution does not permit . . . the exclusion of otherwise qualified citizens from the franchise." *City of Phoenix v. Kolodziejski,* 399 U.S. 204, 209 (1970). Accordingly, any qualification or classification restricting who may participate in an election must be subject to strict scrutiny under the Equal Protection Clause. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966)

("[C]lassifications which might invade or restrain [the right to vote] must be closely scrutinized and carefully confined."); *Kramer*, 395 U.S. at 626 ("No less rigid an examination is applicable to statutes denying the franchise to citizens who are otherwise qualified by residence and age."); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969) ("[I]f a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.") (quotation and citation omitted); *Evans v. Cornman*, 398 U.S. 419, 422 (1970) ("And before [the right to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny."); *Hill*, 421 U.S. at 297 ("[A]ny classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest."); *Mo. Protection and Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803, 808 (8th Cir. 2007) ("More recent decisions have given varying degrees of 'close constitutional scrutiny' to voter eligibility requirements under the Equal Protection Clause . . . ."). Therefore, the "general presumption of constitutionality afforded state statutes" is not applicable and the state must instead demonstrate that the law is narrowly tailored to a compelling state interest.

Kramer at 627 ("[D]eference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials.").

The Supreme Court has applied strict scrutiny to restrictions on who may participate in an election that affects public offices because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Id.* at 626. The citizens of a state are subject to the rulings of the justices and judges of that state, as well as to the laws as interpreted by those justices and judges. Strict scrutiny is therefore warranted because "unjustified discrimination in determining who may participate in political affairs [and] in the selection of public officials undermines the legitimacy of representative government." *Id.* Selectively giving a certain group of citizens more electoral influence and affording the franchise on a selective basis always poses "the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Id.* at 627.

Therefore, a state must demonstrate that the restriction of the franchise is narrowly tailored to achieve a compelling state interest. *Id.* at 626. To do so, the state must show that the group granted the franchise is disproportionately interested in and affected by the powers of the government officials, and that this

disproportion is substantial, such that there is a compelling reason to restrict the franchise to that group. *Cipriano*, 395 U.S. at 704; *Kolodziejski,* 399 U.S. at 209 (holding that the differences between the interest of the included group and the interests of all citizens must be "sufficiently substantial to justify excluding the latter from the franchise.") The included group cannot merely have a *different* interest in the powers of the given government office, rather, their interest must be substantially greater such that there is a compelling reason to limit the franchise to that group. *Kolodziejski*, 399 U.S. at 212 ("[A]lthough owners of real property have interests somewhat different from the interests of nonproperty owners in the issuance of general obligation bonds, there is no basis for concluding that nonproperty owners are substantially less interested in the issuance of these securities than are property owners."); *Hellebust v. Brownback*, 42 F.3d 1331, 1334 (10th Cir. 1994) ("Our focus is not whether some of the Board's activities deal exclusively with agriculture, but whether its powers transcend that ground and materially affect residents of Kansas who are not represented by the present method of Board selection.").

Then, in order to ensure that the restriction is narrowly tailored to achieve this compelling interest, the state must show that all other qualified citizens are not substantially interested in and significantly affected by the government powers

exercised by the officials and that those excluded from voting "are in fact substantially less interested or affected than those . . . included." *Cipriano*, 395 U.S. at 704. Otherwise, the state law is not narrowly tailored to meet the compelling government interest.

3. The Principles of *Kramer*.

In *Kramer*, the Supreme Court struck down a New York law that permitted only landowners (or lessees) and parents of school children to vote in school district elections. *Kramer*, 395 U.S. at 623. New York had argued that it had a legitimate interest in "restricting a voice in school matters to those 'directly affected' by such decisions." *Id.* at 631. The plaintiff-appellant, a resident of the school district, did not own property or have children enrolled in school and was thereby ineligible to vote in school district elections. He argued the law denied him his fundamental right to vote and that he was "substantially interested in and significantly affected" by the elections as "[a]ll members of the community have an interest in the quality and structure of public education . . . ." *Id.* at 630.

The Supreme Court agreed and held that the law failed strict scrutiny because, even if the State's asserted interest had been valid, the law was "not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to justify the denial of the franchise to [plaintiff-appellant] and

members of his class." *Id*. at 633. In short, because all residents were affected by the outcome of the elections, all residents were entitled to an equal voice.

Furthermore, the Court stated that the strict standard of review was not affected by the fact the school board did not have "'general' legislative powers." *Id*. The Court explained: "Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." *Id.* Equal protection is mandated whenever the office exercises normal functions of government that affect all citizens, such as the appointment of justices and judges.

4. Strict Scrutiny Applies Whether the Office Is Ultimately Filled Is by Appointment or Election.

Under the United States Constitution, state and federal offices are legitimately filled by means of elections or through appointments. *Kramer*, 395 U.S. at 629. But the electoral elements of an appointment system must preserve the right to vote. While the appointment of officials may cause the influence of each voter to be *indirect*, such a system remains constitutional so long as the official(s) making the appointment is "elected consistent with the commands of the Equal Protection Clause," thereby ensuring that each voter's influence is *equal* to that of other citizens. *Id.* at 627 n.7. Ultimately, each citizen must be given an equal voice

in the selection of all government officials, no matter how indirect that voice might be.

Otherwise, a state could simply avoid the commands of Equal Protection by appointing officials through entities rather than by electing the officials directly. Supreme Court precedent has established that, while a non-legislative government official need not be directly elected, the person or entity appointing that official must be elected "consistent with the commands of the Equal Protection Clause. *id.* at 629; *Sailors v. Bd. of Educ. of Kent County*, 387 U.S. 105, 111 (1967). For example, it would be unconstitutional for a state to exclude otherwise qualified citizens from voting in the election of a certain government official on the basis of occupation. *Gray v. Sanders*, 372 U.S. 368, 380 (1963). The state would not be able to avoid the constitution by having that official appointed by another official or entity who was chosen by means of an election that excluded voters on the basis of occupation.

Under the federal Constitution, justices and judges are appointed by the President and confirmed by the Senate. U.S. Const. art. II, § 2. But the President and Senators are selected through an election in which no qualified citizen's vote may be denied, debased, or diluted. U.S. Const. amend. XVII; *id.* art. II, § 1; *Hadley*, 397 U.S. at 52. Even if there were a further level of appointing power in

between, such as if the Constitution had established a committee appointed by the President and Senate, which then appointed justices and judges, if an election took place anywhere in the system that resulted in the selection of those judicial officials, who make up the third branch of government, that election must conform with the requirements of equal protection. The addition of layers to an appointment system does not change the Constitutional mandate that an election that ultimately results in the selection of government officials must comport with the Fourteenth Amendment. *Kramer*, 395 U.S. at 629 (finding that the fact that "the offices subject to election [could] have been filled through appointment" did not affect the Equal Protection analysis). "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause." *Id.*

C. Alaska Cannot Show That the Exclusion of Non-Attorneys from the Selection of Members of the Judicial Council Is Narrowly Tailored to a Compelling Government Interest.

The selection of judges in Alaska denies non-attorney Alaska citizens an equal vote in the selection of members of the Alaska Judicial Council. By permitting only members of the Alaska Bar Association to vote for a supermajority of the Board of Governors, which selects three members of the Council, non-attorneys have been denied equal participation in their representative government. Laws

"granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 627. That is precisely the effect of the way Alaska selects its judges. Alaska cannot demonstrate that this is a narrowly tailored means of achieving a compelling state interest.

1. The Alaska Judicial Council Affects All Alaskans.

The Alaska Judicial Selection Plan suffers from the same fundamental defects as the laws at issue in *Kramer*, *Carrington*, *Harper*, and *Hill*. The Plan denies these voters an equal voice in the selection of their state judiciary. All Alaska residents have a substantial interest in, and are significantly affected by, the composition of the Alaska judiciary. As the Supreme Court has stated, "state court judges possess the power to 'make' common law . . . [and] have immense power to shape the States' constitutions as well." *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002). Judges do not merely affect attorneys, but affect all Alaska residents.

The Alaska supreme court, for example, has the authority to interpret the Alaska constitution and statutes, which all citizens of Alaska are subject to. *Todd v. State*, 917 P.2d 674, 677 (Alaska 1996). The supreme court also is entrusted with the duty and power to ensure compliance with the Alaska constitution on the

part of the other branches of government, so that the court can strike down unconstitutional activities by the other branches. *State v. Murtagh*, 169 P.3d 602, 609 (Alaska 2007). Finally, the Alaska supreme court determines that rights and duties of Alaska's citizens under the constitution and laws of the State. *See State, Dept. of Military and Veterans Affairs v. Bowen*, 953 P.2d 888, 896 n.12 (Alaska 1998).

The Bar Board of Governors votes to select three members of the Council, which considers all applicants for judgeships and has the sole power to nominate applicants for a judicial vacancy. And the governor is required to choose for appointment one of the Council's nominees. The governor cannot appoint any person outside of the Council's nominees. So the Council does not *recommend* judges. Rather, it has exclusive authority to *nominate* judges.

Despite this important role served by the Board and the Council, only Bar members are permitted to vote for a three-quarters supermajority of the Board of Governors. Therefore, non-attorneys do not have an equal voice in determining who their state judges are. Just like in *Kramer* and related cases, the class excluded from voting (non-attorneys) are not "substantially less interested or affected than those the statute includes." *Cipriano*, 395 U.S. at 704. "Such unequal application of fundamental rights [is] repugnant to the basic concept of representa-

tive government." *Little Thunder*, 518 F.2d at 1258. Because the primary role of the Council is to decide who becomes a judge in Alaska, all qualified Alaska citizens have a substantial interest in and are materially affected by who is on that Council.

Furthermore, though the Board of Governors might serve some other purposes that relate only to Bar Association members, this fact does not free Alaska from the strict requirements of the Equal Protection Clause. From the perspective of the voter, "the harm from unequal treatment is the same in any election, regardless of the officials selected." *Hadley*, 397 U.S. at 55. As long as the Board of Governors is charged with selecting Council members, which affects all Alaskans, the election of Board members must comport with the requirements of the Fourteenth Amendment.

Since Alaska cannot show that attorneys are disproportionately interested in and affected by the operations of the Alaska Judicial Council, the State cannot show a compelling interest in reserving the selection of the three Attorney Members of the Council to members of the Bar. Furthermore, since Alaska cannot show that all qualified Alaska citizens are not substantially interested in and affected by the operations of the Council, which is entrusted with determining who the justices and judges are in Alaska, the State cannot show that the exclusion of all but Bar

members from voting in the election that determines the three Attorney Members of the Council is narrowly tailored to a compelling state interest.

2. Non-Attorneys' Voices Are Not Equal

Unlike in some states with similar systems of judicial selection, the method in Alaska does not provide for the direct election of Council members by Alaska Bar members. Rather, as noted above, the Board of Governors are directly elected by Bar members, and the Board then selects the Attorney Members of the Council. This structure does not affect the relevant constitutional analysis because "the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes." *Kramer*, 395 U.S. at 627 n.7. Therefore, the relevant question here is the effectiveness of an attorney's voice compared to that of a non-attorney's voice.

While the particularities of the selection system in Alaska might make attorneys' voices indirect, their influence remains unequal because it is substantially greater than the voices of non-attorneys. As *Kramer* explained:

> [I]f school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies through their votes for the mayor. Each resident's formal influence is perhaps indirect, but it is equal to that of other residents. However, when the school board positions are filled by election and some otherwise qualified city electors are precluded from voting, the

> excluded residents, when compared to the franchised residents, no longer have an effective voice in school affairs.

Id. (citation omitted). Stated differently, while *indirect* voter influence is permissible, *unequal* voter influence is not.

If members of the Council are to be appointed, the appointment must be done by an official who is "elected consistent with the commands of the Equal Protection Clause." *Id*. at 629. This ensures that while a voter's influence might be indirect, it remains equal. The election of the Board of Governors does not comply with the Equal Protection Clause because only attorneys are permitted to vote. *Id*. at 628 ("Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation."). Thus, on its face, the way Alaska selects judges suffers from the fundamental defect of unequal voter influence. Indeed, non-attorneys are excluded from having *any* effective voice, direct or indirect, in the selection of the three Attorney Members of the Council. As a result, non-attorneys are not fairly represented on the Council and are denied equal participation in the selection of the Alaska judiciary.

Therefore, it is irrelevant that Alaska lawyers elect Board of Governors members who select Council members, rather than attorneys directly electing

Council members. Both systems contain the fatal flaw of unequal voter influence. If Alaska is to permit attorneys to vote for the officials charged with appointing Council members, the election must be open to all qualified voters. Absent that, the elected Council members must be disqualified from participating.

D. The Selection of Council Members Does Not Qualify as a Limited Purpose Election.

1. The Franchise May Be Limited When the Government Entity Has a Special Limited Purpose and Disproportionately Affects a Specific Group.

In a narrow line of cases, the Supreme Court has recognized a "significant exception" where the selection of government officials can be restricted to a certain group of qualified citizens. *Ball v. James*, 451 U.S. 355, 360 (1981). An election may be restricted to a specific group of voters, while excluding other qualified citizens, when the official or government entity elected has a "special limited purpose" and its activities have a "disproportionate effect" on the specific group. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 727-28 (1973). The election of Board of Governors members and the selection of Council members does not fall under this exception.

The duties of certain government officials and entities may be "so far removed and so disproportionately affect different groups that a popular election

in compliance with [the Equal Protection Clause] might not be required." *Hadley*, 397 U.S. at 56. But this exception does not apply in situations where the official or entity exercises general government power and performs a vital government function. *Id.*; *Ball*, 451 U.S. at 366. To fall under this special limited purpose exception, the government entity, in this case the Alaska Judicial Council, must serve a peculiarly narrow function and the members of the Alaska Bar Association must be shown to have a special relationship with that function. *Id.* at 357.

A government entity has a narrow function that qualifies for the "special limited purpose" exception when it does not administer normal functions of government, has merely a nominal public character, and its duties are not a traditional element of governmental sovereignty such that it must answer to the people as a whole. *Id.* at 366-68. Thus, when the *entity* has a special limited purpose that only affects a certain group of citizens, then the *election* of that entity may be limited to those so disproportionately affected and interested. The aspect of the limited purpose of the government entity that justifies the restriction is "the disproportionate relationship the [entity's] functions bear to the specific class of people whom the system makes eligible to vote." *Id.* at 370. The question is "whether the effect of the entity's operations . . . [is] disproportionately greater than the effect on those seeking the vote." *Id.* at 371. Not only must the effect of

the Council's operations on the members of the Alaska Bar Association be disproportionately greater than upon the Appellants and all other qualified voters, *id.*, but the voters must be "in fact substantially less interested or affected" than the bar members, *Cipriano*, 395 U.S. at 704.

2. A Limited Purpose Election Is Valid in Only Exceptional Cases Surviving Strict Scrutiny.

The facts in this case involving the Alaska Judicial Selection Plan differ substantially and significantly from the cases where the Supreme Court has upheld a restriction of the vote to a certain group of citizens while excluding everyone else.

Salyer Land Co. v. Tulare Lake Basin Water Storage District upheld a law permitting only landowners to vote for the board of a water district because (a) the district's sole purpose was to acquire, store, and distribute water for farming in the district; (b) it provided no "general public" services; and (c) the district's "actions disproportionately affect[ed] landowners" as all of the costs for the district's projects were assessed against them. 410 U.S. at 728-29. Relevant here is how *Salyer* distinguished *Kramer*, *Cipriano*, and *Phoenix* by pointing out that in those cases the limited group permitted to vote was *not* disproportionally affected by the outcome of the election. *Id*. at 726-29. Thus, under *Salyer*, when the functions and

powers of the government entity are so far removed from normal government and so disproportionately affect a specific group, a popular election might not be required.

Similarly, *Ball v. James* upheld an Arizona law that limited the right to vote in board elections for a power district to only landowners. 451 U.S. at 355-56. Furthermore, the law accorded weight to each vote in proportion to the amount of land owned by the eligible voter. *Id.* The Court stated the issue as whether "the peculiarly narrow function of this local governmental body and the special relationship of one class of citizens to that body releases it from the strict demands of the one-person, one vote principle of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 357. The Court found in the affirmative, as the district was "essentially [a] business enterprise[], created by and chiefly benefit-ting a specific group of landowners." *Id.* at 368.

Thus, under *Ball*, a restricted election is constitutional when the government entity or office has a peculiarly narrow function and has a special relationship with those allowed to vote. In finding that the facts before it satisfied these require-ments, the Court in *Ball* rested its conclusion on the following premises: (a) the district had only a "nominal public character," *id*. at 368, (b) "the provision of electricity is not a traditional element of governmental sovereignty," *id*., and (c)

the district had a "disproportionate relationship . . . to the specific class of people whom the system ma[de] eligible to vote," *id.* at 370.

3. The Selection of Members of the Alaska Judicial Council Does Not Qualify as a Limited Purpose.

Here, Alaska cannot show that the functions of the Alaska Judicial Council are "so far removed" from the normal functions of government and serve such a "peculiarly narrow function" to satisfy the exception to the demands of the Equal Protection Clause. The Members of the Alaska Judicial Council are given the power to select nominees to fill vacant positions on Alaska's courts, including the supreme court. The governor must select one of the nominees, so that the Council decides who will sit in justice over the citizens of Alaska. The nomination of justices and judges is a traditional function of government. The Alaska Judicial Council has the power and duty to determine the composition of the third branch of government in the State of Alaska. *See* Alaska Const. art. IV, § 5, 8. The Council does not have a "nominal" public character and the nomination and appointment justices and judges is a traditional governmental function.

Furthermore, Alaska cannot show that the functions of the Council "so disproportionately affect" the members of the Alaska Bar so that they have a "special relationship" with the Council to satisfy the requirements of the limited

purpose exception. While the members of the Alaska Bar Association may have *different* interests in who the justices and judges are in Alaska, this interest is not substantially *greater* than the interest of all citizens of Alaska. *See Kolodziejski*, 399 U.S. at 212. The Voters are subject to the jurisdiction and decisions of the justices and judges of Alaska's courts. The Voters are subject to the laws and constitution of the State of Alaska, which is interpreted and applied by the justices and judges of Alaska's courts. They are legitimately interested in the composition of the third branch of their own government. The selection and nomination of justices and judges substantially affects all of Alaska's citizens.

Therefore, the narrow Equal Protection exception described in *Salyer* and *Ball* has no application to the selection of members of the Alaska Judicial Council, which is instead governed by the strict Equal Protection review mandated by *Kramer*.

III. The District Court Erred in Dismissing the Voters' Claim.

A. The District Court Applied the Wrong Law.

The District Court's entire rationale rests on the notion that the "one person, one vote" principle does not apply to this case, and that therefore there is no claim under the Equal Protection Clause. (ER 12). But the conclusion does not follow from the premise. All of the commands of the Equal Protection Clause are not

encompassed in the “one person, one vote” principle. “One person, one vote” is simply the application of Equal Protection analysis to the apportionment of voting districts. If the Equal Protection Clause is implicated by Alaska’s system for selecting its judiciary, it is apparent that the system cannot survive strict scrutiny, which neither the State nor the District Court even attempted to show. The District Court’s fundamental error is it’s adoption of the flawed understanding of the “one person, one vote” principle advanced by the Defendants that forms the basis of their contention. (ER 10, 12).

The “one person, one vote” principle is simply one of the many applications of the Equal Protection Clause by the Supreme Court to state action. The Equal Protection Clause had been applied to statutes restricting the right to vote in many other situations. The “one person, one vote” principle is simply the Court’s application of the commands of equal protection to the situation of unequal geographic apportionment of districts. The assertion that this single principle does not apply the appointment of public officials or the selection of the judiciary does not mean that the entire Equal Protection Clause is irrelevant.

The Supreme Court has formulated two distinct principles in two distinct lines of cases applying the commands of equal protection to different aspects of the selection of government officials. One line of cases treats the constitutionality

of "voter qualifications." *Carrington*, 380 U.S. at 98 (Harlan, J., dissenting). In these cases, the Supreme Court developed the principle that classifications "restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the . . . State can demonstrate that the classification serves a compelling state interest." *Hill*, 421 U.S. at 297. The landmark case in this line is *Kramer* and "the principles of *Kramer* apply to classifications limiting eligibility among registered voters." *Id.* at 297-98 (tracing the development of "the principles of *Kramer*" and listing the cases in the *Kramer* line); *see also Mo. Protection and Advocacy Services, Inc.*, 499 F.3d at 807-08 (tracing the law on "voter eligibility requirements" and listing the controlling cases). As a result of this principle, all voter qualifications other than age, residency, or citizenship have been found to be unconstitutional. *See, e.g.*, *Carrington*, 380 U.S. at 96 (exclusion of residents in the military); *Harper*, 383 U.S. at 668 (poll tax invalid); *Kramer*, 395 U.S. at 632-33 (landowning requirement).

The other line of cases concerns the constitutionality of the apportionment of voter districts. In these "reapportionment cases," the Supreme Court formulated the "one person, one vote" principle establishing the "reapportionment doctrine." *Bd. of Estimate v. Morris*, 489 U.S. 688, 691-92 (1989) (tracing the development of the "reapportionment doctrine" and listing the cases in the *Reynolds* line).

According to this doctrine, "[e]lectoral systems should strive to make each citizen's portion equal." *Id.* at 693. As a result, the Supreme Court has insisted that all state and local elections for legislative entities be "subject to the general rule of population equality between electoral districts." *Id.* at 692-93. The objective of the "one person, one vote" principle is thus to "insure, as far as is practicable, that equal numbers of voters can vote for proportionately equal numbers of officials." *Hadley*, 397 U.S. at 56.

Thus, the Supreme Court has subjected both state voter eligibility statutes and state apportionment statutes to close scrutiny under the Equal Protection Clause. But while both lines of cases involve the Equal Protection Clause and voting, they are distinct applications and analyses. Indeed, the lines of cases seldom cite each other, except for general introductions to the Equal Protection Clause as it applies to voting rights.

The District Court below erred from the outset when it applied the incorrect jurisprudence and precedent to this case. (ER 13-19). This case is about a voter eligibility restriction and not about geographic apportionment of voting districts. (ER 211-12). And yet, the District Court barely cited or explained the *Kramer* line of cases, and did not apply its reasoning or principles. (ER 14-16). Instead, the court considered *Kramer* to be an application of the *Reynolds* "one person, one

vote" principle and completely ignored the fact that there are two lines of cases and two distinct analyses set forth by the Supreme Court. (ER 14-15); *see Carrington*, 380 U.S. at 98 (Harlan, J., dissenting) ("The reapportionment cases do not require this extension. They were concerned with methods of constituting state legislatures; this case involves state voter qualifications. The Court is quite right in not even citing them."); *Kramer*, 395 U.S. at 626 ("Thus, state apportionment statutes, which may dilute the effectiveness of some citizens' votes, receive close scrutiny . . . . No less rigid an examination is applicable to statutes denying the franchise . . . .").[1] This error was fatal here, as the "one person, one vote" principle, which was never suggested or relied upon by the voters below and is never mentioned in the line of voter eligibility cases, obviously has no application in this case as no claim has been made alleging unequal electoral district apportionment.

Alaska argues that "the 14th Amendment . . . [has] no application to the judicial selection processes . . . to positions that are filled by appointment rather

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[1]A matter of terminology needs be addressed here. In *Salyer*, the Court's opinion employs the term "one person, one vote" to encompass the Equal Protection Clause's protection against *both* vote dilution, i.e. apportionment, *and* vote denial, i.e. voter classifications. This is the only instance in which the Court has done so. In all other instances, for example, the phrase "one person, one vote" does not appear in cases discussing voter eligibility qualifications, but only in cases discussing apportionment. *Salyer* itself dealt with both a voter qualification and an apportionment of voting weight, which may explain the use of "one person, one vote" as a catch-all phrase.

than election, . . . [and to] procedures that are used to fill positions for limited purpose entities . . . ." (ER 192). This is the foundation and essence of the State's defense, which was adopted by the District Court. (ER 19). According to the State and the District Court, the Fourteenth Amendment is simply irrelevant to the arrangement challenged in this case so that the system is immune to scrutiny or challenge under that part of the Constitution. (ER 22). Because the system is used to select judges, uses appointments, and is for a limited purpose, the District Court found that it is impossible for the Fourteenth Amendment to be violated here. Supreme Court precedent supports none of these conclusions. In fact, it flatly contradicts them.

B. The Equal Protection Clause Applies to All Systems for Selecting Public Officials.

The overall nature of the selection process does not determine whether the Equal Protection Clause is implicated. *Kramer*, 395 U.S. at 629-30. The Equal Protection Clause is implicated by a state election, *Kramer*, 395 U.S. at 629; *Sailors*, 387 U.S. at 111, and there is an election here in which "some resident citizens are permitted to participate and some are not." *Kramer*, 395 U.S. at 629. When a state creates an appointive process, the Equal Protection Clause is relevant to how those who make the appointments were selected. *Id.* The fact that the

Fourteenth Amendment does not require the election of non-legislative officials does not foreclose this challenge to an appointive system.

The ultimate question in this case is whether, in attempting to utilize the unique knowledge of the resident members of the Bar in the process of appointing judges, Alaska may incorporate an election in which only bar members may participate and all non-attorney citizens are excluded. The Supreme Court, in an established line of cases, has held that "as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest." *Hill*, 421 U.S. at 297. Alaska excludes all otherwise qualified citizens from participating in the incorporated election based upon occupation. Such an exclusion cannot withstand constitutional scrutiny. *Gray*, 372 U.S. at 380 ("There is no indication in the Constitution that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State.").

Sailors v. Board of Education of Kent County, is instructive as to why Equal Protection is implicated here and was not in that case. In *Sailors*, the plaintiffs challenged a system for appointing members of a county school board. 387 U.S. at 106-07. (1) These members were appointed by delegates chosen by the local

district school boards. *Id.* (2) Each local board appointed one delegate, regardless of the population of that local district. *Id.* (3) The members of the local board were elected by all qualified residents of the district, with no otherwise qualified voter being excluded. *Id.* Equal Protection was not implicated because there was no constitutional flaw in the underlying election. *Id.* at 111. The Court indicated that Equal Protection scrutiny would be called for if there had been unjustified apportionment or classification in that underlying election. *Id.* Furthermore, the election for the local school board could not have qualified as a "special purpose" election. *Kramer*, 395 U.S. at 632).

Here, the Voters are challenging the system for appointing members of the Alaska's courts. (1) These justices are appointed by the seven-member Council. (2) The governor appoints three Council members and the Board of Governors appoints three, the remaining member sitting *ex officio*. (3) The governor is elected by all resident citizens of Alaska, without exclusion, and the Board of Governors is elected exclusively by the members of the bar. Equal Protection is implicated here because some otherwise qualified Alaska citizens are excluded from this underlying election based upon occupation.

Furthermore, *Kramer* involved the direct election of a local school board and the Supreme Court held that the state could not exclude citizens who were

otherwise qualified by residency and age from participating. In *Kramer* considered it irrelevant for purposes of scrutiny that the board could have been appointed, *Kramer*, 395 U.S. at 628-29. The Supreme Court's analysis would have been unchanged had the board been appointed by an entity that was chosen through an election in which some resident citizens were permitted to participate and others were not. *Id.* at 629. In fact, the Court explicitly anticipated such a situation:

> For example, a city charter might well provide that the elected city council appoint a mayor who would have broad administrative powers. *Assuming the council were elected consistent with the commands of the Equal Protection Clause*, the delegation of power to the mayor would not call for this Court's exacting review.

Id. (emphasis added). If the entity doing the appointing is not itself elected consistent with Equal Protection, then the court must determine whether the system is "necessary to promote a compelling state interest." *Id.* at 627.

The Court in *Kramer* further noted that the system would not violate Equal Protection if the school board members were appointed, *because* all qualified voters are permitted to vote for the appointing official. *Id.* at 627 n.7 ("[I]f school board members are appointed . . . [e]ach resident's formal influence is perhaps indirect, but it is equal to that of other residents.") Therefore, these cases expressly apply in instances where the state uses appointment instead of direct election. Such is the arrangement in the selection of judges in Alaska, so that the State must

show that the appointment of the Attorney Members of the Alaska Judicial Council by the Board of Governors, when all non-attorneys are excluded from the election of the Board of Governors, passes strict scrutiny.

This does not mean that all qualified Alaska voters must be permitted to participate in the election for the members of the Board of Governors of the Alaska Bar Association. Rather, the constitutional infirmity lies in that the Members of the Judicial Council, who do exercise general government functions (determining the composition of the judiciary), are appointed by an entity that is selected through an election in which otherwise qualified voters are excluded based on occupation.

A hypothetical based on the relevant authorities is illustrative. In *Kramer*, only qualified voters who also either owned real property in the district or had children enrolled in the local public schools were permitted to participate in the election for district school board members. *Kramer*, 395 U.S. at 622. The Supreme Court held that this exclusion warranted close scrutiny under the Equal Protection Clause and was unconstitutional because it excluded otherwise qualified voters from participating in an election in which they had an interest. *Id.* at 626-27. What if, instead of limiting the franchise to land-owners and parents, the state in *Kramer* had established that the school board would be appointed by the governing body

of a homeowners association to which all land-owners in the district belonged and that satisfied the requirements for the "special purpose" entity as established in *Salyer* and *Ball*? The State could not circumvent the commands of the Equal Protection Clause by delegating authority to other entities in this manner. *Sailors*, 387 U.S. at 108 & n.5.

C. The Equal Protection Clause Applies to Systems for Selecting Judges.

The Supreme Court's summary affirmation of the *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *summarily aff'd*, 409 U.S. 1095 (1973), decision does not mean that the entire conception of political equality summed up in Equal Protection Clause has no relevancy to the selection of the judiciary. Rather, it simply means that malapportionment in judicial election districts is not a violation of the Fourteenth Amendment. In other words, the "one person, one vote" principle, which governs the apportionment of voting districts, does not apply to judicial elections. It does not follow that the other guarantees of the Equal Protection Clause, such as the "principles of *Kramer*," *Hill*, 421 U.S. at 297, are irrelevant to the selection of a state's judiciary.

Wells simply held that when a state holds elections for judges, it does not need to ensure that "equal numbers of voters can vote for proportionately equal numbers of [judges]." *Hadley*, 397 U.S. at 56. This holding does not mean that a

state may establish qualifications other than residency, age, and citizenship for participation in judicial elections. If this were otherwise, it would lead to the absurd result that a state could exclude citizens from judicial elections based upon occupation, impose a poll tax, or any other factor they deem reasonable.

If, as the District Court maintained, the State does not mean to argue that all applications of the Equal Protection Clause are not relevant to the selection of the judiciary, it gave absolutely no indication of what the State does mean. (ER 176, 192). *Wells* can only mean that malapportionment in judicial election districts is not a violation of the Fourteenth Amendment. If that is the case, then this premise has absolutely no relevance to the dismissal of this case, because no where have the Voters alleged that there is any malapportionment problem in the way Alaska selects its judges. The Voters contend that there are other violations of the Equal Protection Clause, but malapportinment is not one of them. There is abundant authority for the premise that the Equal Protection Clause can be violated in other ways than through malapportionment.

Defendants offer no other authority or rationale that would limit the inapplicability of the one person, one vote principle. Therefore, they offer no authority in support of their argument that the exclusion of otherwise qualified voters here is not a violation of the Fourteenth Amendment. The idea that the Equal Protection

Clause, in all its applications, is entirely inapplicable to the selection of the judiciary is without any support. Supreme Court precedent has only declared that geographic population apportionment is not mandated in judicial elections by the Equal Protection Clause. *See Wells*, 409 U.S. at 1095. The Court has said absolutely nothing to indicate that any other application of Equal Protection is inapplicable to the selection of the judiciary.

According to the District Court, the Supreme Court has held "broadly and categorically, that the 'one person, one vote' principle does not apply" to the selection of the judiciary. (ER 19). This finding has no bearing on this case because this case does not deal with a malapportionment challenge. And there is no support for the idea that the holding in *Wells* also means that the principles governing voter eligibility classifications are also inapplicable in judicial elections. The Voters here are alleging that their exclusion from an election involved in the judicial selection process is a violation of their rights under the Equal Protection Clause. A voter eligibility qualification violates the Equal Protection Clause when it is "arbitrary or invidious." *Avery*, 390 U.S. at 484.

The Supreme Court affirmation of the *Wells* decision does not support the District Court's result here. Rather, the concept of "one person, one vote" is an application of equal protection scrutiny in the geographical apportionment context.

The reasoning in *Wells* is explicitly limited to the concept of apportionment with respect to judicial elections: "The 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." *Wells*, 347 F. Supp. at 455. Given that there is not a body of judges and they do not represent the people, the Court has affirmed the conclusion that strict "one person, one vote" apportionment is not required by equal protection for their selection.

But it does not follow from this holding that all voter qualifications, or any other law that affects the right to vote, are immune to challenge under the Fourteenth Amendment. The District Court has provided no authority for the conclusion that a voter qualification based on occupation should not be subject to Equal Protection Scrutiny because the election is for a judge. If the District Court were correct, then a state could establish that an otherwise qualified voter must also be an attorney in order to participate in a judicial election.

The District Court also erred in finding that, in order to prevail, the Voters must show "invidious action" or an "arbitrary or capricious" distinction by the State. (ER 20). First, this would only be required if the challenge alleged that geographical apportionment violated the Equal Protection Clause. Because the "one person, one vote" apportionment principle does not apply to the judiciary, in

order to prevail on an unconstitutional apportionment claim, a plaintiff must show that the drawing of the district was arbitrary, capricious, or invidious. An example would be an arrangement of judicial voting districts in which the votes of minorities weighed less than other voters.

Second, even using this standard, which arose in the apportionment context, the Alaska system should undergo equal protection scrutiny. Whether a distinction is arbitrary, capricious, or invidious is the standard for all equal protection challenges. "The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious." *Avery*, 390 U.S. at 484. It is not a unique standard established by *Wells*. The Supreme Court has found that "any classification . . . other than residence, age, and citizenship" is arbitrary, capricious, and invidious. *See Hill*, 421 U.S. at 297. In fact, the Supreme Court has explicitly and repeatedly found that distinction among voters based upon occupation is arbitrary, capricious, and invidious. *Carrington*, 380 U.S. at 96 ("[T]here is no indication in the Constitution that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State.") (quoting *Gray*, 372 U.S. at 380) (quotation marks omitted); *Harper*, 383 U.S. at 666 ("Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States

from fixing voter qualifications which invidiously discriminate.”). The Voters have properly alleged that Alaska has violated the Equal Protection Clause by restricting an election on an impermissible basis.

D. The Limited Purpose Analysis Is an Application of Equal Protection Scrutiny.

The Supreme Court has previously rejected the District Court’s application of *Salyer* and *Ball*. “This ruling reflects a significant misreading of our precedents, and accordingly, we reverse.” *Quinn v. Millsap*, 491 U.S. 95, 96 (1989). In *Quinn*, the Missouri Supreme Court had dismissed the claims on the basis that “the Equal Protection Clause ha[d] no relevancy” to the case, the very same basis on which the District Court here rejected this challenge to Alaska’s system. *Id.*; R. 19). The lower court in *Quinn* misapplied the *Salyer/Ball* exception, thinking that it creates an exception whereby the Equal Protection Clause is simply not applied. But this is not the correct understanding, as the Supreme Court explained. *Salyer/Ball is* an application of strict scrutiny under the Equal Protection Clause. “On the contrary, the Court expressly applied equal protection analysis and concluded that the voting qualifications at issue passed constitutional scrutiny.” *Quinn*, 491 U.S. at 105.

To meet the *Salyer/Ball* exception, which *Kramer* contemplated, the exclusion of otherwise qualified voters must be necessary to achieve a compelling state interest. *Id.* To be thus narrowly tailored, the excluded voters must in fact be substantially less interested or affected than the class who are included. *Kramer*, 395 U.S. at 632; *Kolodziejski*, 399 U.S. at 212. The compelling interest involved is that the included group is so disproportionately affected by the powers exercised by the entity, and these powers are so far removed from ordinary functions of government, that the state has a compelling interest in so limiting the franchise. *Quinn*, 491 U.S. at 105.

The Court in *Kramer* found that, even if there was a compelling interest because of the unique interest that the included group might have, the restriction was not narrowly tailored. Narrow tailoring depends "on whether all those excluded are in fact substantially less interested or affected that those" included by the restriction. *Kramer*, 395 U.S. at 632. The statute failed in *Kramer* because it permitted inclusion of many who had a remote and indirect interest while excluding others who had a "distinct and direct" interest. Similarly, the restriction of selection of the Attorney Members of the Board of Governors to the members of the Alaska Bar is both underinclusive and overinclusive. The practices of many lawyers does not involve any litigation, so that they will go their entire careers

without appearing before a judge, let alone on a day to day basis. On the other hand, many non-attorneys are frequently involved in litigation and are before judges often.

After the scheme has survived this application of strict scrutiny, the court should then apply rational basis scrutiny to determine that there is a sufficient relationship between the entity and the favored group. *Salyer* and *Ball* do not "stand for the proposition that the Equal Protection Clause is inapplicable 'when the . . . unit of government in question [has no] general governmental powers." *Quinn*, 491 U.S. at 105. The District Court here erred and should have applied strict equal protection scrutiny.

E. The Principles of *Kramer* Restrict Voter Eligibility Statutes.

There is no question that a state has the power to impose reasonable restrictions upon who may participate in an election. *Pope v. Williams*, 193 U.S. 621 (1904) (upholding residency requirement). The privilege of voting in the election of a state government official is within the jurisdiction of the state "provided, of course, no discrimination is made between individuals, in violation of the federal Constitution." *Id.* at 632. Thus, the Equal Protection Clause "restrains the States from fixing voter qualifications which invidiously discriminate." *Harper*, 383 U.S. at 666. Through the line of cases considering the constitutionality of voter qualifi-

cations, *see Hill*, 421 U.S. at 290, the Supreme Court has determined that all classifications "other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack," *id.* at 291. In other words, all restrictions on who may participate in an election other than residence, age, and citizenship are invidious and arbitrary unless they are found to pass strict scrutiny.

There are situations, however, in which a state may constitutionally restrict an election to a specific group of people. But the state must show that such a restricted election is necessary to achieve a compelling state interest. *Cipriano*, 395 U.S. at 704 ("If a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.") (internal quotation omitted). It is not enough that it is reasonable or convenient to restrict an election to a certain classification of voters. *Carrington*, 380 U.S. at 96 ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."); *Quinn*, 491 U.S. at 105 ("On the contrary, the Court expressly applied equal protection analysis and concluded that the voting qualifications at issue passed constitutional scrutiny."). Thus, the voters here do not contest that it may be permissible for the

state of Alaska to exclude ordinary voters in the process of selecting certain public officials. But they do insist that this scheme must invariably be subjected to strict equal protection scrutiny according to well-established Supreme Court precedent, which the District Court did not even attempt to do here.

F. Other District Court Decisions Do Not Support Dismissal.

The two older district court cases relied upon by the District Court do not support dismissal of this challenge. Indeed, those district courts themselves considered the cases relied upon by Plaintiffs here to be the controlling authority, however erroneous their application of that precedent. *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105, 1128 (E.D. Mo. 1997) ("*AAVRLDF*") ("[I]f an election of general interest . . . were at issue, plaintiffs' statement of the law could not be faulted.") (citing *Kramer*, 395 U.S. at 627 and *Ball*, 451 U.S. at 361-62); *Bradley v. Work*, 916 F. Supp. 1446, 1455-59 (S.D. Ind. 1996) (citing and quoting *Kramer*, *Hadley*, *Reynolds*, *Salyer*, and *Ball* as the controlling and applicable precedents governing the outcome of the Equal Protection claims presented).

The courts in *AAVRLDF* and *Bradley* made two fundamental errors in the application of the relevant law. The first was the determination of when an election calls for close or exacting scrutiny under the Equal Protection Clause. In

Bradley, the court determined that Equal Protection scrutiny was not implicated because the state had decided not to make use of a "popular election." *Bradley*, 916 F. Supp. at 1456. According to the court, the election was not "popular" because it was not open it to all qualified voters. Thus, under *Bradley*, an election does *not* implicate the Equal Protection Clause *unless* it is "one in which all registered voters meeting the age and residency requirements may vote." *Id.* Therefore, according to *Bradley*, the Equal Protection Clause is never implicated when an election is restricted to a certain group of qualified voters.

Kramer and subsequent Supreme Court precedents contradict this conclusion. The Supreme Court in *Kramer* found that "close scrutiny" is required particularly when an election is not opened to all otherwise qualified voters:

> No less rigid an examination is applicable to statutes denying the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, 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.

Kramer, 395 U.S. at 626-27 (citations omitted). Subsequent Supreme Court decisions have reinforced this principle. *Cipriano*, 395 U.S. at 704; *Kolodziejski*, 399 U.S. at 204; *Hill*, 421 U.S. at 297. The court in *Bradley* agreed with the

defendants in that case that the commission members "are not selected by popular election and about the nature of the Commission." *Bradley*, 916 F. Supp. at 1456. But it is the nature of the elected entity that determines whether a popular election is required.

The court in *AAVRLDF* made the same error when it concluded, citing *Kramer* but without giving any reasoning, that the election involved in that case was not one of "general interest (such as election for a legislator)" and therefore did not implicate Equal Protection. *AAVRLDF*, 994 F. Supp. at 1128. But an election does not have to be for a legislator in order to be of "general interest" and implicate close scrutiny under the Equal Protection Clause. In fact, according to the court in *AAVRLDF*, *Kramer*, *Cipriano*, *Kolodziejski*, and other similar Supreme Court cases were all wrongly decided and should not have employed exacting review because none dealt with elections for officials or entities that exercised legislative power. *Hadley*, 397 U.S. at 51; *Kramer*, 395 U.S. at 622 ("[T]he deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators *and other public officials*.") (emphasis added); *Cipriano*, 395 U.S. at 702; *Kolodziejski*, 399 U.S. at 205; *Salyer*, 410 U.S. at 720; *Hill*, 421 U.S. at 291; *Ball*, 451 U.S. at 357.

Contrary to *AAVRLDF* and *Bradley*, the Equal Protection Clause is implicated when certain otherwise qualified voters are excluded from an election unless the "special interest" exception is met. An election does not become one of "special interest" *because* the state is excluding citizens from participating. Rather, *if* the state is excluding citizens from voting in an election, it must either show that the exclusion is necessary to serve a compelling interest or that the election is one of "special interest" such that it need not be open to all qualified voters. *E.g. Hill*, 421 U.S. at 297. Here, Alaska excludes otherwise qualified citizens from voting in an election for the members of a state entity with power to appoint members of the Alaska Judicial Council based upon occupation. *Contra Gray*, 372 U.S. at 380. The State must show that this system survives strict or close scrutiny. *Quinn*, 491 U.S. at 105. This case should not have been dismissed for failure to state a claim.

The courts in *AAVRLDF* and *Bradley* also misapplied the "special purpose" exception analysis from *Salyer* and *Ball* in determining that the respective nominating commissions qualified for restricted elections. The court in *Bradley* determined that the nominating commission at issue satisfied the "special purpose" exception. The court utilized the standard that "[w]hen a special unit of government is assigned certain narrow functions, affecting a definable group of constitu-

ents more than other constituents, limiting the franchise to members of that definable group is proper." *Bradley*, 916 F. Supp. at 1456. The court further explained that when an entity's "purpose is narrow and limited, and a special relationship exists between its functions and one class of citizens" there can be exception to the requirements of *Reynolds* and *Kramer*. *Id.* The court in *AAVRLDF* made the same error when it determined, without analysis, that the nominating commission at issue there was a "special unit with narrow functions." *AAVRLDF*, 994 F. Supp. at 1128 n.49.

These applications of the limited purpose analysis are directly inconsistent with, and completely ignore, the Supreme Court's instructions in *Quinn*. As the Court explained there, *Salyer/Ball is* an application of strict scrutiny under the Equal Protection Clause. "On the contrary, the Court expressly applied equal protection analysis and concluded that the voting qualifications at issue passed constitutional scrutiny." *Quinn*, 491 U.S. at 105. According to the rule established in *Kramer*, to meet the *Salyer/Ball* exception, which *Kramer* contemplated, the exclusion of otherwise qualified voters must be necessary to achieve a compelling state interest.

Conclusion

For the reasons given above, the Voters' claims are not moot. The Voters have stated a cause of action under the Fourteenth Amendment. In addition, Alaska Constitution Article IV, Sections 5 and 8, and Alaska Statutes Sections 22.05.080, 22.07.070, 22.10.100, and 22.15.170 are all unconstitutional both facially and as applied to the Voters. Therefore, these laws should be permanently enjoined so that non-attorney voters in Alaska are no longer excluded from participation in all elections involved in the selection of their judiciary. The Voters therefore respectfully ask this Court to reverse the District Court's ruling below.

Dated: January 13, 2010

Respectfully submitted,

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I hereby certify that this document, including all headings, footnotes, and quotations, but excluding the corporate disclosure statement, table of contents, table of authorities, statement of related cases, statement of oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel, contains 13,232 words, as determined by the word count of the word-processing software used to prepare this document, specifically WordPerfect X4, which is no more than the 14,000 words permitted under Fed. R. App. P. 32(a)(7)(B)(I).

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Statement of Related Cases

There are no related cases pending in this Court.

Certificate of Service

I hereby certify that on January 13, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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s/ Stephen Moore