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
No. 09-CV-00136 JWS

BRIEF OF APPELLEES

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STATEMENT OF JURISDICTION

Appellees do not contest that this court has jurisdiction to decide the legal issues raised by appellants.

ISSUE PRESENTED

Alaska's constitution and statutes adopt a merit selection system for appointing state judges. The system requires the governor to appoint each judge from a list of two or more applicants nominated as most qualified by an independent constitutional body, the Alaska Judicial Council. The Council consists of the Alaska supreme court chief justice, three citizens appointed by the governor, and three lawyers selected by the governing board of the Alaska bar association. The bar's governing board consists of three citizens appointed by the governor and nine bar members elected by bar association members.

The sole issue presented is whether the Fourteenth Amendment prohibits the bar board of governors from appointing the attorney members of the Judicial Council on the ground that only bar members may vote for the attorney members of the bar board of governors.

STATEMENT OF FACTS

Alaska's Judicial Selection System

Alaska's judicial selection system was adopted, after extensive debate, at the

constitutional convention in 1955, when Alaska was still a territory. [ER 4][1] The constitution was ratified by Alaska's voters and approved by Congress, which found Alaska's constitution to be "republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence."[2]

The Alaska constitution prescribes judicial selection for the two constitutionally-created courts -- the state supreme court and the superior court, which is the trial court of general jurisdiction.[3] The Alaska legislature, by statute, adopted the same selection procedures for the judges of Alaska's other state courts.[4]

Under the Alaska constitution and statutes, the governor appoints judges, choosing from the list of the most qualified applicants nominated by the Alaska

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1 *See generally* ALASKA CONSTITUTIONAL CONVENTION PROCEEDINGS ("ACCP"), available at *www.ajc.state.ak.us/General/akccon.htm*. The district judge appended relevant excerpts to his decision. [ER 25-87]

2 Alaska Statehood Act § 1, Pub. L. 85-508, 72 Stat. 339 (July 7, 1958).

3 Alaska Const. art. IV, §§ 1-8. These provisions are set out in full in the Addendum to this brief.

4 AS 22.07.070, 22.15.170(a), (e); *see also* AS 22.05.080, 22.10.100 (statutes implementing constitutional selection procedures for supreme court and superior court).

Judicial Council.[5] After being appointed, judges periodically stand for retention in non-partisan general elections.[6]

Alaska's judicial selection system is based on the "Missouri Plan," developed in Missouri in the 1940s and adopted in whole or part by 33 states and Washington, D.C.[7] The Missouri Plan is a merit-based judicial selection plan, designed to reduce the influence of politics and to increase the quality and the independence of the judiciary.[8]

Alaska's constitution drafters, and the voters who ratified the constitution, deliberately chose an appointive system, rather than an elective system, for selecting judges. George M. McLaughlin, chair of the Committee on the Judiciary Branch, explained to the constitutional convention delegates that the elective system for judges, which began in the United States in the mid-Nineteenth Century, "was found inadequate" because the judiciary then is "in substance . . .

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5 Alaska Const. art. IV, § 5; AS 22.05.080, 22.07.070, 22.10.100, 22.15.170(a), (e).

6 Alaska Const. art. IV, § 6; AS 22.05.100, 22.07.060, 22.10.150, 22.15.195.

7 *See* Larry C. Berkson, *Judicial Selection in the United States: A Special Report* at 2, available at *www.ajs.org/selection/docs/Berkson.pdf*; Amicus Brief of American Judicature Society ("AJS Br.") Arg. III.A.

8 ACCP 583-87 [ER 32-35]; *see also African-American Voting Rights Legal Defense Fund, Inc. v. State of Missouri*, 994 F. Supp. 1105, 1113-15 (E.D. Mo. 1997) (summarizing testimony about the benefits of the Missouri Plan), *aff'd*, 133 F.3d 921 (8th Cir. 1998) (unpublished); Amicus Brief of the Brennan Center ("Brennan Br.") Arg. II.B, C.

dictated and controlled by a political machine."[9] Judicial independence suffers in an elective system, McLaughlin stated, because judges are inclined to consider whether their decisions will be popular, and, "[i]f we determine the validity of our laws in terms of popularity[,] . . . we are then not a government of laws." In his words, "the way to keep [judges] independent is to keep them out of politics."[10]

Central to Alaska's appointive system for selecting judges is the Alaska Judicial Council, which nominates the candidates from whom the governor must choose when making judicial appointments. The constitution's drafters thoughtfully debated the composition of the Judicial Council and how the Council members should be selected.[11] [ER 5-6] They chose a seven-member Council, with three non-lawyers appointed by the governor and confirmed by the legislature, three lawyers appointed by the Alaska bar association board of governors, and the chief justice of the Alaska supreme court, who serves *ex officio*.[12] The Council acts by concurrence of four or more members.[13] Except for the chief justice, Council members are not state employees, and they serve without

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9 ACCP 584. [ER 33]

10 *Id.; see also New York State Board of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2008) (Stevens, J., concurring); Brennan Br. Arg. II.C.

11 *See* ACCP 584-95, 686-96. [ER 33-41, 69-77]

12 Alaska Const. art. IV, § 8.

13 *Id.*

compensation for the work they perform.[14] Other than the chief justice, members of the Council serve six-year terms, which are arranged so that one member's term expires each year, alternating between attorney and non-attorney seats.[15] These staggered terms reduce the influence of any governor on the composition of the Council, and likewise reduce the influence of any particular set of bar governors.

Delegate McLaughlin explained at the constitutional convention some of the reasons why the Judicial Council should include three attorneys:

> The whole theory of the Missouri Plan is that in substance, a select and professional group, licensed by the state, can best determine the qualification of their brothers. The intent of the Missouri Plan was in substance to give a predominance of the vote to professional men who knew the foibles, the defects and the qualifications of their brothers. It 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. That was the theory of the Missouri Plan. 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.[16]

McLaughlin also explained why it is important that the bar association appoint the attorney representatives, rather than having them selected by the governor or the legislature:

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[14] *Id.*; Alaska Judicial Council Bylaws, art. II, § 6 (providing that Council members shall be reimbursed for travel and other expenses incurred while on Council business). [ER 89]

[15] Alaska Const. art. XV, § 16.

[16] ACCP 694. [ER 75] *See also* ACCP 585, 586, 687. [ER 34, 35, 69]

> The three who are appointed by the bar . . . are there based solely on their professional qualifications but selected because they would represent, in theory, the best thinking of the bar and they are there solely because they represent their craft.[17]

He called the involvement of the state bar association in the selection of the attorney members part of "the very essence" of the Missouri Plan.[18]

Another delegate proposed an amendment that would have required legislative confirmation of the attorney members of the Council. Delegate McLaughlin spoke against this, saying:

> If this motion is passed, you might as well tear up the whole proposal and provide for the election of juries because then it would be more efficacious and more democratic. . . . If you require a confirmation of your attorney members you can promptly see what will happen. The selection is not then made by the organized bar on the basis of a man's professional qualifications alone. The determination of the selection of those people who are on the judicial council will 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. . . . If political correctness enters into the determination of the selection of those professional members who are to be placed upon the judicial council, the whole system goes out the window.[19]

Delegate Ralph Rivers concurred:

> I want to heartily second the remarks of Mr. McLaughlin, but also want to point out that the purpose of the draft as now written is to have a nonpartisan selection of these lawyer members and the minute

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[17] ACCP 687. [ER 69] The organized bar existed in Alaska before statehood. *See* Alaska Integrated Bar Act, ch 196, SLA 1955 (discussed and upheld in *In re Paul*, 17 Alaska 360 (D. Alaska 1957)), now codified as AS 08.08.010 *et seq.*

[18] ACCP 687. [ER 69]

[19] ACCP 694-95. [ER 75-76]

> you adopt something like this, you are making a partisanship proposition out of it. We want to carry through to a nonpartisan selection of judges . . . .[20]

The proposal to require legislative confirmation of the lawyers appointed to the Judicial Council failed by a vote of 49 nays to four yeas, with two absent.[21]

Alaska Judicial Selection In Practice

Alaska has followed the judicial selection system set forth in the state constitution and related statutes for over 50 years. [ER 4-5] Every one of the 224 judges who has been appointed since statehood, including each judge now serving on the bench, was appointed by the governor from the list of people nominated by the Judicial Council.[22] Thus, the governor determines the composition of the judiciary in Alaska; the electorate then determines whether the judges and justices appointed by the governor retain their seats. The Judicial Council, through the nominating process, has input into the selection process, by providing the list of candidates from whom the governor must choose, but most people nominated by the Council are not selected to become a judge.[23]

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[20] ACCP 695. [ER 76]

[21] ACCP 696. [ER 76-77]

[22] The number of judicial appointments is derived from Judicial Council records listing both current serving and retired judges. *See www.ajc.state.ak.us/Judges/judgelistcurrent.htm* and */judgelistretired.htm*.

[23] Plaintiffs repeatedly exaggerate the Council's role and erroneously state that the Council determines the composition of the judiciary. *See, e.g.,* Appellants' Brief ("At. Br.") 3, 26, 33, 41.

The Judicial Council has developed an extensive screening process to promote its ability to nominate the most qualified applicants for vacant judgeships.[24] Applicants complete a lengthy form and sign releases authorizing the Council to investigate their education, employment, credit, and criminal records. The Council solicits information from members of the bar and from other people who know the applicant. Council members interview all applicants (in public or private, at the choice of the applicant). The public is invited to comment on applicants by letter or email, and the Council holds a public hearing to receive testimony. [ER 93-94, 100-16]

Any candidate who receives four or more votes is nominated.[25] Council voting records reveal substantial consensus among all members on which candidates are most qualified to serve as judges, reflecting that the understanding of judicial qualifications transcends politics. In all votes between 1984 and 2009 on whether to nominate an applicant for a judgeship, Council members voted unanimously "yes" or "no" 63% of the time and near unanimously (with just one

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[24] *See* Alaska Judicial Council Bylaws, art. VII [ER 93-95]; Alaska Judicial Council Procedures for Nominating Judicial Candidates, parts I-VI. [ER 100-16] These materials are also available as appendices to the Alaska Judicial Council's TWENTY-FOURTH REPORT: 2007-2008 TO THE LEGISLATURE AND THE SUPREME COURT and through the Council's website, *www.ajc.state.ak.us*.

[25] Alaska Const. art. IV, § 8.

dissenting vote) an additional 19% of the time.[26] The voting records also belie any fears that the attorney members might vote as a faction or that the chief justice and the attorney members frequently might join to outvote the lay members. Voting records for 23 years (1984-2007) show that the Council's three lawyer members voted differently from the three non-lawyer members only five times out of more than 700 votes on judicial candidates, and, in three of those five instances, the chief justice (who votes only when his or her vote would make a difference[27]) voted with the non-lawyers.[28] Thus, only twice in more than 700 votes did the four attorneys on the Council determine whether or not a particular candidate would be nominated.

In addition to its role in the judicial selection process, the Council is required to report to voters on the performance of judges seeking retention.[29] The Council conducts a comprehensive investigation of each judge subject to a retention vote.

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[26] *See* Alaska Judicial Council Memorandum (1/25/10) (summarizing review of Council voting records). When plaintiff Ken Kirk applied to be nominated for a supreme court vacancy, he received no votes in support of his nomination. *See* Alaska Judicial Council Meeting Minutes (2/3/09). The Council's meeting minutes, which report the votes on judicial nominations, are public records available from the Council. *See* Alaska Judicial Council Bylaws, art. X, § 1(2). [ER 96]

[27] Alaska Judicial Council Bylaws, art. V, § 1. [ER 92]

[28] *See* Alaska Judicial Council, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007 at 4 n.12 (Aug. 2008), available at *www.ajc.state.ak.us*.

[29] *See* AS 15.58.050; Teresa W. Carns, *Merit Selection and Performance Evaluation of Alaska's Judges*, 26 ALASKA L. REV. 213, 216 (Dec. 2009).

It seeks input on the judges' performance from peace officers and probation officers, social workers, court system employees, jurors, attorneys, and the general public.[30] Reflecting that the merit selection system works well, most sitting judges receive high marks for their performance.[31] The Council posts the findings from its investigation on its website, prepares materials summarizing its findings for inclusion in the official election pamphlet, and makes recommendations on whether judges should be retained.[32] The Council has recommended against retention a total of ten times, involving seven separate judges.[33] Citizens voted against retaining three of those judges,[34] plus one other judge for reasons unrelated to the Council's performance evaluation.[35]

Besides evaluating judicial applicants and judges seeking retention, the Judicial Council is required to "conduct studies for improvement of the

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30 *See* SELECTING AND EVALUATING ALASKA'S JUDGES, *supra* n.28, at 33; Alaska Judicial Council Bylaws, art. VIII. [ER 95-96]

31 *See* SELECTING AND EVALUATING ALASKA'S JUDGES, *supra* n.28, at 33-36.

32 *See* AS 15.58.020(a)(2); Carns, *supra* n.29, at 234; *www.ajc.state.ak.us/retention/retent.htm*.

33 *See* Alaska Judicial Council Meeting Minutes (8/30/76, 8/10/78, 7/23/80, 7/15/82, 7/17/88, 6/19/06, 7/16/08).

34 *See* SELECTING AND EVALUATING ALASKA'S JUDGES, *supra* n.28, at 36 & n.75; Carns, *supra* n.29, at 217 n.22.

35 *See* Alaska Judicial Council, FOSTERING JUDICIAL EXCELLENCE: A PROFILE OF ALASKA'S JUDICIAL APPLICANTS AND JUDGES at 14 n.36 (1999), available at *www.ajc.state.ak.us*.

administration of justice" and to "make reports and recommendations to the supreme court and to the legislature."[36] It has no other authority or function.

The Alaska Bar Association Board Of Governors

All persons licensed to practice law in Alaska must belong to the Alaska Bar Association.[37] The legislature determined how the state bar association is governed, and how the board of governors is chosen. By statute, the governing body of the bar association is a 12-member board of governors, with three non-lawyers appointed by the governor and confirmed by the legislature, and nine lawyers elected "by and from among the members of the association."[38] Eight of those lawyer seats are assigned geographically by judicial district; the remaining seat is at-large.[39]

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36 Alaska Const. art. IV, § 9.

37 AS 08.08.020(a).

38 AS 08.08.050(a). Plaintiff-appellant Carl Ekstrom currently serves as one of the non-lawyer members of the bar board of governors. [ER 4]

39 *Id.* Two of the eight geographically-assigned seats for attorney members of the board (25%) are assigned to the First Judicial District, which has approximately 10% of the state's population and 12.8% of the state's resident attorneys; four of these seats (50%) are assigned to the Third Judicial District, which has 67% of the state's population and 76.3% of the resident attorneys; two seats (25%) are assigned to the combined Second and Fourth Judicial Districts, which together have 23% of the state's population and 10.9% of the resident attorneys. *See* Alaska Court System, ANNUAL STATISTICAL REPORT 2008 at 129, 131 (2009), available at *www.courts.alaska.gov/specproj/annualrep-fy08.pdf.*

To vote for the attorney members of the board of governors, a person must be an active bar member.[40] The person thus must have passed a bar examination, paid bar dues, met the bar's "standard of character and fitness," and not have been suspended for disciplinary violations. However, voters in a bar board of governors election need not be registered to vote in state elections; they need not reside in Alaska or even in the United States; they need not be U.S. citizens.[41]

The Alaska supreme court has plenary authority to adopt rules governing the practice of law in the state.[42] The bar association board of governors has administrative responsibility "to provide for all . . . matters affecting in any way the organization and functioning of the Alaska Bar."[43] The board sets bar membership dues and manages the bar's budget. It supervises staff who arrange for continuing legal education programs, investigate allegations of misconduct by lawyers, and advise on ethical issues. It administers an arbitration process for fee disputes between attorneys and clients. It has legal authority to hire employees and to sue in the name of the Alaska bar. It may recommend to the Alaska supreme court bylaws and regulations governing admission to the bar, continuing legal

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40 *See* Alaska Bar Bylaws, art. IV, § 2.

41 *See* Alaska Bar Rules 2, 5 (defining requirements for admission to the bar).

42 Alaska Const. art. IV, § 1; *Application of Houston*, 378 P.2d 644, 645 (Alaska 1963).

43 AS 08.08.080(c)(4).

education requirements, and attorney discipline.[44] The bar association receives no public funding,[45] and has no authority over anyone other than attorneys practicing law in the state. It does *not* select or nominate judges.[46]

Approximately once every two years, the bar board of governors appoints an attorney member to the Judicial Council.[47] For at least the six most recent lawyer appointments to the Judicial Council, the bar governors voted unanimously; lawyer and non-lawyer members of the board did not disagree regarding who should serve on the Council.[48]

DISTRICT COURT DECISION

The district court accurately described Alaska's judicial selection procedures -- and plaintiffs do not quarrel with the description. [ER 4-8] The court observed that Alaska's judges are not elected, and that the only election plaintiffs challenge

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[44] AS 08.08.080; Alaska Bar Rules.

[45] The bar association's income derives almost entirely from its attorney members. Over two-thirds of its annual income comes from bar dues, and most of the rest comes from fees paid by attorneys for bar admission, continuing legal education, and attendance at the bar convention. *See, e.g.,* Alaska Bar Association, 2010 Budget, ALASKA BAR RAG at 2 (Oct.-Dec. 2009).

[46] Plaintiffs contend erroneously that the bar association "exercises a controlling interest over the selection of justices and judges." [At. Br. 5] The bar association's role in judicial selection in fact is limited to the board's appointing three of the seven members of the Judicial Council.

[47] Alaska Const. art. IV, § 8; art. XV, § 16.

[48] *See* Alaska Bar Association Minutes of the Board of Governors Meetings (4/28/08, 7/19/07, 1/26/06, 4/26/04, 3/14/02, 5/16/00). These minutes are public records available from the bar association.

is the election of the lawyer members of the bar association's board of governors. [ER 10, 15]

The district court's decision acknowledged *both* threads of Fourteenth Amendment jurisprudence that plaintiffs identify. It recognized that the Equal Protection Clause protects against both vote dilution (such as when voting districts are not apportioned consistent with one person, one vote principles) and vote denial (such as when a state holds an election but excludes certain classes of people from voting). [ER 13] The court did not find principles of equal protection inapplicable to Alaska's judicial selection system, as plaintiffs contend. [At. Br. 9-10, 38-39] Rather, the court found that the guarantees of equal protection are not violated by Alaska's judicial selection system. [ER 20-23]

While recognizing the importance that the Supreme Court has assigned to the right to vote, the district court also correctly recognized that not all elections must be open to all voters. The district court was guided by the Supreme Court's cases holding that, when voting for a special-purpose entity is at stake, the franchise may be limited to the group disproportionately affected by that entity. Those cases also hold that the voting requirements for a special-purpose entity must bear a reasonable relationship to the state's objectives in creating the entity and need not pass strict scrutiny. [ER 14-15]

The court determined that the bar association qualifies as a special-purpose entity, since it exercises only narrow powers and its activities disproportionately affect the members of the association. [ER 20-21] Appropriately applying rational basis scrutiny, the court found a reasonable basis for allowing only lawyers to vote for the lawyer members of the bar board of governors. [ER 21-22] The district court did not separately analyze the Alaska judicial selection plan as a vote denial case, because non-lawyer citizens are not denied all voice or vote in the judicial selection process. [ER 23]

Citing *Wells v. Edwards*,[49] the district court found clear precedent that all citizens need not be afforded an equal voice in the selection of all state judges, because judges are not representatives in the same sense as are legislators or executives. [ER 19] Thus, unequally weighted voices in a judicial selection process are permitted, so long as any distinctions are not arbitrary, capricious, or invidious. [ER 20] Because plaintiffs did not allege any arbitrary, capricious, or invidious discrimination in the design of Alaska's judicial selection plan, the court held that their claims could be denied on this basis alone. [ER 20]

Inasmuch as members of the Judicial Council are not elected, the court recognized that one person, one vote principles do not apply to the Council members' selection -- and therefore the entire analysis whether the Council is a

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[49] 409 U.S. 1095 (1973), *summarily aff'g* 347 F. Supp. 453 (M.D. La. 1972).

special-purpose entity (which would justify an exception to the one person, one vote rule) is inapplicable. [ER 22] But the court considered the nature and function of the Council, and concluded that the Council qualifies as a special-purpose entity because it has limited and specialized functions and does not administer the normal functions of government. Further, its actions disproportionately affect members of the bar association, since only members of the bar may apply for judicial appointment and thereby have their credentials evaluated by the Council.[50] [ER 22-23] The court found that having the bar board of governors select some of the Council's members is rationally related to a legitimate state interest in selecting well-qualified jurists. [ER 23]

The district court listed ways in which non-lawyer citizens actively participate in the judicial selection process in Alaska, including: Non-lawyer citizens serve on both the bar board of governors and the Judicial Council. An applicant for a judgeship cannot be nominated without the vote of at least one Council member who was not appointed by the bar board of governors. The governor, a popularly elected official, makes the final selection of judges. A judge may not keep his or her seat on the bench without a majority "yes" vote from the public in retention elections. [ER 23] The court concluded:

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[50] All Alaska state judges must be attorneys admitted to practice in Alaska. Alaska Const. art. IV, § 4; AS 22.05.070, 22.07.040, 22.10.090, 22.15.160(a).

> These extensive limitations winnow and ultimately defeat the notion central to Plaintiffs' case that it is a select group of citizens -- that is, Alaska lawyers -- who actually select the Alaska judiciary and in doing so deprive other citizens of equal rights under the law. Rather, the [Alaska judicial selection] Plan merely allows the public to draw upon the expertise of Alaska's lawyers in the selection of judicial officers, a justification that is rationally related to a legitimate state interest. [ER 23]

Having found plaintiffs' claims without merit, the court granted the defendants' motion to dismiss the case. [ER 24]

SUMMARY OF ARGUMENTS

Alaska uses an appointive system to select its judges. The popularly elected governor appoints the state's judges. The governor is advised by the Alaska Judicial Council, whose members also are appointed. Because Alaska's judicial selection system is appointive, not elective, the right-to-vote cases on which plaintiffs rely are tangentially relevant at best.

Fourteen other states and Washington, D.C., use judicial nominating commissions comparable to the Alaska Judicial Council and assign their local bar associations the responsibility of selecting lawyers members of the commission. No court has found such a system constitutionally flawed. Two courts, in well-reasoned decisions, expressly rejected equal protection challenges similar to those that plaintiffs advance in this lawsuit. Those cases are persuasive precedent.

Plaintiffs recurrently blur the distinctions between the entities they discuss. They refer to voting for judges and voting for members of the Judicial Council,

when in fact judges and Judicial Council members are appointed and not elected. In reading plaintiffs' arguments, this court will need to attend carefully to what entity and what step of the selection process is being discussed.

Despite rhetoric that sounds to the contrary, plaintiffs do not challenge the fact that judges are appointed and not elected; that all judges must be lawyers; or that the Judicial Council includes three attorney members. They limit their challenge to the fact that the general public may not participate in the election of the lawyer members of the Alaska bar association's board of governors.[51] The cases they rely on, which establish and enforce an equal right to vote, require a threshold decision to submit a decision to public vote. That is, they apply only "once the franchise is granted to the electorate"; then, "lines may not be drawn that are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[52] The election of bar governors is not a popular election to which those cases apply. Board of governors elections are completely divorced from the requirements for voting in municipal and state elections. No authority requires a state to permit all

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[51] Confusingly, in the district court, plaintiffs wrote: "Neither do Plaintiffs challenge the constitutionality of permitting only attorneys to vote for the members of the Board of Governors of the Alaska Bar." [ER 10 n.36, quoting Motion for Preliminary Injunction (Doc. 4) at 24] *See also* Opposition to Motion to Dismiss [Doc. 42] at 7 ("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.").

[52] *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 629 (1969) (internal quotes omitted).

citizens to participate in an election to select the directors of a professional association.

The "special-purpose entity" cases recognize that certain governmental entities have such specialized and narrow functions, and so disproportionately affect a narrow subset of the citizenry, that voting to elect the leaders of these entities may be limited to those most directly affected by the entity's decisions. Exclusion from the right to vote for the leaders of such an entity affects neither a suspect class of citizens nor a fundamental right; hence, the classification that divides voters and non-voters withstands an equal protection challenge so long as a reasonable basis supports it.

The Alaska bar association is a special-purpose entity, a point plaintiffs conceded in the district court. [ER 199] The bar association fulfills no traditional governmental functions, and its actions disproportionately affect its lawyer members. Therefore, restricting voting for the bar board of governors is legitimate so long as the classification dividing voters and non-voters has a rational basis -- and it is rational to allow only members of the bar association to vote to choose the attorney members of the profession's board of governors.

Plaintiffs advance a theory that every public official must be either elected by popular vote or appointed by someone whose appointment can be traced in an unbroken chain to a popularly elected official. Under plaintiffs' theory, no one

may occupy public office without at least an indirect popular vote. No case establishes this supposed principle of constitutional law, and a series of cases refutes it.

The district court correctly determined that plaintiffs' complaint lacks merit and fails to state a claim on which relief may be granted. This court should affirm the district court.

STANDARD OF REVIEW

This court reviews *de novo* a district court's disposition of a motion to dismiss pursuant to Civil Procedure Rule 12(b)(6).[53]

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[53] *See Coto Settlement v. Eisenberg*, __ F.3d __, 2010 WL 323497 at *1 (9th Cir. Jan. 29, 2010); *In re Harris*, 590 F.3d 730, 736 (9th Cir. 2009).

ARGUMENTS

I. THE ALASKA JUDICIAL SELECTION SYSTEM DOES NOT VIOLATE EQUAL PROTECTION.

A. THE ALASKA JUDICIAL SELECTION SYSTEM DOES NOT IMPLICATE THE FUNDAMENTAL RIGHT TO VOTE BECAUSE IT IS AN APPOINTIVE SYSTEM.

The federal system grants states substantial discretion when choosing how to structure their governments with a mix of elective and appointive positions.[54] When a position is appointive, equal protection rights concerning voting in elections are by definition inapposite.[55]

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[54] *See, e.g., Kramer*, 395 U.S. at 629 (states have "latitude in determining whether certain public officials shall be selected by election or chosen by appointment"); *Sailors v. Board of Education*, 387 U.S. 105, 108 (1967) ("We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election."); *Fortson v. Morris*, 385 U.S. 231, 232 (1966) ("Not a word in the Court's opinion [in *Gray v. Sanders*, 372 U.S. 368 (1963)] indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or by elections by the State Assembly."); *see also Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (observing that the Court has rejected claims that "the Constitution compels a fixed method of choosing state or local officers").

[55] *See Hadley v. Junior College District*, 397 U.S. 50, 58 (1970) ("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"); *Sailors*, 387 U.S. at 111 ("Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy."); *see also Kramer*, 395 U.S. at 629 (if a local government called

Alaska's judicial selection system is appointive. The governor appoints Alaska's judges and justices. The members of the Judicial Council are appointed. The fact that bar members vote to select bar governors at an early, indirect step in the multi-step process that ultimately results in the appointment of a judge does not convert the overall judicial selection process into an elective system, any more than does the fact that the governor is elected.

In *Sailors v. Board of Education*, the Supreme Court described a Michigan system for selecting county school board members as "basically appointive" even though an election occurred at one step in the process.[56] Citizens elected the members of local school boards in general elections. Each local school board then selected and sent a delegate to a meeting. Those delegates elected a five-member county school board.[57] Because of inequalities in the population of the local school districts, citizens from certain localities were underrepresented in the nominating group. However, the Supreme Court rejected the argument that the county school board selection process violated the Fourteenth Amendment. It focused on the fact that the county school board selection process was "basically appointive rather

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for appointment of an official, the delegation to one body to make an appointment to another would not call for exacting scrutiny).

[56] 387 U.S. at 109.

[57] *See id.* at 106-07.

than elective."[58] The Court stated that, because the county school board's functions were not "legislative in the classical sense," there was no requirement that the board be elected.[59] And, since the members of the county school board in fact were chosen without an election, there was no requirement that all citizens have an equal voice in the selection process.[60]

In the district court, plaintiffs suggested that a different result is required here because the Alaska governor's appointment power is not unlimited, and the governor must choose from among the nominees selected by the Judicial Council. But this constraint does not render the system elective rather than appointive; it indicates only that the appointive process has multiple steps.[61] The requirement that, to be appointed as a judge, an applicant must be nominated by the Council is not fundamentally different from requirements established for many other gubernatorial appointments.[62]

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58 *Id.* at 109.

59 *Id.* at 110.

60 *See id.* at 110-11.

61 *See Bradley v. Work*, 916 F. Supp. 1446, 1454 (S.D. Ind. 1996) (describing a judicial nominating commission process comparable to Alaska's as one where the governor's "appointment power is aided by a judicial nominating commission"), *aff'd,* 154 F.3d 704 (7th Cir. 1998); *see also infra* at 46-48 (discussing *Bradley* in greater detail).

62 *See, e.g.,* AS 08.65.010(b) (establishing requirements for appointments to the Board of Certified Direct-Entry Midwives); AS 08.88.041(a) (establishing occupational requirements for appointments to the Real Estate Commission); AS

In short, plaintiffs' complaints that non-lawyers are not permitted to vote equally to select judges miss the mark, since no one in Alaska votes to select judges. An appointment simply does not raise equal protection concerns.

Judicial Council members also are appointed. Some are appointed by the governor, and some by the bar association board of governors. *Sailors* is strong precedent that, despite having an election somewhere in the chain of events leading to the appointment of a member of a board or council, the Alaska system still should be classified as "basically appointive." Accordingly, plaintiffs' complaint that non-lawyers and lawyers have unequal rights to vote are misguided again as applied to the Judicial Council, since the Council's members are appointed and not elected.

B. SUPREME COURT CASES RECOGNIZING A FUNDAMENTAL RIGHT TO VOTE ALL INVOLVE POPULAR ELECTIONS.

The constitution does not require that all citizens be permitted to vote in all elections conducted in the area where they live. The fundamental right to vote recognized in the Supreme Court cases on which plaintiffs rely exists *only* when the state has chosen to use a popular election to select public officials or to decide a public question:

31.05.009 (establishing qualifications for appointments to the Alaska Oil and Gas Conservation Commission).

> [*W*]*henever* a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election.[63]

Uniformly, the cases that plaintiffs most rely on involve general elections. For example, in *Kramer* (unlike in *Sailors*), the state chose a popular election as the way to select school board members, but imposed requirements on voting that excluded some residents who otherwise qualified to vote in state general elections.[64] In *Hill, Kolodziejski*, and *Cipriano*, the city governments chose to hold popular referenda on bond issues, but excluded some resident registered voters.[65] In *Carrington*, the state excluded all active-duty military personnel from voting in state elections.[66] In *Harper*, the state excluded people who could not pay a poll tax

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[63] *Hadley*, 397 U.S. at 56 (emphasis added); *see Rodriguez*, 457 U.S. at 10 ("To be sure, *when a state . . . has provided that its representatives be elected*, a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." (emphasis added; internal quotes omitted); *Kramer*, 395 U.S. at 629 (quoted *supra* at 18); *Sailors*, 387 U.S. at 108 (observing that prior cases discussing equal rights to participate in elections "were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials").

[64] *See* 395 U.S. at 622-23, 630.

[65] *See Hill v. Stone*, 421 U.S. 289 (1975) (analyzing whether citizens who did not pay property taxes may be excluded from voting in a city election to approve issuance of bonds); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (similar); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (similar).

[66] *See Carrington v. Rush*, 380 U.S. 89 (1965).

from voting in state elections.[67] In each of these cases, the Supreme Court held that, once a state decides to hold a popular election to choose leaders or decide issues, the right to vote in such an election is a fundamental right, and it subjected the voting restrictions to strict scrutiny. But none of these cases, nor the other cases that plaintiffs cite,[68] hold that every election for any kind of governmental entity must be a popular election.

To build a broader argument for a situation with no popular election, plaintiffs cite holdings taken out of context, emphasizing equal protection principles while disregarding accompanying phrases or facts that make clear that these principles apply *only* when a popular election is held.

Plaintiffs rely particularly on *Kramer* and cite it repeatedly for the proposition that all citizens must have an equal voice in selecting the people whose decisions significantly affect them. [*E.g.*, At. Br. 20-21, 24, 27-28, 36, 42-43, 53-

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67 *See Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

68 *See Evans v. Cornman*, 398 U.S. 419 (1970) (analyzing whether state residents living on federal enclaves could be denied the right to vote in state elections); *Hadley v. Junior College District*, 397 U.S. 50 (1970) (analyzing whether elections for the trustees of a junior college district that had general governmental powers must comply with one person, one vote principles); *Avery v. Midland County*, 390 U.S. 474 (1968) (analyzing whether elections for local government officials must comply with one person, one vote principles); *Reynolds v. Sims*, 377 U.S. 533 (1964) (analyzing whether voting for both houses of a state legislature must comply with one person, one vote principles); *Gray v. Sanders*, 372 U.S. 368 (1963) (analyzing whether the victor in a statewide primary must be determined in compliance with one person, one vote principles).

55] A close look at *Kramer* shows that the phrases plaintiffs repeat apply only when the state uses a popular election to fill a governmental position or to decide a public question.[69]

In *Kramer*, the Supreme Court examined a state statute that provided that only certain people in the geographically affected area -- mostly property taxpayers and parents of school-aged children -- could vote for members of the school board.[70] The Court found this plan unconstitutional, holding that, since the state had provided for an election, the franchise could not be limited to just certain voters.[71] The Court used a hypothetical example to illustrate that the principle it announced would not apply if the state had chosen an appointive, rather than an elective process:

> [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. On the other hand, if the city charter made the office of mayor subject to an election in which only some resident citizens were entitled to vote, there would be presented a situation calling for our close review.[72]

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69 *Also see Gray*, 372 U.S. at 379 & n.10 (distinguishing between voting and other ways of selecting officials); *Bradley*, 916 F. Supp. at 1458 n.17 (distinguishing cases involving popular elections, which recognize a fundamental right to vote, from cases not involving popular elections).

70 395 U.S. at 622-23.

71 *Id.* at 630-33.

72 *Id.* at 629-30 (emphasis added).

Plaintiffs emphasize the italicized phrase [At. Br. 28, 42], but the phrase does not make the point that plaintiffs assert. The highlighted passage simply reflects the Court's awareness that, in describing a hypothetical city council, it needed to make clear that the election of that council was not flawed in the same way as the school board election that the Court's holding invalidated. "[C]onsistent with the commands of the Equal Protection Clause" does not mean that all residents who are registered voters must be permitted to participate in the election that precedes the appointment. As discussed in Section C *infra*, and as plaintiffs sometimes seem to concede [*e.g.*, At. Br. 29-30], principles of equal protection permit voting for the governing boards of special-purpose entities to be limited to the people primarily affected. Where the election that is challenged involves a special-purpose entity, allowing just its members to vote for its directors or board of governors is fully "consistent with the commands of the Equal Protection Clause."[73]

C. THERE IS NO FUNDAMENTAL RIGHT TO VOTE IN THE ELECTION OF THE BOARD OF A SPECIAL-PURPOSE ENTITY.

1. An election for the directors of a special-purpose entity is not a popular election.

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[73] Plaintiffs also disregard that the holding in *Kramer* and the hypothetical dealt with legislative and executive positions and have no obvious application to a judicial nominating commission with neither legislative nor executive authority.

When a state decides to fill a governmental position by election, in most instances the voting must be open to all citizens meeting the state's basic qualifications for voting, such as citizenship, age, and residency.[74] However, a longstanding exception exists for elections for special-purpose entities. Supreme Court cases discussing special-purpose entities establish unambiguously that elections for the leaders of such entities are not elections in which all citizens must be allowed to participate.

The seminal cases are *Salyer Land Co. v. Tulare Land Basin Water Storage District*[75] and *Ball v. James*.[76] *Salyer* distinguished between groups that exercise "normal governmental" authority and those that serve only a "special, limited

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[74] *See generally Hill*, 421 U.S. at 297. Parenthetically, plaintiffs are wrong that the *only* voting criteria that have survived strict scrutiny are age, residency, and citizenship. [At. Br. 36] Courts have approved other criteria such as being literate and not being convicted of a felony. *See Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 51-53 (1959); *see also Gray*, 372 U.S. at 380 (reaffirming *Lassiter*).

[75] 410 U.S. 719 (1973). Prior to *Salyer*, the Court in *Hadley* recognized that there could be situations where a state "elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* might not be required." 397 U.S. at 56. And before that, *Avery* observed that, if the governmental unit at issue were a "special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions." 390 U.S. at 483-84.

[76] 451 U.S. 355 (1981).

purpose" and whose acts disproportionately affect one group of people.[77] *Salyer* held that, for such special-purpose entities, the right to vote for the governing board may be limited to members of the group primarily affected.[78]

Salyer found that a water storage district, governed by a board of directors, was a special-purpose entity. Important facts included that it provided no general public services, such as schools, police, housing, transportation, roads, and utilities; it levied no taxes on the public and assessed costs only against those who directly benefited from its operations.[79] The Court found it understandable and constitutional that the franchise was open only to the landowners most affected by the special-purpose unit's operations.[80] As part of finding that the water district was a special-purpose entity, the Supreme Court remarked on the non-traditional criteria that had been adopted for voters: they did not need to be residents of the area or even natural persons.[81]

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77 410 U.S. at 728.

78 *See id.* at 730; *also see Ball*, 451 U.S. at 362-70.

79 *See Salyer*, 410 U.S. at 728-29.

80 *See id.* at 729-30.

81 *See id.* at 730 ("[T]o sustain their contention that all residents of the district must be accorded a vote would not result merely in the striking down of an exclusion from what was otherwise a delineated class, but would instead engraft onto the statutory scheme a wholly new class of voters in addition to those enfranchised by the statute.").

Ball also found that a water storage and conservation district was a special-purpose entity, even though it raised money by selling electricity to thousands of people who were thereby affected by its operations but who could not vote for the board of directors.[82] The Court determined that the district qualified as a special-purpose entity because it "does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*."[83] The Court observed that the district, as in *Salyer*, had no power to impose taxes or enact laws, and it did not administer "such normal functions of government" as maintenance of streets, operation of schools, or provision of sanitation, health, or welfare services.[84]

In a case decided a decade after *Ball*, the California Supreme Court offered a particularly thoughtful analysis of the *Salyer* and *Ball* holdings.[85] The state court found that a local government entity with powers to impose special assessments on area landowners to finance a rapid transit system "lack[ed] virtually any of the incidents of government" and qualified as a special-purpose entity.[86] Other cases, described in greater detail in Section E *infra*, have specifically found that judicial

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82 *See* 451 U.S. at 365-66.

83 *Id.* at 366.

84 *Id.*

85 *Southern California Rapid Transit District v. Bolen*, 822 P.2d 875, 881-83 (Cal. 1992).

86 *See id.* at 883.

nominating commissions, very much like the Alaska Judicial Council, are special-purpose entities.

2. The Alaska bar association is a special-purpose entity.

The Alaska bar association easily qualifies as a special-purpose entity within the meaning of the cases just discussed. The bar association exercises no "normal functions of government."[87] It does not maintain roads, operate schools, or provide social services to the community. It imposes no taxes and enacts no laws; it receives no public funding.[88] It is not a legislative body; the supreme court, not the bar association, adopts the rules that govern the practice of law.[89] The sole function of the bar association is to regulate the legal profession in Alaska. Its actions disproportionately affect its members. Only bar members pay the dues that principally fund the bar's operations. Only bar members must meet continuing legal education requirements, conform to ethical standards established by the bar, submit disputes with clients to arbitration by the bar, and face discipline by the bar.

In the district court, plaintiffs agreed that it is "indisputable that the Alaska Bar Association is a limited purpose entity." [ER 199] Plaintiffs adopt a different

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87 *Ball*, 451 U.S. at 366.

88 *See supra* at 12-13.

89 *See supra* at 12 & n.42.

position on appeal. [*E.g.*, At. Br. 29][90] However, even on appeal, when considering just the everyday functions of the bar association, plaintiffs still appear not to quarrel with the designation of the bar association as a special-purpose entity. Their constitutional challenge focuses exclusively on the bar board of governors' role in appointing the three attorney members of the Judicial Council. [At. Br. 43]

To try to show that, in this respect, the bar association is not a special-purpose entity, plaintiffs reason backward from the fact that judges make important decisions that affect all citizens: Judges are appointed by the governor, who relies on the screening of candidates by the Judicial Council, and some Council members are appointed by the bar board of governors. Because of the importance to all citizens of judges' decisions, plaintiffs conclude that the bar board of governors' indirect and attenuated role in selecting judges is sufficient to deny the bar association treatment as a special-purpose entity. [At. Br. 24-26, 33-34]

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[90] This court may hold plaintiffs to their earlier position and decline to consider arguments based on a change in a key legal position. *See United States v. Tarallo*, 380 F.3d 1174, 1196 (9th Cir. 2004) (a party may not rest an argument on a different ground than that raised in the trial court); *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1283-84 (9th Cir. 1994) (a party may not rely on appeal on a different theory than was raised below); *Russell v. Rolfs*, 893 F.2d 1033, 1039 (9th Cir. 1990) (party was estopped from arguing a different position on appeal).

No authority supports plaintiffs' claim that the bar board's function in appointing some Judicial Council members makes the bar a general governmental unit where voting must be open to all and not a special-purpose entity where voting may be limited. The power to appoint some of the members of one board or commission is not an example of "normal governmental functions" as that term is defined in *Salyer* and *Ball.* Nor does this limited appointment power change the reality that the bar board of governors' actions disproportionately affect bar members as compared to non-lawyer Alaska citizens, since only bar members may be appointed by the bar association to the seats on the Council reserved for lawyers.

The criteria that the legislature established for voting in bar association elections reaffirm that the bar association is a special-purpose entity.[91] First, the lawyer seats on the bar board of governors are not apportioned in accordance with one person, one vote principles -- and the law is clear that bar association elections do not need to meet that requirement.[92] If the bar association were not a special-

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[91] *See Salyer*, 410 U.S. at 730 (considering the voting criteria as part of the analysis whether the governmental unit was a special-purpose entity).

[92] *See Brady v. State Bar of California*, 533 F.2d 502, 502-03 (9th Cir. 1976) ("malapportionment of representation on a state bar governing body is not a violation of fourteenth amendment rights"), citing *Sullivan v. Alabama State Bar*, 394 U.S. 812 (1969), *summarily aff'g* 295 F. Supp. 1216 (M.D. Ala. 1969) (rejecting argument that state bar elections must conform to one person, one vote principles).

purpose entity, it would be required to conduct elections conforming to one person, one vote rules. Second, the sole requirement for voting for the lawyer members of the bar board of governors is membership in the Alaska bar association. Lawyer-voters need not be state residents, U.S. citizens, or registered to vote in Alaska. If equal protection demanded that all citizens, not just bar members, be allowed to participate in elections for the bar governors, there would be no obvious limits on who in the country or the world would have to be allowed to vote, since any new lines based on residency or citizenship would exclude some active bar members, who justifiably would be aggrieved at being treated differently from other Alaska bar members.[93]

3. Where a special-purpose entity is in issue, the classification limiting who may vote is not subject to strict scrutiny.

Courts scrutinize voting restrictions for a special-purpose entity using the rational basis test.[94] Plaintiffs vastly oversimplify the law when they contend that courts always apply strict scrutiny when evaluating restrictions on the right to vote. [*E.g.,* At. Br. 9, 16-17, 42-43, 50-54] As noted above, they rely on cases involving popular elections, which are inapposite where a special-purpose entity is involved.

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[93] *See Salyer*, 410 U.S. at 730; *Southern California Rapid Transit District*, 822 P.2d at 887 (both noting that adopting the challengers' position would not merely invalidate an exclusion but would require defining an entirely new class of voters).

[94] *See Ball*, 451 U.S. at 371; *Salyer*, 410 U.S. at 730-31.

Kramer, which plaintiffs cite, applied strict scrutiny because it determined first that the franchise had been granted to the electorate; it then examined restrictions that excluded some categories of citizens otherwise qualified to vote in state general elections.[95] Further, *Kramer* predated *Salyer*, which articulated the rule that, when the election under review involves a special-purpose entity, assuming no suspect class is excluded from voting, reviewing courts require only a rational basis to sustain the classification that determines who may vote.[96]

In *Salyer*, the Court first determined that the governmental body in question was a special-purpose entity, then evaluated the voting criteria to determine whether the decision to deny the franchise to residents in the affected area who were not landowners was "wholly irrelevant" to achievement of the objectives of

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[95] *Kramer*, 395 U.S. at 629-30. *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994), which plaintiffs cite [At. Br. 19], applied strict scrutiny only *after* determining that the governmental entity in question there did not qualify as a special-purpose entity.

[96] Despite contrary language at other places in their brief, plaintiffs at one point appear to concede that an election for a special-purpose entity need not meet the strict-scrutiny standard. [At. Br. 56 ("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*" (emphases altered)]

the entity.[97] The Court upheld the restrictions on voting because there was a reasonable basis for the classification on who could vote.[98]

The Supreme Court applied the rational basis test in another special-purpose entity case decided the same day as *Salyer*.[99]

In *Ball*, after finding that the district in question qualified as a special-purpose entity, the Court examined the voting requirements to determine whether they were "reasonably related" to the entity's objectives. The Court remarked that "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 principles of the Equal Protection Clause."[100] The Court expressly distinguished *Kramer*'s strict scrutiny requirement for popular elections.[101]

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97 410 U.S. at 730.

98 *See id.* at 731-32 (applying rational basis test to exclusion of area lessees from voting).

99 *See Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743, 745 (1973).

100 451 U.S. at 357.

101 *See id.* at 365 n.8.

Discussing *Salyer* in a subsequent case, the Court reiterated that the classification distinguishing between those who may and may not vote in a special-purpose entity's election must pass only a "reasonableness" test.[102]

Plaintiffs cite *Quinn v. Millsap*[103] as authority for requiring strict scrutiny of voter qualifications after determining that an election involves a special-purpose entity [At. Br. 49, 57], but *Quinn* offers no such holding. *Quinn* is not even an election case; it addressed whether a state could require citizens to own real property as a condition for being appointed to a particular government board.[104] It applied "rationality review" in striking down that requirement.[105] In a phrase that plaintiffs highlight, *Quinn* discussed *Salyer* and *Ball* and stated simply that these cases "applied equal protection analysis and concluded that the voting qualifications at issue passed constitutional scrutiny."[106] Rational basis review is a type of constitutional scrutiny. *Quinn* noted that the holding in *Salyer* and *Ball*

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102 *See Town of Lockport v. Citizens for Community Action*, 430 U.S. 259, 266-67 (1977); *see also City of Herriman v. Bell*, 590 F.3d 1176, 1186 n.6 (10th Cir. 2010) (describing *Salyer* and *Ball* as cases that adopted rational basis review for voting restrictions for special-purpose districts); *Southern California Rapid Transit District*, 822 P.2d at 888 (similar).

103 491 U.S. 95 (1989).

104 *See id.* at 97-98.

105 *Id.* at 107.

106 *Id.* at 106.

was that "it was *rational* for the States in those cases to limit voting rights."[107] In short, *Quinn* reinforces and does not contradict *Salyer* and *Ball*'s holdings that that the appropriate type of constitutional scrutiny when reviewing the voting criteria for a special-purpose entity is rational basis.

Accordingly, because the Alaska bar association is a special-purpose entity, this court must apply rational basis scrutiny when reviewing the criteria that define who may vote for the bar's leadership. Even plaintiffs do not maintain that no rational basis exists for giving the members of a profession a disproportionate voice in electing the governing body of the profession; plaintiffs claim only that strict scrutiny should be applied and that limiting the voting to lawyers does not pass strict scrutiny. [At. Br. 24, 26-27, 31-34]

As the district court found, it is reasonable to allow bar members alone to select the majority of the bar board of governors, since bar members are disproportionately affected by the bar board's decisions. [ER 21-22] This conclusion is clearly correct. The district court properly dismissed plaintiffs' claims that the inability of non-lawyers to vote for the lawyer members of the bar board of governors violates equal protection.

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107 *Id.* at 109 (emphasis added).

4. The special-purpose entity doctrine does not apply to the Alaska Judicial Council because the Council is not elected, and, in any event, the Council exercises no general governmental functions and its actions disproportionately affect bar members.

Plaintiffs argue that the Alaska Judicial Council is not a special-purpose entity. [At. Br. 33-34] The analysis is misguided, because there is no election for Council members. The special-purpose entity doctrine applies when courts consider whether voting may be restricted; it has no bearing when no election is held.

If the analysis were relevant, the Judicial Council easily would qualify as a special-purpose entity. First, its functions are narrow, to an even greater degree than those of the bar board of governors. The Judicial Council neither levies taxes nor enacts laws. It administers no typical governmental programs. It makes no appointments to any other governmental body.[108] In other jurisdictions, the Council's function to investigate, evaluate, and recommend judicial candidates is frequently filled by advisors who hold no official governmental position at all.

Second, the Council's functions disproportionately affect one group of people: Alaska bar members. Only Alaska bar members may apply to the Council for nomination to be a judge. Thus, only bar members are investigated and

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[108] Plaintiffs argue that the Council determines who will serve as judges in Alaska [*e.g.,* At. Br. 33], but this simply is not so.

evaluated, only bar members are nominated, and only bar members are reviewed after serving as judges when the Council issues its reports and recommendations regarding retention. Plaintiffs' allegation that the Council does not disproportionately affect lawyers relies on the actions of judges after they are appointed, not the actions of the Council. [At. Br. 24-26, 34] Unquestionably, all citizens care about having high quality, independent, and honest judges, and judges' decisions certainly affect all citizens. But to focus on the importance of judges confuses the analysis. *Salyer* and *Ball* make clear that the special-purpose entity doctrine looks only at the functions and direct actions of the entity under analysis, not whether the entity makes decisions or takes actions that ultimately indirectly affect other people.[109]

D. THE ONE PERSON, ONE VOTE CASES AND THE VOTER DISQUALIFICATION CASES ARE NOT DISTINCT LINES OF CASES REQUIRING DIFFERENT ANALYSES.

Plaintiffs assert that the district court erroneously treated their arguments as if they were based solely on the one person, one vote principles of the Equal

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[109] *See Ball*, 451 U.S. at 369-71 (in deciding that a water district qualified as a special-purpose entity, the Court did not give weight to the effects of the water district on consumers of electricity sold by the district); *Salyer*, 410 U.S. at 730-31 (in deciding that a water district qualified as special-purpose entity, the Court distinguished between the possible effects of the water district assessments on all those who could be indirectly affected by the assessments and the direct effects of the assessments on those who were required to pay them); *Southern California Rapid Transit District*, 822 P.2d at 886 (similar).

Protection Clause. [At. Br. 34] They contend that there are two distinct lines of cases: those involving one person, one vote principles ("vote dilution" cases) and those involving disqualifications from voting ("vote denial" cases). They maintain that the district court totally missed the point of their equal protection challenges. [At. Br. 34-39]

The district court did not err. There are not two distinct sets of cases requiring distinct analyses. Both the one person, one vote cases and the voter disqualification cases derive from *Baker v. Carr*,[110] which brought equal protection analysis to voting cases. Both sets of cases address allegations of inequality at the ballot box. The cases express the same underlying principle: when the vote is granted to the general public, all citizens' voices must be heard equally. If a group of people may not vote, their votes are diluted to the point of having no weight at all; this is an extreme example of the violation of one person, one vote principles, not an entirely different legal concept. The "vote denial" cases cite and rely on "vote dilution" cases and vice versa.[111] The district court acknowledged the key

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[110] 369 U.S. 186 (1962).

[111] *See, e.g., Kramer*, 395 U.S. at 626-27 (citing *Reynolds* and *Avery* and describing vote denial and vote dilution cases as closely linked: "Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice . . . ."); *Harper*, 383 U.S. at 667, 670 (invalidating a poll tax that denied some citizens the right to vote, relying on *Reynolds*, a one person, one vote case that held that the Equal Protection Clause requires "the opportunity for equal participation by all voters"); *Reynolds*, 377 U.S.

principle of both groups of cases.[112] Contrary to plaintiffs' claims, the district court did not disregard *Kramer* and other voter disqualification cases.

The district court focused especially on the special-purpose entity cases. The special-purpose entity cases apply both lines of cases.[113] These cases use "one person, one vote" language, yet they are primarily about whether many people may be denied the right to vote in a particular election.[114]

Lastly, notwithstanding plaintiffs' protestations that this case should not be considered as raising one person, one vote claims, the present case in fact is most accurately described as involving unequal representation rather than total lack of a chance to vote. Non-attorneys have a voice and a vote on the bar board of governors and in selecting some of the bar governors. Plaintiffs' basic complaint is that, with three public members on a board of 12, non-attorneys are not represented proportionately to their population. Accordingly, if one strand of the

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at 554-55 (applying one person, one vote principles to elections for state offices, citing and relying on vote denial cases, reasoning that neither the right to vote nor the right to have one's vote counted could be denied or diluted).

[112] *See* ER 13 (district court stated that the Supreme Court has held that the right of suffrage can be denied by dilution of the vote and by wholly prohibiting the free exercise of the franchise).

[113] *See Ball*, 451 U.S. at 360-63, 364 n.8; *Salyer*, 410 U.S. at 726-27.

[114] Plaintiffs acknowledge that *Salyer* uses one person, one vote terminology to encompass *both* vote denial and vote dilution cases. [At. Br. 38 n.1]

equal protection cases were more applicable than the other, the one person, one vote ("vote dilution") cases should predominate in the analysis.

The district court properly considered the relevant precedent and did not neglect a line of analysis, as plaintiffs contend.

E. Other Courts Have Upheld State Judicial Selection Systems In Which One Step Of The Process Involves Lawyers Selecting Lawyers To Participate On A Nominating Commission.

Fourteen other states and Washington, D.C., use judicial nominating commissions similar to the Alaska Judicial Council for at least some judicial appointments and provide that members of the bar association select the lawyers to serve on the commission.[115] Only two cases have challenged these systems on equal protection grounds similar to those raised by plaintiffs in this case, and both times the courts rejected the challenges.[116] Contrary to plaintiffs' claims, these cases offer well-reasoned, persuasive precedent.

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[115] *See* Ala. Const. amends. 83, 408, 607, 615, 780, 819; D.C. Code § 1-204.34; Haw. Const. art. VI, §§ 3, 4; Ind. Code § 33-27; Iowa Const. art. V, §§ 15, 16; Kan. Const. art. III, § 5; Ky. Const. § 118; Mo. Const. art. V, § 25; Neb. Const. art. V, § 21; Nev. Const. art. VI, § 20; N.M. Const. art. VI, § 35; Okla. Const. art. 7-B, §§ 3, 4; S.D. Const. art. V, § 7 and S.D. Codified Laws § 16-1A-2; Vt. Stat. tit. 4, §§ 601, 603; Wyo. Const. art. V, § 4; *see generally* AJS Br. Table 1 & Addendum.

[116] *See African-American Voting Rights Legal Defense Fund, Inc. v. State of Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997), *aff'd,* 133 F.3d 921 (8th Cir. 1998) (unpublished opinion); *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996), *aff'd*, 154 F.3d 704 (7th Cir. 1998) (equal protection issues not preserved for appeal).

In *African-American Voting Rights Legal Defense Fund* ("*AAVRLDF*"), plaintiffs challenged Missouri's judicial selection system, on which Alaska's is modeled. In Missouri, separate judicial nominating commissions screen candidates for different state courts; each commission consists of a mix of lawyers, lay members, and a judge, and in each instance, the lawyer members are selected by vote of the local bar association.[117] Plaintiffs, a group of non-lawyers, claimed that their inability to vote for the lawyer members of the commissions denied them the equal protection guaranteed by the Fourteenth Amendment.[118]

The district court determined, first, that the group excluded from voting -- non-lawyers -- is not a suspect class for purposes of equal protection analysis, and, second, that the selection system does not infringe on any fundamental right:

> Missouri's practice of permitting lawyers to elect the lawyers on the nominating commission does not interfere with the exercise of a fundamental right because there is no fundamental right of every citizen to vote in every election which happens to take place in Missouri.[119]

Because neither a suspect class nor a fundamental right was in issue, the court appropriately held that strict scrutiny of the voter classification was not required.

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[117] *See AAVRLDF*, 994 F. Supp. at 1112, 1117. In this respect, the Missouri system differs slightly from Alaska's. The only voting in Alaska's judicial selection system is one step further removed from the judicial appointment.

[118] *See id.* at 1126-29. Plaintiffs also raised other challenges to the state's judicial selection plan. *See id.* at 1121.

[119] *Id.* at 1127.

The court then examined whether any rational basis justified allowing only lawyers to vote for the lawyer members of the commissions; it concluded that this test was readily met, inasmuch as it is reasonable to assume that lawyers as a group are best situated to determine which lawyers should serve on a nominating commission.[120] The district court also determined that the judicial nominating commissions fit within the definition of special-purpose entities.[121]

The Eighth Circuit affirmed in an unpublished decision that adopted the district court's reasoning.[122]

The second district court decision is *Bradley v. Work*. Again, among other claims, plaintiffs there challenged on equal protection grounds the fact that only lawyers could vote to select the lawyer members of the state's judicial nominating commission.[123] The district court analyzed the selection of members of the nominating commission as not a popular election and "more in the category of executive appointments."[124] The district court observed accurately that appointments do not implicate the Equal Protection Clause.[125] Next, the court considered the application of the special-purpose entity cases. The court observed

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120 *See id.* at 1128-29.

121 *See id.* at 1128 n.49.

122 133 F.3d 921 (8th Cir. 1998) (unpublished opinion).

123 *See* 916 F. Supp. at 1451.

124 *Id.* at 1456.

125 *See id.*

that the nominating commission serves "no traditional governmental functions at all" as that term is used in cases such as *Salyer* and *Ball*,[126] and that the commission's activities principally affect one group -- lawyers -- because only lawyers can be nominated by the commission.[127] The court found that, with its limited function and disproportionate effect on one group, the commission qualifies as a special-purpose entity.[128] Focusing on the limited role of the judicial nominating commission, the court rejected the argument that plaintiffs make in this case that the nominating commission cannot be a special-purpose entity because all citizens are equally interested in the composition of the judiciary.[129] "Having found that the election of attorney members to the Commission does not involve a suspect class or infringe a fundamental right," the court then "turn[ed] to applying the proper test of the constitutionality of the classification, which is the rational basis test."[130] The cases that plaintiffs there, like plaintiffs here, relied on, which applied strict scrutiny, were distinguished because they all involved elections of

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126 *See id.* at 1456-57.

127 *See id.* at 1457.

128 *See id.*

129 *See id.* ("The Voters overstate the effect of the Lake County attorneys' votes. To say that they, alone, are 'voting' for the judicial branch is erroneous. . . . [Commission members do not] 'vote[]' for the judiciary. Instead, they perform a specific, carefully circumscribed, task on behalf of the governor.").

130 *Id.* (footnote omitted).

general interest, not elections for a special-purpose entity.[131] Applying the rational basis test, the court found it rational to believe that lawyers are in the best position to evaluate other lawyers' qualifications to serve on the nominating commission.[132]

The *Bradley* plaintiffs did not appeal the district court's equal protection rulings, only certain rulings related to the Voting Rights Act. The Seventh Circuit affirmed the rulings that were challenged on appeal.[133]

Plaintiffs in the current case criticize these district court decisions that rejected the same arguments they raise, but the criticisms are without merit. Plaintiffs contend that both district courts misapplied *Kramer* and the subsequent cases that invalidated restrictions on who could vote. [At. Br. 54-55] They assert that these cases require strict scrutiny whenever any citizens are denied the right to vote in any election. [At. Br. 54-55] This is incorrect. *AAVRLDF* and *Bradley* correctly followed the mode of analysis set forth in *Salyer* and *Ball*, where the court first determines whether the entity whose election is challenged is a special-purpose entity, and, if it is, examines only whether a rational basis supports the qualifications for voting, because no fundamental right of all citizens to vote is infringed.[134]

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131 *See id.* at 1457 n.17.

132 *See id.* at 1458.

133 154 F.3d 704 (7th Cir. 1998).

134 *See supra* at 35-39.

The cases that plaintiffs principally rely on in criticizing *AAVRLDF* and *Bradley* involved situations where the state or local government chose to let the general electorate participate in an election, but then imposed an additional requirement that disqualified some voters.[135] Because the local government itself defined the election as one of general interest, the courts applied strict scrutiny to determine whether the restriction on voting satisfied equal protection. Those cases do not apply where the state government has chosen not to fill positions by popular election.[136]

AAVRLDF and *Bradley* -- the only two reported cases that address issues closely related to the issues raised in the present case -- are soundly reasoned and provide persuasive precedent for this court.

F. EQUAL PROTECTION DOES NOT REQUIRE THAT ALL CITIZENS HAVE AN EQUAL SAY IN THE SELECTION OF ANY GOVERNMENTAL OFFICIAL.

Plaintiffs invent a rule that "each citizen must be given an equal voice in the selection of all government officials, no matter how indirect that voice might be."

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135 *See* At. Br. 54-57 (citing *Cipriano v. City of Houma, City of Phoenix v. Kolodziejski, Hadley v. Junior College District, Hill v. Stone, Kramer v. Union Free School District No. 15* (all discussed and distinguished *supra* at 25-28)).

136 *See supra* at 24-28, 35-39.

[At. Br. 21-22] This belief is central to their position, but it has no foundation in law.[137]

Supreme Court cases from a variety of contexts refute the existence of the rule that plaintiffs rely on. In addition to rejecting this rule for special-purpose entities as discussed above, the Court has expressly upheld against equal protection challenges systems that do not guarantee an equal voice to all citizens:

- when a state elects its judges[138];
- when a state uses a multi-step appointive process for a county school board, such that the appointments are made by a group that does not equally represent all citizens[139]; and
- when a state allows members of only one political party to vote to name a legislator to fill a mid-term vacancy.[140]

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[137] Plaintiffs' assertion of this belief also makes it clear that the board of governors' *election* merely supplies a hook for plaintiffs to reach the result they seek -- to diminish the role of lawyers. The election is not the source of the "problem" they wish to correct. If, hypothetically, the legislature had declared that the bar board of governors will consist of the two most senior lawyers from each judicial district, plaintiffs would be equally unhappy that lawyers appear to have a disproportionate say in the selection of judges, but their equal protection argument based on election cases would disappear entirely.

[138] *See Wells v. Edwards*, 409 U.S. 1095 (1973), *summarily aff'g* 347 F. Supp. 453 (M.D. La. 1972).

[139] *See Sailors*, 387 U.S. at 109-11.

[140] *See Rodriguez*, 457 U.S. at 10-12; *see also Gray*, 372 U.S. at 379 & n.10 (holding that *when* a state chooses a primary in which citizens vote to nominate their party's candidates for statewide offices, the state must give all citizens' votes

Each of these key cases is discussed briefly in turn.

In *Wells v. Edwards*, plaintiffs from Louisiana challenged the fact that the state's judicial districts were not apportioned to provide all citizens with equally weighted votes when they elected judges.[141] The district court held that equal protection principles were not violated,[142] and the Supreme Court summarily affirmed.[143] Plaintiffs in the current case contend that *Wells* is irrelevant because it merely held that one person, one vote principles do not apply to judicial elections. [At. Br. 44-45] *Wells* is in fact instructive. If the Constitution does not require that all citizens have an equal voice in the direct selection of judges, it follows logically that the Constitution must not mandate that all persons have an equal voice in all stages of the selection process leading up to the appointment of judges. Moreover, although plaintiffs attempt to distinguish *Wells* because they insist that their case is not premised on one person, one vote principles, as discussed above, at base their claim rests on the fact that, while non-lawyer citizens have a voice and a vote in all stages of the process leading to selection of judges in Alaska, lawyers have a larger formal role, disproportionate to their numbers in society. Accordingly, *Wells* is

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equal weight, but expressly not reaching the equal protection questions that are presented when the state chooses a non-elective system -- such as conventions -- to nominate candidates).

141 *See* 347 F. Supp. at 454.

142 *See id.* at 455.

143 409 U.S. 1095 (1973).

very much relevant precedent establishing that the Fourteenth Amendment does not require giving equal voice to all citizens in the judicial selection process. By itself *Wells* supports the district court's alternative holding that plaintiffs' equal protection claims may be dismissed on the simple ground that the judiciary is not a representative branch of government. [ER 19-20][144] A decision affirming the district court could rely on this ground alone.

Sailors is discussed at length earlier.[145] It upheld a "basically appointive" process of picking county school board members, even though not all citizens had an equal voice in that process.[146] It illustrates, like *Wells*, that the Supreme Court does not demand that all citizens be given equal voice in selecting every governmental official whose decisions may affect them.

Rodriguez upheld a system where only members of one party could vote for the nominee to fill a midterm vacancy in the Puerto Rico legislature.[147] The challengers argued, much like plaintiffs in the current case, that the power to make appointments "must be vested in an elected official, such as the Governor of the

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144 *See also Smith v. Boyle*, 144 F.3d 1060, 1061 (7th Cir. 1998) (affirming dismissal of complaint alleging that Illinois's method of selecting judges violates the Equal Protection Clause and reiterating that one person, one vote principles do not apply to judicial elections).

145 *See supra* at 22-23.

146 *See* 387 U.S. at 109-11.

147 457 U.S. at 10-12, 14.

Commonwealth, so that the appointments will have 'the legitimacy of derivative voter approval and control.'"[148] The Supreme Court rejected this argument.[149] In upholding the Puerto Rican selection system, the Court demanded no more than that it be a reasonable way to meet Puerto Rico's "special concerns and political circumstances."[150] Puerto Rico justified the plan because it saved money compared to holding a general election, and it preserved the party representation chosen in the last general election. The Court accepted these as reasonable justifications for a system of selecting a legislator that did not permit all citizens an equal voice.[151] Alaska's judicial selection plan is also backed by sound and legitimate reasons. Drafters of the state constitution desired to keep the judicial selection process merit-based and non-partisan, and they believed that keeping the selection of attorney members of the Judicial Council entirely outside the political process promoted this goal.[152]

As the preceding Section E showed, other federal courts have upheld judicial selection systems very much like Alaska's, where not all citizens participate

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148 *Id.* at 12 (quoting the appellants' reply brief in that case).

149 *See id.* at 12-14.

150 *Id.* at 13-14 (internal quotes omitted).

151 *See id.*

152 *See supra* at 3-7; *see generally* Brennan Br. Arg. II.C.

equally in selecting the members of a judicial nominating commission.[153] These cases reject the premise that all citizens must have an equal voice at every stage in the selection of judges.

In support of their claim that this court should recognize a right that no other court has recognized, plaintiffs observe that, in the federal judiciary, justices and judges are appointed by the President and confirmed by the Senate, and both the President and the Senate are elected in popular elections. [At. Br. 22] This observation proves nothing. First, states have substantial discretion to develop systems of government not modeled on the federal system.[154] Second, in the federal system, the appointing officer, the President, actually is *not* selected in an election in which all citizens had equal voice, nor does each Senator represent the same number of constituents.[155] Third, the President and the Senators, in deciding whom to appoint and whether to confirm a nominee, rely heavily on advisors who are neither elected nor appointed by elected officials and who are not necessarily

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153 Other comparable judicial selection systems have operated for decades, without constitutional challenge. *See* AJS Br. Arg. III.C.

154 *See generally Town of Lockport*, 430 U.S. at 269-70 (observing that respect for different ways of structuring state government is a fundamental component of the federal system); *see also* cases cited *supra* n.54.

155 *Cf. Gray*, 372 U.S. at 376-78 (discussing the electoral college system that elects the President and the bicameral Congress in which not all citizens are equally represented in the Senate as exceptions to the principle of equal voice which were adopted as compromises when the country was founded).

representative of the general electorate.[156] That the President, in exercising his appointment powers, receives advice from people who were not elected or appointed following the rules that plaintiffs seek to impose does not violate the equal protection rights of those who were not consulted. Nor is there a constitutional difference because Alaska, rather than allowing the executive complete discretion to pick all of his or her own advisors, requires the governor to rely on the Judicial Council, a specifically chosen and publicly visible advisor, to screen and narrow the list of candidates from whom the governor may appoint.

Contrary to plaintiffs' hyperbole [At. Br. 22, 43-44], rejecting plaintiffs' proposed rule that all appointments must derive exclusively from someone elected in a general election does not mean that a state could circumvent the guarantee of equal protection by allowing any special-purpose group to appoint any other state official. The Supreme Court has suggested that certain positions -- such as

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[156] *See generally* Federal Judicial Center, *Federal judges and how they are appointed*, available at *www.fjc.gov/federal/courts.nsf/autoframe!openform&nav.=menu18page=/federal/courts.nsf/page/183* ("The professional qualifications of prospective federal judges are closely evaluated by the Department of Justice, which consults with others, such as lawyers who can evaluate the prospect's abilities. The Senate Judiciary Committee undertakes a separate examination of the nominees."); *www.abanet.org/scfedjud/home.html* (describing the volunteer activities of the Standing Committee on the Federal Judiciary of the American Bar Association, which investigates and evaluates potential nominees for federal judgeships).

legislators elected to full terms -- *must* be chosen in a popular election.[157] Moreover, if a special-purpose entity wielded appointment power for positions not closely related to the entity's special purpose, the entire selection system might be invalidated as arbitrary and irrational.[158]

This court need not explore the boundaries of a state's right to designate certain positions as appointive, because the current case presents none of the threats about which plaintiffs hypothesize. First, the Judicial Council unquestionably is not a legislative body. Second, under the Alaska constitution, the directors of one special-purpose entity appoint a minority of the members of another specialized commission that also exercises no general governmental power and whose limited functions are closely related to the functions of the appointing entity. More important, the argument that all citizens must be equally represented in the selection of the Judicial Council's members misses a critical point: The Judicial Council is designed expressly not to be a representative assembly where members are expected to represent particular constituencies. To the contrary, the

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[157] *See Sailors*, 387 U.S. at 108 (quoted *supra* n.55); *see also Kramer*, 395 U.S. at 629 (stating that in *Sailors* the Court "held that where a county school board is an administrative, not legislative, body, its members need not be elected"); *cf. Rodriguez*, 457 U.S. at 8-14 (rejecting argument that legislative seats vacated mid-term must be filled through a general election).

[158] *Cf. Sailors*, 387 U.S. at 109 ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs.").

drafters of the Alaska constitution deliberately structured the Judicial Council to remove the influences of partisan politics and the need to represent a constituency.

Most fundamentally, the judiciary is not a representative branch of government. Judges' duties sometimes require disregarding popular sentiment. "Judges do not represent people, they serve them."[159] Plaintiffs' complaint that the inability of non-lawyers to vote for most of the members of the bar board of governors ultimately denies non-attorneys "equal participation in their representative government" therefore badly misses the mark. [At. Br. 23] Having some Council members appointed by the bar board of governors, rather than by the governor or the legislature, does not undermine representative democracy in Alaska and does not violate equal protection.

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[159] *Wells*, 347 F. Supp. at 454 (internal quotes omitted); *see also Chisom v. Roemer*, 501 U.S. 380, 390 n.11 (1991) (citing *Wells*); Brennan Br. Arg. II.C.2.

CONCLUSION

Alaska's merit selection system for judicial appointments is constitutional in all respects. This court should affirm the district court's dismissal of plaintiffs' claims.

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I hereby certify that on February 26, 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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I hereby certify that this document, including all headings, footnotes, and quotations, but excluding the table of contents, table of authorities, addendum containing constitutional provisions, and certificates of counsel, contains 13,901 words, as determined by the word count of the word-processing software used to prepare this document, specifically Microsoft Word 2007, which is no more than the 14,000 words permitted under Fed. R. App. P. 32(a)(7)(B)(1).

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ADDENDUM

THE CONSTITUTION OF THE STATE OF ALASKA

Article IV: The Judiciary

Section 1 - Judicial Power and Jurisdiction.
The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

Section 2 - Supreme Court.
(a) The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court.

(b) The chief justice shall be selected from among the justices of the supreme court by a majority vote of the justices. His term of office as chief justice is three years. A justice may serve more than one term as chief justice but he may not serve consecutive terms in that office.

Section 3 - Superior Court.
The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.

Section 4 - Qualifications of Justices and Judges.
Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.

Section 5 - Nomination and Appointment.
The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.

Section 6 - Approval or Rejection.
Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.

Section 7 - Vacancy.
The office of any supreme court justice or superior court judge becomes vacant ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself.

Section 8 - Judicial Council.
The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.

Section 9 - Additional Duties.
The judicial council shall conduct studies for improvement of the administration of justice, and make reports and recommendations to the supreme court and to the legislature at intervals of not more than two years. The judicial council shall perform other duties assigned by law.