Testimony Re: HJR 33
House Judiciary Committee
Michael Pauley, Alaska Family Action
March 7, 2014

Thank you, Mr. Chairman, members of the committee, I'm Michael Pauley. I'm representing Alaska Family Action, which is the legislative advocacy arm of the Alaska Family Council.

Our organization supports more public involvement in the process by which we select, evaluate, and retain judges in Alaska. We support the goal of House Joint Resolution 33, which would increase the public's decision-making authority in that process.

No person can serve as a judge or justice in Alaska without first being nominated by the Judicial Council. This concentrates an awesome amount of power in the seven members who serve on this panel. In fact, they have more power than any other single entity to determine who will hold the reins of power in one of our three branches of government.

If we look at other states, there's a wide diversity in the number of people who serve on judicial nominating commissions:

Colorado:	16
Arizona:	16
Florida:	9
Utah:	8
Iowa:	15
Oklahoma:	15
Tennessee	17

So, the proposal in HJR 33 for a 10-member Judicial Council is hardly radical or untried, and it's certainly mainstream as compared to other states. It's also important to note that the population of Alaska has at least tripled since the time of statehood, and the court system has grown along with it. Creating a larger Judicial Council seems appropriate as well, given its expanded workload and responsibilities.

But beyond the issue of the total membership on the Council, there's also a very crucial issue concerning what the proper balance should be on the Council between members who are there representing the interests of the state Bar Association vs. those members who are representing the general public.

Those who defend the Judicial Council's existing structure argue that it's perfectly balanced by having 3 attorneys and 3 public members. We strongly disagree with that view.

The attorneys on the Council are selected by the Board of Governors of the Bar Association – an entity with 4,212 members. They get to choose half the regular voting members of the Council, and they constitute ½ of 1 percent of the population of this state. The three public members are

there to represent non-attorneys – the other 731,000 Alaskans who are served by the Court system. Whatever one might call this system, it's not balanced. It shifts enormous power away from the general public and concentrates it in the hands of those who make a living practicing law in front of judges.

It's also important to remember that the Chief Justice is a dues-paying member of the Bar Association, and so in reality the Bar members have a majority of four of the seven seats on the Council.

Now some former attorney members of the Council have stated that they feel like they were representing all Alaskans, not just the Alaska Bar Association. That is an admirable sentiment – but the fact of the matter is that the Board of Governors of the Alaska Bar Association has exclusive control to determine which members of the Bar serve on the Council. This cannot be emphasized enough: The Bar members of the Council are NOT appointed by the Governor, and they are not required to be confirmed by the Legislature. In contrast, the non-attorney public members must appear before the House and Senate Judiciary committees, where they can be questioned and grilled about their backgrounds, their political beliefs, anything. But meanwhile, the Bar members – most of whom are skilled trial lawyers – get a free ride, and don't have to go through this occasionally tough process.

This is different from how we structure other commissions in government. We of course recognize that we should have physicians on the state Medical Board. But we don't let the Alaska State Medical Association appoint them! The Governor appoints the physician members AND the public members, and they both have to stand for legislative confirmation – doctors and lay people alike, they all get treated equally. The same holds true for the Board of Nursing and the Board of Pharmacy.

One reason we support adding more public members is that it will provide a valuable check on the ability of Bar Association members to vote as a bloc to prevent clearly qualified judicial applicants from being nominated for the Governor's consideration.

There have been five notable examples in just the last two years where all three public members of the Council voted YES to nominate a particular applicant for a judicial vacancy, but all the participating attorney members voted NO. In each of these cases, the Supreme Court Justice sided with the attorneys and voted NO – thus acting to defeat the nomination and shorten the list of nominees that would be sent to the Governor.

What is stunning is that three out of these five votes occurred with respect to vacancies on the Supreme Court. And so we have this unseemly situation where the Chief Justice's NO vote is directly influencing who will be chosen to sit with him or her on the High Court. The potential of the Chief Justice in these situations to alter the future philosophical direction of the Court is undeniable.

I'd like to discuss just one example of these split votes between public members and attorney members, because I think it speaks volumes about what is broken in our current system.

In June of 2012, the Council met to consider the vacancy created when Justice Morgan Christen left the high court. The Council had to vote on a very distinguished group of 12 applicants. The pool of talent included: one judge from the Alaska Court of Appeals; three judges from the Superior Court, one each from Fairbanks, Palmer, and Anchorage; and two administrative law judges, one from Anchorage and one from Juneau. Incredibly, not a single one of the candidates with prior judicial experience was nominated for the Governor's consideration.

Instead, out of this distinguished field of applicants, the Council chose to nominate just two individuals. One was an attorney in private practice who also happened to be a member of the Board of Governors of the Alaska Bar Association – the same group, of course, that selects the attorney members of the Council. The other nominee was the former director of the Alaska Legal Services Corporation.

On June 26, 2012, the *Alaska Dispatch* ran a story about these two applicants that the Council nominated to the Supreme Court.

The reporter, Amanda Coyne, decided to look at the political views of the two nominees. Among other interesting details, she reported that one of the nominees, Mr. Peter Maassen, was a registered Democrat and a contributor to numerous liberal candidates and causes. She also reported that the other nominee, Mr. Andrew Harrington, was registered as non-partisan, but was formerly a member of the ACLU.

Now, as a member of the public, upon reading this, you might naturally conclude that out of a field of 12 applicants, the Council had chosen to nominate two attorneys with left-of-center political views to the Supreme Court. Is this a problem? As a representative of a conservative political organization in Alaska, my answer may surprise you: No, it's not a problem that the Council chose to nominate these gentlemen.

Very few would doubt that both of these gentlemen possessed the qualifications to serve on the Alaska Supreme Court – but surely not to the exclusion of the many other qualified applicants with distinguished careers and prior judicial experience. The scandal here is not about who WAS nominated, it's about who WASN'T nominated. It's not the Judicial Council's job to nominate only liberals or only conservatives, it's the Governor's job – as an elected official – to weigh those subjective factors in a nominee.

Now, some of the more strident critics of HJR 33 have made the rather unflattering charge that the goal of this amendment is to allow the Governor to appoint political hacks to the Council, who will nominate only applicants to his liking, so the Governor can stack the courts as he or she wishes.

My argument would be: if you want to look at how future Gubernatorial appointees might vote, your best yardstick is to look at how the past ones have voted. Let's look at the June 2012 vacancy on the Supreme Court as an example. At that time, on the Council, there were two public members on the Council appointed by Governor Palin, and one appointed by Governor Parnell. So how did these three Republican appointees vote on the two rather liberal nominees to the Supreme Court? Well, the answer is, that in the case of Mr. Maassen, all three Republican

appointees to the Council voted YES to forward his name to the Governor. In the case of Mr. Harrington, two out of the three Republican appointees voted to forward his name to the Governor. So the evidence shows that the public members were being inclusive in who they chose to nominate.

But in stark contrast to this, there were three different cases in 2012 alone, where the public members voted unanimously to nominate certain applicants to the Supreme Court, while the attorney members, including the Chief Justice, voted as a bloc to prevent these applicants from being considered by the Governor. In all three of these cases, the dispute did not concern an applicant who was some "crazy right-wing activist," instead the applicants were sitting Superior Court judges who had already gone through previous vetting, and approval, by the Judicial Council. These were currently serving judges who were passed over, not crazy activists or sub-standard attorneys.

So in conclusion, I think it is grossly unfair to suggest that all public members, nominated by the Governor, and confirmed by the Legislature, would be political hacks who would threaten the impartiality of our Court system.

Now, the Judicial Council will tell you that the scenario I've described in my remarks about split votes between attorney members and public members is exceptionally rare. And that's true when you factor in the hundreds of votes over the years on District and Superior Court vacancies, which make up the bulk of the Council's work. But when you apply it to just the State Supreme Court, it's not all that rare – especially in just the last two years.

As we sit here today, two out of the five seats on Alaska's Supreme Court were filled by a process where the attorney members and the Chief Justice voted as a bloc to overrule the unanimous choice of the public members, and narrow the Governor's options for filling these vacancies. And the public has no clue why this is the case, because of course all the deliberations occur in secret, behind closed doors.

One of the reasons that HJR 33 represents good public policy is that it will make such tie votes even more rare, if not impossible. A larger commission with an odd number of regular voting members is much less likely, statistically speaking, to experience tie votes, unlike our current system where six persons are regular voting members.

The method of selecting judges in Alaska is the least democratic and least transparent of all the various processes and mechanisms that help determine the composition of the three different branches of state government. The addition of three more public members to the Council will not, in and of itself, cure all the shortcomings of this process. But it will be a step in the right direction, adding more voices and more votes from ordinary citizens who are not influenced by the insider politics of the Bar Association.

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."

We believe that HJR 33 is a proposal that is consistent with this constitutional heritage, and we urge your support of this measure.

Thank you very much.

###