Testimony Re: HB 200

Michael Pauley, Alaska Family Action

Mr. Chairman, members of the committee, I'm Michael Pauley. I'm a lobbyist for Alaska Family Action, which is the legislative advocacy arm of the Alaska Family Council.

Our organization is primarily focused on family policy. Some of our key issues include promoting greater respect for human life; protecting the institution of marriage; defending freedom of religious expression; and supporting parental choice in education.

We're also one of the few organizations in Alaska that has taken an active role in judicial retention campaigns. And that is why I'm here today.

Our organization strongly supports HB 200. This bill would accomplish a very simple, but also a very important change: it would prohibit state government from using public funds to influence the outcome of any judicial retention election.

We believe this is a crucial step for preserving what was the original intent in our Constitution for having retention elections in the first place.

The retention election is the only opportunity for the public to directly engage in the process of determining who will serve them in the 3rd branch of government.

We believe the public has a right to evaluate judges without state government exercising an improper influence by "advising" the public on how they should cast their ballots.

Most Alaskans take it for granted that state funds could never be used legally to pay for campaign advocacy messages on behalf of a candidate for Governor, or a legislative candidate.

And yet when it comes to judicial retention elections, there is not even a pretense of neutrality regarding the outcome. The state government, through the Alaska Judicial Council and the Division of Elections, spends untold thousands of dollars in every election cycle to promote a specific vote on judges and justices who stand for retention.

This was not how things were done in the early years of statehood. From 1959 to 1975, state government respected the independence of voters. That all changed in 1975, when the Alaska Judicial Council asked for, and the Legislature granted, a new statutory authority for the Council to make vote recommendations.

The Alaska Constitution, at Article 9, Section 6, says that no public funds can be appropriated except for a public purpose. It is our view that there can be no valid public purpose for using the public's money to tell the public how they ought to vote. If that were indeed a valid public purpose, then perhaps we should establish a commission to

evaluate legislators, and the Governor, and even ballot propositions, and make similar vote recommendations.

The national context

I'd like to speak briefly to how the Alaska system compares to other states. In a nutshell, the Alaska process is highly unusual.

The majority of states do not have any government-funded evaluation program for judges. Of those that do, many of these states provide the evaluation information only to the judge, for purposes of self-improvement. In other states this information is provided to the Governor or Legislature, to help guide decision-making as to whether a particular judge should be reappointed.

According to the Institute for the Advancement of the American Legal System at the University of Denver (iaals.du.edu), there are only 6 states, other than Alaska, where a government-sponsored evaluation of judges is provided to voters:

Arizona
Colorado
Missouri
New Mexico
Tennessee
Utah

But even among this minority of states, there are important differences. In Arizona, the evaluation provided to voters does not include a vote "yes" or "no" recommendation.

Instead, the Arizona Commission on Judicial Performance Review (www.azjudges.info) simply tells voters whether they feel a judge/justice "meets judicial performance standards" or "does not meet judicial performance standards." Although we believe this still exerts an improper influence on elections, it at least shows more restraint than the practice we follow in Alaska.

There are also key differences in how retention recommendations are communicated to the public. The Alaska system involves an aggressive expenditure of public funds to send the "yes" or "no" vote recommendations to every registered voter by means of the Division of Elections voter pamphlet. In addition, the Alaska Judicial Council has routinely spent public funds on newspaper ads and radio ads and other media to advertise its vote recommendations.

Our research shows that only two other states – Colorado and Utah – actually provide an explicit "vote yes" or "vote no" recommendation which is then communicated to every voter in the state in an official voter pamphlet. The other states – such as Missouri and New Mexico – make the recommendations available in a more passive manner, by posting the information on a website.

The list of states providing voters with retention recommendations formerly included Kansas. However, in 2011, the Legislature eliminated all funding for the Kansas Commission on Judicial Performance. This was spurred in part by voter anger over the state using public funds to tell people how to vote.

The Alaska History

So how did we arrive at the system we have now in Alaska?

In 1975, according to a paper by the American Judicature Society, there was no state in the country that had what we have in Alaska today – a state-sponsored program of evaluating judges, including a retention recommendation, which was communicated to all voters, using public funds.

On April 2, 1975, the members of the Alaska Judicial Council met with the House Judiciary Committee. According to the meeting minutes, and I'm quoting here,

> The Council does not have specific statutory authority to evaluate judges' qualifications and convey this information and recommendation to the public. They feel it is a legitimate function of the Council and would like specific authorization.

Five days after this meeting occurred, the Judiciary Committee filed HB 384, by request of the Judicial Council. This was the bill that creates the law we're living under now. The bill was referred to just one committee – Judiciary.

Three days later, Judiciary heard the bill, and moved it out of committee. 15 days later it was on the House calendar in 3rd reading and passed unanimously. The Senate received it the next day. Its first and only hearing occurred in the Senate Judiciary Committee 4 days later. And then, 3 days after that, the bill was on the Senate floor and passed unanimously.

The total elapsed time from the moment the bill was first introduced, to final passage by both houses of the Legislature, was an astonishing 26 days. Governor Jay Hammond signed it into law on May 23, 1975.

Given the speed at which this matter traveled through the Legislature, and the fact that we're talking about the pre-Internet age of 1975, it's reasonable to infer that there was very little public awareness of this bill. The first time that many in the public likely became aware of it was during the 1976 election, when they received their voter pamphlets and noticed for the first time that an agency of state government was advising them on how they should cast their ballots.

One of the reasons I'm glad that HB 200 has been introduced is that it gives the Legislature – and the public – an opportunity to give this issue the careful and deliberate consideration that it apparently did not receive back in 1975.

Frankly, if the Legislature sees fit to deliberate on this bill for slightly longer than 26 days, I'd say that's a good public process.

Public Perception of Judicial Retention Elections

I'd like to take a moment to talk about public perceptions of judicial retention campaigns, which appear to be changing. For much of recent history, judicial retention elections attracted little attention from the public, whether in Alaska or in other states. However, that is now changing.

According to a study by Oliver Roeder at the University of Texas at Austin, in the 2010 election cycle there were contested judicial retention elections in five states: Alaska, Colorado, Illinois, Iowa, and Kansas. The total amount of money spent in these retention campaigns was $3 million.

The most noteworthy retention battle of the 2010 election cycle occurred in Iowa, where voters removed three Supreme Court justices from the bench. And I'll note in passing that Iowa is among the majority of states that does not advise voters on how they should cast their ballots.

In the 2012 election cycle, there were contested retention campaigns in Alaska, Colorado, Florida, and Iowa. And unfortunately, I don't have the campaign spending figures from that election cycle.

But clearly, the days when retention elections were seen as a rather boring ritual of democracy are over. Why is this?

I think U.S. Supreme Court Justice Antonin Scalia provided a good answer to that question. In his dissenting opinion in the case of *Planned Parenthood vs. Casey*, Justice Scalia stated as follows:

> "**The American people love democracy and the American people are not fools.** As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here – reading text and discerning our society's traditional understanding of that text – the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. **But if in reality our process of constitutional adjudication consists primarily of making *value judgments*; if we can ignore a long and clear tradition clarifying an ambiguous text,** as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation ceremonies, *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); **if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law**

> **school – maybe better**. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours.*

Mr. Chairman, I believe that at the end of the day, this is what retention elections are about. It's an opportunity for the people to say to a specific judge or justice, or perhaps to the court system in general, "Our value judgments are every bit as good as yours – and we object to the fact that you've used the power of your office to impose *your* values, rather than *ours*."

I believe the most important words in the Alaska Constitution are found in Article I, Section 2, which is titled: "Source of Government." It states –

> "All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole."

Mr. Chairman, I believe that each retention election provides a free people the opportunity to assert that <u>all</u> government – including the judicial branch – is "founded upon their will only." It is a vital component of our system of checks and balances. It helps ensure that the judicial branch will not abuse its power. It helps ensure that the courts will not make policy in areas that are rightfully the domain of the executive and legislative branches of government.

The people deserve to participate in retention elections as free agents, without the government exercising undue influence on their decisions.

That is what HB 200 will accomplish, and we urge the committee members to support this essential reform. Thank you for this opportunity to testify.

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