No.____

In The
Supreme Court of the United States

STEVEN CARLSON, ET AL., *Petitioners,*
v.
JUSTICE DAVID WIGGINS, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Petition for a Writ of Certiorari

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Question Presented

This Court in *Kramer v. Union Free School Dist. 15*, 395 U.S. 621, 626 (1969) established that the Fourteenth Amendment's Equal Protection Clause applies to elections and that restrictions on who can vote in elections are subject to strict scrutiny. Iowa, like nine other states, selects its appellate judges by mandatory gubernatorial appointment of nominees from a 15-member Commission, of which 7 are elected solely by members of the Iowa Bar Association. The Eighth Circuit held that this did not violate Iowa voters' rights under the Equal Protection Clause.

(1) Whether the election of Iowa Judicial Commission members is a general interest election in which all voters are entitled to vote under the Fourteenth Amendment's Equal Protection Clause.

(2) Whether Iowa's election of 7 Commission members solely by attorneys fails strict scrutiny.

Parties to the Proceedings

The following individuals and entities are parties to the proceedings in the court below:

Steven Carlson, Mary Granzow, Richard Kettells, William Ramsey, *Plaintiffs-Appellants*;

Justice David Wiggins, Jean Dickson, Steven J. Pace, Beth Walker, Amy J. Skogerson, Joseph L. Fitzgibbons, Guy R. Cook, H. Daniel Holm, Jr., margaret G. Reden baugh, Coleen A. Denefe, Mary Beth Lawler, Madalin A. Williams, David C. Cochran, Steve Brody, Timothy L. Mikkelsen, David K. Boyd, *Defendants-Appellees*.

Corporate Disclosure Statement

Petitioners are individuals and so have no parent corporation and are not a publicly held corporation. Rule 29.6.

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Petition for a Writ of Certiorari

Petitioners respectfully request a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.

Opinions Below

The panel decision reversing the district court is at 675 F. 3d 1134. App. 1a. The district court opinion is at 760 F. Supp. 2d 811. App. 17a.

Jurisdiction

The Eighth Circuit court of appeals upheld the district court's decision on April 9, 2012. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I.

Iowa Const. Art V, sec 16 is at 62a.

Iowa Code sec 46.2 is at 65a.

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Iowa Code sec 46.8 is at 76a.

Iowa Code sec 46.9 is at 77a.

Iowa Code sec 46.9A is at 79a.

Iowa Code sec 46.10 is at 80a.

Iowa Code sec 46.14 is at 82a.

Iowa Code sec 46.14A is at 85a.

Statement of the Case

This case presents a equal protection challenge by Steven Carlson, Mary Granzow, Richard Kettells, and William Ramsey ("the Voters"), who are registered voters in the state of Iowa. Iowa fills vacancies in the Supreme Court and Court of Appeals through a Commission that nominates three candidates for any open position, one of which the Governor must select or forfeit his involvement.[1] Seven of the 15 members of the Commission are elected by vote of only attorneys.

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[1]Iowa is 1 of 9 states that employs a system such as this. Thirty-three states employ some form of what is known as "the Missouri Plan" for selecting their judges. *Kirk v. Carpeneti*, 623 F.3d 889, 892 (9th Cir. 2010); *see also* Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 Mo. L. Rev. 751 (2009). But a minority of those, including Iowa, provide that the nominations of the commission are binding and not subject to any legislative confirmation while also having a certain number of commissioners selected exclusively by the members of the bar, without legislative confirmation. *See* Alaska Const. art. IV, § 8; Ind. Code § 33-27; Iowa Const. art. V, §§ 15-16; Kan. Const. art. III, § 5; Mo. Const. art. V, § 25; Neb. Const. art. V, § 21; Okla. Const. art. 7-B, §§ 3-4; S.D. Const. art. V, § 7; Wyo. Const. art. V, § 4. All other states employ constitutional forms of merit-selection of judges, in that either the nominations are not binding on the governor or are subject to legislative confirmation, and in that the members of the bar do not exclusively elect or appoint any members of the nominating entity.

Voters claim that denying them a vote in the election of these seven members of the Commission denies them equal protection of the laws.

I. The Facts

This case involves the elections of certain officials on the State Judicial Nominating Commission ("Commission") in Iowa. The Commission was established by the Iowa Constitution as amended in 1962 to "make nominations to fill vacancies in the supreme court." Iowa Const. art. V, § 16. When a vacancy occurs on the Iowa Supreme Court, the governor fills it by appointing one of three nominees nominated by the Commission. Iowa Const. art. V, § 15; Iowa Code § 46.15.1. If the governor fails to appoint one of the nominees from the Commission, the chief justice of the Iowa Supreme Court must make the appointment. Iowa Const. art. V, § 15; Iowa Code § 46.15.2. The nominations made by the Commission, and the subsequent appointments, are not subject to any kind of confirmation by the Iowa legislature. The Commission also makes nominations for vacancies on the Iowa Court of Appeals in the same way. Iowa Code § 46.14A. One of the Commission's nominees will invariably become a justice or judge in Iowa. Thus, the Commission determines the composition of the Iowa state judiciary.

The Commission has fifteen members. The composition and selection of the Commission was established in the 1962 Iowa Constitution as follows:

> There shall be not less than three nor more than eight appointive members, as provided by law, and an equal number of

> elective members on such commission, all of whom shall be electors of the state. The appointive members shall be appointed by the governor subject to confirmation by the senate. The elective members shall be elected by the resident members of the bar of the state. The judge of the supreme court who is senior in length of service on said court, other than the chief justice, shall also be a member of such commission and shall be its chairman.

Iowa Const. art. V, § 16.

The composition and selection of the Commission is provided by statute after July 4, 1973. Currently, the Commission has fifteen members. The governor appoints one eligible elector from each congressional district, subject to confirmation by the senate. Iowa Code § 46.1. And the resident members of the bar of each congressional district elect one eligible elector to the Commission. Iowa Code § 46.2. A resident of a given congressional district must be a member of the bar of Iowa in order to be an eligible elector and participate in these elections. Iowa Code § 46.7. These elections are not subject to any kind of legislative or executive confirmation. All members, both appointed and elected, serve six-year terms. Iowa Code §§ 46.1, 46.2.

The Voters are all Iowa citizens registered to vote in Iowa, residing in counties across the state. They are excluded from participating in the elections of the members of the Commission because they are not members of the bar. When the complaint was filed, The terms of three of the elected members were to end on

June 30, 2011. The elections for the new members have now taken place but there will be election of members of the Commission in the future in which Voters want to participate.

Three vacancies were created on the Iowa Supreme Court on January 1, 2011. These vacancies were created because on November 2, 2010, Chief Justice Marsha Ternus, Justice David Baker, and Justice Michael Streit stood for retention and failed to receive enough votes to be retained on the Iowa Supreme Court. The results of these retention elections were certified on November 29, 2010. As required by law, the State Judicial Nominating Commission began the process of making nominations to fill the impending vacancies within ten days of the certification. The Commission submitted its nominations to the governor on January 27, 2011. The governor made the appointments from these nominations on February 23, 2011.

II. The History of the Litigation.

On December 8, 2010, the Voters filed their Verified Complaint in the United States District Court for the Southern District of Iowa alleging that their federal constitutional rights to equal protection under the law are violated by Iowa Constitution Article V, Section 16 and as implemented by Iowa Code Sections 46.2, 46.4-46.10, and 46.14. Also on December 8, 2010, the Voters filed a Motion for Temporary Restraining Order and Preliminary Injunction requesting that the attorney members of the Commission be enjoined from participating in the selection of nominees for state judicial office, including filling the upcoming vacancies on the Iowa Supreme court.

On December 13, 2010, the District Court denied the motion for temporary restraining order and scheduled the case for hearing on the preliminary injunction motion on January 6, 2011. The State filed a motion to dismiss on December 17, 2010, and requested that the hearing on the preliminary injunction motion also include argument on the merits of the motion to dismiss. The Court consolidated the hearing on the preliminary injunction and dismiss motions on December 20, 2010. The State filed its response to the preliminary injunction motion on December 23, 2010, and the Voters filed their response to the motion to dismiss on January 3, 2011. Because the hearing that took place on January 6, 2011, included consideration of both the preliminary injunction and dismiss motions, the judgment that followed was final and on the merits.

On January 19, 2011, the District Court issued an order and opinion granting the State's motion to dismiss for failure to state a claim and denying the Voters' motion for preliminary injunction as moot. The Voters filed their notice of appeal on February 16, 2011.

On April 9, 2012, the Eighth Circuit affirmed the district court's holding, finding that the Voters had failed to state a claim because under rational basis review, the election of members of the Commission by only the vote of members of the bar satisfied Fourteenth Amendment requirements and was constitutional. App 16a.

Reasons for Granting the Petition

The Eighth Circuit held that Iowa voters have no Fourteenth Amendment equal protection right to vote in an election, in which only attorneys could vote, for members of a Commission tasked with selecting members of the state judiciary.

The right to participate in an election is protected by the equal protection clause of the Fourteenth Amendment. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Therefore, the government must meet a high standard to justify "[s]tatutes grant[ing] the right to vote to some bona fide residents of requisite age and citizenship and den[ying] the franchise to others." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969). Accordingly, "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, 295 (1975). This ensures that public officials cannot be chosen by an exclusive group, but must be chosen by the people as a whole. This includes judges. *See* The Federalist No. 39, at 210 (James Madison) (Clinton Rossiter ed. 1999) ("Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves.").

The Eighth Circuit, however, misconstrues the Commission's function as that of "'screen[ing] candidates as part of the judicial appointment process' in the State of Iowa." App. 12a (*quoting Bradley v. Work,* 916 F. Supp. 1446, 1456 (S.D. Ind. 1996)). But

the Iowa Constitution says nothing about screening or making recommendations. It states: "Such commission shall make nominations to fill vacancies in the supreme court." Iowa Const. art. V, § 16. And these nominations are binding; they cannot be rejected and are not subject to any review. Iowa Const. art. V, § 15. One of the Commissions' three nominees will invariably become a justice. The Commission, therefore, determines the composition of the Iowa judiciary.

More importantly, the Eighth Circuit erroneously held that "commission disproportionately affects a definable group of constituents—the members of the Iowa Bar 'as officers of the court and as potential candidates for judicial office,'" App. 13a (*citation omitted*), thereby justifying the exclusion of Voters from the election as a "special interest" election. However, all Iowans have a real interest in and are materially affected the actions of the judicial branch of government, thus an election to choose who shall determine who those judges are is a "general interest" election in which all Iowa voters are entitled to participate.

Finally, the panel decision empowered the States to constitutionally delegate the election of all members of the state judiciary to whatever powerful special interest they choose, thereby usurping legitimate voter participation and undermining democracy. This Court should grant a writ of certiorari to this case and decide it on the merits to restore full Fourteenth Amendment protection to voters and to ensure uniformity among the circuits.

I. This Case Involves The Important Question of Law of Whether Judicial Commission Elections Are Subject to Strict Scrutiny Analysis Under The Equal Protection Clause, Which Should be Applied Here. [2]

In a republic, all government power is derived from

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[2]This case does not challenge or call into question the constitutionality of so-called "merit-selection" systems for choosing state judges. Nothing in the challenge here would result in a substantial change to Iowa's system for selecting judges or force Iowa to adopt some other system, such as direct election of judges. The Voters do not challenge the constitutionality of the nomination of their judges through a commission or by government appointment. They do not challenge the constitutionality of the composition of the Commission. And they do not challenge the constitutionality of any requirement that a certain number of Commissioners must be members of the bar, any more than they object to the requirement that judges be members of the bar. They simply allege that they, as qualified Iowa citizens, may not be excluded from elections for the public officials who nominate their judges.

Only the constitutionality of a single provision of the Iowa Code, Section 46.7, which establishes the eligibility requirements for participating in the elections, is at issue. So Iowa would continue to use a "merit-selection" system for selecting its judges if the Voters are granted the relief they seek. *See* Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 Mo. L. Rev. 479, 492 (2009); Joshua Ney, *Does the Kansas Supreme Court Selection Process Violate the One Person, One Vote Doctrine?*, 49 Washburn L.J. 143, 148 (2009) (observing that Prof. Kales's original plan of 1914 did not provide for bar involvement in the selection of nominating commissions).

the people as a whole. The Federalist No. 39, at 209. The powers exercised by each branch of the government, whether to make, execute, or interpret the law, must come from the people who are subject to that law. As a result, all government officials must be selected by the people as a whole, and not by any one group. This idea of a republic is embodied in the principle that all are equal under the law.

This is the essence of self-government in a republic, as contrasted with an aristocracy or monarchy. A republic is government by the people. "It is *essential* to such a government that it be derived from the great body of the society, and not from an inconsiderable proportion or a favored class of it . . . . It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people." *Id.* In a government by the people, public officials cannot be chosen by an exclusive group, but must be chosen by the people as a whole. This includes judges. *Id.* at 210 ("Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves."). In a republic, all government officials are representatives, because it is a representative form of government.

The notion of self-governance underlies the Supreme Court's jurisprudence regarding what the Equal Protection Clause of the Fourteenth Amendment requires in the selection of public officials. The right to vote, after all, derives from the right to self-governance. *Kramer*, 395 U.S. at 626 ("Any unjustified discrimination in determining who may participate . . . in the selection of public officials undermines the

legitimacy of representative government."). Having a certain group of citizens exclusively vote for certain public officials is contrary to the fundamental concepts of representative government and equality under the law. *See Little Thunder v. South Dakota*, 518 F.2d 1253, 1258 (8th Cir. 1975) ("Such unequal application of fundamental rights we find repugnant to the basis concept of representative government.").

A. The Equal Protection Clause Prohibits Unjustified Franchise Restrictions on Elections.

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has interpreted this clause to mean that a state government may not make arbitrary and invidious distinctions among its citizens. *Avery v. Midland County*, 390 U.S. 474, 484 (1968). This principle applies with greatest force when a state discriminates among its citizens with respect to granting a fundamental right. The right to participate in an election is one such right. *See Reynolds*, 377 U.S. at 554. Therefore, the government must meet a high standard to justify "[s]tatutes grant[ing] the right to vote to some bona fide residents of requisite age and citizenship and den[ying] the franchise to others." *Kramer*, 395 U.S. at 627. According to that standard, "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*, 421 U.S. at 295.

As the court below observed, two distinct lines of cases for applying the Equal Protection Clause to elections exist. App 8a. *See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730 (1973) ("[A]ppellants derive no benefit from the *Reynolds* and *Kramer lines of cases* . . . .") (emphasis added). The line of cases beginning with *Reynolds*, 377 U.S. at 533, developed the "reapportionment doctrine" regarding the constitutionality of the geographic apportionment of voting districts. *See Bd. of Estimate v. Morris*, 489 U.S. 688, 691-92 (1989) (tracing the development of the "reapportionment doctrine" in the *Reynolds* line). The reapportionment doctrine ensures that the right to vote is not diluted by requiring "population equality between electoral districts." *Id.* at 693. Malapportionment of voting districts is not at issue in this case. The other line of cases developed by the Supreme Court from *Kramer* treats the constitutionality of "voter qualifications." *See Carrington v. Rash*, 380 U.S. 89, 98 (1965) (Harlan, J., dissenting).

While the two lines of cases are related, this case involves a voter eligibility statute, Iowa Code § 46.7, and therefore is governed by the *Kramer* line. App. 8a. *See Hill*, 421 U.S. at 297-98 ("[T]he principles of *Kramer* apply to classifications limiting eligibility among registered voters."). This line of cases governs when "a state law discriminates among eligible voters within the *same* electoral district," and establishes that "compelling government interests must justify restrictions of the franchise." *City of Herriman v. Bell*, 590 F.3d 1176, 1185-86 (10th Cir. 2010).

This is precisely what is at issue here. Iowa

discriminates among its citizens in granting who may participate in the elections of the Elective Members of the State Judicial Nominating Commission. Iowa Const. art. V, § 16; Iowa Code 46.2, 46.5, 46.7-46.10. Specifically, by statute, only those who are admitted to the Iowa bar are eligible to vote in these elections. Iowa Code § 46.7.

B. Appointed Judicial Offices Are Subject to Equal Protection Review.

The Equal Protection Clause is implicated here even though justices and judges are ultimately appointed, rather than directly elected. The Equal Protection Clause is implicated by a state election, *Kramer,* 395 U.S. 629; *Sailors v. Bd. of Educ. of Kent County*, 387 U.S. 105, 111 (1967), and there is an election here in which "some resident citizens are permitted to participate and some are not," *Kramer*, 395 U.S. at 629. Specifically, Iowa excludes all otherwise qualified citizens from participating in the elections of the Elective Members of the Commission based upon occupation.[3] When a state creates an appointive process, the Equal Protection Clause is relevant to how those who make the appointments were selected. *Id.*; *Sailors*, 387 U.S. at 111.

In *Kramer*, the Supreme Court held that the state could not exclude citizens who were otherwise qualified by residency and age from participating. The Court

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[3]Such an exclusion cannot avoid constitutional scrutiny. *Gray*, 372 U.S. at 380 ("There is no indication in the Constitution that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State.")

considered it irrelevant for purposes of scrutiny that the board could have been appointed. *Kramer*, 395 U.S. at 628-29. In fact, the Court explicitly anticipated such a situation:

> [A] city charter might well provide that the elected city council appoint a mayor who would have broad administrative powers. Assuming the council were elected consistent with the commands of the Equal Protection Clause, the delegation of power to the mayor would not call for this Court's exacting review. On the other hand, if the city charter made the office of mayor subject to an election in which only some resident citizens were entitled to vote, there would be presented a situation calling for our close review.

Id. The *Kramer* decision further noted that the system before it would not violate Equal Protection if the school board members were appointed, *because* all qualified voters are permitted to vote for the appointing official. *Id.* at 627 n.7 ("[I]f school board members are appointed . . . [e]ach resident's formal influence is perhaps indirect, but it is equal to that of other residents."). These cases expressly apply in instances where the state uses appointment instead of direct election. Such is the arrangement in the selection of judges in Iowa. So the State must show that the nomination of justices and judges by the Commission, when all non-attorneys are excluded from the election of 7 of the 15 Commission members, passes strict scrutiny.

C. Unless It Is A Special Interest Election, The Election of Commission Members Must Satisfy Strict Scrutiny.

The Eighth Circuit correctly observed that only one exception to the general principle of applying strict scrutiny in Equal Protection cases exists, and that exception applies when the elections at issue are of "special interest." App. 9a-10a. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69 (1978); *City of Herriman*, 590 F.3d at 1186 n.6 ("Only a narrow line of Supreme Court cases applying rational basis review to voting restrictions discriminating among voters in specialty districts tempers these holdings.").

This narrow and rarely applied exception to the voter qualification rule was established in *Kramer*, was further developed in the *Salyer* and *Ball* cases and has not been applied by the Supreme Court since then.[4] *See Salyer,* 410 U.S. 719; *Ball v. James*, 451 U.S. 355 (1981).

In *Kramer*, the Supreme Court struck down a New York law that permitted only landowners (or lessees) and parents of school children to vote in school district elections. *Kramer*, 395 U.S. at 623. New York had argued that it had a legitimate interest in "restricting a voice in school matters to those 'directly affected' by

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[4]In fact, no federal appellate court has applied the exception to a legislative, executive, or judicial official. It has only been applied to nominally public entities with limited administrative authority. *See, e.g.*, *Kessler v. Grand Cent. Dist. Management Ass'n, Inc.*, 158 F.3d 92 (2nd Cir. 1998); *Education/Instruccion, Inc. v. Moore*, 503 F.2d 1187 (2nd Cir. 1974).

such decisions." *Id.* at 631. The plaintiff-appellant, a resident of the school district, did not own property or have children enrolled in school and was therefore ineligible to vote in school district elections. He argued the law denied him his fundamental right to vote and that he was "substantially interested in and significantly affected" by the elections as "[a]ll members of the community have an interest in the quality and structure of public education . . . ." *Id.* at 630.

The Supreme Court held that the law failed strict scrutiny because, even assuming the State's asserted interest were valid, the law was "not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to justify the denial of the franchise to [plaintiff-appellant] and members of his class." *Id.* at 633. In short, because all residents were affected by the outcome of the election, all residents were entitled to vote.

From this, the "special interest" exception was established. If the government can show that (1) the entity does not exercise "normal governmental authority" and (2) the entity's function "disproportionately affects" only a certain group, then the election is of limited interest and the franchise may be restricted accordingly, subject only to rational basis scrutiny. Before the exception can be applied, however, it must be established that "all those excluded are in fact substantially less interested or affected than those the statute includes." *Kramer*, 395 U.S. at 632.

These principles were more clearly established in the U.S. Supreme Court decisions of *Salyer* and *Ball*.

Salyer upheld a law permitting only landowners to vote for the board of a water district because (a) the district's sole purpose was to acquire, store, and distribute water for farming in the district; (b) it provided no "general public" services; and (c) the district's "actions disproportionately affect[ed] landowners" as all of the costs for the district's projects were assessed against them. 410 U.S. at 728-29. *Salyer* distinguished the *Kramer* line of cases by pointing out that in those cases the limited group permitted to vote was *not* disproportionally affected by the outcome of the election. *Id*. at 726-29. Thus, under *Salyer*, when the functions and powers of the government entity are so far removed from normal government and so disproportionately affect a specific group, a popular election might not be required.

Similarly, *Ball* upheld an Arizona law that limited the right to vote in board elections for a power district to only landowners. 451 U.S. at 355-56. The law accorded weight to each vote in proportion to the amount of land owned by the eligible voter. *Id.* The Court looked at whether "the peculiarly narrow function of this local governmental body and the special relationship of one class of citizens to that body releases it from the strict demands of the one-person, one vote principle of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 357. It found in the affirmative, as the water district was "essentially [a] business enterprise[], created by and chiefly benefitting a specific group of landowners." *Id.* at 368; *see also Kessler*, 158 F.3d at 95.

Thus, under *Ball*, a restricted election is constitutional when the government entity or office has

a peculiarly narrow function and has a special relationship with those allowed to vote. In finding that the facts before it satisfied these requirements, the Court in *Ball* rested its conclusion on the following premises: (a) the district had only a "nominal public character," *id*. at 368, (b) "the provision of electricity is not a traditional element of governmental sovereignty," *id*., and (c) the district had a "disproportionate relationship . . . to the specific class of people whom the system ma[de] eligible to vote," *id*. at 370.

As demonstrated below, the court below failed to properly apply these cases to conclude that the election of Commission members is only subject to rational basis review. The resulting conflict with Supreme Court jurisprudence that warrants this Court's review.

1. The Election of Commission Members Is Not A Special Interest Election.

The first step in an Equal Protection analysis of a voter eligibility statute is determining whether the outcome of the election at issue is of general or limited interest and effect. *Kramer*, 395 U.S. at 632-33; *Cipriano v. City of Houma*, 395 U.S. 701, 704-06 (1969); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 207-12 (1970); *Salyer*, 410 U.S. at 726-30; *Hill*, 421 U.S. at 296-97.

The determination of whether the election is of general or limited interest focuses on the extent of the interest and effect of the "outcome of the election" on the citizenry. *Hill*, 421 U.S. at 296; *Kramer*, 395 U.S. at 632; *Cipriano*, 395 U.S. at 706; *Kolodziejski*, 399 U.S. at 209. The court must initially look to whether all resident voters are "substantially affected and

directly interested in" the outcome of the election. *Cipriano*, 395 U.S. at 706. If "all citizens are affected in important ways by" and "have a substantial interest in" the outcome of the election in question, then "the Constitution does not permit . . . the exclusion of otherwise qualified citizens from the franchise." *Kolodziejski*, 399 U.S. at 209.

a. The Nomination of Judges Is a Traditional Government Function.

The court below found that the Commission's function was not the kind of general governmental power that invokes strict Equal Protection scrutiny. App. 12a. The court referred to the list of powers mentioned in *Ball* and *Avery* to decide that the Commission's role of nomination of judges "is narrow and its purpose limited." App. 11a-12a. But its analysis is inconsistent with Supreme Court precedents.

First, the Eighth Circuit misconstrues the Commission's function as that of "'screen[ing] candidates as part of the judicial appointment process' in the State of Iowa." App. 12a (*quoting Bradley,* 916 F. Supp. at 1456). But the Iowa Constitution says nothing about screening or making recommendations. It states: "Such commission shall make nominations to fill vacancies in the supreme court." Iowa Const. art. V, § 16. And these nominations are binding; they cannot be rejected and are not subject to any review. Iowa Const. art. V, § 15. One of the Commissions' nominees will invariably become a justice. The Commission, therefore, determines the composition of the Iowa judiciary.

This power is not unlike supervising students or making building contracts. Indeed, supervising students and making contracts are not even inherently *governmental* functions, but are routinely performed by private individuals and entities. But never in the history of this country have judges ever been nominated by private individuals or entities. And when judges have been nominated in primaries, those primaries must fully comport with the commands of *Kramer* and *Reynolds*.

The nomination of judges is a core governmental power. *Ball* expressly made the distinction between a normal "governmental" function and a "nominally public" function. *Ball*, 451 U.S. at 367-68. In *Ball*, the Court found that the provision of water and electricity is not traditionally a "governmental" function, but has been traditionally performed by private entities, so that the water districts were essentially business enterprises co-opted by the government. *Ball*, 451 U.S. at 368. So the Eighth Circuit ought to have looked at whether the nomination of judges is traditionally a governmental function, like the appointing of county officials and determination of voting districts, or an essentially private one, like the provision of utilities.

Moreover, the U.S. Supreme Court in *Ball* weighed several factors when making this distinction. It considered that the water districts were pre-existing private entities that were co-opted by the state for financing purposes. *Ball*, 451 U.S. at 368. It then observed that the provision of electricity "is not a traditional element of governmental sovereignty," in the sense that the entity could be liable under 26 U.S.C. § 1983. *Id.* at 368 (*citing Jackson v.*

Metropolitan Edison Co., 419 U.S. 345, 353 (1974)). *Ball* concluded that the water district therefore did not exercise "the sort of general or important governmental function" that would invoke the commands of Equal Protection.

Under these factors, the nomination of judges is a traditional government role. It has traditionally been the function of the highest executive or legislative officials, *see, e.g.*, U.S. Const. art. II, § 2 ("The President shall . . . nominate . . . Judges of the Supreme Court, and all other Officers of the United States."); Larry C. Berkson, *Judicial Selection in the United States: a special report*, American Judicature Society (April 2010), *available at* http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf, or has been accomplished through primary elections, *see, e.g.*, *Gray v. Sanders*, 372 U.S. 368, 370 (1963). The Commission is in no sense a pre-existing "nominally public" entity that was co-opted by the state.

The Commission's nominations are absolutely binding. Contrary to the Eighth Circuit's holding, they are not recommendations or suggestions. *See Education/Instruccion*, 503 F.2d at 1189 (upholding a limited purpose election on the basis that the entity was "essentially advisory" and could make no binding decisions). They cannot be rejected by the governor and are not subject to any kind of legislative confirmation at any stage. In this way, the power to nominate exercised by the Commission is even greater than the parallel power exercised by the President, whose nominations are subject to approval by the Senate.

Furthermore, courts have held that the members of judicial nominating commissions can be held liable under 42 U.S.C. § 1983. *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982); *see also McMillan v. Svetanoff*, 793 F.2d 149, 153-54 (7th Cir. 1986). In *Richardson*, the Ninth Circuit held that the members of a judicial nominating commission do not qualify for judicial immunity from civil rights action liability because they perform a traditionally executive governmental function. *Richardson*, 693 F.2d at 914-15. *Ball* drew a direct parallel between this liability analysis and its consideration of whether a government entity performed the kind of function that would invoke Equal Protection principles. *Ball*, 451 U.S. at 368. As *Richardson* shows, a judicial nominating commission performs the kind of function that is traditionally associated with sovereignty and so cannot satisfy the requirements of the *Salyer/Ball* exception.

In addition, the Supreme Court has held that the strict requirements of Equal Protection apply fully to the nomination of judges in a primary election. *Gray*, 372 U.S. at 370; *see Smith v. Allwright*, 321 U.S. 649 (1944). Any restriction of the franchise in a primary election to nominate judges, therefore, would have to be shown necessary to achieve a compelling state interest. And the Supreme Court has held that occupational voter qualifications cannot survive Equal Protection scrutiny. *Harper*, 383 U.S. at 667. It stands to reason that if the nomination of judges through primaries invokes the *Kramer* rule, the election of an official with the power to nominate judges must also satisfy that rule and cannot satisfy the *Salyer/Ball* exception.

Finally, no court has provided an exhaustive list of "general governmental powers" that trigger strict Equal Protection scrutiny, so the reliance of the Eighth Circuit on these decisions as providing an comprehensive list to make a final determination that the Commission's role is not a traditional government function is misplaced. The entities before the court in *Ball*, for example, did not exercise any legislative or executive power. Therefore, the question was whether the administrative powers they did exercise were governmental in nature, or merely nominally public, and the extent of the effect of those powers. Many legislative and executive functions, such as calling the militia and impeaching officials, are not on the list. But it is incorrect to suggest that they are therefore not governmental powers in every sense of the term. It is even more incorrect, and has the Supreme Court's jurisprudence even more backwards, to suggest that Equal Protection applies *only* if an entity exercises *administrative* or *regulatory* power. Rather, it appears that *only* entities that exercise *merely* administrative/regulatory power that are eligible for the limited purpose exception. Thus, Eighth Circuit's observation that the Commission does none of the things listed, App. 11a, is not dispositive.

Because the Eighth Circuit misapplies Supreme Court jurisprudence to conclude the Commission does not serve a traditional government function warranting strict scrutiny review, this Court should grant Petitioners' writ request.

b. The Nomination of Judges Affects and Interests All Iowans.

With respect to the effect of this function, the focus

should not be on how attorneys are affected in ways that others are not, as the Eighth Circuit emphasized. App. 13a. Rather, the focus is on whether non-attorneys are materially affected and substantially interested in the nomination of judges. It is not enough for the interests and effects to be different. *Kolodziejski*, 399 U.S. at 209. This is where the court below got it wrong: it held that the "commission disproportionately affects a definable group of constituents—the members of the Iowa Bar 'as officers of the court and as potential candidates for judicial office.'" App. 13a (*quoting Bradley*, 916 F. Supp. at 1457).

The panel decision below focuses its analysis on the interest and effect with respect to the group included in the franchise. App. 13a. This is improper. Under *Kramer,* the court's focus ought to be "whether all those excluded [were] in fact substantially less interested or affected than those [included]." *Kramer*, 395 U.S. at 632.

All Iowans are interested in and affected by the nomination of judges. They have a real interest in and are materially affected by the nomination of officials to the judicial branch of government. The nomination of judges determines the composition of the Iowa judiciary, which influences and effects every person in the State of Iowa.

The notion that all residents are not substantially interested in and are less affected by the binding nomination of the highest officials in a branch of government is patently untenable. The effect of the Commission's nominations on Iowans is not indirect or remote, any more than the effect of primary elections

for governor or legislators is indirect or remote.

The Eighth Circuit improperly analyzed Iowans' interest in the nomination of Iowa judges under U.S. Supreme Court jurisprudence, this Court should grant a writ of certiorari.

2. The Commission Election Fails Strict Scrutiny.

Because the members of the Commission make the nominations to fill vacancies on Iowa's Supreme Court and Courts of Appeal, they serve a traditional governmental function that materially affects Iowans, who have a substantially interested in their role. Therefore, contrary to the Eighth Circuit's holding below, the elections do not satisfy the "special interest" exception and, accordingly, must be subject to strict Equal Protection scrutiny.

To pass strict scrutiny, the Commission's franchise restriction must be narrowly tailored to a compelling government interest. The State must show that those who retain the franchise are "specially interested" in the outcome of the election, such that "all those excluded are in fact substantially less interested or affected than those the statute includes." *Cipriano*, 395 U.S. at 704. The disproportionate interest between those who retain the franchise and those excluded must be "sufficiently substantial to justify excluding the latter from the franchise." *Kolodziejski*, 399 U.S. at 209 (1970). This will only be the case if those excluded are not substantially interested in and significantly affected by the government powers exercised by the government body. *Cipriano*, 395 U.S. at 704. Otherwise, the restriction is not narrowly tailored to

meet the compelling government interest.

Iowa's system for selecting its judges suffers from the same fundamental defects as the laws at issue in *Kramer*. All Iowans have a substantial interest in and are significantly affected by the nomination of the state judiciary. As the U.S. Supreme Court has stated, "state court judges possess the power to 'make' common law . . . [and] have immense power to shape the States' constitutions as well." *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002). The nomination of judges do not merely, or even predominantly, affect only Iowa attorneys, but all Iowans. The Iowa supreme court, for example, has the authority to interpret the Iowa constitution and statutes, to which all Iowans are subject. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 875-76 (Iowa 2009). The supreme court is also the ultimate arbiter of the rights and duties of all Iowans under the constitution and statutes of the State. *See, e.g.*, *id.*

While attorneys might be affected by judges' procedural rules and dispositions, the overall effect of and decisions regarding any litigation or court involvement ultimately rests on the shoulders of the litigants, not their attorneys. This involvement is not simply a political interest. Rather, it is an interest that stems from the fact that governments in this country receive power by the consent of the governed. The litigant standing before the judge who will decide whether and how often she will see her children has a substantial interest in who is exercising that power over her. The litigant standing before the judge who will decide whether he will spend the rest of his life in prison has a substantial interest in who that judge is.

It is inconceivable that all Iowans have a substantial interest in having a fair, qualified, and independent judiciary and yet somehow apparently do not have a substantial interest in how that judiciary is selected. There is no disproportionate relationship between the Commission and a group of the population.

Despite the broad-reaching effect of the Commission's role on all Iowans, only bar members are permitted to vote for the seven elected members. As in *Kramer*, the class excluded from voting (non-attorneys) are not "substantially less interested or affected than those the statute includes." *Cipriano*, 395 U.S. at 704.

Without evidence that the Commission's role in determining who becomes a justice or judge in Iowa disproportionately, substantially, and materially affects Iowa attorneys more than Iowa citizens, the restriction fails strict scrutiny.

II. Other Federal Courts Reviewing This Important Matter Have Broadly Deprived Voters Of Their Right to Participating In Judicial Elections.

A. The Ninth Circuit Misapplies Supreme Court Precedent.

The Ninth Circuit considered this matter in *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010). In Alaska, state justices and judges must be appointed by the governor from two or more nominations made by the Alaska Judicial Council ("Council"). Alaska Const. art. IV, § 5; Alaska Stat. § 22.05.080(a). The Council is composed of seven members. Alaska Const. art. IV, § 8. One is the current chief justice of the Alaska supreme court, who sits ex officio. *Id.* Three members, who must

be non-attorneys, are appointed by the governor subject to confirmation by the legislature in joint session. *Id.* And the final three members must be attorneys and are appointed by the Board of Governors of the Alaska Bar Association ("Board") without any legislative confirmation. *Id.*; Alaska Stat. § 08.08.020.

The Ninth Circuit's decision in *Kirk* turned on the fact that the Council members are appointed rather than elected. *Kirk*, 623 F.3d at 898 ("As the district court correctly concluded, however, the right to equal voting participation has no application to the Judicial Council because the members of the Council are appointed, rather than elected."). Thus, the fundamental holdings of the case is that the Equal Protection Clause does not require limiting "appointment power to officials who have been popularly elected." *Id.* at 899. According to the court, there could be no violation of Equal Protection in the selection of the Council because the Council was not elected. *Id.* at 898.

The *Kirk* decision was erroneous because it is fundamentally inconsistent with established Supreme Court and Circuit Court precedent. The court in *Kirk* opened its discussion by observing that the Supreme Court's Equal Protection cases generally involve only executive and legislative offices, while the case before it involved neither branch of government. *Kirk*, 623 F.3d at 897. And the court concluded that the decision to give attorneys a particular role in the nomination of judges is therefore within the state's discretion. *Id.* But there is absolutely no authority in any Supreme Court or Ninth Circuit precedent for this foundational premise, as is evidenced by the fact that the court in

Kirk could not cite to a single case in support.

Contrary to *Kirk*, the Supreme Court has applied the Equal Protection principles of *Kramer* and *Reynolds* with full force to the selection of judges. *See, e.g.*, *Carrington*, 380 U.S. at 96 (striking down occupational exclusion on elections including judicial elections); *Gray*, 372 U.S. 803-804 (striking malapportionment system for primary elections, including judicial primaries); *see also Little Thunder*, 518 U.S. at 1254 (striking down franchise exclusion, including for judicial elections). The only exception to this is the summary affirmation in *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *summarily aff'd*, 409 U.S. 1095 (1973), which only involved an exception to the reapportionment doctrine. *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1993). There is absolutely no support for the notion that the commands of Equal Protection somehow apply with less force to the selection of judges.

Moreover, the court in *Kirk*, as well as the State of Alaska, fully acknowledged that the selection system at issue gave attorneys, as an occupation, a greater voice and more influence over the nomination of judges in Alaska than non-attorneys. *Kirk*, 623 F.3d at 900. Without apology, the scheme in Alaska "is not intended to give all [Alaskans] an equal vote in selecting the members of the [Alaska Judicial Council]." *Hellebust v. Brownback*, 824 F. Supp. 1511, 1513 (D. Kan. 1993). But the Ninth Circuit concluded that this inherent inequality does not violate the Equal Protection Clause because there is no constitutional requirement that all participants in the selection of a public official "must either be popularly elected, or be appointed by a

popularly elected official." *Kirk*, 623 F.3d at 891.

The Equal Protection Clause, of course, does not mandate elections for every public official. *Kramer*, 395 U.S. at 629. But it does forbid *inequality of influence* in the selection of public officials. *See id.* at 626-27 & n.7. When franchise restrictions on the election of a given official would be unconstitutional, then that official, if appointed instead, must be appointed by an official or entity free of the same franchise restrictions. This principle is clearly recognized in *Kramer* and is universally respected.

Kramer recognized this principle in refuting the very same argument made by the Eighth Circuit here. *Id.* at 629. The state in *Kramer* had argued that it could constitutionally limit the franchise because it could have eliminated the election altogether and had the officials appointed. *Id.* But the court rejected this argument by stressing that the reason why an appointment would not violate Equal Protection is *because with an appointment no one would be excluded and each resident's influence would be equal*. *Id.* at n.7. *Kramer*, therefore, expressly contemplates that an appointment would implicate the Equal Protection Clause if it resulted in *inequality of formal influence* over the selection of the appointed official. The Supreme Court reiterated this principle in *Sailors* when it noted that the appointive system at issue did not implicate Equal Protection because *no one was excluded* from the election of the appointing entities. *Sailors*, 387 U.S. at 111. *Kirk* is therefore flatly inconsistent with *Kramer* and *Sailors*.

If *Kirk* were correct, it would render the principles

in *Kramer* and following cases absolutely meaningless. Following *Kirk*, instead of placing franchise restrictions on direct elections for the school board, the government in *Kramer* could have simply had the school board appointed by a limited purpose entity, such as a landowners or parents association, elected with the very same franchise restrictions. *Kirk*'s fundamental holding is that this arrangement would be perfectly constitutional. Yet this holding is logically inconsistent with the reasoning in *Kramer*. If *Kirk* were correct, then any public office that may be appointed rather than elected, which means virtually every public office except for members of state legislatures, may be appointed by any limited purpose entity. This result cannot possibly be consistent with the Supreme Court's Equal Protection jurisprudence. This Court should grant a writ to review this case.

B. Federal District Courts Have Improperly Applied This Court's Jurisprudence.

Three federal district courts have considered challenges to similar judicial selection systems in Indiana, Missouri, and Kansas. *Bradley*, 916 F. Supp. 1446; *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997) ("*AAVRLDF*"); *Dool v. Burke*, No. 10-1286, 2010 WL 4568993 (D. Kan. Nov. 3, 2010). *Bradley* was the first case to consider the validity of franchise restrictions on the elections of the members of a judicial nominating commission under the Equal Protection Clause. The Equal Protection claims in that case were not appealed. Yet, the case, a fundamentally flawed district court opinion, has become the sole foundation for all subsequent cases that have rejected

an Equal Protection challenge to the exclusion of voters from Commission elections.

AAVRLDF, when it rejected the Equal Protection claims before it, did not go through an independent analysis, but simply cited to *Bradley*. And the next case to consider a similar situation was *Kirk*. While the district court in that case followed *Bradley*, the Ninth Circuit did not discuss or make any finding with regard to whether the nominating entity could be elected in a limited election, but held that Equal Protection did not apply because the Council member were not elected. Last, the District Court in *Dool* simply passed on the challenge to the Tenth Circuit without much analysis, pointing to the fact that previous cases have rejected the Equal Protection challenge. Thus, the foundation of all the federal court decisions on this issue is *Bradley*, which has refused to subject these franchise restrictions to proper Equal Protection scrutiny on two grounds.

First, the court's determination of when an election calls for strict scrutiny under Equal Protection was incorrect. The court determined that strict Equal Protection scrutiny was not required because the state had decided not to make use of a "popular election." *Bradley*, 916 F. Supp. at 1456. According to the court, the franchise could be limited because the state had decided not to open the election to all qualified voters.

But *Kramer* and subsequent precedents flatly contradict this circular reasoning. *Kramer* determined that strict scrutiny was required *because* the election was not open to all otherwise qualified voters:

> Therefore, if a challenged state statute

> grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Kramer, 395 U.S. at 626-27 (citations omitted). The court in *Bradley* agreed with the defendants in that case that the commission members "are not selected by popular election and about the nature of the Commission." *Bradley*, 916 F. Supp. at 1456. But it is the nature of the elected entity that determines whether a popular election is required. The court in *AAVRLDF* made the same error when it concluded, citing *Kramer* but without giving any reasoning, that the election involved in that case was not one of "general interest (such as election for a legislator)" and therefore did not implicate Equal Protection. *AAVRLDF*, 994 F. Supp. at 1128.

Contrary to *AAVRLDF* and *Bradley*, an election does not become one of "special interest" *because* the state is excluding citizens from participating. It is precisely the decision not to hold a popular election—the state action of granting the franchise on a selective basis—that must be subject to strict Equal Protection scrutiny. *If* the state excludes citizens from voting in an election, it must either show that the exclusion is necessary to serve a compelling interest or that the election is one of "special interest" such that the restriction need only survive rational basis scrutiny. *E.g. Hill*, 421 U.S. at 297. Here, Iowa excludes otherwise qualified citizens from voting in an election for the members of the Commission based

upon occupation and the Commission exercises a traditional government function whose interest and effect is not limited to one group. *Contra Gray*, 372 U.S. at 380. The State must show that this system survives strict scrutiny.

Second, *Bradley* misapplied the "special purpose" exception analysis from *Salyer* and *Ball* in determining that the nominating commission was a nominal government entity. The court utilized the standard that "[w]hen a special unit of government is assigned certain narrow functions, affecting a definable group of constituents more than other constituents, limiting the franchise to members of that definable group is proper." *Bradley*, 916 F. Supp. at 1456. *Bradley* held that the commission before it performed "no traditional governmental functions at all." *Id.* at 1456. And *AAVRLDF* followed, even though the commission in Missouri actually has the power to *appoint* supreme court justices if the governor fails to make a nomination. It is difficult to conceive how the nomination of judges, and certainly the appointment of judges, is not a government function at all. *Bradley* marked an unprecedented and expansive application of the *Salyer/Ball* exception. For the first time, it was applied to a statewide office that performed an executive function.

Because improper precedent is being used as the backbone of the analysis of these types of cases, this Court should grant a writ of certiorari.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari and reverse the decision below.

Respectfully submitted,

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