Docket No. 10-3320

In the

United States Court of Appeals

For the

Tenth Circuit

ROBERT DOOL, JULIE BROWN,
DONALD D. ROSENOW and THOMAS C. SCHERMULY,

Plaintiffs-Appellants,

v.

ANNE E. BURKE, KERRY E. McQUEEN, PATRICIA E. RILEY,
MATTHEW D. KEENAN, JAY F. FOWLER and CAROL GILLIAM GREEN,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Kansas (Wichita), No. 6:10-CV-01286-MLB-KMH · Honorable Monti L. Belot (U.S. District Judge)

REPLY BRIEF OF APPELLANTS

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Introduction

The granting of the motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) by the District Court was erroneous. The District Court incorrectly applied the principles from the relevant Supreme Court cases and from this Court's decision in *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994). The Kansas Supreme Court Nominating Commission ("Commission") does not meet the narrow requirements of the *Salyer/Ball* exception. Accordingly, the restriction on the franchise in the elections of the members of the Commission must be justified as necessary to acheive a compelling state interest. The State of Kansas cannot make this showing and the restriction, therefore, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Argument

I. The Restriction of the Franchise in the Elections of the Members of the Kansas Supreme Court Nominating Commission Violates Appellants' Equal Protection Rights.

Appellants do not proceed on the premise that they have a right "to vote in the selection process for Kansas appellate judges if anyone gets to vote in any aspect of that process." Appellee's Brief at 23. Appellants begin with and proceed on the premise that the Equal Protection Clause prohibits states from granting the right to participate in an election on a selective basis if the election is one of

general interest. *See, e.g.*, *Hill v. Stone*, 421 U.S. 289, 295 (1975); *Hellebust v. Brownback*, 42 F.3d 1331, 1333 (10th Cir. 1994); *Little Thunder v. South Dakota*, 518 F.2d 1253, 1257 (8th Cir. 1975). The State of Kansas holds elections for some of the members of the Kansas Supreme Court Nominating Commission. Kan. Const. art. III, § 5(e); Kan. Stat. §§ 20-119 to -123. The sole issue for this Court to decide is whether these elections are of general interest. And the fact that the members of the Commission are given the power to nominate Kansas Supreme Court justices is relevant to this issue. If the officials in question made nominations to fill vacancies on the board of a water district or a professional association, this would be a much different case.

While the U.S. Constitution does not define or bestow the right to vote, "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state . . . elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Thus, it is well established that, if a state law "grants the right to vote to some bona fide residents and denies the franshise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969). Here, the Kansas constitution and statutes provide for elections for some members of the Kansas Supreme Court Nominating Commission, an entity itself established by the

Kansas constitution. Appellants simply argue that Kansas may not restrict the franchise in these elections without justifying those restrictions under the Equal Protection Clause.

Appellees argue that the principle of Equal Protection jurisprudence are inapplicable to the process for selecting Kansas judges because the judges are appointed rather than elected. Appellee's Brief at 24. Appellees state that the elections of the governor and the members of the Nominating Commission do not convert the appointments into "an elective process." *Id.* But nothing in Appellants' arguments has suggested or been contingent upon a characterization of the overall process as "elective" or "appointive" in nature. Such a characterization is quite simply irrelevant. There is an election here and a "constitutional complaint is raised respecting that election." *Sailors v. Bd. of Educ. of Kent County*, 387 U.S. 105, 111 (1967).

A. Whenever the Government Holds an Election and Grants the Franchise on a Selective Basis, That Discrimination Must Be Justified Under the Equal Protection Clause.

Strict Equal Protection scrutiny applies to voter eligibility restrictions on all elections held by state or local government, both to elections of officials, *Kramer*, 395 U.S. at 625, and elections involving ballot questions, *Cipriano v. City of Houma*, 395 U.S. 701, 704-06 (1969). This is the general rule, and it applies

unless a narrow exception formulated by the Supreme Court can be met. *Hill*, 429 U.S. at 295; *Hellebust*, 42 F.3d at 1333; *City of Herriman v. Bell*, 590 F.3d 1176, 1185-86 & n.6 (10th Cir. 2010) ("Only a narrow line of Supreme Court cases . . . tempers these holdings"). Appellees portray Appellants as attempting an unprecedented and far-reaching application of the general rule. But it is Appellees who are suggesting an unprecedented and expansive application of the narrow exception.

Appellees are incorrect in stating that Equal Protection principles only apply to elections for public officials who exercise "general governmental powers." Appellees' Brief at 24. No such test appears in any precedent. What does appear is an exception whereby Equal Protection principles will not apply when in an election is for *public officials* who have a "special limited purpose" and whose activities have a "disproportionate effect" on a certain group. *Ball v. James*, 451 U.S. 355, 361 (1981); *Hellebust*, 42 F.3d at 1333. But the general rule applies unless the state can show that the exception does, not the other way around.

The Commission does not "screen applicants." *Contra* Appellees' Brief at 16. The provisions themselves state that Kansas judges shall "be nominated" by the "nominating commission." Kan. Const. art. III, § 5(a). And the statutes repeatedly and exclusively refer to the making of "nominations." Curiously, both the District Court and Appellees consistently have refrained from using the actual

language of the provisions in question here. But the words are not synonymous. Indeed, if the Commission merely "screened applicants" and made "recommendations," this would be an entirely different case.

Recommendations can be disregarded. Screens can be ignored. But nominations, in every sense of the term, are binding. The U.S Senate is not free to consider other applicants to the Supreme Court, only the one nominated by the President. Only the candidate nominated by his or her party may be listed as the party's candidate on the ballot. And in Kansas, the governor may only appoint a judge nominated by the Commission.

Appellees suggest that the members of the Commission are somehow not public officials. Appellees' Brief at 25. Yet, the Commission is not a private entity. The elections are not private elections, such as for a civic organization or a professional association. The offices are created by the state constitution. Kan. Const. art. III, § 5(d). The methods for their appointments and elections are proscribed by statute. Kan. Stat. §§ 20-119, -120, -124. The members of the Commission execise a traditional executive function. The members can sue and be sued in their official capacities. The members can be found liable as state actors for their official actions under 42 U.S.C. § 1983. *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982). The members of the Commission are public officials in every sense of the term.

Equal Protection applies whenever the government holds elections and grants the franchise on a selective basis. *Kramer*, 395 U.S. at 627; *Hill*, 421 U.S. at 297. Neither Appellees nor the District Court even argue that Kansas is not doing that here. The essense of an Equal Protection challenge is that the state is engaging in unjustified discrimination among its citizens. *Avery v. Midland County*, 390 U.S. 474, 484 (1968). If Kansas is going to hold an election, that election must either be open to all qualified voters or Kansas must show that the election is not the kind of election that must be open to all because of its special limited purpose. *Kramer*, 395 U.S. at 629 ("Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not."); *City of Herriman*, 590 F.3d at 1185-86 & n.6. And this rule applies regardless of whether Kansas could have used some other method for selecting the members of the Commission, rather than holding elections. *Kramer*, 395 U.S. at 628-29 ("The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment.").

B. Reapportionment Is Not at Issue in This Case, So *Sailors* and *Wells* Are Inapposite.

Appellees' arguments do not recognize the distinct lines of cases that the Supreme Court has developed in applying the Equal Protection Clause to different voting rights violations. The *Reynolds* line of cases developed the "reapportionment doctrine" dealing with vote dilution resulting from population differences between geographical voting districts for the same offices. *See Bd. of Estimate v. Morris*, 489 U.S. 688, 691-92 (1989). The *Kramer* line, on the other hand, developed the principles governing the constitutionality of "voter qualifications." *See Mo. Protection and Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803, 808 (8th Cir. 2007). To say that *Reynolds* does not apply says absolutely nothing as to whether *Kramer* does, as this Court observed in *City of Herriman*. *See City of Herriman*, 590 F.3d at 1185-86. This is a crucial distinction. This case has nothing to do with malapportionment of population among voting districts. Appellees' arguments, therefore, establish nothing more than that perhaps the voting districts for the elected members of the Commission do not have to be of equal population. But it absolutely does not follow that the state may therefore restrict the franchise as it sees fit.

Sailors is indeed helpful in understanding the distinction between the application of the principles from *Reynolds* and those of *Kramer*. In *Sailors*, the

Court held that the reapportionment doctrine did not apply to the appointment of certain local administrative officials. *Sailors*, 387 U.S. at 110. According to *Sailors*, the members of a county school board may be appointed by local school boards of divergent population. *Id.* But the Court clarified that there was no violation of the voter qualification principles from *Kramer* because no one had been excluded from the underlying local school board elections. *Id.* at 111 ("For while there was an election here for the local school board, no constitutional complaint is raised respecting that election."). That the reapportionment doctrine did not apply to the appointment of the county board, therefore, said nothing about whether the elections of the local boards were constitutional. It does not follow from *Sailors* that the state could have proceeded to place voter eligibility restrictions on the elections of the local boards without satisfying strict scrutiny under *Kramer*.

Appellees, therefore, have no authority for the argument that a voter eligibility statute restricting the franchise in an election is somehow immune from the principles of *Kramer* because the election is part of an "appointive selection process." Appellees' Brief at 16. *Sailors* expressly rejects this argument. *Sailors*, 387 U.S. at 111. And in this case, unlike in *Sailors*, the underlying elections are subject to a voter eligibility restriction and a constitutional complaint has been raised respecting those elections.

Wells is entirely inapposite for similar reasons. *Wells* simply held that the reapportionment doctrine from *Reynolds* does not apply to judicial electoral districts, so that there is no requirement that such district have equal populations. *Wells v. Edwards*, 347 F. Supp. 453, 454 (M.D. La. 1972), *summarily aff'd*, 409 U.S. 1095 (1973). This holding says absolutely nothing about whether restrictions on the franchise in judicial elections are constitutional. Furthermore, the members of the Commission here are not judicial officers, but exercise an executive function. *Richardson*, 693 F.2d at 914. Therefore, even if this case were alleging malapportionment of voting districts, *Wells* would not be applicable to the elections of the members of the Commission. The Court in *Wells* determined that there was a difference between the elections of judges and other public officials for purposes of reapportionment. But there is no support for the notion that franchise restrictions receive lower scrutiny when they are placed on judicial elections. *Wells* and *Sailors* are entirely irrelevant to the analysis of the voter eligibility statutes challenged here because malapportionment is not at issue.

Appellants have not asserted that the reapportionment doctrine of *Reynolds* should apply to the appointment of Kansas judges. *Contra* Appellee's Brief at 15-17. Rather, Appellants have asserted that the restriction of the franchise in the elections of the members of the Commission violates the principles established in *Kramer*. None of Appellees arguments based on *Sailors*, *Wells*, or *Kirk* refute this

assertion, or are even relevant to it, because those cases did not treat the constitutionality of franchise restrictions. Appellee's Brief at 25-28.

C. Other Courts Have Erroneously Applied, and Created an Unprecedented Exception to, the Supreme Court's Equal Protection Jurisprudence.

As explained in Appellants' Opening Brief, the Ninth Circuit in *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010), did not address the Equal Protection theory presented here. Appellant's Brief at 40-49. An examination of the briefing and arguments in that case reveals that the plaintiffs in *Kirk* never argued that all participants in a state's judicial selection process must be either popularly elected or appointed by a government official who is popularly elected. *Contra* Appellee's Brief at 17. Instead, the plaintiffs in *Kirk* argued that, if it would be unconstitutional to restrict the franchise if the members of the Alaska Judicial Council had been chosen through elections, then it must also be unconstitutional for those members to be appointed by another entity whose members are chosen through elections with the same franchise restriction. The plaintiffs in *Kirk* argued that this conclusion was discussed in, and is logically compelled by, *Kramer*. The Ninth Circuit rejected this argument and held that the members of a state nominating commission may be appointed by a professional association elected exclusively by one occupation. *Kirk*, 623 F.3d at 899. Equal Protection did not apply because plaintiffs were not being excluded from any election. *Id.* at 898. But

the Court in *Kirk* did not make any holding or finding regarding the constitutionality of a franchise restriction on the election of members of a state nominating commission. *Kirk* did not hold that, oreven discuss whether, a state nominating commission would satisfy the *Salyer/Ball* exception if it were directly elected.

The *Carlson v. Wiggins* decision is both fundamentally flawed and not precedential. As in this case, the plaintiffs in *Carlson* argued that when a state holds an election and restricts the franchise, that restriction must survive strict scrutiny unless the *Salyer/Ball* exception applies. *Kramer*, 395 U.S. at 627; *City of Herriman*, 590 F.3d at 1185-86 & n.6. As the Supreme Court established in *Kramer*, Equal Protection applies because the state is holding an election and granting the franchise "on a selective basis." *Kramer*, 395 U.S. 627; *Hill*, 421 U.S. at 297. The subject of the election is irrelevant. *Kramer*, 395 U.S. at 629. But the court in *Carlson* refused to follow this precedent, and invented a new "threshold issue" for when the Equal Protection applies to an election. *Carlson v. Wiggins*, No. 10-587, 2011 WL 166492, at *11 (S.D. Iowa Jan. 19, 2011).

According to *Carlson*, Equal Protection is only implicated when the state holds elections for officials who "represent any segment of the State's population." *Id.* But the *Carlson* court could not cite to a single case that explains or established this threshold test. *Id.* at *12 ("The Supreme Court did not explain

in *San Antonio* what it means to "represent any segment of the State's population.'"). So, according to *Carlson*, the Supreme Court, after decades of Equal Protection jurisprudence applied to elections, has never explained when the right to vote is implicated by an election. No other case cites to or uses the phrase quoted by *Carlson* as some sort of threshold test for when an election implicates Equal Protection rights. Indeed, the entire discussion in *Carlson* is flatly contradicted by all the cases in the *Kramer* line. Every case proceeds with the starting point that Equal Protection is implicated when the state holds an election and excludes grants the franchise to some while excluding others.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), which is the only case cited by *Carlson* for the supposed fundamental threshold case for when the Equal Protection Clause applies to an election, *is not even a voting rights case*. That case dealt with the issue of whether Equal Protection applied to the funding of schools. *Id.* And the language quoted by *Carlson* appears in a footnote that was part of a discussion that was dicta. *Id.* at 36 n.78. This footnote does not establish, much less even summarize, any test for the application of the Equal Protection Clause to the right to vote. The *San Antonio* case is not part of the Supreme Court's voting rights jurisprudence, much less a leading case that establishes *the* threshold test for when Equal Protection applies to an election. Beyond this case,

the *Carlson* court could only cite to a law review article. *Carlson*, 2011 WL 166492, at *12.

Carlson was also incorrect in its characterization of *Kramer* as involving "a representative body that exercised legislative powers." *Carlson*, 2011 WL 166492, at *8. *Kramer* has absolutely no discussion of the school board being a "representative" body and in fact stated that the board *did not* exercise "legislative powers." *Kramer*, 395 U.S. at 629. Accordingly, *Kramer* itself does not follow the supposed test proposed in *Carlson*. *Carlson* also directly conflicts with the Court's decision in *Hellebust*, which found that the application of Equal Protection "does not tolerate constitutional distinctions on the basis of the purpose of the election or the function—legislative or administrative—of the elected official." *Hellebust*, 42 F.3d 1331. The test from *Carlson* simply does not exist. Instead, Equal Protection is implicated whenever the state holds elections and restricts the franchise. The state must then show that the restriction either survives strict scrutiny or that the *Salyer/Ball* exception applies. *City of Herriman*, 590 F.3d at 1185-86 & n.6.

The analysis purporting to apply the test in *Carlson* does not appear in any Supreme Court case. The Supreme Court has never found or reasoned that Equal Protection does not apply to an election because the officials elected "have no constituencies." *Carlson*, 2011 WL 166492, at *12. And even if such an analysis

existed, in what sense does a director of a water storage district, a county recorder of deeds, or a junior college trustee have constituents?

It is not magic, but the Equal Protection Clause that requires the government to justify granting the right to vote in an election to some citizens and not to others. *Kramer*, 395 U.S. at 629. The Constitution does not confer the right to vote on anyone. The state confers the right to vote by holding an election and establishing the franchise. But the Constitution then requires that, when the state grants the right to vote, it must do so without unjustified discrimination. *Id.* The Equal Protection Clause is violated when the state grants the right to vote in a discriminatory manner, such as by restricting the franchise on the basis of wealth, property ownership, or occupation. Strict Equal Protection scrutiny is required because the state is discriminating among its citizens in granting a fundamental right.

The fact that the members of the Commission are allegedly chosen on a nonpartisan basis is also irrelevant. Appellees' Brief at 20. Many elections in this country are nonpartisan, but that does not mean that a voter eligibility statute restricting the franchise in that election should not undergo strict scrutiny. The election of the Board of Agriculture in *Helebust* was nonpartisan. *Hellebust*, 42 F.3d at 1331.

Again, Appellees do not mention that the members of the Commission are given the binding and entirely unreviewable power to nominate Kansas judges. In the majority of states that use some form of merit selection for their judges, the members of the nominating commission are not elected exclusively by attorneys. The constitutionality of merit selection is not at issue in this case. Nothing in Appellants' arguments suggests that Kansas may not appoint judges using a nominating commission. If Appellants' relief is granted, Kansas would retain merit selection for its appellate judges. But it would no longer hold restricted elections for public officials who exercise a traditional government function.

The "repercussions" from Appellants' arguments mentioned by the Ninth Circuit are imaginary. Appellees' Brief at 21. Nothing in Appellants' arguments call into question the way federal bankruptcy and magistrate judges are appointed. All the members of the merit selection or merit screening committees are appointed by the district court judges. None of the members of these commissions are elected through restricted elections. And the district court judges, in turn, are appointed by the President with Senate confirmation. And no otherwise qualified resident is excluded from the elections of the President and Senators. Thus, at every stage, the appointment of federal magistrate and bankruptcy judges conforms to the principle that those who nominate judges must be at least traceable to a popular election.

D. If Equal Protection Does Not Apply, the State Could Impose Any Voting Eligibility Restriction.

Finally, Appellees are incorrect when they conclude that the elections of the attorney members of the Commission should be subject to rational basis scrutiny if the Equal Protection Clause does not apply here. Appellees' Brief at 20; *Carlson*, 2011 WL 166492, at *12. Rational basis scrutiny is a form of Equal Protection scrutiny, as the Supreme Court has made clear. *Quinn v. Millsap*, 491 U.S. 95, 105 (1989). If Appellants do not have the right to vote in these elections and Equal Protection does not apply, then the restrictions on the election are not subject to *any* scrutiny. *Id.* at 105-06. If the State were correct, then it could place any restriction whatsoever on these elections. *Id.* at 106 ("The rationale . . . would render the Equal Protection Clause inapplicable even to a requirement that all members of the board be white males."). Therefore, Appellees' argument that the right to vote is not implicated, such that the Equal Protection Clause is inapplicable here, cannot be correct.

The position maintained by the State necessarily leads to untenable conclusions. The State argues that it is not required to allow anyone to vote "in connection with the appointment of supreme court justices." Appellees' Brief at 22. If the State were correct, then it could restrict these elections in any manner or give *any* entity with power to nominate Kansas judges, with no obligation to show

even a rational basis for doing so. *Quinn*, 491 U.S. at 105-106. This cannot be the case. The State of Kansas is holding elections, as provided for in constitutional and statutory provisions, and restricting the franchise in those elections. Therefore, the restrictions must be subject to Equal Protection scrutiny.

II. The Elections of the Members of the Kansas Supreme Court Nominating Commission Do Not Satisfy the *Salyer/Ball* Test.

The sole question, then, is what level of scrutiny should be applied. As this Court has recognized, when a state "discriminates among eligible voters within the *same* electoral district, strict scrutiny applies, and compelling government interests must justify restrictions of the franchise." *City of Herriman*, 590 F.3d at 1185-86. Here, the chairman of the Commission is chosen in a statewide election and one member is elected from each congressional district. Kan. Const. art. III, § 5(e); Kan. Stat. §§ 20-119, -120. Therefore, strict Equal Protection scrutiny applies unless the State can show that "the narrow line of Supreme Court cases applying rational basis review to voting restrictions discriminating among voters in specialty districts" applies. *City of Herriman*, 590 F.3d at 1186 n.6. Those cases involved situations where the elected entity has "a narrow and limited focus which disproportionately affects the few who are entitled to vote." *Hellebust*, 42 F.3d at 1333. The State cannot show that the Commission fits the narrow exception described in the *Salyer/Ball* cases.

A. Appellees' Arguments Mischaracterize the *Salyer/Ball* Exception.

Appellees are incorrect in their characterization of the limited purpose exception. Appellees' Brief at 23. The general rule of strict scrutiny applies *unless* the State can prove that the election fits the narrow exception provided in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball*. *City of Herriman*, 590 F.3d at 1186. The State frames the limited purpose exception as if the general rule *only applies* if Appellants can prove the opposites of the factors described in the cases applying *Salyer* and *Ball*. Appellees' Brief at 23.

Strict Equal Protection scrutiny does not only apply to "units of local government having general governmental powers." Appellees' Brief at 23 (quoting *Avery*, 390 U.S. at 484). For example, it also applies to state government officials and entities. Appellees ignore the context in which the Supreme Court made this statement. The Supreme Court developed its Equal Protection jurisprudence gradually, as different situations were presented to it. In *Avery*, for the first time, the Supreme Court held that the strict requirements of Equal Protection from *Reynolds* applied to a unit of local government (as opposed to state government) that did not exercise any legislative or executive power, but was simply administrative. *Avery*, 390 U.S. at 484. The Supreme Court similarly extended the application of Equal Protection with respect to voter restrictions in

Kramer. *Kramer*, 395 U.S. at 629-30. These cases established that the commands of Equal Protection apply *not only* to state government, *but also* to local government, and *not only* to officials exercising legislative and executive power, *but also* to administrative officials without such power. Thus, the general default rule is that all elections are subject to the Equal Protection Clause, at all levels of government and regardless of the "charaterization" of the authority exercised. *See Hellebust*, 42 F.3d at 1333.

In *Salyer* and *Ball*, the Supreme Court created a narrow exception to this general rule. According to this exception, elections involving certain government officials (or referendum questions) are only subject to rational basis Equal Protection review. To date, this exception has only been applied to units of local government that perform only limited administrative functions. *See Kessler v. Grand Cent. Dist. Management Ass'n, Inc.*, 158 F.3d 92 (2d Cir. 1998); *Education/Instruccion, Inc. v. Moore*, 503 F.2d 1187 (2nd Cir. 1974); *Plowman v. Massad*, 61 F.3d 796 (10th Cir. 1995). *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996), marked the first time that the *Salyer/Ball* exception has been applied to a *state* entity the exercises *executive* functions.

As set forth in *Salyer* and *Ball*, courts consider several factors in determining whether the exception applies. The number of functions exercised by the official or entity has never been one of these factors. *Contra* Appellees' Brief

at 23. Appellees cannot point to a single case in which the number of functions performed was considered relevant. Indeed, the inference would lead to absurd results. The members of the Electoral College exercise a single, narrow function. Rather, what matters is whether the function is governmental and what portion of the eligible voters are interested in and affected by the function.

Furthermore, no court has provided an exhaustive list of "general governmental powers" that trigger strict Equal Protection scrutiny. Appellees' Brief at 23. Again, Appellees ignore the context of the cases. The entities before the courts in *Salyer*, *Ball*, and *Hellebust* did not exercise any legislative or executive power. Therefore, the question was whether the administrative powers they did exercise were governmental in nature, or merely nominally public, and the extent of the effect of those powers. Many legislative and executive functions, such as calling the militia and impeaching officials, are not on the list. But it is incorrect to suggest that they are therefore not governmental powers in every sense of the term. It is even more incorrect, and has the Supreme Court's jurisprudence even more backwards, to suggest that Equal Protection applies *only* if an entity exercises *administrative* or *regulatory* power. Rather, it appears that *only* entities that exercise *merely* administrative/regulatory power that are eligible for the limited purpose exception. This Court's *Hellebust* decision was significant because it concluded that an entity, *even though it only exercised administrative*

authority, would fail the limited purpose exception because of the scope of that authority. *Hellebust*, 42 F.3d at 1333.

Thus, the observation that the Commission does none of the things listed in their brief is irrelevant. Finally, most of the functions listed by Appellees *are not traditionally performed by the government*, but are commonplace activities for both private and public persons. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974). Nominating judges is not. It has exclusively been something done by government officials and never by private persons.

Courts have applied strict Equal Protection scrutiny to officials and entities that do not exercise any of the functions on Appellees' list. Judges, for example, exercise none of these functions. In *Little Thunder*, the Eighth Circuit applied strict scrutiny to elections for county officials such as the recorder of deeds, coroner, and auditor. *Little Thunder*, 518 F.2d at 1254-55. These officials all exercise a single *administrative* function. They do not levy taxes, hire or fire employees, make contracts, supervise the public, acquire property, or build facilities. And Courts have also applied the limited purpose exception to entities that *had* the function listed. In *Salyer* and *Ball*, thee entities could levy taxes, maintain a staff of employees, make contracts with other government agencies, take property through eminent domain, and build public facilities. *Salyer*, 410 U.S. at 728 n.7. Appellees' reliance on lists of examples is misguided.

B. Looking to the Principles in *Ball* and *Hellebust*, the Commission Cannot Satisfy the Limited Purpose Exception.

Appellees mistake the primary bases for Appellants' arguments. Appellees' Brief at 24. Appellants base their arguments on the factors used in the analyses in *Salyer* and *Ball*, together with the factors considered in *Hellebust*. Appellants' Brief at 16-18, 28-32. Appellants compare the Commission with the cases in which the limited purpose exception has been applied and the cases in which it has been held inapplicable. Appellants' Brief at 35-39. Is the nomination of judges a function more akin to recording deeds and auditing property taxes or more like providing electricity? *Compare Little Thunder*, *with Ball*. The provision of electricity has not traditionally been done by the government, but recording deeds and auditing property always has. *See Jackson*, 419 U.S. at 353. Is the effect of the nomination of judges disproportionate as in *Ball*, or are all citizens interested and affected? Landowners bore "the entire burden of the [water] district's costs" and their consent was necessary to organize the water district. *Salyer*, 410 U.S. at 731. But Appellees cannot show how the nomination of judges has any more effect on attorneys than on other citizens, other than that attorneys have a self-interest in

determining who will be reviewing their applications should they decide to apply for a vacancy.[1] Appellees' Brief at 31.

This Court has considered the application of the limited purpose exception in two cases, *Hellebust* and *Plowman*. Is the Commission more like a Board of Agriculture or a Board of Dentists? An examination of the principles considered in *Hellebust* reveals that the same strict scrutiny should apply.

Regulating for the benefit of the health, safety, and welfare of the general public is "part of the normal functions of state government." *Hellebust*, 42 F.3d at 1335. As *Ball* put it, such regulation is a traditional element of governmental sovereignty. *Ball*, 451 U.S. at 368. But regulating the dental profession, or the legal profession, is not. *Plowman*, 61 F.3d at 798. The regulation of professions was carried on by professional associations before being coopted into the government with the creation of the Board. It is a nominally public function. *See Ball*, 451 U.S. at 367-68. The nomination of judges is not a nominally public function: it has never been exercised by private entities. It is a traditional element of sovereignty in the sense discussed in *Ball*. Appellants' Brief at 31.

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[1]Appellees' argument is further undermined by the fact that, in order to become a Kansas Supreme Court justice, a person must be admitted to the bar and have practiced or taught law or been a judge for 10 years. Kan. Stat. § 20-105. But the franchise is open to all members of the bar.

The Commission makes "nominations" to fill vacancies on Kansas appellate courts. Kan. Const. art III, § 5(a); Kan. Stat. § 20-132. The Commission does not "screen applicants" and merely "recommend" qualified individuals to fill vacancies. *Contra* Appellees' Brief at 23. The nomination of judges for appointment is a traditional executive governmental function. Appellants' Brief at 31. In no sense is it private or nominally public. And when officials are elected, the Equal Protection Clause applies fully to primary elections as well. No political party would be permitted to restrict its membership, and consequently the franchise in a primary election, based upon occupation, or anything other than age, residence, or citizenship.

With respect to the effect of this function, the focus should not be on how attorneys are affected in ways that others are not. Appellees' Brief at 31-32. Rather, the focus is whether non-attorneys are materially affected and substantially interested in the nomination of judges. *Hellebust*, 42 F.3d at 1334. It is not enough for the interests and effects to be different. *City of Phoenix v. Kolodziejski,* 399 U.S. 204, 209 (1970). All Kansans are interested in and affected by the nomination of judges. They have a real interest in and are materially affected by the nomination of officials to the judicial branch of government. Appellants' Brief at 37-39. The nomination of judges determines the composition of the Kansas

judiciary, which "unremittingly influence[s] every person within the State of Kansas." *Hellebust*, 42 F.3d at 1335.

Conclusion

The District Court was in error and should be reversed. This Court should strike Kansas Constitution Article III, Section 5(e) and Kansas Statutes Section 20-119, -120, and the provisions that are contingent on them, because the restricted elections they provide violate the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

Dated: March 24, 2011

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