Neil T. O'Donnell
State Committee Chair
n.odonnell49@gmail.com

February 24, 2021

State of Alaska
Senate Judiciary Committee

Dear Senator Reinbold and Committee Members:

We are writing as the members of the Alaska State Committee of the American College of Trial Lawyers in opposition to Senate Bill 14.[1] That bill seeks to end Alaska's merit selection system for District Court and Court of Appeals Judges and replace it with a partisan and politicized appointment process. This would be bad public policy.[2] Alaska's merit selection system has served the state in an exemplary manner for more than 60 years. The state's merit selection process properly focuses on qualifications such as legal knowledge, experience, diligence, integrity, and temperament. Replacing that system with a gubernatorial appointment/legislative confirmation process would elevate political allegiance, political fundraising, and patronage factors over the role of merit; undermine the promise of equal justice to all regardless of their political views; and inevitably diminish the perceived—and eventually the actual—quality and fairness of our state's judiciary.

Senate Bill 14 would also prohibit the Judicial Council from submitting a judicial applicant's name to the Governor unless the Council first "determines that the judicial candidate understands and is committed to strict constitutional interpretation of statutes and regulations and adhering to legislative intent." The Alaska State Committee of the American College of Trial Lawyers also opposes this proposal. First, beyond its use as a political slogan, it is not clear what "strict construction" means, nor how the Judicial Council would evaluate an applicant on his or her "commitment" to this undefined concept. Second, even in a general sense, no one should want a judge to be a "strict constructionist." Notably, Supreme Court Justice Antonin Scalia explained that "I am not a strict constructionist, and no one ought to be." Rather, "[a] text should not be construed strictly, and it should not be construed

---

[1] The American College of Trial Lawyers (ACTL) is an invitation-only fellowship of leading trial lawyers in the United States and Canada that is drawn from all areas of trial practice including criminal prosecution, criminal defense, and the civil plaintiff and defense bar. The College, founded in 1950, seeks to improve the standards of trial and appellate advocacy, the ethics of the profession, and the fair and impartial administration of justice. See www.actl.com.

[2] It is also legally doubtful that the Legislature can avoid the constitutionally-mandated Judicial Council merit selection system by creating courts that are subsidiary to those expressly described in the Alaska Constitution and statutorily deeming the subsidiary courts exempt from the merit selection system.

REPLY TO:
Cascadia Cross Border Law Group LLC
4300 B Street, Suite 207
Anchorage, AK 99503
(907) 440-2079

NATIONAL OFFICE
1300 Dove St., Suite 150
Newport Beach, CA 92660
T: (949) 752-1801
F: (949) 752-1674
www.actl.com

leniently; it should be construed reasonably, to obtain all that it fairly means." *A Matter of Interpretation*, A. Scalia, p. 23 (1997). It is further unclear why SB 14 directs the Judicial Council to evaluate applicants based on their commitment to "adhering to legislative intent." Longstanding Alaska jurisprudence already establishes that the role of statutory interpretation in Alaska "is to give effect to the lawmaker's intent, with due regard for the meaning the statutory language conveys to others. . . . [and] the plainer the language, the more convincing evidence of contrary legislative intent must be."[3] Obviously, the legislature also has the authority to repeal or amend a statute if it has been interpreted in a manner with which the legislature disagrees.

Senate Bill 14 also transfers the judicial retention evaluation process from the Judicial Council to the Commission on Judicial Conduct. The reasons for this change, as expressed in the Sponsor Statement, are that the Judicial Council ratings presently "tend to be non-critical" and the Commission on Judicial Conduct "receives complaints about judges, and they are best qualified to rate them." The Alaska State Committee of the American College of Trial Lawyers opposes this change. The fact that Judicial Council's ratings "tend to be non-critical" is because Alaska's existing judicial selection and retention system is a success story. To date, Alaska's judiciary has been overwhelmingly filled by hard-working, fair, competent, considerate, and distinguished individuals. Furthermore, the Judicial Council already considers a broad range of information about each judge when making retention recommendations, specifically including "public files from the Commission on Judicial Conduct, to determine whether the judge was the subject of any disciplinary proceedings."[4] Finally, transferring responsibility for generating judicial retention recommendations to the Commission on Judicial Conduct would create significant unnecessary expense because the similar task of generating nominating recommendations would still remain, as required by Article IV §§ 5 and 8 of the Alaska Constitution, with the Judicial Council, resulting in substantial redundancy in staff and resources and unnecessary expense.

Senate Bill 14 finally requires that, in addition to judges, magistrates also stand for periodic retention votes. The Alaska Chapter of the American College of Trial Lawyers believes this proposal is unnecessary and ill-advised. Voters are already challenged by the substantial number of judges who appear on the ballot for retention votes. Magistrates have limited jurisdiction and authority. Requiring magistrates to stand for retention would, in turn, require that a retention recommendation be

---

[3] *State of Alaska v. Vote Yes for Alaskan's Fair Share*, 478 P.3d 679, 687 and n.35 (Alaska 2021) (internal quotations omitted).

[4] *See* http://www.ajc.state.ak.us/retention/retproced.html

prepared for each magistrate, further generating substantial additional effort and expense.

The first woman to serve as a Justice of the United States Supreme Court, Sandra Day O'Connor, was nominated by President Ronald Reagan in 1981 and retired from the Court in 2006. Justice O'Connor has dedicated her professional life following retirement to maintaining a fair and independent judiciary. She is a strong advocate of a judicial merit selection system like that found in the Alaska Constitution. In a 2009 interview she stated that "[m]erit selection addresses this concern [voters lacking sufficient knowledge about numerous judicial candidates] by employing a good screening mechanism to make sure our judges are well qualified for appointment. The voters can then decide after a period of time whether the judges should be retained. This preserves a direct democratic check on the system." *Thoughts on Safeguarding Judicial Independence*, Litigation, Vol. 35, No. 3, p. 8, American Bar Association, Spring 2009. Justice O'Connor further cautioned that "[j]udicial independence doesn't happen all by itself. It's very hard to create and it's easier than most people imagine to destroy." *Id*. p. 7. Enacting SB 14 would be a substantial step towards destroying the fair, effective and independent judiciary that has served Alaska extraordinarily well since statehood. The Alaska State Committee of the American College of Trial Lawyers believes that SB 14 is ill-conceived, unnecessary, and counter-productive, and should be rejected.

Sincerely,

/s/ *Ray R. Brown*		/s/ *Michael L. Lessmeier*
/s/ *Kimberlee A. Colbo*		/s/ *Neil T. O'Donnell*
/s/ *Laura L. Farley*		/s/ *Matthew K. Peterson*
/s/ *Kevin T. Fitzgerald*		/s/ *Michael J. Schneider*
/s/ *Howard A. Lazar*		/s/ *Gary A. Zipkin*