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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MICHAEL MILLER, KENNETH KIRK, and CARL EKSTROM, *Plaintiffs*, v. CHIEF JUSTICE WALTER CARPENETI, in his official capacity as *ex officio* Member of the Alaska Judicial Council; JAMES H. CANNON, in his official capacity as Attorney Member of the Alaska Judicial Council; KEVIN FITZGERALD, in his official capacity as Attorney Member of the Alaska Judicial Council; and LOUIS JAMES MENENDEZ, in his official capacity as Attorney Member of the Alaska Judicial Council; WILLIAM F. CLARKE, in his official capacity as Non-Attorney Member of the Alaska Judicial Council; KATHLEEN THOMPKINS-MILLER, in her official capacity as Non-Attorney Member of the Alaska Judicial Council; and CHRISTENA WILLIAMS, in her official capacity as Non-Attorney Member of the Alaska Judicial Council, *Defendants*	Civil Action Number 3:09-cv-00136-JWS PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(6)

Introduction

On, July 2, 2009, Plaintiffs Michael Miller, Kenneth Kirk, and Carl Ekstrom brought suit against the members of the Alaska Judicial Council challenging several provisions of the Alaska Judicial Selection Plan. On the same day, Plaintiffs filed a Motion for Preliminary Injunction. On July 31, 2009, Defendants filed their Motion to Dismiss in conjunction with their Response in Opposition to Plaintiffs' Motion for the Preliminary Injunction. Plaintiffs filed their Reply in Support of their Motion for Preliminary Injunction. Plaintiffs now timely file their Response in Opposition to Defendants' Motion to Dismiss.

Defendants' Motion to Dismiss should be denied by the court because Plaintiffs have brought a challenge to the constitution and statutes of Alaska under applicable United States Supreme Court authority. As discussed below, Plaintiffs have shown that the commands of the Equal Protection Clause are applicable when a state has chosen to select public officials through appointments in that those who make the appointments must have been elected consistent with those commands. Plaintiffs simply contend that, because all otherwise qualified Alaska voters are excluded from participating in the election for the Board of Governors of the Alaska Bar Association, the appointment of members of the Alaska Judicial Council by the Board violates the Equal Protection Clause. **As a result,** Plaintiffs respectfully request that this court deny Defendants' Motion to Dismiss.

Argument

A. Alaska's System for Appointing Judges Implicates the Fourteenth Amendment.

1. The Elections Involved in an Appointive System Must Comply With the Commands of Equal Protection.

The commands of the Equal Protection Clause of the Fourteenth Amendment apply to the election of state officials regardless of whether the state ultimately employs an elective or an appointive system. Otherwise, a state could simply avoid the commands of Equal Protection by appointing officials through an entity rather than by means of an election. If Defendants' position were correct, then any and all non-legislative government officials could be appointed by entities that are not composed in accordance with the requirements of Equal Protection.

But the State of Alaska cannot avoid the Equal Protection Clause and dismiss Plaintiffs' challenge so easily. The Supreme Court precedents do have bearing upon Alaska's judicial selection process because an election is involved, however buried within the appointment process. Both *Kramer* and *Sailors* held that, while a non-legislative government official need not be directly elected, the appointing entity must be composed "consistent with the commands of the Equal Protection Clause." *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 629 (1969); *Sailors v. Bd. of Educ. of Kent County*, 387 U.S. 105, 111 (1967).

The overall nature of the process does not determine whether the Equal Protection Clause is implicated. *Kramer*, 395 U.S. at 629-30. While the election of the person or entity that makes appointments may not convert an "appointive" process into an "elective" process, Doc. 35 at 12, the Equal Protection Clause is implicated by that underlying election, *Kramer*, 395 U.S. at 629; *Sailors*, 387 U.S. at 111. When a state creates an appointive process, the Equal Protection Clause is relevant

to how those who make the appointments were selected. *Id.* The fact that the Fourteenth Amendment does not require the election of non-legislative officials does not foreclose this challenge to an appointive system.

To say that none of Plaintiffs' legal authority is relevant to Alaska's system for appointing judges ignores the fact that elections are an integral part of that appointment process. Defendants argue that it is rationally related to the goals of the system for the Board of Governors to appoint the attorney members of the Council Governors precisely because attorneys exclusively elect the Board. Doc. 35 at 21-22. This election, and the fact that it excludes all non-attorney citizens from taking part, is apparently "the very essence" of the system. Doc. 35 at 6. While this election may have other consequences, it has been provided for here and therefore must be closely scrutinized by this court because "some resident citizens are permitted to participate and some are not." Defendants seek to downplay the significance of the electoral elements of Alaska's judicial selection process, while by their own admission it is the most significant aspect of the process. *Compare* Doc. 35 at 20 *with id.* at 6-7.

The ultimate question in this case is whether, in attempting to utilize the unique knowledge of the resident members of the bar in the process of appointing judges, Alaska may incorporate an election in which only bar members may participate and all non-attorney citizens are excluded. The Supreme Court, in an established line of cases, has held that "as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest." *Hill v. Stone*, 421 U.S. 289, 297 (1975). Alaska excludes all otherwise qualified citizens from participating in the incorporated election based upon

occupation. Such an exclusion cannot withstand constitutional scrutiny. *Gray v. Sanders*, 372 U.S. 368, 380 ("There is no indication in the Constitution that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State."). Therefore, this court must decide whether the incorporation of the election for the Board of Governors into the Alaska judicial selection process can be justified because that election is one of "special purpose." Plaintiffs contend that, if the election for the Board of Governors qualifies as one of "special purpose," then it is unconstitutional for the Board to have the power to appoint members of the Council.

Sailors is instructive as to why Equal Protection is implicated here and not in that case. In *Sailors*, the plaintiffs challenged a system for appointing members of a county school board. 387 U.S. at 106-07. (1) These members were appointed by delegates chosen by the local district school boards. *Id.* (2) Each local board appointed one delegate, regardless of the population of that local district. *Id.* (3) The members of the local board were elected by all qualified residents of the district, with no otherwise qualified voter being excluded. *Id.* Equal Protection was not implicated because there was no constitutional flaw in the underlying election. *Id.* at 111. The Court indicated that Equal Protection scrutiny would be called for if there had been unjustified apportionment or classification in that underlying election. *Id.* Furthermore, the election for the local school board could not have qualified as a "special purpose" election. *Kramer*, 395 U.S. at 632).

Here, Plaintiffs are challenging the system for appointing members of the Alaska's courts. (1) These justices are appointed by the seven-member Council. (2) The governor appoints three Council members and the Board of Governors appoints three, the remaining member sitting *ex officio*. (3) The governor is elected by all resident citizens of Alaska, without exclusion, and the Board of Governors is elected exclusively by the members of the bar. Equal Protection is implicated

here because some otherwise qualified Alaska citizens are excluded from this underlying election based upon occupation. Thus, *Sailors* actually supports Plaintiffs' challenge here because there is a constitutional complaint respecting an election. *Id.* at 111.

Furthermore, *Kramer* involved the direct election of a local school board and the Supreme Court held that the state could not exclude citizens who were otherwise qualified by residency and age from participating. Contrary to what Defendants assert here, Doc. 35 at 13, the Court in *Kramer* considered it irrelevant for purposes of scrutiny that the board could have been appointed, *Kramer*, 395 U.S. at 628-29. The Court's analysis would have been unchanged had the board been appointed by an entity that was chosen through an election in which some resident citizens were permitted to participate and others were not. *Id.* at 629. In fact, the Court explicitly anticipated such a situation:

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

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

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

attorneys are excluded from the election of the Board of Governors, passes strict scrutiny. Contrary to Defendant's assertion, there is abundant legal authority for the principle that any election for an official who has the power to appoint government officials must be consistent with Equal Protection.

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. Doc. 4 at 24. Rather, the constitutional infirmity lies in that the Members of the Judicial Council, who do exercise general government functions (determining the composition of the judiciary), are appointed by an entity that is selected through an election in which otherwise qualified voters are excluded based on occupation.

A hypothetical based on the relevant authorities is illustrative. In *Kramer*, only qualified voters who also either owned real property in the district or had children enrolled in the local public schools were permitted to participate in the election for district school board members. *Kramer*, 395 U.S. at 622. The Supreme Court held that this exclusion warranted close scrutiny under the Equal Protection Clause and was unconstitutional because it excluded otherwise qualified voters from participating in an election in which they had an interest. *Id.* at 626-27. What if, instead of limiting the franchise to land-owners and parents, the state in *Kramer* had established that the school board would be appointed by the governing body of a homeowners association to which all land-owners in the district belonged and that satisfied the requirements for the "special purpose" entity as established in *Sayler* and *Ball*? Defendants' position is that such an arrangement would be constitutional because the entity doing the appointing, even though it limits participation by the very same classifications that would be unconstitutional were the school board elected directly, is properly elected under the "special purpose" exception. Doc. 35 at 19-20. But the State cannot circumvent

the commands of the Equal Protection Clause by delegating authority to other entities in this manner. *Sailors*, 387 U.S. at 108 & n.5.

Plaintiffs contend that the natures of *both* the Alaska Judicial Council and the Board of Governors of the Bar Association are critical to the determination of the constitutionality of the process. The Council exercises government functions such that if the members were directly elected, that election must comply with Equal Protection and otherwise qualified voters could not be excluded from participation based on occupation. But the Board of Governors may satisfy the qualifications for an office or entity of limited purpose that may be elected exclusively by those who are disproportionately affected by its activities. *See Sayler Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 720 (1973); *Ball v. James*, 451 U.S. 355, 357 (1981). Plaintiffs contend that Alaska cannot avoid the commands of the Equal Protection Clause with respect to the Judicial Council by delegating appointment power to an entity that may not be bound by those commands. *See Sailors*, 387 U.S. at 108 & n.5; *Kramer*, 395 U.S. at 629.

2. *AAVRLDF* and *Bradley* Do Not Support Dismissal.

The two cases relied upon by Defendants do not support dismissal of this challenge. Indeed, those district courts themselves considered the cases relied upon by Plaintiffs here to be the controlling authority, however erroneous their application of that precedent. *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105, 1128 (E.D. Mo. 1997) ("*AAVRLDF*") ("[I]f an election of general interest . . . were at issue, plaintiffs' statement of the law could not be faulted.") (citing *Kramer*, 395 U.S. at 627 and *Ball v. James*, 451 U.S. 355, 361-62 (1981)); *Bradley v. Work*, 916 F. Supp. 1446, 1455-59 (S.D. Ind. 1996) (citing and quoting *Kramer*,

Hadley, *Reynolds*, *Sayler*, and *Ball* as the controlling and applicable precedents governing the outcome of the Equal Protection claims presented).

The courts in *AAVRLDF* and *Bradley* made two fundamental errors in the application of the relevant law. The first was the determination of when an election calls for close or exacting scrutiny under the Equal Protection Clause. In *Bradley*, the court determined that Equal Protection scrutiny was not implicated because the state had decided not to make use of a "popular election." *Bradley*, 916 F. Supp. at 1456. According to the court, the election was not "popular" because it was not open it to all qualified voters. Thus, under *Bradley*, an election does *not* implicate the Equal Protection Clause *unless* it is "one in which all registered voters meeting the age and residency requirements may vote." *Id.* Therefore, according to *Bradley*, the Equal Protection Clause is never implicated when an election is restricted to a certain group of qualified voters.

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

> No less rigid an examination is applicable to statutes denying the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Kramer, 395 U.S. at 626-27 (citations omitted). Subsequent Supreme Court decisions have reinforced this principle. *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Hill*, 421 U.S. at 297. The court in *Bradley* agreed with the defendants in that case that the commission members "are not selected by popular election and about

the nature of the Commission." *Bradley*, 916 F. Supp. at 1456. But it is the nature of the elected entity that determines whether a popular election is required.

The court in *AAVRLDF* made the same error when it concluded, citing *Kramer* but without giving any reasoning, that the election involved in that case was not one of "general interest (such as election for a legislator)" and therefore did not implicate Equal Protection. *AAVRLDF*, 994 F. Supp. at 1128. But an election does not have to be for a legislator in order to be of "general interest" and implicate close scrutiny under the Equal Protection Clause. In fact, according to the court in *AAVRLDF*, *Kramer*, *Cipriano*, *Kolodziejski*, and other similar Supreme Court cases were all wrongly decided and should not have employed exacting review because none dealt with elections for officials or entities that exercised legislative power. *Hadley*, 397 U.S. at 51; *Kramer*, 395 U.S. at 622 ("[T]he deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators *and other public officials*.") (emphasis added); *Cipriano*, 395 U.S. at 702; *Kolodziejski*, 399 U.S. at 205; *Sayler Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 720 (1973); *Hill*, 421 U.S. at 291; *Ball v. James*, 451 U.S. 355, 357 (1981).

Contrary to *AAVRLDF* and *Bradley*, the Equal Protection Clause is implicated when certain otherwise qualified voters are excluded from an election unless the "special interest" exception is met. An election does not become one of "special interest" *because* the state is excluding citizens from participating. Rather, *if* the state is excluding citizens from voting in an election, it must either show that the exclusion is necessary to serve a compelling interest or that the election is one of "special interest" such that it need not be open to all qualified voters. *E.g. Hill*, 421 U.S. at 297. Here, Alaska excludes otherwise qualified citizens from voting in an election for the members of a

state entity with power to appoint members of the Alaska Judicial Council based upon occupation. *Contra Gray*, 372 U.S. at 380. Alaska must either overcome strict scrutiny under the Fourteenth Amendment or show that the election is one of special interest. Either way, this case should not be dismissed for failure to state a claim.

The courts in *AAVRLDF* and *Bradley* also misapplied the "special purpose" exception analysis from *Sayler* and *Ball* in determining that the respective nominating commissions qualified for restricted elections. The court in *Bradley* determined that the nominating commission at issue satisfied the "special purpose" exception. The court utilized the standard that "[w]hen a special unit of government is assigned certain narrow functions, affecting a definable group of constituents more than other constituents, limiting the franchise to members of that definable group is proper." *Bradley*, 916 F. Supp. at 1456. The court further explained that when an entity's "purpose is narrow and limited, and a special relationship exists between its functions and one class of citizens" there can be exception to the requirements of *Reynolds* and *Kramer*. *Id.* The court in *AAVRLDF* made the same error when it determined, without analysis, that the nominating commission at issue there was a "special unit with narrow functions." *AAVRLDF*, 994 F. Supp. at 1128 n.49. But, as will be discussed below, this is not the standard established by *Sayler* and *Ball*.

Defendants have not established that the relevant Supreme Court authority does not apply to a judicial selection process that involves both appointments and elections. This Court should deny their motion to dismiss and consider Plaintiffs claims according to the relevant binding authority.

B. Selection of the Judiciary Implicates the Equal Protection Clause.

The Supreme Court has not limited application of the Equal Protection Clause to scrutinizing the apportionment of voting districts to ensure that each qualified citizen's vote is equal to others

as in *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Hadley v. Junior College District*, 397 U.S. 50 (1970). The Equal Protection Clause is also implicated in cases dealing with requirements on the availability of the ballot, *see Pope v. Williams*, 193 U.S. 621 (1904), suspect classifications, *see McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), and classifications based on qualifications other than residency, age, and citizenship, *see, e.g.*, *Hill*, 421 U.S. at 297. These applications of Equal Protection scrutiny are distinct from the "one person, one vote apportionment" analysis from *Reynolds*. *See Kramer*, 395 U.S. at 626-27 (distinguishing scrutiny of state apportionment statutes from the examination of exclusions from voting and not relying upon *Reynolds* for analysis).

Plaintiffs' injury here arises from a classification that excludes them from participating in an election based upon occupation. *Hill*, 421 U.S. at 297. The Equal Protection Clause is implicated because this exclusion results in an unequal voice and influence among residents. *Kramer*, 395 U.S. at 627 & n.7 ("Each resident's formal influence is perhaps indirect, but it is equal to that of other residents."). While both apportionment and exclusion based on certain qualifications may both implicate the Equal Protection Clause by causing inequality, they do so by very different means. Therefore, the summary affirmation of *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd summarily*, 409 U.S. 1095 (1973), did not indicate that the Equal Protection Clause is inapplicable to judicial selection when the challenge is not based upon apportionment, as it was in *Wells*, but upon classification.

The Supreme Court has established the principle that any classification restricting who may participate in an election other than residence, age, and citizenship violates the Equal Protection Clause unless the State can show that it is necessary to serve a compelling interest. *Hill*, 421 U.S.

at 297. Defendants cite no precedent supporting the claim that this principle has no application in the selection of judges. Doc. at 18.

C. The Selection of the Alaska Judicial Council Must Comply With Equal Protection.

Plaintiffs have established that all elections that precede an appointive process for an official or entity who performs general government functions must be consistent with the commands of the Equal Protection Clause. *Supra* Part A. Therefore, this case is about an election and the effect that this election has on an appointive process under the Equal Protection Clause. There is no question that a government official or entity may be appointed, *Kramer*, 395 U.S. at 629-30, but the Equal Protection Clause is implicated with respect to who is doing the appointing, *id.* at 629; *Sailors*, 387 U.S. at 111.

Any law that establishes which otherwise qualified resident citizens may participate in the election of public officials or entities must survive strict scrutiny under the Fourteenth Amendment to be constitutional. *Kramer*, 395 U.S. at 627. The only exception to this constitutional requirement is when a public official or entity exercises functions that are "so far removed from normal governmental activities and so disproportionately affect different groups" that the election need not comply with the commands of the Equal Protection Clause. *Hadley*, 397 U.S. at 56. When these qualities are present, a classification as to who may vote is permissible based on rational basis. But an exception is not justified if the entity exercises "general governmental powers" and performs "important government functions" that have a significant effect on all citizens. *Id.* at 53-54. Plaintiffs contend that the Alaska Judicial Council has general government power from the Alaska constitution and performs an important government function under the constitution that significantly affects all Alaskans.

It is important to note that *both* elements must be present. It is not enough to satisfy the exception if a public official exercising normal government power disproportionately affects a certain group. It would also not be enough if a public entity exercised only nominal government power that did not affect one group disproportionately. A classification based on occupation, for example, would be unconstitutional in both instances.

1. The Council is a Public Entity Exercising Normal Governmental Power That Affects All Alaskans.

The nature of the public official or entity is the first consideration when determining whether an exception to the commands of the Equal Protection Clause is warranted. *Sayler*, 410 U.S. at 728; *Ball*, 451 U.S. at 366-70. The Supreme Court in *Sayler* held that a water storage district exercises sufficiently "limited authority" to satisfy this first prong. The Court reached this conclusion based on the fact that the "reason for its existence" was water storage and distribution in one area and that it provided "no other public services." *Sayler*, 410 U.S. at 728-29.

The Court in *Ball* set forth a more comprehensive test for determining whether the first prong is satisfied. The Court considered three factors that indicated the entity had a special limited purpose.

First, the water district did not exercise "normal functions of government." *Ball*, 451 U.S. at 366. In the case of the Alaska Judicial Council, it is difficult to conceive how an entity created by the state constitution to nominate judges does not perform a "normal function of government." *Id.* The Council is established by the constitution as an integral part of the judicial branch of government. Alaska Const. art. IV, § 8. And its function is similar to that of the President of the United States with respect to the nomination of the members of the judiciary in its jurisdiction. U.S. Const. art. II, § 2. The Council nominates judges and the governor must appoint one from the list provided. Alaska Const. art IV, § 5. As evidenced by the fact that it is established and its functions

defined by the Alaska constitution, the Alaska Judicial Council exercises the kind of government power that invokes the strict demands of *Reynolds* and *Kramer*.

The district courts in *Bradley* and *AAVRLDF* erroneously determined that the judicial nominating commissions in those cases did not exercise normal governmental power. *Bradley*, 916 F. Supp. at 1456; *AAVRLDF*, 994 F. Supp. at 1128 n.49. In both Indiana and Missouri, the judicial nominating commissions have the power to *both* nominate *and* appoint justices and judges. Ind. Const. art. 7, § 10 (empowering the Chairman of the commission to appoint from the list if the governor refuses to do so); Mo. Const. art. V, § 25(a) (empowering the commission to appoint a nominee if the governor rejects the list). This is the same power as is given the President of the United States and the Senate combined. U.S. Const. art. II, § 2. Yet, the court in *Bradley* determined that the commission "serves no traditional government functions at all." *Bradley*, 916 F. Supp. at 1456. A function enumerated in the constitution of the government for the determination of the composition of an entire branch of government is, by definition, a traditional government function. This court should not make the same error, because the determination of the nature of the Council is relevant to whether the Equal Protection Clause is implicated by who appoints its members. *Kramer*, 395 U.S. at 629; *Sailors*, 387 U.S. at 108 n.5, 111.

Second, the water district in *Ball* had a "nominal public character." *Ball*, 451 U.S. at 368. "The constitutionally relevant fact" for the Court in *Ball* was that "the districts remain essentially business enterprises, created by and chiefly benefitting a specific group of landowners." *Id.* Thus, if the entity is created by and for the benefit of a specific group, the "nominal public character" of the entity does not change the specific limited purpose it serves. *Id.*

The Alaska Judicial Council does not have a merely "nominal public character." Indeed, the state constitution created the Council to determine the composition of the third branch of government. It is not an entity created by and chiefly benefitting a specific group of people, but is part of the government as established by the constitution. As such, the people of Alaska created the Council for the benefit of the people as a whole. Alaska Const. pmbl. ("We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of States, do ordain and establish this constitution for the State of Alaska.").

Finally, the provision of electricity and water by the water district in *Ball* was not a traditional element of governmental sovereignty. *Ball*, 451 U.S. at 368-69. Thus, the entity did not perform the sort of "general or important governmental function" that would invoke the strict requirements of *Reynolds*. *Id.* at 368. And so the scheme for the selection of the members of the water district could "constitutionally reflect the narrow primary purpose for which the district [was] created." *Id.* at 369.

The Alaska Judicial Council, by strong contrast, nominates judges and justices to Alaska's courts. This is a traditional element of government sovereignty for the same reasons described above as to why the powers of the Council are normal functions of government and are not nominally public. Therefore, the scheme for selecting members of the Council must constitutionally reflect its origin and the purpose for which it was created: by the people of Alaska to secure their liberty.

Since the Alaska Judicial Council is not an entity with a special limited purpose that warrants an exception to the strict requirements of *Reynolds* and *Kramer*, it follows that the members of the Council cannot be selected in such a way that certain groups are excluded from having an effective

voice on the basis of occupation. *Kramer*, 395 U.S. at 626-27; *Hill*, 421 U.S. at 297; *Gray*, 372 U.S. at 380.

2. The Judicial Council Affects All Alaskans.

Whether the entity with the special limited purpose has a disproportionate effect on a certain group is the second consideration when determining whether an exception to the commands of the Equal Protection Clause is warranted. *Sayler*, 410 U.S. at 729; *Ball*, 451 U.S. at 370-71. The legitimacy of restricting the vote to those who are primarily interested depends on "whether all those excluded are in fact substantially less interested or affected than those" included. *Kramer*, 395 U.S. at 632.

The difference between the interest of the group permitted to vote and the interests of all those otherwise qualified but excluded must be "sufficiently substantial to justify excluding the latter." *Kolodziejski*, 399 U.S. at 209. It is not enough for the included group to merely have different interest in the powers of the given government office, rather, their interest must be substantially greater such that there is a compelling reason to limit the franchise to that group. *Id.*, 399 U.S. at 212 ("[A]lthough owners of real property have interests somewhat different from the interests of nonproperty-owners in the issuance of general obligation bonds, there is no basis for concluding that nonproperty-owners are substantially less interested in the issuance of these securities than are property owners.").

Then the state must show that all other qualified citizens are not substantially interested in and significantly affected by the government powers exercised by the officials and that those excluded from voting "are in fact substantially less interested or affected than those . . . included." *Cipriano*, 395 U.S. at 704. But all Alaska residents have a substantial interest in, and are

significantly affected by, the composition of the Alaska judiciary and therefore in the actions of the Judicial Council. As the Supreme Court has stated, "state court judges possess the power to 'make' common law . . . [and] have immense power to shape the States' constitutions as well." *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002). Judges do not merely affect attorneys, but affect all Alaska residents.

The Alaska supreme court, for example, has the authority to interpret the Alaska constitution and statutes, which all citizens of Alaska are subject to. *Todd v. State of Alaska*, 917 P.2d 674, 677 (Alaska 1996). The supreme court also is entrusted with the duty and power to ensure compliance with the Alaska constitution on the part of the other branches of government, so that the court can strike down unconstitutional activities by the other branches. *State of Alaska v. Murtagh*, 169 P.3d 602, 609 (Alaska 2007). Finally, the Alaska supreme court determines that rights and duties of Alaska's citizens under the constitution and laws of the State. *See State, Dept. of Military and Veterans Affairs v. Bowen*, 953 P.2d 888, 896 n.12 (Alaska 1998).

Under the Plan the Alaska Bar Association Board of Governors appoints three members of the Council, which considers all applicants for judgeships and has the sole power to make nominations for judicial vacancies. And the Governor is required to choose for appointment one of the Council's nominees. The Governor cannot appoint any person outside of the Council's nominees. So the Council does not *recommend* judges. Rather, it has exclusive authority to *nominate* judges.

Thus, the narrow Equal Protection exception described in *Sayler* and *Ball* has no application to the selection of the members of the Alaska Judicial Council. Therefore, the issue in this case is whether Council members can be appointed by an entity that may qualify for the exception. Plaintiffs contend that the State cannot circumvent the commands of the Equal Protection Clause that would

be applicable to the direct election of the Council members by assigning this power to an entity that otherwise would be exempt from these commands. In accord with Supreme Court precedent in *Kramer* and *Sailors*, the fact that the Council members are appointed does not remove the Equal Protection Clause from this challenge, because the appointing officials or entities must have been in turn elected consistent with the commands of Equal Protection. *Kramer*, 395 U.S. at 629; *Sailors*, 387 U.S. at 111.

Defendants' argument that the selection of Attorney Members of the Judicial Council, "even considering just that activity," would satisfy the *Sayler*/*Ball* exception is therefore entirely inconsistent with Supreme Court precedent. Doc. 35 at 20. According to Defendants, if the only function of the Board of Governors was to select these members of the Council, such an arrangement would satisfy the exception to the Equal Protection Clause. But the Supreme Court has held that the excluded group, that is, all non-attorney voters, must be substantially less interested and affected, and it is not enough for the included group to have simply "different" interests. *Cipriano*, 395 U.S. at 704; *Kolodziejski*, 399 U.S. at 212. The rights, property, duties, and freedom of litigants and clients are affected on a daily basis by the choice of who serves on the bench, not that of attorneys. *Contra* Doc. 35 at 21. They might have to work with and before judges, but their clients, the non-attorney voters of Alaska, are the ones who have their rights adjudicated. Defendants' motion to dismiss should be denied.

D. If the Board of Governors Qualifies As a Special Limited Purpose Entity, Then it Cannot Constitutionally Appoint Members of the Judicial Council.

The question remains as to whether the role of appointing members of the Council prevents the election of the Board of Governors from qualifying as for a limited purpose. Doc. 35 at 20. But Plaintiffs contend that it is not necessary for this court to reach this issue. If the election of the Board

qualifies as one of limited purpose, then by its nature it excludes otherwise qualified voters from participating, in this case, on the basis of occupation. But if the Alaska Judicial Council does not qualify as an entity with a limited purpose, then, if the Council were elected, Alaska voters cannot be excluded from participating on the basis of occupation. *Hill*, 421 U.S. at 297; *Gray*, 372 U.S. 380. Plaintiffs contend that the violation of their Equal Protection rights consists in the assignment of appointment power to the Board of Governors. *Sailors*, 387 U.S. at 108 n.5, 111. *Sailors*, far from supporting the idea that a state can simply avoid the commands of the Equal Protection by having an official appointed, stands for the opposite principle. *Id.* It is therefore not necessary to consider whether that role disqualifies the Board from the limited purpose exception for its own election.

In the alternative, however, Plaintiffs would contend that the Board has sufficient powers that its election must comply with the commands of the Equal Protection Clause. The selection of Council members is of such import, because it ultimately determines the composition of an entire branch of the state government, that it is not a "minor part" of the activities of the Board. Doc. 35 at 20. But this court need not reach this contention, because the assignment of appointive power to the Board violates Equal Protection in itself.

Finally, Plaintiffs do not contend, or even suggest, that the Attorney Members of the Council must be popularly elected, Doc. 35 at 22, they could be appointed by the Governor to the Council, just like the other members of the Council. Nor do Plaintiffs contest, or even question, the wisdom of merit-based judicial selection. But however attorney input is accommodated, it cannot violate the Equal Protection Clause. If otherwise qualified voters are excluded from participation on the basis of occupation, the exclusion cannot withstand constitutional scrutiny.

Many states employ systems in which judicial nominating commissions, with the participation of the state bar, assist in the selection of judges without violating the commands of the Equal Protection Clause.[1] Thus, more narrowly tailored means exist for merit-based selection of judges. The distinguishing characteristics in Alaska's system are that the appointments made by the Board of Governors and the nominations made by the Judicial Council are not subject to gubernatorial or legislative approval or veto. Therefore, a significant portion of the decision-making power over the composition of the judiciary, three of seven votes, is entirely without accountability to the people of Alaska.

Plaintiffs Miller and Ekstrom are therefore denied an equal voice "in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 627. Plaintiff Kirk, as an past applicant to judicial vacancies in Alaska, and one who would like to apply in the future, is harmed by having his applications reviewed by an unconstitutionally composed Council. These denials of equal protection of the law are not justified.

[1]Defendants point out that in seventeen states, members of the bar association appoint or elect some of the members of the nominating commission without gubernatorial or legislative approval or confirmation. But in three of these states, New York, North Dakota, and Vermont, the governor and legislature may absolutely reject the nominations of the nominating commission. In Maryland, the governor can, in fact, reject the appointments to the commission made by the bar. Thus, of the twenty-seven states that make use of judicial nominating commissions, thirteen have the offending characteristics.

Conclusion

This court should deny Defendants' Motion to Dismiss because Plaintiffs' have more than sufficiently stated a claim upon which relief may be granted.

Dated August 17, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August 2009, a copy of the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(6) was served electronically on:

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