MEMORANDUM

To: Senator Pete Kelly

Copy: Heather Shadduck

From: Mike Pauley, Alaska Family Action

Date: March 28, 2013

Re: Senate Bill 76

Thank you for introducing SB 76, concerning involvement of the Alaska Judicial Council in retention elections. We believe that passage of this legislation is essential for restoring fairness to the process of retention elections.

This memo offers background information that helps delineate the importance of this issue, and also seeks to respond to some of the criticism that has been expressed regarding SB 76.

Summary

State government has an important responsibility to provide voters with critical information related to candidates and issues that appear on election ballots. However, respect for the democratic process should preclude the government from ever "advising" citizens on how they are to vote on any candidate or issue.

Alaska is one of the few states in the country where an agency of state government, the Judicial Council, actually expends public funds for the specific purpose of telling the public how they should vote.

This is grossly unfair to voters, who deserve the right to make a decision about retention without the state using the voters' money to tell them how they should cast their ballots. The use of state funds to promote a "yes" vote on virtually all judges has, with rare exceptions, turned the biennial retention elections into largely a "rubber stamp" process. This sort of electoral process was justly ridiculed when utilized by countries like the former Soviet Union, or present day Cuba.

According to the American Judicature Society (www.judicialselection.us), the Alaska Judicial Council's practice of making retention recommendations was an innovation that began in 1976. It was not part of the judicial retention process in the first chapter of statehood following the constitutional convention.

It is the position of Alaska Family Action that voters would be well-served if we returned to the pre-1976 system, where state government respected the intelligence of voters and did not attempt

to interfere with the decision-making process as to whether a particular judge or justice should be retained.

Discussion of National Context

Alaska's practice of using state funds to evaluate judges and then provide voters a "yes" or "no" recommendation is unusual. According to the Institute for the Advancement of the American Legal System at the University of Denver (iaals.du.edu), there are only 7 states (including Alaska) where a government-sponsored evaluation of judges is provided to voters:

Alaska
Arizona
Colorado
Missouri
New Mexico
Tennessee
Utah

However, 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 this still exerts a problematic influence on retention elections, it at least shows more respect for the independence of voters as compared to the Alaska system.

Also, there are important differences in how judicial performance information is communicated to voters. The Alaska system involves the expenditure of public funds to send the "yes" or "no" vote recommendations to every registered voter via the Division of Elections voter pamphlet. In addition, the Alaska Judicial Council has routinely spent public funds on newspaper ads and other media advertising its vote recommendations.

The author's research shows that only three other states – Arizona, Colorado, and Utah – actually provide the judicial evaluation data in the voter pamphlet. The other states – Missouri, New Mexico, and Tennessee – make the recommendations available in a more passive manner, by posting the information on a website.

Because Arizona does not explicitly advise voters to cast a "yes" or "no" ballot, this means that only 3 out of 50 states – Alaska, Colorado and Utah – have a statutory scheme that involves all of the following:

a) A state-designed and state-financed process for evaluating judges;
b) Legal authorization for the evaluating commission to actually tell voters whether they should cast a "yes" or "no" vote; and
c) A state-funded scheme for actively disseminating these vote recommendations to every registered voter in the state.

Note: 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 (www.kansasjudicialperformance.org), a move spurred in part by voter anger over the state using public funds to tell people how to vote.

Flaws in the Judicial Council's Evaluation Process

The Alaska Judicial Council's retention recommendations arise from an evaluation process that is severely deficient because it includes no analysis of a judge or justice's overall "judicial philosophy" regarding the proper methodology for interpreting statutory and constitutional provisions. This is a fatal flaw, because no other aspect of judicial performance has a greater potential to impact the lives of *all* Alaskans – not just those who happen to find themselves in a courtroom at some point in their lives.

Does the record show that a given judge or justice is a so-called "strict constructionist" in his or her methodology for interpreting the constitution and statutes? Or is the judge or justice an "originalist" or a "textualist" or an "activist"? Does he or she believe in the "living Constitution" concept? One can perform a Google search on any of these terms and read literally hundreds of articles, both academic and popular, that illustrate the crucial importance of these categories.

On the U.S. Supreme Court these schools of thought will determine, for example, whether a majority of the Justices will decide that the federal constitution contains a right to abortion, or a right for homosexuals to be issued marriage licenses. It will determine whether a judge or justice is more like an Antonin Scalia (a textualist) or a Ruth Bader Ginsburg (a "living Constitution" adherent).

This issue of judicial philosophy is the proverbial "elephant in the room" that the Alaska Judicial Council wants to pretend is simply a non-issue in retention elections. The Judicial Council staff and other legal elites typically act as if judicial philosophy ought never to influence a voter's decision to cast a "yes" or "no" ballot. They think voters should concern themselves only with what the Judicial Council thinks is important, such as their surveys asking social workers or court employees to rate judges – as if the opinions of these groups were somehow more worthy of consideration than the opinions of any other group in society (say, business people, property owners, natural resource industry employees, doctors, parents, pastors, etc.).

Legal elites in Alaska and elsewhere in the U.S. believe it is essential to instruct voters on how they should cast their ballots, because they think they know better than voters about how to fairly evaluate the record of a judge or justice. This is an inherently elitist argument; if it were true, it would actually be a better argument for dispensing with retention elections altogether. Why even bother consulting voters when they can't be trusted to make an informed decision without "hand holding" by their intellectual betters?

Regardless of what the legal elites think, there is ample evidence that most voters do believe that judicial philosophy is a valid reason to retain or reject a judge. There is increasing voter

frustration with judges who act like "super legislators," enacting sweeping political or cultural changes without any legal or constitutional authority to undergird their decisions.

Retention elections offer voters an important mechanism for ridding the bench of activist judges. The most notable example from recent history occurred in the state of Iowa in 2010, when voters threw out three justices of the state Supreme Court after they proclaimed a new constitutional right for homosexuals to be married. Thankfully, Iowa is among the majority of states that do not use taxpayer dollars to lecture voters about how they should cast their ballots. The 2010 results in Iowa might have been different if the state government had spent public funds to influence the outcome of the election.

Spotlight on Contested Retention Elections in Alaska

There have been several efforts over the years by groups of Alaskans to remove judges or justices from the court, because of disagreements over judicial philosophy. This is an entirely legitimate reason to oppose or favor retaining a judge – yet in each case these citizen groups have had to do battle with the state government (in the form of the Judicial Council), which uses their money to campaign against what they are trying to achieve. It matters not whether any person agrees with the views of a group seeking to non-retain a judge. The salient point is that they have a right to make their case to voters based on the merits of their issues – without the state using taxpayer funds to nullify their cause.

Although not an exhaustive list, the following are examples of contested retention campaigns in recent history.

2000 – Supreme Court Justice Dana Fabe

YES: 57%
NO: 43%

Notes: From 1976 to the present, the average "yes" vote on a Supreme Court Justice (excluding Dana Fabe's two retention elections in 2000 and 2010) has been 64.8%. Fabe's 57% yes vote in 2000 was the lowest received by any Supreme Court Justice since 1980.

Opposition to Fabe came from the group Alaskans for Judicial Reform, and arose from public backlash to several of her controversial rulings:

1) **Prisoners' Rights (1998):** In one of the most shocking cases of judicial arrogance in Alaska (and U.S.) history, Fabe and a majority of the justices then serving on the Supreme Court ruled that Alaska voters would be ***prohibited*** from voting on a proposed amendment that limited the rights of prisoners (*Bess v. Ulmer*, 985 P.2d 979). This amendment, SJR 3, was approved by overwhelming majorities in the Senate and House and was due to be placed before voters for their consideration in the November 1998 statewide election. Fabe and her colleagues knocked the measure off the ballot – using the perfidious justification that the amendment – which was *one sentence long* – was actually a "revision" of the constitution, not an amendment. (Revisions of the

constitution can be approved only through a constitutional convention). Through this ruling, the Supreme Court has set a precedent that allows them to kill any future proposed constitutional amendment that they strongly disapprove of – they need merely to rule that the amendment is a "revision" rather than an amendment. Thus, with the stroke of a pen they can deprive voters of the right to amend a constitution that belongs to the *people*, not to the Supreme Court.

2) **Marriage Amendment (1998):** In the same case cited above (*Bess v. Ulmer*, 985 P.2d 979), the Supreme Court also arrogantly decided that it had the right to edit the text of an amendment that was lawfully placed on the ballot by the Legislature for the voters to consider (the court deleted the entire second sentence of the amendment). This was a clear-cut violation of the separation of powers. To see a damning critique of the *Bess v. Ulmer* decision, see the *Alaska Law Review* article written by former State Senator Dave Donley, former Alaska Attorney General Douglas Baily, and several other attorneys:

   http://scholarship.law.duke.edu/alr/vol19/iss2/2/

   Regarding the *Bess* decision, Donley, Bailey, *et al.*, state:

   > This is, to the best of the authors' awareness, the only case in which an American court has ever altered the text of a legislatively proposed constitutional amendment and then placed it on the ballot. To take such a radical new step, and arrogate to itself such authority, the court would need a compelling justification. The justification actually offered in *Bess,* however, was far from sufficient.

3) **Coercing Conscientious Objectors to Support Abortion:** In yet another astonishing case of judicial overreach, Dana Fabe as a Superior Court judge forced a private, non-profit, cooperative hospital to allow abortions to be performed in its facility – even though the member-elected Board of Directors had elected not to do so (*Mat-Su Coalition for Choice v. Valley Hospital Association, Inc.* 3PA-92-01207 CI (1995)). In the extreme ideology of Dana Fabe, support for a woman's "right to choose" means that everyone else loses their "freedom of choice."

2000 – Superior Court Judge Peter Michalski (3rd Judicial District)

YES: 57%
NO: 43%

Notes: The typical retention percentage for 3rd District judges in 2000 was in the range of 65 to 69 percent. Judge Michalski's poor performance resulted from a meagerly funded campaign by Alaskans for Judicial Reform to unseat him. Judge Michalski provoked outrage with his 1998 decision in the case of *Brause v. Bureau of Vital Statistics*, in which he ruled that the State of Alaska couldn't deny marriage licenses to homosexual couples unless it could prove a "compelling state interest" for doing so. Judge Michalski's ruling prompted the Legislature to pass, and the voters to approve, a constitutional amendment defining marriage as a union of one man and one woman (Alaska Constitution, Article I, Section 25).

2000 – Superior Court Judge Sen Tan (3rd Judicial District)

YES: 55%
NO: 45%

Notes: Alaskans for Judicial Reform also opposed Judge Tan. Tan struck down the Legislature's 1997 law that sought to require a parent's consent before an abortion could be performed on a minor (*Planned Parenthood v. State*, 3AN-97-6014 CI). Thanks to Judge Tan, a 13-year-old girl can receive an abortion in Alaska today, without a parent's consent being required – even though it would be required for any other surgical procedure, or even for something as minor as an ear piercing.

Judge Tan also forced the Legislature to pay for abortions, even though the Legislature had voted to end funding of abortions through the state's General Relief Medical program (*Planned Parenthood v. Perdue*, 3AN 98-7004 CI). Judge Tan ruled that if the state chooses to pay for prenatal care for poor women and their unborn babies, then it must also pay for poor women to have abortions. In the lethal logic of Judge Sen Tan, if you're using public funds to help ensure that healthy babies are born, then you must also use public funds to ensure that some children are *never* born. Judge Tan's decision contradicted previous U.S. Supreme Court rulings, which said there is no federal constitutional right for a "free" abortion.

2000 – Superior Court Judge Mary Greene (4th Judicial District)

YES: 53%
NO: 47%

Notes: Judge Greene ruled that the University of Alaska had a legal duty to give the boyfriends and girlfriends of University employees the same benefits (e.g., coverage under health care plans, retirement, etc.) to which the *married* spouses of University employees were entitled (*Tumeo v. University of Alaska*, 4FA-94-43 CI).

2010 – Supreme Court Justice Dana Fabe

YES: 54%
NO: 46%

Notes: The lowest "yes" vote on a Supreme Court justice standing for retention in 30 years.

2012 – Superior Court Judge Sen Tan (3rd Judicial District)

YES: 55%
NO: 45%

Judicial Council's Influence on Election Results

In all of the retention elections cited above, the Alaska Judicial Council recommended a "yes" vote to retain a judge or justice who was embroiled in controversy based on the substance of his or her decisions. If there had not been a recommendation in each of these retention campaigns, the judge or justice in question would not have benefitted from the things that come attached to an AJC recommendation – such as state-sponsored campaign advertising and favorable media coverage. These differences could have produced a different outcome in each of these retention elections.

As evidence of this point, in one of the rare cases where the Alaska Judicial Council actually recommended a "no" vote on a judge, the results were almost a mirror opposite of the numbers above:

2010 – District Court Judge Richard Postma (3rd Judicial District)

YES: 46%
NO: 54%

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