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.

On Appeal from the United States District Court
for the District of Alaska (Anchorage), No. 09-CV-00136
Before the Honorable John W. Sedwick

BRIEF FOR AMICUS CURIAE THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE

The Brennan Center for Justice at NYU School of Law (the "Brennan Center") is a nonprofit, nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice, including the preservation of fair and impartial courts as the ultimate guarantors of liberty and equal justice. The Brennan Center conducts research, public education, and advocacy focused on, among other things, improving and de-politicizing state court judicial selection mechanisms, and maintaining the independence of state courts. The Brennan Center believes that merit commission systems like Alaska's are an effective way to reduce the influence of special interests and political partisans on the courts and thereby to increase judicial quality and independence.

All parties have consented to the filing of this amicus brief.

INTRODUCTION

Since 1959, Alaska has used a merit commission system to select state court judges. The Alaska Judicial Council is an independent, nonpartisan commission which reviews the qualifications of potential judicial candidates and presents nominees to the governor, who selects among those nominees. Alaska is one of 32 states that use some form of merit commission to select at least some state court judges. By ensuring that qualifications relating to merit are central to the selection process—and thereby ensuring that selections are not based on a judicial aspirant's

political affiliation, ability to raise money, or willingness to pander to an electorate—these commissions help reduce the negative effect that partisan politics can have on the independence—and perceived independence—of the judiciary. Because the commissions consist of a select, independent group containing (though not limited to) lawyers, they are well-equipped to ensure that nominees have the requisite professional qualifications to effectively discharge the duties of a state judge.

Alaska's merit commission system is written into the state's constitution. That constitution, including its judicial selection provisions, was subject to extensive debate at the Alaska Constitutional Convention held in 1955 and 1956. It was ratified by the people of Alaska in 1956, and approved by the U.S. Congress, which concluded it was "in conformity with the Constitution of the United States." Alaska Statehood Act, Pub. L. No. 85-508, § 1, 72 Stat. 339, 339 (1958). The constitution took effect in 1959 when Alaska joined the Union.

In this litigation, brought a half-century later, Appellants claim that the process Alaska uses to appoint judges violates the federal equal protection rights of the state's non-lawyers. Appellants claim that because Alaska bar members have a greater voice in the selection of the bar association's Board of Governors, and because the Board of Governors appoints three of the seven members of the Alaska

Judicial Council, non-attorneys are impermissibly denied an "equal" voice in the selection of state court judges.

These claims are meritless. As we explain below, Alaska's decision to delegate to the Board of Governors the selection of the Judicial Council's attorney members promotes the constitutionally vital goals of judicial independence and judicial quality. It more than amply satisfies rational basis review, which, as we explain in Part I, is the appropriate level of scrutiny. As we explain in Part II, by giving the Board of Governors responsibility for appointing the three attorney members of the Judicial Council, rather than allowing a political branch of government to appoint all Council members, Alaska's Constitution reduces the role of political partisanship in the selection process and ensures that highly qualified lawyers will serve on the Judicial Council. This reflects a reasonable judgment that the presence of the three bar-selected attorney members will make it more likely that the Council will select judicial nominees who are highly qualified and who will not feel beholden to another branch of government or a majority of the electorate.

Amicus urges the Court to hold that—as is the case in the 14 other states where the bar is responsible for selecting lawyers who serve on merit commissions—Alaska's judicial selection system is valid under the Equal

Protection Clause as a means to further the vital goal of selecting a qualified and independent judiciary.

ARGUMENT

I. ALASKA'S MERIT COMMISSION SYSTEM COMPORTS WITH THE EQUAL PROTECTION CLAUSE

The Alaska Constitution provides for a multi-layered appointment scheme. The Governor appoints a judge from at least two nominees submitted by the Alaska Judicial Council. Alaska Const. art. IV, § 5. The Council has seven members. Three non-lawyer members are appointed by the state Governor for six-year terms, subject to confirmation by the Alaska legislature. *Id.* § 8. Three lawyer members are appointed by the bar association's Board of Governors (the "Board") for six-year terms. *Id.* All six appointments are made without regard to political affiliation. *Id.* The Chief Justice of the Alaska Supreme Court serves ex-officio as the seventh Council member, and as its chairman. *Id.* Nine of the 12 members of the Board of Governors are elected by the active members of the bar, and the remaining three, who are non-attorneys, are appointed by the Alaska Governor. *See* AS § 08.08.040(b). Each step in this appointment process comports with the Equal Protection Clause.

A. The Election Of The Board Of Governors Is Constitutional

Restricting the authority to elect nine of the Board's members to active members of the bar satisfies the requirements of equal protection, because the

Board is a classic "limited purpose" entity whose activities disproportionately affect bar members.

1. The election of a "limited purpose" entity must only satisfy rational basis review

As relevant here, the Equal Protection Clause guarantees that when a state or local government "decides to select persons by popular election to perform governmental functions," each qualified voter "must be given an equal opportunity to participate in that election." *Hadley v. Junior College Dist. Metro. Kansas City*, 397 U.S. 50, 56 (1970). This guarantee protects voters against the "dilution" of their votes as well as against unjustified restrictions on who may participate in a popular election. *See Kramer v. Union Free School Dist.*, 395 U.S. 621, 626-627 (1969). Restrictions on which residents may vote in a popular election are generally subject to strict scrutiny. *Id*. at 627.

Strict scrutiny does not apply, however, where an election is for a "limited purpose" entity and the favored class of voters is disproportionately affected by the activities of that entity. An entity has a "limited purpose" if it does not exercise general governmental powers. *See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728-729 (1973) ("limited purpose" entity provided no "general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body"); *Ball v. James*, 451 U.S. 355, 366 (1981) ("limited purpose" entity could not impose taxes, enact

laws, maintain streets, or operate schools, health, or welfare services). Where the entity in question has a limited purpose and its operations have a "disproportionately greater" effect on the favored class of voters, the restriction of the franchise is subject only to rational basis review. *See Salyer*, 410 U.S. at 728, 730-731 (restriction is constitutional so long as it is not "wholly irrelevant to achievement of the regulation's objectives" (internal quotations and citation omitted)); *Ball*, 451 U.S. at 368, 371 ("we conclude that the voting scheme for the District is constitutional because it bears a reasonable relationship to its statutory objectives"); *see also Quinn v. Millsap*, 491 U.S. 95, 109 (1989) ("it was *rational* for the States in [*Salyer* and *Ball*] to limit voting rights to landowners" (emphasis added)).

2. The Alaska bar association's Board of Governors is a limited purpose entity and its election satisfies rational basis review

The Alaska bar association's Board of Governors is a classic limited purpose entity. The Board provides no general public services "such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body." *Salyer*, 410 U.S. at 728-729. Its activities are focused almost exclusively on regulating and organizing Alaska's lawyers. The Board establishes and collects dues from bar members, recommends rules to the Alaska Supreme Court regarding the admission, discipline, licensing, and continuing legal

education of lawyers, and adopts bylaws and regulations regarding issues related to membership. *See* AS § 08.08.080. Thus, the activities of the Board have a disproportionate effect on bar members as compared to non-attorneys. The fact that one function of the Board is to occasionally appoint a member to the Judicial Council does not transform it into an entity with general governmental functions whose voting restrictions must, as a result, be subject to strict scrutiny review.

Because the Board of Governors is a "limited purpose" entity, restrictions on who may vote for its members must only be rationally related to a legitimate state interest. They plainly are. Alaska's decision to give bar members a disproportionate say in the election of the Board "bears a reasonable relationship" to important statutory objectives. *Ball*, 451 U.S. at 371; *cf. Sullivan v. Alabama State Bar*, 295 F. Supp. 1216, 1222 (M.D. Ala.), *aff'd summarily*, 394 U.S. 812 (1969) (one person, one vote principle not relevant to bar board of governors); *Brady v. State Bar of California*, 533 F.2d 502, 502-503 (9th Cir. 1976) (disproportionate representation on state bar governing body not a violation of Fourteenth Amendment). The state has an obvious interest in organizing and regulating members of a profession through associations like the bar, and members of the profession are both disproportionately interested in selecting qualified leaders and in the best position to do so.

B. The Board's Appointment Of Council Members Is Constitutional

Appellants concede, as they must, that the federal Constitution does not require that all government officials be elected. Br. 21. States are free to appoint certain officials, particularly of a "nonlegislative character," *Sailors v. Board of Educ. of County of Kent*, 387 U.S. 105, 108 (1967), including judges. *See Chisom v. Roemer*, 501 U.S. 380, 401 (1991). Appellants also do not appear to contest Alaska's right to seat members of the Judicial Council through appointment.

Appellants object, however, to the fact that the Board of Governors is assigned the authority to appoint three of the Council's seven members. Appellants claim that this facet of the selection process renders the process unconstitutional because elections preceding appointments must be "'consistent with the commands of the Equal Protection Clause.'" Br. 21, 22, 28 (quoting *Kramer*, 395 U.S. at 629). This argument attacks a straw man, because, as demonstrated above, the election of the Board of Governors—the only election involved in the judicial selection process—*is* "consistent with the commands of the Equal Protection Clause." Indeed, Appellants have conceded this point. *See* Pls.' Mot. Prelim. Inj. 24 (July 2, 2009) ("[n]either do Plaintiffs challenge the constitutionality of permitting only attorneys to vote for the members of the Board of Governors of the Alaska Bar").

Appellants apparently mean to suggest that in any election of an official who participates in an appointment process, each citizen's voice must be *equally represented*. *See* Br. 25 (non-attorneys do not have "an equal voice" in determining judges). But Appellants provide no support for the claim that any election preceding an appointment must be perfectly "representative." Any such claim is squarely foreclosed by the Supreme Court's decision in *Sailors*: "the [*Sailors*] Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts *even though the component boards had equal votes and served unequal populations*." *Avery v. Midland County*, 390 U.S. 474, 485 (1968) (emphasis added) (citing *Sailors*, 387 U.S. 105)); *see also Hadley*, 397 U.S. at 58 ("where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws" (citing *Sailors*, 387 U.S. 105)).[1]

[1] Were Appellants correct that any official involved in appointments must be elected in a contest in which all of a state's voters have an equal voice, it would require striking down not only judicial selection systems like Alaska's, but also judicial selection systems in which commission members are appointed by a single member of a legislature—such as a House majority leader—whose election is limited to voters in one district. Such methods are used in states like Hawaii, New Mexico, and Connecticut. On the federal level, the United States Senate confirms judicial nominees, but the Senate itself is not a perfectly "representative" body because its members represent different numbers of citizens. That Appellants'

C. Restricted Election Cases And The "Limited Purpose" Exception Are Not Applicable To The Judicial Council

Appellants argue that the Judicial Council itself is not a "limited purpose" entity and therefore its selection is subject to strict scrutiny. Br. 30, 33-34. But because the Council is an appointed, not an elected, body, the case law cited by Appellants involving voting restrictions is inapposite. Simply put, no citizen has been "denie[d] the franchise," *Kramer*, 395 U.S. at 627, in the selection of a Council whose members are not elected.

Even assuming *arguendo* that the restricted election cases were applicable, the Judicial Council would still qualify as a "limited purpose entity." The Council does not exercise traditional governmental powers such as levying taxes, enacting laws, maintaining roads, operating schools and hospitals, and handling housing and welfare services. *See Ball*, 451 U.S. at 366; *Salyer*, 410 U.S. at 728-729. Instead, it is a panel of experts or quasi-experts organized to perform the valuable, but narrow, functions of (1) evaluating and nominating applicants for judgeships, and (2) conducting studies for improving the administration of justice in Alaska. *See* Alaska Const. art. IV, §§ 5, 8, 9. The panel's composition (in particular, the fact that three members are attorneys, and a fourth is the state's Chief Justice) reflects this specialized role.

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theory would potentially render such systems unconstitutional underlines the extent to which they overreach.

The Council's actions also disproportionately affect bar members. *See Ball*, 451 U.S. at 371. Only members of the bar may apply for judgeships, so they are disproportionately affected by the Council's nomination and screening activities. Attorneys are also disproportionately affected by the quality of Alaska's judges because they must practice before those judges on a day to day basis. *See Bradley v. Work*, 916 F. Supp. 1446, 1457 (S.D. Ind. 1996) ("Attorneys, as officers of the court and as potential candidates for judicial office, are disproportionately affected by the screening process performed by the Commission."), *aff'd on other grounds*, 154 F.3d 704 (7th Cir. 1998).

Although Alaskan citizens are affected by the Council's nomination of judicial candidates, the impact is attenuated and indirect. First, the Governor ultimately selects the judges from the Council's nominees. Second, it is not the selection of judges, but their rulings in particular cases, that affects the public. On this point, the Supreme Court's analysis in *Salyer* is instructive: Even though the assessments imposed by the limited purpose entity at issue would become "a cost of doing business for those who farm within it, and that cost must ultimately be passed along to the consumers," that did not mean that such consumers were equally affected by the entity's activities. As the Court explained: "Constitutional adjudication cannot rest on any such 'house that Jack built' foundation." 410 U.S. at 730-731. The same reasoning applies here.

It is, finally, important to consider Appellants' arguments in light of the purposes served by the Equal Protection Clause. At bottom, Appellants complain that non-lawyers lack a proportionate voice in the appointment of Judicial Council members relative to their numbers in the citizenry. *See* Br. 25. But that circumstance does not offend the Equal Protection Clause, the object of which is arbitrary and invidious discrimination. *See, e.g.*, *Clements v. Fashing*, 457 U.S. 957, 967 (1982). Not every difference in the application of laws to different groups of citizens violates the Constitution. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Alaska's appointment system is hardly arbitrary: It reflects the eminently reasonable policy judgment that integrating legal expertise into the nomination process, and assuring that a number of seats among the nominating body are not controlled by the governor and the legislature, will help produce a qualified and independent judiciary. That is, by any measure, a vital goal in a constitutional democracy.[2]

[2] Nor can "non-lawyers" seriously claim to resemble the "discrete and insular minorities" or other suspect classes whom the Equal Protection Clause has historically been aimed at protecting. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153, n.4 (1938); *San Antonio Ind. Sch. Dist. v. Rodriquez*, 411 U.S. 1, 28 (1973) (a "suspect class" is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

Further, historically, the principle of "one person, one vote" has not applied to the apportionment of judicial seats, because the judiciary is not a representative branch of government. *See Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd summarily*, 409 U.S. 1095 (1973); *accord Smith v. Boyle*, 144 F.3d 1060 (7th Cir. 1998) (Posner, J.). Judges "are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to [e]spouse the cause of a particular constituency." *Wells*, 347 F. Supp. at 455 (internal quotations and citation omitted). The rationale behind these cases—that the judiciary is distinct from the representative branches, and considerations beyond mathematical equivalence are germane to the allocation of judicial resources—counsels in favor of viewing a thoughtful appointive scheme such as Alaska's with considerable deference.

In sum, Appellants are entitled, at most, to have Alaska's appointment system subjected to rational basis review. *See Salyer*, 410 U.S. at 730. As we now demonstrate, it more than amply satisfies this standard. The merit selection system adopted by Alaska, like the merit commission systems used to select judges in a majority of states, clearly advances the important objective of securing a qualified and independent judiciary.

II. THE SELECTION OF LAWYER COUNCIL MEMBERS BY THE BAR PROMOTES A QUALIFIED AND INDEPENDENT JUDICIARY

Alaska, like the other states which use merit commission systems for the selection of state court judges, adopted its system with the goal (vital in a constitutional democracy) of promoting a highly qualified and independent judiciary. Alaska's decision to use the Board of Governors to select the Judicial Council's three attorney members plainly promotes this goal: It helps assure that the Council will have members who are well qualified to assess the merit of judicial candidates; it helps de-politicize the selection process; and it makes it more likely that the judges who are ultimately seated will be well-qualified and not beholden to politicians or the electorate. *See African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105, 1128 (E.D. Mo. 1997) ("That aspect of the Plan designed to have lawyers select lawyers to sit on the commissions was rationally conceived and maintained."), *aff'd* 133 F.3d 921 (8th Cir. 1998) (unpublished).

A. Lawyer Members Are Uniquely Qualified To Serve On Merit Commissions

Alaska was one of the earliest states to adopt a merit commission system.[3]

[3] In 1940, Missouri became the first state to adopt a commission-based appointment plan. Most states that use merit selection plans adopted them in the 1960s, 1970s, and early 1980s. *See* ABA Coalition for Justice, *Judicial Selection: The Process of Choosing Judges* 4-5 (2008), *available at* http://www.abanet.org/justice/pdf/judicial_selection_roadmap.pdf.

Today, 32 states and the District of Columbia use some type of nominating commission to help the governor select at least some state court judges.[4] The use of these systems is widely supported by commentators and the legal community: Since 1937, for instance, the American Bar Association has supported merit commission plans for the selection of state court judges.[5] *See also*, *e.g.*, O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 Mo. L. Rev. 479, 486 (2009) (while merit selection plans can be improved, they are "far better than the alternative").

The vast majority of states that use merit commissions have recognized the value of having lawyers serve on those commissions. Of the 32 states that use merit commissions, 28, including Alaska, require that at least some commission members be lawyers.[6] Similarly, in the federal system, the bar's input and advice on judicial candidates has been sought by Presidents for most of the last half-

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[4] *See* Berkson, *Judicial Selection in the United States: a Special Report* 2 (updated by Caufield Aug. 2004), *available at* http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf; American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* 1 (2009), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

[5] *See* Tarr, *Retention Elections in a Merit-Selection System*, 74 Mo. L. Rev. 605, 609 (2009); *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary* 70 (July 2003), *available at* http://www.abanet.org/judind/jeopardy/pdf/report.pdf.

[6] *See* American Judicature Society, *Judicial Merit Selection: Current Status*, Table 1 (2009), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf.

century. *See Public Citizen v. Department of Justice*, 491 U.S. 440, 443 (1989); American Bar Association Standing Committee on the Federal Judiciary, *What It Is and How It Works* 1 (2009) ("Standing Committee").[7]

There are differences among the states in how lawyer members are placed on those commissions. In Alaska, as in 14 other states and the District of Columbia, the bar is responsible for selecting at least some lawyer commission members without legislative or executive approval—either through the bar's Board of Governors, its president, or an election in which only bar members participate.[8] In other states, lawyer members are nominated by the bar and subject to political confirmation. Finally, some states that call for lawyers to serve on their nominating commissions give the bar no formal role in selecting these members.

B. The Selection Of Lawyer Members By The Board Of Governors Of The Bar Enhances Judicial Quality

Appellants dispute neither the wisdom nor the constitutionality of requiring that merit commissions include lawyer members. *See* Br. 40. But they challenge the method used by Alaska (and, implicitly, that of the 14 other states with similar systems) for placing lawyers on the Council. According to Appellants, because the Board of Governors appoints the three attorney members, "non-attorneys are not fairly represented on the Council." Br. 28. But Alaska's decision to delegate the

[7] Available at http://www.abanet.org/scfedjud/federal_judiciary09.pdf.

[8] *See* Appellee's Br. 44, n.115.

selection of the three attorneys to the bar's chosen leadership is an entirely rational way to ensure that the Council will identify the most qualified nominees for the bench.

Unlike the legislative and executive branches, the judiciary is composed of a single type of professional: all judges must be lawyers. To be a judge, one must be certified by the state as having attained a minimum level of legal training and one must also have a certain amount of experience. *See, e.g.*, Alaska Const. art. IV, § 4; AS §§ 22.05.070, 22.07.040, 22.10.090. The qualities likely to make a candidate an outstanding judge include qualities specific to the profession. Thus, the American Bar Association states that its evaluation of prospective nominees to the federal bench "is directed solely to their professional qualifications: integrity, professional competence and judicial temperament." *See* Standing Committee 3.

The Alaska Judicial Council similarly assesses the "professional competence" of applicants for the bench. *See* Bylaws of the Alaska Judicial Council, art. 1, § 1. Professional competence is measured by the applicant's "intellectual capacity, legal judgment, diligence, substantive and procedural knowledge of the law, [and] organizational and administrative skills." *See* Alaska Judicial Council Procedures for Nominating Judicial Candidates § VI.A.[9] The

[9] Available at http://www.ajc.state.ak.us/selection/procedur.htm (last visited Mar. 4, 2010).

Council also requires a writing sample to assess the applicant's "ability to discuss factual and legal issues in clear, logical, and accurate legal writing," *id.*, and reviews the sample "for the quality of the applicant's legal research and analysis," *id.* § II.B.3.

By dint of their training and experience, lawyers are uniquely well suited to help determine who can best evaluate judicial applicants. This includes determining which of their fellow lawyers has the substantive legal knowledge and legal writing ability to assess those qualities in a potential judge. As George M. McLaughlin, the Chairman of the Judiciary Committee for Alaska's Constitutional Convention, explained: "[A] select and professional group, licensed by the state, can best determine the qualifications of their brothers." Minutes of the Daily Proceedings: Alaska Constitutional Convention 694 (Transcript of daily proceedings) (1965) ("Convention Minutes"); *cf.* Federalist No. 51 (Madison) ("peculiar qualifications being essential in the members" of the judiciary, "the primary consideration ought to be to select that mode of choice which best secures these qualifications").

It was also reasonable for the Constitutional Convention to conclude that the Board of Governors—compared to Alaska's Governor, legislature, or electorate—would more likely choose lawyer Council members based on their "professional qualifications," so that these lawyer members would "represent a craft" and reflect

the "best thinking of the bar," rather than pursuing partisan or parochial objectives. *See* Convention Minutes 687. Lawyers work with and answer to judges throughout their professional careers; they have a clear and substantial interest in securing judges who are professionally competent and fair. The Board of Governors has the further advantage of leading a professional association whose members will appear on both sides of every case. It is therefore more likely to select Council members who will look at candidates' professional qualifications and not their political affiliations or ideological leanings. *See id.* at 694 ("The theory was that the bar association would attempt to select the best men possible for the bench because they had to work under them.").

In addition to their professional expertise, lawyers are also more likely than the general public to have pre-existing knowledge of other lawyers and their professional reputations. As Chairman McLaughlin put it, lawyers know "the foibles, the defects and the qualifications" of their fellow lawyers, since "[i]t is unquestionably true that in every trade and every profession the men who know their brother careerists the best are the men engaged in the same type of occupation." Convention Minutes 694; *see also African-American Voting Rights*, 994 F. Supp. at 1128 (noting, in upholding a similar system, that "[a]ttorneys typically will know the judicial aspirants better than the general public," and "will know which aspirants have the legal acumen, the intelligence, and the temperament

to best serve the people"); Jackson, *Beyond Quality: First Principles in Judicial Selection and their Application to a Commission-Based Selection System*, 34 Fordham Urb. L.J. 125, 151-152 (2007) (even lawyers lacking direct, personal knowledge of fellow bar members will often have "better access to a network of information" regarding other lawyers and "a better understanding of how to interpret that information").

Instructively, Hawaii, in adopting its merit commission system in 1978, justified the inclusion of lawyers on the selection panel in almost identical terms. Hawaii's Constitutional Convention noted that "[a]ttorney members not only would know what professional qualities would be required of a justice or judge but also would be aware of the backgrounds and reputations of the candidates for judicial vacancies." Hawaii Constitutional Convention Minutes 625 (1980).

C. The Selection Of Lawyer Members By The Board Of Governors Of The Bar Enhances Judicial Independence

Alaska's use of the Board of Governors to select the Judicial Council's lawyer members is an eminently reasonable means of promoting a judiciary that is independent from the other branches of government and the majority will. By circumscribing the executive branch's appointment power over the judiciary, Alaska enhances the separation of powers within its state government. And by denying the political branches the power to select a majority of the members of the seven-member Judicial Council, Alaska promotes a judiciary that is less likely to

be beholden to a political majority or to partisan influence. These, too, are important justifications for Alaska's judicial selection mechanism.

1. Alaska's system promotes separation of powers

Alaska's system for selecting commission members is an effective method for maintaining a judiciary that is neither dominated nor controlled by the legislative and executive branches, and that is answerable not to the political forces that influence those branches but rather to the law and the Constitution.

As is, the Alaska Governor has substantial influence within the selection process, at various points. He selects three of the 12 members of the bar association's Board of Governors, which in turn selects the Judicial Council's three attorney members; he directly appoints the Judicial Council's three non-attorney members, with legislative confirmation; he appoints the state's Chief Justice, who, ex officio, serves as the seventh member of the Council; and, of course, he ultimately selects a nominee from the finalists identified by the Council. Viewed in this context, the Board of Governors' role as the entity selecting the Judicial Council's three attorney members—the only feature of the appointment system expressly challenged by Appellants—represents an important countervailing feature of the appointment process. It prevents the political branches from exercising exclusive control over the selection of Council members and appointment of judges.

Separation of powers is a foundational principle of our republican democracy. The Framers "knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers." *Public Citizen*, 491 U.S. at 468; *see also* Federalist No. 51 (Madison) (the "separate and distinct exercise of the different powers of government" was "to a certain extent [] admitted on all hands to be essential to the preservation of liberty"); Federalist No. 78 (Hamilton) ("there is no liberty, if the power of judging be not separated from the legislative and executive powers" (internal quotation marks and citation omitted)). The Supreme Court has recognized that a "Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 217-218 (1980).

Because the executive and legislative branches do not have direct influence over the role of the Board of Governors in the appointment process, Alaska's system helps ensure that "the members of each [branch]" have "as little agency as possible in the appointment of the members of the others." Federalist No. 51 (Madison). This reinforces the original rationale for the merit selection process, which early proponents described as offering "an affirmative and co-operative form of check on the appointing power." *See* Editorial, 11 J. Am. Judicature Soc'y

131, 132 (1928). The opposite is true of the alternative that Appellants seek—to have all or nearly all Council members appointed by the Governor alone. *See* First Amended Verified Complaint 12 ¶ 3. Such a system would necessarily increase the "agency" of the executive branch over the determination of judicial nominees. It would increase the likelihood that judicial appointees will feel influenced by the executive branch, which would serve as both the nominating and the appointing authority. *See* Jackson, 34 Fordham Urb. L.J. at 137-138. Commentators have criticized such arrangements on the ground that giving the appointing authority the power to select the nominating members undermines the merit commission system's goal of de-politicizing the judicial selection process. *See* Greene, *Perspectives on Judicial Selection Reform*, 68 Alb. L. Rev. 597, 605 (2005) (because merit selection is intended to deprive the executive of the opportunity to make appointments on the basis of political motivations, it is considered self-defeating to permit the executive to appoint the commissioners).

2. Alaska's system promotes a judiciary independent of political majorities

Alaska's decision to use the Board of Governors to select three Council members also prevents its judiciary from being dominated by the majority will.[10]

[10] Alaska's appointment plan does include features that render judges accountable to the populace, at least to deter or prevent judges from grossly or willfully ignoring the law. Thus, Alaska provides for "retention elections," whereby the electorate may vote in an up-or-down, nonpartisan election on whether to retain the

The representative branches of government are, by definition, expected to act in accordance with the political interests of their constituents. *See* Federalist No. 52 (Madison) ("government in general should have a common interest with the people," and it is "particularly essential" that the House of Representatives have "an immediate dependence on, and an intimate sympathy with, the people"). A judge, however, has a different charter. Unlike legislators, judges do not fulfill their duties by acting in accordance with the political wishes of the populace, or the residents of their district, or the official who appointed them; judges are expected to rule according to the law. *See Chisom*, 501 U.S. at 400 (public opinion is ideally irrelevant to the judge's role, "because the judge is often called upon to disregard, or even to defy, popular sentiment"); *Wells*, 347 F. Supp. at 455 (judges do not "represent" people). Although Appellants repeatedly invoke the rhetoric of "representative government" (Br. 7, 13, 15, 23 ("non-attorneys have been denied equal participation in their representative government")), they concede that the judiciary is not a truly "representative" branch (Br. 47 (judges "do not represent the people")).

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new judge. *See* Alaska Const. art. IV, § 6 (retention election held at first general election more than three years after appointment, and thereafter every ten years for supreme court justices and every six years for superior court judges). The Alaska system thus seeks to balance independence with a degree of accountability, with the goal of promoting a properly functioning judiciary. *See generally* Ferejohn & Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 975 (2002).

The Board of Governors' power to appoint three Council members promotes such an independent judiciary. As the governing body of a professional association, the Board is largely independent of the representative branches of Alaska's government, and thus independent of prevailing popular sentiment. Only three of its 12 members are appointed by the Governor, and the remainder are elected by active bar members. Further, the vast majority of the Board's duties relate to nonpartisan matters involving the regulation of the legal profession. *See* AS § 08.08.080. Allowing this relatively independent entity to appoint three Council members means that those members are unlikely to feel politically accountable to any partisan group or to the electorate as a whole. The presence of the three members appointed by the Board reduces the likelihood that the Council as a whole will be prompted to act in a particular way to appease the popular will. The judges who are nominated, in turn, are less likely to feel beholden to any partisan group or the electorate as a whole, and thus are more likely to have the ability to impartially apply the law to the facts of any given dispute.

Like separation of powers, judicial independence is a foundational feature of our constitutional democracy, as reflected in Article III of the federal Constitution and Article IV of the Alaska Constitution. An independent judiciary is necessary to protect individual and minority rights, especially constitutional rights, from diminishment or encroachment by the majority or representatives of the majority.

The framers of the federal Constitution "were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'" *INS v. Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring). Because individual liberties and minority rights may be agreed upon *ex ante* but inspire conflict in specific cases, the important role of a judge is to ensure that the law's general commitments are not sacrificed to the expediency of prevailing popular sentiment. *See* Resnick, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 Cardozo L. Rev. 579, 592-593 (2005). Judges "must sometimes stand up to what is generally supreme in a democracy: the popular will." *See* Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989) (noting that while the protection of an individual criminal defendant and the preservation of checks and balances "may earn widespread respect and admiration in the long run," almost by definition they will be unpopular in the particular case).

The drafters of Alaska's commission system expressly intended for it to promote a more politically independent judiciary. The delegates to the Constitutional Convention understood that, in contrast to legislators, "[i]t is not the function of the judge to make the law, it is his function to determine it, and the way to keep [judges] independent is to keep them out of politics." Convention Minutes 584. Independence would be compromised if politicians dominated the selection

of the nominating commission itself. When one delegate suggested that the attorney members be confirmed by the legislature, *id.* at 693, the amendment met with vociferous objections, and failed. *Id.* at 696. Chairman McLaughlin explained that requiring legislative confirmation would mean that the selection of the attorney members would then not be based on "professional qualifications alone," but would have to be "qualified by the condition, are they acceptable to a house and a senate or a senate alone, which is essentially Democratic or essentially Republican"—in other words, qualified by the question, "will they be acceptable in terms of political correctness?" *Id.* at 694-695. Ralph Rivers, seconding those remarks, noted that "the purpose of the draft as now written is to have a nonpartisan selection of these lawyer members, and the minute you adopt something like this, you are making a partisanship proposition out of it. We want that to carry through to a nonpartisan selection of judges . . . ." *Id.* at 695. A nonpartisan selection of judges would more likely result in a nonpartisan bench and "keep [judges] independent." *Id.* at 584.

Alaska's appointment system, which removes the selection of the Council's lawyer members from the control of the state's political branches, is thus tailored to its significant interest in a qualified and independent judicial branch. It also enhances the *appearance* of an independent judiciary. *See Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); *see*

also Mistretta v. United States, 488 U.S. 361, 407 (1989) ("[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship"). As former Justice O'Connor has emphasized, "the legitimacy of the judicial branch rests entirely on its promise to be fair and impartial. *If the public loses faith in that*—if they *believe* that judges are just politicians in robes—then there is no reason to prefer their interpretation of the law or Constitution over the opinions of the real politicians representing the electorate." O'Connor, 74 Mo. L. Rev. at 489 (emphasis added). A merit selection system which reduces the authority of political actors reduces the appearance of a politicized judiciary, and thereby increases the ability of the judiciary to carry out its essential function.

* * *

Former Chief Justice Rehnquist once described "an independent judiciary with the final authority to interpret a written constitution" as "one of the crown jewels of our system of government." Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U. L. Rev. 263, 274 (1996). Alaska's appointment plan represents the state's reasonable and considered solution to the question of how best to achieve a qualified, independent judiciary while maintaining some degree of democratic accountability. Its plan meets "the minimum requirements of the Fourteenth Amendment," *see supra* Part I, and is a permissible exercise of the "wide discretion" granted to states "to

experiment with solutions to difficult problems of policy" in this area. *Smith v. Robbins*, 528 U.S. 259, 273 (2000); *Sailors*, 387 U.S. at 109; *see also Oregon v. Ice*, 129 S. Ct. 711, 718-719 (2009) (recognizing the role of the states as "laboratories for devising solutions to difficult legal problems" (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Alaska's considered decision to give lawyers a distinct voice in the selection of members of its judicial nominating commission is, by any measure, rationally related to advancing important state interests. It should be upheld.

CONCLUSION

For the reasons stated above, the judicial selection process provided for in Alaska's Constitution complies with the Equal Protection Clause, and the district court's ruling should be affirmed.

Respectfully submitted.

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I hereby certify that on this 5th day of March, 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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