CASE 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

vs.

Anne E. Burke, in her official capacity as Chairman of the Kansas Supreme Court Nominating Commission; Kerry E. McQueen, Patricia E. Riley, Matthew D. Keenan, and Jay F. Fowler, in their official capacities as Attorney Members of the Kansas Supreme Court Nominating Commission; and Carol Gilliam Green, in her official capacity as Clerk of the Kansas Supreme Court,
Defendants-Appellees

Appeal from the United States District Court
for the District of Kansas
Honorable Monti L. Belot, Judge
District Court Case No. 6:10-01286-MLB-KMH

BRIEF OF APPELLEES

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Oral Argument is requested.

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STATEMENT OF THE ISSUE

Plaintiffs make clear that several arguments are *not* part of this appeal: "The constitutionality of the so-called merit-selection system for selecting judges is absolutely not at issue in this case. Appellants do not object to the nomination of their judges through a commission or the composition of the present Commission. They do not object to any requirement that a certain number of Commissioners be attorneys." Appellants' Br. 5.

Although Plaintiffs suggest now that they are raising only a single issue in this appeal, their equal protection theory raises two issues, not just the one Plaintiffs identify. Plaintiffs' explicit claim is that limiting the selection process for the lawyer-members of the Kansas Supreme Court Nominating Commission to lawyers violates the "one person, one vote" rule of the Equal Protection Clause. But the necessary premise for that claim is that Plaintiffs have some sort of general, fundamental right to vote for persons involved in a non-elective state judicial selection process. Thus, when Plaintiffs state, for example, that "they, as qualified Kansas voters, cannot be excluded from the elections for the public officials who nominate their judges," Appellants' Br. 5, they are glossing over (and indeed assuming the answer to) the questions (1) whether the lawyer-members of the Commission are in fact "public officials" and (2) whether Plaintiffs have any constitutional right to vote for such Commission members.

Respectfully, this appeal actually raises the following two issues:

1. Whether there is a constitutional right to vote for the lawyer-members of a judicial nominating commission, when those lawyers serve as private citizens in the state's non-elective judicial selection process.

2. Whether—assuming for the sake of argument the existence of some constitutionally-based right to vote in these circumstances—the requirement that lawyer-members of a judicial nominating commission be elected by lawyers need only satisfy rational basis review.

STATEMENT OF THE CASE

Plaintiffs filed a complaint in the District of Kansas on August 25, 2010, against the lawyer-members of the Kansas Supreme Court Nominating Commission and Carol Green, Clerk of the Kansas Appellate Courts. The complaint contended that Kansas' method of appointing judges to the Kansas Supreme Court and Kansas Court of Appeals violated the "one person, one vote" requirement of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs also requested a Temporary Restraining Order (TRO) and preliminary injunction, seeking to halt the ongoing process to fill the judicial vacancy created by the death of Chief Justice Robert Davis of the Kansas Supreme Court.

The district court held a status conference on September 10, 2010, and also heard argument on Plaintiffs' motion for extraordinary relief. On September 14, 2010, the district court issued an order denying Plaintiffs' motion, concluding that Plaintiffs had failed to prove any—let alone all—of the four requirements for such relief. Plaintiffs have not appealed that order.

Defendants subsequently filed a Motion to Dismiss, asserting Plaintiffs failed to state a claim on which relief may be granted; Plaintiffs, in turn, filed a Motion for Summary Judgment. Both parties filed responses to the respective motions. Promptly after the Ninth Circuit issued its decision in *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010), which concerned a near-identical challenge to Alaska's nominating commission brought by Plaintiffs' counsel, the district court ordered the parties to submit supplemental briefing on *Kirk*'s impact on the present action, and both sides did so.

The district court granted Defendants' Motion to Dismiss on November 3, 2010, and denied Plaintiffs' request for summary judgment as moot. Plaintiffs timely filed their notice of appeal.

STATEMENT OF THE FACTS

Plaintiffs expressly declined to seek any factual discovery regarding the operation and functioning of the Commission. Instead, their challenge to the Commission is limited to a facial attack on the Kansas Constitution and the

implementing statutes that create the Commission and govern its operations. Thus, the "facts" before this Court on appeal are simply and solely the relevant provisions of the Kansas Constitution and statutes. A brief historical discourse is helpful, however, to place these provisions in context.

In 1956, then-Kansas Governor Fred Hall lost the Republican primary. Faced with the prospect of being out of a job come inauguration day, Hall avoided unemployment by orchestrating what became known as the infamous "Kansas Triple Play." The Triple Play occurred when, prior to inauguration day, (1) Hall's friend and political ally, Chief Justice William Smith, resigned his seat on the Kansas Supreme Court; (2) Hall resigned his position as governor; and (3) Lieutenant Governor John McCuish appointed Hall to the Kansas Supreme Court to fill the vacancy created by Smith's resignation. There was strong, negative public reaction to these political maneuvers, and efforts began almost immediately to overhaul the Kansas judicial selection system to prevent any similar shenanigans in the future.

Elmer Hoge, a prominent political figure of the time, opined that the Triple Play "has brought discredit upon the Supreme Court." *Change Asked in Kansas Law*, KANSAS CITY TIMES, Jan. 7, 1957. Doc. 25-1, at 1 (Appendix A to Defendants' Supplemental Memorandum Addressing the Ninth Circuit's Decision in *Kirk v. Carpeneti*). An article covering the judicial reform effort noted that

"[t]he maneuver of this week could not have been pulled off in Missouri," which had already implemented nonpartisan judicial nominating commissions. *Political Courts a Hot Kansas Issue*, KANSAS CITY STAR, Jan. 7, 1957. Doc. 25-1, at 2 (Appendix A to Defendants' Supplemental Memorandum).

Within days after the Triple Play, a joint resolution was introduced in the Kansas Legislature proposing a constitutional amendment to establish a nonpartisan Supreme Court Nominating Commission to screen the qualifications of applicants for the Kansas Supreme Court. *See* 1957 Kan. Sess. Laws ch. 234, § 1. Kansas residents were active participants in this process. As a contemporaneous editorial poignantly explained:

> [I]t is not the Legislature that has the final say. Such a plan, which would give the legal profession a part in the choice of state judges, requires a constitutional amendment. The decision facing the Legislature is whether the people of Kansas should be allowed to express themselves on the matter.
> . . . .
>
> What the Legislature has to decide now, and all it has to decide, is to put the question on the ballot so that the people may first hear all the facts and all the arguments, pro and con, and then make the final decision.

Let the People Decide Judges' Choice, STATE JOURNAL, Feb. 27, 1957. Doc. 25-2, at 1 (Appendix B to Defendants' Supplemental Memorandum).

Kansas voters did consider the arguments, "pro and con," for the Commission, and in the 1958 general election Kansans overwhelmingly approved

the judicial selection process that remains in effect today. KAN. CONST. art. III, § 5. The Kansas Legislature—the elected representatives of the Kansas voters—then enacted a number of statutes implementing the constitutional amendment. *See* KAN. STAT. ANN. § 20-119 *et seq*. When the legislature established the Kansas Court of Appeals in 1977, it determined that the Commission should perform the same screening process for that court. KAN. STAT. ANN. § 20-3004(a).

The resulting judicial nomination process in Kansas is a variation of what is commonly referred to as "the Missouri Plan," a process the State of Missouri implemented in the 1940s. The Kansas Supreme Court Nominating Commission consists of one chairperson (who must be a lawyer licensed and residing in Kansas) and a lawyer-member and nonlawyer-member from each Kansas congressional district. KAN. CONST. art. III, § 5(e); KAN. STAT. ANN. §§ 20-119 to 20-124. Currently, the Commission has nine members: the chairperson, four lawyer-members, and four nonlawyer-members.

Kansas, like a number of states that utilize the Missouri Plan, provides that some members of the Commission are to be selected by lawyers in the state. In Kansas, which does not have mandatory bar association membership, all lawyers who are licensed to practice law and also reside in Kansas may vote for the lawyer-member of the Commission selected from their particular congressional district, and also for the chair of the Commission. KAN. CONST. art. III, § 5(e); KAN. STAT.

ANN. §§ 20-119, 20-120. All of these elections are administered by the Clerk of the Appellate Courts. KAN. STAT. ANN. §§ 20-119, 20-120. The nonlawyer-members are appointed by the governor. KAN. CONST. art. III, § 5(e); KAN. STAT. ANN. § 20-124. No person may serve more than two four-year terms on the Commission. KAN. STAT. ANN. §§ 20-125, 20-131. The Commission may only act "by the concurrence of a majority of its members." KAN. CONST. art. III, § 5(e).

Members of the Commission are prohibited from holding any appointed public office, from holding an official position in any political party, and from nomination to the Court of Appeals or Supreme Court for six months after serving on the Commission. KAN. CONST. art. III, § 5(g). The legislature declared the overall goal for the Commission and the selection process as follows:

> It is the intent of this act that the members of the commission shall consist only of those persons whose purpose it will be to recommend for appointment on the supreme court only lawyers or judges of recognized integrity, character, ability and judicial temperament, and whose conduct will conform to the letter and the spirit of the constitutional amendment implemented by this act.

KAN. STAT. ANN. § 20-133; *see also* KAN. STAT. ANN. § 20-3004(b) (a person nominated to serve on the Kansas Court of Appeals "shall be a person of recognized integrity, character, ability, experience, and judicial temperament, to the end that persons serving as judges of the court of appeals will be the best qualified therefor").

When a judicial vacancy arises in the Kansas appellate courts, the Clerk of the Appellate Courts promptly notifies the Commission's chairperson. KAN. STAT. ANN. §§ 20-132; 20-3007. The Clerk then sends a notice of the vacancy to all active Kansas attorneys residing in the state with a deadline for submission of applications to fill the vacancy. Patricia E. Riley, *Merit Selection: The Workings of the Kansas Supreme Court Nominating Commission*, 17 KAN. J.L. & PUB. POL'Y, 429, 431 (2008); *see* Kansas Appellate Court Nominating Form, *available at* http://www.kscourts.org/appellate-clerk/nominating-commission/. Once applications have been submitted, the Commission performs a background check and interviews each applicant. Riley, 17 KAN. J.L. & PUB. POL'Y at 432-34.

At the close of the interviews, the Commission members meet and vote to decide which three applicants' names will be submitted to the governor. *Id.* at 434-35. The governor appoints one of those three persons to fill the appellate vacancy. KAN. CONST. art. III, § 5(a); KAN. STAT. ANN. § 20-3005. If the governor fails to appoint the new judge or justice within 60 days of having received the three names from the Commission, the chief justice of the Kansas Supreme Court will make an appointment from the list of three qualified nominees. KAN. CONST. art. III, § 5(b); KAN. STAT. ANN. § 20-3009(a). In actual practice, the governor has always appointed one of the applicants; the chief justice has never made an appointment.

After each newly appointed judge or justice has served a full year on the bench, he or she must stand for retention on the ballot in the next general election. If a majority of Kansas voters elect to retain the judge or justice in office, he or she remains on the bench. If, on the other hand, a majority of Kansans vote against retention, the position becomes vacant, and the selection process begins anew. KAN. CONST. art. III, § 5(c), KAN. STAT. ANN. § 20-3006(b). Justices of the Kansas Supreme Court sit for retention votes every six years thereafter. KAN. CONST. art. III, § 5(c). Kansas Court of Appeals judges sit for retention every four years. KAN. STAT. ANN. § 20-3006(b).

These essential elements of the Kansas judicial selection system are not unique. Twenty-seven other states select at least some of their judges through the use of a nominating commission that proposes a slate of nominees from which the governor makes an appointment. Larry C. Berkson, *Judicial Selection in the United States: A Special Report* at 2, *available at* http://www.judicialselection.us/upload/documents/Berkson. At least 14 other states rely on lawyers in their respective state to select lawyer-members of their nominating commissions. And the American Judicature Society recommends that states use a system in which lawyers alone select the lawyer-members of such nominating commissions. American Judicature Society, *Model Judicial Selection Provisions* at 2 (rev. 2008), *available at* http://www.judicialselection.us/uploads.

Against this backdrop, Plaintiffs challenged the Kansas judicial selection system as a violation of their right to vote and equal protection.

SUMMARY OF THE ARGUMENT

I. Plaintiffs' necessary underlying premise—that they have a constitutional right to vote for the lawyer-members of a state judicial nominating commission—is without merit. The Supreme Court has made it absolutely clear that there is no constitutional requirement that states provide for the election of non-legislative officials (such as judges), holding instead that states are completely free to decide whether such positions will be filled "by the governor, by the legislature, or by some other appointive means rather than by an election." *Sailors v. Board of Education of the County of Kent*, 387 U.S. 105, 108 (1967); *see also Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969). Where a non-legislative position is not elected, the "principle of 'one man, one vote' ha[s] no relevancy." *Sailors*, 387 U.S. at 111; *see also Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 56, 58 (1960); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (Supreme Court has rejected the argument that "the Constitution compels a fixed method of choosing state or local officers").

II. Furthermore, the one person, one vote principle relied on by Appellants does *not* apply when (1) the entity exercises only narrow, limited governmental powers, and (2) those who vote for the members of the entity are

disproportionately affected by that entity's activities. *Ball v. James*, 451 U.S. 355, 364, 366 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973). In such cases the challenged entity need only be rationally related to a legitimate state purpose.

The Kansas Supreme Court Nominating Commission is such an entity; its narrow and sole purpose is to screen persons applying for appellate judicial vacancies. Not only do Kansas lawyers have a special expertise that is of service to the State in evaluating the credentials and experience of potential judicial nominees, Kansas lawyers are also disproportionately affected by the Commission's activities. This is true whether the focus is on the Commission's narrow purpose of vetting judicial applicants (all of whom must be licensed Kansas lawyers), or if the focus is on the Kansas Supreme Court, which regulates all aspects of the Kansas legal profession. Because there is no question that the decision by the people of Kansas to have lawyers select the lawyer-members of the judicial nominating commission is rationally related to the legitimate state interest of having a qualified judiciary, the Commission easily passes constitutional muster.

III. Finally and importantly, *no* court has invalidated any selection mechanism states have adopted for lawyer-members of nominating commissions, but two circuit courts and four federal district courts (in addition to the district

court below) have expressly rejected the very argument that Plaintiffs make in this case. *See Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010); *Carlson v. Wiggins*, No. 10-587 (S.D. Iowa Jan. 19, 2011); *Miller v. Carpeneti*, No. 09-136 (D. Alaska Sept. 29, 2009); *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105, 1128-29 (E.D. Mo. 1997), *affirmed on the merits*, 133 F.3d 921 (Table), No. 97-1885 (8th Cir. 1998) (unpublished); and *Bradley v. Work*, 916 F. Supp. 1446, 1448-49, 1456 (S.D. Ind. 1996), *affirmed on other grounds*, 154 F.3d 704 (7th Cir. 1998). As this brief demonstrates, there is no basis for this Court to reach a contrary conclusion. Rather, the district court correctly held that Plaintiffs' complaint fails as a matter of law to state a valid constitutional claim. This Court should affirm the dismissal of the complaint.

STANDARD OF REVIEW

This Court reviews de novo the dismissal of a complaint under Rule 12(b)(6) for failure to state a cognizable legal claim. *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F. 3d 1188, 1191 (10th Cir. 2009); *Teigen v. Renfrow*, 511 F. 3d 1072, 1078 (10th Cir. 2007); *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006). Under Rule 12(b)(6), a complaint must be dismissed as a matter of law when it fails to allege a plausible legal theory. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1969, 1974 (2007); *Ridge at Red Hawk*, 493 F.3d at 1174, 1177 (10th Cir. 2007). Although for purposes of this Rule 12(b)(6) motion

Plaintiffs' *fact* allegations in the complaint are taken as true, "conclusory allegations" are "insufficient to state a claim on which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Here the district court correctly dismissed Plaintiffs' suit because, as a matter of law, Plaintiffs cannot prove they are entitled to the relief requested. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984). Indeed, Plaintiffs declined to engage in any discovery, so only pure issues of law are presented. Because Plaintiffs have failed to identify and articulate a meritorious legal claim, dismissal under Rule 12(b)(6) is appropriate. *See Peterson v. Grisham*, 594 F. 3d 723, 727 (10th Cir. 2010); *Sunrise Valley, LLC v. Kempthorne*, 528 F. 3d 1251, 1254 (10th Cir. 2008); *Ridge at Red Hawk*, 493 F.3d at 1177; *U.S. Bioservices Corp. v. Lugo*, 595 F. Supp. 2d 1189, 1190-91 (D. Kan. 2009) (citing *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)).

ARGUMENT

I. Plaintiffs Have No Constitutional Right To Vote In The Nomination Process Used To Select Kansas Appellate Judges.

Plaintiffs apparently proceed on the erroneous premise that they have a constitutional right to vote in the selection process for Kansas appellate judges if anyone gets to vote in any aspect of that process. Such a claim finds no basis in the federal Constitution—which nowhere defines a right to vote or bestows such a right in the context of state judicial selection processes—nor is it consistent with

principles of federalism, judicial power, or the Supreme Court's voting cases in the equal protection context.

The one person, one vote cases Plaintiffs cite are inapplicable to the Kansas process for selecting appellate judges because Kansas appellate judges are appointed, not elected. Kansas appellate judges are appointed by the governor from a list of qualified nominees presented by the Commission. The governor is elected by a statewide vote, but the fact that the person who makes the judicial appointments is elected does not convert judicial appointments into a popular election. Likewise, although Kansas lawyers select some members of the Commission by elections, the election of these private citizen, lawyer-members does not convert judicial appointments into an elective process for "public officials."

Even the cases on which Plaintiffs rely indicate that the one person, one vote principle applies only in situations where the persons being elected are (1) *public officials* who will (2) exercise *general governmental powers*. *See Kramer*, 395 U.S. at 629; *Phoenix v. Kolodziejski*, 399 U.S. 204, 209 (1970). The people of Kansas responded to an egregious abuse of previously unfettered gubernatorial appointment power by amending the Kansas Constitution—expressly to constrain the governor's power to appoint state supreme court justices. The people of Kansas achieved that end by specifically providing for a citizen-Commission, consisting of both lawyer and nonlawyer-members, that screens potential judicial nominees and recommends three

to the governor for each vacancy on the court. There can be no serious or plausible suggestion that the members of the Commission are "public officials" who exercise any "legislative" or "executive" power. Thus, when the people of Kansas created the Commission, they did not create nine new "government" or "public" officials. The governor is a public official; the members of the Commission are not. Nothing in the Constitution or the Supreme Court's equal protection cases declares that the creation of such a citizen commission by the states is off limits.

Sailors is particularly helpful in understanding why the one person, one vote cases have no bearing here. The *Sailors* court considered a one person, one vote challenge to the selection of the members of a Michigan county school board in a suit brought by citizens complaining that voters in smaller school districts had a disproportionate voice in the process. 387 U.S. at 106-07. In *Sailors*, the voters elected the members of their local school boards in a popular election. *Id*. Each local school board (regardless of the population of the school district) then selected one delegate to a kind of nominating commission, and those delegates chose the five members of the county school board. *Id*. The court characterized the county school board selection system as "basically appointive rather than elective," even though the selection process began with the election of local school board members. *Id*. at 109. Because the process was "basically appointive," the court held the one person, one vote challenge was without merit. *Id*. at 111.

Like the system for choosing county school board members in *Sailors*, the judicial selection process in Kansas is "basically appointive rather than elective." The governor appoints the four non-lawyer-members of the Commission. The Commission screens applicants and recommends a list of three candidates to fill a vacancy, and the governor then appoints a justice or judge from that list of candidates. Because the people of Kansas purposely decided by constitutional amendment not to fill supreme court vacancies through elections, Plaintiffs' authorities are simply inapplicable to the Kansas judicial selection system.

Both the United States and Kansas Constitutions recognize that there is a fundamental difference between the selection of appointed judges and the election of legislators. Acknowledging this distinction, a three-judge district court—in a decision summarily affirmed by the Supreme Court of the United States—long ago held that "the concept of one-man, one-vote apportionment does not apply to the judicial branch of the government." *Wells v. Edwards*, 347 F. Supp. 453, 454 (M.D. La. 1972), *aff'd summarily*, 409 U.S. 1095 (1973). The *Wells* court's unassailable reasoning was that the one person, one vote rule, "which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary," because "[j]udges do not represent people, they serve people." *Id.* at 455. Indeed, courts have repeatedly recognized that the one person, one vote principle does not apply to judicial selections. *E.g., Chisom*

v. Roemer, 501 U.S. 380, 402-03 (1991); *Smith v. Boyle*, 144 F.3d 1060, 1061 (7th Cir. 1998); *Field v. Michigan*, 255 F. Supp. 2d 708, 711-13 (E.D. Mich. 2003). Yet Plaintiffs here incorrectly assert that the principle should be applied to a system that *appoints* state appellate judges and justices.

The only circuit court to address Plaintiffs' equal protection theory on the merits emphatically rejected it. In *Kirk v. Carpeneti*, the Ninth Circuit affirmed the Rule 12(b)(6) dismissal of the plaintiffs' challenge to the Alaska judicial nominating system (the plaintiffs in *Kirk* were represented by the same Indiana counsel who represent Plaintiffs here). As do Plaintiffs here, the plaintiffs in *Kirk* 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. *See* Aplt. App. at 16, ¶ 51; But the Ninth Circuit flatly rejected this theory, explaining:

> The *federal courts have recognized no constitutional principle that supports Plaintiffs' contention* that all participants in the judicial selection process must be either popularly elected or appointed by a popularly elected official, and have rejected all such assertions. *Plaintiffs therefore cannot obtain the changes they seek through the courts*. Our conclusion is demonstrated by the election cases upon which Plaintiffs rely.

Kirk, 623 F. 3d at 896 (emphasis added).

The primary authority relied upon by both the plaintiffs in *Kirk* and Plaintiffs in this case for their novel proposition is a footnote in *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 n.7 (1969). *See Id.* at 899. The Ninth

Circuit, however, concluded that "[t]he *Kramer* footnote does not stand for" any such proposition, and that the Supreme Court in *Kramer* "did not suggest a sweeping new constitutional rule that appointments for all positions in every branch of government must be made by an official who is popularly elected." *Id*. Indeed, the Supreme Court long ago rejected that notion in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), which upheld a procedure by which a political party was permitted to appoint a legislator to fill a vacancy in the legislative body at issue there.

Even more recently than the Ninth Circuit's decision in *Kirk*, a federal district court rejected the very argument Plaintiffs make in this case. In *Carlson v. Wiggins*, No. 10-587 (S.D. Iowa Jan. 19, 2011), the court stated that the plaintiffs (again represented by the same Indiana counsel as in *Kirk* and this case) argue "that they 'have the right to vote for officials who exercise government power affecting them.'" Slip op. 21 (internal citations omitted). The court quickly rejected that argument, however, observing that none "of the Supreme Court cases Plaintiffs rely upon state such a test." *Id*. Importantly, the court drilled down to the essence of the plaintiffs' argument, which was the same as their argument in this appeal:

> Indeed, it appears that Plaintiffs' proffered 'test' is simply an inversion of the *Ball-Salyer* exception to the 'one person, one vote' rule. In effect, Plaintiffs are arguing that all state elections must be evaluated using a strict dichotomy—the election must either satisfy the *Ball-Salyer* exception, and thus qualify as a 'special election,' or it will be deemed a 'general election' subject to the 'one person, one vote' rule, as

> enunciated and applied in *Kramer*. *The basic logical problem with this proposition is obvious—one cannot prove that a rule applies by proving that its exception does not apply. Moreover, Plaintiffs' arguments seem to ignore the scope of the fundamental right to vote*.

Id. 22 (emphasis added).

The Iowa court pointed out that the Supreme Court has made clear that "'the right to vote, per se, is not a constitutionally protected right.'" *Id*. (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 n. 78 (1973) and citing *Rodriguez*, 457 U.S. at 9 ("this Court has often noted that the Constitution 'does not confer the right of suffrage upon any one") (internal citations omitted)). Instead, the Supreme Court has recognized an implicit right to participate in elections when a state has adopted an elective process for choosing public officials who will represent any segment of a state's population. *Carlson*, slip op. at 22-23. Thus, the Iowa court noted that voting rights apply when choosing elected executive and legislative officials, because those persons *represent* segments of the population, and are "'representative in the sense of reflecting or responding to the views of a public.'" *Id*. (quoting G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 Fordham Urban L.J. 291, 302 (2007)).

Applying this standard, the Iowa court correctly and easily concluded that the lawyer-members of the Iowa nominating commission have no constituencies; they "do not represent the people of Iowa, they serve the people of Iowa." *Carlson*, slip op. 24. Thus, because the lawyer-members "are not representatives in the relevant sense,

Iowa voters do not have a constitutional right to vote for them." *Id*. "The mere fact that the people of Iowa decided to grant members of the Iowa Bar the ability to vote for the [lawyer members of the commission] does not, as Plaintiffs suggest, somehow magically vest Plaintiffs with a constitutional *right* to vote in that election." *Id*. at 24-25. The court also pointed out that, like the Kansas Commission lawyer-members, the lawyers chosen for the commission in Iowa are chosen on a nonpartisan basis, "a requirement that would make no sense if the Commission was supposed to be comprised of politically responsive officials." *Id*. at 24 n. 15. Consequently, the court concluded "that the challenged provisions do not implicate Plaintiffs' fundamental right to vote" and, thus, "the challenged provisions do not trigger strict scrutiny, but are subject only to rational basis review." *Id*. at 25.

Fifteen years ago, a federal district court in Indiana also considered a claim virtually identical to Plaintiffs' claim here—and likewise rejected it on the merits—in *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996). In Lake County, Indiana, the governor appoints judges from candidates screened by a local judicial nominating commission. The local commission consisted of nine members, including four attorneys who were elected by the county's lawyers. *Id.* at 1450. As in this case, the plaintiff voters in *Bradley* contended that their equal protection rights were violated because only lawyers could participate in the selection of the lawyer-members of the commission. *Id.* at 1455. The district court flatly rejected

the claim, holding that the one person, one vote cases are inapplicable to elections such as those for the commission's lawyer-members because such votes are not a "general election" and instead are "more in the category of executive appointments, which does not implicate the Equal Protection clause." *Id.* at 1456.

The current Plaintiffs have no authority that supports their claim that choosing the members of a private citizen commission that participates in a judicial selection process under which the governor appoints judges (no Kansas appellate judge is elected; the governor appoints them all) must be treated as a general election open to all voters. Indeed, although Kansas is hardly alone in using a judicial selection process that appoints judges using a nominating commission process,* or that permits lawyers to select the lawyer-members of such commissions, and even with such systems being in place now for almost 70 years,

* The Ninth Circuit recognized that the repercussions of Plaintiffs' theory are not limited to state judicial nominating commissions. Rather, Plaintiffs' constitutional theory, if accepted, would call into question "well-established federal judicial appointments that do not conform to Plaintiffs' desired universal principle." *Kirk*, 623 F.3d at 900. In particular, the *Kirk* court pointed to two federal judicial appointment procedures that would be jeopardized by Plaintiffs' constitutional theory: (1) federal magistrate judges, who "are nominated by merit selection panels composed of lawyers and community members, and then appointed by a majority of district court judges in the district where the magistrate is to serve"; and (2) federal bankruptcy judges, who "are nominated by merit screening committees and then appointed by federal appellate judges." *Id*. The Ninth Circuit aptly observed that "[i]n both cases, neither the judges nor the members of the nominating body are popularly elected." *Id*. Furthermore, these selection systems are embodied in federal statutes. *See* 28 U.S.C. §§ 631(a) & (b)(5), 152(a)(1).

Plaintiffs cannot cite a single case invalidating such a system on equal protection grounds, or any other grounds for that matter.

Allowing a franchise limited to lawyers in selecting the lawyer-members of the Commission does not implicate the one person, one vote principle: Kansas is not constitutionally required to permit anyone to vote in connection with the appointment of supreme court justices and, in fact, Kansas does not grant anyone the power to vote for Kansas appellate judges. Kansas certainly can decide to limit the selection of the Commission's lawyer-members to elections by their lawyer colleagues. Thus, when Kansas voters established the Commission and specifically decided that the selection of the lawyer-members of the Commission would *not* be a franchise granted to the entire electorate, that decision was within the people's constitutional discretion. *Sailors*, 387 U.S. at 111.

II. Even If The One Person, One Vote Principle Applied To The Kansas Judicial Selection Process, The Kansas Supreme Court Nominating Commission Is A Limited-Purpose Entity That Does Not Exercise General Governmental Powers.

In addition to there being no constitutional right to vote in the selection process for selecting appellate judges, the Supreme Court has held that the one person, one vote principle does *not* apply when (1) the entity has a limited purpose and does not exercise general governmental powers and (2) those permitted to vote regarding the entity are disproportionately affected by its activities. *E.g., Ball v. James*, 451 U.S. 355, 364, 366 (1981); *Salyer Land Co. v. Tulare Lake Basin*

Water Storage Dist., 410 U.S. 719, 728 (1973). The Kansas Supreme Court Nominating Commission easily passes this two-part test.

A. The Commission Has A Single, Narrow Function And Does Not Exercise General Governmental Powers.

The Kansas Supreme Court Nominating Commission has one and only one function: to screen applicants for vacancies on the Kansas appellate courts in order to send to the governor a list of three qualified candidates for each position that becomes vacant. This single, limited purpose removes the Commission from the one person, one vote principle announced by *Reynolds v. Sims*, 377 U.S. 533 (1964) and its progeny, as that principle only applies to "units of local government having *general governmental powers* over the entire geographic area served by the body." *Avery v. Midland County*, 390 U.S. 474, 485 (1968) (emphasis added).

Neither the Supreme Court nor this Court has ever suggested that strict scrutiny applies simply because an entity may exercise a power that may, in some sense, be deemed "governmental." Rather, the Supreme Court's cases, as well as this Court's decision in *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994), focus on (1) whether an entity exercises general governmental powers, such as levying taxes, hiring and firing employees, making contracts, supervising the public, acquiring property, or building public facilities, and (2) if so, the nature and scope of the entity's authority. The Kansas Supreme Court Nominating Commission plainly and obviously does none of the things listed in factor (1).

Furthermore, the Commission arguably does not exercise any "governmental" power at all. The primary bases on which Plaintiffs rely for arguing that the Commission exercises governmental power are that (1) by analogy, the President of the United States appoints federal judges and such authority therefore must be "governmental" in nature and (2) judges exercise governmental power. The second basis is a complete nonstarter—*the Commission* does not exercise "judicial" power in any way, shape, or form.

The first basis is also a stretch, because nothing compels the conclusion that every authority granted to federal officials under the United States Constitution necessarily and automatically is "governmental" power for purposes of state governments and state constitutions. Indeed, the Supreme Court has declared that the federal separation of powers doctrine simply does not apply to the states and their governments: "[T]his Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957). Thus, the states are free to organize their governments largely as they wish, including the use of a unicameral legislature (Nebraska), allowing line item vetoes (numerous states), imposing term limits on elected representatives (many states), and appointing rather than electing officials such as attorneys general (Maine) and state judges (numerous states, including Kansas, Alaska, Iowa, Missouri, and Indiana). *Cf. N. Colo. Water*

Conservancy Dist. v. Bd. of County Comm'rs, 482 F. Supp. 1115, 1118 (D. Colo. 1980) (recognizing that the organization and extent of a state entity's power may be "a question of state law that involves important concerns based on federalism concerning the way in which a state chooses to organize its government").

That the United States Constitution authorizes the president to nominate federal judges in no way means that any and all aspects of state processes for selecting judges are necessarily "governmental" in nature, and certainly not in the sense contemplated in the one person, one vote cases: "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

First, the Commission's "power" in the Kansas judicial selection process is strikingly different in both nature and scope from the president's power to nominate federal judges. Unlike the president, the Commission cannot actively select candidates but, rather, must simply evaluate the applications that it receives from interested lawyers and judges. Significantly, the Commission—again, unlike the president—has no power to actually appoint anyone to the appellate bench. Thus, the "nomination" at issue in the federal and state systems can be very different, as it is in Kansas and other states that use judicial nominating commissions.

Second, nothing in the Supreme Court's voting rights cases suggests that all powers wielded under the federal constitution are "traditional governmental functions" that only duly elected or appointed public officials may exercise. Indeed, the significant variety of judicial selection systems utilized in the states refutes any notion that there is any single "traditional" method for selecting judges, much less that any and all aspects of the proliferation of state judicial selection systems necessarily involves "governmental" power of the type the Supreme Court's equal protection voting rights cases contemplate.

More importantly, even if the Kansas Commission exercises some very limited and narrow governmental power, the Commission indisputably does not exercise "general" governmental power within the meaning of the case law. In *Avery*, the Supreme Court found that a county commission exercised "general government powers" because the commission

> is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization for tax assessments.

390 U.S. at 476. In contrast, the Supreme Court in *Ball* found that the water district did not perform a "general government function" as required by *Reynolds* and *Avery* because the water district could not and did not:

- "impose ad valorem property taxes or sales taxes";
- "enact any laws governing the conduct of citizens"; or
- "administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services."

Ball, 451 U.S. at 366.

To the same effect, this Court found in *Hellebust*, 42 F.3d at 1332-34, that the Kansas Board of Agriculture exercised "general government powers" because the Board (1) had approximately 330 employees; (2) had an annual budget of $15 million allocated from the state general fund; and (3) enforced approximately 80 laws that affected the everyday lives of Kansas citizens. In contrast, this Court rejected a one person, one vote challenge to the Board of Governors of the Registered Dentists of Oklahoma because the Board "'functions as a special purpose unit of government'" and thus is "not subject to the one person, one vote rule." *Plowman v. Massad*, 61 F.3d 796, 798 (10th Cir. 1995); *see also Kessler v. Grand Cent. Dist. Management Ass'n, Inc.*, 158 F.3d 92 (2d Cir. 1998) (governing body of the New York City Business Improvement District not subject to the one person, one vote rule); *Louisiana Republican Party v. Foster*, 674 So.2d 225 (La. 1996) (one person, one vote rule not applicable to a political party's statewide central committee because such persons "do not appear to nor are alleged to perform any governmental function at all, much less an important one").

The district court in this case correctly applied the distinction: "To be sure, decisions of the Kansas Supreme Court and the Kansas Court of Appeals can affect the daily lives of Kansans, *but they are judicial decisions, not decisions of the Commission*." *Dool v. Burke* (Aplt. App. at 32) (emphasis added). Indeed, just as they did in the district court below, Plaintiffs in this Court attempt to conflate the powers of the Commission with the powers of the Kansas judiciary. But that effort must fail, because the Commission and its members exercise no judicial power whatsoever; they have no direct power to affect the outcomes of specific cases or to decide the course of the law. Indeed, the Commission has no duties, functions, or powers that directly affect the daily lives of all Kansans.

The Ninth Circuit in *Kirk* correctly applied the distinction in the very context of a challenge to the selection of the lawyer-members of a state judicial nominating commission. The *Kirk* court recognized that, under the Supreme Court's cases, "states and localities can restrict voting in certain elections involving so called 'limited purpose entities.'" *Kirk*, 623 F.3d at 897. Importantly, like this Court in *Hellebust*, the Ninth Circuit reaffirmed the long-standing definition of "limited purpose" entities as those that "characteristically serve only a 'special limited purpose' and have no power to impose taxes or enact laws. They do not administer 'such normal functions of government' as maintenance of streets, operation of

schools, or provision of sanitation, health, or welfare services." *Id*. (internal citations omitted).

The Ninth Circuit's application of these principles in *Kirk* is equally persuasive in this case and confirms that the Kansas Commission is a "limited purpose" entity within the meaning of the Supreme Court cases. Like the Alaska Commission, the Kansas Commission has only a single, narrow function—to submit to the governor three nominees for each Kansas appellate court vacancy. The Kansas Commission has no other "powers"; it cannot impose taxes or enact (or enforce) laws. The Kansas Commission does nothing remotely approaching any of the "normal functions of government." Instead, it has a solitary purpose.

Moreover, as the Ninth Circuit observed:

> the power vested in the [Commission] is not to make the final appointment, but to nominate persons for judicial selection. The ultimate power to appoint judges is in the Governor, who is popularly elected by the people of [the State]. In addition, the people have the opportunity to reject the appointment in subsequent retention elections.

Id. at 900. These observations are equally applicable to the Kansas Commission and compel the same conclusion that the Ninth Circuit reached in *Kirk*: Plaintiffs' challenge to the Kansas judicial nominating system fails.

Likewise, the Indiana federal district court in *Bradley* hit the nail on the head in rejecting this same equal protection challenge fifteen years ago:

> The Commission is responsible for selecting from among eligible applicants for a judicial appointment the three most highly qualified candidates. This is a narrow and limited purpose and function. In fact, the attorney members of the Commission are elected to a special group that serves no traditional governmental functions at all. The Commission's sole purpose and reason for existence is to screen candidates as part of the judicial appointment process. *Consequently, the Commission satisfies the "special unit with narrow functions" prong of the exception to the one-man, one-vote rule*.

Bradley, 916 F. Supp. at 1456-57 (emphasis added).

The Kansas Commission has no power to impose any form of tax; it cannot enact or enforce laws or regulations affecting all citizens; and it does not exercise police powers over traditional matters of public health, safety, or welfare. *See Ball*, 451 U.S. at 366; *Bradley*, 916 F. Supp. at 1456-57. In fact, the Commission has no authority to make any law whatsoever; it has no employees; it does not even have a budget to administer. Its "officials" are private citizens providing pro bono service to the state, with no "official" status or perquisites.

In sum, it is difficult to imagine another commission or entity with such a "limited purpose" or "special" function. The *only* responsibility of the Commission is to screen potential judicial candidates and provide three nominees to the governor *if and when* there is an appellate vacancy in Kansas. For most months of most years, the Commission performs no function at all, and does not even convene. Ultimately, the Commission is the epitome of a special-purpose entity

with limited powers, and thus the selection of its lawyer-members is not subject to the requirements of the one person, one vote rule.

B. The Commission's Activities Disproportionately Affect Kansas Lawyers.

Certainly, all Kansans share a common interest in achieving the Kansas Constitution's goal of having a qualified judiciary. But the test is not whether the group being permitted to vote for a limited-purpose entity is the *only* group affected by the entity's activities; rather, the test is whether the voting group is *disproportionately* affected by the activities of the entity compared to the general public. *See Ball*, 451 U.S. at 371; *Salyer*, 410 U.S. at 728. As noted in *Bradley*, 916 F. Supp. at 1457, lawyers "as officers of the court and as potential candidates for judicial office, are disproportionately affected by the screening process performed by the Commission." Only individuals licensed to practice law in Kansas may be considered by the Commission and the governor for a position on a Kansas appellate court, so only Kansas bar members are interviewed, investigated, evaluated, and recommended by the Commission. KAN. STAT. ANN. §§ 20-105 (Supreme Court) and 20-3002(a) (Court of Appeals).

Thus, the Commission's sole and limited function directly impacts Kansas lawyers in ways far beyond any effect the Commission has on Kansas citizens generally. Moreover, there can be no serious question that Kansas lawyers are disproportionately affected by the Commission's role in nominating Kansas

Supreme Court justices and Kansas Court of Appeals judges. As stated in *Bradley*, 916 F. Supp. at 1457, lawyers' interests "*are different in nature and in scope from the interests of the general public*."

Furthermore, Kansas lawyers also have a beneficial perspective to offer the Commission and the state in terms of evaluating potential appellate court nominees—a perspective based on their experience practicing law in Kansas and their personal knowledge of the credentials, experience, integrity, and character of the candidates. It is precisely that expertise that the people of Kansas sought to tap when they overwhelmingly passed the constitutional amendment in 1958 that created the current merit-based selection process. As the Kansas Legislature expressly recognized when it enacted statutes to implement that amendment:

> It is the intent of this act that the members of the commission shall consist only of those persons whose purpose it will be to recommend for appointment on the supreme court only lawyers or judges of recognized integrity, character, ability and judicial temperament, and whose conduct will conform to the letter and the spirit of the constitutional amendment implemented by this act.

KAN. STAT. ANN. § 20-133. Because that constitutional amendment specifically provided for the lawyer-members of the Commission and the means by which they are selected, it is apparent that the role of lawyers on the Commission is critical to the goals of the people of Kansas. KAN. CONST. art. III, § 5(e).

C. Having Lawyers Select The Lawyer-Members Of The Commission Is Rationally Related To A Legitimate State Interest.

Because the Commission is a limited-purpose entity, the decision by the people of Kansas to have licensed members of the bar select the five lawyer-members of the Commission must only satisfy rational basis review in order to survive equal protection scrutiny. *Ball*, 451 U.S. at 371. This, it easily does.

Permitting Kansas lawyers to select the lawyer-members of the Commission is rationally related to the legitimate state interests of avoiding politicization of the judicial selection process and ensuring that those appointed to the bench are experienced lawyers with strong credentials and recognized integrity. Lawyers are uniquely qualified to evaluate the legal skills and experiences of their colleagues in the bar. Likewise, because all judicial applicants must be licensed to practice law in Kansas, skill and experience in the practice of law play a vital role in determining an applicant's qualifications. Thus, it was reasonable for the people of Kansas to conclude that Kansas lawyers—by virtue of their legal knowledge and experience—have insight as to who may be the most qualified to serve as a Kansas Supreme Court justice. As the district court explained in *African-American Voting Rights Legal Defense Fund, Inc.* regarding the similar system in Missouri:

> Certainly, it is reasonable, if not necessary, to have lawyers on these commissions. There is no one better to evaluate the ability of potential judges than the attorneys who will have to practice before them every day. Attorneys typically will know the judicial aspirants better than the general public. They will know which aspirants have

> the legal acumen, the intelligence, and the temperament to best serve the people of Missouri.

African-American Voting Rights Legal Defense Fund, Inc., 994 F. Supp. at 1128.

That said, Plaintiffs' tunnel-vision focus on the role that lawyers play in selecting some members of the Commission should not obscure the fact that nonlawyers also have an important and substantial role on the Commission. *See Miller*, slip op. at 22; *African-American Voting Rights Legal Defense Fund, Inc.*, 994 F. Supp. at 1129 n.51; *Bradley*, 916 F. Supp. at 1458. Four nonlawyers sit on the Commission, and they are appointed by the popularly-elected governor. The Plaintiffs make no claim (nor could they) that any Commission vote on a candidate has ever split along lawyer versus nonlawyer lines. *See* Patricia E. Riley, *Merit Selection: The Workings of the Kansas Supreme Court Nominating Commission*, 17 KAN. J.L. & PUB. POL'Y, 429, 435 (2008) (stating that "[s]upport for applicants has never broken down along lawyer/non-lawyer lines"). Thus, the method of selecting the lawyer-members of the Commission is rationally related to a legitimate state interest and, combined with the appointment of nonlawyer-members, is meeting the people's objective. As a result, Plaintiffs' equal protection claim fails as a matter of law.

III. ALL Courts That Have Considered The Plaintiffs' One Person, One Vote Theory Have Rejected It.

In addition to the district court in this case, two circuit courts and four federal district courts have rejected Plaintiffs' theory, and *no court has found the theory to have any legal validity*. All courts have come to the same conclusion: state judicial nominating commissions are limited-purpose entities that fall outside the scope of the one person, one vote principle.

A. The Alaska Case.

The Plaintiffs' Indiana counsel had essentially the same equal protection argument rejected by the Ninth Circuit and a federal district court in Alaska in *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010), and *Miller v. Carpeneti*, No. 09-136 (D. Alaska Sept. 29, 2009). In Alaska, members of the bar elect a state board that governs the bar. That board in turn appoints several lawyer-members to the Alaska Judicial Council, which screens potential Alaska Supreme Court candidates and provides three names to the Alaska governor. Like Plaintiffs here, the Alaska plaintiffs complained that because only lawyers had a vote that could affect the choice of the lawyer-members of the nominating commission (in that case only indirectly), the Alaska system violated the one person, one vote principle.

The district court disagreed, concluding that the Alaska Judicial Council was a limited-purpose entity not subject to the one person, one vote principle:

> Here, the Council does not "administer normal functions of government" or "enact laws governing the conduct of citizens"; rather, among its responsibilities, the Council is charged with evaluating and recommending the most qualified candidates for Alaska's bench based on its assessment of the credentials of members of the bar being considered for vacant judgeships. In this regard, therefore, the Council is a limited purpose entity whose actions disproportionately affect the membership of the Alaska bar.

Miller, slip op. at 21-22. The court then upheld the Alaska system under rational basis review, observing that "the selection of the Council's attorney members by the Board is rationally related to a legitimate state interest in selecting well-qualified jurists." *Id.* at 22.

Importantly, the court noted that "the Alaska Constitution has included checks on the exercise of the appointment powers in the Plan, which save it from defeat under rational basis review." *Id.* Three of those "checks" apply with full force to the Kansas selection system:

- "some members of the Board are themselves appointed by the Governor";
- "the Council's nominations are subject to a final selection by the Governor"; and
- "every person nominated by the Council and selected by the Governor must stand for periodic retention elections in which all registered voters participate."

Id. Relying on these important "checks," the district court upheld the Alaska selection system and dismissed the plaintiffs' complaint, concluding as follows:

> 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 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.

Id.

The Ninth Circuit affirmed, as discussed above in Sections I. and II.A. of this brief. That discussion is not repeated here, but is incorporated by reference.

B. The Iowa Case.

The most recent effort of Plaintiffs' Indiana counsel was in Iowa, where a lawsuit challenging that state's judicial selection system was filed after three Iowa Supreme Court Justices lost retention elections in November, resulting in three vacancies to be filled after January 1, 2011. *Carlson v. Wiggins*, No. 10-587 (S.D. Iowa Jan. 19, 2011). As described above in Parts I and II.A. of this brief, the Iowa district court granted the defendants' Rule 12(b)(6) motion to dismiss. In particular, that court concluded both that (1) there was no fundamental constitutional right to vote for the lawyer-members of the Iowa nominating commission and (2) the Iowa Commission is a limited-purpose entity satisfying the *Ball-Salyer* exception to the one person, one vote rule.

C. The Missouri Case.

In *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997), the plaintiffs challenged the constitutionality of Missouri's judicial selection process—the "Missouri Plan" on which the Kansas system is modeled. In Missouri, as in Kansas, the governor makes judicial appointments from a list of nominees presented by a nominating commission. The nominating commission in Missouri is composed of lay citizens, lawyer citizens, and judges. *Id.* at 1112. The lawyer-members of the commission are selected by an election in which only licensed lawyers may vote. *Id.* at 1117.

In rejecting the plaintiffs' equal protection claim, the district court pointed out that the persons who may not vote for the lawyer-members of the commission—nonlawyers—are not a "suspect class" for purposes of equal protection analysis. *Id.* at 1127. The court then held:

> 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.

Id. The court specifically rejected the case law on which Plaintiffs here rely, holding that those cases are inapplicable because the nominating commission is "a special unit with narrow functions" and thus fits within the "limited purpose"

exception to the one person, one vote rule. *Id.* at 1128 n.49. Thus, the district court concluded that

> because the practice of lawyers electing lawyers does not operate to the peculiar detriment of any suspect class, and it does not trammel upon a fundamental right, the only issue remaining is whether there is a rational basis for the practice in question.

Id. at 1128.

Applying rational basis review, the court concluded that the Missouri selection system passed muster, holding:

- "it is reasonable, if not necessary, to have lawyers" on a judicial nominating commission;
- "There is no one better to evaluate the ability of potential judges than the attorneys who will have to practice before them every day";
- "Attorneys typically will know the judicial aspirants better than the general public"; and
- Attorneys "know which aspirants have the legal acumen, the intelligence, and the temperament to best serve the people" as a justice or judge.

Id. Importantly, the district court specifically upheld the process by which lawyers were elected to the nominating commission, not just the participation of lawyers on the commission. *Id.* at 1129. The Eight Circuit affirmed the district court's decision on the merits without further discussion, emphasizing that "we conclude that the decision of the District Court is correct and that extended discussion would add nothing of substance to the thorough and well-reasoned opinion of that court."

African-American Voting Rights Legal Defense Fund, Inc. v. Missouri, 133 F.3d 921 (Table), No. 97-1885 (8th Cir. 1998) (unpublished).

D. The Indiana Case.

In *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996), discussed above in Parts I. and II.A. of this brief, the district court held that a local judicial nominating commission—which included lawyer-members elected only by members of the bar in that county—was a limited-purpose entity not subject to the one person, one vote principle. The court observed that the local nominating commission "serves no traditional governmental functions at all." *Id.* at 1456. Consequently, "the Commission satisfies the 'special unit with narrow functions' prong of the exception to the one-man, one-vote rule." Id. (quoting *Ball v. James*, 451 U.S. 355, 361-62 (1981)). Thus, as in the Missouri case, the court applied rational basis scrutiny, pointing out:

> The attorney-members of the Commission are selected to represent the interests and reflect the expertise of the local bar when evaluating candidates for a judicial appointment. Their divergent interests uniquely qualify attorneys to advise the governor, for their interests are different in nature and scope from the interests of the general public in a fair and impartial judiciary.

Id. at 1457.

The court easily concluded that the Indiana system passed constitutional muster because "the State's classification represents a reasonable effort to provide representation of both the general populace and the members of the bar on a

Commission whose limited function is to advise the governor on the selection of an appropriate candidate for judicial office." *Id.* at 1458. The Seventh Circuit affirmed, but did not address the plaintiffs' equal protection argument, which had not been preserved on appeal. *Bradley v. Work*, 154 F.3d 704, 711 (7th Cir. 1998).

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Counsel for the Appellees are ready and willing to present oral argument if doing so would be of assistance to the Court.

CONCLUSION

It is not a coincidence that all courts that have decided this question have rejected Plaintiffs' equal protection theory as a matter of law. In those cases, the courts recognized both that the plaintiffs have no fundamental right to vote for the members of state judicial selection processes and that state judicial nominating commissions are limited-purpose entities that do not exercise general governmental powers. This case requires the same conclusions, and Plaintiffs have not stated a claim upon which relief can be granted. The district court properly dismissed the complaint, and this Court should affirm.

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CERTIFICATE OF COMPLIANCE

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 10,883 words.

Complete one of the following:

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☐ I counted five characters per word, counting all characters including citations and numerals.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: s/Todd N. Thompson
Todd N. Thompson

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing Brief of Appellees, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the McAfee VirusScan Enterprise Version No. 8.7i (8.7.0.570), last updated on March 6, 2011, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ Leslie Gerstenkorn
Leslie Gerstenkorn, Paralegal

s/Todd N. Thompson
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee was furnished through (ECF) electronic service to the following on the 7th day of March, 2011:

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1885

African-American Voting Rights Legal Defense Fund, Inc.; Elbert A. Walton; Charles Q. Troupe; O. L. Shelton; Vernon Thompson; Errol S. Bush; Theodore Hoskins; Phillip B. Curls; Robert Bradley; Luretta B. Hawkins; St. Louis Council of Black Elected Officials, Inc.; Black Elected County Officials, Inc.,	*	
Appellants,	*	
v.	*	
State of Missouri; Leo G. Stoff; George Mehan; Judith Coleman; James R. Willard; Cynthia L. Ewert; Junious Buchanan; Ann M. Presley; Board of Election Commissioners, Jackson County, Missouri, in their official capacity; Thomas F. Simon, in his official capacity; Vivian Schmidt, in her official capacity as a member of the Board of Election Commissioners of the County of St. Louis, MO; Francis Barnes, III, also known as Bud Barnes, in his official capacity as a member of the Board of Election Commissioners of the County of St. Louis, MO; Patrick Hickey, Jr., in his official capacity as a member of the Board of Election	*	Appeal from the United States District Court for the Eastern District of Missouri. [UNPUBLISHED]

[ATTACHMENT 1]

Commissioners of the County of St. Louis, MO; Mel Carnahan; Rebecca Cook; Stanley A. Grimm; Gary A. Fenner; Edward D. Robertson; Mavis Thompson; Gene Overall; Jaci Morgan; John Moten,	*
Appellees.	*

Submitted: January 14, 1998
Filed: February 4, 1998

Before BOWMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and JONES,[1] District Judge.

PER CURIAM.

After a bench trial, the District Court[2] rejected plaintiffs' claims that the Missouri Non-Partisan Court Plan provisions for the selection of appellate court and certain trial court judges are invalid under the Voting Rights Act and the Constitution. The court set forth its findings of fact and conclusions of law in a fifty-five page opinion, and entered judgment for the State of Missouri and the other named defendants. Plaintiffs appeal.

---

[1]The Honorable John B. Jones, United States District Judge for the District of South Dakota, sitting by designation.

[2]The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

Having considered the case, we conclude that the decision of the District Court is correct and that extended discussion would add nothing of substance to the thorough and well-reasoned opinion of that court.

The judgment is affirmed. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

STEVEN CARLSON, MARY GRAZNOW, RICHARD KETTELLS, and WILLIAM RAMSEY,	*	
Plaintiffs,	*	
	*	4:10-cv-00587
v.	*	
JUSTICE DAVID WIGGINS,[1] in his official capacity as Chairman of the State Judicial Nominating Commission; JEAN DICKSON, STEVEN J. PACE, BETH WALKER, AMY J. SKOGERSON, JOSEPH L. FITZGIBBONS, GUY R. COOK, and H. DANIEL HOLM, JR., in their official capacities as Elective Members of the State Judicial Nominating Commission; MARGARET G. REDENBAUGH, COLEEN A. DENEFE, MARY BETH LAWLER, MADALIN A. WILLIAMS, DAVID C. COCHRAN, STEVEN BRODY, and TIMOTHY L. MIKKELSEN, in their official capacities as Appointive Members of the State Judicial Nominating Commission; and DAVID K. BOYD, in his official capacity as State Court Administrator,	*	MEMORANDUM OPINION AND ORDER
Defendants.	*	

Currently before the Court are two motions. The first motion is "Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction," filed on December 8, 2010. Clerk's No. 2. Defendants filed a response in opposition to this motion on December 23, 2010. Clerk's

[1] Justice David Wiggins became chair of the State Judicial Nominating Commission on January 1, 2011. Therefore, Justice Wiggins has been substituted as a party in this case for Justice Mark Cady, who was the chair of the State Judicial Nominating Commission when this case was filed. *See* Fed. R. Civ. P. 25(d); *see also* Clerk's No. 35.

No. 31. Plaintiffs filed a reply on January 3, 2011.[2] Clerk's No. 32. The American Civil Liberties Union of Iowa, Foundation, Inc. (hereinafter the "ACLU of Iowa") has also filed, with leave of court, an *amicus* brief regarding the issues raised in this motion. *See* Clerk's Nos. 18-2, 34.[3] The second motion before the Court is "Defendants' Motion to Dismiss," filed on December 17, 2010. Clerk's No. 10. Plaintiffs filed a response in opposition to this motion on January 3, 2011. Clerk's No. 32. Defendants did not file a reply. The Court held a hearing on both motions on January 6, 2010. Clerk's No. 35. At the hearing, the Court ordered Plaintiffs to file a letter regarding the application of certain legal authorities to this case. *See id.* The Court received Plaintiffs' letter on January 11, 2011. *See* Clerk's No. 36. The matters are fully submitted.

I. FACTUAL & HISTORICAL BACKGROUND

A. *The Development of the "Missouri Plan"*

"Since the American Revolutionary War, there have been heated debates about the best methods for state judicial selection." Rachel Paine Caufield, Ph.D., *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 Fordham Urb. L.J. 163, 164 (2007) (hereinafter "Caufield"). From 1776 to 1830, states selected their judges by appointment. *See id.* at 166. In the mid-nineteenth century, however, "a wave of popularism spread across the land" and "[i]t came to be thought that all public officials should be elected, for

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[2] Plaintiffs request that their "Response to Defendants' Motion to Dismiss" also be considered their reply regarding their own motion for preliminary relief. Clerk's No. 32 at 1. That request is granted.

[3] The ACLU of Iowa filed its proposed brief as an attachment to its motion for leave to file. *See* Clerk's No. 18-2. After the Court granted the ACLU of Iowa's motion, the ACLU of Iowa did not file its brief in a separate docket entry. However, the Court will consider the ACLU of Iowa's brief to be filed at its current location, Clerk's No. 18-2.

short terms." Harvey Uhlenhopp, *Judicial Reorganization in Iowa*, 44 Iowa L. Rev. 6, 52 (1958–1959) (hereinafter "Uhlenhopp"); *see also* Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 Mo. L. Rev. 479, 483 (2009) (hereinafter "O'Connor") (noting that, during this period, "[m]any people felt that appointive systems had allowed governors and legislators to award judgeships based on party loyalty rather than on legal ability, judicial temperament, or fair mindedness"). As a result, a number of states decided to change their judicial selection systems and began electing their judges by popular vote. *See* Uhlenhopp at 52–53; Caufield at 167.

However, "by the close of the 19th century disenchantment [with elected judiciaries] had begun to set in." Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 Duq. L. Rev. 61, 64 (1968–1969) (hereinafter "Winters"). During the early decades of the twentieth century, the issues of judicial selection and retention gained increasing attention from commentators. *See generally id*. at 64–65, 70. For example, in a famous 1906 speech, Professor Roscoe Pound criticized elective judiciaries for "[p]utting courts into politics, and compelling judges to become politicians," arguing that "in many jurisdictions [judicial elections] ha[d] almost destroyed the traditional respect for the bench." *See id*. (quoting Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 46 J. Am. Jud. Soc'y 55, 66 (1962) (hereinafter "Pound"). In 1913, William Howard Taft "severely criticized both partisan and non-partisan election and urged a return to the appointive system." *Id*. at 65 (citing William H. Taft, *The Selection and Tenure of Judges*, 36 Annual Rep. A.B.A. 418 (1913)).

In 1914, a Northwestern University law professor, Albert M. Kales, proposed a system in

which judges would be: (1) nominated by "a group of knowledgeable people"; (2) appointed by a popularly-elected official; and (3) retained in office subject to periodic non-competitive elections. *See id.* at 67; *id.* at 65 (citing Albert M. Kales, UNPOPULAR GOVERNMENT IN THE UNITED STATES (1914) (hereinafter "Kales")). In 1940, Missouri was the first state to adopt a judicial selection and retention system that included these three basic elements. *See id.* at 71. Therefore, some commentators have referred to other judicial selection systems that share these three basic elements as following the "Missouri Plan."[4] *See id.*

Generally, in judicial selection systems following the Missouri Plan, "some portion of the membership [of the nominating commission] is made up of attorneys, while others are selected from the general public. In most systems, the governor, legislature, state bar association, and, sometimes, the chief justice appoint some proportion of the nominating commission's membership." Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 Cornell J.L. & Pub. Pol'y 273, 301 (2002) (hereinafter "Behrens"). However, beyond these basic elements, there is "great variance between the [judicial] selection systems of the states" that follow the Missouri Plan. *See id.*; *see also* Caufield at 171 ("It is important to note that there is no one merit selection system.").

B. *Iowa's Implementation of the Missouri Plan*

Iowa became a state in 1846, during the period in which a number of states discarded their old appointive systems and decided to select judges by popular election. *See generally* Uhlenhopp at 52–53. Therefore, it is not surprising that the framers of the Iowa Constitution "hotly debated" the issue of whether or not Iowa judges should be directly elected. *See id.* at 53

[4] This general type of system has also been referred to as the "Merit Plan," the "American Bar Association Plan," and the "Kales Plan." Winters at 63.

n.154. When the original Iowa Constitution was adopted in 1846, it reflected a sort of compromise between those who favored direct, popular elections and those who did not. The 1846 Constitution provided that district court judges would be selected by popular election but that supreme court justices would be elected by the state general assembly. *See* Iowa Const., art. V, §§ 3, 4 (1846). This distinction did not last long, however. In 1857, Iowa adopted a new constitution that provided for the popular election of all state judges. *Id.*, art. V, §§ 3, 5 (1857).

Iowa continued to elect its judges for over one hundred years. In the 1950s, however, momentum began building for change. In 1957, one commentator noted that "Iowa . . . persists in the popular election of all members of the judiciary system, from the supreme court to the justice of the peace," and suggested that an appointive system would "elevate the quality of the members of the bench . . . ." *See* Uhlenhopp at 54–55 n.160 (quoting Russell Marion Ross, THE GOVERNMENT AND ADMINISTRATION OF IOWA 356 (1957)). In 1958, an Iowa "district court judge proposed to change the procedure for judicial selection" in an *Iowa Law Review* article. *See* Opinion No. 94-7-2(L), 1994 WL 470468, at *1 (Iowa A.G. July 1, 1994) (citing Uhlenhopp at 54, 65–66).

In that article, Judge Harvey Uhlenhopp[5] called for, among other things, a "return to a nonpolitical judiciary." Uhlenhopp at 11. Judge Uhlenhopp argued that, in order to promote justice, judges must be "beholden to no one." *Id.* at 51. He also argued, in a judicial selection system, "[t]he objective is to secure the best qualified individual for judge who is available. Hence, the choice must be made intelligently." *Id.* at 54. But, according to Judge Uhlenhopp:

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[5] Judge Uhlenhopp was a district court judge from 1953 until 1970, when he was appointed to the Iowa Supreme Court. IOWA OFFICIAL REGISTER 108 (L. Dale Ahern, ed.) (Fifty-Fourth Number, 1971–1972).

> The trouble with the elective method is that this essential [of intelligent choice] is almost entirely lacking. Popular election, rather than careful selection, is a poor way to fill posts involving professional qualifications. The people have little opportunity to study the training, experience, and character of the various lawyers who want to be judge. . . . The people . . . should only be called upon to select policy makers, such as the chief executive of the legislators. The people can and will learn how those candidates stand on the issues. But voters are not prepared for the choices they must make when they are asked to pick department heads, railroad commissioners, judges, and whatnot. . . . The people should decide between candidates who establish broad programs, but judges do not function in that area. We might as well pick our school teachers and highway engineers at the polls.

Id. at 54–56 (footnotes omitted).

Judge Uhlenhopp argued that Iowa's elective system also had "four side effects," namely: (1) discouraging talented lawyers from seeking judicial office; (2) preventing talented lawyers from becoming judges if they belonged to the minority political party; (3) discouraging judges from firmly managing their dockets for fear of offending powerful lawyers; and (4) and inviting "the loss of public confidence which results from politics in the courts." *Id.* at 58–62.

Judge Uhlenhopp proposed that Iowa adopt a version of the Missouri Plan. *See id.* at 65 (arguing that "[n]o system is perfect, but students of the subject generally agree that the best selection system yet devised is the one conceived by Albert Kales in 1914 . . . ."). Specifically, Judge Uhlenhopp proposed that:

> In Iowa, there would be a statewide commission for the supreme court, and a separate commission in each district . . . . These commissions would have an important function, and they should be carefully composed. The governor on behalf of the public should select some of the members of each commission. The lawyers have special knowledge which is of value and they should select some of the commissioners, but not a controlling number. Judges too have valuable knowledge concerning candidates' qualifications. Hence the chief justice should serve on the state commission, and he should be its chairman. . . . Except for the judicial members, there should be no restriction respecting the occupation of commissioners . . . . They should be electors of the area in question, but their political affiliation should be disregarded.

Id. at 65–67 (footnotes omitted). Judge Uhlenhopp noted that a number of states had already adopted or proposed similar judicial selection systems, including Alaska and Kansas. *Id.* at 66 n.194.

Judge Uhlenhopp argued that once selected, all appellate judges and supreme court justices should have life tenure, subject only to good behavior. *See id.* at 68. According to Judge Uhlenhopp, such a system would not only attract the best legal talent, but also "assure the State of a supreme court free to render right though temporarily unpopular opinions." *Id.* For trial courts, however, Judge Uhlenhopp recommended that the judges serve subject to periodic retention elections. *See id.* at 69. According to Judge Uhlenhopp, retention elections would provide a "practical compromise" between the competing interests of judicial independence and judicial accountability. *See id.* at 71.

In 1959, the Iowa Legislature passed a joint resolution proposing to amend the Iowa Constitution to replace Iowa's elective judicial system with an appointive system. *See* IOWA OFFICIAL REGISTER 484 n.47 (Edward F. Mason, ed.) (Fiftieth Number, 1963–1964) (hereinafter "REGISTER"). The proposed amendment resembled Judge Uhlenhopp's proposal, providing that all state judges would be nominated by a commission, appointed by the Governor, and retained subject to periodic retention elections. *See id.* at 484–85. The proposed amendment was readopted by the Legislature in 1961 and put on the ballot for consideration by voters in 1962. *See id.* at 484 n.47. On June 4, 1962, the people of Iowa voted to adopt the amendment. *See id.*; *see also* Br. in Supp. of Mot. to Dismiss (hereinafter "Defs.' Br.") at 2–3 (Clerk's No. 10-1).

The judicial selection and retention system adopted by the people of Iowa in 1962 remains in place to this day. Under this system, whenever there is a vacancy on the Iowa

Supreme Court or the Iowa Court of Appeals, the State Judicial Nominating Commission (hereinafter the "Commission") must accept applications and create a list of three nominees for each vacancy. *See* Iowa Const., art. V, §§ 15, 16; *see also* Iowa Code §§ 46.14. The Governor then appoints a nominee from that list. *See* Iowa Const., art. V, § 15. If the Governor does not appoint a judge within 30 days, the Chief Justice of the Iowa Supreme Court must select one of the Commission's nominees to fill the vacancy. *See id.*

Once the Governor appoints a judge, that judge "serve[s] for one year after appointment and until the first day of January following the next judicial election after the expiration of such year." Iowa Const. Art. V, § 17. At that point, the new judge must stand for retention. *See id.* In a retention election, voters are asked to vote "yes" or "no" on the issue of whether the judge should be retained. *See id.* If the judge receives a majority of "yes" votes, the judge then serves a full term. *See id.* At the end of that full term, the judge must again stand for retention.

The Commission is currently comprised of 15 members, seven of whom were appointed (hereinafter the "Appointive Members") and seven of whom were elected by members of the Iowa Bar (hereinafter the "Elective Members"). *See* Compl. ¶ 26. The final member, and chair, of the Commission is the Iowa Supreme Court justice "who is senior in length of service on said court, other than the chief justice . . . ." Iowa Const., art. V, § 16.

C. *Current Vacancies on the Iowa Supreme Court*

On November 2, 2010, three Iowa Supreme Court justices stood for retention and were not retained. *See* Compl. ¶ 34. Therefore, their terms ended on January 1, 2011, leaving three vacancies on the Iowa Supreme Court. *See id.* The Commission accepted applications to fill those vacancies through January 14, 2011 and is currently evaluating those applications. *See*

Hr'g Tr. 44:18–19.[6]

D. *The Parties*

The Plaintiffs are all citizens of Iowa and are all registered to vote in Iowa. Compl. ¶¶ 7–10. The Defendants are the State Court Administrator and the current members of the Commission, all named in their official capacities. *Id.* ¶¶ 11, 14, 17, 21.

II. LEGAL STANDARDS

A. *Standard for Motions to Dismiss*

Defendants seek to dismiss Plaintiffs' complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Mot. to Dismiss at 1. Defendants' arguments regarding Rule 12(b)(1) are limited to a facial attack on Plaintiffs' complaint. *See id.* "A motion to dismiss for lack of jurisdiction under Rule 12(b)(1) which is limited to a facial attack on the pleadings is subject to the same standard as a motion brought under Rule 12(b)(6)." *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003) (citing *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)).

"A motion to dismiss under Rule 12(b)(6) is the usual and proper method of testing the legal sufficiency of the complaint." *Peck v. Hoff*, 660 F.2d 371, 374 (8th Cir. 1981); *see also Helgoth v. Larkins*, No. 4:09-CV-1880, 2010 WL 1936196, at *2 (E.D. Mo. May 12, 2010). Rule 12(b)(6) allows the Court "to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity." *See Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989)).

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[6] All citations to the hearing transcript refer to the rough draft provided to the Court by the court reporter.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In reviewing a complaint, a court must "accept as true all of the factual allegations contained in the complaint," and must draw "all reasonable inferences . . . in favor of the plaintiff," *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008) (citing *Twombly*, 550 U.S. at 555–60), but need not accept any legal conclusions contained in the complaint, *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2001). Thus, "[a] complaint may be dismissed as a matter of law if it lacks a cognizable legal theory or states insufficient facts under a cognizable legal theory." *Serrano v. Security Nat'l Mortg. Co.*, No. 09-CV-1416, 2009 WL 2524528, at *1 (S.D. Cal. Aug. 14, 2009) (slip copy) (citing *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984)); *see also In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 621 F.3d 781, 790 (8th Cir. 2010) ("Dismissal is proper when the complaint fails to state a claim upon which relief can be granted." (quoting *Hawks v. J.P. Morgan Chase Bank*, 591 F.3d 1043, 1049 (8th Cir. 2010))).

B. *Standard for Motions for Preliminary Relief*

In their motion, Plaintiffs request both a temporary restraining order and a preliminary injunction. The test for both of these forms of preliminary relief involves consideration of four factors: (1) the probability that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties and litigants; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc); *see also*

Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 369 n.1 (8th Cir. 1991) (describing the *Dataphase* factors as "the factors governing preliminary relief in the Eighth Circuit").

Plaintiffs have the burden of showing that preliminary relief should be granted. *See Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) (citing *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 737 (8th Cir. 1989) (en banc)). Because Plaintiffs seek to enjoin the enforcement of state statutes, they must "demonstrate more than just a 'fair chance' that they will succeed on the merits." *See Planned Parenthood of Minn. v. Rounds*, 530 F.3d 724, 731–32 (8th Cir. 2008) (en banc). Instead, Plaintiffs must meet a more rigorous standard, demonstrating that they are "likely to prevail on the merits." *Id.* at 732 (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). This more "rigorous standard 'reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.'" *Id.* (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)). The Eighth Circuit has stated that "[b]y re-emphasizing this more rigorous standard for demonstrating a likelihood of success on the merits in these cases, we hope to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis." *Id.* at 733. The Court has no doubt that this exhortation to apply "an appropriately deferential analysis" applies with at least equal—if not greater—force where, as here, Plaintiffs seek to enjoin enforcement of not just a state statute, but a provision of a state constitution.

III. ANALYSIS

A. *Defendants' Motion to Dismiss*

Defendants argue that Plaintiffs' case should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) because Plaintiffs lack standing and have failed to state a claim upon which relief can be granted. Mot. to Dismiss at 1–2. The Court will consider each of these arguments in turn.

First, Defendants argue that Plaintiffs have failed to allege that they have or will suffer any harm that is distinct from that allegedly suffered by the public at large and, therefore, lack Article III standing. *See* Mot. to Dismiss at 1; *see also* Defs.' Resistance to Pls.' Mot. for TRO/Prelim. Inj. (hereinafter "Defs.' PI Br.") at 4 n.1 (Clerk's No. 31) (citing *Nolles v. State Comm. for Reorganization of Sch. Dists.*, 524 F.3d 892, 899 (8th Cir. 2008)). Plaintiffs argue that they are not required to allege that they suffer a harm not suffered by other qualified Iowa voters, pointing to the Supreme Court's opinion in *Gray v. Sanders*. Pls.' Resp. to Defs.' Mot. to Dismiss (hereinafter "Pls.' Br.") at 2 (Clerk's No. 32) (citing 372 U.S. 368, 375 (1963)).

In *Gray*, the Supreme Court stated that the "appellee, like any person whose right to vote is impaired, has standing to sue." 372 U.S. at 375 (internal citations omitted). As Defendants point out, this standard appears to be somewhat circular to the extent that it bases Plaintiffs' standing on the validity of Plaintiffs' claim. Hr'g Tr. 31:23–25. Nonetheless, the Court concludes that, under *Gray*, Plaintiffs' allegation that they have been denied the right to vote is sufficient to satisfy the injury in fact requirement of Article III. *See* Compl. ¶ 89. Therefore, Plaintiffs have alleged a sufficient injury and have standing to bring Count 2.

However, in Count 1 of their complaint, Plaintiffs do not allege that they have been denied the right to vote. *See id.* at 8 (alleging a violation of the "Right to Equal Participation in the Selection of Judicial Officials"); *see also* Hr'g Tr. 18:6-15 (distinguishing the two claims);

id. 48:8–13 (same). Therefore, *Gray* does not apply directly to Count 1. However, Count 1 alleges that Plaintiffs have suffered a violation of their constitutional rights and appears to be premised, at least in part, upon Plaintiffs' asserted right to vote. *See* Compl. ¶¶ 46–47, 59–60. Additionally, the Court is mindful of the fact that it "must construe the complaint in favor of the complaining party." *Gardner v. First Am. Title Ins. Co.*, 294 F.3d 991, 993 (8th Cir. 2002) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Therefore, Plaintiffs have alleged a sufficient injury and have standing to bring Count 1.

Second, Defendants argue that Plaintiffs have failed to state a claim for which relief may be granted. Mot. to Dismiss at 2. Defendants argue that Plaintiffs' claims are "so fatally flawed in their legal premises that the complaint fails to state a plausible claim for relief against any Defendant." *Id*. Defendants also argue that "[o]ther federal courts have consistently and without exception rejected challenges to merit selection of state judges." Defs.' Br. at 4 (citing *Kirk v. Carpenti*, 623 F.3d 889 (9th Cir. 2010); *Dool v. Burke*, No. 10-1286, 2010 WL 4568993 (D. Kan. Nov. 3, 2010) (slip opinion); *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996), *aff'd on other grounds*, 154 F.3d 704 (7th Cir. 1998); *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997), *aff'd per curiam*, 133 F.3d 921 (8th Cir. 1998) (hereinafter "*AAVRLDF*"); *see also* Defs.' PI Br. at 2 (noting that both *Kirk* and *Dool* were dismissed for failure to state a claim).

In this lawsuit, brought pursuant to 42 U.S.C. § 1983, Plaintiffs allege that "their Equal Protection rights are violated because they are excluded from participating in the elections of the Elective Members of the Commission." Pls.' Br. at 2. Therefore, they "ask this court to stop the elections from which they are excluded and also end the terms of the current" Elective Members

"so that they cannot participate in the process of making nominations to fill the current vacancies." *See id.* Specifically, Plaintiffs request that the Court preliminarily and permanently enjoin "enforcement and execution" of Article V, Section 16 of the Iowa Constitution and Iowa Code §§ 46.2, 46.4, 46.5, 46.7, 46.8, 46.9, 46.9A, 46.10 and 46.14. Compl. at 15–16. Plaintiffs allege that the challenged provisions violate two fundamental rights, a "right to equal participation in the selection of judicial officials" and a "right to vote" for the Elective Members.[7] The Court will address each of Plaintiffs' asserted rights in turn.

1. *"Right to equal participation in the selection of judicial officials."*

In Count 1 of their complaint, Plaintiffs invoke a Fourteenth Amendment "right to equal participation in the selection of judicial officials." Compl. at 8; *see also id.* ¶ 18. Specifically, Plaintiffs allege that because they are not allowed to vote for the Elective Members of the Commission, the challenged provisions violate their "right to equal participation in the selection of Justices of the Iowa Supreme Court . . . ." *Id.* ¶ 2. According to Plaintiffs, under Iowa's judicial selection system, they have "substantially less influence over who is nominated to become an Iowa Supreme Court justice or Court of Appeals judge," as compared to members of the Iowa Bar, and that this "violates Plaintiffs' Equal Protection rights . . . ." *Id.* ¶¶ 60, 81. Plaintiffs aver that "[w]hile the appointment of officials may make the influence of each voter *indirect*, this is constitutional when the official making the appointment is 'elected consistent with the commands of the Equal Protection Clause,' thereby ensuring that each voter's influence

[7] Plaintiffs insist that these are two distinct rights. Hr'g Tr. 18:10–15, 48:6–7 ("[W]e are bringing two distinct counts that aren't—they aren't necessarily dependent upon each other."). However, Plaintiffs do not meaningfully distinguish between these two Fourteenth Amendment "rights" in their briefs. *E.g.*, Pls.' PI Br. at 4–14. Therefore, the Court has attempted to understand the distinctions between and the legal bases for Plaintiffs' asserted rights by referring to Plaintiffs' complaint.

is *equal* to that of other citizens."[8] *Id.* ¶ 53 (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 n.7 (1969)).

At the hearing, Plaintiffs' counsel conceded that no federal court has recognized the "right to equal participation" that Plaintiffs assert in this case. *See* Hr'g Tr. 24:18–25:1. Indeed, within the past four months, two federal courts have rejected this claim, based on essentially identical arguments. *See Kirk*, 623 F.3d at 898 (involving a challenge to Alaska's judicial selection system); *Dool*, 2010 WL 4568993, at *6 (involving a challenge to Kansas' judicial selection system).

Nonetheless, Plaintiffs contend that this right is "implicit in *Kramer*."[9] Hr'g Tr. 22:18–20. In support of this proposition, Plaintiffs point to a single footnote of dicta in *Kramer*. *See* Compl. ¶ 53 (citing *Kramer*, 395 U.S. at 627 n.7). That footnote states, in full:

> Of course, the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes. For example,

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[8] The Court rejects Plaintiffs' suggestion that all judges—or at least, all participants in the judicial selection process—be either popularly elected or appointed by a popularly elected official with unfettered discretion in selecting candidates. *See* Compl. ¶ 53; *see also* Hr'g Tr. 24:6–9 (arguing that the current Iowa system is constitutionally deficient because the Governor does not have unfettered discretion in selecting candidates for the judiciary). The Court has found no cases that support—let alone establish—this broad proposition. To the contrary, the two other federal courts that have considered this proposition have rejected it. *See Kirk*, 623 F.3d at 896; *Dool*, 2010 WL 4568993, at *6.

[9] At the hearing, Plaintiffs also averred, without explanation or elaboration, that this right is "contemplated in . . . *Sailors*." Hr'g Tr. 21:4–5 (referring, apparently to *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105 (1967)). The Court does not agree. Although the appointive system upheld in *Sailors* conformed with Plaintiffs' preferred model (*see* Footnote 8 of this Opinion) because the appointments were made by popularly-elected officials, nothing in *Sailors* indicates that the appointive system upheld in that case is the only constitutionally-permissible system. To the contrary, in *Sailors*, the Supreme Court recognized the value of local experimentation and innovation. *See* 387 U.S. at 110–11. Moreover, nothing in *Sailors* indicated that the Supreme Court meant to create a new substantive right of the type advanced by Plaintiffs in Count 1.

> if school board members are appointed by the [mayor], the district residents may effect a change in the board's membership or policies through their votes for the mayor. Each resident's formal influence is perhaps indirect, but it is equal to that of other residents. However, when the school board positions are filled by election and some otherwise qualified city electors are precluded from voting, the excluded residents, when compared to the franchised residents, no longer have an effective voice in school affairs. This is precisely the situation with regard to the size of the school budget in districts where [the statute at issue] applies.

Kramer, 395 U.S. at 627 n.7 (internal citation omitted).

Based upon this footnote, Plaintiffs conclude that there is an "implicit" right guaranteeing that "each citizen . . . be given an equal voice in the selection of public officials, however indirect that voice might be." *See* Compl. ¶ 53. The Court does not agree. Even if this footnote could be read as establishing some controlling principle, that principle was announced in a very different context than the one presented here. In *Kramer*, the Supreme Court considered the right to vote in the context of a local school board, a representative body that exercised legislative powers that directly affected the residents of the school district. *See Kramer*, 395 U.S. at 624. Although the Supreme Court indicated in *Kramer* that its rationale would apply to equal force to executives with "broad administrative powers," *see id.* at 629, nothing in *Kramer* suggests that the Supreme Court meant to create an entirely new, substantive Fourteenth Amendment right to equal influence in the selection of any person who might, in any sense, be deemed a "public official," including state court judges. *See* Compl. ¶ 53; *see also id.* ¶ 2. Therefore, the Court concludes that the right Plaintiffs assert in Count 1 is not "implicit in *Kramer*."

Additionally, Plaintiffs ignore the fact that the Supreme Court's decision in *Kramer* was premised on the concept of representative democracy. *See* 395 U.S. at 626. As the three-judge court recognized in *Wells v. Edwards*, "[t]he State judiciary, unlike the legislature, is not the

organ responsible for achieving representative government." 347 F. Supp. 453, 456 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973) (quoting *N.Y. State Ass'n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 153 (S.D.N.Y. 1967)). Unlike legislators and executives, "[j]udges do not represent people, they serve people." *See id*. (quoting *Buchanan v. Rhodes*, 249 F. Supp. 860, 865 (N.D. Ohio 1960)); *see also Carey v. Wolnitzek*, 614 F.3d 189, 193 (6th Cir. 2010) ("Judges do not represent constituents. They apply the law to the facts one case at a time, and, if they represent anyone or anything, it is the rule of law, which is why they sometimes must rule against the policy preferences of a majority of the voters."); Caufield at 164 ("Unlike officials in the legislative and executive branches, who are meant to be the representatives of the people, judges occupy a unique position in that they are responsible to the law."). Therefore, the particular concerns regarding representative government that animated the Supreme Court's decision in *Kramer* are not implicated by the selection of state court judges.[10] But to the extent those concerns are relevant in this context, the fact remains that the Governor—a popularly-elected official—has the ultimate power to appoint judges.

At base, Plaintiffs are asking this Court to recognize an entirely new substantive Fourteenth Amendment right. The Court declines Plaintiffs' invitation to do so. It not the business of the federal courts "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). That is especially true, where, as here, Plaintiffs have failed to provide

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[10] To be clear, the Court is not to saying that there are no constitutional constraints upon how states may select their judiciaries and is not expressing any opinion on the relevant rules that would apply to direct elections of judges. Rather, the Court seeks to provide context for the broad statements in *Kramer*—and its progeny—that Plaintiffs have cobbled together in order to construct their case.

adequate legal support for their asserted "right to equal participation." The Court concludes that Plaintiffs do not have a right, let alone a fundamental right, to "equal participation" in the selection of state court judges—at least not as that "right" is conceptualized by Plaintiffs. Because it is not based on a cognizable legal theory, Count 1 fails to state a claim for which relief may be granted.

2. *"Right to vote."*

a. *Determination of the proper standard of review*.

In Count 2 of their complaint, Plaintiffs allege that the challenged provisions violate a fundamental right—specifically, their right to vote for the Elective Members.[11] *See* Compl. ¶ 89; *see also id*. at ¶ 2. Therefore, Plaintiffs assert that the challenged provisions are subject to strict scrutiny.

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious." *Avery v. Midland Cnty.*, 390 U.S. 474, 484 (1968). The Supreme Court has "treated as presumptively invidious those classifications that

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[11] Defendants argue that while "the equal protection doctrine is relevant to the definition of the franchise for purpose of the direct public election of public officials," this case does not present such a situation. Defs.' Br. at 3. Rather, according to Defendants, "[h]ere, we have only a nomination process preparatory to an appointment by the Governor, not a popular election." *Id*. This argument has some force vis-à-vis Plaintiffs' claim in Count 1; however, it is not particularly relevant to the resolution of Plaintiffs' claim in Count 2. In Count 2, Plaintiffs are not challenging the way the Commission nominates candidates; rather, they argue the selection of the Elective Members *is* a direct public election of public officials. *See* Pls.' Br. at 4.

disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982). Therefore, if a classification "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," the Court must analyze that classification using strict scrutiny. *See Mass. Bd. of Retirement v. Murgia,* 427 U.S. 307, 312 (1976) (footnote omitted).

If, however, a classification does not impermissibly interfere with the exercise of a fundamental right or involve a suspect class, then "judicial scrutiny under the Equal Protection Clause demands only a conceivable rational basis for the challenged state distinction." *Nordlinger v. Hahn*, 505 U.S. 1, 27 (1992) (Thomas, J., concurring). If this rational basis standard applies, then "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

As framed by Plaintiffs, the "sole question" the Court must decide is whether the election of the Elective Members is an "election of general interest" or a "limited election," as those concepts have been developed in *Kramer* and its progeny. *See* Hr'g Tr. 7:25–8:3. The line of cases upon which Plaintiffs rely began with the Supreme Court's landmark decision in *Reynolds v. Sims*. In *Reynolds*, the Court recognized a constitutional right to vote and held "that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." 377 U.S. 533, 554, 568 (1964). This holding was based upon the proposition that "[a]s long as ours is a representative form of government, and our legislatures are those instruments of government

elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Id.* at 562.

> Since *Reynolds*, the Court has applied the "one person, one vote" principle in a line of cases concerning various types of elections in which the franchise has been selectively distributed, including junior college trustee elections, [*id.*,] school district board elections, [*Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-27, 632 (1969),] and revenue bond elections[, *Cipriano v. Houma*, 395 U.S. 701, 705-06 (1969)].

Miller v. Carpeneti, No. 3:09-cv-136, slip op. at 13 (D. Alaska Sept. 15, 2009), *aff'd sub nom. Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010) (hereinafter "*Carpeneti*") (bracketed material appeared in footnotes in the original).

This "one person, one vote" rule has been summarized as follows: "[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 . . . ." *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 56 (1970). There is also an exception to this rule. As one court recently explained:

> One exception to the "one person, one vote" rule—the "limited purpose exception"—dictates that the rule does not apply to the election of a governmental entity that (1) exercises only narrow, limited governmental powers, and (2) conducts activities that disproportionately affect only a specific group of individuals. [*See Ball v. James*, 451 U.S. 355, 363-72 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 731 (1973); *Hadley*, 397 U.S. at 56.]

Carpeneti, No. 3:09-cv-136, slip op. at 13 (bracketed material appeared in footnotes in the original). The Court will refer to this exception to the "one person, one vote" rule as the "*Ball-Salyer* exception."

However, despite Plaintiffs' eagerness to proceed straight to a determination of the

applicability of the "one person, one vote" rule, this Court finds that this case presents a more basic, threshold issue—whether or not the Plaintiffs have a constitutional right to vote for the Elective Members in the first place.[12]

I. *Do Plaintiffs have a constitutional right to vote for the Elective Members?*

Plaintiffs aver that they "have the right to vote for officials who exercise government power affecting them." *See* Compl. ¶ 83 (citing *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) and *Hellebust v. Brownback*, 42 F.3d 1331, 1333 (10th Cir. 1994)); *see also id.* ¶ 89 (arguing that Plaintiffs' rights have been violated because the election of the Elective Members is "an election that affects them" (citing *Phoenix v. Kolodziejski*, 399 U.S. 204, 209 (1970)). However, neither of the Supreme Court cases Plaintiffs rely upon state such a test.[13] In *Reynolds*, the Supreme Court stated that "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections," but limited its holding to elections for legislators. *Reynolds*, 377 U.S. at 554, 568. In *Phoenix*, the Supreme Court did not hold, as Plaintiffs suggest, that all qualified voters have a right to vote in any election that

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[12] The Court is aware that other courts have not engaged in this type of threshold analysis in similar cases. *E.g.*, *Dool*, 2010 WL 4568993, at *2. However, the Court cannot ignore the fact that the strict scrutiny presumption enunciated in *Reynolds* is premised on the existence of a fundamental right to vote. *See Reynolds*, 377 U.S. at 562. Additionally, because the "one person, one vote" rule carries a presumption of invalidity, if the Court were to apply that rule without first determining that Plaintiffs have a fundamental right to vote in the elections at issue, the Court would risk, in effect, creating a right to vote where none actually exists. *Cf. Snead v. City of Albuquerque*, 663 F. Supp. 1084, 1087 (D.N.M. 1987) ("[T]o implicate the higher standard of review on the basis of a 'fundamental right' requires that the right be guaranteed by the Constitution.").

[13] Even if *Hellebust* could be fairly read to state such a proposition, *Hellebust* is neither binding nor persuasive authority and is, in any case, both legally and factually distinguishable from this case. *See Dool*, 2010 WL 4568993, at *2 (distinguishing *Hellebust* in a nearly identical challenge to Kansas' judicial selection system).

"affects them." *See* Compl. ¶ 89. Rather, in *Phoenix*, the Supreme Court merely stated that, "[p]resumptively, when all citizens are affected in important ways by a *governmental decision subject to a referendum*, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise." *Phoenix*, 399 U.S. at 209 (emphasis added).

Indeed, it appears that Plaintiffs' proffered "test" is simply an inversion of the *Ball-Salyer* exception to the "one person, one vote" rule. In effect, Plaintiffs are arguing that all state elections must be evaluated using a strict dichotomy—the election must either satisfy the *Ball-Salyer* exception, and thus qualify as a "special election," or it will be deemed a "general election" subject to the "one person, one vote" rule, as enunciated and applied in *Kramer*.[14] *See*, *e.g.*, Hr'g Tr. at 9:13–15; *see also* Pls.' PI Br. at 5. The basic logical problem with this proposition is obvious—one cannot prove that a rule applies by proving that its exception does not apply. Moreover, Plaintiffs' arguments seem to ignore the scope of the fundamental right to vote.

"[T]he right to vote, per se, is not a constitutionally protected right." *San Antonio*, 411 U.S. at 36 n.78; *see also Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) ("[T]his Court has often noted that the Constitution 'does not confer the right of sufferage upon any one . . . .'" (quoting *Minor v. Happersett*, 21 Wall. 162, 178 (1875)). There is, however, a "protected right, implicit in our constitutional system, to participate in state elections on an equal basis with

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[14] The Supreme Court did not actually used the phrase "election of general interest" in *Kramer*. *See* 395 U.S. 621. Indeed, in *Cipriano*, a case decided on the same day as *Kramer*, the Supreme Court characterized the rule in *Kramer* as one pertaining to "a limited purpose election." *See Cipriano*, 395 U.S. at 704. In 1975, however, the Supreme Court characterized *Kramer* as follows: "In *Kramer* . . . we held that in an *election of general interest*, restrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack." *Hill v. Stone*, 421 U.S. 289, 29 (1975) (emphasis added).

other qualified voters whenever the State has adopted an elective process *for determining who will represent any segment of the State's population*." *San Antonio*, 411 U.S. at 36 n.78 (emphasis added). This is the fundamental "right to vote" established by *Reynolds* and its progeny. *See id.* at 59 n.2 (Stewart, J., concurring) (citing *Reynolds*, 377 U.S. 533; *Kramer*, 395 U.S. 621; and *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Lubin v. Panish*, 415 U.S. 709, 713–14 (1974); *see also generally AAVRDLF*, 994 F. Supp. at 1127 ("[T]here is no fundamental right of every citizen to vote in every election which happens to take place in Missouri."). Therefore, the key issue in this case is whether the Elective Members "represent any segment of the State's population." *See San Antonio*, 411 U.S. at 36 n.78.

The Supreme Court did not explain in *San Antonio* what it means to "represent any segment of the State's population." *See id.* However, the fundamental right to vote is grounded in the concept of representative democracy. *See Reynolds*, 377 U.S. at 562; *see also id.* at 555 ("The right to vote freely for the candidate of one's choice is of [*sic*] the essence of a democratic society, and any restrictions on that right strike at the heart of representative democracy."). Thus, *Reynolds* and its progeny are "based on the propositions that in this country the people govern themselves through their elected representatives and that 'each and every citizen has an inalienable right to full and effective participation in the political processes' of the legislative bodies of the Nation, State, or locality as the case may be." *Bd. of Estimate of N.Y. v. Morris*, 489 U.S. 688, 693 (1989) (quoting *Reynolds*, 377 U.S. at 565). This concept of representative government includes elected executive officials as well as legislative officials. *See Kramer*, 395 U.S. at 629–30; *see also Republican Party of Minn. v. White*, 536 U.S. 765, 805 (2002) (Ginsburg, J. dissenting) ("Legislative and executive officials serve in representative capacities.

They are agents of the people; their primary function is to advance the interests of their constituencies.") Therefore, the Court concludes that persons who "represent any segment of the State's population" are those who are "representative in the sense of reflecting or responding to the views of a public." *See* G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 Fordham Urb. L.J. 291, 302 (2007) (hereinafter "Tarr").

The Elective Members "have no constituencies, so they are not representative in the sense of reflecting or responding to the views of a public." *See id.* Instead, the Elective Members provide legal expertise to the Commission's nomination process. *See id.* at 302 ("The [nominating] commission's job is quality control. It should ensure that the selecting authority chooses only from qualified candidates."). In this function, the Elective Members do not *represent* the people of Iowa, they *serve* the people of Iowa.[15] *Cf. Wells*, 347 F. Supp. at 455 (quoting *Buchanan*, 249 F. Supp. at 865). Therefore, the Court concludes that the Elective Members do not "represent any segment of the State's population." *See San Antonio*, 411 U.S. at 36 n.78.

Because the Elective Members are not representatives in the relevant sense, Iowa voters do not have a constitutional right to vote for them. *See id.*; *see also AAVRLDF*, 994 F. Supp. at 1127 ("Missouri's practice of permitting lawyers to elect the lawyers on the nominating commissions does not interfere with the exercise of a fundamental right . . . ."). The mere fact that the people of Iowa decided to grant members of the Iowa Bar the ability to vote for the Elective Members does not, as Plaintiffs suggest, somehow magically vest Plaintiffs with a

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[15] Indeed, the Elective Members, like the Appointive Members, must be "chosen without reference to political affiliation," a requirement that would make no sense if the Commission was supposed to be comprised of politically responsive officials. *See* Iowa Const., art. 5, § 16.

constitutional *right* to vote in that election. *Cf. Snead*, 663 F. Supp. at 1087 ("Because the Plaintiffs in this case have no constitutionally protected right to vote in the city's elections, the mere fact that the New Mexico law extends the right to vote to [others who do not have a constitutional right to vote in those elections] does not implicate strict scrutiny by this Court of the provisions."). For all of these reasons, the Court concludes that the challenged provisions do not implicate Plaintiffs' fundamental right to vote. Therefore, the challenged provisions do not trigger strict scrutiny, but are subject only to rational basis review.

The Court notes that this conclusion is not inconsistent with *Kramer* or its progeny, despite the sometimes broad statements made in some of those cases. Indeed, the main cases upon which Plaintiffs rely involved direct elections for representatives who had the power to exercise governmental powers directly over some segment of the state's population.[16] *See Ball*, 451 U.S. at 357 (directors of a water reclamation district); *Salyer*, 410 U.S. at 724–25 (directors of a water storage district); *Hadley*, 397 U.S. at 51–52 (junior college trustees); *Kramer*, 395 U.S. at 622 (school board members); *Little Thunder v. South Dakota*, 518 F.2d 1253, 1254 (8th Cir. 1975) (various county officials); *Hellebust*, 42 F.3d at 1332 (members of the Kansas State Board of Agriculture). The Elective Members are not, as discussed above, representatives in this sense. They do not directly govern the affairs of any segment of the population of Iowa. *Cf. Little Thunder*, 518 F.2d at 1256 (concluding that residents "possess a substantial interest in the

[16] The other cases relied upon by Plaintiffs involved elections for the approval of bonds. *See Hill*, 421 U.S. 289; *Cipriano*, 395 U.S. at 702; *Phoenix*, 399 U.S. at 205. The elections in these cases "concerned the operations of traditional municipalities exercising the full range of normal government powers." *See Ball*, 451 U.S. at 366 n.11. Therefore, the government powers at issue in those cases are analogous to the powers held by traditional municipal representatives. Because the Commission does not exercise such powers, the Court's conclusion is not inconsistent with these cases either.

choice of county officials" who "govern their affairs"). Therefore, the democratic concerns that motivated the results—and supported the Supreme Court's broad statements—in cases such as *Kramer* are not implicated here. *See generally Morris*, 489 U.S. at 693 (focusing on the proposition that the people "govern themselves through their elected representatives"). In other words, the challenged provisions are simply not the type of restrictions that "strike at the heart of representative democracy." *See Reynolds*, 377 U.S. at 555.

ii. *Alternate analysis: Is the election of the Elective Members an "election of general interest" that requires the application of strict scrutiny?*

Even if the Court did not engage in the foregoing threshold analysis, the Court would still conclude that the challenged provisions are subject to rational basis review instead of strict scrutiny. That is because the election of the Elective Members is not an "election of general interest" subject to the strict scrutiny rule announced *Kramer*.

As an initial matter, the Court notes that this not a matter of first impression in the Eighth Circuit. The original Missouri Plan—i.e., the "Non-Partisan Selection of Judges Court Plan" adopted by Missouri in 1940—has already been subjected to, and survived, a Fourteenth-Amendment challenge not unlike the one presented here. *See AAVRLDF*, 994 F. Supp. at 1127–28, *aff'd* 1998 WL 42473. The plaintiffs in *AAVRLDF*, like Plaintiffs here, claimed that their right to vote was violated because, as non-attorneys, they could not vote for the attorney members of the state's judicial nominating commissions. *See id.* at 1126–27. The district court rejected the plaintiffs' argument that the Missouri election provisions were subject to strict scrutiny because the election of the attorney members was not an "election of general interest." *Id.* at 1128. Applying the rational basis standard of review, the court concluded that the election of the attorney members did not violate the Equal Protection Clause. *Id.* at 1128–29. The Eighth

Circuit affirmed, "conclud[ing] that the decision of the District Court is correct and that extended discussion would add nothing of substance to the thorough and well-reasoned opinion of that court." *See* 1998 WL 42473, at *1. Although, as Plaintiffs point out, the Eighth Circuit's opinion in *AAVRLDF* was unpublished, the Court can see no reason why the Eighth Circuit would reach a different conclusion in this case.

Plaintiffs protest, however, that the district court in *AAVRLDF* merely "assert[ed] without argument" that the election at issue was not an election of general interest. Pls.' PI Br. at 9. This is not entirely accurate. *See AAVRLDF*, 994 F. Supp. at 1128 (distinguishing the election of lawyers to a judicial nominating commission from "an election of general interest (such as an election for a legislator)"). However, it is true that the court in *AAVRLDF* did not engage in—and thus, the Eighth Circuit did not specifically affirm—a detailed analysis on this point.

Plaintiffs argue that the election of the Elective Members is an "election of general interest" because "the members of the Commission exercise a traditional government function that has an effect on all citizens of Iowa . . . ." *See* Compl. ¶ 63. The Court will address each component of this contention in turn.

a) *Does the Commission exercise a traditional government function?*

Plaintiffs assert that "[t]he nomination of judges is a traditional government function." *See* Compl. ¶ 61. Therefore, according to Plaintiffs, the Elective Members "perform[] 'the sort of general or important governmental function'" that requires strict scrutiny review. *See* Pls' Br. at 6 (quoting *Ball*, 451 U.S. at 368). The Court does not agree.

Indeed, in the line of cases upon which Plaintiffs rely, the Supreme Court has never suggested that a power triggers strict scrutiny simply because it may, in some sense, be deemed

"governmental." *See generally Hadley*, 397 U.S. at 54 (considering not just whether powers were "governmental," but also whether or not those "powers [were] general enough and have sufficient impact throughout the district to justify the conclusion" that strict scrutiny should be applied). Instead, only certain "sort[s] of governmental powers" have been deemed sufficient to "invoke the strict demands of *Reynolds*" and its progeny. *See Ball*, 451 U.S. at 366. In this context, "traditional government functions" include:

> [T]he ability to "levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college," appoint county officials, make contracts, establish and maintain a courthouse and jail, administer the county welfare system, perform duties in connection with elections, set the county tax rate, build roads and bridges, adopt the county budget, build and run hospitals, airports, and libraries, fix school district boundaries, establish a housing authority, and determine the election districts for county commissioners.

See DeJulio v. Georgia, 290 F.3d 1291, 1295 (11th Cir. 2002) (quoting *Hadley*, 397 U.S. at 53–45 and citing *Avery*, 390 U.S. at 476–77) (internal citation omitted). Plainly, the Commission does not exercise any of these powers, or any powers of similar type or magnitude. To the contrary, the Commission simply "selects and forwards to the governor the names of three applicants it deems best qualified" for each vacant position. *See Dool*, 2010 WL 4568993, at *2; *see also* Iowa Const., art. 5, § 16. Therefore, the Court concludes that the Commission "simply does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*" and its progeny. *See Ball*, 451 U.S. at 366; *see also Bradley*, 916 F. Supp. at 1456 ("[T]he [judicial nominating] Commission does not perform traditional governmental functions."); *AAVRLDF*, 994 F. Supp. at 1128 n.49.

None of the authorities cited by Plaintiffs compel a different conclusion. In support of

their contention that the Commission performs a "traditional government function," plaintiffs cite three cases and a provision of the United States Constitution.[17] *See* Compl. ¶ 61 (citing *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982); *In re Advisory Op. to the Governor*, 276 So.2d 25, 29–30 (Fla. 1973); and U.S. Const. art. II, § 2); Pls.' PI Br. at 12 (citing *Richardson*, 693 F.2d at 914 and *McMillan v. Svetanoff*, 793 F.2d 149, 153–54 (7th Cir. 1986)).

The cases relied upon by Plaintiffs are neither binding nor persuasive authority. The opinions in *Richardson* and *McMillan* dealt with the entirely separate issue of judicial immunity. *See Richardson*, 693 F.2d at 913–14; *McMillan*, 793 F.2d at 150. In the third case cited by Plaintiffs, the Supreme Court of Florida opined that "[t]he appointment of a judge is an executive function and the screening of applicants which results in the nomination of those qualified is also an executive function," but did so in answering a question regarding the balance of powers between the executive and judicial branches in the judicial selection process. *See In re Advisory Op.*, 276 So.2d at 28–29. Even if the Court found these cases to be persuasive, they establish—at most—that the Commission's power might, in some sense, be described as "executive," rather than "legislative" or "judicial." But none of these cases address the key issue

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[17] At the hearing, Plaintiffs' counsel also argued that "the distinction that *Ball* and *Salyer* make is between quasi-private functions and traditional Government functions." Tr. 15:17–19. As an initial matter, the Court is not convinced that this is the only relevant distinction between functions that have been deemed sufficiently and insufficiently "governmental." In *Hadley*, for example, the Court referred to things such as making contracts and collecting fees as "governmental functions," even though private entities regularly make contracts and collect fees. *See* 397 U.S. at 53–54. But even if Plaintiffs' public-private distinction were the correct one, the Court cannot agree with Plaintiffs' assertion that nominating judges has "never been done in the history of this country by a private entity or a private organization." *See* Hr'g. Tr.16:9–11. In Iowa, prior to 1962, some judges were nominated by private organizations—political parties. *See* Uhlenhopp at 54; *see also* Kales at 226–27 (arguing that, in certain metropolitan districts, "elected" judges were, in effect, appointed by private "politicocrats of the extra-legal government").

raised in this case—namely, whether or not the Commission's powers are "the sort of governmental power[] that invoke[s] the strict demands of *Reynolds*" and its progeny. *See Ball*, 451 U.S. at 366.

Additionally, the Court finds that Plaintiffs' citation—without explanation—to the United States Constitution is not dispositive of this issue. *See* Compl. ¶ 84 (citing U.S. Const., Art. II, § 2). The provision cited by Plaintiffs states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . ." U.S. Const., Art. II, § 2. As an initial matter, it is not at all clear that the government function described in Article II is the same function performed by the Commission. Although the power of the Commission and the power of the President in Article II, section 2 may be generally described as "nominating judges," the Commission's power in the Iowa judicial selection process is very different from the President's power in the federal judicial selection process. Unlike the President, the Commission cannot actively select candidates; rather, the Commission simply evaluates and selects from the applications that it receives. *See* Iowa Code § 46.14(1). Additionally, the Commission—unlike the President—has no power to make actual appointments. *See* Iowa Const., art. V, § 16 (giving the Governor the ultimate appointment power). Therefore, although both the President and the Commission engage in "nomination" in some sense, their powers are not as identical as Plaintiffs suggest. More importantly, even if the Commission's function is comparable to that of the President, the Court has seen nothing in the Supreme Court's voting rights jurisprudence that suggests that all federal powers are "traditional government functions" in the relevant sense or that all traditional federal government functions

are also traditional state government functions.[18] Therefore, Plaintiffs' mere citation to Article II, section 2 does not persuade the Court that the Commission performs a "traditional government function" in the relevant sense.

b) *Does the Commission exercise government powers that affect all Iowans?*

Plaintiffs also argue that they, like all Iowans, "have a substantial interest in, and are significantly affected by, the nomination of the justices and judges of Iowa's courts because 'state court judges possess the power to "make" common law . . . [and] have immense power to shape the States' constitutions as well." Compl. ¶ 11 (quoting *Republican Party of Minn.*, 536 U.S. at 784) (omission and addition in original). The Court does not agree. "To be sure, decisions of the [Iowa] Supreme Court and [Iowa] Court of Appeals can affect the daily lives of [Iowans], but they are judicial decisions, not decisions of the Commission." *See Dool*, 2010 WL 4568993, at *2. Although the Commission has the power to affect the composition of a portion of the Iowa judiciary,[19] Plaintiffs have not suggested—let alone pled sufficient facts to support a

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[18] Indeed, the proliferation of different judicial selection systems suggests that there is no single "traditional" way to nominate state court judges.

[19] The Court rejects Plaintiffs' assertion that the Commission "determine[s] the composition of the Iowa judiciary." *Id.* ¶ 79; *see also id.* ¶ 69 (averring that "the Commission decides who will sit in judgment over the citizens of Iowa"); ¶ 42 (arguing that the Commission "determines the composition of the judicial branch of government in Iowa"). As an initial matter the Commission has no role whatsoever in the selection of district court judges. *See* Iowa Const., art. V, § 16 (providing for separate district court nominating commissions). And, "[r]ealistically, the daily affairs of [Iowa] residents are more directly affected by decisions of [district] courts" than by the decisions of the courts of last resort. *See Dool*, 2010 WL 4568993, at *2. Therefore, the Commission does not, as a factual matter, determine the composition of the entire Iowa judiciary—or even the composition of its most important parts. Additionally, the Commission does not actually determine the composition of either the Iowa Court of Appeals or the Iowa Supreme Court because the Commission only acts when there is a vacancy. *See* Iowa Const., art. V, § 16. And even then, the Commission does not have the power to actively select candidates, but is limited to considering the applications it receives. *See* Iowa Code § 46.14(1). Moreover, the Governor—not the Commission—actually determines who will become a judge.

reasonable inference that—the Commission has any power to affect the specific outcomes of any judicial decisions. Therefore, the Court rejects Plaintiffs' attempt to conflate the powers of the Commission with the powers of the Iowa judiciary.

Contrary to Plaintiffs' assertions, the Commission has no duties, functions or powers which directly affect the daily lives of all Iowans. *See Dool*, 2010 WL 4568993, at *2. The Court acknowledges that, by participating in the selection of judges, the Commission may have, in some sense, an effect on the development of the common law in Iowa. However, the Commission's ability to affect the development of the common law is, at best, highly indirect and remote. Plaintiffs have not cited—and the Court is not aware of any—cases where this type of indirect, remote effect has been found sufficient to trigger the application of strict scrutiny.

Therefore, the Court concludes that the Commission's activities do not "have sufficient impact" on the daily lives of Iowans to trigger the application strict scrutiny. *See Hadley*, 397 U.S. at 54.

c) *Conclusion - Nature of the election.*

For the reasons stated above, the Court concludes that the Commission does not exercise a traditional government function and has, at best, only an indirect and remote impact on the daily lives of Iowans. Therefore, the election of the Elective Members to the Commission is not an "election of general interest" that triggers the application of strict scrutiny. For this additional, independent reason, the Court concludes that the challenged provisions are subject to rational basis review.

See id. It is true, as Plaintiffs point out, that the Governor does not have unfettered discretion in choosing judges. However, this does not change the fact that the Governor has the power, ultimately, to determine who will fill a given judicial vacancy.

b. *Application of rational basis review.*

For the reasons stated above, the challenged provisions are subject to rational review, not strict scrutiny. Therefore, Plaintiffs have the burden to "negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *See Garrett*, 531 U.S. at 367.

Plaintiffs do not seriously dispute that the state of Iowa has a legitimate interest in selecting well-qualified judges to serve on the Iowa State Supreme Court and Iowa Court of Appeals. However, Plaintiffs argue that the method by which the Elective Members are chosen is not rationally related to that interest. Plaintiffs argue that, even if attorneys are better situated to evaluate legal qualifications than the public at large, that fact would only provide a rational basis for the inclusion of attorneys on the Commission—not for having those attorneys selected by other members of the Iowa Bar. *See* Clerk's No. 36 at 3; Hr'g Tr. 17:16–19. The Court does not agree. It is conceivable that the people of Iowa, when they chose to adopt the current judicial selection system, believed that attorneys were not only better able to select judges, but also better able to select Commission members from their peers. *See AAVRLDF*, 994 F. Supp. at 1128 ("Defendants contend that lawyers properly elect lawyers to the commissions for much the same reasons that attorneys are well-suited to nominate judges. Defendants assert that attorneys know their peers, and they know who will be best-suited to evaluate the ability of commission aspirants."). Plaintiffs have not pled any facts that negative this conceivable, reasonable rationale. *See Garrett*, 531 U.S. at 367. Therefore, for this reason alone, Plaintiffs have failed to meet their burden. *See id.*

Additionally, the state of Iowa has a legitimate interest in increasing judicial legitimacy

by decreasing the role of partisan politics in the judicial selection process. If the public believes that "judges are just politicians in robes—then there is no reason to prefer their interpretation of the law or Constitution over the opinions of the real politicians representing the electorate." O'Connor at 489; *see also* Uhlenhopp at 62 (noting "the loss of public confidence which results from politics in the courts"); Pound at 66 (noting that the injection of politics into the judiciary had, by 1906, "almost destroyed the traditional respect for the bench"). The method of selecting the Elective Members is rationally related to this interest because it means that some—though not all—of the Commission members are selected without direct involvement of the political branches of government. Indeed, in choosing the present system, Iowans may have reasonably sought to avoid a partisan confirmation process, which can become—as it has at the federal level—"quite nasty and brutish." *See generally* Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 Harv. J. L. & Pub. Pol'y 1035, 1038 (2009). They may also have sought to avoid the "redundancy and inefficiency" that characterizes systems in which the Governor appoints all of the members of the judicial nominating commission. *See* Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 Fordham Urb. L.J. 73, 87 (2007). Plaintiffs have not pled any facts that negative these additional conceivable, reasonable rationales. *See Garrett*, 531 U.S. at 367.

Because Plaintiffs have failed to plead sufficient facts to establish that the challenged provisions violate the Equal Protection Clause, Count 2 fails to state a claim for which relief may be granted.

B. *Plaintiffs' Motion for Preliminary Relief*

In light of the foregoing, Plaintiffs' motion for preliminary relief is denied as moot.

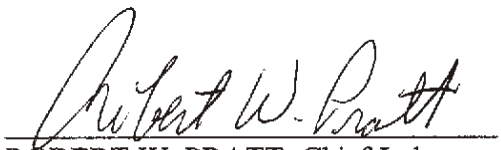
IV. CONCLUSION

Undoubtedly, the right to vote for political representatives is the bedrock of American democracy. In this case, however, Plaintiffs are asking the Court to radically expand the scope of this fundamental right beyond all existing precedent and to recognize an entirely new Fourteenth Amendment "right" to greater influence in the selection of judges. Their claims, therefore, are fatally flawed. Plaintiffs may prefer that Iowa had a different method of judicial selection, but absent a violation of a clearly-established constitutional right, the people of Iowa are entitled to retain the judicial selection system they chose in 1962.

For all of the reasons stated above, the Court concludes that Plaintiffs have failed to state a claim for which relief may be granted. Therefore, "Defendants' Motion to Dismiss" (Clerk's No. 10) is GRANTED and Plaintiffs' motion for preliminary relief (Clerk's No. 2) is DENIED as moot.

IT IS SO ORDERED.

Dated this ___19th___ day of January, 2011.



ROBERT W. PRATT, Chief Judge
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

MICHAEL MILLER, KENNETH KIRK and CARL EKSTROM,	)	
Plaintiffs,	)	**3:09-cv-00136-JWS**
vs.	)	**ORDER AND OPINION**
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; 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,	)	**[Re: Motions at Dockets 4 and 36]**
Defendants.	)	

[ATTACHMENT 3]

I. MOTIONS PRESENTED

At docket 4, plaintiffs Michael Miller, Kenneth Kirk, and Carl Ekstrom ("Plaintiffs") ask the court to enjoin the three attorney members of the Alaska Judicial Council ("Council"), defendants James H. Cannon, Kevin Fitzgerald, and Louis James Menedez ("attorney members"), from exercising their powers under Article IV, §§ 5 and 8 of the Alaska Constitution and AS 22.05.080, which require them to take part in the deliberations and voting for nominees to fill the vacancy on the Alaska Supreme Court created by the retirement of Justice Robert L. Eastaugh. Plaintiffs also ask the court to enjoin the remaining Council members, defendants William F. Clarke, Kathleen Thompkins-Miller, Christena Williams ("non-attorney members"), and Chief Justice Walter Carpeneti (collectively with the attorney members "Defendants") from observing the requirement of Article IV, § 8, that they act by the concurrence of four or more members in order to enable them to make nominations by majority vote. Defendants oppose the motion, and Plaintiffs reply.[1]

At docket 36, Defendants move to dismiss Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the decisions upon which plaintiffs' case rests are "inapposite, because they apply only when a state decides to select officials through elections. They are irrelevant when the state has chosen a non-election method to select certain officials."[2] Defendants also contend that Plaintiffs "consistently blur the discussion of the entities whose powers and selection processes are at issue."[3] As Defendants see things, "the only election Plaintiffs address is the election of the attorney members of the bar Board of Governors–and Plaintiffs expressly do not contest the constitutionality of allowing only lawyers to vote for the lawyer members who serve on the governing board of their association."[4] Plaintiffs oppose the

[1]Docs. 34 and 38.

[2]Doc. 35 at 3.

[3]*Id.*

[4]*Id.*

motion and Defendants reply.[5] Oral argument on both motions was heard on September 11, 2009. At the end of the proceeding, the court ruled from the bench, granting the motion to dismiss and denying the motion for injunctive relief as moot. This order sets forth the rationale for the decision announced on September 11, 2009.

II. BACKGROUND

Michael Miller is a citizen of and registered voter in the State of Alaska. Kenneth Kirk, also a citizen and registered voter, is an active member of the Alaska Bar Association and a former and potentially a future applicant for vacant positions on the Alaska Supreme Court and the Alaska Superior Court. Carl Ekstrom is a non-attorney member of the Alaska Bar Association ("Bar") Board of Governors ("Board"), as well as a citizen and registered voter. Plaintiffs challenge the process by which supreme court justices, and appellate, superior, and district court judges are selected on Equal Protection grounds.[6]

The Alaska Judicial Selection Plan ("Plan") empowers the Council to select the nominees for vacancies to the various courts of Alaska. The Governor then appoints a new justice or judge from the Council's nominees. Periodically thereafter, the justice or judge must stand for a retention election in which all registered voters may participate. The Plan is a merit selection system based on the "Missouri Bar Plan" for judicial appointments.[7] The Plan was crafted by the delegates to Alaska's Constitutional Convention in 1955-56, adopted by the Convention on February 5, 1956, ratified by the people of the state on April 24, 1956, set forth in Article IV, and used for more than fifty years without any challenge–until now. Every sitting appellate, superior, and district

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[5]Docs. 42 and 43.

[6]*See* Alaska Const. Art. IV, § 5; AS 22.05.080 (Supreme Court); AS 22.07.070 (Court of Appeals); AS 22.10.100 (Superior Court); and AS 22.15.170 (District Court).

[7]*See generally* Alaska Constitutional Convention Minutes ("ACCM"), Days 32 and 35 (Dec. 9 and 12, 1955), *available at* http://www.law.state.ak.us/doclibrary/cc_minutes.html (copy attached as Appendix A). The court takes judicial notice of the ACCM as a matter of public record under Federal Rule of Evidence 201. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

court judge, and supreme court justice in the state has been selected pursuant to the Plan.

The composition of the Council is dictated by Alaska Constitution Article IV, § 8, which provides as follows:

> 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."[8]

At Alaska's Constitutional Convention, the Plan's chief supporter, George M. McLaughlin, who was Chairman of the Judiciary Committee and a former municipal magistrate judge for the City of Anchorage, said of the Plan:

> "The theory is you have a select group. The lawyers know who are good and they know who are bad. The laymen represent in substance the public in order to protect them in substance from the lawyers, but they are confirmed by the senate for one reason. The laymen in the committee insisted upon it so that we would have a broader base and the governor himself would not necessarily be able to nominate to the judicial council, his own house."[9]

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[8]Alaska Const. art. IV, § 8. Defendants point out that, in addition to Alaska, 17 other states and the District of Columbia vest the election or appointment of judicial selection commission members in the state bar association without legislative or gubernatorial confirmation or approval. Doc. 35 at 3-4 and n.3 (collecting states). Plaintiffs contend that there are only 13 states whose process is akin to that in Alaska because in New York, North Dakota, and Vermont, the governor or legislature may reject the nominations of the nominating commission, while in Maryland, the governor may reject the appointments to the commission made by the bar. Doc. 42 at 21 n.1.

[9]ACCM, Day 32 (Dec. 9, 1955).

In response to critics of the Plan advocating an amendment to provide for legislative confirmation of the attorney members of the Council, McLaughlin responded that the lay members of the Council would adequately "represent the public and . . . the predominant political thought . . . [while] the lawyer members of the council . . . represent the profession . . . [and] the best interests of the profession."[10] McLaughlin's fear of legislative confirmation was based on his perception that such a process would favor partisanship over qualifications:

> "[i]f 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. All you have is one other political method of selection of your judges. The theory, and it is the only way it can possibly work, is that the lawyers are put on there to get the best man and not to take a man on the basis of his politics."[11]

Ultimately, the proposed amendment to provide for legislative confirmation of the attorney members of the Council was defeated 49 to 4, with two members absent.[12] After the Plan was ratified by Alaska voters, it was approved by Congress, which found Alaska's Constitution to be "in conformity with the Constitution of the United States."[13]

Under the Plan, the Council is entrusted with evaluating and recommending qualified individuals to vacant seats on the various courts of Alaska. When a vacancy on any court arises, either by departure of a sitting judicial officer or by legislative creation, the Council invites and accepts applications to fill the vacancy.[14] After receiving and verifying the applications, the Council reviews them, interviews the candidates, deliberates, and nominates two or more candidates, whose names are then

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[10]ACCM, Day 35 (Dec. 12, 1955).

[11]*Id.*

[12]*Id.*

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

[14]Alaska Judicial Council Bylaws ("AJC Bylaws"), Article VII, § 1, *available at* http://www.ajc.state.ak.us/Reference/Bylaws09.pdf (copy attached as Appendix B). The court takes judicial notice of the AJC Bylaws as a matter of public record under Federal Rule of Evidence 201. *See supra* note 4.

sent to the governor.[15] Each applicant who receives four or more votes by Council members becomes one of the nominees.[16] If fewer than two applicants receive the requisite four votes, the Council will not submit any names to the governor; and typically will re-advertise the position.[17] "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."[18] The governor must make the appointment within 45 days of receiving the nominations.[19]

Judicial officers initially obtain their positions by appointment, but to remain on the bench they must be approved by a vote of the people. Alaska Supreme Court justices are subject to retention elections "at the first general election held more than three years after the justice's appointment. If approved, the justice shall thereafter be subject to approval or rejection in a like manner every tenth year."[20] Similarly, judges of the Alaska Court of Appeals are subject to an initial election after three years, and subsequent elections every eight years.[21] Judges of the Alaska Superior Court are subject to an initial election after three years, and subsequent elections every six years.[22] Alaska District Court judges are subject to an initial election after two years, and subsequent elections every four years.[23] Unless a justice or judge withdraws his or

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[15]AJC Bylaws, Article VII, § 4.

[16]Alaska Judicial Council Selection Procedures ("AJC Selection Procedures") § VI(D), *available at* http://www.ajc.state.ak.us/selection/procedures/selectionprocedures7-24-07.pdf (copy attached as Appendix C). The court takes judicial notice of the AJC Selection Procedures as a matter of public record under Federal Rule of Evidence 201.

[17]*Id.*

[18]Alaska Const. art. IV, § 5.

[19]AS 22.05.080(a).

[20]AS 15.35.030; *see also* AS 22.05.100.

[21]AS 15.35.053; *see also* AS 22.07.060.

[22]AS 15.35.060; *see also* AS 22.10.150.

[23]AS 15.35.100; *see also* AS 22.15.195.

her candidacy at least 48 days before the general election, the name must appear on the general election ballot.[24] Prior to a general election, the Council conducts an evaluation of each judge or justice and may provide a recommendation regarding retention or rejection, which is made public at least 60 days prior to the election.[25]

As noted above, and of particular relevance to the pending litigation, three of the seven members of the Council are selected by the Board - the "governing body of the organized state bar" - whose powers and duties, in addition to selecting the three attorney Council members, include approving and recommending to the Alaska Supreme Court rules "(1) concerning admission, discipline, licensing, continuing legal education, and defining the practice of law; (2) providing for continuing legal education and for certification of a continuing legal education program; [and] (3) establishing a program for the certification of attorneys as specialists."[26] The Board may also adopt bylaws and regulations "(1) concerning membership and the classification of membership in the Alaska Bar; (2) fixing the annual membership fees; [and] (3) concerning annual and special meetings."[27] Finally, the Board has the power to "(1) provide for employees of the Alaska Bar, the time, place and method of their selection, and their respective powers, duties, terms of office, and compensation; (2) establish, collect, deposit, invest, and disburse membership and admission fees, penalties, and other funds; (3) sue in the name of the Alaska Bar in a court of competent jurisdiction to enjoin a person from doing an act constituting a violation of this chapter; [and] (4) provide for all other matters affecting in any way the organization and functioning of the Alaska Bar."[28]

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[24]AS 15.35.135.

[25]AS 22.15.195.

[26]AS 08.08.080(a)(1)-(3).

[27]AS 08.08.080(b)(1)-(3).

[28]AS 08.08.080(c)(1)-(4).

The Board consists of 12 members - nine attorney members elected by the Bar membership and three non-attorney members appointed by the governor.[29] The Bar is an instrumentality of the government of the State of Alaska.[30] The breakdown of the Board membership and the method of its members' selection is as follows:

> Two members of the board shall be elected by and from among the members of the association resident in the first judicial district; four members of the board shall be elected by and from among the members of the association resident in the third judicial district; two members by and from among the members of the association resident in the combined area of the second and fourth judicial districts; and one member at large from the entire state. Three members who are not attorneys shall be appointed by the governor and are subject to confirmation by the legislature in joint session.[31]

Board members serve three-year terms. They are selected in a triennial rotation specified by statute.[32]

After Justice Robert L. Eastaugh announced his retirement from the Alaska Supreme Court effective November 2, 2009, the Council sent an invitation to members of the Bar to apply for Justice Eastaugh's soon-to-be-vacant position on the court.[33] The Council's letter set the deadline for applications as May 15, 2009, which was later extended to May 28, 2009. This lawsuit followed. Plaintiffs ask the court for two injunctions. First, Plaintiffs seek an injunction preventing the three attorney members of the Council that were selected by the Board from engaging in deliberations and voting on the candidates who have applied for the vacant Alaska Supreme Court position. Second, Plaintiffs seek an injunction prohibiting the Chief Justice and the three non-

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[29] *See* AS 08.08.040.

[30] AS 08.08.010.

[31] AS 08.08.050(b).

[32] AS 08.08.050(c)(1)-(3).

[33] Letter dated April 15, 2009 from the Alaska Judicial Council to Members of the Alaska Bar Association, *available at* http://www.ajc.state.ak.us/selection/supreme092/annsuprm09.pdf (copy attached as Appendix D). The court takes judicial notice of the this letter as a matter of public record under Federal Rule of Evidence 201.

attorney members of the Council from observing the requirement that the Council act by a concurrence of four or more members, in order to permit the remaining four members of the Council to proceed with the nomination of a new justice by majority vote.

Plaintiffs contend that because only members of the Bar are permitted to elect some members of the Board, the public's right to vote is deprived in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution.[34] Plaintiffs believe that the Plan excludes non-attorney citizens of Alaska from voting for a controlling majority of the Board, which appoints the three attorney members of the Council, and therefore indirectly excludes the general public from an equal vote in selecting Council members and, ultimately, Alaska's judges and justices. Plaintiffs acknowledge that there are some elections in which the selection of government officials may be restricted to a limited group of citizens when the official or government entity has a "special limited purpose" whose activities have a "disproportionate effect" on the limited group of voters.[35] However, Plaintiffs contend that the election of the Board, and the Board's subsequent selection of the attorney members of the Council, is not such an election and the right to vote for the Board must be extended to all citizens of Alaska.[36]

Defendants argue in their motion to dismiss that because Alaska selects its judges by an appointive, not elective, process, the "one person, one vote" rule announced in *Reynolds v. Sims* and elaborated in its progeny does not implicate Alaska's judicial selection procedure, including the election of the Board and the layered appointment structure of the Council. Specifically, Defendants argue that Plaintiffs "repeatedly disregard the distinctions between the election of Boards members, the

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[34]Doc. 32, ¶¶ 45 and 46 citing *Hadley v. Junior College Dist. Of Metro. Kansas City*, 397 U.S. 50, 52 (1970), and *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)).

[35]*Id.,* ¶¶ 68-69 (quoting *Ball v. James*, 451 U.S. 355, 360 (1981) and *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 727-28 (1973)).

[36]*But see* Docket 4 at 24 ("Neither do Plaintiffs challenge the constitutionality of permitting only attorneys to vote for the members of the Board of Governors of the Alaska Bar.").

appointment of Judicial Council members, and the appointment of judges by the Governor."[37] Because Plaintiffs concede the election of the Board is a limited purpose election, Defendants continue, their Equal Protection claims are aimed at the appointment of the Council, not the election of the Board. As a result, Defendants argue, the proposition that an election forming part of an appointive process must be one consistent with the "one person, one vote" rule is not supported by any legal authority. Plaintiffs oppose Defendants' motion on the same grounds advanced in their motion for injunctive relief.

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim made pursuant to Rule 12(b)(6) tests the legal sufficiency of the claims in the complaint.[38] In reviewing a Rule 12(b)(6) motion to dismiss, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party."[39] "Conclusory allegations of law, however, are insufficient to defeat a motion to dismiss."[40] A dismissal for failure to state a claim can be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."[41] "To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations; rather, it must plead 'enough facts to state a claim to relief that is plausible on its face.'"[42] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

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[37]Docket 35 at 19.

[38]*De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978).

[39]*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

[40]*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

[41]*Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

[42]*Weber v. Dept. of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

misconduct alleged."[43] "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"[44]

In *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court rejected the Ninth Circuit's long-standing legal standard governing motions for a preliminary injunction.[45] Since *Winter,* "[p]laintiffs seeking a preliminary injunction in a case in which the public interest is involved must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest."[46] Plaintiffs seeking preliminary relief must demonstrate that irreparable injury is *likely* in the absence of an injunction.[47] "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[48]

IV. DISCUSSION

A. Motion at Docket 36

The primary issue to be addressed in defendants' motion is whether the "one person, one vote" rule announced in *Reynolds v. Sims* applies to the Plan. As Plaintiffs frame the issue, 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

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[43]*Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009).

[44]*Id*. (quoting *Twombly*, 550 U.S. at 557).

[45]*Winter v. Natural Res. Def. Council, Inc.*, ___ U.S. ____, 129 S.Ct. 365, 376 (2008).

[46]*California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849-50 (9th Cir. 2009) (citing *Winter,* 129 S.Ct. at 376)).

[47]*Winter*, 129 S.Ct. at 375.

[48]*Id.* at 375-76.

that election is one of 'special purpose.'"[49] Plaintiffs contend that "[i]f the entity doing the appointing is not itself elected consistent with Equal Protection, then the court must consider whether the system is 'necessary to promote a compelling state interest.'"[50] Defendants counter that because the system for selecting Alaska's justices and judge is appointive, not elective, the "one person, one vote" principle does not apply.[51] Furthermore, Defendants contend that, even if the process were elective in nature, "one person, one vote" does not apply to the judicial branch because judges do not represent people.[52] In the alternative, Defendants argue that the election of the Board falls within the limited purpose election exception to the "one person, one vote" rule.[53]

1. Jurisprudential Framework

In *Reynolds v. Sims*, the Supreme Court held that qualified citizens have a right to vote in state and federal elections which is protected by the Constitution of the United States, adding that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[54] The Court also recognized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[55] As the Court in *Hadley v. Junior College District of Metropolitan Kansas City* summarized, "whenever 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

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[49]Docket 42 at 5.

[50]Docket 42 at 6 (quoting *Kramer*, 395 U.S. at 627).

[51]Docket 35 at 11-18.

[52]*Id.* at 18.

[53]*Id.* at 18-23.

[54]*Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

[55]*Id.*

that election."[56] Since *Reynolds*, the Court has applied the "one person, one vote" principle in a line of cases concerning various types of elections in which the franchise has been selectively distributed, including junior college trustee elections,[57] school district board elections,[58] and revenue bond elections.[59]

One exception to the "one person, one vote" rule - the "limited purpose exception" - dictates that the rule does not apply to the election of a governmental entity that (1) exercises only narrow, limited governmental powers, and (2) conducts activities that disproportionately affect only a specific group of individuals.[60] Accordingly, the Court has said that any classification restricting or limiting the franchise to certain members of the public, except those involving residence, age, or citizenship, is unconstitutional "unless the district or State can demonstrate that the classification serves a compelling state interest."[61] Such a limitation may only be upheld if it is demonstrated that "all those excluded are in fact substantially less interested or affected than those the (franchise) includes."[62] Where the governmental entity whose members are subject to the selective franchise performs a vital governmental function that has sufficient impact throughout the state, a limited franchise will not comport with the

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[56]*Hadley v. Junior College Dist. of Metropolitan Kansas City*, 397 U.S. 50, 56 (1970).

[57]*Id.*

[58]*Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-27, 632 (1969).

[59]*Cipriano v. Houma*, 395 U.S. 701, 705-06 (1969).

[60]*See Ball v.* James, 451 U.S. 355, 363-72 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 731 (1973); *Hadley*, 397 U.S. at 56.

[61]*Hill v. Stone*, 421 U.S. 289, 29 (1975) (giving power to property owners alone "can be justified only by some overriding interest of those owners that the State is entitled to recognize"); *Kramer*, 395 U.S. at 626-27 ("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.")

[62]*Kramer*, 395 U.S. at 632.

principle set forth in *Reynolds*.[63] On the other hand, where the strictures of *Reynolds* do not apply to a challenged election, the state need only show that the voting scheme bears a reasonable relationship to its statutory objectives.[64]

Of course, Alaska judges are not selected in an election. This forces plaintiffs to contend that *Reynolds* applies even where the state has chosen to select judges by appointment. Moving still further from direct application of the principle announced in *Reynolds*, Plaintiffs also argue that the appointment of the Council members should be governed by the "one person, one vote" rule, relying on *Sailors v. Board of Education of Kent County*[65] and *Kramer v. Union Free School District No. 15*.[66] In *Sailors*, the Court considered the constitutionality of the selection of a county school board chosen, not by the electors of the county, but by delegates from the local school boards.[67] The process by which the county school board was selected was as follows: "Each board sends a delegate to a biennial meeting and those delegates elect a county board of five members, who need not be members of the local boards, from candidates nominated by school electors."[68] Petitioner argued that the process violated the "one person, one vote" principle, which the Court has held is constitutionally required in state elections.[69] After discussing *Reynolds*, the Court found that there is "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."[70] The Court then held that "[a]t least as respects nonlegislative officers, a

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[63] *See Hadley*, 397 U.S. at 56

[64] *Ball*, 451 U.S. at 364-65.

[65] 387 U.S. 105 (1967).

[66] 395 U.S. 621 (1969).

[67] 387 U.S. at 106.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 108.

State can appoint local officials or elect them or combine the elective and appointive systems as was done here."[71]

The Court expanded upon *Sailors* in *Kramer*, which involved a New York statute that limited the right to vote in school district elections to individuals who owned or leased taxable real property within the school district and parents of children enrolled in the local public schools.[72] Most pertinent to the case at bar, the Court first recognized that "States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters."[73] The Court only then went on to explain that the need to scrutinize the manner in which the voting franchise is distributed is not reduced, "simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment.[74] Of *Sailors*, the *Kramer* Court noted that "each local school board sent one delegate to a biennial meeting at which the members of the county board of education were selected . . . [but that] "no constitutional complaint (was raised respecting [the] election of the local school boards."[75] Ultimately, the Court concluded that New York had failed to demonstrate a compelling interest that was sufficiently tailored to limit the franchise to owners or lessees of taxable property.[76]

In *Rodriguez v. Popular Democratic Party*, the Court considered whether the principle enunciated in *Kramer* and *Sailors* applied to a Puerto Rico statute, which vested in a political party the power to fill an interim vacancy in the Puerto Rico Legislature.[77] The Court noted that while *Sailors* held that a statute authorizing appointment rather than

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[71] *Id.* at 111.

[72] *Kramer*, 395 U.S. at 622.

[73] *Id.* at 629.

[74] *Id*. at 628-29.

[75] *Id.* at 629 n.12 (quoting *Sailors*, 387 U.S. at 111).

[76] *Kramer*, 395 U.S. at 633.

[77] 457 U.S. 1, 3 (1982).

election of a county school board was valid, it left open the question whether a state may constitute a local legislative body through the appointive rather than elective process.[78] The Court reasoned that the statute at issue did not restrict access to the electoral process because "[a]ll voters have an equal opportunity to select a district representative in the general election; and the interim appointment provision applies uniformly to all legislative vacancies, whenever they arise."[79] Applying rational basis review, the Court ultimately concluded that "[t]he Puerto Rico Legislature could reasonably conclude that appointment by the previous incumbent's political party would more fairly reflect the will of the voters than appointment by the Governor or some other elected official."[80]

Two district court decisions discussed by the parties have applied the above framework in circumstances similar to the present case. In *Bradley v. Work*, minority voters challenged an Indiana procedure for selecting members of a judicial nominating commission and for electing judges. They alleged violations of the Voting Rights Act, the Equal Protection Clause, and the Fifteenth Amendment.[81] Like Alaska, Indiana limits the election of the attorney members of its judicial nominating commission to attorneys, while the Governor is charged with appointing the commission's non-attorney members.[82] Relying on the limited purpose exception, the district court held that the procedure by which Indiana's judicial nominating commission is selected is constitutional because the commission "does not perform traditional governmental functions," reasoning that the commission's "sole purpose and reason for existence is to screen candidates as part of the judicial appointment process."[83] Approving of this arrangement, the district court wrote:

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[78] *Id.* at 9-10 & n.9 (citing *Sailors*, 387 U.S. at 109-10).

[79] *Rodriguez*, 457 U.S. at 10.

[80] *Id.* at 12.

[81] 916 F. Supp. 1446 (S.D. Ind. 1996), *aff'd*, 154 F.3d 704 (7th Cir. 1998).

[82] *Id.* at 1456.

[83] *Id.*

> The attorney-members of the Commission are selected to represent the interests and reflect the expertise of the local bar when evaluating candidates for a judicial appointment. Their divergent interests uniquely qualify attorneys to advise the governor, for their interests are different in nature and in scope from the interests of the general public in a fair and impartial judiciary.[84]

The district court went on to conclude that "the State's classification represents a reasonable effort to provide representation of both the general populace and the members of the bar on a Commission whose limited function is to advise the governor on the selection of an appropriate candidate for judicial office."[85] The Seventh Circuit affirmed the district court, but did not reach the Equal Protection issue because it had not been preserved on appeal.[86]

In *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri* ("*AAVRLDF*"), another district court reached a similar conclusion in a slightly different context.[87] In that case, African-American voters alleged that they were denied the right to vote for lawyer members of Missouri's judicial selection commission on the ground that African-Americans were, at the time, underrepresented in the Missouri Bar.[88] The court first found that the franchise had not been denied to African-Americans, which would require proof of intentional discrimination, but rather to the entire nonlawyer populace of Missouri, which would only require the State to support the statute by a reasonable basis that was rationally related to a legitimate state interest.[89] Applying rational basis review to uphold the Missouri practice, the district court explained:

> Certainly, it is reasonable, if not necessary, to have lawyers on these commissions. There is no one better to evaluate the ability of potential

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[84] *Id*. at 1457.

[85] *Id.* at 1458.

[86] *Bradley*, 154 F.3d at 711.

[87] 994 F. Supp. 1105 (E.D. Mo. 1997).

[88] *Id.* at 1126.

[89] *Id.* at 1127.

> judges than the attorneys who will have to practice before them every day. Attorneys typically will know the judicial aspirants better than the general public. They will know which aspirants have the legal acumen, the intelligence, and the temperament to best serve the people of Missouri. It is therefore quite clear that attorneys must serve on the commissions."[90]

On appeal, the Eighth Circuit affirmed the decision of the district court without discussion, noting that "the decision of the District Court is correct and that extended discussion would add nothing of substance to the thorough and well-reasoned opinion of that court."[91] With these principles in mind, the court proceeds to discuss application of "one person, one vote" to the Plan.

2. Application of "One Person, One Vote" to the Judiciary

In *Wells v. Edwards*, a decision of a three-judge panel in the Middle District of Louisiana that was affirmed by the Supreme Court, held, broadly and categorically, that the "one person, one vote" principle does not apply to the judicial elections challenged as denials of equal protection because "'judges . . . are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency.'"[92] Rather, "[t]he primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents."[93] This rule has been reiterated by the Supreme Court and at least one notable jurist outside this

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[90] *Id.* at 1128.

[91] *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 133 F.3d 921 (8th Cir. 1998) (unpublished).

[92] *See Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964), *aff'd*, 409 U.S. 1095 (1973)).

[93] Defendants highlight that "Plaintiffs do not contend defendants' point that the one person, one vote principle does not apply to judicial elections." Docket 43 at 3. This assertion is incorrect in that it overstates *Wells*' application and flatly contradicts *Kramer*'s holding that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Kramer*, 395 U.S. at 629 (quoting *Harper,* 383 U.S. at 665)).

circuit.[94] Plaintiffs are correct that *Wells* involved judicial district apportionment, and not a classification on the basis of occupation, but *Wells* also held that an affected voter may only mount a challenge to any judicial election by showing:

> "an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. In other words, this Court must find that the State has not only distinguished between citizens and voters, but that such distinctions are arbitrary and capricious or invidious."[95]

In order to invalidate the Plan under this test, Plaintiffs would have to show an "invidious action" or an "arbitrary or capricious" distinction by the framers of the Alaska Constitution in devising and adopting the Plan during the Constitutional Convention. Plaintiffs have not alleged any such arbitrary, capricious, or invidious action.[96] Plaintiffs' challenge to the Plan fails on this ground alone.

3. Application of the Limited Purpose Exception to the Plan

a. The Board's Election

The "one person, one vote" does not apply to the election of the members of the Board, because the Board's activities generally fall within the limited purpose exception applicable when a governmental entity (1) exercises only narrow, limited governmental powers, and (2) conducts activities that disproportionately affect only a specific group of individuals.[97] With respect to the first prong, the Board exercises powers that concern the regulation of a specific profession, the practice of law.[98] Thus, the Board approves

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[94]*See Chisom v. Roemer*, 501 U.S. 380, 402-03 (1991) (Stevens, J.); *Smith v. Boyle*, 144 F.3d 1060, 1061 (7th Cir. 1998) (Posner, J.).

[95]*Wells*, 347 F. Supp. at 455 (quoting *Holshouser v. Scott*, 335 F. Supp. 928, 933 (M.D. N.C. 1971)).

[96]Even assuming Plaintiffs alleged an invidious action or arbitrary and capricious distinction, they have not pled any plausible factual allegations supporting such behavior on the part of the Constitutional Convention, the State, or the Council.

[97]*See Ball*, 451 U.S. at 363-72; *Salyer Land Co.*, 410 U.S. at 731.

[98]Traditional governmental functions include the imposition of sales or property taxes, enactment of laws governing the conduct of citizens, selling tax-exempt bonds, condemning property, setting policies that substantially affect all residents, or administering normal functions

and recommends to the Alaska Supreme Court rules concerning admission, discipline, licensing, continuing legal education, specialization, and defining the practice of law.[99] The Board also adopts bylaws and regulations concerning membership, classification, fees, and annual and special meetings.[100] Finally, the Board has the power to hire and sue on behalf of the Bar, as well as establish, collect, deposit, invest, and disburse membership and admission fees, penalties, and other funds from its members.[101] With respect to the second prong, the only individuals who are regulated by the Board's activities are Bar members. For the election of the Board, limiting the franchise to lawyers is therefore logically and legally sound, and it clearly falls within the limited exception to the "one person, one vote" rule.

Having determined that the Board's election falls within the exception, the next question is whether the restriction on those who can vote for Board members violates Equal Protection values. Given that the Board is a limited purpose entity, the franchise may be constitutionally limited to a group of individuals who are disproportionately affected so long as the decision is reasonable and bears a rational relationship to a legitimate state interest.[102] The Plan reflects the entirely rational proposition that lawyers have the experience and expertise needed to select Council members from among the ranks of Alaska's lawyers. Furthermore, the interest in selecting qualified persons to serve on the Board is a legitimate – indeed very important – interest. Absent a clear constitutional limitation, Alaska is free to structure its judicial system to meet special concerns regarding the qualifications of its judges. The court concludes therefore that

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of government such as maintenance of streets, the operation of schools, or sanitation, health or welfare services. *Ball*, 451 U.S. at 366.

[99]AS 08.08.080(a)(1)-(3).

[100]AS 08.08.080(b)(1)-(3).

[101]AS 08.08.080(c)(1)-(4).

[102]*Ball*, 451 U.S. at 371; *Kramer*, 395 U.S. at 627-28.

the limitation on who may vote for members of the Board survives rational basis review.[103]

b. The Council's Appointment

Having concluded that the Board's election passes constitutional muster, the next question is whether the Board's selection of the attorney members of the Council violates Equal Protection principles. Plaintiffs urge that there is a violation, but in doing so, they are necessarily imposing on the process a judgment that a public election is necessary for the appointment of judicial officers. Yet, as noted above, the Court specifically held in *Sailors* that the "one person, one vote" principle does not apply where non-legislative officers are chosen by appointment, rather than by election.[104] Moreover, the delegates to the Alaska Constitutional Convention endorsed and the people of the State of Alaska ratified the proposition that Alaska state judges are to be appointed, rather than elected. Plaintiffs have not cited, nor has this court's research found, any authority in support of the proposition that a state may not appoint, rather than elect, its judiciary.[105] Thus, although "one person, one vote" is not relevant to appointments, this court also finds the analysis by the district judges in *Bradley* and *AAVRLDF*, which found that judicial selection commissions perform non-traditional governmental functions, persuasive. Here, the Council does not "administer normal functions of government" or "enact laws

[103]Additionally, even if the Board's election did not fall within the limited purpose exception, the Ninth Circuit has held that "the malapportionment of representation on a state bar governing body is not a violation of fourteenth amendment rights." *Brady v. State Bar of California*, 533 F.2d 502, 502-03 (9th Cir. 1976). Thus, assuming the Board were malapportioned, "its acts would not for that reason be invalid, but would be valid as acts of a de facto authority." *Id.* at 503.

[104]*See*, *e.g.*, *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."); *accord Wells*, 347 F. Supp. at 455 ("one person, one vote" does not apply to the judiciary).

[105]Plaintiffs rely on *Kramer,* but as explained above, that case dealt only with a situation in which the state had decided to use an elective process rather than an appointive process to choose members of a county school district board.

governing the conduct of citizens;[106] rather, among its responsibilities, the Council is charged with evaluating and recommending the most qualified candidates for Alaska's bench based on its assessment of the credentials of members of the bar being considered for vacant judgeships. In this regard, therefore, the Council is a limited purpose entity whose actions disproportionately affect the membership of the Alaska Bar.

For many of the same reasons supporting the limitation on the Board's election, the selection of the Council's attorney members by the Board is rationally related to a legitimate state interest in selecting well-qualified jurists. Moreover, the Alaska Constitution has included checks on the exercise of the appointment powers in the Plan, which save it from defeat under rational basis review. To begin with, some members of the Board are themselves appointed by the Governor. Second, the Board appoints only three of the seven members of the Council. Any candidate for judicial office must therefore secure the vote of at least one other member of the Council in order to be recommended for appointment. Third, the Council's nominations are subject to a final selection by the Governor. Fourth, every person nominated by the Council and selected by the governor must stand for periodic retention elections in which all registered voters participate. 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 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.

B. Motion at Docket 4

Because the court grants Defendants' motion to dismiss, Plaintiffs' motion for a preliminary injunction is denied as moot.

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[106] *Ball*, 451 U.S. at 366 n.11.

V. CONCLUSION

For the foregoing reasons, Defendants' motion at docket 36 is **GRANTED**, and Plaintiffs' motion at docket 4 is **DENIED** as moot.

DATED at Anchorage, Alaska, this 15th day of September 2009.

/s/ JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE